



INTERIOR BOARD OF INDIAN APPEALS

In Re Estates of Wallace J. Cook, et al.  
(Tribal Heirship of Interests in Absentee Shawnee Allotments)

58 IBIA 87 (11/14/2013)



# United States Department of the Interior

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

IN RE ESTATES OF WALLACE J. )  
COOK, ET AL. (TRIBAL HEIRSHIP ) Order Affirming Order Denying  
OF INTERESTS IN ABSENTEE ) Rehearing  
SHAWNEE ALLOTMENTS) )  
) )  
) ) Docket No. IBIA 11-144  
) )  
) ) November 14, 2013

The Citizen Potawatomi Nation (CPN) appealed to the Board of Indian Appeals (Board) from an Order Denying Petition for Rehearing (Order Denying Rehearing) entered on July 5, 2011, by Administrative Law Judge (ALJ) Richard L. Reeh in a consolidated proceeding for the estates of Wallace J. Cook and 21 other Indian decedents.<sup>1</sup> The ALJ addressed an issue arising in each probate concerning tribal heirship for trust interests in land in present-day Oklahoma that was allotted to members of the Absentee Shawnee Tribe (AST), but located within an area approved as a reservation for CPN pursuant to an 1867 treaty. Under the rules of intestate succession (i.e., when property does not pass pursuant to a will) in the American Indian Probate Reform Act (AIPRA), if no eligible heirs in the line of succession exist, trust real property descends to “the Indian tribe with jurisdiction over the interests in trust or restricted lands.” 25 U.S.C. § 2206(a)(2)(B)(v); *see id.* § 2206(a)(2)(D)(iii)(IV).

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<sup>1</sup> The 22 decedents whose probate estates are subject to the Order Denying Rehearing and this appeal are, Wallace J. Cook, Probate No. P000080427IP; Harold Ray Day, No. P000075916IP; William Delaware, No. P000085481IP; Oscar Little Doctor, No. P000070129IP; Charles Kenneth Donaho, No. P000066720IP; Martha Lee Gibson, No. P000070906IP; Raymond Kenneth Guy, No. P000078840IP; Delores June Harjo, No. P000080314IP; Franklin Joseph Harris, No. P000071157IP; Gayla A. Horsechief, No. P000083735IP; Maurice Johnson, No. P000081123IP; Tommy Ray Kionute, No. P000048302IP; Jerry Ray Little Charley, No. P000073191IP; Calvin Jon Logan, No. P000077848IP; Lawrence Ray Martinez, No. P000082306IP; Carol Fern Najafian, No. P000083619IP; Dorothy J. Nemecek, No. P000067631IP; Charles J. Squire, No. P000060198IP; Carl Raymond Squire, No. P000070790IP; Harold Tiger, No. P000067782IP; Timothy Don Tiger, No. P000080450IP; and Robert Allen Washington, No. P000063410IP.

The ALJ decided that AST—not CPN—is the “tribe with jurisdiction” over the allotments originally allotted to AST members (“AST allotments”), based on an 1891 Act of Congress that ratified agreements in which both tribes ceded and relinquished all claim, title and interest of every kind and character in and to the tract that had been selected as CPN’s reservation, and that confirmed allotments made to members of both tribes within the tract.

We conclude that the ALJ correctly held that AST is the “tribe with jurisdiction” over the AST allotments, within the meaning of AIPRA, and thus AST inherits the interests in these estates that are subject to the tribal heirship rule. The history of CPN’s reservation leaves doubt about whether CPN ever acquired actual territorial jurisdiction over the 30-mile-square tract that was to be (but never was) conveyed to CPN as a reservation for its exclusive use and occupancy. But even assuming that CPN acquired territorial jurisdiction at one time, we conclude that CPN’s relinquishment of any interest in the tract, and the statutes authorizing and confirming allotments to AST members within the tract, clearly abrogated any jurisdictional authority that CPN might have had over the land allotted to AST members.

The absence of CPN’s jurisdiction over AST allotments does not necessarily mean that AST *is* the “tribe with jurisdiction” because in some cases, as Congress recognized, there may be no tribe with jurisdiction over an allotment, in which case trust interests may descend in equal shares to the co-owners of an allotment. *See* 25 U.S.C. § 2206(a)(2)(C)(i) and (a)(2)(D)(iii)(V). But we conclude that AST is the “tribe with jurisdiction” over the AST allotments within the meaning of AIPRA. Congress’ confirmation of allotments made to AST members, as part of an agreement with AST, provides the necessary foundation for us to conclude that AST is the tribe with jurisdiction, particularly when we consider the fact that AST’s jurisdiction over AST trust lands has been recognized by the Department of the Interior (Department) for at least 20 years. Thus, we conclude that AST is the “tribe with jurisdiction” over the AST allotments for purposes of AIPRA.

## **Background**

### **I. Historical Background**

The lands at issue in this case were among those conveyed by the United States to the Creek and Seminole Nations as part of the removal of those tribes from the eastern United States, and which those tribes then ceded and conveyed back to the United States through post-Civil War treaties for the purpose of providing lands in the Indian Territory on which the United States could settle other Indians and freedmen. *See* Treaty with Creek Nation, June 14, 1866, Art. III, 14 Stat. 785, 786; Treaty with Seminole Nation, Mar. 21,

1866, Art. III, 14 Stat. 755, 756; *see also* Letter from Commissioner of Indian Affairs (Commissioner) to Superintendent, Mar. 30, 1872 (AST Ex. 5).

In 1867, the United States entered into a treaty with the Potawatomie Nation, then residing in Kansas, to resettle the tribe to a reservation in the “Indian country” south of Kansas. Under the treaty, the Potawatomies could select a location they considered suitable, and if the location was approved by the Secretary of the Interior (Secretary),

such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same . . . said tract shall be patented to the Pottawatomie nation . . . .

Treaty with the Pottawatomie Tribe, Feb. 27, 1867, Art. I, 15 Stat. 531, 531.<sup>2</sup>

A delegation of Potawatomies selected a 30-mile-square tract, and the Secretary approved the selection in 1870. The Absentee Shawnees had been occupying lands in the northern part of the tract since 1840, but their occupation was not based on any treaty or statutory right or claim of title.<sup>3</sup> In 1872, the Absentee Shawnees asked to be granted title to the lands on which they had settled. Petition of Absentee Shawnee to the President, Feb. 19, 1872 (AST Ex. 3). The Potawatomies “expressed a willingness *not to disturb them* – but ask[ed] the Government to extend [CPN’s] Reserve westward.” Letter from Superintendent to Commissioner, Mar. 20, 1872 (AST Ex. 4).

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<sup>2</sup> Historical documents use the spelling “Pottawatomie.” CPN uses the spelling “Potawatomi,” which we use except as necessary in quoting or citing documents in the record. For purposes of this decision, we use CPN and Potawatomi Tribe or Nation interchangeably to refer to the band of Potawatomies that relocated from Kansas to the 30-mile-square tract in present-day Oklahoma.

<sup>3</sup> The 30-mile-square tract selected by CPN and approved by the Secretary was bounded on the north by the North Fork of the Canadian River, and on the south by the Canadian River (also referred to as the South Canadian River); the eastern boundary of the tract was the western boundary of the Seminole Nation reservation, and the western boundary of the tract was a straight north-south line 17 miles to the west. The tract was divided roughly across the middle from east-to-west by the Little River. The Absentee Shawnees had settled north of the Little River. *See* AST Ex. 3 (boundary description in AST Petition); CPN Petition to Indian Claims Commission, ¶ 3 & Ex. A (description of CPN reservation and map) (AST Ex. 19)

Meanwhile, the Department had concluded that because all members of the Potawatomi Tribe had been granted U.S. citizenship through various treaties, the tribe had ceased to exist, and thus there was no tribal entity to which to convey a patent (title) for the tract selected and approved as CPN's reservation, as provided in the treaty. *See* H. Exec. Doc. No. 42-203 at 3-4 (1872) (AST Ex. 2); Letter from Commissioner to Superintendent, Mar. 30, 1872 (AST Ex. 5).<sup>4</sup> This was also the beginning of the "allotment era" in Federal Indian policy, in which tribal lands were divided into individual allotments for the purpose of "civilizing" and assimilating members of tribes into the non-Indian society, with "surplus" lands made available to white settlers. *See* Cohen's Handbook of Federal Indian Law 75-84 (2005 ed.).

Instead of conveying title to CPN, but to accommodate the Potawatomies who had moved from Kansas to settle on the tract, and also address the concerns raised by the Absentee Shawnees, the Department secured legislation in 1872 to allot lands within the tract to both Potawatomies and Absentee Shawnees. *See* H. Exec. Doc. No. 42-203 (1872) (AST Ex. 2); Letter from Commissioner to Superintendent, Mar. 30, 1872 (AST Ex. 5). The "Act to provide Homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory," authorized and directed the Secretary to issue certificates by which allotments would be made to both Potawatomies and Absentee Shawnees "within the thirty-mile square tract selected for the Pottawatomie Indians." Act of May 23, 1872, 17 Stat. 159, 159 (1872 Act). The 1872 Act required that the certificates of allotments specify "that said tracts are set apart for the exclusive and perpetual use and benefit of such assignees and their heirs." 17 Stat. at 159; *see id.* at 160 (incorporating same requirement for AST allotments). For members of both tribes, there were use-and-occupancy requirements to be met before an individual could receive an allotment. The Potawatomies were required to pay for their allotments; the Absentee Shawnees were not.

While the 1872 Act provided for allotments to both Potawatomies and Absentee Shawnees "indiscriminately" within the tract, the Department sought, to the extent practicable, to make allotments for Potawatomies from lands lying south of Little River, and for Absentee Shawnees from lands lying north of the Little River. 1872 Annual Report of the Commissioner at 39 (AST Ex. 8). The Commissioner described the situation as follows:

Certain Indians . . . known as "absentee Shawnees," have been for twenty years or more residing on lands between the main Canadian and the

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<sup>4</sup> At the time, as a matter of policy, U.S. citizenship and tribal affiliation were viewed as inconsistent with one another. *See* Cohen's Handbook of Federal Indian Law 894 (2005 ed.).

north fork of that river, west of the Seminole reservation, in Indian Territory. Moreover, many Pottawatomies having become citizens . . . have . . . removed to the same locality; so that a body of Indians to the number of 2,263 were, in fact, residing upon what is known as “the thirty miles square tract west of the Seminole reserve,” without any authority of law for such residence, or any color of title to the soil. It being . . . desirable that they should be assigned permanent homes, legislation was recommended at the last session of Congress, by which these “absentee Shawnees” and “citizen Pottawatomies” should be allowed to secure individual homesteads within the tract thus occupied by them in common. . . . [T]he lands thus certified [as allotments] to be “set apart for the exclusive and perpetual use and benefit of such assignees and their heirs.” The entire thirty miles square tract is now being surveyed, preparatory to making the authorized allotment to the Indians.

*Id.* at 89.

In 1875, 131 (or possibly 109) allotments were approved for Potawatomes and 327 allotments were approved for Absentee Shawnees, but certificates were not issued for the Potawatome allotments because the allottees had not paid for them, nor were certificates issued for the Absentee Shawnee allotments, for reasons that are unclear. *See* S. Exec. Doc. No. 51-64 at 2 (1891) (AST Ex. 16); S. Exec. Doc. No. 51-78 at 20 (1890) (AST Ex. 11). Subsequently, a few Potawatome allotments were paid for and certificates of allotment were issued. S. Exec. Doc. No. 51-78 at 20.

In 1887, Congress passed the General Allotment Act, or “Dawes Act,” which provided general authority for allotting land to members of tribes, primarily from tribal lands but also, if necessary, from Federal lands. *See* Act of Feb. 8, 1887, §§ 1, 4, 24 Stat. 388, 388-89. Reporting on the status of allotting lands to the Potawatomes and Absentee Shawnees, the Commissioner stated:

A feeling of uneasiness and insecurity has existed among [the Absentee Shawnee] since the settlement of the Pottawatomies upon the lands exclusively occupied by the former for more than 30 years.

The two tribes have not assimilated, and do not agree well together.

The Shawnees have repeatedly requested that the Pottawatomies be confined to the south side of Little River, which divides the reservation from east to west into two nearly equal parts, the Shawnees to be confined to the north side of said river. The allotments made in 1875 conformed to this division.

S. Exec. Doc. No. 51-64 at 3.

A question also arose within the Department about whether allotments could be made under the authority of the 1887 General Allotment Act, instead of, or as supplemental to, the authority in the 1872 Act. Among the advantages to the Potawatomies was the fact that the General Allotment Act did not require payment for an allotment. *See* S. Exec. Doc. 51-78 at 20. The Secretary approved making allotments under the General Allotment Act to members of both tribes. Describing the “joint occupation of this reservation by the two tribes or bands of Indians” as “a source of vexation to each,” the Commissioner instructed that in making allotments, the Indian agent was to “confine the choice of the Shawnees to the north side of [the Little River] and the Pottawatomies to the south side,” unless an individual had made substantial improvements in another location. S. Exec. Doc. 51-64 at 7.

Eventually—continuing to implement the Federal policy to allot lands to individual Indians and make the “surplus lands” available to settlers—the United States negotiated agreements with both CPN and AST to relinquish any claims they might have to the 30-mile-square tract, or any portion of it, in exchange for certain fixed payments and the confirmation of allotments to members of both tribes. Included in correspondence forwarded to Congress, with the recommendation to ratify the agreements, is a letter dated July 3, 1890, from the Commissioner to the Secretary, which stated:

[T]his office has uniformly maintained that the Citizen Pottawatomies have no right, title, or valid claim to any lands within the 30-mile-square tract, except such as are given to them by the [1872 Act], *i.e.*, the right of each member of the band to purchase a certain quantity of land, or by the [General Allotment Act of 1887], *i.e.*, the right to receive allotments under said act. They have, however, asserted claim to the surplus lands in this reservation, and I can see no valid objection to the extinguishment of said claim by a payment to the Indians of the sum agreed upon by the commission. It will probably be better to have the claims of these Indians extinguished at once to their satisfaction than to allow them to exist to be urged before Congress in years to come.

The same remarks will apply to the Absentee Shawnees.

S. Exec. Doc. No. 51-186 at 10-11 (1890) (AST Ex. 35).

The Act of March 3, 1891 (1891 Act), ratified the June 25, 1890, agreement with CPN (CPN Agreement), and the June 26, 1890, agreement with AST (AST Agreement). *See* Act of Mar. 3, 1891, 26 Stat. 1016. The agreement between the United States and the

Absentee Shawnees was signed by “White Turkey, Chief, and five others, on the part of said Absentee Shawnee Indians.” *Id.* § 9, 26 Stat. at 1018-19.

In the respective agreements, each tribe ceded, relinquished, and surrendered to the United States “all their claim, title and interest of every kind and character in and to the [30-mile-square] tract of country in the Indian Territory.” 26 Stat. at 1016 (CPN Agreement, Art. I), 1019 (AST Agreement, Art. I). Each agreement recited that allotments had been made to members of the respective tribe, and directed that “all such allotments so made shall be confirmed,” and that when confirmed and approved by the Secretary, “the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the [General Allotment Act].” *Id.* at 1017 (CPN Agreement, Art. II), 1020 (AST Agreement, Art. II).<sup>5</sup>

As part of the agreements, the United States agreed to pay CPN \$160,000, and AST \$65,000, as the “only additional consideration for such relinquishment of all title, claim, and interest of every kind and character in a [sic] to said lands.” *Id.* at 1018 (CPN Agreement, Art. IV), 1020 (AST Agreement, Art. IV). Congress also conferred jurisdiction on the Court of Claims to adjudicate certain claims that CPN might have regarding the tract. No similar provision was made for AST.

In 1951, CPN filed a claim with the Indian Claims Commission (ICC) seeking compensation for the “approximately half” of the tract that CPN contended it had purchased from the United States, but which the United States had taken from CPN without compensation through the 1872 Act. *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Petition at 2 (Indian Claims Commission, Docket No. 96) (AST Ex. 19). CPN alleged that although the tract had been selected and approved, pursuant to the 1867 treaty, for CPN’s exclusive use and occupancy, the 1872 Act had authorized the Secretary to make allotments within the tract to the Absentee Shawnees without CPN’s consent and without payment of just compensation to CPN. *Id.* at 6-8. CPN further alleged that it “was excluded from occupying any of the land on the Oklahoma Reservation lying north of the Little River,” consisting of approximately 285,000 acres, and that it had “never obtained actual occupancy” of those lands. *Id.* at 8-9. CPN sought compensation for all of the lands within the tract that had not been allotted to members of CPN—i.e., for the lands allotted to AST members and the so-called surplus lands. *Id.* at 12, 15-16.

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<sup>5</sup> Under the General Allotment Act, patents were issued to allottees, which provided, among other things, that the allotment was held in trust by the United States “for the sole use and benefit” of the allottee (and heirs). General Allotment Act § 5, 25 Stat. at 389.

Among the issues presented to the ICC was “whether [CPN] ever acquired a right, title or a compensable interest of any kind or character in and to all or any part of the ‘Oklahoma Reservation,’” i.e., the 30-mile-square tract. *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, 6 I.C.C. 647 (AST Ex. 19). The ICC found that the tract was, pursuant to the treaty, to be set apart as a reservation for the sole use and occupancy of CPN, “the same to be patented to [CPN],” and that by approving the selection of the tract, the Secretary had “unequivocally recognized [CPN’s] ownership” by recognizing its entitlement to the tract. *Id.* at 649, 650. The ICC found that the Potawatomes had expressed a willingness not to disturb the Absentee Shawnees, “*but had asked that their reservation be extended westward so as to include an additional equivalent area,*” and thus had not waived any right to the entire tract. *Id.* at 652. The ICC also found that the 1867 treaty “did not contain present words of grant nor a description by metes and bounds of land,” but that it did contain a “clear and unequivocal promise to issue a patent to [CPN] to a home in the Indian country of an area not exceeding thirty miles square,” to be set apart for CPN’s exclusive use and occupancy. *Id.* at 660, 661.

The ICC concluded that the treaty was “a contract to convey land,” which established for CPN a “compensable right and interest to the extent of full ownership in and to the 575,877 acres . . . known as the Oklahoma Reservation.” *Id.* at 661, 665; *see id.* at 659 (“if not a grant of title, [the treaty] was a contract to grant title” to CPN). The ICC awarded CPN compensation for 362,832.22 acres, the difference between 575,877 acres and the 213,044.78 acres allotted to 1,487 members of CPN. *Id.* at 655, 665.<sup>6</sup>

## II. AIPRA’s Tribal Heirship Rules

Under AIPRA’s rules of intestate succession, an Indian tribe “with jurisdiction over the interests in trust or restricted lands” may inherit those interests if there are no eligible heirs who precede the tribe in the line of succession. 25 U.S.C. § 2206(a)(2)(B)(v); *see id.* § 2206(a)(2)(D)(iii)(IV). If there are no eligible heirs and no tribe with jurisdiction over the interests, then the interests descend in equal shares to the co-owners of trust or restricted interests in the land. *Id.* § 2206(a)(2)(C) and (a)(2)(D)(iii)(V).

AIPRA does not define the phrase “tribe with jurisdiction.” As the ALJ noted, similar language was included in the Indian Land Consolidation Act (ILCA) in 1983 and in successive amendments, of which AIPRA is the most recent. ILCA’s original “escheat”

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<sup>6</sup> The ICC found it unnecessary to decide whether CPN had “paid” for the tract because CPN’s funds were in the custody of the United States, and thus any failure by CPN to have fulfilled its obligation under the 1867 treaty to pay for the lands could not be a defense for the United States. 6 I.C.C. at 661-62.

provision applied to certain fractional interests in land “within a tribe’s reservation or otherwise subjected to a tribe’s jurisdiction.” Pub. L. No. 97-459, § 207, 96 Stat. 2515, 2519 (Jan. 12, 1983); *see also* Pub. L. No. 98-608, 98 Stat. 3171, 3173 (Oct. 30, 1984) (amending ILCA § 207) (“within a tribe’s reservation or otherwise subject to a tribe’s jurisdiction.”). The legislative history of ILCA 1983 explains the House Committee’s intent behind that language as follows:

For purposes of this Act, tribal jurisdiction means that the tribe exercises civil governmental powers over the lands involved or that the Secretary of the Interior 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 these 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 (1982).

After the 1983 and 1984 versions of ILCA § 207 were struck down as unconstitutional, but before enacting AIPRA, Congress amended ILCA several times, using similar tribal-jurisdiction language in relation to ILCA’s rules governing intestate succession. *See* Pub. L. No. 101-644, § 301, 104 Stat. 4662, 4666-67 (Nov. 29, 1990) (amending ILCA § 207) (escheat of certain fractional interests in “land within a tribe’s reservation or outside of a reservation and subject to such tribe’s jurisdiction . . . or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land”); Pub. L. No. 106-462, § 103(4), 114 Stat. 1991, 1996, 1997 (Nov. 7, 2000) (striking and replacing ILCA § 207) (“If the remainder interest . . . does not descend to an Indian heir or heirs it shall descend to the Indian tribe that exercises jurisdiction over the parcel of trust or restricted lands involved.”).<sup>7</sup>

When Congress enacted AIPRA, which again struck and replaced the language in ILCA § 207, it used the phrase “the Indian tribe with jurisdiction over the interests in trust or restricted lands” to identify a potential tribal heir in the line of succession between family members who are eligible heirs and co-owners of trust or restricted interests in the land. Pub. L. No. 108-374, § 3(a), 118 Stat. 1773, 1775, 1776 (Oct. 27, 2004) (codified at

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<sup>7</sup> *See also* 25 U.S.C. § 2205(a)(1) (authorizing tribes to adopt probate codes to govern the descent and distribution of trust or restricted lands that are “(A) located within that Indian tribe’s reservation; or (B) otherwise subject to the jurisdiction of that Indian tribe”).

25 U.S.C. § 2206(a)(2)(B)(v) and (a)(2)(D)(iii)(IV)). AIPRA's legislative history does not include any discussion of the meaning of the phrase "tribe with jurisdiction."

### III. ALJ's Consolidated Proceedings and Decision

In the consolidated proceeding before Judge Reeh, AST submitted an affidavit in which its Realty Director testified that as of February 2011, there were 54 parcels involved in the consolidated probate proceedings, and a member of AST owned an undivided fractional interest in each of the 54 parcels. Supplemental Affidavit of Rachel Howell ¶ 4 (AST Ex. 48). Howell also stated that AST's members or AST collectively hold a majority interest in 46 of the parcels. *Id.* Howell testified that for the 54 parcels, CPN owned no interest at all in any parcel, and a member of CPN owned no interest in 52 of the parcels. *Id.* ¶ 5. Howell further testified that CPN members together do not hold a majority interest in any of the parcels, and that the total of all CPN interests together in any single parcel does not exceed 1% of the overall ownership interest. *Id.* CPN did not dispute this evidence.

AST also offered evidence to show that it has exercised jurisdiction over the AST allotments. Among the evidence offered is AST's liquor ordinance, which was published on March 16, 1993, by the Acting Assistant Secretary – Indian Affairs in the Federal Register. *See* Absentee Shawnee Tribe of Oklahoma Alcohol Regulations, 58 Fed. Reg. 14298. The tribal ordinance imposes an excise tax and regulates the sale, possession, consumption, distribution, and manufacture of liquor "in the area of Indian Country under the jurisdiction of the Absentee Shawnee Tribe of Oklahoma." *Id.* The ordinance provides that "[t]he jurisdiction of the Absentee Shawnee Tribe shall extend to all tribally owned land *and all restricted or trust land belonging to tribal members* within the boundary of the [30-mile-square tract] . . . and such other land, or interest in land, which may be subsequently acquired." *Id.* (emphasis added).

As discussed below, CPN contended, and contends on appeal, that it has jurisdiction over the AST allotments as a matter of law because they are located within CPN's former reservation and AST was never granted rights to that reservation. CPN relies, in part, on a judicial decision in which CPN successfully challenged a decision by BIA and the Board finding that the 30-mile-square tract was also AST's former reservation for purposes of applying BIA's trust acquisition regulations. *See Citizen Band Potawatomi Indian Tribe v. Collier*, 142 F.3d 1325 (10th Cir. 1998); 25 C.F.R. §§ 151.2 (definition of "Indian reservation"), 151.8 (tribal consent for nonmember acquisitions). In *Collier*, the Court of Appeals held that the 1891 Act did not simultaneously grant AST a reservation right in the 30-mile-square tract and accept the relinquishment by both tribes of any interest in the tract. *Collier*, 142 F.3d at 1333. The result of the *Collier* decision is that under BIA's interpretation of its trust acquisition regulations, CPN must consent before BIA may

exercise its discretionary authority to acquire land in trust for AST within the 30-mile-square tract, unless AST already owns a trust interest in the parcel. *Id.* at 1334; *see* 25 C.F.R. § 151.8.

In the present case, the ALJ concluded that when Congress ratified CPN's cession and relinquishment of all claim, title and interest to the 30-mile-square tract, and then confirmed allotments to Absentee Shawnees, Congress effectively removed any jurisdiction that CPN might previously have had over those allotments. The ALJ impliedly concluded that AST, as the tribe of the allottee, had acquired jurisdiction over those allotments.

The ALJ was not convinced that the legislative history of the tribal-jurisdiction language in 1983 ILCA, *see supra* at 94-95, even if relevant, provided a clear indication of Congressional intent in AIPRA to divest AST of its jurisdiction over AST allotments. *See* Order on Motions for Summary Judgment (Decision) at 8-11. Nor was he convinced that a different result was required by *Collier*. *See id.* at 5-7, 9-10. The ALJ also found that AST, unlike CPN, had shown that it has in fact exercised jurisdiction over the AST allotments, and that the Department, through BIA, has recognized AST's authority to do so.

In the Order Denying Rehearing, the ALJ again rejected CPN's argument that *Collier* and the legislative history of ILCA required a finding that CPN is the tribe with jurisdiction over the AST allotments, and rejected CPN's argument that the 1891 Act confirming AST allotments was not sufficient to grant AST jurisdiction over those allotments. Order Denying Rehearing at 2-3.

### **Arguments on Appeal**

On appeal, CPN contends that the ALJ (1) misapplied the legislative history of ILCA 1983; (2) failed to give proper consideration to *Collier*; (3) erred in concluding that the 1891 Act resulted in AST, not CPN, having jurisdiction over AST allotments; and (4) incorrectly treated as relevant AST's assertion or exercise of jurisdiction over or delivery of services to the AST allotments. Opening Brief (Br.) at 5-7.<sup>8</sup>

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<sup>8</sup> CPN also makes several additional allegations that the ALJ incorrectly relied on certain case law and evidence that CPN contends is inapplicable or irrelevant as support for a finding that AST is the tribe with jurisdiction over the AST allotments. *See* Opening Br. at 6-7. We find it unnecessary to address CPN's additional arguments because the case law and evidence that CPN contends the ALJ improperly relied upon in support of AST's position, whether or not relevant, is not something we rely upon to affirm the ALJ's conclusion.

CPN argues that because the AST allotments are located within CPN's former reservation, the legislative history of the tribal-jurisdiction language in ILCA 1983 indicates Congressional intent that CPN, and not AST, is the tribe with jurisdiction over the AST allotments. CPN also argues that *Collier* conclusively established that CPN is the tribe with jurisdiction within the former reservation area for purposes of BIA's land acquisition regulations, and therefore the land consolidation policies reflected in ILCA and AIPRA favor a finding that CPN, not AST, is the tribe with jurisdiction over the AST allotments. CPN contends that if it is the tribal heir, it will be able to consolidate trust interests within its former reservation. In contrast, CPN argues, because *Collier* held that under BIA's regulations, CPN's consent is required for AST trust acquisitions within the former reservation, AST will be unable to consolidate its land ownership outside of the AST trust allotments. Opening Br. at 17.<sup>9</sup>

CPN also argues that the Tenth Circuit has interpreted similar tribal-jurisdiction language found elsewhere in ILCA in holding that "no tribe may be considered to be the 'tribe with jurisdiction' . . . without a Congressional grant of jurisdiction over the lands at issue," even if the tribe exercises civil governmental powers over those lands. CPN Opening Br. at 14 (citing *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1145 (10th Cir. 2011) (interpreting the phrase, "tribal government that exercises jurisdiction over the land," found in 25 U.S.C. § 2216)). In *Miami Tribe*, the court stated that "before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land," and the threshold question of a tribe's jurisdiction must focus "principally on congressional intent and purpose, rather than recent unilateral actions of the [tribe]." 656 F.3d at 1144 (quoting *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001)). CPN contends that the 1891 Act did not grant AST jurisdiction over the AST allotments, and that CPN is the "only tribe with a valid, recognized and exclusive interest in the former Potawatomi Reservation prior to allotment and, therefore, is the only 'tribe with jurisdiction'" over AST allotments for purposes of AIPRA's tribal heirship rule. Opening Br. at 15. According to CPN, because Congress never granted AST jurisdiction over the AST allotments, AST's assertion or exercise of jurisdiction over those allotments (i.e., through tribal ordinances and the delivery of services) is irrelevant.

AST responds that the AST allotments were expressly confirmed by Congress and set aside for members of AST, pursuant to the 1890 agreement with AST—as a tribe—and when that happened, the AST allotments became Indian country subject to AST's jurisdiction. AST argues that at least since the 1891 Act, the AST allotments have had "no

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<sup>9</sup> Although not said expressly, CPN's argument suggests that it does not intend to give its consent to any fee-to-trust acquisition proposals by AST within the former reservation area.

connection whatsoever” to CPN, a “complete lack of nexus . . . for over 120 years.” AST Answer Br. at 2-3. AST counters CPN’s policy arguments by asserting that ILCA’s policies also include strengthening tribal sovereignty and self-determination, which are relevant to both tribes. AST also contends that its actual exercise of jurisdiction over the AST allotments through ordinances or services relating to liquor, taxation, criminal matters, trespass, divorce, and child support—many or all of which are approved by or supported with funding from the Bureau of Indian Affairs (BIA)—provides further evidence that AST is the “tribe with jurisdiction” over those allotments and recognized as such by the Secretary.<sup>10</sup>

## Discussion

### I. Standard of Review

This case does not involve disputed issues of material fact, nor does any party contend otherwise. *Cf. Collier*, 142 F.3d at 1331 n.5 (“It is not the facts which are in dispute, but their legal significance.”). Instead, the issue is a legal one, and thus we review the ALJ’s determination *de novo*. *Estate of Sarah Steward Sings Good*, 57 IBIA 65, 72 (2013).

### II. Is CPN the Tribe with Jurisdiction over the AST Allotments?

We begin by addressing whether CPN is the tribe with jurisdiction over AST allotments. We begin with CPN because the allotments were made from lands located within the area approved as a reservation for CPN for its exclusive use and occupancy, and because only CPN was determined to have had a compensable interest in those lands. At the outset, we agree with CPN that the Tenth Circuit’s decision in *Miami Tribe* provides a useful analytical framework in deciding the present case, although we reach a different result than the result urged on us by CPN. While CPN narrowly focuses on whether the 1891 Act granted AST jurisdiction, we examine, as a threshold matter, whether CPN ever acquired actual jurisdiction over the lands that became the AST allotments. We are not convinced that it did because actual title and ownership in the tract itself never vested in CPN.

At the turn of the 20th century, “Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because “[t]he notion that reservation status of Indian lands might not be

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<sup>10</sup> The Regional Director filed a brief in which he “states, in the strongest possible terms,” his support for the ALJ’s decision. Regional Director’s Br. at 1. The Regional Director’s brief summarizes and characterizes the ALJ’s decision in favorable terms, but does not address in any detail CPN’s arguments on appeal.

coextensive with tribal ownership was unfamiliar.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984)). At the time, “Indian country” consisted of lands to which “Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer,” unless otherwise provided by “the treaty by which the Indians parted with their title, or by some act of Congress.” *Bates v. Clark*, 95 U.S. 204, 208 (1877). It was not until 1948 that Congress uncoupled reservation status from Indian ownership. *Solem*, 465 U.S. at 468. Prior to that, the common understanding was “that tribal ownership was a critical component of reservation status.” *Yankton*, 522 U.S. at 346. Consistent with those principles, the determination of tribal jurisdiction over allotments, although ultimately a fact-specific determination, may depend on “the historical test to what band, tribe, or group of tribes did the land in question belong at the time when it was allotted?” IRA Interpretation Regarding Devisee Questions, M-27796 (Nov. 7, 1934), I Op. Sol. on Indian Affairs 478, 479 (1979).

It is undisputed that CPN’s treaty right, combined with the Secretary’s approval of its selection for a 30-mile-square reservation, created a compensable interest in CPN as measured by the full extent of ownership, because CPN had a *contract right* to receive title to and ownership of the tract. But it is also undisputed that the treaty did not contain “present words of grant nor a description by metes and bounds of land,” 6 I.C.C. at 660, the tract was never surveyed, and a patent was never issued to convey actual title and ownership to CPN. However mistaken the Department was in asserting that title could not be conveyed to CPN, the fact is that ownership remained in the United States.<sup>11</sup> Indeed,

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<sup>11</sup> We acknowledge that a portion of the Board’s decision in *Citizen Band Potawatomi Indian Tribe v. Anadarko Area Director*, 28 IBIA 169 (1995), that was not struck down by the court in *Collier* characterized the ICC’s decision as determining CPN’s “ownership” in the tract. *See Collier*, 142 F.3d at 1331 (finding it unnecessary to address the issue). To the extent that portion of the Board’s decision has any continuing viability, we now conclude that the Board’s characterization of the holding by the ICC was not well founded. The ICC held that CPN had a *contract right* to obtain ownership, but it did not hold that actual title had ever passed to CPN. We do not construe the ICC’s finding that the Secretary “unequivocally recognized [CPN’s] ownership” by recognizing its entitlement to the tract, 6 I.C.C. at 650-51, as intended to literally mean that the Secretary recognized that actual title had passed to CPN. The historical record unequivocally demonstrates otherwise, and in any event that finding was not necessary to the ICC’s holding. The fact that CPN had an exclusive compensable right to acquire the 30-mile-square tract of land, which would have been abrogated if the 1891 Act had been construed as granting AST an equal right in the tract, *see Collier*, 142 F.3d at 1333, does not mean that CPN ever acquired actual title and ownership of that tract.

although the tract was selected and approved for CPN’s reservation, CPN expressed at least some willingness to exclude the lands occupied by the Absentee Shawnees as long as the reservation was extended westward to make up the difference, thus leaving the possibility that the final boundaries might be changed before the land was conveyed to CPN. Nor did CPN obtain—notwithstanding the treaty right—exclusive use and occupancy over the tract selected and approved for its reservation. See *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Petition at 8-9 (AST Ex. 19) (CPN “was excluded from occupying any of the land on the Oklahoma Reservation lying north of the Little River,” consisting of approximately 285,000 acres, and “never obtained actual occupancy” of those lands).

Considering the common understanding at the time that Indian title and jurisdiction went hand in hand, it seems unlikely, at best, that Congress intended CPN to obtain territorial jurisdiction over a 30-mile-square tract before the final boundaries were surveyed and before actual title and ownership were conveyed to CPN for its exclusive use and occupancy. Nor is it likely that CPN understood the treaty as separately giving it jurisdiction over lands owned by the United States, before those lands were surveyed and conveyed to the tribe.

But even assuming that the 1867 treaty, as ratified by Congress, can fairly be construed as intended to grant CPN jurisdiction over lands before CPN obtained actual ownership of those lands, we conclude that the subsequent acts of Congress, beginning with the 1872 Act, and culminating with the 1891 Act, provide the “clear and plain” intent required to support a finding that Congress divested CPN of any such jurisdiction over the lands that were allotted to Absentee Shawnees. *Yankton*, 522 U.S. at 343. The conflict between the two tribes was clearly communicated to Congress, as was the Department’s de facto separation of the tract into two parts by generally allotting lands north of the Little River to AST members, and lands south of the Little River to CPN members.

In our view, the 1872 Act, by authorizing allotments to members of another tribe, clearly abrogated CPN’s treaty right to receive title to and exclusive use, occupancy, and possession of the 30-mile-square tract to the extent of AST allotments made pursuant to that act.<sup>12</sup> It is unclear, however, precisely how many or which particular AST allotments may have been completed under the 1872 Act, if any.

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<sup>12</sup> Of course, because the treaty had given CPN a contract right to obtain title to the entire 30-mile-square tract, the abrogation served as the basis for the ICC to award CPN compensation.

Ultimately, however, we need not and do not rely on the 1872 Act to conclude that any territorial jurisdiction that CPN may have acquired over the 30-square-mile tract no longer exists for the AST allotments. The 1890 cession by CPN, ratified by Congress in 1891, provides the necessary clear and plain intent to abrogate any such right. As relevant to CPN's jurisdiction, CPN ceded, relinquished, and surrendered to the United States "all . . . claim, title and interest of every kind and character in and to the [30-mile-square] tract of country in the Indian Territory." 26 Stat. at 1016. In exchange, the United States agreed to pay CPN a sum certain. As CPN concedes, the 1891 Act disestablished the exterior boundaries of the 30-mile-square tract as CPN's reservation. *See* CPN Reply Br. at 16. As a result, any residual jurisdiction would have depended upon any retained Indian title in lands within that tract.

But neither CPN nor its members were granted (nor could they have "retained") any title to the land allotted to AST members. Any jurisdictional "boundary" that might have served as a nexus between CPN and the AST allotments was lost when the boundary to the 30-mile-square tract, such as it was, was disestablished. And Congress's confirmation of the AST allotments, given the historical circumstances and unfriendly relations between the two tribes, clearly and plainly is inconsistent with CPN having jurisdiction over those allotments. Thus, even though the AST allotments were Indian country, and even though they were located within a tract that had previously been approved by the Secretary to become CPN's reservation, the facts of this case do not, in our view, support a conclusion that the AST allotments were Indian country that either were or remained in any respect a "reservation" set aside for CPN or its members, or that Congress intended CPN to have jurisdiction over the AST allotments. We conclude that in the 1891 Act, Congress unambiguously intended to abrogate any jurisdiction or authority that CPN might previously have acquired over the lands allotted to Absentee Shawnees. *See Miami Tribe*, 656 F.3d at 1144.

We do not understand *Collier* to require a different result. CPN argues that *Collier* "held that CPN's pre-existing Congressional grant of jurisdiction over the Potawatomi Reservation was not abrogated by the [1891 Act]." Opening Br. at 18. We believe that CPN reads *Collier* too broadly. There can be little question that the 1891 Act abrogated CPN's treaty right to receive title and exclusive use and occupancy to the 30-mile-square tract: CPN ceded all claim, title, and interest to the tract. The focal issue in *Collier* was whether *AST* had ever obtained any tribal right to the 30-mile-square tract as a whole, so that *AST* was on an equal status with CPN with respect to the tract as a whole, in applying BIA's trust acquisition regulations. In *Collier*, the parties accepted without examination the premise that the 30-mile-square tract had at one time been CPN's "reservation," within the meaning of the trust acquisition regulations, and that 25 C.F.R. § 151.8 (tribal consent for

nonmember acquisitions) at least applied to CPN with respect to the tract. The only question in *Collier* was whether AST had the same rights in that area, such that a proposed fee-to-trust acquisition could proceed without CPN's consent. We construe *Collier* within the context in which it was decided—BIA's interpretation and application of its trust acquisition regulations. CPN's actual jurisdiction over either fee lands or AST trust lands within the former reservation area was simply not an issue.

And finally with respect to CPN's jurisdiction, although not determinative, we note that CPN does not dispute AST's assertion that at least since the 1891 Act, CPN has had "no connection whatsoever with" the AST allotments, the Federal government has never recognized any CPN governmental authority over those allotments, and there has been a "complete lack of nexus with these lands for over 120 years." AST Answer Br. at 2-3. If nothing else, this evidence provides "one additional clue" that the intent and effect of the 1891 Act was to divest CPN of any jurisdiction it might otherwise have had over the lands allotted to AST members. *Solem*, 465 U.S. at 472.

### III. Is AST the Tribe with Jurisdiction over the AST allotments?

Our conclusion that CPN is not the tribe with jurisdiction over the AST allotments does not necessarily lead to the conclusion that AST does have jurisdiction over the allotments for purposes of AIPRA. Congress recognized that in some cases, there may be no tribe that is "the tribe with jurisdiction" over trust or restricted interests, in which case co-owners of trust or restricted interests in a parcel are next in line to inherit. In the present case, although the issue is not entirely free from doubt, we conclude that AST is the tribe with jurisdiction over the AST allotments for purposes of AIPRA.

By authorizing and confirming allotments to AST members, we think Congress impliedly authorized or consented to AST's exercise of jurisdiction over those members' lands. The allotment policy undoubtedly was intended to facilitate the end of Indian tribes, but as long as allotments remained for tribal members, even in the absence of tribally owned lands, those allotments were intended to serve as an "adequate fulcrum for tribal affairs." *DeCouteau v. District Court*, 420 U.S. 425, 447 (1975). As noted above, the Department had actively sought to make allotments to AST members in the portion of the 30-mile-square tract that was already occupied by AST. The Department made its de facto separation of allotments by tribal affiliation known to Congress, and the AST allotments all appear to be located north of the Little River, and are largely grouped together. See AST Ex. 32, Att. B (map); AST Ex. 19 (map). Under the facts of this case, Congressional confirmation of the AST allotments, based on an agreement with AST, provides a sufficient basis to conclude that the 1891 Act impliedly contains the necessary grant of jurisdiction to

AST over the allotments of its members, even if title did not first pass through AST as a tribal entity.

In addition, to the extent Congress intended to accept Secretarial recognition of tribal jurisdiction as determining the identity of the “tribe with jurisdiction,” for purposes of applying AIPRA, BIA’s recognition of AST as having governmental and jurisdictional authority over AST allotments supports our conclusion. *See* H.R. Rep. No. 97-908 at 8 (1982) (“For purposes of this Act, tribal jurisdiction means that the tribe exercises civil governmental powers over the lands involved *or* that the Secretary of the Interior recognizes that the tribe has the authority to exercise civil governmental powers over such lands.”). In 1993, the Assistant Secretary approved AST’s liquor ordinance under 18 U.S.C. § 1161, thus recognizing AST’s jurisdiction over AST-owned trust lands. Even though the ordinance described AST’s jurisdiction over AST-owned lands in relation to their location—within the 30-mile-square tract—CPN never sought to challenge the Assistant Secretary’s approval of AST’s ordinance and recognition of its jurisdiction. Nor, apparently, did anyone else. Thus, the Department has, for at least 20 years, recognized AST jurisdiction over AST-owned allotments.<sup>13</sup>

CPN argues that the ALJ erred by construing the legislative history of ILCA 1983 as meaning “that Congress intended that AST and not CPN has jurisdiction” over the AST

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<sup>13</sup> It is possible, of course, that the Assistant Secretary’s approval of AST’s liquor ordinance, which preceded the *Collier* decision, may have been influenced at least in part by a mistaken belief that AST had at one time been granted broader rights in the 30-mile-square tract as a whole. But given the fact that AST’s assertion of jurisdiction in its liquor ordinance is limited to AST-owned lands, we are not convinced that *Collier* may be read as negating the significance of the Assistant Secretary’s recognition of AST’s liquor ordinance and its jurisdiction over the lands described therein, an ordinance which apparently remains in force today.

With respect to AST’s other examples of its exercise of jurisdiction over AST allotments, we do not find particularly persuasive AST’s argument that its Constitution serves as evidence that it has jurisdiction over the AST allotments. We agree with CPN that both tribes’ constitutions are ambiguous in this respect.

Nor do we rely on some of the other examples AST gives to show that it exercises jurisdiction over AST allotments, e.g., by taxing certain transactions, providing services, etc. It is not clear that BIA approved AST’s taxation ordinance, nor is it clear that BIA’s involvement in other matters necessarily would constitute affirmative recognition of AST’s jurisdictional authority over land. It may well be that there are additional examples of BIA recognition of AST jurisdiction over AST allotments, but if so, BIA has not provided them to us in this case.

allotments for purposes of AIPRA's tribal heirship rule. Opening Br. at 5. CPN mischaracterizes the ALJ's decision. The ALJ did not construe the legislative history as affirmative evidence of Congressional intent that AST is the tribe with jurisdiction. Instead, having concluded that AST had acquired jurisdiction over the AST allotments through the 1891 Act, the ALJ found that the language in the legislative history was insufficient to demonstrate that Congress intended a different result in AIPRA. We agree.

The legislative history states that for purposes of ILCA 1983, which we accept as also relevant to AIPRA, "tribal jurisdiction means that the tribe exercises civil governmental powers over the lands involved or that the Secretary of the Interior recognizes that the tribe has the authority to exercise civil governmental powers over such lands." H.R. Rep. No. 97-908 at 8 (1982). That language is consistent with a finding that AST is the "tribe with jurisdiction" over AST allotments.

The legislative history also states, however, that "[t]he term 'subjected to that tribe's jurisdiction' is used so that these 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." *Id.* (emphases added). CPN construes this language to mean that as long as any Indian country remains within its former reservation, Congress intended CPN to be the tribe with jurisdiction for purposes of AIPRA. But whether that would be true in many or even most other "disestablishment" cases, the language in the legislative history cannot overcome the historical record in this case, which serves as the basis for finding that AST, not CPN, is the tribe with jurisdiction over AST allotments. We construe the legislative history as indicating that a tribe whose jurisdiction remained over trust lands of the tribe and its members, notwithstanding the disestablishment of its reservation, will still be covered as to those lands. We do not construe it as intended, as applied to this case, to divest AST of jurisdiction over AST allotments and to deem CPN to be the "tribe with jurisdiction" under AIPRA, simply because the AST allotments are within the boundaries of a tract that originally was promised, but never delivered, to CPN. Nor do we think that the land consolidation policy objectives of AIPRA necessarily supersede other policy objectives, including tribal self-determination, to serve as a basis to find that Congress intended to sever the historical nexus between AST and lands allotted to its members.

### **Conclusion**

For the reasons set forth above, we conclude that the ALJ correctly held that AST is the "tribe with jurisdiction" over the AST allotments at issue in these probates, and thus is the tribal heir of certain interests as set forth in the ALJ's separate decisions determining heirs in each case.

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 Order Denying Rehearing.<sup>14</sup>

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>14</sup> The ALJ discussed the history of several other reservations involving multiple tribes, and indicated that one tribe had suggested that the decision in this case could have “rippling effects” on probate cases involving other tribes. Order on Motions for Summary Judgment at 4-5 & n.5. Our decision is limited to determining the relative rights of CPN and AST with respect to the AST allotments. We express no opinion on any other lands involving other tribes.