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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CHEMEHUEVI INDIAN TRIBE, et al., Plaintiff, v. KEN SALAZAR, Secretary of the United States Department of the Interior, Defendant.	No. CV 11-04437 SVW (DTBx) Date: November 14, 2011 Time: 1:30pm Courtroom: Hon. Stephen V. Wilson

(1) DEFENDANT'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; AND

(2) CROSS-MOTION FOR SUMMARY JUDGMENT.

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I. INTRODUCTION

Plaintiffs, the Chemehuevi Indian Tribe (the "Tribe") and several of its individual members (the "Individual Tribal Plaintiffs"), have filed a motion for summary judgment, notwithstanding Defendant's pending Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim, because they contend the case only involves "interpretations of federal law." (Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Motion") at 3.) Defendant agrees that the crux of the case revolves around the parties' differing interpretations and applications of 25 U.S.C. § 81 ("Section 81"). However, even assuming arguendo the Court denies the Motion to Dismiss, Defendant maintains the decision of the Interior Board of Indian Appeals ("IBIA") was not arbitrary, capricious or contrary to law. The IBIA's decision is legally entitled to deference.

As discussed in its Motion to Dismiss, Plaintiffs cannot identify a waiver of sovereign immunity allowing them to allege a violation of Section 81 or a breach of trust. Only Plaintiffs' second claim under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"), could possibly be actionable, although Defendant has moved to dismiss that claim as well because it is based on Section 81. Defendant opposes Plaintiffs' Motion both on the ground that Defendant's final agency decision is entitled to deference under the APA, and because Plaintiffs have no legally cognizable claim as a matter of law. Accordingly, Defendant simultaneously asserts a cross-motion for summary judgment on the basis that it is entitled to judgment as a matter of law on all three claims. Fed. R. Civ. P. 56(a).[1]

For the reasons set forth below, Plaintiffs cannot prevail on their Motion and judgment should be entered in favor of Defendant.

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[1] Defendant has filed the certified Administrative Record ("AR") along with his opposition and cross-motion, and requests that the Court strike Plaintiffs' purported administrative record.

II. FACTUAL BACKGROUND

Defendant repeats the basic factual background set forth in its Motion to Dismiss, with citations to the AR. The Tribe enacted an ordinance to permit tribal members to possess tribal land in a designated area on the Reservation for residential purposes. Pursuant to another ordinance, referred to for simplicity as the "Land Assignment Ordinance," the Tribe purported to convey land assignment deeds to the Individual Tribal Plaintiffs so the assignees would have "exclusive right of use and possession of the Tribe's Reservation lands for the purpose of building a home and maintaining a permanent or part-time residency on the Reservation." (AR 626.) The Tribe's goal is to provide the Individual Tribal Plaintiffs with an interest in tribal land as close to fee simple absolute as possible. (AR 626.) The Land Assignment Ordinance requires that the land assignment deeds be approved by the Secretary. (AR 632.)

Between approximately 2005 and 2010, the Tribe submitted the land assignments at issue in this case to the Western Regional Director of the Bureau of Indian Affairs ("Regional Director") requesting approval of the deeds. (See, e.g., AR 540, 574, 589 & 657.) In each instance, the Regional Director denied the request to approve the land assignment deed. (See, e.g., AR 525, 573, 574, 587, 642 & 645.) The Tribe appealed all of the Regional Director's denials to the IBIA. (See, e.g., AR 500, 517 & 563.)

On October 26, 2010, the IBIA issued its final agency decision, holding that "the Tribe's land assignments are subject to review under 25 U.S.C. § 81 and that 25 U.S.C. § 81bars approval of the assignments because they are in violation of the Nonintercourse Act, 25 U.S.C. § 177." (AR 25). The IBIA issued a second ruling on December 30, 2010 similarly affirming the Regional Director's decision not to approve the land assignment deeds because they are barred by the Nonintercourse Act, 25 U.S.C. § 177. (AR 484).

III. STATUTORY AND REGULATORY PROVISIONS

As discussed in greater length in Defendant's Motion to Dismiss, two statutes are relevant to the proceedings before the Court. As stated by the IBIA, at issue "is the intersection of two statutes, 25 U.S.C. §§ 81 and 177." (AR 008.) The "Nonintercourse Act" or "Section 177" states, in pertinent part:

> 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.

25 U.S.C. § 177.

The statute upon which Plaintiffs based their land assignment deed requests is Section 81. Set forth below are the pertinent provisions of Section 81:

> (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.
>
> (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; . . .

At the direction of Congress, the Secretary published regulations implementing the Act in 25 C.F.R. Part 84. The regulations repeat the congressional requirement that "*[u]nless otherwise provided in this part*, contracts and agreements entered into by an Indian tribe that encumber tribal lands for a period of seven or more years require Secretarial approval under this part." 25 C.F.R. § 84.003 (emphasis added.)

Consistent with the Act, the regulations provide that the Secretary will disapprove a contract or agreement that violates federal law. 25 C.F.R. § 84.006(a)(1).

IV. THE IBIA'S DECISION

The primary issue the Court should consider is whether the IBIA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Accordingly, Defendant sets forth the key specific findings and rulings by the IBIA at the outset.

At the beginning of its final decision, the IBIA concluded the land deed assignments:

> seek to convey an exclusive possessory interest that is intended to be perpetual and, as such, violates the Nonintercourse Act, 25 U.S.C. § 177 (§ 177). Through regulation, the Department has interpreted § 81 to apply to encumbrances *not* governed or subject to *other* statutes and regulations, such as leasing statutes of § 177. We reject the Tribe's argument that § 81 effectively granted the Secretary broad authority to approve encumbrances of land that convey a perpetual possessory interest, such as the Tribe's assignments.

(AR 007.)

The IBIA agreed with Plaintiffs that the land deed assignments are "encumbrances" within the meaning of § 81. (AR 016 & 17-18.) The IBIA also agreed with Plaintiffs that the land deed assignments were not "temporary use" assignments exempt from Secretarial approval under 25 C.F.R. § 84.004(d). (AR 016 & 18-20.) However, the IBIA disagreed with Plaintiffs and agreed with the Regional Director that § 81 does not authorize the approval of encumbrances that are otherwise prohibited by law, and the assignments are prohibited by § 177. (AR 016 & 20-25.)

The IBIA observed the "overriding intent of § 177 is the protection of tribal lands." (AR 021.) Further, the IBIA noted that,

> the reach of §177 is broad, prohibiting not only conveyances intended to

> be permanent, e.g., sales and grants, but also conveyances of possessory interests that would temporarily divest tribes of their use of the land, e.g., leases." Although Congress later carved out an exception, *inter alia*, for tribal leases, *see, e.g.,* 25 U.S.C. §§ 415, 4211, no exception exists for land assignments, such as the Tribe's proposed assignments, that convey in perpetuity an exclusive possessory interest in a tribe's lands that may be devised, sold, or otherwise conveyed by the assignee.

(AR 022.) Reviewing the facts provided by the Tribe, the IBIA concluded:

> [t]he Ordinance falls squarely within the prohibitions found in § 177. The terms of the assignment deeds and the Ordinance do not benefit the Tribe. The Tribe loses its right to use and possess its land while the assignees gain not only the right to demand compensation in the event of a condemnation action by the Tribe but enforceable property rights against all third parties, including the Tribe. . . Given these terms, we cannot but conclude that the Tribe has conveyed a significant claim to its lands that fall squarely within the proscription of § 177.

(AR 023-24.)

In rendering its decision, the IBIA specifically rejected the Tribe's argument that Section 81 grants the Bureau of Indian Affairs the ability to approve transactions that might otherwise be prohibited by Section 177. (AR 024.) The IBIA found no support for the argument and stated the provisions of Section 81 are evidence of the contrary intent: "Congress simply did not confer authority on the Secretary to approve encumbrances notwithstanding the applicability of other statutory proscriptions." (AR 024.) The IBIA also considered and dismissed the Tribe's contention that the Secretary's approval of the Tribe's Constitution equated a finding by Defendant that the land assignment deeds do not violate Section 177. (AR 024-25.)

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V. ARGUMENT

A. Applicable Legal Standard Under the Administrative Procedure Act

Plaintiffs allege a violation of the APA. Under the APA, a court may overturn an agency's decision only if it finds the underlying decision to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 368 (9th Cir. 1996). The standard of review is narrow, and does not empower courts to substitute their judgment for that of the agency. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Under the "arbitrary and capricious" standard, "administrative action is upheld if the agency has 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 982 (9th Cir. 1985) (quoting Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 105 (1983)).

A court's role is only to determine whether the agency considered the relevant factors and information and articulated a "rational connection between the facts found and the choice made." Bowen v. American Hosp. Ass'n, 476 U.S. 610, 626 (1986) (citation and internal quotation omitted).

This standard is "exceedingly deferential." Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974); see also Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action."). "The [agency's] action . . . need be only a reasonable, not the best or most reasonable, decision." National Wildlife Federation

v. Burford, 871 F.2d 849, 855 (9th Cir. 1989).

The APA does not require–or even allow–a court to overturn an agency action because it disagrees with the agency's decision or even with its conclusions about the scope, breadth or effect of the decision at issue. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). The reviewing court's task is simply "to ensure a fully-informed and well considered decision, not necessarily a decision that [the court] would have reached had [it] been a member of the decisionmaking unit of the agency." Id. at 558. Moreover, as discussed in Western Shoshone National Council, "[t]he APA's waiver of sovereign immunity is limited, however. . . It does not extend to claims for money damages, *or to claims another statute prohibits*." 408 F. Supp. 2d at 1048 (internal citations omitted and emphasis added).

Further, if the agency's decision is found to be arbitrary and capricious or contrary to law, the proper remedy is to remand the decision to the agency for further consideration. See Camp v. Pitts, 411 U.S. 138, 142–43 (1973). A court can compel an agency to take action, but not direct the method of the agency in doing so or the outcome of that action. See Cobell v. Norton, 392 F.3d 461, 475 (D.C. Cir. 2004).

B. Applicable Legal Standard for Statutory Interpretation

In addition to the deference owed the agency under the APA, a two-step process further governs the Court's review of the IBIA's interpretation of the statutes at issue. In Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., the United States Supreme Court explained the process in what has become known as "Chevron deference":

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always is the question of whether Congress has directly spoken to the precise questions at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court

> determines Congress has not directly addressed the precise question at issue, the court does not simply impose its construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). As this Court has held, a court can overturn an agency's interpretation only if it finds it is 'not one that Congress would have sanctioned.'" United States v. Loran Medical Systems, Inc., 25 F. Supp. 2d 1082, 1084 (C.D. Cal. 1997)(quoting United States v. Shimer, 367 U.S. 374) .

If the Court determines the statutory language is ambiguous, Defendant's interpretation of the statute, not Plaintiffs' interpretation, controls as long as it is a permissible construction. See Auer v. Robbins, 519 U.S. 452, 461 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)(agency's interpretation of its regulations control unless plainly erroneous or inconsistent with regulation); Christopher v. SmithklineBeecham Corp., 635 F.3d 383, 392 (9th Cir. 2011)(applying rules of statutory construction and deference). This is often referred to as Auer deference. Siskiyou Reg'l Education Project v. United States Forest Serv., 565 F.3d 545, 555 (9th Cir. 2009). Auer deference is only warranted if the statutory language is ambiguous. Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). In Auer, the United States Supreme Court determined "[w]hile respondents' objections would perhaps support a different application of the. . .test . . .we cannot conclude they compel it." Auer, 519 U.S. at 457-58

C. The Statutory Language Is Unambiguous

Plaintiffs contend the language of Section 81 is unambiguous. (Motion at 5-8.) Defendant agrees the language is clear. However, the parties interpret the statute differently and arrive at completely different outcomes. Under the legal standard the

Court must apply, deference should be afforded to the IBIA pursuant to Chevron.

Plaintiffs commence with a recitation of the word "encumber." Plaintiffs' lengthy interpretation is unnecessary because the IBIA ruled the land assignment deeds are encumbrances under Section 81. (AR 017-018.)

The parties disagree with the interpretation of one key provision of Section 81 – a section setting forth exceptions to the requirement that the Secretary approve an encumbrance of tribal land that exceeds seven years. The statute states that the Secretary shall refuse to approve an agreement or contract that "violates Federal law." 25 U.S.C. § 81 (d)(1). In applying this provision, Defendant determined the land assignment deeds violated another federal statute, the Nonintercourse Act. (AR 021-025.) As discussed in Section IV above, as well as in its final decision, the IBIA explained its rationale for determining the land assignment deeds violated Section 177 and thus were excluded from Secretarial approval under Section 81.

Defendant contends the language of both Section 81 and 177 is clear. The Secretary (or his designee) cannot approve a land assignment for a period of more than seven years if it violates another federal law. As the statutory language is clear, the Court need not probe further. See Christopher, 635 F.3d at 392 ("if the language of a statute or regulation is unambiguous, we apply the terms as written.") The IBIA's decision should be affirmed because the IBIA gave effect to the unambiguously expressed intent of Congress. Accordingly, Defendant requests that the Court similarly construe the language as clear, and render judgment in favor of Defendant.

If, however, the Court determines the statutory language is unclear, the Court should apply Auer deference and uphold the IBIA's interpretation of the statute and regulations it administers. The IBIA's thoroughly considered all the arguments and interpretations offered by Plaintiffs as well as the Regional Director. Its construction of the statute was reasonable and rational, and thus permissible.

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D. Defendant's Interpretation of Section 81 Is Reasonable and Is Entitled to Deference

In an effort to avoid the clear language of the statute and Defendant's reasonable interpretation and application of the statute to the land deed assignments, Plaintiffs proffer their own interpretations of Section 81. For example, Plaintiffs offer two "categories of agreements that the phrase 'violates Federal law' could conceivably encompass." (Motion at 9.) Plaintiffs' unsupported statements and conjecture cannot substitute for the opinion of the Secretary because the Secretary is charged with interpreting and applying his own regulations. Under the deferential standard the Court must apply in reviewing an APA claim, the agency's decision should be upheld.

Even in their interpretation, Plaintiffs concur that agreements which violate the Nonintercourse Act fall within 25 U.S.C. § 81 (d)(1). (Motion at 10.) Plaintiffs proceed with a recitation of some of the history of Section 177. (Id. at 10-11.) Plaintiffs then challenge Defendant's decision on the theory that no agreement that encumbers land for more than seven years would be exempt from Section 177. (Id. at 12.) Plaintiffs take their argument one step further and posit that "it is evident that Congress, in enacting Section 81, intended that approval of an encumbrance by the Secretary have the effect of removing the prohibition against such encumbrances contained in Section 177." (Id.)

Plaintiffs have not provided, and cannot provide, support for their interpretations. On the other hand, the IBIA did consider Plaintiffs' arguments and rejected them, and its interpretations are both reasonable and worthy of the deference owed to the agency.

For example, like Plaintiffs, the IBIA considered the history and purpose of the Nonintercourse Act. (AR 021-023.) As noted by the IBIA,

> T]he overriding intent of § 177 is the protection of tribal lands: "The obvious purpose of [§ 177]is to prevent unfair, improvident or improper

> disposition by Indians of lands owned or possessed by them to other parties..."

(AR at 021, citing Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960)). The IBIA observed the reach of Section 177 is broad, but went on to note that Congress carved out exceptions – but not an exception to cover the type of land assignments created by Plaintiffs. (AR 022.) Contrary to Plaintiffs broad claim that any agreement that encumbers land for more than seven years would violate Section 177, the IBIA observed: "'where the assignment takes the form of e.g., a life estate for the assignee, the assignment is not necessarily violative of § 177." (AR 024.)

Additionally, also like Plaintiffs, the IBIA considered the legislative history of Section 81, and "found nothing in [the 2000 amendment] of § 81 that impliedly repeals the application of § 177 to any contracts or agreements that would otherwise fall within the scope of § 81." (AR 022 n. 14.)

The Tribe's desire to convey tribal lands to the Individual Tribal Plaintiffs clearly falls within the purview of the Nonintercourse Act. Accordingly, the Chemehuevi land assignment deeds violate the Nonintercourse Act and the IBIA correctly determined the deeds did not fall within Section 81. As they violated that statute, which is a federal law, the Secretary properly concluded he could not approve or deny the land assignments pursuant to Section 81.

E. Defendant's Approval of the Tribe's Constitution Does Not Equate to Approval of the Land Assignment Deeds

Plaintiffs argue before the Court and argued to the IBIA that the Secretary's approval of the Tribe's Constitution necessarily means the land assignments do not violate federal law. (Motion at 20.) The IBIA considered and rejected the argument because the Tribe could have made assignments that did not violate the Nonintercourse Act. (AR 024-025.) As the land assignment deeds presumably were not before the IBIA when it considered the validity of the Constitution, the IBIA's

decision is eminently reasonable and certainly not arbitrary, capricious or contrary to law in violation of the APA.

F. The Legislative History of Section 81 and the Regulations Do Not Compel the Secretary to Approve the Land Assignment Deeds

Plaintiffs argue the regulations implementing Section 81 "reinforce the conclusion" that their land assignment deeds require Secretarial approval. (Motion at 13-15.) Plaintiffs contend that the "critical question" in determining if the land assignment deeds fall within an exclusion from Section 81 coverage was whether the deeds were agreements conveying temporary use of tribal lands and thus excluded by of 25 C.F.R. § 84.004(d). (Motion at 13.) The IBIA agreed with Plaintiffs (and disagreed with the Regional Director) that the land assignment deeds were not intended to be temporary. (AR 018-20.)

Plaintiffs proceed to argue that changes to 25 C.F.R. § 84.004(d) from the time it was proposed to the time it was enacted show that the land assignment deeds issued by Plaintiffs were contemplated to fall within Section 81. Plaintiffs' arguments fail for four reasons. First, they are extracting arguments about what Section 81 and 25 C.F.R. § 84.004(d) do cover from the regulation setting forth what kinds of agreements Section 81 and 25 C.F.R. § 84.004(d) do not cover. Second, Plaintiffs make bold statements about what the Secretary must have intended, but they have no support for their statements. In contrast, the Court has before it the Administrative Record of the agency in which the agency demonstrated it reviewed, considered and applied its own regulations in a rational manner.

Third, Plaintiffs' reasoning could just as easily be interpreted in favor of Defendant. For example, Plaintiffs argue the change in the wording of the proposed regulation to the final version 25 C.F.R. § 84.004(d) "reflects the fact that the Secretary was aware that tribes might choose to assign interests in land for longer terms and specifically decided not to include that type of assignment in the list of excluded contracts or agreements." (Motion at 14.) This argument supports

Defendant's position that some contracts do not fall within Section 81. Certainly, there could be instances in which an agreement encumbers land for more than seven years but less than permanently.

Fourth, and most importantly, pursuant to Chevron and Auer, the IBIA's decision is entitled to deference. Christopher, 635 F.3d at 392. The Court can overturn an agency's interpretation only if it finds it is 'not one that Congress would have sanctioned.'" Loran Medical Systems, Inc., 25 F. Supp. 2d at 1084. Siskiyou Reg'l Education Project, 565 F.3d at 555. As stated in Auer, 519 U.S. at 463, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."

Plaintiffs also argue the legislative history of § 81 reveals that its purpose was 'to encourage Indian economic development,' among other things. (Motion at 16.) Defendant agrees. Section 81 is "[a]n Act to encourage economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes, and for other purposes). Pub. L. No. 106-179, 114 Stat. 46 (2000); S. Rep. No. 106-150, at 1 (1999). When the Committee held hearings in May 1999, its purpose was: (1) to limit the "Secretary's determination to whether the agreement would violate federal law." S. Rep. No. 106-150, 10. As future agreements would now have a presumption of federal approval, it would be "appropriate for the Secretary to be satisfied that the agreement does not contravene any specific statutory prohibitions;" and (2) the modification to Section 81 was to apply to those transactions that are not leases, per se, but which could result in the loss of tribal proprietary control. S. Rep. No. 106-150, at 9.

The legislative history recaptures the concept that a major purpose of the Secretary's review is to ensure that the transaction does not violate federal law. The IBIA indicated it was aware of the history of Section 81 when it considered the application of the nonintercourse Act. (AR 022 n. 14.) As the IBIA ruled that the proposed approval of the land assignment deeds violated Section 177, the IBIA acted

in a manner that conformed with the legislative history of the statute, not in violation of it, as Plaintiffs contend.

G. Plaintiffs' Desire to Apply the Indian Canons of Construction Is Unnecessary Because the Statutes Are Explicit

Plaintiff urge the Court to apply "canons of construction" which require that statutes and regulations be read to protect Indian rights and be read in a manner favorable to Indians. (Motion at 20-21.) However, the canons of construction apply only if the statute under consideration is ambiguous. See Artichoke Joe's Ca. Grand Casino v. Norton, 353 F.3d 712, 728 (9th Cir. 2003)("Ambiguity in a statute that is enacted for the benefit of Indians implicates a well-known canon of construction."). As discussed above, neither Section 81 nor Section 177 are ambiguous. Moreover, contrary to Plaintiffs' position, Defendant contends the canons support the Secretary's interpretation and position.

When faced with two reasonable choices under statutes and regulations, the Secretary is required to choose the alternative that is in the best interest of the tribe, *even if that alternative differs from the one proffered by the tribe itself* (as is the situation in the case before the court). Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984), adopted as majority opinion as modified en banc, 782 F.2d 855 (10th Cir. 1986).

The intent of Congress in cases such as the one before the Court was not, as it was prior to the enactment of Section 81 in 2000, to protect the tribes by setting up obstacles (such as Secretarial approval) to conveyances; rather, it was to empower tribes by removing obstacles. In GasPlus, L.L.C., v. United States Department of the Interior, 510 F. Supp. 2d 18, 33 (D.D.C. 2007), the Department of Interior was held to have acted in violation of the APA because it interpreted Section 81 too broadly:

> The fundamental flaw in Defendants' reasoning is their belief that Section 81 should be interpreted to benefit Indian tribes and, therefore, that any ambiguity in the statute should be resolved in favor of the

> Nambe Pueblo. . .Giving Section 81 a broad reading in this case simply because the Nambe Pueblo wish to escape their contractual obligations does not 'benefit Indian tribes' as Defendant suggests. On the contrary, it deprives Indian tribes of the primary benefit bestowed upon them when it amended Section 81: less Government oversight of their economic activities.

Id. at 33 n.5.

Thus, a reading of Section 81 that "favors Indian tribes" is not one to be expanded any further than Congress or the Secretary intended, but rather to read the statute narrowly and afford Indian tribes the opportunity to contract with *less* oversight of their economic activities.

For these reasons, and because the statutory language is clear, the Court does not need to apply the canons of construction. The IBIA's interpretation of the land deed assignments benefits the Tribe.

H. The Alleged Effect of the IBIA's Decision on the Individual Tribal Plaintiffs Does Not Alter the Fact that Defendant Is Entitled to Summary Judgment

Plaintiffs submitted declarations to "reveal the real world consequences of the Secretary's refusal to approve the Assignment Deeds." (Motion at 23-24.) For the reasons set forth in its separately filed Objections to Evidence Presented by Plaintiffs in Their Motion for Summary Judgment, Defendant moves to strike the declarations pursuant to the Federal Rules of Evidence and the APA.

The IBIA acknowledged the Tribe's efforts to provide its members with a home on the Reservation. (AR 025.) The IBIA observed however, that the means chosen

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by the Tribe contravene the Nonintercourse Act. The IBIA has not precluded the Tribe from pursuing its goals utilizing an assignment that does not violate Section 177.[2]

I. Plaintiffs Cannot Prevail on Their Non-APA Claims

Plaintiffs bring a motion for summary judgment but make no effort to differentiate their three claims for relief. As set forth in Defendant's Motion to Dismiss, there is no waiver of sovereign immunity that allows Plaintiffs to allege a claim for "violation of Section 81" or "breach of trust." See United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323, 180 L. Ed. 2d 187 (2011). Moreover, Plaintiffs Motion neither sets forth the elements of these claims nor demonstrates how the elements were established. Accordingly, Defendant is entitled to judgment as a matter of law on all Plaintiffs' claims.

VI. CONCLUSION

In its conclusion, Plaintiffs assert the Secretary is "directly interfering in the ability of the Tribe to govern itself and the use of its Reservation lands under tribal law." On the contrary, by determining the land assignment deeds do not require Secretarial approval, Defendant is allowing the Tribe to govern its own affairs. In so doing, the Secretary interpreted and applied Section 81 correctly. His decision was rational, reasonable and a permissible reading of the statutes. The IBIA's final decision was not arbitrary, capricious or otherwise not in accordance with law.

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[2] For example, to the extent Plaintiffs argue they cannot obtain funding because the language of the land assignment deeds state Secretarial approval is required, the IBIA did not compel the Tribe to include such language in its deeds.

Accordingly, Defendant requests the Court to affirm the IBIA's decision and grant judgment in favor of Defendant.

DATED: October 14, 2011.

Respectfully submitted,

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