ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5133

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUANTUM ENTERTAINMENT LIMITED,

Plaintiff-Appellant,

-v.-

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
Case No. 11-cv-00047 (Hon. Ricardo M. Urbina)

INITIAL ANSWERING BRIEF OF DEFENDANT-APPELLEE UNITED STATES DEPARTMENT OF THE INTERIOR

IGNACIA S. MORENO
Assistant Attorney General

WILLIAM J. LAZARUS
JOHN L. SMELTZER
KRISTOFOR R. SWANSON
MATTHEW LITTLETON
Attorneys, Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7415
Washington, DC 20044
(202) 514-4010
matthew.littleton@usdoj.gov

Of Counsel:

STEPHEN L. SIMPSON
JANET L. SPAULDING
Office of the Solicitor
U.S. Department of the Interior

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Federal Statutes and Public Laws

Federal Rules

New Mexico Statutes and Public Laws

New Mexico Regulations

Miscellaneous

GLOSSARY

APA	Administrative Procedure Act
Board	United States Department of the Interior Board of Indian Appeals
Interior	Defendant-Appellee United States Department of the Interior
JA	Joint Appendix
Kewa	Kewa Gas Limited, a tribal corporation
Management Agreement	Management Agreement between Quantum Entertainment Limited, the Santo Domingo Pueblo, and Kewa Gas Limited (Aug. 1, 1996)
New Section 81	25 U.S.C. § 81 (2000)
Old Section 81	25 U.S.C. § 81 (1994)
Pueblo	Santo Domingo Pueblo
Quantum	Plaintiff-Appellant Quantum Entertainment Limited
Regional Director	Acting Regional Director, United States Department of the Interior, Bureau of Indian Affairs, Southwest Region

STATEMENT OF JURISDICTION

Plaintiff-Appellant Quantum Entertainment Limited (Quantum) sued Defendant-Appellee the United States Department of the Interior (Interior), alleging that the Interior Board of Indian Appeals (Board) violated the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, by declaring a contract null and void. The district court had jurisdiction under 28 U.S.C. § 1331. The court granted Interior summary judgment on March 26, 2012. Joint Appendix (JA) **[**Doc. 20**]**. Quantum filed a timely notice of appeal on April 24, 2012. **[**Doc. 22**]**; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In 1996, Quantum signed an agreement (Management Agreement) with the Santo Domingo Pueblo (Pueblo)—a federally-recognized Indian tribe—and Kewa Gas Limited (Kewa), a tribal corporation owned by the Pueblo. Quantum agreed to manage Kewa's fuel distribution business in return for 49% of business income. The Pueblo agreed not to compete with the business, which received tax benefits from its association with the tribe and its federally-held lands. Interior was not asked to review the agreement until 2003, at which time Interior refused to approve it.

1. Did Interior properly conclude that, under 25 U.S.C. § 81 (1994) (Old Section 81), the Management Agreement was void absent Interior's approval because it was made "with [a] tribe of Indians" and "relative to their lands"?

2. Did Interior correctly refuse to apply 25 U.S.C. § 81 (2000) (New Section 81) to the Management Agreement because that revised statute would have the impermissible retroactive effect of imposing legal rights and duties where no such rights or duties previously existed?

STATUTES AND REGULATIONS

In 1872, Congress enacted Old Section 81, which declared "null and void" any agreement to provide services to Indian tribes that were "relative to their lands," unless Interior had approved the agreement.

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money . . . in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> * * *
>
> . . . [Such agreement] shall bear the approval of the Secretary of the Interior . . . indorsed upon it.
>
> * * *
>
> All contracts or agreements made in violation of this section shall be null and void . . . .

25 U.S.C. § 81 (1994), R.S. § 2103 (1878). Quantum concedes that the Management Agreement was made "for the payment or delivery of . . . money . . . in consideration of services . . . ." 25 U.S.C. § 81 (1994); *see* **[**AR842**]**. The parties dispute, however, whether the Management Agreement is an agreement "with [a] tribe of Indians" and, if so, whether it is "relative to their lands." 25 U.S.C. § 81 (1994).

Congress did not substantively amend Old Section 81 until 2000, four years after Quantum signed the Management Agreement with the Pueblo and Kewa. The amended statute (New Section 81) narrows the universe of agreements that require Interior's approval.

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 81(b) (2000), Pub. L. No. 106-179, § 2(b), 114 Stat. 46 (Mar. 14, 2000). The parties agree that New Section 81 does not cover the Management Agreement because it does not "encumber[ ] Indian lands" within the meaning of that provision. **[**AR910**]**. Thus, if New Section 81 governs the agreement, it is valid even without Interior's approval.

All pertinent statutes and regulations are appended to this brief.

STATEMENT OF FACTS

A. Background to the Management Agreement

The Pueblo chartered Kewa as a tribal corporation to promote economic development and tribal income on the Pueblo's federally-held lands in north-central New Mexico. **[**AR61**]**. Kewa owns several above-ground tanks located on lands that the Pueblo leases to Kewa. **[**AR88-89, 297-98**]**. Trucks deliver fuel to the tanks for temporary storage, and the fuel is later removed and delivered to retail service stations both within and outside the Pueblo's federally-held lands. **[**AR297-98**]**.

Because Kewa is wholly owned by the Pueblo, Kewa receives tax advantages from locating its fuel distribution business on federally-held tribal lands. When the Management Agreement was signed in 1996, Kewa's business was exempt from all state taxes on the receipt and downstream sale of fuel.[1] **[**AR583**]** (N.M. Stat. § 7-13-2(K)(1)(b) (1995)); **[**AR586-87**]** (3 N.M. Admin. Code 16.3.10 (1996), exempting "[g]asoline

[1] The Board agreed with the Pueblo's interpretation of New Mexico's tax laws as they existed in 1996. **[**AR828 n.1**]**; *see* **[**AR560-65**]**. Quantum did not argue for a different interpretation before the Board and has therefore waived any right to contest the point before this Court. *See Coburn v. McHugh*, 679 F.3d 924, 930-31 (D.C. Cir. 2012).

received by an Indian tribe on its own territory" from taxation); **[**AR595-97**]** (N.M. Revenue Ruling 640-96-1 (Apr. 4, 1996)). But Kewa's existing tax exemption was under threat at that time. *See* **[**AR610**]** (governor's proclamation asking legislature to amend state gas tax laws); **[**AR566 n.3**]** (listing several state bills introduced between 1996 and 1999 to eliminate exemption). When the Pueblo approved the Management Agreement, the tribe recognized "that [Kewa's] proposed gasoline distribution business involved certain unusual risk factors due to the uncertainty of state law [in 1996], and that gasoline distributors are reluctant to do business with Indian entities seeking to take advantage of tax exemptions under current state law . . . ." **[**AR129**]**.

New Mexico ultimately revised its tax law in 1999 to replace the existing exemption with two deductions. **[**AR622-639**]** (1999 N.M. Laws ch. 190 (S.B. 588)). Kewa retained a tax advantage after the amendments, however, because one of the deductions was available only to Indian tribes or tribally-owned corporations like Kewa that distribute and sell gasoline from "nonmobile storage container[s]" (i.e., fuel tanks) situated on tribal lands. N.M. Stat. § 7-13-4(F) (1999).

B. Substance of the Management Agreement

The Management Agreement authorized Quantum to "manage the day-to-day operation of [Kewa's] Gas Distribution Business," **[**AR131**]**, for a term of 10 years (i.e., until 2006), **[**AR135**]**.[2] Among other things, Quantum agreed to hire and train all personnel; market the business; negotiate fuel purchase and sale prices; prepare operating and capital expenditure budgets; advance capital for construction projects; pay operating costs; bill customers; and maintain business records. **[**AR131-33, 137**]**. In return, Quantum received 49% of Kewa's net income from fuel distribution, plus a bonus for any fuel sold to the Pueblo's own retail gas station and another bonus for every gallon of fuel sold in excess of one million gallons per month. **[**AR134-35**]**.

The parties to the Management Agreement also covenanted not to compete with Kewa's existing gas distribution operations. **[**AR137-38**]**. In particular, the Pueblo agreed not to "directly or indirectly, as an owner, consultant, agent, partner, joint venture, or in any other capacity, participate in, engage in, or have a financial or other interest

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[2] Quantum had the option to extend the term of the contract for two additional 10-year periods. **[**AR135**]**.

in, any other gas distribution business within the State of New Mexico." **[**AR137**]**. In so doing, the Pueblo relinquished its right to further capitalize on the tax advantages available to tribal entities operating fuel distribution businesses on federally-held tribal lands.

STATEMENT OF THE CASE

The parties did not ask Interior to approve the Management Agreement when it was signed in 1996. In 2003, however, the Pueblo's new tribal governor asked Interior to review the agreement to ensure that the Pueblo's legal rights were adequately protected and that the agreement was fair to the tribe. **[**AR52**]**. After reviewing the Management Agreement, the Acting Director for the Southwest Region of the Bureau of Indian Affairs (Regional Director) declined to approve the agreement because it was not in the Pueblo's best interest. **[**AR40**]**. The Regional Director also informed the Pueblo and Quantum that the Management Agreement fell within the purview of Old Section 81 and was therefore null and void absent Interior's approval. **[**AR40**]**. After learning of the Regional Director's determination in October 2003, the parties to the Management Agreement stopped performing under that agreement.

Quantum appealed the Regional Director's decision to the Board. In 2007, the Board upheld the Regional Director's conclusion that the Management Agreement was null and void. **[**AR826-57**]**. The Board reasoned that Old Section 81 applied to the Management Agreement because it was made "with [a] tribe of Indians." **[**AR843-46**]**. The Board abstained, however, from deciding the question whether the Management Agreement was "relative to [the Pueblo's] lands." The Board abstained due to pending federal litigation addressing the issue with respect to a similar contract. **[**AR846-48**]** (citing *GasPlus v. U.S. Dep't of the Interior*, D.D.C. Case No. 03-cv-1902 (filed Sept. 10, 2003)).

The Board also concluded that because Interior's approval was required under Old Section 81, but not New Section 81, applying the new statute to the Management Agreement "would [impermissibly] alter the legal consequences of acts completed before New Section 81 was enacted." **[**AR841**]**. For that reason, the Board held that Old Section 81 applied and that the Management Agreement was void because Interior had never approved it. The Board separately held that Quantum lacked prudential standing to challenge the Regional Director's decision to not approve the agreement in 2003. **[**AR849-52**]**.

Quantum filed an APA suit in the United States District Court for the District of Columbia seeking to overturn both Interior's determination that the Management Agreement was void under Old Section 81 and the agency's decision not to approve the agreement in 2003. **[**AR865**]**. In 2009, the district court partially granted Quantum's motion for summary judgment and remanded the Board's decision to the agency. **[**AR875**]**. Addressing only Interior's determination that the Management Agreement was null and void, the court asked the Board on remand to reach the question whether the agreement was "relative to [the Pueblo's] lands" under Old Section 81.[3] **[**AR872-74**]**. The court also instructed the Board to further explain its conclusion that New Section 81 did not govern the Management Agreement. **[**AR870-72**]**.

In 2010, the Board issued a new decision affirming its initial determination that the Management Agreement was null and void. **[**AR1016-50**]**. In particular, the Board explained why the contract was "relative to [the Pueblo's] lands" and therefore required Interior's approval under Old Section 81. **[**AR1034-42**]**. The Board also

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[3] The Board no longer had a basis for abstention on that question after the decision issued in *GasPlus v. United States Department of the Interior*, 510 F. Supp. 2d 18 (D.D.C. 2007). **[**AR1018 n.4**]**.

elaborated on its earlier holding by clarifying that the application of New Section 81 would impermissibly create rights and duties for parties to an otherwise void agreement. **[**AR1042-49**]**.

Quantum challenged the Board's new determination in district court but abandoned its challenge to Interior's decision not to approve the Management Agreement in 2003. The district court awarded summary judgment to Interior. **[**Doc. 20**]**. The court held that "[a]n agreement concerning a business located on tribal land that provides services to Native Americans is 'relative' to Native American lands within the meaning of Old Section 81." **[**Doc. 21, at 11**]**. Thus, the court concluded that the contract required Interior's approval under Old Section 81. *Id.* The court also agreed with the Board that applying New Section 81 to the Management Agreement would have an "impermissible retroactive effect." **[**Doc. 21, at 13**]**. The court affirmed the Board's determination that the Management Agreement was void.

SUMMARY OF ARGUMENT

1. The Board correctly determined that the Management Agreement was void. The plain language of Old Section 81 makes agreements like the Management Agreement "null and void" unless

approved by Interior. The Management Agreement falls within the scope of Old Section 81 for two reasons. First, the Pueblo—a "tribe of Indians"—was an essential party to the agreement who gave up valuable consideration in the form of a covenant not to compete. Second, the agreement was "relative to" the Pueblo's lands because the value of Kewa's fuel distribution business was tied to the Pueblo's sovereignty on its federally-held tribal lands. The Board reasonably and permissibly interpreted Old Section 81 and the Management Agreement, and its decision should be affirmed.

2. Old Section 81 governs the determination whether the Management Agreement is void. The text and legislative history of New Section 81 do not reveal any Congressional intent to retroactively validate void service agreements made with Indian tribes. And applying New Section 81 to the Management Agreement would validate an otherwise void agreement, thereby impermissibly creating new legal rights and duties based on actions completed before New Section 81 was enacted. New Section 81 cannot apply retroactively here, so Old Section 81 applies, and Old Section 81 dictates that the Management Agreement is null and void.

STANDARD OF REVIEW

Both the district court's grant of summary judgment and issues of statutory construction are reviewed *de novo*. *Calloway v. District of Columbia*, 216 F.3d 1, 5 (D.C. Cir. 2000). Where a statute is ambiguous, however, courts defer to an administering agency's permissible construction. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). This Court should also accord *Chevron*-like deference to Interior's interpretation of ambiguous language in an agreement when Interior is evaluating whether the agreement requires agency approval under Old Section 81. Congress expressly delegated to Interior the exclusive power to validate certain agreements involving Indian tribes, and the agency has unique expertise in analyzing those agreements. *See MarkWest Mich. Pipeline Co., LLC v. FERC*, 646 F.3d 30, 34 (D.C. Cir. 2011) (listing those two factors as the basis for according *Chevron*-like deference to an agency's interpretation of a settlement agreement between private parties). In this context, this Court should defer to Interior's interpretation of the Management Agreement for the same reasons that it defers to Interior's

interpretation of 25 U.S.C. § 81. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569-72 (D.C. Cir. 1987).

This Court reviews Interior's decision under the APA to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). An agency action was arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). This Court reviews the Board's factual conclusions only to determine whether there is substantial evidence in the administrative record to support them. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Gov'rs of Fed. Reserve Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (Scalia, J., joined by R.B. Ginsburg, J.). Under the arbitrary-and-capricious standard of review, "substantial evidence" is the most stringent standard that applies to questions of evidentiary sufficiency for factual determinations; it is

more deferential even than the "clearly erroneous" standard for appellate review of trial court factual findings. *See Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999).

ARGUMENT

I. THE MANAGEMENT AGREEMENT IS VOID IF IT IS GOVERNED BY OLD SECTION 81.

An agreement must have three features in order to fall within the terms of Old Section 81. It must (1) be made "with [a] tribe of Indians," (2) be "relative to their lands," and (3) be for the payment of valuable consideration in exchange for services provided to the tribe. 25 U.S.C. § 81 (1994). The parties agree that the Management Agreement satisfies the last criterion. **[**AR842**]**. As explained below, the agreement required Interior's approval because it was also (1) "with [a] tribe of Indians" and (2) "relative to their lands."

A. Quantum signed an agreement "with [a] tribe of Indians."

The Board correctly determined that Quantum entered into the Management Agreement "with [a] tribe of Indians." **[**AR843-46**]**. The Board grounded its thorough analysis in both the substance and the form of the agreement. **[**AR846**]**.

The Board found that the Pueblo's commitments in the Management Agreement were integral to the agreement as a whole. **[**AR846**]**. Specifically, the non-compete clause "requires the Pueblo to surrender valuable consideration, and the practical value of the [a]greement is inextricably tied to the Pueblo's commitments." **[**AR845**]**; *see* **[**AR137**]**. As the Board noted, the non-compete covenant meant that the Pueblo, Kewa's sole owner, could not "simply dissolve Kewa and its business and start a new gasoline distribution business without [Quantum]." **[**AR845**]**. Absent the Management Agreement, the Pueblo could take further advantage of the unique tax benefits conferred on tribal fuel distribution businesses operating on tribal lands. *See supra*, at 4-5. The non-compete clause was thus "a significant concession by the Pueblo and an integral component of the [Management] Agreement as a whole." **[**AR845**]**.

The Board declined Quantum's invitation to artificially separate the Management Agreement into two sub-agreements, one between Quantum and the Pueblo and the other between Quantum and Kewa. **[**AR844**]**. The Board's decision was reasonable based on the face of the Management Agreement, which makes no such distinctions. Rather,

the Pueblo's commitments are intertwined with Kewa's commitments under the agreement. *See* **[**AR137**]** (reciting non-compete covenants for the Pueblo and Kewa in a single provision).

The Board found that the Management Agreement treated the Pueblo and Kewa as a "single contracting unit." **[**AR844**]**. The agreement explicitly notes that Kewa is wholly-owned by the tribe. **[**AR131**]**. The agreement purports to be drafted "between" two parties, Quantum "on the one hand" and the Pueblo and Kewa "on the other hand." **[**AR131**]**; *see* **[**AR844**]**; *see also* **[**AR138**]** (preventing "[ ]either party" to the Management Agreement from assigning rights and obligations under the agreement absent consent "of the other party"); **[**AR139**]** (requiring the signature of "both parties" to amend the agreement). That is unsurprising, given that the Pueblo did not even charter Kewa as a corporation until after the Management Agreement was drafted. **[**AR1038**]**; *compare* **[**AR55-56**]** *and* **[**AR131**]**. Because the Pueblo gave up valuable consideration in the Management Agreement, and because that agreement treated the Pueblo and Kewa as a single unit, the Board did not need to reach the question whether Old Section 81 would cover an agreement made with Kewa alone. **[**AR845-46**]**.

Contrary to Quantum's contention (Br. 52-53), the Pueblo's participation in the Management Agreement was not "a mere afterthought." As the Board explained, the Pueblo's non-competition agreement was integral to the success of the agreement. So was the Pueblo's mere participation, given that when the agreement was drafted, Kewa was not even chartered as a tribal corporation and had no authority to enter into the agreement. In any event, this Court should not give any weight to Quantum's speculation about the importance of the Pueblo's role in the Management Agreement. According to Quantum (Br. 54), the Pueblo "undertook almost no obligations of its own" because the Pueblo's non-competition covenant was "an easy promise to keep." But Interior is in a better position than Quantum to make that judgment. After all, Congress has charged the agency with protecting the Pueblo's interests in both Old and New Section 81. The Board reasonably concluded that the Pueblo's unique position under existing tax law made the tribe's concessions in the Management Agreement significant.

Quantum relies (Br. 54-55) on *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498 (9th Cir. 1981), to support its view that the

Pueblo's non-competition covenant did not bring the Management Agreement within the scope of Old Section 81. Even if *Inecon* were binding on this Court (which it is not), the Board explained that *Inecon* is distinguishable because the tribe's sole obligation in that case was to not interfere with the relevant agreement. **[**AR844, 845 n.1**]** (citing *Inecon*, 656 F.2d at 501). Here, by contrast, the tribe undertook an affirmative obligation to limit its commercial activity throughout its federally-held lands for the entire term of the Management Agreement (potentially up to 30 years). The Pueblo's obligations were integral to the success of the Management Agreement and clearly made that agreement "with [a] tribe of Indians." *See Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 809-10 (7th Cir. 1993); *see also Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 545 (1st Cir. 1997).[4]

[4] If this Court determines that the Pueblo's role in the Management Agreement is not sufficient to make the agreement "with [a] tribe of Indians" under Old Section 81, the Board should be permitted on remand to address the question whether Kewa, by itself, is a "tribe" within the meaning of that provision. At this juncture, however, Quantum's discussion of that issue (Br. 55-56) is irrelevant to this Court's review of Interior's decision.

B. The Management Agreement is "relative to [the Pueblo's] lands."

The Board reasonably concluded that the Management Agreement was "relative to [the Pueblo's] lands" and thus fell within the purview of Old Section 81. **[**AR1019**]**. The Board explained that "the value of the [Management] Agreement, and the consideration to Quantum for its services, is derived from the location of the business on the Pueblo's reservation lands, and . . . the [a]greement limited the right of the Pueblo and Kewa to derive that same value on other Pueblo lands without Quantum's consent . . . ." **[**AR1037**]**. The Board's interpretation of Old Section 81 is compelled by the statute, and even if not, the Board's reading of the statute is reasonable and permissible and should be upheld.

1. Old Section 81 plainly covers service agreements whose value lies in assets tied to sovereign tribal lands.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S.

246, 252 (2004)). Old Section 81 requires Interior to review all service agreements with Indian tribes that are "relative to their lands." 25 U.S.C. § 81 (1994). Under the ordinary meaning of the word "relative," agreements that "hav[e] a relation to or connection with or necessary dependence on" tribal lands require Interior's approval. **[**AR1035 & n.14**]**. The word "relative" is broad in scope, and "statutes written in broad, sweeping language should be given broad, sweeping application." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (Roberts, J.). The Board was therefore correct in holding that Old Section 81 covers agreements, like the Management Agreement, "whose value for the services derived from Indian land as an asset." **[**AR1036**]**.

The legislative history of Old Section 81 does not call the Board's interpretation into question. Examining the Senate debate concerning Old Section 81, the Board found no objection to a broad, sweeping construction of the phrase "relative to their lands." **[**AR1036**]** (citing **[**AR1051-57**]**). Quantum's brief completely ignores the legislative history of Old Section 81. Quantum mentions the legislative history of New Section 81 (Br. 39), but Congress' intent when enacting that amended statute is not probative of Congress' intent 128 years earlier

when it enacted Old Section 81. *See Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005).

To discern the meaning of Old Section 81, the Board also looked to 25 U.S.C. § 177, a statute passed in 1834 that "prohibited transactions purporting to transfer tribal property interest in their lands" without the federal government's consent. **[**AR1035**]**; *see also Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926) (applying 25 U.S.C. § 177 to Pueblo Indians). Against that background, the Board reasoned, Congress would not have bothered to enact Old Section 81 unless it covered more than agreements transferring property interests in tribal land. **[**AR1035-36**]**. The Supreme Court's decision in *Green v. Menominee Tribe of Indians*, 233 U.S. 558 (1914), confirms that the Board's broad reading of Old Section 81 is appropriate. There, the Court applied Old Section 81 to an Indian trader's agreement to provide logging equipment to members of a tribe. *Id.* at 569; *see* **[**AR1024**]**. The agreement in that case plainly did not transfer a property interest in tribal land.

Finally, the Board appropriately examined Congress' general attitude toward Indian affairs at the time that Old Section 81 was passed. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1978). Congress enacted Old Section 81 in 1872, during an "unabashedly paternalistic" period when the United States treated its relationship with Indian tribes like that of a guardian to his wards. *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 682 (5th Cir. 1999); *see* **[**AR1021-22, 1036**]** (citing Senate debate on Old Section 81, at **[**AR1051-53**]**). Old Section 81 was "intended to protect the Indians from improvident and unconscionable contracts" offered by swindlers. *In re Sanborn*, 148 U.S. 222, 227 (1893). Given Congress' paternalistic motivations, it is reasonable to think that Congress meant to require Interior's approval for an agreement—like the Management Agreement—that would limit a tribe's ability to use land that the federal government had specifically set aside for the tribe's benefit.

In sum, the Board's broad interpretation of Old Section 81 is supported by all of the traditional tools of statutory construction: the unambiguous language of the statute itself, its legislative history, the preexistence of 25 U.S.C. § 177—a statute that already required

Interior's approval for transfers of property interests in tribal lands—and Congress' general attitude toward Indian affairs in the 1870s.

2. The Board's interpretation of Old Section 81 is reasonable and permissible.

Old Section 81 unambiguously covers service agreements whose value in consideration for services derives from tribal lands as an asset. But even if the statute were ambiguous on that point, this Court should defer to the Board's permissible interpretation of Old Section 81.

Quantum argues (Br. 43-50) that the Board's construction runs counter to *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993). By the Seventh Circuit's own admission, however, that case did not probe the outer reaches of Old Section 81's phrase "relative to their lands." *See Altheimer*, 983 F.2d at 811; **[**AR1037**]**. Moreover, *Altheimer* was not an APA case involving Interior, so there was no reason for the court to defer to any party's interpretation of Old Section 81. In any case, the Board reasonably concluded that the Management Agreement satisfied the standards that the Seventh Circuit set forth in *Altheimer*. **[**AR1037-42**]**.

Altheimer lists four factors that are "important in determining whether a management contract is relative to Indian lands" under Old

Section 81: (1) whether the managed facility is located on tribal lands; (2) whether the managing party has the exclusive right to operate the facility; (3) whether the agreement prohibits the tribe from encumbering the property; and (4) whether the operation of the facility depends on the tribe's sovereign status. 983 F.2d at 811.

Quantum agrees (Br. 44) that the first *Altheimer* factor is met in this case; Kewa's gas distribution business is located on federally-held tribal lands. As to the second factor, the Board interpreted the Management Agreement to effectively give Quantum the exclusive right to operate Kewa's business. **[**AR1038**]**. Quantum agreed to manage the day-to-day operations of Kewa's business, hire and supervise all personnel, set prices and wages, and market the business. **[**AR131-33**]**; *see supra*, at 6. Quantum (Br. 45) interprets *Altheimer* to require exclusive control over tribal real estate, as opposed to operational control over a business. But *Altheimer* only examined whether the management agreement gave the non-Indian party control over the tribe's "production" process, not its tribal real estate. 983 F.2d at 811.

The third *Altheimer* factor addresses whether the agreement forbids a tribe from encumbering its property. While conceding that the

Management Agreement does not expressly prohibit the Pueblo from encumbering its lands, the Board noted that the agreement restricts the Pueblo's use of its other property through the covenant not to compete. **[**AR1039**]**. The non-compete clause functions like a negative easement on the Pueblo's sovereign tribal lands. **[**AR1039**]**. Quantum argues (Br. 46-47) that the key inquiry for this *Altheimer* factor is whether a tribal property interest has been transferred. But the Board correctly concluded that the transfer of a tribal property interest cannot be the touchstone of whether Old Section 81 applies. *See supra*, at 21.

The fourth and final *Altheimer* factor asks whether the operation of the managed facility depends on the legal status of the Indian tribe. As the Board explained, Kewa's business derived a "special benefit" from its location on tribal lands under state gas tax laws. **[**AR1040-42**]** (quoting *Altheimer*, 983 F.2d at 812). Quantum does not dispute that its compensation under the Management Agreement is tied to tax benefits that are unique to tribal fuel distribution operations located on tribal lands. *See* **[**AR1041**]**. Although those tax benefits were technically conferred by state law, they derived from the preemption of state tax law by tribal sovereignty. **[**AR828 n.1, AR1041-42**]**; *see Okla.*

Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (barring direct state taxation of tribes and tribal members on tribal lands absent a clear waiver of sovereign immunity). As the Board determined, "whether the tax exemption is attributed to the sovereignty of Indian tribes, or the State's action in response to that sovereignty," the value that Quantum received from the Management Agreement was ultimately tied to the Pueblo's sovereignty. **[**AR1042**]**. In sum, even under the *Altheimer* factors, the Board made a reasonable and permissible determination that the Management Agreement fell within the scope of Old Section 81.

II. OLD SECTION 81 GOVERNS THE MANAGEMENT AGREEMENT.

The 1996 Management Agreement is subject to Old Section 81 because New Section 81, enacted in 2000, cannot retroactively validate a previously void agreement. This Court's inquiry is governed by the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which established a two-part test for determining whether a statute should be applied to regulated conduct that was completed before the statute's enactment. First, courts ask whether Congress expressly prescribed the statute's temporal reach. *Id.* at 280. If not,

courts ask whether the statute would have an impermissible "retroactive effect," e.g., whether it would "increase a party's liability for past conduct" or "impose new duties with respect to transactions already completed." *Id.* Congress did not expressly intend for New Section 81 to apply retroactively. And applying New Section 81 in this case would impermissibly create legal rights and duties based on an agreement signed before New Section 81's enactment. Under *Landgraf*, therefore, New Section 81 cannot apply retroactively to the Management Agreement. Because New Section 81 does not apply to the agreement, Old Section 81 applies and renders the Management Agreement void, for reasons explained in Part I.

A. Congress did not expressly intend for New Section 81 to apply retroactively.

To overcome the "deeply rooted presumption" against retroactive application of New Section 81, Quantum must show that "Congress has unambiguously instructed retroactivity." *Vartelas v. Holder*, 132 S. Ct. 1479, 1484, 1486 (2012). Quantum concedes (Br. 24) that the text of New Section 81 "does not explicitly extend the statute's reach to contracts antedating the statute's enactment." And Quantum does not

present any legislative history demonstrating Congressional intent to apply New Section 81 to previously-signed agreements.

Instead, Quantum approaches the issue as though the anti-retroactivity presumption cut the other way. Quantum asserts (Br. 37) that "[t]here is no reason to suppose that Congress intended to insulate existing contracts from the more enlightened policy that New Section 81 represented." But legislative silence does not suffice to overcome the anti-retroactivity presumption. At bottom, Quantum contends (Br. 24-25) that applying New Section 81 to previously-signed agreements would further Congress' purpose of narrowing federal oversight over tribal business affairs. But "although it will frequently be true that retroactive application of a new statute would vindicate its purpose more fully, that consideration is not sufficient to rebut the presumption against retroactivity." *Singh v. George Washington Univ. Sch. of Med.*, 667 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

B. Applying New Section 81 to the Management Agreement would impermissibly endow a void agreement with legal significance.

Since Congress did not unambiguously prescribe retroactive application of New Section 81, this Court must ask "whether the new provision attaches new legal consequences to events completed before its enactment." *Singh*, 667 F.3d at 4 (quoting *Landgraf*, 511 U.S. at 270). There can be no doubt that New Section 81, passed in 2000, would imbue the Management Agreement, signed in 1996, with new legal consequences. Those consequences include the Pueblo's waiver of sovereign immunity, **[**AR137**]**; the Pueblo's agreement not to operate another gas distribution operation on its reservation, **[**AR137**]**; Quantum's agreement to operate Kewa's business, **[**AR131-33**]**; and Quantum's right to a share of Kewa's income and performance bonuses, **[**AR134-35**]**. Under the Board's interpretation of Old Section 81, the question whether New Section 81 applies to the Management Agreement is "outcome-determinative." Quantum Br. 20.

Quantum relies on *Ewell v. Daggs*, 108 U.S. 143 (1883), and *McNair v. Knott*, 302 U.S. 369 (1937), to argue that New Section 81 has no retroactive effect because it simply "legitimizes previously unlawful

contracts." Quantum Br. 28-29. But the Management Agreement is not an "illegal contract," *McNair*, 302 U.S. at 373, that is "contrary to law," *Ewell*, 108 U.S. at 151. Under Old Section 81, the Management Agreement simply lacked legal effect—it was "null and void"—unless and until Interior approved it. As the Board put it, Quantum and the Pueblo had a "business relationship" but not a "*contractual* relationship." **[**AR1044**]**. Applying New Section 81 would create an enforceable contractual relationship where none previously existed.

Moreover, *Ewell* and *McNair* both involved agreements between parties that had authority to contract; the later-enacted statute simply legalized previously illegal contractual provisions. **[**AR1046**]**. Here, by contrast, Old Section 81 withdrew the Pueblo's independent authority to enter into agreements like the Management Agreement. Under that statute, agreements signed by the Pueblo were deemed to have legal effect only if Interior approved them. In *Ewell*'s terms, "no right or claim can be derived from" an agreement falling under Old Section 81 absent Interior's approval.[5] 108 U.S. at 150; *see* **[**AR1046-47**]**. Against

[5] Other courts of appeals have held that Old Section 81 renders void any agreement that Interior has not approved, regardless of where the *(cont'd)*

that background, tribes understood that they could not be held to their obligations under signed agreements unless Interior approved those agreements. *See* **[**AR130**]** (tribal resolution stating that Management Agreement might require Interior's approval); **[**AR1045**]** (Board noting that Quantum bore the risk that Interior would not approve the Management Agreement).

Ewell and *McNair* are inapposite for other reasons as well. In *McNair*, the Supreme Court determined that Congress clearly intended for the new law to apply retroactively, so it was unnecessary to inquire whether applying the statute retroactively would have legal consequences. 302 U.S. at 371-72 (discerning intent from text and legislative history). And in *Ewell*, the Court applied a presumption of retroactivity to the repeal of usury statutes. 108 U.S. at 150 ("[I]t has been quite as generally decided that the repeal of such laws, without a

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equities lie. *See Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 890 (10th Cir. 1989); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986); *see also Contour Spa at the Hard Rock, Inc. v. Seminole Tribe*, 692 F.3d 1200, 1211-12 (11th Cir. 2012) (reaching same conclusion for contract falling within terms of New Section 81).

saving clause, operated retrospectively . . . ."). In this case, the opposite presumption applies. *See Vartelas*, 132 S. Ct. at 1484.

Finally, Quantum argues (Br. 32-37) that the Management Agreement was not "absolutely void" absent Interior's approval, but merely "voidable" at the election of the Pueblo until 2000, when Congress passed New Section 81. But Quantum ignores the plain language of Old Section 81, which declared all applicable agreements to be "null and void" absent Interior's approval. Before New Section 81 passed, the unapproved Management Agreement was an empty document that imposed no legal requirements on the Pueblo. To hold that agreement valid and legally enforceable against the Pueblo as of 2000, solely as a consequence of New Section 81's enactment, would work an impermissible retroactive effect, and *Landgraf* forbids such effects in the absence of clear Congressional intent.

In sum, the Board reasonably determined that New Section 81 cannot apply retroactively to the Management Agreement. Therefore, as the Board concluded, Old Section 81 applies and renders the agreement null and void. The Board's decision should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,159 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Century Schoolbook, 14-point.

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

November 5, 2012

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

Federal statutes

New Mexico statutes and regulations

States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.

(R.S. § 2080.)

CODIFICATION

R.S. § 2080 derived from act July 5, 1862, ch. 135, § 1, 12 Stat. 528.

SUBCHAPTER II—CONTRACTS WITH INDIANS

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupations; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub. L. 85–770, Aug. 27, 1958, 72 Stat. 927.)

CODIFICATION

R.S. § 2103 derived from acts Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570; May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136.

AMENDMENTS

1958—Par. Second. Pub. L. 85–770 struck out requirement that contracts with Indian tribes be executed before a judge of a court of record.

Par. Sixth. Pub. L. 85–770 struck out par. Sixth enumerating contractual elements to be certified to by the judge.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

CROSS REFERENCES

Forfeiture of money received contrary to this section and punishment by fine or imprisonment, see section 438 of Title 18, Crimes and Criminal Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 81a, 84, 416a, 450*l*, 458cc, 2701, 2711 of this title; title 18 section 438.

§ 81a. Counsel for prosecution of claims against the United States; cancellation; revival

Any contracts or agreements approved prior to June 26, 1936, by the Secretary of the Interior between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a specified percentage, shall be deemed a sufficient compliance with section 81 of this title: *Provided, however*, That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement: *Provided further*, That the provisions of this section and section 81b of this title shall not be construed to revive any contract which has been terminated by lapse of time, operation of law, or by acts of the parties thereto.

(June 26, 1936, ch. 851, § 1, 49 Stat. 1984.)

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§ 81b. Continuation of contracts with attorneys containing limitation of time where suits have been filed

Any existing valid contract made and approved prior to June 26, 1936, pursuant to any Act of Congress by any tribe, band, or group of Indians with an attorney or attorneys for the

Apr. 2, 1982, Pub. L. 97–164, title I, § 149, 96 Stat. 46, related to cases transferred to United States Claims Court from Commission.

§ 70w. Repealed. May 24, 1949, ch. 139, § 142, 63 Stat. 110

Section, act Aug. 13, 1946, ch. 959, § 24, 60 Stat. 1055, related to Indian claims accruing after Aug. 13, 1946. See section 1505 of Title 28, Judiciary and Judicial Procedure.

CHAPTER 3—AGREEMENTS WITH INDIANS

SUBCHAPTER I—TREATIES

SUBCHAPTER II—CONTRACTS WITH INDIANS

SUBCHAPTER I—TREATIES

§ 71. Future treaties with Indian tribes

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of title 26 does not permit a like Federal tax to be imposed on such income.

(R.S. § 2079; Pub. L. 100–647, title III, § 3042, Nov. 10, 1988, 102 Stat. 3641.)

CODIFICATION

R.S. § 2079 derived from act Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566.

AMENDMENTS

1988—Pub. L. 100–647 inserted sentence at end relating to State tax treatment of income derived by Indians from exercise of fishing rights secured by treaties, Executive orders, or Acts of Congress.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–647 applicable to all periods beginning before, on, or after Nov. 10, 1988, with no inference created as to existence or nonexistence or scope of any income tax exemption derived from fishing rights secured as of Mar. 17, 1988, by any treaty, law, or Executive order, see section 3044 of Pub. L. 100–647, set out as an Effective Date note under section 7873 of Title 26, Internal Revenue Code.

SHORT TITLE OF 2000 AMENDMENT

Pub. L. 106–179, § 1, Mar. 14, 2000, 114 Stat. 46, provided that: ''This Act [amending sections 81 and 476 of this title] may be cited as the 'Indian Tribal Economic Development and Contract Encouragement Act of 2000'.''

§ 72. Abrogation of treaties

Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.

(R.S. § 2080.)

CODIFICATION

R.S. § 2080 derived from act July 5, 1862, ch. 135, § 1, 12 Stat. 528.

SUBCHAPTER II—CONTRACTS WITH INDIANS

§ 81. Contracts and agreements with Indian tribes

(a) Definitions

In this section:

(1) The term ''Indian lands'' means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term ''Indian tribe'' has the meaning given that term in section 450b(e) of this title.

(3) The term ''Secretary'' means the Secretary of the Interior.

(b) Approval

No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Exception

Subsection (b) of this section shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) Unapproved agreements

The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) of this section if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

(1) violates Federal law; or

(2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

(e) Regulations

Not later than 180 days after March 14, 2000, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b) of this section.

(f) Construction

Nothing in this section shall be construed to—

(1) require the Secretary to approve a contract for legal services by an attorney;

(2) amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.

(R.S. §2103; Pub. L. 85–770, Aug. 27, 1958, 72 Stat. 927; Pub. L. 106–179, §2, Mar. 14, 2000, 114 Stat. 46.)

REFERENCES IN TEXT

The Indian Gaming Regulatory Act, referred to in subsec. (f)(2), is Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, as amended, which is classified principally to chapter 29 (§2701 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CODIFICATION

R.S. §2103 derived from acts Mar. 3, 1871, ch. 120, §3, 16 Stat. 570; May 21, 1872, ch. 177, §§1, 2, 17 Stat. 136.

AMENDMENTS

2000—Pub. L. 106–179 amended section generally, substituting present provisions for provisions which required agreements with Indian tribes or Indians to be in writing, to bear the approval of the Secretary, to contain the names of all parties in interest, to state the time and place of making, purpose, and contingencies, and to have a fixed time limit to run, and provisions which declared agreements made in violation of this section to be null and void and which authorized recovery of amounts in excess of approved amounts, with one half of recovered amounts to be paid into the Treasury.

1958—Par. Second. Pub. L. 85–770 struck out requirement that contracts with Indian tribes be executed before a judge of a court of record.

Par. Sixth. Pub. L. 85–770 struck out par. Sixth enumerating contractual elements to be certified to by the judge.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 81a, 416a, 450*l*, 458cc, 458aaa–10, 2701, 2711 of this title.

§81a. Counsel for prosecution of claims against the United States; cancellation; revival

Any contracts or agreements approved prior to June 26, 1936, by the Secretary of the Interior between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a specified percentage, shall be deemed a sufficient compliance with section 81 of this title: *Provided, however*, That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement: *Provided further*, That the provisions of this section and section 81b of this title shall not be construed to revive any contract which has been terminated by lapse of time, operation of law, or by acts of the parties thereto.

(June 26, 1936, ch. 851, §1, 49 Stat. 1984.)

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§81b. Continuation of contracts with attorneys containing limitation of time where suits have been filed

Any existing valid contract made and approved prior to June 26, 1936, pursuant to any Act of Congress by any tribe, band, or group of Indians with an attorney or attorneys for the rendition of services in the prosecution of claims against the United States under authority of which suit or suits have been filed, and which contains a limitation of time for the completion of the services to be performed may be continued in full force unless a subsequent contract dealing with the same subject matter has been made and approved.

(June 26, 1936, ch. 851, §2, 49 Stat. 1984.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 81a of this title.

§82. Payments under contracts; aiding in making prohibited contracts

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money

Section 172, R.S. § 2112, related to imposition of a penalty for carrying seditious messages intending to contravene a United States treaty or law.

Section 173, R.S. § 2113, related to imposition of a penalty for corresponding with foreign nations intending to incite Indians to war.

§ 174. Superintendence by President over tribes west of Mississippi

The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, ''to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;'' and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

(R.S. § 2114.)

CODIFICATION

R.S. § 2114 derived from act May 28, 1830, ch. 148, §§ 7, 8, 4 Stat. 412.

AMERICAN INDIAN POLICY REVIEW COMMISSION

Pub. L. 93–580, Jan. 2, 1975, 88 Stat. 1910, as amended by Pub. L. 94–80, §§ 1–4, Aug. 9, 1975, 89 Stat. 415, 416; Pub. L. 95–5, Feb. 17, 1977, 91 Stat. 13, provided for the establishment, membership, etc., of the American Indian Policy Review Commission, and for investigations, studies, and a final report respecting Indian tribal government affairs, with the Commission to cease to exist three months after submission of the final report but not later than June 30, 1977, and Congressional committee reports to Congress within two years after referral to committee of the final report by the President of the Senate and Speaker of the House.

§ 175. United States attorneys to represent Indians

In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

(Mar. 3, 1893, ch. 209, § 1, 27 Stat. 631; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

CHANGE OF NAME

''United States attorney'' substituted in text for ''United States district attorney'' on authority of act June 25, 1948. See section 541 of Title 28, Judiciary and Judicial Procedure.

§ 176. Survey of reservations

Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

(R.S. § 2115; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

CODIFICATION

R.S. § 2115 derived from act Apr. 8, 1864, ch. 48, § 6, 13 Stat. 41.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

''Bureau of Land Management'' substituted in text for ''General Land Office'' pursuant to section 403 of Reorg. Plan No. 3 of 1946, set out in the Appendix to Title 5, which established the Bureau and transferred thereto the powers and duties of the General Land Office.

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

(R.S. § 2116.)

CODIFICATION

R.S. § 2116 derived from act June 30, 1834, ch. 161, § 12, 4 Stat. 730.

§ 178. Fees on behalf of Indian parties in contests under public land laws

In contests initiated by or against Indians, to an entry, filing or other claims, under the laws of Congress relating to public lands for any sufficient cause affecting the legality or validity of the entry, filing or claim, the fees to be paid by and on behalf of the Indian party in any case shall be one-half of the fees provided by law in such cases, and said fees shall be paid by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, on an account stated by the proper land officers through the Secretary of the Interior or such officer as he may designate.

(Mar. 3, 1893, ch. 209, § 1, 27 Stat. 631; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

''Secretary of the Interior or such officer as he may designate'' substituted in text for ''Commissioner of the General Land Office'' on authority of section 403(d) and (e) of Reorg. Plan No. 3 of 1946, set out in the Appendix to Title 5, which abolished office of Commis-

NMSA 1978, § 7-13-2

NEW MEXICO STATUTES 1978, ANNOTATED
CHAPTER 7. Taxation
ARTICLE 13. Gasoline Tax

7-13-2 Definitions.

As used in the Gasoline Tax Act [this article]:

A. "gasoline" means any flammable liquid used primarily as fuel for the propulsion of motor vehicles, motorboats or aircraft. "Gasoline" does not include diesel-engine fuel, kerosene, liquefied petroleum gas, natural gas and products specially prepared and sold for use in the turbo-prop or jet-type engines;

B. "department" means the taxation and revenue department, the secretary of taxation and revenue or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

C. "secretary" means the secretary of taxation and revenue or the secretary's delegate;

D. "motor vehicle" means any self-propelled vehicle suitable for operation on highways;

E. "highway" means every way or place, including toll roads, generally open to or intended to be used for public travel by motor vehicles, regardless of whether it is temporarily closed;

F. "distributor" means any person, but not including the United States of America or any of its agencies except to the extent now or hereafter permitted by the constitution and laws thereof, who receives gasoline within the meaning of "received" as defined in this section;

G. "wholesaler" means any person not a distributor who sells gasoline in quantities of thirty-five gallons or more and does not deliver such gasoline into the fuel supply tanks of motor vehicles;

H. "retailer" means any person who sells gasoline in quantities of thirty-five gallons or less and delivers such gasoline into the fuel supply tanks of motor vehicles;

I. the definitions of "distributor", "wholesaler" and "retailer" shall be construed so that a person may at the same time be a retailer and a distributor or a retailer and a wholesaler;

J. "person" means:

(1) any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, limited liability partnership, joint venture, syndicate or other entity, including any gas, water or electric utility owned or operated by a county, municipality or other political subdivision of the state; or

(2) the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof;

K. "received" means:

(1) (a) gasoline which is produced, refined, manufactured, blended or compounded at a refinery in this state or stored at a pipeline terminal in this state by any person is "received" by such person when it is loaded there into tank cars, tank trucks, tank wagons or other types of transportation equipment, or when it is placed into any tank or other container from which sales or deliveries not involving transportation are made;

(b) when, however, such gasoline is shipped or delivered to another person registered as a distributor under the Gasoline Tax Act, then it is "received" by the distributor to whom it is so shipped or delivered; and

(c) further, when such gasoline is shipped or delivered to another person not registered as a distributor

under the Gasoline Tax Act for the account of a person that is so registered, it is "received" by the distributor for whose account it is shipped;

(2) notwithstanding the provisions of Paragraph (1) of this subsection, when gasoline is shipped or delivered from a refinery or pipeline terminal to another refinery or pipeline terminal, such gasoline is not "received" by reason of such shipment or delivery;

(3) any product other than gasoline that is blended to produce gasoline other than at a refinery or pipeline terminal in this state is "received" by a person who is the owner thereof at the time and place the blending is completed; and

(4) except as otherwise provided, gasoline is "received" at the time and place it is first unloaded in this state and by the person who is the owner thereof immediately preceding the unloading, unless the owner immediately after the unloading is a registered distributor, in which case such registered distributor is considered as having received the gasoline;

L. "drip gasoline" means a combustible hydrocarbon liquid formed as a product of condensation from either associated or nonassociated natural or casing-head gas which remains a liquid at existing atmospheric temperature and pressure;

M. "gallon" means the quantity of liquid necessary to fill a standard United States gallon liquid measure or that same quantity adjusted to a temperature of sixty degrees fahrenheit at the election of any distributor, but a distributor shall report on the same basis for a period of at least one year; and

N. "ethanol blended fuel" means gasoline received in New Mexico containing a minimum of ten percent by volume of denatured ethanol, of at least one hundred ninety-nine proof, exclusive of denaturants.

History: 1953 Comp., § 72-27-2, enacted by Laws 1971, ch. 207, § 2; 1977, ch. 249, § 59; 1979, ch. 166, § 5; 1983, ch. 204, § 2; 1986, ch. 20, § 73; 1987, ch. 46, § 1; 1993, ch. 32, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

The 1993 amendment, effective June 18, 1993, deleted " 'division' or" at the beginning of Subsection B and " 'director' or" at the beginning of Subsection C; inserted "limited liability company, limited liability partnership," in Paragraph (1) of Subsection J; deleted "manufactured exclusively in New Mexico" following both "fuel" and "ethanol" in Subsection N; and made minor stylistic changes in Subsections D, E, and M.

N. M. S. A. 1978, § 7-13-2

NM ST § 7-13-2

END OF DOCUMENT

NMSA 1978, § 7-13-4

NEW MEXICO STATUTES 1978, ANNOTATED
CHAPTER 7. Taxation
ARTICLE 13. Gasoline Tax

7-13-4 Deductions; gasoline tax.

In computing the gasoline tax due, the following amounts of gasoline may be deducted from the total amount of gasoline received in New Mexico during the tax period, provided satisfactory proof thereof is furnished to the department:

A. gasoline received in New Mexico, but exported from this state by a rack operator, distributor or wholesaler other than in the fuel supply tank of a motor vehicle or sold for export by a rack operator or distributor; provided that, in either case:

(1) the person exporting the gasoline is registered in or licensed by the destination state to pay that state's gasoline or equivalent fuel tax;

(2) proof is submitted that the destination state's gasoline or equivalent fuel tax has been paid or is not due with respect to the gasoline; or

(3) the destination state's gasoline or equivalent fuel tax is paid to New Mexico in accordance with the terms of an agreement entered into pursuant to Section 9-11-12 NMSA 1978 with the destination state;

B. gasoline received in New Mexico sold to the United States or any agency or instrumentality thereof for the exclusive use of the United States or any agency or instrumentality thereof. Gasoline sold to the United States includes gasoline delivered into the supply tank of a government-licensed vehicle of the United States;

C. gasoline received in New Mexico sold to an Indian nation, tribe or pueblo or any political subdivision, agency or instrumentality of that Indian nation, tribe or pueblo for the exclusive use of the Indian nation, tribe or pueblo or any political subdivision, agency or instrumentality thereof. Gasoline sold to an Indian nation, tribe or pueblo includes gasoline delivered into the supply tank of a government-licensed vehicle of the Indian nation, tribe or pueblo;

D. gasoline received in New Mexico, dyed in accordance with department regulations and used in any manner other than for propulsion of motor vehicles on the highways of this state or motorboats or activities ancillary to that propulsion;

E. gasoline received in New Mexico and sold at retail by a registered Indian tribal distributor if:

(1) the sale occurs on the Indian reservation, pueblo grant or trust land of the distributor's Indian nation, tribe or pueblo;

(2) the gasoline is placed into the fuel supply tank of a motor vehicle on that reservation, pueblo grant or trust land; and

(3) the Indian nation, tribe or pueblo has certified to the department that it has in effect an excise, privilege or similar tax on the gasoline; provided that the volume of gasoline deducted pursuant to this subsection shall be the total gallons sold in accordance with the provisions of this subsection multiplied by a fraction the numerator of which is the rate of the tribal tax certified to the department by the Indian nation, tribe or pueblo and the denominator of which is the rate of the gasoline tax imposed pursuant to the Gasoline Tax Act [this article], but if the fraction exceeds one, it shall be one for purposes of determining the deduction; and

F. gasoline received in New Mexico and sold by a registered Indian tribal distributor from a nonmobile storage container located within that distributor's Indian reservation, pueblo grant or trust land for resale outside that distributor's Indian reservation, pueblo grant or trust land; provided the department certifies that the distributor claiming the deduction sold no less than one million gallons of gasoline from a nonmobile storage container located within that distributor's Indian reservation, pueblo grant or trust land for resale outside that distributor's Indian reservation, pueblo grant or trust land during the period of May through August 1998; and provided further that the amount of gasoline deducted by a registered Indian tribal distributor pursuant to this subsection shall not exceed two million five hundred thousand gallons per month, calculated as a monthly average during the calendar year. Volumes deducted pursuant to Subsection E of this section shall not be deducted pursuant to this subsection.

History: 1978 Comp., § **7-13-4**, enacted by Laws 1991, ch. 9, § 32; 1997, ch. 192, § 2; 1998, ch. 44, § 1; 1999, ch. 190, § 3.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and reenactments. — Laws 1991, ch. 9, § 32 repeals **7-13-4** NMSA 1978, as amended by Laws 1991, ch. 9, § 31 and enacts the above section, effective July 1, 1992.

The 1997 amendment, effective June 1, 1997, rewrote Subsection A, added the second sentence of Subsection B, and added Subsection C.

The 1998 amendment, deleted “that” following “provided” in the introductory language and added Subsection D, making minor punctuation and stylistic changes. Laws 1998, ch. 44, contains no effective date provision, but, pursuant to N.M. Const. art. IV, § 23, iseffective May 20, 1998, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for “Adjournment Dates of Sessions of Legislature” table.

The 1999 amendment, effective July 1, 1999, added Subsections E and F and made a related stylistic change.

Emergency clauses. — Laws 1997, ch. 192, § 17 makes the act effective immediately. Approved April 10, 1997.

Preemption by Self-Determination Act. — To the extent that the Gasoline Tax Act imposes a tax on Indian entities, where that tax would not be imposed if the gasoline were sold to a federal agency providing the same services as the Indian entity, the tax imposed is preempted by the Self-Determination Act, 25 U.S.C.A. §§ 450-458. Ramah Navajo Sch. Bd., Inc. v. New Mexico Taxation & Revenue Dep't, 1999-NMCA-050, N.M. ,977 P.2d 1021 (Ct. App. 1999).

GASOLINE REGULATIONS

Below are reproduced all the regulations issued by the Taxation and Revenue Department pertaining to the New Mexico Gasoline Tax Act, the Special Fuels Act, and the Petroleum Products Loading Fee Act. These regulations appear in sequence according to the numbers assigned to them by their respective state agencies. A Finding List of Regulations appears on page 163.

Gasoline Tax Regulations

General Provisions

[¶ 43-001] 3 NMAC 16.1.7. **Definitions.**—For purposes of this chapter (3 NMAC 16) and forms and instructions of the Department with respect to the Gasoline Tax Act and the taxes imposed by that Act:

1) "acquired gasoline" means gasoline which is not "received" within the meaning of Section 7-13-2(K);

2) "owner of stored gasoline" means the person who owns gasoline stored at a pipeline terminal immediately prior to the loading of the gasoline;

3) "refiner" means, except for purposes of Section 7-13-8, a person who produces, refines, manufactures, blends or compounds gasoline at a refinery or other facility in New Mexico; and

4) "tax refund gasoline" means gasoline purchased by a person holding a permit issued under Section 7-13-13 and used other than in motorboats or vehicles licensed by the Motor Vehicle Division to be operated on the highways of New Mexico, whether such gasoline is dyed or undyed.

(Adopted August 31, 1996.)

Imposition and Rate of Tax

[¶ 43-002] 3 NMAC 16.3.7. **Definitions.**—For the purposes of this part (3 NMAC 16.3):

"Indian tribe means:

1) an Indian nation, tribe or pueblo, including:

(a) any political subdivision, agency or department of that Indian nation, tribe or pueblo;

(b) any incorporated or unincorporated enterprise of the Indian nation, tribe or pueblo or its political subdivisions, agencies or departments; and

(c) any corporation required to be considered an Indian and therefore a member of the Indian nation, tribe or pueblo under *Eastern Navaho Industries, Inc. v. Bureau of Revenue*, 552 P2d 805 (NMCtApp 1976); and

2) a member of the Indian nation, tribe or pueblo; and

"tribe's territory" means that part of Indian country in New Mexico reserved formally or informally for that Indian nation, tribe or pueblo, including its dependent Indian communities, and, with respect to a member of that tribe, any land in New Mexico allotted, reserved or held in trust by the United States for that member.

(Adopted August 31, 1996.)

[¶ 43-003] 3 NMAC 16.3.8. **When Gasoline is "Received"—First Instance.**—1. Generally, gasoline is "received" in the first instance in the three circumstances specified in this paragraph (3 NMAC 16.3.8.1). The refiner, the owner of stored gasoline or the importer is the person who has "received" the gasoline.

1) Gasoline produced, refined, manufactured, blended or compounded at a refinery or other facility in this state or stored at a pipeline terminal in this state by any person is "received" by that person when its is loaded at the refinery, other facility or the pipeline terminal into tank cars, tank trucks, tank wagons or other types of transportation equipment;

ATTACHMENT B

2) Gasoline produced, refined, manufactured, blended or compounded at a refinery in this state or stored at a pipeline terminal in this state by any person is "received" by that person when it is placed into any tank or other container from which sales or deliveries not involving transportation are made;

3) Except for gasoline imported by pipeline and stored at a pipeline terminal in New Mexico, gasoline imported into this state is "received" at the time and place it is first unloaded in this state; the person who is the owner of the gasoline immediately preceding the unloading is the person who has received the gasoline.

In the special case in which any substance other than gasoline is blended to produce gasoline and the blending takes place at a place other than a refinery or pipeline terminal, the product becomes gasoline and is "received" at the time and place the blending is completed. The person who owns the blended product at the time of blending is the person who must report and pay tax with respect to the product received.

Example: A distributor sends its tank truck to a pipeline terminal where the truck is loaded to 90% of its capacity with gasoline. The distributor has received the gasoline at this time; see 3 NMAC 16.3.8.1. The truck then moves to the facility of a producer of ethanol. The remaining 10% of the truck's capacity is filled with ethanol. At this time and place ethanol and gasoline are blended. The distributor has received additional gallons of gasoline (representing the addition of the ethanol) at this time and must report and pay tax with respect to it. See 3 NMAC 16.5.9.

2. Although a refiner, pipeline terminal operator or importer is the first person to receive gasoline, the incidence of the tax and the obligation to report and pay gasoline taxes can be shifted to registered distributors. See 3 NMAC 16.3.9.

(Adopted August 31, 1996.)

[¶ 43-004] 3 NMAC 16.3.9. **When Gasoline is "Received"—Shift to Registered Distributor.**—1. The definition of "received" imposes the gasoline excise tax in the first instance on refiners, owners of stored gasoline or importers. If, however, gasoline is shipped or delivered from one of those entities to a distributor registered under the Gasoline Tax Act, the incidence of the tax shifts to the registered distributor. In this case the registered distributor has received the gasoline and is responsible for reporting and paying the gasoline tax with respect to the gasoline received. The distributor receiving the gasoline may not further shift the receipt of the gasoline and the obligation to report and pay gasoline tax to any other person, even if the gasoline is subsequently sold or otherwise transferred to another registered distributor.

Example 1: At its refinery, Refinery R loads 8,000 gallons of gasoline into a tank truck owned by Distributor A. In this case A has received the gasoline at the refinery (the place of delivery) and is responsible for reporting and paying the gasoline tax.

Example 2: Same facts as example 1, except that Distributor A then sells some of the gasoline to Distributor B and unloads it from the truck into a tank belonging to Distributor B. Distributor A has received the gasoline and remains liable for the gasoline tax. Distributor B has not received the gasoline.

Example 3: At the pipeline terminal, gasoline is loaded into a tank truck owned by T, a trucking company. T is not a registered distributor but picks up the gasoline for the account of, and delivers it to, 3 registered distributors. In this case, T has accepted delivery of the gasoline at the pipeline terminal as agent for the distributors. The three distributors have received gasoline and must report and pay gasoline tax in proportion to the gasoline each received.

2. If the refiner or owner of stored gasoline ships or delivers, or if an importer first unloads, gasoline in this state and the person taking delivery of the gasoline is not a registered distributor and is not taking delivery for the account of any registered distributor, the incidence of the tax remains with the refiner, owner of stored gasoline or importer. The refiner, owner of stored gasoline or importer is responsible for reporting and paying the gasoline tax with respect to the gasoline received. Any person once registered as a distributor but who is no longer listed on the list of registered distributors promulgated by the Department is not a registered distributor.

3. When a refiner, owner of stored gasoline or importer is responsible for reporting and paying gasoline tax, that entity must report in the same time and manner as a registered distributor.

(Adopted August 31, 1996).

[¶ 43-005] 3 NMAC 16.3.10. **Pre-Emption of Tax by Federal Law.**—1. Gasoline received by an Indian tribe on its own territory is not subject to the taxes imposed by the Gasoline Tax Act if taxation of the gasoline received is prohibited by federal law.

2. If an Indian tribe is a distributor, it receives gasoline on its own territory when:

1) the gasoline is shipped or delivered to the distributor by the refiner or owner of stored gasoline to the tribe's territory; or

2) an importer unloads the gasoline for the distributor's account on the tribe's territory.

Example: Tribe T operates a retail gasoline station on its reservation or pueblo grant. Tribe T registers as a distributor. As a distributor, Tribe T arranges for an owner of stored gasoline to ship gasoline from a rack (not located on T's territory) and unload it into the retail station's tank. T receives the gasoline when it delivered. Neither the owner of stored gasoline or T owe gasoline tax, although T must report it as received.

3. If an Indian tribe is a distributor and it receives gasoline at any place in New Mexico other than on the tribe's territory, imposition of the tax is not barred by federal law and the Indian tribe must report and pay gasoline tax.

Example: Z is a member of an Indian tribe T and is registered as a distributor. Z hires tank trucks to pick up loads of gasoline at a rack which is not on T's territory. Z receives the gasoline at that rack. Z owes gasoline tax on the gasoline received.

(Adopted August 31, 1996.)

[¶ 43-006] 3 NMAC 16.3.11. **Inventory Report.**—On or before the twenty-fifth day of August for those years in which there is an increase or decrease in the tax rate, each gasoline distributor and wholesaler shall report on forms provided by the department the number of gallons of gasoline which that distributor or wholesaler has in inventory as of July 1. Reports are required even if no inventory exists.

(Amended effective December 4, 1989; December 13, 1993; August 31, 1996.)

[¶ 43-007] 3 NMAC 16.3.12. **Exchanges.**—1. Exchanges of gasoline between one refiner or pipeline terminal operator and another are exempt deliveries of gasoline under Section 7-13-2K(2). When pipeline terminal operators or refiners exchange gasoline, the person to whom the gasoline is delivered steps into the shoes of the person who delivered the gasoline.

2. Example: X is a pipeline terminal operator in New Mexico. Y is a refinery in another state. Z is a registered distributor in New Mexico who distributes Y's brands of gasoline. Because Y does not operate a pipeline terminal in New Mexico from which it can supply its own distributors and retailers, Y arranges with X to exchange Y's gasoline stored at a pipeline terminal out-of-state with X's gasoline stored at a New Mexico pipeline terminal. Y then ships or delivers Y's New Mexico gasoline to Z.

In this example, Y will be treated as a pipeline terminal operator in New Mexico. Because Y ships or delivers gasoline to Z, a registered distributor, Z has received the gasoline and the obligation to report and pay the tax, just as if X had shipped or delivered the gasoline to Z.

(Adopted August 31, 1996.)

Deductions

[¶ 43-009] 3 NMAC 16.4.8. **Satisfactory Proof.**—1. Satisfactory proof of the export of gasoline consists of a manifest or bill of lading showing the amount of gasoline and the destination outside New Mexico and evidence that the gasoline has been reported to another state or other proof acceptable to the Department.

2. Proof of sale to the United States or any agency or instrumentality thereof shall be furnished to the department upon request by means of the following:

1) documentation showing that the purchaser was the United States, an agency or instrumentality thereof;

2) a purchase order issued by the United States, an agency or instrumentality thereof; or

3) an invoice showing that the gasoline was charged to the United States, an agency or instrumentality thereof.

Copies of all documents supporting deductible sales must be retained for at least three years from the end of the calendar year in which the gasoline was sold.

(Amended effective December 4, 1989; December 13, 1993; September 15, 1995; August 31, 1996.)

[¶ 43-012] 3 NMAC 16.4.9. **Deduction—Sales to Other Distributors.**—1. Gasoline received by a distributor and sold to another distributor may not be deducted from the amount of gasoline received in New Mexico, even though the other distributor is bonded and registered, because the purchasing distributor did not "receive" gasoline within the meaning of the Act.

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov