Tribal Law and Courts



OVERVIEW

Energy, financial, and commercial clients increasingly seek advice about law developed by tribal nations, the courts and agencies of such nations, and what it means for business with, or on or near lands of, tribal nations. In a phrase, it means unique issues and risks to be managed.

The past twenty years have seen consistent increases in the number and sophistication of tribal enterprises, advocacy by tribal nations that non-Indians abide by tribal laws, and the quality of legal advice tribal nations receive. The opportunities to do business with tribal nations, and on tribal lands, have correspondingly increased. So has the complexity. With 560-plus tribal nations in continental America, each with unique governmental structure and laws, the assessment of tribal laws and courts must proceed on an individualized basis, consistent with the client's core area(s) of business.

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:

Land

- If the tribal nation has a reservation, determination of boundaries, legal formation, its status and jurisdiction, as well as the status of the lands on which the project is located
- Determination if project land has been allotted or if other cessions of reservation land exist

Treaties and Governance

- What, if any, treaties does the tribal nation have with the United States
- Whether the tribal nation has adopted laws akin to the Constitution's Bill of Rights, and how does the tribal nation apply the Indian Civil Rights Act
- What are the governing body(ies) of the tribal nation

Laws and Custom

- Determination of tribal laws and rules that may apply to a project or agreement
- Determination of where existing tribal laws may be interpreted: In tribal courts or in light of tribal custom and tradition
- Determination if federal or tribal law override state law

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- If a business or project would benefit from federal laws—for instance by overriding unfavorable state or local laws—would the federal laws apply to a business on Indian land or with a Native American- or tribally-owned company

Tribal Enterprises and Sovereign Immunity

- Finding under what sovereignty's law tribal enterprises have been formed
- Waiver of sovereign immunity by the tribal nation or entity; determining if the entity or Congress ever done so generally or for the specific kind of transaction
- Depending on the activities or conduct will being undertaken on Indian land, outlining what business agreements will be needed
- Detailing how disputes be resolved, and what court(s) have authority to hear them

Taxation

- Determining if tribal taxes apply to the business or project
- If so, finding if state and federal taxes also apply

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 provide representation in tribal courts and agencies.

We are recognized in New Mexico and Nationwide in Native American Law by *Chambers USA*; 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.

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- 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.

Tribal Courts

- 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. In federal court, we have argued that the District is not subject to the Act, as courts in other jurisdictions.
- 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. We have also examined whether New Mexico employment laws may apply to BNCC, as it is on the Navajo Nation and the Nation has employment laws inconsistent with New Mexico.
- Western Refining has gas stations on and off the Navajo Reservation, through subsidiaries. A member of the Navajo Nation was struck by an intoxicated driver who allegedly purchased beer at the company's convenience stores located off the reservation. The injured tribal member sued in Navajo Court. In both Navajo and federal court, the firm challenged the Nation's subject matter jurisdiction over the mater, and personal jurisdiction over Western, which does not do business on the Reservation. Eventually, Plaintiff agreed to dismiss the Navajo case and proceeded in federal court until settled.
- Represented Meyer Engineering in litigation filed by the Coushatta 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.

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 on Indian lands. 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

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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. Neztsosie*, 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).
- Serving as lead counsel for the Commissioners of the Oklahoma Tax Commission in defending 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).
- The firm defends Transwestern Pipeline Company and Enterprise Products Partners LP and Mid-America Pipeline Company, LLC, and served as lead counsel for a broader group of defendants, against claims of Navajo Nation tribal members who own allotments (akin to homesteads) in northwestern New Mexico seeking to cancel rights-of-way for pipelines and utility transmission lines that traverse the allotments. The federal district court dismissed all of the plaintiffs' claims, holding that the applicable statute of limitations had expired, and that the plaintiffs had not exhausted their administrative remedies, The plaintiffs have attempted to file over 900 administrative appeals relating to that ruling. *See, Begay v. Public Service Company of New Mexico et al.*, U.S. District Court Cause No. 09-cv-00137-MV-RLP (D.N.M.).
- 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. Modrall Sperling serves 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 transactions charged with, among other responsibilities, 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.
- Provides title opinion services in support of oil and gas company exploration and production efforts to develop resources of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. This work involves examining title documents from the unique set of sources applicable to Indian country mineral ownership interests to support for oil and gas drilling or other associated activities.
- Representation of financial sector companies in Indian country has included preparation of form agreements for investment

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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.

- *S*erved 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 natural gas operations on the Jicarilla Apache Reservation and Navajo Nation lands in northwestern New Mexico.

KEY CONTACT

Sarah M. Stevenson
505.848.1884
sarah.stevenson@modrall.com

Lynn H. Slade
505.848.1828
lynn.slade@modrall.com

Brian K. Nichols
505.848.1852
brian.nichols@modrall.com

RELATED ATTORNEYS

Stan N. Harris

Christopher H. Killion

Brian K. Nichols

Caleb G. Ritzheimer

Lynn H. Slade

Sarah M. Stevenson

RELATED INDUSTRIES

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