Case Nos. 18-4030 & 18-4072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lynn D. Becker,
Plaintiff-Appellee

v.

Ute Indian Tribe of the Uintah and Ouray Reservation, et al.
Defendants and Appellants

v.

Honorable Barry G. Lawrence,
Third-Party Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
THE HONORABLE JUDGE CLARK WADDOUPS
NO. 2:16-CV-00958

BRIEF OF APPELLEE LYNN D. BECKER

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ORAL ARGUMENT REQUESTED

August 15, 2018

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STATEMENT OF PRIOR OR RELATED APPEALS

There are five prior or related appeals: (1) *Becker v. Ute Indian Tribe*, 13-4172, 770 F.3d 944 (10th Cir. 2014); (2) *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017); (3) *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017); (4) *Becker v. Ute Indian Tribe*, 18-4019 (10th Cir. 2018); (5) *Ute Indian Tribe v. Lawrence*, 18-4013 (10th Cir. 2018).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362.[1]

Becker disagrees with the Tribe's statement that this Court has jurisdiction under 28 U.S.C. §1291, which applies to appeals from final judgments. Rather, this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's granting of Becker's motion for preliminary injunction[2] and denial of the Tribe's motions for preliminary injunction.[3]

Becker disputes that this Court has jurisdiction to review the district court's denial of the Tribe's motion for sanctions, denial of the Tribe's motion for protective

1 *Becker v. Ute Indian Tribe*, 868 F.3d 1199, 1203 (10th Cir. 2017) quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 ("[W]hether a tribal court has adjudicative authority over nonmembers is a federal question.").

2 Dkt 70. *Becker v. Ute Indian Tribe*, 868 F.3d at 1202.

3 Portions of Dkts 73 and 74. *Brooks v. Colorado Dep't of Corrections*, 2018 U.S. App. LEXIS 9031, ** 6 – 7 (10th Cir., April 11, 2018).

order and portions of the Tribe's summary judgment motions other than those relating to the requested preliminary injunction.[4]

Becker agrees that the appeal was timely filed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Was approval of the Agreement by the United States Secretary of the Interior required?

II. Did the tribal court have jurisdiction of this dispute?

III. Was Becker required to exhaust tribal court remedies?

IV. Did the district court properly enjoin the tribal court action?

STATEMENT OF THE CASE

This is a contract action under an independent contractor agreement ("Agreement")[5] for services that appellee Lynn Becker performed for the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"). By the Agreement, the parties unambiguously agreed that no dispute relating to the Agreement could be brought or adjudicated in the Ute tribal court – the Tribe "waive[d] any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waive[d] any requirement that such Legal Proceedings be

4 Dkt 155. *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 912 (10th Cir. 2018).

5 The terms defined in this brief have the same definitions as in Becker's brief in the Companion Appeal, 18-4013.

brought in Tribal Court or that Tribal remedies be exhausted." "Legal Proceeding" was defined broadly as:

> any judicial, administrative, or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement…. A Legal Proceeding shall not include proceedings related to royalty or similar interests in lands…. The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding.[6]

For the first 3 ½ years of litigation (2013 – 2016), the Tribe honored these covenants and did not assert or suggest that the Ute tribal court had any power over the dispute. But in June 2016, after disappointments in state court, and after the federal district court refused to enjoin the State Court Action, the Tribe brought the Tribal Court Action despite its covenants not to. In the tribal court, and later in the State Court Action and the federal actions, the Tribe claimed that it was not bound by its covenant against tribal court litigation because the Agreement, including those covenants, was void for lack of approval by the U.S. Secretary of the Interior ("Secretary"). The Tribe now claims that Secretarial approval was required under federal statutes, federal common law and tribal law.[7]

6 Agreement Art. 23. Aplt Appx Vol 1, pp. 0063-0064

7 Answer, Counterclaim and Third-Party Complaint, Dkt 19 ¶ 44. Aplt Appx Vol 2, pp. 0333-0334

Becker promptly brought the underlying action here to enjoin the Tribal Court Action. The district court granted Becker's motions for temporary restraining order and preliminary injunction and ordered the Tribe not to proceed with that action. On the Tribe's appeal of the preliminary injunction, this Court stayed the preliminary injunction and the Tribal Court Action proceeded despite the Tribe's contractual promises not to litigate in tribal court.

In that earlier appeal of this action, this Court reversed the preliminary injunction because Becker had not responded to the Tribe's claims of voidness for lack of Secretarial approval.[8] In doing so, however, this Court made it clear that the Court had not decided any of the merits of the Secretarial approval issues:

> In denying panel rehearing we note, however, that the panel did not decide the merits of the issues of exhaustion or the need for federal approval of the Becker contract. To the extent we addressed those issues, we did so only in the context of reversing a preliminary injunction on the record then before the district court. Upon remand to the district court, the parties are free to address those or other issues on the merits.[9]

This memorandum shows that the Agreement is not void as claimed because no federal statute, federal common law or tribal law required Secretarial approval. This memorandum then shows that most of the Tribe's other arguments depend upon

8 The Tribe had asserted the Secretarial approval issue in this action shortly before the preliminary injunction hearing. As is evident here, the Secretarial approval issues could not be adequately addressed in that short time.

9 Order dated December 13, 2017, 16-4175. Becker's Addendum A.

the claimed voidness of the Agreement, and fall automatically with the fall of the Tribe's voidness claims. The memorandum then shows that there was no tribal court jurisdiction and no duty of tribal court exhaustion because of the clear contractual consent to federal and state court jurisdiction and the clear contractual waivers of tribal sovereign immunity, tribal court exhaustion, tribal law and tribal court jurisdiction. It then shows that the district court had, and properly exercised, jurisdiction and discretion to enjoin the tribal court action. Finally, this memorandum shows that this Court lacks jurisdiction of the remaining interlocutory orders that the Tribe challenges.

STANDARD OF REVIEW

This Court reviews the granting[10] and the denial[11] of a preliminary injunction for abuse of discretion. This Court also reviews a district court's rulings regarding tribal court matters for abuse of discretion[12] since those rulings are not jurisdictional, but a matter of comity.[13]

10 *Becker v. Ute Indian Tribe,* 868 F.3d 1199, 1202 (10th Cir. 2017).
11 *Brooks v. Colorado Dep't of Corrections,* 2018 U.S. App. LEXIS 9031, ** 6 – 7 (10th Cir., April 11, 2018).
12 *Cincinnati Ins. Co. v. AMSCO Windows,* 593 Fed. Appx. 802, 811 (10th Cir., Nov. 26, 2014).
13 *Becker v. Ute Indian Tribe,* 868 F.3d 1199, 1203 (10th Cir. 2017).

SUMMARY OF THE ARGUMENTS

This memorandum shows that none of the three asserted federal statutes – (1) Section 177 of the Indian Nonintercourse Act of 1790 ("Section 177");[14] (2) Section 2102(a) of the Indian Minerals Development Act ("IMDA" or "Section 2102(a)");[15] and 25 U.S.C. § 81 ("Section 81") [16](jointly "Three Statutes") – required Secretarial approval of the Agreement. The memorandum then shows that not a single authority, including the Tribe's vaunted 100-year-old *Noble,*[17] recognizes any common law voiding any Indian-related agreement for lack of Secretarial approval. The memorandum then shows that tribal law is wholly irrelevant to the Secretarial approval question.

The next section shows that virtually all remaining Tribal arguments fall with the Tribe's Secretarial approval argument because they depend upon the Secretary approval/voidness argument. That section also shows that the Tribe effectively waived any duty of tribal court exhaustion, tribal law and tribal court jurisdiction. Thus, the acts of the tribal court are a nullity that were properly enjoined.[18]

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14 25 U.S.C. § 177.
15 25 U.S.C. § 2102(a).
16 25 U.S.C. § 81. Becker's Addendum B.
17 *United States v. Noble*, 237 U.S. 74 (1915).
18 The Tribe's repeated statement that "undisputed facts" support its arguments on this appeal (e.g., Opening Brief p. 21 – "the undisputed material facts establish that the Agreement is void) is baffling. First, that is a standard applicable to summary judgment, but not to the resolution of the motions for preliminary injunction at

Finally, this memorandum shows that this Court lacks jurisdiction to review the remaining issues asserted by the Tribe.

ARGUMENT

The Tribe's principal argument is that the Agreement is void for lack of Secretarial approval. The central tension is that, on the one hand, federal law protects Indian tribes from improvident alienation of their real property, including trust property and mineral rights, by requiring that any such alienation must be reviewed and approved by the Secretary. On the other hand, Indian tribes have increasingly sought the freedom to benefit from their valuable natural resources without Secretarial interference and oversight by entering into agreements as entrepreneurs that reward tribes for commercial acuity and reasonable risk.[19]

Here, the Tribe had entered into traditional land-based agreements such as leases, deeds, exploration and development agreements, liens and security interests that generated relatively predictable but modest returns in the passive form of royalties, rents, taxes and other land-based fees. All these traditional land-based agreements were duly approved by the Secretary or his statutory designate at the Bureau of Indian Affairs ("BIA").

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issue here. Second, the Tribe makes no effort to show exactly what facts it claims to be material to its various arguments and how such facts have been placed beyond material dispute. The Tribe's arguments about "undisputed facts" are pure rhetoric.

19 S. Rep. No. 106-150, at 4 - 8 (1999). Becker's Addendum C.

Decades of development of law and commercial practices related to Indians in the United States made it practical and possible by the beginning of this century, particularly with the amendment of Section 81, for Indian tribes and their commercial colleagues and venturers, without Secretarial regulation or approval, to enter into commercial agreements separate from or in addition to traditional land-based agreements that did not put at risk the tribes' or their members' trust or other real property, but that allowed Indians to benefit from their valuable resources as commercial entrepreneurs.

That is what happened here. The Tribe entered into a series of commercial agreements with non-Indian commercial partners that allowed the Tribe to take reasonable commercial risk and receive attractive commercial returns without Secretarial approval or oversight. With non-Indian commercial entities, the Tribe in February 2005 created a Delaware limited liability company, Ute Energy, LLC ("Ute Energy"), whose activities were governed by an operating agreement. In 2007, with the introduction of additional non-Indian commercial entities and capital, Ute Energy amended its operating agreement, resulting in the Amended and Restated Ute Energy Operating Agreement ("UE Operating Agreement") and presented that agreement to the BIA for a determination as to whether the UE Operating Agreement

required Secretarial approval.[20] In consultation with its counsel, the United States solicitor's office, the BIA determined that the "Tribe may, at its discretion, proceed with the implementation of the [UE Operating Agreement] without any further review by the BIA. On behalf of the BIA, we extend our encouragement and wish you continued success.[21] The operations of Ute Energy under the UE Operating Agreement were indeed extraordinarily successful. During the relevant period, Ute Energy generated over $1 billion in gross revenue.[22]

These revenues were distributed to the various stakeholders pursuant to various agreements.[23] There is no evidence that any such agreement or distribution was approved by the Secretary. These distributions included distributions of net revenue of over $378 million to the Tribe and Ute Energy Holdings, by then wholly owned by the Tribe.[24] Of course, the Tribe does not assert that this non-Secretarial-approved distribution to the Tribe's holding company required Secretarial approval

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20 The district court engaged in a thorough examination and analysis of thousands of documents, including numerous related exploration and development agreements, assignments and operating agreements. Memorandum Decision and Order, pp. 39 – 62. Tribe Addendum C. Because the Tribe has not included the reviewed documents in the record on appeal, the district court's analysis of and conclusions about those documents must stand on appeal. *E.g., Burnett v. Southwestern Bell Tel., L.P.*, 555 F.3d 906 (10th Cir. 2009) (appellant's failure to include documents necessary to a review of the correctness of the district court's legal conclusions prevented appellate review).

21 July 7, 2007 BIA Letter, Aplt Appx Vol 3, 0522 – 0524.

22 Appellee's Brief, p. 5, Companion Appeal, 18-4013.

23 Id.

24 Id.

or should be voided for lack of such approval. Of the distribution of over $1 billion of Ute Energy's gross revenue, the only Agreement that the Tribe has apparently claimed to have required Secretarial approval is Becker's Agreement providing for the distribution of a tiny percentage (less than one percent) of the gross revenue.

By Becker's Agreement, as compensation for valuable services that made the venture possible, the Tribe promised to pay to Becker 2% of the net revenue distributed to Ute Energy Holdings. Unfortunately, however, to try to avoid paying the 2% of that distribution to Becker, the Tribe asserts that its Agreement with Becker is void for lack of Secretarial approval.

The Agreement unambiguously does not create any interest that requires Secretarial approval under any of the Three Statutes. Of course, any analysis of the legal import of an agreement should start with the terms of the Agreement itself. The Tribe barely mentions the terms of the Agreement, and entirely fails to analyze those terms in the light of the law relating to Secretarial approval. The Tribe fails to cite a single authority that suggests that an agreement with terms like Becker's requires Secretarial approval -- an independent contract for services with no encumbrance of or reference to any specific restricted tribal property. For example, the Agreement entirely lacks any interest in any tribal real property, trust or otherwise restricted property or mineral interest. The Agreement does not provide for the recording of any interest or instrument in any real property records. It does

not constitute, convey, assign or transfer any tribal or trust property. It does not create any real property interest whatsoever – no lien, pledge, deed, deed of trust, conveyance, mortgage, assignment, warranty, title, note or security.

The Agreement does not provide for any payment commonly associated with the ownership of any real property, including royalties, taxes or rents. Indeed, the Agreement affirmatively states that the Agreement does not authorize any action "related to royalty or similar interests in lands held by the Tribe"[25] and specifies that "Contractor shall receive no interests in or incentive payments or payments of any kind based on any fees or revenues paid to the Tribe that are regulatory in nature including, but not limited to, the following: royalties, severance tax, through-put fees, surface or rights-of-way payments, and lease bonuses."[26] The only remedies that the Agreement envisions are remedies common to any state-law contract for services – an action for breach and associated costs and attorney fees.[27] The Agreement provides no remedies common to the ownership, transfer or encumbrance of real property such as foreclosure, sale, attachment or execution. The Agreement does not specify that the monthly payments or the duty to pay 2% of distributed net revenue is anything but normal fees to pay for services, partially as a monthly fee, and partially on a contingent basis. The Agreement does not tie

25 Agreement Art. 23. Aplt Appx Vol 1, pp. 0063-0064.
26 Agreement Exh. B, ¶ 3. Aplt Appx Vol 1, p. 0068.
27 Agreement Art. 14. Aplt Appx Vol 1, pp. 0061-0062.

the payment of any of these fees to any mineral production, real property, trust property or any other tribal property.

I. The Agreement Is Not Void for Lack of Secretarial Approval

The Tribe's principal argument is that the Agreement is void because it was not approved by the Secretary. The grounds for this argument are rambling and difficult to pin down, but clearly the Tribe's arguments prove too little and too much. Too little, because, in fact, no federal statute, federal common law or applicable tribal law voids the Agreement. Too much, because, if the Tribe's arguments were law, most commercial contracts to which any recognized Indian tribe in the United States is a party would be invalidated as void.

Of the Three Statutes that the Tribe claimed below to support voiding the Agreement, the Tribe has asserted only two on this appeal -- Sections 177 and 2102(a). Throughout the various actions that comprise this dispute, and as recently as the February 28, 2018 hearing, the Tribe has also contended that Section 81 required Secretarial approval of the Agreement.[28] Apparently because Section 81 so plainly undercuts the Tribe's Secretarial-approval claims, the Tribe has not asserted Section 81 in this appeal. This memorandum includes a discussion of Section 81, however, because, as amended in 2000 just before the transactions at

28 Hearing Transcript, Feb. 28, 2018 hearing, p. 63. Tribe's Addendum C.

issue here began to be created, Section 81 itself bars the Tribe's voiding claims and clarifies that Section 177 and Section 2102(a) also do not void the Agreement.

Becker contends that the Three Statutes unambiguously assure that no Secretarial approval of the Agreement was required, and that the issue can be determined within the 16 corners of the Agreement and the Three Statutes. If the Court looks outside, however, all relevant contract and statutory construction tools support Becker's position -- the legislative history of the 2000 amendments to Section 81; the Indian canon of statutory construction; *Chevron* deference and *Chevron* textual analysis of multiple related statutes; and the appellate marshalling requirement.

A. No Federal Statute Required Secretarial Approval of the Agreement

The Tribe fails to identify a single federal statute that voids the Agreement. The Tribe asserts that two federal statutes – 25 U.S.C. §§ 177 & 2102(a) – required approval by the U.S. Secretary of the Interior, and that the Agreement is void under these statutes because Secretarial approval was neither sought nor given. The Tribe argues that, if these statutes are found to be ambiguous, this Court must construe the statutes in favor of the Tribe. This rule of construction has no place here, however, because, as shown below, both statutes unambiguously do not require Secretarial approval of the Agreement.

1. Section 177 Unambiguously Did Not Require Secretarial Approval Because Section 177 Applies Only to Conveyances of Tribal Lands

The Tribe argues that the Agreement is subject to Section 177 of the Indian Nonintercourse Act of 1790, which provides in relevant part:

> No *purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto,* from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[29]

Becker's Agreement is none of these. It is not a purchase, grant, lease or other conveyance of any of the Tribe's land, and does not convey any title to Indian land or make any claim thereto. The Agreement does nothing to undercut the "overriding purpose" of Section 177, "the protection of Indian lands,"[30] because it neither transfers nor encumbers any Indian land.[31] The Agreement is merely an independent contractor agreement for services.

The Tribe has not cited, and Becker has not found, any authority for the application of Section 177 outside of conveyances and encumbrances of Indian land. Section 177 is simply immaterial to the Agreement. For example, the Tribe argues that Section 177 applies to "*conveyances of Indian lands*, or 'of any title or claim

29 25 U.S.C. §177 (emphasis added). Tribe's Addendum F.

30 *United States for and on behalf of Santa Ana Indian Pueblo v. Univ. of New Mexico,* 731 F.2d 703, 706 (10th Cir. 1984).

31 *GasPlus, LLC v. U.S.*, 510 F. Supp. 18, 28 – 34 (D.D.C. 2007).

thereto….'"[32] Neither this or any other authority supports the Tribe's suggestion that the language "any title or claim thereto" can apply to any agreement other than a conveyance of Indian lands.

The only support that the Tribe offers for its claim that Section 177 can apply to an agreement that is clearly not a conveyance of Indian land is "the reasons explained by the Tribe's experts at the 2/28/2018 hearing and in the evidentiary materials that were submitted as part of the Tribe's summary judgment motion."[33] The district court rejected experts' statements as evidence, and accepted those statements only as additional legal argument.[34] The cited materials include the 800-plus appendix pages that the Tribe cites in this appeal[35] and the nearly 4,000-page appendix in the Companion Appeal.[36] But the Tribe has not included in the record on appeal the documents reviewed by the asserted experts or the massive documents reviewed by the district court. The Tribe has waived any right to challenge the correctness of the district court's legal conclusions regarding Secretarial approval based upon the district court's thorough review of the massive record before the

32 Opening Brief n. 43 (emphasis added) citing *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1037 (Fed. Cir. 2012).
33 Opening Brief p. 37.
34 Memorandum Decision and Order p. 44, Case 2:16-cv-00958. Tribe's Addendum C.
35 Opening Brief nn. 60 & 66.
36 Companion Appeal, 18-4013.

district court.[37] In short, the materials included in the record on appeal do not support the Tribe's argument that the so-called experts statements support the Tribe's Secretarial-approval arguments.

2. Section 2102(a) Did Not Require Secretarial Approval Because the Agreement Is Not a Minerals Agreement within the Meaning of IMDA

The Tribe argues that both the text and the legislative history of IMDA show that IMDA required Secretarial approval of the Agreement. Becker shows first that the actual text of IMDA itself unambiguously supports Becker's position and that the legislative history need not be consulted. Becker then shows, in case the Court considers the legislative history, that the legislative history clearly excludes the Agreement from the scope of IMDA.

a. IMDA Unambiguously Did Not Require Secretarial Approval

The Tribe urges that the Agreement is void under Section 2102(a) of the Indian Minerals Development Act ("IMDA")[38] which provides:

> Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating,

37 Opening Brief n 60. Judge Waddoups reviewed and analyzed a documentary record of more than 5,000 pages, including the underlying transactional documents such as exploration and development agreements, assignments and operating agreements. The Tribe has failed to present that record to this Court on appeal and has thereby foregone any attempt to challenge the district court's conclusions based upon those documents. *E.g., Burnett v. Southwestern Bell Tel., L.P.*, 555 F.3d 906 (10th Cir. 2009) (appellant's failure to include documents necessary to a review of the correctness of the district court's legal conclusions prevented appellate review).

38 25 U.S.C. § 2101 – 2108 (emphasis added). Tribe's Addendum G.

> production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Minerals Agreement") *providing for the exploration for, or extraction, processing, or other development of, oil, gas,* uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a beneficial or restricted interest, *or providing for the sale or other disposition of the production or products of such mineral resources*.

IMDA unambiguously requires Secretarial approval only of agreements "*providing* for the exploration for, or extraction, processing, or other development of, oil, gas … or other energy or nonenergy mineral resources in which such Indian tribe owns a beneficial or restricted interest, *or providing* for the sale or other disposition of the production or products of such mineral resources.

The Agreement does not *provide for* the exploration, extraction, processing or other development of any mineral resource. Nor does the Agreement *provide for* the sale or other disposition of the production or products of any mineral resources. Not a drop of oil, nor a Btu of gas, nor an ounce of any mineral or product thereof may be explored, extracted, processed, developed, sold or disposed pursuant to the Agreement. The Agreement is simply not within the scope of IMDA.

The Tribe mischaracterizes this language by arguing that "provide" should be read as "involve."[39] IMDA unambiguously requires that, to be covered, an agreement must expressly "*provide for*" the named mineral activities, not merely "involve." The Tribe tries to stretch the reach of IMDA by substituting broader language for the actual statutory language of IMDA. The actual language is what counts, however, and that language plainly does not require Secretarial approval of the Agreement.

b. The Legislative History of IMDA Supports Becker's Position

The Tribe contends that the legislative history of IMDA shows that IMDA required Secretarial approval of the Agreement. Just the opposite is true.

The legislative history of IMDA[40] shows that IMDA was adopted in 1982 specifically to respond to and loosen unduly restrictive standards for Indian contracting under Section 177, Section 81[41] and other older statutes. And as the title of this act ("Indian Minerals *Development*") suggests, and as the Tribe admits,[42] IMDA was passed in 1982, not to further *restrict* the development of Indian minerals

39 "IMDA agreements can span a broad spectrum … [of] agreements *involving*" exploration, development or sale or disposition of minerals. Opening Brief p. 41 (emphasis added).

40 S. Rep. 97-472. Tribe's Addendum I.

41 Of course, the 1982 enactment of IMDA was referring to Section 81 before Section 81 was made more flexible by the 2000 amendments discussed below.

42 "Congress enacted IMDA in order to grant Indian tribes flexibility to enter into '*various kinds*' of agreement[s]…." Opening Brief p. 40 (emphasis added). See generally Opening Brief pp. 40 – 43.

by expanding the breadth of the types of agreements requiring Secretarial approval, but to *narrow* the scope of such agreements in order to expand tribes' participation in and benefits from such development. "The contractual relationships permitted by IMDA were designed to meet two objectives: 'first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources.'"[43]

The Tribe's arguments based upon the legislative history in Senate Report 97-472 are misleading and wrong. For example, the Tribe argues that the Senate report stated that IMDA broadened the scope of subject agreement to agreements that included "terms commonly used in the parlance of the mineral industry."[44] The facts underlying this argument are wrong and the Tribe's logic is backwards. The Tribe argues that since the Agreement includes the phrase "participation plan," and since that phrase can be used in a mineral agreement, the Agreement must be a mineral agreement, and since the Agreement promises Becker "2% of net revenue distributed," the Agreement must create an oil and gas "net revenue interest." The arguments fail at every turn.

43 *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1458 (9th Cir. 1986).
44 Opening Brief p. 41.

To start, the definition of "net revenue interest" in the cited Williams & Meyers list states that the phrase is "rarely used currently" and is a subset of a "working interest," which is defined as "the exclusive right to exploit the minerals on the land…." In addition, Williams & Meyers cites this court's opinion in *Elm Ridge Exploration Co. v.* Engle[45] for the proposition that a working interest only exists if the working interest owner "has the right to explore and develop the lease for oil and gas and generally pays the cost of drilling and completing a well." Since the Agreement fulfills none of these requirements, even under this Court's *Elm Ridge* opinion, the Agreement does not require Secretarial approval.

The Tribe argues that the sheer title of Exhibit B to the Agreement – "Participation Plan" – reveals a mineral interest. The problem with the argument is that the cited materials do not include the phrase "participation plan." The nearest phrase is "participating interest," defined as an interest in oil and gas "produced from a specified tract or tracts, or wells(s) [sic] which right is limited in duration to the terms of any existing lease…." Of course, in the context of the Agreement, the "Participation Plan" is merely a covenant to share the distribution of net

45 721 F.3d 1199, 1204 (10th Cir. 2013).

revenue from Ute Energy, and has nothing to do with the "participating interest" defined in the materials cited by the Tribe. The contract language must be read in the context of the Agreement, which shows that the phrase "participation plan" does not create a mineral interest within the meaning of Section 2102(a).

Instead of supporting the Tribe's arguments, the legislative history shows repeatedly that the reach of IMDA is limited to "minerals agreements" as carefully and narrowly defined in the statute. For example, where the Tribe argues that the Secretary must broadly determine the Tribe's "best interest" with respect to the Agreement, the Senate Report shows that the relevant "best interest" analysis only applies to minerals agreements: "In determining the tribe's best interest … the Secretary should assess … (1) recent … agreements … involving the same type of minerals, the probability that production will occur, [and] (3) the fair market value of the minerals that are the subject of the agreement…."

This is consistent with the regulations adopted under IMDA, which advise that mineral agreements normally include such terms as a "legal description of the lands" subject to the minerals agreement, a description of the methods of disposition of production, duties for "future

abandonment, reclamation and restoration activities," provisions for "reporting production and sales," provisions for the "unitizing and communitizing of lands," and provisions for "protection of the minerals agreement lands from drainage and/or unauthorized taking of mineral resources."[46]

In short, the Tribe's argument is tautological. The Tribe argues that if the Agreement is (mis)interpreted as creating a mineral interest known as a "net revenue interest," the Agreement creates a "net revenue interest" which is a mineral interest requiring Secretarial approval under IMDA. But if the actual terms of the Agreement and IMDA are read accurately, the Agreement is an independent contract for services and does not convey a mineral interest nor require Secretarial approval.

As with Section 177, so with Section 2102(a): the Tribe does not cite a single case that shows that any agreement similar to Becker's is subject to Secretarial approval under either statute.

46 Title 25 C.F.R., Part 225.21 Negotiation Procedures (emphasis added). Becker's Addendum D.

3. The 2000 Amendments to Section 81 Affirmatively Bar the Tribe's Argument that Secretarial Approval of the Agreement Was Required Because the Agreement "Relates" to or "Involves" Tribal Minerals

Thus, neither of the two statutes (25 U.S.C. §§ 177 & 2102(a)) upon which the Tribe now bases it Secretarial-voidness arguments on this appeal is apt. Finding no support in the clear language of the cited statutes, the Tribe defaults to the vague and overbroad argument that the Agreement and/or Becker's actions thereunder were "related to" or "involved" restricted tribal property and must therefore be void for lack of Secretarial approval.[47] This section shows that both the language of the 2000 amendments to Section 81[48] and their crystalline legislative history reveal that in 2000 Congress consciously and deliberately amended Section 81 to prevent the vague "related to" or "relative to" arguments engendered by the original 1872 language of Section 81. Congress did so precisely to remove the uncertainty of vague language that had so hobbled Indian commercial contracting for decades, and

47 Opening Brief pp. 36 and 41.

48 As recently as the February 28 hearing in the Companion Case, the Tribe argued through its tendered "experts" that Section 81 was itself a statute that caused the Agreement to be void for lack of Secretarial approval, though none of those experts addressed the 2000 amendments to Section 81 discussed here. On this appeal, however, the Tribe has understandably abandoned that claim for the reasons discussed in this subsection. The Tribe cannot, however, avoid the affirmative amended Section 81 barrier to the Tribe's Secretarial-approval arguments.

to encourage commercial agreements like Becker's without the oversight of the Secretary.

In 1872, Congress passed the original Section 81.[49] The statute originally provided that, without Secretarial approval, "[n]o agreement shall be made with any tribe of Indians … in consideration of services for said Indians *relative to* their lands…."[50] For more than a century thereafter, "Indian tribes, their corporate partners, courts, and the Bureau of Indian Affairs … struggled … with how to apply Section 81 in an era that emphasizes tribal self-determination, autonomy, and reservation economic development."[51] The nub of the problem was that Section 81's proscription of agreements "relative to" Indian lands was too broad and vague. Congress found that the vague "relative to" language was "susceptible to the interpretation that any contract that 'touches or concerns' Indian lands must be approved."[52] Indeed, "neither tribes, their partners, nor the BIA could predict with any certainty whether a court might ultimately conclude that a transaction was void" for lack of Secretarial approval.[53] The penalties for guessing wrong about Secretarial approval, including the voiding of agreements, came to be viewed as

49 See generally *Chemehuevi Indian Tribe v. Adams*, 767 F.3d 900, 904 – 910 (9th Cir. 2014) ("*Chemehuevi*").
50 *Chemehuevi*, 767 F.3 at 904 – 05.
51 S. Rep. No. 106-150, at 2 (1999). Becker's Addendum C.
52 S. Rep. No. 106-150, at 8 (1999).
53 S. Rep. No. 106-150, at 5 (1999).

"draconian" and unwarranted.[54] The result was that "[c]ontracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies [were] routinely presented to the BIA for review and approval."[55]

This confusion led Congress in 2000 to pass the Indian Tribal Economic Development and Contract Encouragement Act of 2000 ("2000 Contract Encouragement Act") "to encourage Indian economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes"[56] and to narrow and "clarify which agreements with Indian tribes require federal approval"[57] and, at least as importantly, to identify the scope of Indian-related agreements not requiring Secretarial approval. Congress found that the vague Secretarial approval requirements of Section 81 arising from the "relative to" language had led to confusion and chaos that depressed the value of tribal natural resources and prevented tribes from participating as entrepreneurs in the development of their valuable mineral resources.[58]

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54 S. Rep. No. 106-150, at 8 - 9 (1999).
55 S. Rep. No. 106-150, at 9 (1999).
56 S. Rep. No. 106-150, at 5 (1999). Becker's Addendum C.
57 S. Rep. No. 106-150, at 5 (1999).
58 S. Rep. No. 106-150, at 7 – 9 (1999).

The 2000 Contract Encouragement Act accomplished this "by replacing the phrase 'relative to Indian lands,' with 'encumbering Indian lands' [to] 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."[59] "Encumber" within the meaning of the 2000 amendments to Section 81 must be read narrowly to comport with "the fact that Congress fundamentally changed Section 81 by emphatically narrowing its scope"[60] and means "to attach a claim, lien, charge, right of entry or liability to real property…."[61] The Agreement does none of this.

> The Senate Report of the 2000 Contract Encouragement Act stated:
>
> > [A] lender may finance a transaction on an Indian reservation and receive an interest in tribal lands as part of that transaction…. [I]f 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.[62]

Becker's Agreement is much further removed from restricted tribal property than the above sample language that the Senate Report stated would not require approval – Becker had no recourse to any restricted tribal property and the net revenue that he was to receive was not derived from specified lands.

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59 S. Rep. No. 106-150, at 9 (1999).
60 *GasPlus, LLC v. U.S.*, 510 F. Supp. 18, 33 (D.D.C 2007).
61 25 C.F.R §84.002 (Becker's Addendum E) cited at *Chemehuevi, Chemehuevi,* 767 F.3 at 906.
62 S. Rep. No. 106-150, at 9 (1999) (emphasis added).

Statements in the Code of Federal Regulations just after the 2000 amendments to Section 81 specifically excluded agreements like the Becker Agreement from Section 81 – they specify that amended Section 81 excluded "contracts for personal services … [and] contracts for services performed for tribes on tribal land…."63

Thus, the 2000 amendments to Section 81 were specifically enacted to prevent the gossamer argument that an agreement can be subject to Secretarial approval because in some vague or indirect sense the agreement "relates to" tribal minerals. Indeed, the 2000 amendments to Section 81 were hand-tailored to allow tribes to develop resources through agreements like Becker's – with the reasonable risk and concomitant potential profits that tribes had been seeking for decades.

The Tribe's Secretarial arguments show that the Tribe is willing, in an attempt to avoid its obligation to Becker, to discourage Indian-related contracting back to the chaotic and depressed pre-2000 era level by arguing that all "Indian-related" contracts require Secretarial approval.

63 *GasPlus, LLC v. U.S.*, 510 F. Supp. 18, 29 (D.D.C 2007) quoting 66 Fed. Reg. at 38,920 (July 26, 2001) (Becker's Addendum F). As shown above, the Agreement is not an agreement for services on Indian land, but this regulation shows that even if it were, Section 81 would not require Secretarial approval.

4. If Any of the Three Statutes Is Ambiguous, Additional Applicable Rules of Construction Favor Becker's Position

If the Court determines that any of the Three Statutes is ambiguous, three additional rules of statutory construction refute the Secretarial-approval arguments that the Tribe advances from matters outside of the four corners of the Agreement and outside of the 12 corners of the Three Statutes.

a. The Indian Canons of Construction Favor Enforcement of the Agreement

The Tribe argues that Judge Waddoups erred by not applying "Indian law canons of construction."[64] Judge Waddoups did not err, for two reasons. First, these canons apply only to resolve ambiguous statutes,[65] and the Tribe has failed to show any statutory ambiguity that pertains to any issue here.

Second, application of the canons to the Three Statutes viewed in the light of the 2000 Amendments to Section 81 favor the enforcement of the Agreement. The 2000 Amendments reflected the judgment and policy of Congress that Indian tribes' interests lie in self-determination and in successful, profitable, predictable and enforceable commercial contracts consonant with the 2000 amendments. The facts that, years after the Tribe made clear promises to Becker upon which he relied and that the Tribe now repudiates that Agreement under the direction of a new business

64 Opening Brief p. 38.

65 N*avajo Nation v. Dalley*, 2018 U.S. App. LEXIS 20493 n 11 (Indian canons of construction do not apply to the construction of unambiguous statutes).

committee, do not mean that the Tribe's true interests are aligned with the position of the current business committee and at loggerheads with the promises of the former business committee. This was recognized in *GasPlus, LLC v. U.S.*:

> That the [Indian tribe] had a change of heart after entering into a contract with GasPlus and its new leaders sought to avoid the Tribe's voluntarily assumed legal duties is irrelevant to whether Section 81 applies. Section 81 is not an escape hatch for Indian tribes who enter into unfavorable business arrangements; it is a safeguard that protects Indian lands from being alienated or encumbered by legal claims that could interfere with Indian tribes' ability to use the land to their benefit. Indeed, the Senate Report [of the 2000 amendments to Section 81] made clear that, "[c]onsistent with the principles of tribal self-determination, [amended Section 81] does not direct the BIA to substitute its business judgment over that of a tribal government." The [tribe's] government made a business decision to contract with GasPlus to manage the Tribe's gasoline distribution business, which had nothing more than an attenuated connection to tribal land. The BIA's decision to void the contract under Section 81 because the [tribe's] government changed its mind about the wisdom of the contract violated the letter and spirit of Section 81 as amended by the Indian Tribal Economic Development and Contract Encouragement Act of 2000. *That decision may have benefitted the [tribe's] immediate litigation interests, but it did not benefit the economic interests of Indian tribes generally.*[66]

b. "*Chevron* Deference" Supports Enforcement of the Agreement

The district court properly considered the July 2, 2007 letter of the Bureau of Indian Affairs (BIA) under the *Chevron* deference doctrine that "considerable weight should be accorded to an executive department's

66 *GasPlus, LLC v. U.S.*, 510 F. Supp. 18, 33 – 34 (D.D.C. 2007) (citations omitted) (emphasis added).

construction of a statutory scheme it is entrusted to administer…."[67] *Chevron* deference proceeds in two steps. First, if the responsible executive agency's action or regulation is in accord with an unambiguous statute, "that is the end of the matter."[68] As to the BIA's July 2, 2007 determination of relevant issues, the BIA was the agency charged with interpreting and enforcing Section 81 on behalf of the Secretary. Under this doctrine, the Court resolves statutory ambiguity by deferring to a determination of the agency responsible for interpreting and implementing the statute so long as that determination is "based on a permissible construction of the statute."[69] The BIA is charged with interpreting and implementing the statutes relevant here,[70] and the BIA's determination that the UE Operating Agreement required no approval under any of the Three Statutes is reasonable and permissible. The UE Operating Agreement authorized Ute Energy to make the distributions of net revenue to the Tribe and Becker at issue here, and the duty of the Tribe to share 2% of that distribution with Becker cannot require

67 *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984).
68 *New Mexico v. DOI,* 854 F.3d 1207, 1221 (10th Cir. 2017).
69 *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. at 843 (1984); *New Mexico v. DOI,* 854 F.3d at 1230.
70 25 U.S.C. § 81,177 & 2102(a).

approval, since it is derivative of an agreement that did not require approval.

c. If Section 177 or 2102(a) Is Ambiguous, the "Statutory Context" Doctrine Requires the Court to Consider those Statutes in the Light of the 2000 Amendments to Section 81

Section 177 was enacted in 1790. As shown above, IMDA was enacted in 1982 expressly[71] to relax the strictures of Section 177 in order to encourage development of Indian resources and allow a broader range of such agreements without Secretarial approval. In 2000, Section 81 was further modified with express reference to both Section 177 and IMDA with the same express purpose – to amplify the scope of Indian-related agreements allowed without Secretarial approval. If any of these statutes is deemed to be ambiguous on any material issue, no discussion of any of these statutes can be complete without acknowledging that in 2000 Congress sought to inoculate Indian-related agreements against undue attacks for lack of Secretarial approval.

In the face of statutory ambiguity, the Court should interpret statutes in the context of their "purpose, history and relationship to other statutes"

71 As shown above, IMDA referred expressly to Section 177 and to Congress' intent to widen the scope of Indian-related commercial agreements not requiring approval.

pertaining to the same subject matter.[72] No discussion of the breadth of Indian-related agreements allowed by a federal statute without Secretarial approval can be complete without considering the context of related statutes and the progression of Congressional acts if the statute at issue is deemed to be ambiguous.[73] The latest congressional action relevant to this action was the 2000 amendments to Section 81. The Tribe, though urging consideration of matters outside of the statutory language itself, fails to acknowledge or deal with the impact of the 2000 amendments to Section 81 upon either Section 177, Section 2102(a) or Section 81. The fact that in 2000 the Congress increased flexibility for Indian-related commercial contracting, and that in 2000 Congress specifically rejected any effort under any of these statutes to do what the Tribe is attempting here – arguing that any agreement "related to" or "involving" Indian minerals – should be rejected as antithetical to Congress' latest directions on this issue.

72 *See, e.g., New Mexico v. DOI*, 854 F.3d 1207, 1223 – 1224 (10th Cir. 2017).

73 *See Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004)

d. Paragraph 2 of Exhibit B of the Agreement Did Not Require Secretarial Approval

The Tribe appears to argue[74] that, though Becker makes no claim under paragraph 2 of Exhibit B of the Agreement ("Paragraph 2"), the paragraph created an interest in restricted tribal land requiring Secretarial approval because it contains the phrases such as "involving the development exploration and/or exploitation of minerals," and "net revenue interest," a phrase sometimes used in oil and gas agreements. This argument is just another iteration of the vague argument that the Agreement creates a "mineral interest" within the meaning of Section 2102(a) because it "relates to" or "involves" minerals. As shown above, the 2000 amendments to Section 81 foreclose this argument. This is just the sort of chimerical "relationship" or "involvement" argument that the 2000 amendments to Section 81 were designed to prevent. Paragraph 2 addresses future, unspecified, conditional "projects *involving the development* … of minerals in which the Tribe has an participating interest and/or earning rights, or similar commercial interests and [Becker] is providing services under this Agreement…."[75] Under Section 81, as amended, no federal statute can require Secretarial approval just because it "involves" or "relates to" but does not *encumber* restricted tribal property.

74 The argument appears only in the Tribe's argument that the Agreement contains the phrase "net revenue interest." Opening Brief p. 37.

75 Agreement, Exhibit B, paragraph 2.

B. There Is No Federal Common Law Allowing or Requiring the Voiding of Any Agreement for Lack of Secretarial Approval

The above section showed that no federal statute voids the Agreement for lack of Secretarial approval. The Tribe's fallback position is that, even without applicable federal statutes, "federal common law" provides that the Agreement "is void for lack of necessary federal approval."[76] This section shows that no federal case law voids the Agreement in the absence of an applicable federal statutes.

1. *Noble* Is Inapplicable Because Its Holdings Pertain to an Inapplicable Statute

The principal case cited for a federal common law principle voiding agreements untethered to any statute is *United States v. Noble*.[77] Though the Tribe argues that *Noble* "is on all fours with this case," *Noble* is the opposite of this case on all relevant points.

First, and most importantly, *Noble* simply interpreted the specific language of specific mineral leases under a specific 1895 statute allotting specific land to a specific individual member of the Quapaw Indian tribe in Oklahoma. That statute has no application here. Contrary to the Tribe's argument that "the controlling legal principle of *Noble* is fully applicable to, and indeed dispositive of, Mr. Becker's

76 Tribe's Amended Counterclaims ¶ 45. Dkt 34. Aplt Appx Vol 3, pp. 0394-0395.
77 *United States v. Noble*, 237 U.S. 74 (1915).

claims," *Noble* does not recognize or create any federal common law principle whatsoever for voiding Indian-related agreements for lack of Secretarial approval.

Next, the factual predicates of the Tribe's *Noble* argument are wrong. The Tribe argues that "Mr. Becker[] claims … a 'net revenue interest' in the production of the Ute Tribe's oil and gas interests assigned to Ute Energy LLC." Becker does not claim a "net revenue interest"[78] at all and does not claim any interest whatsoever in any "production of the Ute Tribe's oil and gas."

Next, the Tribe argues that *Noble* means that agreements to pay revenues must be voided if a lease is voided. This argument ignores the material distinctions. First, *Noble* simply applied the obvious principle that if a lease providing for payments of rents and royalties is voided, the duty to pay the rents and royalties *under that lease* is also voided. That is not this case. Here, there is no claim that the UE Operating Agreement (the analog to the *Noble* leases) that generated the relevant revenue should be voided, and therefore that duty to distribute the revenues therefrom evaporates.

This application of *Noble* would require the following. First, the UE Operating Agreement (the analog to the *Noble* leases) would need to be determined to be void for lack of Secretarial approval, exactly contrary to the Secretary's express

78 The Tribe twists the actual promise of "2% of the net revenue distributed" by Ute Energy to the Tribe to try to make the Agreement sound like an interest in trust or restricted minerals.

determination that the Ute Energy Operation Agreement did not require Secretarial approval, and was therefore not void for lack of that approval. Next, the revenue (rent) payment at issue in *Noble* that was voided was generated by the agreement (lease) creating the revenue, and the voiding of the lease stopped the generation of revenue. To apply here, all revenues generated by Ute Energy (the analog to the rents and royalties of the *Noble* leases) would need to be voided, and all distributions of all such revenues would need to be voided and returned. That is simply not this case: there is no claim here that the $1 billion in gross revenue generated by Ute Energy must be voided, including the payment of some $600 million to the other owners of and advisors to the company and to third parties, resulting in the net revenue of the $378 million distributed to the Tribe. The Tribe fails to explain how, under its *Noble* theory, the Tribe could validly receive $378 million but be prevented from sharing the 2% of that revenue that the Tribe promised to pay to Becker.

2. No Other Case Creates Any Federal Common Law Requiring Secretarial Approval

The other cases cited by the Tribe create no legal support for the argument that the voiding action of *Noble* for lack of Secretarial approval applies as a matter of federal common law or to any situation where no voiding federal statute applies.

Bunch,[79] *Martin*[80] and *Apple*[81] -- like *Noble* -- grounded their voiding power in specific statutes, and did not recognize any power in federal common law to void agreements for lack of Secretarial approval.

3. The Tribe's Tendered Experts Provided No Fact, Opinion or Legal Argument that Supports the Tribe's Secretarial Arguments

In the absence of a single case for the asserted "controlling" common law principle that the Tribe tries to wrench from the cases,[82] the Tribe argues that the assertions of its so-called experts makes this so.[83] Confirming Becker's objections to these "expert" assertions, the district court rejected these assertions, and the assertions of these so-called experts may not be considered as evidence.[84]

C. Tribal Law Did Not Require Secretarial Approval

The Tribe's treatment of issues of tribal law and the tribal court is unfortunate, both because little of it is based upon any law or record fact, and virtually none of it is accurate. Without any justification, the Tribe attacks Judge Waddoups with

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79 *Bunch v. Cole*, 263 U.S. 250, 252 (1923) (Opening Brief p. 28).

80 *United States v. Martin*, 45 F.2d 836, 841 (E.D. Okla. 1930) (Opening Brief p. 28).

81 *United States v. Apple*, 262 F. 200, 204 (D. Kan. 1919) (motion to dismiss denied where Indian claimed that a federal statute -- Act of Congress of June 7, 1897 (30 Stat. 72, c. 3) -- not applicable here, created voiding power) (Opening Brief p. 28).

82 Opening Brief pp. 20, 25, and 28.

83 Opening Brief p. 35, n 60

84 Memorandum Decision and Order p. 44, Case 2:16-cv-00958. Tribe's Addendum C.

hyperbole, personal aspersions and charges completely contrary to the record. For example, of course Judge Waddoups did not, as the Tribe charges, "with thinly-disguised contempt" criticize the tribal court judge or "construct a theory that the tribal court was just 'too dumb' to know which tribal jurisdiction ordinance applies…"[85] Rather, Judge Waddoups' comprehensive opinion was what it should be – a respectful analysis of relevant factual, substantive, legal and procedural matters and a clarion analysis of the legal consequences of those matters. Judge Waddoups' analysis of tribal law and of tribal court jurisdiction and exhaustion was exhaustive. The purpose of an appeal is to challenge the law and facts, not to hurl hyperbole.

Instead of accurately acknowledging unmistakable law as to the proper role of a federal court in analyzing matters related to a tribal court, the Tribe makes breathtakingly wrong and unsupported arguments. For example, the Tribe asserts that "federal courts have no authority to decide issues of tribal law." This broad statement is not supported by the Tribe with a single citation, and is contrary to the scores of authorities, including the Supreme Court[86] and this Court,[87] that clearly

85 Opening Brief p. 18.

86 *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (in harmony with numerous exceptions to the tribal court exhaustion doctrine, federal courts have the right and duty to review tribal court matters).

87 *Norton v. Ute Indian Tribe*, 868 F.3d 1236 (10th Cir. 2017); *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006).

define the space within which federal courts have not only the power, but the duty, to review tribal court matters and interpret tribal law.

The Tribe's rhetoric that a federal court does not "sit as appellate court to review and reverse a tribal court's ruling on questions of tribal law" is just that – rhetoric. Of course, a federal court is not a tribal appellate court. Of course, Judge Waddoups did not say that he was.

The Tribe charges that "apparently the [federal] district court thinks the law is whatever that court says it is, no citations to law needed."[88] Ironically, Judge Waddoups provided extensive legal citations for his process, findings and conclusions, but the Tribe's only support for the interpretation of tribal law is whatever the tribal judge said it was. The Tribe argues that, because whatever a tribal judge says is tribal law, *is* tribal law, no federal judge has any business gainsaying whatever the tribal judge says is tribal law. For example, the Tribe argues that under tribal law a tribal ordinance "can be applied retroactively, and federal courts must abide by that decision."[89] Unsurprisingly, the Tribe cites no tribal law for this assertion – only the *ipse dixit* of Judge Pechota. That is not the law, either federal or tribal.

88 Opening Brief p. 19.
89 Opening Brief p. 21.

The Tribe wholly ignores what should be the starting – and ending – point of its tribal court arguments: If the Agreement is *not* void as contended, but valid, what impact does the Agreement have upon the issues here? The Tribe's ignoring this issue underscores the clear answer – the Agreement and its clear, powerful, enforceable waivers precludes all the Tribe's tribal court arguments. The Agreement itself establishes that the tribal court lacked jurisdiction, that there was no tribal court exhaustion right or duty, that the tribal court rulings are a nullity with no entitlement to deference, comity, law of the case or preclusion, and the Tribe was properly enjoined from further tribal court action. This section supplies what the Tribe did not – the demonstration that the Tribe has no valid tribal court argument because the Agreement precludes each of the Tribe's tribal court arguments.

The Tribe's argument that tribal law required Secretarial approval is precluded by the Agreement's covenant that "[t]his Agreement and all disputes arising hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah;"[90] that Utah state law would be applied in "any judicial … proceeding … relating to the interpretation, breach or enforcement of this Agreement;"[91] and that Utah law would be applied to the "full determination of questions of fact and law"[92] in any such proceeding. The Tribe's argument that tribal

90 Agreement Art. 21. Aplt Appx Vol 1, p. 0063.
91 Agreement Art. 23. Aplt Appx Vol 1, p. 0063.
92 Agreement Art. 23. Aplt Appx Vol 1, p. 0063.

law can control any issue flies in the face of the Agreement that state law would determine all such questions.

II. The Tribal Court Action Was Properly Enjoined

The parties to the Agreement covenanted that all disputes related to the Agreement would be governed by Utah state law. Federal law is pertinent only to the extent that federal law preempts state law. Tribal law is not pertinent in any way. The Tribe has not shown a single authority or reason that tribal law can preempt the contractually-selected application of state law. All of the Tribe's arguments based on tribal law, including the arguments addressed in this section, should be summarily rejected on the sole principle that tribal law has no place here.

Without waiving this pivotal point, this section includes tribal court and tribal law issues. This section shows that the tribal court lacked jurisdiction and that there was no duty of exhaustion because the Agreement waived any duty of exhaustion.

This section also shows that the tribal ordinances upon which the Tribe relies do not provide any support because, as the Tribe admitted both to the tribal court and to the federal district court in this action, tribal ordinances clearly stripped the tribal court of any jurisdiction over Becker's claims against the Tribe. This fact makes it clear that the parties could not have intended to include the tribal court within the Agreement's provision that only a "court of competent jurisdiction" could adjudicate the Agreement in the absence of federal court jurisdiction.

A. The Tribal Court Lacked Jurisdiction

As *National Farmers*[93] and *Burrell*[94] clearly require, the Tribe admits[95] that, if the tribal court lacked jurisdiction, the tribal court rulings were a nullity and the district court had the power, jurisdiction and duty to review the tribal court's actions and enjoin further tribal court action. "[F]ederal courts have authority to determine, as a matter 'arising under' federal law, *see* 28 U.S.C. § 1331, whether a tribal court has exceeded the limits of its jurisdiction" and to reject erroneous jurisdictional rulings by the Tribal Court.[96]

This section shows that the tribal court lacked jurisdiction under *Montana v. United States* and under Ute tribal ordinances.

1. The Tribal Court Lacked Jurisdiction Under Montana

The United States Supreme Court, after an epic analysis of American Indian history and treaties, affirmed that "through their original incorporation into the United States, as well as through specific treaties and statutes, the Indian tribes have

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93 *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

94 *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).

95 Opening Brief pp. 14 – 15.

96 *Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997) quoting *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 - 53 (1985). *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (the "Tribal Court's determination of tribal jurisdiction is ultimately subject to review" by the federal district court).

lost many of the attributes of sovereignty."[97] The result is that tribes' sovereignty is limited to the governance of "only the relations among members of a tribe."[98] "Generally, therefore, 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'"[99] The Supreme Court in 2001 thus summarized *Montana:*[100]

> Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty. In *Montana*, the most exhaustively reasoned of our modern cases addressing this latter authority, we observed that Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.

Thus, *Montana* establishes "a presumption ***against*** tribal court civil jurisdiction over non-Indians."[101] This means that any effort by a tribe to assert civil jurisdiction over a non-Indian is "presumptively invalid."[102]

Montana recognizes two narrow exceptions to this presumptive general prohibition of tribal power over nonmembers – the consensual relationships exception and a narrow "integrity/security" exception. The Tribe bears the burden

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97 *Montana v. United States*, 450 U.S. 544, 563 (1981).

98 450 U.S. at 564 quoting *United States v. Wheeler,* 435 U.S. 313 (emphasis in original),

99 *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1150 (10th Cir. 2011) quoting *Montana,* 450 U.S. 544 at 564

100 *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 649 – 650 (2001).

101 *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1150 (10th Cir. 2011). (Emphasis added.)

102 *Atkinson v. Trading Co.*, 532 U.S. 645, 659 (2001).

to establish these exceptions.[103] They are "sharply circumscribed"[104] and cannot be construed in a manner that would "swallow the rule."[105]

The first exception is that "a tribe may regulate … the activities of nonmembers who enter consensual relationships with the tribe … through commercial dealing, contracts, leases, or other arrangements…."[106] The Agreement is obviously a consensual relationship. But where the consensual relationship is built upon a contract, and the contract clearly waives and prohibits Tribal Court jurisdiction and exhaustion, the contract and the relationship built upon the contract cannot perversely constitute the opposite of the expressed intention of the parties – namely, consent to Tribal Court jurisdiction. The Tribe has failed to cite any authority--and the Tribal Court failed to provide any rationale--explaining how a contract that affirmatively declares that the parties do not consent to Tribal Court jurisdiction can nonetheless constitute consent.

The Tribal Court held, but completely failed to analyze, justify or even explain how the Tribal Court had jurisdiction under the second *Montana* exception. The Tribal Court's conclusion about the second exception is not only unexplained, but utterly inexplicable. This exception requires a showing of conduct by Becker that

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103 *Plains Commerce Bank v. Long Family & Cattle Co., 554 U.S. 316*, 330 (2008)
104 *Atkinson v. Shirley*, 532 U.S. 645, 650 (2001).
105 *Plains Commerce Bank, 554 U.S 316.* at 330.
106 *Montana*, 450 U.S. 544 at 565.

"threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[107] "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[108] The second exception is a "narrow one."[109] Assertion of Tribal Court jurisdiction under the second exception must be necessary to "avert catastrophic consequences."[110] The Tribe did not even argue to Judge Pechota that the second exception applies.[111] And there is no authority for applying the second exception here. Whatever else can be said about Becker's claims to enforce the Agreement, they do not remotely pose an existential threat to the Tribe's organizational "integrity" or "security."

2. The Tribal Court Lacked Jurisdiction under Tribal Ordinances

After 3 ½ years of state and federal litigation, the Tribe sued Becker in tribal court. Though Becker believed, and contends, that the tribal court lacked and lacks jurisdiction, he brought counterclaims in tribal court to preserve his rights. In the end, the Tribe made the unconditional judicial admission that its own tribal court lacked jurisdiction of Becker's claims against the Tribe. And the only feint made

107 *Montana*, 450 U.S 544. at 511.
108 *Plains Commerce Bank,* 554 U.S. at 341 quoting *Montana.*
109 *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1153 (10th Cir. 2011)
110 *Plains Commerce Bank,* 554 U.S. at 341.
111 Plaintiffs' Objection to Becker's Third Motion to Dismiss dated February 26, 2018. Aplt Appx Vol 20, pp. 4286-4298.

for tribal court jurisdiction rested upon ignoring the numerous unambiguous terms of the Agreement that prevent such jurisdiction.

a. As the Tribe Admitted, Tribal Ordinances Prevented Tribal Court Jurisdiction over Becker's Claims Against the Tribe

This section shows that the Tribe admitted what the Agreement and the tribal ordinances forced the Tribe to admit: that the tribal court lacked jurisdiction of *Becker's* claims against the Tribe.

On February 26, 2018, the Tribe finally conceded what it had denied for 5 years. In Plaintiffs' Objection filed in the tribal court on February 26, its Objection filed in the district court in this action ("February 26 Objection"), the Tribe flatly admitted that "Becker's claims against the Tribe have been destroyed by [Ute Tribal Ordinance] § 1-2-3(5)…."[112] The February 26 Objection expressly requested that "this [Tribal] Court should enter an order dismissing all of Becker's counterclaims"[113] against the Tribe because tribal ordinance § 1-2-3(5) prohibited such jurisdiction.

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112 Plaintiffs' Objection p. 7 (Aplt Appx Vol 20, p. 4292). The identical language that the Tribe admitted had "destroyed" the Tribal Court's jurisdiction of Becker's claims had been in effect since 1987. Before 2013, this provision was contained as Section 1-2-3(4) of Tribal Ordinance 87-04. From 2013 to the present, the provision has been codified as Section 1-2-3(5) of Tribal Ordinance 13-010. The Tribe's arguments in this appeal about 13-010 do not apply to this provision, since the provision is identical to the ordinance language in effect through all iterations of the ordinance since 1987.

113 Objection p. 7, n.4 dated February 26, 2018. Aplt Appx Vol 20, p. 4292.

The next day, February 27, Becker filed in the federal district court a motion to supplement notifying the district court of the Tribe's admission filed in tribal court that tribal ordinances prevented tribal court jurisdiction of Becker's claims against the Tribe.[114] At the hearing the next day, Judge Waddoups asked the Tribe about this admission. In response, the Tribe's counsel (Ms. Real Bird) initially suggested that the Tribe's February 26 Objection had been mistakenly filed "on the heels of a weekend of other briefing" and that "it is our intent to withdraw" it.[115] After further questions from Judge Waddoups, however, Ms. Real Bird conceded that, in fact, the Tribe conceded that the tribal court lacked jurisdiction of Becker's claims against the Tribe.[116]

Despite this admission filed in the tribal court on February 26, and counsel's affirmation at the federal court hearing on February 28 of the Tribe's admission that the tribal court lacked jurisdiction of Becker's claims, on February 28 the tribal judge ruled that it had jurisdiction of Becker's claims against the Tribe and, without any discussion or explanation as to how the tribal court could have concluded that it had such jurisdiction, refused the Tribe's request to dismiss its Becker's claims against the Tribe. Judge Waddoups was correct to reject this determination of the tribal

114 Plaintiffs' Objection p. 7, Aplt Appx Vol 20, p. 4292.
115 579, February 28, 2018 Hearing Transcript p. 100 at 10-12.
116 579, February 28, 2018 Hearing Transcript pp. 100-106.

judge. The Tribe's only response in its opening brief in this appeal to these pivotal events is pregnant silence.

Had the Tribe admitted from the outset that the Tribal Court lacks jurisdiction of Becker's claims, the 5-year torture of arguing in multiple fora about Tribal Court exhaustion would have been eliminated since, as shown above, Becker had no duty to exhaust his tribal court remedies if there is no Tribal Court with jurisdiction over his claims.[117]

b. The Tribal Court Lacked Jurisdiction of the Tribe's Claims

The Tribe's repeated arguments for tribal court jurisdiction of the Tribe's claims against Becker simply ignore the Agreement's clear waiver of the application of tribal law and waiver of tribal court exhaustion and jurisdiction. The Tribe argues that the Agreement made Becker an employee and that Tribal Ordinance 13-010 therefore established jurisdiction of the Tribe's claims against Becker. Becker has shown in the Companion Appeal that Becker was not an employee, and Becker incorporates by reference his response to this argument in the Companion Appeal.[118]

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[117] The Tribe's admission that the tribal court lacked jurisdiction of Becker's claims against the Tribe precludes the Tribe's argument that the parties could have intended the tribal court to be a "court of competent jurisdiction" to adjudicate claims related to the Agreement. Agreement Article 23. Obviously, the parties intended that the indicated non-federal "court of competent jurisdiction" was required to be able to adjudicate Becker's claims. Since the tribal court lacked and lacks such jurisdiction, the tribal court manifestly could not have been intended to have been a "court of competent jurisdiction."

118 579, Brief of Appellee Lynn D. Becker, p. 4, & pp. 16-21

Because the Tribe's arguments for tribal court jurisdiction fail, the district court correctly exercised its discretion and properly concluded that the Tribe had failed to show a probability of success on the critical issue of tribal court jurisdiction.

B. Becker Was Not Required to Exhaust Tribal Court Remedies

The duty to exhaust tribal court remedies is not a jurisdictional doctrine, but a prudential rule based upon comity.[119] As shown above, *Montana/Norton* hold that there can be no duty to exhaust tribal court remedies if the tribal court would lack jurisdiction. Even if there were tribal court jurisdiction, there is no exhaustion duty if the Tribe has waived that duty. As in the previous appeal of this action,[120] the Tribe does not argue that the contractual waiver of tribal court exhaustion is vague or otherwise defective if the Agreement is valid. That is, the Tribe implicitly concedes that, unless the Agreement is void, the exhaustion duty was waived by the Agreement. By the Agreement, the Tribe waived tribal court exhaustion here in the clearest possible terms: "the Tribe waives any requirement of Tribal law stating that courts have exclusive original jurisdiction over all matters involving the Tribe and

119 *Becker v. Ute Indian Tribe*, 868 F. 3d 1199, 1203 (10th Cir. 2017); *Norton v. Ute Indian Tribe*, 868 F.3d 1236, 1243 (10th Cir. 2017).

120 *Becker v. Ute Indian Tribe*, 868 F. 3d at 1203 – 1204 (10th Cir. 2017) ("Mr. Becker argues that the Tribe waived the exhaustion rule. He points to the Contract language stating, '[T]he Tribe … waives any requirement … that Tribal remedies be exhausted.' The Tribe responds, however, that any waiver is ineffective because the Contract is void for lack of approval by federal authorities.") (citation omitted).

waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted."[121]

C. The District Court Properly Enjoined the Tribal Court Action

Of the four requirements for the district court's entry of a preliminary injunction in favor of Becker – (1) probability of success, (2) irreparable injury, (3) balance of harms and (4) public policy – the Tribe addresses only the first element, and the above discussion shows that Judge Waddoups' conclusion that Becker had demonstrated a probability of success on the merits is justified.

The Tribe has not challenged that Becker satisfied the second, third and fourth requirements for a preliminary injunction.

III. This Court Lacks Jurisdiction to Review Sanctions, Protective Order and Summary Judgment Issues

This Court lacks jurisdiction over the district court's interlocutory orders[122] denying the Tribe's motions for discovery sanctions[123] and for a protective order.[124] This Court has jurisdiction to review those portions of the Tribe's summary

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121 Agreement Art 23. Aplt Appx Vol 1, p. 0064.

122 The Tribe cites only 28 U.S.C. §1291 for this Court's jurisdiction. Because Section 1291 applies only to appeals from final orders, and there is no final order, Section 1291 cannot support this Court's jurisdiction. Becker assumes that the Tribe intended to assert appellate jurisdiction of interlocutory orders under 28 U.S.C. §1292.

123 The Tribe moved for discovery sanctions against Becker's counsel (Dkt 146) and the district court denied the motion. Dkt 155.

124 Tribe's motion: Dkt 130. Order denying motion: Dkt 148.

judgment motions that were deemed to be motions for preliminary injunction. This Court lacks jurisdiction, however, to review the district court's denial of other portions of the Tribe's summary judgment motions.[125] The Tribe did not move under Section 1292(b) to certify an interlocutory appeal, and this Court lacks jurisdiction to review these interlocutory orders.[126]

CONCLUSION

Becker respectfully requests that the Court affirm the district court's April 30, 2018 Memorandum Decision and Order Reversing Denial of and Granting Plaintiff's Motion for Preliminary Injunction.

125 Tribe's motions: Dkts 73 & 74. Order denying preliminary and/or permanent injunction portions of motions: Dkt 148.

126 *Menocal v. GEO Group, Inc.*, 882 F.3d 905, 912 (10th Cir. 2018).

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 24, Becker requests oral argument. Becker believes that the issues here will have a significant impact nationally upon the incentives and barriers to commercial contracts between Indian tribes and non-Indians, and that consideration of these important issues will be aided by oral argument.

Date: August 15, 2018

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By: /s/David K. Isom

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Lynn D. Becker

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains 11,987 words, excluding the parts of the brief exempted by Fed. R. App. P 32(a)(7)(B)(iii) and 10th Cir. Local Rule 32(b). I relied on my word processor using Microsoft Office Word 2013 to obtain the count.

This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14-point font.

CERTIFICATE OF COMPLIANCE WITH ECF REQUIREMENTS

In compliance with 10th Cir. R. 25.3 and the Court's CM/ECF User Manual, Sections II & III, the undersigned certifies that Becker's Appellee's Brief filed August 15, 2018 complies with the Court's CM/ECF requirements. The electronic copy submitted in digital form via the Court's ECF system on August 15, 2018 was scanned for viruses with Endpoint Antivirus on August 15, 2018 and, according to the program, was free of viruses. I also certify that all privacy redactions have been made.

/s/ David K. Isom

_____

CERTIFICATE OF SERVICE

I certify that the foregoing Appellee's Brief was served upon all parties by ECF this 15th day of August 2018.

I certify that on this 15th day of August 2018 seven paper copies of this Appellee's Brief was served upon the clerk of the court by delivering the copies to a courier for delivery within two business days.

/s/ David K. Isom

Becker v. Ute Indian Tribe, et al.

Case Nos. 18-4030 and 18-4972

BECKER'S ADDENDUM

to

Becker's Appellee's Brief

August 15, 2018

EXHIBIT A

FILED
United States Court of Appeals
Tenth Circuit

December 13, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LYNN D. BECKER,

Plaintiff Counterclaim Defendant – Appellee,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally chartered corporation; UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; UTE ENERGY HOLDINGS, LLC, a Delaware LLC,

Defendant Counterclaimants Third-Party Plaintiffs - Appellants,

v.

JUDGE BARRY G. LAWRENCE,

Third-Party Defendant - Appellee.

No. 16-4175
(D.C. No. 2:16-CV-00958-CW)
(D. Utah)

ORDER

Before **HARTZ** and **EBEL**, Circuit Judges.

This matter is before the court on the appellee's *Petition for Panel Rehearing and Request for Rehearing En Banc*. We also have a response from the appellants. Upon consideration, the request for panel rehearing is denied by the original panel members.

In denying panel rehearing we note, however, that the panel did not decide the merits of the issues of exhaustion or the need for federal approval of the Becker contract. To the extent we addressed those issues, we did so only in the context of reversing a preliminary injunction on the record then before the district court. Upon remand to the district court, the parties are free to address those or other issues on the merits.

In addition, the petition and response were also circulated to all the judges of the court in regular active service and who are not recused. *See* Fed. R. App. P. 35(a). As no judge on the original panel or the en banc court requested that a poll be called the request for en banc review is likewise denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

EXHIBIT B

25 U.S. Code § 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 5304(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) 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) 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).

(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.)

EXHIBIT C

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-

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

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[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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EXHIBIT D

Title 25, C.F.R.: Indians

PART 225—OIL AND GAS, GEOTHERMAL, AND SOLID MINERALS AGREEMENTS

Contents

Subpart A—General

§225.1 Purpose and scope.

(a) The regulations in this part, administered by the Bureau of Indian Affairs under the direction of the Secretary of the Interior, govern minerals agreements for the development of Indian-owned minerals entered into pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. 2101-2108 (IMDA). These regulations are applicable to the lands or interests in lands of any Indian tribe, individual Indian or Alaska native the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. These regulations are intended to ensure that Indian mineral owners are permitted to enter into minerals agreements that will allow the Indian mineral owners to have more responsibility in overseeing and greater flexibility in disposing of their mineral resources, and to allow development in the manner which the Indian mineral owners believe will maximize their best economic interest and minimize any adverse environmental or cultural impact resulting from such development. Pursuant to section 4 of the IMDA (25 U.S.C. 2103(e)), as part of this greater flexibility, where the Secretary has approved a minerals agreement in compliance with the provisions of 25 U.S.C. chap. 23 and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such minerals agreement. However, as further stated in the IMDA, the Secretary continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement, and to uphold the duties of the United States as derived from the trust relationship and from any treaties, executive orders, or agreements between the United States and any Indian tribe.

(b) The regulations in this part shall become effective and in full force on April 29, 1994, and shall be subject to amendment at any time by the Secretary; *Provided,* that no such regulation that becomes effective after the date of approval of any minerals agreement shall operate to affect the duration of the minerals agreement, the rate of royalty or financial consideration, rental, or acreage unless agreed to by all parties to the minerals agreement.

(c) The regulations of the Bureau of Land Management, the Office of Surface Mining Reclamation and Enforcement, and the Minerals Management Service that are referenced in §§225.4, 225.5, and 225.6 are supplemental to these regulations, and apply to minerals agreements for development of Indian mineral resources unless specifically stated otherwise in this part or in other Federal regulations. To the extent the parties to a minerals agreement are able to provide reasonable provisions satisfactorily addressing the issues of valuation, method of payment, accounting, and auditing, governed by the Minerals Management Service regulations, the Secretary may approve alternate provisions in a minerals agreement.

(d) Nothing in these regulations is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, or minerals operations within their territorial jurisdiction.

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§225.2 Information collection.

It has been determined by the Office of Management and Budget that the Information Collection Requirements contained in part 225 do not require review under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

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§225.3 Definitions.

As used in this part, the following terms have the specified meaning except where otherwise indicated.

Area Director means the Bureau of Indian Affairs Official in charge of an Area Office.

Assistant Secretary—Indian Affairs means the Assistant Secretary—Indian Affairs of the Department of the Interior, a designee of the Secretary of the Interior who may be specifically authorized by the Secretary to disapprove minerals agreements (25 U.S.C. 2103(d)) and to issue orders of cessation and/or minerals agreement cancellations as final orders of the Department.

Authorized Officer means any employee of the Bureau of Land Management authorized by law or by lawful delegation of authority to perform the duties described herein and in 43 CFR parts 3160, 3180, 3260, 3280, 3480 and 3590.

Director's Representative means the Office of Surface Mining Reclamation and Enforcement Director's Representative authorized by law or by lawful delegation of authority to perform the duties described in 30 CFR part 750 and 25 CFR part 216.

Gas means any fluid, either combustible or noncombustible, that is produced in a natural state from the earth and that maintains a gaseous or rarefied state at ordinary temperature and pressure conditions.

Geothermal resources means: (1) All products of geothermal processes, including indigenous steam, hot water, and hot brines;

(2) Steam and other gases, hot water, and hot brines, resulting from water, gas, or other fluids artificially introduced into geothermal formations;

(3) Heat or other associated energy found in geothermal formations; and

(4) Any by-product derived therefrom.

In the best interest of the Indian mineral owner refers to the standards to be applied by the Secretary in considering whether to take administrative action affecting the interests of an Indian mineral owner. In considering whether it is “in the best interest of the Indian mineral owner” to take a certain action (such as approval of a minerals agreement or a unitization or communitization agreement) the Secretary shall consider any relevant factor, including, but not limited to: economic considerations, such as date of lease or minerals agreement expiration; probable financial effects on

the Indian mineral owner; need for change in the terms of the existing minerals agreement; marketability of mineral products; and potential environmental, social and cultural effects.

Indian lands means any lands or interests in lands owned by any individual Indian or Alaska Native, Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group, the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Indian mineral owner means any individual Indian or Alaska Native, or Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group that owns a mineral interest in oil and gas, geothermal resources or solid minerals, title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Indian surface owner means any individual Indian or Alaska Native, or Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group that owns the surface estate in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Indian tribe means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group that owns land or interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Individual Indian means any individual Indian or Alaska Native who owns land or interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Minerals includes both metalliferous and non-metalliferous minerals; all hydrocarbons, including oil and gas, coal and lignite of all ranks; geothermal resources; and includes but is not limited to sand, gravel, pumice, cinders, granite, building stone, limestone, clay, silt, or any other energy or non-energy mineral.

Minerals agreement means any joint venture, operating, production sharing, service, managerial, lease (other than a lease entered into pursuant to the Act of May 11, 1938, or the Act of March 3, 1909), contract, or other minerals agreement; or any amendment, supplement or other modification of such minerals agreement, providing for the exploration for, or extraction, processing, or other development of minerals in which an Indian mineral owner owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such minerals.

Minerals Management Service official means any employee of the Minerals Management Service authorized by law or by lawful delegation of authority to perform the duties described in 30 CFR chapter II, subchapters A and C.

Mining means the science, technique, and business of mineral development, including, but not limited to: opencast work, underground work, in-situ leaching, or other methods directed to severance and treatment of minerals; however, when sand, gravel, pumice, cinders, granite, building

stone, limestone, clay or silt is the subject mineral, an enterprise is considered "mining" only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year.

Oil means all non-gaseous hydrocarbon substances other than coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons). Oil includes liquefiable hydrocarbon substances such as drip gasoline and other natural condensates recovered or recoverable in a liquid state from produced gas without resorting to a manufacturing process.

Operator means a person, proprietorship, partnership, corporation, or other business entity that has entered into an approved minerals agreement under the authority of the Indian Mineral Development Act of 1982, or who has been assigned an obligation to make royalty or other payments required by the minerals agreement.

Secretary means the Secretary of the Interior or an authorized representative, except that as used in §225.22 (e) and (f) the authorized representative may only be the Assistant Secretary for Indian Affairs (25 U.S.C. 2103(d)).

Solid minerals means all minerals excluding oil, gas, and geothermal resources.

Superintendent means the Bureau of Indian Affairs official in charge of an agency office.

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§225.4 Authority and responsibility of the Bureau of Land Management (BLM).

The functions of the Bureau of Land Management are found in 43 CFR part 3160—Onshore Oil and Gas Operations, 43 CFR part 3180—Onshore Oil and Gas Unit Agreements: Unproven Areas, 43 CFR part 3260—Geothermal Resources Operations, 43 CFR part 3280—Geothermal Resources Unit Agreements: Unproven Areas, 43 CFR part 3480—Coal Exploration and Mining Operations, and 43 CFR part 3590—Solid Minerals (Other Than Coal) Exploration and Mining Operations. These functions include, but are not limited to, resource evaluation, approval of drilling permits, approval of mining, reclamation, and production plans, mineral appraisals, inspection and enforcement, and production verification. These regulations, as amended, apply to minerals agreements approved under this part.

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§225.5 Authority and responsibility of the Office of Surface Mining Reclamation and Enforcement (OSMRE).

The OSMRE is the regulatory authority for surface coal mining and reclamation operations on Indian lands pursuant to the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*). The relevant regulations for surface mining and reclamation operations are found in 30 CFR part 750 and 25 CFR part 216. These regulations, as amended, apply to minerals agreements approved under this part.

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§225.6 Authority and responsibility of the Minerals Management Service (MMS).

The functions of the MMS for reporting, accounting, and auditing are found in 30 CFR chapter II, subchapters A and C. These regulations, unless specifically stated otherwise in this part or in other regulations, apply to all minerals agreements approved under this part. To the extent the parties to a minerals agreement are able to provide reasonable provisions satisfactorily addressing the issues or functions governed by the MMS regulations relating to valuation of mineral product, method of payment, accounting procedures, and auditing procedures, the Secretary may approve alternate provisions in a minerals agreement.

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Subpart B—Minerals Agreements

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§225.20 Authority to contract.

(a) Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into a minerals agreement with respect to mineral resources in which the tribe owns a beneficial or restricted interest.

(b) Any individual Indian owning a beneficial or restricted interest in mineral resources may include those resources in a tribal minerals agreement subject to the concurrence of the parties and a finding by the Secretary that inclusion of the resources is in the best interest of the individual Indian mineral owner.

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§225.21 Negotiation procedures.

(a) An Indian mineral owner that wishes to enter into a minerals agreement may ask the Secretary for advice, assistance, and information during the negotiation process. The Secretary shall provide advice, assistance, and information to the extent allowed by available resources.

(b) No particular form of minerals agreement is prescribed. In preparing the minerals agreement the Indian mineral owner shall, if applicable, address provisions including, but not limited to, the following:

(1) A general statement identifying the parties to the minerals agreement, the legal description of the lands, including, if applicable, rock intervals or thicknesses subject to the minerals agreement, and the purposes of the minerals agreement;

(2) A statement setting forth the duration of the minerals agreement;

(3) A statement providing indemnification to the Indian mineral owner(s) and the United States from all claims, liabilities and causes of action that may be made by persons not a party to the minerals agreement;

(4) Provisions setting forth the obligations of the contracting parties;

(5) Provisions describing the methods of disposition of production;

(6) Provisions outlining the method of payment and amount of compensation to be paid;

(7) Provisions establishing accounting and mineral valuation procedures;

(8) Provisions establishing operating and management procedures;

(9) Provisions establishing any limitations on assignment of interests, including any right of first refusal by the Indian mineral owner in the event of a proposed assignment;

(10) Bond requirements;

(11) Insurance requirements;

(12) Provisions establishing audit procedures;

(13) Provisions for resolving disputes;

(14) A force majeure provision;

(15) Provisions describing the rights of the parties to terminate or suspend the minerals agreement, and the procedures to be followed in the event of termination or suspension;

(16) Provisions describing the nature and schedule of the activities to be conducted by the parties;

(17) Provisions describing the proposed manner and time of performance of future abandonment, reclamation and restoration activities;

(18) Provisions for reporting production and sales;

(19) Provisions for unitizing or communitizing of lands included in a minerals agreement for the purpose of promoting conservation and efficient utilization of natural resources;

(20) Provisions for protection of the minerals agreement lands from drainage and/or unauthorized taking of mineral resources; and

(21) Provisions for record keeping.

(c) In order to avoid delays in obtaining approval, the Indian mineral owner is encouraged to confer with the Secretary prior to formally executing the minerals agreement, and seek advice as to whether the minerals agreement appears to satisfy the requirements of §225.22, or whether additions or corrections may be required in order to obtain Secretarial approval.

(d) The executed minerals agreement, together with a copy of a tribal resolution authorizing tribal officers to enter into the minerals agreement, shall be forwarded by the tribal representative to the appropriate Superintendent, or in the absence of a Superintendent to the Area Director, for approval.

§225.22 Approval of minerals agreements.

(a) A minerals agreement submitted for approval pursuant to §225.21(d) shall be approved or disapproved within:

(1) One hundred and eighty (180) days after submission, or

(2) Sixty (60) days after compliance, if required, with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) or any other requirement of Federal law, whichever is later.

(b) At least thirty (30) days prior to approval or disapproval of any minerals agreement, the affected Indian mineral owners shall be provided with written findings forming the basis of the Secretary's intent to approve or disapprove the minerals agreement.

(1) The written findings shall include an environmental study which meets the requirements of §225.24 and an economic assessment, as described in §225.23.

(2) The Secretary shall include in the written findings any recommendations for changes to the minerals agreement needed to qualify it for approval.

(3) The 30-day period shall commence to run as of the date the written findings are received by the Indian mineral owner.

(4) Notwithstanding any other law, such findings and all projections, studies, data or other information (other than the environmental study required by §225.24) possessed by the Department of the Interior regarding the terms and conditions of the minerals agreement; the financial return to the Indian parties thereto; the extent, nature, value or disposition of the mineral resources; or the production, products or proceeds thereof, shall be held by the Department of the Interior as privileged and proprietary information of the affected Indian mineral owners. The letter containing the written findings should be headed with: PRIVILEGED PROPRIETARY INFORMATION OF THE (names of Indian mineral owners).

(c) A minerals agreement shall be approved if, at the Secretary's discretion, it is determined that the following conditions are met:

(1) The minerals agreement is in the best interest of the Indian mineral owner;

(2) The minerals agreement does not have adverse cultural, social, or environmental impacts sufficient to outweigh its expected benefits to the Indian mineral owners; and,

(3) The minerals agreement complies with the requirements of this part and all other applicable regulations and the provisions of applicable Federal law.

(d) The determinations required by paragraph (c) of this section shall be based on the written findings required by paragraph (b) and paragraphs (b)(1) through (b)(4), inclusive, of this section. The question of "best interest" within the meaning of paragraph (c)(1) of this section shall be determined by the Secretary based on information obtained from the parties, and any other information considered relevant by the Secretary, including, but not limited to, a review of comparable contemporary contractual arrangements or offers for the development of similar mineral resources received by Indian mineral owners, by non-Indian mineral owners, or by the Federal Government, insofar as that information is readily available.

(e) If a Superintendent or Area Director believes that a minerals agreement should not be approved, a written statement of the reasons why the minerals agreement should not be approved shall be prepared and forwarded, together with the minerals agreement, the written findings required by paragraph (b) and subparagraphs (b)(1) through (b)(4), inclusive, of this section, and all other pertinent documents, to the Secretary for a decision with a copy to the affected Indian mineral owner.

(f) The Secretary shall review any minerals agreement referred with a recommendation that it be disapproved, and the Secretary's decision to disapprove a minerals agreement shall be deemed a final Federal agency action (25 U.S.C. 2103(d)).

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§225.23 Economic assessments.

The Secretary shall prepare or cause to be prepared an economic assessment that shall address, among other things:

(a) Whether there are assurances in the minerals agreement that operations shall be conducted with appropriate diligence;

(b) Whether the production royalties or other form of return on mineral resources is adequate; and

(c) Whether the minerals agreement is likely to provide the Indian mineral owner with a return on the production comparable to what the owner might otherwise obtain through competitive bidding, when such a comparison can reasonably be made.

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§225.24 Environmental studies.

(a) The Secretary shall ensure that all environmental studies are prepared as required by the National Environmental Policy Act of 1969 (NEPA) and the regulations promulgated by the Council on Environmental Quality (CEQ) found at 40 CFR parts 1500-1508.

(b) The Secretary shall ensure that all necessary surveys are performed and clearances obtained in accordance with 36 CFR parts 60, 63, and 800 and with the requirements of the Archaeological and Historic Preservation Act (16 U.S.C. 469 *et seq.*), the National Historic Preservation Act (16 U.S.C. 470 *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. 1996), and Executive Order 11593 (3 CFR 1971-1975 Comp., p. 559, May 13, 1971). If these surveys indicate that a mineral development will have an adverse effect on a property listed on or eligible for listing on the National Register of Historic Places, the Secretary shall:

(1) Seek the comments of the Advisory Council on Historic Preservation, in accordance with 36 CFR part 800;

(2) Ensure that the property is avoided, that the adverse effect is mitigated, or that appropriate excavations or other related research is conducted; and

(3) Ensure that complete data describing the historic property is preserved.

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§225.25 Resolution of disputes.

A minerals agreement shall contain provisions for resolving disputes that may arise between the parties. However, no such provision shall limit the Secretary's authority or ability to ensure that the rights of an Indian mineral owner are protected in the event of a violation of the provisions of the minerals agreement by any other party to the minerals agreement.

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§225.26 Auditing and accounting.

The Secretary may conduct audits relating to the scope, nature and extent of compliance with the minerals agreement and with applicable regulations and orders to lessees, operators, revenue payors, and other persons with rental, royalty, net profit share and other payment requirements arising from the provisions of a minerals agreement. Procedures and standards used for accounting and auditing of minerals agreements will be in accordance with audit standards established by the Comptroller General of the United States, in “Standards for Auditing of Governmental Organizations, Programs, Activities, and Functions, 1981,” and standards established by the American Institute of Certified Public Accountants.

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§225.27 Forms and reports.

Any forms required to be filed pursuant to a minerals agreement may be obtained from the Superintendent or Area Director. Prescribed forms for filing geothermal production reports required by the BLM (43 CFR part 3260, §§3264.1, 3264.2-4 and 3264.2-5) may be obtained from the Superintendent, Area Director, or the Authorized Officer. Applicable reports required by the MMS shall be filed using the forms prescribed in 30 CFR part 210, which are available from MMS. Guidance on how to prepare and submit required information, collection reports, and forms to MMS is available from: Minerals Management Service, Attention: Lessee (or Reporter) Contact Branch, P.O. Box 5760, Denver, Colorado 80217. Additional reporting requirements may be required by the Secretary.

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§225.28 Approval of amendments to minerals agreements.

An amendment, modification or supplement to a minerals agreement entered into pursuant to the regulations in this part, whether the minerals agreement was approved before or after the effective date of these regulations, must be approved in writing by all parties before being submitted to the Secretary for approval. The provisions of §225.22 apply to approvals of amendments, modifications, or supplements to minerals agreements entered into under the regulations in this part. However, amendments, modifications, or supplements that do not substantially alter or affect the factors listed in §225.22(c), may be approved by referencing materials previously submitted for the initial review and approval of the minerals agreement. The Secretary may approve an amendment, modification, or supplement if it is determined that the underlying minerals agreement, as amended, modified, or supplemented meets the criteria for approval set forth in §225.22(c).

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§225.29 Corporate qualifications and requests for information.

(a) The signing in a representative capacity of minerals agreements or assignments, bonds, or other instruments required by a minerals agreement or these regulations, constitutes certification that the individual signing (except a surety agent) is authorized to act in such a capacity. An agent for a surety shall furnish a power of attorney.

(b) A prospective corporate operator proposing to acquire an interest in a minerals agreement shall have on file with the Superintendent a statement showing:

(1) The State(s) in which the corporation is incorporated, and a notarized statement that the corporation is authorized to hold such interests in the State where the land described in the minerals agreement is situated; and

(2) A notarized statement that it has power to conduct all business and operations as described in the minerals agreement.

(c) The Secretary may, either before or after the approval of a minerals agreement, assignment, or bond, call for any reasonable additional information necessary to carry out the regulations in this part, or other applicable laws and regulations.

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§225.30 Bonds.

(a) Bonds required by provisions of a minerals agreement should be in an amount sufficient to ensure compliance with all of the requirements of the minerals agreement and the statutes and regulations applicable to the minerals agreement. Surety bonds shall be issued by a qualified company approved by the Department of the Treasury (see Department of the Treasury Circular No. 570).

(b) An operator may file a $75,000 bond for all geothermal, mining, or oil and gas minerals agreements in any one State, which may also include areas on that part of an Indian reservation extending into any contiguous State. Statewide bonds shall be filed for approval with the Secretary.

(c) An operator may file a $150,000 bond for full nationwide coverage to cover all geothermal or oil and gas minerals agreements without geographic or acreage limitation to which the operator is or may become a party. Nationwide bonds shall be filed for approval with the Secretary.

(d) Personal bonds shall be accompanied by:

(1) Certificate of deposit issued by a financial institution, the deposits of which are Federally insured, explicitly granting the Secretary full authority to demand immediate payment in case of default in the performance of the provisions and conditions of the minerals agreement. The certificate shall explicitly indicate on its face that Secretarial approval is required prior to redemption of the certificate of deposit by any party;

(2) Cashier's check;

(3) Certified check;

(4) Negotiable Treasury securities of the United States of a value equal to the amount specified in the bond. Negotiable Treasury securities shall be accompanied by a proper conveyance to the Secretary of full authority to sell such securities in case of default in the performance of the provisions and conditions of a minerals agreement; or

(5) Letter of credit issued by a financial institution authorized to do business in the United States and whose deposits are Federally insured, and identifying the Secretary as sole payee with full authority to demand immediate payment in the case of default in the performance of the provisions and conditions of a minerals agreement.

(i) The letter of credit shall be irrevocable during its term.

(ii) The letter of credit shall be payable to the Bureau of Indian Affairs on demand, in part or in full, upon receipt from the Secretary of a notice of attachment stating the basis thereof (e.g., default in compliance with the minerals agreement provisions and conditions or failure to file a replacement in accordance with subparagraph (d)(5)(v) of this section).

(iii) The initial expiration date of the letter of credit shall be at least one (1) year following the date it is filed in the proper Bureau of Indian Affairs office.

(iv) The letter of credit shall contain a provision for automatic renewal for periods of not less than one (1) year in the absence of notice to the proper Bureau of Indian Affairs office at least ninety (90) days prior to the originally stated or any extended expiration date.

(v) A letter of credit used as security for any minerals agreement upon which operations have taken place and final approval for abandonment has not been given, or as security for a statewide or nationwide bond, shall be forfeited and shall be collected by the Secretary if not replaced by other suitable bond or letter of credit at least thirty (30) days before its expiration date.

(e) The required amount of a bond may be increased in any particular case at the discretion of the Secretary.

[59 FR 14971, Mar. 30, 1994; 60 FR 10474, Feb. 24, 1995]

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§225.31 Manner of payments.

Unless specified otherwise in the minerals agreement, after production has been established, all payments due for royalties, bonuses, rentals and other payments under a minerals agreement shall be made to the Secretary or such other party as may be designated, and shall be made at such time as provided in 30 CFR chapter II, subchapters A and C. Prior to production, all bonus and rental payments, shall be made to the Superintendent or Area Director.

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§225.32 Permission to start operations.

(a) No exploration, drilling, or mining operations are permitted on any Indian lands before the Secretary has granted written approval of the minerals agreement pursuant to the regulations. After a minerals agreement is approved, written permission to start operations must be secured by applying for the permits referred to in paragraph (b) of this section.

(b) Applicable permits in accordance with rules and regulations in 30 CFR part 750, 43 CFR parts 3160, 3260, 3480, 3590, and Orders or Notices to Lessees (NTL) issued thereunder shall be required before actual operations are conducted on the minerals agreement acreage.

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§225.33 Assignment of minerals agreements.

An assignment of a minerals agreement, or any interest therein, shall not be valid without the approval of the Secretary and, if required in the minerals agreement, the Indian mineral owner. The assignee must be qualified to hold the minerals agreement and shall furnish a satisfactory bond conditioned on the faithful performance of the covenants and conditions thereof as stipulated in the minerals agreement. A fully executed copy of the assignment shall be filed with the Secretary within five (5) working days after execution by all parties. The Secretary may permit the release of any bonds executed by the assignor upon submission of satisfactory bonds to the Bureau of Indian Affairs by the assignee, and a determination that the assignor has satisfied all accrued obligations.

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§225.34 [Reserved]

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§225.35 Inspection of premises; books and accounts.

(a) Operators shall allow Indian mineral owners, their authorized representatives, or any authorized representatives of the Secretary to enter all parts of the minerals agreement area for the purpose of inspection. Operators shall keep a full and correct account of all operations and submit all related reports required by the minerals agreement and applicable regulations. Books and records shall be available for inspection during regular business hours.

(b) Operators shall provide records to the Minerals Management Service (MMS) in accordance with MMS regulations and guidelines. All records pertaining to a minerals agreement shall be maintained by an operator in accordance with 30 CFR part 212.

(c) Operators shall provide records to the Authorized Officer in accordance with BLM regulations and guidelines.

(d) Operators shall provide records to the Director's Representative in accordance with OSMRE regulations and guidelines.

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§225.36 Minerals agreement cancellation; Bureau of Indian Affairs notice of noncompliance.

(a) If the Secretary determines that an operator has failed to comply with the regulations in this part; other applicable laws or regulations; the terms of the minerals agreement; the requirements of an approved exploration, drilling or mining plan; Secretarial orders; or the orders of the Authorized Officer, the Director's Representative, or the MMS Official, the Secretary may:

(1) Serve a notice of noncompliance; or

(2) Serve a notice of proposed cancellation.

(b) The notice of noncompliance shall specify in what respect the operator has failed to comply with the requirements referenced in paragraph (a), and shall specify what actions, if any, must be taken to correct the noncompliance.

(c) The notice of proposed cancellation shall set forth the reasons why cancellation is proposed.

(d) The notice of proposed cancellation or noncompliance shall be served upon the operator by delivery in person or by certified mail to the operator at the operator's last known address. When certified mail is used, the date of service shall be deemed to be when received or five (5) working days after the date it is mailed, whichever is earlier.

(e) The operator shall have thirty (30) days (or such longer time as specified in the notice) from the date that the Bureau of Indian Affairs notice of proposed cancellation or noncompliance is served to respond, in writing, to the Superintendent or Area Director actually issuing the notice.

(f) If an operator fails to take any action that may be prescribed in the notice of proposed cancellation, fails to file a timely written response to the notice, or files a written response that does not, in the discretion of the Secretary, adequately justify the operator's failure to comply, then the Secretary may cancel the minerals agreement, specifying the basis for the cancellation. Cancellation of a minerals agreement shall not relieve the operator of any continuing obligation under the minerals agreement.

(g) If an operator fails to take corrective action or to file a timely written response adequately justifying the operator's actions pursuant to a notice of noncompliance, the Secretary may issue an order of cessation. If the operator fails to comply with the order of cessation, or fails to timely file an appeal of the order of cessation pursuant to paragraph (k) of this section, the Secretary may issue an order of minerals agreement cancellation.

(h) This section does not limit any other remedies of the Indian mineral owner as set forth in the minerals agreement.

(i) Nothing in this section is intended to limit the authority of the Authorized Officer, the Director's Representative, or the MMS Official to take any enforcement action authorized pursuant to statute or regulation.

(j) The Authorized Officer, the Director's Representative, the MMS Official, and the Superintendent or Area Director should consult with one another before taking any enforcement actions.

(k) If orders of cessation or minerals agreement cancellation issued pursuant to this section are issued by a designee of the Secretary other than the Assistant Secretary for Indian Affairs, the orders may be appealed under 25 CFR part 2. If the orders are issued by the Secretary or the Assistant Secretary for Indian Affairs, and not one of their delegates or subordinates, the orders are the final orders of the Department.

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§225.37 Penalties.

(a) In addition to or in lieu of cancellation under §225.36, violations of the terms and conditions of any minerals agreement, the regulations in this part, other applicable laws or regulations, or failure to comply with a notice of noncompliance or a cessation order issued by the Secretary may subject an operator to a penalty of not more than $1,650 per day for each day that such a violation or noncompliance continues beyond the time limits prescribed for corrective action.

(b) A notice of a proposed penalty shall be served on the operator either personally or by certified mail to the operator at the operator's last known address. The date of service by certified mail shall be deemed to be the date received or five (5) working days after the date mailed, whichever is earlier.

(c) The notice shall specify the nature of the violation and the proposed penalty, and shall specifically advise the operator of the operator's right to either request a hearing within thirty (30) days of receipt of the notice or pay the proposed penalty. Hearings shall be held before the Superintendent or Area Director whose findings shall be conclusive, unless an appeal is taken pursuant to 25 CFR part 2. If within thirty (30) days of receipt of the notice of proposed penalty the operator has not requested a hearing or paid the amount of the proposed penalty, a final notice of penalty shall be served.

(d) If the person served with a notice of proposed penalty requests a hearing, penalties shall accrue each day the violations or noncompliance set forth in the notice continue beyond the time limits presented for corrective action. The Secretary may issue a written suspension of the requirement to correct the violations pending completion of the hearings provided by this section only upon a determination, at the discretion of the Secretary, that such a suspension will not be detrimental to the Indian mineral owner and upon submission and acceptance of a bond deemed adequate to indemnify the Indian mineral owner from loss or damage. The amount of the bond must be sufficient to cover the cost of correcting the violations set forth in the notice or any disputed amounts plus accrued penalties and interest.

(e) Payment of penalties in full more than ten (10) days after a final decision imposing a penalty shall subject the operator to late payment charges. Late payment charges shall be calculated on the basis of a percentage assessment rate of the amount unpaid per month for each month or fraction thereof until payment is received by the Secretary. In the absence of a specific minerals agreement provision prescribing a different rate, the interest rate on late payments and underpayments shall be a rate applicable under section 6621(a)(2) of the Internal Revenue Code of 1954. Interest shall be charged only on the amount of payment not received and only for the number of days the payment is late.

(f) None of the provisions of this section shall be interpreted as:

(1) Replacing or superseding the independent authority of the Authorized Officer, the Director's Representative, or the MMS Official to impose penalties under applicable statutory or regulatory authorities;

(2) Replacing, superseding, or replicating any penalty provision in the terms and conditions of a minerals agreement approved by the Secretary pursuant to this part; or

(3) Authorizing the imposition of a penalty for violations of minerals agreement provisions for which the Authorized Officer, Director's Representative, or MMS Official has either statutory or regulatory authority to assess a penalty.

[59 FR 14971, Mar. 30, 1994, as amended at 81 FR 42481, June 30, 2016; 82 FR 7652, Jan. 23, 2017; 83 FR 5195, Feb. 6, 2018]

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§225.38 Appeals.

Appeals from decisions of Officials of the Bureau of Indian Affairs under this part may be taken pursuant to 25 CFR part 2.

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§225.39 Fees.

(a) Unless otherwise authorized by the Secretary, each minerals agreement or assignment thereof, shall be accompanied by a filing fee of $75.00 at the time of filing.

(b) An Indian mineral owner shall not be required to pay a filing fee if the Indian mineral owner, pursuant to a provision in the existing minerals agreement, acquires an additional interest in that minerals agreement.

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§225.40 Government employees cannot acquire minerals agreements.

U.S. Government employees are prevented from acquiring any interest(s) in minerals agreements by the provisions of 25 CFR part 140 and 43 CFR part 20 pertaining to conflicts of interest and ownership of an interest in trust land.

EXHIBIT E

25 CFR 84.002

This document is current through the August 1, 2018 issue of the Federal Register. Title 3 is current through July 6, 2018.

Code of Federal Regulations > TITLE 25 -- INDIANS > CHAPTER I -- BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR > SUBCHAPTER F -- TRIBAL GOVERNMENT > PART 84 -- ENCUMBRANCES OF TRIBAL LAND -- CONTRACT APPROVALS

§ 84.002 What terms must I know?

The Act means the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Public Law 106-179, which amends section 2103 of the Revised Statutes, found at *25 U.S.C. 81.*

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

Indian tribe, as defined by the Act, means any Indian tribe, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the Secretary to Indians because of their status as Indians.

Secretary means the Secretary of the Interior or his or her designated representative.

Tribal lands means those lands held by the United States in trust for an Indian tribe or those lands owned by an Indian tribe subject to federal restrictions against alienation, as referred to Public Law 106-179 as "Indian lands."

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

25 U.S.C. 81, Pub. L. 106-179.

History

[66 FR 38918, 38923, July 26, 2001]

Annotations

Notes

[EFFECTIVE DATE NOTE:

66 FR 38918, 38923, July 26, 2001, added Part 84, effective Sept. 24, 2001.]

Case Notes

LexisNexis® Notes

Gasplus, L.L.C. v. United States Doi, 510 F. Supp. 2d 18, 2007 U.S. Dist. LEXIS 65700 (DDC Sept. 6, 2007), appeal dismissed by 2008 U.S. App. LEXIS 9126 (D.C. Cir. Mar. 12, 2008).

Overview: *A gasoline distributor's contract with an Indian Tribe to "operate" the gasoline distribution business did not arise from any interest in the Tribe's real property; thus, the BIA's decision that the contract was subject to 52 U.S.C.S. § 81 and voiding of the contact was set aside as arbitrary and capricious under 5 U.S.C.S. § 706(2)(A).*

- The Department of the Interior's definition of "encumber," contained in the regulations it passed pursuant to the amended 25 U.S.C.S. § 81, is in keeping with the view that an encumbrance is a legal right or interest in real property. 25 C.F.R. § 84.002. Go To Headnote
- 25 C.F.R. § 84.002, cmt., gives examples of the types of contracts that do not "encumber Indian lands" under 25 U.S.C.S. § 81: contracts for personal services; construction contracts; contracts for services performed for tribes on tribal land; and bonds, loans, security interests in personal property, or other financial arrangements that do not and could not involve interests in land. The commentary also provides examples of the types of contracts that may "encumber Indian lands" under § 81: a restrictive covenant or conservation easement may encumber tribal land within the meaning of § 81, while an agreement that does not restrict all economic use of tribal land may not. An agreement whereby a tribe agrees not to interfere with the relationship between a tribal entity and a lender, including an agreement not to request cancellation of the lease, may encumber tribal land, depending on the contents of the agreement. Similarly, a right of entry to recover improvements or fixtures may encumber tribal land, whereas a right of entry to recover personal property may not. The commentary further states that the terms of the contract or agreement will determine whether the contract or agreement encumber tribal lands. Go To Headnote
- Ownership is not the touchstone of the 25 U.S.C.S. § 81 analysis; a lesser interest in land, such as an easement or lien, is clearly an encumbrance within the statute's meaning. To come within the ambit of § 81, a third party's right to use tribal land must be in the nature of a legal interest that interferes with a tribe's proprietary control over the land. 25 C.F.R. § 84.002. To this effect, the regulations mention a "restrictive covenant," a "conversion easement," and a "right of entry to recover improvements or fixtures" as examples of "uses" that create encumbrances. Go To Headnote

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Regulations pertaining to migratory birds, applicable to Indians living on reservations: See Wildlife and Fisheries, 50 CFR chapter I.

Bureau of Land Management regulations pertaining to Indians: See Bureau of Land Management, 43 CFR part 2530.

Public Health regulations pertaining to contracts and health: See Public Health, 42 CFR chapter I.

Other regulations issued by the Department of the Interior appear in title 30, chapters II, III, IV, VI, VII; title 36, chapter I; title 41, chapter 114; title 48, chapter 14; title 43; and title 50, chapters I and IV, Code of Federal Regulations.

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Availability of Final Report, see: *82 FR 50532,* Nov. 1, 2017.]

End of Document

EXHIBIT F

[Federal Register Volume 66, Number 144 (Thursday, July 26, 2001)]
[Rules and Regulations]
[Pages 38918-38924]
From the Federal Register Online via the Government Publishing Office [www.gpo.gov]
[FR Doc No: 01-18475]

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 84

RIN 1076-AE00

Encumbrances of Tribal Land--Contract Approvals

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior, Bureau of Indian Affairs (BIA), is issuing a Final Rule that states which types of contracts or agreements encumbering tribal land are not subject to approval by the Secretary of the Interior under the Indian Tribal Economic Development and Contract Encouragement Act of 2000. The regulation also provides, in accordance with the Act, that Secretarial approval is not required (and will not be granted) for any contract or agreement that the Secretary determines is not covered by the Act. Finally, for contracts and agreements that are covered by the Act, the regulation sets out mandatory conditions for the Secretary's approval.

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EFFECTIVE DATE: September 24, 2001.

FOR FURTHER INFORMATION CONTACT: Duncan L. Brown, Department of the Interior, Office of the Secretary, 1849 C Street, NW., MS 7412 MIB, Washington, DC 20240, telephone 202/208-4582.

SUPPLEMENTARY INFORMATION:

I. Background

Under subsection (e) of the Indian Tribal Economic Development and Contract Encouragement Act of 2000 (25 USC 81) (referred to commonly and herein as ``Section 81''), the Secretary is required to enact regulations establishing which types of agreements are not covered by Section 81. The preamble to the Proposed Rule, 65 FR 43874 (July 14, 2000), provides further background on the history of Section 81, including the contents of the 2000 amendments. The Final Rule was developed with attention to Secretarial Order 3215, ``Principles for the Discharge of the Secretary's Trust Responsibility,'' of April 28, 2000, which was converted to and made permanent in the Departmental Manual on October 31, 2000. See 303 DM 2.

In a significant departure from past practice, the BIA distributed the preliminary drafts of the proposed regulation to the National

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

The regulation was published in the Federal Register on July 14, 2000, (65 FR 43874) with a 90-day public comment period to solicit comments from all interested parties. The BIA received 19 written comments from tribes, tribal representatives, and tribal organizations. During the comment period, the BIA discussed the regulation and received oral comments on the record at seven formal tribal consultation sessions with tribal leaders, individual Indians, and other interested parties: Aberdeen, SD (August 7-8, 2000); Oklahoma City, OK (August 10, 2000); Bloomington, MN (August 17, 2000); Albuquerque, NM (August 21 and 22, 2000 [two separate consultation meetings]; Billings, MT (August 24, 2000); and Reno, NV (August 28-29, 2000). Transcripts were made of these sessions in order to ensure that both oral and written comments were considered. Following the consultation meetings, several BIA regional and agency offices established informal local working groups with tribes to encourage discussion of the proposed regulations and submission of written comments. Throughout the comment period the BIA met on an informal basis to discuss the regulations with interested organizations, including the NCAI working group and the Inter-Tribal Monitoring Association. In sum, tribes and individual Indians have had an extraordinary opportunity to provide meaningful input on the proposed regulation through informal consultations on the early drafts, formal consultations, and the public comment period.

Comments were forwarded to a clearinghouse for compilation. The comments and compilation documents were carefully reviewed by the regulation drafting team, made up of BIA employees from the Central Office and trust program attorneys from the Solicitor's Office. Depending upon their merit, the Department accepted, accepted with revision, or rejected particular comments made on each part of the rule. Substantive comments and responses by the BIA are summarized below.

II. Response to Comments

As noted in the section-by-section analysis below, in direct response to comments the regulations have been clarified. No sections were deleted from the Proposed Rule to the Final Rule. One new section was added in the Final Rule at section 84.007 and the proposed section 84.007 was renumbered to section 84.008.

General Observations Regarding Changes From Proposed Rule

Overall, respondents recommended that we provide clarifications as to the types of agreements that do not require approval under Section 81. Therefore, in response to these comments, we revised definitions and language to make clearer the types of agreements that are not subject to Section 81. These revisions included corrections to the treatment of corporations under 25 USC 477 and contracts under 25 USC 450f or compacts under 25 USC 458aa. Several respondents recommended that we develop specific procedures for the submission and review of contracts covered under this Part. The BIA does not intend to prescribe any particular format for submission of requests for approval. Additionally, internal procedures for BIA review are not appropriate for rulemaking, but will be addressed in the Indian Affairs Manual.

We also received comments concerning Section 81's repeal of our authority to approve tribal attorney contracts, except for those entered into by the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) in Oklahoma. As noted in the preamble to the Proposed Rule, BIA will now only approve attorney contracts if required to do so under a tribal constitution. The criteria, if any, for approval of such contracts will be those in the tribal constitution and any relevant Federal law. As is its policy, BIA will defer to the tribe's interpretation of its own law regarding such approvals. Consistent with the repeal of our statutory authority for approval of tribal attorney contracts, we are today repealing relevant portions of the regulations for such approvals at 25 CFR Part 89.

Section-by-Section Analysis

Section 84.001 What Is the Purpose of This Part?

Summary of Section. Section 84.001 states the purpose of the rule as being the implementation of the Indian Economic Development and Contract Encouragement Act of 2000, Pub. L. 106-179.

Comments. We received no comments on this section and no changes were made.

Section 84.002 What Terms Must I Know?

Summary of Section. Section 84.002 contains terms necessary for understanding the rule. The term ``encumber,'' which Congress did not define in the Act, refers, consistent with the Act's legislative history, to the possibility that a third party could gain exclusive or nearly exclusive proprietary control over tribal land. The ``third party'' in this definition refers to any party outside of the tribe who, under the terms of the contract or agreement, could gain exclusive or nearly exclusive proprietary control over tribal land, such as a lender or the holder of a secured interest in any improvements for a transaction involving a tribe and a potential lessee. We have defined ``Indian tribe'' as it is defined in the Act. The definition of ``tribal lands'' in the rule is the same as the definition of ``Indian lands'' in the

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Act. We have used ``tribal lands'' to make it clear that the provisions of the Act and this rule do not apply to individually owned lands.

Comments. We received comments to revise the definitions of ``encumber '', ``Indian tribe'', and ``tribal lands''. We modified the definition of ``encumber'' to clarify that the terms of the contract or agreement will determine whether the contract or agreement encumber tribal lands. We did not accept the recommendations to change the definitions of ``Indian tribe'' and ``tribal lands''. These definitions are those provided by Congress. We did, however, modify the definition of ``Indian tribe'' to reflect the actual language of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b(e), as directed by Congress.

Section 84.003 What Types of Contracts and Agreements Require Secretarial Approval Under This Part?

Summary of Section. Section 84.003 indicates that, unless otherwise exempted, those contracts and agreements that encumber tribal lands for a period of seven or more years require Secretarial approval under this rule. As noted in the preamble to the Proposed Rule, the legislative history of Section 81 states, for example, that, if the default provision in a contract or agreement allows a third party (e.g., a lender) to operate the facility, that contract or agreement would ``encumber'' tribal land within the meaning of Section 81. If, however, the lender is only entitled to first right to the revenue from the facility, the contract or agreement would not ``encumber'' tribal land.

Comments. No comments were received for this section and no changes were made.

Section 84.004 Are There Types of Contracts and Agreements That Do Not

Require Secretarial Approval Under This Part?

Summary of Section. Section 84.004 indicates that the following types of contracts or agreements are not subject to this rule:

Contracts or agreements otherwise reviewed and approved by the Secretary under this title or other federal law or regulation. 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. This exemption is also consistent with previous opinions of both the Department of the Interior and the Department of Justice, judicial decisions, and legislative history of the Indian Mineral Development Act, all of which consistently state that the requirements of Section 81 do not apply to leases, rights-of-way, and other documents that convey a present interest in tribal land. Note, however, that contracts and agreements that are similar to those approved under other federal law or regulation, but are not subject to that approval, such as a contract between a tribe and another party to least a tract of tribal land at a future date, may be subject to approval under this Part.

Leases of tribal land that are exempt from approval by the Secretary under 25 U.S.C. 415 or 25 U.S.C. 477. Currently, this exemption only applies to certain leases by the Tulalip Tribes, the Navajo Nation, and tribes with a corporate charter authorized by 25 U.S.C. 477.

Subleases and assignments of leases of tribal land that do not require approval by the Secretary under Part 162 of this title. This provision will ensure maximum consistency with BIA policies concerning different types of leases.

Contracts or agreements that convey temporary use rights assigned by tribes, in the exercise of their jurisdiction over tribal lands, to tribal members. Such assignments are internal tribal matters. We must approve any encumbrances of the assigned tribal land under this Part or another relevant regulation (e.g., 25 CFR Part 162).

Contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of seven years or more. By definition, such contracts or agreements do not encumber the land under the Act. Such contracts or agreements may include contracts for personal services; construction contracts; contracts for services performed for tribes on tribal lands; and bonds, loans, security interests in personal property, or other financial arrangements that do not and could not involve interests in land.

Contracts that are exempt from Secretarial approval under the terms of a corporate charter authorized under 25 U.S.C. 477.

Tribal attorney contracts. However, as noted above, although the Act repealed the federal statutory requirements for approval of most attorney contracts, the BIA will still do so if required under a tribal constitution.

Contracts or agreements entered into in connection with a contract under the Indian Self-Determination Act, 25 U.S.C. 450f, or a compact under the Tribal Self-Governance Act, 25 U.S.c. 458aa. This is to conform to the exemption of these contracts from approval by the Secretary under 25 U.S.C. 4501(c)(15)(A).

Contracts or governments that are subject to approval by the National Indian Gaming Commission. The Act specifically exempts these contracts and agreements from its provisions, and the National Indian Gaming Commission will continue to review and approve contracts that provide for management of a tribal gaming activity.

Contracts or agreements under the Federal Power Act (FPA) relating to the use of tribal lands that meet the definition of a ``reservation'' under the FPA, with certain conditions. The FPA already provides for review of such contracts or agreements by the Secretary.

Comments. Several comments recommended that the rule provide specific examples of contracts that do not encumber tribal land. These comments were partially accepted and clarifications were provided in this section concerning certain types of agreements such as hydropower projects and assignments of tribal land to tribal members.

The preamble to the Proposed Rule stated that Section 81 did not apply by its terms to any contracts or agreements entered into by corporations chartered under 25 U.S.C. 477. Commenters noted that there was no support in either Section 81 or its legislative history for such a statement. We agree, and have narrowed the exemption to only those contracts or agreements entered into by those corporations that do not otherwise require Secretarial approval. Conversely, commenters stated that the exemption in the Proposed Rule limited to attorney contracts entered into by Self-Governance tribes was too narrow, ignoring the broad exemption from Secretarial approval under 25 U.S.C. 4501(c)(15)(A) for any contract or agreement entered into under the Indian Self-Determination Act, 25 U.S.C. 450f, or a compact under the Tribal Self-Governance Act, 25 U.S.C. 458aa. We accepted the comments and broadened the exemption accordingly.

We rejected comments that recommended that the rule contain an exhaustive list of contracts or agreements that do not encumber tribal land. Such a list is not practicable because the determination of encumbrance is conducted on a case-by-case basis. For example, a restrictive covenant or conservation easement may encumber tribal land within the meaning of Section 81, while an agreement that does not restrict all economic use of tribal land may not. An agreement whereby a tribe agrees not to interfere with the relationship between

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a tribal entity and a lender, including an agreement not to request cancellation of the lease, may encumber tribal land, depending on the contents of the agreement. Similarly, a right of entry to recover improvements or fixtures may encumber tribal land, whereas a right of entry to recover personal property may not.

Section 84.005 Will the Secretary Approve Contracts or Agreements Even Where Such Approval Is Not Required Under This Part?

Summary of Section. Section 84.005 makes it clear that the Secretary will return to the submitting tribes those contracts and agreements that do not require his or her approval. Therefore, we will no longer issue ``accommodation approvals.''

Comments. We received several comments recommending that the regulation specify a specific time frame when the Secretary will return contracts and agreements with a statement explaining why Secretarial approval is not required. We accepted these comments and added a time frame in this section that states that within thirty days after receipt of final, executed documents, the Secretary will return such contracts and agreements with a statement explaining why Secretarial approval is not required. We also received comments requesting provisions for appeal of determinations under this section. These comments were not accepted because Part 2 of this Title applies to all decisions made by the Secretary, including those under this section.

Section 84.006 Under What Circumstances Will the Secretary Disapprove a Contract or Agreement That Requires Secretarial Approval Under This Part?

Summary of Section. Section 84.006 establishes the criteria for disapproval of a contract or agreement under this rule. Specifically, the Secretary must disapprove those contracts or agreements that would violate federal law or those that do not contain provision(s) regarding the exercise of tribal sovereign immunity. As noted in the preamble to the Proposed Rule, consistent with the legislative history of the Act, these are the only criteria for Secretarial disapproval under this rule.

Comments. Many respondents provided comments that recommended that the Secretary consult with tribes prior to disapproving a contract or agreement so that tribes may have an opportunity to correct elements that may lead to disapproval. We accepted these comments and added subsection (b) to this section to identify that the Secretary will consult with tribes for this purpose. We also received comments asking whether the Secretary will require particular kinds of remedies for a

contract or agreement. Consistent with the purposes of Section 81, the Secretary will only identify whether remedies are addressed but will not disapprove a contract or agreement based on the types of remedies used.

Section 84.007 What Is The Status of a Contract or Agreement That Requires Secretarial Approval Under This Part But Has Not Yet Been Approved?

Summary of Section. This section provides that a contract or agreement that requires Secretarial approval under this Part is not valid until the Secretary approves it.

Comments. This section was added to the Final Rule in response to several comments. We also received comments recommending that we determine in the rule whether contracts can be approved retroactively by the Secretary. Decisions as to whether a particular contract or agreement may be approved retroactively will be made on a case-by-case basis. Such retroactive effect may be approved if the Secretary is satisfied that the consideration for the contract or agreement was adequate; that the tribe received the full consideration bargained for; that there is no evidence of fraud, overreaching, or other illegality in the procurement of the contract or agreement; and that the conditions of section 84.006 of this Part are met. Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21 (1982).

Section 84.008 What Is the Effect of the Secretary's Disapproval of a Contract or Agreement That Requires Secretarial Approval Under This Part?

Summary of Section. Section 84.008 states, consistent with section 2(b) of the Act, that the effect of disapproval of a contract or agreement under this Part (as opposed to return of a contract or agreement under section 84.005 of this rule) is that the contract or agreement is invalid.

Comments. There were no comments on this section. The section was renumbered from Sec. 84.007 in the Proposed Rule to this section of the Final Rule.

III. Procedural Requirements

A. Review Under Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the BIA must determine whether the regulatory action is ``significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ``significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations or recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ``significant regulatory action'' from an economic or policy standpoint. This rule is pursuant to a statutory mandate and is consistent with the Department's policy of encouraging tribal self-determination and economic development. The rule reduces the number of contracts the Department has to review each year. Prior to the amendments enacted under Pub. L. 106-179, tribes had to submit certain contracts for approval by the Secretary of the Interior for which Secretarial approval has now (through enactment of Pub. L. 106-179) been deemed unnecessary. Those

tribes having contracts or agreements covered under the new law, however, must include a statement regarding their sovereign immunity or remedies. This is an intergovernmental mandate; however, it would not affect the rights of either party under such contracts and agreements, but would only require that these rights be explicitly stated. The cost burden on the tribes for including this provision would be minimal. Otherwise, the rule has no direct or indirect impact on any other agency, does not materially alter the budgetary impact of financial programs, or raise novel legal or policy issues.

B. Review Under Executive Order 12988

With respect to the promulgation of new regulations, section 3(a) of Executive Order 12988, ``Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements:

(1) Eliminate drafting errors and ambiguity;

(2) Write regulations to minimize litigation; and

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(3) Provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section (b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation:

(1) Clearly specifies the preemptive effect, if any;

(2) Clearly specifies any effect on existing Federal law or regulation;

(3) Provides a clear legal standard for affected conduct while promoting simplification and burden reduction;

(4) Specifies the retroactive effect, if any;

(5) Adequately defines key terms; and

(6) Addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of the Interior has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

A Regulatory Flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is not required for this rule because it applies only to tribal governments, not State and local governments.

D. Review Under the Small Business Regulatory Enforcement Act of 1996 (SBREFA)

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more. This rule will not result in a major increase in costs or prices. In fact, it is estimated that the Department will save time and resources through the rule because the number of contracts submitted for Secretarial approval will be reduced. Therefore, no increases in costs for administration will be realized and no prices would be impacted through the streamlining of the contract approval process within the Department and the BIA. The effect of the rule is to encourage and foster tribal contracting and, consequently, strengthen tribal self-determination and economic development. This rule will not result in any significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United

States-based companies to compete with foreign-based companies in domestic and export markets. The impact of the rule will be realized by tribal governments in the economy of administration accorded contract negotiation between tribes and third parties. Unless the contracts contemplate an encumbrance of Indian lands or by their terms could otherwise lead to the loss of tribal proprietary control over such lands, the Department would not require such contracts and agreements to be submitted to the BIA for approval. The Department anticipates, therefore, that the impacts to small business or enterprises and the tribes themselves will be positive and, indeed, allow for greater flexibility in contracting for certain services on Indian lands.

E. Review Under the Paperwork Reduction Act

No information or record keeping requirements are imposed by this rule. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

F. Review Under Executive Order 13132 Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

G. Review Under the National Environmental Policy Act of 1969

This rule is categorically excluded from the preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq., because its environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and the Federal actions under this rule (i.e., approval or disapproval of contracts or agreements that could encumber Tribal lands for a period of seven years or more) will be subject at the time of the action itself to the National Environmental Policy Act process, either collectively or case-by-case. Further, no extraordinary circumstances exist to require preparation of an environmental assessment or environmental impact statement.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the Act, the Department generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ``Federal mandates'' that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. This rule will not result in the expenditure by the state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. The Department does take notice, however, that the rule (in response to Pub. L. 106-179) requires that a tribe entering into a covered contract include a specific statement regarding its sovereign immunity or remedies. This is an additional enforceable duty imposed on the tribes, and so would constitute an intergovernmental mandate under the Unfunded Mandates Reform Act. However, the cost of this mandate would be minimal.

I. Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of May 14, 1998, ``Consultation and Coordination with Indian Tribal Governments'' (63 FR

27655) and 512 DM 2, we have evaluated any potential effects upon Federally recognized Indian tribes and have determined that there are no potential adverse effects. No action is taken under this rule unless a tribe voluntarily enters into a contract or agreement that could encumber tribal land for seven years or more. As noted above, tribes were asked for comments prior to publication of this Final Rule.

J. Review Under Executive Order 13211--Energy

In accordance with the President's Executive Order 13211, ``Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355), we have determined that this rulemaking is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking simply clarifies those types of contracts or agreements encumbering tribal land that are not subject to the approval of the Secretary

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of the Interior under the Indian Tribal Economic Development and Contract Encouragement Act of 2000. This is, therefore, an administrative clarification and would not otherwise have any impact on the Nation's energy resources.

List of Subjects in 25 CFR Part 84

Administrative practice and procedure, Indians--lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends 25 CFR chapter I by adding Part 84 to read as follows:

PART 84--ENCUMBRANCES OF TRIBAL LAND--CONTRACT APPROVALS

Sec.

Authority: 25 U.S.C. 81, Pub. L. 106-179.

Sec. 84.001 What is the purpose of this part?

The purpose of this part is to implement the provisions of the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Public Law 106-179, which amends section 2103 of the Revised Statutes, found at 25 U.S.C. 81.

Sec. 84.002 What terms must I know?

The Act means the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Public Law 106-179, which amends section 2103 of the Revised Statutes, found at 25 U.S.C. 81.

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

Indian tribe, as defined by the Act, means any Indian tribe, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the Secretary to Indians because of their status as Indians.

Secretary means the Secretary of the Interior or his or her designated representative.

Tribal lands means those lands held by the United States in trust for an Indian tribe or those lands owned by an Indian tribe subject to federal restrictions against alienation, as referred to Public Law 106-179 as ``Indian lands.''

Sec. 84.003 What types of contracts and agreements require Secretarial approval under this part?

Unless otherwise provided in this part, contracts and agreements entered into by an Indian tribe that encumber trial lands for a period of seven or more years require Secretarial approval under this part.

Sec. 84.004 Are there types of contracts and agreements that do not require Secretarial approval under this part?

Yes, the following types of contracts or agreements do not require Secretarial approval under this part:

(a) Contracts or agreements otherwise reviewed and approved by the Secretary under this title or other federal law or regulation. See, for example, 25 CFR parts 152 (patents in fee, certificates or competency); 162 (non-mineral leases, leasehold mortgages); 163 (timber contracts); 166 (grazing permits); 169 (rights-of-way); 200 (coal leases); 211 (mineral leases); 216 (surface mining permits and leases); and 225 (mineral development agreements);

(b) Leases of tribal land that are exempt from approval by the Secretary under 25 U.S.C. 415 or 25 U.S.C. 477;

(c) Sublease and assignments of leases of tribal land that do not require approval by the Secretary under part 162 of this title;

(d) Contracts or agreements that convey to tribal members any rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal laws or custom;

(e) Contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of seven years or more;

(f) Contracts or agreements that are exempt from Secretarial approval under the terms of a corporate charter authorized by 25 U.S.C. 477;

(g) Tribal attorney contracts, including those for the Five Civilized Tribes that are subject to our approval under 25 U.S.C. 82a;

(h) Contracts or agreements entered into in connection with a contract under the Indian Self-Determination Act, 25 U.S.C. 450f, or a compact under the Tribal Self-Governance Act, 25 U.S.C. 458aa.

(i) Contracts or agreements that are subject to approval by the National Indian Gaming Commission under the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq., and the Commission's regulations; or

(j) Contracts or agreements relating to the use of tribal lands for hydropower projects where the tribal lands meet the definition of a ``reservation'' under the Federal Power Act (FPA), provided that:

(1) Federal Energy Regulatory Commission (FERC) has issued a license or an exemption;

(2) FERC has made the finding under section 4(e) of the FPA (16 U.S.C. 797(e)) that the license or exemption will not interfere or be inconsistent with the purpose for which such reservation was created or acquired; and

(3) FERC license or exemption includes the Secretary's conditions for protection and utilization of the reservation under section 4(e) and payment of annual use charges to the tribe under section 10(e) of the FPA (16 U.S.C. 803(e)).

Sec. 84.005 Will the Secretary approve contracts or agreements even where such approval is not required under this part?

No, the Secretary will not approve contracts or agreements that do not encumber tribal lands for a period of seven or more years. Within thirty days after receipt of final, executed documents, the Secretary will return such contracts and agreements with a statement explaining why Secretarial approval is not required. The provisions of the Act will not apply to those contracts or agreements the Secretary determines are not covered by the Act.

Sec. 84.006 Under what circumstances will the Secretary disapprove a contract or agreement that requires Secretarial approval under this part?

(a) The Secretary will disapprove a contract or agreement that requires Secretarial approval under this part if the Secretary determines that such contract or agreement:

(1) Violates federal law; or

(2) Does not contain at least one of the following provisions that:

(i) Provides for remedies in the event the contract or agreement is breached;

(ii) References a tribal code, ordinance or ruling of a court of competent

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jurisdiction that discloses the right of the tribe to assert sovereign immunity as a defense in an action brought against the tribe; or

(iii) Includes an express waiver of the right of the tribe to assert sovereign immunity as a defense in any action brought against the 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.

(b) The Secretary will consult with the Indian tribe as soon as practicable before disapproving a contract or agreement regarding the elements of the contract or agreement that may lead to disapproval.

Sec. 84.007 What is the status of a contract or agreement that requires Secretarial approval under this part but has not yet been approved?

A contract or agreement that requires Secretarial approval under this part is not valid until the Secretary approves it.

Sec. 84.008 What is the effect of the Secretary's disapproval of a contract or agreement that requires Secretarial approval under this

part?

If the Secretary disapproves a contract or agreement that requires Secretarial approval under this part, the contract or agreement is invalid as a matter of law.

Dated: July 9, 2001.
Neal A. McCaleb,
Assistant Secretary--Indian Affairs.
[FR Doc. 01-18475 Filed 7-25-01; 8:45 am]
BILLING CODE 4310-02-M