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RE: Section 81 Approval

In 2000, the Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. 106-179 §2, 114 Stat.46 (2000), was enacted to encourage outside investment in Indian Country. To facilitate this objective, Congress revised Section 81 and amended the rule that subjected all transactions relating to Indian lands between non-Indians and Indian Tribes to Secretarial approval.

The new Section 81 provides that contracts which encumber Tribal lands for a period of seven or more years must be approved by the Secretary of the Interior. A contract subject to such approval will not be approved if it violates federal law or fails to include a provision related to tribal sovereign immunity. Specifically, the new Section 81 requires that, in order to be approved, a contract subject to it must either: (1) provide for remedies in the event of breach; (2) expressly disclose sovereign immunity; or (3) expressly waive sovereign immunity. In its discussion of the final rule, the Bureau stated that 'the Secretary will only identify whether remedies are addressed but will not disapprove a contract or agreement based on the types of remedies used." 25 C.F.R. Part 84. In addition, the Bureau added a new subsection to the regulations which provides that the Bureau will consult with the Tribe regarding any problems with the contract that could lead to disapproval before actually disapproving the contract. However, a contract that requires Secretarial approval is not valid until it has been approved.

Tribes will most likely encounter problems when determining whether a specific contract or agreement has the effect of encumbering Tribal lands. The term encumbrance is defined broadly as "attach a claim, lien, charge, right of entry or liability to real property." Encumbrances may include "leasehold mortgages, easements, and other contracts or agreements that could give a third party exclusive or nearly exclusive proprietary control over tribal land." Id. Unfortunately, this definition only provides more uncertainty as to what constitutes an encumbrance. For example, does a lender's right to access and repossession of personal property located on Indian lands constitute a "right of entry" and therefore, an encumbrance or just an extension of the conveyance of a temporary interest to Tribal members which is exempt under the regulations. Further, the legislative history of Section 81 provides that, for example, if a contract's default provision allows a third party (e.g., a lender) to operate the facility, that contract would encumber Tribal land. If, however, the lender is only entitled to first right to the facility's revenue, the contract would not encumber Tribal land. When asked by Tribes to clarify the term encumbrance, the Secretary refused holding that the determination of what constitutes the same must be determined on a case-by-case basis. However, under the regulations, the following contracts do not require Secretarial approval:

1. Contracts or agreements otherwise reviewed and approved by the Secretary, i.e. patents in fee, certificates of competency, non-mineral leases, leasehold mortgages, timber contracts, grazing permits, rights-of-way, coal leases, mineral leases, surface mining permits and leases, and mineral development agreements;
2. Leases of Tribal land that are exempt from Secretarial approval under 25 U.S.C. 477 (Section 17 corporations);
3. Sublease and assignments of leases of Tribal land that do not require Secretarial approval under Part 162;
4. 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;
5. Contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over Tribal lands for a period of seven years or more;
6. Contracts or agreements that are exempt from Secretarial approval under a corporate charter;
7. Tribal attorney contracts;
8. 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.
9. Contracts or agreements that are subject to the approval of the National Indian Gaming Commission under the Indian Gaming Regulatory Act or the accompanying regulations;
10. Contracts or agreements relating to the use of Tribal lands for hydropower projects; Provided, the Tribe meets certain requirements.

As the preceding examples illustrate, many contracts fall outside the realm of Section 81 approval. However, if the Tribal Constitution provides otherwise, all contracts must be submitted to the Secretary for review and approval, which will not be forthcoming as the new Section 81 regulations hold that the Secretary will not approve contracts that do not require same. In addition, the Secretary has thirty (30) days to return a submitted contract with an explanation for not issuing "accommodation approvals." 25 U.S.C. Part 84.

Congress, in enacting Section 81, simultaneously repealed all of Part 89 regarding approval of attorney contracts, except the provisions related to the Five Civilized Tribes and when required by a Tribal constitution or other Tribal law. 25 C.F.R. Part 89. Additionally, the Bureau has stated the criteria for approval of such contracts will be those in the constitution and any relevant federal law, and the BIA will defer to the Tribe's interpretation of its own law regarding such approvals. Id.

In conclusion, Secretarial approval is no longer mandated unless a contract or agreement encumbers land for a period of seven years or more. If Secretarial approval is constitutionally required for all contracts that encumber Tribal lands, the Tribe must submit all agreements to the BIA, even those outside the scope of Section 81, only to have the submission returned within thirty days with an explanation as to why the BIA will not approve the contract or agreement.

Please contact me if there are any questions.