

**STATEMENT OF MICHAEL J. ANDERSON
DEPUTY ASSISTANT SECRETARY - INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
HEARING ON
S. 613, A BILL TO ENCOURAGE INDIAN ECONOMIC DEVELOPMENT
TO PROVIDE FOR THE DISCLOSURE OF INDIAN TRIBAL
SOVEREIGN IMMUNITY IN CONTRACTS INVOLVING INDIANS**

May 19, 1999

Mr. Chairman and members of the Committee, I am pleased to be here today to present the views of the Department of the Interior on S. 613, a bill providing for amendments to Section 2108 of the Revised Statutes (25 U.S.C. § 81).

We commend the Committee for its interest and efforts in reforming the deficiencies of Section 81. As you are aware, Section 81 provides for Secretarial approval of certain contracts by and between Indian tribes and third parties. Due to the many uncertainties that attend compliance with Section 81, we oppose S. 613 which would amend the section. Instead, we are prepared today to advocate for the repeal of the statute. In the event Congress chooses to amend Section 81 rather than repeal the provision, we would encourage the Committee to amend the statute in a different manner than the one proposed in S. 613.

I would like to take a few minutes to review the history of Section 81 and provide some information on the complications inherent in enforcing it. This particular law is one of a series of statutes designated as 25 U.S.C. §§ 81- 88, found under the statutory heading, "Subchapter II -- Contracts with Indians." Included in this subchapter are some laws which are almost certainly obsolete, due to

their express relation to contracts in effect in 1936, i.e., §§ 81a and 81b. Other laws relate only to contracts involving money or property of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes or their members, i.e., §§ 82a and 86. What remains, §§ 82, 84, 85, and 88, should generally be considered in connection with Section 81 .

It is probably safe to say that of all the individuals conducting business in Indian Country today, no one is entirely comfortable in attempting to comply with 25 U.S.C. § 81. It is extremely difficult even to determine when this law applies. Even when it does apply to a particular agreement, it isn't clear what criteria the Department should look at in determining whether to approve or disapprove the agreement. For example, it is unclear whether we should review the agreement to determine whether it is not unfair to the tribe or whether it is in the best interest of the tribe. The latter requires the Department to question the tribe's business judgment. We do not believe that it is appropriate for the BIA to be second guessing the decisions of tribes and their consultants over business decisions made by the tribes.

In essence, Section 81 requires that all contracts involving payments by tribes for services relative to their lands must be approved by the Secretary of the Interior. Any contract that is subject to the provisions of Section 81 and is not approved by the Secretary is null and void. The primary purpose of Section 81 was to ensure that tribes were not being taken advantage of by attorneys filing claims on behalf of the tribes against the United States for the taking of tribal lands. For decades, the BIA applied Section 81 solely to the approval of attorney contracts with tribes. However, in the early 1980's with the advent of gaming on Indian lands, the scope of Section 81 began to change.

Many non-Indian gaming operators signed management agreements with tribes to operate gaming enterprises on tribal lands. Disputes arose between some of the tribes and their gaming operators. Ultimately, in litigation over the management contracts, the theory that the contracts were void because they had not been approved pursuant to Section 81 was asserted. The Department's Office of the Solicitor issued an opinion that Section 81 applied only to the approval of attorney contracts and, therefore, the gaming management contracts did not require approval by the Secretary. The Seventh Circuit Court of Appeals in Wisconsin Winnebago Business Comm. v. Koberstein, 762 F.2d 613 (1985) disagreed. It found that the management agreement at issue in that case involved a payment by the Winnebago Tribe for the manager's services and gave the gaming manager the absolute right to use tribal land during the term of the management agreement. The court found that this right to exclusive use was "relative to tribal lands," that the contract was subject to Section 81, and since it had not been approved by the Secretary (even though the Secretary had, in fact, said the contract needed no approval), that the contract was void. At least one other circuit has followed the Seventh Circuit Court's lead. See A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F. 2d 785 (9th Cir. 1986); Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987). The result has been that virtually everyone wishing to conduct business with an Indian tribe now demands a Section 81 approval of their contracts because of the uncertainty of the precise meaning of "relative to tribal lands."

Contracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies are now routinely presented to the BIA for review and approval. Even though many of these contracts are clearly not subject to Section 81,

assurances by the Department are of little value since the Department's earlier opinion has been rejected in the Koberstein case and the consequences for not having an approved contract are extreme. If a contract is subject to Section 81 and is not approved by the Secretary, any citizen can bring a suit challenging the contract (this citizen suit provision of Section 81 has in recent years been somewhat limited by the courts) and if the contractor loses, all monies paid by the tribe to the contractor are refunded to the tribe while all benefits (i.e., vehicles, buildings etc.) of the contracts to the tribe are forfeited by the contractor. In addition, there are criminal penalties for violation of Section 81 in Title 18 of the United States Code.

Although there may have been good reason for such legislation in the 1870's, most of those reasons no longer exist today. Tribes are encouraged through the contracting and compacting provisions of Public Law 93-638 to make decisions and decide their political and economic futures for themselves. Public Law 93-638, in fact, has an express provision waiving the applicability of Section 81 in certain circumstances. See 25 U.S.C. §§ 4501(b)(15) and 458cc (h)(2). However, because the Bureau's twelve Area Offices and the Solicitor's Regional and Field Offices apply Section 81 differently as a result of the uncertainty over the precise scope of Section 81 caused by decisions of various courts of appeals, these provisions have had little effect.

S.613 proposes to remedy many of the deficiencies of Section 81 noted here today. In our opinion, however, the best remedy would be to repeal the statute. In the alternative, we would suggest amending the statute in a manner which clarifies the type of transactions for which Section 81 approval is required. For example, the statute should be amended to clarify that contracts for matters such as the sale of vehicles or office supplies to tribes or routine maintenance contracts, would no

longer require BIA approval.

One of our primary concerns with S. 613 lies with the bill's failure to define the meaning of the phrase "services related to their lands" found in the current language of Section 81. Should Section 81 not be repealed, a definition explaining this phrase would eliminate many of the problems encountered in interpreting the statute as it exists today. Indeed, simply defining this phrase would eliminate the need for most of the revisions to Section 81 proposed in S. 613.

We find the proposed time lines found in S. 613 objectionable because they do not allow sufficient time to permit consultation between Tribes and the Department in order to facilitate contracts that are more protective of tribal interests. These time lines would work to allow otherwise illegal contracts that are not in the best interest of a particular tribe to be ratified simply because the review process extended beyond the time limitations set forth within this bill. We also note that approval of an agreement under Section 81 may require compliance with cross-cutting federal statutes. The possible need for such compliance also argues against approval occurring within the time lines set forth in the bill.

Another of the Department's major concerns with the proposed bill stems from the sovereign immunity provisions of S. 613. There is, in our opinion, an ample amount of case law that adequately addresses the subject of tribal sovereign immunity. The law, as it has developed and as it exists today, serves as more than adequate notice for anyone contemplating conducting business with an Indian tribe that tribes enjoy sovereign immunity from suit in the absence of a clear and unequivocal waiver of immunity. Those seeking to do business with Indian tribes have the opportunity to protect their

own interests through the negotiation of waivers of immunity. Surely, in the spirit of self-determination, Indian tribes should not be forced by the United States to negotiate the waiver of their sovereign immunity with those with whom they would conduct business. Simply put, the government should not dictate the waiver of tribal sovereign immunity as a condition of a tribe's right to enter into a contract. The Department also objects to the provision requiring the Secretary to protect non-Indians by ensuring that they have remedies against a tribe. This provision would not only place the Secretary in a conflict of interest, but would also force the Bureau to play an essential role in every contract negotiation in which a tribe is involved.

This concludes my prepared statement on S. 613. I will be happy to answer any questions you may have.