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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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State Taxation of Tribal Leases Preempted by Federal Law

In *Seminole Tribe of Florida v. State of Florida*,[1] the United States District Court for the Southern District of Florida concluded that two Florida state taxes were precluded by federal law, including recently promulgated regulations. Assuming it is not appealed and overruled, this decision could be used by tribes to seek to invalidate state taxation of leases on tribal lands.

Background: The Seminole Tribe of Florida is a federally recognized tribe that owns and operates entertainment and gaming facilities. The Tribe leased space at two of its casinos to a third party, and although it is not clear from the opinion, the third party appears to be a non-Indian. Florida assessed a tax on the rent paid to the Tribe for those leases. Florida also imposed a utility tax on electricity delivered to the Tribe on its reservations. With respect to both taxes, the Tribe argued that federal law prohibited Florida from imposing the taxes—an argument accepted by the district court.

State Tax on Lease Rental Proceeds Prohibited by 25 U.S.C. § 465:[2] The court first held the Florida rental tax unlawful under 25 U.S.C. § 465, which allows the Secretary of the Interior to acquire land for the use and benefit of tribes, and exempts those lands from "State and local taxation." Because the Secretary conveyed certain lands to the Tribe under 25 U.S.C. § 465, the court concluded those lands were exempt from Florida's tax. The court further held that the rental taxes constituted an impermissible "use tax" on "permanent improvements" under *Mescalero Apache Tribe v. Jones*.[3] The court observed that the right to lease property is among the privileges of ownership of property and, consequently, a tax on the lease is a tax on the property itself.

State Tax on Lease Rental Proceeds Preempted by Federal Law: [4] Relying on *White Mountain Apache Tribe v. Bracker*,[5] the court next concluded that the rental tax was preempted by federal law and impermissibly interfered with the Tribe's ability to exercise its sovereign functions.

The court first held that the current Bureau of Indian Affairs Business Site leasing regulations, which were amended in 2012, expressly prohibit the rental tax. 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 any State or political subdivision of a State." The court explained that the Secretary, in enacting the new regulations, undertook a comprehensive evaluation of federal law and concluded that the federal statutory scheme for leasing "precludes state taxation."[6] The court stated that it "now has the benefit of the comprehensive analysis performed by the Secretary of the Interior showing how tribal interests are affected by state taxes on leases of restricted Indian land," and that the Secretary's analysis "merit[ed] the full amount of deference available under the law." The court thus 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 rejected Florida's argument that the rental tax

was not a tax on the leasehold or possessory interest, but was instead an excise tax on the privilege of renting or leasing real property. The court explained that even if characterized as an excise tax, the tax was nevertheless barred by federal law, citing 25 C.F.R. § 162.017(b)-(c).

The court distinguished *Cotton Petroleum Corp. v. New Mexico*,[7] where the Supreme Court upheld a state tax on a non-Indian oil and gas lessee's oil and gas production on tribal lands, because, unlike the evidence presented in *Cotton*, the "Seminole Tribe has offered the detailed and comprehensive analysis from the Secretary of the Interior" regarding the preemptive effect of federal law. The court further distanced *Cotton* because, unlike the congressional history supporting the taxation of oil and gas taxes at issue in that case, "[t]here is no similar Congressional history expressly permitting states to tax non-agricultural surface leasing of land."

In concluding its preemption analysis, the court broadly stated: "The Secretary of the Interior's new regulations have changed the landscape of this area of the law, specifically regarding the issue of preemption."

State Utility Tax Unlawful:[8] 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*.[9] In rejecting the tax as unlawful, the court, in addition to other bases, distinguished Florida's utility tax from the tax upheld by the Supreme Court in *Wagnon v. Prairie Band of Potawatomi Nation*,[10] where the challenged state regulation allowed distributors to pass the tax to downstream purchasers, but did not require them to do so. In contrast, the Florida utility tax did not allow utility companies to choose to not pass the tax to downstream consumers. The court also distinguished *Wagnon* because, unlike in that case, a Florida utility company does not pay the tax on electricity that is not delivered to a customer, which the court found supportive of its analysis that the incidence of the tax fell on the consumer as opposed to the utility. The court concluded its analysis stating: "[T]he fairest reading of Florida's utility-tax scheme as a whole is that the legal incidence of the tax falls upon the consumer." The court so held because Florida's scheme requires the utility to include the tax in their bills to consumer, collect the tax from the consumers, and then deliver the tax to the State.

Take-Aways: In this case, the court concluded that the newly promulgated leasing regulations demonstrated that federal law preempts state taxation of leases of Indian lands. Tribes may cite this decision to challenge state taxation of activities on tribal lands. Moreover, this decision may also impact state taxation of rights-of-way, because the Department of the Interior is in the process of amending its regulations governing rights-of-way on Indian lands. *See* Proposed 25 C.F.R. § 169.009, 79 Fed. Reg. 34455, 34464 (June 17, 2014). The proposed regulations governing rights-of-way contain language similar to that relied upon by the United States District Court for the Southern District of Florida, and thus could be subject to a similar interpretation, *i.e.*, that the regulations preempt state taxation of rights-of-way crossing Indian lands. The comment period on the

proposed regulations closes on November 3, 2014.

The district court's decision also fails to expressly analyze the conditional language of the leasing provision, which specifically acknowledges that the prohibition on state taxation is "[s]ubject only to applicable Federal law." *See* 25 C.F.R. § 162.017. The fact that the district court apparently did not consider the regulation's language limiting could potentially be the subject of a challenge, if an appeal is taken.

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

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[1] 2014 U.S. Dist. LEXIS 124162 (S.D. Fla. Sept. 5, 2014) ("Slip op.").
[2] Slip op. at 4-6.
[3] 411 U.S. 145, 158 (1973).
[4] Slip op. at 6-17.
[5] 448 U.S. 136, 142 (1980).
[6] Slip op. at 7 (quoting 77 Fed. Reg. 72440, 72447-48 (Dec. 5. 2012)).
[7] 490 U.S. 163 (1989).
[8] Slip op. at 17-31.
[9] 515 U.S. 450, 458 (1995).
[10] 546 U.S. 95 (2005).

Revisiting Tribal Sovereign Immunity under *Michigan v. Bay Mills Indian Community*

As our Summer 2014 Native American Law Watch reported, on May 27, 2014, the Supreme Court decided *Michigan v. Bay Mills Indian Community* ("*Bay Mills*"),[1] broadly reaffirming tribal sovereign immunity from suit, even for suits regarding commercial activities off reservation lands, but only by a slim 5-4 margin. While an important victory for tribes, the majority opinion of Justice Kagan reaffirms at least one avenue for relief against tribal officials and suggests categories of cases where the rule may not hold.

The *Bay Mills* Majority Holding: Michigan sued the Bay Mills Indian Community, a federally recognized Indian tribe for violating a federally approved tribal-state gaming compact by opening a casino outside the tribe's Indian lands in violation of the Indian Gaming Regulatory Act ("IGRA"). After the district court granted an injunction against operation of the casino, the Sixth Circuit Court of Appeals reversed, holding IGRA neither provided subject matter jurisdiction nor abrogated Bay Mills' immunity from suit by the State. The Supreme Court affirmed, rejecting Michigan's interpretation of the IGRA and its invitation to overturn the Court's 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[2] which held tribal sovereign immunity extended to off-reservation commercial activities. In addition to strongly worded dissents by four Justices, *Bay Mills*' majority opinion leaves open matters that may be addressed in future cases.

The *Ex parte Young* Avenue for Suits Against Tribal Officials: The majority observed that Michigan could have negotiated a waiver of immunity in its compact with Bay Mills, but did not. The majority decision did not leave Michigan without a remedy, because it could "bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction . . . . [because] tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct."[3] The majority referenced the doctrine of *Ex parte Young*[4] and its earlier statement that in an action properly framed under *Ex parte Young*, tribal officials are not immune from suit.[5] The federal courts

may see increasing efforts for relief against tribal officials, when meaningful relief can be accorded in the form of a declaratory judgment or injunction affecting future tribal conduct.

Limits on the Doctrine? Referencing its discussions of the opportunity to secure a waiver by compact and *Ex parte Young,* the majority noted "the State . . . has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."[6] Whether *Bay Mills* signals flexibility regarding the non-constitutional tribal sovereign immunity doctrine remains to be seen in future cases.

***Bay Mills* in the Courts:** It is too early to assess how the federal courts will apply *Bay Mills.* The few sovereign immunity decisions entered since the May 27, 2014 decision do not reflect new directions.

For more information, please contact Lynn Slade, Bill Scott, or Sarah Stevenson.

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[1] 134 S. Ct. 2024 (2014), affirming 695 F.3d 406 (6th Cir. 2012).
[2] 523 U.S. 751 (1998).
[3] 134 S. Ct. at 2035.
[4] 209 U.S. 123 (1908), which holds sovereign immunity does not bar suits for prospective declaratory or injunctive relief against government officials who are acting in excess of their authority under federal law. *See Verizon, Inc. v. Md. Pub. Serv. Comm.*, 535 U.S. 635, 645 (2002).
[5] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).
[6] *Bay Mills*, 134 S. Ct. at 2036 n.8 (citation omitted)

Private Employers May Utilize a "Tribal" Employment Preference, at Least Under Some Circumstances

In *Equal Employment Opportunity Commission v. Peabody Western*,[1] the Ninth Circuit upheld the lower court's conclusion that Peabody Western Coal Co.'s ("Peabody Western") tribal hiring preference did not constitute national origin discrimination in violation of Title VII of the Civil Rights of Act of 1964. As we previously in reported our Fall 2012 Native American Law Watch, the federal district court ruled that Title VII does not prohibit tribal member preference where required by a lease of tribal lands that has been approved by the Secretary of the Interior ("Secretary") or his delegate acting pursuant to federal laws governing Indian land leasing. The Ninth Circuit affirmed, concluding as did the district court, that the Navajo hiring preference contained in Peabody Western's leases with the Navajo Nation is a political classification, rather than a prohibited classification based on national origin.

Background: At issue were two Peabody Western leases with the Navajo Nation, which were approved by the Department of the Interior ("DOI"), and which require a preference for Navajo Nation members in employment. In 1998, two members of the Hopi Tribe and one member of the Otoe Tribe filed discrimination charges with the Equal Employment Opportunity Commission ("EEOC") alleging that, although qualified for the positions, they were not

hired because they were not Navajo. The district court, after "an examination of the status of Indian tribes in general and their relationship to the federal government," and relying on the Supreme Court's guidance in *Morton v. Mancari*,[2] held that the preference was a political classification, and not in violation of Title VII.[3]

Ninth Circuit Decision: The Ninth Circuit affirmed the district court's conclusion that the tribal preference did not violate Title VII, despite the EEOC's arguments that the lease provisions constitute impermissible national origin preference based on tribal affiliation. The Secretary countered that the tribal preferences were designed to "promote tribal self-governance in accordance with congressionally mandated federal Indian policy."[4] The court agreed with the Secretary. In reaching its conclusion, the Ninth Circuit relied on the purposes of the Indian Mineral Leasing Act ("IMLA"),[5] under which Peabody Western's leases were approved, and the Indian Reorganization Act ("IRA"),[6] a statute which provides for tribal self-government, among other things. The court emphasized that both acts were designed to advance tribal independence and self-determination.

While stating that the issue before it was one of first impression, the Ninth Circuit acknowledged that it had previously held, in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District* (*Dawavendewa I*),[7] that an employment preference based on tribal affiliation can give rise to a Title VII Claim.[8] The court rejected EEOC's reliance on *Dawavendewa I*, because the Ninth Circuit had, four years later, limited the scope of that decision in *Dawavendewa II.*[9] The Ninth Circuit, in *Peabody Western*, reiterated that it had declined to consider in *Dawavendewa I* whether other legal defenses, such as the federal policy fostering tribal self-determination, justified the challenged hiring preference policy. The Ninth Circuit concluded that the circumstances presented by EEOC's challenge to Peabody Western's leases with the Navajo Nation presented a situation where federal law, *i.e.*, Title VII, "yields out of respect for treaty rights or the federal policy fostering tribal self-governance."[10]

The Ninth Circuit, like the district court, also relied on *Mancari*, where the Supreme Court had held that the Equal Employment Opportunity Act ("EEOA") did not impliedly repeal the BIA employment preference and that the Indian employment preference for federal positions did not constitute racial discrimination in violation of the Due Process Clause. In *Mancari*, the Court held that the Indian employment preference was not based on a racial designation, but rather on a political preference that was rationally tied to Congress' obligation toward the Indians. The Ninth Circuit acknowledged that the *Mancari* Court was faced with a challenge to a political classification providing a general Indian hiring preference as opposed to a tribe-specific preference. Nevertheless, the Ninth Circuit concluded that "*Mancari*'s logic applies with equal force where a classification addresses differential treatment between or among particular tribes or groups of Indians."[11] Such comments could, in later cases, support extending the holding to tribal employment preferences outside of leases approved by the Secretary. The court concluded that the "Navajo tribal hiring preferences in this case are based on the policy considerations that undergird *Mancari*," *i.e.*, the IMLA and IRA's goals of advancing tribal self-government.[12] The court emphasized: "Where the exploitation of mineral resources on a particular tribe's reservation is concerned, the federal government's

responsibility necessarily runs to that tribe, not to all Indians."[13]

The court also rejected EEOC's argument, based on Title VII's Indian hiring preference provisions, that Title VII only allows preferences that distinguish between Indians and non-Indians. Title VII expressly provides that a preference for Indians (of any federally recognized tribe) living "on or near a reservation" is lawful.[14] The court construed Title VII's Indian preference exemption as "necessary to clarify that Title VII's prohibition against racial or national origin discrimination does not extend to Indians."[15] The court noted that tribal hiring preferences had been included in leases[16] approved under the IMLA long before the enactment of Title VII, reiterated that tribal hiring preferences furthered the goals of the IMLA and IRA, and found nothing to indicate that Congress intended Title VII to depart from its prior policy announcements regarding tribal self-determination.

Take-Away: Private employers may utilize a tribal preference in employment, if required by a lease approved by the Secretary of the Interior. Portions of the Court's rational could extend the holding. Issues remain however, with regard to tribal preferences in contracting, and other employment preferences required by tribal law.

For more information, please contact Brian K. Nichols.

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[1] No. 12-17780 (9th. Cir. Sept. 26, 2014) ("Slip op.").
[2] 417 U.S. 535 (1974).
[3] Slip op. at 7.
[4] *Id.* at 8.
[5] 25 U.S.C. §§ 396a, 396e.
[6] 25 U.S.C. §§ 461 *et seq.*
[7] 154 F.3d 1117 (9th Cir. 1998).
[8] Slip. op. at 9.
[9] *Dawavendewa v. Salt River Project Agric. Improvement & Power District*, 276 F.3d 1150 (9th Cir. 2002).
[10] Slip. op. at 17 (quoting *Dawavendewa II*, 276 F.3d at 1158).
[11] *Id.* at 20.
[12] *Id.* at 21.
[13] *Id.*
[14] 42 U.S.C. § 2000e-2(i).
[15] Slip op. at 22.
[16] The BIA's recently revised Part 162 leasing regulations, which do not govern IMLA leases, include a new provision specifically providing that "a lease of Indian land may include a provision, consistent with tribal law, requiring the lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe." 25 C.F.R. § 162.015. The BIA has recently proposed revisions to the regulations governing rights-of-way, currently found at 25 C.F.R. Part 169, that propose to include a similar provision for rights-of-way. See proposed § 169.122 (a right-of-way grant over Indian land "may include a provision, consistent with tribal law, requiring the grantee to give a preference to qualified tribal members, based on their political affiliation with the tribe"). The current deadline for submitting comments on the proposed rights-of-way regulations is November 3, 2014.

Bald and Golden Eagle Take Permits: Challenges Based on Religious Freedom and Failure to Adequately Analyze Impacts

The Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (the "BGEPA"), provides for civil and criminal penalties for the take of eagles without a permit. The BGEPA has been described as "one of the cornerstones of our nation's efforts to protect and preserve the bald eagle."[1] Members of federally recognized Indian tribes, users for scientific purposes, and, as described in the last edition of the Native American Law Watch, industrial projects such as wind energy farms, may seek a permit to authorize the take of eagles. This article discusses two

recent developments regarding the BGEPA: Whether the BGEPA and related regulations comply with the Religious Freedom Restoration Act, and a recent challenge to the proposed Department of the Interior's ("DOI") Programmatic Take Permit Rule. While the regulations governing the protection of eagles play a central role in each of these challenges, the eventual outcome of these challenges may result in far broader change.

DOI's Regulations Invalidated: The Fifth Circuit Court of Appeals invalidated the DOI's regulations issued under the BGEPA and the Migratory Bird Treaty Act (the "MBTA"), in *McAllen Grace Brethren Church v. Salazar*.[2] In that case, the plaintiffs challenged the DOI's enforcement of the two Acts, and the DOI's prohibition of American Indians who are not members of federally recognized tribes from possessing bald and golden eagle feathers. The plaintiffs, who included a member of a non-federally recognized Indian tribe and non-Indians who had eagle feathers in their possession confiscated, argued the DOI's "confiscation of the feathers violated the Free Exercise Clause of the First Amendment"[3] as well as the Religious Freedom Restoration Act ("RFRA").

The RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."[4] Only if the government can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest" may the burden be placed.[5] The DOI did not dispute that the BGEPA substantially burdened the plaintiffs' religious beliefs. The Fifth Circuit held, however, that the DOI did not meet its burden to establish the BGEPA satisfied RFRA's standard.

Compelling Interests: The DOI asserted that protecting eagles and meeting the government's "unique responsibility" to federally recognized Indian tribes constituted the requisite "compelling governmental interest." The Fifth Circuit joined the Ninth and Tenth Circuits in ruling that "protecting bald eagles qualifies as a compelling interest because of its status as our national symbol, regardless of whether the eagle still qualifies as an endangered species."[6] The court found unsupported, however, the argument "that Congress intended to protect only federally recognized tribe members' religious rights," particularly when the State of Texas had long recognized the specific tribe, and the individual plaintiff's religious sincerity was not questioned.[7] Relying on the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.*,[8] the Fifth Circuit ruled that the record did not have sufficient evidence to determine whether the protection of federally recognized tribes was a compelling interest.

Least Restrictive Means: The DOI was required to show that the regulations were the "least restrictive means" of meeting a compelling government interest, which is "a heavy burden." "The very existence of a government-sanction exception to a regulatory scheme that is purported to be the least restrict means can, in fact, demonstrate that other, less-restrictive alternatives could exist."[9] The court held that the DOI did not demonstrate that limiting eagle feather possession to members of federally-recognized Indian tribes was the least restrictive method to protect the eagle population, and highlighted that permits for "other interests" could be issued under the BGEPA, and the DOI could require permits for individuals to possess feathers.[10] Additionally, the court ruled that the DOI did not establish that non-

members of federally recognized Indian tribes could not hold sincere religious beliefs.

Turning to the proffered interest of fulfilling responsibilities to federally recognized Indian tribes, the court ruled that concerns about increased waiting time to obtain legal eagle feathers and an increase in the black market were unsupported by specific evidence in the record. Interestingly, to the extent the federal eagle depository was inefficiently run, that was not relevant to whether the plaintiff's sincerely held religious belief could be burdened. Because the DOI did not meet its burden of proof to warrant summary judgment, the case was remanded to the district court for further proceedings.

Challenge to the Programmatic Take Rule: A challenge to a new rule promulgated by the United States Fish and Wildlife Service ("FWS"), changing the time period for a permit issued under the BGEPA from five to thirty years, has been filed in the Northern District of California. *Shearwater v. Ashe*[11] challenges the regulations under the National Environmental Policy Act ("NEPA"), the BGEPA, and the Administrative Procedure Act ("APA"), arguing that the environmental impacts of the rule were not analyzed prior to the rule's promulgation, and that the rule "subverts the basic eagle protection purposes of BGEPA and eliminates crucial procedural and other safeguards for eagle populations with any adequate explanation."[12] The FWS' prior rule authorized the take of eagles incidental to ongoing activities, such as wind farms, for five year periods; the new rule increases the time period to 30 years, but FWS did not undertake NEPA review. The plaintiffs seek to invalidate the regulations for failure to conduct a programmatic NEPA analysis prior to changing the rule and issuing permits to wind farms, and for purportedly reversing policy on the necessary safeguards for protecting the eagle populations. The defendants have filed an answer, asserting the affirmative defenses of lack of standing and ripeness.

Take-Aways: These two cases could have broad effects. *McAllen Grace*, if adopted by other courts or affirmed by the Fifth Circuit when that case reaches a final judgment, could open the door to application of *Hobby Lobby* to RFRA challenges to any statutory schemes that contain specific and limited religious accommodations. In addition, the *McAllen Grace* ruling may affect statutory schemes that limit benefits to members of federally recognized tribes, because here the plaintiff was found to be a member of a non-recognized tribe with sincerely held religious beliefs. The *McAllen Grace* ruling is also of note because it applies the Supreme Court's recent *Hobby Lobby* decision to invoke a steeper burden of proof for the government to prove it has complied with the RFRA. The Fifth Circuit relied on *Hobby Lobby* to impose an exacting burden on the DOI, requiring a complete paucity of alternatives to the current regulations to satisfy the RFRA.

Professor Kathryn Kovacs recently analyzed *Hobby Lobby*'s effect on the RFRA,[13] arguing that *Hobby Lobby* should not open up RFRA claims under the BGEPA, because BGEPA claims represent a zero-sum game. That is, while the Fifth Circuit in *McAllen Grace* noted that eagle feathers were available at zoos, increasing their availability, Professor Kovacs describes the BGEPA as a "stark example of a zero-sum game": where one non-Native American person with religious beliefs obtains a feather, that reduces by one the number of feathers available to Native Americans, who are expressly

permitted by BGEPA to obtain and use eagle feathers. Under this analysis, the *McAllen Grace* Court should have reached the opposite result: a RFRA claim by a non-Native American seeking an exemption from the BGEPA's limitations should fail, because, even under *Hobby Lobby*, the RFRA does not permit the government to shift a religious burden from one party to the other.

Shearwater, while in the preliminary stages, may affect the standard of adequacy of modifying regulations, and if the regulations are invalidated, could upset the expectations of a number of wind farm projects currently under development.

For more information, please contact Sarah Stevenson or Deana Bennett.

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[1] *United States v. Wilgus*, 638 F.3d 1274, 1278 (10th Cir. 2011).
[2] 2014 WL 4099141 (5th Cir. Aug. 20, 2014) ("Slip op.").
[3] Slip op. at 3.
[4] *Id.* at 7 (quoting 42 U.S.C. § 2000bb-1(a)).
[5] *Id.* at 8 (quoting 42 U.S.C. § 2000bb-1(b)).
[6] *Id.* at 10.
[7] *Id.* at 11.
[8] 134 S. Ct. 2751 (2014).
[9] Slip op. at 14.
[10] Slip op. at 17.
[11] *Deborah Shearwater; Steven A. Thal; Michael Dee; Dr. Carolyn Crockett; Robert M. Ferris; and American Bird Conservancy v. Dan Ashe, Director, United States Fish and Wildlife Service; Sally Jewell, Secretary, United States Department of the Interior*, No. 5:14-cv-02830 (filed June 19, 2014), considering regulations published at 78 Fed. Reg. 73704 (Dec. 9, 2013).
[12] *Id.* ¶ 1.
[13] Kathryn E. Kovacs, *Hobby Lobby and the Zero-Sum Game*, Wash. U. L. Rev. Commentaries (Sept. 14, 2014).

Ninth Circuit Court of Appeals Limits Class of Transfers Approvable Under Section 81

In *Chemehuevi Indian Tribe v. Jewell*,[1] the Ninth Circuit upheld the Secretary of the Interior's ("Secretary") decision that the Indian Nonintercourse Act, 25 U.S.C. § 177 ("Section 177") requires Congress to expressly authorize a class of transfer of Indian lands, and 25 U.S.C. § 81 ("Section 81") does not authorize BIA to approve transfers of essentially perpetual exclusive possession of tribal lands. In *Chemehuevi*, the Chemehuevi Indian Tribe ("Tribe") and thirty-four of its members appealed the Bureau of Indian Affairs' ("BIA") refusal to approve assignments of tribal land to tribal members. Because Section 81 did not authorize approval of assignments of tribal lands to tribal members granting exclusive possession, and no other statute so authorized, the transfers could not be approved because doing so would violate Section 177. The decision reinforces the importance of determining the specific statutory authority supporting any transfer of an interest in trust or restricted Indian land.

Background: In the 1940s, Congress condemned that portion of the Tribe's reservation where all tribal members lived to construct the Parker Dam and to create Lake Havasu. The dam flooded the Reservation and all but one tribal family relocated off the Reservation. The flooding eventually subsided, and the Tribe began encouraging its members to move back to the Reservation through conveyances to its members of certain lands, including the exclusive right of use and possession similar to fee simple absolute. The Tribe issued deeds, which it submitted to the BIA for approval under Section 81. Section 81(b) provides that agreements or contracts with tribes "that

encumber[] Indian lands for a period of 7 or more years" are invalid unless approved by the Secretary. Section 81(d) further provides that the Secretary shall not approve an agreement that violates federal law. Because Section 177, first enacted in 1791, prohibits the "purchase, grant, lease or other conveyance of [Indian] lands, or of any title or claim thereto" unless approved by an act of Congress, the issue was whether Section 81 approves a transfer of exclusive possession of tribal lands and, if it did not, whether the approval would violate Section 177.

After the BIA refused to approve the deeds, the Tribe appealed to the Interior Board of Indian Appeals ("IBIA"), which concluded that the deeds could not be approved because doing so would violate Section 177. The IBIA concluded that the deeds from the Tribe to the tribal members constituted conveyances under Section 177, which no act of Congress had authorized, and therefore could not be approved by the Secretary.

On appeal, the Tribe argued that the deeds were not "conveyances" for purposes of Section 177, because the deeds did not completely extinguish the Tribe's interest in the lands. The district court, applying the highly deferential standard of review set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[2] upheld the IBIA's decision, and granted the Secretary summary judgment.

Ninth Circuit Decision—Assignments Not Authorized by Section 81 and Violate Section 177: The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the IBIA. The court stated that the resolution of the dispute before it turned on the interpretation of Sections 177 and 81. With respect to Section 177, the court explained that Section 177's goal "is to ensure that tribal lands remain in tribal hands," and that the statute "has been interpreted as prohibiting a great deal of transactions absent Congressional authorization."[3] The court described Section 81 as providing for restraints on alienation to protect Indians from entering into improvident contracts.

The Ninth Circuit first rejected the Tribe's argument that the deeds did not violate Section 177 because the deeds did not completely divest the Tribe of its interest in the lands. The court held that, by its plain language, Section 177 "applies to conveyances of less than complete divestment."[4] The court also rejected the Tribe's argument the 2000 amendments to Section 81 expanded the scope of the Secretary's authority to approve conveyances that Section 177 would otherwise prohibit. The court held that the 2000 amendments to Section 81 were intended to narrow the scope of Section 81 authority to contracts that give a third party exclusive or near exclusive proprietary control over Indian land, but not to grant perpetual exclusive use and possession. Noting that Section 81 specifically prohibits approval of a conveyance that would violate federal law, and that the deeds would violate Section 177, the court concluded that the amendments did not impliedly repeal Section 177.

Finally, the court concluded that the IBIA correctly determined that the deeds assigned sufficient tribal interests in the lands that they constituted conveyances under Section 177. The deeds assigned to the members "a formal exclusive right to use and possess tribal lands,"

and allowed for conveyance by descent, transfer, exchange, or leases to other individuals.[5] In other words, the Tribe would lose its right to use and possess the lands, and could only recover that right in limited circumstances.

Take-Away—Importance of Thorough Due Diligence: The Ninth Circuit's decision demonstrates the importance of thorough due diligence efforts before contracting with a tribe or tribal members to ensure that there is statutory authority for each transfer necessary to consummate a transaction, supporting that the contracting party has the authority, and title, it claims.

For more information, please contact Brian Nichols or Deana Bennett.

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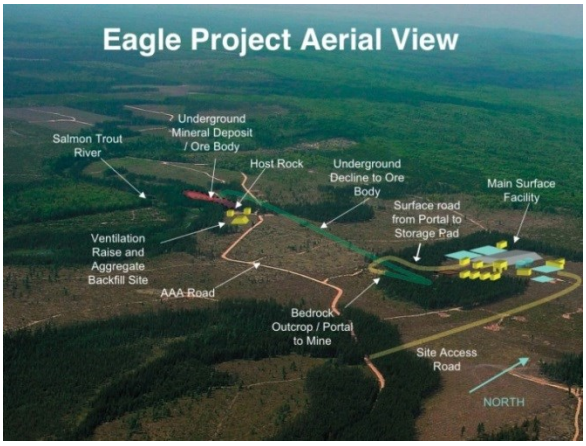
[1] 2014 U.S. App. LEXIS 17937 (9th Cir. Sept. 17, 2014) ("Slip op.").
[2] 467 U.S. 837, 843-44 (1984).
[3] Slip Op. at 9.
[4] *Id.* at 15.
[5] *Id.* at 20-21.

Michigan Court of Appeals Upholds Mining Permit Despite Concerns Over Potential Impacts to Traditional Religious Site

On August 12, 2014, the Michigan Court of Appeals upheld decisions by state regulators to grant mining and groundwater discharge permits for a nickel and copper mine.[1] The court noted the litigation "reflects the attempt to balance the potentially conflicting imperatives of exploiting a great economic opportunity and protecting the environment, natural resources and public health."[2] Appellants challenged the approval of the mining permit arguing that, in relevant part, the proximity to Eagle Rock, a Native American religious site, necessitated further review. A three-judge panel unanimously upheld the granting of the permits.



Background: In February 2006, Kennecott Eagle Minerals Company ("Kennecott") submitted applications to Michigan's Department of Environmental Quality ("DEQ") for a nonferrous metallic mining permit and a groundwater discharge permit for its Eagle Mine, located in the Upper Peninsula of Michigan. Both applications were consolidated in January 2007 for public hearing held in September 2007, and the permits were ultimately issued in December 2007. Appellants, National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community and Huron Mountain Club, requested contested case hearings on both permits.

Appellant Keweenaw Bay Indian Community argued that the proposed location of the mine's portal, Eagle Rock, was a place of worship and that the permit application

should therefore include a specific analysis of the project's impacts on Eagle Rock. Appellants also raised concerns about mine crown stability, acid mine drainage and the sufficiency of impact assessment on various resources including air emissions, noise, vibration, wildlife. In August 2009 the DEQ's administrative law judge ("ALJ") issued a proposal for decision, rejecting all challenges except whether Eagle Rock was a place of worship.

Appellants administratively appealed the ALJ's decision. The final agency decision-maker concluded, in relevant part, that a Michigan statute, Mich. Admin Code R 425.202(2)(p), upon which Appellants relied because it requires an assessment of mining impacts on "places of worship," concerned only buildings used for human occupancy, not purely outdoor locations such as Eagle Rock. Appellants sought judicial review in the state circuit court, which affirmed the DEQ in all regards. On August 7, 2012 the Michigan Court of Appeals granted leave to appeal.

Impacts on Eagle Rock: In relevant part, Appellants challenged the district court's affirmance of the DEQ's ruling that the impacts on Eagle Rock did not have to be considered. Specifically, Appellants argued that, under Michigan's codes governing mining, Kennecott was required to address the significance of Eagle Rock in its environmental impact assessment ("EIA").[3] Testimony described Eagle Rock as "an imposing jagged rock outcrop rising some 60 feet at its highest point, from the otherwise flat geography of the Yellow Dog Plain," and included detailed descriptions of traditional religious and cultural uses of the location as a special gathering place.[4] Appellants thus challenged the district court's affirmance of DEQ's conclusion that Eagle Rock did not meet the definition of "place of worship" as that term is used in the Michigan code. The court acknowledged that the relevant Michigan code required that an EIA include descriptions of certain "natural and human made conditions and features" including, but not limited to "places of worship." The Michigan Court of Appeals declined to address this issue but affirmed the lower court's decision on timeliness grounds, rather than on the meaning of the term "place of worship."[5] The court reasoned that Appellants' testimony established that Kennecott and DEQ were only informed of Eagle Rock's significance during the public comment period after the EIA was issued, and not when Kennecott submitted its EIA. The court established that Appellants did not allege that Kennecott's investigation or inquiry in the early stages was deficient, nor did Appellants cite any authority that Kennecott was obliged to update its EIA throughout the review process based on the newly acquired information. Even assuming "places of worship" under Rule 425.202(2) included outdoor locations like Eagle Rock, the court nonetheless held Kennecott's EIA was not deficient, because Kennecott neither knew nor should have known of such traditional cultural uses, when it submitted its EIA.

Take-Aways: This case underscores the importance for developers and stakeholders to understand both federal and state environmental and cultural resources laws, and the differences between the two.

Although this case is decided under Michigan state law, similar concerns about impacts are frequently raised in the

context of federal permitting of mine plans and permits and impact assessments under the National Environmental Policy Act. The decision contains useful discussion of the type and sufficiency of substantial evidence on environmental impacts of mining that supported the DEQ's permit decision.

Put within the broader context of the trend among indigenous groups to seek protection of cultural landscapes as sacred sites or traditional cultural properties (TCPs), this case highlights the widely divergent outcomes that can occur depending on the specific circumstances and legal regimes involved. *Compare, e.g., Rayellen Resources, Inc. v. N.M. Cultural Properties Review Committee*, 2014-NMSC-006, 319 P.3d 639 (upholding a state agency's listing of Mt. Taylor as a TCP under New Mexico law at the request of five nominating tribes with religious and cultural ties to the mountain and its surrounding mesas).

For more information, please contact Joan E. Drake or Benjamin A. Nucci.

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[1] *Nat'l Wildlife Fed'n v. Dep't of Envtl. Quality*, 2014 Mich. App. LEXIS 1484, 2014 WL 3928563 (Mich. Ct. App.2014) ("Slip op.") (mining permit); *Nat'l Wildlife Fed'n v. Dep't of Envtl. Quality*, 2014 Mich. App. LEXIS 1482, 2014 WL 3928561 (Mich. Ct. App.2014) (groundwater discharge permit). This note does not address the court's analysis of the propriety of the groundwater discharge permit.

[2] Slip op. at 1.

[3] *See* MCL 324.63205(2) (requiring permit application include an EIA); Mich. Admin. Code, R. 425.202(1)(a0(i) (requiring an EIA to include information about, among other things, "places of worship").

[4] Slip op. at 12.

[5] *Id.* at 12.

BIA Extends Comment Period Regarding Revisions to Proposed Rights-of-Way Regulations

The Bureau of Indian Affairs ("BIA") is proposing to revise its regulations governing rights-of-way across Indian lands currently found in 25 C.F.R. Part 169. Our prior alert on the proposed regulations is available here. BIA's proposed regulations can be found here. On September 30, the BIA announced a further extension of the deadline to submit comments through November 3, 2014. For more information, please contact Lynn Slade, Stan Harris, or Deana Bennett.

EPA Announces Final Policy on Environmental Justice for Tribes

As we previously reported, on April 30, 2014, the United States Environmental Protection Agency ("EPA") announced a public comment period on a revised draft EPA policy on environmental justice. On July 24, 2014, EPA Administrator Gina McCarthy signed EPA's Final Policy on Environmental Justice for Tribes ("Policy"). The Policy is "designed to better clarify and integrate environmental justice principles in a consistent manner in the Agency's

work with federally recognized tribes and indigenous peoples."[1]

EPA's Policy: The Policy contains seventeen principles that the EPA states will "support the fair and effective implementation of federal environmental laws, and provide protection from disproportionate impacts and significant risks to human health and the environment."[2] Notably, the EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[3]

The seventeen principles are organized by one of four EPA goals: (1) Promoting Environmental Justice Principles in EPA Direct Implementation of Programs, Policies, and Activities; (2) Promoting Environmental Justice Principles in Tribal Environmental Protection Programs; (3) Promoting Environmental Justice Principles in EPA's Engagement with Indigenous Peoples; and (4) Promoting Environmental Justice Principles in Intergovernmental Coordination and Collaboration. The principles reinforce EPA's goal to "consult[] with federally recognized tribes and provide[] meaningful involvement opportunities for indigenous peoples. . .," to be "responsive to the environmental justice concerns of federally recognized tribes. . .," and to use "legal authorities, as appropriate to advance environmental justice goals. . . ."[4] The Policy "recognizes the right of tribal governments to self-determination" and seeks to "provide[] advice and recommendations to. . . tribes supporting the integration of environmental justice principles. . . into tribal government. . . ."[5] The Policy demonstrates EPA's desire to maintain relationships with tribes, to strive "for open communication and meaningful involvement" with tribes, and "to identify key points of contact in affected communities to facilitate meaningful involvement and fair treatment on environmental justice issues."[6] The Policy seeks to encourage tribes to incorporate principles of environmental justice in tribal laws, regulations, policies and programs.[7]

Take-Away: This Policy is not a rule or regulation; it does not change or substitute any law, regulation, or any other legally-binding requirement and is not itself legally enforceable. The Policy will, however, guide the EPA's interactions and dealings with tribes and EPA decisions affecting tribal land. The Policy signals an express EPA effort to collaborate with tribes concerning decisions that impact tribal lands. The Policy also represents an Administration-wide goal to protect tribal interests in the health of indigenous peoples and sites that are sacred or of cultural significance to tribes.

For more information, please contact Bill Scott or Zoë Lees.

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[1] EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples, at 1, available here.
[2] *Id.*
[3] *Id.* at 5.
[4] *Id.*
[5] *Id.*.
[6] *Id.*
[7] See id.