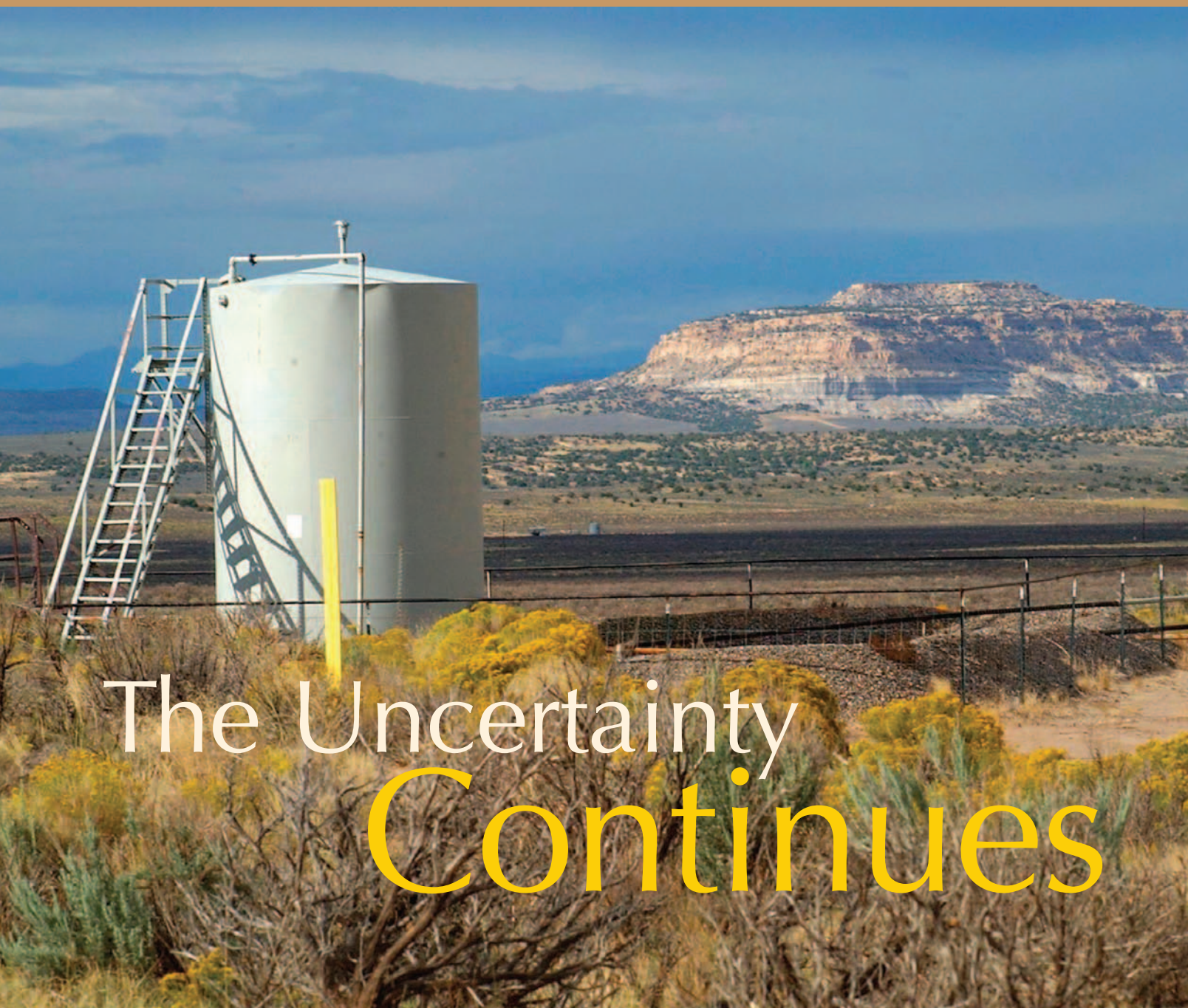
Contracting with Tribes Under 25 U.S.C. § 81

By Mark A. Smith



The Uncertainty Continues

A gas well production unit sits Monday, Aug. 25, 2003, at the base of Dzilna'oodilii, New Mexico, one of the Navajos' most sacred mountains.

AP Photo/The Albuquerque Journal, Richard Pipes

Over the last 20 years, economic development by native American tribes has undergone dramatic changes. Although not all tribes are participating, many tribes are not only developing shopping centers, casinos, golf courses, resorts, hotels, businesses, and schools, but also creating tribal utilities and infrastructure, developing fossil fuel properties, and marketing energy. This increased economic activity is the result of a shift in federal policy from paternalism to self-determinism and a realization by the tribes that their position as sovereigns gives them unique development opportunities. The increasing infusion of capital into tribes, from both gaming and more traditional development, the amount of land, water, and other natural resources available to tribes for development, and the tribes' ability to use self-governance to complement their development goals have created a synergy that has generated an exponential increase in the tribes' role as major economic players.

All of this spells "O-P-P-O-R-T-U-N-I-T-Y"—not just for the tribes, but also for nontribal economic partners and the lawyers who represent them. Dealing with tribes, however, presents challenging legal issues that are not present in non-Indian transactions. These issues stem from a variety of common law doctrines and statutes that are, in turn, rooted in an ever-developing federal Indian policy. One important example of that law and policy is 25 U.S.C. § 81 (2001).

Section 81 requires that certain contracts with Indian tribes be approved by the Secretary of the Interior or the Secretary's designee. The section was adopted in an era of federal Indian policy that was based on paternalism. Intended to protect tribal interests in real property, section 81 has been applied to contracts for rendering services that have some sort of "connection" with the tribal land, though determining the nature and extent of that connection has proven to be controversial. The stakes in making that determination are high because a failure to follow section 81, if it applies to a contract, can result in termination of the contract and disgorgement of payments made under it.

In the context of real property transactions, section 81 issues arose historically in contracts for services related to large turnkey developments on reservations. In such situations, the real property security interest may be a mortgage of a ground lease, because a mortgage may not be taken on the fee-in-trust land. The ground lease mortgage must be approved under federal regulations governing leases of Indian land. 25 C.F.R. part 162. Other contracts, however, that are critical to the project and in which the lender may have a security interest—for instance, management agreements for hotels, casinos, energy facilities, resorts, or any other on-reservation business—may also require section 81 approval.

The most notorious agreements to be determined subject to section 81 and void for want of federal approval have been management agreements to operate casinos or bingo halls located on reservations. Currently, under the Indian Gaming Regulatory Act, gaming management agreements no longer are subject to section 81. 25 U.S.C. § 2711(h) (1988); 25 C.F.R. § 84.0004(i). But, unless subject to approval under another federal law, until recently virtually any other agreement to render services on tribal property could be determined to be subject to section 81 and void if not approved. Ascertaining whether a contract is subject to section 81, then, has always been an important part of due diligence when entering into any real property transaction with a tribe.

More recently section 81 has been viewed as unnecessarily restrictive on a tribe's ability to control its affairs. The language of section 81 also created no small amount of confusion in identifying the contracts to which it applied. To deal with these problems, section 81 was substantially amended in 2000 to loosen restrictions and relieve many transactions of the burden of government approval. The amendments also were intended to remove the uncertainty about the identity of

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Mark A. Smith is a partner in the Albuquerque, New Mexico, office of Rodey, Dickason, Sloan, Akin & Robb, P.A. He was and is lead counsel on the appeal of *GasPlus v. U.S. Dep't of the Interior.*

contracts that are subject to the statute's requirements. Heralded as a shift away from paternalism to self-determinism, the revisions to section 81 may have caused practitioners to believe that many transactions now will be free from the requirement of governmental approval. That belief, however, may be premature, given a recent interpretation of the amended section 81 by the Bureau of Indian Affairs (BIA). To understand why this is so, it is necessary to understand both pre- and post-amendment section 81.

The Federal Trust Responsibility

The starting place for understanding many issues relating to Indian law, including section 81, is an acquaintance with the federal government's trust responsibility to Indian tribes. Important as the trust responsibility is, however, neither its origin nor its scope is perfectly clear. The trust relationship first was characterized by the U.S. Supreme Court as that of "ward" to "guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The Court provided no authority for this proposition and did not specifically identify

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the source of the duty that it was recognizing in the federal government. In a later case, the Court indicated that the duty of guardianship arose from treaties and that it was in the nature of a moral obligation to protect those whom the federal government had weakened. *United States v. Kagama*, 118 U.S. 375, 384 (1886). By the late 20th century, the Court indicated that the trust relationship arose from the government's control over Indian assets. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

Whatever the genesis of the federal trust responsibility, it carries with it a fiduciary obligation. "[The federal government's] conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). It is this trust relationship that gives rise to, among other things, section 81. "[Section 81] 'has its origin in the longstanding trust relationship between the federal government and Indian tribes.'" *Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 552 (1st Cir. 1997) (quoting *Narragansett Indian Tribe v. RIBO, Inc.*, 686 F. Supp. 48, 50 (D.R.I. 1988)).

Federal Policy Changes: Out with the Old Law, In with the New

Section 81 was adopted in 1871, particularly because of "claims agents and attorneys working on contingency fees who routinely swindled Indians out of their land, accepting it as payment for prosecuting dubious claims against the federal government." *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971, 976 (8th Cir. 2001). Section 81 erected procedures to ensure that the federal government could protect tribes from entering into contracts with connivers. From 1871 to 2000, section 81 stayed largely the same, except for the deletion in 1958 of a requirement that certain contracts with tribes be executed before a judge who would certify certain matters.

Before the 2000 amendment, the statute (old section 81) provided that a contract with an Indian tribe for services "relative to" Indian land would be "null and void," unless approved by the Secretary. Old section 81 also provided that, if a contract that was subject to the statute had not received the necessary approval, anyone could initiate a qui tam action seeking disgorgement of the money paid by the tribe under the contract. The recovery was to be split half to the plaintiff and half to the United States for use by the offended tribe.

There are at least two notable features to old section 81. One is that the term "relative to" is vague.

> The problem . . . is that the term "relative" is itself relative. The phrase . . . could be construed so narrowly as to apply only to contracts transferring title to parcels of land. Conversely, it might be read so broadly as to require federal approval of every contract for services signed or negotiated on or even near Indian land.

Turn Key Gaming, 260 F.3d at 975. Another notable feature of the old statute is that the remedy of disgorgement is very severe.

The vagueness, severity, and qui tam provision of old section 81 yielded several unhappy results. First, it was difficult to predict whether a court would determine that the statute applied to a particular contract. S. Rep. No. 106–150, at 5 (1999). Second, given the breadth of possible interpretations of "relative to," old section 81 received expansive interpretation by some courts, which brought into the section 81 net commercial transactions that many believed should not be there. See, e.g., id. at 9; *United States ex rel. Gulbronson v. D & J Enters.*, No. 93-C-233-C, 1993 WL 767689, at *6 (W.D. Wis. Dec. 23, 1993) ("The legislation was not intended to require the government to oversee every transaction involving services that might cause a non-Indian merely to touch tribal lands when there was no accompanying danger of the tribe's losing legal or de facto control over the land."). Third, by encouraging lawsuits by strangers to tribal transactions, the qui tam provision fostered the disruption of tribal business; if a lawsuit were filed, the parties would not know the fate of their contract until the completion of the litigation. S. Rep. No. 106–150, at 7. Fourth, some feared that the problems inherent in section 81 discouraged businesses from entering into transactions with tribes altogether. Id. at 7.

In 2000, Congress amended section

81 (new section 81). The amendment was in the nature of a complete replacement of old section 81 and was intended to address some of the problems created by old section 81. New section 81 provides that the requirement of secretarial approval (and other more technical requirements of the statute) apply only to contracts that "encumber" Indian land, as opposed to contracts that are "relative to" Indian land. The change from "relative to" to "encumber" was intended to remove the ambiguity inherent in old section 81 and to clarify that the statute was not meant to have the broad application that it had been given by some courts. The Senate report explaining new section 81 states that the amended statute is intended to apply to a "limited number of transactions" and that it "will no longer apply to a broad range of commercial transactions." Id. at 9. To further clarify, the Department of the Interior issued regulations that contain a definition of "encumber." 25 C.F.R. § 84.002. To foster yet more objectivity in determining whether section 81 applies to a contract, Congress also provided that only contracts with terms of seven years or more will be subject to new section 81. 25 U.S.C. § 81(b) (2001).

In addition to clarifying and narrowing the scope of section 81, Congress attempted to provide a more stable environment in which to contract with tribes. First, new section 81 does not have a qui tam provision. Strangers to a transaction no longer can interfere with it by filing a lawsuit to claim half of a recovery. S. Rep. No. 106–150, at 7, 9. Second, subsection (c) of new section 81 provides that subsection (b), which is the subsection that sets forth the requirement of secretarial approval, "shall not apply to any agreement or contract that the Secretary . . . determines is not covered under that subsection." This attempt to make conclusive the Secretary's determination that a contract is not subject to new section 81 was intended to address the problem with old section 81 of parties' uncertainty whether the statute applied to their contracts unless and until the issue had been fully litigated. Id. at 5. Third, new section 81 eliminated the disgorgement provision of old section 81. That provision had been criticized as "draconian," out of proportion, and one that discouraged contracting with tribes. Id. at 7.

The substitution of new section 81 for old section 81 reflects a change in federal Indian policy. Old section 81 was adopted at a time when Congress believed that tribes were incapable of protecting themselves in their economic affairs. Id. at 2. The paternalism of old, however, no longer provides the background on which Indian policy is drawn. Instead, federal Indian policy is a function of self-determinism and the promotion of economic development, and new section 81 is an outgrowth of that policy. "Indian tribes, their corporate partners, courts, and the Bureau of Indian Affairs . . . have struggled for decades with how to apply Section 81 in an era that emphasizes tribal self-determination, autonomy, and reservation economic development." Id. New section 81 was intended to help put an end to that struggle.

Interpreting New Section 81

Contracting "with a Tribe"

One factor that is constant in both old section 81 and new section 81 is that, for the statute to apply, the contract must be with an Indian tribe. Whether a contract is "with a tribe" is a fact-based inquiry, the outcome of which will depend not only on the formal identity of the parties to the contract, but also their relationship to each other and the terms of the contract. Not infrequently, for instance, contracts arising from tribal economic development are with entities that are owned or controlled by the tribe. These entities may be internal divisions or departments of a tribe, a corporation chartered under tribal law, a corporation formed under 25 U.S.C. § 477 (2001), or an entity formed under state law, with the tribe as the sole shareholder.

The form of the tribal entity may make a difference in whether the contract is determined to be "with an Indian tribe." A contract that is with a division of a tribe, for instance, almost certainly will be "with an Indian tribe" for the purposes of section 81. In *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987), the contracting party was a "non-profit instrumentality" of the tribe that had no shareholders and did not hold itself out as an entity separate from the tribe. The court found that the contract was "with an Indian tribe."

In *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498 (9th Cir. 1981), however, the contract was with a corporation formed under Arizona law. Even though the corporation was wholly owned by the tribe, and its board of directors was made up entirely of council members, the court held that the contract was not "with an Indian tribe" for the purposes of section 81.

The paternalism of old no longer provides the background on which Indian policy is drawn.

Multiple party contracts, in which the contract not only is with a tribal entity but also with the tribe, present a peculiar challenge to determining whether a contract is subject to section 81. In such cases, courts do not appear to be inclined to rely on the formality of the tribe being a signatory and party to the contract but, instead, look to the terms of the contract to determine the extent of the tribe's obligations and role in the transaction. In *Inecon*, in addition to the tribal corporation, the tribe executed the contract solely for the purpose of undertaking the obligation "not to interfere" in the performance of the contract. The court found that the tribe's limited role under the contract did not make the contract "with an Indian tribe" for section 81 purposes,

even though the tribe was a signatory and a party. On the other hand, in *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 810 (7th Cir. 1993), another case in which the tribe was an additional signatory to the contract, the court found that the contract was with a tribe, opining that the tribe's role was not limited sufficiently to warrant a finding similar to that in *Inecon.* The *Altheimer* court also took note that the parties to the transaction "seemingly considered the Tribe and [its corporation] to be interchangeable." Id. at 808.

"Encumbering" Indian Land

Practitioners do not yet have the benefit of a recorded judicial decision regarding the interpretation of "encumber" under new section 81. The BIA, however, has made at least one decision regarding the application of new section 81 to a contract. This decision, which is making its way through the appellate process, is likely to make an appreciable difference in the way practitioners and BIA approach new section 81.

At issue in *GasPlus v. U.S. Dep't of the Interior, Bureau of Indian Affairs,* No. 1:03CV01902 (D.D.C. filed Sept. 10, 2003), is the BIA's determination that a contract for the management of an on-reservation gas distribution business was subject to new section 81. The contract had been performed for approximately one year and had not been approved by the Secretary. The director of the BIA's southwest regional office declared that the contract "encumbered" Indian land, had not been approved, and was never valid. Decision Letter from Arch H. Wells, Regional Director BIA (Feb. 7, 2002) (on file with author) (hereinafter "Decision Letter"). The regional director also demanded that GasPlus return to the tribe all money paid to GasPlus under the contract. The decision was appealed to the Interior Board of Indian Appeals ("Board"). The Secretary, under 25 C.F.R. § 2.20(c)(1) and 43 C.F.R. § 4.332(b), removed the appeal from the board and decided the administrative appeal. Decision on Appeal by GasPlus from Feb. 7, 2002, Decision of the Southwest Regional Director BIA (June 2003) (on file with author) (hereinafter "Secretary's Decision"). Her decision affirmed the regional director in all respects and GasPlus appealed to the District Court for the District of Columbia, where the case is pending.

Despite what one might expect based on the history of section 81 and its amendment, the Secretary's decision does not reflect a radical departure from the old section 81 approach, and it signals that new section 81, at least as currently interpreted by the Secretary, may not have the clarifying aspect that many had hoped. To determine whether the GasPlus agreement "encumbered" Indian land, the Secretary employed a business-control test similar to the test that was used by courts in their analysis of whether a contract was "relative to" Indian land under old section 81. Moreover, the

Secretary signaled that she believes that disgorgement remains a remedy for a violation of new section 81.

The Business Control Test Under Old Section 81

Although courts looked at several factors under old section 81 to determine whether a contract was "relative" to Indian land, one principal factor was whether the contract gave the non-Indian contracting party exclusive control over a tribal business. In *Altheimer,* 983 F.2d at 810, for instance, the court decided that the contract was not "relative to" Indian land, in significant part, because the non-Indian contracting party (MST) did not have exclusive control over the business that was being managed. In making that decision, the *Altheimer* court analyzed the contract to determine the amount of control that MST had over the tribe's business. Although the court observed that MST was "heavily involved" in the venture on tribal property, the court also pointed out that MST "did not have unilateral power to set wages and salaries or operation and administration costs." Id. at 811. Based on the tribe's ability to participate in setting salaries and costs, the court concluded: "While it may be an understatement to characterize MST solely as a consultant, it would be an overstatement to say MST had exclusive control over the . . . facility." Id. at 811–12. Thus, the Seventh Circuit reversed the lower court's ruling that the contract was subject to old section 81.

The Business Control Test Under New Section 81

The analysis that the Secretary employed in *GasPlus* to determine whether the contract "encumbered" Indian land strongly resembles the old section 81 analysis that courts had used to determine whether a contract was "relative to" Indian land. Indeed, the Secretary concluded that the contract was subject to new section 81 because, in her view, GasPlus had nearly exclusive control over a tribal business.

The Secretary began her analysis by reviewing the definition of "encumber" at 25 C.F.R. § 84.002:

> *Encumber* means to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.

She opined that the operative part of the definition of "encumber" is not the first sentence, which provides that an encumbrance is a claim that "attach[es] . . . to real property." Rather, the Secretary opined that the operative

part of the definition is its second sentence, which provides that agreements may encumber tribal land if "by their terms [they] could give to a third party nearly exclusive proprietary control over tribal land." The Secretary equated "nearly exclusive proprietary control over tribal land" with nearly exclusive control over *current use* of the land and equated "nearly exclusive control over current use of the land" with nearly exclusive control over the business that is being operated on tribal land. Thus, according to the Secretary, "to encumber" is "to have nearly exclusive control over a business that is being operated on tribal land." Secretary's Decision, supra, at 9–11, 15.

To determine the extent of GasPlus's control over the business, the Secretary reviewed the terms of the GasPlus contract and determined:

> Under the terms of the Agreement, the Pueblo cedes all day-to-day operations and control over its facility to Gasplus. While this level of proprietary control may not be "exclusive" since Gasplus still has reporting obligations to the Pueblo and spending limits, it is so pervasive as to be "nearly exclusive" within the meaning of the regulations and the legislative history of Section 81. The Agreement therefore "encumbers" the land within the meaning of Section 81 and the regulations.

Id. at 15.

The Secretary's interpretation of "encumber" in new section 81 hinges on the amount of control that the non-Indian has over a tribal business, which was a principal test for interpreting "relative to" under old section 81. It is not clear, then, how the Secretary's interpretation squares with the intent of Congress to depart from old section 81 and narrow the application of new section 81. In fact, the Secretary's interpretation in *GasPlus* can be read to cast new section 81's net even wider than that of old section 81. Under old section 81, according to *Altheimer,* for a contract to be "relative to" Indian land, it had to grant to the non-Indian exclusive control over the tribal business. The fact that the tribe had input into setting wages, salaries, and costs prevented the *Altheimer* court from finding that the non-Indian had *exclusive* control over the business and therefore prevented the Court from finding that the agreement was subject to old section 81. Under the Secretary's reading of the regulation for new section 81, however, for a contract to "encumber" Indian land, it needs merely to grant to the non-Indian *nearly exclusive* control over the tribal business.

Disgorgement

Old section 81 provided that, if a contract was executed in violation of the statute, "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 [services related to Indian land], in excess of the amount approved by the commissioner and Secretary for such services, may be recovered." If no amount of money was approved by the commissioner or the Secretary, a literal reading of the statute allowed recovery not only of profit from the transaction, but also of all money paid under a contract, including the non-Indian contracting party's cost of performance. Thus, not only might a service provider lose its expectancy of making money under a contract, it also could lose all the money that it invested in the enterprise.

Persons contracting with tribes still must struggle with determining whether the contract gives the non-Indian the requisite business control for the BIA to determine it "nearly exclusive."

New section 81 is silent about any sort of remedy for execution or performance of a contract in violation of the statute's requirements. The elimination of the disgorgement provision appears to have resulted from Congress's concern that the severity of the penalty generated overcautious behavior by those who contract with, or who might contract with, tribes. This overcautious behavior manifested itself in submitting contracts to BIA for approval, even if the contract could not arguably fall within the purview of the statute. Such approvals were known as accommodation approvals. In the other extreme, some entities may have simply declined to do business with tribes. The Senate report related to new section 81, for instance, criticized old section 81 as "draconian," and expressed concern that the "distasteful" remedy might do "more harm than good." S. Rep. No. 106–150, at 7–9.

Even so, the regional director in *GasPlus* wrote, "Gasplus must return all proceeds of the gas distribution business generated under this agreement." On appeal, the Secretary, without further comment, opined that "Gasplus must therefore take all of the actions ordered in the Regional Director's decision, including, but not limited to . . . returning all proceeds and management fees. . . ." The BIA, therefore, appears to have taken the position that disgorgement of all money paid under a contract executed in violation of section 81 remains an appropriate remedy even though Congress eliminated the remedy in 2000.

While the case was being argued in the district court, the Department of the Interior asked the court to remand the case for reconsideration of the remedy. On remand, the Associate Deputy Secretary of the Interior concluded that the BIA had no authority under section 81 to order a remedy on its own accord. *Decision on Remand—GasPlus v. U.S. Dep't of the Interior,* Civ. Act. No. 03-1902 (RMC) (Nov. 21, 2005). Therefore, the associate deputy secre-

tary stated that the language in the BIA's prior decisions should be read as a "demand letter," which would put GasPlus on notice that the agency could ask the Department of Justice to prosecute on the agency's behalf. The associate deputy secretary declined to address the specific issue of whether disgorgement is an appropriate remedy under new section 81, suggesting that issue should be decided in an enforcement action rather than in the current proceedings regarding the validity of the contract.

So Now What?

Given the similarity of the BIA's approaches to new section 81 and old section 81, practitioners and contracting parties have not gained the clarity or certainty intended by Congress in adopting the new statute. Persons contracting with tribes still must struggle with determining whether the contract gives the non-Indian the requisite business control for the BIA to determine it "nearly exclusive." That determination can be for high stakes, because the Secretary has signaled that disgorgement remains an appropriate remedy for violation of the statute. Exacerbating the problem, BIA has indicated that it no longer will give "accommodation" approvals.

One still may submit a contract for approval and obtain the BIA's determination on whether it is subject to the statute. If the BIA determines that the contract is subject to new section 81, it may approve or disapprove the contract. If the BIA determines that the contract is not subject to the statute, according to subsection (c) of new section 81, that determination is conclusive on whether secretarial approval is required.

Problems remain, however, with the willy-nilly submission of contracts to the BIA. First, it is of questionable prudence to unnecessarily invite a governmental agency into what would otherwise be a private transaction. This is especially true given that the BIA's expansive interpretation of "encumber" increases the odds that it will accept the invitation. Moreover, although the extent of the BIA's fiduciary duty to a tribe may not yet have been fully circumscribed, it is clear that the agency has a duty to a tribe that it does not have to the non-Indian contracting party. From the non-Indian contracting party's perspective, unnecessarily submitting a contract to the BIA for approval is involving another entity in the business relationship that not only has a duty to the other side, but that also has the weight and resources of the federal government behind it.

Second, there is no case, yet, that addresses the issue of whether subsection (c) of new section 81 violates the separation of powers by purporting to remove from the courts the ability to

construe the statute on whether it applies to a particular contract. Thus, a party to a tribal contract cannot be sure that the other party, having become dissatisfied with a contract that was submitted to the Secretary and determined not to be subject to new section 81, will be estopped from insisting that a court, rather than the Secretary, interpret the statute on whether the contract "encumbers" tribal land.

The one objective standard that a practitioner and his client may use to determine whether section 81 applies to a contract is whether the contract is for a term of seven years or more. If the contract is for a term that is less than seven years, new section 81 does not apply. It is important to note, however, that BIA has taken the position that renewal options may be tacked onto the original term of a contract to determine whether the contract is for a period of seven years or more. A four-year contract with an option to renew for another four years may meet the seven-year requirement.

Conclusion

Congressional efforts notwithstanding, new section 81 thus far has added neither clarity nor security to transactions in Indian country. To the contrary, persons familiar with the issues under old section 81 might be inclined to rely on the language and legislative history of new section 81 in forming the opinion that section 81 "will no longer apply to a broad range of commercial transactions." S. Rep. No. 106–150, at 7–9. Given the BIA's interpretation of new section 81 in *GasPlus,* that reliance might be misplaced, and new section 81 may function in much the same way as old section 81. Indeed, the innocuous appearance of new section 81 may make it a more treacherous pitfall than old section 81.

For now, the only way to ensure that a contract for services is not subject to new section 81 is to make it for a term of less than seven years, with no renewal options. If this fail-safe way of avoiding new section 81 requirements will not work for a specific transaction, the practitioner is faced with the dilemma of risking unnecessary government intervention in a private business transaction or risking a post-performance declaration that the contract is subject to section 81.

Whether BIA's current interpretation of new section 81 will survive or whether it will be required to adopt a new interpretation of the statute is not likely to be determined until several cases have made their way through lengthy administrative and judicial appellate processes. Practitioners may, however, get their cue from the district court's decision in *GasPlus* and are well-advised to keep an eye out for the court's opinion. ■