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Native American Law Watch

Spring 2015

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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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Balancing Opposing Cultural and Religious Beliefs on a Shared Reservation: Agency consideration of "Native American culture" not enough to demonstrate narrowly tailored compelling interest

In *Northern Arapaho Tribe v. Ashe*,[1] the United States District Court for the District of Wyoming contrasted two tribes' eagle interests, the First Amendment, the Bald and Golden Eagle Protection Act, and the Supreme Court's *Hobby Lobby* decision to conclude that the Fish and Wildlife's decision to issue a bald eagle take permit, limited to the areas outside the Reservation, violated one tribe's First Amendment right to the free exercise of religion.

Background: The Wind River Reservation ("Reservation") has been shared by the Northern Arapaho Tribe ("NAT") and the Eastern Shoshone Tribe ("EST") since its creation in 1868. The two tribes, however, differ on the relationship between eagles and traditional culture and religion, as demonstrated in a recent case with roots in a decade-old killing of a bald eagle by a NAT member for use in a tribal ceremony.

After the Tenth Circuit ruled that the NAT and its members could not kill eagles for religious purposes without a permit under the Bald and Golden Eagle Protection Act ("BGEPA"),[2] the NAT applied for an eagle take permit under the BGEPA to allow the taking of two eagles within "Freemont County, Wyoming, Wind River Reservation." The EST submitted to the Director of Fish and Wildlife Services ("FWS") ("Director") a letter opposing the application on grounds that the EST considered eagles to be sacred, who then engaged in consultations with both tribes. When there was no action on the NAT's application, the NAT filed suit for FWS's failure to rule on its application.

The Challenged Permit: FWS issued the challenged permit on March 9, 2012, and it allowed the NAT to take up to two bald eagles but limited the geographic area in which the permit applied to *outside* the Reservation. In its *Findings for Northern Arapahoe Tribe's Permit to Take Bald Eagles for Religious Purposes* ("Permit Findings"), FWS concluded the proposed take was compatible with eagle preservation goals and "within the annual take threshold established by the Service for the Northern Rocky Mountains region"; and that "the proposed take was for a bona fide religious purpose." Limiting the take to areas outside the Reservation, however, was considered necessary to protect the EST's religion and culture.[3] The NAT amended its complaint to challenge the permit issued.

Challenge to the FWS' Consideration of EST's Objections: The NAT complaint raised two issues that may recur in controversies concerning claims of religious significance of eagles to tribes. First, the complaint argued that the FWS' regulations[4] only allow the agency to consider the religious ceremonies and beliefs of the tribe that seeks to use eagles or eagle parts for cultural or religious purposes. The court rejected this argument, deferring to the FWS' interpretation of its regulation to treat consideration of other tribes' interests as allowable as "other criteria" authorized for consideration by the regulations. The decision thus allows FWS to consider multiple tribes' positions and beliefs in determining whether to issue a take permit.

The NAT also argued that the FWS' decision violated the NAT's rights under the free exercise clause of the First Amendment. The district court agreed and ruled that the permit's limitations, allowing take only outside the Reservation, were facially discriminatory because they were expressly based on the EST's view that eagles are sacred and, therefore, "burdened the [NAT's] culture and religion based on the cultural or religious objection of the [EST]."[5] As such, the court held that FWS was required to justify the permit limitation by a compelling interest and by demonstrating that the permit limitation was narrowly tailored to advance that interest,[6] citing the Supreme Court's controversial decision in *Burwell v. Hobby Lobby Stores, Inc.*, in which the Court held an employer's religious convictions can support an otherwise illegal discrimination.

The court held that FWS' decision to allow the NAT to take up to two bald eagles per year, but to limit the right to areas outside the Reservation, was not justified by a compelling governmental interest, because the EST's identified interest, that "eagles are sacred," would be

affected whether the take was within or outside the Reservation. The district court concluded that FWS could not justify the restriction based solely on a broadly stated interest in protecting Native American culture.[7] Because FWS based its limitation on the EST's objection that eagles are sacred, restricting the take of eagles to outside the Reservation was not narrowly tailored enough to support the limitation on place of take, particularly when the eagles are then taken back on the Reservation for use.

Take-Away: This case recognizes that federal agencies may need to consult with multiple tribes when considering a specific project or permit application, but this does not excuse an agency need to ensure any decision is narrowly tailored to advance a compelling interest when a tribe asserts an interest that may be infringed on by agency action. Because FWS is a party to the case, a notice of appeal of the district court's ruling is not due until 60 days after March 12, 2015. Whether this ruling is affirmed or reversed by the Tenth Circuit Court of Appeals, it underscores the importance of agency adherence to the proper level of scrutiny.

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

[1] 2015 WL 1137487, No. 2:11-CV-00347-ABJ (D. Wyo. Mar. 12, 2015).
[2] 16 U.S.C. § 668–668(d).
[3] 2015 WL 1137487, at *4.
[4] 50 C.F.R. § 22.22 requires FWS, when evaluating an eagle take permit application, to consider the effect the permit would have on bald or golden eagles, and "[w]hether the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies."
[5] 2015 WL 1137487 at *16.
[6] *Id.* at *17-18 (citing *Burwell v. Hobby Lobby Stores, Inc.,* ___U.S. ___, 134 S.Ct. 2751 (2014), and related precedent including *Holt v. Hobbs,* ___U.S. ___, 135 S.Ct. 853 (2015), and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006)).
[7] 2015 WL 1137487 at *25.

Federal District Court Upholds Uranium Mining Within a Traditional Cultural Property Without Further NEPA Review and With Abbreviated NHPA Consultation

On April 7, 2015, in *Grand Canyon Trust v. Williams*,[1] the United States District Court for the District of Arizona granted summary judgment to the U.S. Forest Service ("USFS") on claims brought by the Grand Canyon Trust ("Trust") that USFS violated the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") in 2012 when it issued a Valid Existing Rights Determination ("VER") and approved resumption of operations at a uranium mine that had been in stand-by status since 1992.

This decision will be of interest to the many uranium and other mines in the West that received approvals many years—sometime decades—ago, and are now considering resumption of mining with the rise in commodity prices. Importantly, the court found that continuation of mining under valid existing mineral rights does not trigger NEPA where the prior approved plan of operations provided for stand by operation and continuation of mining, and needs no modification. Further, the court upheld USFS's abbreviated NHPA consultation process even regarding a newly designated Traditional Cultural Property ("TCP") that is of great importance to tribes.

Background: The Canyon Mine, a uranium mine located six miles south of Grand Canyon National Park, received USFS approval of its Plan of Operations ("1986 Plan") in 1986. The Havasupai Tribe challenged that approval, claiming USFS failed to comply with NEPA. The District Court granted summary judgment to USFS, and the Ninth Circuit affirmed in 1991.[2] The mine owner, Energy Fuels Nuclear, Inc. ("EFN"), started work on the mine, but when uranium prices fell in 1992, ENF placed the mine on stand-by status and maintained the mine under the 1986 Plan's interim management provisions.

In 2010, USFS designated nearby Red Butte and the surrounding area, including the location of the Canyon Mine, as a TCP, due to its "ongoing, and historic cultural and religious significance to multiple tribes." In 2012, the Department of Interior withdrew approximately 633,547 acres of public lands and 360,002 acres of National Forest lands, including the location of the Canyon Mine, for up to 20 years from location and entry under the Mining Law of 1872 (the "Withdrawal"). The environment impact statement ("EIS") for the Withdrawal identified Canyon Mine and assumed that the mine would continue operations.

In 2011, Energy Fuels Resources (USA), Inc. ("EFR"), Canyon Mine's successor owner, notified USFS it intended to resume operations under the 1986 Plan. USFS completed a VER Determination to confirm the owner had valid rights to the uranium deposit, and undertook a "Mine Review" to evaluate the sufficiency of the 1986 Plan and original EIS, and to review historical, religious, tribal, and environmental issues. USFS concluded EFR had valid existing rights and that the operations could resume at the Canyon Mine under the 1986 Plan without modification.

The Arizona State Historic Preservation Office, the Advisory Council on Historic Preservation ("ACHP"), and various tribes advised USFS that it should undertake a full consultation under Section 106 of the NHPA. USFS disagreed and instead undertook a reduced consultation process, which involved letters, meetings, site visits, and workshops. A memorandum of agreement was in preparation when the Trust and tribes filed suit in 2013, seeking declaratory and injunctive relief under the Administrative Procedures Act ("APA"), claiming NEPA and NHPA violations, and challenging the adequacy of the VER Determination and the Withdrawal.

The Legal Effect of the Withdrawal and the VER Determination: The court found that the questions of the legal necessity of the VER Determination and the legal effect of the Withdrawal were threshold considerations. The court first concluded that the VER Determination was a "practical requirement" but not a legal requirement for the Canyon Mine to resume operations. The purpose of the VER Determination was to allow USFS to determine whether the mine owner had valid existing rights and whether USFS should contest the claim.

The court next rejected Plaintiffs' argument that the Withdrawal required that the VER Determination be completed before the Canyon Mine could resume operations, because, according to the court, the Withdrawal did not extinguish pre-existing mining rights, and the Withdrawal EIS specifically contemplated that four uranium mines, including the Canyon Mine, would continue in operation. The court took particular note of Bureau of Land Management's ("BLM") Surface Management Handbook, which provides that approved plans of operation in effect prior to a withdrawal "are not subject to the mandatory valid existing rights determination procedures [and] . . . . can continue as accepted or approved and do not require a validity determination unless or until there is a material change in the activity. . . ."[3] The court found that because no new plan was required for Canyon Mine after the Withdrawal, the relevant regulations and guidance documents did not require a VER Determination and mining could resume without one.

No Additional NEPA Compliance Required: The court rejected Plaintiffs' argument that USFS violated NEPA by not preparing an EIS in connection with the VER Determination, because USFS prepared a full EIS and took its Major Federal Action on the Plan in 1986. Further, the VER Determination was not required as a matter of law before Canyon Mine could resume operations, and the Mine Review concluded that no modification or amendment of the existing Plan was necessary for mining to resume. Thus, the 1986 Plan approved after a full EIS evaluation continued to govern operations at the Canyon Mine.

The court next held that continued operations under an approved Plan do not trigger NEPA. The court noted that the Ninth Circuit has held that where a proposed federal action would not change the status quo, an EIS is not necessary, and that EIS requirements do not apply to mere continued operation of a facility. Here, the Major Federal Action was the same as approved in 1986—mining under the Plan of Operations. The court relied upon *Center for Biological Diversity v. Salazar* ("*CBD*"),[4] which involved nearly identical facts. In *CBD*, the same District Court found, and the Ninth Circuit affirmed, that a Supplemental EIS was not required for BLM to approve resumed operations of a uranium mine, located on the north side of the Grand Canyon, that had been in stand-by status for several years because the owner proposed to resume operations under the original Plan of Operations that had been approved in 1988 after completion of a full EIS. The BLM had required the mine owner to update its reclamation bond and obtain a clean air permit before resuming operations. The court found the Major Federal Action occurred in 1988 when BLM approved the mine's Plan of Operation after a full NEPA review, and that the

updating of the bond and the obtaining the air permit were mere ministerial tasks.

The court distinguished this situation from that in *Pit River Tribe v. U.S. Forest Service*,[5] because in that case, without the BLM's extension of the expired leases, the activity (geothermal development) could not proceed. In contrast, Canyon Mine's approved 1986 Plan had no time limit and the 1986 Plan's interim management provisions continued to govern while the Mine was on stand-by status. Unlike the expiration of leases in *Pit River Tribe*, ENF's rights were never terminated and did not require affirmative renewal.

Abbreviated NHPA Consultation Upheld: Plaintiffs argued that NHPA Section 106 consultation was required because, according to Plaintiffs, the VER Determination was an "undertaking," which the NHPA defines as a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license or approval."[6] The court rejected this argument for two reasons. First, since the VER Determination was not legally required, it could not be considered a Federal permit, license, or approval when mining operations could have resumed without it. Second, because mining operations were to resume under the original Plan; there was no new or modified plan. If mining at the Canyon Mine was an undertaking for purposes of NHPA, that undertaking was approved in 1986.

The court acknowledged one significant change had occurred since the 1986 approval—the designation of Red Butte and the surrounding land, including the location of the Canyon Mine, as a TCP. USFS chose to treat the TCP status as a "new discovery" under the NHPA regulations.[7] The "new discovery" regulations apply when historic properties or effects on historic properties are discovered *after* a Section 106 process has been completed. One subsection applies when the Section 106 process is finished but the agency has not approved the undertaking or construction on the approved undertaking has not yet commenced, and requires a full consultation (subparagraph (b)(1)).[8] A different subsection applies when the Section 106 process is finished, the agency has approved the undertaking, and construction has commenced (subparagraph (b)(3)). In those circumstances, the regulation provides for a less demanding process and merely requires the agency to notify interested parties, including Indian tribes, within 48 hours of the discovery, who must then respond with recommendations within 48 hours. USFS must then take into consideration the recommendations and "carry out appropriate actions."[9]

USFS decided that the abbreviated consultation process under subparagraph (b)(3) applied because full Section 106 consultation had been completed and construction had already started on the Canyon Mine many years ago. However, in lieu of requiring responsive recommendations within 48 hours, USFS allowed tribes and other interested parties 30 days to respond. USFS also held various meetings, site visits, and workshops with tribes, and a memorandum of agreement was in preparation when this lawsuit was filed.

Plaintiffs argued that subparagraph (b)(3) applies only in "emergencies," which this was not, and consequently USFS was required to engage in full Section 106 consultation under subparagraph (b)(1). The court concluded that Plaintiffs' arguments did not satisfy the "highly deferential" standard of review under the APA.[10] The court characterized the undertaking as "continuation of mining operations" under the 1986 Plan, without modification, and, consequently, there was no *new* undertaking that required another approval. The court concluded that it need not resort to statutory or regulatory construction or history to determine whether subparagraph (b)(3) applied only to emergencies because the regulation's language was not ambiguous and, by its plain language, applied where the agency had already approved the undertaking and construction had commenced.

The court also found that USFS had complied with subparagraph (b)(3), even though it did not send notice within 48 hours of being informed of the intent to reopen the mine, because it sent notice letters to tribes and other interested parties the same day it determined that this subparagraph applied to the Canyon Mine situation. The court reasoned that in this unusual situation, it took some

time for the agency to determine what kind of review was required.

In a letter to USFS, ACHP interpreted the abbreviated consultation procedures under subparagraph (b)(3) to apply where there was limited time and opportunity for consultation, and instead recommended a full consultation due to concerns regarding "unproductive conflict" between USFS and the tribes. The court noted ACHP's recommendation appeared to be more tactical advice than an interpretation of the regulation, and more of a comment on the situation than on the meaning of the regulation. Even if ACHP's letter was the agency's interpretation of subparagraph (b)(3), the court concluded that it need not defer to ACHP under the U.S. Supreme Court's decision in *Auer v. Robbins*,[11] because, under *Auer*, deference to an agency's interpretation of its regulations is warranted only when the regulation's language is ambiguous. The court concluded that the language of subparagraph (b)(3) was not ambiguous and clearly applied. The court reasoned that accepting ACHP's recommendation would essentially allow the agency to create a new category for undertakings approved, started, and then stopped, which would improperly allow the agency "under the guise of interpreting a regulation, to create de facto a new regulation."[12]

The Havasupai Tribe, and Sierra Club, Center for Biological Diversity and Grand Canyon Trust, have filed appeals of the decision with the Ninth Circuit.

Take-Aways: Like Canyon Mine, many uranium mines throughout the West have been in stand-by status for years. With the price of uranium rising, mine owners may be considering resumption of operations. This decision provides welcome news to miners pondering what further federal agency approvals and consultation may be needed to continue mining operations after many years on stand-by status. Specifically, to the extent that a mine's prior approved plan of operations includes provisions for operation in stand by status and for continuation of mining thereafter, this decision supports a conclusion that no further NEPA review is needed provided no modifications to the plan of operations and no additional federal agency approvals are needed. Further, this decision supports an abbreviated NHPA consultation process even where the project may affect a TCP or other sensitive resource discovered or designated after the initial approval.

Nevertheless, mine owners should expect that federal agencies and courts will require mine plan reviews to confirm that the approved plan of operations needs no modification, and will require further, albeit abbreviated, consultation under NHPA for historic properties discovered following the original approval.

For more information, please contact Joan E. Drake.

[1] No. CV-13-08045-PCT-DGC, 2015 WL 1538084 (D. Ariz. Apr. 7, 2015).
[2] *Havasupai Tribe v. United States*, 752 F.Supp. 1471 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991).
[3] *See* BLM Surface Management Handbook § 8.1.5, available here.
[4] 791 F.Supp.2d 687 (D. Ariz. 2011), *aff'd* 706 F.3d 1085 (2013).
[5] *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006).
[6] 16 U.S.C. § 470w(7)(C), *repealed* Dec. 19, 2014, *now found at* 54 U.S.C. § 300320.
[7] 36 C.F.R. § 800.13(b).
[8] 36 C.F.R. § 800.13(b)(1).
[9] 36 C.F.R. § 800.13(b)(3).
[10] Because the suit was brought under the APA, the court noted it could only set aside USFS's decision if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).
[11] 519 U.S. 452, 461 (1997).
[12] *Grand Canyon Trust*, 2015 WL 1538084, *22 (quoting *Christiansen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

Washington Court Rules Property Tax Incentive Benefitting Indian Tribes Is Unconstitutional

Agreements for payments in lieu of taxes (PILOTs or PILTs) are used frequently by local governments to incentivize private investment in facilities or infrastructure that will provide a public benefit. A recent case in the State of Washington highlights the risk of reliance on PILTs when a project will be developed on fee land owned by an Indian tribe.

Legislation at Issue: Washington House Bill 1287, enacted in 2014, expanded a tax preference to Indian

tribes for the purpose of creating jobs and improving the economic health of tribal communities. The legislation exempts from the State's property tax property belonging exclusively to any federally recognized Indian tribe if (a) the tribe is located in the State and (b) the property is used exclusively for essential government services. Essential government services include not just tribal administration and other public services, such as fire and police services, but also activities that facilitate the creation or retention of businesses or jobs or that improve the standard of living or economic health of tribal communities. The legislation requires a tribe wishing to claim the property tax exemption to pay a payment in lieu of tax (PILT) to the municipal government, to be negotiated in good faith by the tribe and the applicable county, or, in the absence of agreement between the tribe and county, to be determined by the Washington State Department of Revenue.

Legislation Ruled Unconstitutional: In *City of Snoqualmie v. King County*,[1] the City of Snoqualmie took issue with the property tax benefits of HB 1287 afforded the Muckleshoot Indian Tribe and its Salish Lodge at Snoqualmie Falls. The City also raised concerns about the Muckleshoot Tribe's planned development of approximately 60 acres into a hotel and conference center and residential community. The City argued that HB 1287 provides a substantial economic windfall to Indian tribes that is not available to non-Indian governments or private entities because the State and its municipal governments are generally not authorized to engage in general economic development or commercial activities and other non-tribal entities that are authorized to engage in economic development and commercial activities are not entitled to the benefit of the property tax exemption.

Judge Mary E. Roberts agreed with the City and concluded that the PILT is a property tax under Washington law and is subject to the uniformity requirements of Article VII of the Washington Constitution, which requires that all taxes be uniform upon the same class of property within the territorial limits of the authority levying the tax. The court held that the PILT violates the uniformity requirements because it is not imposed at an equal tax rate and does not produce equality in valuing the property taxed. Furthermore, because determination of the amount of the PILT is delegated to the tribe and county, or to the Department of Revenue, the court reasoned that HB 1287 violates Article VII Section 1 of the Washington Constitution mandating that the power to tax not be surrendered, suspended or contracted away.

The case is currently on appeal to the Washington Supreme Court.

Take-Away: When seeking to engage in economic development activities with a promise of favorable tax treatment from local governments for activities benefitting Indian communities, developers and their lawyers should analyze applicable statutes and regulations to determine whether the tax incentives will withstand a constitutional challenge.

For more information, please contact Debbie Ramirez.

[1] No. 14-2-29269-4 (Wash. Superior Ct. Mar. 4, 2015)

Indian Reserved Water Rights: Groundwater Included

Most Native American tribes have at least some land that was reserved by the federal government for the purpose of creating a homeland for the Tribe. Under the *Winters* doctrine, established by the United States Supreme Court in 1908,[1] the reservation generally includes some amount of water necessary to support the purposes of the homeland. This doctrine provides that when the United States "withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[2] Such rights "vest[] on the date of the reservation and [are] superior to the rights of future appropriators," and arise and are determined under federal law.[3]

The majority of courts to have considered the issue have concluded, that with regard to Indian water rights claims, *Winters* rights include groundwater rights.[4] In one case, however, the Supreme Court of Wyoming concluded that

Winters rights did not include groundwater rights because the reservation did not explicitly include groundwater.[5] In the most recent case to consider the question, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, the court ruled "[a]ppurtenance, as that term is used by the *Winters* doctrine, must provide some legal limitation to impliedly reserved water rights; but persuasive authority suggests that limit should not be drawn between surface and groundwater sources."[6] Rejecting the Wyoming Supreme Court's ruling, *Agua Caliente* noted that since 1988, "[t]he weight of authority on the issue has shifted"[7]—and it cannot seriously be questioned that reserved water rights include groundwater rights. (The district court, however, did reject the Agua Caliente Band's argument that they had an aboriginal right to groundwater on statute of limitations grounds.)

The Coachella Valley Water District and the Desert Water Agency have petitioned the Ninth Circuit Court of Appeals to appeal the question of whether the Tribe has a federal reserved right to groundwater. The Tribe and the United States opposed the petition.

Modrall Sperling attorneys are experienced advising tribes, pueblos, state and local governments, and business entities on Native American water rights.

For more information on our water practice or this note, please contact Maria O'Brien or Sarah M. Stevenson.

[1] *Winters v. United States*, 207 U.S. 564 (1908).
[2] *Cappaert v. United States*, 426 U.S. 128, 138 (1976).
[3] *Id.*
[4] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 745, 747-48 (Ariz. 1999) (recognizing groundwater rights); *Confederated Salish & Kootenai Tribes v. Stults*, 59 P.3d 1093, 1099 (Mont. 2002) (same); *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont 1968) (same); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 695 F.2d 559, 561 (Fed. Cir. 1982) (same); *United States v. Washington Dep't of Ecology*, 375 F. Supp. 2d 1050, 1058 (W.D. Wash. 2005) (recognizing that *Winters* rights include groundwater rights).
[5] *In re Big Horn River System*, 753 P.2d 76, 99 (Wyo. 1988), *aff'd by an equally divided court, Wyoming v. United States*, 492 U.S. 406 (1989).
[6] *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 2015 WL 1600065, No. 13-883-JGB, *8 (E.D. CA, Mar. 20, 2015)
[7] *Id.* n.5.

Jurisdiction over Suits Against Tribal Entities or Employers

Federal courts must often grapple with the question of jurisdiction over claims brought by a plaintiff against a tribal entity or tribe pursuant to statutes of general applicability, such as the Civil Rights Act and the Age Discrimination in Employment Act ("ADEA") or the Employee Retirement Income Security Act of 1974 ("ERISA"). Challenges to federal court jurisdiction arise either as a result of tribal sovereign immunity or based on the doctrine of exhaustion of tribal remedies. Three recent decisions illustrate these challenges.

Sovereign Immunity Bars Federal Court Jurisdiction over Title VII and ADEA Claims Against an Indian Owned Business: *Tremblay v. Mohegan Sun Casino*, No. 14-2031-cv, 2015 WL 1529041 (2nd Cir. Apr. 7, 2015): On April 7, 2015, the United States Court of Appeals for the Second Circuit affirmed the lower court's decision to dismiss Elizabeth Tremblay's discriminatory discharge claims against Mohegan Sun Casino, a corporation owned by an agency of the federally recognized Mohegan Tribe of Connecticut. Ms. Tremblay brought her discriminatory discharge claims under Title VII of the Civil Rights Act and the ADEA. The court held that the district court's dismissal of her Title VII claim was proper as the court did lack subject matter jurisdiction, reasoning that Title VII expressly excludes American Indian tribes from its definition of covered employers, which extends to the arms and agencies of the tribe. Because Mohegan Sun Casino is wholly-owned by a Mohegan Tribe agency, the court held that it is not an employer under Title VII.

The Second Circuit also affirmed the dismissal of Ms. Tremblay's ADEA claim because the court held that Congress has yet to unequivocally abrogate tribal sovereign immunity pursuant to the ADEA. Ms. Tremblay failed to identify any other applicable waiver of immunity from such suits in federal court. Therefore, the Second Circuit held that tribal sovereign immunity barred both Ms. Tremblay's Title VII and ADEA claims.

Exhaustion of Tribal Court Remedies Not Required for Non-Member Employee's ERISA Claim: *Coppe v. The Sac & Fox Casino Healthcare Plan*, Case No. 14-2598-RDR, 2015 WL 1137733 (D. Kan. Mar. 13, 2015): On March 13, 2015, the United States District Court for the District of Kansas held that tribal courts do not have jurisdiction over ERISA actions. In *Coppe*, a non-member of the Sac and Fox Nation alleged that the defendants refused to pay her medical expenses under the provisions of the Sac & Fox Casino Healthcare Plan, which was an employee benefit she received while working for the casino and which is governed by ERISA. The court first noted that the Healthcare Plan was not considered a "governmental plan" under ERISA, which is a plan established and maintained by an Indian tribe for employees of a non-commercial tribal entity. *See* 29 U.S.C. § 1002(32). "Governmental plans" are not regulated by ERISA, so the fact that the Plan was a nongovernmental plan brought it within ERISA's reach.

Relying on the United States Supreme Court's decision in *Nevada v. Hicks*,[1] the Kansas federal district court held that tribal courts are not courts of general jurisdiction, and without an explicit grant of jurisdiction over ERISA claims by Congress, tribal courts lack jurisdiction over such claims. Moreover, the court reasoned that a tribe's right to govern its members and regulate activity on its reservation "does not exclude federal authority as expressed in ERISA to occupy and preempt the field of ERISA rights enforcement for nongovernmental plans." The court thus held that exhaustion of tribal court remedies was not required, allowing the case to proceed in federal court. Unlike Title VII and the ADEA, courts have held that tribal sovereign immunity is waived for ERISA claims for non-governmental plans.[2]

Exhaustion of Tribal Remedies Required under ERISA: *Life Ins. Co. of N. Am. v. Hudson Ins. Co.*, No. CIV-15-064-RAW, 2015 WL 1966667 (E.D. Okla. Apr. 30, 2015): On April 30, 2015, United States District Court for the Eastern District of Oklahoma clarified that "[c]omplete preemption under ERISA is limited to claims brought under § 502(a) [29 U.S.C. § 1132(a)] and that provision, in turn, is limited by its terms to claims by a participant or beneficiary of an ERISA-regulated plan to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan." Because the case was not brought by a participant or beneficiary to recover benefits or enforce or clarify rights under a plan, the court held that complete preemption did not apply and exhaustion of tribal remedies was required.

Take-Away: These cases demonstrate that, while statutes of general applicability may apply to a tribal enterprise, a claim brought pursuant to such statute may nevertheless be barred by the tribe or tribal entities' immunity from suit or may have to be brought in the first instance in a tribal forum.

For more information, please contact Zoë Lees.

[1] 533 U.S. 353 (2001).

[2] *See, e.g.*, *Vandever v. Osage Nation Enter., Inc.*, No. 06-CV-380-GKF-TLW, 2009 WL 702776, at *4 (N.D. Okla. Mar. 16, 2009) ("Second, the amended language of § 1002(32) makes clear that Congress *has* abrogated sovereign immunity of the tribes with respect to certain ERISA plans.").

OF NOTE

Enforceability of Arbitration Provisions in Agreements with Tribes or Tribal Entities

Over the past few years, federal courts have seen an influx of cases involving challenges to "payday" lending agreements referencing tribal law or courts, and involving Western Sky Financial, LLC and/or related entities or persons. Some of these agreements include an arbitration provision selecting Cheyenne River Sioux Tribal law and jurisdiction and requiring the arbitration to be conducted by the Cheyenne River Sioux Tribe. The United States Supreme Court recently denied two petitions for writs of certiorari seeking review of decisions by the Eleventh and Seventh Circuits, both of which refused to compel arbitration under the same arbitration agreement because neither the arbitral forum nor applicable tribal law

exist.[1] The challenged arbitration agreement has now been modified, and courts have been compelling arbitration pursuant to the modified agreement. For example, in *Hayes v. Delbert Services Corp.*,[2] the United States District Court for the Eastern District of Virginia compelled arbitration because Western Sky's modified arbitration provision allows selection of arbitrators from the American Arbitration Association ("AAA") or JAMS. In *Kemph v. Reddam*,[3] the United States District Court for the Northern District of Illinois compelled arbitration under the same arbitration provision. *Kemph* specifically held that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"), and its policy favoring arbitration applies to arbitration agreements, even when the choice-of-law provision of the contract containing the arbitration provision states that federal law does not apply, and when the specific arbitration provision is silent on the applicability of federal law. Conversely, in *Heldt v. Payday Financial, LLC*,[4] the United States District Court for the District of South Dakota refused to compel arbitration under the modified arbitration provisions allowing the selection of AAA or JAMS, because, although containing "clearer arbitration terms," the loan agreement was nevertheless ambiguous and the court concluded that its ambiguities should be resolved by the tribal court in the first instance.

In negotiating a contract with a tribes or tribal entities, the tribe or tribal entity may want a tribal arbitrator or tribal law to apply. These cases provide guidance on how to ensure that arbitration provisions contained in contracts with tribes or tribal entities are enforceable. First, if the arbitration provision selects a tribal forum or tribal law, it is important to understand whether a tribal forum or law is available and review the arbitration provision's terms to ensure that they are not susceptible to ambiguities that could undermine their effectiveness. The cases construing the modified arbitration agreements demonstrate that specifying a recognized arbitration service provider and specifically making applicable the FAA and its policies may avoid or minimize the likelihood that a court will reject as invalid the arbitration agreement.

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

[1] *See Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014), *cert. denied*, April 6, 2015; *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), *cert. denied*, April 27, 2015.
[2] 2015 U.S. Dist. LEXIS 6715 (E.D. Va. Jan. 21, 2015).
[3] 2015 U.S. Dist. LEXIS 38861 (N.D. Ill. March 27, 2015); *see also Williams v. Cashcall, Inc.*, 2015 U.S. Dist. LEXIS 32620 (E.D. Wisc. March 17, 2015) (refusing to compel arbitration of one plaintiff's claims brought under the former arbitration provision but compelling arbitration of another plaintiff's claims brought under the modified arbitration provision based on the FAA and because the provision allowed for the selection of arbitrators and arbitral rules).
[4] 12 F.Supp.3d 1170, 1190-91 (D.S.D. 2014).

Cross-Commissioned Pueblo Police Officer Must Be Defended by County

The New Mexico Supreme Court, in *Loya v. Gutierrez*,[1] decided a case in which a Pueblo of Pojoaque police officer, who is also cross-commissioned as a Santa Fe County deputy, arrested and prosecuted a non-Indian in state magistrate court, for violating state law on tribal land. The officer was then sued for civil rights violations, and *Loya* held that Santa Fe County, where the non-Indian was prosecuted, was required to provide the officer a legal defense under the New Mexico Tort Claims Act.[2] The court described the factual circumstances as "endemic to the New Mexico experience" and held that, because the officer was enforcing state law, and not tribal law, he was acting as a state officer—and thus should receive the protections provided state employees. Cross-commission agreements are common in New Mexico, where Pueblos and Reservations often exist close to cities or are traversed by state highways, and experience has taught the respective governments that authorizing additional officers to enforce applicable laws is beneficial to all communities. *Loya* ensures that tribal officers—providing services to cities and counties by enforcing their laws—receive the benefit of protection from liability available to other police officers.

[1] No. 34,447 (May 11, 2015).
[2] NMSA 1978, §§ 44-4-1 to -29 (1976, as amended through 2009).