No. 12-56836

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHEMEHUEVI INDIAN TRIBE, et al.,

Plaintiffs – Appellants,

v.

SALLY JEWELL,* in her official capacity as Secretary of the Department of the Interior,

Defendant – Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Hon. Stephen V. Wilson, No. 11-CV-4437)

FEDERAL DEFENDANTS-APPELLEE'S RESPONSE BRIEF

ROBERT G. DREHER
Acting Assistant Attorney General

WILLIAM B. LAZARUS
ELIZABETH A. PETERSON
THEKLA HANSEN-YOUNG
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415 (Ben Franklin Station)
Washington, DC 20044
(202) 307-2710
thekla.hansen-young@usdoj.gov

* Under Fed. R. App. P. 43(b)(2), Sally Jewell is substituted for Kenneth L. Salazar in this case.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for Federal Defendant-Appellee is not aware of any prior or related appeals.

JURISDICTIONAL STATEMENT

The Plaintiffs-Appellants, the Chemehuevi Indian Tribe ("Tribe") and thirty-four individual members (collectively "Plaintiffs") invoked the district court's jurisdiction under 28 U.S.C. § 1331 seeking judicial review of a decision of the Secretary ("Secretary") of the United States Department of the Interior ("Interior"), not to approve certain Assignment Deeds ("Assignment Deeds") executed by the Tribe that would have conveyed interests in the Tribe's land to its members.

Plaintiffs appeal from an August 6, 2012 order of the U.S. District Court of the Central District of California granting summary judgment on all claims to the Secretary. The district court did not enter a separate judgment. Plaintiffs filed a timely notice of appeal on October 8, 2013. *See* Fed. R. Civ. P. 58(a), (c); Fed. R. App. P. 4(a)(1)(B); ER35-36. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Tribe issued Assignment Deeds to thirty-four of its members that conveyed perpetual and exclusive interests in the Tribe's lands that were "as close to fee simple absolute as possible." ER864. The Tribe requested the Secretary to approve the Assignment Deeds under 25 U.S.C. § 81 (2000) ("New Section 81"). The Secretary declined to approve the Assignment Deeds, finding that they violated the Nonintercourse Act, 25 U.S.C. § 177 ("Section 177"). The questions presented on appeal are:

1. Whether the Secretary reasonably concluded that Section 177 requires Congressional authorization of conveyances of Indian land that do not completely divest a tribe of title and interests in its land.

2. Whether the Secretary reasonably determined that the Assignment Deeds could not be approved under New Section 81 because they are not just encumbrances within the meaning of New Section 81, but are also conveyances that require specific Congressional authorization under Section 177.

STATEMENT REFERENCING THE ADDENDUM

Pursuant to Fed. R. App. P. 28-2.7, an addendum containing pertinent statutes and legislative history is attached to the end of this brief.

STATEMENT OF THE CASE

Between 2004 and 2010, the Tribe issued Assignment Deeds to its members that conveyed interests in its lands that were "as close to fee simple absolute as possible." ER864. The Tribe submitted the Assignment Deeds to the Secretary for approval under New Section 81, which provides that no agreement or contract with an Indian tribe that "encumbers Indian lands for a period of 7 of more years" is valid, unless it "bears the approval of the Secretary of the Interior or a designee." 25 U.S.C. § 81. New Section 81 requires that the Secretary "refuse to approve" agreements if she determines that they "violate[] federal law." *Id.*

The Interior Board of Indian Appeals ("IBIA"), acting on behalf of the Secretary, held that the Secretary lacks authority to approve the Assignment Deeds under New Section 81 because the Assignment Deeds are not just encumbrances under New Section 81, but are also conveyances under Section 177 that Congress has not specifically authorized the Secretary to approve. Section 177 states that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto," from an Indian tribe is valid unless approved by Congress. 25 U.S.C. § 177. Congress must therefore delegate authority under Section 177 to the Secretary before she can approve any transactions.

New Section 81 provides the Secretary with the authority to approve agreements that encumber Indian lands only if she concludes they do not violate other federal laws. And while the IBIA concluded that the Assignment Deeds encumber Indian lands, it also determined that the Assignment Deeds go beyond what Congress authorized the Secretary to approve under New Section 81 because they convey extensive rights. Specifically, the Assignment Deeds convey an exclusive right to use and possess the property, as well as a right to transfer, lease, or exchange the property with other tribal members. ER677-79. The Assignment Deeds also provide that they will descend to the assignee's survivors and can only be canceled in limited circumstances. ER682-83. If the Tribe wants to repossess the property, it must pay the assignee the market value of the Tribe's land. ER679-

80. The IBIA also noted that the Solicitor of the Department of the Interior ("Solicitor") had previously concluded that similar "conveyances of permanent use rights" violated Section 177. *See* ER575; ER52; ER69. It accordingly determined that the Assignment Deeds conveyed interests that cannot be conveyed absent Congressional approval under Section 177. Because Congress has not granted the Secretary authority to approve these conveyances, the IBIA found that the Assignment Deeds violate federal law and the Secretary could not approve them. Notably, the IBIA explained in its decision that there were other ways—different from the Assignment Deeds—in which the Tribe could assign land to its members.

The Tribe challenged Interior's final decision in district court, arguing that the Assignment Deeds do not violate Section 177 because they do not completely extinguish the Tribe's interest in its lands. The Tribe also argued that the Secretary had the requisite authority and should have approved the Assignment Deeds under New Section 81. The district court rejected these arguments and granted the Secretary's motion for summary judgment. The Tribe appeals.

BACKGROUND

A. Statutory and regulatory framework

1. Section 177

Enacted in 1790, and today codified in 25 U.S.C. Chapter 5 – "Protection of Indians," Section 177 has been called "the most significant congressional

enactment regarding Indian lands." *U.S. for and on Behalf of Santa Ana Indian Pueblo v. Univ. of N.M.*, 731 F.2d 703, 706 (9th Cir. 1984) (internal citations omitted). Section 177 requires Congressional approval of a broad range of conveyances of tribal land, including both permanent and temporary conveyances that would divest tribes of their use of the land. Section 177 provides:

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

25 U.S.C. § 177.

Section 177 was enacted to protect "Indian title" to land. *See* Felix S. Cohen, *Handbook of Federal Indian Law* at 998 (2005 ed.). Indian title has been characterized as "title of occupancy," "right of occupancy," and "right of possession," and is not equivalent to fee title. *See Handbook of Federal Indian Law* at 971; *Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 548-49 (1st Cir. 1997) ("In 1872, when Congress passed § 81, federal law provided that Indian tribes enjoyed the right to possess and occupy lands but not to alienate these lands without the federal government's approval."); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (stating that United States possessed title to all Indian lands "subject only to the Indian right of occupancy"); *United States v. Cook*, 86 U.S. (19 Wall.) 591, 592-94 (1873) (Indians enjoyed only right of occupancy in Indian lands and that "the fee was in the United States").

Section 177 has long been interpreted as prohibiting a broad range of transactions absent specific Congressional approval. *See, e.g., United States v. Candelaria*, 271 U.S. 432, 441-44 (1926) (individuals may not occupy and fence off reservation lands to exclude Indians without government's consent); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938) (land may not be taken from tribe by adverse possession without government's consent); *Alonzo v. United States*, 249 F.2d 189, 184-96 (10th Cir. 1957) (individual members of tribe may not claim interest in land separate from interest as member of the tribe; fact that tribe acquired land by purchase did not preclude application of Section 177); *Oneida Indian Nation of N.Y. v. Oneida Cnty. of N.Y.*, 414 U.S. 661, 667-68 (1974) (tribe may not cede reservation land to State without government's consent). Notably, even agreements between tribes and their members are not exempt. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 948 (D. Mass. 1978) *aff'd*, 592 F.2d 575 (1st Cir. 1979), *cert. denied* 444 U.S. 866 (1979).

The statute's broad proscription against conveyances of title or claims to tribal lands reflects Congress's intent "to prevent unfair, improvident or improper disposition" of tribal lands "without the consent of Congress, and to enable the Government, . . . to vacate any disposition of [such] lands made without its consent." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *see also Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 617 F.3d 114,

141 (2d Cir. 2010) (Gershan, J., dissenting); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 685-86 (9th Cir. 1976). Today, "[l]and forms the basis for social, cultural, religious, political, and economic life for American Indian nations." *Handbook of Federal Indian Law* at 965. The restraint against alienation is intended to "preserve tribal land for the furtherance of distinct Indian values." *Id.* at 1008.

2. Section 81

Congress enacted Section 81 in 1872 ("Old Section 81") as an additional restraint against alienation that was specifically designed to protect tribes from fraud "in the conduct of their economic affairs." S. Rep. No. 106-150, at 2 (1999). As originally enacted, Old Section 81 declared "null and void" any agreement to provide services to Indian tribes that were "relative to their lands," unless the Secretary had approved the agreement. Old Section 81 provided:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money . . . in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows: . . . [Such agreement] shall bear the approval of the Secretary of the Interior . . . indorsed upon it. . . . All contracts or agreements made in violation of this section shall be null and void . . . .

25 U.S.C. § 81 (1994), (original version at R.S. § 2103 (1871)). The broad statutory language created confusion, however, and "Indian tribes, their corporate partners, courts, and the [Bureau of Indian Affairs] . . . struggled for decades with

how to apply Old Section 81 in an era that emphasizes tribal self-determination, autonomy, and reservation economic development." S. Rep. No. 106-150, at 2. Parties often "erred on the side of caution" and submitted "any contract" with a tribe to the Secretary for approval. *Id*. at 9.

In 2000, Congress significantly amended Old Section 81 to clarify the kinds of agreements that require Secretarial approval. Pub. L. No. 106-179, 114 Stat. 46 (2000); S. Rep. No. 106-150, at 1. The amended statute narrows the universe of agreements that require the Secretary's approval:

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

25 U.S.C. § 81(b) (2000), 114 Stat. at 46.

The 2000 amendments granted authority to the Secretary to promulgate regulations implementing the statute, including regulations identifying the types of agreements or contracts that require Secretarial approval under New Section 81 and the types of agreements that are exempt. 25 U.S.C. § 81(e). The Secretary defined encumbrances as agreements that "attach a claim, lien, charge, right of entry or liability to real property." 25 C.F.R. § 84.002. Some examples of encumbrances are "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." *Id*. The regulations also explain

which agreements are exempt from Secretarial review and approval, including, among others, those "that convey to tribal members any rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal laws or custom," 25 C.F.R. § 84.004(d), and "contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of seven years or more," *id*. § 84.004(e).

The 2000 statutory amendments also provide:

> (d) Unapproved agreements. The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) of this section if the Secretary (or a designee of the Secretary) determines that the agreement or contract—
> (1) violates Federal law; . . .

25 U.S.C. § 81(d). Consistent with New Section 81, the regulations reiterate that the Secretary will "disapprove a contract or agreement" that requires Secretarial approval under New Section 81 if the "Secretary determines that such contract or agreement violates federal law." 25 C.F.R § 84.006(a)(1) (internal punctuation omitted).

3. The Administrative Procedure Act

Under the APA, a plaintiff may request a federal court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). The

APA authorizes judicial review only when a person has been "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, that is "final," and "for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 61-62 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When, as here, review is sought . . . under the general review provisions of the APA, the agency action in question must be final agency action."); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999).

B. The Tribe's Land Assignment Deeds

The Chemehuevi Reservation ("Reservation") is located in San Bernardino County, California. In 2001, the Tribal Council approved Ordinance No. 01-08-25-1-A ("Ordinance"), which "establish[ed] a uniform procedure for determining when and under what conditions tribal members will be allowed to occupy unassigned tribal trust lands for residential purposes . . . in a manner similar to [fee simple ownership] in land off the Reservation." ER671. The Ordinance defines an "assignment" of tribal land as "a formal exclusive right to use and possess [parcels of] tribal land for Residential Assignment purposes subject to the provisions of this Ordinance." ER672. According to the Tribe's complaint, there are approximately 113 residential lots on the Reservation. ER865; ER894.

While an Assignment Deed under the Ordinance does not expressly vest title to a residential lot in the assignee, it is characterized as a "deed" that "formally convey[s]," among other interests, an exclusive right to use and possess the land to the assignee. ER676; *see*, *e.g.*, ER293-336. Assignment Deeds may be transferred to, devised to, or exchanged with other tribal members, or leased to nonmembers, ER677-78; ER681, and if the assignee dies intestate, the Assignment Deed will descend to the assignee's surviving spouse or children, ER678-79. *See also* ER864-65; ER585-87 (letter from Tribe explaining perpetual interests granted by the Assignment Deeds).

Furthermore, once a parcel of tribal land is assigned, it can be canceled only in limited situations. For example, the Ordinance provides that the Assignment Deed can be canceled if the assignee transfers it without approval, creates a public nuisance, fails to establish residence or occupy the land within a certain time, or commits a crime on the property. ER682-83; ER865. To recover possession of assigned lands needed for tribal purposes, the Tribe must pay fair market value for its own land and any permanent improvements on its land. ER679-80.

The Assignment Deeds contain a waiver of the Tribe's sovereign immunity to enforce both the Assignment Deeds and the Ordinance, which is incorporated therein, in tribal court or, if tribal court is unable to hear the case, in any court of

competent jurisdiction. *See, e.g.*, ER597; ER293-336. The Tribe also represents that it intends the Assignment Deeds to be enforceable against third parties.

C. The Tribe's Request for Secretarial Approval

In 2004, the Tribe asked the Regional Director, who was acting on behalf of the Secretary,[1] to approve the first set of Assignment Deeds under New Section 81. *See Chemehuevi Indian Tribe v. Acting W. Reg'l Dir., Bureau of Indian Affairs*, 45 IBIA 81 (2007) ("*Chemehuevi I*"); ER572-73. A year later, during administrative review, the Tribe filed suit in district court to compel approval of the Assignment Deeds. *Casanova v. Norton*, 2006 WL 2683514, at *1 (D. Ariz. Sept. 18, 2006). The court dismissed the case without prejudice based on the Tribe's failure to exhaust its administrative remedies. *Id.* at *4.

While the suit was pending, in August 2005, the Regional Director declined to approve the first group of Assignment Deeds. ER572-76. The Regional Director

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[1] The Secretary has delegated some of her responsibilities to Interior's Bureau of Indian Affairs' ("BIA") Regional Directors, including the responsibility to review and approve encumbrances under New Section 81. *See* 25 C.F.R. § 84.002; Interior Department Manual, 209 DM 8 (Apr. 21, 2003) (delegation of authority), *available at* http://elips.doi.gov/elips/DocView.aspx?id=802&searchid=a2ee2fb9-0089-4189-87a4-b6ed5ff2668f&dbid=0; Indian Affairs Manual, Delegations of Authority, Part 3, Chapter 1, IAM Release #99-06 (Oct. 25, 1999), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-000326.pdf. Decisions made by Regional Directors are governed by BIA's administrative appeal regulations and are appealable to the IBIA, whose decision is final for Interior. *See* 25 C.F.R. §§ 2.2, 2.3, 2.4(e), 2.6; 43 C.F.R. §§ 4.200-4.340 (applicable procedures, as required by 25 C.F.R. § 2.4(e)).

explained that the Assignment Deeds appeared to grant more than a possessory interest in Indian lands because "the interest conveyed may continue indefinitely so long as certain conditions are satisfied." ER574. Accordingly, "the grant would not be authorized by federal law and could not be approved under any circumstance" because it would violate Section 177.[2] ER574-75. The Regional Director explained that Interior's Solicitor's Office "had found similar 'conveyances of permanent use rights to be violative of [Section 177].'" *Id.*

The Regional Director suggested that the Tribe choose an alternate system of land assignments by granting 50-year residential leases to its tribal members under 25 U.S.C. § 4211. ER575. These long-term leases would meet the Tribe's goal of providing its members with stable and tangible property interests, because lessees could mortgage the leases and eventually assign them to their heirs. ER575. The Regional Director also noted that "numerous tribes" have obtained 99-year leasing authority, and at least one tribe has obtained an exception to Section 177, which allows it to convey title to parcels of its land to its members under certain

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[2] The Regional Director also alternatively held that "[t]o the extent a possessory interest is being conveyed, the grant would need to be approved under the leasing statutes and regulations, and would thus be exempt from approval under Section 81 under 25 C.F.R. § 84.004(a)." ER574. The Regional Director also noted that, typically, tribes assign land for temporary use. ER574. Such assignments for temporary use are exempt from approval under Section 81, but to the extent the Assignment Deeds here granted a possessory interest, they would need to be approved under the relevant leasing statute. *Id.*; *see* 25 C.F.R. § 84.004(d).

circumstances. ER575. The Regional Director informed the Tribe that it could appeal his decision to the IBIA. ER576.

After the district court dismissed its lawsuit, the Tribe appealed the Regional Director's decision to the IBIA. *Chemehuevi I*, 45 IBIA 81. The IBIA dismissed the appeal as untimely and the Tribe did not seek judicial review of its decision. *Id.*

In August and November 2007, the Tribe submitted two additional groups of Assignment Deeds to the Regional Director for approval. ER567-68; ER615-17. The Regional Director declined to approve these Assignment Deeds in September 2007 and January 2008, respectively, for the same reasons stated in his August 2005 decision. ER567-68 (Sept. 21, 2007 decision citing ER572-76); ER615-17 (Jan. 15, 2008 decision citing same). The Tribe submitted another group of Assignment Deeds for approval in April 2010, which the Regional Director denied in May 2010 for the same reasons. ER548-49 (citing ER572-76).

D. The Tribe's Appeals to the Interior Board of Indian Appeals

The Tribe appealed the Regional Director's September 2007, January 2008, and May 2010 decisions to the IBIA in, respectively, October 2007, ER523-25; February 2008, ER365-66; and May 2010, ER546-47. The IBIA consolidated the first two appeals and, in October 2010, affirmed the Regional Director's September

2007 and January 2008 decisions.[3] *Chemehuevi Indian Tribe v. W. Reg'l Dir., Bureau of Indian Affairs*, 52 IBIA 192 (2010); ER51-71. The IBIA affirmed the Regional Director's May 2010 decision separately in December 2010 for the same reasons provided in its October 2010 decision. 52 IBIA 364 (2010); ER532-33.

The IBIA held that the Assignment Deeds were encumbrances "subject to review under [New Section] 81." ER70. However, the Assignment Deeds conveyed such substantial interests in the Tribe's lands that the IBIA found that they conveyed the "fair equivalent" to "absolute title to the land." ER70; ER52 (Assignment Deeds "seek to convey an exclusive possessory interest that is intended to be perpetual and, as such, violates [Section 177]."). The IBIA explained that "[t]he Tribe has relinquished all authority to use, control, or possess its own land—to the point of committing itself to paying fair market value to the assignee for the Tribe's own land in a condemnation proceeding and permitting the assignee to sell or devise the assignment to another tribal member." ER69-70.

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[3] The IBIA noted that because the Tribe's appeal of the Regional Director's 2005 decision was untimely, and the Regional Director denied the later-submitted Assignment Deeds on the same grounds utilized in his 2005 decision, review of the Regional Director's decisions would be barred by res judicata. Because, however, the Regional Director submitted briefs to the IBIA indicating that he changed his position and believed that the Assignment Deeds were properly characterized as temporary use agreements and therefore were not properly submitted under New Section 81, the IBIA reconsidered the Regional Director's decisions. ER52.

Thus, the Assignment Deeds "fall within the prohibition of [Section 177]," and could not be approved under New Section 81. ER70.

E. District Court Litigation

The Tribe filed suit in district court seeking declaratory and injunctive relief. The Tribe challenged the IBIA's October 2010 and December 2010 decisions, asserting that the denial of its requests to approve the Assignment Deeds violated New Section 81 and the APA, ER872-74, and breached the government's trust duties to the Tribe, ER874-75. The Secretary moved to dismiss the case for lack of subject matter jurisdiction, and both parties moved for summary judgment. Dkt. Nos. 6, 7, 17.

The court granted summary judgment for the Secretary on August 6, 2010. ER1-33. As relevant here, after finding it had jurisdiction, ER3-4, the court held that the Secretary's interpretation of New Section 81 and its implementing regulations are reasonable and entitled to deference under *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc*, 467 U.S. 837, 842-43 (1984), *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and the APA. ER11-16; ER24. The court held that the Secretary reasonably exercised her Congressionally-delegated authority, ER12-16, and that the IBIA correctly concluded that the Assignment Deeds "were barred under Section 177" and thus could not be approved under New Section 81. ER24.

The district court rejected the Tribe's assertions that New Section 81 granted authority to the Secretary to approve the Assignment Deeds. As the court explained, New Section 81 "contains no affirmative grant of authority allowing the Secretary (or Indian landowners) to engage in transactions that would otherwise be barred under Section 177." ER28; *see also* ER20-21; ER23; ER25-26.

The court further held that interpreting New Section 81 to prohibit approval of the Assignment Deeds would not render it null. The court identified several instances in which an agreement could "encumber" Indian land, and therefore require Secretarial approval under New Section 81, but not require additional Congressional authorization under Section 177. ER22-23. The court also held that the Indian canon of construction did not apply here because it is not clear which interpretation of New Section 81 and Section 177 favors Indian interests. ER18-19.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, *see Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003), applying the same deferential standard of review under the APA, 5 U.S.C. § 701 *et seq.*, applied by the district court. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995). The APA provides that courts may set aside agencies' actions as unlawful only if those actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." 5 U.S.C. § 706(2)(A); *see also Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1035 (9th Cir. 2012).

Review under the APA is narrow and a court must not "substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "Even when an agency explains its decision with 'less than ideal clarity,'" a court "will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (*quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). A court should be particularly deferential to an agency's decision when "the challenged decision implicates substantial agency expertise." *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 869 (9th Cir. 2003); *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

The Secretary has been charged with implementing New Section 81, including the authority to decide what types of agreements fall within the scope of the statute. 25 U.S.C. § 81(b)-(e). Courts defer to an agency's reasonable interpretation of a statute that it is charged with implementing, *see Chevron*, 467

U.S. at 844-45, like the Secretary's interpretation of the statutes at issue here. Courts first consider whether Congress has "directly spoken to the precise question at issue." *Id.* at 842-43. Congressional intent is determined by examining the statute's plain language; if the plain language is not clear, the court looks to the legislative history and purposes of the statutory scheme. *See In re BCP West*, 319 F.3d 1166, 1171 (9th Cir. 2003). If the statute is silent or ambiguous on the issue, the question for the court is whether the agency's interpretation is permissible. *Chevron*, 467 U.S. at 843. If the agency's interpretation is reasonable, courts defer to that interpretation. *Id.* at 844-45. Similarly, an agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461; *see also Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891-92 (9th Cir. 1986) ("We must accord very great deference to an agency's interpretation of its regulations.").

SUMMARY OF THE ARGUMENT

The IBIA reasonably concluded that the Secretary could not approve the Assignment Deeds under New Section 81 because they violate federal law, specifically Section 177. Section 177 prohibits purchases, grants, leases, or other conveyances of Indian lands, or title or claims thereto, unless the transactions are specifically approved by Congress. 25 U.S.C. § 177. In the absence of

Congressional authorization, Section 177 prohibits conveyances that completely extinguish Indian title to lands as well as transactions that, for example, result in a tribe's indefinite surrender of possession and use of its land.

Over the years, Congress delegated some of its authority under Section 177 to Interior to approve certain categories of transactions. Old Section 81, as originally enacted, authorized the Secretary to approve a limited range of contracts made "in consideration of services for . . . Indians relative to their lands." 25 U.S.C. § 81 (1994). This language created uncertainty about which contracts required Secretarial approval, causing tribes and individuals to seek approval of a broad range of contracts, including contracts for the sale of vehicles and office supplies. *See* S. Rep. No. 106-150, at 8-9; Business Development on Indian Lands: Hearing Before the Senate Comm. on Indian Affairs, 106th Cong. 96, at 20 (1999) (hereinafter "S. Hrg. 106-96").

To clarify the statute, Congress narrowed Section 81 in 2000 "to require [Secretarial] approval" only "of contracts that encumber Indian lands for a period of at least seven years," S. Rep. No. 106-150, at 14-15, and gave the Secretary authority to determine what kinds of agreements are subject to review under 25 U.S.C. § 81. New Section 81 also mandates that the Secretary "refuse to approve an agreement or contract . . . if the Secretary (or a designee of the Secretary) determines that the agreement or contract—(1) violates Federal law." 25 U.S.C.

§ 81(d); *see also* 25 C.F.R. § 84.006(a) (Interior's regulations with same language). There is nothing in the language or legislative history of the amendment that indicates that Congress intended to expand the Secretary's authority to approve agreements encumbering Indian lands where those agreements would also convey a property interest in excess of a mere "encumbrance."

Interior previously found that it lacked authority under Old Section 81 to approve land assignments very similar to the Assignment Deeds here on the ground that, without specific Congressional approval (which did not exist), they constituted unauthorized conveyances of land under Section 177. *See* ER67, citing Solicitor's Opinion, M-31724 (Nov. 21, 1942), *available at* http://thorpe.ou.edu/sol_opinions/p1156-1180.html#m-31724. The IBIA determined it was bound by this precedent in considering whether the Secretary had authority to approve the Assignment Deeds here because Congress did not enlarge the Secretary's authority when it amended Section 81. ER67-68.

In evaluating the terms of the Assignment Deeds and the Ordinance, the IBIA concluded that the Assignment Deeds are not only encumbrances, ER62-65, but are also "designed to individualize the tribal title and create in the individual an enforceable vested interest," ER68. The Assignment Deeds here, like the land assignments at issue in the 1942 Solicitor's Opinion, would convey the perpetual, exclusive use and possession of the Tribe's land, combined with the rights of

descent and alienation, the ability to enforce the agreement against third parties, and the commitment of the Tribe to pay for the value of its own land if the Tribe wished to repossess it. ER68-70. The IBIA concluded that these features demonstrated that "the Tribe has conveyed a significant claim to its lands that falls squarely within the proscription of [Section] 177." ER69. This decision was reasonable and is entitled to deference under the APA. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 496-97. Because the IBIA determined that the Assignment Deeds conveyed interests beyond mere "encumbrances" in tribal land, it properly concluded that the Secretary lacked authority to approve them under New Section 81.

The Tribe contends that the enactment of statutes permitting the alienation of various interests in Indian land, subject to approval by the Secretary, suggests that the Secretary may approve these Assignment Deeds. Those statutes constitute Congress's authorization of specific land transactions, subject to Secretarial approval, and even the Tribe does not suggest that any of those statutes authorizes the Assignment Deeds. The IBIA reasonably concluded that no statute affirmatively authorizes the Secretary to approve assignments where they "convey in perpetuity an exclusive possessory interest in a tribe's lands that may be devised, sold, or otherwise conveyed by the assignee." ER67.

Last, contrary to the Tribe's assertion, the Indian canon of construction does not apply here because the Tribe's proposed interpretation of the statutes does not clearly benefit Indian interests generally. The district court properly deferred to Interior's decision to deny the Assignment Deeds under New Section 81 on the grounds that they are prohibited by Section 177.

ARGUMENT

Relying on *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039 (5th Cir. 1996), the Tribe asserts, Br. at 34-40, that the Assignment Deeds do not violate Section 177 because Section 177 only applies to agreements that completely extinguish tribal title to land. The Tribe also asserts, Br. at 21-28, 30 n.1, 45, 47-48, that, even if the Assignment Deeds would violate Section 177 and could not have been approved under Old Section 81, by enacting New Section 81, Congress expanded the scope of the Secretary's authority to approve "encumbrances" like the Assignment Deeds. ER20-21. After a thorough analysis, the IBIA rejected the Tribe's contentions. *See* ER66-69. The IBIA reasonably concluded that the Assignment Deeds are not merely encumbrances, but convey such extensive interests in the Tribe's land that they could not be approved by the Secretary under New Section 81 and its implementing regulations, and instead require Congressional approval under Section 177. ER70.

I. Section 177 requires Congressional approval of conveyances of title or claims to Indian lands.

Section 177 was enacted to protect "Indian title" to property, which, as explained above in Section A.1, is characterized as a right of possession and occupancy. The statute specifically requires Congressional approval of leases, grants, "or other conveyance[s] of lands, or of any title or claim thereto." 25 U.S.C. § 177. Contrary to the Tribe's assertions (Br. at 34-40) and as explained by the IBIA (ER66), Section 177 by its own terms applies to conveyances of less than complete divestment, including the Assignment Deeds. *See* ER66.

Section 177 does not define the terms "conveyance," "title" or "claim."[4] However, as the U.S. Attorney General explained in an 1885 opinion, "[t]his statutory provision is very general and comprehensive." *Lease of Indian Lands for Grazing Purposes*, 18 Op. Att'y Gen. 235, 237 (1885). The Solicitor of the Department of the Interior similarly explained that because Congress used "all-inclusive" language in Section 177, it is "immaterial" (1) "whether the forbidden transaction involves Indians or whites;" (2) "whether the particular transaction be one running from the tribe to its members or from the members to each other;" or

[4] To "convey," as defined by Black's Law Dictionary, means "[t]o transfer or deliver (something, such as a right or property) to another, esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests." *Black's Law Dictionary* (9th ed. 2009). Similarly, a "conveyance" is defined as "[t]he voluntary transfer of a right or of property." *Id.*

(3) whether a transaction attempts to convey less than complete title—"the attempted transfer of any title or claim to the tribal land is equally within the prohibition." *See* Solicitor's Opinion, M-31724; *see also* ER67, citing *Mashpee Tribe*, 447 F. Supp. at 948 ("The Nonintercourse Act does not by its terms provide for any exception for the conveyance of land from a tribe to individual Indians. . . ."). "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." 18 Op. Att'y Gen. at 237. Section 177 therefore applies to instances where the tribe surrenders possession and use of its land for a limited duration or for a specific purpose. *See* ER66; *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("alienation" of land without Congressional approval constitutes violation); *United States v. S. Pac. Transp.*, 543 F.2d at 684 (easements granting railroad rights of way are "claim[s] to Indian lands . . . and are therefore invalid under section 177" unless authorized by Congress).

The Tribe, relying on *Tonkawa Tribe*, 75 F.3d at 1044, asserts that Congressional approval under Section 177 is needed only for conveyances that completely extinguish a tribe's interest in its lands, but not for conveyances that do not completely extinguish a tribe's title to its lands. Br. at 34-42. The Tribe

theorizes that because the Assignment Deeds at issue here do not completely extinguish the Tribe's title to its lands, they do not require Congressional approval under Section 177.[5] Br. at 37. Not only does this assertion misunderstand the scope of Section 177 for the reasons explained above, but the Tribe's reliance on *Tonkawa* is misplaced.

In *Tonkawa*, the Fifth Circuit evaluated a claim brought by a tribe against the State of Texas, alleging that an 1866 state law granted the tribe an enforceable interest in land that was divested by Texas without the federal government's consent, in violation of Section 177. 75 F.3d at 1043. The Fifth Circuit held that in order for the tribe to assert a violation of Section 177, it had to establish, among other things, that "the [t]ribe's title or claim to the interest in land has been extinguished without the express consent of the United States." *Id.* at 1044.

The Fifth Circuit's fact-bound ruling in *Tonkawa* addressed an entirely different situation from the one present here. In *Tonkawa*, the tribe asserted that the state, by statute, had completely divested tribal title to land in violation of Section 177. By bringing suit, the tribe was attempting to recover its title (i.e. rights of possession and occupancy) to land. It is undisputed that Section 177 applies to

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[5] If it were true that Section 177 only required Congressional approval of conveyances that completely extinguish title, then Congress would not have had to enact the statutes cited by the Tribe at Br. at 41-42.

conveyances that completely extinguish Indian title. The Fifth Circuit's decision therefore explained the necessary elements of a Section 177 claim where a tribe's claimed Indian title had been completely extinguished. However, the Fifth Circuit did not address what would be necessary to demonstrate a Section 177 claim in a situation like this one, where the Tribe has proposed to convey extensive rights to its members that do not completely extinguish its interests in its lands.

II. The IBIA correctly concluded that the Secretary lacked authority to approve the Assignment Deeds because, though they are encumbrances within the meaning of New Section 81, they are also conveyances that require, but lack, Congressional approval under Section 177.

The Tribe asserts that even if the Assignment Deeds are subject to Section 177's Congressional-approval requirement, ER20; *see also* Br. at 45, 47-48, the Secretary had authority to approve them under New Section 81 because they are agreements that encumber Indian lands.[6] Br. at 48-49. This argument is without merit. The IBIA reasonably determined that the Secretary lacked authority under New Section 81 to approve the Assignment Deeds because they require Congressional authorization under Section 177.

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[6] The Tribe and Interior agree that the Assignment Deeds are agreements that encumber Indian lands. ER62-64; Br. at 30-34. The difference is that the IBIA found that the Assignment Deeds go beyond the sorts of encumbrances that the Secretary is authorized to approve under New Section 81 and constitute conveyances that require specific Congressional approval under Section 177, which Congress has not provided.

A. In amending Section 81, Congress did not intend to expand the scope of the Secretary's authority to approve conveyances of title or claims to Indian lands within the meaning of Section 177.

As explained above in Sections A-B, Interior may only approve transactions listed in Section 177 if there is "some law, . . . derived from either a treaty or a statutory provision," that authorizes it to approve the transactions. 18 Op. Att'y Gen. at 238. Since enacting Section 177, Congress has enacted various statutes authorizing the Secretary to approve certain kinds of transactions relating to Indian land, including Section 81. The Secretary was not, however, authorized to approve conveyances of Indian title, such as the Assignment Deeds, under Old Section 81.[7]

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. Br. at 45, 47-48. Contrary to the Tribe's assertions, Br. at 49-50, 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." *See* ER19-28; ER66.

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[7] The Tribe appears to agree that the Secretary was not authorized by Congress to approve the Assignment Deeds under Old Section 81. *See* Br. at 28.

There is no such express language in New Section 81 supporting this contention. As the district court noted, "repeal by implication is disfavored." ER20 (citing *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1058 (9th Cir. 2009)). Further, as explained below, there is no support for the Tribe's assertions in either the text or the legislative history of Section 81.

1. The statutory language and legislative history demonstrate that Congress authorized the Secretary to approve agreements that encumber Indian land if they do not violate federal laws, and not agreements that convey title or claims to Indian lands.

New Section 81 empowers the Secretary to approve agreements or contracts that encumber Indian lands for more than seven years, subject to the requirement that the Secretary determines that such contracts comply with other federal statutes. As the IBIA explained, New Section 81 "is explicit in prohibiting the approval of any agreements or contracts that are subject to its approval requirements if 'the agreement or contract – (1) violates Federal law.'" ER66, citing 25 U.S.C. § 81(d); *see also* 25 C.F.R. § 84.006(a) (regulations with the same language). Nothing in the statutory language suggests that Congress intended to authorize the Secretary to approve any agreement encumbering Indian lands, even where the agreement would also convey a property interest in excess of a mere encumbrance and falling within the scope of Section 177. The IBIA therefore reasonably concluded that "Congress simply did not confer authority on the

Secretary to approve encumbrances notwithstanding the applicability of other statutory proscriptions." ER69.

The Tribe argues that the legislative history of New Section 81 provides no guidance on how it should be interpreted. Br. at 35-36. However, a review of the legislative history indicates that Congress did not intend New Section 81 to expand the Secretary's authority to approve a broader range of encumbrances than Congress had previously authorized in Old Section 81.[8]

Old Section 81 did not authorize the Secretary to approve agreements that convey or lease Indian lands. *See* S. Rep. No. 106-150, at 14-15. Rather, Old Section 81 was enacted in 1871 "as an additional barrier to alienation of tribal land." *Handbook on Indian Law* at 1002. Congress was responding 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." *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 976 (8th Cir. 2001); S. Hrg. 106-96, at 20 (same). Old Section 81 therefore "require[d] [Interior] approval of *all contracts involving payments* between non-Indians and Indians *for services relative to Indian lands*." S. Rep. No.

[8] Review of legislative history to discern Congressional intent is generally permissible, even when language is plain. *See Amalgamated Transit Union Local 1309 v. Laidlaw Transit*, 435 F.3d 1140, 1146 (9th Cir. 2006).

106-150, at 14-15 (emphasis added); S. Hrg. 106-96, at 20 (explaining Old Section 81 requires Interior to approve contracts involving *payments made by tribes* for services relative to Indian lands); 25 U.S.C. § 81 (1994) (declaring void any contract "in consideration of services for . . . Indians relative to their lands" unless specified criteria were met, including approval by Interior). While Old Section 81 addressed contracts "relative to lands," the contracts it was intended to address "[we]re really contracts for things not related—or barely related—to land issues." S. Hrg. 106-96, at 22.

The language of Old Section 81 created uncertainty about which contracts required approval. S. Rep. No. 106-150, at 2, 5, 7. Any contract that "touches or concerns" Indian lands, including contracts for the sale of vehicles to tribes or for purchase of office supplies, were submitted to Interior for approval under Old Section 81. *See* S. Rep. No. 106-150, at 8-9; S. Hrg. 106-96, at 20. Despite a proposal from the executive branch to eliminate Section 81 (and thus Interior's role in approving contracts) entirely, S. Hrg. 106-96, at 20, 32; S. Rep. No. 106-150, at 9, Congress decided to make only "modest" changes to Section 81, S. Hrg. 106-96, at 18. Congress explained that it intended to "leave[ ] the [amended] provision in place to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." S. Rep. No. 106-150, at 9. New Section 81 was intended to allow tribes to engage in a broad

range of commercial transactions and only require federal oversight of "transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands." *Id.*

To achieve this purpose, Congress amended Section 81 to "eliminate[] the overly-broad scope of the Act by replacing the phrase 'relative to Indian lands' with the phrase 'encumbering Indian lands.'" S. Rep. 106-150, at 7. The change meant that New Section 81 "will no longer apply to a broad range of commercial transactions," *Id.*; *accord* H.R. Rep. No. 106-501, at 2 (2000), and clarified that Secretarial approval was only required in situations where a tribe was encumbering its land in a potentially significant way. This revised language "allow[s] Indian tribes and their partners to determine with a much greater level of certainty whether Section 81 applies" and "ensure[s] that Indian tribes will be able to engage in a wide array of commercial transactions without having to submit those agreements to the BIA as a precaution." *See* S. Rep. No. 106-150, at 9-10.

Because Old Section 81 was only intended to apply to contracts that were only "barely related" to land issues, S. Hrg. 106-96, at 22, and the amendment simply narrowed the application of Section 81 to "require approval of contracts that encumber Indian lands for a period of at least seven years," S. Rep. No. 106-150, at 14-15, the IBIA reasonably found nothing in the amendment that expanded

the Secretary's authority to approve agreements that would have required approval under Section 177 in the past, *see* ER67 n.14; ER69. Indeed, one of the bill's proponents, Senator Campbell, explained that the amendment only "addresses non-lease agreements between Indian tribes and those that provide services that relate to the tribe's lands." 145 Cong. Rec. S2648-03 at S2666-67 (145 Cong. Rec. 4441) (1999). He further explained that "[a]ll other federal laws will still apply to the agreement[s]" presented for approval. *Id.* at S2667. After the amendment, "[o]ther statutes [would] continue to ensure the [United States'] trust responsibility for [Indian] land," S. Hrg. 106-96, at 22, and the amendment still "authorized [the Secretary] to reject any contract that violates federal law," 145 Cong. Rec. S2648-03 at S2667; *see also* S. Rep. No. 106-150, at 10 (because "agreements will bear the imprimatur of federal approval, it is appropriate for the Secretary to be satisfied that the agreement does not contravene any specific statutory prohibitions.").

These statements demonstrate that the amendment was intended to apply only to the kinds of agreements previously governed by Old Section 81, *id.*, and was not intended to grant new, enlarged authority to the Secretary to approve agreements previously outside of the scope of Old Section 81. Congress amended the statute to narrow the universe of contracts involving payments for services relating to Indian lands that are subject to review under Section 81, as well as to "bring Section 81's antiquated treatment of Indian tribes in line with modern

attitudes towards tribal self-determination."[9] *Gas Plus, L.L.C. v. U.S. Dep't of the Interior*, 510 F. Supp. 2d 18, 27-28 (D.D.C. 2007); S. Rep. No. 106-150, at 2. It did not amend Section 81 to authorize the Secretary to approve encumbrances that are convey such substantial interests that they are conveyances within the meaning of Section 177.

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[9] The Tribe asserts, Br. at 59-60, that interpreting New Section 81 to provide the Secretary with authority to approve these Assignment Deeds is more in line with the purpose of promoting tribal self-determination. But, as explained above, even when Congress amended Section 81 such that it "will no longer apply to a broad range of commercial transactions," S. Rep. No. 106-150, at 9, consistent with "modern attitudes towards tribal self-determination," *GasPlus*, 510 F. Supp. 2d at 27-28, S. Rep. No. 106-150, at 2, Congress still required (1) Secretarial approval of all agreements that would encumber land for greater than seven years and (2) a determination by the Secretary that the agreements comply with other federal laws.

The Tribe also posits that interpreting New Section 81 in such a manner conflicts with the Indian Reorganization Act, 25 U.S.C. § 476, which it asserts impliedly gave tribes "authority to determine the terms and conditions under which [land] encumbrance[s] will take place," Br. at 58-59. While it is true that the IRA provides that tribal constitutions shall vest in the tribe the right "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 (emphasis added), the statute nowhere provides tribes with an unlimited right to dispose of, alienate, encumber, or convey title or claims to tribal lands.

Further, contrary to the Tribe's assertions, Br. at 59, the IBIA reasonably concluded that "the Secretary's approval of the Tribe's Constitution, which grants the Tribal Council broad powers to make land assignments, cannot be deemed to be approval of any and all manner of land assignments or programs," particularly where the Tribe, though its later-issued Assignment Deeds, "has relinquished all authority to use, control, or possess its own land" in contravention of Section 177, ER69-70.

2. Encumbrances that may be approved by the Secretary under New Section 81 are not coterminous with conveyances that require Congressional authorization under Section 177.

The Tribe asserts that if New Section 81 is not interpreted as authorizing the Secretary to approve conveyances requiring Congressional consent under Section 177, it is rendered null, because every "encumbrance" under New Section 81 qualifies as an unlawful "conveyance of lands, or of any title or claim thereto" under Section 177. Br. at 40-48. This contention ignores the statutory text and legislative history of the amendment, explained above.[10]

The Tribe's assertion also rests on the mistaken premise that no agreement can possibly "encumber" Indians lands under New Section 81 without also being an unlawful conveyance under Section 177. "Encumbrances" within the meaning of New Section 81 are not coterminous with "conveyance[s] of lands, or of any title or claim thereto" prohibited by Section 177 absent Congressional consent. For an agreement to encumber property under New Section 81 does not necessarily

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[10] It also ignores the fact that New Section 81 defines "Indian lands" as being those "lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation." 25 U.S.C. § 81(a)(1); *accord* 25 C.F.R. § 84.002. In authorizing the Secretary to approve agreements that encumber "Indian lands," Congress therefore both ensured that New Section 81 would only apply to Indian lands and incorporated Section 177's historic restraint on alienation to limit the Secretary's authority to approve agreements that encumber those lands. *See* S. Rep. No. 106-150, at 8.

mean that the land, or any title or claim to the property, will be conveyed within the meaning of Section 177. And not all conveyances encumber (i.e. attach a claim, lien, or right of entry to) real property.

As explained above in Section I of this brief, Section 177 does not define the term "conveyance" and Interior has not promulgated regulations implementing Section 177. Interior's regulations implementing New Section 81 define "encumber" as "to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances)." 25 C.F.R. § 84.002. The regulations further provide that "[e]ncumbrances 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).[11]

However, what constitutes an encumbrance must be determined "on a case-by-case basis." 66 Fed. Reg. 38,918-01, 38,920-21 (July 26, 2001); *c.f.* S. Rep. No. 106-150, at 4 (referencing difficulties in determining whether agreements could be approved under Old Section 81 or whether they were subject to Congressional

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[11] Black's Law Dictionary similarly explains that an "encumbrance" is "[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* (9th ed. 2009). "An encumbrance cannot defeat the transfer of possession, but it remains after the property or right is transferred." *Id.*

authorization under Section 177). An encumbrance may include, among other things, "a restrictive covenant or conservation easement," "[a]n 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," or "a right of entry to recover improvements or fixtures." 66 Fed. Reg. at 38,920-21.

As the IBIA noted, "[t]hrough regulation, the Department has interpreted [Section] 81 to apply to encumbrances *not* governed by or subject to *other* statutes and regulations, such as leasing statutes or [Section] 177." ER52 (emphasis in original). The IBIA, in its decision, also gave an example of a kind of encumbrance under New Section 81—assignments of life estates to tribal members—that the Tribe could have chosen to implement without running afoul of Section 177. *See* ER69, citing *Rogers v. Acting Deputy Assistant Sec'y – Indian Affairs (Operations)*, 15 IBIA 13, 17 (1986) (evaluating land assignments bearing the characteristics of life estates without raising any concerns under Section 177).

The Senate Report on the amendment also provided examples of agreements that could encumber tribal lands, but none of those examples resemble the type of conveyance established by the Assignment Deeds. One such example is that of a lender financing a transaction on an Indian reservation, and "receiv[ing] an interest in tribal lands as part of that transaction." S. Rep. No. 106-150, at 9. If one of the lender's remedies "would allow this interest to ripen into authority to operate the

facility, this would constitute an adequate encumbrance to bring the contract within Section 81." *Id.* (internal emphasis omitted). On the other hand, "if the transaction concerned 'limited recourse financing' and the lender merely acquired the first right to all of the revenue derived from specific lands for a period of years, this would not constitute a sufficient encumbrance to bring the transaction within Section 81." *Id.*

The examples given by the Secretary, the Senate, and the IBIA demonstrate that, by amending Section 81, Congress intended to authorize the Secretary to approve contracts that could result in an encumbrance of tribal land in the nature of a lender being permitted to operate a facility on tribal land or a third party being granted a right of entry to recover improvements. These examples also make clear that the Secretary was not authorized to approve encumbrances that convey such substantial and perpetual interests in tribal lands that are the "fair equivalent" to "absolute title" within the meaning of Section 177. ER70.

In sum, encumbrances that may be approved by the Secretary under New Section 81 differ from conveyances requiring Congressional approval under Section 177. The IBIA reasonably concluded that, while there are agreements that encumber Indian lands within the meaning of New Section 81 and may be approved by the Secretary, there are also agreements that encumber Indian lands to such an extent that the agreements actually convey interests in the land and thus

fall outside the scope of the Secretary's authority under New Section 81 and require Congressional approval under Section 177. The Tribe's contention that the IBIA's interpretation of New Section 81 renders it null is without merit.

B. The IBIA reasonably concluded that these Assignment Deeds do not merely encumber the Tribe's lands within the meaning of New Section 81, but convey such substantial interests in the land that they require separate Congressional approval under Section 177.

The IBIA reasonably found that the Assignment Deeds are "claim[s] to land" or "other conveyance[s]" that must be approved by Congress under Section 177 to be valid. ER66; ER67-69.[12] Not only do the Assignment Deeds convey the "exclusive use and possession" of the Tribe's lands in perpetuity to tribal members, but they convey rights of descent and alienation, as well as enforceable rights against third parties and the Tribe. These features make the Assignment Deeds not only "encumbrances" within the meaning of New Section 81, but also conveyances under Section 177 that require Congressional approval to be valid.

In reaching its decision, the IBIA first explained prior agency precedent addressing the difference between contracts that could be approved by the

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[12] The Tribe cites, Br. at 39, to a 2004 memorandum from the Phoenix Field Office of the Solicitor, which advised the Regional Director that it did not believe that the Assignment Deeds required further Congressional authorization under Section 177. *See* ER741; ER58-60, 60 n.8. However, this memorandum is not binding on Interior. In any event, the IBIA considered the memorandum and rejected the suggestion contained therein, ER58-60, 60 n.8, and the IBIA's decision is final for the Secretary. *See* 43 C.F.R. § 4.312.

Secretary under Old Section 81 and those requiring Congressional approval under Section 177. *See* Solicitor's Opinion, M-31724. In that decision, the Solicitor of the Department of the Interior determined that a land assignment nearly identical to the ones proposed here could not be approved by the Secretary under Old Section 81 because it needed Congressional authorization under Section 177. *Id.* The tribe there proposed to sell to its members the exclusive use of tribal land accompanied by the right to devise the interest or convey the property to another tribal member with tribal approval. *Id.* The Solicitor explained that to determine whether a contract submitted for review under Old Section 81 violates Section 177, the relevant inquiry is whether a transaction "convey[s] an interest in real property." *Id.* If the transaction merely "relat[e]s to the use of real property" and "do[es] not create an interest therein," it is not prohibited by Section 177. *Id.* The Solicitor concluded that it was sufficient that the assignments conveyed an "enforceable" possessory interest in the property that could, in turn, be conveyed to others. *Id.*

Even though this decision relates to Old Section 81, the IBIA determined that it was bound by this precedent because, as explained above in Section II.A, it concluded Congress did not intend to expand the Secretary's authority when it amended Section 81. *See* ER67 n.14; ER68-69, citing 212 Department Manual 13.8(c), *available at* www.doi.gov/oha/manuals/upload/212-DM-13-ELIPS.pdf;

209 Department Manual 3.2A(11), 3.3 and Solicitor's Opinion, M-37003 (Jan. 18, 2001), *available at* www.doi.gov/solicitor/opinions/M-37003.pdf.[13]

In applying this precedent, the IBIA considered both the terms of the Assignment Deeds and the intent of the Tribe in granting them to its members. As explained in the IBIA's decision, the Tribe consistently represented that "the assignments are perpetual conveyances of an exclusive possessory interest combined with rights of descent and alienation," ER68, that were meant to be "permanent and irrevocable," and provide its members with "an interest in the parcel of tribal land assigned to them that [is] as close to fee simple absolute as possible." ER587; ER864-65.

The Ordinance enacted by the Tribe describes the Assignment Deeds as "*deed[s]* formally conveying the assigned land to the applicant." ER676 (emphasis added). The Assignment Deeds, which incorporate the terms of the Ordinance, "grant to third parties (the assignees) a right of entry on, a claim to, and nearly exclusive proprietary control over a parcel of the Tribe's trust land to the exclusion

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[13] The Tribe nowhere argues that the Solicitor's Opinion was incorrect, and therefore, it is also entitled to *Skidmore* deference. *See Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1034-35 (9th Cir. 2010) (Agency interpretations in opinion letters "even if not authoritative for purposes of *Chevron*, are entitled to so-called *Skidmore* deference insofar as they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (quoting *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

of all others, including the Tribe." ER62; *see, e.g.*, ER293-336. The Assignment Deeds also provide assignees "with rights of descent and alienation" ER68, as well as the ability to transfer, devise, or exchange the land with other tribal members, and to lease the land to anyone, subject to approval from the Tribal council, ER55.

The Assignment Deeds waive the Tribe's sovereign immunity to suits by assignees to enforce the terms of the Assignment Deeds, and there is nothing in the Assignment Deeds or the Ordinance that "gives the Tribe a right to reclaim its land at will." ER62. The Tribe is required to pay the market value of its own land and improvements on the land if it wishes to repossess the land for tribal use. ER62-63.

The IBIA concluded that it did not matter to its analysis that there were limited circumstances in which possession of the land could return to the Tribe because those circumstances were "not intended to occur." ER69; ER64-65. The IBIA found that the conditions in which title would return to the tribe "can be analogized to exercises of governmental regulatory and criminal authority that have counterparts in American jurisprudence," such as statutes providing that land will escheat to the state where a landowner dies without heirs, that "are not intended to cause or result in a defeasance of fee." ER64 n.12.

In sum, the IBIA explained that the "[t]he Tribe loses its right to use and possess its lands while the assignees gain not only the right to demand compensation in the event of a condemnation action by the Tribe but enforceable

property rights against all third parties, including the Tribe." ER68-69. These features, and the "absence of any right in the Tribe to reclaim its land at will" indicate that the Assignment Deeds are "designed to individualize the tribal title and create in the individual an enforceable vested interest." ER68, citing Solicitor's Opinion, M-31724.

The IBIA therefore reasonably concluded that the Assignment Deeds were not simply encumbrances that the Secretary had authority to approve under New Section 81. Rather, the Assignment Deeds, like the ones found to be prohibited in the Solicitor's 1942 opinion, conveyed "a significant claim to [the Tribe's] lands that falls squarely within the proscription of [Section] 177." ER69. The "interest that is conveyed" by the Assignment Deeds "even if not absolute title to the land, is a fair equivalent thereto" and therefore requires Congressional authorization to be valid. ER70. This conclusion is fully supported by the record and implicates substantial agency expertise. It is therefore entitled to deference under the APA. *Mt. Graham Red Squirrel*, 986 F.2d at 1571.

C. That Congress expressly permitted the Secretary to authorize some agreements relating to Indian lands does not mean that Congress intended New Section 81 to authorize the Secretary to approve these Assignment Deeds.

The Tribe points to various statutes that make it lawful to alienate Indian land with only the approval of the Secretary, and not Congress. The Tribe asserts that these statutes demonstrate Congressional intent to empower the Secretary to

approve the Assignment Deeds under New Section 81. Br. at 42-43 (citing statutes). This argument fails.

Interior may only approve transactions outlined in Section 177 if there is "some *law*, . . . derived from either a treaty or a statutory provision," that grants the agency the power to approve the transactions. 18 Op. Att'y Gen. at 238. Since enacting Section 177, Congress has categorically approved the alienation of certain interests, including various types of leases, subject only to the approval of the Secretary. These statutes, cited by the Tribe, contain an explicit affirmative grant of authority to the Secretary to approve previously-prohibited transactions involving Indian land. *See* 25 U.S.C. § 415 ("Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior . . . ."); 25 U.S.C. § 397 ("Where lands are occupied by Indians . . . , the same may be leased by authority of the council speaking for such Indians . . . subject to the approval of the Secretary . . . ."); 25 U.S.C. § 323 ("The Secretary . . . is empowered to grant rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . ."); 25 U.S.C. § 311 ("The Secretary of the Interior is authorized to grant permission . . . to the proper State or local authorities for the opening and establishment of public highways . . . through any Indian reservation . . . ."); 25 U.S.C. § 312 ("A right of way for a railway,

telegraph, and telephone line through any Indian reservation in any State . . . is granted to any railroad company . . . which shall comply with the provisions of sections 312 to 318 of this title and such rules and regulations as may be prescribed thereunder: Provided, That no right of way shall be granted . . . until the Secretary of the Interior is satisfied . . . ."); 25 U.S.C. § 321 ("The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation . . . ."). And while each statute expressly provides the Secretary with authority to approve the kinds of agreements detailed therein, *none* of them condition Secretarial approval on a finding that the agreement does not "violate federal laws."

In enacting these specific statutes, Congress categorically approved the alienation of the interests described therein subject to Secretarial approval and thus brought those transactions outside Section 177's prohibition. *See Tonkawa Tribe*, 75 F.3d at 1044 (express Congressional consent required to alienate Indian lands).[14] However, as the IBIA explained, no such clear categorical approval

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[14] Indeed, the legislative history of New Section 81 and Interior's comments to its regulations reflect an acknowledgement that *different* statutes expressly govern other kinds of transactions involving Indian lands. *See* 145 Cong. Rec. S2648-03 at S2666-67 ("My proposed bill does not affect the federal government's authority to approve leases. [It] addresses non-lease agreements between Indian tribes and those that provide services that relate to the tribe's lands."); 66 Fed. Reg. at 38920

applies to the Assignment Deeds at issue here. *See* ER67; *see also* 18 Op. Att'y Gen. at 238 (requiring clear Congressional delegation of authority to Interior before Interior may approve transactions listed in Section 177). There is no Congressional authorization of "land assignments, such as the Tribe's proposed assignments, that convey in perpetuity an exclusive possessory interest in a tribe's lands that may be devised, sold, or otherwise conveyed by the assignee." ER67. Therefore, the existence of these statutes does not support the Tribe's assertion that Congress intended New Section 81 to expand the scope of the Secretary's authority to approve the Assignment Deeds.

D. The Indian canon of construction does not apply here.

The Tribe asserts that the district court erred when it declined to apply the Indian canon of construction in interpreting New Section 81 and that its interpretation should be adopted by this Court because doing so would promote the Tribe's self-governance and economic interests.[15] Br. at 50-63. The Tribe asserts,

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("Congress did not repeal any other requirement for Secretarial approval of encumbrances, nor did it state that the Act imposed an additional approval process, separate from existing statutory requirements. . . . [T]he requirements of Section 81 do not apply to leases, rights-of-way, and other documents that convey a present interest in tribal land").

[15] The Tribe also asserts that the district court erred in describing it as advocating a "broad" application of New Section 81. Br. at 50-51, citing ER19. The court thoroughly addressed the substance of the Tribe's argument about New Section 81's purpose, ER17-19; it therefore matters not whether the court characterized the Tribe as advocating for a "broad" or "narrow" application of New Section 81.

without citing any precedent, that this Court should apply the Indian canon of construction because it is a "fundamental aspect of the trust relationship between the federal government and Indian tribes." Br. at 55. This argument fails.

The Indian canon requires courts to resolve ambiguity in statutes enacted for the benefit of Indians in favor of Indian interests. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The Indian canon does not apply, however, where it is not clear what position favors Indian interests.[16] *See Shakopee Mdewakanton Sioux Cmty. v. Hope*, 16 F.3d 261, 264-65 (8th Cir. 1994) (declining to apply the Indian canon where it was unclear what position favored Indian tribes); *Confederated Tribes of Chehalis Indian Reservation v. State of Washington*, 96 F.3d 334, 340 (9th Cir. 1996). The canon is inapplicable here because interpreting New Section 81 as authorizing the Secretary to approve agreements when those agreement 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.

As the court noted, both New Section 81 and Section 177 were passed for the benefit of Indian tribes. Though the IBIA's interpretation of New Section 81

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[16] The Tribe erroneously asserts that the Indian canon requires this Court to "adopt the Indians[']s interpretation." Br. at 56. There is no precedent that supports the position that the Court must adopt the position advocated by a particular Tribe.

precludes Secretarial approval of those agreements that convey more than mere "encumbrances," it is not clear that this interpretation cuts against Indian interests. Although the concept of restraint on alienation of tribal lands "was based on paternalistic and insulting images of Indians . . . , Indian people have tenaciously worked to retain land at every juncture, and they have perceived the restraint as an ally" in "preserv[ing] tribal land for the furtherance of distinct Indian values." *Handbook of Federal Indian Law* at 1008. Congress determined that Interior should maintain a role in approving agreements under New Section 81 and that it should ensure those agreements did not violate the restraint on alienation provided by Section 177. *See* Sections A, I, II.A. 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.[17]

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[17] There is similarly no merit to the Tribe's assertion that "*Chevron* deference to interpretations that conflict with the interests of Indians is [] incompatible with the fiduciary relationship between the federal government and Indian tribes." Br. at 56. The United States' general trust relationship does not give rise to a legally-cognizable obligation unless the government expressly "assumes Indian trust responsibilities" by statute. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011); *United States v. Navajo Nation*, 556 U.S. 287, 290-91 (2009) ("tribe must identify a substantive source of law that establishes specific . . . duties"). The Tribe has not pointed to any such statutory responsibilities here.

CONCLUSION

As explained above, the district court correctly granted the Secretary's motion for summary judgment because the IBIA reasonably determined that the Secretary lacked authority to approve the Assignment Deeds under New Section 81. The judgment of the district court should be affirmed.[18]

Respectfully submitted,

/s/ Thekla Hansen-Young
ROBERT G. DREHER
Acting Assistant Attorney General

WILLIAM B. LAZARUS
ELIZABETH A. PETERSON
THEKLA HANSEN-YOUNG
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415 (Ben Franklin Station)
Washington, DC 20044
(202) 307-2710
thekla.hansen-young@usdoj.gov

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[18] If this Court concludes that the Secretary erred and that any error was not harmless, 5 U.S.C. § 706, it should remand to the Secretary for additional explanation or reconsideration of its decision. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 n.7 (9th Cir. 2004); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 938 (9th Cir. 2010). In any event, this Court should deny the Tribe's request, Br. at 64, ER876, that the Court order the Secretary to approve the Assignment Deeds, as the Tribe has not demonstrated that the Secretary has a mandatory duty to do so. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010); *Winter*, 555 U.S. at 20.

CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure. Excepting the portions described in Rule 32(a)(7)(B), the brief contains 12,929 words.

/s/ Thekla Hansen-Young
THEKLA HANSEN-YOUNG
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415 (Ben Franklin Station)
Washington, DC 20044
(202) 307-2710
thekla.hansen-young@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response Brief and the following Statutory Addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2013.

I certify that all participants are CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thekla Hansen-Young
THEKLA HANSEN-YOUNG
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 7415 (Ben Franklin Station)
Washington, DC 20044
(202) 307-2710
thekla.hansen-young@usdoj.gov

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Sec.
81b. Continuation of contracts with attorneys containing limitation of time where suits have been filed.
82. Payments under contracts; aiding in making prohibited contracts.
82a. Contracts for payment of money permitted certain tribes; payment for legal services.
83. Repealed.
84. Assignments of contracts restricted.
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86. Encumbrances on lands allotted to applicants for enrollment in Five Civilized Tribes; use of interest on tribal funds.
87, 87a. Repealed.
88. False vouchers, accounts, or claims.

SUBCHAPTER I—TREATIES

§ 71. Future treaties with Indian tribes

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of title 26 does not permit a like Federal tax to be imposed on such income.

(R.S. § 2079; Pub. L. 100-647, title III, § 3042, Nov. 10, 1988, 102 Stat. 3641.)

CODIFICATION

R.S. § 2079 derived from act Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566.

AMENDMENTS

1988—Pub. L. 100-647 inserted sentence at end relating to State tax treatment of income derived by Indians from exercise of fishing rights secured by treaties, Executive orders, or Acts of Congress.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-647 applicable to all periods beginning before, on, or after Nov. 10, 1988, with no inference created as to existence or nonexistence or scope of any income tax exemption derived from fishing rights secured as of Mar. 17, 1988, by any treaty, law, or Executive order, see section 3044 of Pub. L. 100-647, set out as an Effective Date note under section 7873 of Title 26, Internal Revenue Code.

CROSS REFERENCES

Organization and incorporation of Indian tribes, see sections 476 and 477 of this title.

§ 72. Abrogation of treaties

Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.

(R.S. § 2080.)

CODIFICATION

R.S. § 2080 derived from act July 5, 1862, ch. 135, § 1, 12 Stat. 528.

SUBCHAPTER II—CONTRACTS WITH INDIANS

§ 81. Contracts with Indian tribes or Indians

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:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupations; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub. L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

CODIFICATION

R.S. § 2103 derived from acts Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570; May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136.

AMENDMENTS

1958—Par. Second. Pub. L. 85-770 struck out requirement that contracts with Indian tribes be executed before a judge of a court of record.

Par. Sixth. Pub. L. 85-770 struck out par. Sixth enumerating contractual elements to be certified to by the judge.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

CROSS REFERENCES

Forfeiture of money received contrary to this section and punishment by fine or imprisonment, see section 438 of Title 18, Crimes and Criminal Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 81a, 84, 416a, 450*l*, 458cc, 2701, 2711 of this title; title 18 section 438.

§ 81a. Counsel for prosecution of claims against the United States; cancellation; revival

Any contracts or agreements approved prior to June 26, 1936, by the Secretary of the Interior between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a specified percentage, shall be deemed a sufficient compliance with section 81 of this title: *Provided, however,* That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement: *Provided further,* That the provisions of this section and section 81b of this title shall not be construed to revive any contract which has been terminated by lapse of time, operation of law, or by acts of the parties thereto.

(June 26, 1936, ch. 851, § 1, 49 Stat. 1984.)

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§ 81b. Continuation of contracts with attorneys containing limitation of time where suits have been filed

Any existing valid contract made and approved prior to June 26, 1936, pursuant to any Act of Congress by any tribe, band, or group of Indians with an attorney or attorneys for the rendition of services in the prosecution of claims against the United States under authority of which suit or suits have been filed, and which contains a limitation of time for the completion of the services to be performed may be continued in full force unless a subsequent contract dealing with the same subject matter has been made and approved.

(June 26, 1936, ch. 851, § 2, 49 Stat. 1984.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 81a of this title.

§ 82. Payments under contracts; aiding in making prohibited contracts

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

(R.S. § 2104.)

CODIFICATION

R.S. § 2104 derived from act May 21, 1872, ch. 177, § 3, 17 Stat. 137.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

CROSS REFERENCES

Forfeiture of money received contrary to this section and punishment by fine or imprisonment, see section 438 of Title 18, Crimes and Criminal Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 438.

§ 82a. Contracts for payment of money permitted certain tribes; payment for legal services

Contracts involving the payment or expenditure of any money or affecting any property belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes of Indians, including contracts for professional legal services, may be made by said tribes, with the approval of the Secretary of the Interior, or his authorized rep-

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§§ 5801–END
TO
TITLE 25—INDIANS

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§ 72. Abrogation of treaties

Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.

(R.S. § 2080.)

CODIFICATION

R.S. § 2080 derived from act July 5, 1862, ch. 135, § 1, 12 Stat. 528.

SUBCHAPTER II—CONTRACTS WITH INDIANS

§ 81. Contracts and agreements with Indian tribes

(a) Definitions

In this section:

(1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term "Indian tribe" has the meaning given that term in section 450b(e) of this title.

(3) The term "Secretary" means the Secretary of the Interior.

(b) Approval

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

(c) Exception

Subsection (b) of this section shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) Unapproved agreements

The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) of this section if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

(1) violates Federal law; 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).

(e) Regulations

Not later than 180 days after March 14, 2000, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b) of this section.

(f) Construction

Nothing in this section shall be construed to—

(1) require the Secretary to approve a contract for legal services by an attorney;

(2) amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.

(R.S. § 2103; Pub. L. 85–770, Aug. 27, 1958, 72 Stat. 927; Pub. L. 106–179, § 2, Mar. 14, 2000, 114 Stat. 46.)

REFERENCES IN TEXT

The Indian Gaming Regulatory Act, referred to in subsec. (f)(2), is Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, as amended, which is classified principally to chapter 29 (§ 2701 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CODIFICATION

R.S. § 2103 derived from acts Mar. 3, 1871, ch. 120, § 3, 16 Stat. 570; May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136.

AMENDMENTS

2000—Pub. L. 106–179 amended section generally, substituting present provisions for provisions which required agreements with Indian tribes or Indians to be in writing, to bear the approval of the Secretary, to contain the names of all parties in interest, to state the time and place of making, purpose, and contingencies, and to have a fixed time limit to run, and provisions which declared agreements made in violation of this section to be null and void and which authorized recovery of amounts in excess of approved amounts, with one half of recovered amounts to be paid into the Treasury.

1958—Par. Second. Pub. L. 85–770 struck out requirement that contracts with Indian tribes be executed before a judge of a court of record.

Par. Sixth. Pub. L. 85–770 struck out par. Sixth enumerating contractual elements to be certified to by the judge.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§ 81a. Counsel for prosecution of claims against the United States; cancellation; revival

Any contracts or agreements approved prior to June 26, 1936, by the Secretary of the Interior between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a spec-

Sec.
190. Sale of plants or tracts not needed for administrative or allotment purposes.
191. Repealed.
192. Sale by agents of cattle or horses not required.
193. Proceedings against goods seized for certain violations.
194. Trial of right of property; burden of proof.
195. Repealed.
196. Sale or other disposition of dead timber.
197. Disposition of dead timber on reservations in Minnesota.
198. Contagious and infectious diseases; quarantine.
199. Access to records of Five Civilized Tribes.
199a. Custody of records; Oklahoma Historical Society.
200. Report of offense or case of Indian incarcerated in agency jail.
201. Penalties; how recovered.
202. Inducing conveyances by Indians of trust interests in lands.

§§ 171 to 173. Repealed. May 21, 1934, ch. 321, 48 Stat. 787

Section 171, R.S. § 2111, related to imposition of a penalty for sending seditious messages intending to contravene a United States treaty or law.

Section 172, R.S. § 2112, related to imposition of a penalty for carrying seditious messages intending to contravene a United States treaty or law.

Section 173, R.S. § 2113, related to imposition of a penalty for corresponding with foreign nations intending to incite Indians to war.

§ 174. Superintendence by President over tribes west of Mississippi

The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;" and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

(R.S. § 2114.)

CODIFICATION

R.S. § 2114 derived from act May 28, 1830, ch. 148, §§ 7, 8, 4 Stat. 412.

AMERICAN INDIAN POLICY REVIEW COMMISSION

Pub. L. 93–580, Jan. 2, 1975, 88 Stat. 1910, as amended by Pub. L. 94–80, §§ 1–4, Aug. 9, 1975, 89 Stat. 415, 416; Pub. L. 95–5, Feb. 17, 1977, 91 Stat. 13, provided for the establishment, membership, etc., of the American Indian Policy Review Commission, and for investigations, studies, and a final report respecting Indian tribal government affairs, with the Commission to cease to exist three months after submission of the final report but not later than June 30, 1977, and Congressional committee reports to Congress within two years after referral to committee of the final report by the President of the Senate and Speaker of the House.

§ 175. United States attorneys to represent Indians

In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

(Mar. 3, 1893, ch. 209, § 1, 27 Stat. 631; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

CHANGE OF NAME

"United States attorney" substituted in text for "United States district attorney" on authority of act June 25, 1948. See section 541 of Title 28, Judiciary and Judicial Procedure.

§ 176. Survey of reservations

Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

(R.S. § 2115; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

CODIFICATION

R.S. § 2115 derived from act Apr. 8, 1864, ch. 48, § 6, 13 Stat. 41.

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

"Bureau of Land Management" substituted in text for "General Land Office" pursuant to section 403 of Reorg. Plan No. 3 of 1946, set out in the Appendix to Title 5, which established the Bureau and transferred thereto the powers and duties of the General Land Office.

§ 177. Purchases or grants of lands from Indians

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. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

(R.S. § 2116.)

CODIFICATION

R.S. § 2116 derived from act June 30, 1834, ch. 161, § 12, 4 Stat. 730.

§ 178. Fees on behalf of Indian parties in contests under public land laws

In contests initiated by or against Indians, to an entry, filing or other claims, under the laws

S. HRG. 106–96

BUSINESS DEVELOPMENT ON INDIAN LANDS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 613

TO ENCOURAGE INDIAN ECONOMIC DEVELOPMENT, TO PROVIDE FOR THE DISCLOSURE OF INDIAN TRIBAL SOVEREIGN IMMUNITY IN CONTRACTS INVOLVING INDIAN TRIBES

AND

S. 614

TO PROVIDE FOR REGULATORY REFORM IN ORDER TO ENCOURAGE INVESTMENT, BUSINESS, AND ECONOMIC DEVELOPMENT WITH RESPECT TO ACTIVITIES CONDUCTED ON INDIAN LANDS

MAY 19, 1999
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The CHAIRMAN. These are modest measures, and I would hope that the administration does support them or, if they do not, at least identify the reasons for not supporting them.

With that, I welcome the first panel, and would tell everyone who is testifying that all of your written testimony will be included in the record.

In this committee we use this light system here, and if you could confine your verbal testimony to about 7 minutes, we would appreciate it.

The first panel is Jonathan Orszag, Assistant Secretary and Director of Policy for the Department of Commerce, and Mike Anderson, Deputy Assistant Secretary for Indian Affairs, Department of the Interior.

We will go ahead and start with you, Jonathan, if you would proceed.

STATEMENT OF JONATHAN M. ORSZAG, ASSISTANT SECRETARY AND DIRECTOR OF POLICY, DEPARTMENT OF COMMERCE, WASHINGTON, DC

Mr. ORSZAG. Thank you, Mr. Chairman. My name is Jonathan Orszag and I am the Director of Policy and Strategic Planning at the Department of Commerce. In that capacity, I serve as Secretary Daley's chief policy advisor, and my office is responsible for coordinating policy development and implementation for the Department.

It is my pleasure to represent the Secretary today to discuss the Department's efforts to assist Native American communities and to represent the Department's views on two bills affecting Indian country that you have introduced.

Today, America's economy is the strongest in a generation. Unfortunately, as you know, the story for our Native American communities is not as bright. While we have made progress in recent years, there is still more work to do. The unemployment rate is still too high; the poverty rate is too high; the median family income of Native American families is far below that for all families. An astonishing 53 percent of Indian homes on reservations do not even have a telephone, compared to 5 percent for the entire United States.

President Clinton, Vice President Gore, and Secretary Daley believe strongly in the value that American does not have a person to waste—or a community that can be left behind. THus, as the President said in his State of the Union address,

> We must do more to bring the spark of private enterprise to every corner of America, to build a bridge from Wall Street to Appalachia, to the Mississippi Delta, to our Native American communities.

That is why Secretary Daley participated in the announcement by the President and Vice President of their New Markets Tour—a tour to these underserved areas—which will hopefully shine the spotlight on those areas of the country, including Native American communities, that have not fully benefitted from our economic prosperity. That is why the President held the first-ever White House Conference on Economic Development in Indian Country. That is also why the Department has been focused on promoting economic growth in Native American communities.

I am pleased to tell the committee that on June 4, the Department will open the San Manuel Band of Mission Indians Associate Office, a satellite office of an Export Assistance Center in California. Assisting local businesses in realizing their export potential, this Associate Office will be the first ever opened on Native American lands. For your information I have attached a list of programs and initiatives that the Department has undertaken to help business development on Native American reservations.

But despite our efforts and the efforts of the Department of the Interior, we know we have more to do. Mr. Chairman, you have advocated increased coordination of our programs to help Native American communities. Upon review of your recommendation, I am pleased to tell you that Secretary Daley has decided to hire a senior advisor to the Secretary who will be responsible for coordinating all of the Department's efforts to assist Native American communities. This person will serve as the point of contact for Indian economic development and will work with Commerce bureaus to increase tribal awareness of the wide array of programs that we offer.

I would like to turn now to the topic of today's hearing, S. 613 and S. 614. Since the Commerce Department is not directly affected by S. 613, we will respectfully defer to Interior.

As you know, we have a long history of working with tribes to promote and foster economic development. However, there remain many challenges to the ability of tribes to attract outside investment to stimulate economic development in Native American communities. Therefore the Department supports S. 614 and believes it is very important to identify Federal laws and regulations that affect investment and business decisions concerning activities conducted on Indian lands. The Department believes that we would fulfill the obligations laid out in the bill effectively and efficiently, as long as the necessary resources are made available. Of course, we would work closely with the Department of the Interior and other relevant Cabinet agencies to achieve the goals contemplated in the act.

Since the cost of the Authority could be significant, I believe it is important to emphasize that the Department cannot currently perform the work required by S. 614 within existing funds.

We look forward to working with the committee to find adequate appropriations within a balanced budget to carry out the task.

Thank you again for the opportunity to represent the Department and the Secretary's views, and I would be pleased to respond to any questions that you may have.

[Prepared statement of Mr. Orszag appears in appendix.]

The CHAIRMAN. Okay.

Mike, why don't you go ahead.

STATEMENT OF MICHAEL J. ANDERSON, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. ANDERSON. Good morning, Mr. Chairman and members of the committee. I am pleased to present the views of the Department of the Interior on both S. 614 and S. 613, a bill amending 25 USC 81.

As my colleague, Mr. Orszag, has described, the administration supports S. 614. We appreciate the efforts of the committee in finding tools and ways to increase economic development in Indian country, something which the administration has placed a high priority.

Because the Department of Commerce has explained the views of the administration on S. 614, let me turn to our testimony on S. 613, a bill amending section 81.

We commend the committee for its efforts in reforming the deficiencies in section 81. As you know, section 81 requires the Secretary of the Interior to approve certain contracts by American Indian tribal governments and third parties. These contracts involve payments by tribes for services, in the words of the statute, "relative to their lands." Any contract that is subject to section 81 that is not approved by the Secretary is null and void, and payments made by the tribe to third parties may be recovered when such contracts are declared null and void.

This statute was passed by Congress in 1871 and was designed, in part, to prevent unscrupulous attorneys from signing unfair contracts from tribes when they filed land claims against the United States on behalf of the tribe.

In 1871, the level of sophistication, business acumen, and negotiation skills of tribes dealing with non-Indians were light years away from what they are today. Today, most tribes have a great deal of experience in negotiating contracts with third parties and attorneys, and they don't need the Secretary of the Interior to second-guess their decisions.

For that reason, the Department believes that the best answer to reforming section 81 is to repeal it entirely. Under the current version of section 81, the definition of contracts "relative to Indian lands" is overbroad. Since it is overbroad, contracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies are now routinely presented to the BIA for approval. No other government is subject to such paternalistic requirements, nor should they be. Tribal leaders and decisionmakers are not incompetent wards who need Bureau officials telling them that they are not paying a fair price.

We have some technical comments in our written testimony which we have shared with your staff.

In summary, some of our concerns regarding S. 613 as currently drafted include the problem that services "relative to Indian lands" is not defined, just as it was not defined in 1871. At least approval of routine contracts should be excluded.

Also, the timelines in the bill for automatic approval allow little time for tribal consultation on whether the deal that the tribes have bargained for is fair.

Additionally, the section requiring the Secretary to provide for remedies for non–Indians against the tribes forces the Bureau to play an essential role in every contract negotiation in which a tribe is involved.

Finally, the Department's major concerns with the proposed bill stems from the sovereign immunity provisions of S. 613. There is, in our opinion, an ample amount of case law that adequately ad-

dresses the subject of tribal sovereign immunity. The law, as it has developed and as it exists today, serves as more than adequate notice for anyone contemplating conducting business with an Indian tribe, that tribes enjoy sovereign immunity from suit in the absence of a clear and unequivocal waiver of immunity. Those seeking to do business with Indian tribes have the opportunity to protect their own interests through negotiation of waivers of immunity. Surely, in the spirit of self-determination, Indian tribes should not be forced by the United States to negotiate the waiver of their sovereign immunity with those with whom they would conduct business. Simply put, the Government should not dictate the waiver of tribal sovereign immunity as a condition of a tribe's right to enter into a contract.

Our written testimony includes further technical comments to S. 613. At this time we are prepared to offer any assistance or answer any questions that the committee may have.

Thank you.

[Prepared statement of Mr. Anderson appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Orszag, can you expand a little bit on your comments about the Department hiring a senior advisor? It went by me pretty fast. What will the duties of that senior advisor to the Secretary be?

Mr. ORSZAG. That person's duties would be to coordinate all our efforts. We have nine different Bureaus, ranging from NOAA to the Patent and Trademark Office, to EDA, to the Economic Statistics Administration, and this person would be responsible for bringing together all nine Bureaus and ensuring that all our policies are making sense, and then also in terms of being the point of contact for members of Native American communities at the Department—this would be the point of contact. This would be the person that, if somebody wanted to find out about all the programs that we offer, they could go to this person. This person will serve as the senior advisor and would be in the Office of Policy and Strategic Planning.

The CHAIRMAN. And that person would report directly to the Secretary?

Mr. ORSZAG. The person is within the Office of the Secretary. I guess technically they would be reporting to me, but it's sort of a diagonal to me, and to the Secretary, too.

The CHAIRMAN. And would part of that person's job responsibility be to also deal with tribes, as I understand you?

Mr. ORSZAG. Yes.

The CHAIRMAN. That won't be a statutory job, however?

Mr. ORSZAG. No; it will not be.

The CHAIRMAN. And what's to prevent the person, if he doesn't want to deal with the tribes, just simply not doing it?

Mr. ORSZAG. I think what would prevent the person from doing that would be their term of employment.

The CHAIRMAN. Yes; hopefully.

Having a senior advisor to the Secretary to increase tribal awareness of the Department's programs—I mean, it sounds good, but I need to ask you those questions, but if there is no institutional or statutory authority to actually coordinate the programs, it worries me a little bit. But I guess you just have to take it from a stand-

point that a person will do the job that you appoint him to do, and hopefully he would.

So the administration's position is that if we make the resources available, you would support the regulatory reform authority in S. 614?

Mr. ORSZAG. Yes; we would support the bill.

The CHAIRMAN. Okay.

Mike, in your testimony section 81 impedes economic development in Indian country; do I understand you right?

Mr. ANDERSON. That's correct.

The CHAIRMAN. And you would prefer just to repeal it altogether?

Mr. ANDERSON. Right.

The CHAIRMAN. Would that then set in place the accusation that we are somehow ducking our trust responsibility, if we repealed 81? Section 81 deals primarily with lands and, as I understand it, attorney contracts, too. Is that right.

Mr. ANDERSON. Right, "relative to lands." The lease statute actually deals with lands and the lease of lands. In 1870, or perhaps even in the early 1900's, that may have made sense because tribes, as we know, did not have the sophistication to deal with the western world and with business interests. Today, most tribes have had a long history of negotiating business leases and other attorney contracts. They have a lot of familiarity. There may be a few tribes that could use assistance from the BIA, but as a matter of Congressional policy or administration policy, it simply doesn't make sense in the modern world.

We do have other statutes that will continue to ensure the trust responsibility for land, but section 81 contracts are really contracts for things not related—or barely related—to land issues. So it just doesn't make sense to us anymore.

In the timeline, the requirement for a review, as we point out in our testimony, is really hard to define from the statute. Do we look at the thing to get the best deal for the tribes? Or are we just making sure that it's not unfair to the tribes? The standard for review is very unclear, too.

The CHAIRMAN. Well, you've known me for a long time, and I've always been concerned about some of the exorbitant fees that attorneys charge tribes. But the fact of the matter is, if you believe in sovereignty, they get to make their own mistakes, too, and if they want to pay that much—and I think they're getting ripped off sometimes, frankly, by some of the tribal attorneys—it's their deal. If they want to do it, I guess that's a mistake that we have to allow them to do.

But your Department agrees that attorney contracts should no longer be subject to Federal approval?

Mr. ANDERSON. Right. Actually, in the self-governance law they are no longer subject under self-governance compacts.

The CHAIRMAN. Are there any other statutes that should be modified or eliminated to encourage economic development in Indian country?

Mr. ANDERSON. At this time we don't have any other suggestions, other than section 81. That deals, really, most squarely with our role in terms of approving business deals. That's the one that we would really like to focus on most, specifically.

The CHAIRMAN. Okay. Well, if you have any others that you could share with the committee, I would certainly appreciate that, and I think the other members would, too.

Okay, I thank you. I have no further questions and I appreciate your appearing.

The CHAIRMAN. The second panel will be David Tovey, Executive Director of the Confederated Tribes of the Umatilla Indian Reservation, and Dennis Horn of Holland and Knight Law Offices.

Mr. Tovey, if you would like to go ahead and start? The same deal. You can submit all of your written testimony, and we can probably give you about 7 minutes to summarize.

STATEMENT OF DAVID TOVEY, EXECUTIVE DIRECTOR, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, PENDLETON, OR, ACCOMPANIED BY DANIEL HESTER, ESQUIRE, LEGAL COUNSEL

Mr. TOVEY. Great. Thank you, Mr. Chairman, good morning.

My name is Dave Tovey, and I welcome the opportunity to present testimony on behalf of the Confederated Tribes of the Umatilla Indian Reservation. We are located in northeast Oregon. I am here to focus my testimony on S. 613 before this distinguished committee. I am here on behalf of our Chairman, Antone Minthorn, who is the Chairman of our Board of Trustees, our governing board.

Currently and for the past year I have served as the Executive Director for the Umatilla Tribes, and prior to that, for about 10 years, I was the Director of Economic and Community Development for our tribe, and for the past 4 years, and currently, I serve as the President of the Affiliated Tribes of Northwest Indians Economic Development Corporation.

As I said, I've been involved with the tribe for about 12 years. Our tribe has in the last 4 years undergone quite a massive development in financing and development of our Wildhorse Resort, which includes a casino, a 100-room hotel, an 18-hole championship golf course, a 100-slip RV park, and, just as of last August, our Tamastslikt Cultural Institute. That was about $18 million.

Also appearing with me is Daniel Hester, who has served as the tribe's legal counsel for the past 15 years. Mr. Chairman, he comes from your home State of Colorado; and in spite of earlier comments, he is cheap and affordable—[Laughter.]

And really productive.

Mr. Chairman, you introduced S. 613 to amend 25 U.S.C. 81 so as to encourage tribal economic development, to eliminate excessive and unproductive bureaucratic oversight of tribal decisions, and to provide for disclosures on tribal sovereign immunity. The CTUIR is generally in agreement with the objectives of S. 613.

We have had considerable experience with Section 81 approvals in recent years. As I said, since 1995, we have had to do 33 separate documents receiving either outright section 81 approvals, or section 81 accommodation approvals. As a result of our experience, the CTUIR has concerns regarding section 81 as currently written. There are basically three concerns.

There is uncertainty about what transactions require Section 81 approval.

The section 81 approval process increases the transactional costs associated with the development and financing of tribal enterprises.

And finally, quite honestly, there is a lack of adequately trained and experienced BIA personnel to provide meaningful review of financial documents during the process.

With these concerns in mind, we would like to offer the following comments.

No. 1, the CTUIR wholeheartedly agrees with the amendment to section 81 that eliminates the need for BIA approval of contracts that tribes enter with their own legal counsel. This change is long overdue, and of course, we feel like we can make that selection on our own.

No. 2, S. 613 would create a new subsection (b) that would impose timelines on Secretarial approvals under section 81. While the CTUIR agrees that timelines for Secretarial action are essential, we believe that the 90-day period is a little too long. We would like to see that shortened to 30 days. Furthermore, the CTUIR suggests that the time period for the Secretary to inform a tribe of their intent to review an agreement that the tribe has stated is not subject to section 81 review should be reduced from 45 to 30 days. Of course, many times in a commercial setting, in business dealings, time is of the essence, and a prolonged period of Federal review can increase transaction costs or, even worse, render a project infeasible.

We would like to submit a letter from the Portland Area Office, from Portland Area Director Stan Speaks, that suggests a similar kind of 1-month turnaround on these kinds of approvals.

No. 3, the CTUIR urges the committee to revise S. 613 to provide that Secretarial determinations regarding whether section 81 approval is required for a particular agreement to be binding so as to remove uncertainty regarding Section 81 application to any agreement or transaction. I guess what we're saying is that we would like to make it clear that when the Secretary determines that Section 81 approval is not required—whether that determination is made by action or inaction—such determination is binding upon the parties to the agreement. By providing certainty on this issue—and of course, it's that certainty that our investment partners, banks, and others, are looking for—unnecessary transactional costs and potential loss of business opportunity can be avoided.

No. 4, S. 613 also imposes a requirement that any tribal agreement subject to section 81 approval must address tribal sovereign immunity in the agreement in order to receive section 81 approval. The CTUIR sees no need for these requirements in section 81. In our experience, the parties that we have dealt with are fully and completely aware of tribal sovereign immunity. If the objective of S. 613 is to put lenders and other contracting parties on notice regarding the existence and potential consequences of tribal sovereign immunity, our experience clearly indicates that no such notice is required.

No. 5, the CTUIR believes that S. 613 would benefit the section 81 review and approval process by further clarifying what agreements section 81 applies to. While S. 613 contains subsection (c)(3), which authorizes the Secretary to issue guidelines for identifying

which agreements section 81 does not apply to, we believe it would be useful to clarify the statutory language in the first paragraph of section 81 that requires section 81 approval for any tribal agreements that are "relative to tribal lands." And, of course, considerable time is spent trying to determine what that applies to as far as our lands, working through that ambiguous language.

Therefore, the CTUIR urges that section 81 approval only be required for tribal agreements that involve a contracting party receiving some possessory interest in tribal lands, such as an easement or lease.

Finally, the CTUIR urges that the committee recognize the importance of providing adequate BIA funding for the hiring of qualified personnel to provide meaningful section 81 review of the commercial and financial agreements that the tribes are increasingly entering. Of course, with recent reductions in BIA staffing at the Agency and Area Office level, the tribes' experience demonstrates that the BIA does not have sufficient staff to provide a timely and meaningful section 81 review. We have had tremendous cooperation—and we would like to note that—in the past 5 years of our economic development efforts with the Director of the Portland Area Office, Stan Speaks, and with the Umatilla Agency Superintendent, Phil Sanchez. We know that the expansion of tribal economic development initiatives and meaningful review of increasingly sophisticated tribal financial and commercial agreements will require additional professional expertise in the BIA field offices.

Also attached to my testimony is a letter from Jesse Smith. He is Vice President of Seattle Northwest Securities, and they served as the underwriter for our $17 million bond issuance, which more or less refinanced all the initial loans for our Wildhorse Resort development. And I believe Mr. Smith's letter, from a lender's perspective, supports many of our points.

Again, in closing, we would applaud the committee's leadership, and particularly yours, Mr. Chairman, in advancing these initiatives. I will close there.

[Prepared statement of Mr. Tovey appears in appendix.]

The CHAIRMAN. Okay. Thank you.

Mr. Horn, why don't you go ahead.

STATEMENT OF DENNIS HORN, ESQ., LAW OFFICES OF HOLLAND AND KNIGHT, WASHINGTON, DC

Mr. HORN. Thank you, Mr. Chairman. My name is Dennis Horn. I am an attorney in the law firm of Holland and Knight. For the past 2 years I have been involved in managing the District of Columbia's regulatory reform project for the Washington, DC Control Board.

Before we started, Mr. Chairman, Mr. Tovey asked me why somebody who knows a lot about the District of Columbia would be testifying about regulatory reform for Indians, and it's a very good question. I think the answer is that there's a very close correlation between bureaucratic red tape and jobs. We found in the District of Columbia that businesses wanted to be here if you could eliminate the hassle of them doing their jobs and creating jobs. The regulatory reform project in the District of Columbia is all about creating jobs in the District of Columbia. Hopefully, that will be of some

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF MICHAEL ANDERSON, DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. Chairman and members of the committee, I am pleased to be here today to present the views of the Department of the Interior on S. 613, a bill providing for amendments to Section 2108 of the Revised Statutes (25 U.S.C. Sec. 81).

We commend the committee for its interest and efforts in reforming the deficiencies of Section 81. As you are aware, Section 81 provides for Secretarial approval of certain contracts by and between Indian tribes and third parties. Due to the many uncertainties that attend compliance with Section 81, we oppose S. 613 which would amend the section. Instead, we are prepared today to advocate for the repeal of the statute. In the event Congress chooses to amend Section 81 rather than repeal the provision, we would encourage the committee to amend the statute in a different manner than the one proposed in S. 613.

I would like to take a few minutes to review the history of Section 81 and provide some information on the complications inherent in enforcing it. This particular law is one of a series of statutes designated as 25 U.S.C. Sec. 81–88, found under the statutory heading, "Subchapter II-Contracts with Indians." Included in this subchapter are some laws which are almost certainly obsolete, due to their express relation to contracts in effect in 1936, that is, sec. 81a and 81b. Other laws relate only to contracts involving money or property of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes or their members, that is, sec. 82a and 86. What remains, sec. 82, 84, 85, and 88, should generally be considered in connection with Section 81.

It is probably safe to say that of all the individuals conducting business in Indian country today, no one is entirely comfortable in attempting to comply with 25 U.S.C. Sec. 81. It is extremely difficult even to determine when this law applies. Even when it does apply to a particular agreement, it isn't clear what criteria the Department should look at in determining whether to approve or disapprove the agreement. For example, it is unclear whether we should review the agreement to determine whether it is not unfair to the tribe or whether it is in the best interest of the tribe. The latter requires the Department to question the tribe's business judgment. We do not believe that it is appropriate for the BIA to be second guessing the decisions of tribes and their consultants over business decisions made by the tribes.

In essence, Section 81 requires that all contracts involving payments by tribes for services relative to their lands must be approved by the Secretary of the Interior. Any contract that is subject to the provisions of Section 81 and is not approved by the Secretary is null and void. The primary purpose of Section 81 was to ensure that tribes were not being taken advantage of by attorneys filing claims on behalf of the tribes against the United States for the taking of tribal lands. For decades, the BIA applied Section 81 solely to the approval of attorney contracts with tribes. . However, in the early 1980's with the advent of gaming on Indian lands, the scope of Section 81 began to change.

Many non-Indian gaming operators signed management agreements with tribes to operate gaming enterprises on tribal lands. Disputes arose between some of the tribes and their gaming operators. Ultimately, in litigation over the management contracts, the theory that the contracts were void because they had not been approved pursuant to Section 81 was asserted. The Department's Office of the Solicitor issued an opinion that Section 81 applied only to the approval of attorney contracts and, therefore, the gaming management contracts did not require approval by the Secretary. The Seventh Circuit Court of Appeals in *Wisconsin Winnebago Business Comm.* v. *Koberstein,* 762 F.2d 613 (1985) disagreed. It found that the management agreement at issue in that case involved a payment by the Winnebago Tribe for the manager's services and gave the gaming manager the absolute right to use tribal land during the term of the management agreement. The court found that this right to exclusive use was "relative to tribal lands," that the contract was subject to Section 81, and since it had not been approved by the Secretary (even though the Secretary had, in fact, said the contract needed no approval), that the contract was void. At least one other circuit has followed the Seventh Circuit Court's lead. See *A.K. Management Co.* v. *San Manuel Band of Mission Indians,* 789 F. 2d 785 (9th Cir. 1986); *Barona Group of the Capitan Grande Band of Mission Indians* v. *American Management and Amusement, Inc.,* 840 F.2d 1394 (9th Cir. 1987). The result has been that virtually everyone wishing to conduct business with an Indian tribe now demands a Section 81 approval of their contracts because of the uncertainty of the precise meaning of "relative to tribal lands."

Contracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies are now routinely presented to the BIA for review and approval. Even though many of these contracts are clearly not subject to Section 81, assurances by the Department are of little value since the Department's earlier opinion has been rejected in the *Koberstein* case and the consequences for not having an approved contract are extreme. If a contract is subject to Section 81 and is not approved by the Secretary, any citizen can bring a suit challenging the contract (this citizen suit provision of Section 81 has in recent years been somewhat limited by the courts) and if the contractor loses, all monies paid by the tribe to the contractor are refunded to the tribe while all benefits (that is, vehicles, buildings et cetera) of the contract(s) to the tribe are forfeited by the contractor. In addition, there are criminal penalties for violation of Section 81 in Title 18 of the United States Code.

Although there may have been good reason for such legislation in the 1870's, most of those reasons no longer exist today. Tribes are encouraged through the contracting and compacting provisions of Public Law 93–638 to make decisions and decide their political and economic futures for themselves. Public Law 93–638, in fact, has an express provision waiving the applicability of Section 81 in certain circumstances. See 25 U.S.C. Sec. 4501(b)(15) and 458cc (h)(2). However, because the Bureau's 12 Area Offices and the Solicitor's Regional and Field Offices apply Section 81 differently as a result of the uncertainly over the precise scope of Section 81 caused by decisions of various courts of appeals, these provisions have had little effect.

S. 613 proposes to remedy many of the deficiencies of Section 81 noted here today. In our opinion, however, the best remedy would be to repeal the statute. In the alternative, we would suggest amending the statute in a manner which clarifies the type of transactions for which Section 81 approval is required. For example, the statute should be, amended to clarify that contracts for matters such as the sale of vehicles or office supplies to tribes or routine maintenance contracts, would no longer require BIA approval.

One of our primary concerns with S. 613 lies with the bill's failure to define the meaning of the phrase "services related to their lands" found in the current language of Section 81. Should Section 81 not be repealed, a definition explaining this phrase would eliminate many of the problems encountered in interpreting the statute as it exists today. Indeed, simply defining this phrase would eliminate the need for most of the revisions to Section 81 proposed in S. 613.

We find the proposed timelines found in S. 613 objectionable because they do not allow sufficient time to permit consultation between tribes and the Department in order to facilitate contracts that are more protective of tribal interests. These timelines would work to allow otherwise illegal contracts that are not in the best interest of a particular tribe to be ratified simply because the review process extended beyond the time limitations set forth within this bill. We also note that approval of an agreement under Section 81 may require compliance with cross-cutting Federal statutes. The possible need for such compliance also argues against approval occurring within the timelines set forth in the bill.

Another of the Department's major concerns with the proposed bill stems from the sovereign immunity provisions of S. 613. There is, in our opinion, an ample amount of case law that adequately addresses the subject of tribal sovereign immunity. The law, as it has developed and as it exists today, serves as more than adequate notice for anyone contemplating conducting business with an Indian tribe that tribes enjoy sovereign immunity from suit in the absence of a clear and unequivocal waiver of immunity. Those seeking to do business with Indian tribes have the opportunity to protect their own interests through the negotiation of waivers of immunity. Surely, in the spirit of self-determination, Indian tribes should not be forced by the United States to negotiate the waiver of their sovereign immunity with those with whom they would conduct business. Simply put, the government should not dictate the waiver of tribal sovereign immunity as a condition of a tribe's right to enter into a contract. The, Department also objects to the provision requiring the Secretary to protect non-Indians by ensuring that they have remedies against a tribe. This provision would not only place the Secretary in a conflict of interest, but would also force the Bureau to play an essential role in every contract negotiation in which a tribe is involved.

This concludes my prepared statement on S. 613. I will be happy to answer any questions you may have.

PREPARED STATEMENT OF MICHAEL ANDERSON, DEPUTY ASSISTANT SECRETARY—INDIAN AFFAIRS DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Good morning, Mr. Chairman and members of the committee. I am here today to provide the Department of the Interior's position on S. 614, which provides for regulatory reform in order to stimulate investment, business and economic development on Indian reservations. We support S. 614.

As many of you on this committee know, life on most Indian lands is hard. There is widespread unemployment, poor health, substandard housing and associated social problems which can be directly related to a lack of opportunities on Indian reservations. Research has shown that when business and economic development opportunities appear in Indian country, these conditions and the resulting social problems tend to decrease.

With budgetary constraints severely limiting the availability of Federal funding for social and governmental programs, tribes nationwide must become more self-sufficient and focus their attention on developing their own economic growth to meet their community's needs.

Some tribal communities have flourished as a result of tribal gaming and other commercial business ventures. However, these examples are still scarce and most Indian communities remain impoverished, separate and distinct entities. Economic prosperity doesn't necessarily cross reservation borders any more than it does in urban areas where affluent and poor communities exist side-by-side.

On August 6, 1998 the administration held the first White House Conference on Indian Economic Development. At this conference, President Clinton directed the Departments of the Interior and Commerce, and the Small Business Administration to collaborate and develop, in consultation with other interested parties that includes tribal governments, a strategic plan for coordination of existing Federal economic development initiatives for American Indian and Alaska Native communities. Following this conference, agencies coordinated and developed a number of aggressive goals to increase business opportunities in Indian country, expand economic opportunities for tribes and individual Indians, and to encourage the non-Indian private sector communities to seek tribal business partners. The conference was an unqualified success and it is our challenge to see that the goals are achieved. Recently, the President and Vice President announced their New Markets Tour, which will highlight the administration's FY2000 budget proposals that will help generate new markets in economically distressed communities, including Indian country.

The proposed activities considered in S. 614 seek to remove obstacles to investment, stimulate business development, and create wealth on Indian reservations. We understand that an entity composed of 21 members would direct these efforts. Of these 21 members, 12 will represent Tribes from the Areas served by the Bureau of Indian Affairs [BIA]. An integral component in any comprehensive national effort must be tribal involvement and support. Representatives from each of BIA's 12 areas would provide for such involvement.

We recommend that the committee allow for the BIA to be represented as an active participant in this new authority. The BIA established the Office of Economic Development to coordinate, facilitate, improve and increase economic opportunities in Indian country. This office continues to work on addressing those related issues,

Calendar No. 270

106TH CONGRESS *1st Session* | SENATE | REPORT 106–150

ENCOURAGING INDIAN ECONOMIC DEVELOPMENT, TO PROVIDE FOR THE DISCLOSURE OF INDIAN TRIBAL SOVEREIGN IMMUNITY IN CONTRACTS INVOLVING INDIAN TRIBES, AND FOR OTHER PURPOSES

SEPTEMBER 8, 1999.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 613]

The Committee on Indian Affairs, to which was referred the bill (S. 613) to encourage Indian economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends the bill as amended do pass.

PURPOSE

The purpose of S. 613, as amended, is to replace the provisions of the Act of May 21, 1872, Section 2103 of the Revised Statutes, found at 25 U.S.C. §81 (Section 81) to clarify which agreements with Indian tribes require federal approval, to specify the criteria for approval of those agreements, and to provide that those agreements covered by the Act include a provision either disclosing or addressing tribal immunity from suit. S. 613 also amends the Indian Reorganization Act of 1934 and §81 to eliminate any statutory requirement for federal review of tribal contracts with attorneys.

BACKGROUND

The federal government is the legal trustee for Indian lands. As a result, these lands may not be sold or leased except in a manner consistent with federal law. In addition, an 1872 statute, Section 2103 of the Revised Statutes, found at 25 U.S.C. §81 requires federal approval of agreements "relative to" Indian lands owned by a tribe or "Indians not citizens of the United States." Section 81 in-

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cludes a list of technical requirements for such agreements and provides that any agreement that does not conform with its requirements is null and void and all amounts paid by a tribe or on the tribe's behalf are to be disgorged. Finally, the statute authorizes parties to bring suit to enforce the statute "in the name of the United States in any court of the United States, regardless of the amount in controversy."

Enacted in 1872, Section 81 reflects Congressional concerns that Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs.[1] As explained by the Supreme Court: "The early legislation affecting the Indians has as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others * * *"[2] The Indian Reorganization Act of 1934 (IRA) represented a fundamental break with this policy. As the Supreme Court explained: "The intent and purpose of the [IRA] was 'to develop the initiative destroyed by a century of oppression and paternalism.'"[3] The IRA's sponsor in the Senate, Senator Burton K. Wheeler characterized the purpose of the IRA: "[It] seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation organized by the Indians."[4]

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

Although the IRA did not explicitly amend Section 81, it was soon apparent that the two laws were based on fundamentally inconsistent principles. This left those concerned with tribal transactions with the difficult task of reconciling an 1872 statute that sought to protect Indian tribes by imposing extensive federal oversight with a 1934 Act intended "to disentangle the tribes from official bureaucracy."[5]

A 1952 Opinion by the Department of Interior's Office of the Solicitor represents one attempt to reconcile these two statutes.[6] The opinion addresses two separate transactions by two different tribal entities. Although both entities were organized pursuant to the IRA, one entity traced its authority to a tribal corporation chartered under Section 17 of the IRA (25 U.S.C. § 477), while the other was organized under an IRA constitution pursuant to Section 16 of the IRA (25 U.S.C. § 476). With respect to the Section 17 corporation, the Solicitor pointed out that the IRA allowed the Secretary to grant charters that authorized Indian tribes to mortgage or lease

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[1] The legislative history reveals that Congress enacted this statute because of concerns about individuals retained by tribes to assert claims on their behalf. See *In re United States ex rel. Hall*, 825 F. Supp. 1422, 1431–2 (1993), *aff'd* 27 F.3d 572 (8th Cir. 1994).

[2] *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 579 (1928).

[3] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., 6 (1934).

[4] Id. at 152, quoting 78 Cong. Rec. 11125.

[5] Id. at 153.

[6] Contracts for the Employment of Managers of Indian Tribal Enterprises, Opinion of the Solicitor, February 14, 1952 (M–36119).

tribal lands for any period up to 10 years. Thus, the Solicitor reasoned that the Secretary could "grant to the tribe freedom to make contracts without complying with the requirements prescribed in [Section 81]."

The Solicitor reached this conclusion even though Section 17 precluded the Secretary from granting to the tribe incidental corporate powers which are "inconsistent with the law." The Solicitor interpreted this phrase very restrictively, to include only those "powers which cannot lawfully be given to any corporation, non-Indian or Indian." This interpretation was consistent with the purpose of incorporation, which was characterized by the Solicitor as "the means for the conduct of business activities in a business-like way. * * *" Having concluded that nothing in Section 17 prohibited the Secretary from freeing a tribal corporate entity from the dictates of Section 81, the Solicitor then concluded that a provision authorizing the tribe to enter into land leases of up to ten years and contracts of up to $5,000 per year, without BIA review, should be interpreted as such an exemption.[7]

Nevertheless, the Solicitor opined that Section 81 was applicable to a farm manager's contract with an Indian tribe organized pursuant to Section 16. The Solicitor explained that in addition to the powers which were explicitly to be vested in the tribe under Section 16, the tribe retained "all powers vested * * * by existing law." The Solicitor then stated: "We do not find here any grant of power to make contracts without regard to the requirements [Section 81]." This conclusion deviates from the Solicitor's long-standing practice, which continues to this day, of interpreting the IRA as a codification rather than the source of tribal authority.[8] Hence, it is surprising that the Solicitor would look to the Section 16 for a "grant" of authority.

In fact, the Solicitor recognized that the IRA "was intended to make a new point of departure in the relations between the tribes and the Government," but reasoned that a repeal by implication was disfavored. Certainly Section 16 did not explicitly exempt the

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[7] It is worth noting that the actual Section 17 corporate charter under consideration in the 1952 opinion was granted to the Minnesota Chippewa Tribe. However, the agreement which was under consideration (and found not to require Section 81 approval) was an agreement between a non-Indian and the Grand Portage Band, "one of the constituent bands of the Minnesota Chippewa Tribe." Thus, it would seem to follow that any tribe with Section 17 corporation could confer similar authority on any of its subordinate economic entities, at least up to the extent of any conditions contained in its corporate charter.

[8] Finding that Section 81 was inapplicable to the Section 17 contract was consistent with the longstanding principle that federal laws, including the IRA, are not the source of tribal authority.

> Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. *The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty* rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or tribal council by existing law."—Powers of Indian Tribes, 55 Interior Decision 14 (October 25, 1934) (emphasis supplied).

However, applying Section 81 to the farm manager's contract apparently disregards an equally important principle articulated in the same 1934 opinion: "The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference." Another example where this important principle may have been disregarded is *Yavapai-Prescott Indian Tribe* v. *Watt*, 707 F.2d 1072 (1983) (Secretarial approval needed to both approve and terminate lease).

contract at issue from Section 81, but neither did Section 17 of the IRA. In addition, the Solicitor pointed out that it would be "unsafe" to assume that Section 81 was inapplicable because the failure to comply with its requirements would subject the contracting party to a fine and the loss of any benefit conferred upon the party by the tribe. Again, the same risk applies to contracts with section 17 corporations and counsels in favor of assuming that Section 81 applies to those contracts.

The Solicitor's decision represents an attempt to reconcile two statutes that derive from two fundamentally different eras with little guidance from Congress on how these statutes were to be harmonized. The opinion also freed at least some Indian tribes from the onerous requirement of obtaining federal approval for a potentially vast array of contracts.[9] Nevertheless, a number of problems remain unresolved. For example, until 1991, Section 17 charters were only granted by the Secretary after a vote of a tribe's membership. Second, the Solicitor's 1952 opinion did not provide any guidance concerning the appropriate reach of Section 81's application to agreements "relative to Indian lands." Even where there is no question that Section 81 applies to an agreement, it provides no standards for the BIA to apply when deciding whether to approve a proposed agreement.[10] In addition, as the tribal transactions became increasingly more complex, the BIA often lacked the resources or expertise necessary to adequately review proposed contracts.

As federal policy increasingly emphasized tribal-self-determination by reducing or eliminating federal review of tribal decisions, Congress has both directly and indirectly addressed concerns about Section 81. For example, in 1958, Congress removed a provision from Section 81 which required the execution of these agreements in the presence of a judge.[11]

More recently, Congress explicitly cited problems with Section 81 review of management agreements as a justification for enacting the Indian Mineral Development Act of 1982, P.L. 97–382:

> [T]he approval procedure for non-lease ventures under Section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of the

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[9] Another Solicitor's Opinion recognized that an Indian tribe could organize its political institutions under Section 16 of the IRA and still obtain a Section 17 charter for purposes of conducting business. Separability of Tribal Organizations Organized Under Sections 16 and 17 of the I.R.A. 65 Interior Dec. 483 (November 20, 1958).

[10] In one case where a private party sought judicial review of a decision under Section 81, the United States argued that judicial review should be unavailable because the Act did not contain sufficient standards to allow the court to determine how the Act should be applied to the case.

> As an alternate basis on which to affirm the district court['s decision to dismiss], *the government asserts* that "review [of Interior Department decisions under 25 U.S.C. §81] is not to be had [because] the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Stock West Corporation* v. *Lujan*, 982 F.2d 1389, 1399–1400 (1993) (Emphasis supplied, internal quotation to *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)).

Obviously, if the government takes the position that Section 81 provides courts with no discernible standards for applying the statute, tribes and their (potential) partners are similarly at a loss to determine how and whether the Act will be applied. Such uncertainty is anathema to reservation development.

[11] Public Law 85–770.

> 1938 act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). [In addition], with the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority for approval of existing ventures, because of the confusion concerning the Secretary's authority to approve non-lease ventures, the Department is reluctant to approve a number of proposed agreements which are pending.[12]

More general relief was provided by Congress in 1990 when it made several changes to Section 17 of the IRA. Public Law 101–301 amended the IRA by eliminating the requirement for a reservation-wide plebiscite before the Secretary of Interior could confer a corporate charter pursuant to Section 17. In addition, it authorized section 17 tribal corporations to lease Indian lands without Secretarial approval for up to 25 years.[13] As enacted the IRA limited such leases to 10 years.

In addition, the Tribal Self-Governance Act, established as a component of the Indian Self-Determination and Education Assistance Act,[14] makes Section 81 inapplicable to participating Indian tribes during the terms of their participation in Self-Governance.[15] These Indian tribes are also exempt from any requirements under either 25 U.S.C. §81 or §476 to submit attorney contracts for federal approval.

While these laws have allowed some Indian tribes to engage in business transactions without needing to conform with requirements that were intended to shield them from "their own improvidence and the spoliation of others," it left Section 81's core provisions intact. As a result, neither tribes, their partners, nor the BIA could predict with any certainty whether a court might ultimately conclude that a transaction was void because it was not approved pursuant to Section 81. The risk that a court might make such a conclusion was exacerbated by severity of the penalty for noncompliance borne by the party contracting with the tribe.

For example, in 1985, in *Wisconsin Winnebago Business Committee* v. *Koberstein,* 726 F.2d 613 (7th Cir. 1985) the United States Court of Appeals for the 7th Circuit ruled on the applicability of Section 81 to a five-year agreement with a corporation "to assist the [tribal business committee] in obtaining financing, construct, improve, [develop], manage, operate and maintain [specified tribal lands] as a facility for the conduct of bingo games. * * *" The proposed agreement was submitted to the BIA Area Office and the Department of Interior Field Solicitor. The Solicitor determined that

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[12] H.R. Rep. No. 746, 97th Cong., 2nd. Sess. 1982.

[13] As passed by the Committee, S. 613 would eliminate the basis in federal law for Secretarial review or approval of a number of contracts and agreements. As a question of tribal law, however, Section 17 charters, tribal constitutions, or tribal by-laws may include terms that require Secretarial approval of agreements. In addition, some of these documents may require Secretarial approval of any amendments to those organic documents. There is no reason to assume that the Secretary does not possess the authority to approve duly authorized amendments to such documents. Certainly S. 613, P.L. 101–301, and the IRA demonstrate a clear Congressional policy in favor of reducing federal review of tribal decisions and agreements.

[14] P.L. 93–638, 25 U.S.C. 450 et seq.

[15] 25 U.S.C. §458cc(h)(2) and §4501(b)(15).

Section 81 did not apply to the agreement. Nevertheless, the Court of Appeals ruled that it did.[16]

The *Koberstein* case concerned an Indian tribe's attempt to prevent the operation of a bingo facility run by an individual who failed "to disclose the potential conflict of interest between his duties as tribal attorney and his position as president of the [bingo management company]." Thus, it is not surprising that the court ruled that the agreement was void. In its defense, the company sought to argue that Section 81 should be interpreted in light of subsequent Congressional enactments that limit federal review of tribal decisions and encourage tribal economic development. For example, the Supreme Court wrote in 1976: "[W]e previously have construed the effect of legislation affecting reservation Indians in light of "intervening" legislative enactments.[17] The *Koberstein* court brushed these arguments aside, relying instead on the Supreme Court's analysis in cases addressing the preemption of state law in matters affecting Indian tribes and their members. In these cases, the Court has refused to be swayed by "modern conditions" that arguably counsel in favor of state regulation or taxation of the activities of Indian tribes or their members.[18] In cases involving preemption, the Court has indicated that statutes are "given a sweep as broad as their language." Applying this principle to the relationship between tribes and the federal government, the court determined that section 81 should be interpreted broadly: "[S]ection 81 governs transactions relative to Indian lands for which Congress has not passed a specific statute." This approach is inconsistent with the principle that "The acts of Congress which appear to limit the powers of Indian tribes are not to be unduly extended by doubtful inference."[19] In fact, the court conceded: "No federal cases have been presented to us * * * that comprehensively analyze the scope of coverage of section 81."

Soon after *Koberstein* was decided, the 9th Circuit Court of Appeals adopted its reasoning and conclusion in a suit where a gaming management company sued to enforce an agreement that was not approved by the BIA pursuant to section 81. In this case a company sought to argue that section 81 was not applicable to the agreement, even though its agreement with the tribe recognized that section 81 approval was a prerequisite to the contract. *A.K. Management Company* v. *The San Manuel Band of Mission Indians,* 789 F.2d 785 (9th Cir. 1986).

In response to federal court cases finding Section 81 applicable to gaming management contracts and as part of the federal policy that encourages Indian tribes to engage in gaming activities comparable to those offered within a state, the Department published guidelines for the approval of these agreements.[20] Federal courts

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[16] Since the contracting party in this case was unaware of the BIA's determination that Section 81 was inapplicable, the court of appeals did not address whether principles of estoppel and/or detrimental reliance precluded its application after BIA found that an agreement was not covered by Section 81.

[17] *Bryant* v. *Itasca County,* 426 U.S. 373, 386, quoting *Moe* v. *Salish & Kootenai Tribes,* 425 U.S., at 472–5 (1976).

[18] *Central Machinery Co.* v. *Arizona,* 448 U.S. 160, 166 (1980).

[19] 55 Interior Dec. 14 (October 25, 1934). See footnote 8.

[20] "[T]he Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises. Under the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq. (1982 ed. and Supp. III), the Secretary of the Interior has made grants and has guaran-

cited these guidelines as evidence of a reversal of the Department's previous position that Section 81 did not apply to these agreements, even though the BIA was seeking legislative clarification of the statute in response to these decisions. As a result, the application of Section 81 to gaming management agreements was well established as a question of law, even though some federal courts characterized "the draconian remedy of the statute [as] distasteful." One federal court argued that the statute might cause more harm than good: "[Section 81] imposes a penalty out of proportion to the purely technical violations if proscribes. It seems likely that tribes may be hurt rather than protected by the disruption of their successful business relationships."[21]

At its May 19, 1999 hearing, the Commission heard testimony that tribes and their partners are unable to eliminate the uncertainty created by Section 81. In this respect, Section 81 differs from the doctrine of tribal sovereign immunity. Any uncertainty about whether tribal immunity will prevent the enforcement of an agreement with an Indian tribe can be addressed and eliminated through the terms of an agreement with the tribe or by some other means. Courts have ruled, however, that parties may not waive the application of Section 81 in the same manner. In fact, it appears that Section 81 prevents a tribe from binding itself to an agreement that it will not raise its provisions as a defense if litigation ensues.[22] In addition, some courts have interpreted the last paragraph of Section 81 as allowing *qui tam* suits against the party contracting with the tribe. In some cases, such suits can be brought by parties other than the tribe or the United States.[23] Thus, even if the parties decide that Section 81 is inapplicable and agree that they will not subsequently employ it as a defense to the contract's enforcement, third parties can bring suit and at least disrupt the contract's performance through costly and lengthy litigation. In addition, even where the BIA determines that a contract does not fall within the purview of Section 81, courts are not bound by this conclusion. Thus, Section 81 produces uncertainty and leaves Indian tribes, their business partners, and the BIA powerless to eliminate this uncertainty.

Another concern relates to the increasing complexity of tribal transactions. Quoting from Congressional proceedings, one U.S. District Court noted: "Section 81 was enacted to protect the Indian tribes at a time when Congressmen believed that '[t]here are no In-

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teed loans for the purpose of constructing bingo facilities * * * [T]he Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. *The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. §81, and has issued detailed guidelines governing that review.*" *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 217–8 (1987) (emphasis supplied and citations omitted).

[21] *U.S.* v. *D & J Enterprises*, 1993 WL 76789 (W.D. Wis. 1993) (finding that Section 81 voided the agreement even though the tribe was represented by competent legal counsel and there was no evidence of fraud or duress).

[22] For example, courts have ruled that an agreement that is void pursuant to Section 81 "[the agreement] cannot be relied upon to give rise to any obligation by [the tribe], including an obligation of good faith and fair dealing." *A.K. Management Co.* v. *The San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (1986).

[23] Based on this interpretation, non-parties to the contract can sue a party contracting with the tribe if the agreement was not approved under Section 81. This result was soundly criticized by one court as "bestowing a windfall" for litigants, even where there is no evidence of fraud or duress. *U.S.* v. *D & J Enterprises*, 1993 WL 767689 (W.D. Wis. 1993). Subsequently, the 7th Circuit Court of Appeals ruled muted the effect such suits by ruling that the tribe is an indispensable party under F.R.C.P. Rule 19 *United States ex rel. Hall* v. *Tribal Development Corp.*, 100 F.3d 476 (7th Cir. 1996).

dians, as a tribe or as individuals, that are competent to protect themselves against the enterprise and the fraud of the white man.'"[24] There is no justification for such an assumption to provide the basis for federal policy in this era of tribal self-determination.[25]

Similarly, there is no basis to require, as a matter of federal law, that tribes must submit their attorney contracts to the federal government for approval. For example, during the 100th Congress, the Interior Department's Assistant Secretary for Indian Affairs Ross O. Swimmer suggested that a bill amending the IRA should include a provision eliminating this requirement.

> [W]e recommend that [the bill] as passed by the House by amended to eliminate the current statutory requirements that the Secretary approve the tribal selection of tribal attorneys and attorney fees (25 U.S.C. section 81 and 476). It would be consistent with the goals of Indian self-determination to allow the tribes to choose their own attorneys and set the rate of compensation without the Secretary's oversight.[26]

The current Administration has also indicated its support for such a provision and S. 613 incorporates this proposal.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Section 1. Short title

Section 1 cites the short title of the bill as the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

Section 2. Contracts and agreements with Indian tribes

Section 2 of the bill replaces the text of 25 U.S.C. §81 with six subsections.

Subsection (a) provides definitions for the terms "Indian lands," "Indian tribe," and "Secretary." Perhaps a definition for Indian lands is intended to circumscribe the scope of this statute to those lands where title is held in trust for a tribe or a restraint on alienation exists as a result of the principle, dating from the Revolutionary War Era, that the federal government must hold title to Indian lands in furtherance of the federal-tribal trust relationship.

Subsection (b) provides that agreements or contracts with Indian tribes that encumber Indian lands for a period of seven or more years are not valid unless they bear the approval of the Secretary of Interior or a designee of the Secretary. Under present law, Section 81 is susceptible to the interpretation that any contract that "touches or concerns" Indian lands must be approved. In addition, because of the "draconian" nature of the penalty for non-compli-

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[24] *U.S.* v. *D & J Enterprises*, 1993 WL 76789 (W.D. Wis. 1993), quoting Senator Davis, Cong. Globe 1484.

[25] In fact, there is some evidence that the Seventh Circuit recognizes the difficulty of applying its *Koberstein* rule in a manner that makes Section 81 applicable to "nearly all transactions relating to Indian lands." *Altheimer & Gray* v. *Sioux Manufacturing Corp*,. 983 F.2d 803 (1993) (reversing district court ruling that applied Section 81 to an agreement with an entity that was more than a consultant, but which lacked exclusive control over a non-gaming facility owned by a tribe.)

[26] Sen. Rep. 100–577, 100th Cong. 2nd Sess. (1988), letter from Assistant Secretary Ross O. Swimmer to then-Chairman of the Committee on Indian Affairs, Senator Daniel K. Inouye, dated September 7, 1988.

ance, parties frequently "erred on the side of caution" by submitting any contract with a tribe to the BIA for approval. Deputy Commissioner for Indian Affairs Michael J. Anderson testified: "Contracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies are now routinely presented to the BIA for review and approval." As reported by the Committee, subsection (b) will allow tribes and their contracting Partners to determine whether Section 81 applies when they form an agreement. First, by limiting the provision's applicability to those agreements with a duration of seven of more years, parties can look to an objective measure to determine whether an agreement falls within the scope of the statute. Also, by replacing the phrase "relative to Indian lands," with "encumbering Indian lands," the bill will ensure that Indian tribes will be able to engage in a wide array of commercial transactions without having to submit those agreements to the BIA as a precaution. Two other provisions also advance this objective. First, subsection (e) directs the Secretary to issue regulations identifying the types of agreements not covered by the Act. Second, by eliminating the *qui tam* provisions in the statute, the bill eliminates the possibility that third parties will bring suits without the consent of any of the parties to the agreement.

At the Committee's May 19, 1999 hearing, the Administration proposed simply eliminating Section 81 entirely. Although the amendment in the nature of a substitute reported by the Committee addresses many of the Department's concerns, it leaves the provision in place to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor.

The amendment eliminates the overly-broad scope of the Act by replacing the phrase "relative to Indian lands" with the phrase "encumbering Indian lands." By making this change, Section 81 will no longer apply to a broad range of commercial transactions. Instead, it will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands. For example, a lender may finance a transaction on an Indian reservation and receive an interest in tribal lands as part of that transaction, If, for example, one of the remedies for default would allow this interest to ripen into authority *to operate* the facility, this would constitute an adequate encumbrance to bring the contract within Section 81. By contrast, if the transaction concerned "limited recourse financing" and the lender merely acquired the first right to all of the revenue derived from specified lands for a period of years, this would not constitute a sufficient encumbrance to bring the transaction within Section 81. A more difficult case would involve a situation where a designated third-party would operate the facility in the case of default. In essence, with the exception of those tribes exempted pursuant to the Self-Governance program, Section 81 will apply to those transactions that are not leases, per se, but which could result in the loss of tribal proprietary control.

The bill also proscribes the Act's application to those agreements that take more than 7 years to complete. Just as the statute of

frauds looks at transactions when they are entered into, this provision is concerned with the reasonable expectations of the parties when they enter an agreement.

Subsection (c). In addition to the provisions that allow Indian tribes and their partners to determine with a much greater level of certainty whether Section 81 applies, subsection (c) provides that a BIA determination that an agreement is not covered by Section 81 has the effect of making the section inapplicable. It would contradict the bill's intent if parties made a practice of submitting agreements where Section 81 is patently inapplicable, simply to obtain an official endorsement of this conclusion. To be sure, such official determination may be necessary, especially when tribal obligations are to be sold in the secondary market. This subsection may help eliminate uncertainty and increase the marketability of transactions involving tribal obligations. If a practice develops where agreements are submitted even where it is patently obvious that Section 81, as amended, does not apply, the BIA may find it necessary to simply return these agreements without making any determination, even the determination authorized by subsection (c). Such action may not be necessary, but might be needed to preclude the waste of limited BIA staff resources.

Finally, this subsection is intended to work in conjunction with subsection (e), which directs the Secretary to enact regulations establishing which agreements are not covered by Section 81.

Subsection (d). Under subsection (d), the Secretary is to refuse to approve any agreement otherwise covered by the Act, if it is in violation of federal law or if it fails to address sovereign immunity in one or more of the three ways specified.

Violation of Federal law

Consistent with the principles of tribal self-determination, this bill does not direct the BIA to substitute its business judgment over that of a tribal government. This is not to say that the Department may not offer and tribes may not seek advice or assistance in negotiating, preparing, or submitting agreements covered by Section 81, as amended. Since the enactment of the IRA, at least those tribes with corporate charters conferred pursuant to Section 17 of that Act have been authorized to enter agreements without Section 81 approval.[27] In addition, those tribes participating in Self-Governance are also free from the requirements of Section 81. The Committee has not been informed that this has resulted in any widespread problems. In fact, the Department's May 19, 1999 testimony in favor of striking all of Section 81 clearly demonstrates that it does not believe that federal review of such agreements is necessary. For that reason, in place of more intrusive review, the bill will limit the Secretary's determination to whether the agreement would violate federal law. Since these agreements will bear the imprimatur of federal approval, it is appropriate for the Secretary to be satisfied that the agreement does not contravene any specific statutory prohibitions.

[27] See the discussion of the February 14, 1952 Solicitor's Opinion accompanying footnote 6.

Tribal sovereign immunity

Over the last several years, the Committee has held extensive hearings on tribal sovereign immunity.[28] Over the course of these hearings, Committee members have expressed divergent views about the value, effect, and even the purpose and justification for the doctrine. One view closely parallels that of Supreme Court Justice Stevens, who has written: "there is no justification for permanently enshrining the judge-made law of sovereign immunity." This view questions the philosophical justification for the doctrine with respect to the federal government, states, or Indian tribes. With respect to Indian tribes, Justice Steven's dissent in *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies,* 523 U.S. 761 (1998) criticizes tribal immunity by arguing that "Indian tribes[s] enjoy broader immunity than the States, the Federal government, and foreign nations[]." In his Kiowa dissent, Justice Stevens pointed out that his opinion for the Court in *Nevada* v. *Hall,* 440 U.S. 410 (1979) precludes states from asserting immunity in the courts of another state because one state's ability to plead immunity is a question of comity rather than a constitutional command. By contrast, he pointed out that the Court's ruling in *Kiowa* makes the result in *Nevada* v. *Hall* inapplicable to Indian tribes appearing in state courts, probably based on the principle urged by the United States that tribal immunity is a matter of national, rather than state, policy.[29]

Another perspective articulated by members of the Committee begins with the premise that Indian tribes, are one of the three domestic sovereign entities recognized by the United States Constitution. Recent Supreme Court cases have strongly affirmed that notions of sovereignty that existed when the Constitution was formed have lost none of their relevance in the subsequent two centuries.[30] One of the fundamental components of that sovereignty is the right to decide for itself when or under what circumstances a sovereign will be sued, especially in its own courts. Based on the long-standing principles enunciated in *Williams* v. *Lee,* 358 U.S. 217 (1959) tribal courts almost always possess exclusive jurisdiction over agreements with Indian tribes.

Rather than trying to reconcile these divergent views concerning tribal sovereign immunity, the approach taken in S. 613 builds upon an apparent agreement that Indian tribes and their contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed. As discussed above, this view is also shared by Indian tribes that have entered into increasingly complex commercial

[28] These hearings include S. Hrng. 104–694 (September 24, 1996) and S. Hrng. 105–303, Parts I, II, and III (March 11, April 7, and May 6, 1998 respectively).

[29] See *Amicus* Brief of the United States in *Kiowa Tribe* v. *Manufacturing Technologies* (96–1037) at pp. 22–25. This brief also notes that with respect to the immunity of foreign governments, "the courts did not take it upon themselves to abrogate the sovereign immunity of foreign governments in certain circumstances. That step was left to the political Branches, as the Constitution required."

[30] *Seminole Tribe of Fla.* v. *Florida,* 517 U.S. 44 (1996) (Congress lacks power to abrogate state sovereign immunity from suits commenced or prosecuted in the federal courts), *Alden* v. *Maine,* 67 USLW 3683 (U.S. 1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. * * *" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank,* 67 USLW 3682 (U.S. 1999).

transactions by addressing immunity directly. Such arrangements are especially relevant where parties are seeking to utilize or create a secondary market for tribal obligations. To be sure, all tribal obligations may face disparagement in such secondary markets if a perception exists that tribal immunity will preclude enforcement of these agreements. Such perceptions may develop even in instances where a party contracting with a tribe was fully informed about the tribe's immunity. As Chairman Campbell indicated upon introducing S. 613: "I am concerned, however, about those who may enter into agreements with Indian tribes knowing that the tribe retains immunity but at a latter time insist that they have been treated unfairly by the tribe raising the immunity defense."[31] Under terms of S. 613, there will not be any question that a party entering into a contract that requires federal approval pursuant to Section 81, as amended, was at least informed of tribal immunity. In practice, there appears to be a consensus that this requirement will not violate any core tribal interests. As one member of the Committee explained:

> [E]arlier hearings discussed contracts in which sovereign immunity is sometimes imposed. It's probably the field, listening to all of the testimony, in which there's been the most extensive abandonment of sovereign immunity on a case by case basis by tribes themselves because at least in connection with large contracts, unless there is some kind of remedy, no outside organization is anxious to make a significant investment, but [I believe] it is still a problem with small day-to-day contracts.[32]

The Committee has reached a consensus that Section 81 should not (or perhaps was never intended to) apply to such "routine" contracts. With respect to those contracts and agreements that fall within the scope of Section 81, as amended, the overwhelming practice is to address immunity, and often to provide some form of arbitration, a full or partial waiver of immunity, or some other recourse. For example, irrevocable letters of credit are sometimes employed. While some form of waiver is often a practical necessity, S. 613 does not make such waivers a legal necessity. At a minimum, however, S. 613 directs the Secretary not to approve an agreement or contract covered by Section 81 if immunity is not, at least, disclosed.

Subsection (e). This provision requires the Secretary of Interior to promulgate regulations that identify those types of agreements or contracts that are not covered by subsection (b), for example because they do not sufficiently encumber Indian lands.

Subsection (f). This section removes the statutory requirement that attorney contracts must be approved by the Secretary. It also makes clear that S. 613 is not intended to make any changes to provision of the Indian Gaming Regulatory Act of 1988, P.L. 100–497, which require federal approval. Finally, consistent with the long-standing principle that the federal trust obligation may not be

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[31] Cong. Rec. March 15, 1999, p. S.2666.
[32] Hrng. 105–303, pt. 3, Hearing Before the U.S. Senate Committee on Indian Affairs, Sovereign Immunity, p. 35.

unilaterally terminated, S. 613 does not alter those tribal constitutions that require federal approvals.

Section 3

This section amends the Indian Reorganization Act to eliminate the requirement that attorney contacts must be submitted to the Secretary.

LEGISLATIVE HISTORY

S. 613 was introduced on March 15, 1999 by the Chairman of the Senate Indian Affairs Committee, Senator Ben Nighhorse Campbell, and referred to the Committee on Indian Affairs. On May 19, 1999 the Committee held a legislative hearing on the bill. At an open business meeting on June 16, 1999, Senator Campbell proposed an amendment to S. 613 in the nature of a substitute. Senator Orrin G. Hatch was joined as a co-sponsor of the proposed amendment.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on July 19, 1999, the Committee on Indian Affairs, by a voice vote, adopted the amendment in the nature of a substitute offered by Senator Campbell and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 613 as reported.

SECTION-BY-SECTION ANALYSIS OF S. 613 AS REPORTED BY THE COMMITTEE

Section 1. Short title

Section 1 cites the short title of the bill as the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

Section 2. Contracts and agreements with Indian tribes

Section 2 replaces the provisions of Section 2103 of the Revised Statutes, 25 U.S.C. § 81.

Section 2(a) provides three definitions: "Indian lands," "Indian tribe," and "Secretary";

(b) Establishes that agreements or contracts that encumber Indian lands for a period of seven or more years are not valid unless they are approved by the Secretary of Interior or his designee;

(c) Makes subsection (b) inapplicable if an appropriate official determines that a contract or agreement is not covered by that subsection;

(d) Directs the Secretary to refuse to approve an agreement if that agreement either violates federal law or it fails to include a provision that either: provides remedies to address a breach of the agreement; provides a reference to applicable law (found in either tribal code, ordinance, or competent court ruling) that discloses the tribe's right to assert immunity; or waives immunity in some manner;

(e) Provides the Secretary for 180 days to issues regulations for identifying the types of agreements or contracts that are not covered under subsection (b);

(f) Establishes that this section is not to be construed to require Secretarial approval of contracts for legal services; or limit, amend, or repeal the authority of the National Indian Gaming Commission, or any tribal organic documents that require Secretarial approval.

Section 3. Choice of counsel

Section 3 amends the Indian Reorganization Act to strike the requirement for Secretarial review and approval of attorney contracts.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 613, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 9, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 613, the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Megan Carroll (for federal costs), and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 613—Indian Tribal Economic Development and Contract Encouragement Act of 1999

Summary: Based on information from the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA), CBO estimates that implementing S. 613 would reduce discretionary costs for BIA by a total of about $2 million over the 2000–2004 period. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. S. 613 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that this mandate would impose minimal costs that would be far below the threshold established by that act ($50 million in 1996, adjusted annually for inflation). Further, the bill would reduce the costs of an existing mandate, more than offsetting any new mandate costs. S. 613 contains no new private-sector mandates as defined in UMRA.

S. 613 would amend a provision of law (25 U.S.C. 81) to remove certain restrictions on contracts between Indian tribes and other parties. This provision, known as section 81, requires DOI's approval of all contracts involving payments between non-Indians and Indians for services relative to Indian lands. Under current law, any contract that is subject to this provision and is not approved

by DOI can be declared null and void. As amended by S. 613, section 81 would only require approval of contracts that encumber Indian lands for a period of at least seven years. S. 613 would prohibit DOI from approving contracts that neither provide for remedies in the case of a breach of contract nor explicitly disclose or waive an Indian tribe's right to assert sovereign immunity as a defense in an action brought against it. In addition, the bill would amend the Indian Reorganization Act to remove a requirement that a tribe's choice of legal counsel and the fees to be paid to such counsel be subject to DOI approval.

Estimated cost to the Federal Government: Based on information form DOI and BIA, CBO expects that S. 613 would reduce the number of contracts the department has to review each year. CBO estimates that implementing this legislation would reduce costs for BIA by between $300,000 and $400,000 in each of fiscal year 2000 through 2004. Any change in overall BIA spending would be subject to appropriation action.

Pay-as-you-go considerations: None.

Estimated impact on state, local, and tribal governments: Section 81 currently imposes a mandate on tribes to submit certain contracts for approval by the Secretary of the Interior. The bill would greatly reduce the number of contracts requiring approval, thus reducing the cost to tribes of the existing mandate. But under this bill, a tribe entering into a covered contract would have to include a specific statement regarding its sovereign immunity. This in an additional enforceable duty imposed on tribes, and so would constitute an intergovernmental mandate under UMRA. The cost of this mandate would be minimal, however. It would not affect the rights of either party under such contracts, but would only require that these rights be explicitly stated.

Estimated impact on the private sector: This bill contains no new private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Megan Carroll. Impact on State, Local, and Tribal Governments: Marjorie Miller.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 613 will have a minimal regulatory or paperwork impact.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law (existing law proposed to be omitted is enclosed in black brackets, new matter printed in italic):

25 U.S.C. 81

[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 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:

[First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

[Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

[Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

[Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

[Fifth. It shall have a fixed limited time to run, which shall be distinctly stated. All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.]

SEC. 2103. (a) In this section:

(1) The term "Indian lands" means lands, the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term "Indian tribe" has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term "Secretary" means the Secretary of the Interior.

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) 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).

(e) Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 1999, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b).

(f) Nothing in this section shall be construed to—

(1) require the Secretary to approve a contract for legal services by an attorney;

(2) amend or repeal the authority of National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.

* * * * * * *

25 U.S.C. 476(e)

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 employ legal counsel**[**, the choice of counsel and fixing of fees to be subject to the approval of the Secretary**]**; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

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106TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 106–501

INDIAN TRIBAL ECONOMIC DEVELOPMENT AND CONTRACT ENCOURAGEMENT ACT OF 1999

FEBRUARY 29, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

REPORT

[To accompany S. 613]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (S. 613) to encourage Indian economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of S. 613 is to encourage Indian economic development, to provide for the disclosure of Indian tribal sovereignty immunity in contracts involving Indian tribes, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

S. 613, the proposed Indian Tribal Economic Development and Contract Encouragement Act of 1999, would amend existing law to provide that 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 is approved by the Secretary of the Interior. The bill also provides that the Secretary shall issue regulations for identifying the types of agreements or contracts not covered by the aforementioned requirement.

Section 81 of Title 25 of the United States Code, enacted in 1872, is intended to protect Indians from improvident contracts and is concerned primarily with federal control over contracts between In-

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dians tribes or individual Indians and non-Indians. Over the decades many provisions of this law have come to be antiquated and unnecessary. In 1958 Congress amended Section 81 to remove the requirement that all such contracts be executed in the presence of a judge. In 1982 Congress amended Section 81 as it related to management agreements. In 1990 Congress amended Section 81 as it related to reservation-wide plebiscites and exempted Self-Governance tribes from Section 81.

S. 613 eliminates a major portion of federal control exercised pursuant to Section 81 by making federal approval only applicable to certain contracts having a life of seven or more years. In addition, S. 613 amends Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. 476) by removing the requirement that the choice of counsel and the fixing of fees by a Tribe shall be subject to the approval of the Secretary of the Interior.

COMMITTEE ACTION

S. 613 was introduced on March 15, 1999, by Senator Ben Nighthorse Campbell (R–CO). The bill, as amended, was passed by the Senate on September 15, 1999, by unanimous consent, and referred to the Committee on Resources. On February 16, 2000, the Resources Committee met to consider the bill. No amendments were offered and the bill was ordered favorably reported to the House of Representatives by voice vote.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. Government Reform Oversight Findings. Under clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and rec-

ommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 29, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 613, the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette Keith (for federal costs), and Marjorie Miller (for the state, local, and tribal impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 613—Indian Tribal Economic Development and Contract Encouragement Act of 1999

Summary: Based on information from the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA), CBO estimates that implementing S. 613 would reduce discretionary costs for BIA by a total of about $2 million over the 2001–2005 period. The act would not affect direct spending or receipts; therefore, pay-as-you-go procedures would apply. S. 613 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that this mandate would not impose minimal costs that would be far below the threshold established by that act ($55 million in 2000). Further, S. 613 would reduce the costs of an existing mandate, more than offsetting any new mandate costs. This legislation contains no new private-sector mandates as defined in UMRA.

S. 613 would amend current law (25 U.S.C. 81) to remove certain restrictions on contracts between Indian tribes and other parties. This provision, known as section 81, requires DOI's approval of all contracts involving payments between non-Indians and Indians for services relative to Indian lands. Under current law, any contract that is subject to this provision and which is not approved by DOI can be declared null and void. As amended by S. 613, section 81 would only require approval of contracts that encumber Indian lands for a period of at least seven years. S. 613 would prohibit DOI from approving contracts that neither provide for remedies in the case of a breach of contract nor explicitly disclose or waive an

Indian tribe's right to assert sovereign immunity as a defense in an action brought against it. In addition, the act would amend the Indian Reorganization Act to remove a requirement that a tribe's choice of legal counsel and the fees to be paid to such counsel be subject to DOI approval.

Estimated cost to the Federal Government: Based on information from DOI and BIA, CBO expects that S. 613 would reduce the number of contracts the department has to review each year. CBO estimates that implementing this legislation would reduce costs for BIA by between $300,000 and $400,000 in each of fiscal years 2001 through 2005. Any reduction in total BIA spending would be subject to appropriate action.

Pay-as-you-go considerations: None.

Estimated impact on state, local, and tribal governments: Section 81 currently imposes a mandate on tribes to submit certain contracts for approval by the Secretary of the Interior. S. 613 would greatly reduce the number of contracts requiring approval, thus reducing the cost to tribes of the existing mandate. But under this legislation, a tribe entering into a covered contract would have to include a specific statement regarding its sovereign immunity. This is an additional enforceable duty imposed on tribes, and so would constitute an intergovernmental mandate under UMRA. The cost of this mandate would be minimal, however. It would not affect the rights of either party under such contracts, but would only require that these rights be explicitly stated.

Estimated impact on the private sector: S. 613 contains no new private-sector mandates as defined in UMRA.

Previous CBO estimate: On July 9, 1999, CBO prepared a cost estimate for S. 613 as ordered reported by the Senate Committee on Indian Affairs on June 16, 1999. Our cost estimates for these two versions of the legislation are the same.

Estimate prepared by: Federal Costs: Lanette Keith; Impact on State, Local, and Tribal Governments: Marjorie Miller.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 2103 OF THE REVISED STATUTES

[SEC. 2103. 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:

[First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

[Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

[Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

[Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

[Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

[All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.]

SEC. 2103. (a) In this section:

(1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term "Indian tribe" has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term "Secretary" means the Secretary of the Interior.

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) 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).

(e) Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 2000, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b).

(f) Nothing in this section shall be construed to—

(1) require the Secretary to approve a contract for legal services by an attorney;

(2) amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.

SECTION 16 OF THE ACT OF JUNE 19, 1934

SEC. 16. (a) * * *

* * * * * * *

(e) 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 employ legal counsel**[**, the choice of counsel and fixing of fees to be subject to the approval of the Secretary**]**; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

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COHEN'S HANDBOOK OF FEDERAL INDIAN LAW

2005 EDITION

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§ 15.01 The Importance of the Indian Land Base in Preserving Tribal Existence and Sovereignty

Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations.[1] The interests that Indian tribes hold in real and personal property represent a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints against alienation. Land ownership can also be a critical factor in determining the relative bounds of tribal, federal, and state jurisdiction.[2]

Real property holdings are the single most important economic resource of most Indian tribes. Approximately 55.4 million acres of land are now held in trust by the United States for Indian tribes and individuals.[3] Another 44 million acres have been set aside for Alaska Natives pursuant to the Alaska Native Claims Settlement Act.[4] Of the non-Alaska land, trust land includes 44 million acres of range and grazing land, 5.3 million acres of commercial forest, and 2.5 million acres of crop lands. Mineral resources include four percent of the United States' oil and gas reserves, 40 percent of the United States' uranium deposits, and 30 percent of western coal reserves.[5] Lands and resources provide opportunities for tribal economic development, providing the necessary land base for enterprises such as tourism, manufacturing, mining, logging, and other forms of resource management, and gaming.[6]

§ 15.02 Tribal Property

The common law of real property recognizes particular "estates in land" that comprise the various forms in which real property can be held. These estates describe particular bundles of rights and obligations, some of which can be varied by owners and some of which are mandatory.[7] In the whole range of ownership forms known to our legal system, there is probably no form of property right that has not been lodged in an Indian tribe at one time or another. The term "tribal

[1] *See, e.g.*, John P. LaVelle, *Rescuing* Paha Sapa*: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 Great Plains Nat. Resources J. 40 (2001) (recounting historical and continuing spiritual significance of Black Hills for Lakota, Dakota, and Nakota people); Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. Rev. 246 (1989); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615, 1640 (2000).

[2] *See* Ch. 4, §§ 4.01–4.02; Ch. 6, § 6.01–6.02.

[3] U.S. Dep't of Int., Annual Report of Indian Lands 54 (Dec. 31, 1996).

[4] 43 U.S.C. § 1601 et seq. For discussion of the Act, see Ch. 4, § 4.07[3][b][ii].

[5] U.S. Forest Service, National Resource Guide to American Indian and Alaska Native Relations, App. D, D-1 (April 1997) <www.fs.fed.us/people/tribal>.

[6] *See* Ch. 21, *Economic Development*.

[7] *See* Joseph William Singer, Introduction to Property §§ 7.1 to 7.7, at 289–332 (Aspen Law & Business 2001).

the boundaries of a reservation. But courts often use the term "trust land"—particularly in differentiation from the term "fee land"—to delineate areas of jurisdiction within Indian reservations. Used in that sense, the terms are commonly employed to distinguish between land held in trust by the federal government (trust land) and land held in fee by non-Indian landowners or entities (fee land).[27] The term "fee land" in the jurisdictional context thus has not been used to include lands within reservation boundaries that are held in fee by tribes and their members.

§ 15.04 Forms of Tribal Property

[1]—Introduction

Interests in real property have been acquired by Indian tribes in at least six ways: (1) by action of a prior government; (2) by possession and exercise of sovereignty; (3) by treaty; (4) by act of Congress; (5) by executive action; or (6) by purchase.[28]

Land acquired by various methods may be treated similarly for many purposes, such as application of restrictions against alienation, treatment as land held in trust by the United States, and applicability of federal and not state law to property claims, to name a few. Moreover, the methods of acquiring property may overlap when one studies a particular parcel: Original Indian title may have been confirmed by a treaty or statute; a treaty, executive order, or purchase of land to be taken into trust may carry out statutory objectives; or a statute may execute treaty promises or ratify an executive order. In addition, acts of the United States government may parallel or confirm acts of prior sovereigns. Nevertheless, some important differences and variations are peculiar to the method of acquisition of a particular tract of land. In particular, although the practice of the United States has been to compensate tribes when tribal property acquired by any method is taken by eminent domain, compensation may not be constitutionally required in certain circumstances unless the Indian title has been recognized by statute or treaty.[29] For that reason, it is important to trace the history of a particular tract of land to which a tribe claims title.

[2]—Possession and Exercise of Sovereignty: Original Indian Title

Original Indian title, also known as aboriginal Indian title, refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance.[30] Original Indian

[27] *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981).

[28] Lands held by individual Indians are held in two forms: (1) restricted or trust allotments, and (2) fee simple. *See* Ch. 16, § 16.03.

[29] *See* § 15.09[1][d].

[30] Individual Indians have also on occasion established original Indian title. *See* Ch. 16, § 16.02.

title need not be established prior to the formation of the United States.[31] Rather, a tribe must establish its "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property."[32]

The Supreme Court has consistently held that tribes have a "legal as well as just claim to retain possession"[33] of the lands that they historically occupied within the United States that is not dependent on United States' recognition for its existence.[34] Aboriginal title is also recognized today by the law of other English common law countries,[35] as well as international law.[36] Although Congress has the power to modify or extinguish Indian title, the intent to extinguish Indian title must be clearly expressed on the face of a treaty or statute.[37] Until title is extinguished, a tribe has the collective right to occupy and use its land as it sees fit.[38]

The history of the development of Indian title is important to understanding its current legal structure. Early Supreme Court opinions laid the framework for understanding the relationship of tribes to the United States with respect to tribal property. The first extended discussion of Indian title occurred in 1823 in *Johnson v. M'Intosh*,[39] in which the Court adopted a rule of international law known as the discovery doctrine and elaborated on how that doctrine functioned in United States law. Under the discovery doctrine, European nations claimed the right to acquire ownership of land from native Americans, exclusive both of other European nations and of their own subjects.[40] In *Johnson v. M'Intosh,* the Court held that tribal conveyances to private parties in 1773 and 1775 did not convey fee simple title to the lands, because English law forbade alienation of Indian title without the Crown's consent. Thus, later conveyances of the fee in those

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[31] *See* Sac & Fox Tribe of Oklahoma v. United States, 383 F.2d 991, 998–999 (Ct. Cl. 1967) (Indian titles are not frozen as of date of discovery or date of establishment of United States).

[32] *See* Sac & Fox Tribe of Oklahoma v. United States, 383 F.2d 991, 997–998 (Ct. Cl. 1967).

[33] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

[34] Holden v. Joy, 84 U.S. 211, 244 (1872) ("[t]hroughout, the Indians as tribes or nations, have been considered as distinct, independent communities retaining their original, natural rights as the undisputed possessors of the soil, from time immemorial"); *see also* United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946); Cramer v. United States, 261 U.S. 219 (1923).

[35] *See, e.g.,* Mabo v. Queensland (1992) 175 C.L.R. 1 (Austl.).

[36] *See* Mary & Carrie Dann, Inter-American Comm'n on Human Rights ¶¶ 129–130 (Case No. 11.140) (Rep. No. 113/01, Oct. 15, 2001) (acknowledging rights of indigenous peoples to their traditional lands and finding that United States had deprived Mary and Carrie Dann of their lands held under original Indian title through unfair procedures).

[37] Jones v. Meehan, 175 U.S. 1 (1899); Johnson v. M'Intosh, 21 U.S. 543 (1823); *see* § 15.09[1][c].

[38] Johnson v. M'Intosh, 21 U.S. 543 (1823).

[39] Johnson v. M'Intosh, 21 U.S. 543 (1823).

[40] Johnson v. M'Intosh, 21 U.S. 543, 573 (1823) ("discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession").

lands by the United States superseded the prior conveyances by the tribes. The Court described the tribal interest in land variously, as a "title of occupancy," "right of occupancy," and "right of possession,"[41] while characterizing the interest of the discovering nation and the United States as successor to the discoverer as the "fee," "absolute title," or the "absolute ultimate title."[42]

This discovery doctrine invalidated alienation of Indian title without the European sovereign's consent or the consent of the United States (or one of the original 13 states) as successor nation. Correlative to this restraint on alienation was the exclusive power to purchase Indian land, traditionally called the right of preemption. The doctrine also provided a mechanism to validate the previous acquisitions of tribal land by the United States "by purchase or conquest." At the same time, although the discovery doctrine acknowledged the United States' preemptive right to acquire tribal property and thereby extinguish Indian title, the Court declared that tribes had a "legal as well as just claim to retain possession" of the land.[43]

An earlier decision, *Fletcher v. Peck*, had established that the 13 original states had succeeded to Great Britain's fee interest in Indian title.[44] At issue was the validity of a 1795 land patent to Indian lands granted by the Georgia legislature, alleged to have been corruptly procured. The land was in present-day Mississippi; in 1795, it was at the western edge of Georgia's claimed territory, and at least part of it was lawfully possessed by Indian nations. As a successor owner of an interest in the land originally granted by the state of Georgia in 1795, Peck had allegedly[45] conveyed to Fletcher by warranty deed. Fletcher sued on the covenant of seisin in Peck's deed, arguing several claims, among them that because Georgia only had a right of preemption, and not fee simple title, it had not had "seisin" to the land sufficient to allow it to transfer its interest in 1795. Fletcher also argued that Georgia's right of preemption had been ceded to the United States by the Constitution, and that seisin in Georgia was inconsistent with the Indian title, so the state had no interest to convey.[46] The Court rejected both arguments. It held first, that the Constitution had not transferred Georgia's right of preemption to the federal government, and second, that "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of [Georgia]."[47] As a result, Georgia could transfer its right of

[41] Johnson v. M'Intosh, 21 U.S. 543, 583, 587, 588 (1823).

[42] Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).

[43] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

[44] Fletcher v. Peck, 10 U.S. 87 (1810).

[45] The lawsuit was reportedly collusive. *See* Lindsay G. Robertson, *"A Mere Feigned Case": Rethinking the* Fletcher v. Peck *Conspiracy and Early Republican Legal Culture*, 2000 Utah L. Rev. 249, 252.

[46] Fletcher v. Peck, 10 U.S. 87, 140–143 (1810).

[47] Fletcher v. Peck, 10 U.S. 87, 142–143 (1810). Contrast Justice Johnson's dissenting opinion,

> 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.[282]

In 1871, Congress enacted an additional barrier to alienation of tribal land. Until amended in 2000, the statute declared void any contract with tribes "in consideration of services . . . relative to their lands" unless specified criteria were met, including approval by the Interior Department. The statute authorized enforcement by qui tam action.[283] The 2000 replacement voids a contract that "encumbers Indian lands for a period of 7 or more years" unless a new set of criteria are met, still including approval by the Interior Department[284] and eliminates Qui tam enforcement.

In 1953, Congress enacted Public Law 280, conferring Indian country jurisdiction on certain state courts.[285] The statute explicitly preserved the federal restraint on alienation, however.[286]

[2]—Tribal Land Presumptively Restricted

Indian tribal land is presumptively restricted against alienation. The terms of section 177 expressly forbid any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" without federal authority.[287] These terms present obvious issues about whether a land conveyor is an Indian tribe,[288] and whether there is federal authority for a conveyance. In addition, litigants have, with varying success, attempted to carve out implied exceptions to the restraint.

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who owned land and lived in non-Indian settlements. Narragansett Tribe v. S. R.I. Land Dev. Corp., 418 F. Supp. 798, 808–809 (D.R.I. 1976). But the Act's history and language are more consistent with an interpretation that the proviso was not meant to apply to land transactions at all, only to trade provisions. *See* Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980). As the United States acquired new territory in the West, the restraint was expressly extended to the new lands. *See, e.g.,* Act of Feb. 27, 1851, § 7, 9 Stat. 574 (New Mexico and Utah).

[282] 25 U.S.C. § 177. Statutes supplementing section 177 have been enacted to prohibit conveyances with respect to particular tribes or bands. *See, e.g.,* Act of June 7, 1924, § 17, 43 Stat. 636 (Pueblos).

[283] Act of Mar. 3, 1871, § 3, 16 Stat. 544 (formerly codified at 25 U.S.C. § 81). *See* Green v. Menominee Tribe, 233 U.S. 558 (1914); Penobscot Indian Nation v. Key Bank, 112 F.3d 538 (1st Cir. 1997).

[284] 25 U.S.C. § 81.

[285] *See* Ch. 6, § 6.04[3].

[286] *See* 28 U.S.C. § 1360(b); In re Blue Lake Forest Prod., Inc., 30 F.3d 1138 (9th Cir. 1994).

[287] 25 U.S.C. § 177; *see also* 25 C.F.R. § 152.22(b).

[288] *See, e.g.,* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) (tribe found voluntarily disbanded was not covered); United States v. Dann, 873 F.2d 1189 (9th Cir. 1989) (individual Indians not covered).

Some claims for exceptions have been based on the form of tribal title. Much tribal land is reserved under the terms of treaties, agreements, statutes, and executive orders without any words of common-law conveyancing or estates.[289] Modern statutes provide for newly established Indian title to be held in trust by the United States,[290] and it is common to refer to tribal land as trust land regardless of formal wording.[291] However, some tribal land has been held in fee simple[292] and several eastern states hold land in state trusteeship.[293]

In general, lands guaranteed to tribes in fee are subject to the restraint on alienation.[294] Nonetheless, a significant attempt to evade the restraint for Pueblo lands succeeded for a time, and the form of title played a part. In 1869, the Supreme Court of the New Mexico Territory decided that members of Pueblo tribes were not protected by federal Indian laws.[295] Federal protection of Pueblo land reached the Supreme Court in 1877, and the Court held federal law inapplicable, principally based on the purported form of Pueblo land tenure.[296] Congress manifested its disagreement, however, and the Court eventually acquiesced and held that the federal restraint applied to Pueblo land.[297] In the meantime, the Pueblo Tribes lost much land to encroaching settlers, and Congress enacted a complex statute to sort out conflicting land claims.[298]

[3]—Tribal Land in the Original States

The terms of the 1790 Nonintercourse Act seem clearly intended to include the original states by banning unauthorized sales "to any state, whether having the right of pre-emption to such lands or not."[299] Nevertheless, for many years both the Bureau of Indian Affairs and eastern state governments treated federal trusteeship as inapplicable in original states, based on the theory that the statutes applied only to tribes that had been specifically "recognized" by the federal government and on differences in the form of land title.[300]

[289] *See* § 15.04[3], [4].

[290] *See, e.g.*, 25 U.S.C. §§ 459, 465, 501, 1466, 1495, 2209.

[291] *See* § 15.03.

[292] *See* § 15.04[5].

[293] *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[294] There is some question whether property purchased by tribes in fee simple is subject to the restraint on alienation. *See* § 15.06[4].

[295] United States v. Lucero, 1 N.M. 422 (1869); *see* Ch. 4, § 4.07[2].

[296] United States v. Joseph, 94 U.S. 614, 618 (1877).

[297] United States v. Candelaria, 271 U.S. 432 (1926).

[298] Pueblo Lands Act, June 7, 1924, 43 Stat. 636. The Act authorized future transfers of interests in tribal land only with federal approval. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985).

[299] Act of July 22, 1790, § 4, 1 Stat. 137.

[300] *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), *aff'g* 388 F. Supp. 649 (D. Me. 1975).

in fee simple is subject to the restraint, and state laws are preempted to the same extent as for land expressly held in trust or restricted title.[326] When trust title is involved, the tribe is entitled to invoke the restraint whether or not the United States does so.[327]

[6]—Desirability of the Restraint

The federal restraint on alienation of tribal land has been strongly criticized, and at various times there have been calls for its abolition. One class of critics attacks the restraint because it removes land from efficient allocation of resources by market forces and treats Indian nations and their members differently from other Americans.[328] Some argue that the restraint is a barrier to Indian prosperity.[329] Other critics object to the great power the restraint gives the federal government and to a history of referring to tribes and Indians in demeaning terms based in part on the restraint, such as "noncompetent," and of asserting that the restraint protects Indians from their own "improvidence."[330]

The most compelling answer to critics is that the restraint has the broad support of Native American people. Even though the concept of the restraint originated in European and Anglo-American law, was based on paternalistic and insulting images of Indians, and Indian consent to it was not sought at the outset, Indian people have tenaciously worked to retain land at every juncture, and they have perceived the restraint as an ally. The dominant view of Native Americans today continues to favor the restraint to preserve tribal land for the furtherance of distinct Indian values.

On many occasions, powerful political forces have advocated unilateral termination of all federal protection for Indian land. While they have not succeeded generally, they have prevailed in particular situations, some with very broad impact.[331] Results of these episodes have reinforced Native Americans' determination to maintain their land base. Much land subjected to market forces was lost, and, with rare exceptions, the social impact on tribal communities was

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[326] *See* Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957) (suit to enjoin adverse possession claim against Pueblo lands held in fee simple subject to federal restraint on alienation).

[327] *See, e.g.*, Narragansett Tribe v. S. R.I. Land Dev. Corp., 418 F. Supp. 798, 805–806 (D.R.I. 1976).

[328] *See, e.g.*, 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 108-114 (Univ. Neb. Press 1984); 2 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 661–662, 879–887 (Univ. Neb. Press 1984).

[329] *See, e.g.*, Terry L. Anderson, Sovereign Nations or Reservations? An Economic History of American Indians (Pac. Research Inst. for Pub. Pol'y 1995).

[330] *See, e.g.*, Robert A. Williams, The American Indian in Western Legal Thought: The Discourses of Conquest 285–317 (Oxford Univ. Press 1990); Wilcomb E. Washburn, Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian 41–46 (Univ. Okla. Press 2d ed. 1995).

[331] *See* Ch. 1, §§ 1.03, 1.06; Ch. 4, § 4.07[3][b].

plainly negative. The most important of these experiments was the allotment policy, which resulted in massive loss of land and the undermining of Indian culture and society.[332] The termination policy of the 1950s provided more recent examples, even though Indian consent was obtained in some instances. The experience of the Menominee Tribe provides detailed evidence of the importance of the restraint to the preservation of tribal culture and society.[333] Subjected to economic forces of the marketplace and state taxation, the Menominees were forced to sell portions of their homeland for residential development. Congress interceded at the urging of the tribe and restored Menominee tribal lands to trust status, reimposing the restraint on alienation.[334]

§ 15.07 Land Acquisition and Consolidation

[1]—Conversion of Fee Land to Trust Status

[a]—Authority

Since the Indian Reorganization Act of 1934 (IRA),[335] Congress has supported the policy of protecting and increasing the Indian trust land base.[336] The IRA was adopted as part of the repudiation of the allotment policy of the late nineteenth century, which had resulted in the large-scale transfer of land out of Indian ownership that "quickly proved disastrous for the Indians."[337] The first four sections of the IRA protect the existing Indian land base,[338] repudiate the allotment policy,[339] indefinitely extend the trust status of Indian lands,[340]

[332] *See* Ch. 1, § 1.04.

[333] *See* S. Rep. No. 93-604, 93rd Cong., 1st Sess. (1973) (Menominee Restoration); Joseph F. Preloznik & Steven Felsenthal, *The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination,* 51 N.D. L. Rev. 53 (1974); *see also* Ch. 1, § 1.06.

[334] Menominee Restoration Act of 1973, 25 U.S.C. §§ 903–903f; *see* Ch. 3, § 3.02[8].

[335] Act of June 18, 1934, 48 Stat. 984; *see* Ch. 1, § 1.05.

[336] A partial detour from this policy occurred during the termination era of the 1950s. *See* Ch. 1, § 1.06.

[337] Hodel v. Irving, 481 U.S. 704, 707 (1987); *see also* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 253–257 (1992) (discussing allotment policy). Indian land holdings declined from 138 million acres in 1887 to 48 million acres in 1934, when the IRA was enacted. *Readjustment of Indian Affairs:* Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs). *See* Ch. 1, § 1.04.

[338] The IRA reflected a major shift in federal policy from one favoring diminishment of tribal lands to one protecting tribal lands and supporting tribal self-government and economic development. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 964 (1972); *see* Ch. 1, § 1.05

[339] 25 U.S.C. § 461.

[340] 25 U.S.C. § 462.