DOCKET NO. 12-56836

In the

United States Court of Appeals

For the

Ninth Circuit

CHEMEHUEVI INDIAN TRIBE, et al.,

Plaintiff-Appellant,

v.

KENNETH SALAZAR, Secretary of the United States Department of the Interior,

Defendants-Appellees,

Appeal from a Decision of the United States District Court for the Central District of California, No.CV-11-04437-SVW-DTB ● Honorable Stephen V. Wilson

BRIEF OF APPELLANT

Lester J. Marston
Scott Johnson
RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, California 95482
Tel. (707) 462-6846
Fax. (707) 462-4235
Attorneys for Appellants, Chemehuevi Indian Tribe, et al.

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Jurisdictional Statement

1. The United States District Court for the Central District of California ("District Court") had jurisdiction over the claims of Appellants, Chemehuevi Indian Tribe ("Tribe") and 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, ("Assignees") based upon the following:

(a) 28 U.S.C. § 1331, in that the Tribe's and Assignees' claims arise under the Constitution and laws of the United States, and

(b) 28 U.S.C. § 1361, in that the Tribe and the Assignees seek to compel officers and employees of the United States and its agencies to perform duties owed to the Tribe and its members.

2. The Court of Appeals has jurisdiction over this appeal based upon:

(a) 28 U.S.C. § 1291, in that the Tribe and Assignees are appealing a final judgment of the District Court;

(b) The District Court issued an order granting the motion for summary judgement filed by Appellee, Secretary of the Interior, Kenneth Salazar ("Secretary"), denying the Tribe's motion for summary judgment and granting the Secretary's motion to dismiss on August 6, 2012;

(c) The District Court did not issue a separate final judgment in this case;

(d) The Tribe filed a notice of appeal on October 8, 2012, pursuant to Fed. R. Civ. P. 58(a). Because the Secretary is an official of the United States who is being sued in his official capacity, the filing of the notice of appeal within sixty (60) days of the entry of the Judgment was timely; and

(e) The Order granting the Appellee's motion to dismiss and cross-motion for summary judgment and denying the Tribe's motion for summary judgment, constitutes a final judgment that disposed of all of the claims of all of the parties.

Statement of Issues

1. Did the District Court err in ruling that the Tribe's land assignments ("Land Assignments"), granted to the Assignees, could not be approved by the Secretary, pursuant to 25 U.S.C. §81 ("Section 81"), because they violate federal law?

(a) Did the District Court err in ruling that the Land Assignments violate 25 U.S.C. § 177 ("Section 177" or "Non-intercourse Act") despite the fact that the District Court did not conclude that the Land Assignments extinguished the Tribe's title to the assigned land?

(b) Did the District Court err in ruling that the Land Assignments violate Section 177, because the District Court's ruling effectively renders Section 81 a nullity?

2. Is the District Court's ruling that the Secretary is not authorized to approve the Land Assignments in conflict with the provisions of 25 U.S.C. §476, which grants to Indian tribes the authority to control the sale, disposition, lease, or encumbrance of tribal lands and interests in lands?

3. Is Section 81 ambiguous?

(a) Assuming that Section 81 is ambiguous, did the District Court err in refusing to apply the Indian canons of statutory construction ("Indian canons")to its analysis of Section 81 and Section 177 and their

application to the Land Assignments, since the Indian canons require that Indian legislation be interpreted as the Indians understand it?

Statement Of The Case

1. On September 21, 2007, January 15, 2008 and May 3, 2010, Western Regional Director ("Regional Director") for the Bureau of Indian Affairs ("BIA") denied the Tribe's request to approve Land Assignment deeds ("Deeds") to the Assignees, concluding that the Land Assignments constituted leases and did not meet the requirements for approval of leases, pursuant to 25 U.S.C. § 415.

2. On October 9, 2007, February 6, 2008, and May 20, 2010, the Tribe appealed the denial of the requests to approve the Deeds to the Interior Board of Indian Appeals ("IBIA").

3. On October 26, 2010, the IBIA upheld the Regional Director's September 21, 2007 and January 15, 2008 decisions, based on the conclusion that the Deeds could not be approved by the Secretary because approval was barred by Section 177. On December 30, 2010, the IBIA upheld the Regional Director's May 3, 2010 decision, based on its October 26, 2010 decision.

4. On May 23, 2011, the Tribe filed suit in the District Court against the Secretary, based on claims that the Secretary, in refusing to

approve the Deeds , violated Section 81, the Administrative Procedure Act, 5 U.S.C. § 701 et seq. and the Secretary's trust obligations owed to the Tribe.

5. On August 5, 2011, the Secretary filed a motion to dismiss the Tribe's claims for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

6. On September 19, 2011, while the Secretary's motion to dismiss was pending, the Tribe filed a motion for summary judgment.

7. On October 14, 2011, the Secretary filed a cross-motion for summary judgment.

8. In a order dated August 6, 2012 ("Order"), the District Court granted the Secretary's motion for summary judgment, denied the Tribe's motion for summary judgement, and denied the Secretary's motion to dismiss.

9. The District Court did not enter a separate final judgment in the case.

10. On October 8, 2012, the Tribe filed a timely notice of appeal appealing the August 6, 2012 Order.

Statement Of Facts

1. The Chemehuevi Indian Tribe is a federally recognized Indian

Tribe. (65 Fed. Reg. 13299 (March 13, 2000).) The Tribe is a quasi-sovereign governmental entity that exercises inherent powers of self-government. The Tribe is organized under a written constitution, which, as subsequently amended, was approved by the Secretary of the Interior under the provisions of the Indian Reorganization Act, 25 U.S.C. §476 ("IRA"). Under the Tribe's Constitution, the Chemehuevi Tribal Council is the governing body of the Tribe. E.R. p. 377; 776, ¶ 6.

2. The Tribe is the beneficial owner of 32,000 acres of land ("Reservation") adjacent to the Colorado River and Lake Havasu in San Bernardino County, California. The Reservation was created by Order of the Secretary of the Interior dated February 2, 1907. Title to the Tribe's Reservation lands is owned by the United States of America in trust for the Tribe. E.R. p. 776, ¶ 7.

3. In 1940, in order to provide water to Los Angeles and San Diego, Congress condemned all of the valuable bottom land of the Chemehuevi Reservation to construct Parker Dam and create Lake Havasu. The creation of the Dam flooded all of the lands occupied by the Tribal members forcing them to relocate off the Reservation. E.R. pp. 775-776, ¶¶ 3-4.

4. The Reservation remained unoccupied until the Tribe

reorganized its Tribal government in 1970 and sought to provide incentives for tribal members to move back to the reservation. E.R. p. 776, ¶ 5.

5. In order to provide an incentive for members to sell their homes and relocate to the Reservation, the Tribe created a residential subdivision of lake front property and executed land assignment deeds conveying parcels of land to over 50 of its members. E.R. pp. 778-779, ¶¶ 14-20.

6. Article VI, Section 2(f) of the Tribe's Constitution delegates to the Tribal Council the authority to manage the Tribe's Reservation lands, including, but not limited to, the authority to determine who can use or possess those lands. Pursuant to that authority, the Council adopted a comprehensive Land Use Plan for the Reservation and a comprehensive Zoning Ordinance. E.R. pp. 382; 776, ¶ 8.

7. Pursuant to Chapter 8 of the Tribe's Zoning Ordinance, the Tribe zoned the Reservation for the purpose of implementing the Tribe's Land Use Plan. The area designated "residential" in the Land Use Plan was zoned "R-1 Residential Tribal Members Only." Under that zoning designation, the only permitted use is residential single-family dwellings for use only by enrolled members of the Tribe. E.R. pp. 776-777, ¶ 9.

8. Article VI, Section 2(f) of the Tribe's Constitution expressly authorizes the Tribal Council to make assignments of Tribal land to members of the Tribe. Pursuant to that authority, the Council adopted Ordinance No. 01-08-25-1-A, "An Ordinance of the Tribal Council For The Chemehuevi Indian Tribe Adopting Land Assignment Regulations For Determining When and Under What Conditions Tribal Members Can Occupy Tribal Lands" ("Land Assignment Ordinance"). E.R. pp. 671-686; 777-778, ¶ 10.

9. Under the Land Assignment Ordinance, the Tribal Council is authorized to approve a "Land Assignment Deed," conveying to the assignee an exclusive right of use and possession of a parcel of the Tribe's Reservation lands for the purpose of building a home and maintaining a permanent or part-time residency on the Reservation. The Land Assignment Ordinance requires that the Deeds be approved by the Secretary, as required by 25 U.S.C. § 81. E.R. pp. 674-681; 777-778, ¶ 10.

10. The Tribal Council's fundamental purpose in enacting the Land Assignment Ordinance was to attract tribal members back to the Reservation, and to encourage them to invest in the Reservation. The Council recognized that many of the tribal members whom the Tribe hoped to attract back to the Reservation: (1) were homeowners who were

displaced in the wake of the flooding of the Reservation for the creation of Lake Havasu; (2) moved to towns and cities such as Burbank, Los Angeles, Las Vegas, and Phoenix in order to find work; and (3) purchased homes in these cities, back in the 50's and 60's, which have increased significantly in value since the time that they were purchased. E.R. p. 778, ¶ 11.

11. Based upon these facts, the Tribal Council determined that tribal members would have to be provided with an interest in the parcel of tribal land assigned to them that was as close to fee simple absolute as possible to convince members to: (1) sell their exiting off-reservation homes and invest that money in building a new home on the Reservation or (2) borrow a significant amount of money to build new homes on the Reservation using the land assignment as collateral for the loan. E.R. pp. 671-672; 778, ¶ 12.

12. In setting this policy, the Tribal Council also concluded that it would be in the best interest of the Tribe to encourage tribal members to construct houses of substantial size and value, thus, making it more likely that members would return to and remain on the Reservation and pass on to their heirs a home which their family members could occupy. E.R. p. 671-672; 779, ¶ 13.

13. In adopting the Land Assignment Ordinance, the Tribal Council intended to convey to tribal members an interest in tribal lands similar to the interest that a person receives when purchasing a parcel of property off the Reservation in fee simple absolute. E.R. pp. 671-672; 777-778, ¶ 10. Assignees can convey their land assignments by will, to take effect when they die, provided that the heir is an enrolled tribal member. If an assignee dies intestate, the land assignment will be inherited by the assignee's lawful heirs, provided the heirs are tribal members. Once a land assignment is conveyed, it can only be terminated by the Tribe if: (1) the property is used for a purpose other than a residence; (2) the assignee purports to convey an interest in the land assignment without the consent of the Tribe; (3) the assignee uses the land assignment in the commission of a crime; (4) the assignee abandons the land assignment; or (5) the Tribe condemns the land assignment for a public purpose. E.R. pp. 777-778, ¶ 10.

14. Pursuant to Article VI, Section 2(f) of the Tribe's Constitution, the Council adopted Ordinance No. 01-07-27-01, "An Ordinance of the Tribal Council of the Chemehuevi Indian Tribe Adopting the Chemehuevi Subdivision Ordinance" ("Subdivision Ordinance"). Under the Subdivision Ordinance, the Council is authorized to subdivide Reservation lands into individual lots or parcels. E.R. pp. 778-779, ¶ 14; 784-818.

15. Pursuant to the Subdivision Ordinance, the Tribe hired a civil engineer to prepare a tentative subdivision map, subdividing that portion of the Reservation zoned "R-1 Residential Tribal Members Only." On March 27, 2004, the Council adopted and approved the Tentative Map creating the "Tribal Members Only Subdivision" or "Colony Subdivision." The adoption of the Colony Subdivision Map created approximately 113 residential lots within the subdivided area. E.R. pp. 779, ¶ 15; 894.

16. After the adoption of the Colony Subdivision Map, the Tribe's Realty Office began accepting and processing land assignment applications from Tribal members for lots located within the Colony Subdivision, pursuant to the Tribe's Land Assignment Ordinance. E.R. p. 779, ¶ 16.

17. The Assignees, and each of them, made application to the Tribe for a land assignment lot within the Colony Subdivision. The land assignment applications were processed by the Tribe on a first-come first-served basis. E.R. p. 779, ¶ 17.

18. Between April 22, 2004, and June 26, 2004, the Tribe executed and the Tribal Council approved land assignment deeds for Emmanuel Evans, Howard Irving Peach, Waco Escobar, Leona Gordon, Tony Fixel, Steven Dale Bacon, Christina Ray, Richard Sandate, Jesse Seymour Gordon, Michelle Dolores Barrett, Angela Marie Jones-Marston, John

DeVilla, Rikki Harper, Sierra Pencille, Joseph Allen Lusch, Jr., Samiyah White, Dusti Rose Bacon, Mark Eswonia, Ramona Madalene Powell, Tiffany T. Adams, Angela Carrillo, Evangelina Hoover, Tito Katts Smith, and Ramon Campass Martinez. ("Original Assignees") E.R. pp. 293-337; 779, ¶ 18.

19. On August 23, 2007, Charles Wood, then Chairman of the Tribe, submitted the land assignment deeds for the Original Assignees to the BIA, Regional Director, requesting approval of the Deeds pursuant to 25 U.S.C. § 81. E.R. pp. 585-587; 780, ¶ 22.

20. On September 21, 2007, the Regional Director denied the request to approve the Deeds for the Original Assignees. E.R. pp. 500-502; 780, ¶ 23.

21. On October 9, 2007, the Tribe appealed the denial of the request to approve the Land Assignment Deeds for the Original Assignees to the IBIA. E.R. pp. 523-525; 780-781, ¶ 24.

22. On July 29, 2006, the Tribe executed land assignment deeds for Michelle Mendoza, Juana Bush, Roberta Sestiaga, Adam Trujillo, Jr., and Hope Hinman ("Additional Assignees"), enrolled members of the Tribe. E.R. pp. 644-670; 779, ¶ 19.

23. By Tribal Resolution 06-07-29-01, executed on July 29, 2006, the Tribal Council approved the Land Assignment Deeds for the Additional Assignees. E.R. pp. 641-643; 779, ¶ 19.

24. On November 30, 2007, the Vice-Chairman of the Tribe, Shirley Smith, submitted the Land Assignment Deeds for the Additional Assignees to the Regional Director requesting approval of the Deeds pursuant to 25 U.S.C. § 81. E.R. pp. 634-636; 781, ¶ 25.

25. On January 15, 2008, the Regional Director, denied the request to approve Deeds for the Additional Assignees. E.R. pp. 353-355; 781, ¶ 26.

26. On February 6, 2008, the Tribe appealed the denial of the request to approve the Land Assignment Deeds for the Additional Assignees. E.R. pp. 358-369; 781, ¶ 27.

27. Between April 24, 2004 and March 27, 2010, the Tribe executed land assignment deeds for John W. Hernandez, Sharon Melissa Kaseman, Brian Kellywood, Steven Dale Maderos, and Adam Steven Trujillo, Sr. ("Final Assignees"). E.R. p. 780, ¶ 28.

28. On April 13, 2010, then Chairman of the Tribe, Charles Wood, submitted the Land Assignment Deeds for the Final Assignees to the Regional Director, requesting approval of the Deeds pursuant to 25 U.S.C. § 81. E.R. pp. 548-550; 781, ¶ 28.

29. On May 3, 2010, the Regional Director, denied the request to approve the Deeds for the Final Assignees. E.R. pp. 548-550; 781, ¶ 29.

30. On May 20, 2010, the Tribe and Final Assignees appealed the denial of the request to approve the Land Assignment Deeds for the Final Assignees, to the IBIA. E.R. pp. 545-551; 781-782, ¶ 30.

31. On October 26, 2010, the IBIA issued a ruling ("October 26, 2010 Ruling") that the Secretary is not authorized to approve the Land Assignment Deeds for the Original Assignees and Additional Assignees, pursuant to 25 U.S.C. §81, because such approval was barred by 25 U.S.C. §177. E.R. pp. 51-72; 782, ¶ 31; 819-840.

32. On December 30, 2010, the IBIA issued a ruling that the Secretary is not authorized to approve the Land Assignment Deeds for the Final Assignees, based on the October 26, 2010 Ruling. The Original Assignees, Additional Assignees, and Final Assignees shall hereinafter be referred to collectively as the "Assignees." E.R. p. 782, ¶ 32; 841-843.

33. Under Article VI, Section 2 of the Tribe's Constitution, the Council has adopted Ordinance No. 01-10-27-01, "An Ordinance of the Tribal Council of the Chemehuevi Indian Tribe Establishing A Department of Housing" ("Housing Ordinance"). E.R. pp. 782, ¶ 34; 844-850.

34. Under the Housing Ordinance, the Tribal Department of Housing has an obligation to provide safe, sanitary, and decent housing to Tribal members on the Reservation by, among other actions, participating in the United States Department of Housing and Urban Development's ("HUD") 184 Loan Program. E.R. pp.782-783, ¶ 35.

35. Under the 184 Loan Program, the United States, through HUD, will guarantee the payment of any loan made to an enrolled member of a federally recognized Indian Tribe for the construction or rehabilitation of a home on reservation trust land. E.R. pp. 853-854.

36. At the time that the Deeds were approved by the Council, each of the land assignment lots had a house on it. All of the homes were substandard and did not meet the Uniform Building Code standards adopted by the Tribal Council. E.R. p. 782, ¶ 33.

37. Because the Land Assignment Deeds have not been approved by the Secretary, the Assignees have been unable to obtain financing to remodel or replace the existing housing structures on the land assignment lots from any conventional banking institution. E.R. p. 768, ¶ 22; 774, ¶ 22.

38. The inability to obtain financing to improve or replace the dwellings, which resulted from the Secretary's refusal to approve the Land

Assignment Deeds, has caused and continues to cause damage to the Assignees. E.R. p. 763, ¶¶ 8-10; 768, ¶¶ 22-25; 774, ¶¶ 22-23.

39. Of the thirty-four Land Assignment Deeds at issue in this case, seventeen of the homes located on land assignment lots have been recently condemned or demolished, because the dwellings have deteriorated to such a degree that the buildings had become a health and safety hazard to the Assignees and other residents of the Reservation. E.R. p. 783, ¶ 36.

40. Because the Assignees have been and continue to be unable to repair or replace the homes on the land assignment lots, nine of the Assignees have been forced to move off the Reservation. Several others have been unable to move onto the Reservation, despite their desire to do so. E.R. p. 763, ¶¶ 8-10; 768, ¶¶ 22-25; 774, ¶¶ 22-23; 783, ¶ 36.

41. Because the Land Assignment Deeds have not been approved by the Secretary, the Tribe's fundamental purpose in issuing the Deeds has been frustrated. The Tribe is losing, rather than attracting, on-reservation tribal member residents, because safe, sanitary housing is not available. E.R. p. 783, ¶ 37.

42. Unless the Secretary is compelled to approve the Land Assignment Deeds, the Assignees and the Tribe will continue to suffer damages, as the homes on the land assignment lots will continue to

deteriorate, more homes will be condemned and demolished, more tribal members will be forced to move off the Reservation, and fewer tribal members will return to live on the Reservation. E.R. p. 783, ¶ 38.

Summary of Argument

This appeal revolves around the interplay between two federal statutes relating to Indian tribes and their land, 25 U.S.C. §81, and 25 U.S.C. §177. Section 81 provides that "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years" is "valid" without the approval of the Secretary of the Interior." Section 81 further provides that the Secretary shall refuse to approve such an agreement if the agreement "violates federal law." Section 81 does not define the term "encumber," but regulations promulgated by the Secretary define "encumber" and provide examples of "encumbrances." 25 C.F.R. §84.002 ("Section 84.002").

Section 177 prohibits the alienation of Indian lands unless the conveyance is approved by Congress: "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."

In this case, the Chemehuevi Indian Tribe issued Land Assignment Deeds to tribal members or Assignees. The Land Assignment Deeds granted to the Assignees the right to use and occupy the land and to pass the land assignment lots to their descendants, so long as the Assignee met the requirements of the assignments. There is no dispute that the Land Assignments are encumbrances as defined by Section 84.002.

The District Court concluded that the Secretary could not approve the Land Assignments, because they violated Section 177. In this brief, the Tribe and Assignees will demonstrate that the District Court erred in concluding that Section 177 barred Secretarial approval under Section 81 and that the Secretary is compelled to approve the Land Assignment Deeds.

The Tribe and Assignees will begin with a summary of the history of the law applicable to the ownership of Indian lands. The Tribe and Assignees will then show that the Land Assignment Deeds do not violate Section 177, because they do not extinguish the Tribe's underlying Indian title to the land. The Tribe and Assignees will then demonstrate that the provisions of Section 81 that prohibit the Secretary from approving agreements that violate federal law was not intended to apply to Section 177, because the Secretary's approval has the effect of exempting the Deeds from the Section 177 prohibition. The Tribe and Assignees will also show

that the canons of construction for statutes passed for the benefit of Indians should be applied in interpreting Section 81, and Section 177 and that those statutes must be read in pari materia with other statutes, such as 25 U.S.C. § 476, relating to the use and ownership of Indian land.

Finally, the Tribe and Assignees will show that the Land Assignments promote tribal economic development and tribal self-government, and that the approval of the Land Assignment Deeds is consistent with Congress's purposes in enacting Section 81.

Standard Of Review

This case involves the Tribe's challenge to the Government's interpretation of 25 U.S.C. § 81 and 25 U.S.C. § 177. If the Assignment Deeds do not convey the Tribe's underlying Indian Title to its Reservation trust lands, then approval of the Deeds by the Secretary, pursuant to Section 81, does not violate Federal law, specifically Section 177, and the Secretary has an obligation to approve the Deeds. Conversely, even if the Assignment Deeds do fall within the coverage of Section 177, the Secretary's approval of the Deeds, brings the Deeds into compliance with Section 177, and Secretarial approval of the Deeds does not violate Federal law. And the Secretary, therefore, would have an obligation to approve the Deeds for the Tribe and the Assignees.

In *Arizona State Board for Charter Schools v. U.S. Department of Education*, 464 F.3d 1003, 1006 (9th Cir. 2006), the Ninth Circuit Court of Appeals stated that the Court will review both a district court's grant of summary judgment and questions of statutory interpretation de novo. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir. 1999); *Wilderness Soc'y v. Dombeck,* 168 F.3d 367, 370 (9th Cir. 1999).

The District Court ruled that Section 81 was ambiguous requiring it to interpret the words "violate Federal law" contained in the statute. The District Court interpreted those words to mean that the Land Assignment Deeds violated Section 177, rather than determining whether the interested conveyed by the Deeds to the Assignees conveyed the Tribe's actual Indian title to its trust lands. In reviewing the District Court's Order, therefore, the first issue is whether the language of the statute is plain and unambiguous. The review of that issue is subject to the de novo standard. *Arizona State Board for Charter Schools v. U.S. Department of Education*, *supra*, 464 F.3d at 1006.

Finally, to the extent that this Court of Appeals concludes that the statutory provisions at issue in this case are ambiguous, the Court is compelled to apply the Indian canons of statutory construction, that statutes passed for the benefit of Indians and Indian tribes are to be

construed liberally in favor of Indians and Indian tribes with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985)*; Cobell v. Norton*, 240 F.3d 1081, 1101-1102 (D.C. Cir. 2001).

I.
SUMMARY OF THE HISTORY OF LAW RELATING TO OWNERSHIP OF INDIAN LAND.

In 1790, Congress passed the original version of what is now Section 177, the Trade and Intercourse Act of 1790, commonly referred to as the "Non-Intercourse Act." The 1790 Act was reenacted with minor modifications in 1793, 1796, 1799, and 1802. The current version, enacted in 1834, states: "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." Section 177 set the foundation for the rules governing the alienation of Indian land. From the earliest years of the United States, federal law has provided that only the United States has the authority to extinguish Indian title:

> The federal restraint on alienation of Indian title evolved from the national and international law of the European nations that colonized the Americas. . . . [T]he so-called "discovering" European sovereign, or its successor by war or purchase, claimed the exclusive right to acquire Indian land. That restraint helped to

> keep the peace among the colonial powers and with tribes; it also helped control the pace of European settlement. While it fostered the policy that Indian land should be openly purchased, it also gave the sovereign vast power and a convenient way to reward favorites or to resell land at a profit.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §15.06[1] (2012, Matthew Bender & Company, Inc.).

In 1823, the Supreme Court, in *Johnson v. McIntosh*, 21 U.S. 543 (1823), was faced with the issue of the validity of transfers of interests in Indian lands through grants issued before the United States became independent, and before the enactment of Section 177. The Supreme Court articulated the legal foundation for Indian title to land and the federal government's authority to control title to land occupied by Indians:

> In the establishment of these relations [between the discover and the natives], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

Johnson v. McIntosh, 21 U.S. 543, 574(1823).

Beginning in the late 19th Century, Congress enacted a series of statutes that authorized the alienation of specific interests in Indian land. See, e.g., 25 U.S.C. § 311 (public highways); §§ 312-318 (railroad, telegraph, telephone line rights-of-way, and town site stations); § 319 (telephone and telegraph rights-of-way); § 320 (railway reservoirs or materials); § 321 (pipeline rights-of-way); § 323 (rights-of-way for any purpose); §§ 396a-396g (leases for oil and gas mining and permits to prospect); § 399 (leases for oil and gas mining and permits to prospect); § 399 (leases for mining purposes); § 407 (sale of dead and fallen timber); § 415 (leases of tribal land for public, religious, educational, recreational, residential or business purposes); §§ 416-416j (leases on Sand Xavier and Salt River Reservations); §§ 641-646 (authorizing Hopi Tribal Council to mortgage Hopi land for industrial park); 25 U.S.C. §§ 2100-2108 (mineral agreements)(hereinafter referred to collectively as the "Alienation Statutes"). All of those statutes required that the agreements alienating the interests in tribal land be approved by the Secretary in order to remove the Section 177 prohibition and be valid.

As the United States expanded and Indian tribes were forced to cede their land to the United States pursuant to treaties, unscrupulous non-

Indians entered into agreements with Indian tribes to act as their agents in assisting the tribes to receive money or other benefits promised to them by the United States in treaties and legislation. In reality, the alleged agents did little or nothing to benefit the tribes, but, instead took a large portion of the money due to the tribes for themselves. Recognizing the inflammatory effect on Indians of the actions of these alleged agents, in 1871, Congress enacted a statute that would eventually be codified as Section 81.

> Congress 'intended [*§ 81*] to protect the Indians from improvident and unconscionable contracts. . . . Specifically, Congress adopted *§ 81* to protect Indian tribes and individual Indians from persons, particularly attorneys and claims agents, offering dubious services, typically the assertion of the Indians' land claims against the government, in exchange for enormous fees.

Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 548 (1st Cir, 1997), citing *In re Sanborn*, 148 U.S. 222, 227 (1893) and CONG. GLOBE, 41st Cong., 3d Sess. 1483, 1483-1486 (daily ed. Feb. 22, 1871). See also, *Gasplus, L.L.C. v. United States Department of the Interior*, 510 F. Supp. 2d 18, 20 (D.D.C 2007), "'*Section 81* was enacted in 1871 in response to "claims agents and attorneys working on contingency fees who routinely swindled Indians out of their land, accepting it as payment for prosecuting dubious claims against the federal government.'" citing, *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 976 (8th Cir. 2001).

As originally codified, Section 81 stated, 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, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
> . . . It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

As will be discussed below, Section 81 was of limited importance or application until the advent of Indian gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA").

In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. § 461 et seq ("IRA"). The IRA was designed to protect the land base of tribes (which had been devastated by efforts to privatize tribal lands through the General Allotment Act, 24 Stat. 388) and to allow tribes to create legal structures to support tribal self-government. Among the most important sections of the IRA was section 16, codified at 25 U.S.C. § 476 ("Section 476). Section 476 states, in relevant part, "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution

adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ."

In 1953, Congress enacted Public Law 280, conferring Indian country jurisdiction on certain state courts. The statute preserved the federal restraint on alienation:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . 28 U.S.C. §1360(b).

In the 1980's Indians began conducting high stakes bingo on their lands. In 1988, Congress enacted the IGRA. The IGRA authorized gaming by Indian tribes on Indian land, 25 U.S.C. 2710(d)(1), which the IGRA defines as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4). Because of the phrase, "in consideration of services for said

Indians relative to their lands," contained in Section 81, as gaming on Indian lands became more common, issues arose as to whether contracts for the financing and management of tribal gaming operations were void if they had not been approved by the Secretary. The phrase "relative to their lands" took on much greater significance. Section 81 "has seen new life in recent years as Indian reservations have contracted with outside firms to build and operate bingo halls and casinos on their reservations." *Altheimer & Gray v. Sioux Manufacturing Corporation*, 983 F.2d 803, 805-806 (7th Cir. 1993). A number of courts interpreted Section 81 broadly, finding that it encompassed a wide variety of gaming related contracts, so long as their was arguably a connection to Indian lands. See, *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985) ("*Koberstein*"), *A.K. Management Company v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986) ("*A.K. Management*"), *United States v. D & J Enterprises*, 1993 U.S. Dist. LEXIS 19843 (W.D. Wis. 1993). The broad interpretation of the phrase was seen as protecting the interests of Indian and Indian tribes from predatory lenders and casino management companies who were able to convince desperate tribes to agree to pay them a high percentages of the profits from the gaming. See, e.g. *United States v. D & J Enterprises*, 1993 U.S. Dist. LEXIS at *4-*7. But

they were also seen to be a way for tribes to escape deals they had knowingly entered into, with disastrous consequences for the investor. See e.g. *A.K. Management* at 789. The litigation arising from Section 81, along with the dismissal of lawsuits based on contracts which did not contain a waiver of tribal sovereign immunity, also raised concerns that tribes' ability to engage in commercial activity with non-Indians was being stunted because they were being treated as unsophisticated wards of the United States, and that such a perception was inappropriate. S. Rep. No. 106-150, at 1 (1999).

As a result of these issues, in 2000, Congress amended Section 81, "to encourage Indian 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 1 (1999). The amendment was "an amendment in the nature of a substitute." *Id*. The new Section 81, while it was enacted against the background of the issues that arose from the original Section 81, was entirely unrelated to the purpose of the original Section 81, which, as discussed above, was to protect tribes from unscrupulous persons defrauding tribes while allegedly acting as their agents. The new Section 81 removed most transactions from the requirement for Secretarial approval. The new Section 81 provides that

"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." It also requires that any such agreements include specific provisions that either waived tribal sovereign immunity or alert parties to the fact that sovereign immunity could be used as a defense to any action to enforce the agreement. Section 81(d)(2).

This summary of the history of federal law relating to the ownership and control of Indian lands reveals that federal law has evolved from one in which Indian tribes' "relations to the United States resemble that of a ward to his guardian," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), to full participants in the modern economy of the United States who have control over their governments, economies, and land. The gradual emergence of Indian tribes as independent economic entities has led to the enactment of laws that acknowledge or grant tribes greater control over their activities and resources, including their land. Federal law has also evolved to allow tribes to use their land in more and different ways under a variety of legal arrangements, leases, rights of way, mining, and the development utilities. It would be inconsistent with this history to conclude that Congress intended in enacting the present section 81,to limit

a tribes' ability to determine how they will allow their own members to use their reservation trust lands.

II.
THE LAND ASSIGNMENTS ARE ENCUMBRANCES TO INDIAN LAND FOR A PERIOD OF MORE THAN SEVEN YEARS.

Title 25 of the United States Code § 81, as amended,[1] provides, in part:

> No agreement or contract with an Indian tribe that *encumbers* Indian lands for a period of seven 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.

25 U.S.C. § 81(b) (Emphasis added).

The term "encumber" is not defined in Section 81. The regulations enacted to implement Section 81, however, define the term:

> 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.*

25 C.F.R. § 84.002 (Emphasis added).

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[1]Section 81 was amended in 2000, P.L. 106-179, § 2, 114 Stat. 46 (March 14, 2000). As will be discussed in detail in Section I, above, the amended Section 81 amounts to a new statute that must be interpreted by its own terms, not based on the preceding version of the statute.

In *Gasplus, L.L.C. v. United States Department of the Interior*, 510 F. Supp. 2d 18 (D.D.C 2007), the only case that the Tribe is aware of that interpreted the amended Section 81 in detail, the District Court for the District of Columbia defined the term "encumbrance":

> The word "encumbrance" is a term of art in property law that has a fairly well-defined meaning. Black's Law Dictionary defines "encumbrance" as: "A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." *Black's Law Dictionary* 547 (7th ed. 1999). A leading treatise on real property states that "**[t]he term 'encumbrance' is broader than 'lien' and includes a variety of rights or interests in land (e.g. liens, easements, or restrictive covenants) which may diminish the value of the encumbered property but which are not inconsistent with the transfer of fee simple title**." 11 *Thompson on Real Property* § 93.03(a)(2) (2d ed. 1994). Similarly, under the Uniform Commercial Code, "'[e]ncumbrance' means a right, **other than an ownership interest, in real property.** The term includes mortgages and other liens on real property." *U.C.C. § 9-102(a)(32)*.

Gasplus, 510 F. Supp. 2d at 28. (Emphasis added.)

In interpreting Section 81, the *Gasplus* court described the effect of the amendments to Section 81:

> . . . the amendments changed the analytical focus from whether a contract is *related* to Indian lands to whether a contract gives a third party a legal *interest* in tribal lands that encumbers a tribe's ability to control the land as proprietor.

Id., 510 F. Supp. 2d at 33 (Emphasis Original).

Under both the 25 C.F.R. § 84.002 definition and the definition set forth in *Gasplus*, the Land Assignments are unquestionably encumbrances for the purposes of Section 81. The Recitals to the Land Assignment Ordinance specifically state that it was the intention of the Chemehuevi Tribal Council to grant nearly exclusive proprietary control over the tribal land to the Assignees: "The Council desires to establish a procedure by which *tribal members can acquire the right to use tribal land for residential purposes in a manner similar to how persons acquire an ownership interest in land off the Reservation in fee simple*." (Emphasis added.) E.R. p. 671, ¶ F. Each Assignment Deed grants the Assignee an exclusive right of use and possession of tribal land for the life of the Assignee and, upon the Assignee's death, to the Assignee 's heirs, if the heirs are members of the Tribe. E.R. pp. 676-679; 777-778, ¶ 10. A Land Assignment can only be terminated if the Assignee : (1) does not use the Land Assignment as a permanent or part-time residence; (2) attempts to convey an interest in the assigned lands, including a leasehold interest, without the consent of the Chemehuevi Tribal Council; (3) uses the property for the commission of a crime; or (4) uses the property in violation of tribal law. E.R. pp. 777-778 ¶ 10.

In order to ensure that the Assignees are able to protect their interest in their Land Assignments, the Assignment Deeds include a waiver of sovereign immunity, which allows an Assignee to enforce his/her interest in the Land Assignment should a future Tribal Council attempt to shorten or negate the land assignment. E.R. p. 293, ¶ 2. The Assignment Deeds also incorporate by reference the provisions of the Assignment Ordinance, to ensure that those provisions would be enforceable under a claim of breach of contract, should a future Tribal Council attempt to revoke an Assignment Deed for any reason other than those permitted under the Assignment Ordinance. *Id.*

Finally, Section 14.08.015 of the Assignment Ordinance requires the Chairman of the Tribe to execute all Assignment Deeds formally conveying the interest in the assigned land to tribal members who qualify for an Assignment. *Id.* This provision ensures that: (1) the present Assignment Ordinance and its provisions are incorporated into the terms of the Deed; and (2) the waiver of sovereign immunity in the Deed is unequivocally expressed, which will allow an Assignee to challenge a decision to revoke the Assignment by bringing an action in the Chemehuevi Tribal Court or, if the Tribal Court declines to hear the case, in any court of competent jurisdiction. *Id.*

Clearly, the Assignment Deeds grant to the Assignees a nearly exclusive claim to use and occupy tribal land, as well as a nearly exclusive right of entry to tribal land. Thus, there is no doubt that the Assignment Deeds executed by the Tribe to the individual Assignees are "encumbrances" for the purposes of § 81 and as defined in 25 C.F.R. § 84.002 . Because the encumbrances are for a period longer than seven years, the Land Assignment Deeds require Secretarial approval under § 81(b) and 25 C.F.R. § 84.003, unless they fall within one of the exceptions to the approval requirement.

The District Court concluded that the Land Assignments are "encumbrances" as that term is used in Section 81 and as defined in 25 C.F.R. § 84.002. The issue in this appeal, therefore, is whether the Secretary is prohibited from approving the Land Assignment Deeds because they violate Federal law.

III.

THE LAND ASSIGNMENTS DO NOT VIOLATE FEDERAL LAW.

Section 81 lists two exceptions to the requirement that the Secretary approve encumbrances of tribal land for a period of more that seven years:

> (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; or
> (2) does not include a provision that–
> (A) provides for remedies in the case of a breach of the agreement or contract;
> (B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or
> (C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

25 U.S.C. § 81(d).

The District Court concluded that the Secretary was prohibited from approving the Assignment Deeds on the ground that the Land Assignments violated Federal law, specifically Section 177.[2] Section 81 does not include any definition or explanation of what was intended by the phrase, "violates Federal law." The regulations merely restate the provisions of the statute.

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[2]The District Court did not conclude or even suggest that the Land Assignments do not contain the elements required by Section 81(d)(2). The Land Assignments provide for remedies in case of a breach in the form of a grant of tribal court jurisdiction over claims brought by Assignees to enforce the provisions of the Ordinance and the terms of the Assignment Deeds. They also contain an express waiver of the Tribe's immunity from suit. E.R. p. 293, ¶ 2. The District Court's conclusion that the Secretary was prohibited from approving the Land Assignments was based entirely on the conclusion that the Land Assignments violate federal law, specifically Section 177.

25 C.F.R. §84.006.The legislative history of the new Section 81, also provides no direct guidance on the issue.

The District Court concluded that the Land Assignments violated federal law, because they violate Section 177:

> . . . 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. . . . Accordingly, the unambiguous terms of the statute support the IBIA's conclusion that Secretary properly refused to approve the Land Assignment Deeds, because they were barred under Section 177.

Order, p. 24. E.R., p. 24.

25 U.S.C. §177 states, 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.

The District Court, in seeking to find a standard for interpreting agreements that violated Section 177, stated:

> There is relatively little case law addressing what constitutes a forbidden "conveyance" of land under Section 177. In *Tonkawa Tribe of Oklahoma v. Richards*, 75 F. 3d 1039 (10th Circuit 1996), which has been referred to as the "seminal case in the 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.

Order, p. 21. (Emphasis added). E.R., p. 21.

This standard has been recognized by a number of federal courts. See, e.g., *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983), *rev'd on other grounds*, 476 U.S. 498 (1986); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902 (D. Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 803 (D.R.I. 1976).

This is the only discussion in the District Court's Order that addresses the standard to be applied to determining whether a conveyance of an interest in Indians lands violates Section 177.

Careful examination of the documents that created the Land Assignments compels the conclusion that, while the Tribe and its Land Assignments meet the first three elements of the *Tonkawa* test, the Land Assignments do not meet the fourth criteria. Under the Tribe's Land Assignment Ordinance, the Tribe's title to the assigned land has not been "extinguished without the express consent of the United States." Although the Land Assignment Ordinance provides that the Land Assignments can

be passed on to an Assignee's heirs, the Land Assignments do not extinguish the Tribe's title. Section 14.08.010 of the Land Assignment Ordinance states: "An assignment granted under this Ordinance does not vest title to the property in the Assignee , but only grants the Assignee an exclusive right to use and possess the land under the terms and conditions of the Assignment." E.R., p. 676. The Land Assignment Ordinance also imposes an number of restrictions on the Assignee's use of the land. It provides that the land can only be used for residential housing purposes and provides for the relinquishment of the Land Assignment, cancellation of the Land Assignment for cause, circumstances under which the Land Assignment will escheat to the Tribe, and it authorizes condemnation by the Tribe. Additionally, an Assignee's interest in a Land Assignment can be relinquished, Section 14.08.030, or terminated where the Assignee violates the terms of the Land Assignment, Section 14.16.20. E.R., pp. 678; 682-683. The Land Assignment deeds incorporate the terms of the Land Assignment Ordinance. E.R., pp. 293-294. A Land Assignment Assignee, thus, is granted a restricted right to use the assigned parcel. The right continues only so long as the Assignee or his heirs manage the property in compliance with the Land Assignment Ordinance. Thus, the Deeds do not

convey any of the Tribe's underlying Indian title or ownership to the land. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

This analysis is consistent with the Department of the Interior's original evaluation of the Tribe's request for approval. In an opinion dated June 28, 2004, ("Opinion") Solicitor William Quinn[3] concluded that the Chemehuevi Land Assignments did not violate the Non-Intercourse Act, 25 U.S.C. § 177, because the Deeds did not convey full marketable title to the Assignee s and because they required Secretarial approval under 25 U.S.C. § 81 before becoming effective. E.R., p. 741 [AR, Vol. II, Tab 10, Confidential Memorandum dated June 28, 2004, to Wayne Nordwall, Regional Director, from William Quinn, Office of the Solicitor, Phoenix Field Office, p. 4.][4]

While the District Court cited to the *Tonkawa* decision, at no point in its analysis did the District Court conclude that, pursuant to the Land

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[3]Solicitor Quinn is the former attorney for the Bureau of Indian Affairs Office of Federal Acknowledgment and has written a number of law review articles in the area of Federal Indian Law. see, e.g. William W. Quinn Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37 (1992).

[4]Solicitor Quinn's opinion was submitted to the District Court in support of the Tribe's arguments. E.R. p. 738.

Assignments, "the Tribe's title or claim to the interest in land has been extinguished without the express consent of the United States." Clearly, the District Court was compelled to do so in order to find that the Land Assignments violated Section 177. Under the District Court's own analysis, therefore, the Land Assignments do not violate Section 177.

Because the Land Assignments are encumbrances, and because they do not violate Section 177 (and, therefore, do not violate Federal law), the Secretary was required to approve the Land Assignment Deeds. Because the District Court did no do so, its conclusion that the Land Assignment Deeds could not be approved by the Secretary is unquestionably an error of law and the District Court's judgment must be reversed on this basis alone.

IV.
IF THE *TONKAWA* STANDARD IS NOT APPLIED, SECRETARIAL APPROVAL IS REQUIRED FOR ALL AGREEMENTS GRANTING AN INTEREST IN TRIBAL LAND.

If the Court does not apply the *Tonkawa* standard, an entirely different analysis of Section 81, Section 177, and the effect of Secretarial approval of agreements would be required.

Assuming that the Court does not apply the *Tonkawa* standard, the issue that this Court must address arises from the second category: agreements that would violate federal law in the absence of Secretarial

approval. This category would include agreements that would violate the provisions of 25 U.S.C. § 177, if a literal interpretation of Section 177, not the *Tonkawa* interpretation, is applied. The critical language from Section 177 is: "**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."

A literal reading of this provision would compel the conclusion that Indian tribes are prohibited from conveying any interest in tribal land unless the transaction is made by treaty or convention. Section 177's prohibition is not restricted to extinguishment of title: it specifically lists grants, leases or other conveyances of "any title or claim" to Indian land.

The Section 177 prohibition on agreements granting an interest in Indian land eventually became an impediment to public works activities, such as the creation of road systems, the expansion of utility systems, and the commercial development of tribal resources for the benefit of the tribes. Congress, therefore, enacted a number of Alienation Statutes that permitted parties to obtain an interest in tribal land.[5] Those Alienation

[5]Over time, the provision requiring a "treaty or convention" came to be understood to mean a treaty, convention, or act of Congress:

Statutes applied to numerous interests in tribal land, among them, leases of tribal land for general purposes, 25 U.S.C. §415; leases for grazing and mining, 25 U.S.C. § 397; rights-of-way for general purposes, 25 U.S.C. §323; rights-of-way for highways, 25 U.S.C. § 311; rights-of-way for railroad, telegraph, and telephone lines, 25 U.S.C. § 312; and rights-of-way for pipelines, 25 U.S.C. §321. The effect of each of these Alienation Statutes was to permit what would otherwise be prohibited by Section 177.

All of these statutes require that the agreements granting an interest in tribal land be approved by the Secretary of the Interior. Without the Secretary's approval, any agreement entered into pursuant to the Alienation Statutes would violate Section 177. The very existence of the Alienation Statutes is evidence that Congress does not regard Section 177 as an absolute prohibition on the granting of interests in tribal land. Congress has repeatedly found it necessary and permissible to create exceptions to

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> "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, *without the consent of Congress*, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent."

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) (Emphasis added).

the Section 177 prohibition and, in every case, that exception was implemented through Secretarial approval.

The problem is that there are agreements that Indian tribes may wish to enter into that are not covered by the Alienation Statutes. This is where Section 81 applies. The foregoing discussion of the history of Section 81 demonstrates that the interpretation of the original Section 81 evolved to be far broader than the original intention of Congress. A number of federal courts explicitly recognized Section 81's role as a catch-all mechanism for addressing agreements that are not encompassed within the Alienation Statutes. In *Koberstein*, the Seventh Circuit stated: "[W]e hold that section 81 governs transactions relative to Indian lands for which Congress has not passed a specific statute." *Koberstein*, 762 F.2d at 619, (citing to the Alienation Statutes as examples of the specific statutes, *Id.*, at fn. 5.). See *Altheimer & Gray v. Sioux Manufacturing Corporation*, 983 F.2d at 805; *A. K. Management*, 789 F.2d at 787, fn 2.

If one analyzes the definition of "encumbrance" as defined by 25 C.F.R. § 84.001 in light of the prohibition contain in Section 177, it becomes clear that the District Court's interpretation of Section 81 is incorrect because the interpretation taken literally would render Section 81 in its present form a nullity.

The regulation defines "encumbrance" as any "claim, lien, charge, right to entry, or liability to real property," including "leasehold mortgages, easement, and other contracts or arguments that by their terms could give to a third party exclusive or nearly exclusive propriety central over tribal land." 25 C.F.R. § 84.002. Thus, any agreement that merely gives a party a right to enter trust land, let alone exclusive control over trust property, is an "encumbrance" under Section 81 as defined by the regulation.

Yet a literal reading of Section 177 prohibits any "claims" to Indian lands based upon any "conveyance" or "grant" from any Indian Tribe. 25 U.S.C § 177.

Given the broad coverage of the prohibition contained in Section 177, there is conceivably no "encumbrance" as defined by § 84.002, that would not be prohibited by Section 177, absent Congressional approval.

If the District Court's interpretation of Section 81 is correct, it renders Section 81 a nullity because the Secretary is prohibited from approving any "encumbrance" that violates Section 177.

Since all encumbrance as defined by § 84.002 are prohibited by Section 177, there would be no "encumbrances"for the Secretary to approve, rendering the statute meaningless.

In addition, the new Section 81 is, for all intents and purposes, a new statute, but it was enacted against the background of the court interpretations of the former Section 81. The amendedSection 81 reduces the number and type of agreements that must be approved by the Secretary. Section 81 now applies to any encumbrance of tribal land of seven or more years that are not encompassed by the Alienation Statutes. This is evident from the definition of "encumbrance" in 25 C.F.R. § 84.001: "[C]ontracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land." Clearly, any interest in tribal land that gives a third party "exclusive or nearly exclusive proprietary control over tribal land" would fall within the reach of Section 177.

The District Court, nevertheless, concluded that the Land Assignments cannot be approved, because they would violate Section 177: "Here, there is no provision [of the Amended Section 81] corresponding to (and altering the application of) Section 177. Instead, Section 81 expressly *prohibits* the approval of any contract that violates federal law." Order, p. 30, E.R., p. 30.

Before the District Court, the Tribe argued there are no agreements that grant "exclusive or nearly exclusive proprietary control over tribal

land" for a period of seven or more years that would not violate Section 177. The Tribe further argued that, if the courts were to accept the IBIA's conclusion that Section 81 does not empower the Secretary to approve encumbrances that would otherwise violate Section 177, Section 81 would be rendered a nullity. Finally, the Tribe argued that all of the agreements permitted under the Alienation Statutes would also violate Section 177 because their validity is dependant on the Secretary's approval, and the conclusion that the Secretary's approval is not sufficient to remove it from the Section 177 prohibition would undermine that validity.

The District Court found that there are a number of agreements that would qualify as an encumbrance under Section 81 without violating Section 177. The District Court cited as an example a life estate in a parcel of Indian land and then quoted examples of such agreement set forth in the commentary to the regulations implementing the Amended Section 81:

> 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. 38920-38921.

The problem with these examples is that, if the Court does not restrict its interpretation of Section 177 to the *Tonkawa* criteria, all of the agreements listed by the District Court violate the plain wording of Section 177, because they all convey some interest in Indian land.

If the Tribe's interpretation is correct then the question the Court must ask is: To what types of agreements does the phrase "violate Federal Law" apply?

It is the Tribe's interpretation that there are two categories of agreements that the phrase "violates Federal law" in Section 81(d)(1) could conceivably encompass. The first category is contracts that would violate federal law under any circumstances. An obvious example of this kind of agreement would be an agreement granting an interest in tribal land for the construction of a landfill that violated the Clean Water Act, 33 U.S.C. § 1251, et seq. Such a agreement is not at issue here.

It is beyond debate that the Secretary is not empowered to approve, and thereby legitimize, agreements that are violations of criminal law or against public policy. *McMullen v. Hoffman*, 174 U.S. 639, 669 (1899). There is also no doubt that restricting the application of Section 81 to

exclude such agreements would be consistent with the plain wording of the statute.

Finally, the second category is contracts that would violate federal law *but for* Secretarial approval. As the foregoing analysis demonstrates, it would be contrary to the purpose of Section 81 and the history of Section 177 and the Alienation Statutes to conclude that "violates federal law" was intended to exclude the very agreements to which Section 81 was designed to apply.

Because the District Court's interpretation of Section 81 and Section 177 would render Section 81 a nullity and because the phrase "violates federal law" can be interpreted in such a way as to uphold the validity of the statute, this Court should reverse the District Court by adopting the Tribe's interpretation of the two statutes.

V.
THE DISTRICT COURT'S RULING WAS BASED ON SIGNIFICANT MISINTERPRETATIONS OF THE TRIBE'S ARGUMENT.

The District Court's ruling was based on at least two significant misunderstandings of the Tribe's argument. The Tribe believes that those misinterpretations must be corrected in order for this Court to properly understand the Tribe's analysis of the issues in this case.

One of the fundamental elements of the District Court's rejection of the Tribe's analysis was that the Tribe effectively argued that Section 81 had the effect of repealing Section 177. Order, p. 20; E.R. p. 20. Before the District Court, the Tribe argued that Section 81 should be interpreted to grant the Secretary the authority to authorize agreements granting encumbrances beyond those over which the Secretary has been granted the specific authority to approve, such as leases, 25 U.S.C. §415; rights of way, 25 U.S.C. § 323; and mining, 25 U.S.C. §397. The argument that Section 81 provides a catch-all for agreements not include in the specific Alienation Statutes does not compel the conclusion that Section 81 repeals by implication Section 177, any more than the Alienation Statutes. On the contrary, the requirement that the Secretary is required to approve agreements under Section 81 and the Alienation Statutes is premised on the efficacy of Section 177. There would be no need for Secretarial approval of those agreements if they were not prohibited by Section 177. Thus, not only is the conclusion that Section 81 was repealed by implication not compelled by the Tribe's argument, it is in direct conflict with the Tribe's argument.

The reason that this element of the District Court's decision merits discussion here is that it was a fundamental element of the District Court's

conclusion that Secretarial approval pursuant to Section 81 does not have the effect of exempting the approved agreements from the Section 177 prohibition. Had the District Court properly understood the Tribe's argument, its analysis would have been entirely different.

The second misinterpretation was that the Tribe argued that Section 81 should be read broadly, not narrowly. Order, p. 19; E.R., p. 19. There is no question that the new Section 81 was intended to narrow and clarify the application of Section 81, by eliminating the confusion arising from the phrase "in consideration of services for said Indians relative to their lands." The parties as well as the District Court acknowledge that the Land Assignments fit within 25 C.F.R. § 84.001's definition of encumbrances. The Tribe's argument that the Land Assignments do not violate Section 177 is intended to clarify that the term "encumbrances" should be interpreted to permit Tribes to use tribal land in ways that are consistent with their powers of self-government and an Indian tribe's modern participation in the larger economy. The broad interpretation, if there is one, is of the Tribe's options for use of tribal land and the Tribe's tools of self-government, not of the limitations arising from the need for Secretarial approval. That interpretation is consistent with the explicit goals of Section 81 ("Encouraging Indian Economic Development, to Provide for the

Disclosure of Indian Tribal Sovereign Immunity in Contracts Involving Indian Tribes, and for Other Purposes"). The District Court's interpretation does not narrow the reach of Section 81, and thereby encourage tribal governmental and economic independence, it perpetuates the limitations on tribal activities that dominated the United States policies of the late 18th Century, policies that have been rejected by Congress.

VI.
THE DISTRICT COURT ERRED BY FAILING TO APPLY THE INDIAN CANONS OF STATUTORY CONSTRUCTION IN INTERPRETING 25 U.S.C. §81.

There is not doubt, that the United States maintains a trust relationship with Indians and Indian tribes. "This principal has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). See, *United States v. Mason,* 412 U.S. 391, 398 (1973); *Minnesota v. United States,* 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe,* 304 U.S. 111, 117-118 (1938); *United States v. Candelaria,* 271 U.S. 432, 442 (1926); *McKay v. Kalyton,* 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock,* 185 U.S. 373, 396 (1902); *United States v. Kagama,* 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia,* 30 U.S.1 (1831). The nature of this trust relationship was eloquently stated by the Supreme Court:

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. **Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards**.

Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942) (Emphasis added).

The federal government's fiduciary responsibility toward Indians exists independent of an express provision of a treaty, agreement, executive order or statute. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 991 (Ct. Cl. 1980).

Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Morton v. Ruiz*, 415 U.S. 199 (1974); *McNabb v. Bowen*, 829 F. 2d 787 (9th Cir. 1987); *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

> When the Congress legislates for Indians only, something more than a statutory entitlement is involved. **Congress is acting upon the premise that a special relation is involved,**

> **and is acting to meet the obligation inherent in that relationship.**

White v. Califano, at 557. (Emphasis added).

Based on the federal government's fiduciary obligations to Indians and Indian tribes, the Supreme Court has developed canons of construction requiring that federal law must be read as protecting Indian rights and in a manner favorable to Indians ("Indian Canons"). The Supreme Court adheres to "the general rule that statutes passed for the benefit of the dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985) ("*Blackfeet").*

When Indian rights are shown to exist, later federal action which might arguably abridge them is construed narrowly in favor of preserving Indian rights. The Supreme Court requires a "clear and plain statement" of Congressional intent before abrogating Indian treaty rights or Indian rights arising from statutes. *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). See *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982).

This Court has held that the Indian Canons are

> somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian - a status accompanied by fiduciary obligations. . . . While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

Based on the fiduciary obligations of the federal government, the Supreme Court has ruled that courts must apply the Indian canons of statutory construction to resolve ambiguities in statutes passed for the benefit of Indians, rather than canons of construction applicable in other contexts:

> **[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law**. . . . [T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

Blackfeet, 471 U.S. at 766. (Emphasis added).

The Supreme Court's conclusion that "standard principles of statutory construction" are not to be applied to statutes passed for the benefit of Indians encompasses the deference given to an agency's interpretation of a statute under decisions such as *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984) ("*Chevron*"), decided a year before *Blackfeet*. This is so because the Indian Canons are not merely canons of construction, but a fundamental aspect of the trust relationship between the federal government and Indian tribes.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court recognized that Indians have faced outrageous treatment and deprivations of property and rights at the hands of officials of the federal government, state governments, and private persons and entities. Federal Courts have repeatedly found that federal officials and agencies cannot be trusted to consistently make fair decisions with regard to the interests of Indians. The Indian Canons arise from the Court's conclusion that Indians and their interests must be protected from, among others, federal officials. See, e.g. *Duncan v. United States*, 517 F. Supp. 1 (N.D. Cal. 1977).

Chevron deference is premised on the notion that agencies and their officials have expertise that others, including the courts, lack with regard to

the matters within the agencies' jurisdiction. "[An] agency's interpretation is generally accorded *Chevron* deference because the agency has superior expertise in the particular area." *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997). Allowing that premise to protect federal agency decisions that are damaging to the interests of Indians is in direct conflict with the foundation of the Indian Canons: federal officials *cannot be trusted* to make the right decision on matters of Indian rights and property. See, e.g. *Cobell v. Norton*, 240 F.3d 1081(D.C. Cir. 2001).

Chevron deference to interpretations that conflict with the interests of Indians is also incompatible with the fiduciary relationship between the federal government and Indian tribes upon which the Indian Canons are based. As fiduciaries, federal officials are not permitted to interpret treaties, statutes, or regulations to the detriment of the Indians they are required to protect. To do so would be to violate their fiduciary obligations. *Seminole Nation v. United States*, 316 U.S. at 296-297.

The Indian Canons must be applied, moreover, not because the Indian's interpretation is always the best interpretation of the statute, but because the Indian Canons require this Court to adopt the Indians interpretation.

> Application of the *Blackfeet* presumption is straightforward. We are confronted by an ambiguous provision in a federal

> statute that was intended to benefit Indian tribes. One construction of the provision favors Indian tribes, while the other does not. We faced a similar situation in the context of Indian taxation in *Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002)*. In choosing between two characterizations of a tax law "plagued with ambiguity," we adopted the construction that favored the Indian Nation over the one that favored Grays Harbor County, noting that "it is not enough to be persuaded that the County's is a permissible or even the better reading." *Id. at 647*. Here, we must follow a similar approach. We adopt Defendants' construction, not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes.

Artichoke Joe's Ca. Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

Here, the Secretary's refusal to approve the Land Assignments pursuant to Section 81 has the effect of restricting the Tribe's ability to use its Reservation trust lands in a manner that the Tribe has concluded is in the best interests of the Tribe and its members. E.R. pp. 671-672; ¶¶ E-H; 777-778, ¶¶ 10-13. The lack of approval will prevent tribal members from making the investment in their Reservation homes that would allow the tribal members to make the Reservation their full time residence. E.R. p.672, ¶ H; 774, ¶ 22; 778, ¶¶ 12-13 . The Tribe's efforts to both draw tribal members back to the Reservation and improve the quality of housing and thereby the quality of life on the Reservation will be stymied. E.R. pp. 671-

672; ¶ H; 778, ¶ 12. The foregoing discussion has made it clear that an interpretation that approval of the Land Assignments under Section 81 is compelled because the Land Assignments are encumbrances and they do not violate Section 177, because they do not extinguish the Tribe's underlying beneficial Indian title to its lands.

Moreover, Section 81 and Section 177 must be read in pari materia with other statutes relating to the ownership and use of tribal lands and tribal self-governance. In particular, Section 81 and Section 177 must be read together with 25 U.S.C. §476.

The Indian Reorganization Act, 25 U.S.C. § 476 ("§ 476"), was enacted by Congress to stop the alienation of tribal land through the General Allotment Act and to bring an end to the BIA's bureaucratic control over tribal lands. *Coyote Valley Band of Pomo Indians v. United States* 639 F. Supp. 165 (N. D. Cal 1986)

By enacting 25 U.S.C. § 476, Congress directly delegated and vested in IRA tribes the authority to prevent the alienation and "encumbrance" of their lands. Encompassed with the authority to prevent the alienation and encumbrance of tribal lands, is the authority to determine the terms and conditions under which such encumbrance will take place. This is exactly what the Chemehuevi Tribe has done in this case.

In 1993, the Tribe approved a Constitution. Article VI, Section 2 (f)of the Constitution expressly authorizes the Tribal Council to make assignments of Tribal lands to its members. Pursuant to the authority granted to him by § 476, the Secretary approved the Tribe's Constitution. Approval of the Constitution by the Secretary is an expressed finding by the Secretary that the provisions contained in the Constitution, including the Tribe's authority to make assignments of tribal lands to its members, do not violate federal law. 25 U.S.C. § 476 (d)(1).

Furthermore, there are only three federal laws that use the terms "encumbrance" or "encumber", they are: 25 U.S.C. § 81, 25 U.S.C. §476 and 25 U.S.C. § 1360.[6] Of these statutes only Section 81 and Section 476 deal specifically with the authority to approve encumbrances of Indian land. The first, Section 81, prevents a Tribe from entering into any agreement that encumbers a tribes land where the agreement has not been approved by the Secretary. The Second, is a Congressional delegation of authority to an IRA tribes to prevent the "encumbrance" of their lands without their consent. Because both statutes deal with the terms and conditions under which

[6]Title 28 of the United States Code § 1360, grants to state courts limited civil jurisdiction to resolve disputes arising on Indian reservations. The statute specifically denies states courts the authority to adjudicate any interest in trust land , including any encumbrances.

Indian lands can be encumbered, they should be read together in order to ensure that the purpose and meaning of both statutes are fulfilled. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-413 (1968).

Given that the purpose of Section 476 is to promote tribal self-government and to vest in IRA tribes the authority to determine under what conditions their lands can be encumbered, Section 81 should be interpreted in light of this backdrop and in a manner that upholds the right of tribe's to determine whether their lands will be encumbered and the extent and nature of such encumbrance, subject to Secretarial approval.

A reading, in pari materia, of Section 81 and 479 in this manner would dictate that the phrase "in violation of federal law" would not include violations of Section 177, because to do so would preclude the IRA tribe's from being able to make an assignment of its lands for more than seven years to its members and diminish its right to determine under what circumstances its reservation land would be encumbered.

VIII.

EQUITABLE CONSIDERATIONS FAVOR THE TRIBE.

Within living memory, the federal government flooded all of the arable land within the Chemehuevi Indian Reservation to create Lake

Havasu, forcing the members to relocate and seek work elsewhere. E.R. p.776, ¶ 4.

The Tribe has spent decades trying to reverse the catastrophic effect of that diaspora. Nevertheless, out of a population of 1,043 members, only 154 now live on the Reservation. Tribal members remain reluctant to return to the Reservation, in large part because they have invested their savings in their off-reservation homes. For tribal members to sell those homes and return to the Reservation, or even to make the substantial investment necessary to build a part time dwelling of reasonable quality on the Reservation, they must know that they are investing in a Reservation home that will remain theirs and that of their heirs. The Tribe concluded that the only way to convince tribal members living off-reservation to make the substantial investment necessary to construct quality homes on the Reservation and uproot and move back to the Reservation was to grant as close to a fee simple absolute interest in parcels of tribal land as tribal and federal law would allow. E.R. pp. 671, ¶ F; 777-778, ¶¶ 10-13. The Tribe, therefore, enacted the Land Assignment Ordinance that authorized the Chemehuevi Tribal Council to grant tribal members permanent Land Assignments through Assignment Deeds.

Pursuant to the Land Assignment Ordinance, the Tribal Council granted Land Assignments to the qualifying tribal members who applied. Because the Land Assignment Deeds granted the Assignees the right to enter and use Tribal land for more than seven years, the Tribe sought Secretarial approval of the Deeds, pursuant to 25 U.S.C. § 81. Approval by the Secretary is not only required by both federal and tribal law, it would ensure that the Assignees are able to demonstrate to financial institutions that they have a sufficient interest in the land to justify a mortgage or other loan.

The Tribe has determined that in order to make its Reservation a true homeland for its members it needed to have its members move back to the Reservation. To accomplish this goal it devised a land tenure system that provides an incentive to its members to sell their off reservation homes and take the profits from those homes and invest it in building homes on the Reservation.

Even in today's economy, tribal members living off the Reservation would be able to sell their homes for hundreds of thousands of dollars. The Tribal Council determined that tribal members would not invest that money building homes on the Reservation knowing that there was a possibility that at the end of a lease period, the lease may not be renewed

and the land that their homes was located on might be leased to someone else.

To remedy the problem the Tribal Council enacted the Land Assignment Ordinance that allows Tribal Member Assignees to occupy tribal land for the purpose of building homes on the Reservation and upon their death allow the Assignees heirs to inherit the Land Assignment.

If the Court finds Section 81 to be ambiguous, it should interpret the statute is such a manner that upholds tribal rights, tribal sovereignty, and the right of the Tribe to enact its own laws and be ruled by them. *William v. Lee*, 358 U.S. 217 (1959). Such an interpretation would fulfill the purpose for which the Reservation was created and further Congress's policy of promoting tribal self-government.

CONCLUSION

The non-Intercourse Act does not preclude the Secretary from approving the Land Assignments because the Assignments Deeds do not divest the Tribe of its beneficial ownership of its land. In addition, even if this Court assumes that the phrase "federal law" in Section 81 includes Section 177, the Secretary's approval of the Assignment Deeds remedies the Section 177 prohibition.

The Tribe has determine that in order to make the Reservation a true homeland for its members, the Tribal Council must have the authority to grant land assignments to its members for an indefinite period of time. The Secretary should not be allowed to substitute his decision for that of the Tribe.

For these reasons and the reasons stated above this Court should reverse the District Court and declare that the Secretary has an obligation under Section 81 to approve the Tribe's Assignment Deeds.

DATED: March 18, 2013

Respectfully submitted,

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*

Lester J. Marston, Attorney for the Tribe and the Assignees

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,936, words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 12; font 14 and style: Georgia.

Dated: March 18, 2013

/s/ Lester J. Marston
LESTER J. MARSTON, Attorney for Appellants, Chemehuevi Indian Tribe and the Assignees

STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28.2.6

Appellant's are unaware of any pending related cases before this Court as defined in Ninth Circuit Rule 28-2.26.

DATED: March 18, 2013

Respectfully submitted,

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*

Lester J. Marston, Attorney for the Tribe and the Assignees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing:

APPELLANT'S OPENING BRIEF and EXCERPTS OF RECORD,

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellant CM/ECF system on March 18, 2013.

I certify that all the participants in the case are registered CM/ECF users and that service will be accomplished by the appellant CM/ECF system.

/s/ Brissa De La Herran

Brissa De La Herran