



INTERIOR BOARD OF INDIAN APPEALS

Quantum Entertainment, Limited v. Acting Southwest Regional Director,
Bureau of Indian Affairs

44 IBIA 178 (03/27/2007)

Overruling:

36 IBIA 79

Judicial review of this case:

Remanded to Board, *Quantum Entertainment Ltd v. United States Department of the Interior*, 597 F. Supp. 2d 146 (D.D.C. 2009)

Decision on Remand: 52 IBIA 289

Judicial review of this case:

Affirmed, *Quantum Entertainment, LTD. v. U.S. Dept. of the Interior*, 848 F.Supp2d 30, (D.D.C. 2012)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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QUANTUM ENTERTAINMENT	:	Order Affirming in Part, Abstaining
LIMITED,	:	in Part, and Dismissing in Part
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 04-21-A
ACTING SOUTHWEST REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	March 27, 2007

Quantum Entertainment Limited (Appellant) seeks review of an October 23, 2003 decision (Decision) of the Acting Southwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director concluded that an August 1, 1996 gasoline distribution business management agreement (Agreement) signed by Appellant, the Santo Domingo Pueblo (Pueblo), and Kewa Gas, Limited (Kewa) was subject to BIA approval under the version of 25 U.S.C. § 81 that was in effect in 1996 (“Old Section 81”), and concluded that the Agreement was invalid because it had not received such approval. The Regional Director declined to approve the Agreement retroactively and demanded that Appellant vacate the Pueblo’s property on which the gasoline distribution business was located and disgorge proceeds that Appellant had received under the Agreement.

As a threshold matter, we conclude that Appellant has standing to challenge the Regional Director’s determination that Old Section 81 applies to the Agreement and that it is subject to Secretarial approval. On the merits of that issue (1) we affirm the Regional Director’s choice of law to review the Agreement under Old Section 81 rather than under the statute as amended in 2000 (“New Section 81”), and (2) with respect to the Regional Director’s conclusion that the Agreement is subject to BIA approval under Old Section 81, we affirm in part but also abstain in part based on collateral judicial proceedings involving the Department of the Interior (Department).

Assuming for purposes of this appeal that Old Section 81 requires that the Agreement be approved by BIA in order to be valid, we conclude that Appellant lacks prudential standing to challenge the Regional Director’s decision declining to approve the Agreement retroactively. In reaching our conclusion, we overrule Hattum v. Great Plains

Regional Director, 36 IBIA 79 (2001) because the summary disposition by the Board of Indian Appeals (Board) of the standing issue in that case does not withstand the weight of contrary judicial precedent.

With respect to the portions of the Regional Director's decision declaring the Agreement invalid and the proceeds unauthorized, and demanding remedial action, we affirm in part and dismiss in part. Appellant has standing to challenge the Regional Director's authority to include declarations in his decision regarding the invalidity of the Agreement and the unauthorized status of proceeds received under it. We conclude on the merits that the Regional Director did have authority to state in a decision what the statute by its own terms clearly provides.

To the extent that the Regional Director's decision may be read as purporting to issue a legally-binding judgment or order against Appellant to vacate the premises and to repay proceeds, we conclude that the Regional Director's disclaimer on appeal of any such intent, and Appellant's acceptance of that disclaimer, has rendered this portion of Appellant's appeal moot. In addition, with respect to the Regional Director's demand for full repayment of proceeds without allowing any setoff for the value of Appellant's services, the Regional Director on appeal impliedly disclaimed any intent to have made a quantum meruit determination under Old Section 81. While that disclaimer may not render the quantum meruit issue moot, we conclude that this issue is not ripe for our review.

Finally, we reject Appellant's claims that the Regional Director denied it due process by issuing his decision without providing Appellant with advance notice and an opportunity to submit its views. The Regional Director's decision was neither final nor effective, pending resolution of this appeal, and Appellant has been afforded a full opportunity to present its views and have them considered prior to a final Departmental determination.

Background

A. Introduction

This case involves a long-term Agreement signed in 1996 by Appellant, the Pueblo, and Kewa (a tribally-created entity) under which Appellant was to manage and operate a gasoline distribution business owned by Kewa on lands leased by Kewa from the Pueblo. The Agreement was intended, at least in part, to allow the parties to benefit from a tax

exemption available to Indian tribes. 1/ The parties apparently performed under the Agreement for seven years, until the Regional Director issued his decision declaring that the Agreement was subject to Old Section 81 and was invalid for lack of BIA approval.

In order to give context to the facts of this case, we first describe and provide background on the statute at issue in this appeal — 25 U.S.C. § 81. We then describe the facts giving rise to this appeal.

B. 25 U.S.C. § 81

In 1871, Congress first enacted what later was codified as 25 U.S.C. § 81. 2/ From 1872 to 2000, with a minor exception not relevant here, the statute remained unchanged and provided in relevant part as follows:

No agreement shall be made by any person with any tribe of Indians * * * for the payment or delivery of any money or other thing of value * * * in consideration of services for said Indians relative to their lands * * * unless such contract or agreement be executed and approved [by the Secretary of the Interior (Secretary)]. * * * 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

1/ In 1996, New Mexico's Taxation and Revenue Department, after reviewing both New Mexico state tax law and principles of Federal law, ruled that an Indian entity gasoline distributor (e.g., Kewa), operating on Indian reservation land (e.g., the Pueblo's land), would be exempt from the State's gasoline receipt tax. See Revenue Ruling 640-96-1; see generally Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (State of Oklahoma could not apply its motor fuels tax to fuel sold by the Chickasaw Nation's retail stores on tribal land when the legal incidence of the tax fell on the tribal retailer).

Although Chickasaw struck down Oklahoma's tax as applied to the tribe, the Court and the parties recognized that the State could achieve the same revenue objective by amending its law so that the legal incidence fell on the consumer and the tribe had to collect and remit the tax. 515 U.S. at 460. Thus, the New Mexico Taxation and Revenue Department's recognition of a federal tax exemption available to an Indian entity gasoline distributor was based on the structure of the State's gasoline receipt tax in 1996.

2/ Initially, the provision was attached to an appropriations bill. Act of March 3, 1871, ch. 120, § 3, 16 Stat. 570. In 1872 it was enacted as permanent legislation. Act of May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136.

behalf, on account of such services, in excess of the amount approved by the * * * Secretary for such services, may be recovered by suit in the name of the United States * * *.

25 U.S.C. § 81 (1994); cf. R.S. § 2103 (1878). 3/

Congress enacted Old Section 81 to “protect the Indians from improvident and unconscionable contracts.” Alzheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 805 (7th Cir. 1993) (quoting In re Sanborn, 148 U.S. 222, 227 (1893)). The statute has been characterized as “unabashedly paternalistic,” TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676, 682 (5th Cir. 1999), and as reflecting “Congressional concerns that Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs,” S. Rep. No. 106-150, at 2 (1999).

In 2000, Congress repealed and replaced Old Section 81 with New Section 81, the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46 (Mar. 14, 2000), codified at 25 U.S.C. § 81 (2001). New Section 81 provides that “[n]o 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 [is approved by the Secretary or his designee].” Id. § 81(b). New Section 81 required the Secretary to issue regulations identifying the types of agreements or contracts that are not covered by the statute.

As described in the legislative history, New Section 81 “eliminate[d] the overly-broad scope of [Old Section 81]” so that the statute would “no longer apply to a broad range of commercial transactions.” S. Rep. No. 106-150, at 9. Instead, New Section 81 is intended to “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

3/ In addition to the quoted provisions, Old Section 81 provided that in suits for recovery brought in the name of the United States, “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.” Suits brought under this provision are termed “qui tam” actions, shorthand for the Latin phrase describing actions brought by a private party in the name of the king. See “qui tam action,” Black’s Law Dictionary 1282 (8th ed. 2004).

control over the Indian lands.” Id. 4/ New Section 81 also eliminated the qui tam provision and omitted statutory remedies for contracts or agreements that are rendered invalid for lack of Secretarial approval. 5/ New Section 81 was intended reduce the degree of Federal paternalism in favor of tribal self-determination and autonomy, and in favor of reservation economic development. Id. at 2, 9. See also Notice of Proposed Rulemaking, 65 Fed. Reg. 43,952-53 (July 14, 2000) (discussing Senate Report language concerning reduced scope of New Section 81).

C. The Gasoline Distribution Business and the Agreement

On August 14, 1996, the Pueblo Tribal Council (Tribal Council) enacted two resolutions for establishing and managing a gasoline distribution business on Pueblo lands — one to create Kewa and another to approve the Agreement.

The first resolution adopted a corporate charter establishing Kewa as a for-profit business of the Pueblo, “to carry on certain economic development activities on behalf of the Pueblo, including * * * operation of a gasoline distribution business.” See Res. No. S.D. 08-96-18 (Aug. 14, 1996). Kewa’s charter describes it as a “for-profit enterprise,” a primary purpose of which is “to act on the Pueblo’s behalf as a distinct legal entity with respect to development, construction, operation, and management of one or more businesses relating to the sale and distribution of motor vehicle fuels, * * * and other related businesses directed at serving the motoring public.” Charter arts. I, III. Another “principal purpose[]” is “[t]o provide for the separation of the Pueblo’s business enterprise management systems from the governmental and political processes of the Pueblo, while maintaining the Enterprise as an integral division of the Pueblo.” Id. art. III. The Charter provides that “[a]lthough [Kewa] shall act as an entity which is separate and distinct from the governing body of the Pueblo, [Kewa] is a division and instrumentality of the Pueblo and shall possess all immunities from suit and other proceedings possessed by the Pueblo.” Id. art. IV, § 11.

4/ New Section 81 does not define “encumber,” but through regulation the Department has defined it to mean “to 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 by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.” 25 C.F.R. § 84.002.

5/ New Section 81 includes several additional reform measures that are not relevant here.

The Charter grants Kewa broad powers to engage in business activities related to the sale and distribution of motor fuel, including entering into contracts in its own name. See id. art. IV, §§ 1, 9. Unless expressly authorized by the Tribal Council, however, Kewa is precluded from entering into any agreements on behalf of the Pueblo and prohibited from encumbering real or personal property of the Pueblo. Id. art. V, §§ 1, 3. Control and operation of Kewa is vested in a Board of Directors. Id. art. VII, § 1. At all times relevant to this appeal, the Pueblo was the sole shareholder of Kewa, although the Pueblo is authorized to transfer up to 40 percent of its shares to another party. Id. art. VI, § 2. As long as the Pueblo remains the sole shareholder, however, members of the Board of Directors must be selected by the Tribal Council. Id. art. VII, § 2. A majority of the members of the Board must be Pueblo members, and the Pueblo's Governor, Lieutenant Governor, and Secretary serve as ex officio members of the Board. Id. art. VII, § 3.

The second Tribal Council resolution enacted on August 14, 1996, was a resolution approving the Agreement at issue in this appeal, under which Appellant was to manage Kewa's gasoline distribution business, in exchange for a percentage of net profits and other performance bonuses. In relevant part, the Tribal Council resolution approving the Agreement reads as follows:

WHEREAS, the Pueblo has established a wholly-owned tribally-chartered corporation, Kewa Gas Limited, as a means of engaging in various businesses on behalf of the Pueblo, including wholesale distribution of gasoline; and

WHEREAS, Kewa Gas Limited proposes to enter into a Management Agreement with [Appellant], by which [Appellant] would manage all aspects of the gasoline distribution business for a percentage of net profits, plus certain performance bonuses, as set forth in the Management Agreement; and

WHEREAS, the Pueblo understands that the proposed gasoline distribution business involved (sic) certain unusual risk factors due to the uncertainty of state law, and that gasoline distributors are reluctant to do business with Indian entities seeking to take advantage of tax exemptions under current state law, as the result of which a higher than normal management fee is appropriate, in order to obtain the services of experienced managers with established connections in the gasoline distribution business willing to take the risks inherent in the business; and

WHEREAS, [Appellant] has such connections and experience, and in other respects is fully qualified to provide the services called for by the proposed Management Agreement; and

WHEREAS, the proposed Management Agreement has been carefully reviewed by the Pueblo's officers and general counsel, and by the Board of

Directors of Kewa Gas Limited, and they have agreed that its terms are consistent with the Pueblo's interests; and

WHEREAS, the establishment of this business, under the management of [Appellant] as proposed, appears likely to generate substantial benefits to the Pueblo in terms of revenues and some employment for Pueblo members; and

WHEREAS, the approval of the Management Agreement by the Tribal Council is necessary in order to assure that the Pueblo fully backs the venture on behalf of Kewa Gas Limited;

NOW, THEREFORE, BE IT RESOLVED * * * that the Management Agreement by and among [Appellant, Kewa and the Pueblo] * * * is hereby approved, and the Governor of the Pueblo is authorized and directed to execute such agreement on behalf of the Pueblo, and to do any and all other things necessary so as to obtain the approval of the Secretary of the Interior to such Agreement (if such approval is required) * * *; and

Upon the approval of the Management Agreement by [Appellant and Kewa, Kewa] is authorized to commence operation of the gasoline distribution business in accordance with the terms of the Management Agreement, pending its approval by the Secretary of the Interior, on the premises leased to Kewa * * * by the Pueblo by the lease approved by the Tribal Council by resolution 08-96-17 * * *.

Resolution No. S.D. 08-96-19. 6/

Under the Agreement, Kewa, as the "Distributor," engaged Appellant to "manage, supervise, and operate" Kewa's gasoline distribution business. Agreement § 1.1. In exchange for Appellant's services, Kewa agreed to pay Appellant 49 percent of Kewa's net

6/ On August 19, 1996, the Pueblo and Kewa entered into a 33-page lease under which Kewa leased lands from the Pueblo for, among other things, developing and operating the gas distribution business. Lease BIA No. M20 717 50 008 0555. The lease required Kewa to construct and maintain such improvements as were necessary to operate its businesses. Lease art. VIII. As consideration for the lease, Kewa agreed to pay the Pueblo a \$1,000 guaranteed minimum monthly rental and 40% of the Estimated Net Income to Kewa from all businesses operated on the leased premises, after payment of Kewa's expenses. Id. art. VI. BIA approved the lease on April 21, 2000, after it had been amended in 1999 to reduce the acreage covered by the lease from approximately 640 acres to approximately 21 acres. The land covered by the amended lease is bounded on the southeast by Interstate 25 and on the northeast by New Mexico Route 22.

income from the business, plus three cents per gallon for gasoline or diesel fuel sold to the Pueblo's retail gasoline station, plus a performance bonus of ½ cents per gallon for every gallon of gasoline or diesel fuel sold by Kewa in excess of one million gallons per month. Id. §§ 1.1, 2.1 - 2.3.

The Agreement itself, dated “as of August 1, 1996,” is styled “by and between [Appellant], a New Mexico Limited Liability Company, on the one hand, and the [Pueblo], acting by and through its Tribal Council, and Kewa * * *, on the other hand.” Id., Introductory Clause. ^{7/} The final provision in the Agreement provides that it “may not be modified or amended except in writing signed by both parties.” Id. § 9.9. The signature lines list the parties as follows: “QUANTUM ENTERTAINMENT LIMITED, LLC,” “SANTO DOMINGO PUEBLO,” and “Kewa Gas Limited.” Id. at p. 9-10 (capitalization in original). The Agreement has an initial term of 10 years, until July 31, 2006, with an option for Appellant to renew for two additional 10-year periods.

Most of the terms in the Agreement run solely between Appellant and Kewa, but a few also create rights or obligations for the Pueblo. Section 6 provides that any dispute between Appellant and Kewa, or between Appellant and the Pueblo, arising under the Agreement, shall be resolved by binding arbitration. The Pueblo and Kewa “expressly, unequivocally and irrevocably waive sovereign immunity” in connection with arbitration and any disputes arising under or related to the Agreement. Id. § 6. In section 8, the Pueblo and Kewa agree not to compete, directly or indirectly, with Appellant in any other gasoline distribution business within the State of New Mexico. Id. § 8.1. Appellant, in turn, agrees not to compete with Kewa's gasoline distribution business within the State, with a limited exception requiring Kewa's concurrence. Id. § 8.2. And in section 9, the parties agree that the Pueblo and/or Kewa have the sole right to and ownership of all original trademarks, insignia, logos, business names, and other marks or devices under which Kewa does business under the Agreement. Id. § 9.4.

After the Agreement, and the lease between the Pueblo and Kewa, were executed, Appellant apparently began operating Kewa's gas distribution business pursuant to the terms of the Agreement. There is no indication in the record that Appellant, Kewa, or the

^{7/} The only date on the Agreement is the “as of August 1, 1996” date referred to in the introductory paragraph; the signatures are not dated. The date of the Tribal Council resolutions suggests that the Agreement was executed, at least by the Pueblo, on or after August 14, 1996, and purportedly made effective as of August 1, 1996. Kewa, of course, did not exist until August 14, 1996, when it was chartered by the Tribal Council.

Pueblo presented the Agreement to BIA for review and approval at that time, or that any of them discussed with BIA whether Federal approval was required.

D. The Regional Director's Decision

Seven years later, on March 28, 2003, then-Governor of the Pueblo Everett Chavez sent to the Superintendent of the Southern Pueblos Agency, BIA (Superintendent) various documents relating to the Agreement. The Governor's transmittal letter stated that it was his understanding that none of the documents had ever been sent to BIA for review. Mar. 28, 2003 Letter from Pueblo Governor to Superintendent. The Governor expressed his view that the Agreement was subject to BIA approval, but he did not expressly request BIA's approval. Nor did he state unequivocally that BIA should decline to approve the Agreement, or suggest that the Tribal Council had repudiated the Agreement or repealed the resolution approving it in 1996. Instead, the Governor stated that he believed the Agreement was "far too lucrative" for Appellant. Id. 8/ In a subsequent declaration filed in these proceedings, former Governor Chavez asserted that the Pueblo's "decision to oppose any retroactive BIA approval of the [Agreement] was [also] based in part on * * * health and safety concerns" associated with the gasoline distribution business's proximity to the

8/ It is not clear from the record what prompted the Governor's review of the matter and his conclusion that Appellant was receiving a disproportionate fee. However, according to the Pueblo, the tax exemption for Indian distributors was a matter of great controversy in the State between 1996 and 1999 because, among other things, a tax-exempt tribal distributor could legally resell gasoline to off-reservation retailers, and there would never be any sale that was subject to the state gasoline tax. Pueblo's Supplementary Brief at 21. The Pueblo contends that in 1999, with the support of tribes, petroleum marketers, and the State Taxation and Revenue Department, the State enacted a law that eliminated part of the tax "loophole," "but created a new deduction for gasoline sold at retail on tribal land subject to a tribal tax * * * and a new deduction for limited volumes of gasoline sold at wholesale by a tribal entity on tribal land." Id. at 23. The Pueblo describes the law as "a compromise response to the tribes' tax exemption based on Chickasaw." Id. Thus, if we are to accept the Pueblo's version of events, it appears that by 2003, the "unusual risk factors due to the uncertainty of state law," see Resolution No. 08-96-19, which factored into the Pueblo's decision to enter into the Agreement with Appellant in 1996, may no longer have existed.

Santo Domingo Elementary School and retail businesses of the Pueblo. Declaration of Everett F. Chavez ¶ 6. 9/

The Superintendent forwarded the Governor's letter to the Regional Director. On October 23, 2003, without soliciting the views of Appellant, the Regional Director sent a letter to the Governor and to Appellant with the results of his review — the Decision at issue in this appeal.

The Regional Director first concluded that Old Section 81 was the appropriate version of the statute to apply because it was in effect in 1996 when the Agreement was executed and because application of the statute as amended could impermissibly give New Section 81 retroactive effect. The Regional Director then evaluated the Agreement under Old Section 81 and decided that the Agreement fell within the scope of contracts for which the statute required Secretarial approval. The Regional Director announced that

as the official within the Bureau of Indian Affairs vested with delegated authority from the Secretary to determine whether or not a contract requires approval under Section 81, I hereby advise you that it is my official determination that such approval was required. Therefore the [Agreement] has never been legally valid and any monies received by [Appellant] pursuant to [the Agreement] were unauthorized.

Decision at 5.

Based on his understanding that the Pueblo did not want BIA to approve the Agreement, and identifying the concerns raised by the Pueblo about the fairness of the Agreement, the Regional Director declined to approve it retroactively. 10/ The Regional Director then demanded that Appellant vacate the premises of the gasoline distribution business, return all items of access and control (e.g., keys) to the Pueblo, arrange for transfer of the books and records of the business to the Pueblo, and return all proceeds by

9/ Former Governor Chavez's declaration states that in 2003 he asked Appellant to consider moving the facility to a safer location, but Appellant "refused." Declaration of Everett F. Chavez ¶ 5. Appellant denies this version of events. See Affidavit of Kenneth Newton ¶ 10. Neither the Chavez Declaration nor the Regional Director's decision identifies what authority, if any, Appellant had to choose the location of the facility.

10/ The decision does not address the Pueblo's asserted health and safety related concerns regarding the facility.

placing any bank accounts established pursuant to the Agreement solely in the name of the Kewa and the Pueblo and repaying any management fees paid during the existence of the Agreement. Id.

The Decision advised Appellant of its right to appeal to the Board, and Appellant filed this appeal. Appellant, the Regional Director, and the Pueblo submitted briefs. 11/

Discussion

A. Summary of Issues on Appeal

In its opening brief, Appellant raises six arguments challenging the Regional Director's decision: (1) the Regional Director should have applied New Section 81 rather than Old Section 81, and the Agreement does not require BIA approval under New Section 81; (2) even under Old Section 81, the Agreement does not require BIA approval because it is not an agreement with a "tribe of Indians" and it is not "relative to" Indian lands; (3) if the Agreement is subject to BIA approval, the Regional Director abused his discretion in declining to approve it; (4) the Regional Director exceeded his authority by including a "declaratory judgment and order of relief" in his decision, by declaring the Agreement invalid and the proceeds unauthorized, and by ordering Appellant to disgorge those proceeds and vacate the premises; (5) the Regional Director abused his discretion by not considering whether to allow Appellant to retain some proceeds as an offset to the value of the services rendered to Kewa, as authorized by Old Section 81; and (6) the Regional Director's decision deprived Appellant of liberty and property interests without due process of law because the Regional Director issued his decision without notice to Appellant.

The Regional Director and the Pueblo contend that the Board should dismiss this appeal for lack of standing because the Decision did not cause injury to Appellant and Appellant is outside the zone of interests protected by Old Section 81. 12/ Their lack-of-

11/ In addition to the initial round of briefing on the merits, the Board allowed several additional rounds of briefing, including briefing on Appellant's standing.

12/ Although the Board, as an Executive Branch forum, is not limited by the same constitutional and prudential constraints that apply to the exercise of judicial authority, the Board has a well-established practice of adhering to those jurisdictional constraints as a matter of prudence in the interest of administrative economy. See Pueblo of Tesuque v. Acting Southwest Regional Director, 40 IBIA 273, 274 (2005). These constraints include
(continued...)

injury argument is that the Regional Director's determinations on the applicability of Old Section 81 and the requirement for BIA approval are advisory in nature, and his order for relief is in the nature of a demand letter simply notifying Appellant of a recommendation that BIA might make for action by the U.S. Department of Justice.

As further discussed below in the context of addressing Appellant's claims, we reject the arguments by the Regional Director and the Pueblo that we should dismiss this appeal in its entirety for lack of standing. We conclude that Appellant does have standing to challenge the Regional Director's determination that Old Section 81 applies to the Agreement, and therefore we review those portions of the decision. We also conclude, however, that Appellant does not have standing to challenge the Regional Director's decision declining to retroactively approve the Agreement. In addition, we conclude that the fourth issue raised by Appellant (that the Regional Director exceeded his authority) is now partially moot and that the fifth issue raised by Appellant (that the Regional Director abused his discretion by not making a quantum meruit determination) is not ripe for review. We reject Appellant's due process claims. We now turn to a discussion of each claim made by Appellant.

12/(...continued)

the requirement that an appellant demonstrate that it has standing. Arizona State Land Dep't v. Western Regional Director, 43 IBIA 158, 163 (2006). The Board follows the three elements of standing described in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992): an appellant must show that (1) it has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally-protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision.

An appellant may have standing to raise certain claims, but not others. See, e.g., Skagit County v. Northwest Regional Director, 43 IBIA 62, 70 (2006). In addition to the constitutional requirements of standing, prudential principles of standing require that when a plaintiff claims to have been "adversely affected or aggrieved [by agency action,] within the meaning of a statute, the plaintiff must establish that the injury he complains of (*his* grievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990).

B. Did the Regional Director Err in Concluding that Old Section 81 Applies and that the Agreement is Invalid Without BIA Approval?

1. Appellant's Standing

We first consider whether Appellant has standing to challenge the Regional Director's decision that Old Section 81 applies to the Agreement and that under Old Section 81, the Agreement must be approved by BIA in order to be valid. Appellant contends that the Agreement is valid without BIA approval and therefore the Regional Director's contrary (and erroneous) decision interfered with Appellant's valid contract rights, causing injury. Appellant further contends that the injury is redressable because a favorable decision by the Board declaring Section 81 inapplicable would grant it the relief that it seeks. The Regional Director contends that Appellant lacks standing to challenge his decision because it is merely a statement of BIA's position, did not require the parties to stop performance of the Agreement, and therefore did not cause injury to Appellant.

It is true that, notwithstanding a Departmental determination and in the absence of an enforcement action, the parties to the Agreement may, if they wish, continue to perform under the Agreement. It is also true that if, as Appellant contends, Kewa has stopped performing under the Agreement, the Department's proceedings do not preclude Appellant from attempting to invoke the Agreement's arbitration provisions for breach of contract, consistent with its position that the Agreement is binding and valid without Secretarial consent.

On the other hand, we find unconvincing the Regional Director's post-hoc characterization of his decision as merely a statement of BIA's position. The Regional Director made a formal administrative determination on whether the Agreement requires Secretarial approval in order to be valid. His decision also demanded remedial action from Appellant.

Even though the Regional Director apparently now seeks to discount the effect or immediacy of his decision, it still — if upheld by the Board and made effective and final for the Department — constitutes an administrative action against Appellant's allegedly lawful contract rights because the Regional Director determined that Appellant is effectively in

trespass on the Pueblo's lands and is holding unauthorized funds. ^{13/} This result does not change even though the Regional Director subsequently disclaimed any authority to issue self-executing "orders" against Appellant and the fact that an administrative demand is not "binding" in the sense of a judicial order, or otherwise self-enforcing. The Board regularly reviews BIA decisions that, in effect, administratively adjudicate the rights of parties, even though they are not self-executing or self-enforcing. See, e.g., Aloha Lumber Corp. v. Alaska Regional Director, 41 IBIA 147 (2005) (review of BIA decision declaring an appellant in breach of contract and demanding damages); Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195 (2005) (review of BIA decision finding an appellant liable for trespass); Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169 (1993) (review of BIA decision finding an agreement concerning Indian trust land to be null and void in the absence of Secretarial approval); Bulletproofing, Inc. v. Acting Phoenix Area Director, 20 IBIA 179 (1991) (review of BIA decision declaring lease void and directing appellants to remove their property and vacate the premises).

We conclude that Appellant has made the necessary showing of injury for purposes of demonstrating standing to challenge the Regional Director's decision on the applicability of Old Section 81 and his statements concerning the consequences flowing from nonapproval of the Agreement.

In addition, the alleged injuries result from the Regional Director's decision, thus satisfying the causation element of standing. Finally, if the Board were to reverse or vacate the Regional Director's demands for relief, it would provide Appellant the relief it seeks against BIA, thus satisfying the redressability element of standing. The Pueblo itself suggests that if the Department were to conclude that Old Section 81 does not apply, "[t]he practical consequence is that the parties will probably act as though they have a valid contract." Pueblo's Response to Board's Order for Briefing on Jurisdiction at 4 n.1.

We therefore conclude that Appellant has standing to challenge the Regional Director's decision based on a claim that the decision interferes with Appellant's valid contract rights.

^{13/} For purposes of evaluating standing, we leave aside the fact that the Regional Director's decision is automatically stayed during the period for filing an appeal and that the stay continues after an appeal is filed. See 25 C.F.R. § 2.6, 43 C.F.R. § 4.314. Therefore, we evaluate the effect of the decision on an appellant as if it were to become a final and effective Departmental decision.

2. Which Version of the Statute Applies — Old Section 81 or New Section 81?

Having concluded that Appellant has standing to assert its claim that the Regional Director erred in concluding that the Agreement requires Secretarial approval under Old Section 81 in order to be valid, we now turn to the merits of that claim. We first address the Regional Director's decision to apply Old Section 81, rather than New Section 81, in determining whether Secretarial approval is required. As discussed below, whether or not it is permissible to apply a subsequently-enacted statute (New Section 81) to an earlier event (execution of the 1996 Agreement) depends on the effect such application would have. Therefore, in addressing this issue we assume, for purposes of this discussion, that application of the different versions of the statute would yield different results. Specifically, we assume for this analysis that Appellant is correct that the Agreement is valid without Secretarial approval under New Section 81, and that BIA is correct that the Agreement is invalid without such approval under Old Section 81.

Appellant contends that New Section 81 is the proper choice of law because it was the version of the statute in effect when the Regional Director conducted his review of the Agreement. Appellant argues that “[u]nless application of an amended statute has an impermissibly retroactive effect, the statute in effect when a decision is rendered is the statute that should be applied.” Opening Brief at 9. Appellant acknowledges that there is a presumption against giving statutes retroactive effect. *Id.* at 9-10 (discussing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)). Appellant contends, however, that applying New Section 81 to the Agreement would not give it retroactive (and therefore presumptively impermissible) effect because it would not impair existing rights and would be consistent with congressional intent in amending the statute to remove “the burden of obtaining Secretarial approval of all but a narrow category of contracts.” *Id.* at 10.

In Landgraf, the Supreme Court addressed what the Court described as the apparent tension between “seemingly contradictory” rules of construction concerning the effect of intervening changes in the law: one stating that courts should apply the law in effect at the time their decisions are rendered and the other that statutes will not be construed as having retroactive effect, absent clear congressional intent. 511 U.S. at 264. The Court recognized that applying a statute that is enacted after the events giving rise to a lawsuit does not necessarily make such application “retroactive” in effect, e.g., when it “authorizes or affects the propriety of prospective relief.” *Id.* at 273. However, if giving effect to a statute would “change[] the legal consequences of acts completed before its effective date,” such application will be deemed retroactive, and is impermissible without clear congressional

expression to the contrary. Id. at 269-70 & n.23. 14/ In Landgraf, the Court made clear that it had never “displace[d] the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment.” Id. at 278. In subsequent decisions, the Court reiterated that ordinarily the legal effect of conduct should be assessed under the law that existed when the conduct occurred. See, e.g., INS v. St. Cyr, 533 U.S. 289, 316 (2001).

Appellant argues that because New Section 81 “increases the rights of tribes * * * to enter into contracts without government intervention,” and imposes no new duties, applying it in this case would not make it impermissibly retroactive. Opening Brief at 12.

We disagree. Appellant ignores the fact that if the Agreement is exempt from BIA approval under New Section 81, application of New Section 81 would significantly change the legal consequences of the 1996 Agreement by rendering valid an otherwise invalid contract. The issue is not whether New Section 81 generally increased the rights of tribes or imposed new duties, but whether applying it to pre-2000 agreements to which Old Section 81 would otherwise apply would alter the legal consequences of acts completed before New Section 81 was enacted. Undoubtedly it would.

If a tribe entered into an agreement subject to Old Section 81, no legal obligations or liabilities for the tribe arose unless and until the agreement was approved by the Secretary. Such an agreement was deemed “null and void” by the express language of Old Section 81. The application of New Section 81 to such agreements would create contractual obligations and liability on the part of tribes where none previously existed, thus changing the legal consequences of the previous agreement. In 2000, Congress clearly concluded that Old Section 81 was overly paternalistic, but — consistent with the presumption against retroactivity — we find it inconceivable that Congress intended New Section 81 to effect a wholesale ratification of previously invalid agreements without making such an intent utterly clear. It is true, as Appellant contends, that New Section 81 was intended to give tribes greater flexibility and to limit the types of agreements subject to Secretarial approval. But that congressional intent is a far cry from a congressional intent

14/ Appellant does not contend that New Section 81 contains clear congressional expression that it should be applied to contracts and agreements entered into before the date of enactment. Therefore, Appellant apparently concedes that if applying New Section 81 to the Agreement would “change the legal consequences” of the Agreement, then the presumption against retroactive application governs.

to ratify previously void agreements, possibly against tribes' wishes, and to create obligations and potential liability for tribes where none previously existed. 15/

We conclude that if the Agreement is subject to BIA approval under Old Section 81, applying New Section 81 would profoundly alter the legal consequences of the parties' actions and therefore is impermissible under Landgraf and St. Cyr in the absence of any clear congressional directive to do so. We therefore affirm the Regional Director's conclusion that the Agreement is properly reviewed under Old Section 81, rather than under New Section 81. 16/

3. Does Old Section 81 Require BIA Approval for the Agreement to be Valid?

We now analyze whether the Agreement falls within the class of contracts for which BIA approval is required. Old Section 81 contains a three-part test for making this determination — (1) is the Agreement with a “tribe of Indians,” (2) is the Agreement for the payment or delivery of any money or other thing of value in consideration of services for the tribe, and (3) is the Agreement “relative to” Indian lands? The second element of the test is not disputed in this case, and therefore we address only the first and third elements. We conclude that the first element is satisfied, and we abstain from making a determination regarding the third element because of collateral judicial proceedings involving the Department.

15/ If a contract were subject to and void under Old Section 81, but did not require BIA approval under New Section 81, a tribe could simply reexecute the contract if it were so inclined.

16/ Appellant contends that its argument that New Section 81 applies is buttressed by the Board's decision in Madison Gas and Electric Co. v. Acting Midwest Regional Director, 36 IBIA 74 (2001). We disagree. In Madison Gas, the appellant was concerned that it might be subject to a qui tam action unless the Board held that New Section 81 applied to an agreement. The Board stated that the appellant's concern was misplaced because “there is no longer any statutory authority for such suits.” Id. at 78; see also Hattum, 36 IBIA at 79 n.1 (same). We are not convinced that repeal of a statutorily-granted cause of action is comparable to retroactively imposing contractual obligations and potential liability based on pre-enactment conduct.

a) Is the Agreement With a “Tribe of Indians”?

The Regional Director determined that the Agreement is with an Indian tribe because the Pueblo is a party to the Agreement. The Regional Director acknowledged that many of the provisions of the Agreement run between Kewa and Appellant, but concluded that there also are provisions that run between the Pueblo and Appellant. The Regional Director also relied on Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987), which he construed as holding that a contract with a tribal corporation is a contract with an Indian tribe within the meaning of Old Section 81.

Appellant argues that the Regional Director erred because (1) the Pueblo’s participation as a signatory to the Agreement is not dispositive in determining whether the Agreement is with a tribe, (2) all of the relevant obligations in the Agreement run solely between Appellant and Kewa, and the Pueblo’s participation is limited and insignificant for purposes of determining whether the Agreement is enforceable between Appellant and Kewa, and (3) the Regional Director wrongly characterized and relied upon Santa Ana to suggest that Kewa is necessarily a “tribe” within the meaning of Old Section 81. ^{17/} Appellant contends that Kewa is a corporation that is legally distinct from the Pueblo and is not a “tribe” within the meaning of Old Section 81, and that the Regional Director ignored Inecon Agricorporation v. Tribal Farms, Inc., 656 F.2d 498 (9th Cir. 1981), which allowed the enforcement of an agreement against a tribally-created corporation, even though the tribe was also party to the agreement.

^{17/} In Santa Ana, the Pueblo of Santa Ana — seeking to escape the constraints of Old Section 81 — argued that a non-profit enterprise created by the tribe was a legally separate entity and therefore not a “tribe” within the meaning of Old Section 81. 663 F. Supp. at 1305. The court rejected that argument, finding that the tribal enterprise was “not a separate corporation,” but was instead a “non-profit instrumentality of the Pueblo of Santa Ana.” Id. at 1306. The court found that the tribal enterprise did not hold itself out as a separate corporation, had no shareholders, and its directors were appointed and could be removed by the tribe’s council. Id. The court held that an agreement between a third party and the tribal enterprise was “with a tribe” and was subject to Section 81.

Because we conclude that we need not decide Kewa’s precise individual status in this case, see infra at 198, we also need not address the relevance of Santa Ana to the determination of that status. We do agree with Appellant, however, that the Regional Director mischaracterized the holding in Santa Ana. The court undertook a fact-specific analysis and concluded that the tribal entity at issue was an instrumentality of the Santa Ana Pueblo that fell within the meaning of “tribe” under Section 81. The court made no blanket ruling about all tribally-created corporations or instrumentalities.

Appellant relies largely on the Inecon decision as judicial precedent to support its position that the Agreement, at a minimum, is valid and enforceable against Kewa without Secretarial approval. In Inecon, the Fort Mohave Tribe and a tribally-created corporation, Tribal Farms, Inc., raised Old Section 81 as a defense against the enforceability of an agribusiness agreement they had signed with Inecon. The court concluded that Tribal Farms, which had been incorporated by the tribe under state law as an Arizona corporation, was not a “tribe of Indians” within the meaning of Old Section 81. 656 F.2d at 501. The court found that the tribe had only a limited role under the agreement (in a clause prohibiting the tribe from interfering with Inecon’s performance of its contract duties or receipt of contract rights) and concluded that the agreement was enforceable between Inecon and Tribal Farms, even assuming that Old Section 81 would bar enforcement against the tribe. Id.

We agree with Appellant that, at least under Inecon, a tribe’s participation as a signator to an agreement is not necessarily dispositive in determining whether the agreement as a whole is subject to Old Section 81. However, because we do not consider the Pueblo’s signature as dispositive of the issue in this appeal, this does not end our inquiry.

We also agree with Appellant that the great majority of the specific provisions in the Agreement relate specifically to and describe obligations between Appellant and Kewa. We disagree with Appellant, however, that the nature and extent of the Pueblo’s role is such that the Agreement can, in practical effect, be treated as two separate sub-agreements, one between Appellant and Kewa and the other between Appellant and the Pueblo. Viewing the Agreement as a whole, we find that the Agreement does not evidence intent by the parties to bifurcate the Agreement in this way. To the contrary, we find that the Agreement treated the Pueblo and Kewa as a single contracting unit. Therefore, under the facts of this case, we conclude that the Pueblo’s participation as a party to the Agreement does make the entire Agreement with a “tribe of Indians” for purposes of Section 81.

As Appellant acknowledges, “[i]t is the Management Agreement that sets forth the relationship between Kewa, [the Pueblo], and [Appellant].” Opening Brief at 4. Nowhere does the language of the Agreement, however, state it that was intended to be treated as, in effect, two separate contracts, the terms of which were intended to be separately and independently enforceable between any two of the three signators. In fact, although the Agreement divides certain roles and responsibilities between the Pueblo and Kewa, with Kewa undoubtedly assuming the active role between the two, it is significant that the Agreement is drafted as an agreement “between” two parties — not three — Appellant “on the one hand,” and the Pueblo and Kewa “on the other hand.” Agreement, Introductory Clause. In addition, the Agreement provides that it cannot be modified “except in writing

signed by both parties.” *Id.*, § 9.9. The signature lines capitalize Appellant and the Pueblo, but not Kewa, which appears below the Pueblo’s signature line in lower case letters. These are not mere semantic or stylistic quirks, particularly when viewed collectively.

Our reading of the Agreement as treating the Pueblo and Kewa as a single contracting unit is bolstered by the fact that the Agreement recites that the Pueblo owns 100% of Kewa’s stock, thus denoting its complete and exclusive control over and interest in Kewa at the time the Agreement was signed. Thus, despite distinct roles and obligations of the Pueblo and Kewa, the evidence on the face of the Agreement indicates that the Pueblo and Kewa are treated collectively as a single “party.” Even assuming that outside the context of the Agreement, Kewa may in certain respects be considered a distinct legal entity from the Pueblo, that does not mean that the parties treated Kewa that way in the Agreement.

Apart from the form of the Agreement, the substance of the Agreement requires the Pueblo to surrender valuable consideration, and the practical value of the Agreement is inextricably tied to the Pueblo’s commitments. The Pueblo’s commitment not to compete with Appellant in the gasoline distribution business is hardly insignificant consideration for the Agreement as a whole. Without that commitment, the Pueblo, as sole shareholder of Kewa, could simply dissolve Kewa and its business and start a new gasoline distribution business without Appellant. Because Appellant’s role under the Agreement is to manage and operate Kewa’s business, the dissolution of Kewa would effectively defeat the entire Agreement. Therefore, the non-compete provision is a significant concession by the Pueblo and an integral component of the Agreement as a whole. We need not decide whether a tribal non-compete provision, without more, would be enough to find that an entire contract is “with a tribe” for purposes of Old Section 81 because here we have the additional language in the Agreement, discussed above, to support our finding. 18/

18/ The court in *Inecon* summarily concluded that the agreement in that case was enforceable against Tribal Farms because of the tribe’s “limited role” and because Tribal Farms was a corporate creature of Arizona state law. 656 F.2d at 501. *Inecon* apparently stands alone in effectively compartmentalizing an agreement to which a tribe is a party in order allow a portion of the agreement to be enforced against a tribally-created and controlled, but not “tribal,” entity. Whether the court reached the correct result in that case, as a matter of law or as a matter of fairness, or both, we find it to be of limited usefulness here, given the court’s sparse factual recitation and equally sparse analysis, and given the factual distinctions that can be discerned from the present case.

In summary, we conclude that the form of the Agreement establishes an intent to treat the Pueblo and Kewa collectively as a single contracting unit, and the substance establishes that the Pueblo's commitments are integral to the Agreement as a whole. Therefore, we conclude that the Agreement must be treated as one with a "tribe of Indians." In light of this conclusion, we need not decide whether Kewa, by itself, is a "tribe" within the meaning of Old Section 81.

b) Is the Agreement "Relative to" Indian lands?

The next issue relevant to the applicability of Old Section 81 is whether the Agreement is "relative to" the Pueblo's lands.

Here, we face an initial question regarding the propriety of the Board reaching the merits of this issue because in a separate case, the Assistant Secretary - Indian Affairs determined that a virtually identical agreement "encumbers" Indian lands within the meaning of New Section 81 and 25 C.F.R. Part 84, and the Department presently is defending that decision in judicial litigation, GasPlus v. United States Department of the Interior, No. 1:03-CV-1902 (RMC) (D.D.C.). 19/

Appellant contends that the Agreement in this case neither "encumbers" the Pueblo's lands within the meaning of the more limited scope of New Section 81, nor is it "relative to" Pueblo lands, under the admittedly broader, but not unlimited, language of Old Section 81. The Regional Director and the Pueblo contend that the Agreement both "encumbers" and is "relative to" Pueblo lands. Among the disagreements between the parties on appeal is the degree to which the Agreement does, or does not, give Appellant control over Kewa's gasoline distribution business or Pueblo lands or both, and whether that control constitutes an "encumbrance" or is "relative to" Pueblo lands. Compare Opening Brief at 14

19/ The Gasplus litigation involves a decision by the Department finding that a January 4, 2001 management agreement signed by Gasplus and the Pueblo of Nambe falls within the scope of New Section 81. Appellant asserts that the Agreement in this case and the agreement at issue in GasPlus are "not identical," although it does not articulate any relevant differences. Appellant's Reply to Regional Director's Response Brief at 7. Based on the extensive excerpts from the GasPlus agreement quoted in the decision of the Acting Assistant Secretary - Indian Affairs in GasPlus's appeal from the Regional Director's decision in that case, and in the absence of any evidence or articulation of relevant differences, the Board finds that the two agreements are identical in all relevant respects for purposes of our analysis of the relative-to-Indian-lands issue.

(“Agreement does not encumber Indian lands”) with Regional Director’s Response Brief at 15 (“there was actually an encumbrance of tribal land”).

The Regional Director does not contend that the Assistant Secretary’s GasPlus decision is binding on the Board, but does argue that the management agreements in both cases are virtually identical, that the rationale of the Assistant Secretary’s GasPlus decision in is equally applicable in this case, and that the Assistant Secretary’s decision “should be applied consistently throughout the Department.” Regional Director’s Response Brief at 10.

Appellant contends that the Assistant Secretary’s decision is not controlling authority, and that the Board should make an independent decision in this case. Appellant also argues that it is “inappropriate” for the Regional Director to suggest that the Board make its decision in this case based on the Department’s interest in another case. Appellant’s Reply to Regional Director’s Brief at 7.

We first address the relationship between the Assistant Secretary’s determination in GasPlus and the issue in this case. The agreement at issue in GasPlus post-dates the 2000 amendments to Section 81, and therefore the Assistant Secretary applied New Section 81 in determining whether Secretarial approval was required. As we concluded above, Old Section 81, not New Section 81, governs whether the Agreement in this case requires Secretarial approval in order to be valid.

None of the parties in this appeal has argued, or even implied, that an agreement that “encumbers” Indian land under New Section 81 would not also fall within the “relative to” Indian lands language in Old Section 81, nor do we think such an argument would be consistent with either the statutory language or legislative history of New Section 81. 20/

20/ As we have already noted, New Section 81 was clearly intended to reduce the range of commercial transactions subject to Secretarial approval, and to allow tribes and their business partners greater flexibility and authority to enter into agreements without Departmental involvement. Nothing in either the statutory language nor legislative history of New Section 81 suggests any congressional intent to create a new category of agreements that will be subject to approval under New Section 81 that were not subject to approval under Old Section 81. Instead, the intent was simply to shrink the universe of covered agreements. See S. Rep. No. 106-150, at 9 (“eliminates the overly-broad scope of [Old Section 81]” so that the statute “will no longer apply to a broad range of commercial transactions”); see also Opening Brief at 13 (“There is little doubt that by changing Section 81 as it did, Congress intended to narrow the application that Old Section 81 had been given by some courts.”).

Thus, regardless of how broadly, or narrowly, the term “relative to” Indian lands is properly construed under Old Section 81, we conclude that if the Agreement in this case would “encumber” Indian lands under New Section 81, it necessarily would be “relative to” those lands under Old Section 81. Therefore, if the court in GasPlus upholds the Assistant Secretary’s determination on that issue, it would, in practical effect, be controlling in this case.

Conversely, if the Board were to address the merits of the issue in this case and find that the Agreement here is not “relative to” the Pueblo’s lands within the meaning of Old Section 81, it would be inconsistent with the Department’s position in GasPlus that a virtually identical agreement “encumbers” Indian lands within the meaning of New Section 81.

It is well-established that the Board does not have authority to review a decision of the Assistant Secretary unless the decision or a regulation specifically grants a right of appeal to the Board. Felter v. Acting Western Regional Director, 37 IBIA 247, 250 (2002). It is also well-established that the conduct of litigation in Federal court is a matter within the control of the Department of Justice and the Solicitor’s Office of this Department. Id.

In Felter, the appellant apparently asked the Board to change or directly review the litigating position of the Department in pending litigation. In the present case, Appellant does not ask us to review the Assistant Secretary’s decision in GasPlus directly, but a Board decision could undermine the litigating position of the Department in that case if the Board were to conclude that the Agreement is not “relative to” the Pueblo’s lands. As such, Appellant’s arguments in this case that the Agreement is not “relative to” Indian lands amounts to a collateral attack on the Assistant Secretary’s conclusion that a substantively identical agreement was an encumbrance on Indian lands.

Under these circumstances, the Board concludes that it is appropriate to abstain from addressing the merits of this issue. Abstention will accommodate the Board’s strong interest in protecting its independence when reviewing matters brought before it, while recognizing the realities of the broader context in which the Board operates within the Department and the Executive Branch. Therefore, we do not address or express any view on the merits of this issue, and instead dismiss this portion of the appeal, allowing the Regional Director’s determination on this particular issue to become effective. We assume, for purposes of resolving the remaining issues in this appeal, that the Agreement is subject to the requirement of Secretarial approval under Old Section 81.

C. Did the Regional Director Abuse His Discretion in Declining to Approve the Agreement?

We do not reach the merits of this issue because we conclude that Appellant lacks prudential standing to challenge the Regional Director's exercise of discretion declining to approve the Agreement. Appellant's interest in contracting with the Pueblo is outside the zone of interests sought to be protected by the provision in Old Section 81 requiring Secretarial approval of certain contracts. 21/

Two Board decisions involving Old Section 81 — Madison Gas, 36 IBIA 74, and Hattum, 36 IBIA 79 — have held that a party contracting with a tribe did have standing to challenge BIA's decision declining to approve a contract. We conclude, however, that Madison Gas is distinguishable and, after reviewing judicial decisions interpreting Old Section 81, we conclude that Hattum should be overruled.

Under the doctrine of prudential standing, when a party claims to have been adversely affected or aggrieved by agency action, within the meaning of a statute, the party

21/ Appellant argues that it has constitutional standing, primarily on the ground that the Regional Director's decision caused it injury by interfering with its contract rights. We found that argument sufficient to establish jurisdiction to review whether the Agreement is subject to Secretarial approval under Old Section 81. Once that issue is decided against Appellant however, by operation of law the Agreement is "null and void" because the Agreement has received no such approval.

Appellant's constitutional standing to challenge the Regional Director's decision declining to approve the Agreement requires a separate inquiry. In effect, the Regional Director declined to affirmatively grant relief to Appellant from a void contract and from the liability arising as a matter of law in the absence of such relief. Thus, Appellant's claimed contract rights may no longer serve as a basis for injury resulting from this portion of the Regional Director's decision. Because we conclude that Appellant lacks prudential standing, we need not decide whether Appellant has alleged injury to a legally-protected interest resulting from the Regional Director's decision not to approve the Agreement. We also do not address the Pueblo's argument that its opposition to Secretarial approval of the Agreement precludes such approval, and therefore the redressability element of standing cannot be satisfied. We do note, however, that the record before the Board does not show that the Tribal Council has repealed the Resolution approving the Agreement, has formally revoked its consent, or has otherwise withdrawn from the Agreement. The record only reflects the Pueblo's opposition based on issues of fairness and on health and safety concerns.

must establish that the interest to be protected arguably falls within the “zone of interests” sought to be protected or regulated by the statutory provision in question. Ass’n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); see also Lujan, 497 U.S. at 883 (plaintiff must show that the injury complained of “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint”).

Several courts have held that a non-Indian contracting party lacks standing to challenge BIA’s decision declining to approve a contract under Old Section 81 because the non-Indian party is outside the zone of interests sought to be protected or regulated by the statute. In Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1056 (10th Cir. 1993), the Tenth Circuit Court of Appeals stated that “the undisputed purpose of [Old Section 81] is to protect tribal lands, not to regulate [non-Indian contractors] or to create either an administrative right of review or a contract cause of action for non-Indian contractors.” (Emphasis added.) The court continued: “Given the overtly paternalistic cast of [Old Section] 81, we conclude that ‘it cannot reasonably be assumed that Congress intended to permit the suit,’ * * * by non-Indian contractors.” Id.

Similarly, while ultimately not deciding the standing issue, the court in United States ex rel. Shakopee v. Pan American Mgmt. Co., 616 F. Supp. 1200, 1208 (D. Minn. 1985), rejected an argument that Old Section 81 was intended at least to “regulate” non-Indian contractors, stating that the statute “is concerned with the Indian tribes and their ability to contract * * *.” (Emphasis added.) The potential economic interest of non-Indians in a contractual relationship with a tribe is not within the intended purview of the statute.” See also Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel, 685 F. Supp. 221, 223 (W.D. Okla. 1988) (non-Indian contracting party “is not even arguably within the ‘zone of interest’ to be protected by [Old Section 81]”), aff’d on other grounds, 883 F.2d 890 (10th Cir. 1989), cited approvingly in Western Shoshone, 1 F.3d at 1056. Similar reasoning was applied in Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1037 (8th Cir. 2002), in which the court concluded that a non-Indian lessee lacked standing to challenge BIA’s decision to declare void a previously-approved contract.

At least one court has entertained a suit by a non-Indian contracting party challenging a BIA decision not to approve a contract with an Indian tribe, but the jurisdictional issue apparently was not raised and was not addressed by the court. See Ho-Chunk Mgmt. Corp. v. Fritz, 618 F. Supp. 616 (D. Wisc. 1985). As we noted earlier, however, two Board cases — Madison Gas and Hattum — have expressly recognized the standing of a non-Indian contracting party to challenge a BIA decision declining to approve a contract that was submitted for approval under Old Section 81.

In Madison Gas, BIA declined a request from the Ho-Chunk Nation to approve an agreement under Old Section 81 on the grounds that it had already been approved under BIA's right-of-way regulations, and did not require section 81 approval to be valid. The tribe did not appeal, but Madison Gas (the non-Indian contracting party) did. In the appeal to the Board, the Regional Director challenged Madison Gas's standing. The Board held that Madison Gas had standing to appeal, and proceeded to affirm the Regional Director's decision on the merits — i.e., the determination that the agreement did not require approval under Old Section 81. 36 IBIA at 77-78.

The Board in Madison Gas thus held that when a tribe has requested approval of a contract under Old Section 81 and BIA determines that the contract does not require such approval, the non-Indian contracting party has standing to appeal that determination. Under those facts, the primary, if not sole incentive to obtain higher-level review within the Department to reduce or eliminate the risk of a future contrary Departmental position (i.e., that the contract did require approval and without such approval is void) is on the non-Indian contracting party. As such, there is some logic to affording the non-Indian contracting party standing under these circumstances. This is true even though the Department owes no duty to the non-Indian party to review the contract or take any action whatsoever. ^{22/} Thus, in Madison Gas, when the tribe submitted a contract for review under Section 81, the Board afforded standing to the non-Indian contracting party to obtain administrative review with respect to the determination whether or not the contract fell within the class of contracts subject to Old Section 81. Madison Gas did not, however, decide whether a non-Indian contracting party has standing to appeal from a BIA discretionary decision declining to approve a contract that BIA has determined does fall within the class of contracts subject to Old Section 81.

In Hattum, however, the Regional Director specifically considered and declined a request by appellant Hattum — the non-Indian contracting party — to grant approval under Old Section 81 to an agreement between Hattum and the Crow Creek Sioux Tribe, after a court in a qui tam action had held that the agreement was void without such approval. In declining Hattum's request for approval, the Regional Director found that

^{22/} On the other hand, a non-Indian contracting party can easily protect itself: It need only make its obligations under the contract and initiation of performance contingent on approval of the contract by BIA, thus providing the tribe with an incentive to appeal a BIA decision declining to approve it. If the tribe is committed to the deal, the tribe could be expected to appeal BIA's decision. Conversely, if the tribe chooses not to appeal, the non-Indian contracting party is protected because the contract by its own terms never becomes effective.

there was no indication that the tribe had requested BIA's approval. To the contrary, the tribe had filed the qui tam action to invalidate the contract. The Regional Director concluded that absent a request for approval from the tribe, BIA's approval would not be appropriate. Hattum appealed BIA's decision to the Board, and on appeal the Regional Director challenged Hattum's standing. Relying on Madison Gas, the Board held that Hattum had standing. 36 IBIA at 80. The Board then decided, on the merits, that it was appropriate for the Regional Director to consider the tribe's opposition to the agreement and that he reasonably declined to approve it. Id. at 82.

Hattum is not distinguishable from the present case in any relevant respect. The Board in Hattum, however, relied solely on Madison Gas to find that the non-Indian contracting party had standing. As we have already concluded, Madison Gas was limited to deciding the threshold issue of the applicability of Old Section 81 and is therefore distinguishable from the present case and from Hattum. Moreover, Hattum did not discuss any judicial precedent construing the zone of interests under Old Section 81.

Given the "unabashedly paternalistic" nature of Old Section 81, see TTEA, 181 F.3d at 682, it is unlikely that Congress intended to give a non-Indian party a cause of action to force the Secretary to consider whether to approve a contract that is subject to Old Section 81. Even if Old Section 81 were construed to authorize such a cause of action, the substantive standard to apply is solely within the province of the Secretary or the tribe to raise — whether the contract is in the tribe's interest. Old Section 81 makes no provision for the Secretary to consider the economic interests of the non-Indian contracting party, and the non-Indian party cannot assert the tribe's interest to gain approval of the contract. See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director, 41 IBIA 308, 311 (2005) (a party generally must assert its own legal rights and interests). The absence of consideration of the non-Indian's interest in deciding whether or not to approve a contract reinforces the judicial decisions that find a non-Indian contracting party to be outside the zone of interests for purposes of challenging a decision declining to approve a contract with a tribe under Old Section 81.

We conclude that Hattum erred in summarily relying on Madison Gas, and in failing to discuss or analyze the prudential requirements of standing as applied to the specific facts of that case. In light of judicial precedent, we now conclude that Hattum should be overruled. We therefore overrule the standing portion of Hattum and hold that Appellant lacks prudential standing to challenge the Regional Director's decision declining to approve the Agreement.

D. Did the Regional Director Exceed His Authority in Issuing His Decision?

In its opening brief, Appellant argued that the Regional Director exceeded his authority by including a “declaratory judgment and order of relief” in his decision, i.e., by declaring the Agreement invalid and ordering Appellant to disgorge proceeds and vacate the premises. Opening Brief at 35. According to Appellant, “the most that the Regional Director was authorized to do by Section 81 was determine whether the Management Agreement required Section 81 approval and, if so, approve or disapprove it.” *Id.* The Regional Director responded that Appellant had “misapprehended the purpose of BIA’s determination letter.” Regional Director’s Response Brief at 18. The Regional Director concedes that BIA “has no authority to enter a legally binding order against [Appellant].” *Id.* In subsequent briefing, Appellant acknowledged that “the authority issue (whether BIA has the authority to order a non-Indian to [take] any action) * * * was effectively removed as an issue in controversy * * * by BIA’s admission that it lacked authority to order [Appellant] to action.” Appellant’s Supplemental Brief on Effect of GasPlus at 2-3. ^{23/} Appellant continues to assert, however, that the Regional Director’s “authority is limited to determining whether a contract requires Secretarial approval,” and does not extend to issuing “legal conclusions regarding the validity of the [Agreement] and the monies paid under it.” Appellant’s Reply to Regional Director’s Response Brief at 25. Appellant also argues that the Regional Director did not have authority to apply or even “to look to” Old Section 81 to “invalidate” the “valid, enforceable, and lucrative contractual agreement with Kewa.” Appellant’s Reply Brief to Pueblo’s and Regional Director’s Response to the Board’s Order for Briefing on Jurisdiction at 3, 10, 13.

We conclude that the issue of the Regional Director’s authority to enter a legally binding order of relief is moot. The Regional Director’s authority to include in a decision legal conclusions about the validity of a contract and monies paid under it is not moot, but on the merits of this issue we reject Appellant’s argument.

We find no basis for Appellant’s assertions that the Regional Director had no authority to look to Old Section 81 or to include statements in his decision that the Agreement was “invalid” and that the proceeds received under it by Appellant were “unauthorized.” These statements, whether or not styled as “declarations,” did not reflect

^{23/} Appellant’s supplemental brief was submitted in response to the Board’s November 23, 2005 order for briefing on the effect, if any, of a then-recent decision issued on remand by the Associate Deputy Secretary of the Interior in Gasplus. The Associate Deputy Secretary’s decision on remand in Gasplus addressed certain remedial and due process issues arising in that case.

actions taken by the Regional Director, but were merely statements that mirror the statutory language regarding the status of an unapproved contract that is subject to Old Section 81 and the attendant legal consequences for the non-Indian contracting party.

Contrary to Appellant's argument, the Regional Director did not purport to take any action to invalidate or void an otherwise valid contract. Rather, he simply evaluated the Agreement under Old Section 81 and stated the consequences of nonapproval as provided by the statute itself. See United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms, 102 F. Supp. 2d 1154, 1164 (D.S.D. 2000) ("As a matter of law, such contract is null and void for lack of such approval."). Assuming, as Appellant contends, that it has a valid contract that is not subject to Secretarial approval, then the Regional Director's decision that Old Section 81 applies would be in error, and his action declining to approve the Agreement would simply be irrelevant to the parties' rights and obligations. The Regional Director's statements that the unapproved contract was invalid and that therefore the proceeds received by Appellant were unauthorized were not outside the scope of the Regional Director's authority.

E. Did the Regional Director Err in Demanding that Appellant Return All Proceeds Received Under the Agreement, Without Making Allowance for the Value of Appellant's Services?

In its opening brief, Appellant argued that even if the Agreement does fall within the scope of Old Section 81, the Regional Director nevertheless erred in demanding full disgorgement of monies received under the Agreement, without considering quantum meruit principles that might warrant allowing Appellant to retain at least a portion of the proceeds. In response, the Regional Director disclaimed any intent to issue a legally binding order against Appellant. The Regional Director also apparently disclaimed any intent to have made a quantum meruit determination, by arguing that the quantum meruit issue is outside the scope of the present appeal. See Regional Director's Response Brief at 22-23. Appellant did not respond to the Regional Director's assertion that the quantum meruit issue is outside the scope of these proceedings. In the absence of a response from Appellant on this issue, it is possible that this issue is moot. It is also possible that the Regional Director simply did not intend to exercise the Secretary's quantum meruit authority in his decision, but rather to state Appellant's legal liability under the statute, but not its actual liability if quantum meruit principles are applied. Given this possible reading of the Regional Director's intent, we decline to find that this issue is moot. Cf. Friends of the Earth v. Laidlaw Envtl. Services, 528 U.S. 167, 189 (2000) (strict standard for finding mootness based on a defendant's voluntary cessation of challenged conduct). We do conclude, however, based on the Regional Director's assertion that the quantum meruit

issue is outside the scope of this appeal, that this issue is not ripe for our review and that this portion of the appeal should therefore be dismissed.

Because the effectiveness of the Regional Director's decision has been automatically stayed pending resolution of this appeal, our determinations of mootness and lack of ripeness serve as the only final and effective Departmental determination with respect to these issues. If Appellant requests that the Regional Director exercise the Secretary's quantum meruit authority under Old Section 81, the Regional Director will at that time have an opportunity to consider the exercise of such authority and to consider Appellant's views concerning the appropriateness of quantum meruit relief. 24/

F. Did the Regional Director's Failure to Provide Appellant with Notice and an Opportunity to Present its Views Before Issuing His Decision Deprive Appellant of Due Process?

We next address Appellant's argument that it was deprived of due process. Appellant contends that it was denied due process because the Regional Director issued his decision without providing prior notice to Appellant, or giving it an opportunity to respond. Whether or not the better course of action would have been for the Regional Director to allow all of the parties, including Appellant, to fully present their arguments and any evidence they considered relevant before issuing his decision, we find no merit in Appellant's due process claims.

Appellant first argues that due process was offended by the Regional Director's failure to afford it an opportunity to present documents and testimony to support its position through a hearing. Appellant relies on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), in which the Supreme Court stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated * * * to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Appellant's reliance on Mullane is misplaced. The Regional Director's decision, standing alone, did not deprive Appellant of any property or liberty interests without due

24/ In this appeal, none of the parties has even addressed whether the Secretary's quantum meruit authority survived the amendments to Old Section 81 in 2000, which bolsters our conclusion that Appellant's initial challenge to the Regional Director's demand for full disgorgement, based on entitlement to some quantum meruit relief, is not ripe for our review.

process because it was not an effective or a final decision for the Department. The decision was automatically stayed during the period for filing an appeal, see 25 C.F.R. § 2.6(a) & (b), and the automatic stay continued once this appeal was filed, see 43 C.F.R. 4.314(a). See Chuchua v. Pacific Regional Director, 42 IBIA 1, 7 (2005) (a BIA decision is not final until the Board affirms it, citing 25 C.F.R. § 2.6(a)). Appellant contends that “[t]he only way the [Regional] Director could make the case that [Appellant] was not deprived of due process would be to make the claim that his Decision was of no force or effect.” Reply Brief at 28. But that is precisely what occurred by operation of 25 C.F.R. § 2.6(a), which automatically stayed the effectiveness of the Regional Director’s decision. 25/

In addition, because the Regional Director’s decision did not purport to affect any existing rights, due process did not require prior notice to Appellant. Cf. Tallgrass Petroleum Corp. v. Acting Eastern Oklahoma Regional Director, 39 IBIA 9, 11 (2003) (due process did not require advance notification before BIA notified lessee that the lease had terminated by its own provisions); Magnum Energy, Inc. v. Eastern Oklahoma Regional Director, 38 IBIA 141, 142 (2002) (same). The Regional Director purported only to determine the status of the Agreement under Federal law, and not, by his action or a decision, to “void” or otherwise alter any existing legally-enforceable rights held by Appellant.

Finally, the Board has repeatedly held that an appellant’s due process rights are protected by the right to appeal a BIA decision to this Board. See Chuchua, 42 IBIA at 7; All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 211 (1992). Appellant contends that the fact that the Regional Director’s decision was appealable to the Board “does not shield it from the requirements of due process [because were] it otherwise, orders of district courts would not be subject to due process requirements.” Appellant’s Reply to Regional Director’s Response Brief at 26. Orders of district courts, however, are effective unless stayed pending appeal. As we have already discussed, a Regional Director’s decision is automatically stayed pending appeal, unless made effective by the Board. 25 C.F.R. § 2.6(a). Appellant had ample opportunity to, and did, present arguments to the Board and the Board has fully considered Appellant’s arguments.

25/ Whether the Regional Director’s decision “emboldened” Kewa to “refuse to allow [Appellant] to perform under [the Agreement],” Appellant’s Reply to Regional Director’s Response Brief at 26, Kewa’s conduct cannot be attributable to that decision being effective. Kewa apparently chose to assume that the Regional Director’s decision eventually would be sustained in an appropriate forum, and chose to accept any risk that the Agreement might ultimately be deemed enforceable.

The Board concludes that Appellant has failed to show that it was denied due process.

Conclusion

For the reasons discussed above and pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decision to review the Agreement under Old Section 81 rather than under New Section 81, and affirms in part and abstains in part from the Regional Director's conclusion that the Agreement is subject to BIA approval under Old Section 81. We dismiss for lack of standing Appellant's challenge the Regional Director's decision declining to approve the Agreement. We affirm the Regional Director's authority to include in his decision a determination that in the absence of Secretarial approval, the Agreement is void. We dismiss the portion of the appeal concerning the Regional Director's decision demanding relief, based in part on mootness and in part on lack of ripeness.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge