



# Economic Development



## OVERVIEW

Doing business with, or on lands of Native American tribal nations presents unique challenges. Federal laws impose specific requirements on the acquisition of rights to use Native American land by lease or right-of-way. In addition, tribal nations' laws may apply to many aspects of economic development, and some disputes may be subject to resolution in tribal courts. Prudent development requires agreements be structured, negotiated and documented to achieve business goals in a manner consistent with applicable federal and tribal laws. And, agreements should specify choice of law and dispute resolution providing the stability and certainty business requires, in a manner acceptable to tribal partners. In a phrase, it means unique issues and risks to be managed.

Modrall Sperling's Business in Indian Country Practice Group is a team of professionals who focus their practices on advising and assisting business to plan for, document, and implement effective business development on tribal lands or with Native American-owned entities.

Located in New Mexico, with experience with more than 50 tribal nations in more than 20 states, we bring expertise that translates nationwide. Our experience informs some key areas where business requires attention to unique issues affected by tribal law and tribal courts.

Our Indian law practitioners work with clients to assess these issues for their business or project, assist or participate in negotiations with tribal nations, craft productive agreements, and represent business in tribal courts and agencies and in federal court litigation arising in Indian country.

The firm is recognized in New Mexico and Nationwide in Native American Law by *Chambers USA Directories of America's Leading Lawyers for Business*; moreover, Lynn H. Slade, Walter E. Stern, and Deana Bennett are ranked Nationwide on an individual basis, among other rankings. Since 1977, we have represented clients in Indian country involving more than 50 tribal nations in 20-plus states, including Oklahoma, Oregon, Pennsylvania, Louisiana, Montana, North Dakota, and across the Southwest. We have an inter-disciplinary approach, with more than twenty lawyers bringing expertise from business practice areas, such as taxation, finance, or federal regulations, and applying that expertise with experience in Indian law settings. We balance a fundamental respect for tribal nations, tribal sovereignty and Native Americans, with knowledge of our clients' businesses and industries and the practical and legal requirements for successful economic development in Indian country.

## EXPERIENCE

### Creative Problem-Solving

While the details of every issue differ, particularly in Indian country, and past success is not an indication of future success,



some examples of creative problem-solving by our Indian law attorneys include:

- Working with BHP Billiton New Mexico Coal, Inc. (BBNMC) and other co-counsel, Modrall Sperling completed a series of interrelated transactions between BBNMC and subsidiaries, Arizona Public Service Company, the Navajo Nation and Navajo Transitional Energy Company, LLC (NTEC), a wholly owned enterprise of the Navajo Nation (“Nation”). The transaction marks one of the most substantial and innovative recent energy transactions in Indian country. The successful closing followed lengthy due diligence, detailed discussions promoting creative deal structures, navigation of Navajo Nation legislative and executive processes, and an evolving power plant regulatory regime. The multi-faceted transaction included the sale of BHP Navajo Coal Company (BNCC), the owner/operator of the Navajo Mine, a large surface coal mining operation on the Navajo Reservation, to NTEC and for operation of the mine for a period of years by a BBNMC subsidiary. Hand in hand with completing those steps, the negotiators crafted new and amended coal supply agreements with owners of the FCPP, a coal-fired generating station located on the Navajo Reservation in northwestern New Mexico, to ensure a market for the coal reserves that NTEC acquired.
- Advised Portland General Electric’s (PGE) when its license to operate a hydroelectric plant straddling the boundary of the Warm Springs Reservation in Oregon was slated to expire in several years. The Confederated Tribes of the Warm Springs Reservation challenged re-issuance of the license to PGE and urged the Federal Energy Regulatory Commission to issue the license to the Tribes. On PGE’s behalf, Modrall Sperling was able to address federal Indian law and trust responsibility issues with federal agencies and the Tribes, and then assisted PGE to negotiate and document a ground-breaking cooperative agreement with the Tribes for future joint operation of the facility.
- Sandia Peak Tram Company, a special use permit holder on national forest lands, sought the counsel of Modrall Sperling for its defense of Indian land claim litigation brought in federal court by the Pueblo of Sandia. The Pueblo claimed that approximately 10,000 acres of National Forest lands in the Sandia Mountains adjacent to Albuquerque should have been included in its land grant. After suit was filed, the firm represented the Tram in alternative dispute resolution proceedings that resulted in an amicable Indian land claim settlement requiring ratifying federal legislation. Representation included participation in a lengthy mediation process, lobbying, and testimony before Senate Committees on Indian Affairs and on Energy and Natural Resources. The result of this effort was enactment of the federal T’uf Shur Bien Preservation Trust Act legislation implementing the agreements.

### Definitive Federal Indian Law Disputes

Modrall Sperling has also been involved in some of the key federal Indian law disputes defining the extent of tribal, state, and federal jurisdiction and taxation on Indian lands. That experience enables our lawyers to structure transactions and projects to address likely jurisdictional uncertainties and identify alternatives that meet business needs while addressing key tribal interests. The firm’s Indian law lawyers have recently been involved in the following cases:

- Representing El Paso Natural Gas Company, Modrall Sperling attorneys participated in the briefing that led to the Supreme Court’s ruling that federal courts, rather than tribal courts, should initially decide which court has jurisdiction over claims for injuries arising from nuclear incidents. *See, El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999).
- Representing the Burlington Northern Santa Fe Corporation as tribal court counsel on appeal in *Red Wolf* and as *amicus curiae* in *Strate*, and the Association of American Railroads in *Atkinson Trading* and *Plains Commerce Bank*, Modrall Sperling attorneys were instrumental in decisions defining tribal jurisdiction over non-members. *See, Burlington Northern Santa Fe Corp. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 2000); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), *Atkinson Trading Co. Inc. v. Shirley*, 520 U.S. 438 (1997); and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).
- Served as special Indian law counsel to Blue Tee Corp. and Gold Fields Mining LLC in defense of claims under the federal Superfund law or CERCLA, together with common law natural resources damages, nuisance, and injunctive relief claims



brought by the Quapaw Tribe against successors to mining companies that operated lead and zinc mines in the vicinity of the tribe's historic reservation. *See, Quapaw Tribe of Oklahoma v. Blue-Tee Co. et al.*, S. District Court Cause No. 03-CV-0846-CVE-PJC (N.D. Okla.).

- QEP, a natural gas transporter and processor on tribal lands in Northeastern Utah, filed this action, seeking injunctive relief against tribal actions to limit its possession of tribally granted leases and rights-of-way and to enjoin a tribal court injunction that supported the tribal actions. We serve as Indian law counsel to QEP in the action. The federal district court entered a preliminary injunction in QEP's favor.

### Transactions and Permitting

Modrall Sperling serves as Indian law counsel to businesses consummating transactions in which it is charged with, among other responsibilities, acquiring lease or right-of-way interests, compliance with requirements of federal regulations that may apply, and assessing the authority of tribal signatories under tribal and federal law, including:

- Served as Indian law counsel to K Road Solar Power, LLC, in its acquisition of leasehold rights for utility scale solar development in Nevada, California, and other states. We helped develop documents that support a package of land, right-of-way, and related rights focused on minimizing approval delays and optimizing project competitiveness in the fast-paced renewable energy market.
- Representation of financial sector companies in Indian country has included preparation of form agreements for investment advisors and fiduciaries, Fidelity Investments, Charles Schwab & Co., and advice concerning federally-guaranteed loans supporting Indian country development, including pursuing collection of defaulted loans for and Deutsche Bank NA.
- Served as outside counsel to Enterprise Products Partners, LP, Kinder Morgan/El Paso Natural Gas, and Transwestern Pipeline Company in negotiations, drafting and approval of long term gas gathering system agreement for operations on the Jicarilla Apache Reservation and Navajo Nation lands in northwestern New Mexico.

### Taxation and Regulation

Business expectations regarding the regulatory regimes they face and the taxes imposed upon them frequently are confounded in Indian country. The Supreme Court has recognized a tribal right to "make their own laws and be ruled by them" and, not only that tribes may tax certain transactions or activities, but in some circumstances both a tribe and the applicable state may both tax, presenting a risk of double taxation. Additionally, the United States Bureau of Indian Affairs has recently adopted regulations intended to strengthen tribes' abilities to tax activities on tribal leases and rights-of-way.

#### Taxation

With respect to federal, tribal and state taxation of business, Modrall Sperling lawyers have:

- Filed a brief *amicus curiae* in *Atkinson Trading v. Shirley*, 532 U.S. 645, 650 n.1 (2001), the Supreme Court's most recent case addressing taxation in Indian country.
- Serving as lead counsel defending the Commissioners of the Oklahoma Tax Commission against the Osage Nation's claims seeking an injunction prohibiting the Commission from collecting Oklahoma state income taxes upon the income of Osage Nation members who both earn income and reside anywhere within the County. The federal district court entered judgment in favor of the Commissioners, ruling that federal statutes terminated the Reservation and that federal law does not preempt Oklahoma's taxation of the income in dispute. The Tenth Circuit Court of Appeals affirmed unanimously. *See, Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010).

#### Regulation

We advise businesses on the Supreme Court and other federal cases defining, sometimes in less than clear fashion, the



boundaries and interactions of federal, tribal and state regulatory authority in Indian country, ranging from environmental compliance regimes to land use planning and mineral development activities and impacts.

- Represented the Oklahoma Department of Environmental Quality in its successful petition before the Court of Appeals for the District of Columbia Circuit challenging EPA's statutory authority to adopt a regulation displace state regulation over certain sources in Indian country nationally. The Court of Appeals set aside the rule with respect to the portions challenged. *See Oklahoma Department of Environmental Quality v. Environmental Protection Agency*, 740 F.3d 185 (D.C. Cir. 2014).
- Advising Osage Wind LLC regarding whether a tribal mining lease or permit was necessary for excavation of towers for a utility scale wind energy development in Osage County, Oklahoma, and successfully defending the district court challenge to compel a lease of permit. *See United States v. Osage Wind LLC*, Case No. 4:14 cv-00704-JHP-TLW (N.D. Ok. 2015), on appeal, Tenth Cir. No. Nos. 15-5121 & 16-5022.
- Crafting personnel policies for compliance with TERO ordinances requiring hiring or contracting preferences for tribal member or Native American workers or contracting firms.

### Dispute Resolution

Modrall Sperling Indian law practitioners have substantial experience structuring dispute resolution provisions in agreements and representing business in dispute resolution arising from business in Indian country. We have represented businesses in federal, tribal, and state courts addressing the proper forum to resolve a dispute, employment and labor issues, lease and right-of-way issues, and jurisdiction and taxation. Modrall Sperling has represented parties or filed briefs *amicus curiae* in each of the recent cases addressed by the United States Supreme Court addressing court jurisdiction in Indian country.

- The firm represented Meyer Engineering in litigation filed by the Coshatta Tribe of Louisiana in tribal court alleging breach, and seeking cancellation of, a contract to construct a power plant on tribal land. Modrall Sperling lawyers filed suit in Louisiana state court to enforce the contract's provision requiring disputes to be resolved in state court. The Louisiana Supreme Court held the case must proceed in the contract-specified state court and affirmed injunction against the tribal court action. *See, Meyer Engineering v. Coshatta Tribe of Louisiana*, 992 So.2d 446 (La. Sup. Ct. 2008), *denied*, 129 S.Ct. 1988 (2009).

### Employment and Tribal Employment Rights Issues

Many businesses are familiar with employment or contracting preference in other contexts. In Indian lands transactions and development, these considerations often are presented through Tribal Employment Rights Ordinances (TEROs), which may require preferences for employment or contracting or subcontracting for qualified Native American workers or firms or, alternatively for member of the tribal nation, itself, or companies owned by such members. Modrall Sperling has experience addressing such ordinances on numerous reservations, including appearing in tribal administrative bodies or courts which address such issues.

- The Central Consolidated School District has several locations on the Navajo Nation, which has an employment law, the Navajo Preference in Employment Act, requiring a preference in hiring for Navajos and "just cause" for discipline. Our lawyers have successfully defended several suits brought under the Preference Act, demonstrating that the District disciplined employees with cause and has a lawful preference in hiring. We have also guided the District in maintaining a tribal, that is Navajo, preference in light of the EEOC's position that employers may have a Native American, but not tribal preference.
- BHP Navajo Coal Company ("BNCC") employed a Navajo Nation member as a governmental affairs liaison who also was a traditional healer or medicine man. After his employment was terminated, he sued the employer in the Navajo Labor Commission under Navajo law, contending that he was fired without just cause and BNCC committed religious discrimination. The firm represented BNCC and prevailed both in the Commission and the Navajo Supreme Court. Each determined that



BNCC valued expertise in Navajo custom and promoted Navajo practices at work.

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Mining  
Railroads  
Ranching and Agriculture

## CASE STORIES

Innovative sale of mine preserves income, jobs and power for Navajo Nation