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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) DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT Date: November 21, 2011 Time: 1:30pm Courtroom: Hon. Stephen V. Wilson

I. INTRODUCTION

In their effort to compel Defendant to approve land assignment deeds the IBIA determined could not legally be approved under Section 177, Plaintiffs continue to try to shove a round peg in a square hole.

Defendant agrees a trust relationship exists between Defendant and the Tribe. However, Plaintiffs cannot identify a specific trust obligation or duty compelling Defendant to approve the land assignment deeds, especially once he determined they violate federal law. Nor can Plaintiffs identify a waiver of sovereign immunity that allows them to bring a claim for breach of trust.

Plaintiffs have failed to demonstrate Defendant acted arbitrarily and capriciously in rendering his opinion regarding the land assignment deeds. The Tribe's desire to convey tribal lands to the Individual Tribal Plaintiffs falls within the purview of the Nonintercourse Act. Thus, the land assignment deeds violate a federal law and fall within the prohibition set forth in Section 81.

Contrary to Plaintiffs' contention, the IBIA opinion was a rational, reasonable and correct interpretation of applicable law. Accordingly, Defendant requests the Court grant summary judgment in favor of Defendant.

II. PLAINTIFFS CONFUSE A TRUST RELATIONSHIP WITH A TRUST OBLIGATION

Plaintiffs contend Defendant ignores both "an express trust obligation" and the "plain wording" of the Nonintercourse Act, 25 U.S.C. § 177. (Plaintiffs' Reply to Defendant's Opposition to Motion for Summary Judgment ("Plaintiffs' Reply") at 1.) Defendant is encouraged that Plaintiffs agree the wording of the Nonintercourse Act is clear and that the statute is relevant to the land assignment deeds. The core of the legal issue surrounding the land assignment deeds is Section 177, not the inapplicable Section 81.

Plaintiffs confuse a trust *relationship* with a trust *obligation* and again ignore or overlook the U.S. Supreme Court's recent discussion on this issue. In United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011) ("Jicarilla"), the Court observed it did "not question 'the undisputed existence of a general trust *relationship* between the United States and the Indian people.'" Id. at 2324 (citing United States v. Mitchell, 463 U.S. 205, 225 (1980)(emphasis added). Nor does Defendant.[1]

[1]As aptly stated by the Western Regional Director, "The Tribe points out the unremarkable proposition that the United States has a trust responsibility to the Tribe concerning the tribal land at issue." (AR 081.) As before the Court, Plaintiffs failed to

But, a general trust *relationship* does not become a *responsibility* (i.e., a trust obligation) unless the government "assumes Indian trust responsibilities" by way of statute. Id. at 2325. Therefore, the Jicarilla Court concluded that "[w]hen 'the Tribe cannot identify a specific, applicable, trust creating statute or regulation that the Government violated, . . . neither the Government's 'control' over the [Indian assets] nor common-law trusts principles matter.'" Id. (citing United States v. Navajo Nation, 556 U.S. 287(2009)).

In its June 2011 ruling, the Jicarilla Court rejected the Jicarilla Apache Nation tribe's position that Acts of Congress created a trust obligation. The Court noted the Acts of Congress defined or created trust *responsibilities* of the United States, which were not tantamount to *obligations*. More importantly, the Court noted that, unlike the Court of Appeals, which concluded these general statutes created a trust obligation, the Supreme Court strongly disagreed with the lower court's conclusion. Id. at 2325-26. According to the Court, the application of such general statutes, unless more specific direct control is obligated by an Act of Congress, are nothing more than the government exercising its "carefully delimited trust responsibility in a sovereign capacity to implement national policy respecting the Indian tribes." Id. at 2326. Consequently, a trust relationship, which Congress routinely includes in legislation enacted for Indians, does not automatically create a trust obligation, as maintained by Plaintiffs.

As the tribe in Jicarilla did, Plaintiffs endeavor to convert the trust relationship into a trust obligation. Plaintiffs cite to the Mission Indian Relief Act ("MIRA") as a source of the necessary trust obligation. (Plaintiffs' Reply at 2-4.) Plaintiffs discuss how the Tribe's land was "patented" and that the United States holds the land for the

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indicate how the Regional Director failed to meet its fiduciary standard or provide criteria for meeting the standard. Id.

benefit of the Tribe. Once again, Defendant agrees a trust relationship exists between it and the Tribe.

However, Plaintiffs then mistakenly jump to the conclusion that the issuance of the trust patent imposes duties on Defendant. They cite cases purporting to ascribe specific duties to Defendant – but the duties Plaintiffs seek to impose are not found in either MIRA or the cases they cite. The cases Plaintiffs rely on discuss only the fiduciary relationship, but they do not assist Plaintiffs by identifying a "specific, applicable, trust creating statute" which would compel Defendant to approve the land assignment deeds regardless of any other federal law.

Plaintiffs apparently believe Section 81 and 177 are the specific, applicable trust-creating statutes. (Plaintiffs' Reply at 3.) However, Plaintiffs cannot identify the language in either statute to substantiate their position. Cf. Samish Indian Nation v. United States, 657 F.3d 1330, 1337 (Fed. Cir. 2011)(statute at issue did not contain "detailed express language supporting the existence of a fiduciary relationship" as required by Jicarilla).

Moreover, Defendant agrees Sections 81 and 177 have, as stated purposes, the prevention of alienation of tribal land. In declining to approve the land assignment deeds, Defendant acted in compliance with this purpose by refusing to allow the Tribe to convey its land to the Individual Tribal Plaintiffs in perpetuity. As noted by the IBIA,

> The 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)). As stated by the IBIA, "The terms of the assignment deeds and the Ordinance do not benefit 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.)

Thus, Plaintiffs' attempt to contest Defendant's effort to protect Tribal lands is as unavailing as their effort to avoid the requirements set forth in Jicarilla. Contrary to Plaintiffs' assertion Defendant has not breached his duty to Plaintiffs.

III. DEFENDANT'S INTERPRETATION OF SECTION 81 DOES NOT RENDER IT A NULLITY

Plaintiffs argue Defendant's interpretation of Section 81 renders the statute a nullity. (Plaintiffs' Reply at 4-6.) As discussed in Defendant's Cross-Motion for Summary Judgment, this argument has no support and carries no weight.

In particular, Plaintiffs' argument that the leasing and rights of way statutes would violate the Nonintercourse Act is nonsensical. In applying Section 177, Congress realized the problems with the breadth of the statute and corrected them by enacting the leasing and rights-of-way statutes. Thus, there are federal laws which govern these types of conveyances. Therefore, these conveyances are exempt from the reach of Section 81. See 25 C.F.R. § 84.004. Unfortunately for Plaintiffs, Congress has not recognized a problem with land assignments and has not enacted a statute to exempt such conveyances. Accordingly, conveyances of land in virtual (or complete) perpetuity continue to violate the Nonintercourse Act.

Defendant's interpretation of the law is in line with the IBIA's decision at issue. The IBIA observed:

> the reach of Section 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 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, otherwise conveyed by the assignee.

(AR 022; see AR 007 ("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.") As discussed above and in Defendant's Cross-Motion for Summary Judgment, this holding by the IBIA has a rational basis and should be upheld.

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.) Defendant has approved such conveyances pursuant to Section 81.

III. PLAINTIFFS' APPLICATION OF THE CANONS IS MISPLACED

Plaintiffs persist in arguing the Indians canons trump all federal law. (Plaintiffs' Reply at 6-9.) As discussed in Defendant's Cross-Motion for Summary Judgment, the canons do not come into play unless a statute is ambiguous. Neither Section 81 nor Section 177 is ambiguous. Thus, there is no need to apply the Indian canons.[2]

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[2] Similarly, the Court need apply Chevron deference *only* if it finds Section 81 or Section 177 to be ambiguous. Defendant reiterates it believes both statutes are clear and unambiguous.

Plaintiffs' effort to distinguish Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)("Chevron") is both perplexing and inapposite. First, Plaintiffs "mix" it with the canons of construction. As previously discussed, the canons are not applicable.[3]

Second, Plaintiffs contend Chevron deference applies only to "agency interpretations that result from formal adjudication, notice-and-comment rulemaking, or through some other method by which Congress intended to grant comparable law-making authority." (Plaintiffs' Reply at 7.) In so doing, Plaintiffs appear to dismiss the applicability of Chevron deference because the facts of the case before the Court differ from those in Chevron. Chevron deference is an approach used in a wide variety of cases, as a simple search of cases citing Chevron demonstrates. Moreover, the case before the Court is here because of an agency ruling which was the result of formal administrative adjudication. Thus, Plaintiffs' effort to dissuade the Court from relying on Chevron to uphold the IBIA's decision is unavailing.

In arguing the IBIA's decision is not entitled to Chevron deference, Plaintiffs gloss over an important fact. Plaintiffs minimize the deference owed the IBIA under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"). As set forth in Defendant's Cross-Motion for Summary Judgment, the Court may overturn the agency's decision only if it finds it 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.

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[3] Plaintiffs cite Navajo Nation v. Dep't of Health & Human Servs., 325 F.3d 1133, 1137 n. 4 (9th Cir. 2003) for the proposition that the "interplay between the Indian canons and Chevron presumptions is still an open question in the Ninth Circuit." (Plaintiffs' Reply at 8.) In that case, the court noted the question was briefed and argued but ultimately the issue was left "for another day" because the court determined the statute at issue was not ambiguous. Navajo Nation, 325 F.3d at 1137 n. 4.

402, 416 (1971). The standard of review is "exceedingly deferential." Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996). "The [agency's] action . . . need be only a reasonable, not the best or most reasonable, decision." National Wildlife Fed'n v. Burford, 871 F.2d 849, 855 (9th Cir. 1989).

Plaintiffs disagree with Defendant's decision regarding the land assignments. However, disagreement with the outcome does not render the decision a violation of the APA. Defendant, on the other hand, has met its burden by demonstrating the IBIA's decision was reasonable and rational, and thus permissible.

IV. PLAINTIFFS FAIL TO IDENTIFY A WAIVER OF SOVEREIGN IMMUNITY FOR CLAIMS ONE AND THREE

Plaintiffs contend Defendant engaged in "self-serving analysis" by arguing Plaintiffs failed to identify a waiver of sovereign immunity and failed to support its assertions. (Plaintiffs' Reply at 9.) As discussed at length – with many legal citations – in Defendant's Motion to Dismiss, the federal government is immune from suit absent a waiver of sovereign immunity. United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L. Ed. 2d 607 (1980); United States v. Testan, 424 U.S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). A waiver "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969). A federal court is presumed to lack jurisdiction over an action "unless the contrary affirmatively appears." General Atomic Co. v. Nuclear Corp., 655 F.2d 968, 970 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1981).

Plaintiffs have not and cannot identify a waiver of sovereign immunity for a violation of Section 81 or breach of fiduciary duty. *There is no express waiver of sovereign immunity for these claims for relief.* In referring to general

jurisdictional statutes, Plaintiffs confuse subject matter jurisdiction with sovereign immunity. Both are required to sue the federal government. The waiver of sovereign immunity for claims one and three in the Complaint are lacking. Plaintiffs cannot circumvent this requirement.

Plaintiffs contest Defendant's admonition that Plaintiffs failed to set forth the elements for those two claims for relief, let alone demonstrate how they satisfied the elements. (Plaintiffs' Reply at 9.) In so doing, Plaintiffs overlook the fact that the parties are arguing cross-motions for summary judgment – the merits of the case – and are no longer at the liberal pleading stage.[4] Plaintiffs have not met their burden of proving claims one and three of their Complaint. Accordingly, Defendant requests the Court grant judgment in favor of Defendant.

V. CONCLUSION

The IBIA interpreted and applied Section 81 and Section 177correctly. Plaintiffs' efforts to steer the Court from the central issue should be no more persuasive than they were to the IBIA. The Tribe's land assignment deeds as currently drafted and crafted are illegal conveyances under the Nonintercourse Act. The Tribe can convey land to the Individual Tribal Plaintiffs – just not in the manner it has chosen to do so.[5]

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[4] Plaintiffs' counsel declined defense counsel's request that Defendant's Motion to Dismiss be briefed, heard and ruled upon before the parties proceeded to motions fo summary judgment.

[5] Defendant's representatives have endeavored to provide suggestions to Plaintiffs so that Plaintiffs can achieve that which they seek. See, e.g., AR 082 n. 7.

Defendant requests the Court enter judgment in his favor as Plaintiffs have failed to satisfy their burdens.

DATED: November 7, 2011.

Respectfully submitted,

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