UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE; TIFFANY T. ADAMS; DUSTI ROSE BACON; STEVEN DALE BACON; MICHELLE DELORES BARRETT; JUANA BUSH; ANGELA CARRILLO; JOHN DEVILLA; WACO ESCOBAR; MARK ESWONIA; EMMANUEL EVANS; TONY FIXEL; RIKKI HARPER; JESSE SEYMORE GORDON; LEONA GORDON; JOHN W. HERNANDEZ; HOPE HINMAN; EVANGELINA HOOVER; ANGELA MARIE JONES; SHARON MELISSA KASEMAN; BRIAN KELLYWOOD; JOSEPH ALAN LUSCH, JR.; STEVEN DALE MADEROS; RAMON CAMPASS MARTINEZ; MICHELLE MENDOZA; HOWARD IRVING PEACH; SIERRA PENCILLE; RAMONA MADALENE POWELL; CHRISTINA RAY; RICHARD SANDATE, JR.; ROBERTA SESTIAGA; TITO KATTS SMITH; ADAM TRUJILLO, JR.; ADAM STEVEN TRUJILLO, SR., and SAMIYAH WHITE; Plaintiffs, v. KEN SALAZAR, Secretary of the United States Department of the Interior, Defendant.	CV 11-4437 SVW (DTB) ORDER RE: DEFENDANT'S MOTION TO DISMISS [6]; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [7]; DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT [17] JS - 6

I. INTRODUCTION AND BACKGROUND

This case arises from the Chemehuevi Indian Tribe's (the "Tribe") attempt to convey the exclusive rights of use and possession in certain parcels of Tribal land to several of its individual members (the "Individual Tribal Plaintiffs"). Beginning in 2004, the Tribe began executing "Land Assignment Deeds," pursuant to which the Individual Tribal Plaintiffs would receive "an interest in the parcel of tribal land assigned to them that was as close to fee simple absolute as possible[.]" (See Dkt. 18, Defendant's Response to Plaintiff's Statement of Undisputed Facts ("DRPSUF"), ¶ 8).

The Tribe subsequently submitted the Land Assignment Deeds to Bureau of Indian Affairs ("BIA") Western Regional Director Allen Anspach, requesting approval of the Deeds pursuant to 25 U.S.C. § 81. Anspach denied these requests. The Tribe appealed these denials to the Interior Board of Indian Appeals ("IBIA"). (See id. at ¶¶ 16-27).

On October 26, 2010, the IBIA issued a decision with respect to some (but not all) of the Individual Tribal Plaintiffs, holding that the Secretary of the Interior properly had declined to approve the Land Assignment Deeds under 25 U.S.C. § 81, because such approval was barred by 25 U.S.C. § 177. See Chemehuevi Indian Tribe v. Western Regional Director, Bureau of Indian Affairs, 52 IBIA 192 (October 26, 2010); (see also Dkt. 23, Certified Administrative Record ("CAR"), at 6). On December 31, 2010, the IBIA summarily affirmed the Regional Director's denial of the Tribe's request for approval of the remaining Land Assignment Deeds, based on the IBIA's October 26, 2010 order. (CAR, at 484).

On May 23, 2011, the Tribe and Individual Tribal Plaintiffs

(collectively, "Plaintiffs") brought the instant action, alleging that the Secretary of the Interior ("Defendant" or "Secretary") violated the Administrative Procedure Act ("APA") by improperly refusing to approve the Land Assignment Deeds. (Dkt. 1). Plaintiffs allege the following three claims for relief: (1) Violation of 25 U.S.C. § 81; (2) Violation of the APA; and (3) Breach of Trust. (Complaint, ¶¶ 68-84).

On August 1, 2011, Defendant filed a motion to dismiss, arguing that: (1) this Court lacks jurisdiction over Plaintiffs' claims, and the action should be dismissed under Federal Rule of Civil Procedure 12(b)(1); and (2) Plaintiffs fail to state a claim under Rule 12(b)(6). (Dkt. 6). On September 19, 2011, while Defendant's motion to dismiss was pending, Plaintiffs filed a Motion for Summary Judgment. (Dkt. 7). Defendant filed a cross-motion for Summary Judgment on October 14, 2011. (Dkt. 17).

For the reasons set forth below, Defendant's Motion for Summary Judgment is GRANTED; Plaintiffs' Motion for Summary Judgment is DENIED; Defendant's Motion to Dismiss for lack of jurisdiction is DENIED; and Defendant's Motion to Dismiss for failure to state a claim is DENIED AS MOOT.

II. JURISDICTION

In his motion to dismiss, Defendant contends that Plaintiffs have failed to identify a specific waiver of sovereign immunity, which allows Plaintiffs to bring this action against Defendant in his official capacity as Secretary of the Interior. (MTD, at 7-9). The APA, however, provides a specific waiver of the United States' sovereign immunity:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]"

5 U.S.C. § 702. Thus, so long as this Court has an independent basis for subject matter jurisdiction over the action, Plaintiffs' claims against the Secretary are permissible under the APA's express waiver of sovereign immunity. See Coyote Valley Band of Pomo Indians v. United States, 639 F. Supp. 165, 168 (E.D. Cal. 1986) (holding the APA provides a specific waiver of sovereign immunity as to claims against the Secretary of the Interior, noting that "[t]here is, however, no independent grant of federal jurisdiction under the APA. . . . Plaintiffs must therefore look to other statutes which do provide independent subject matter jurisdiction").

Here, Plaintiffs allege that the Secretary improperly refused to approve their Land Assignment Deeds under 25 U.S.C. § 81, and seek an order compelling the Secretary to do so. Accordingly, the Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.

§§ 1331,[1] 1361,[2] and 1362.[3] See id. at 169 (finding subject matter jurisdiction over Indian tribes' complaint against the Secretary under 28 U.S.C. §§ 1331, 1361, and 1362).

Nevertheless, Defendant argues that this Court lacks subject matter jurisdiction under the APA, because the Secretary properly declined to approve Plaintiffs' Land Assignment Deeds. (See MTD Reply, at 2). This argument, however, improperly conflates this Court's subject matter jurisdiction with the underlying merits of Plaintiffs' claims, which are addressed below.

III. LEGAL STANDARD

A. Summary Judgment

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

Here, there are no disputed issues of material fact. The resolution of this case depends entirely upon the proper interpretation

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[1] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[2] "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

[3] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

of 25 U.S.C. §§ 81 & 177, and related regulations. Summary judgment is therefore appropriate.

B. Legal Standard Under the APA

Under the APA, a court may overturn an agency's decision only if it finds the 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).

IV. DISCUSSION

A. Relevant Statutory Provisions

This case hinges upon the interaction of two venerable statutes: 25 U.S.C. § 177 ("Section 177", also referred to as the "Nonintercourse Act") and 25 U.S.C. § 81 ("Section 81").

1. Section 177

The Nonintercourse Act was originally enacted in 1790; the current version (codified at 25 U.S.C. § 177) was passed in 1834 and provides, in relevant 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 Indian Nonintercourse Act, 25 U.S.C. § 177, has been perhaps the most significant congressional enactment regarding Indian lands. The Act's overriding purpose is the protection of Indian lands. It acknowledges and guarantees the Indian tribes' right of possession, and imposes on the federal government a fiduciary duty to protect the lands covered by the Act.

United States on behalf of Santa Ana Indian Pueblo v. University of New

Mexico, 731 F.2d 703, 706 (10th Cir. 1984) (internal citations omitted).

2. Section 81

As originally enacted in 1872, Section 81 provided, in relevant part:

> **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** . . . unless such contract or agreement . . . bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it. . . .

25 U.S.C. § 81 (prior to March 14, 2000 amendment) (emphases added).

> In 1872, Congress passed what is now known as 25 U.S.C. § 81. . . . According to the Supreme Court, the statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 227, 37 L. Ed. 429, 13 S. Ct. 577 (1893); *see also* Cong. Globe 1483 (1871) (law is for Indians' "protection and to prevent them from being plundered"). At the time of the law's enactment, Indians apparently were being swindled by dishonest lawyers and claims agents. *See United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co.*, 616 F. Supp. 1200, 1217 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 805 (7th Cir. 1993).

B. 2000 Amendment of Section 81

1. Legislative History

As originally enacted, Section 81 applied to contracts for "services for Indians relative to their lands." This somewhat cryptic language caused considerable confusion as to what contracts were "relative to [Indian] lands," such that Secretarial approval was required under Section 81.

As a result, neither tribes, their partners, nor the BIA

> could predict with any certainty whether a court might ultimately conclude that a transaction was void because it was not approved pursuant to Section 81. The risk that a court might make such a conclusion was exacerbated by severity of the penalty for noncompliance borne by the party contracting with the tribe.

S.Rep. 106-150 at 4.

> Indian tribes, their corporate partners, courts, and the Bureau of Indian Affairs (BIA) . . . struggled for decades with how to apply Section 81 in an era that emphasizes tribal self-determination, autonomy, and reservation economic development.

Id. at 2.

In 1999, the Senate Committee on Indian Affairs recommended the enactment of what it referred to as "an amendment [of Section 81] in the nature of a substitute." The stated purpose of the 2000 Amendment was, *inter alia*, "to replace the provisions of [Section 81] to clarify which agreements with Indian tribes require federal approval [and] to specify the criteria for approval of those agreements." S.Rep. 106-150 at 1. Under the amended Section 81, the statute no longer applies to contracts for "services for Indians relative to their lands;" instead, it applies to contracts "that encumber[] Indian lands for a period of 7 or more years." 25 U.S.C. § 81(d). As explained in the Senate Report:

> Under present law, Section 81 is susceptible to the interpretation that any contract that "touches or concerns" Indian lands must be approved. In addition, because of the "draconian" nature of the penalty for non-compliance, parties frequently "erred on the side of caution" by submitting any contract with a tribe to the BIA for approval. Deputy Commissioner for Indian Affairs Michael J. Anderson testified: "Contracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies are now routinely presented to the BIA for review and approval." As reported by the Committee, subsection (b) will allow tribes and their contracting Partners to determine whether Section 81 applies when they form an agreement. First, by limiting the provision's applicability to those agreements with a duration of seven of more years, parties can look to an objective measure to determine whether an agreement falls

> within the scope of the statute. Also, by replacing the phrase "relative to Indian lands," with "encumbering Indian lands," the bill will ensure that Indian tribes will be able to engage in a wide array of commercial transactions without having to submit those agreements to the BIA as a precaution.

S.Rep. 106-150 at 6.

The Senate Committee considered eliminating Section 81 altogether, but chose to "leave[] the provision in place to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." Id. at 7.

2. Amended Section 81 and Related Regulations

As amended, Section 81 now provides, in relevant part:

> (b) 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) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract–
>
> (1) violates Federal law . . . .

25 U.S.C. § 81.

Pursuant to Section 81(e),[4] the Secretary issued regulations regarding the application of Section 81. 25 CFR 84.003 provides: "Unless 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 CFR 84.002 defines "encumber" as follows:

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[4] "Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 2000 [enacted March 14, 2000], the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b)." 25 U.S.C. § 81(e).

> Encumber means to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.

Consistent with Section 81(d)(1), 25 CFR 84.006(a)(1) provides that "[t]he Secretary will disapprove a contract or agreement that requires Secretarial approval under this part if the Secretary determines that such contract or agreement . . . [v]iolates federal law[.]"

C. IBIA Decision

In its October 26, 2010 decision, the IBIA first determined that the Land Assignment Deeds at issue qualify as "encumbrances" within the meaning of 25 U.S.C. § 81(b) and 25 C.F.R. § 84.002. Chemehuevi Indian Tribe, 52 IBIA at 203-06. "The Tribe's land assignment deeds meet this criteria because they grant to third parties (the assignees) a right of entry on, a claim to, and nearly exclusive proprietary control over a parcel of the Tribe's trust land to the exclusion of all others, including the Tribe." Id. at 203.

The IBIA further held, however, that the Regional Director properly declined to approve the Land Assignment Deeds under Section 81(d), because they were barred by Section 177.

> Section 81 is explicit in prohibiting the approval of any agreements or contracts that are subject to its approval requirements if "the agreement or contract -- (1) violates Federal law." 25 U.S.C. § 81(d); *see also* 25 C.F.R. § 84.006(a)(1). Under § 177, any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" is invalid unless authorized by Congress. 25 U.S.C. § 177.

Id. at 207. In support, the IBIA cited a 1942 Opinion of the Solicitor of the Department of the Interior, in which the Solicitor concluded that a similar purported conveyance of property rights from a

recognized Indian tribe to individual tribe members was barred by Section 177. Id. at 208 (citing Solicitor's Opinion, M-31724, Nov. 21, 1942, I Opinions of the Solicitor 1178).

Finally, the IBIA addressed the Tribe's argument that Section 81, as amended in 2000, authorized the Secretary to approve transactions that otherwise would have been prohibited by Section 177. Id. at 210. The IBIA concluded:

> We find no support for this argument and § 81 itself is evidence to the contrary: In prohibiting the approval of agreements or contracts that "violate[] Federal law," 25 U.S.C. § 81(d)(1), Congress explicitly made § 81 subject to any Federal statutory proscriptions, which include § 177. Congress simply did not confer authority on the Secretary to approve encumbrances notwithstanding the applicability of other statutory proscriptions.

Id.

Accordingly, the IBIA held that the Regional Director properly refused to approve the Land Assignment Deeds.

> Therefore, while we understand and appreciate the Tribe's efforts to provide its tribal members with a homestead on the reservation and the means of obtaining construction or other loans based on ownership rights, the particular means by which the Tribe has chosen to do so contravene § 177. Accordingly, BIA is barred from approving the assignments under § 81, and the assignments are null and void as a matter of law pursuant to § 177.

Id. at 211.

D. Deference to the IBIA's Decision

1. Statutory Interpretation

An agency's interpretation of a statute is a question of law subject to *de novo* review. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1212 (9th Cir. 2008) (citing Schneider v. Chertoff, 450 F.3d 944, 952 (9th Cir. 2006)). When a statute is silent or ambiguous on a particular point, however, courts may, under certain circumstances,

defer to the agency's interpretation. Id. at 1212-13 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843(1984); Espejo v. INS, 311 F.3d 976, 978 (9th Cir. 2002)). Here, the parties dispute whether, and to what extent, the IBIA's decision is entitled to deference by this Court.

Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), is directly on point. There, the Ninth Circuit held that the IBIA's interpretation of the Reindeer Act was entitled to "substantial deference" under Chevron. Williams, 115 F.3d at 660. The court concluded that the IBIA's decision (which held that the Reindeer Act proscribed non-Indian entry into the reindeer industry in Alaska) was entitled to such deference because:

> The Interior Department is charged with administering the Reindeer Act, *see* 25 U.S.C. § 500k ("The Secretary of the Interior is hereby authorized to promulgate such rules and regulations as, in his judgment, are necessary to carry into effect the provisions of this subchapter."), and the IBIA exercises final decisionmaking authority for the Secretary of Interior concerning challenges to administrative actions by Bureau of Indian Affairs (BIA) officials, like the Regional Solicitor and Juneau Area Director. *See* 43 C.F.R. § 4.1(b)(2)(i) (1995).

Id. at 660 n.3.

Here too, the Secretary of the Interior is expressly authorized to administer, and to promulgate regulations with respect to, Section 81. See 25 U.S.C. § 81(b)-(e). Moreover, as in Williams, "the IBIA exercises final decisionmaking authority for the Secretary of Interior concerning challenges to administrative actions" undertaken in connection with Section 81. See Williams, 115 F.3d at 660 n.3. Finally, as the court noted in Williams:

> It makes no difference that the Interior Department's interpretation is embodied in a decision of the IBIA instead of a regulation. A statutory interpretation adopted by an

> agency in the course of adjudicating a dispute is entitled to *Chevron* deference so long as the agency has the power to make policy in the area. 1 Kenneth Culp Davis, Administrative Law Treatise § 3.5, at 120 (1994). The Interior Department is authorized to make policy in the area of Alaska's reindeer industry. *See* 25 U.S.C. § 500f ("The Secretary of the Interior is authorized . . . to organize and manage the reindeer industry . . . .").

Williams, 115 F.3d at 660 n.3.

In addition to the specific authority delegated to the Secretary with respect to the review and approval of qualifying contracts under Section 81 (discussed *supra*), the Secretary has been granted broad authority over the management of Indian affairs in general. See, e.g., 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior . . . have the management of all Indian affairs and of all matters arising out of Indian relations."). The Secretary undoubtedly is authorized to "make policy" in this area. See Williams, 115 F.3d at 660 n.3.

Accordingly, under Williams, the IBIA's decision in this case must be accorded "substantial deference" under Chevron. Accord Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 550 (1st Cir. 1997) (affording Chevron deference to the Secretary of the Interior's interpretation of Section 81). Under Chevron, this Court defers to the agency's construction of the statute as long as "its interpretation is rational and consistent with the statute." UFCW, Local 1036 v. NLRB, 307 F.3d 760, 766-67 (9th Cir. 2002). "Courts may only ignore the views of the agency where the intent of Congress is clear on the face of the statute." Id. at 767 (citing Chevron, 467 U.S. at 842-43).

2. Interpretation of Applicable Regulations

The court in Williams applied Chevron deference despite the absence of any applicable regulations promulgated by the Secretary.

See Williams, 115 F.3d at 660 n.3. Here, in contrast, the Secretary engaged in a lengthy rule-making process – which entailed significant input not only from the BIA, but also from the Indian tribes themselves[5] – and ultimately promulgated several regulations that are directly at issue in this case. Plaintiffs do not (and cannot) dispute that an agency's interpretation of its own regulations is entitled to substantial deference. See Auer v. Robbins, 519 U.S. 452, 461 (U.S. 1997) ("Because the salary-basis test is a creature of the Secretary's

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[5] "In a significant departure from past practice, the BIA distributed the preliminary drafts of the proposed regulation to the National Congress of American Indians (NCAI) and to tribes through BIA regional directors, with a request for comments and recommendations. Several subsequent meetings were held with an NCAI policies and procedures working group to discuss the evolving draft regulation prior to publishing the proposed regulation. These meetings included the Assistant Secretary-Indian Affairs, the Deputy Commissioner of Indian Affairs, staff of the Trust Policies and Procedures (TPP) project, trust program managers, and trust program attorneys from the Solicitor's Office. Notably, tribal representatives from each BIA region and BIA managers participated in a three-day meeting in Mesa, Arizona, in April 2000, to discuss the draft regulation.

The regulation was published in the Federal Register on July 14, 2000, (65 FR 43874) with a 90-day public comment period to solicit comments from all interested parties. The BIA received 19 written comments from tribes, tribal representatives, and tribal organizations. During the comment period, the BIA discussed the regulation and received oral comments on the record at seven formal tribal consultation sessions with tribal leaders, individual Indians, and other interested parties . . . . Following the consultation meetings, several BIA regional and agency offices established informal local working groups with tribes to encourage discussion of the proposed regulations and submission of written comments. Throughout the comment period the BIA met on an informal basis to discuss the regulations with interested organizations, including the NCAI working group and the Inter-Tribal Monitoring Association. In sum, tribes and individual Indians have had an extraordinary opportunity to provide meaningful input on the proposed regulation through informal consultations on the early drafts, formal consultations, and the public comment period."

66 Fed. Reg. At 38919.

own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted).

3. United States v. Mead Corp., 533 U.S. 218 (2001)

Notwithstanding the Ninth Circuit's decision in Williams, Plaintiffs contend that the IBIA's decision should receive little or no deference under United States v. Mead Corp., 533 U.S. 218 (2001). Where, as here, the Ninth Circuit has spoken to an issue, a district court may disregard the Ninth Circuit's holding in light of an intervening Supreme Court decision only "where the reasoning or theory of [the Ninth Circuit decision] is ***clearly irreconcilable*** with the reasoning or theory" of the Supreme Court decision. Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (emphasis added). Applying Williams in this case, however, is not "clearly irreconcilable" with either the holding or the reasoning of Mead Corp.

In Mead Corp., the Supreme Court held that a so-called "ruling letter" issued by the United States Customs Service was not entitled to deference under Chevron. Mead Corp., 533 U.S. at 227-34. The Court observed that "[o]n the face of the statute . . . the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law." Id. at 231-32. As such, there were no "circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here." Id. at 231.[6]

[6] See also id. at 231 n.11 ("If *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that

The Court further observed that the agency's own procedures did not treat "ruling letters" as binding precedent on third parties. Id. at 233. Given that 46 different Customs offices issued 10,000 to 15,000 such ruling letters each year, the Court concluded that they could not reasonably be intended to have the force of law. Id.

In contrast, here (as in Williams), Congress's intent to delegate interpretative authority to the Secretary is obvious on the face of the statute. See 25 U.S.C. § 81(e) ("Not later than 180 days after the date of enactment . . . the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b)."); see also 25 U.S.C. §§ 81(b)-(d). Moreover, unlike the *ad hoc* ruling letters at issue in Mead Corp., decisions by the IBIA represent the final adjudication of disputes regarding the Secretary's enforcement of Section 81; the IBIA's decisions constitute binding precedent. See Williams, 115 F.3d at 660 n.3; 43 C.F.R. § 4.1 ("The Office may hear, consider, and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary"); 43 C.F.R. § 4.1(b)(1)(i) ("The Board decides finally for the Department appeals to the head of the Department pertaining to . . . Administrative actions of officials of the Bureau of Indian Affairs").

Accordingly, the Supreme Court's decision in Mead Corp. is not "clearly irreconcilable" with Williams; the decisions are consistent. Therefore, this Court remains bound by the Ninth Circuit's holding in Williams that the IBIA's decision warrants Chevron deference.

Congress would want such a delegation to mean that agencies enjoy primary interpretational authority") (quoting Merrill & Hickman, *Chevron*'s Domain, 89 Geo. L. J. 833, 872 (2001)).

4. Statutory Interpretation in Favor of Indian Tribes

Plaintiffs further contend that their interpretation of Section 81 should be accepted under the canon of construction requiring that statutes be read, whenever possible, in a manner favorable to Indians. (See MSJ, at 21 ("The Supreme Court has long adhered to 'the general rule that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.") (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (U.S. 1918))).

The Ninth Circuit, however, repeatedly has held that this canon of construction must give way to agency interpretations of a statute that warrant Chevron deference.

> While at least one of our sister circuits regards this liberal construction rule as a substantive principle of law, we regard it as a mere guideline and not a substantive law. We have therefore held that the liberal construction rule must give way to agency interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law.

Williams, 115 F.3d at 663 n.3 (internal citations and quotations omitted); accord Seldovia Native Ass'n v. Lujan, 904 F.2d 1335, 1342 (9th Cir. Alaska 1990) ("We stated in *Haynes v. United States*, 891 F.2d 235 (9th Cir. 1989) that 'while this court has recognized this canon of construction [construing statutes liberally in favor of Indians] . . . it has also declined to apply it in light of competing deference given to an agency charged with the statute's administration." Id. at 239.[7]

[7] Plaintiffs correctly point out that the Ninth Circuit expressly declined to revisit this issue en banc in Navajo Nation v. Dept. Health & Human Servs., 325 F.3d 1133, 1137 n.4 (9th Cir. 2003) (en banc). (See MSJ Reply, at 8). Contrary to Plaintiffs' assertion, however, that declination does not render this issue an "open question in the Ninth Circuit." (See id.). Instead, the holdings of Williams and Seldovia (among other cases) that Chevron deference trumps the canon of construction favoring liberal construction of

Moreover, *both* statutes at issue in this case – not just Section 81 – were passed for the benefit of Indian tribes. And it is far from settled that narrowly construing Section 177, as Plaintiff advocates in this case, is justified based on the canon of construction favoring Indians. As one commentator has observed:

> The federal restraint on alienation of tribal land has been strongly criticized, and at various times there have been calls for its abolition. One class of critics attacks the restraint because it removes land from efficient allocation of resources by market forces and treats Indian nations and their members differently from other Americans. Some argue that the restraint is a barrier to Indian prosperity. Other critics object to the great power the restraint gives the federal government and to a history of referring to tribes and Indians in demeaning terms based in part on the restraint, such as "noncompetent," and of asserting that the restraint protects Indians from their own "improvidence."
>
> The most compelling answer to critics is that the restraint has the broad support of Native American people. Even though the concept of the restraint originated in European and Anglo-American law, was based on paternalistic and insulting images of Indians, and Indian consent to it was not sought at the outset, Indian people have tenaciously worked to retain land at every juncture, and they have perceived the restraint as an ally. The dominant view of Native Americans today continues to favor the restraint to preserve tribal land for the furtherance of distinct Indian values.
>
> On many occasions, powerful political forces have advocated unilateral termination of all federal protection for Indian land. While they have not succeeded generally, they have prevailed in particular situations, some with very broad impact. Results of these episodes have reinforced Native Americans' determination to maintain their land base. Much land subjected to market forces was lost, and, with rare exceptions, the social impact on tribal communities was plainly negative. The most important of these experiments was the allotment policy, which resulted in massive loss of land and the undermining of Indian culture and society. The termination policy of the 1950s provided more recent examples, even though Indian consent was obtained in some instances. The experience of the Menominee Tribe provides detailed evidence of the importance of the restraint to the preservation of tribal culture and society. Subjected to

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statutes in favor of Indians remains binding precedent in this Circuit, which this Court is obligated to follow.

> economic forces of the marketplace and state taxation, the Menominees were forced to sell portions of their homeland for residential development. Congress interceded at the urging of the tribe and restored Menominee tribal lands to trust status, reimposing the restraint on alienation.

1-15 Cohen's Handbook of Federal Indian Law **§** 15.06 (2009). See also, e.g., Gasplus, L.L.C. v. United States Department of Interior, 510 F. Supp. 2d 18, 33 (D.D.C. 2007) (holding that construing Section 81 *narrowly* – not broadly, as advocated by Plaintiffs in this case – favored the Indians); Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 278 n.66 (U.S. 1985) (Brennan, J., dissenting) (arguing that construing Section 177 *broadly* – not narrowly, as advocated by Plaintiffs in this case – favored the Indians).

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In sum, the IBIA's decision in this case warrants "substantial deference" under both Chevron (with respect to the interpretation of Section 81) and Auer (with respect to the interpretation of applicable regulations).

E. Analysis

Both parties agree with the IBIA's conclusion that the Land Assignment Deeds at issue in this case qualify as "encumbrances" under 25 U.S.C. § 81(b), and are not conveyances of "rights for temporary use," which would be exempt from Secretarial approval under 25 C.F.R. § 84.004(d). Thus, the dispositive question before the Court is whether the IBIA correctly held that the Land Assignment Deeds were barred by Section 177, based on Section 81(d)(1)'s requirement that "[t]he Secretary . . . shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary . . . determines that the agreement or contract . . . violates Federal law."

Plaintiffs concede that absent Section 81, the Land Assignment Deeds would be prohibited under Section 177.[8] Plaintiffs further concede that, as originally enacted in 1872, Section 81 would not have permitted the Secretary to approve the Land Assignment Deeds at issue in this case. Instead, Plaintiffs contend that the 2000 amendment to Section 81, which "amounts to a new statute that must be interpreted by its own terms, not based on the preceding version of the statute," gave the Secretary the authority to approve conveyances of land that otherwise would violate Section 177. (See MSJ, at 5 n.1).

In effect, Plaintiffs contend that the 2000 amendment to Section 81 impliedly repealed (in whole or in part) Section 177. "[S]uch repeal by implication is disfavored." Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1058 (9th Cir. 2009) (quoting Mummelthie v. City of Mason City, 873 F. Supp. 1293, 1319 (N.D. Iowa 1995)). Moreover, neither the statutory text of Section 1981 nor its legislative history support this contention.

1. Statutory Text

As noted by the IBIA, Section 81 (as amended) expressly provides that the Secretary "shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary . . . determines that the agreement or contract . . . violates Federal law[.]" 25 U.S.C. § 81(d)(1). On its face, this provision indicates a clear

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[8] As noted by the IBIA, the fact that the Land Assignment Deeds purport to convey property rights to individual members of the Tribe does not remove them from Section 177's broad reach. "The Nonintercourse Act does not by its terms provide for any exception for the conveyance of land from a tribe to individual Indians." Chemehuevi Indian Tribe, 52 IBIA at 208 (quoting Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 948 (D. Mass. 1978), *affirmed sub. nom* Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir. 1979)).

Congressional intent to make Section 81's provisions subject to other Federal statutes (including, *e.g.*, Section 177). Nothing in the text of Section 81 indicates a contrary intent. As the IBIA observed, "Congress simply did not confer authority on the Secretary to approve encumbrances notwithstanding the applicability of other statutory proscriptions." Chemehuevi Indian Tribe, 52 IBIA at 210.

Plaintiffs argue, however, that a literal application of Section 81(d)(1) would render Section 81 a nullity. "If the Secretary's approval of an encumbrance does not remove Section 177's prohibition, then Section 81 is rendered a nullity because there are no encumbrances as defined by 25 C.F.R. § 84.002 . . . that would not be subject to Section 177's prohibition." (MSJ Reply, at 5).

Plaintiffs argument rests on the mistaken premise that no agreement could possibly "encumber" Indian lands under Section 81(b) without constituting a forbidden "conveyance of lands, or of any title or claim thereto" under Section 177. There is relatively little case law addressing what constitutes a forbidden "conveyance" of land under Section 177. In Tonkawa Tribe v. Richards, 75 F.3d 1039 (5th Cir. 1996), which has been referred to as the "seminal" case in this area, the Fifth Circuit held:

> To establish a violation of the Nonintercourse Act ("the Act") 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.

Tonkawa Tribe v. Richards, 75 F.3d 1039, 1044 (5th Cir. 1996) (emphasis added); accord County of Oneida v. Oneida Indian Nation, 470 U.S. 226,

240 (U.S. 1985) ("We recognized in *Oneida I* that the Nonintercourse Acts simply put in statutory form what was or came to be the accepted rule -- that the ***extinguishment of Indian title*** required the consent of the United States.") (emphasis added).

The relevant question, therefore, is whether an agreement could "encumber" Indian land without extinguishing the Tribe's title or claim to its interest in that land. In its decision, the IBIA identified one such agreement: the assignment of a life estate to a member of the Tribe. See Chemehuevi Indian Tribe, 52 IBIA at 210 ("Of course the Tribe may make assignments of tribal land to its members. And where the assignment takes the form of, *e.g.*, a life estate for the assignee, the assignment is not necessarily violative of § 177.") (citing Rogers v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 15 IBIA 13, 17 (1986) (evaluating land assignments, which bore the characteristics of life estates, without raising any potential bar under Section 177)).

In the commentary accompanying the regulations promulgated pursuant to Section 81(e), the Secretary referenced several additional types of agreements that could potentially "encumber" Indian land without impermissibly extinguishing Indian title in that land.

> [T]he determination of encumbrance is conducted on a case-by-case basis. For example, a restrictive covenant or conservation easement may encumber tribal land within the meaning of Section 81, while an agreement that does not restrict all economic use of tribal land may not. An agreement whereby a tribe agrees not to interfere with the relationship between a tribal entity and a lender, including an agreement not to request cancellation of the lease, may encumber tribal land, depending on the contents of the agreement. Similarly, a right of entry to recover improvements or fixtures may encumber tribal land, whereas a right of entry to recover personal property may not.

66 Fed. Reg. at 38920-21.

As discussed above, *see supra* Section IV(D), the IBIA's conclusion that Section 81 (and related regulations) can be interpreted in a manner consistent with Section 177 is entitled to substantial deference under Chevron and Auer. Thus, because the Secretary's construction of Section 81 "is rational and consistent with the statute," this Court must defer to the Secretary's interpretation. See UFCW, Local 1036 v. NLRB, 307 F.3d at 766-67.

There is undoubtedly substantial overlap between "conveyances" of Indian lands prohibited under Section 177 and "encumbrances" on Indian lands that would – absent Section 177 – be permissible under Section 81 (subject to approval by the Secretary). Such overlap between these statutes, however, has existed since their inception.[9] Nevertheless, the Court is aware of no decision in the roughly one-hundred-and-forty years since the enactment of Section 81 holding that Section 81 abrogated Section 177, or reduced its scope in any way. In one of the few published decisions addressing both statutes, the Supreme Court concluded that a contract by a tribal chief, pursuant to which an attorney would represent the tribe in its claim "to an enormous tract of country" in exchange for a 50% interest in that tract, violated both Section 81 *and* Section 177.

> [T]he conveyance and the power [of attorney granted concurrently therewith] were both void by force of §§ 2103 [now Section 81] and 2116 [now Section 177] Revised Statutes. . . . ***None of their requirements can be dispensed with***, and it does not appear that in respect of most of them there was even an attempt to comply.

Pueblo of Santa Rosa v. Fall, 273 U.S. 315, 320-21 (1927) (emphasis

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[9] Indeed, because the scope of Section 81, as originally enacted, was *broader* than that of the amended version, the potential for such overlap between Section 81 and Section 177 was actually *greater* prior to the 2000 Amendment relied upon by Plaintiffs.

added; internal citations omitted). Thus, where the agreement at issue fell under the ambit of both Section 81 and Section 177, the Supreme Court did *not* hold that compliance with Section 81 obviated the need to satisfy Section 177's requirements. Instead, the Supreme Court held that "[n]one of the[] requirements [of Section 81 and Section 177] can be dispensed with[.]" See id.

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In sum, Section 81 does not permit the Secretary to approve agreements that would otherwise be prohibited by Section 177. To the contrary, Section 81(d)(1) expressly prohibits the approval of such an agreement. Further, a literal interpretation of Section 81(d)(1) – as reasonably construed by the Secretary – does not render Section 81 a nullity. Accordingly, the unambiguous terms of the statute support the IBIA's conclusion that the Secretary properly refused to approve the Land Assignment Deeds, because they were barred under Section 177.

2. Legislative History

The legislative history of the 2000 amendment of Section 81 further supports this plain-text reading of the statute. As discussed above, the unequivocal purpose of the 2000 Amendment was to *narrow* the universe of contracts subject to review under Section 81.

> In short, the 2000 amendments to Section 81 had two purposes: to clarify the statute's language and *to* ***narrow its scope***. To accomplish those purposes, Congress eliminated the "relative to Indian lands" standard and amended Section 81 so that it would apply only to contracts "that encumber[ ] Indian lands."

Gasplus, L.L.C. v. United States DOI, 510 F. Supp. 2d 18, 28 (D.D.C. 2007) (emphasis added).

The amendment eliminates the overly-broad scope of the Act by

> replacing the phrase 'relative to Indian lands' with the phrase 'encumbering Indian lands.' By making this change, Section 81 will no longer apply to a broad range of commercial transactions.

S.Rep. 106-150 at 7.

> [The amendment] eliminates a major portion of federal control exercised pursuant to Section 81 by making federal approval only applicable to certain contracts having a life of seven or more years.

106 H.Rpt. 501 at 2.

In the commentary accompanying 25 CFR 84.004, the Secretary noted:

> [25 CFR 84.004(a)] is . . . consistent with previous opinions of both the Department of the Interior and the Department of Justice, judicial decisions, and legislative history of the Indian Mineral Development Act, all of which consistently state that ***the requirements of Section 81 do not apply to*** leases, rights-of-way, and other ***documents that convey a present interest in tribal land.*** (emphases added).

The IBIA's decision in this case reiterated this interpretation. "Through regulation, the Department has interpreted § 81 to apply to encumbrances *not* governed by or subject to *other* statutes and regulations, such as leasing statutes or § 177." Chemehuevi Indian Tribe, 52 IBIA at 193 (emphases in original).

Contrary to Congress's stated purpose, Plaintiffs argue that the 2000 Amendment was intended to significantly *broaden* the scope of Section 81 by granting the Secretary the authority to review and approve contracts that previously were barred by Section 177. Neither the text of the 2000 Amendment, nor its legislative history, nor the Secretary's interpretation of Section 81 (and related regulations) supports this conclusion. To be sure, the 2000 Amendment was enacted to further the goals of "tribal self-determination, autonomy, and reservation economic development,"

see S.Rep. 106-150 at 2, and these goals arguably would be furthered through the effective repeal of Section 177, as Plaintiffs contend. But this is a decision for Congress, not this Court. The mere fact that an existing statute is inconsistent with current federal policy is insufficient to demonstrate Congressional intent to impliedly repeal or abrogate that statute. See, e.g., Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613, 618 (7th Cir. 1985) (declining to hold that Section 81 had been impliedly repealed by subsequent acts of Congress, notwithstanding the "present federal policy favoring tribal self-determination").

Here, Congress elected to further its policy of tribal self-determination in a very specific manner; namely, enacting the 2000 Amendment for the express purpose of *narrowing* Section 81's reach, so that only a limited number of contracts remained subject to Secretarial review and approval. Nowhere in the statute, the applicable regulations, the Senate Report, or the House Report is there an indication that the 2000 Amendment was intended to repeal Section 177.

3. Other Statutes Involving Conveyances of Tribal Land

Plaintiffs contend that Congress's intent to eliminate Section 177's restrictions through the enactment of the 2000 Amendment is illustrated by Congress's prior enactment of several other statutes, which granted the Secretary authority to approve certain categories of transactions involving Indian lands. (MSJ at 11; MSJ Reply at 5-6). Unlike Section 81, however, each of the statutes cited by Plaintiffs contains an unequivocal, affirmative grant of authority to the

Secretary (and/or Indian landowners) to engage in previously-prohibited transactions involving Indian land. See Tonkawa Tribe, 75 F.3d at 1044 (where the United States has "express[ly] consent[ed]" to conveyances of Indian land (*e.g.*, through the enactment of a statute), Section 177 is not violated).

- "**Where lands are occupied by Indians . . . the same may be leased** by authority of the council speaking for such Indians [for specified purposes]." 25 U.S.C. § 397 (enacted February 28, 1891).

- "**A right of way** for a railway, telegraph and telephone line through any Indian reservation . . . **is hereby granted** to any railroad company organized under the laws of the United States [subject to certain conditions]." 25 U.S.C. § 312 (enacted March 2, 1899).

- "**The Secretary of the Interior is authorized to grant permission** . . . to the proper State or local authorities **for the opening and establishment of public highways** . . . through any Indian reservation . . . ." 25 U.S.C. § 311 (enacted March 3, 1901).

- "**The Secretary of the Interior is authorized and empowered to grant a right of way**, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines . . . through any Indian reservation . . . ." 25 U.S.C. § 319 (enacted March 3, 1901).

- "**The Secretary of the Interior is authorized and empowered to grant a right of way** in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation . . . ." 25 U.S.C. § 321 (originally enacted March 11, 1904).

- "**The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way** for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . ." 25 U.S.C. § 323 (enacted February 5, 1948).

- "**Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners**, with the approval of the Secretary of the Interior [subject to additional, tribe-specific conditions] . . . ." 25 U.S.C. § 415(a) (originally enacted August 9, 1955).

(emphases added).

Moreover, in recent legislation affecting the alienation of Indian

lands, Congress has been even more explicit when it intended to eliminate the application of Section 177 to the transactions at issue.

- "The provisions of section 2116 of the Revised Statutes **[25 U.S.C. § 177] shall not be applicable** to [specified tribes in Maine]". 25 U.S.C. § 1724(g)(1) (statute regarding Maine Indian Claims Settlement and Land Acquisition Funds, enacted October 10, 1980).

- "Ownership and transfer of non-Reservation parcels **shall not be subject to Federal law restrictions on alienation, including** (but not limited to) the restrictions imposed by Federal common law and the provisions of section 2116 of the Revised Statutes **(25 U.S.C. 177)."** 25 U.S.C. § 941k(b) (statute regarding non-Reservation properties of the Catawba Indian Tribe of South Carolina, enacted on October 27, 1993).

- "**Notwithstanding any other provision of law**, any trust or restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, subject to the approval of the affected Indian tribe and the Secretary of the Interior, for housing development and residential purposes." 25 U.S.C. § 4211(a) (leasing statute, enacted October 26, 1996).

(emphases added).

Section 81, in contrast, contains no affirmative grant of authority allowing the Secretary (or Indian landowners) to engage in transactions that would otherwise be barred under Section 177. Instead, Section 81 contains an express *prohibition* on the approval of contracts that otherwise violate Federal law. See 25 U.S.C. § 81(d)(1).

4. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (U.S. 1985)

Although it was not addressed by the parties, the Supreme Court's decision in Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (U.S. 1985) warrants discussion. In Pueblo of Santa Ana, the Supreme Court held that Section 17 of the Pueblo Lands Act of 1924 authorized the Secretary to approve conveyances of Indian property that otherwise would have been barred by Section 177. There, the Court

concluded:

> This interpretation of § 17 gives both clauses [in § 17] a meaning that is consistent with the remainder of the statute and with the historical situation of the Pueblos. It is consistent with the limited legislative history available, and is supported by the contemporaneous opinion of the Secretary of the Interior and the Federal District Judge who placed a stamp of approval on [the transaction at issue] and numerous others in the years following the enactment of the Pueblo Lands Act in 1924.

Id. at 253-54. Each of the circumstances relied on by the Supreme Court in Pueblo of Santa Ana, however, supports a contrary result in this case.

a. Statutory Text

In Pueblo of Santa Ana, the Court noted that "§ 16 of the Act authorized the Secretary of the Interior, with consent of the Pueblo, to sell" certain tribal lands. Section 17 of the Act further provided:

> [No] sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior*.

Id. at 250-51 (quoting 43 Stat. 641-42) (emphasis added). The Court observed that the above-quoted language was identical in most respects to Section 177, with one critical distinction: Section 17 was "altered to provide for approval by the Secretary of the Interior instead of ratification by Congress." Id. at 251. Thus, the Court reasoned that "Congress intended to authorize a different procedure for Pueblo lands" than that generally required under Section 177. Id. The Court further reasoned that interpreting § 17 of the Act otherwise would "nullify the effect of § 16." Id. at 250. "It is inconceivable that Congress would have inserted § 16 in the comprehensive settlement scheme provided in the Act if it did not expect it to be effective forthwith [*i.e.*,

without requiring additional statutory authorization under Section 177]." Id.

Section 81, in contrast, contains no provision expressly authorizing the Secretary to sell Indian lands. Moreover, the provision at issue in Pueblo of Santa Ana repeated Section 177's general prohibition on the conveyance of Indian Lands almost verbatim, but replaced "unless the same be made by treaty or convention entered into pursuant to the Constitution" with "unless the same be first approved by the Secretary of the Interior." This raised the obvious inference that Congress specifically intended to alter Section 177's application to Pueblo lands. Here, there is no provision corresponding to (and altering the application of) Section 177. Instead, Section 81 expressly *prohibits* the approval of any contract that violates Federal law. 25 U.S.C. § 81(d)(1).

b. Legislative History and Unique Situation of the Pueblo Indians

The Court in Pueblo of Santa Ana further reasoned that Congress intended to alter Section 177's requirements with respect to Pueblo lands "in view of their unique history – a history that is discussed at some length in the Committee Reports." Pueblo of Santa Ana, 472 U.S. at 251. In particular, the Pueblo lands at issue were acquired by the United States in 1848. Id. at 240. For many years, it was generally believed that the Pueblo Indians were not a formally-recognized "Indian Tribe" and, consequently, were not bound by Section 177's restrictions on alienation. Id. The Supreme Court called this assumption into question with its 1913 decision in United States v. Sandoval, 231 U.S. 28 (1913), which held that Congress could regulate commerce with the

Pueblo Indians under its Constitutional authority to regulate commerce with "Indian Tribes." Id. at 242-43. Prior to this decision, roughly 3,000 non-Indians had acquired putative ownership of parcels of Pueblo land. Id. at 243. After conducting extensive hearings, Congress enacted the Pueblo Lands Act of 1924 to "settle the complicated questions of title and to secure for the Indians all of the lands to which they are equitably entitled." Id. at 244.

Given the large number of claims at issue, and the Court's conclusion that "[t]he design of the Pueblo Lands Act indicates that Congress thought some consolidation of Pueblo land holdings might be desirable in connection with the claims settlement program [implemented under the Act]," the Court concluded that it was both reasonable and likely that Congress intended to implement a more streamlined process for the conveyance of Pueblo lands than that generally applicable to Indian tribes. See id. at 248.

Moreover, the Court held that its conclusion was "consistent with the limited legislative history available." Specifically,

> Francis Wilson, a representative for the Pueblos, apparently originated the first draft of § 17. In a letter to the Commissioner of Indian Affairs he explained that "Section 17 of the Bill is, we think the shortest way to prevent present conditions from recurring or existing again. . . . This section is intended to cover the same ground as [the Nonintercourse Act] but it is changed so as to accord with the conditions of the Pueblo Indians."

Id. at 251, n.24.

Here, in contrast, Section 81 was not amended in response to the unique situation of a particular Indian tribe. Instead, Plaintiffs advocate an interpretation of the 2000 Amendment that would effectively eliminate the application of Section 177 to *all* Indian lands. Moreover, unlike in Pueblo of Santa Ana, the legislative history in

this case firmly supports the conclusion that the 2000 Amendment was not intended to eliminate the application of Section 177.

c. Contemporaneous Opinion of Secretary

In Pueblo of Santa Ana, the Supreme Court held that "[t]he uniform contemporaneous view of the Executive Officer responsible for administering the statute [*i.e.*, the Secretary] and the District Court with exclusive jurisdiction over the quiet title actions brought under the Pueblo Lands Act is entitled to very great respect. These individuals were far more likely to have had an understanding of the actual intent of Congress than judges who must consider the legal implications of the transaction over half a century after it occurred." Id. at 254. The Court also noted its practical "concern" that a contrary interpretation of the Act "might have a significant effect on other titles acquired pursuant to § 17" in the decades after its enactment. Id. at 249.

Here, in contrast, the Secretary has concluded that the 2000 Amendment was *not* intended to displace Section 177. Moreover, unlike in Pueblo of Santa Ana, applying Section 177's requirements will not undo sixty years of transactions based on the mistaken interpretation of a 1924 statute.

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Accordingly, the Supreme Court's decision in Pueblo of Santa Ana is distinguishable on literally every basis relied upon by the Court.

V. CONCLUSION

For the reasons set forth above, Defendant's Motion for Summary Judgment is GRANTED; Plaintiffs' Motion for Summary Judgment is DENIED; Defendant's Motion to Dismiss for lack of jurisdiction is DENIED; and Defendant's Motion to Dismiss for failure to state a claim is DENIED AS MOOT.

IT IS SO ORDERED.

DATED: August 6, 2012

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE