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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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Supreme Court Affirms Indian Gaming Regulatory Act Does Not Abrogate Sovereign Immunity for Suit Alleging Illegal Gaming Occurring On Non-Indian Lands

The Supreme Court's May 27, 2014 decision *Michigan v. Bay Mills Indian Community* (Bay Mills),[1] rebuffed a potent recent threat to tribes' ability to avoid litigation by invoking tribal sovereign immunity from suit. Bay Mills affirmed the Sixth Circuit's holding that Congress did not abrogate tribal sovereign immunity for a lawsuit by a State against a tribe seeking to enjoin off-reservation gaming in the Indian Gaming Regulatory Act (IGRA).[2] IGRA is a comprehensive statutory scheme that permits States and Tribes to enter into gaming compacts to permit Tribes to conduct "class III gaming"—Las Vegas style gambling—on the Tribes' "Indian lands," lands over which the Tribe has jurisdiction and exercises governmental power. Section 2710(d)(7)(A)(ii) of IGRA provides a federal court with subject matter jurisdiction for a suit by a State against a Tribe "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect."

Background: Michigan and Bay Mills entered into a tribal-state gaming compact, and Bay Mills opened and operated a casino on its reservation in Michigan's Upper Peninsula. The dispute with Michigan arose when Bay Mills purchased property in Vanderbilt, approximately 175 miles away on the Lower Peninsula, and opened a new casino. Michigan filed suit for injunctive relief, arguing that the Vanderbilt casino was not located on Bay Mills' Indian lands and thus was not permitted by the gaming compact. The district court granted the injunction, and the Sixth Circuit reversed, ruling that IGRA did not provide subject matter jurisdiction nor abrogate Bay Mills' immunity from suit by the State.

Michigan deployed a two-pronged attack to pierce the tribe's immunity from suit to enjoin illegal off-reservation gaming: the tribe's immunity was abrogated by IGRA's provision providing a federal court remedy for breach of compact conditions, but, if that contention were rejected, the Court should overrule its cases affirming tribal immunity from suit entirely, or alternatively hold tribes do not retain immunity for off-reservation commercial activities. The tribal community was appropriately concerned when the Court granted certiorari on both issues.

Majority Opinion: The Supreme Court's opinion, authored by Justice Kagan and joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor, affirmed the Sixth Circuit's sovereign immunity holding, ruling that IGRA did not abrogate the Tribe's immunity from suit. The opinion begins by reaffirming the principle of tribal sovereign immunity, and the existence of tribal sovereign immunity for commercial activities of a tribe, even when those activities do not occur on Indian lands, unless that immunity has been abrogated or waived. Acknowledging that IGRA abrogates tribal sovereign immunity for some suits in 2710(d)(7)(A)(ii), the Court concluded that provision did not apply in the dispute between Michigan and Bay Mills because Michigan alleged the Vanderbilt casino was *not* on Indian lands. That allegation removed the suit from IGRA's abrogation of immunity for suits seeking to enjoin conduct *on* Indian lands.

The Court rejected Michigan's argument that the authorization of the Vanderbilt casino from Bay Mills' reservation served to locate the activity the suit sought to enjoin on Indian lands, finding this argument ignored that IGRA permits a suit to enjoin "gaming activity"—or gambling. The Court also refused the argument that Congress could not have intended to preclude a state

remedy for off-reservation Indian gaming, rejecting Michigan's invitation to rewrite IGRA.

The Supreme Court considered Michigan's position that its interpretation of IGRA leaves states without a remedy for illegal tribal gaming on state land, and found it lacking. To challenge off-reservation gaming, Michigan could deny a casino license; bring a suit under the *Ex parte Young* doctrine against tribal officials; or prosecute the operators and customers of the illegal casino. The Court also recommended states negotiate waivers of tribal sovereign immunity when Congress has not abrogated immunity for specific commercial activities.

The Court rejected Michigan's invitation to overturn its 1998 decision in *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*,[3] a case that held tribal sovereign immunity extends to commercial activities. Michigan had not presented any compelling reason to stray from the doctrine of *stare decisis*, particularly as in *Kiowa* the Court had invited Congress to alter the bounds of tribal sovereign immunity if it disagreed with the Court's interpretation—and Congress has made no wholesale modification of the tribal sovereign doctrine.

Other Opinions: The Supreme Court's opinion was fractured, 5-4, with the key issue being the Court's prior opinion in *Kiowa*. Justice Sotomayor issued a concurring opinion, setting forth the historical and practical background of the tribal sovereign immunity doctrine, in refutation of the primary dissent authored by Justice Thomas and joined by Justices Scalia, Ginsburg, and Alito. Justice Thomas advocated overruling *Kiowa* and limiting tribal sovereign immunity to on-reservation governmental activities only. Justice Scalia issued a short dissent, noting the change in his position from concurring in *Kiowa* when it was issued to believing it was wrongly decided now. Justice Ginsburg also issued a short dissent to note her opinion that Eleventh Amendment immunity had been unreasonably broadened by the Court.

Take-Away: *Bay Mills* does not mark a great change to the law. The Court affirmed the doctrine of tribal sovereign immunity, and its extension to a tribe's commercial activities that may take place outside a tribe's Indian lands. States, and others doing business with or otherwise in contact with tribes, are not at a loss when a dispute arises. States can enforce their generally applicable laws on state lands, and suits against tribal officials for prospective relief for an ongoing violation of federal law remains a viable option under the *Ex parte Young* doctrine. As a practical matter, negotiating a waiver of tribal sovereign immunity is highly recommended when contracting with tribes or tribal entities, to avoid judicial disputes over sovereign immunity entirely. While Congress did not accept the Court's invitation to limit tribal sovereign immunity in *Kiowa*, there remains the possibility that a future Congress will change the law of the land. For now, however, *Bay Mills* has maintained the status quo. For more information, please contact Lynn Slade, William Scott, or Sarah Stevenson.

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[1] No. 134 S. Ct. 2024, affirming 695 F.3d 406 (6th Cir. 2012).

[2] 25 U.S.C. §§ 2701 *et seq.*

[3] 523 U.S. 751 (1998).

Revisions to Regulations Governing Rights-of-Way over Indian Land Forthcoming

The Bureau of Indian Affairs (BIA or Bureau) of the Department of the Interior (DOI or Department) continues to update its regulations governing Indian Land. The Department is revising 25 C.F.R 169 Rights-of-Way over

Indian Land. In an interview with a source at the DOI, we learned that the proposed rule will be published by the end of 2014.

Current Regulations: The current Rights-of-Way regulations, published in 1969, provide the procedures and terms and conditions under which rights-of-way may be granted over and across tribal land, individually owned land and Government owned land. These regulations are extremely detailed and prescriptive. They proscribe the processes for rights-of-way applications and renewals as well as regulations for specific types of rights-of-way, which include: service lines; railroads; oil and gas pipelines; telephone and telegraph lines; radio, television, and other communications facilities; power projects; and public highways. They include all the various statutes on rights-of-way on Indian Land then in existence, most of which were passed in the early 1900s. For example, the regulations on rights-of-way for oil and gas pipelines in section 169.25 are subject to the provisions of the Act of March 11, 1904[1]—which is silent with respect to tribal consent.

Reasons for Change: The Department's overarching goals in revising the Rights-of-Way regulations, according to our DOI source, are: (1) to standardize and simplify the regulations, and (2) to promote tribal self-determination. The Department is taking advantage of the Indian Rights of Way Act of 1948,[2] which allows for rights-of-way—with consent from the tribe—for any purpose. Currently, when this Act is mentioned in the regulations, it is limited by the regulations. The Department would like the new regulations to be more flexible, and remove the limitations permitting rights-of-way for specific purposes only, as delineated in the current regulations.

The Department, according to our DOI source, also wants to modernize the regulations. For example, section 169.6(a) requires that each right-of-way application include maps of the right-of-way location "consisting of an original on tracing linen." Our source reported that the revised regulations likely will allow for survey grade GPS and do away with the tracing linen requirement. The current regulations also include right-of-way regulations for telegraph lines, which our DOI source said are probably no longer necessary. The kilowatt limitations for service lines also need to be updated.

Take-away: Once the revisions to the Rights-of-Way regulations are published, they will be open for public comment. The Department will consult with Indian Tribes as it has an affirmative obligation to do so, but will not reach out to consult other groups. We will provide analysis on the proposed rule when it is issued. For more information, please contact Zoe Lees.

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[1] 33 Stat. 65, as amended by the Act of March 2, 1917, 25 U.S.C. § 321.

[2] 25 U.S.C. §§ 323-328.

Challenge to U.S. Fish and Wildlife Service's Promulgation of the Bald and Golden Eagle Act Programmatic Permit Rule

On April 30, 2014, the American Bird Conservancy (ABC) informed the Department of the Interior and the U.S. Fish & Wildlife Service (USFWS) of its intent to sue for alleged violations of federal law in promulgating the Bald and Golden Eagle Permit Rule, contained in 50 C.F.R. Parts 13 and 22. ABC contends that in enacting the Bald and Golden Eagle Permit Rule, USFWS violated that National Environmental Policy Act (NEPA), the Endangered Species Act, and the Bald and Golden Eagle Protection Act (Eagle Act). Under the Endangered Species Act, ABC is required

to submit a notice of intent to sue 60 days prior to filing suit. The sixty-day notice period will expire on June 29, 2014. We will monitor the suit, if filed, and report on its progress in subsequent reports.

The Eagle Act: The Bald and Golden Eagle Permit Rule was published as a final rule on December 9, 2013 pursuant to the Eagle Act.[1] The Eagle Act prohibits the "take" of bald and golden eagles by otherwise lawful activities. "Take" is defined to include the following acts: pursue, shoot, poison, wound, kill, capture, trap, collect, destroy, molest or disturb. In 2009, USFWS published a final rule that established permit regulations that authorized incidental take of eagles, but the permit term was limited to five years. In April 2012, USFWS proposed to amend the 2009 regulations to provide for a programmatic permit, which authorizes recurring take that is unavoidable even after implementation of Advanced Conservation Plans (ACPs), with a term up to thirty years to better correspond to operational timeframes for renewable projects. ACPs are "scientifically supportable measures approved by the Service that represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable."

The Programmatic Take Rule: Under the Programmatic Take Rule, project developers/operators will be required to implement all available measures to avoid and minimize incidental take, and each permit issued for more than five years will be reviewed at five year intervals to assess fatality rates, whether measures undertaken to reduce take are effective, and whether the permit's terms should be modified or revised to add additional mitigation measures if necessary for the preservation of eagles. The Programmatic Take Rule also allows a permit to be transferred, subject to a determination by USFWS that the successor meets all of the qualifications for holding a permit, that the successor provides adequate written assurances of sufficient funding for a conservation plan or agreement, if applicable, and demonstrates a willingness to implement the terms and conditions of the permit. If an activity is not compatible with eagle preservation, USFWS retains the right to revoke a permit. The Programmatic Take Rule "substantially increase[es]" the application fees for programmatic take permits. Federal, state, tribal, and other governmental agencies are exempt from the permit application processing fee.

Voluntariness: In response to comments, USFWS clarified that an eagle take permit does not authorize construction or operation of a facility *per se*, but instead authorizes eagle take that may result from the construction or operation of the facility. USFWS emphasized that it is "the responsibility—and choice—of the developer, operator, or landowner to seek a permit and avoid liability for such take." While recognizing that obtaining an eagle take permit is voluntary, USFWS "encourages all entities within a project that has a potential to incidentally take eagles to obtain an eagle take permit." USFWS also stated that a permit will not be issued "unless an activity can be made compatible with the conservation standards of the Eagle Act." USFWS further explained that individual eagle take permit applications will be subject to NEPA and that the "[e]nvironmental impacts of activities on local or regional eagle populations will be addressed in the NEPA analysis of direct, indirect, and cumulative impacts for each permitted project."

Take-away: The Programmatic Take Permit has the beneficial effect of providing a long-term, transferrable permit intended to balance developers' need for life-of-project certainty with the Eagle Act's goal of preventing take. Although primarily intended for wind projects, the Programmatic Take Permit Rule could apply to other types of renewable energy facilities, as well as transmission lines, airport operators, commercial and residential

construction, and recreation. The USFWS has acknowledged that the Programmatic Take Permit Rule could be perceived negatively by Native American Tribes for whom eagles have religious significance, but has stated that it believes that the Programmatic Take Permit Rule will sufficiently protect eagles.[2] If litigation does occur, it may delay projects while the substance and procedure of the Programmatic Take Permit Rule is considered. For more information, please contact Deana Bennett.

[1] Final Rule 78 Fed. Reg. 73704 (Dec. 9, 2013).

[2] *See* 78 Fed. Reg. at 73722.

Tribal Recognition Regulations Reformed

The Bureau of Indian Affairs (BIA) published proposed rule changes to 25 C.F.R. 83, Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.[1] The proposed rule seeks to streamline the process and criteria for obtaining Federal acknowledgment of Indian Tribes. It eliminates the requirement that the petitioner demonstrate that third parties have identified the petitioner as a tribe, and replaces that requirement with a narrative providing evidence of a group's existence in historical times (up to and including 1900). The revisions also require evidence of community and political authority from 1934 to the present. Petitions will be reviewed by the Office of Federal Acknowledgment, and denials may be appealed to the Office of Hearing and Appeals, with final review by the Assistant Secretary of Indian Affairs. That decision may be appealed to a federal district court. The proposed rules would also allow a previously denied petitioner reapply in limited circumstances. The BIA will be holding public meetings and tribal consultations in July. Comments on the proposed rule are due August 1, 2014. For more information, please contact Zoe Lees.

[1] 79 Fed. Reg. 30766 (May 29, 2014).

Grand Canyon Litigation Settles; Long Live Grand Canyon Litigation

The ongoing litigation between the Hualapai Tribe of Arizona and a Tribal entity and Grand Canyon Skywalk Development, LLC (previously reported in these pages) has been settled by the parties for an undisclosed amount. The settlement resolves all pending suits in tribal, federal, and bankruptcy court between the Tribe and the developer of the Skywalk, including breach of contract and defamation suits. The Skywalk remains involved in litigation, however, between the developer and a public relations firm retained by the Tribe and sued for defamation. The developer's defamation claims recently survived a motion to dismiss in the United States District Court for the District of Nevada, and litigation related to the contentious tourist attraction in northern Arizona continues.