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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) REPLY IN SUPPORT OF MOTION TO DISMISS Date: November 21, 2011 Time: 1:30pm Courtroom: Hon. Stephen V. Wilson

Defendant submits the following Reply in support of his Motion to Dismiss ("Motion").

I. INTRODUCTION

Plaintiffs allege Defendant improperly argues the merits of the case in his Motion.[1] However, a motion to dismiss is the proper vehicle to use when subject matter jurisdiction is lacking. Mackay v. Pfeil, 827 F.2d 540, 543 (9th Cir. 1987).

[1] If the Court construes Defendant's Motion, particularly with respect to the Second Claim for Relief, as one brought more appropriately as a motion for summary judgment, Defendant respectfully refers the Court to Defendant's Cross-Motion for Summary Judgment filed on October 14, 2011.

Plaintiffs' Opposition fails to competently refute Defendant's contention that sovereign immunity bars the cause of action for allegedly violating 25 U.S.C. § 81 ("Section 81"), in and of itself, as alleged in their first claim for relief, because no specific waiver of sovereign immunity exists in the text of Section 81. Thus, Defendant contends the Court should dismiss the first claim for relief for lack of subject matter jurisdiction.

With respect to the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA") claim, Defendant recognizes that such a claim would be viable as a general rule, but it is not actionable in this case because, as a matter of law, Defendant cannot approve the land assignment deeds under Section 81 and thus cannot be accused of having acted in violation of the APA for refusing to grant them. Accordingly, the second claim for relief is subject to dismissal for lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted.

Addressing their third claim for relief, Plaintiffs similarly fail to identify a waiver of sovereign immunity sufficient to allege a breach of trust. Plaintiffs cannot maintain their action by ignoring U.S. Supreme Court rulings, such as United States v. Jicarilla Apache Nation, which require Plaintiffs to identify a specific, applicable, trust-creating statute or regulation that Defendant violated. Neither Section 81 nor Section 177 contain specific duties or obligations Defendant can be accused of violating. On the contrary, Defendant acted in compliance with its duties and with the provisions of the statutes, as set forth in great detail in its Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment.

Therefore, Defendant requests the Court dismiss the Complaint with prejudice for lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil

Procedure.[2]

II. DEFENDANT HAS NOT WAIVED ITS SOVEREIGN IMMUNITY

Plaintiffs contend Defendant has waived its sovereign immunity because Plaintiffs state a claim under Section 81. Notably, Plaintiffs do not address the sovereign immunity claim addressed to the allegation that Defendant violated Section 81 (Plaintiffs' First Claim for Relief). Instead, Plaintiffs only address it as it pertains to the APA allegation (their Second Claim for Relief). Plaintiffs bear the burden of proving the Court has subject matter jurisdiction over Defendant. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994).

Section 81 does not contain a specific waiver of sovereign immunity. See 25 U.S.C. § 81. Plaintiffs cannot identify one because there is none. Thus, Plaintiffs cannot bring a claim for relief pursuant to Section 81.

Moreover, as discussed in the Motion, general jurisdictional statutes, such as 28 U.S.C. §§ 1331 and 1362, do not serve to waive the government's sovereign immunity. Blatchford v. Native Village of Noatak, 501 U.S. 775, 786, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991); Paiute-Shoshone Indians of the Bishop Community v. City of Los Angeles, 637 F.3d 993, 999-1000 (9th Cir. 2011) ("We decline Plaintiff's sweeping invitation to read § 1362 as waiving sovereign immunity over every action brought by an Indian tribe against the United States when the statute says nothing about either sovereign immunity or actions against the United States."). Accordingly, for these reasons and for the reasons set forth in Defendant's Motion,

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[2] Plaintiffs filed a Declaration of Lester J. Marston in support of their Opposition to Defendant's Motion to Dismiss. The document attached to the declaration is protected by the attorney-client privilege and should be stricken. Defendant requested Plaintiffs withdraw the declaration and document. In the event Plaintiffs do not do so, Defendant requests the Court strike the document, ask that it be removed from PACER, and not consider the document for any purpose.

Defendant requests the Court dismiss the First Claim for Relief for lack of subject matter jurisdiction.

III. THE APA DOES NOT PROVIDE A WAIVER OF SOVEREIGN IMMUNITY BECAUSE DEFENDANT CANNOT LEGALLY TAKE THE ACTION REQUESTED BY PLAINTIFFS

With respect to the Second Claim for Relief, Defendant acknowledges the APA provides a waiver of sovereign immunity for certain specific actions. However, it does not waive sovereign immunity for every action brought under the APA. As discussed in Western Shoshone Nat'l Council v. United States, 408 F. Supp. 2d 1040, 1047 (D. Nev. 2005), "[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)s. In Tucson Airport Authority v. General Dynamics Corporation, 136 F.3d 641, 645 (9th Cir. 1998), the U.S. Court of Appeals for the Ninth Circuit observed that the APA waives sovereign immunity only if three conditions are met, and one of those conditions is that the "claims do not seek relief expressly or impliedly forbidden by another statute."

As Defendant argued in its Motion (and also in its Cross-Motion for Summary Judgment), Section 81 applies to agreements and contracts that meet its terms of duration and "encumbrance" but does not apply to agreements or contracts that violate federal law. Section 177 is a valid federal law that prohibits the alienation of Indian lands absent a treaty or other consent of the United States. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985). The land assignment deeds at issue are agreements that fall within Section 177 because they are designed to convey Tribal land to the Individual Tribal Plaintiffs in perpetuity. Cf. Mont Faulkner v. Acting Northwest Regional Director, Bureau of Indian Affairs, 39 I.B.I.A. 62 (2003)(observing that "unlike leases of tribal land, tribal

land assignments are not subject to BIA approval under Federal law.") Thus, Section 177 is a statute that forbids the conveyances the Tribe seeks. Therefore, because the relief they request is forbidden by Section 177, Plaintiffs cannot meet all the conditions necessary to bring an action under the APA. Accordingly, even the APA claim Plaintiffs allege is barred by sovereign immunity.

Plaintiffs concede "[t]he only potentially applicable exception to the application of Section 81 is an agreement that 'violates Federal law.'" (Opposition at 4.) In referencing Section 81(d)(1), Plaintiffs acknowledge that agreements could be exempt from Section 81 approval if they violated another law. Plaintiffs then summarily state "there are no agreements" that could encumber land for more than seven years and not violate the Nonintercourse Act.

Plaintiffs' contention is incorrect. It is not difficult to imagine the existence of a contract that would encumber Indian land for more than seven years but less than forever. For example, water service contracts encumber the land but have limited time periods (generally in excess of seven years), and thus could be subject to Section 81. The fact that Plaintiffs' land assignment deeds fall outside the purview of Section 81 but within Section 177 does not render either Section 81(d)(1) or Section 177 a nullity.

Plaintiff refers the Court to several cases for its proposition that a court should not interpret a statute so as to render the provisions of another statute a nullity. However, the cases Plaintiffs cite are cases in which a court was reviewing provisions of the *same* statute, not provisions of one statute as they affect another statute. Even a case cited by Plaintiffs, Boise Cascade Corporation. v. U.S. Environmental Protection Agency, states: "Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions *of the same statute* inconsistent, meaningless or superfluous." 942 F.2d 1427, 1432 (9th Cir. 1991)(emphasis added);

see also Dodd v. United States, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005)(dissenting opinion discusses interpretations of sections within same statute). Plaintiffs' efforts to compare apples with oranges is unavailing.

Lastly, Plaintiffs contend the land assignment deeds do not fall within the prohibitions of Section 177 under the test articulated in Tonkawa Tribe of Oklahoma v. Richards ("Tonkawa test"). To qualify as a violation of Section 177:

> the Tribe must show that (1) it constitutes an Indian tribe within the meaning of the Act; (2) the Tribe had an interest in or claim to land protected by the Act; (3) the trust relationship between the United States and the Tribe has never been expressly terminated or otherwise abandoned; and (4) the Tribe's title or claim to the interest in land has been extinguished without the express consent of the United States.

75 F. 3d 1039, 1044 (5th Cir. 1996).

Under the Tonkawa test, the only factor in dispute is the fourth one. Confusingly, Plaintiffs argue both that the Tribe's title to the land is not extinguished and that extinguishment is permissible with the consent of the United States. (Opposition at 6.) In a non-sequitur, Plaintiff then contends its interpretation is consistent with "the Tribe's assertion that the Secretary has the authority to approve agreements that would otherwise be in conflict with the Non-Intercourse Act." (Id.) Plaintiffs cite no authority for their proposition that the Secretary is vested with authority to approve and essentially bless contracts that otherwise violate Section 177. On the other hand, in considering Plaintiffs' request to do this very thing, Defendant determined it did not have the authority to approve a contract that otherwise violates a federal law. The IBIA addressed this argument in its decision in this regard.

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A plain reading of the Ordinance and the land assignment deeds reveals the Tribe intends to grant the Individual Tribal Plaintiffs with an interest in tribal land "as close to fee simple absolute as possible." (Compl. ¶ 14.) Plaintiffs make no effort to backtrack from this intention. The stated goal demonstrates the Tribe is effectively conveying its interest in the land to the Individual Tribal Plaintiffs. Congress has not approved such conveyances. Accordingly, Plaintiffs' land assignment deeds satisfy the Tonkawa test and support Defendant's contention that the assignments violated Section 177.

IV. THE CANONS OF CONSTRUCTION ARE INAPPLICABLE BECAUSE THE STATUTE IS CLEAR

Plaintiffs argue the Indian canons of construction require that "any doubts about the interpretation of the statues and regulations involved in this case. . .must be construed in favor of the Plaintiffs." (Opposition at 7.) In making this statement, Plaintiffs acknowledge – and then gloss over – the basic tenet that a canon of construction should be only applied *if the terms of a statute or regulation are 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."). Plaintiffs have not demonstrated Section 81 is ambiguous. On the contrary, in their Motion for Summary Judgment Plaintiffs contend Section 81 is *unambiguous*. (Plaintiffs' Motion for Summary Judgment at 5-8.)

Moreover, as discussed in Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, 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* . 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); Cf. Candelaria v. Sacramento Area Director, Bureau of Indian Affairs, 27 I.B.I.A. 137 (1995)(noting Section 81 was enacted to promote tribal interests, not those of individuals with separate economic interests.). Moreover, the canon "does not require that the Indian party should win in each individual case." United States ex. rel. Steele v. Turn Key Gaming, Inc., 260 F.3d 971, 979 n.9 (8th Cir. 2001). Additionally, applying the lesson of GasPlus, L.L.C., v. United States Department of the Interior, 510 F. Supp. 2d 18, 33 (D.D.C. 2007), the Court should read Section 81 narrowly and thus be consistent with the goal of Section 81, which was to afford Indian tribes the opportunity to contract with *less* oversight of their economic activities.

Thus, Plaintiffs' desire that the Court apply the canons of instruction is unavailing because the statute is clear and applying the canons does not lead to a different result.

V. PLAINTIFFS IGNORE A SUPREME COURT RULING IN ARGUING DEFENDANT BREACHED ITS TRUST OBLIGATIONS

In arguing Defendant "put forth the specious argument that Plaintiffs have not identified a statute that establishes a specific trust responsibility," Plaintiffs completely ignore a recent U.S. Supreme Court decision which addresses the issue of Defendant's trust duties to Indians: United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011)("Jicarilla").

Plaintiffs cite several federal statutes and boldly assert they "impose specific duties on the Secretary with respect to the encumbrance and use of Tribal lands." (Opposition at 9.) Plaintiffs fail to identify the specific provisions on which it relies to compel the Secretary to approve the land assignment deeds (in violation of the Nonintercourse Act) to maintain its fiduciary relationship with the Tribe.

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In declining to note the provisions, Plaintiffs ignore the teachings and holdings of Jicarilla. It bears repeating:

> The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.

131 S. Ct. at 2318. The trust obligation arises from the recognition that "the organization and management of the trust is a sovereign function subject to the plenary authority of Congress." Id. at 2323. Hence, contrary to Plaintiffs' broad assertions, limitations to the trust responsibilities arise.

In an effort to define those responsibilities, the Jicarilla Court determined the "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." Id. at 2325. The Jicarilla Court observed that Congress enacted certain statutes, such as the General Allotment Act and the Indian Mineral Leasing Act, to have a limited trust relationship to serve a narrow purpose and enacted other statutes with clearly established fiduciary obligations. Id.

Thus, unless Plaintiffs can "identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . .neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.'" Id. (citing United States v. Navajo Nation, 556 U.S. 287, 129 S. Ct. 1547, 1558, 173 L. Ed. 2d 429 (2009)). Plaintiffs have not done so and cannot do so. Accordingly, Plaintiffs claim of breach of trust should be dismissed for lack of subject matter jurisdiction because the United States has not waived its sovereign immunity to allow Plaintiffs' claim to proceed.

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VI. CONCLUSION

For the reasons set forth above and in his Motion, Defendant requests the Court dismiss the Complaint in its entirety for lack of subject matter jurisdiction. In the alternative, Defendant urges the Court to dismiss the Complaint for failure to state a claim because none of the three claims for relief allege a viable cause of action.

DATED: October 28, 2011

Respectfully submitted,

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/s/ Monica L. Miller
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