



INTERIOR BOARD OF INDIAN APPEALS

Chemehuevi Indian Tribe, On Its Own Behalf and On Behalf of Its Assignees,
Emmanuel Evans, Howard Irving Peach, Joseph Alan Lusch, Jr., Leona Gordon,
Tony Fixel, Steven Dale Bacon, Christina Ray, Waco Escobar, Richard Sandate, Jr.,
Jesse Seymore Gordon, Michelle Delores Barrett, Angela Marie Jones, John Devilla,
Rikki Harper, Dusti Rose Bacon, Mark Eswonia, Samiyah White, Sierra Pencille,
Ramon Compass, Martinez, Tito Katts Smith, Ramona Madalene Powell, Tiffany T.
Adams, Evagelina Hoover, and Angela Carillo and Chemehuevi Indian Tribe,
On Its Own Behalf and On Behalf of Its Assignees, Juana Bush, Adam Trujillo, Jr.,
Roberta Sestiaga, Shope Hinman, and Michelle Mendoza v.
Western Regional Director, Bureau of Indian Affairs

52 IBIA 192 (10/26/2010)

Judicial review of this case:

Affirmed, *Chemehuevi Indian Tribe v. Salazar*, No. 11-4437 SVW (C.D. Cal. Aug. 6, 2012),
appeal pend'g. No. 12-56836 (9th Cir.)

Related Board cases:

45 IBIA 81

46 IBIA 298

52 IBIA 364



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CHEMEHUEVI INDIAN TRIBE, ON) Order Affirming Decisions

ITS OWN BEHALF AND ON)

BEHALF OF ITS ASSIGNEES,)

EMMANUEL EVANS, HOWARD)

IRVING PEACH, JOSEPH ALAN)

LUSCH, Jr., LEONA GORDON,)

TONY FIXEL, STEVEN DALE)

BACON, CHRISTINA RAY, WACO)

ESCOBAR, RICHARD SANDATE,)

Jr., JESSE SEYMORE GORDON,)

MICHELLE DELORES BARRETT,)

ANGELA MARIE JONES, JOHN)

DEVILLA, RIKKI HARPER, DUSTI)

ROSE BACON, MARK ESWONIA,)

SAMIYAH WHITE, SIERRA)

PENCILLE, RAMON CAMPASS)

MARTINEZ, TITO KATTS SMITH,)

RAMONA MADALENE POWELL,)

TIFFANY T. ADAMS, EVAGELINA)

HOOVER, and ANGELA CARILLO,)

and)

CHEMEHUEVI INDIAN TRIBE, ON)

ITS OWN BEHALF AND ON)

BEHALF OF ITS ASSIGNEES,)

JUANA BUSH, ADAM TRUJILLO,)

JR., ROBERTA SESTIAGA, SHOPE)

HINMAN, and MICHELLE)

MENDOZA,)

Appellants,)

v.)

WESTERN REGIONAL DIRECTOR,)

BUREAU OF INDIAN AFFAIRS,)

Appellee.)

Docket Nos. IBIA 08-14-A
08-41-A

October 26, 2010

The Chemehuevi Indian Tribe (Tribe), on its own behalf and on behalf of 29 assignees, appealed to the Board of Indian Appeals (Board) from two decisions by the Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA), dated September 21, 2007, and January 15, 2008. The Tribe had sought approval from BIA under 25 U.S.C. § 81 (§ 81) of land assignments made by the Tribe to each assignee pursuant to a land assignment program enacted by the governing tribal council.¹ In both the September 21 and January 15 decisions, the Regional Director concluded that the proposed land assignments “may not be approved . . . for the reasons stated in our August 10, 2005, decision [2005 Decision].”² Although the 2005 Decision became final for the Department of the Interior (Department) in 2005, we decline to apply *res judicata* to dismiss the Tribe’s present appeals because the Regional Director submitted a brief on the merits that departs in several material respects from his 2005 Decision, leaving his understanding of his own decision in doubt and undermining the principle of finality that the doctrine of *res judicata* is intended to serve. On the merits, we conclude that the Regional Director’s decisions properly held that the Tribe’s land assignments could not be approved under § 81, but we clarify why that is the case: They seek to convey an exclusive possessory interest that is intended to be perpetual and, as such, violates the Nonintercourse Act, 25 U.S.C. § 177 (§ 177). Through regulation, the Department has interpreted § 81 to apply to encumbrances *not* governed by or subject to *other* statutes and regulations, such as leasing statutes or § 177. We reject the Tribe’s argument that § 81 effectively granted the Secretary broad authority to approve encumbrances of land that convey a perpetual possessory interest, such as the Tribe’s assignments.

¹ The Regional Director’s September 21 decision, Docket No. IBIA 08-14-A, addressed 24 land assignments to Emmanuel Evans, Howard Irving Peach, Joseph Alan Lusch, Jr., Leona Gordon, Tony Fixel, Steven Dale Bacon, Christina Ray, Waco Escobar, Richard Sandate, Jr., Jesse Seymore Gordon, Michelle Delores Barrett, Angela Marie Jones, John Devilla, Rikki Harper, Dusti Rose Bacon, Mark Eswonia, Samiyah White, Sierra Pencille, Ramon Campass Martinez, Tito Katts Smith, Ramona Madalene Powell, Tiffany T. Adams, Evagelina Hoover, and Angela Carillo; the January 15 decision, Docket No. IBIA 08-41-A, addressed the remaining 5 assignments to Juana Bush, Adam Trujillo, Jr., Roberta Sestiaga, Shope Hinman, and Michelle Mendoza.

² The two decision letters now before the Board are identical to each other except for the date the proposed assignments were submitted to BIA and the names of the proposed assignees.

Statutory and Regulatory Framework

At issue in this appeal is the intersection of two statutes, 25 U.S.C. §§ 81 and 177. Section 177, which was enacted in 1834 and has not been amended in the 175 years since its enactment, broadly prohibits purchases, grants, leases, or other conveyances of Indian tribal lands, “or of any title or claim thereto,” unless otherwise authorized by Congress. Section 81, as amended in 2000, prohibits “encumbrances” of tribal land for a period of 7 or more years, unless approved by the Secretary, but also provides that the Secretary shall refuse to approve such agreements or contracts if they “violate[] Federal law.” 25 U.S.C. § 81(d)(1). Through rulemaking, the Department has further prescribed which types of agreements or contracts are subject to approval under § 81, which ones are valid without Secretarial approval, and which ones do not require approval under § 81 but do require approval under other statutes in order to be valid.

The Tribe submitted its land assignments to BIA for review under § 81, which provides in relevant part:

(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. . . .

Pertinent regulations promulgated under § 81 include:

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

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

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

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

(a) Contracts or agreements otherwise reviewed and approved by the Secretary under this title or other federal law or regulation. See for example, . . . 25 CFR part[] 162 (non-mineral leases, leasehold mortgages). . . .

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

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

No, the Secretary will not approve contracts or agreements that do not encumber tribal lands for a period of seven or more years. Within thirty days after receipt of final, executed documents, the Secretary will return such contracts and agreements with a statement explaining why Secretarial approval is not required. The provisions of [25 U.S.C. § 81] will not apply to those contracts or agreements the Secretary determines are not covered by [§ 81].

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

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

(1) Violates federal law. . . .

Background

In 2001, the Tribe established the tribal residential land assignment program that is germane to these appeals when it adopted Ordinance No. 01-08-25-1-A (Ordinance). The

purpose of the Ordinance “is to establish a uniform procedure for determining when and under what conditions tribal members will be allowed to occupy unassigned tribal trust lands for residential purposes . . . in a manner similar to [fee simple ownership] in land off the Reservation.” Ordinance, § 1(E)-(F). The Ordinance defines an assignment of tribal land as “a formal *exclusive right to use and possess tribal land* for [r]esidential [a]ssignment purposes subject to the provisions of this Ordinance.” *Id.* § 14.02.020 (emphasis added). The Ordinance expressly stops short of vesting title to the property in the assignee, but repeats in several places that it grants the assignee an exclusive right to use and possess the land, *id.* § 14.08.010, that assignments under the Ordinance may be transferred to, devised to, or exchanged with other tribal members, or leased, *id.* §§ 14.08.020, 14.08.090, 14.12.010, and that if the assignee dies intestate, the assignment will descend to the assignee’s surviving spouse or children, if they are tribal members, *id.* §§ 14.08.040 - 14.08.080.³ Thus, while stopping short of purporting to convey title, the assignments vest in the assignee the incidents of fee simple ownership. Consistent with this intent, in order to recover possession of assigned lands needed for tribal purposes, the Tribe must pay fair market value for the land as well as for permanent improvements on the land. *Id.* § 14.08.110. The assignment deeds contain an express waiver of the Tribe’s sovereign immunity to be sued by assignees to enforce the terms of the assignments, and the Tribe represents that it intends the assignments to be enforceable against third parties. The terms of the Ordinance are incorporated into each assignment deed, and assignees are authorized by their deed to enforce the terms of the Ordinance “that was or is in effect at the time th[eir] Assignment Deed was or is approved.” Assignment Deed at 1.

An assignment may terminate under several conditions, most of which are within the exclusive control of the assignee and none of which allow the Tribe to revoke the assignment at will. The assignments are not limited in duration, and the Tribe confirms on appeal that it intends them to be perpetual, subject only to the possibility of reversion should one of the defeasing conditions occur.⁴

In 2004, the Tribe submitted the first set of land assignments to BIA for approval under § 81. *Chemehuevi Indian Tribe v. Acting Western Regional Director*, 45 IBIA 81, 82

³ Surviving spouses who are not tribal members may be entitled to hold an assignment in certain circumstances. *See id.* §§ 14.08.050 - 14.08.060. A surviving, non-member spouse may hold up to but no more than a life estate in the assignment.

⁴ For example, an assignment reverts to the Tribe when an assignee relinquishes the assignment, Ordinance, § 14.08.030; abandons the assignment, *id.* § 14.10.020; or uses or permits others to use the assignment for illegal purposes, *id.* §§ 14.12.020, 14.16.020(F).

(2007) (*Chemehuevi I*). A year later, during the pendency of BIA's review of the proposed land assignments, the Tribe filed suit in Federal district court to compel approval of the deeds. *Casanova v. Norton*, No. CV 05-1273 PHX ROS, 2006 WL 2683514 (D. Ariz. *dism'd* Sept. 18, 2006). During the pendency of that suit, the Regional Director issued his 2005 Decision and declined to approve the land assignments. *Chemehuevi I*, 45 IBIA at 83.

The Regional Director held, as a matter of law, that he was precluded from approving the proposed land assignments under 25 U.S.C. § 81, but instead of squarely identifying a single ground for that conclusion, the Regional Director relied on various alternate grounds, some of which depended on alternate interpretations of what interests the assignments purported to convey.

First, however, the Regional Director rejected an interpretation of the assignments as “temporary” tribal land assignments, which would be exempt from — and valid without — BIA's approval. *See* 25 C.F.R. § 84.004(d). The Regional Director found that it “seems clear” that the assignments in this case were intended to convey at least a possessory interest that potentially “*may continue indefinitely* so long as certain conditions are satisfied.” 2005 Decision at 3 (emphasis added). The Regional Director contrasted the assignments in this case with what he characterized as “traditional” tribal land assignments, by which he apparently meant the type of temporary-use assignments covered by § 84.004(d).

Next, the Regional Director posited several possible characterizations of the interest that the Tribe intended to convey through the assignments. He found that “[t]he Ordinance proposes to convey to the individual Tribal member an exclusive, inheritable right to use, exclude and possess[] tribal land,” 2005 Decision at 4, and that, to the extent the assignments conveyed a possessory interest, approval would be required pursuant to leasing regulations and statutes, instead of pursuant to § 81, *see* 25 C.F.R. § 84.004(a) (exempting from approval under § 81 contracts or agreements otherwise reviewed and approved by the Secretary under other statutes or regulations, e.g., leasing statutes). Under this characterization, the assignments could not be reviewed or approved *under* § 81, but they would still be subject to review and approval — and be subject to limitations, e.g., on duration — under other statutes. The Regional Director did not directly state that the assignments, as currently structured, could not be approved under the leasing statutes and regulations, but he impliedly made that finding by offering suggestions about how the Tribe might provide tribal members with an exclusive right of possession of tribal lands within limits prescribed by applicable leasing statutes.⁵

⁵ The Regional Director suggested that the Tribe's objective of granting assignments — to secure a mortgage — could be achieved through 50-year residential leases as authorized by
(continued...)

The Regional Director also suggested another characterization of the assignments — as possibly conveying “more than a possessory interest.” 2005 Decision at 3-4. The Regional Director did not explain what he meant by this alternative interpretation, particularly in light of the express language of the Ordinance that the assignments do *not* vest title in the assignees. But whatever the Regional Director meant, he concluded that if the assignments did convey such a greater-than-possessory interest, they would violate § 177. Summarizing his mixed bag of findings, the Regional Director concluded that the Tribe’s assignment deeds “may not be approved under Section 81.” *Id.* at 5. The 2005 Decision provided accurate appeal instructions. Well over a year later, and after its trip to Federal court, the Tribe filed an appeal to the Board from the 2005 Decision.

The Board dismissed the Tribe’s appeal as untimely. *Chemehuevi I*, 45 IBIA 81. Judicial review apparently has not been sought.

Following the Board’s decision in *Chemehuevi I*, the Tribe submitted 29 additional land assignments to BIA for approval, which the Regional Director declined to approve on September 21, 2007, and January 15, 2008.⁶ Although the 29 assignments were made to different tribal members than the assignments in *Chemehuevi I*, they were made pursuant to the same ordinance. Aside from appeal rights and a table identifying the assignees, the

⁵(...continued)

25 U.S.C. § 4211. That, of course, would only partially achieve the Tribe’s objective, which *also* is to grant a perpetual right of exclusive use and occupancy, functionally equivalent to fee simple ownership.

The Regional Director also suggested the possibility of seeking tribal-specific legislation for 99-year leasing authority, which the Tribe rejects as either insufficient or as simply unnecessary in light of the Tribe’s interpretation of § 81. *See, e.g.*, 25 U.S.C. § 415(a) (authorizing certain tribes to offer 99-year leases).

⁶ On November 8, 2007, the Regional Director also issued a decision declining to approve two land assignments to Pedro T. Madrigal and Janice Arlene Maderos Hultquist. In March 2008, the Tribe appealed the Regional Director’s decision to the Board. In *Chemehuevi Indian Tribe v. Western Regional Director*, 46 IBIA 298 (2008), this appeal was dismissed by the Board as untimely.

In addition, the Tribe has another appeal pending before the Board from the Regional Director’s refusal to approve an additional five land assignments. *Chemehuevi Indian Tribe v. Acting Western Regional Director*, Docket No. IBIA 10-102 (*Chemehuevi II*). On May 27, 2010, the Board stayed proceedings in *Chemehuevi II* pending our decision in the instant two appeals.

Regional Director's 2007 and 2008 Decisions, which are addressed to the Tribal chairman, state in their entirety:

By letter of [date], you submitted Land Assignment Deeds and requested that we approve them as encumbrances under 25 U.S.C. § 81 (Section 81). These Assignment Deeds would convey to tribal members (for residential purposes) the exclusive right to possess, use and occupy, *in perpetuity*, various parcels or lots of land owned by the United States in trust for the . . . Tribe (under the purported authority of Tribal Land Assignment Ordinance No. 01-08-25-1-A). For the reasons stated in our [2005 Decision] to your office (copy enclosed), it is our determination that the Land Assignment Deeds may not be approved under § 81. We are, therefore, returning the originally executed copies of the Assignment Deeds listed below. If it is later determined that § 81 approval would have been sufficient and appropriate, no further action will be required by our office for the Land Assignment Deeds to become effective.

Letters dated Sept. 21, 2007, and Jan. 18, 2008, from the Regional Director to the Tribe (emphasis added). The Tribe submitted timely appeals to the Board from each of the two decisions.

After receiving the record in this case, the Board ordered briefing on whether the appeals are barred by res judicata or collateral estoppel. *See* Notice of Docketing and Order for Briefing, Mar. 19, 2008, at 2. After receiving the parties' briefs, the Board took the issue under advisement, and ordered briefing on the merits of the appeals. Briefing is now complete, and the matter is ripe for decision.⁷

Discussion

A. Application of Res Judicata

The Board has applied the doctrine of administrative res judicata to preclude review of decisions that have become final for the Department. *Castillo v. Pacific Regional Director*, 46 IBIA 209, 212-13 (2008). Where a decision of a regional director is subject to further administrative review but no timely appeal is taken, the regional director's decision becomes final for the Department at the end of the appeal period. 25 C.F.R. §§ 2.6(b), 2.9(a).

⁷ After briefing was complete, the Tribe submitted two motions to supplement the record. These motions are granted, and the additional documents have been added to the record.

The Board's application of the doctrine of res judicata is based, at least in part, on the principle that the Board is not delegated authority to review decisions that have become final for the Department, and that a party may not evade that principle simply by prompting BIA to issue another "decision" that simply reiterates what is already a final Departmental decision. As a general matter, the doctrine of res judicata, and the related doctrine of collateral estoppel, serve the purposes of promoting judicial (in this case, administrative) economy and finality. *See* 47 Am. Jur. 2d Judgments § 465 (2006). Thus, unless BIA actually decides to reopen or reconsider its own prior and final decision, res judicata ordinarily will bar an appeal to the Board by the same parties or their privities.

The Tribe's appeal in this case typically would be barred by res judicata because the Regional Director's decisions merely reiterated what the Regional Director already decided in the 2005 Decision that became final for the Department when the Tribe did not file a timely appeal. But, this case departs from the ordinary course because, as will become apparent in our discussion of the merits, the Regional Director's brief on appeal takes a position that is directly contrary in some respects to his decisions, and in other respects appears intended to modify, or perhaps to clarify, the 2005 Decision. Of course, because these appeals divested the Regional Director of jurisdiction, he cannot actually modify or amend the appealed decisions or the underlying 2005 Decision on which they relied. But by taking positions that impliedly reopen the merits of the earlier decision, the Regional Director's brief effectively undermines the interest in finality that the application of res judicata would serve, especially when it raises doubt — as it does here — about what BIA's position on the merits actually is. To hold that the Tribe's appeals are barred by res judicata would thus promote uncertainty (i.e., does the Regional Director consider the assignments valid or not), rather than finality. Therefore, under the circumstances of this case, we decline to hold that the Tribe's appeals are barred by res judicata.

B. The Merits

1. Summary

As described earlier, the Regional Director made several, sometimes alternate, findings in his 2005 Decision, based on various characterizations (or possible characterizations) of the assignments. And although his ultimate conclusion was that the assignments "may not be approved under Section 81," he added several elements of confusion by not expressly disapproving the assignments, by "returning" the assignment deeds to the Tribe, *see* 25 C.F.R. § 84.005, and by stating that "if it is later determined that

Section 81 approval would have been sufficient and appropriate, no further action will be required by our office.” 2005 Decision at 5.⁸

On appeal to the Board, the Tribe argues that (1) the assignments constitute “encumbrances” under § 81; (2) they are not exempt from (and valid without) Secretarial approval under 25 C.F.R. § 84.004(d) because they are not temporary; and (3) as encumbrances lasting for 7 years or more, they fall within the scope of § 81 and may (and must) be approved by BIA, notwithstanding any limitations (e.g., leasing statutes) or outright prohibitions (i.e., § 177) that might otherwise apply if § 81 did not exist. The Tribe also argues that the assignments do not violate § 177, and thus the Regional Director erred in suggesting that they do. The Tribe expresses frustration that the Regional Director never directly took a position on whether the assignments constitute “encumbrances” within the meaning of § 81, the Tribe appears to be uncertain whether or not the Regional Director determined whether the assignments are temporary, and the Tribe criticizes the decision as never squarely explaining why these specific assignments, as created by the terms

⁸ A lack of clarity in the 2005 Decision may be attributable to conflicting advice received from the Solicitor’s office. The Regional Director first received advice from the Phoenix Field Solicitor that the assignments *are* encumbrances, are *not* temporary, *do* require approval under § 81, and do *not* violate § 177. Memorandum from Phoenix Field Solicitor (Phoenix SOL) to Regional Director, June 28, 2004. The Regional Director also sought guidance from BIA’s Central Office, which obtained advice from the Division of Indian Affairs within the Solicitor’s office (SOL-DIA). SOL-DIA advised BIA, without discussing or even acknowledging the Phoenix Field Solicitor’s opinion, that the assignments *are* temporary and thus do *not* require approval under § 81 because of the exemption in 25 C.F.R. § 84.004(d) for temporary-use tribal land assignments. Memorandum from Associate Solicitor, Division of Indian Affairs to BIA Deputy Director - Trust Services, Apr. 18, 2005. SOL-DIA further opined that if the assignments *did* convey permanent use rights (which is precisely what the Tribe contends), they *would* violate § 177. *Id.* at 2 n.2. The 2005 Decision appears to recite concepts from both legal opinions while setting out a third course of analysis — that the assignments are not temporary (per Phoenix SOL); do not require approval under § 81 (per SOL-DIA, but for a different reason); *are* subject to approval under other statutes (except that they cannot be approved under those other statutes because they do not conform to the requirements of those other statutes, e.g., 50-year limits for residential leases); and would violate § 177 if they convey “more than a possessory interest” (per SOL-DIA). The Regional Director also returned the assignment deeds to the Tribe, which suggests that the assignments do not require approval under § 81. *See* 25 C.F.R. § 84.005.

of the Ordinance and as characterized by the Tribe, do not fall within the plain language of § 81 and the implementing regulations.

The Regional Director, in his answer brief, argues that the assignments do not require Secretarial approval because they are temporary use assignments, and are thus exempt from the approval requirements of § 81, through 25 C.F.R. § 84.004(d) and the broad rule making authority delegated in the statute to the Secretary to exempt certain transactions from the applicability of § 81. Because he considers the assignments to be only “temporary,” the Regional Director agrees with the Tribe that § 177 does not apply to the assignments. In sum, while the Regional Director thought it seemed “clear” in his 2005 Decision that the assignments were *not* temporary, concluded that they could not be approved under § 81, and implied that they were *invalid* without Secretarial approval, the Regional Director’s position on appeal necessarily implies that the assignments need not be approved and are *valid* without such approval.⁹ The Tribe maintains that neither position is correct because the Tribe unequivocally intends the assignments to be permanent encumbrances and contends that they are only valid if they are approved by BIA under § 81. The Tribe argues that the assignments do not contravene § 177 or, alternatively, that § 81 authorizes the approval of encumbrances that might otherwise be prohibited by another statute, such as § 177.

We hold that:

(1) The assignments are “encumbrances” within the meaning of § 81 and the implementing regulations.

(2) The 2005 Decision correctly concluded (and the Tribe agrees) that the assignments are not temporary-use tribal land assignments that are exempt from, and valid without, Secretarial approval under 25 C.F.R. § 84.004(d);

(3) The Regional Director properly declined to approve the Tribe’s perpetual assignments of an exclusive possessory interest under § 81 because § 81 does not authorize the approval of encumbrances that are *otherwise* prohibited by law, and the assignments are prohibited by § 177.

We turn now to a discussion of each of our holdings.

⁹ The Regional Director’s position on appeal conforms to the advice received from SOL-DIA, *see supra* n.8, but it does not conform to the 2005 Decision.

2. The Assignments are Encumbrances

We agree with the Tribe that its land assignments are encumbrances within the meaning of § 81. “Encumbrance”, for purposes of § 81, is defined as “a claim, lien, charge, right of entry or liability to real property” and “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. § 84.002.¹⁰ As the court held in *Gasplus, L.L.C. v. U.S. Dept. of the Interior*, 510 F. Supp. 2d 18, 29 (D.D.C. 2007), “under Section 81 and the implementing regulations, a contract that ‘encumbers Indian lands’ is a contract that, by its terms, provides a third party with a legal interest in the land itself; that is, *a right or claim attached to the real property that would interfere with the Tribe’s exclusive proprietary control over the land.*” Emphasis added.

The Tribe’s land assignment deeds meet this criteria because they grant to third parties (the assignees) a right of entry on, a claim to, and nearly exclusive proprietary control over a parcel of the Tribe’s trust land to the exclusion of all others, including the Tribe.¹¹ Nothing in the deeds or in the Ordinance gives the Tribe a right to reclaim its land at will. The Ordinance as well as the individual assignment deeds contain express waivers of the Tribe’s immunity from suit to permit assignees to enforce the terms of their assignments against the Tribe. *See* Assignment Deed at 1; Ordinance, § 1(G). In addition, the

¹⁰ In the comments to the final rule, the Department observed that “third party” as used in the definition of “encumbrance” in § 84.002, “refers to any party *outside of the tribe* who, under the terms of the contract or agreement, could gain exclusive or nearly exclusive proprietary control over tribal land.” 66 Fed. Reg. 38,918, 38,919 (July 26, 2001) (emphasis added). If the drafters had intended to define “third party” to exclude tribal members, this definition should have been included in the regulations, not in the comments, because its effect would arguably be to remove from coverage under § 81 *all* transactions between a tribe and its members that otherwise qualify as “encumbrances” within the meaning of §§ 81 and 84.002. But even if “third party” had been so defined, the Tribe’s land assignments would still be void because they run afoul of § 177. *See* discussion *infra* at 206-210.

¹¹ The assignments are subject to pre-existing easements as well as future easements granted by the Tribe. *See* Ordinance §§ 14.20.010, 14.20.020. The assignments grant surface rights only; the Tribe retains all rights to natural resources on the property, including harvestable timber and mineable minerals, which may not be removed by the assignee except with express authorization from the Tribe and, where necessary, from BIA. *Id.* § 14.22.010.

Ordinance and the assignment deeds bind the Tribe to the payment of damages in the event the Tribe condemns the assigned parcel or grants an easement or right-of-way across it. Assignment Deed at 1; Ordinance, §§ 14.08.110, 14.20.020. Therefore, we conclude that the land assignments are encumbrances within the meaning of § 81.

3. The Assignments are not Temporary Use Assignments

In a departure from his 2005 Decision, the Regional Director contends in his Answer Brief that because the land assignments are temporary use assignments, they are exempt from Secretarial review under § 81. *See* 25 C.F.R. § 84.004(d). He argues that the assignments are temporary because the Tribe retains a reversionary interest that “may not be permanent or perpetual.” Answer Brief at 7. The Regional Director also observes that when the Tribe refers to the assignments as “permanent” or “perpetual,” it adds the following qualifying language, “as long as the conditions of the . . . Ordinance are met,” citing the Tribe’s Opening Brief at 12, or “so long as the Assignees do not violate the terms of the Ordinance and the Deeds,” *id.* at 16. Therefore, because there is a risk of loss of the assignment if certain conditions occur, the Regional Director concludes that the assignments are temporary. We disagree, and conclude that the assignments are not “temporary use” rights within the meaning of § 84.004(d).

Section 81 authorizes the Secretary to promulgate regulations that, *inter alia*, “identify[] types of agreements or contracts that are not covered under [§ 81](b).” 25 U.S.C. § 81(e). One type of agreement or contract that is not subject to § 81 is one that grants temporary rights to tribal members to use tribal trust land. *See* 25 C.F.R. § 84.004(d). Although, as the Regional Director points out, neither “temporary” nor “temporary use” is defined in the regulations, he argues that “temporary” has a plain, dictionary meaning that is the opposite of perpetual and permanent, and is a time period of limited duration. Answer Brief at 6-7. While conceding that the assignments do not actually include any specific time limitation, the Regional Director argues that the Tribe imposed conditions that indirectly limit the duration of the assignments: When one of the conditions is triggered, that occurrence — be it the intestate death of an assignee without heirs (as defined in the Ordinance), the abandonment of an assignment, or any other condition — then defines the duration of the assignment by causing the reversion of the possessory interest to the Tribe. According to the Regional Director, these conditions thus render the assignments of “limited duration” or “temporary” simply because *if* they occur, their occurrence triggers a reversion of the possessory interest to the Tribe.

The fallacy of the Regional Director's argument lies in (1) his complete disregard for the Tribe's clear and unequivocal intent for the assignments to be permanent and *not* limited in duration, and (2) his mistaken belief that a conveyance of a property interest that is subject to the possibility of reversion is the same as a conveyance "for a time period of limited duration."

First, the Tribe is emphatic that its assignment deeds are intended to convey a perpetual "right to use tribal land" that is analogous to fee simple ownership interests in off-reservation lands. Ordinance, § 1(F); *see* letter from Tribe to BIA, Nov. 30, 2007, at 1 (requesting approval for land assignments that convey "an exclusive right to possess, use and occupy, *in perpetuity*, various parcels or lots of [tribal trust] land." Emphasis added). The Tribe's interpretation of its own law is eminently reasonable, and BIA cannot simply ignore the Tribe's own characterization of its Ordinance and land assignment program in evaluating the applicability of § 81.

Second, the imposition of "conditions" on the assignees' use of the land, and the possibility of a reversion to the Tribe does not render the assignments "temporary" or subject to "a period of time of limited duration." Instead, the term of the conveyances is for an *unlimited period*, albeit with certain conditions. But an assignee (and his or her eligible heirs, transferees, or assigns) who continues to comply with these conditions retains the assignment in perpetuity. Whether or not one or more assignees (or heirs, transferees, or assigns) might fail to satisfy a condition, thus triggering the Tribe's reversionary interest, does not mean that the assignments, as a class, constitute conveyances of a property interest that is for a period of limited duration. These events are not circumstances that ordinarily are expected to occur or that naturally occur. There is no rational basis for ascertaining that any one of the conditions will ever occur, much less when they might occur.¹² Therefore, the mere fact that certain conditions attach to the permanent interest acquired through the assignment, and that the occurrence of one or more of those conditions could trigger a

¹² Moreover, these conditions can be analogized to exercises of governmental regulatory and criminal authority that have counterparts in American jurisprudence: For example, states have enacted statutes governing the descent of property, including provisions for land to escheat to the state where a landowner dies without heirs; the United States has enacted asset forfeiture laws pursuant to which land used in the commission of certain crimes is subject to forfeiture to the Federal government; and states permit nonpayment of property taxes to result in foreclosure. Just as the foregoing American legal concepts affecting property are not intended to cause or result in a defeasance of fee, neither are the Tribe's conditions.

reversion of the interest to the Tribe, does not render the legal character of the assignments “temporary.” Rather, the assignments are analogous to defeasible fee interests.¹³

Ultimately, the Tribe cannot regain its assigned lands at will, even if it were to repeal the Ordinance. The terms of the Ordinance are incorporated into the assignment deeds and apparently are irrevocable notwithstanding any repeal or amendment of the Ordinance. *See* Assignment Deed at 1 (authorizing assignees “to enforce the provisions of . . . the Ordinance that was or is in effect at the time this Assignment Deed was or is approved”). The Tribe may only regain use of its assigned lands if the land is needed for a specific public purpose and the Tribe follows tribal condemnation procedures. Ordinance, § 14.08.110. When condemnation occurs, the Tribe is required to pay for any land and improvements thereon that it condemns.

In our view, the intended permanence of the Tribe’s land assignments, even if subject to conditions, takes the assignments out of the realm of “temporary use” rights under § 84.004(d) and thus they are not exempt from, and valid without, Secretarial review.

4. The Regional Director Properly Declined to Approve the Tribe’s Land Assignments Under § 81

Given our conclusion that the Tribe’s land assignments are encumbrances and do not qualify as “temporary use rights” under 25 C.F.R. § 84.004(d), we now determine whether the Regional Director properly declined to approve the assignments under 25 U.S.C. § 81, and we conclude that his decision was proper because the assignments are prohibited by § 177.

The Tribe contends (1) that the assignments do not violate § 177, as determined by applying a four-part test set out by the U.S. Court of Appeals for the Fifth Circuit in *Tonkawa Tribe of Oklahoma v. Richards*, 75 F. 3d 1039 (5th Cir. 1996); and (2) that even if the assignments would have violated § 177 in the absence of § 81, § 81 authorizes and requires the Secretary to approve tribal conveyances of exclusive possessory interests of

¹³ We need not decide whether the Regional Director’s definition of “temporary” is correct — i.e., whether any tribal conveyance of use rights to a tribal member that falls short of being “permanent” would necessarily be “temporary” within the meaning of § 84.004(d). In the present case, the Tribe clearly intends the assignments to be permanent and of unlimited duration, and thus even under the Regional Director’s own definition of “temporary,” the assignments are not temporary.

unlimited duration — i.e., § 81 impliedly repealed and superseded § 177. We disagree with both contentions.

In *Tonkawa Tribe*, the tribe brought suit against the State of Texas under § 177 to recover damages and land promised to the tribe by the Texas Legislature in 1866. The Fifth Circuit Court of Appeals set forth the following *prima facie* test:

[T]he Tribe must show that (1) it constitutes an Indian tribe within the meaning of the [Nonintercourse] Act; (2) the Tribe had an interest in or claim to land protected by the Act; (3) the trust relationship between the United States and the Tribe has never been expressly terminated or otherwise abandoned; and (4) the Tribe's title or claim to the interest in land has been extinguished without the express consent of the United States.

75 F. 3d at 1044 (citations omitted). The test articulated above is applicable to those conveyances where a tribe has surrendered all possible rights and possession of lands to a third party. It is beyond cavil that § 177 applies to such conveyances. However, § 177, by its very terms, also applies to conveyances of less than complete divestment. The Act applies to leases, grants, “or other conveyance of lands, *or* of any title or claim thereto,” 25 U.S.C. § 177 (emphasis added), and therefore is not limited in scope to instances where a tribe's title is extinguished but also extends to instances where the tribe surrenders possession and use of its land for a limited duration (lease) or for a specific purpose (easement). *See United States v. Southern Pacific Transportation*, 543 F. 2d 676, 684 (9th Cir. 1976) (railroad rights-of-way between railroad and tribe are subject to § 177). Thus, the fact that individual tribal members would have a claim to the Tribe's lands for their exclusive use and possession is a “claim to lands” or an “other conveyance” within the meaning of section § 177 and its proscription.

Section 81 is explicit in prohibiting the approval of any agreements or contracts that are subject to its approval requirements if “the agreement or contract — (1) violates Federal law.” 25 U.S.C. § 81(d); *see also* 25 C.F.R. § 84.006(a)(1). Under § 177, any “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians” is invalid unless authorized by Congress. 25 U.S.C. § 177. The overriding intent of § 177 is the protection of tribal lands:

The obvious purpose of [§ 177] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent.

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960). The reach of § 177 is broad, prohibiting not only conveyances intended to be permanent, e.g., sales and grants, but also conveyances of possessory interests that would temporarily divest tribes of their use of the land, e.g., leases. Although Congress later carved out an exception, *inter alia*, for tribal leases, *see, e.g.*, 25 U.S.C. §§ 415, 4211, no exception exists for land assignments, such as the Tribe’s proposed assignments, that convey in perpetuity an exclusive possessory interest in a tribe’s lands that may be devised, sold, or otherwise conveyed by the assignee. Moreover, nothing in § 177 exempts transactions between a tribe and its members. *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 948 (D.Mass. 1978) (“The Nonintercourse Act does not by its terms provide for any exception for the conveyance of land from a tribe to individual Indians”), *affirmed sub. nom Mashpee Tribe v. New Seabury Corp.*, 592 F. 2d 575 (1st Cir. 1979); *see also* Solicitor’s Opinion, M-31724, Nov. 21, 1942, I Opinions of the Solicitor 1178, 1179 (“It is immaterial . . . whether the forbidden [land] transaction involves Indians or whites [or] be one running from the tribe to its members.”).

In support of his determination, the Regional Director cited in his 2005 Decision the foregoing opinion of the Department’s Solicitor. In that opinion, the Solicitor held that land assignments by the Confederated Tribes of the Colville Reservation could not be approved under former § 81 because the proposed assignments violated § 177. *See* Solicitor’s Opinion, M-31724.¹⁴ In the Colville land assignment program, the tribe proposed to sell the exclusive use of certain tribal lands to its members together with the right to devise that interest or to reconvey the property to another tribal member with the consent of the tribal council. The deeds would recite that “the lands and improvements . . . are held in trust for the tribe for the exclusive use and occupancy by the Indian purchaser during his lifetime” with the right to reconvey the property to another tribal member or devise the property. *Id.*, I Opinions of the Solicitor at 1178. The Solicitor concluded that the assignments violated § 177: “The mere fact that no absolute conveyance of the fee is

¹⁴ Section 81, which was originally enacted in 1874, remained unchanged until its amendment in 2000. As originally enacted, § 81 had broad application: “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. . . .” 25 U.S.C. § 81 (1999). In 2000, Congress refined the scope of § 81 in pertinent part to apply to “encumbrances” on tribal lands for 7 or more years. As we explain *infra*, we find nothing in this amendment of § 81 that impliedly repeals the application of § 177 to any contracts or agreements that would otherwise fall within the scope of amended § 81. Therefore, the Solicitor’s application of § 177 to the Colville land assignments remains apt under either version of § 81.

intended is obviously not decisive. The attempted transfer of any title or claim to the tribal land is equally within the prohibition [of § 177].” *Id.* at 1179. The Solicitor explained that

[t]he element of purchase plus the incidents of descent and alienation stamp the transaction as one designed to individualize the tribal title and create in the individual an enforceable vested interest. Even if it be conceded that such a grant would not be infeasible so far as the tribe itself is concerned and that the tribe nevertheless retains the power to revoke the grant, this would not preclude the applicability of [§] 177.

Id. at 1179-80.¹⁵ So it is for the Tribe’s land assignments as well. The Tribe’s insistent representations that the assignments are perpetual conveyances of an exclusive possessory interest combined with rights of descent and alienation, the commitment of the Tribe to payment for the land and improvements in the event of a condemnation action,¹⁶ the incorporation of the terms of the Ordinance into the assignment deeds to provide added security and permanence to the assignee, and the absence of any right in the Tribe to reclaim its land at will “stamp the transaction as one designed to individualize the tribal title and create in the individual an enforceable vested interest.”¹⁷

Thus, the Ordinance falls squarely within the prohibitions found in § 177. The terms of the assignment deeds and the Ordinance do not benefit the Tribe. The Tribe loses its right to use and possess its lands while the assignees gain not only the right to demand

¹⁵ The Solicitor’s “M-Opinions” are binding on the Board. 212 Departmental Manual (DM) 13.8(c) (limitation on delegation of authority to Office of Hearings and Appeals); 209 DM 3.2A(11), 3.3 (delegation of authority to the Solicitor); *see also* Solicitor’s Opinion M-37003 (Jan. 18, 2001) (Sec. Bruce Babbitt, concurring).

¹⁶ Nothing in the Ordinance or in the individual assignment deeds sets forth any purchase requirement for a tribal member to obtain a land assignment yet the Tribe is obligated to purchase its land from the assignee in the event of a condemnation action.

¹⁷ The Regional Director argues that the land assignments in Colville are substantively different from the Tribe’s land assignments because Colville tribal members were required to purchase their land assignments whereas the Tribe’s land assignments apparently are gift conveyances. This distinction is meritless as a matter of law because § 177 makes no distinction between sales transactions and gift transactions. The focus of § 177 is whether the Tribe has parted with an interest in its lands, regardless of whether or what consideration is provided for that interest.

compensation in the event of a condemnation action by the Tribe but enforceable property rights against all third parties, including the Tribe.¹⁸ The fact that there are circumstances under which possession may return to the Tribe is not persuasive because these circumstances are not intended to occur.¹⁹ Given these terms, we cannot but conclude that the Tribe has conveyed a significant claim to its lands that falls squarely within the proscription of § 177.

One final argument merits brief mention. The Tribe appears to suggest that § 81 is a grant of authority to BIA to approve transactions that might otherwise be prohibited by § 177. We find no support for this argument and § 81 itself is evidence to the contrary: In prohibiting the approval of agreements or contracts that “violate[] Federal law,” 25 U.S.C. § 81(d)(1), Congress explicitly made § 81 subject to any Federal statutory proscriptions, which include § 177. Congress simply did not confer authority on the Secretary to approve encumbrances notwithstanding the applicability of other statutory proscriptions.

The Tribe also contends that the approval by the Secretary of the Tribe’s Constitution, in which authority is delegated to the Tribal Council “to make, administer, and revoke assignments of tribal lands to [tribal] members,” is “an express[] finding by the Secretary the Tribal Council’s conveyance of land assignments does not violate federal law, including, but not limited to, § 177.” Opening Brief at 14 n.7. Of course the Tribe may make assignments of tribal land to its members. And where the assignment takes the form of, e.g., a life estate for the assignee, the assignment is not necessarily violative of § 177. *See Rogers v. Acting Deputy Assistant Secretary – Indian Affairs (Operations)*, 15 IBIA 13, 17 (1986). Alternatively, where the tribal land assignment authorizes temporary, non-possessive use of tribal land, BIA’s approval is not required under either 25 C.F.R. Parts 84, *see id.* § 84.004(d), or 162, *see id.* § 162.103(b)(1). *See also Southern Pacific Transportation*, 543 F. 2d at 699 and n.28. But where, as here, the Tribe has relinquished all authority to use, control, or possess its own land — to the point of committing itself to paying fair

¹⁸ The Regional Director claims without explanation in his brief that “the assignee has only a limited [ownership] right as against the tribe (and none against outside parties).” Answer Brief at 9. The assignment deeds, on their face, purport to permit the assignees to enforce their assignment rights, as set forth in their assignment deed, in tribal court or other court of competent jurisdiction.

¹⁹ If anything, these circumstances are intended to deter conduct that could result in the loss of an assignment, e.g., use of the land for illicit activity, or intended to promote beneficial activity, e.g., permitting the alienation of the assigned land through a devise in a will.

market value to the assignee for the Tribe's own land in a condemnation proceeding and permitting the assignee to sell or devise the assignment to another tribal member — the interest that is conveyed, even if not absolute title to the land, is a fair equivalent thereto and falls within the prohibition of § 177. Consequently, the Secretary's approval of the Tribe's Constitution, which grants the Tribal Council broad powers to make land assignments, cannot be deemed to be approval of any and all manner of land assignments or programs that the Tribe might choose to promulgate.

Thus, we conclude that the Tribe's assignments, even though the Tribe retains beneficial title, convey an interest in the Tribe's lands and give rise in the assignees to a claim to the Tribe's lands. As a result, the proposed assignments are prohibited under § 177, which prohibition also precludes BIA from approving the assignments under § 81.²⁰

Therefore, while we understand and appreciate the Tribe's efforts to provide its tribal members with a homestead on the reservation and the means of obtaining construction or other loans based on ownership rights, the particular means by which the Tribe has chosen to do so contravene § 177. Accordingly, BIA is barred from approving the assignments under § 81, and the assignments are null and void as a matter of law pursuant to § 177.

Conclusion

Because the Regional Director, in his Answer Brief, effected a material change in his decision on the merits of the Tribe's request for approval of its land assignments under 25 U.S.C. § 81, we decline to apply the bar of *res judicata*. On the merits, we affirm the Regional Director's 2007 and 2008 Decisions, and hold that the Tribe's land assignments are subject to review under 25 U.S.C. § 81 and that § 81 bars approval of the assignments because they are in violation of the Nonintercourse Act, 25 U.S.C. § 177.

²⁰ Even if the Tribe's land assignments were construed as the functional equivalent of perpetual leases, *see e.g.*, 49 Am. Jur. 2d Landlord and Tenant § 1006 (2006), review under § 81 still would not be appropriate because leases of tribal trust lands are exempt from coverage under § 81. Section 84.004(a) of 25 C.F.R. specifically exempts “[c]ontracts or agreements otherwise reviewed and approved by the Secretary [of the Interior] under this title or other federal law or regulation.” Several statutes govern leases of tribal trust lands, *see, e.g.*, 25 U.S.C. §§ 415, 4211, and 25 C.F.R. Part 162, Subpart F, governs the review and approval of non-agricultural leases, including residential leases. However, we note that there is no authority for the approval of perpetual leases.

Therefore, 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 decisions of September 21, 2007, and January 15, 2008.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge