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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CHEMEHUEVI INDIAN TRIBE, et al., Plaintiff, v. KENNETH SALAZAR, Secretary of the United States Department of the Interior, Defendant.	No. CV 11-04437 SVW (DTBx) Date: October 17, 2011 Time: 1:30pm Courtroom: Hon. Stephen V. Wilson

1. NOTICE OF MOTION AND MOTION TO DISMISS; and
2. MEMORANDUM OF POINTS AND AUTHORITIES.

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, on October 17, 2011 at 1:30 p.m., or as soon thereafter as may be heard, Defendant Kenneth Salazar, Secretary of the United States Department of the Interior, will, and hereby does, move this Court for an order dismissing the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This motion will be made in Courtroom 6 before the Honorable Stephen V. Wilson, United States District Judge, at the above-entitled Court located at 312 North Spring Street, Los Angeles, California 90012.

Defendant brings the motion on the ground the Court lacks subject matter jurisdiction over Plaintiffs' Complaint because Plaintiffs have failed to identify a specific waiver of sovereign immunity for any of their three claims. Alternatively, Defendant contends Plaintiffs fail to state a claim for relief on the first two claims because the statute on which they rely is inapposite to their factual allegations, and with respect to the third claim for breach of trust, Plaintiffs cannot identify a specific trust provision which Defendant allegedly breached. Accordingly, Defendant moves for dismissal of the Complaint in its entirety.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral and/or documentary evidence as may be presented at, before, and after the hearing of this motion.

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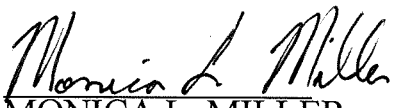
This motion is made following the conference of counsel pursuant to Local Rule 7-3 which was held on August 18, 2011.

DATED: August 31, 2011

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division



MONICA L. MILLER
Assistant United States Attorney

Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, the Chemehuevi Indian Tribe (the "Tribe") and several of its individual members (the "Individual Tribal Plaintiffs"), challenge the decision of Defendant, the Secretary of the United States Department of the Interior's ("Secretary") decision not to approve land assignment deeds the Tribe issued to the Individual Tribal Plaintiffs. Defendant moves to dismiss the action for lack of subject matter jurisdiction and 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.

Plaintiffs invoke general jurisdictional statutes as well as the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"), as the basis of their action. However, the cited statutes are insufficient to provide the Court with jurisdiction over Defendant, a federal agent, without the identification of a specific waiver of sovereign immunity. Thus, Defendant requests dismissal of the Complaint for lack of subject matter jurisdiction.

Alternatively, Defendant moves for dismissal of the Complaint for failure to state a claim upon which relief can be granted. The Complaint purports to present a challenge to Defendant's determination that the land assignment deeds at issue did not require Secretarial approval. However, in endeavoring to compel Defendant to reach a different outcome, Plaintiffs rely on an incomplete and, thus erroneous, interpretation of a federal statute, 25 U.S.C. § 81. That statute, which forms the basis of their claims for relief, is not applicable to Plaintiffs' situation in light of another, broader federal statute, 25 U.S.C. § 177. As the manner in which Plaintiffs have defined and described their land assignment deeds violates 25 U.S.C. § 177, the statute on which Plaintiffs rely, 25 U.S.C. § 81, does not come into play. Accordingly, the first two claims of relief should be dismissed for failure to state a claim upon which relief can be granted on this basis.

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Plaintiffs also bring a claim for "breach of trust." However, in addition to failing to identify a waiver of sovereign immunity and relying on an inapplicable statute, Plaintiffs fail to identify a specific trust responsibility which Defendant allegedly breached. As the United States Supreme Court recently concluded, without indicating which statutory or regulatory trust provision Defendant allegedly breached, Plaintiffs cannot maintain a claim for breach of trust. See United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323, 180 L. Ed. 2d 187 (2011). Accordingly, the allegation does not state a claim upon which relief can be granted.

Plaintiffs have not framed their causes of action in a manner that renders their Complaint actionable. Defendant requests the Court dismiss the action with prejudice because no amended pleading can correct the deficiencies.

II. FACTUAL BACKGROUND

The Tribe enacted an ordinance to permit tribal members to possess tribal land in a designated area on the Reservation for residential purposes. (Compl. ¶¶ 9-11.) Pursuant to another ordinance, referred to for simplicity as the "Land Assignment Ordinance," the Tribe purported to convey land assignment deeds to the Individual Tribal Plaintiffs so the assignees would have "exclusive right of use and possession of the Tribe's Reservation lands for the purpose of building a home and maintaining a permanent or part-time residency on the Reservation." (Compl. ¶ 12.) The Tribe's goal is to provide the Individual Tribal Plaintiffs with an interest in tribal land "as close to fee simple absolute as possible." (Compl. ¶ 14.) The Land Assignment Ordinance requires that the land assignment deeds be approved by the Secretary. (Compl. ¶ 12.)

The Secretary declined the requests to approve the land assignments. (Compl. ¶¶ 40, 45 & 54.) The Tribe appealed the denials to the Interior Board of Indian Appeals ("IBIA"). (Compl. ¶¶ 41, 46 & 55.) The IBIA ruled "the Secretary is not authorized to approve the land assignment deeds [of the Individual Tribal Plaintiffs]

pursuant to 25 U.S.C. § 81, because such approval was barred by 25 U.S.C. § 177." (Compl. ¶¶ 56 & 57.)

Plaintiffs purport to bring their action under the APA "to determine whether the Secretary has a duty to approve, pursuant to 25 U.S.C. § 81" land assignments issued by the Tribe to the Individual Tribal Plaintiffs. (Compl. ¶ 1.) Plaintiffs also seek an order from the Court declaring Defendant breached its fiduciary obligations to Plaintiffs under 25 U.S.C. § 81. Id. All three claims for relief are based on this single statute, 25 U.S.C. § 81. Plaintiffs ignored a relevant statute (and the statute upon which the IBIA decided the matter), 25 U.S.C. § 177, in their Complaint.

III. STATUTORY AND REGULATORY PROVISIONS

Although Plaintiffs focus solely on 25 U.S.C. § 81 in their Complaint – and, indeed, only one provision of that statute, as mentioned above – there is another critical and controlling statute involved, as recognized by the IBIA and upon whihc basis denied the requested relief: 25 U.S.C. § 177. Commonly referred to as "the Nonintercourse Act," Section 177 states, in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The statute upon which Plaintiffs rely, but only in part, is 25 U.S.C. § 81. Section 81 is known as the Indian Tribal Economic Development and Contract Encouragement Act of 2000 (hereafter "Act" or "Section 81"). Set forth below are *all* the pertinent provisions of Section 81:

> (b) Approval
>
> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement

> or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.
>
> (c) Exception
>
> Subsection (b) of this section shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.
>
> (d) Unapproved agreements
>
> The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) of this section if the Secretary (or a designee of the Secretary) determines that the agreement or contract--
>
> (1) violates Federal law; . . .

At the direction of Congress, the Secretary published regulations implementing the Act in 25 C.F.R. Part 84. The regulations repeat the congressional requirement that "*[u]nless otherwise provided in this part*, contracts and agreements entered into by an Indian tribe that encumber tribal lands for a period of seven or more years require Secretarial approval under this part." 25 C.F.R. § 84.003 (emphasis added.) Consistent with the Act, the regulations provide a series of exemptions to the approval requirement, i.e., types of agreements or contracts that are not covered under Section 81(b). Id. at § 84.004. Generally, the list consists of types of contracts and agreements that the Secretary would approve under another authority (such as leases and rights-of-way) or that the Secretary would not otherwise approve (such as leases on certain reservations or subleases under certain circumstances). See id.

Moreover, among those agreements not requiring Secretarial approval are those that "convey to tribal members any rights for temporary use of tribal lands assigned by Indian tribes in accordance with tribal laws or customs." Id. at § 84.004(d). The regulations further state that, if a particular contract or agreement is within one of the

exemptions, the Secretary will return the document to the tribe and will not approve or disapprove it. Id. at § 84.005.

IV. HISTORICAL BACKGROUND

An understanding of the relevant statutes is aided by a consideration of a brief discussion of the history of federal policy towards Indians. The United States has a long-standing policy of restricting the alienation of Indian lands, as evidenced by the Nonintercourse Act, which was enacted in 1834 and remains in effect today. 25 U.S.C. § 177. The Nonintercourse Act is intended to prevent the improper disposition of Indian lands and represents congressional deference to Indian self-determination and preservation of tribal society and culture. See Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960).

In the late 1800s, the United States endeavored to establish a new policy that managed lands it holds in trust on behalf of Indians by way of "allotments." As allotments were permitted at the discretion of the President, not all tribes were afforded the use of this congressional policy. 25 U.S.C. § 331. Although the Tribe was never afforded allotments, an understanding of the allotment program is beneficial to understanding Defendant's legal and policy position with respect to the land assignment deeds at issue, which Defendant contends bear the characteristics of an allotment.[1]

"Congress enacted the General Allotment Act of 1887. . . to conform Indian land ownership to the individual property ownership existing in the United States." United States v. Anderson, 625 F.2d 910, 911 (9th Cir. 1980)(internal citations omitted). An allotment is a term of art created by Congress that allows an Indian to select specific land from a common holding, but the United States retains title to the

[1]The characteristics of tribal property are described in Felix S. Cohen's Handbook of Federal Indian Law, at pages 605-06 of the 1982 edition of that treatise.

land. See generally 25 U.S.C. §§ 331, et seq. ("General Allotment Act"); United States v. Mitchell, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 142, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972). The premise was that the allotment system protected the individual Indian's land while better integrating Indians into the American system. See Blackfeet Tribe of Indians v. State of Montana, 729 F.2d 1192, 1195 (9th Cir. 1984)("The primary purpose of the General Allotment Act was the speedy assimilation of the Indians.").

The General Allotment Act, while well intended, was a failure because it effectively separated the Indians from their lands. See Blackfeet Tribe of Indians, 729 F.2d at 1196-97; Anderson, 625 F.2d at 911. To correct its failure, Congress repudiated the General Allotment Act and implemented the Indian Reorganization Act of 1934 (hereafter "IRA") to "reverse the effects of 47 years of federal Indian policy." Blackfeet Tribe of Indians, 729 F.2d at 1197; 25 U.S.C. §§ 461-65 (codification of IRA); see State of Florida, Dep't of Business Regulation v. United States Dep't of the Interior, 768 F.2d 1248, 1256 (11th Cir. 1985)("Having failed to meet the land needs of individual Indians and Indian tribes through [the General Allotment Act], because many of the allotted lands were sold to whites...Congress directed that Indian land no longer be allotted, 25 U.S.C. § 461, and that alienation of restricted Indian land be prohibited except in certain circumstances.").

The IRA states: "On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase or otherwise, shall be allotted in severalty to any Indian." 25 U.S.C. § 461. "Among the purposes of the IRA were the promotion of a significant increase in tribal autonomy and authority and the extension to the tribes of 'an opportunity to take over the control of their own resources.'" Blackfeet Tribe of Indians, 729 F.2d at 1197 (quoting 78 Cong. Rec. 11123-25 (1934)); see Cheyenne

River Sioux Tribe v. Kleppe, 424 F. Supp. 448, 450 (D.S.D. 1977)(specific purpose of IRA "was to foster and encourage self-government by the various Indian tribes"); H.R. Rep. No. 1804, at 6 (1934).

The purpose of the IRA remains intact today. Since the passage of the IRA, Congress has passed further legislation, such as the Act, in an attempt to emphasize tribal self-determination, autonomy, and economic development. See Pub. L. No. 106-179, 114 Stat. 46 (2000) (Section 81 is "[a]n Act to encourage economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes, and for other purposes); S. Rep. No. 106-150, at 2 (1999). The current principle of tribal self-government of Indians is grounded on the dual aspects of inherent tribal sovereignty and congressional policy. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

V. ARGUMENT

A. Plaintiffs Fail to Identify a Waiver of Sovereign Immunity

Plaintiffs assert jurisdiction pursuant to a variety of general statutes, including the APA and 28 U.S.C. § 1362, which states district courts have original jurisdiction over Indian tribes if the matter arises under the laws of the United States. (Compl. ¶ 2.) However, the statutes Plaintiffs cite do not, in and of themselves, provide the Court with subject matter jurisdiction. Absent a specific waiver of sovereign immunity, the Secretary[2] is not subject to suit and the Complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

It is axiomatic that, absent a waiver, sovereign immunity shields the United States and its agencies from suit. United States v. Mitchell, 445 U.S. 535, 538, 100 S.

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[2] Plaintiffs' suit against the Secretary in his official capacity is equivalent to a suit against the United States. Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982).

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 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); Holloman v. Watt, 708 F.2d 1399 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984); Data Disc, Inc. v. Systems Tech. Associates, Inc., 557 F.2d 1280, 1285 (9th Cir. 1977).

Plaintiffs have not directed the Court to a waiver of sovereign immunity. Section 81, the statute on which Plaintiffs rely for all three claims for relief, does not contain a specific waiver. See 25 U.S.C. § 81.

Even the invocation of 28 U.S.C. § 1362 requires a plaintiff to identify a waiver of sovereign immunity in order to proceed with the action. General jurisdictional statutes, such as 28 U.S.C. §§ 1331 and 1362, do not serve to waive the government's sovereign immunity. As stated by the U.S. Supreme Court in Blatchford v. Native Village of Noatak, "§ 1362 does not create an 'unmistakably clear' intent to abrogate immunity, made plain 'in the language of the statue'." 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."); Western Shoshone Nat'l Council v. United States, 408 F. Supp. 2d 1040, 1047 (D. Nev. 2005)("Title 28 U.S.C. §§ 1331 and 1362 create

jurisdiction, but do not waive the United States' sovereign immunity."). Thus, the general jurisdiction statutes cited by Plaintiffs do not provide the Court with subject matter jurisdiction.

The APA, likewise, does not provide an independent basis of jurisdiction. Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir.1998); see also Califano v. Sanders, 430 U.S. 99, 105-07, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). Plaintiffs may argue the APA provides a specific waiver of sovereign immunity for certain specific actions – and Defendant would agree in general. See Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation of the State of Montana, 792 F.2d 782 (9th Cir. 1986)(holding § 1362 did not waive sovereign immunity but Section 702 of APA did in action arguing unlawful delegation of authority). However, this action does not constitute one of those permitted actions under the APA.

As discussed in Western Shoshone National Council, "[t]he APA's waiver of sovereign immunity is limited, however. . . It does not extend to claims for money damages, *or to claims another statute prohibits*." 408 F. Supp. 2d at 1048 (internal citations omitted and emphasis added); Cf. Vizenor v. Babbitt, 927 F. Supp. 1193, 1200 (D. Minn. 1996)("Section 702, the waiver provision, is part of the APA, and is therefore not implicated if it is found that the action is committed to agency discretion by law."). As discussed in greater depth below, Section 81 does not apply to Plaintiffs' situation, and the provisions of the Nonintercourse Act, as well as the Act, specifically prohibit the particular land conveyances at issue. Accordingly, Plaintiffs cannot assert a valid jurisdictional basis under the APA.

Thus, Defendant contends the Court lacks subject matter jurisdiction over Plaintiff's action and urges the Court to dismiss the action in its entirety.

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B. Plaintiffs' First Claim Fails to State a Claim for Relief Under the Act

By intending to give the Individual Tribal Plaintiffs "an interest in the parcel of tribal land . . . as close to fee simple absolute as possible. . . ," the Complaint makes it abundantly clear the Tribe wants to give its members tribal land virtually in perpetuity. (Compl. ¶ 14.) The Tribe believes the land assignment deeds meet the statutory definition of "encumbrance" under the Act. (Compl. ¶ 67.) Hence, the Tribe argues the Secretary is required to approve the deeds, and violated law by failing to do so. (Compl. ¶¶ 69 & 70.) However, Plaintiffs' interpretation of Section 81 does not address the totality of the Act and corresponding regulations. Plaintiffs' failure to undertake a complete analysis renders its' Complaint subject to dismissal for failure to state a claim upon which relief can be granted.

In enacting Section 81, Congress specifically directed the Secretary to engage in a two-step process. The Secretary first determines whether an agreement or contract encumbers Indian land for a period of seven years or more. 25 U.S.C. § 81(b). The statute requires that an agreement or contract meeting these provisions secure Secretarial approval to be valid. Id.; see 25 C.F.R. § 84.003 (describing types of contracts or agreements subject to Secretarial approval). For this reason, Plaintiffs conclude the land assignment deeds purporting to convey portions of the Tribe's land to the Individual Tribal Plaintiffs constitute an encumbrance within the meaning of the Act.[3]

However, Plaintiffs fail to read and apply the remainder of Section 81, the second step in the process. Two of the "oversights" are contained within the provisions of the Act, but the third one implicates another federal law, the Nonintercourse Act, and is the reason Plaintiffs cannot assert a claim under the Act.

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[3]The Secretary's definition of "encumber" does not include the Tribe, as the regulations consider "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." 25 C.F.R. § 84.002 (emphasis added).

As discussed in the statutory and regulatory section above, Congress granted the Secretary discretion to specifically exclude certain agreements or contracts from the approval provision. The statute reinforces the power of the Secretary's determination by stating the Act "shall not apply to any agreement or contract that the *Secretary (or a designee of the Secretary) determines is not covered under that subsection.*" 25 U.S.C. § 81(c)(emphasis added). By rendering a final determination that the land assignment deeds are not subject to the Act, the Secretary could invoke this provision of the Act, which permits Defendant discretion in assessing the applicability of the Act to a particular conveyance.

Also, as discussed above, the Secretary has identified agreements or contracts which are not subject to the Act. 25 C.F.R. § 84.004. Arguably, land assignments, such as those at issue, are specifically excluded from being "agreements or contracts" requiring Secretarial approval, as they can be interpreted as contracts or agreements that convey rights to tribal members in accordance with tribal laws or custom. See 25 C.F.R. § 84.004(d); see also Comment to 25 C.F.R. § 84.004 ("the determination of encumbrance is conducted on a case-by-case basis.")

Most importantly, however, Plaintiffs fail to acknowledge that, among the agreements or contracts the Secretary is congressionally mandated to "refuse to approve" are agreements or contracts that violate federal law. 25 U.S.C. § 81(d) (1). To reiterate, the Nonintercourse Act states, in pertinent part "*[n]o...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 (Emphasis added.) The Nonintercourse Act still requires that any alienation of Indian land must have the 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).

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A recent case interpreting the Nonintercourse Act sets out a four-part test for determining whether a transaction violates the Nonintercourse Act. The court in Tonkawa Tribe of Oklahoma v. Richards, 75 F. 3d 1039, 1044 (5th Cir. 1996), set forth the following test:

> 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.

In this case, there is no dispute as to the first three factors of the Tonkawa test: the Tribe is clearly a tribe within the meaning of the Nonintercourse Act, the land involved is tribal land, and the relationship between the Tribe and the United States has never been terminated. See Compl. ¶¶ 4, 7-12. Application of the fourth factor leads to a different result.

At issue for purposes of determining if the land assignment deeds violate the Nonintercourse Act (i.e. federal law), is whether the land assignment deeds constitute an extinguishment of the Tribe's title or claim to its interest in the land. The land assignment deeds do not explicitly extinguish the Tribe's title to the land. See Compl., Ex. B, § Section 14.08.010. However, the assignments, by granting to the Individual Tribal Plaintiffs an interest in tribal land "as close to fee simple absolute as possible," the Tribe has, in fact, virtually extinguished its title to and interest in its land. (Compl. ¶ 14.)

The reach of the Nonintercourse Act is broad, prohibiting not only conveyances intended to be permanent, such as sales and grants, but also conveyances of possessory interests that would temporarily divest tribes of their use of the land, such as leases. Although Congress later carved out exceptions, no exception exists for

land assignments, such as the Tribe's proposed land assignment deeds, that convey in perpetuity an exclusive possessory interest in a tribe's lands that may be devised, sold, or otherwise conveyed by the assignee. See Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 948 (D. Mass. 1978) ("The Nonintercourse Act does not by its terms provide for an exception for the conveyance of land from a tribe to individual Indians"), affirmed sub. nom Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

The Tribe's desire to convey tribal lands to the Individual Tribal Plaintiffs clearly falls within the purview of the Nonintercourse Act. The Tribe has not entered into a treaty or convention which allows it to convey the land it wishes to convey to the Individual Tribal Plaintiffs in the manner it has chosen. Accordingly, the Chemehuevi land assignment deeds violate the Nonintercourse Act. As they violate that statute, which is a federal law, the Secretary properly concluded he could not approve or deny the land assignments pursuant to Section 81.

For policy reasons, the Plaintiffs' argument also fails. As discussed in the historical background section above, Congress has adopted a policy of promoting tribal autonomy and tribal self-government. See Blackfeet Tribe of Indians, 729 F.2d at 1197; Cheyenne River Sioux Tribe, 424 F. Supp. at 450. The Tribe's land assignment deeds have the characteristics of allotments. The Tribe's desire to "pull" Defendant into its plan to assign its tribal lands to the Individual Tribal Plaintiffs directly contravenes Congress's intention as stated in the IRA to abolish the allotment system. The Tribe cannot use the Secretary and the Act to accomplish its goal of conveying tribal land in perpetuity to the possible detriment of the Tribe and in contravention of congressional policies designed to promote tribal autonomy.

As the land assignment deeds are not subject to the Act because they violate federal law, Plaintiffs cannot state a claim for relief by arguing Defendant violated the

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Act. Accordingly, Defendant requests the Court dismiss the first claim for failure to state a claim upon which relief can be granted.

C. Plaintiffs' Second Claim Fails to State a Claim Under the APA

Under the APA, a court can "hold unlawful and set aside" an agency action found to be "not in accordance with law." 5 U.S.C. § 706(2)(A). It appears it is this provision which Plaintiffs invoke. (See Compl. ¶ 76.) However, as Plaintiffs cannot state a cause of action for failure to comply with Section 81, they similarly cannot maintain an action under the APA because their APA claim is inextricably tied to their Section 81 claim.

As discussed above, Plaintiffs cannot allege a violation of Section 81 because it is inapplicable to the facts. Additionally, the facts demonstrate Plaintiffs' attempt to alienate tribal land violates the Nonintercourse Act. Plaintiffs' only contention is that Defendant violated the law by failing to apply Section 81, and that Act only. Their insistence on focusing on one provision – and only one provision to the exclusion of other relevant and controlling provisions – of the statute renders their application a failure, and thus likewise their claim that Defendant violated the law in its application of Section 81. For this reason, Plaintiffs are unable to allege or maintain an APA claim.

Moreover, as the U.S. Supreme Court stated in Norton v. Southern Utah Wilderness Alliance, APA jurisdiction only applies to actions the agency is legally required to take. 542 U.S. 55, 62, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004) . Additionally, a court can compel an agency to take action, but not direct the method of the agency in doing so or the outcome of that action. See Cobell v. Norton, 392 F.3d 461, 475 (D.C. Cir. 2004). In their Complaint, Plaintiffs request the Court to compel the Secretary to take an action – approve the land assignment deeds – he legally cannot take. Additionally, Plaintiffs request the Court to compel the Secretary to approve the land assignment deeds. Under APA law, the Court only has the

authority to set aside the Secretary's refusal to approve the land assignment deeds, but cannot dictate whether the deeds should be approved or denied.

For all these reasons, Defendant urges the Court to dismiss the second claim for failure to state a claim upon which relief can be granted.

D. Plaintiffs' Third Claim Fail to State a Claim for Breach of Trust

Plaintiffs allege the Act and the Nonintercourse Act impose upon the United States "mandatory duties which form a trust relationship..." (Compl. ¶ 81.) Plaintiffs then allege Defendant breached that trust. (Compl. ¶ 82.) However, Plaintiffs' arguments overlook the fact that neither statute establishes a specific trust responsibility. Lacking an identifiable waiver of sovereign immunity, as discussed above, and a specific statute or regulation that the Secretary violated, Plaintiffs cannot state a claim for breach of trust.

The history of the trust relationship is a lengthy one. The extent of the trust responsibility is defined by relevant statutes and regulations, *not common law*. Jicarilla, 131 S. Ct. at 2323-25; United States v. Mitchell, 463 U.S. 206, 224, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); Cobell v. Norton, 240 F.3d 1081, 1098-99 (D.C. Cir. 2000); Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995). The United States Supreme Court observed in United States v. Jicarilla Apache Nation:

> [t]his Court has previously noted that the relationship between the United States and the Indian tribe is distinctive, "different from that existing between individuals whether dealing at arm's length, as *trustees and beneficiaries*, or otherwise. Klamath and Moadoc Tribes v. United States, 296 U.S. 244, 254, 56 S.Ct. 212, 80 L.Ed.2d 580 (1935) (emphasis added). "The *general* relationship between the United States and the Indian tribes is not comparable to a private trust relationship."

> Cherokee Nation of Okla. v. United States, 21 Cl.Ct. 565, 573 (1990) (emphasis added).
>
> The Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians as a "trust", see, *e.g.* 25 U.S.C. §162a, that trust is defined and governed by statutes rather than the common law. See United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (Navajo I) ("The analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions"). As we have recognized in prior cases, Congress may style its relations with the Indians a "trust" without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is "limited" or "bare" compared to a trust relationship between private parties at common law.

131 S. Ct. at 2323.

Moreover, when faced with two reasonable choices under statutes and regulations, the Secretary is required to choose the alternative that is in the best interest of the tribe, *even if that alternative differs from the one proffered by the tribe itself* (as is the situation in the case before the court). Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984), adopted as majority opinion as modified en banc, 782 F.2d 855 (10th Cir. 1986). See, e.g., Sangre de Cristo Dev. Co. v. United States, 923 F.2d 891 (10th Cir. 1991), cert. denied, 503 U.S. 1004 (1992) (previous lease approval rescinded in best interest of tribe based in part on significant environmental impacts). The trust responsibility does not, however, require the Secretary to go beyond those statutes and regulations. Pawnee v. United States, 830 F.2d 187, 192 (Fed. Cir. 1987).

As discussed in Jicarilla Apache Nation, "[t]hroughout the history of the Indian trust relationship, we have recognized that the organization and management of the

trust is a sovereign function subject to the plenary authority of Congress." 131 S. Ct. at 2323. Thus, as explained by the U.S. Supreme Court in an earlier decision, "while trust administration 'relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States'." Id. at 2324 (citing Heckman v. United States, 224 U.S. 414 (1912)). Consequently, "Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes." Id. Thus, the United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." Id. at 2325. Moreover, the Jicarilla Apache Nation Court concluded, if you "cannot 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. at 2325 (citing United States v. Navajo Nation, 566 U.S. 287 (2009)).

In the case before the Court, Plaintiffs have not, and cannot, identify a provision in Section 81 or in the Nonintercourse Act (or any statute) which imposes on the Secretary a trust relationship which requires him to approve the land assignment deeds at issue. On the contrary, Defendant is duty bound to decline to approve or deny the deeds, as discussed above. The United States trustee role arises **only** if there is a specific act or direction of Congress for the government to do something for the Indian. In the present matter, there is no specific direction of Congress for the United States to accept land assignment deeds pursuant to Section 81. If the United States lacks these obligations, it is inconsistent for Plaintiffs to allege a breach of trust has occurred.

Plaintiffs' efforts to shoe-horn their allegations into a claim of breach of trust are unavailing. Accordingly, Plaintiffs have failed to state a claim upon which relief

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can be granted and Defendant urges the Court to dismiss the third claim of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

VI. CONCLUSION

For the reasons set forth above, 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.

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Respectfully submitted,

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