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Deana M. Bennett and Sarah M. Stevenson, co-editors

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.

Lawyers

- Brian K. Nichols, co-chair
- Lynn H. Slade, co-chair
- Deana M. Bennett
- Jennifer L. Bradfute
- Duane E. Brown
- Stuart R. Butzier
- Earl E. DeBrine
- Joan E. Drake
- Stan N. Harris
- Zoë E. Lees
- Marte D. Lightstone
- George R. McFall
- Margaret L. Meister
- Lesley J. Nash
- Maria O'Brien
- Ruth M. Schifani
- William C. Scott
- Christina C. Sheehan
- Walter E. Stern
- Sarah M. Stevenson

Albuquerque
505.848.1800
500 Fourth Street NW
P.O. Box 2168
Albuquerque, NM 87103

Santa Fe
505.903.2020
P.O. Box 9318
Santa Fe, NM 87504

www.modrall.com

Pueblo of Jemez v. United States: Tenth Circuit Resurrects Land Claim – Unique Circumstance or Cloudy Titles on the Horizon?

On June 26, 2015, in *Pueblo of Jemez v. the United States*,[1] the United States Court of Appeals for the Tenth Circuit reversed a district court ruling that had dismissed the Pueblo of Jemez' (Pueblo) claim seeking the return to the Pueblo ownership of lands within a Spanish land grant recently acquired by the United States on jurisdictional grounds. The Court of Appeals' reversal allows Pueblo to present the merits of its claims that it retains aboriginal title to the lands.

The Case: In 2012, the Pueblo filed suit in federal district court under the federal Quiet Title Act (QTA) seeking to quiet title to roughly 95,000 acres that had been the subject of a Spanish land grant, referred to as the Baca Location No. 1, confirmed by the United States Congress in 1860 after the Territory of New Mexico was acquired from Mexico through the Treaty of Guadalupe-Hidalgo. The United States originally acquired title to the Baca Location No. 1 lands in 2000. The lands passed back into private ownership until 2015, when the lands were again transferred to the United States. The United States moved to dismiss the case claiming that the Pueblo's claim arose in 1860 and consequently should have been presented pursuant to the Indian Claims Commission Act (ICCA), which waived federal immunity from suit for tribal claims against the United States arising before 1946 for the taking of lands, but required any such claim to be presented to the Indian Claims Commission (ICC), a tribunal created by the Act, by 1951. The district court, having found that the ICCA provided the exclusive remedy for the Pueblo's claim, dismissed the claims because the action was not timely filed and the United States was, therefore, immune from suit and had not waived its immunity.

A unanimous panel of the Tenth Circuit concluded that if the Pueblo holds unextinguished aboriginal title to the lands, then no claim needed to be presented to the ICC, and the Pueblo is free to pursue its aboriginal title claims under the QTA. In addition, the Pueblo has the burden to establish that the actions of the United States in granting the lands to the Baca family did not interfere with its exercise of rights protected under aboriginal title prior to 1946. In the event the Pueblo cannot meet that burden, the Pueblo's claims may yet be barred due to the exclusive remedy provisions of the ICCA.

Historical Backdrop: From Time Immemorial to Sovereign Roles of Spain, Mexico and the United States. According to the Pueblo's Complaint, Pueblo members have used and occupied the lands in dispute since at least 1200, over 800 years ago. The area was used for agricultural purposes, mineral collection, hunting, medicinal and healing activities, and religious and traditional ceremonies. The Pueblo alleges that its members pursued these activities uninterrupted since 1200. In 1860, the United States confirmed the Baca Location No. 1 lands as belonging to the Baca family, after the Surveyor General concluded that the lands were "vacant." The Pueblo alleged, however, that the rights given to the Baca family pursuant to Baca Location No. 1 were subject to the Pueblo's prior and paramount aboriginal rights. In addition, the Pueblo alleges its members continued their traditional uses without interference from the Baca family and its successors.

In 2000, the United States acquired the Baca Location No. 1 lands from the Dunnigan family, successors to the Baca family. In its complaint, the Pueblo alleged that only after the United States acquired the lands in 2000 were actions taken that interfered with the Pueblo's access to the area in dispute. Therefore, the Pueblo contended that its

claims only arose in 2000, and should be heard under the QTA since the claims were filed within its twelve year statute of limitation and are not barred by the ICCA's five year statute of limitations.

Tenth Circuit's Legal Analysis: The Pueblo Should Have an Opportunity to Prove that Interference with its Rights Arose Only After 2000, and to Prove Aboriginal Use and Occupancy. The Tenth Circuit held that the 1860 Baca Grant did not extinguish the Pueblo's claimed aboriginal title. The court noted, however, on remand that the Pueblo had to establish, as a matter of fact, that it has aboriginal title, and that its aboriginal uses were not disturbed until after the United States acquired title in 2000. An important point underlying the Tenth Circuit's analysis arises from historical laws, treaties, and international law principles applicable beginning during the period when Spain had sovereignty over what is now the State of New Mexico, extending through the 1821-1848 period that Mexico exercised sovereignty over the area, and continuing to the present under principles Chief Justice John Marshall established in his early trio of Indian law cases in the 1820s and 1830s: To the extent Native American groups have used and occupied areas, those aboriginal rights will be respected.[2] Against this backdrop, the court reiterated that the "Indian right of occupancy is considered as sacred as the fee-simple of whites," and can only be "extinguished by Congress's plain and unambiguous intent, which will not be lightly implied."[3] The court found no language in the 1860 Baca Grant demonstrating Congress' unambiguous intent to extinguish the Pueblo's aboriginal title. The court rejected the argument that the Surveyor General's conclusion that the land was "vacant" extinguished aboriginal title, because the Surveyor General lacked authority to extinguish title. In sum, the court concluded that the Baca heirs were granted fee title subject to any Pueblo aboriginal rights.

The court also rejected the United States' argument that, even if the Baca Grant did not extinguish the Pueblo's aboriginal title, it placed a cloud on the title, such that the Pueblo's claim accrued in 1860. The court reasoned that "simultaneous occupancy and use of land pursuant to fee title and aboriginal title could occur because the nature of Indian occupancy differed significantly from the occupancy of settlers . . . ."[4] Thus, held the court, the Baca's use of the land was not necessarily inconsistent with the Pueblo's aboriginal title. The court noted that, on remand, the Pueblo would need to demonstrate "actual, exclusive, and continuous use" of the land, although the court reasoned that the exclusive use element is limited to a showing that the Pueblo excluded other Indian groups, and not the Baca heirs.

Before remanding to the district court, the Tenth Circuit had to address one final hurdle: the fact that federal courts, including the Tenth Circuit, have consistently held that claims that accrued prior to 1946 were subject to the exclusive jurisdiction of the ICC.[5] The *Pueblo of Jemez* court distinguished the Tenth Circuit's earlier *Navajo* opinion, in which the court held that the Navajo Nation's quiet title claim against the United States were time barred under the ICCA, on three grounds. First, the *Pueblo of Jemez* court noted that the claim in *Navajo* was based on a claim of title granted by Executive Order, and not aboriginal title. The court explained that, at the time of the Executive Order, the President's authority was limited to granting transitory, possessory rights to tribes. Second, the Navajo Nation conceded that certain Executive Orders were intended to extinguish the Nation's aboriginal title. Third, the *Pueblo of Jemez* court stated that the final Executive Order at issue in *Navajo* expresses clear intent to extinguish the Nation's claim to the lands at issue. The Tenth Circuit reasoned that *Navajo* could not and did not trump Supreme Court case law holding that aboriginal title cannot be extinguished "except by clear and unambiguous congressional intent."[6] Thus, the Tenth Circuit held that, on the record before it, the United States

had failed to show that the Pueblo was required to bring a claim against the United States by 1951 under the statute of limitations of the ICCA.

Take Away: The United States has not yet filed a petition for a writ of certiorari and its time to do so has not yet run. The Tenth Circuit's decision, if not challenged or not overturned upon review by the United States Supreme Court, may lead to some uncertainty as to the status of title for lands claimed to be subject to aboriginal title. The unique factual and historical circumstances giving rise to the decision, however, should minimize that uncertainty. It is noteworthy that the United States did not assert a laches as a defense in this case. In a case involving laches, *City of Sherrill v. Oneida Indian Nation*,[7] the United States Supreme Court reasoned that "longstanding observances and settled expectations are prime considerations," when a party asserts a right to sovereign control over lands. It is unclear how the Tenth Circuit would have ruled if a laches claim was presented to it.

For more information, please contact Walter E. Stern or Deana M. Bennett.

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[1] 790 F.3d 1143 (10th Cir. 2015).

[2] *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Worcester v. Georgia*, 31 U.S. 518 (1832); *Mitchel v. United States*, 34 U.S. 711 (1835).

[3] *Pueblo of Jemez*, 790 F.3d at 1162 (internal quotation marks and citations omitted).

[4] *Id.* at 1165.

[5] *See, e.g., Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987); *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States Corps of Eng'rs*, 570 F.3d 327 (D.C. Cir. 2009).

[6] *Pueblo of Jemez*, 790 F.3d at 1170.

[7] 544 U.S. 197, 218 (2005).

Southern Ute Sues to Bar Applying BLM's Fracking Rule to Tribal Oil and Gas

The Case: The Southern Ute Indian Tribe (Tribe) filed suit on June 18, 2015 in the United States District Court for the District of Colorado[1] against the Department of the Interior challenging the Department's new hydraulic fracturing rule for federal and Indian lands (BLM Frac Rule).[2] The suit alleges that the BLM Frac Rule conflicts with the Indian Mineral Leasing Act (IMLA), the Indian Mineral Development Act (IMDA), and Bureau of Indian Affairs (BIA) regulations, and asks the court to vacate those parts of the rule that violate the IMLA and frustrate the Tribe's authority over its own lands. "The BLM was overreaching when it enacted this rule for tribal lands. Tribal lands should be treated differently than federal lands," said Clement J. Frost, the Tribe's Chairman.[3] The suit contends that the new rule imposes unwarranted regulatory burdens that delay energy development on the Reservation and impair the Tribe's ability to provide services and benefits to the tribal membership. The Tribe's filing follows the earlier suit filed by industry and state opponents of BLM's Frac Rule in the U.S. District Court for the District of Wyoming. *See Independent Petroleum Association of America v. Jewell*.[4] Orders entered in that case have stayed the effective date of the new rule.

The Tribe's Contentions: The Tribe has adopted its own legislative enactment to address hydraulic fracturing, the Southern Ute Indian Tribe Hydraulic Fracturing and Chemical Disclosure Regulations. Its federal court complaint cites a BIA regulation, 25 C.F.R. § 211.29, which authorizes a tribe organized under the Indian Reorganization Act of 1934 (IRA)[5] to supersede federal leasing regulations by enactment of tribal laws. The Tribe is organized under the IRA. Contending that "[t]he Tribe's regulations provide more protection for aquifers with less bureaucratic morass," the Tribe argues that the BLM Frac

Rule, if applicable to the Tribe's oil and gas development, would disadvantage the Tribe's lands as compared with neighboring fee lands. Consequently, the Tribe contends, the BLM Frac Rule cannot be applied to oil and gas leases of tribal lands.

Litigation Progressing: Briefing on the issues framed by the Tribe's amended complaint began on July 23, 2015 and is progressing. The case presents the important question whether IRA tribes can avoid imposition of the controversial BLM Frac Rule by adopting tribal codes to regulate hydraulic fracturing.

For more information, contact Lynn H. Slade.

[1] Southern Ute Indian Tribe v. U. S. Department of the Interior, D. Colo. No. 1:15-cv-01303.

[2] "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands." 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. Part 3160).

[3] Ann Butler, *Tribe Sues Dept. of Interior*, The Durango Herald, June 20, 2015.

[4] D.Wyo. No. 15-cv-00041.

[5] 25 U.S.C. §§ 461—479.

Dependent Indian Communities: Existential Determination Impacts State and Federal (and Tribal?) Jurisdiction

On June 15, 2015, the New Mexico Supreme Court issued a decision that clarified the Indian country status of a certain parcel of land in New Mexico that had been the subject of conflicting state and federal court decisions. In *State of New Mexico v. Steven B.*,[1] the New Mexico court held that the lands were not part of a "dependent Indian community," as that term is used in 18 U.S.C. § 1151, and are therefore subject to state jurisdiction. The decision clears the way for New Mexico to prosecute criminal offenses committed on Fort Wingate's Parcel Three lands on which the Wingate High School and an adjacent staff housing area administered by the Bureau of Indian Affairs (BIA) sit. Administration of the school itself is shared among the BIA, the Navajo Nation, and the State of New Mexico.

Definition of "Indian country": 18 U.S.C. § 1151 is a section of the United States criminal code and defines the term "Indian Country," over which the United States has jurisdiction to prosecute certain major crimes occurring within "Indian Country." The definition, like Gaul, is divided into three parts: (a) Indian reservations; (b) dependent Indian communities; and (c) allotments to individual Native Americans. Initially used only for allocating criminal jurisdiction between states and the federal government, Congress has borrowed the "Indian Country" definition to allocate (and delegate) regulatory authority between the federal government and tribes on the one hand, and states on the other hand.

New Mexico Supreme Court's Analysis: In considering whether the Fort Wingate lands were a dependent Indian community, the New Mexico Supreme Court applied the two prong test developed by the United States Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*.[2] In *Venetie*, the Court said that for lands to be considered a dependent Indian community, two requirements must be met. The lands "must have been set aside by the Federal Government for the use of the Indians as Indian land [, and] must be under federal superintendence."[3] In *Steven B.*, the parties did not dispute a lower court's conclusion that the lands were "under federal superintendence." Therefore, the parties and the court focused attention on whether the lands had been "set aside by the Federal Government for the use of Indians as Indian land."[4]

Following its own analysis from an earlier case, *State v.*

Quintana,[5] the New Mexico Supreme Court initially narrowed the question further, saying that for lands to have been "set aside" for purposes of a dependent Indian community determination there must have been "some explicit action taken by Congress or the Executive to create Indian country." On that issue, the court answered the question in the affirmative. The court said that the 1950 Act of Congress transferring jurisdiction of the lands from the Department of Defense to the BIA constituted the "explicit action" meeting the applicable standard.

Thereafter, the New Mexico court focused on whether the lands were set aside "for the use of the Indians as Indian land." The parties disagreed on the type of "use" sufficient to meet *Venetie*'s first prong. New Mexico argued that lands must be "set aside" for "permanent inhabitation [by] a distinct group of Indians."[6] The criminal defendants advanced a broader view of "use."

With the stage set, the New Mexico Supreme Court undertook a comprehensive historical review of the United States Supreme Court's early dependent Indian community decisions preceding the statutory codification of "Indian country" in 18 U.S.C. § 1151 in 1948. Following that review and a detailed discussion of *Venetie*, the New Mexico Supreme Court concluded that "the 'use' envisioned by Congress when it enacted § 1151(b) was the sort of *occupancy associated with long-term settlement by an Indian community*."[7]

Because a set aside for the BIA does not meet this standard, the New Mexico court concluded that Parcel Three at Fort Wingate did not constitute a dependent Indian community.[8] The court supported its conclusion with a discussion of the roles that the State and County play in administering certain school activities and in providing services to the school and housing area. The New Mexico court did not address assertions by the Navajo Nation and the United States concerning civil and other jurisdictional matters.

Why does this matter? As noted, Congress and courts have borrowed the "Indian country" definition in Section 1151 and used it for other purposes. Therefore, while this case presented issues regarding criminal jurisdiction, the analysis may have implications in other areas, including whether certain lands are within federal delegations of regulatory powers to Native American groups. Further, Indian tribes continue to assert inherent civil, taxing and regulatory authority over Indian Country.

For more information, please contact Walter E. Stern or Deana M. Bennett.

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[1] 2015-NMSC-020, ___ P.3d___.

[2] 522 U.S. 520 (1998).

[3] *Id.* at 527.

[4] As amicus curiae, the United States argued that the "federal superintendence" of the Fort Wingate lands was not the type of superintendence intended to confer federal criminal jurisdictional powers. Because the parties did not contest this issue, neither did the New Mexico Supreme Court.

[5] 2008-NMSC-012, 178 P.3d 820.

[6] *Id.* *9 (quoting *United States v. M.C.*, 311 F. Supp. 2d 1281, 1295 (D.N.M. 2004)).

[7] *Id.* *27 (emphasis added).

[8] Parcel Three stands in contrast to Parcel One at Fort Wingate which is held in trust by the federal government for the Navajo Nation and administered by the BIA.

OF NOTE

EPA Seeks Comments on Interpretation of Clean Water Act Tribal Provision

The Environmental Protection Agency (EPA) requests comments, by October 6, 2015, on its proposal to streamline the process by which Tribes can gain Treatment as States (TAS) under the Clean Water Act to regulate water quality.[1] The

proposed streamlining the TAS approval process is based on the EPA's conclusion that Section 518 of the Clean Water Act delegates to eligible Tribes authority to administer the Act on their reservations, and will "advance cooperative federalism by facilitating tribal involvement in the protection of reservation water quality as intended by Congress." The EPA intends for this change to "bring EPA's treatment of tribes under the Clean Water Act in line with EPA's treatment of tribes under the Clean Air Act."

[1] 80 Fed. Reg. 47432 (Aug. 7, 2015).

Supreme Court Reviewing Tribal Civil Jurisdiction Over Non-members

Dollar General Corporation and Dolgencorp, LLC filed a petition for a writ of certiorari of the Fifth Circuit's decision in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*,[1] seeking review of whether "tribal courts have jurisdiction to adjudicate civil tort claims against non-members including as a means of regulating the conduct of nonmembers who entered into consensual relationships with a tribe or its members." Despite the fact that the Solicitor General of the United States recommended that the Supreme Court not grant the petition, on June 15, 2015, the United States Supreme Court granted the petition. Dolgencorp's brief on the merits is currently due on August 31, 2015. The Supreme Court's decision in this case will further refine tribal jurisdiction over non-members, and thus is of importance for non-members doing business with tribes on tribal lands and tribes and tribal entities seeking to assert jurisdiction over non-members.

[1] 732 F.3d 409 (5th Cir. 2013).