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Articles:

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Native American Practice Group

Modrall Sperling's Native American law practice primarily focuses on the representation of developers, tribal business corporations, financial sector participants, utilities, and others doing business, engaged in dispute resolution, or addressing policy issues in Indian country. The firm has represented clients in matters involving more than 40 tribes in over 20 states. Our Practice Group combines exceptional knowledge of core federal Indian and Native American law principles and recent developments with practitioners who bring specialized expertise applying those principles in finance, land and resource acquisition, employment law, environmental and cultural resource permitting and management, and related fields in Indian country.

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Bondholders and Trustee Avoid Tribal Court Jurisdiction on Defaulted Bonds

On November 24, 2015, the Seventh Circuit Court of Appeals held that bondholders and their counsel were not required to exhaust tribal court remedies in a case involving a bond transaction in which the parties expressly consented in the transaction documents to the jurisdiction of federal or state courts in Wisconsin.[1] The Seventh Circuit also held that the tribal entities involved effectively waived their sovereign immunity in the transaction documents. This decision reinforced precedent giving effect to contractual forum selection provisions and underscored the importance of clear contractual waivers of sovereign immunity.

Background: In January 2008, Lake of the Torches Economic Development Corporation ("Corporation"), wholly-owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe" and, together with the Corporation, collectively the "Tribal Entities"), issued $50 million in taxable gaming revenue bonds to build a riverboat casino, hotel, and bed and breakfast in Natchez, Mississippi, and to refinance existing debt. The bonds were purchased and resold by financial entities, with Wells Fargo Bank serving as trustee of the bonds (collectively, the "Financial Entities"). The Tribe later met difficulty in meeting its bond obligations and, in October 2009, the Tribe elected a new governing council that had campaigned on a pledge to repudiate the bonds. The Corporation eventually repudiated its obligations under the bonds and refused to repay the outstanding principal or interest.

The Litigation: A series of lawsuits arose over the sale of the bonds by the Corporation, including an action brought by Wells Fargo Bank, as trustee, alleging that the Corporation breached the bond indenture. After over three years of litigating in federal and state court, the Tribal Entities brought a tribal court action in April 2013 seeking a declaration that the bonds were invalid under the Indian Gaming Regulatory Act ("IGRA") and tribal law.

Wells Fargo Bank and the other Financial Entities and Godfrey & Kahn S.C., counsel to the Corporation and bond counsel ("Godfrey"), then instituted an action in the United States District Court for the Western District of Wisconsin seeking a ruling that the tribal court lacked jurisdiction over them and an injunction to prevent the Tribal Entities from pursuing their tribal court action. The district court preliminarily enjoined the Tribal Entities from proceeding against the Financial Entities, but allowed the tribal action to proceed against Godfrey.[2] The Tribal Entities appealed the district court's grant of the injunction and Godfrey cross-appealed the district court's denial of the same.

Tribal Court Exhaustion Not Required: The Seventh Circuit agreed with the district court that tribal court exhaustion was not required. Following its reasoning in *Altheimer & Gray v. Sioux Manufacturing Corp.*,[3] the Court of Appeals concluded that the fact that the Tribal Entities expressly consented in the bond documents to the jurisdiction of federal or state courts in Wisconsin, to the exclusion of any tribal court, was dispositive of the exhaustion issue. Citing *Altheimer*, the Seventh Circuit noted "[t]o refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination."

Waiver of Sovereign Immunity Upheld: The Seventh Circuit rejected a string of the Tribal Entities' defenses to the waivers of immunity, including that the waivers were unenforceable because the bond transaction was procured by fraud and that the Tribal Resolution and Bond Resolution did not specifically contain waivers of immunity. The Seventh Circuit concluded that, because the Bond Resolution approved all of the legal provisions in

other bond documents, including the waivers, the waivers were enforceable by all the Financial Entities.

The Seventh Circuit also rejected the Tribal Entities' argument that the waivers were unenforceable because they were in collateral, unapproved management contracts, which the Tribe alleged were void under IGRA, concluding that a document that is "collateral" to a management contract only in the sense that it is related does not require approval under IGRA; it is only when a related agreement also provides for management of all or part of a gaming operation that approval under IGRA is required. Because the bond documents in question did not provide for management of any part of the Corporation's gaming operation, no approval under IGRA was required.

Enjoining the Tribal Court Action Proper: After concluding that tribal court exhaustion was not required and that the Tribal Entities waived their sovereign immunity, the Court of Appeals concluded that the district court properly enjoined the tribal court action.

The Court of Appeals concluded that the Financial Entities established a likelihood of success on their claim that the tribal court lacked jurisdiction over them under the exceptions that can support tribal retained or inherent authority over nonmembers in *Montana v. United States*.[4] The court held that the Tribal Entities' tribal court action did not fall within *Montana*'s first exception, which allows tribal regulation of nonmembers through taxation, licensing or other means when nonmembers enter consensual relationships with a tribe or its members via commercial dealings, contracts, leases or other arrangements.

Similarly, the Financial Entities were likely to prevail in showing there was no tribal court jurisdiction under *Montana*'s second exception, *i.e.*, that the nonmember conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe, the Court of Appeals noted that the Tribal Entities did not point to any actions by the Financial Entities that threatened the Tribal Entities in any such manner. In the tribal court action, the only question raised by the Tribal Entities was the enforceability of commercial agreements. The court reasoned that the financial consequences of adhering to freely negotiated commercial transactions did not rise to the level of threat or injury required by the second *Montana* exception.

The preliminary injunction was proper because the Financial Entities established a likelihood of success on their claim of lack of tribal jurisdiction; the Financial Entities would suffer irreparable harm if forced to litigate in two forums; and the balance of the harms and the public interest weighed in favor of issuing the injunction.

Law Firm's Reliance on Forum Selection Clauses: The Seventh Circuit also rejected the Tribal Entities' assertion that Godfrey could not invoke the forum selection clauses in the bond documents (by which the parties expressly submitted to the jurisdiction of federal and state courts in Wisconsin) because Godfrey was not a party to the bond transaction. The Court of Appeals found that Godfrey's relationship to the transaction met both the affiliation and mutuality tests for whether a non-party can enforce a forum selection clause enumerated in *Adams v. Raintree Vacation Exchange, LLC*,[5] because Godfrey was intimately involved in the negotiations leading to, and the documents evidencing, the bond transaction. Furthermore, as bond counsel to the transaction, Godfrey's opinion was essential to facilitating the sale of the bonds. The court noted that the Tribal Entities named Godfrey as a defendant in the tribal court action, requiring Godfrey to defend the bond documents' validity in tribal court, while the Tribal Entities also maintained the inconsistent position that those documents gave Godfrey no enforceable rights. The Court of Appeals reversed the

district court's judgment denying Godfrey a preliminary injunction and remanded the matter for a determination of whether Godfrey is entitled to a preliminary injunction.

Take-Aways: Parties seeking to avail themselves of forum selection and governing law clauses and waivers of sovereign immunity should ensure that such clauses and waivers are included in each document comprising a transaction, including resolutions of the governing bodies of the parties involved in the transaction. When entering into a transaction covered by IGRA, isolation in a separate agreement of provisions that could be construed to be gaming management provisions may prevent claims that the other transaction documents are void if approval under IGRA was not obtained for those documents.

For more information, please contact Debbie Ramirez.

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[1] *Stifel, Nicholaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015).

[2] *Stifel, Nicholaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 2014 U.S. Dist. LEXIS 67474 (W.D. Wisc. 2014).

[3] 983 F.2d 803 (7th Cir. 1993).

[4] 450 U.S. 544 (1981).

[5] 702 F.3d 436 (7th Cir. 2012).

State Taxation Precluded by Extensive and Exclusive Federal Regulation of Indian Leasing

On August 26, 2015, in *Seminole Tribe of Florida v. Stranburg*,[1] the Eleventh Circuit affirmed in part and reversed in part the United States District Court for the Southern District of Florida's decision,[2] holding that certain state taxes were unlawfully imposed on the Seminole Tribe. The Eleventh Circuit held that Florida's rental tax violated federal law and was preempted by federal law, whereas the utility tax did not. On October 27, 2015, the Eleventh Circuit denied the Tribe's request for rehearing on the validity of the utility tax.

Procedural Background: The Seminole Tribe of Florida (Tribe), entered into 25-year leases with two non-Indian corporations to provide food-court operations at two of the Tribe's casinos. The leases required the non-Indian corporations to pay applicable federal, tribal, or state taxes imposed or assessed. Florida imposed two taxes on the non-Indian corporations—rental tax—a "tax on the 'privilege [of engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property' in the state," and a utility tax—a tax on gross receipts from utility services delivered to a retail customer.[3] The Tribe paid the utility tax as part of its utility bill, and applied to the Florida Department of Revenue for a refund of the Utility Tax, but it was denied. The Tribe then filed a complaint in federal court seeking declaratory and injunctive relief.

District Court Decision: The district court found both the utility tax and the rental tax impermissible. In so doing, the court relied heavily on the current BIA's Business Site leasing regulations, which were amended on January 3, 2013, to conclude that the rental tax was prohibited. The court quoted 25 C.F.R. § 162.017, which states, in part, that a "leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other [charge] imposed by a State or political subdivision of a State." The court held that "the federal regulatory scheme regarding leases of restricted Indian land is so pervasive that it precludes the additional burdens imposed by Florida's Rental Tax." The court also invalidated Florida's imposition of the utility tax, because it concluded that the "legal incidence" of the tax fell upon the Tribe, as the consumer, and not the utility, and was therefore barred under *Oklahoma Tax Commission v. Chickasaw Nation*.[4] Significantly, in analyzing both taxes, the district

court failed to address the conditional language of the leasing regulation, that the prohibition on state taxation is "[s]ubject only to applicable Federal law."[5] Federal law, including federal case law, has specifically provided for circumstances under which state taxation on activities or property in Indian country is appropriate.

Eleventh Circuit's Decision: The Eleventh Circuit affirmed invalidation of the rental tax but reversed the district court's rejection of the utility tax.

Florida's rental tax impermissible: The Eleventh Circuit first held that Florida's rental tax violated 25 U.S.C. § 465, which the Supreme Court has construed as prohibiting state taxation on tribal lands acquired pursuant to a fund established by a 1955 statute and held in trust or upon rights in such lands, while not prohibiting state taxation of income derived from the use of the lands. The Eleventh Circuit concluded that Florida's rental tax "tax[ed] a privilege of ownership," and thus was unlawful.

While agreeing with the district court that the rental tax was preempted by federal law, the Eleventh Circuit faulted the district court for its uncritical reliance on the regulation and failure to undertake an independent preemption analysis as required by *White Mountain Apache Tribe v. Bracker*,[6] characterizing the Interior's analysis in the Federal Register preamble adopting the leasing regulations as a "*Bracker*-like" balancing analysis, but not relieving the lower courts of independent application of the *Bracker* test. The Eleventh Circuit undertook the *Bracker* analysis and weighed the federal interests against the State's interest. In so doing, the court pointed to the Secretary's analysis in the preamble as further evidence of the federal and tribal interests implicated by the leasing of tribal lands. The court concluded: "The extensive and exclusive federal regulation of Indian leasing—as evidenced by federal law and regulations—precludes the imposition of state taxes on that activity."[7]

Florida's utility tax permissible: With respect to the utility tax, the Eleventh Circuit court concluded that the legal incidence of gross-receipts utility tax fell on the non-Indian utility company. The Eleventh Circuit found that the district court's contrary legal-incidence determination was not the fairest reading[8] of the Florida taxing scheme. The court reviewed the language of the statute authorizing the tax, and, while not dispositive, concluded that it "point[ed] strongly towards a legislative intent to impose the tax on utility companies."[9] The court then performed a *Bracker* analysis and held the utility tax was not preempted because there was no "pervasive federal interest or comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient…to preempt state taxation."[10]

Take-Aways: The Eleventh Circuit's decision demonstrates that a State may lack authority to impose

certain taxes on leased tribal lands, but based on specific analysis—not the broad statements in BIA regulations. This holding may provide arguments for developers who oppose facing "dual" taxation burdens from both a tribe and a State. The BIA's recently promulgated revisions to the regulations governing rights-of-way across Indian lands contain the same language as the leasing regulations, which suggests a similar analysis should apply to state taxation of rights-of-way.

For more information, please contact Lynn H. Slade or Deana M. Bennett.

[1] 799 F.3d 1324 (11th Cir. 2015).
[2] 49 F. Supp. 3d. 1095 (S.D. Fla. 2014).
[3] 799 F.3d at 1326.
[4] 515 U.S. 450, 458 (1995).
[5] *See* 25 C.F.R. § 162.017.
[6] 448 U.S. 136 (1980).
[7] 799 F.3d at 1338.
[8] *Id.* at 1345 (quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461 (1995)).
[9] *Id.* at 1347.
[10] *Id.* at 1352.

Wind Energy: Challenged Under Federal Regulations, but More Native American Nations Appear to Be Embracing Its Development

Wind farms offer a source of low-carbon energy and are being developed around the world as governments and private entities seek new sources of energy to power our world. Development of wind farms is not a simple task, though, and developers are often faced with challenges from property owners in the vicinity of development. Native American Nations and tribal entities find themselves on both sides of this issue, developing or investing in wind farms in some cases, and challenging their development in others. This article reviews current developments in Native American involvement in wind energy issues.

Challenge to Wind Farm Development: In Osage County, Oklahoma, Enel Kansas, LLC, Enel Green Power North America, Inc., and a subsidiary, Osage Wind LLC, constructed and own the Osage Wind wind farm (Wind Farm). The Wind Farm, which is now operational, has been the subject of a number of lawsuits by the Osage Nation, the Osage Nation's Osage Mineral Counsel and the United States, on behalf and at the request of the Osage Nation. In the most recent lawsuit,[1] the United States sought declaratory and injunctive relief based on an argument that construction of the Wind Farm constituted "mining" of the Osage Nation's mineral estate.[2] The regulations contained in 25 C.F.R. Parts 211 and 214 govern mineral development on tribal lands, and the latter part is devoted specifically to development of the Osage mineral estate. The district court rejected the United States' argument that construction of the Wind Farm violated federal law by invading the Nation's mineral estate without a lease or permit, and ruled that the United States' interpretation of the regulations would "mean that every proposed construction project in Osage County that requires digging and backfilling, including building a single-family home, multifamily apartment building, commercial building, or septic tank, would be subject to approval by the Osage Nation."[3] The United States did not appeal the order, but on the final day on which an appeal could be filed, the Osage Mineral Counsel intervened for purposes of appeal, arguing that the United States was failing to represent its interests, and has appealed to the Tenth Circuit Court of Appeals. Future editions of this newsletter will report on the outcome of the ongoing litigation.

Also in Osage County, the United States challenged the development of the Mustang Run Wind Farm, asserting similar legal arguments as against the Osage Wind wind farm. In the Mustang Run case, the parties stipulated to dismissal of all claims.[4]

Challenges to regulatory requirements: A number of other recent cases have addressed regulatory requirements for development of wind farms. While these cases do not necessarily involve Indian law, they demonstrate other arguments by opponents of wind energy development. In *Sierra Club v. Bureau of Land Management*,[5] the Ninth Circuit upheld a decision by the United States Bureau of Land Management (BLM) to grant a right of way over federal land to a wind energy project. The proposed right of way would permit a wind farm, developed on private land, to lay, on BLM land, underground power and communication lines connecting the wind farm to the power grid. After the BLM determined that no endangered species were present in the area where the project would occur and that the project on BLM land would not cause a significant environmental impact, it granted the right of way. The appellate court ruled that the BLM did not have a duty to consult under the Endangered Species Act because the wind farm was developed on private land and had an option to connect to the grid that did not involve BLM land. This viable alternative meant that the decision to use a right-of-way on BLM land was a separate project from the development of the wind farm, and thus the wind farm itself was not a "major federal action" requiring consultation under either the Endangered Species Act or the National Environmental Policy Act (NEPA).

In contrast, NEPA review was required when the federal government intended to purchase wind energy. In Illinois, litigation over the proposed Walnut Ridge Wind Farm, owned by BHE Wind and developed by MG2 Tribal Energy LLC and the Mesa Grande Band of Mission Indians, had reached an agreement to sell the United States General Service Administration (GSA) a majority of the produced energy. Property owners sued early in 2015, arguing that because the GSA was intending to purchase the energy, federal law required environmental analysis under NEPA before the project could go forward.[6] The district court agreed, and ordered the GSA to perform a NEPA review on the proposed Wind Farm. The GSA completed its NEPA review on December 18, and concluded that the Wind Farm would not create the potential for significant adverse impacts and that the GSA's involvement in the Wind Farm does not constitute a major federal action. On January 12, 2016, the Bureau County, IL Board granted conditional use permits for 118 turbines, and construction is expected to commence this year.

Take-Aways: While there remains significant opposition to wind farms, including by Native American Tribes, a number of other Tribes are actively embracing wind energy development. In recent years, the Cherokee Nation the Passamaquoddy Indian Tribe, the Turtle Mountain Band of Chippewa Indian Reservation, and the Crow Creek Sioux Tribe all have taken steps toward developing wind farms on Tribal land. As national and international policies increasingly emphasize development of renewable energy resources, we expect more Native American Tribes to become involved in the wind energy field.

For more information on this article, contact Sarah M. Stevenson or Lynn H. Slade.

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[1] Modrall Sperling is one of the law firms representing Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc. in this lawsuit.
[2] *United States v. Osage Wind*, No. 14-CV-704-JHP-TLW (N.D. Okla.).
[3] Opinion and Order, No. 14-CV-704-JHP-TLW, at 13 (Sept. 30, 2015).
[4] *United States of America v. Mustang Run Wind Project, LLC, et al.*, No 15-cv-453-TCK-FHM (N.D. Okla. Doc. 31, Nov. 18, 2015).
[5] 786 F.3d 1219 (9th Cir. 2015).
[6] *Hamrick v. Gen. Serv. Admin.*, No. 1:15-cv-01023-MMM-JEH (C.D. Ill.).

Four Changes to BIA's Right-Of-Way Regulations That Grantees and Applicants Should Know

On November 3, 2015, Kevin Washburn, Assistant Secretary-Indian Affairs signed a final rule revising the Bureau of Indian Affair's (BIA) regulations governing grants of right-of-way (ROW) on Indian lands compiled at 25 C.F.R. Part 169 (Final Rule). The Final Rule was published in the Federal Register on Thursday, November 19, 2015, 80 Fed. Reg. 72492 (Nov. 19, 2015).[1] According to the Preamble to the Final Rule, the Final Rule "comprehensively updates and streamlines the process for obtaining Bureau of Indian Affairs (BIA) grants of rights-of-way on Indian land, while supporting self-determination and self-governance." *See also* Final 25 C.F.R. § 169.001 (describing purpose of the Part 169 regulations). The Final Rule effects significant changes in the rights and responsibilities of applicants and grantees of ROWs on tribal and allotted lands, many of which should be of concern to applicants or grantees of ROWs. The Final Rule was originally scheduled to become effective December 21, 2015; however, BIA recently extended the effective date of the Final Rule March 21, 2016.

Here, we examine four significant changes to the BIA regulations.

Improper Retroactive Application of Final Rule to Existing Grants: The BIA, in response to comments raising concern about the Final Rule's applicability to existing grants, states that the Final Rule's "procedural" provisions apply to an existing ROW grant when the grant is silent with respect to a "procedural" provision addressed by the Final Rule. *See* Final 25 C.F.R. § 169.007; *see also* 80 Fed. Reg. at 72502. The BIA provided as examples of the Final Rule's so called "procedural" provisions, what ROW grantees would consider highly substantive provisions governing assignments, mortgages, and renewals. Under the Final Rule, a grantee can assign a ROW only with the consent of the tribal landowner or the often numerous allotted landowners—or if the grant expressly allows for assignment without further consent and approval. The Final Rule similarly requires express landowner consent and BIA approval of a mortgage. The current regulations, however, do not address, and therefore do not require, landowner consent to, or BIA approval of, assignments and mortgages. As commenters on the proposed regulations pointed out, applying what have now become the Final Rule's consent and approval requirements to an existing grant defeats the parties' expectations formed under prior law and practice, which would be consistent with general law off-reservation, that an instrument silent as to assignment or mortgage may be freely assigned or mortgaged. To the extent the Final Rule impairs a current grantee's existing property rights by imposing new burdens on an existing grant, the current grantee may have a claim that the Final Rule's requirement may not be imposed on its previously granted ROW or the company should be compensated for such impairment.

Expansion of Tribal Jurisdiction: The Final Rule's attempts to expand tribal jurisdiction, and constrain a state's jurisdiction, appear to conflict with case law of the United States Supreme Court. *See* Final 25 C.F.R. §§ 169.009, 169.010, 169.011. For example, the Final Rule provides that state law and state taxation generally do not apply to lands subject to a ROW and activities within a ROW. While companies may benefit from a provision that creates hurdles for state taxation, to the degree the regulations would subject ROW grantees to tribal law, difficulties may be presented by sometimes unwritten or unpredictable tribal law. The Final Rule provides that ROWs are subject to applicable federal law and subject to tribal law that is not inconsistent with federal law. The

Final Rule provides that a tribe's jurisdiction extends to the land subject to the ROW and any person or activity within the ROW. The Final Rule also provides unqualifiedly that tribes have jurisdiction to tax improvements, activities, and ROW interests. These provisions propose broader tribal authority, and narrower state authority, than is recognized by current Supreme Court precedent.

Impediments to Efficiently Obtaining a ROW: The Final Rule includes provisions that may impede an applicant's ability to effectively negotiate for and obtain a ROW. For example, despite contrary industry comments critical of the proposed rule on this point, the BIA retained unconventional, alternative measures of compensation, such as "throughput fees, . . . franchise fees, avoidance value, bonuses, or other factors." Final 25 C.F.R. § 169.112. Suggesting such measures of compensation may lead to increased difficulty in reaching consensus regarding appropriate compensation, particularly for a ROW crossing individually owned Indian lands, which may be acquired through condemnation proceedings in which such measures generally are unavailable. The BIA also imposed a requirement that consent of the Indian landowners be obtained prior to conducting a survey, which is necessary for an application. The Final Rule likely will make it more difficult to obtain the consent of a majority of interest holders when a ROW crosses a tract of certain individually owned Indian lands because BIA inserted a provision that requires the consent of the majority of "remainder interests" identifiable at the time of the application, as well as the consent of the life tenant who granted remainder interests that vest upon his/her death. Consent for ROWs across allotted lands is further complicated by the Final Rule's requiring tribal consent when a tract has fractionalized interests and the tribe holds a fractional interest, raising the specter of a tribal veto of a ROW desired by individual holders or the tribe's leveraging its likely immunity from condemnation to exact higher compensation for allotted landowners.

Limited Recommended Duration of ROW Grants for Necessary Infrastructure: Final 25 C.F.R. § 169.201 limits the recommended maximum duration of a ROW grant for oil and gas pipelines to 20 years, and the BIA deleted the recommendation in the proposed rule that certain types of rights-of-ways, such as railroads, public roads and highways, be granted in perpetuity.

For more information, contact Deana M. Bennett or Lynn H. Slade.

[1] Available at https://www.gpo.gov/fdsys/pkg/FR-2015-11-19/pdf/2015-28548.pdf

Indian Law Cases Pending Before the Supreme Court Worth Following

The United States Supreme Court has a number of Indian law cases on its docket this term.

Dollar General Corporation v. Mississippi Band of Choctaw Indians: Perhaps the highest profile case pending before the Court raises the issue of the necessary demonstration of consent as a prerequisite for tribal court jurisdiction over non-members. Oral arguments were held on December 7, 2015.[1] Dollar General challenged the Mississippi Band of Choctaw Indians' exercise of tort jurisdiction over the corporation, for a suit that a manager of a Dollar General store had sexually abused a young Tribal member who was working at the store, and the award of a multi-million dollar judgment, arguing that the Tribal court did not have jurisdiction over the corporation. The Mississippi Band pointed toward language in its

contracts and leases with Dollar General in which Dollar General agreed to submit to Tribal courts and Tribal laws, and that the tort suit was within the scope of that agreement. The Fifth Circuit Court of Appeals agreed that the Tribal court had jurisdiction over Dollar General.

Dollar General advanced the broad argument that Native American tribes have no civil jurisdiction over non-Indians, a rule that would extend the Supreme Court's opinion in *Oliphant v. Suquamish Indian Tribe*[2] (which prohibited Tribal criminal jurisdiction over non-Indians) to civil cases. It also argued, in the alternative, that neither of the exceptions to the general rule that tribes lack jurisdiction over non-members, stated in *Montana v. United States*,[3] unless (1) the non-member has consented to the exercise of jurisdiction, or (2) when the conduct of non-Indians directly affects the tribe's political integrity, economic security, or health and welfare, is applicable. The argument focused on the first exception, proffering that the lease and business agreements between Dollar General and the Tribe were insufficient to permit the Tribe to exercise jurisdiction over a *tort* not arising out of any contract between the parties.

At oral argument, the Supreme Court's questioned the scope of the agreements between the parties, whether Tribal courts, generally, provided sufficient due process protections to non-Indians, and whether the Constitution permitted the exercise of jurisdiction over non-Indians by Tribes.[4] As noted by one commentator, "[r]egardless of the outcome, sophisticated tribes and businesses will spend increasing amounts of energy at the bargaining table fashioning partnerships where consents to applicable law and forum are clear and express."[5]

Nebraska v. Parker: This case presents the question of whether a non-Indian business is subject to the legislative and taxation authority of the Omaha Tribe of Nebraska. Oral argument occurred on January 20, 2016.[6] The Omaha Tribe sought to collect taxes on alcohol sales by non-Indian businesses that were located on land outside the current boundaries of the Omaha Reservation, but within the historic boundaries of the Reservation. After granting an injunction against application of the tribal tax statute, the federal district court stayed the case so the Omaha Tribal Court could consider its jurisdiction. The Tribal Court ruled that the Reservation was not diminished by an 1882 act of Congress that sold a portion of the Omaha Reservation, and the Tribal Court had jurisdiction and the non-Indian businesses, located within the territory that had been sold in 1882, were subject to the liquor tax. The federal district court then lifted its stay and considered the question of whether the Tribal Court had jurisdiction over the non-Indians, concluding, as had the Tribal Court, that the Reservation was not diminished by the 1882 act. The Eighth Circuit Court of Appeals affirmed, ruling that the reservation status of the land on which the non-Indian businesses were located had not been terminated by any act of Congress, and "mindful to resolve any ambiguities in favor of the Indians," concluded that "there is nothing in this case to overcome the presumption in favor of the continued existence of the Omaha Indian Reservation."[7] The Supreme Court has been asked to consider whether the Eighth Circuit correctly applied the test articulated in, among other cases, *Solem v. Bartlett*,[8] to determine whether Congress intended to diminish a reservation.

Nebraska's brief to the Supreme Court argues that 98% of the disputed area was conveyed to non-Indians after the 1882 act, the area remains predominantly non-Indian, and Nebraska law has applied since 1882, and thus the decision significantly alters the status quo.[9] The United States has intervened in support of the Tribe's position that the Reservation was diminished, arguing the record supported the district court's analysis. *Nebraska v. Parker*

is significant because the Omaha Tribe, like many other Tribes, saw its reservation diminished by Congressional acts subsequent to the reservation's establishment.

Petitions: Petitions for *certiorari* are pending in multiple cases involving civil and criminal tribal court jurisdiction. The civil petitions include *Jensen v. EXC, Inc.*, a case that, like *Dollar General*, raises issues of the scope of the consensual relationship exception of the *Montana* doctrine.[10] The case arose when a non-Indian owned or operated tour bus was involved in an accident on a federal road within the Navajo Nation Reservation, and the estate of the Nation-member decedent filed a wrongful death suit in tribal court. The Navajo Nation Supreme Court had ruled that *Montana* only applies to non-Indian owned fee land within the Navajo Nation, or, alternatively, that the tour operator consented to jurisdiction based on an unsigned permit to operate within the Nation. Conversely, the Ninth Circuit held that, because the federal highway was the equivalent of non-Indian fee land, *Montana* applied, and neither *Montana* exception was satisfied because the unsigned permit "did not provide sufficient notice" that the tour operator would be subject to tribal court jurisdiction, and a tort suit did not "implicate the second *Montana* exception."[11] The petition for *certiorari* presents the question of whether *Montana* applied to the federal road crossing the Reservation and the scope of the *Montana* exceptions. As of the publication of this article, the petition had not been ruled on by the Court.

In *White v. Regents of the University of California*, the petition for *certiorari* sought review of a Ninth Circuit ruling dismissing a complaint based on the Ninth Circuit's conclusion that a Native American tribe was a required party under Federal Rule of Civil Procedure 19 and the tribe's sovereign immunity had not been abrogated by the Native American Graves Protection and Repatriation Act (NAGPRA).[12] The petition presents the question of whether Rule 19 requires dismissal where a tribe has immunity from suit, and the related question of whether tribal immunity has been abrogated in cases where no other forum is available and no relief against the tribe is sought. On January 25, 2016, the Court denied the petition, leaving standing the Ninth Circuit's ruling that the affected tribes were indispensable parties to a suit under NAGPRA, and that the statutory scheme did not abrogate tribal sovereign immunity.

For more information, please contact Lynn H. Slade, Brian K. Nichols, or Sarah M. Stevenson.

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[1] No. 13-1496, on appeal from an opinion of the Fifth Circuit Court of Appeals, reported at 746 F.3d 167 (2014). Modrall Sperling filed an *amicus curiae* brief for the Association of American Railroads, advocating a rule requiring clear and unequivocal consent of a non-member as a precondition to the exercise of tribal court jurisdiction over the nonmember.
[2] 435 U.S. 191 (1978).
[3] 450 U.S. 544 (1981).
[4] A copy of the oral argument transcript is available here.
[5] Ed Gehres, *Argument analysis: Is tribal court civil jurisdiction over non-Indians truly a constitutional issue, or one of settled precedent?*, SCOTUSblog (Dec. 8, 2015, 10:22 PM).
[6] No. 14-1406, appealing opinion of the Eighth Circuit Court of Appeals, *Smith v. Parker*, 774 F.3d 1166 (2014).
[7] *Id.* at 1168-69 (internal quotation marks and citations omitted).
[8] 465 U.S. 463 (1984).
[9] Brief for Petitioners, at 2, 26 (Nov. 16, 2015), available here.
[10] No. 15-64, appealing opinion of the Ninth Circuit Court of Appeals, *EXC, Inc. v. Jensen*, 588 Fed. App'x 720 (2014) (unpublished).
[11] 588 Fed. App'x at 722.
[12] No. 15-667, appealing opinion of the Ninth Circuit Court of Appeals, *White v. Univ. of California*, 765 F.3d 1010 (2014).