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

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

REPORT

[To accompany S. 613]

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

PURPOSE

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

[5] Id. at 153.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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 non-compliance 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

[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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