



INTERIOR BOARD OF INDIAN APPEALS

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

52 IBIA 289 (12/07/2010)

Judicial review of this case:

Affirmed, *Quantum Entertainment, LTD. v. U.S. Dept. of the Interior*, 849 F. Supp. 2d 30
(D.D.C. 2012), affirmed, 714 F.3d 1338 (D.C. Cir. 2013), cert. denied,
134 S.Ct. 1787 (2014)

Related Board case:

44 IBIA 178, remanded to Board, *Quantum Entertainment Ltd. v. U.S. Dept. of the Interior*,
597 F. Supp. 2d 146 (D.D.C. 2009)



United States Department of the Interior

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QUANTUM ENTERTAINMENT)	Order Affirming Regional Director's
LIMITED,)	Decision in Remaining Part and
Appellant,)	Reaffirming Board's Decision on
)	Remand
v.)	
)	
ACTING SOUTHWEST REGIONAL)	Docket No. IBIA 04-021-1
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	December 7, 2010

Introduction

This appeal by Quantum Entertainment Limited (Quantum) is on remand to the Board of Indian Appeals (Board) from the U.S. District Court for the District of Columbia to address one issue not previously considered on the merits and to explain in greater detail our reasoning with respect to a second issue. The court found both issues to be central to the case. See *Quantum Entertainment, Ltd. v. U.S. Department of the Interior*, 597 F. Supp. 2d 146 (D.D.C. 2009) (“*Quantum II*”), remanding *Quantum Entertainment Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178 (2007) (“*Quantum I*”).

At issue in the case is the position of the Department of the Interior (Department) on the validity of a long-term — potentially 30 years — management agreement (Agreement), executed in 1996 by Quantum, on the one hand, and the Santo Domingo Pueblo (Pueblo) and Kewa Gas, Ltd. (Kewa), a tribally-chartered and tribally-owned entity, on the other. The parties to the Agreement agreed to have Quantum manage Kewa's gasoline distribution business, located on the Pueblo's lands, and intended to benefit from a tax exemption available to Indian tribal gasoline distributors operating on Indian reservation lands. See *Quantum II*, 597 F. Supp. 2d at 148; *Quantum I*, 44 IBIA at 179-80 & n.1. For Quantum's services, Kewa agreed to pay Quantum a percentage share of the business' net income, an additional fee for each gallon of fuel sold to the Pueblo's gas station, and a performance bonus based on sales volume.

The Agreement was not approved by the Bureau of Indian Affairs (BIA), and the validity of the Agreement depends on whether such approval is a prerequisite to its validity. That issue, in turn, may depend upon which of two versions of the relevant statute applies.

The relevant statute is 25 U.S.C. § 81, and when the parties executed the Agreement in 1996, the statute declared “null and void” agreements with Indian tribes for services “relative to” their lands, unless approved by BIA. *See* 25 U.S.C. § 81 (1994) (“Old Section 81”). At the time the Agreement was executed, neither party sought a determination from BIA on whether BIA considered the Agreement to be subject to Old Section 81, and if so, whether to approve it. Instead, the parties chose to proceed with the business arrangement. Nearly seven years into operating under the Agreement — and 3 years after Congress replaced Old Section 81 with a new version, which eliminated the “relative to” language and significantly reduced the scope of agreements requiring BIA approval,¹ — the Pueblo presented the Agreement to BIA for review, contending that the Agreement was too lucrative for Quantum.

Quantum’s appeal to the Board arose from an October 23, 2003, decision (Decision) of the Acting Southwest Regional Director (Regional Director) of BIA. In that Decision, the Regional Director applied Old Section 81 to the Agreement, found that the Agreement was subject to Secretarial approval under Old Section 81, declined to approve it, and declared it null and void. *See* 44 IBIA at 178, 186-88.²

In *Quantum I*, we concluded that it was proper for the Regional Director to apply Old Section 81. We found that it would be impermissible to apply New Section 81 retroactively because if the Agreement were valid without Secretarial approval under New Section 81, but had been invalid and void under Old Section 81, applying New Section 81

¹ *See* 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 (2000) (“New Section 81”). New Section 81 was enacted to eliminate what had come to be viewed as the confusing, paternalistic, anachronistic, and overly broad scope of Old Section 81. *See Quantum I*, 44 IBIA at 181 (statute was amended so that it would no longer apply to a broad range of commercial transactions).

² The Regional Director also demanded that Quantum vacate the premises, return certain property from the business, and repay all proceeds it had received under the arrangement. In *Quantum I*, Quantum argued that even if the Agreement is subject to Old Section 81, the Regional Director erred in purporting to order full disgorgement because the statute gave the Secretary authority to allow a party to be paid for its services, even if a contract was declared invalid. We concluded that the issue of possible quantum meruit relief for Quantum was not ripe for our review. 44 IBIA at 206-07.

would impose contractual obligations and liability on the Pueblo based on an act (execution of the Agreement) completed before New Section 81 was enacted. *See* 44 IBIA at 193-94.³

We then discussed whether the Agreement did, in fact, fall within the class of agreements for which Old Section 81 required Secretarial approval as a condition to their validity. Old Section 81 involved the application of a three-part test: (1) is the agreement with an Indian tribe; (2) is it for the payment or delivery of any money or other thing of value in consideration of services for the tribe; and (3) is it “relative to” the tribe’s lands? *See* 44 IBIA at 194. In *Quantum I*, we decided that the first part of the test was satisfied, and it was undisputed that the second part was satisfied. *See id.* at 194-98. We abstained from reaching the merits of the third part of the test based on the Department’s position in litigation involving a related issue.⁴ Instead of deciding the merits of part three, we allowed the Regional Director’s determination on that issue (that part three was satisfied) to become final and effective for the Department. The practical effect of our decision was a Departmental determination that all three parts of the three-part test were satisfied, and thus the Department considered the Agreement to be invalid under Old Section 81.

The Court, in remanding the case, concluded that we failed to adequately explain or address two key issues: The first issue was whether application of New Section 81 would have an impermissibly retroactive effect. On this issue, the Court found that our retroactivity analysis was incomplete because we had failed to explain how application of New Section 81 “would impair the rights, increase the liability, or impose new duties on a party,” *see Quantum II*, 597 F. Supp. 2d at 153, or how it would significantly change the legal consequences of the Agreement, particularly when we had assumed, for purposes of our retroactivity analysis, that the Agreement would be invalid under Old Section 81.

³ For purposes of analyzing this issue, we assumed that Quantum was correct that if New Section 81 were applied, the Agreement would be valid without Secretarial approval. That is now undisputed. *See* Joint Stipulation, *Quantum Entertainment, Ltd. v. U.S. Department of the Interior*, No. 1:07-cv-01295-RMU (D.D.C. June 4, 2008). We also assumed, for purposes of the retroactivity analysis, that Old Section 81 would require such approval. If the outcome (i.e., the Agreement’s validity or invalidity, in the absence of Secretarial approval) were the same under either version of the statute, the retroactivity analysis would have been moot.

⁴ *See* 44 IBIA at 198-200. Subsequently, the Department’s position was rejected, *see GasPlus, LLC v. United States Department of the Interior*, 510 F. Supp. 2d 18 (D.D.C. 2007), and the consideration that led to our abstention is no longer present.

The second issue that the Court found we failed to adequately address was whether the Agreement would, in fact, require Secretarial approval under Old Section 81 in order to be valid. On this issue, the Court found that our decision to abstain from deciding the merits of the third part of the test — whether the Agreement is “relative to Indian lands” — left a gap in explaining why Old Section 81 required Secretarial approval, and compounded the problem that the Court found in our retroactivity analysis. *See id.* at 154.⁵

As discussed in detail below, we now decide that the Agreement falls within the class of agreements prohibited, and declared “null and void,” by Old Section 81 in the absence of Secretarial approval. We conclude that, in addition to the two parts of the test that we held in *Quantum I* were satisfied, the Agreement also satisfies the remaining part of the three-part test: It is “relative to [Indian] lands,” within the meaning of Old Section 81 and the intent of the enacting Congress. Both the language and the legislative history of Old Section 81 confirm that Congress intended it to sweep broadly. The statute was intentionally paternalistic in character, designed to protect tribes and non-citizen Indians from contracts for services related to or involving certain Indian assets — lands, treaty rights, and annuities — unless there was strict Government oversight.

In the present case, we conclude that the Agreement is “relative to” the Pueblo’s lands, as that phrase is most naturally and properly understood through the lens of the enacting Congress. Among the facts we find most relevant is the fact that the profits received by Quantum from the Agreement were derived from capitalizing on the value of a tax exemption that necessarily was tied to the Indian-reservation status of the Pueblo’s land on which the gasoline distribution business was located. In addition, the Agreement effectively prohibits the Pueblo and Kewa from capitalizing on that same value on other Pueblo lands without Quantum’s consent. We pass no judgment on whether the arrangement between Quantum and the Pueblo and Kewa was fair or unfair — the scope of Old Section 81 was not dependent upon any such evaluation. We only conclude that the Agreement was “relative to” the Pueblo’s lands, within the meaning ascribed by the Congress that enacted Old Section 81.

Quantum argues that this case is controlled by a four-part analysis of the relative-to-Indian-lands issue that was framed by the U.S. Court of Appeals for the Seventh Circuit in *Altheimer & Gray v. Sioux Mfg Corp.*, 983 F.2d 803 (7th Cir. 1993). We are not convinced that the *Altheimer* analysis fully captures the breadth that the 41st Congress intended for Old Section 81, and therefore we first discuss the application of Old Section 81 to the

⁵ The Court did not separately evaluate the Regional Director’s analysis of the relative-to-Indian-lands issue under Old Section 81.

Agreement without using the *Alzheimer* analysis. But even under *Alzheimer*, which we then apply, we conclude that the factors present in this case weigh in favor of finding that the Agreement is “relative to” Indian lands because, among other things, the business was located on Indian lands in order to derive the “special benefit” associated with the reservation status of those lands. *See id.* at 812.

Quantum also relies on language in several court decisions which appear to accept an even more limited interpretation of the scope of Old Section 81 and suggest that in order for an agreement to be “relative to” Indian lands under Old Section 81, the agreement must “put in play actual incidents and rights of property ownership.” *See United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 979 (8th Cir. 2001). We decline to follow that approach because we do not find support in the statutory language, legislative history, or most interpretations of Old Section 81 (including those relatively contemporaneous to the statute’s enactment), for such a restrictive interpretation.

On the retroactivity issue, we reaffirm and further explain our conclusion that New Section 81 may not be applied to agreements executed by tribes before New Section 81 was enacted, including the Agreement in this case, because to do so would create an impermissibly retroactive effect. Rendering the 1996 Agreement valid and enforceable (under New Section 81), as opposed to null and void (under Old Section 81), would change the legal consequences of action completed — execution of the Agreement — before New Section 81 was enacted. Under Old Section 81, there were no legal consequences whatsoever that attached to an Indian tribe through its execution of an agreement that fell within the scope of the statute, unless and until it was approved by the Secretary. To declare that New Section 81 retroactively renders valid and enforceable agreements that otherwise would remain null and void under Old Section 81 for lack of Secretarial approval would have the effect of imposing contractual obligations and liability on tribes (in this case on the Pueblo and Kewa) where no such obligations or liability had previous legal existence. To further articulate our reasoning on this issue, we provide several examples of how the application of New Section 81 would impose new obligations and potential liability on the Pueblo and Kewa. We also discuss case law cited by Quantum in the Federal court proceedings prior to the remand,⁶ which Quantum contends supports its argument that New Section 81 should be applied, but which we find unconvincing.

We begin with a survey of the language and legislative history of Old Section 81, and subsequent executive branch and judicial interpretations relevant to the issue of what

⁶ For the Board’s consideration of the case on remand, the parties submitted excerpts from the filings in Federal court.

Congress meant by the phrase “relative to” Indian lands in Old Section 81. We then summarize the factual background of this case, attributes of the Agreement, and other facts that we have considered in reaching our conclusion. Next, we discuss why we conclude that the Agreement is “relative to” the Pueblo’s lands, within the meaning of Old Section 81. Finally, we explain in greater detail why we conclude that it would be impermissible to apply New Section 81 instead of Old Section 81 to the Agreement.

Statutory Background and Executive Branch and Judicial Interpretations of Old Section 81

I. Statutory Language and Legislative History

In 1871, Congress first enacted the substantive provisions contained in Old Section 81, and in 1872 Congress enacted permanent legislation. As enacted in 1872 and later codified, the statute provided:

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved [by the Secretary of the Interior and the Commissioner of Indian Affairs].

. . . .

All contracts or agreements made in violation of this section shall be null and void, . . .

25 U.S.C. § 81 (1994), R.S. § 2103 (1878); *cf.* Act of March 3, 1871, ch. 120, § 3, 16 Stat. 570, reproduced in Appendix at 8.

When Old Section 81 was first enacted in 1871, Congress was concerned with Indians being swindled by persons purporting to represent them and purporting to protect their interests, only to extract exorbitant sums for questionable services. *See, e.g.*, Appendix at 3 (remarks of Sen. Wilson). During the legislative debate, and in the paternalistic culture and language of the time, one of the bill’s proponents described it as “the best shield, the best protection, and the best security for the rights and the helplessness of these sons of the

forest that has ever been devised by American legislation or American humanity.” *Id.* at 2 (remarks of Sen. Davis).

As originally adopted by the House of Representatives, the bill applied to contracts or agreements “with any individual or tribe of Indians,” *see* Appendix at 1, relative to their lands or to claims against annuities from or treaties with the United States. That language prompted the objection that the bill would stop all business with all Indians, including those who were “civilized” and “competent.” *See id.* at 1-2 (remarks of Sen. Cole). In response, the Senate amended the bill in two ways. First, the language was limited to contracts or agreements “with any tribe of Indians, or individual Indians not citizens of the United States,” *see id.* at 5, thus excluding individual Indians who had become citizens.⁷ Second, in response to objections that by creating an absolute prohibition, the bill would prevent good and beneficial contracts along with unnecessary or fraudulent ones, the Senate amended the bill to regulate, rather than absolutely prohibit, such contracts, by allowing them to be valid if approved by the Secretary of the Interior *and* the Commissioner of Indian Affairs.⁸

Thus, the response of a proponent of the bill to an objection that the bill would absolutely prohibit contracts of any kind with Indians was, “[n]o; not with the amendment now inserted in the section by the Senate. . . . It would prevent such contracts being made by them unless approved by the Secretary of the Interior in any matter relating to the land or annuities that they hold under or derive from the United States.” *Id.* at 6 (remarks of Sen. Harlan).

The legislative debate contains no discussion of the meaning of “relative to” Indian lands. There was some discussion of the subject matter of covered agreements, but only to confirm that the proponents intended the legislation to cover contracts or agreements in relation to three specific subjects: lands, treaties, and annuities. *See id.* at 6-7 (remarks of Sen. Casserly).

⁷ At the time, the prevailing view was that U.S. citizenship and tribal affiliation were inconsistent. *See* Cohen’s Handbook of Federal Indian Law 894 (2005 ed.).

⁸ Congress was concerned at least as much with corruption within the Government as it was with outside parties swindling Indians. *See, e.g., id.* at 2 (remarks of Sen. Davis) and 8 (statutory language specifically applying to Indian agents or other Federal employees who aided and abetted contracts or agreements that were illegal under the statute).

II. Judicial and Executive Branch Interpretations of Old Section 81 Prior to the Bingo and Gaming Cases in the 1980s.

Prior to Old Section 81's application in the 1980s, there were few judicial interpretations of the statute. Two of the earliest cases to address Old Section 81 arguably were issued in largely the same historical and cultural context as the statute. Neither decision includes much, if any, discussion or analysis of the relative-to-Indian-lands language, but it is for that precise reason that we find them instructive: in applying Old Section 81 in the early 20th century, neither court felt it necessary to further define or analyze what Congress intended by the relative-to-Indian-lands language.

In 1911, the Supreme Court of Oklahoma concluded that Old Section 81 applied to a contract under which an individual agreed to provide assistance to a non-citizen Indian in locating certain farming and grazing lands in the Osage Nation, in exchange for \$75 for each quarter of land for which the Indian filed for an allotment. The services to be rendered "consisted of sending a man with [the Indian], showing him the said lands, to enable him as a member of the tribe to locate and file thereon for his allotment." *Smith & Steele v. Marvin*, 28 Okla. 836, 115 P. 866 (1911). According to the court:

. . . . The language of the act . . . manifestly intends, as we view it, to preclude the making of any contracts whatsoever with Indians not citizens of the United States in relation to the matters dealt with therein, except that the procedure prescribed is followed. The services rendered in this case were rendered for an Indian as named within the statute, and were in relation to the lands of that tribe of Indians on which this particular Indian intended to file his allotment, and the statute inveighs against the making of any agreement for the payment of money or other thing of value 'in consideration of services for said Indians relative to their lands.' While we are aware that in this conclusion on our part we have placed a broad construction upon the language of the act, yet when we view the evident purposes for which it was enacted, in our judgment this construction is in keeping with the intent of Congress which passed it. To conclude otherwise, and to hold that the act does not apply to a contract of this character, would open the door for others of invidious nature, and such as the act as now viewed by all was clearly intended to cover, until by the very attrition of construction its entire value as a protection would be destroyed.

Id. at 867.

In 1914, the U.S. Supreme Court held that Old Section 81 applied to an agreement between a Federally licensed Indian trader and the Menominee Tribe, in which the trader agreed to furnish equipment and supplies to tribal members to enable them to engage in logging operations on the Menominee Reservation. Payment for the equipment and supplies was to be made with proceeds from the sale of logs. The agreement, which was not in writing, was approved by the local Indian agent, as well as a special Indian agent sent by the Commissioner of Indian Affairs. The trader sought recovery against the Tribe, the lower court declared the agreement void and unenforceable under Old Section 81, and the Supreme Court affirmed, finding the matter simple to resolve.

[W]e think that the conclusion of the court on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute, and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered.

Green v. Menominee Tribe of Indians in Wisconsin, 233 U.S. 558, 569 (1914).

In 1942, amid significant changes in Federal Indian policy as evidenced by the Indian Reorganization Act of 1934 (IRA), *see* 25 U.S.C. § 461 et seq., the author of the first Handbook of Federal Indian Law, Felix S. Cohen, described Old Section 81 as “withdraw[ing] from noncitizen Indians and from Indian tribes [the] power to make contracts involving the payment of money for services relative to Indian lands or claims against the United States, unless such contracts should be approved by the Commissioner of Indian Affairs and the Secretary of the Interior.” Handbook of Federal Indian Law 77 (Cohen ed. 1942); *see also id.* at 164.

In 1952, the Solicitor of the Department concluded that despite the dramatic changes brought by the IRA to foster tribal governments and restore their authority, the IRA had not effected an implied and general repeal of Old Section 81. The Solicitor concluded that the Salt River Indian Tribe, which voted to accept the IRA, nevertheless could not engage a manager for a tribal farming enterprise without complying with Old Section 81 and obtaining the approval of the Secretary. *See* Contracts for the Employment of Managers of Indian Tribal Enterprises (M-36119), II Op. Sol. (Indian Affairs) 1563 (Feb. 14, 1952). It did not matter to the Solicitor that employment of a manager for the tribal farming enterprise was a Federal condition that had been placed on the Tribe as part

of a Revolving Credit Fund loan under the IRA. The parties to the agreement still had to comply with Old Section 81 for the employment contract to be valid.⁹

III. Application of Old Section 81 to Bingo and Gaming-Related Management Agreements

In the early 1980s, as Indian tribes began developing bingo operations, several bingo management agreements between tribes and operators were presented to the Department for review under Old Section 81. In various cases, the tribes engaged another party to construct a tribal bingo hall on tribal land, and gave that party exclusive rights to operate, manage, and maintain it, with the parties sharing the net profits. The courts uniformly concluded that Old Section 81, by its broad and unmistakably clear language, applied. In most of those cases, the courts directly addressed the relative-to-their-lands language of Old Section 81, finding that the language was extremely broad and that it was “obvious” that Congress intended to cover almost all land transactions in Indian property. *See, e.g., Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 618 (7th Cir. 1985).¹⁰ In finding Old Section 81 applicable to the various gaming-related agreements, the courts cited a variety of facts to support their conclusions that the agreements were “relative to” Indian lands. *See, e.g., Koberstein*, 762 F.2d at 619 (the bingo facility was located on tribal trust lands; the agreement gave the non-Indian party an exclusive right to operate and maintain the bingo facility and to control all business, management, and maintenance of the bingo facility; the non-Indian party was allowed to record the agreement in any public record; and the tribe was prohibited from allowing a third party to encumber the bingo facility).

In *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Mgmt Co.*, 616 F. Supp. 1200 (D. Minn. 1985), the court concluded that the bingo

⁹ On the other hand, the Solicitor also concluded that a tribal organization operating under a charter of incorporation approved by the Secretary under section 17 of the IRA, 25 U.S.C. 477, was exempt from the restrictions of Old Section 81. The Salt River Tribe was not operating under a section 17 charter.

¹⁰ In *Koberstein*, BIA had taken the position that the agreement did not fall under Old Section 81, but not because it was not “relative to” the tribe’s lands. Instead, BIA believed that Old Section 81 did not apply because the monetary consideration did not derive from amounts due to the tribe from the United States or its trust property or the proceeds from trust property. *See id.* at 615 (Field Solicitor’s opinion stated there was “no doubt” that the agreement was related to the tribe’s lands, but Old Section 81 did not apply because the consideration derived from non-trust bingo profits).

management agreements at issue were “inextricably tied up in the property rights flowing from the establishment of the bingo operations on tribal trust lands.” *Id.* at 1218. The court noted that “[t]he very existence of the bingo operation arises from the Indian tribe’s sovereignty over tribal trust lands which makes state gaming laws inapplicable to games on reservations.” *Id.* This was “the very reason why bingo can be *profitably offered* by the Community.” *Id.* (Emphasis added.) The court held that “the agreements numerous ties with the land makes them ‘relative to [Indian] lands.’” *Id.* (citing similarities to the facts in *Koberstein*). The court rejected the argument that applying Old Section 81 to the bingo management agreements would render “every contract with Indian tribes” subject to the statute, noting that the agreements at issue “specifically implicate Indian lands in the performance of the contracts and relate [the non-Indian party’s] services to the land.” *Id.* n.19.

In cases that followed that also involved bingo or gaming management agreements, the courts concluded that the agreements fell within the scope of Old Section 81 and thus were invalid without Secretarial approval. In several cases, the courts rejected an argument by the non-Indian party that Old Section 81 did not apply because the contractor’s control over Indian land was more limited than had been present in prior cases, or because limitations placed on the tribe were not as severe. *See, e.g., United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (9th Cir. 1994) (exclusive right to operate games and manage the gaming enterprise was sufficient to place an agreement within the scope of Old Section 81); *Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1987) (agreement gave absolute right of control over the bingo facility, but no express legal control over the land and the agreement did not prohibit tribe from encumbering its property; court concluded that Old Section 81 applied); *United States ex rel. Gulbranson v. D & J Enterprises*, No. 93-C-233-C, 1993 WL 767689, at *2, *7 (W.D. Wis. Dec. 23, 1993) (finance and construction agreement providing that the contractor “shall not have any legal or equitable interest whatsoever” in the casino building or land, and which did not give the contractor control over the day-to-day management of the casino, was nevertheless subject to Old Section 81 because “the existence of the casino so dictates the function of the land.”); *United States ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc.*, 734 F. Supp. 455, 457 (W.D. Okla. 1990) (court found it “irrelevant” that the contractor’s occupancy of the tribe’s lands was governed by a BIA-approved lease; Old Section 81 still applied to the management contract).¹¹

¹¹ *See also A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987) (relative-to-Indian-lands issue uncontested).

IV. Agreements Found *Not* to be “Relative to Indian Lands”

A. *Alzheimer* and the Four-Part Analysis of “Relative to” Indian Lands

In *Alzheimer*, 983 F.2d 803, the Court of Appeals for the Seventh Circuit reviewed the line of Old Section 81 cases that began in the 1980’s (including the Seventh Circuit’s own decision in *Koberstein*); summarized the factors the courts had considered important to the outcome of those cases; and concluded that the agreement at issue in *Alzheimer* was not “relative to” Indian lands within the meaning of Old Section 81. At issue in *Alzheimer* was a Letter of Intent (Letter) agreed to by Sioux Manufacturing Corporation (SMC), a tribal corporation and government subdivision of the Devils (now Spirit) Lake Sioux Tribe; and Medical Supplies & Technology, Inc. (MST). The Letter set forth an understanding of the terms of certain proposed transactions, and related conditions, through which the parties would engage in the production and marketing of various latex medical products in an existing SMC facility located on the Tribe’s reservation. MST was to provide “technology, know-how and expertise,” and SMC was to provide all required government approvals, all working capital, investment capital, and labor. MST was to train those individuals that SMC picked for the management and operation of the business. Neither party would be able to unilaterally set salaries and wages or administrative or other operational costs. When the deal went south, Alzheimer (MST’s law firm), as a third-party beneficiary to the Letter, sued SMC. The district court, applying *Koberstein*, concluded that the Letter was “relative to” the tribe’s lands under Old Section 81, relying primarily if not entirely on the fact that the manufacturing facilities would be located on tribal land. *See id.* at 810. The court of appeals reversed.

The court of appeals first acknowledged its own broad language in *Koberstein*, which had characterized Old Section 81 as covering “nearly all transactions relating to Indian lands,” and stated that the district court’s interpretation of *Koberstein* had not been “incorrect.” *Id.* at 810. But the court of appeals concluded that the lower court had been “too liberal in its interpretation of when a contract actually does relate to Indian lands.” *Id.* The court then reviewed various factors that it characterized as crucial in *Koberstein*, *id.* at 811, as well as facts found sufficient by other courts to conclude that bingo management agreements were “relative to” Indian lands.

Summarizing its review, the court identified the following factors as important in determining whether a management contract is relative to Indian lands:

- 1) Does the contract relate to the management of a facility to be located on Indian lands?
- 2) If so, does the non-Indian party have the exclusive right to

operate that facility? 3) Are the Indians forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?

Id. The court then noted that none of these factors was the “*sine qua non*” for finding that a contract is relative to Indian lands. *Id.*

Applying the above factors to the Letter at issue in *Alzheimer*, the court explained why it concluded that the Letter was not relative to Indian lands under Old Section 81. First, although the manufacturing operation would take place on tribal land, it would occur in a tribal facility that was already in existence and part of an ongoing tribal business. Second, although MST would be heavily involved in the venture, neither the Letter nor the contemplated contracts gave MST exclusive control over SMC’s production activities, and MST did not have unilateral power to set wages and salaries or operation and administration costs. Third, no parties had argued that either the Letter or the contemplated contracts prohibited the tribe from encumbering its land. And finally, the business “derived no special benefit from its location on Reservation land,” in contrast to the *Shakopee* case in which the “very existence” of the bingo operation arose from the tribe’s sovereignty over tribal trust lands. *Id.* at 811-12. “In short,” according to the court, “the Tribe did not cede any right, interest or control of Indian lands to MST.” *Id.* at 812.

B. *United States ex rel. Steele v. Turn Key Gaming*

In *Turn Key Gaming*, 260 F.3d 971, two agreements were at issue, a rental agreement and an employment agreement, both relating to the Oglala Sioux Tribe’s Prairie Wind Casino. The court found Old Section 81 applicable to neither. The rental agreement provided for the Tribe’s lease of moveable buildings, gaming equipment, furniture, a pick-up truck, and various other equipment used in connection with the casino operation. The rental agreement also included sitework to be performed by Turn Key, including the installation of a sewer system, road grading, and landscaping. Through the employment agreement, the Tribe hired an individual to supervise, oversee, and operate the Tribe’s casino.

The court first concluded that to the extent the rental agreement provided for the leasing of goods, it was not a “services” contract within the meaning of Old Section 81. Admittedly, however, the rental agreement also included the provision of services (sitework), and the employment agreement was for employment services.

The court characterized the Supreme Court’s decision in *Green*, *see supra* at 297, as “not particularly instructive,” and construed the legislative history of Old Section 81 as indicating that the law’s supporters were particularly concerned with claims agents and lawyers “who routinely swindled Indians *out of their land*, accepting *it* as payment for prosecuting dubious claims against the Federal Government.” *Turn Key Gaming*, 260 F.3d at 976 (emphasis added).

The court then reviewed the gaming-related Old Section 81 cases, as well as the *Alzheimer* decision, and the “four-question test” posed by the Seventh Circuit in that case. The court in *Turn Key Gaming* characterized the “common element to these holdings [as] whether by an agreement a tribe *transferred a property interest in tribal lands*.” *Id.* at 978 (emphasis added). According to the court, the contracts that the courts found to fall within the relative-to-their-lands language under Old Section 81 “implicated one or more of the bundle of ownership rights inherent in the notion of real property.” *Id.* In contrast, in *Alzheimer*, the tribe “did not give up any incidents of ownership.” *Id.* This interpretation, the court concluded, “offers a sensible understanding of the statute – ‘relative to’ Indian lands includes all contracts which put in play actual incidents and rights of property ownership.” *Id.* at 979. Concluding its analytic framework, the court found: “This reading places within the statute those cases with which Congress was concerned, and governs all transactions *trading services for Indian land*, but excludes agreements *in which Congress manifestly had no interest* and avoids unnecessarily encumbering property and contract law as they apply to Indian tribes.” *Id.* (emphases added).

Applying this interpretation of Old Section 81 to the sitework portion of the rental agreement, the court found that it was not “relative to” the tribe’s lands because in performing the services, Turn Key “will be acting not as a property owner, or as one with any property rights, but only as a contractor.” *Id.* at 980. In short, the Rental Agreement “did not vest any property interest in Turn Key, but *only contract* rights.” *Id.* (emphasis added). Similarly, because the employment agreement “[did] not transfer any interest in Tribal lands” to the employee, the agreement was not “relative to” the tribe’s lands.

V. Non-Gaming Agreement Found to be “Relative to” Indian Lands

After *Alzheimer* was decided, but prior to the Eighth Circuit’s decision in *Turn Key Gaming*, the U.S. District Court in South Dakota had concluded that two contracts for custom farming services on tribal trust lands were “relative to” the Crow Creek Sioux Tribe’s lands, and thus fell within the scope of Old Section 81. *United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms*, 102 F. Supp. 2d 1154 (D.S.D. 2000)

(Kornmann, J.).¹² The contracts provided that the “[t]he contractor shall be retained to provide custom farming, credit assistance and technical assistance relative to the overall operation of” the tribal farm. *Id.* at 1160. The court cited approvingly the Seventh Circuit’s language in *Koberstein* that “it is obvious from the broad language ‘relative to their lands’ that Congress intended to cover almost all land transactions in Indian property.” *Id.* at 1161. The court “respectfully disagree[d] with what could be called a four factor test as set forth [by the Seventh Circuit] in *Alzheimer*.” *Id.* The court also cited approvingly the approach taken by former District Court and by then Circuit Court Judge Murphy in *Shakopee* that Old Section 81 was drafted broadly and that the statute “does not support a narrow construction.” *Id.* at 1161-62. The court found it clear that the custom farming contracts were “relative to Indian lands” and subject to Old Section 81. While criticizing the outdated nature and purpose of Old Section 81, and expressing sympathy for the non-Indian party, the court noted that it was “obligated to apply the law and follow what Congress has ordained.” *Id.* at 1163.

Statements and Findings of Fact

The following statements and findings of fact provide both a factual background and the factual basis and context for our examination, later, of whether the Agreement is “relative to” the Pueblo’s lands, as we understand Congress to have meant that phrase.

1. The Agreement recites that Kewa owns a gasoline distribution business located in Sandoval County, New Mexico, but it does not contain a legal or other description of the property on which the business is located.
2. In the Agreement, Kewa engaged Quantum “to manage, supervise, and operate [Kewa’s] Gas Distribution Business.” Agreement § 1.1. Pursuant to § 1.2 of the Agreement,
 - a. Quantum had the authority to “manage the day-to-day operation” of the gasoline distribution business, including the authority to —
 - i. “Supervise and direct the general operations of [Kewa],”

¹² The court narrowly excepted from its finding certain sharecropper arrangements, which it concluded were governed by a previous Eighth Circuit decision, *U.S. ex rel. Harlan v. Bacon*, 21 F.3d 209 (8th Cir. 1994). 102 F. Supp. 2d at 1159-60, 1162. The *Harlan* decision turned on the exchange and consideration between the parties, and not on whether the agreements were “relative to” Indian lands.

- ii. “Select and train personnel to run the daily operations” of the business, including dispatchers, supervisors, security personnel, sales personnel, administrative and accounting personnel, and an on-site manager,
- iii. “Negotiate prices and coordinate deliveries of gasoline and special fuels,”
- iv. “Develop policies for the purpose of maximizing net income from the operations,”
- v. “Maintain proper and suitable records and books,”
- vi. “Hire and supervise all personnel necessary to maintain and operate” the business, “all of whom will be employees of [Kewa] and not Quantum,”
- vii. “Maintain and operate” the business,
- viii. “Bill and collect all revenues and fees,”
- ix. “Pay or cause to be paid out of [Kewa’s] funds any and all operating expenses” of the business, including salaries for Kewa’s employees, management fees, costs and expenses for legal, accounting, advertising and other technical and professional services, etc.,
- x. “Market, promote, and advertise” the business,
- xi. “Supervise and pay, out of [Kewa’s] funds, any and all construction authorized by [Kewa] to build or expand” the business,
- xii. “Maintain the books and records” for the business,
- xiii. “If required, prepare and file with the appropriate authorities on behalf of [Kewa], monthly reports setting forth” income and expenses, reports on operations, deliveries, etc., and
- xiv. Prepare annual operating and capital expenditure budgets for approval by Kewa.

b. Quantum also was required to —

- i. Regularly consult with Kewa’s Board, or a designated representative thereof, *id.* § 1.4;
- ii. Provide Kewa’s Board with copies of written financial and other statements or reports prepared by Quantum and, at least monthly, prepare and provide Kewa’s Board with a brief written report summarizing the activity of the gasoline distribution business during the preceding month, and noting any special problems or notable gains, or other matters of interest worthy of the Board’s attention. *Id.*

- c. Kewa's approval was required for annual operating and capital expenditure budgets. *See id.* § 1.2(n).
3. As compensation for its services, the Agreement provided that Quantum was entitled to —
 - a. A management fee, in an amount equal to 49% of Kewa's net income for each calendar year;
 - b. An additional fee, payable monthly, equal to \$.03 per gallon of gasoline or diesel fuel sold to the Santo Domingo Gas Station located adjacent to Interstate 25 at the New Mexico State Highway 22 exit; and
 - c. A monthly performance bonus, payable monthly, equal to \$.005 per gallon for every gallon of gasoline or diesel fuel sold by Kewa in excess of 1 million gallons per month.
4. Under a "non-compete" clause in the Agreement, the Pueblo and Kewa agreed that, during the term of the Agreement, neither would directly or indirectly, as an owner, consultant, agent, partner, joint venturer, or in any other capacity, participate in, engage in, or have a financial or other interest in, any other gas distribution business within the state of New Mexico. This clause did not apply to the retail operation of the Santo Domingo Gas Station. *Id.* § 8.1.
5. The term of the Agreement commenced on August 1, 1996, and had an initial term of 10 years. The Agreement granted Quantum two options to extend the Agreement for two additional 10-year terms. *Id.* § 3.
6. The Agreement provides that disputes shall be resolved by binding arbitration, and the Pueblo and Kewa "expressly, unequivocally and irrevocably waive sovereign immunity for actions to compel arbitration and actions to enforce arbitration awards in connection with the resolution, in accordance with the arbitration procedures, of disputes arising under or relating to the Agreement." *Id.* § 6.
7. The Agreement did not transfer to Quantum any legal interest in the Pueblo's land or in Kewa's leasehold on the Pueblo's land, nor did it authorize Quantum to acquire or dispose of such a legal interest, or to place a lien or encumbrance upon the Pueblo's land or Kewa's leasehold.
8. The Agreement did not authorize Kewa to dispose of, pledge, or otherwise encumber real property of the Pueblo.

9. The Pueblo's Tribal Council chartered Kewa as a corporate entity on August 14, 1996.
10. A lease between the Pueblo as lessor and Kewa as lessee determined the location of Kewa's gasoline distribution business.
 - a. Quantum is not a party to the lease.
 - b. The Agreement does not give Quantum a right to determine the location of Kewa's gasoline distribution business, to change the location, or to prevent Kewa from changing the location of its business.
 - c. The lease was submitted to and approved by BIA.
11. After the Agreement and the lease were executed, Quantum began operating Kewa's gasoline distribution business.
12. Neither the Pueblo nor Kewa, nor Quantum, submitted the Agreement to BIA for approval prior to performing under the Agreement.
13. On March 14, 2000, Congress amended and replaced Old Section 81 with New Section 81.
 - a. It is undisputed that under New Section 81, the Agreement would not require Secretarial approval in order to be valid.
14. On March 28, 2003, then-Governor of the Pueblo Everett Chavez sent the Agreement and related documents to BIA for review under § 81.
15. On October 23, 2003, the Regional Director issued his decision, concluding that the Agreement was subject to Old Section 81, declining to approve it, and declaring it null and void.

Discussion

We first address whether the Agreement is "relative to" the Pueblo's lands within the meaning of Old Section 81, and conclude that it is. We then address whether New Section 81 may permissibly be applied to the Agreement, thus rendering it valid without Secretarial approval. We consider the additional arguments made by Quantum on this issue

to the Federal court, but we reaffirm our earlier conclusion that New Section 81 does not apply, and we further explain our reasoning for that conclusion.

I. Is the Agreement “Relative to” the Pueblo’s Lands, Within the Meaning of Old Section 81?

A. Principles of Statutory Construction

Statutory construction begins with the language of the statute and the assumption that the ordinary meaning of the language used by Congress accurately expresses its legislative intent. See *Engine Mfgs Ass’n v. South Coast Air Quality Mgmt Dist.*, 541 U.S. 246, 252 (2004). If statutory language is ambiguous, the legislative history is useful if it shines a reliable light on the enacting Legislature’s intent. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

We also follow the cardinal rule that until Congress repeals or amends a statute intended to protect Indians, we must give it “a sweep as broad as [its] language,’ and interpret [it] in light of the intent of the Congress that enacted [it].” *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160, 166 (1980), quoting *United States v. Price*, 383 U.S. 787, 801 (1966), and citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). At the same time, we must adhere to the rule that “acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.” *Powers of Indian Tribes*, 55 I.D. 14, 19, I Op. Sol. (Indian Affairs) 445, 447 (Oct. 25, 1934).

B. The Enacting Legislature’s Intent and the Agreement

Our reading of Old Section 81’s language, its legislative history, and numerous judicial interpretations, leads us to conclude that the Agreement in this case falls within the class of agreements that the enacting Congress intended to cover in Old Section 81. The gasoline distribution business that Quantum agreed to operate for Kewa, and for which it would share profits, was necessarily connected to and dependent upon being located on Pueblo lands. As noted earlier, *supra* at 289, the parties to the Agreement intended to benefit from a tax exemption available to Indian tribal gasoline distributors operating on Indian reservation lands. Had the business been located on non-Indian fee lands, the parties would have been unable to take advantage of the exemption from state fuel taxes that gave the business a competitive advantage. Thus, the competitive advantage derived from the tax exemption was “inextricably tied” to the Pueblo’s land, its status as reservation land, and the sovereign rights of the Pueblo over its land. Cf. *Shakopee Mdewakanton Sioux Community*,

616 F. Supp. at 1218. Moreover, the Agreement limited the ability of the Pueblo and Kewa to use other Pueblo lands to capitalize on the same tax exemption: The Agreement prohibited the Pueblo and Kewa from participating in another gasoline distribution business on other Pueblo lands without Quantum's consent.¹³

The ordinary meaning of the word "relative" includes "a thing having a relation to or connection with or necessary dependence on another thing." See Free Merriam-Webster Online Dictionary.¹⁴ The characteristics of the Agreement described above fit that description by virtue of the tax exemption and competitive advantage gained by operating on tribal lands, thus making it "relative to" Pueblo lands.

In our view, the phrase "relative to" is plain and unambiguous. The fact that the phrase is indefinite does not, in our view, render it ambiguous, but instead, understood in context, renders it inherently broad. Given its natural reading, Old Section 81 thus broadly prohibited, without approval of the Secretary and the Commissioner, contracts with tribes relating to, necessarily connected with, or dependent upon the tribes' lands. And considering that the Indian Nonintercourse Act, 25 U.S.C. § 177, already broadly prohibited transactions purporting to transfer tribal property interests in their lands, we disagree that the phrase might have been intended only to cover agreements by which a tribe "transferred a property interest in tribal lands," *Turn Key Gaming*, 260 F.3d at 978.¹⁵

¹³ The non-compete language in the Agreement is not limited to Pueblo lands, but the value of the tax exemption could only be realized by a tribal business operating on reservation lands. Thus, as a practical matter, the non-compete limitation was only meaningful in restricting what the Pueblo and Kewa could do on Pueblo lands.

¹⁴ See www.merriam-webster.com/dictionary/relative. We recognize that we are citing a contemporary source for the definition of "relative," but no party has suggested that the word had a different or specialized meaning when Old Section 81 was enacted.

¹⁵ At the time Old Section 81 was enacted, § 177 already declared invalid, as a matter of law or equity, any "purchase, grant, lease, or other conveyance of lands, or of any title *or claim thereto*, from any Indian nation or tribe of Indians" (emphasis added), in the absence of a treaty or Congressional authorization. In other words, when Old Section 81 was enacted, Congress had already broadly prohibited the purported transfer of a property interest in tribal lands, *cf. Turn Key Gaming*, 260 F.3d at 979. Thus, we are not convinced that the 41st Congress "manifestly had no interest", *id.* at 980, in regulating agreements unless they traded services "for land."

Even if the phrase “relative to” is considered to be ambiguous, the legislative history confirms Congress’ intent that it be given broad effect. Notably, none of the objections to the breadth of Old Section 81 were directed at the phrase “relative to.” Its broad scope appears to have been both accepted and acceptable, once the two Senate amendments were adopted. Senator Cole understood the bill to make it an offense “for any person to make any agreement or bargain whatever with any Indian concerning his lands,” Appendix at 1, prompting amendments to exclude citizen Indians and to allow such agreements with non-citizen Indians and tribes if approved by the Secretary. *See also id.* at 6 (remarks of Sen. Pratt) (inquiring “whether it does not prohibit them from making contracts of any kind whatever?”); *id.* (remarks of Sen. Harlan) (“No; not with the amendment now inserted in the section by the Senate.”). The Senate debate reflects an understanding that the legislation broadly covered agreements relating to three subjects that were considered the most ripe for fraudulent activity: Indian lands, treaties, and annuities. *See id.* at 6-7. Nothing in the debate suggests an intent to limit the relative-to-their-lands language only to agreements that conferred upon the non-Indian party the incidents of ownership of land. To the contrary, the debate indicates a concern about persons who “had themselves employed by” Indians by purporting to provide valuable services in relation to their lands, their treaties, or their annuities. *See id.* at 3 (remarks of Sen. Wilson), 6 (remarks of Sen. Casserly). Other than limiting the subject matter to lands, treaties, and annuities, there was no attempt to limit the scope of the agreements covered, only to limit the protected class to non-citizen Indians and tribes, and to vest oversight in the Executive Branch rather than prohibit all covered agreements without exception.

Viewed in the historical context of paternalism, a guardian-ward relationship between the United States and tribal Indians, and the view that tribes and non-citizen Indians were incompetent to independently handle their business affairs, we believe that the 41st Congress intended the relative-to-Indian-lands language in Old Section 81 to cover agreements, such as the one at issue here, whose value for the services derived from Indian land as an asset, even when the non-Indian contracting party did not obtain exclusive control or any actual incidents of ownership over the land. We also consider it significant that through the non-compete clause in the Agreement, Quantum could preclude the Pueblo from using other Pueblo lands for the same purpose by directly or indirectly participating in another gasoline distribution business (i.e., to take advantage of the same tax exemption).

In reaching our conclusion, we think that the construction and understanding of Old Section 81 that is most faithful to the intent of the enacting Congress is reflected in Judge Kornmann’s decision in *Hattum Farms*, and in Judge Murphy’s decision in *Shakopee*. *See supra* at 302-03. And considering the statutory language, legislative history, and early

interpretations of Old Section 81, we do not believe that a conclusion that the Agreement is relative to the Pueblo's lands contravenes the admonition not to "unduly extend[] by doubtful inference" statutes that restrict the powers of Indian tribes. *See Powers of Indian Tribes*, 55 I.D. at 19, I Op. Sol. (Indian Affairs) at 447.

We recognize that when Congress amended and replaced Old Section 81 in 2000, the Senate Committee on Indian Affairs was critical of the court decisions finding Old Section 81 applicable to gaming management agreements, even, for example, where a tribe was represented by competent legal counsel and there was no evidence of fraud or duress. *See S. Rep. No. 106-150*, at 7 n.21; *but cf.* Appendix at 3 (remarks of Sen. Wilson in 1871) ("we have persons calling themselves lawyers, some of them generals, who have hunted around among the Indian tribes and made contracts with them to come here and take care of their interests, when they were not worth the powder it would take to shoot them"). We are not convinced, however, that it was the courts' reading of Old Section 81 that was overbroad. Their task, as is ours, was to "interpret [Old Section 81] in light of the intent of the Congress that enacted [it]," *see Central Machinery Co.*, 448 U.S. at 166, even if it was archaic, "unabashedly paternalistic," *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 682 (5th Cir. 1999), and outdated. *See also Hattum Farms*, 102 F. Supp. 2d at 1163.

Because the value of the Agreement, and the consideration to Quantum for its services, is derived from the location of the business on the Pueblo's reservation lands, and because the Agreement limited the right of the Pueblo and Kewa to derive that same value on other Pueblo lands without Quantum's consent, we conclude that it is "relative to" the Pueblo's lands within the plain meaning of Old Section 81, as confirmed by the legislative history.

C. The *Alzheimer* Test

In arguing that Old Section 81 does not apply to the Agreement, Quantum relies primarily on the *Alzheimer* four-factor test. *See* Plaintiff's Brief in Support of Motion for Summary Judgment at 14. We are not convinced that the *Alzheimer* "test" is as rigid as suggested by Quantum. For example, as we understand Quantum's argument, "exclusive" control over a facility would "satisfy" the criterion, whereas "nearly exclusive" control apparently would make the factor drop out altogether. *See id.* at 15. And although we also are not convinced that the *Alzheimer* test encompasses the outer limits of what the 41st Congress meant by the phrase "relative to" Indian lands, we conclude that even applying the four-factor *Alzheimer* test, the Agreement is "relative to" the Pueblo's lands.

1. Does the Agreement relate to the management of a facility to be located on Indian lands?

Yes, and Quantum concedes this. Quantum argues that the mere physical location of a business on tribal land is not sufficient to make an agreement to manage that business “relative to” the tribal land. *See id.* (citing *Gulbronson*, 1993 WL 767689, at *6). We agree. Here, however, and unlike *Alzheimer*, the location of the business on tribal lands, while not determinative, is significant, because of the tax exemption obtained by locating the business on tribal reservation lands.

2. If so, does the non-Indian party have the exclusive right to operate the facility?

Effectively, yes. Admittedly, the Agreement did not grant Quantum an exclusive right to operate the business without oversight by Kewa. Kewa had the authority to approve or disapprove operational and capital budgets. Kewa also had a right to receive reports and to be consulted.

But Kewa was afforded no other rights over the actual operation, management, and control of the business. Quantum had authority to “[s]upervise and direct the general operations of [the] *Distributor*” (i.e. Kewa), Agreement § 1.2(a) (emphasis added), in connection with Quantum’s authority to manage the day-to-day operations of the gasoline distribution business. Quantum had the authority to hire (and implicitly, to fire), to supervise, and to pay (out of Kewa’s funds) all personnel necessary to maintain the business. *See id.* § 1.2(f) & (i). Although the employees were deemed to be employees of Kewa, *id.* § 1.2(f), the Agreement did not give Kewa any rights to supervise or manage those employees. In contrast, in *Alzheimer*, MST (the non-Indian contractor) was to train “individuals that SMC [the tribal business] picked for the management and operation of the business.” 983 F.2d at 806. In *Alzheimer*, neither party had unilateral authority to set wages and salaries. In the present case, nothing in the Agreement restricts Quantum’s authority to set salaries of employees without Kewa’s approval. Quantum even had the authority to pay its own management fees out of Kewa’s accounts. *See* Agreement, § 1.2(i). And unlike *Alzheimer*, the Agreement was not for the expansion of an existing and ongoing tribal business. *Cf. Alzheimer*, 983 F.2d at 806, 811. The Agreement commenced on August 1, 1996; Kewa’s corporate charter is dated August 14, 1996. To summarize, as a practical matter the Agreement afforded Quantum broad rights of control and independence over the day-to-day management and operation of the business, subject only to Kewa’s authority to approve or decline to approve budgets. Whether characterized as exclusive or nearly exclusive, we think that even under *Alzheimer*, this factor would weigh in

favor of the applicability of Old Section 81. We are not convinced that a distinction between exclusive or nearly exclusive control, under the facts of this case, would be a meaningful distinction under *Altheimer*.¹⁶ Thus, we conclude that this factor weights in favor of finding that the Agreement is relative to the Pueblo's lands.¹⁷ On the other hand, even if we accepted Quantum's understanding of this factor as an all-or-nothing exclusive/not exclusive test, and concluded that it does not weigh in favor of the applicability of Old Section 81, we would still conclude, based on the other factors, that the *Altheimer* test is satisfied.

3. Are the Indians forbidden from encumbering the property?

Not directly or expressly. The non-compete clause in the Agreement *does* restrict the Pueblo's use of its own property elsewhere, as a practical matter, but it does not directly or expressly forbid the Pueblo from encumbering its property.¹⁸ On the other hand, Quantum argues that the non-compete clause "in no way resembles the transfer of a property interest in tribal lands." Plaintiff's Response to Defendant's Motion for Summary Judgment at 18. We disagree. The non-compete clause in the Agreement is, in practical effect, at least analogous to a negative easement. The Pueblo is restricted from using other tribal lands in a way that would take advantage of the same tax exemption that attaches to the Kewa-Quantum business. In that sense, the non-compete clause does act as a restriction on the incidents of property ownership, albeit not as an "encumbrance" as that term is understood in property law.

Quantum contends that "arguably" the non-compete clause "does not even prohibit the Pueblo from allowing a competing gasoline distribution business to operate on tribal

¹⁶ We are constrained to remark on the incongruity of giving much weight to the degree of de jure tribal control retained in an agreement, when the paternalistic premise of Old Section 81 was that tribes were incompetent to handle their own affairs.

¹⁷ We have considered the fact that nothing in the Agreement authorizes Quantum to determine the location of the business, *see supra* at 306, but that does not change our analysis or conclusion about the degree of control it had over the management and operation of the business. The gaming contract cases do not indicate that the contractor selected the site of the bingo hall; only that the contractor was given the right to construct and operate it.

¹⁸ The lease between the Pueblo and Kewa prohibits Kewa from encumbering the property that is subject to the lease, but our analysis pertains to the Agreement.

land.” *Id.* Quantum does not explain what it means by a “competing” gasoline distribution business, but of course, to compete against the Kewa-Quantum business, the other business might well need to be able to obtain the same tax exemption as the Kewa-Quantum business, which in turn would require some association with the Tribe through a tribal entity — the precise prohibition in the non-compete clause. Thus, if the Pueblo established another tribal business entity, and leased Pueblo lands to that entity for a gasoline distribution business in competition with Quantum, Quantum could argue that the Pueblo had violated the terms of the non-compete clause in the Agreement.

Quantum argues that the “critical question” is whether the agreement “transferred a property interest in tribal lands.” *Id.* at 17, quoting *Turn Key Gaming*, 260 F.3d at 978. We disagree that this *Altheimer* factor requires a transfer of a property interest in tribal land. It is sufficient, in our view, that the Agreement imposes a constraint, even if indirect, on the Pueblo’s use of its lands.

On balance, under *Altheimer*, we conclude that the practical effect of the non-compete clause in the Agreement weighs in favor of finding that the Agreement is “relative to” the Pueblo’s lands, though admittedly not as strongly as it did in cases in which the tribe was prohibited from directly encumbering the property. Of course, we also note that in *Barona Group of the Capitan Grande Band of Mission Indians*, 840 F.2d 1394, the agreement at issue gave no express legal control over the land and did not prohibit tribe from encumbering its property, yet the Ninth Circuit found that it was subject to Old Section 81.

4. Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?

Yes, in the sense used by the court in *Altheimer*. The court in *Altheimer* distinguished the bingo cases, and in those cases the “very existence” of the facility depended on the tribe’s sovereign status (and the status of the lands as Indian lands). *See, e.g., Shakopee Mdewakanton Sioux Community*, 616 F. Supp. at 1218; *see also Altheimer*, 983 F.2d at 812 (the location of the facility on Indian lands in those cases afforded the parties “refuge from state civil laws”). But in concluding that the agreement at issue in *Altheimer* did not require Secretarial approval under Old Section 81, the court found that the latex manufacturing facility “*derived no special benefit* from its location on Reservation land.” *Id.* (Emphasis added.) The court did not purport to create a bright line based on whether the “very existence” of a business depended upon tribal sovereignty for this factor to weigh in favor of an agreement being “relative to” tribal lands. Instead, if the business derives a “special benefit” from its location on Indian land, it is sufficiently “dependent” upon the tribe’s sovereignty, and the special status of the tribe’s land, to be “relative to”

those lands. *See also GasPlus*, 510 F. Supp. 2d at 32 (courts considered special benefits derived from a business' location on Indian lands to be a factor in determining whether a contract was "relative to Indian lands" under Old Section 81).

In the present case, the gasoline distribution business derives a special benefit from its location on Reservation land, and Quantum's compensation for its services is related to that special benefit. Quantum's compensation is based on profit-sharing and on bonuses derived from sales volumes, which in turn are related to the competitive advantage of selling fuels that are not subject to the state tax. This weighs heavily in favor of the Agreement being "relative to" Indian land.

Quantum makes much of a purported distinction between the tax exemption being attributable to state law and state sovereignty, and not to the Pueblo's sovereignty, because the State of New Mexico (at least after 1999) "authorized" the tribe to receive a tax exemption under state law. Plaintiff's Brief in Support of Motion for Summary Judgment at 20. Thus, according to Quantum, the tax exemption "*depends on state law.*"¹⁹ We think Quantum's argument is misplaced, as well as premised on a false dichotomy. In 1996, when the Agreement was signed, the tax exemption apparently was the product of the Federal preemption of state laws by tribal sovereignty. *See supra* note 19. But even if the relevance of the Pueblo's sovereignty is to be evaluated in the context of subsequently enacted state law, under which the tax exemption might be characterized as the "product" of state law, the state law cannot be viewed in isolation from the significance of tribal sovereignty. "But for" tribal sovereignty, the exemption would not have attached in 1996 (preempting New Mexico's tax law as it was then structured), and if tribal sovereignty had not revealed the "loophole" in state law, the State would not have been prompted to amend

¹⁹ In 1996, when the Agreement was executed, the tax exemption apparently was simply the product of the way that the state tax was structured — i.e., the legal incidence of the tax fell on the distributor, so if an Indian tribe was the "distributor," the tribe's sovereignty rendered it immune from the tax. As noted in *Quantum I*, 44 IBIA at 180 n.1, because states have authority to decide on what party the legal incidence of a tax falls, the Pueblo's exemption remained subject to further action by the State of New Mexico, prompting the eventual compromise through which the State, as a matter of state law, apparently "granted" the tax exemptions invoked by Quantum as evidence that the tax exemption at issue here depended upon state sovereignty and "not" on tribal sovereignty.

the law after reaching a political compromise with the tribes.²⁰ To summarize, whether the tax exemption is attributed to the sovereignty of Indian tribes, or the State's action in response to that sovereignty, is not a distinction that alters our evaluation of this case under *Altheimer*.

Considering the four-part *Altheimer* test, we conclude that the first, second, and fourth factors weigh strongly in favor of finding Agreement “relative to” the Pueblo's lands, and the third factor weighs somewhat in favor of such a finding. Even if little or no weight were given to the second factor, i.e., if *Altheimer* is construed as requiring absolute exclusive control in all respects and to preclude considering the practical effect of the Agreement, our overall conclusion would not change. Viewed as a whole, we conclude that under the *Altheimer* test, the Agreement is “relative to” the Pueblo's lands.²¹

II. Would the Application of New Section 81 to the 1996 Agreement be Impermissibly Retroactive?

A. Introduction

As we discussed in *Quantum I*, there is a “traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment.” 44 IBIA at 193, quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994). If applying a statute to pre-enactment conduct would “change[] the legal consequences of acts completed before [the statute's] effective date,” that application is

²⁰ Of course, even in the bingo and gaming cases, it could be argued that the tribal exemption “depended on state law.” The Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) was driven, in part, by the fact that the State of California permitted and promoted a substantial amount of gambling, *id.* at 210-11, and in that sense the tribe's exemption may have “depended on” state law. If the State of California had flatly outlawed all gambling within the State, the outcome in *Cabazon* possibly would have been different.

²¹ *Quantum* also argues that even apart from the *Altheimer* test, “case law and common sense” do not support application of Old Section 81 to the Agreement. Plaintiff's Brief in Support of Motion for Summary Judgment at 22. We have already addressed the case law relied upon by *Quantum*. The modern sensibilities urged on us by *Quantum* may have provided the foundation for the 106th Congress to replace Old Section 81 in 2000, but they cannot provide a basis for us to disregard our understanding of the 41st Congress' intent.

impermissibly retroactive, unless there is a clear Congressional expression of intent that it be applied as such. *Landgraf*, 511 U.S. at 269-70 & n.23.²² Quantum accurately summarizes the applicable legal test in stating that “[a]n impermissible retroactive effect of applying current law is deemed to occur if it (i) impairs the rights that a party had when s/he acted; (ii) increases a party’s liability for past conduct; or (iii) imposes new duties with respect to a completed transaction.” Appellant’s Reply to Appellee’s Response Brief at 1, quoting *Landgraf*, 511 U.S. at 273; *see also* Plaintiff’s Brief in Support of Motion for Summary Judgment at 9.²³

In *Quantum II*, the District Court found that our earlier decision did not adequately explain why the application of New Section 81 to the Agreement would be impermissibly retroactive. The Court found that our retroactivity analysis was incomplete because we had failed to explain how application of New Section 81 “would impair the rights, increase the liability, or impose new duties on a party,” or how it would significantly change the legal consequences of the Agreement. 597 F. Supp. 2d at 153-54. Having again considered Quantum’s arguments, including additional arguments made by Quantum in pleadings filed with the Court prior to the remand, we reaffirm our conclusion in *Quantum I* that New Section 81 may not be applied to the Agreement to render it valid, and we provide additional explanation for our conclusion.

B. Application of New Section 81 Would Change the Legal Consequences of the Agreement, Which Was Executed Before New Section 81’s Effective Date.

At the time the Agreement was executed, a contract or agreement that fell within the scope of Old Section 81 was deemed by the statute to be “null and void,” if not approved by BIA. *See* Old Section 81, *supra* at 294. It was void *ab initio* as a matter of law in the absence of Secretarial approval: there was no legally-cognizable “contract” in existence. As

²² As we noted in *Quantum I*, Quantum has not argued that New Section 81 contains a clear expression of congressional intent that it should be applied to agreements that were entered into prior to the enactment of New Section 81.

²³ Quantum also invokes as a “general rule” that “a court is to apply the law in effect at the time it renders its decision.” *Id.* The Supreme Court has made clear, however, that this rule in no way supersedes, or even conflicts with, the “deeply rooted” presumption against retroactive legislation, i.e., legislation that changes the legal consequences of acts completed before its effective date. *See INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *Landgraf*, 511 U.S. at 269-70.

characterized by Cohen, Old Section 81 had withdrawn from tribes, in the absence of Federal oversight, the “power to make contracts.” Cohen’s Handbook of Federal Indian Law at 77; *see also Smith & Steele*, 115 P. at 867 (intent was to “preclude” the making of contracts, except by following the procedure prescribed).

We have concluded that the Agreement falls within the class of agreements covered by Old Section 81, and therefore, at least as long as Old Section 81 was in effect (and regardless of the fact that the parties chose to follow the terms of the Agreement), it could not serve as the source of any legal and enforceable contractual obligations against the Pueblo and Kewa. Nor could it serve as the source of a waiver of sovereign immunity by the Pueblo and Kewa, or a source of exposure to liability for breach of the terms of the Agreement. And — not insignificantly — Quantum had no right to extend and enforce the terms of the Agreement for up to 30 years.

If New Section 81 became applicable to the Agreement upon enactment, the previously null and void Agreement would then be legal and valid without Secretarial approval. It would give rise to legally enforceable contractual obligations for the Pueblo and Kewa where none previously existed, based solely on an act completed before New Section 81 was enacted — the parties’ execution of the Agreement. Put another way, if New Section 81 applies, then on March 14, 2000, the date of enactment of New Section 81, the Pueblo and Kewa would have — on that date — become parties to an enforceable contract with Quantum, would have waived sovereign immunity, would have been bound by the arbitration provisions of the Agreement, and would have been locked into a business arrangement with Quantum for potentially 30 years. Thus, if New Section 81 is applied, Quantum gained the right to operate Kewa’s business for up to 30 years and to be compensated at a rate of 49% of net income, plus bonuses. Whether either result — allowing the Pueblo to walk away from the Agreement, or allowing Quantum to enforce it against the Pueblo — would be fair or unfair, the above discussion illustrates why we conclude that applying New Section 81 to render the Agreement valid and enforceable would change the legal consequences of the parties’ pre-enactment conduct.

Applying Old Section 81 does not, as Quantum contends, “turn back the clock to 1871, . . . to apply to a *contractual relationship* that was ongoing in 2003 a previously repealed statute that had become ‘antiquated and unnecessary’ by 1999 [sic].” Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 10 (emphasis added). Undoubtedly, there was a business relationship that was ongoing in 2003, but as a matter of law, under Old Section 81, there was no *contractual* relationship in existence, and there could be no contractual relationship unless (1) New Section 81 is deemed to apply and to have created such a contractual relationship on March 14, 2000; (2) the parties had ratified

or re-executed the Agreement after New Section 81 was enacted, in which case retroactivity would not even have been an issue in this case; or (3) BIA approved the Agreement.

In the District Court proceedings, the Department noted that the inquiry regarding retroactivity “should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations,” Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment at 13, quoting *INS v. St. Cyr*, 533 U.S. at 321, and suggested that the Pueblo had “reli[ed] on the availability of Government oversight,” Defendant’s Reply in Support of Defendant’s Motion for Summary Judgment at 5. Quantum argued that the Department had “advance[d] the nonsensical notion that Kewa and the Pueblo had a well-founded ‘reliance’ interest in the nonexistence of legal obligations that the parties had performed for seven years before the Regional Director ruled.” Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 11.

We do not construe the Department’s argument as asserting that the Pueblo had a “reliance interest in the nonexistence of legal obligations.” But we do think that for agreements executed while Old Section 81 was in effect, the parties knew, or should have known, that any *risk* that the agreement might be invalid would be borne by the non-Indian contracting party. At the time the Agreement was executed in 1996, the case law made it abundantly clear that many courts understood Old Section 81 to sweep broadly. It is true that the Seventh Circuit’s decision in *Alzheimer* may well have provided a foundation for an argument (as Quantum has done) that the Agreement is not within the scope of agreements covered by Old Section 81. But the potential success of that argument would have been uncertain at best. And if Old Section 81 did in fact apply, Quantum undoubtedly knew, or should have known, that it bore the risk of the Agreement being invalid.²⁴ On the other hand, rightly or wrongly, the Pueblo and Kewa had little or no incentive to present the Agreement for Secretarial approval because they had little or no risk. Whether or not they actually “relied” on the availability of Government oversight, the fact remains that the risk of the Agreement being invalid did not attach to them.

Quantum also relies on the Supreme Court’s decision in *McNair v. Knott*, 302 U.S. 369 (1937), which stated that “[p]lacing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. . . . No person has a vested right to be permitted to evade contracts

²⁴ Quantum easily could have prevented the risk by conditioning its performance on BIA’s approval of the Agreement.

which he has illegally made.” *Id.* at 372-73. And quoting *Ewell v. Dagggs*, 108 U.S. 143, 148-49 (1883), Quantum contends that “statutes and other legal documents often employ words such as ‘void and of no effect’ ‘in the sense of voidable merely, that is capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed, incapable of giving rise to any rights or obligations under any circumstances.” Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 12-13. According to Quantum, applying New Section 81 to the Agreement “creates [no] new obligation[s] . . . because it imposes nothing more than the liability inherent in the contract itself.” *Id.* at 13.

But both *McNair* and *Ewell* involved contracts between parties who had the *power* to contract. In *McNair*, it was only in the context of rejecting an argument that Congress *could not* validate an existing contract by changing the law that the Court said that “[n]o person has a vested right to be permitted to evade contracts which he has illegally made.” 302 U.S. at 373. In that case, the statute at issue was to remove legal obstacles and permit parties to *carry out* their contracts, *see id.*, not to create a contract where none previously existed.²⁵

Relying on *Ewell*, Quantum quotes the Court’s language that “the right of a defendant to *avoid* his contract is *given to him by statute* . . . and that whatever the statute gives . . . may, by a subsequent statute, be taken away.” 108 U.S. at 151. But *Ewell* does not apply where, as here, there was no legally cognizable “contract” to “avoid.” *Ewell* involved the use of a repealed usury law, which had rendered void an interest rate greater than 12 per cent in otherwise enforceable contracts, as a defense to a judgment and foreclosure on a mortgage. The effect of the usury statute had been to enable a party sued to resist recovery against him of the interest (but not the principal) that he had contracted to pay. Repeal of the statute removed it as a defense. What Old Section 81 took away from tribes was not a “right to avoid” a contract, or even a right to avoid a provision within an otherwise enforceable contract, but the very power to enter into a contract without Secretarial supervision and approval. *See Handbook of Federal Indian Law* at 77 (Cohen ed. 1942). Furthermore, when the Court in *Ewell* noted that “[a] distinction is made between acts which are . . . generally regarded as absolutely void, in the sense that no right or claim can be derived from them, and acts which . . . are void or voidable, according to the nature and effect of the act prohibited,” 108 U.S. at 150, the examples provided were

²⁵ In *McNair*, the Court noted that the agreements at issue “did not violate any express statutory prohibition,” and in that case the Court found that Congress clearly did intend the law to retroactively make provisions in existing agreements enforceable. 302 U.S. at 371-72.

unlike Old Section 81. *See id.* at 149 (conveyance may be void as to creditors but not as to others; leases may become null and void upon the happening of a contingency; deed obtained by fraud is said to be “void,” but meaning that it may be voided at the election of the party defrauded). We think that when Congress enacted Old Section 81, it intended to declare agreements made in violation of the statute “absolutely void, in the sense that no right or claim can be derived from them,” and not effective and enforceable, yet “voidable.” *See id.* at 150.

Quantum also invokes various equitable considerations for applying New Section 81. *See, e.g.*, Reply Brief in Support of Plaintiff’s Motion for Summary Judgment at 3 (the benefit that Kewa received as consideration for the contract is just ground for imposing upon Kewa, by subsequent legislation, the liability that Kewa intended to incur) (citing *Ewell*, 108 U.S. at 151). But the Supreme Court has noted that while “[i]t will frequently be true, . . . that retroactive application of a new statute would vindicate its purpose more fully,” that consideration “is not sufficient to rebut the presumption against retroactivity.” *Landgraf*, 511 U.S. at 285-86.²⁶

Quantum’s argument that New Section 81 should be applied because it eliminates the penalty of disgorgement may or may not be convincing in determining whether the *remedy* in Old Section 81 survived its repeal, *cf. Landgraf*, 511 U.S. at 273, but it is inapposite to these remand proceedings, which do not encompass the issue of remedy.²⁷ Because we found the issue of a remedy, at least in terms of disgorgement, not to be ripe, the only issue we have considered on remand is whether the Agreement is valid, and not what remedies may or may not be available if it is invalid.

²⁶ Of course, if the inquiry into whether a statute may permissibly be applied retroactively were simply an exercise in considering the equities of a given case, we would be constrained to further develop the factual record for the present case, e.g., to consider why an apparently identical arrangement between a tribe and GasPlus pays GasPlus a management fee of 30% of profits, *see GasPlus*, 510 F. Supp. 2d at 22, while the Agreement in this case would pay Quantum a management fee of 49% of profits, plus various bonuses.

²⁷ Quantum invokes the common law presumption in favor of applying a current statute where the statute “merely remove[s] a burden on private rights by repealing a penal provision.” Plaintiff’s Brief in Support of Motion for Summary Judgment at 9, quoting *Landgraf*.

C. Congressional Intent

As we stated in *Quantum I*, we find it inconceivable that Congress intended to allow New Section 81 to be applied to legislatively ratify previously invalid agreements, including the Agreement at issue in this case. 44 IBIA at 193. Quantum argues that on March 14, 2000, when New Section 81 was enacted, it was permissible to apply New Section 81 to the Agreement because Congress intended New Section 81 to increase tribes' rights to self-determination and to remove the limitation on tribes' right to contract. Quantum argues that New Section 81 eliminated the burden on tribes and their business partners to obtain Secretarial approval for agreements and eliminated the onerous penalty of disgorgement. *See* Plaintiff's Brief in Support of Motion for Summary Judgment at 9-10. According to Quantum, New Section 81 "allows a tribe *to enter* into more types of contracts." *Id.* at 13 (emphasis added). Quantum argues that the amended statute "allows the tribe *to burden* itself with a contract, but the statute, itself, does not place the burden." *Id.* (emphasis added). Quantum contends that "[q]uite the opposite, [New Section 81] increases the rights of tribes and others *to enter* into contracts without government intervention, instead of impairing or imposing new duties." *Id.* (emphasis added). In support of its argument, Quantum refers to the legislative history of New Section 81. In the Senate Committee Report, the Committee stated that by replacing Old Section 81 with New Section 81, tribes "*will be able to engage* in" a wide variety of commercial transactions without having to submit them to BIA for approval, and that New Section 81 would allow tribes and their partners "*to determine*" with much greater certainty whether the statute applies. *See* S. Rep. No. 106-150 at 9 (Sept. 8, 1999) (emphases added).

The response to Quantum's argument can be found in the verb tense. New Section 81, and the policy it was intended to promote, are described only in the future tense, i.e., to apply to tribes' post-enactment contracts and agreements. Nothing in the language used by Congress remotely suggests that Congress intended the revised statute to apply to purported agreements and contracts entered into before New Section 81 became law. Lifting former restrictions to allow tribes the freedom "to engage" in certain transactions, and "to enter" into contracts without BIA oversight, is not the same as intending to ratify past void transactions by giving tribes the right "to have engaged in" certain agreements. *Cf. Carr v. United States*, __ U.S. __, __, 130 S. Ct. 2229, 2236 (2010) (look to Congress' choice of verb tense to ascertain a statute's temporal reach). As we noted in *Quantum I*, when an agreement was null and void under Old Section 81, but would be valid under New Section 81 without Secretarial approval, New Section 81 undoubtedly gave a tribe complete freedom to re-execute or ratify the agreement under New Section 81. But that would be a new decision and a new action by the Tribe, exercising authority previously denied it.

Quantum argues that by clarifying and significantly reducing the scope of Old Section 81, New Section 81 “makes clear that Congress now considers self-determination – not paternalism – to be in the Indians’ best interest.” Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 9, quoting *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 781 (9th Cir. 2008). It could also be argued, however, that it would be paternalistic for Congress (or this Department) to decide that it is “best” for the Pueblo and Kewa if they are bound to the Agreement they previously executed. Quantum also argues that the Board’s conclusion that New Section 81 cannot permissibly be applied to render valid the previously invalid 1996 Agreement “perversely transforms New Section 81 – a legislative reform designed to liberate Indian economic interests from stifling government oversight . . . – into an instrument of alleged oppression.” Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 11. Of course, the party to the Agreement that purports to feel that “oppression” is Quantum. Again, whether or not that feeling is well-founded, we find nothing in the language or legislative history of New Section 81 that would indicate that Congress intended New Section 81 to be a relief act for the business partners of Indian tribes with respect to previously executed agreements.

Conclusion

The Agreement allowed Quantum to profit from a special benefit that attached to locating the gasoline distribution business on the Pueblo’s reservation, and it also effectively limited the Pueblo’s right to engage in the same business on other Pueblo lands without Quantum’s consent. The Congress that enacted Old Section 81 intended it to have a broad, and admittedly paternalistic effect. Understood in that context, the Agreement is “relative to” the Pueblo’s lands within the meaning of Old Section 81. The fact that Congress concluded, in 2000, that Old Section 81 was outdated, does not make it appropriate for us to disregard the enacting Congress’ intent with respect to agreements predating Congress’ amendment of § 81.

In addition, application of New Section 81 would have an impermissibly retroactive effect because it would impose liability on the Pueblo and Kewa based on their execution of the 1996 Agreement, where no such liability previously existed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and on remand from the U.S. District Court, the Board finds that the Agreement is “relative to” Indian lands, within the meaning of Old Section 81, and therefore we affirm the Regional Director’s Decision in remaining part on the applicability of Old Section 81. We reaffirm our previous conclusion that applying

New Section 81 to the Agreement, to render it valid without Secretarial approval, would give New Section 81 an impermissibly retroactive effect.²⁸

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

²⁸ As noted earlier, a Departmental determination that the Agreement is null and void is not the same as a Departmental determination that Quantum is precluded from being compensated for the value of the services it rendered. In *Quantum I*, we dismissed the issue of compensation for Quantum for its services for lack of ripeness. See 44 IBIA at 206-07.

APPENDIX

Excerpts from Congressional Globe, 41st Cong., 3rd Sess. 1483-87 (Feb. 22, 1871)

[1483] The next amendment of the [Senate] Committee on Appropriations was to strike out the fourth section of the bill in the following words:

SEC. 4. *And be it further enacted*, That hereafter no contract or agreement of any kind shall be made by any person, with any individual or tribe of Indians, for the payment of any money or other thing of value to him, or any other person, in consideration of services, or pretended services, for said Indians relative to their lands, or to any claims against annuities from, or treaties with, the United States; and all such pretended contracts or agreements hereafter made are hereby declared null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf on account of such pretended services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy, . . . ; and the person so receiving said money, and his aiders and abettors, shall, in addition to the forfeiture of said sum, be subject to prosecution for misdemeanor in any court of the United States, and on conviction shall be fined not less than \$1000, and imprisoned not less than six months; and it shall be the duty of all district attorneys of the United States to prosecute such cases when applied to do so, and their failure and refusal shall be ground for their removal from office. And any Indian agent, or other person in the employment of the United States, who shall advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments as are here prohibited, shall, in addition to the punishment hereby imposed on the person making said contract, or receiving said money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same.

Mr. DAVIS. I hope that provision will not be stricken from the bill. It is one of the most important propositions that were ever made in the American Congress for the protection of the Indians. If it is retained and becomes a part of the law, it will be more for their protection and to prevent them from being plundered than any proposition that ever was made in the American Congress.

Mr. COLE. I think it is an ill-digested proposition . . . [that] goes too far altogether. It makes it a penal offense for any person to make any agreement or bargain whatever with any Indian concerning his lands or concerning anything he may be entitled to by virtue of treaty stipulations.

Now, sir, there are in the United States some civilized Indians, a good many, scattered through the States, and through the Territories as well, who are as competent to take care of themselves as white men are. These persons would be precluded from making any contract or agreement that they might desire to enter into concerning their property. . . . If it could be so modified as to prevent the cheating of innocent and unsophisticated Indians, we should agree to it in all probability. But this certainly goes too far altogether Many of the Indians own land in severalty in the Indian territory, they own land in severalty in other parts of the country, and are yet the subjects of treaty stipulations, receiving perhaps annuities from the United States. These would be interfered with; all their business would be at once stopped; it would be throwing them back, as it were, into a body of people by themselves, shutting them off from all the rest of the world in business transactions.

Mr. DAVIS. . . .

Mr. President, it is the proud boast of our country and of our Government that the Indians are the wards of the United States, that they are under the special protection and guardianship of the Government of the United States; and certainly there is no population in the United States who are more in want of such guardianship and protection. There are no Indians, as a tribe or as individuals, that are competent to protect themselves against the enterprise and the fraud and the robbery of the white man. There never was such a subject of plunder in this world's history that I have read of If the whole history of their wrongs, their frauds, their oppressions, and their plundering by the white men, and particularly by agents who are constituted by our Government to take charge of them and their interests, could be written, it would be one of the most abhorrent volumes that ever were written or published.

The proposition which the honorable Senator's committee moves to strike out is the only effective remedy that I have ever read of that has been proposed to prevent these outrageous frauds. If it is enacted and becomes part of the law it will be the best shield, the best protection, and the best security for the rights and the helplessness of these sons of the forest that has ever been devised by American legislation or American humanity. . . .

Mr. CORBETT. Mr. President, I trust that this provision will not be stricken from the bill. . . . This is to protect the Indians against claims agents, who present and secure the payment of large claims against the Government, and make terms with the Indians to take from them one half or three fourths or one quarter of the amount of money they may obtain from the Government. The object of this section is to protect the Indians and the Government both against these claim agents. . . .

Mr. COLE. The Senator from Oregon suggests that if the Indians are sufficiently enlightened to do an act they can send an agent to Washington to look after their interests. This section, if he will examine it, he will see would prevent their making any agreement or bargain, or in any way employing an agent of that kind. The very fact that it goes too far is the objectionable feature of it. They can make no arrangement whatever in regard to their claims with any person As the law now stands, they can protect themselves, those

more enlightened can, certainly; and it is the duty of the superintendents and agents throughout the country to protect the Indians. . . .

. . . .

Mr. POMEROY. . . . The difficulty with this section is that it prevents good men and honest men from doing what ought to be done.

. . . .

Mr. DAVIS. . . . I suggest to [Sen. Sawyer] that he propose, as an amendment to this proposition, if it is too harsh, that the Secretary of the Interior, or the courts in which the Indians may institute any suit, may have the regulation and adjustment of all demands against them by their agents and attorneys for compensation.

Mr. SAWYER. I should have no special objection to such a provision as that. That would guard it and enable the thing to be supervised by proper authority

[1485]

. . . .

Mr. WILSON. I shall vote against striking this section of the bill. A bad practice has grown up in this country of taking contingent fees in law cases. In some portions of the country this is regarded as dishonorable, In other portions of the country it is allowed. It is a thing that ought to pass away. . . . Not content with cheating white men, the effort has been made to plunder the Indians, and we have persons calling themselves lawyers, some of them generals, who have hunted around among the Indian tribes and made contracts with them to come here and take care of their interests, when they were not worth the powder it would take to shoot them; men who were of no benefit to the Indian or to the white man, mere thieves and plunderers, who, professing to have an influence here in Congress, have got these poor people to agree to pay them

. . . .

Mr. WILSON. We will pass this section as it came from the House of Representatives if we can; at any rate I intend so to vote; and then, if these poor Indians find that they have any trouble about the matter, we can by subsequent legislation take care of them. Let us first wring the necks of the men who are cheating and plundering them.

Mr. POMEROY. I move to amend

. . . .

Mr. POMEROY. . . . My point is simply this, that all contracts for payment shall not be valid until approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

Mr. HARLAN. That is part of the amendment I propose to offer. I wish to say . . . that [I agree] . . . that very great abuses have grown up, in violation of the law of the land. They are not in pursuance of any law, but are in violation of it. I have taken the trouble to look up some of the existing statutes on this subject. One of them, which I find in volume nine, Statutes-at-Large, pages 203 and 204, enacted in 1847, reads as follows:

“And all executory contracts made and entered into by any Indian for the payment of money or goods shall be deemed and held to be null and void, and of no binding effect whatsoever.”

This was reenacted in 1852, in the following words:

“Nor shall the executive branch of the Government, now or hereafter, recognize any contract between any Indian, or tribe, or part of a tribe, and any attorney or agent, for the prosecution of any claim against the Government, under this act.”

The “act” there was an Indian appropriation bill. This was repeated in a little different phraseology in 1852, in the act approved August 30, 1852, and then again in March, 1853, showing that the attention of Congress has been called to this subject from time to time, and they have attempted by legislation to prevent the very evils complained of; but I am of opinion that the failure grew out of an attempt to make the provision too sweeping. Indians need counsel sometimes as much as white men. . . .

Now, what is true of white men and true of the United States is probably true of Indians. They occasionally need legal advice So I think it would be better to modify this section so as to enable Indians, when they shall need such services, to contract for the assistance that may be necessary to put it under some suitable supervision.

The honorable Senator from Kansas has suggested an amendment, the spirit of which I am prepared to adopt, and with some such amendment I shall vote against striking out this section, for very great abuses have grown up in the administration of the Indians services which ought to be, if they can be, corrected I had prepared the following amendments: in line three to strike out the words “individuals or,” and insert after the word “Indians” the words “or individual Indians not citizens of the United States.” Then in line seven, after the words “United States,” insert “unless first approved by the Secretary of the Interior.” After the word “made,” in line eight, insert “in violation of this act.” In line twelve, after the word “services,” insert “in excess of the amount approved by said Secretary.” . . . If these several amendments were adopted the section would enable Indians to hire attorneys with the approval of the Secretary of the Interior, and would provide that it should be a crime for an attorney to take more money for his services than might be approved by the Secretary. . . .

The CHIEF CLERK. It is proposed [to amend the section] so that the section, if thus amended, will read:

That hereafter no contract or agreement of any kind shall be made by any person with any individual or tribe of Indians, for the payment of any money

or other thing of value to him or any other person, in consideration of services, or pretended services, for said Indians relative to their lands, or to any claims against annuities from, or treaties with, the United States, unless such contract or agreement shall first be in writing and shall be approved by the Commissioner of Indian Affairs and the Secretary of the Interior.

Mr. HARLAN. I have no objection to that amendment

. . . .

Mr. HARLAN. Now I move to amend [the section] by striking out “individuals or,” and inserting after “Indians” the words “or individual Indians not citizens of the United States.”

The amendment was agreed to.

. . . .

[1486]

. . . .

Mr. COLE. It seems to me that in this matter the zeal of certain Senators runs away with their discretion. As I stated when I was up the last time, this will prevent any Indian from making any arrangement with any other Indian touching the funds that he receives in pursuance of any treaty. All through this [appropriations] bill we are paying money to the Indians for purposes specified in the various treaties

Now, if this section is retained, it will be utterly impossible for the Pottawatomie Indians who are to receive that sum of money to make any contract with a teacher for the purpose of disseminating information among them; it will preclude them from making a contract for the purchase of school-books; it will preclude them from carrying out the objects for which these appropriations are made . . .

. . . . It will be virtually overthrowing the objects of all the treaties and all the appropriations this bill. Then these Indians cannot read. How will they know what kind of contract is made with them? They cannot sign their names. They do not write their names to the treaties; they sign by making a cross. These contracts need not be made in the presence of anybody. They may be made by an individual for the tribe. There is every possible opportunity for cheating, if this section is retained, in the way of carrying out the contracts.

Further, it makes it a penal offense for any person to make an agreement “relating to annuities.” What are annuities? They are moneys that we pay to the Indian from year to year for this, that, and the other purpose, specified in the treaties and in the appropriations bills; and yet if any of this money is contracted for, if they wish to use it in any way, . . . they will be precluded from doing so

Mr. PRATT. I beg leave to inquire of the chairman of the Committee on Indian Affairs whether this section as it stands now does not prohibit absolutely all contracts made by civilized Indians, . . . whether it does not prohibit them from making contracts of any kind whatever?

Mr. HARLAN. No; not with the amendment now inserted in the section by the Senate.

Mr. COLE. I think it does.

Mr. HARLAN. It would prevent such contracts being made by them unless approved by the Secretary of the Interior in any matter relating to the land or annuities that they hold under or derive from the United States. The phraseology is this: for any service “for said Indians relative to their lands or to any claim against annuities from or treaties with the United States.”

. . . .

Mr. CASSERLY. . . . When I heard my colleague [Mr. Cole] describe this section just now as one which practically deprived the Indians of the power to deal with anybody, even for the purposes of education, or for any other purpose, it seemed to me that if his statement was correct the section was too broad. But upon examination I find that his criticism of the section was not well founded. By its express language the section is limited to such agreements or services as are made or rendered relative to the lands of the Indians or to any claims against the annuities from or treaties with the United States. I suggest to the Senator from Iowa, instead of the word “against,” to insert the words “growing out of or in reference to.”

Mr. HARLAN. I think that would be an improvement.

Mr. CASSERLY. Now, sir, it is very obvious that here is an important limitation upon the section, which is also a proper limitation. Why is the section so limited, a very proper section? Because it is precisely in relation to those three classes of subject that the most of these robberies have been perpetrated upon the Indians under the plea of services rendered by the persons who have had themselves employed by these children of the plains and the forest. Yet they are precisely the classes of cases as to which the guardianship of the United States and its duty to protect them are the most obvious and imperative. Why have we an Indian Commissioner; [1487] why have we Indian Committees in the Houses of Congress; why have we a staff of Indian agents everywhere, except to protect these people, except to see that they get their rights promptly and fully and in the sense of the highest equities in regard to these three subjects: first, their lands; next, their treaties with the United States; and, third, their annuities from the United States. Why should these unfortunate tribes be left to the necessity of employing agents or attorneys in regard to any subject arising under any of those classes of cases?

Then, sir, these services are made illegal unless they are rendered in defiance of a provision which requires the agreement to be in writing, and to receive the approbation of the Secretary of the Interior and the Commissioner of Indian Affairs.

It seems to me that with that limitation the section is right and necessary; that we owe it to these people to protect them in the precise manner proposed by the section. While it is a shame to our civilization that such a section should be necessary, yet such a necessity is a part of the lamentable history of all ages and countries of the dealings of the conquering race with a race like these dwindling tribes. . . .

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Appropriations Act of Mar. 3, 1871, § 3, 16 Stat. 570
(showing amendments by Senate to House bill)

SEC. 3. That hereafter no contract or agreement of any kind shall be made by any person, with any ~~individual or~~ tribe of Indians, or individual Indian not a citizen of the United States, for the payment of any money or other thing of value to him, or any other person, in consideration of services, ~~or pretended services~~, for said Indians relative to their lands, or to any claims ~~against~~ growing out of or in reference to annuities from; or treaties with; the United States, unless such contract or agreement be in writing and approved by the commissioner of Indian affairs and the Secretary of the Interior; and all such ~~pretended~~ contracts or agreements hereafter made, in violation of the provisions of this section, are hereby declared null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such ~~pretended~~ services, in excess of the amount approved by the said commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy, one half of which shall be paid to the person suing for the same, and the other half shall be paid into the treasury of the United States, for the use of the Indian or tribe by or for whom it was so paid; and the person so receiving said money, and his aiders and abettors, shall, in addition to the forfeiture of said sum, be subject to prosecution for misdemeanor in any court of the United States, and on conviction shall be fined not less than ~~\$1000~~ one thousand dollars, and imprisoned not less than six months; and it shall be the duty of all district attorneys of the United States to prosecute such cases when applied to do so, and their failure and refusal shall be ground for their removal from office. And any Indian agent, or other person in the employment of the United States, who shall, in violation of the provisions of this section, advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments as are here prohibited, shall, in addition to the punishment ~~hereby~~ herein imposed on the person making said contract, or receiving said money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same.

Act of May 21, 1872, 17 Stat. 136
(Codified at R.S. § 2103 (1878), 25 U.S.C. § 81 (1994))

An Act regulating the Mode of making private Contracts with Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no contract or agreement of any kind shall be made by any person with any tribe of Indians, or individual Indian or Indians, not a citizen of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him or her, or any other person or persons in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, instalments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be in writing, and executed and approved in the manner hereinafter directed.

SEC. 2. That all contracts or agreements between such parties and for such purposes as named in the first section of this act shall be in writing . . . and approved in writing thereon by the Secretary of the Interior and commissioner of Indian affairs.

. . .

SEC. 3. . . . That all such all such contracts or agreements hereafter made in violation of the provisions of this act are hereby declared null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else for or on his or their behalf, on account of such services, in excess of the amount approved by the said commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, . . .