Brian K. Nichols Of Counsel

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OVERVIEW

Brian Nichols' practice is primarily in federal Indian law and litigation, including tribal courts, with focuses on energy, natural resources, transportation and employment.

His experience includes:

- Lead counsel in trials in federal, state, and tribal courts.
- Lead negotiator in labor negotiations.
- Advising and negotiating for clients with tribal nations.
- Consulting with clients doing or considering business on or with tribal nations.

Brian has advised clients including BHP Billiton, Union Pacific Railroad, BNSF Railway Company, Peabody Energy, Western Refining and Giant Four Corners, City of Farmington, Encana, WPX Energy, Continental Resources, and Saddle Butte Pipeline, along with many smaller companies having Indian law issues.

As a member of the Navajo Nation Bar, Brian regularly advises clients regarding Navajo law and represents clients in Navajo courts and agencies.

Brian has achieved nationwide recognition in Native American Law from *Chambers USA*. As reported by *Chambers,* "Brian Nichols handles all aspects of federal Native American law and litigation, including energy work, natural resources, transportation and employment issues. *Best Lawyers in America®* has recognized Brian since 2014, and named him the 2018 Native American Law "Lawyer of the Year" in Albuquerque. Brian regularly appears in state, federal and tribal courts. Interviewees find him to be '*impressive,'* explaining that he is '*a lawyer's lawyer. He is almost academic in his knowledge.'"* Additionally, Brian has received an AV® peer review rating in *Martindale-Hubbell*, the highest rating possible, and listed by *Southwest Super Lawyers®*. He is recognized as a Star by *Benchmark Litigation, Labor & Employment.*

Before joining Modrall Sperling, Brian clerked for the Honorable Pamela B. Minzner of the New Mexico Supreme Court and the Honorable Fredrick J. Martone of the U. S. District Court for the District of Arizona. He serves as Co-Chair of the Native American Law practice group and is a former member of the firm's Executive Committee.

Education

Georgia State University, J.D., 2003, *summa cum laude.* Editorial Board, Georgia State University Law Review

Earlham College, B.A. in Economics, 1993, College and Departmental Honors, *Phi Beta Kappa*, Charles Stinneford Award for Excellence in

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Economics

Bar Admissions

New Mexico
U.S. District Court for the District of New Mexico
U.S. Court of Appeals for the Tenth Circuit
Arizona
The Navajo Nation

EXPERIENCE

Indian Law, Energy & Transportation

- Advises Union Pacific Railroad and other clients in several matters related to tribal nations.
- Team member drafting amicus brief in the United States Supreme Court for the Association of American Railroads in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, No. 13-1496: http://www.scotusblog.com/wp-content/uploads/2015/09/amicus_railroads.pdf
- Lead counsel in trial before the Navajo Nation Labor Commission, *Nez v. BHP Billiton*, NNLC 2015-016, 2015-2016. Decision forthcoming.
- Lead counsel in appeal to Navajo Supreme Court, *Morris v. Giant Four Corners*, Inc., No. SC-CV-13-15. 2014 to present. Decision forthcoming.
- Defended transportation, gas industry and coal industry clients against personal injury and premise liability claims in tribal courts.
- Represents businesses in the courts and agencies of the Navajo Nation. Common matters include employment (the Navajo Preference in Employment Act, NPEA); property (such as the Navajo Nation Civil Trespass Act); vendor preferences and procurement (the Navajo Business Opportunity Act, NBOA); and worker health and safety (such as the Navajo Occupational Safety and Health Act, NOSHA).
- Assists businesses doing or considering commerce with the Navajo Nation and other tribal nations.

General Litigation & Experience

- Lead counsel in federal court bench trial, *Garcia v. City of Farmington*, No. 12-cv-00383. Trial in 2016, decision forthcoming.
- Lead negotiator in labor negotiations for BHP Billiton subsidiaries in New Mexico, 2011 to 2013.
- Participated in the defense of Psilos and Ares Management in consolidated Fraud Against Taxpayers Act claims, *New Mexico ex rel. Foy v. Vanderbilt*, Nos. D-101-CV-2008-01895 & D-101-CV-2009-01189; including an interlocutory appeal resulting in the New Mexico Supreme Court's ruling on retroactivity in *Foy v. Austin Capital Management*, 2015-NMSC-025, 355 P.3d 1.
- Participated in the defense of SunCal affiliated entities and Westland Development Co., Inc. in eight lawsuits related to a corporate merger. The claims included: insider trading (10b-5 claims), proxy misrepresentation (14a claims), breach of fiduciary duty, appraisal under the dissenting shareholder statute and the registration of shares under Article VIII of the Uniform Commercial Code. *Lane v. Page*, 581 F. Supp. 2d 1094 (D. N.M. 2008); *Lane v. Page*, 649 F. Supp.2d 1256 (D. N.M. 2009); *Wilde v. Westland Development Co., Inc.*, 2010-NMCA-085, 148 N.M. 627, 241 P.3d 628; *Rael v. Page*, 2009-NMCA-123, 147 N.M. 306, 222 P.3d 678;

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- Defended several lawsuits involving fatal and other serious accidents. Clients include BNSF Railway Company, Amtrak, TA Operating, LLC (Petro Shopping Center) and BHP Billiton.

Published Decisions & Representative Cases

- In a 2013 unpublished decision of the Navajo Supreme Court, *Jones v. BHP Billiton*, No. SC-CV-07-11, the Court affirmed the decision of the Navajo Labor Commission. The Commission found that BHP Navajo Coal Company had just cause to fire an employee who had undisclosed conflicts of interest. The employee, a Navajo medicine man, contended that his termination was religious discrimination. By contrast, both the Commission and the Supreme Court found that the mine accepted and promoted Navajo culture, and valued the employee's expertise in that area.
- The Navajo Supreme Court reiterated its test for jurisdiction, holding that the Nation may have jurisdiction over a party which no longer has contacts with the Nation. The Court also held that its District Court should determine aspects of the case which, by contract, were to be determined by a Texas court, due to the Nation's interests in real property. *Neptune Leasing, Inc. v. Mountain States Petroleum Corp., et al.*, No. SC-CV-24-10 (Nav. Sup Ct. May 13, 2013).
- The Navajo Supreme Court determined that the Nation's tribal courts must determine jurisdiction over non-Indians at the outset of a case. The court must make factual findings to determine whether it has jurisdiction under both Navajo Law and Federal Law. *Doe BF vs. Diocese of Gallup*, No. SC-CV-06-10 (Nav. Sup. Ct. Sept. 9, 2011).
- Defended Albuquerque Public Schools in a civil rights claim related to special education. The Court of Appeals determined that educators did not violate a student's constitutional rights by placing him in a "time-out room" in response to his dangerous, disruptive behavior. *See Couture v. Albuquerque Public Schools*, 535 F.3d 1243 (10th Cir. 2008).
- Represented Westland Development Co., Inc. and SunCal affiliated entities in federal securities law claims. In two orders, the District Court dismissed in part a proxy claim (14a claim). Previously, the Court denied injunctive relief to the Plaintiff, effectively allowing a corporate merger. *See Lane v. Page*, 581 F. Supp. 2d 1094 (D. N.M. 2008) & 649 F. Supp.2d 1256 (D. N.M. 2009).
- Represented Westland Development Co., Inc. in litigation related to a proposed merger. The District Court had dismissed the plaintiff's claims, holding in part that the appraisal claim created by the dissenting shareholder statute was her exclusive remedy. The Court of Appeals reversed. *See Rael v. Page*, 147 N.M. 306, 222 P.3d 678.
- Represented Bank of New York/Mellon and Westland Development Co., Inc. against claims of fraud and breach of fiduciary duty. In a dispute regarding ownership of Westland's shares, the Court of Appeals affirmed dismissal in part because the claims were time barred, and in part because Westland complied with Article VIII of the Uniform Commercial Code regarding securities. *See Saavedra Wilde v. Westland Development Co., Inc.*, 148 N.M. 627, 241 P.3d 628.

ACTIVITIES

- Navajo Bar Association, Rules Committee
- Planned Parenthood of the Rocky Mountains, Board of Directors
- Pro Bono Legal Representation for members of the Navajo Nation
- Modrall Sperling Executive Committee, 2014-2017

DISCOURSE

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Presentations

- The Robert's Court Indian Law Jurisprudence: The First Ten Years (Panel Member), *2016 Indian Law Conference*, sponsored by the Federal Bar Association, April 7, 2016, Scottsdale, Arizona
- Native American/Developer Partnering, Sustainable Mineral and Energy Development in In Indian Country (Panel Member), *Utah Spring Bar Convention*, sponsored by the Utah State Bar Association, March 12, 2016, St. George, Utah
- Tribal Employment Preference Laws, *Tribal Employment Rights & Law*, sponsored by Law Seminars International, Washington State Convention Center, Seattle, Washington, July 14, 2014, Brian K. Nichols
- Indian Tribes & Discrimination Issues, *Tribal Employment Rights & Law*, sponsored by Law Seminars International, Prior Lake, Minnesota, April 28–29, 2014, Brian K. Nichols and Paul W. Spruhan, Assistant Attorney General, Navajo Nation Department of Justice
- Indian Tribes & Discrimination Issues, *Tribal Employment Rights & Law*, sponsored by Law Seminars International, Cabazon, California, October 28-29, 2013, Brian K. Nichols, Keith C. Smith, Smith, Shellenberger & Salazar, LLC, Westminster, CO and Paul W. Spruhan, Assistant Attorney General, Navajo Nation Dept. of Justice, Window Rock, AZ
- Tribal Employment Preferences and Employee Protection Laws, *Special Institute on "National Resources Development on Indian Lands*, The Rocky Mountain Mineral Law Foundation, Albuquerque, NM, Paper 13A, March 4, 2011, Brian K. Nichols

HONORS

- *Chambers USA Directories of America's Leading Lawyers for Business*, recognized in Native American Law, 2015-present
- *Best Lawyers* Native American Law "Lawyer of the Year" in Albuquerque, 2018
- *Best Lawyers in America*® in Native American Law, 2014-present
- *Martindale-Hubbell* AV® Preeminent, Peer Review Rated
- *Southwest Super Lawyers*® (derived from a lawyer survey), 2012-present
- *Benchmark Litigation Labor & Employment, The Definitive Guide to America's Leading Labor & Employment Litigators,* West Star, 2018-present

RELATED PRACTICES

Energy, Environment and Natural Resources
- Energy
- Utilities and Infrastructure

Labor, Employment and Benefits

Litigation
- Professional Liability
- Torts / Personal Injury

Native American Law
- Economic Development
- Tribal Law and Courts

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RELATED INDUSTRIES

Business in Indian Country
Educational Services and Institutions
Energy
Manufacturing
Mining
Railroads

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