DOCKET NO. 12-56836

In the

United States Court of Appeals

For the

Ninth Circuit

CHEMEHUEVI INDIAN TRIBE, et al.,

Plaintiffs-Appellants,

v.

SALLY JEWEL, in her official capacity as Secretary of the United States Department of the Interior,

Defendant-Appellee,

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

REPLY 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The argument set forth in the Federal-Defendant-Appellee's ("Government") Response Brief ("Response") can be summarized as follows: (1) the Chemehuevi Indian Tribe's ("Tribe") Land Assignment Deeds ("Assignment Deeds") issued to its members ("Assignees") are not merely encumbrances, but convey such extensive interests in the Tribe's land that they cannot be approved by the Secretary of the Interior ("Secretary") under 25 U.S.C. § 81 ("Section 81") because to do so would violate 25 U.S.C. § 177 ("Nonintercourse Act"), Response, p. 23; (2) that the Tribe's interpretation of Section 81 would result in the repeal of the Nonintercourse Act by implication with respect to "any transaction that results in an "encumbrance" of Indian lands greater than seven years in length", Response, p. 28; (3) Section 81 does not contain a clear Congressional delegation of authority to the Secretary to approve an encumbrance that conveys "in perpetuity an exclusive possessory interest in a tribe's lands", Response, p. 40; and (4) the Indian Canons of Statutory Construction ("Canons") are inapplicable in this case, because the Tribe's interpretation of Section 81 does not benefit specific Indian interests, Response, p. 47.

In this reply brief the Tribe and Assignees will show that: (1) the Assignment Deeds are "encumbrances" as defined by the Secretary's own regulations and therefore are "encumbrances" withing the meaning of Section 81; (2) the Assignment Deeds do not convey exclusive unconditional possessory interests in the Tribe's reservation trust lands ("Reservations") that run afoul of the purposes for which the Nonintercourse Act was enacted; (3) the Secretary's approval of the Assignment Deeds, consistent with the conditions of approval contained in Section 81, constitutes the Congressional approval necessary to remove the Nonintercourse Act prohibition; (4) the Tribe's interpretation of Section 81 does not result in an implied repeal of the Noninterourse Act, rather, it is consistent with the purpose and plain wording of the Act and (5) the Canons establish and repeatedly affirmed by the Supreme Court require that this Court resolve all ambiguities contained in Section 81 in favor of the Tribe and Assignees.

STATEMENT OF FACTS

In its Response, the Government misstates and fails to mention a number of essential facts of this case. In order to correct these omissions and misstatements and to clarify the issues before the Court, the Tribe and

Assignees believe that it is necessary to set forth the significant facts omitted or misstated by the Government in its Response.

On February 2, 1907, the Secretary, pursuant to the authority granted to the Secretary under the amendments to the Mission Indian Relief Act, 26 Stat. 712 (January 12, 1891), and the Congressional Appropriations Act, 34 Stat. 1015 (March 1, 1907), issued an order creating the Chemehuevi Indian Reservation ("Reservation").

As originally created, the Reservation included the Chemehuevi Valley, a deep, sheer-walled, low lying valley through which the Colorado River ran, containing lush vegetation and rich soil deposits suitable for agricultural production. E.R. pp. 775-776, ¶ 3-4.

Pursuant to the authority granted to the Secretary by the Parker Dam Act, the Secretary condemned all of the valuable bottom land of the Reservation in order to construct the Parker Dam and create Lake Havasu. Kappler, Charles J., *Indian Affairs Laws and Treaties*, ("Kappler"), Vol. VI, pp. 88-89 (54 Stat. 744).

The creation of the Dam flooded all of the low lying valley bottom lands of the Reservation, where all of the Indians lived, forcing them to

relocate off the Reservation to metropolitan areas where they could get work. E.R. pp. 775-776, ¶ 3-4.

The remaining Reservation land consists of high desert mesas. E.R. p. 776, ¶ 7.

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.

In 1976, the Tribe reorganized its tribal government and adopted a written constitution, pursuant to the provisions of the Indian Reorganization Act, 25 U.S.C. § 476, ("IRA") which was subsequently approved by the Secretary. E.R. p.776, ¶6.

By enacting the IRA, Congress expressly delegated to IRA tribes, like the Chemehuevi, the authority to "prevent the ... encumbrance of tribal lands, [and] interests in lands... without the consent of the tribe..." 25 U.S.C. §476 (e).

The Tribe's Constitution, as approved by the Secretary, expressly authorizes the Tribe to: (1) reject "any... encumbrance... of tribal lands or property"; (2) to "make, administer, and revoke assignments of tribal lands to members of the Tribe"; (3) to "prescribe procedures governing distribution of property and the use of property by the spouse of a deceased

member with no children who are members"; and (4) to "promulgate codes or ordinances on land". E.R. pp. 403-404. Constitution of the Chemehuevi Indian Tribe, Article IV, Section 2.

Pursuant to the Congressional delegation of authority contained in the IRA and the Tribe's Constitution, which was affirmatively approved by the Secretary, the Tribe enacted a series of ordinances subdividing and zoning a portion of the Reservation and authorizing the Tribe to convey to its members land assignments within the subdivision. E.R. p. 414; E.R. p. 776-777, E.R. p. 784.

The Tribe adopted the ordinances as an incentive to persuade tribal members to move back to the Reservation. E.R. pp. 778-780, ¶ 14-20.

Under the Tribe's Land Assignment Ordinance, any member of the Tribe can apply to use a parcel of the Tribe's Reservation trust lands located within the subdivision zoned "R-1 Residential Tribal Members Only" ("Land Assignment"). E.R. p.776-777, ¶ 9.

Under the terms of the Land Assignment, Subdivision, and Zoning Ordinances (collectively the "Ordinances"), tribal members are prohibited from using the property for any purpose other than to construct a single family dwelling ("Home") on the Land Assignment. E.R. p. 416. Under the Ordinances, the Tribe comprehensively regulates the construction of the

Home, the use and development of the property, and enforces the Tribe's regulations governing the Land Assignments.

Tribal members have to construct the Home in accordance with Uniform Building Code Standards, and comply with lot coverage, height restrictions, landscaping requirements and noise restrictions, set forth in the Tribe's Zoning Ordinance. In addition, the Assignee can only use the Land Assignment in accordance with all applicable tribal laws, and cannot use the Land Assignment in the commission of any crime. E.R. pp. 414-429.

Under the Land Assignment Ordinance, the Tribe does not convey any of the United States' or the Tribe's underlying title to the land. E.R. p. 419. The Assignment Ordinance expressly provides: "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. Such right of use and possession will terminate upon cancellation of the Assignment by the Tribal Council, relinquishment of the Assignment by the Assignee, or upon the death of the Assignee." E.R.p. 419.

An Assignee is prohibited from transferring any right, title or interest in the Land Assignment to any person, except another Tribal Member, and only with the express approval of the Tribe's Tribal Council. E.R. p. 420.

If an Assignee dies, the Assignee's Assignment, and the Home constructed on the Land Assignment can be inherited by the Assignee's heirs, provided they are members of the Tribe. E.R., p. 421. If the Assignee dies without an heir, the Land Assignment, and the Home located on it, revert back to the Tribe. E.R. pp. 421-422.

The Land Assignment can be cancelled by the Tribe if the Assignee or any members of his/her household commit any of the following violations:

> A. Transferring, assigning or exchanging an Assignment without the approval of the Tribal Council; B. Illegally granting an easement, right-of-way, leasehold interest or any interest across or the Assignment; C. Removing permanent improvements which are part of the real property of the Assignment without the prior approval of the Tribal Council; D. Creating a public nuisance that endangers life or property and which the Tribe abates by order of a court of competent jurisdiction; E. Failure to establish residence or occupation within the time period specified in the Ordinance; F. The Assignee committing or allowing another person(s) to commit a felony or a misdemeanor on the Assignment; G. Continued non-use of the Assignment for the period set forth in the Ordinance; H. Failure to comply with a lawful order of the Tribal Council regarding the Assignment; I. Asserting in any court or arbitration proceeding that the Reservation was not lawfully created...

E.R. pp. 425-426.

In addition, even if an Assignee uses his or her Land Assignment in accordance with the Ordinances, the Tribe can cancel the Land Assignment for a tribal purpose, provided that the Tribe pays the Assignee for the improvements the Assignee made to the Land Assignment. E.R. pp. 422-423.

Finally, all "harvestable timbers and mineable minerals, including sand, gravel, oil, gas, geothermal energy and other natural resources located on" the Land Assignment are expressly reserved for development by the Tribe. E.R. p. 428.

Taken together the Ordinances make it clear that the Land Assignments do not convey or alienate the United States' or the Tribe's title to the land. The Assignee only receives a conditional right to use the land to build a Home and live on it. The Land Assignment is subject to extensive regulation by the Tribe during the period of the Assignment and can be cancelled by the Tribe if the conditions of the Assignment are not met or if the Tribe needs the property for tribal purposes.

With these facts in mind, the Tribe and Assignees will now address each of the arguments raised by the Government in its Response.

ARGUMENT

I.

THE ASSIGNMENT DEEDS ARE "ENCUMBRANCES AS DEFINED BY THE SECRETARY'S OWN REGULATIONS AND, THEREFORE, ARE ENCUMBRANCES WITHIN THE MEANING OF SECTION 81.

In its Response, the Government seems to imply that the Tribe's Assignment Deeds are not really "encumbrances" within the meaning of Section 81 because they "convey a property interest in excess of a mere encumbrance". Response, p. 29. The problem with the Government's argument is that it conflicts with the plain wording of Section 81 and the Secretary's own regulations defining the term "encumbrance".

Section 81 provides:

> No agreement or contract with an Indian tribe that encumbers Indian land for a period of 7 or more years shall be valid unless the agreement or contract bears the approval of the Secretary of the Interior...

25 U.S.C. § 81 (b).

Under Section 81, Congress expressly authorized the Secretary to "issue regulations for identifying types of agreements or contracts that are not covered under subsection (b)". 25 U.S.C. § 81 (e).

Pursuant to this authority, the Secretary has promulgated detailed regulations defining the term "Encumber" and specifying what types of contracts or agreements do not require Secretarial approval under Section 81. 25 C.F.R. Part 84.

Title 25 of the Code of Federal Regulations Section 84.002 defines the term "Encumber" very broadly to include any:

> ...claim, lien, charge, right of entry or liability to real property, (referred to generally as encumbrances).

25. C.F.R. § 84.002.

Thus, as defined by the Secretary, granting a third party the mere "right" to "enter" the "real property" of an Indian tribe for "a period of 7 or more years" is an encumbrance within the meaning of Section 81.

The regulation goes on to identify the types of agreements that would be considered "encumbrances" within the meaning of Section 81.

> Encumbrance covered by this part may include household 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).

By enacting 25 C.F.R. § 84.002, the Secretary made it clear that any contract that grants a third party "nearly exclusive proprietary control over

the tribal land" of a tribe is an "encumbrance" within the meaning of Section 81.

Under the Assignment Deeds, the Assignee is granted the "right" to "enter" the Tribe's trust lands, construct a Home on the property and live in the Home on the property to the exclusion of the Tribe and its other members, provided however, that the Assignee complies with the terms and conditions of the Land Assignment Ordinance and other applicable tribal law.

Given the broad definition of the word "encumbrance" and "encumber" as defined by 25 C.F.R. § 84.002 there is little doubt that the right of use and occupancy granted to an Assignee under a Land Assignment Deed is an "encumbrance" as that term is used in Section 81.

Any doubt as to whether the Assignment Deeds are "encumbrances" within the meaning of Section 81, is resolved by the history of the promulgation of the regulations. As originally drafted, the Secretary specified that Section 81 would not apply to tribal land assignments. On July 14, 2000, the Secretary published in the Federal Register proposed regulations implementing the newly revised § 81. The proposed regulation excluded tribal land assignments from the § 81 approval process:

> The following types of contracts or agreements do not require Secretarial approval: . . .(d) Contracts or agreements that convey any use rights assigned by tribes, in the exercise of their jurisdiction over tribal lands, to tribal members.

65 Fed. Reg. 43952, 43956 (July 14, 2000), setting forth proposed 25 C.F.R. § 84.004(d).

On July 26, 2001, the Secretary adopted the final regulations implementing 25 U.S.C. § 81. The final regulations removed the reference to "Contracts or agreements that convey *any use rights* assigned by tribes" from the list of contracts that are excluded from Section 81 review. The final version of 25 C.F.R. § 84.004(d) restricted the exclusion to contracts or agreements providing only *temporary use* of tribal land: "Contracts or agreements that convey to tribal members any rights for *temporary use* of tribal lands, assigned by Indian tribes in accordance with tribal laws or custom." 66 Fed. Reg. 38923 (July 26, 2001) (emphasis added).

This change in the final regulations is significant, for at least three reasons. First, the exception set forth in the final regulation does not apply to all assignments of rights in tribal land. It restricted the application of the exception to the narrower category of "temporary use of tribal lands." Second, the change reflects the fact that the Secretary was aware that tribes might choose to assign interests in land for longer terms and specifically decided not to include that type of assignment in the list of excluded

contracts or agreements. Third, the change reveals that, if the Secretary intended to exclude all land assignments, he knew how to do so. Thus, the Secretary consciously decided to include tribal land assignments among the contracts that the Secretary must approve under Section 81.

The examples given in the Federal Register notice commentary on the proposed regulations support this analysis. In providing examples of contracts that qualify as encumbrances and therefore require Secretarial approval, the commentary states:

> a restrictive covenant or conservation easement may encumber tribal land within the meaning of *Section 81*, while an agreement that does not restrict all economic use of tribal land may not. An agreement whereby a tribe agrees not to interfere with the relationship between a tribal entity and a lender, including an agreement not to request cancellation of the lease, may encumber tribal land, depending on the contents of the agreement. Similarly, a right of entry to recover improvements or fixtures may encumber tribal land, whereas a right of entry to recover personal property may not.

66 Fed. Reg. at 38920-21.

The regulations and their evolution through the rule making process reveal that the intention of the Secretary in enacting the regulations was to require approval of agreements that grant more significant interests in tribal land, but not require approval of agreements that grant less significant, temporary interests in tribal land. The Government's

conclusion that the Secretary is not required to approve the Land Assignments, because they grant too great an interest in tribal land and, therefore, violate Section 177, is in direct conflict with the provisions of the regulations and the evident purpose of the regulations as expressed in the rule making process.

Finally, the adoption of the final rule, as embodied in the final regulation, particularly when read together with the definition of the term "encumber" and "encumbrance" set forth in 25 C.F.R. § 84.002, leaves no room for doubt that the Tribe's Land Assignments are "encumbrances" within the meaning of Section 81.

II.

THE LAND ASSIGNMENT DEEDS DO NOT VIOLATE THE NONINTERCOURSE ACT IF THE SECRETARY APPROVES THE DEEDS AS REQUIRED BY SECTION 81.

As shown in the Statement of Facts set forth above, the Assignment Deeds do not convey exclusive unconditional possessory interests in the Tribe's Reservation trust lands. Under the Land Assignment Ordinance the Tribe is not selling its land to the Assignee nor even conveying to the Assignee an unconditional right to use the land. E.R. p. 419. Instead, the Tribe is only granting the Assignee a conditional right to use the land and occupy it for the limited purpose: to build a residential Home on the

property and live in that Home. E.R. pp. 416-416. The Tribe retains the right to cancel or terminate the Land Assignment, if the Assignee violates any of the terms and conditions of the Assignment Deed as specified in the Tribe's Land Assignment Ordinance. E.R. pp. 380-381.

Those terms and conditions include, but are not limited to, a prohibition on the Assignee transferring any interest in the Land Assignment to any third party, unless the transfer is approved by the Tribe. E.R. pp. 375-376.

The Reservation was originally created to provide a permanent homeland for the Tribe. And, while the Tribe is an entity separate and apart from its members, it is still composed of its individual members. Thus, the Reservation was created to provide a place where the members of the Tribe could live and work. To that end, the Tribe, exercising Congressionally delegated authority under the IRA, exercised its sovereign governmental authority and, consistent with Congress' policy of promoting tribal self-government, adopted a comprehensive statutory scheme to attract members back to the Reservation.

This tribal statutory scheme does not run afoul of the purposes for which Congress enacted the Nonintercourse Act. The purpose of the Nonintercourse Act is "to prevent unfair, improvident or improper

disposition by Indians of lands owned or possessed by them to third parties."[*United States v. Southern Pacific Transp. Co.* 543 F. 2d 676, 698 (9th Cir.1976)], unless the disposition is approved by the United States. 18 Op. Atty. Gen. 235 (1885) (holding that Indian tribes cannot convey any interest in their Reservation trust lands under the Nonintercourse Act "without the consent of the Government of the United States."

Here, the Tribe's conveyance to its own members to use its Reservation lands to build a Home and live on the Reservation is consistent with the very purposes for which the Reservation was created, that is, to provide a permanent homeland for the Indians. These conveyances, therefore, do not constitute an "unfair, improvident, or improper" disposition of the Tribe's Reservation lands that the Nonintercourse Act was designed to prevent.

Moreover, the Nonintercourse Act does not prohibit a conveyance by a tribe or Indians of an interest in their lands if the conveyance is approved by the Government pursuant to Congressional authorization.

> I submit that the powers of the Department [of the Interior] to authorize such leases to be made, or that of the ... Secretary to approve or to make the same, ... must rest upon some *law*, and therefore be derived from either a treaty or a statutory provision.

Lease of Indian Lands for Grazing Purposes, 18 Op. Atty. Gen. 235, 239 (1885), (emphasis original).

Section 81 constitutes just such a "law" or "statutory" provision. By enacting Section 81 Congress expressly provided that no contract that encumbers Indian lands for more than 7 years is valid unless it is approved by the Secretary. 25 U.S.C. § 81 (b). The very purpose of requiring the Secretary to approve contracts under Section 81 is to ensure that the contracts are not "unfair" to the Indians and do not improvidently burden the Indians' property interests.

The Secretary's approval of contracts constituting encumbrances under Section 81 fulfills these purposes and satisfies the requirements of the Nonintercourse Act. Since approval of the Land Assignment Deeds under Section 81 satisfies the prohibition against conveyances set forth in the Nonintercourse Act, the approval of the Deeds does not violate "federal law." The Secretary, therefore, has an obligation under Section 81 to approve the Land Assignment Deeds.

III.

THE TRIBE DOES NOT CONTEND THAT THE NEW SECTION 81 IMPLIEDLY REPEALED SECTION 177.

Despite the Tribe's explicit denial that Section 81 impliedly repeals Section 177, the Secretary persists in arguing that this is the Tribe's position.

> The Tribe erroneously contends that by amending New Section 81 to allow Secretarial approval of long-term agreements encumbering Indian lands, Congress authorized the Secretary to approve every kind of "encumbrance" covered by Section 177 that is not already authorized by another statute. . . . Contrary to the Tribe's assertions, . . . the implication of the Tribe's contention is that New Section 81 impliedly repealed or superseded Section 177 as to any transaction that results in an "encumbrance" of Indian lands greater than seven years in length, even where the transaction would also convey a property interest in excess of a mere "encumbrance."

Response, p. 28.

The Secretary's assertion notwithstanding, the Tribe's argument cannot be reasonably interpreted to imply that the New Section 81 "repealed or superseded Section 177." The Tribe's position is clear: the purpose of the Secretarial approval provision of Section 81 is to permit encumbrances of tribal land that would otherwise be barred by Section 177. The argument that Section 81 grants such authority is *dependant* on the ongoing validity of Section 177, not its implied repeal. Just as the Conveyance Statutes[1] cannot be said to impliedly repeal Section 177, neither

[1]The Conveyance Statutes are found at 25 U.S.C. § 311; 25 U.S.C. § 312; 25 U.S.C. § 321; 25 U.S.C. § 323; 25 U.S.C. § 397; and 25 U.S.C. § 415 (collectively the "Conveyance Statutes").

does Section 81. The purpose in granting the Secretary the authority to approve encumbrances under Section 81 is the same as the authority granted in the Conveyance Statutes, to permit encumbrances of tribal land that would otherwise violate Section 177. Such approval would allow tribes to make use of their land in a manner that benefits the tribes and their members. At the same time, the Secretary's approval protects tribes and their members from the "unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties . . . ." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960), which was the purpose of the enactment of Section 177. The Tribe's interpretation is fully consistent with and depends on the ongoing applicability of Section 177.

The Tribe's position is, in fact, the opposite of the Secretary's characterization. As the Tribe clearly stated in its Opening Brief, the only implied repeal arising from the conflicting interpretations of Section 81 presented in this case results from the Secretary's interpretation. The Secretary's interpretation effectively makes Section 81 superfluous. If the Secretary's approval does not allow for encumbrances that would fall within Section 177, the New Section 81 has no purpose. If the encumbrances subject to approval under the New Section 81 do not fall within Section 177,

no approval is necessary, since there would be no statute or regulation that the encumbrances would violate.

The Secretary's argument is nothing more than an exercise in misdirection. Throughout the Response, the Secretary acknowledges that the Land Assignments qualify under the Regulations as an "encumbrance." In arguing that the Tribe's position is that the New Section 81 impliedly repeals Section 177, the Secretary introduces a new concept, "where the transaction would also convey a property interest *in excess of a mere 'encumbrance.'*" (Emphasis added.) The Secretary does not explain the origin of this distinction or how it relates to the Secretary's acknowledgment that the Land Assignments are an encumbrance. The Secretary also does not explain how this distinction is relevant in light of her argument, based on the 1885 Opinion of the Attorney General, that Section 177 applies to the transfer of all interests in tribal land. ("Whatever the right or title may be, each of the tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States." *Lease of Indian Lands for Grazing Purposes*, 18 Op. Att'y Gen. 235, 237 (1885).) What this distinction really reflects is the Secretary's inability to find a

meaningful basis for claiming that the Land Assignments are not subject to Secretarial approval.

IV.

THE INDIAN CANONS OF STATUTORY CONSTRUCTION APPLY, BECAUSE IT IS IN THE INTEREST OF ALL IRA TRIBES TO HAVE CONTROL OF THE USE OF THEIR INDIAN LANDS.

The Secretary argues that the canons of construction applicable to statutes passed for the benefit of Indian tribes do not apply in the present case because, "Interpreting New Section 81 as exempting the Assignment Deeds from the purview of Section 177 does not clearly benefit a particular set of Indian interests, and the canon is thus inapplicable." Response, p. 48.

In fact, interpreting the New Section 81 to permit the Tribe to grant the Land Assignments to its members does clearly benefit a particular, and fundamental, interest of Indian tribes. As the Tribe made clear in its Opening Brief, the New Section 81 must be read in *pari materia* with the Indian Reorganization Act, in particular 25 U.S.C. § 476. In that statute, Congress delegated authority to Indian tribes who did not reject the IRA to prevent the sale, disposition, lease, or encumbrance of their lands:

> 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 . . . .

25 U.S.C. § 476(e).

Encompassed within this delegation of authority to Indian tribes to prevent the sale, disposition, lease, or encumbrance of an Indian tribe's lands is the authority to determine under what circumstances a tribe's lands can be encumbered.

The Secretary's argument that the Canons do not apply IS based on an inaccurate statement of the interest that is at issue. "The canon is inapplicable here because interpreting New Section 81 as authorizing the Secretary to approve agreements when those agreement [sic] do not merely encumber Indian lands, but convey such substantial and perpetual interests in those lands that they fall within the scope of Section 177, does not clearly benefit specific Indian interests." Response, p. 47.

A fundamental purpose of the IRA is to grant to Indian tribes the authority to determine how tribal members are permitted to use tribal land. It is in the interests of all Indian tribes that did not reject the IRA to have the New Section 81 interpreted to enhance an Indian tribe's ability to exercise control over the use of their lands *by their members*. The Land

Assignments are not an alienation of the Tribe's title to its lands, and the interests that are granted in the Land Assignments are not being granted to non-members. The Land Assignments are designed to grant individual tribal members the right to occupy their Land Assignment so that the tribal members are able to use the Tribe's Indian lands in a manner that the Tribe has determined provides the greatest benefit to the Tribe and its members. It is precisely this kind of self-determination on the part of Indian tribes that was intended in the provisions of Section 476 that explicitly delegate authority to Indian tribes to control the encumbrance of their lands.

This interpretation is consistent with the purpose of the New Section 81 because that statute grants authority to the Secretary to review encumbrances of Indian lands to ensure that the encumbrances do not alienate title to Indian lands and, in particular, do not alienate title to Indian lands to non-Indians.

Thus, contrary to the Secretary's interpretation, the Tribe's interpretation that the New Section 81 permits tribes to encumber their Indian lands through land assignments does "clearly benefit specific Indian interests," the interests that all Indian tribes have in using their Indian lands in the manner that each tribe determines is for the benefit of its members, without unnecessary interference on the part of the federal

government. There is no alternative or competing interest of Indian tribes that would support a different interpretation of the New Section 81, particularly when considered in the context of the provisions of Section 476.

As the sections of Cohen's Handbook of Federal Indian Law cited by the Secretary make clear, Indian tribes have long battled to protect their lands from alienation to non-members in order to preserve the most fundamental resource of Indian tribes, their tribal lands. Inextricably connected with that effort to protect tribal interests in their lands is the effort to ensure that Indian tribes have the power to control the use of their Indian lands for the benefit of their members. Indian tribes have not battled for centuries for the right to have the Great White Father determine how tribal members are permitted to use tribal land, they have battled to decide for themselves how to use their tribal lands.

Thus, the District Court should have applied the Canons and its failure to do so compels this Court to reverse the District Court's decision.[2]

[2]If the Panel concludes that Circuit precedent precludes reversal on this issue, the Tribe urges the Court to encourage *en banc* review in the text of its decision.

CONCLUSION

The official policy of the United States toward the Indian tribes is one of promoting self-determination. This self-determination policy and the concept of tribal self-governance are based on the principle that Indian tribes are, in the final analysis, the government that should control reservation lands and regulate the use of those lands by both Indians and non-Indians.

In furtherance of this policy of self-determination and the exercise of both inherent sovereign powers and Congressionally delegated authority under the Indian Reorganization Act, the Chemehuevi Tribe enacted laws designed to reverse the devastating effects of the flooding of its Reservation by the federal government and provide a permanent homeland where its members could live and work.

To accomplish this goal the Tribe granted to its members a conditional right to use its Reservation land to build a Home. It did not sell the land to its members or give them an absolute, unconditional right to use the property to the exclusion of the Tribe. Instead, it granted its members a limited right of occupancy subject to the Tribe's governmental regulation and its authority to cancel the Assignment Deeds if the Assignees fail to comply with the conditions of the Land Assignment.

The Tribe submitted the Assignment Deeds to the Secretary for approval under Section 81 because the Deeds encumber the Tribe's trust lands. Rather than approve the Deeds, the Secretary has shirked her duty, claiming that Section 81 itself prevents approval of the Deeds because to do so would violate federal law, specifically the Nonintercourse Act.

In the final analysis this is a simple case of statutory construction. The Court can either adopt the Government's convoluted argument that the Secretary's approval of the Deeds does not satisfy the prohibition contained in the Nonintercourse Act, or it can interpret Section 81 to the benefit of the Tribe by determining that the Nonintercourse Act is not violated if the Secretary approves the Assignment Deeds.

The first interpretation promotes federal paternalism towards Indians and the arbitrary interpretation and implementation of federal laws and regulations. The second interpretation promotes tribal self-government, fulfills the Government's fiduciary obligation to Indians relative to their lands and fulfills the purpose for which the Tribe's Reservation was created. Unless this Court adopts the Tribe's interpretation of Section 81, the Tribe's ability to govern itself will be restricted and the Tribe's efforts to attract its members back to the Reservation will be thwarted.

For these reasons and the reasons stated above, this Court must reverse the decision of the District Court and order the Secretary to approve the Tribe's Land Assignment Deeds.

Dated: July 10, 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 5409, 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: July 10, 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: July 10, 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 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 July 10, 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