



Native American Law Watch

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Native American Practice Group

Modrall Spierling'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](#)
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- [Earl E. DeBrine](#)
- [Joan E. Drake](#)
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- [Walter E. Stern](#)
- [Sarah M. Stevenson](#)

Financing affordable housing in Native American communities

Development of affordable housing in and around Native American communities frequently requires a variety of financing sources due to the lower market rents that can be collected from occupants in those areas.

Available funding sources: The Native American Housing Assistance and Self-Determination Act (“NAHASDA”)¹ authorizes the United States Department of Housing and Urban Development (“HUD”) to make block grants to Indian tribes to carry out affordable housing activities and to carry out self-determined housing activities for tribal communities. Under the block grant program, funds are made available for affordable housing, better access to mortgage markets, and integration of infrastructure resources for low-income Native American families on Indian reservations and other Indian areas.² Self-determined housing activities are those that are wholly self-determined by an Indian tribe for housing activities involving construction, acquisition, rehabilitation or infrastructure that will benefit the community served by the Indian tribe.

In addition to funding through NAHASDA, housing developers may seek financing or loan guarantees through other programs administered by HUD or the United States Department of Agriculture (“USDA”). Federally funded programs require compliance with Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968.³ Title VI prohibits exclusion of persons from participation in or receiving the benefits of federally funded programs based on race, color and national origin. Title VIII prohibits discrimination in the

provision of housing and housing services. Title VI and Title VIII requirements do not apply to actions under NAHASDA by Indian tribes or their tribally designated housing entities.⁴ However, when a non-Indian developer of affordable housing seeks to avail itself of both NAHASDA grant funds and other federally funded programs, such as a USDA loan guarantee, the non-Indian

“The answer lies in structuring the developer entity, which is usually a single-asset entity, in a manner that qualifies it as a tribally designated housing entity or a tribal instrumentality.”

developer may be faced with a violation of Title VI and Title VIII as a result of the conflict between the requirement under NAHASDA that the housing be designated for low-income Indian families and the requirements under Title VI and Title VIII that prohibit exclusion of non-Indians from

such housing and discrimination in the provision of housing.

Structure developer entity to comply with all applicable laws: So how does a non-Indian housing developer draw from the multiple sources of financing that may be available for development of housing in Indian areas AND comply with United States civil rights laws? The answer lies in structuring the developer entity, which is usually a single-asset entity, in a manner that qualifies it as a tribally designated housing entity or a tribal instrumentality.

A “tribally designated housing entity” is generally an Indian housing authority or an entity established by (a) exercise of the power of self-government of one of more Indian tribes independent of state law or (b) by operation of state law providing specifically for housing authorities or housing entities for Native Americans.⁵ Both NAHASDA funding and other federally funded programs are available

to tribal housing authorities and entities established under Native American law or state laws specifically authorizing formation of Indian housing entities.

Corporate law applies in determining whether an entity is a tribal instrumentality. Under the corporate instrumentality rule, the corporate existence of the developer will be disregarded if it is so organized and controlled by a parent entity that it becomes an instrumentality of the parent entity.⁶ For the developer entity to become a tribal instrumentality, its assets, operations and management must be controlled by an Indian tribe or a tribally designated housing entity or by another entity whose assets, operations and management are controlled by an Indian tribe or a tribally designated housing entity. A non-Indian developer entity that is properly structured as a tribal instrumentality could be awarded NAHASDA funding, as well as financing from federally funded programs and other traditional development and construction financing.

A demonstrated success: In a recent loan transaction for construction of a multifamily community to be located near an Indian reservation, in which Modrall Sperling was involved, the developer sought funding from a state affordable housing lender, a commercial bank, a tribal housing authority using NAHASDA grant funds, and a private fund guaranteed by USDA. The tribal housing authority and the borrower entered into an agreement providing for control by the housing authority over certain aspects of the borrower and resulting in the borrower becoming a tribal instrumentality that was eligible to receive NAHASDA funds, as well as the USDA guaranteed funds.

The future of similar projects: NAHASDA expired on September 30, 2013, but the U.S. Congress has continued funding it during reauthorization negotiations. Three reauthorization bills stalled in the 113th Congress (H.R. 4277, H.R. 4329 and S. 1352). H.R. 360, introduced by Representative Steve Pearce (R-NM) on January 14, 2015, is making its way through committees in the 114th Congress. H.R. 360 is co-sponsored by Representatives from several states with significant Native American communities – Alaska, Arizona, Hawaii, Michigan, Minnesota, Montana, Nevada, Oklahoma, Washington and Wisconsin.

Take-away: Project developers should take full advantage of the many funding sources available to construct housing where the need exists. A properly structured corporate entity will be able to take advantage of funds set aside for constructing tribally designated housing, while not running afoul of federal civil rights laws.

For more information, please contact [Debbie Ramirez](#).

¹ 43 U.S.C. § 4101 *et seq.*

² NAHASDA defines “Indian tribe” as any federally recognized tribe or state recognized tribe. “Indian area” is an area within which an Indian tribe or tribally designated housing entity, as authorized by one or more Indian tribes, provides assistance under NAHASDA for affordable housing. *Id.* at 4103(13) & (11).

³ 42 U.S.C. § 2000d *et seq.* and § 3601 *et seq.*

⁴ *See* 24 C.F.R. § 1000.12(d).

⁵ 43 U.S.C. § 4103(22).

⁶ *See, e.g., National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248, 255 (D.Mo. 1974).

Solar Reservations: BLM's "Fast Track" approvals of solar projects on federally administered lands causing concern

The goal of generating 80% of the Nation's electricity from clean energy sources by 2035 has led to numerous solar power project proposals on millions of acres of federally owned lands. Native American lands in the sunny, vast regions of the western United States seem, to many, like ideal places for solar power projects.¹ However, solar development on tribal lands have increasingly come under fire amid accusations the United States Bureau of Land Management ("BLM") is "fast tracking" projects without sufficient consultation with Native American tribes or environmental impact assessment. The recent case filed by the Colorado River Indian Tribes ("CRIT") challenging the approval of a utility-scale energy generation facility on federal lands in Blythe, California, highlights the increased conflict between the current Administration's policy of pushing for clean energy expansion and a federal agency's duty to comply with federal statutes requiring consultation and environmental review.

"While the CRIT case is in the early stages of litigation, it provides an important lesson for clean energy developers. BLM is working on unprecedented volumes of projects."

Development of "clean energy" on Tribal lands:

Four major factors have contributed to a surge in solar energy. The eight-year extension of the Investment Tax Credit for renewable energy that was part of the 2008 Bush administration's economic bailout package; State renewable portfolio standards; the Obama administration's pro-solar policies, including friendly environmental reviews, cash grants in lieu of tax credits and guaranteed loans; and the steep decline in the price of photovoltaic units ("PV"), or solar panels.

These factors have assisted tribes like the Hopi Tribe to accelerate their expansion into clean energy. A non-

gaming tribe, the Hopi Tribe historically has received over 80% of tribal revenues from coal royalties.² However, after air quality complaints were filed and concerns started to rise regarding depletion of the Nation's water source, the Hopi Tribal Government established the Hopi Clean Air Partnership Project to begin a paradigm shift from a coal dominated economy to one that is more diversified. The move led to the Hopi Solar Electric Enterprise, a project that assists Hopi and Navajo families purchase and install PV for their homes.

Support for solar projects on federal and tribal lands is not unanimous, however. In one high-profile example, the U.S. District Court for the Southern District of California

granted a preliminary injunction to delay the construction of the Imperial Valley Solar project, located near El Centro, California.³ Brought by the Quechan tribe, the suit challenged BLM final approval alleging that during the National Environmental Policy Act process, the Department of

the Interior's Draft Environmental Impact Statement ("EIS") failed to adequately analyze the impacts on cultural or historical resources of the tribe from destruction of the proposed site. Though there were numerous communications between specific tribe members and the BLM, the court found that they did not amount to the type of "government-to-government" consultations the National Historic Preservation Act requires. The 709 megawatt project would be located on 6,500 acres of mostly federal land and, prior to the suit, had been in development for over five years, with three years of permitting work at a cost of over twenty million dollars. The license for the project has been terminated.

The CRIT challenge: On December 4, 2014, the CRIT filed a complaint in the U.S. District Court for the Central District of California seeking injunctive relief vacating BLM approval of the Modified Blythe Solar Power Project (“Blythe Project”), a utility scale solar energy generation facility slated for development. In a case almost identical to the Imperial Valley Solar project, CRIT, whose reservation begins a few miles northeast of the Blythe Project, alleged BLM conducted no government-to-government consultation prior to the project’s approval.

In its complaint, CRIT, a federally recognized Indian Tribe whose members include Mohave (Aha Macav), Chemehuevi, Hopi, and Navajo peoples, allege that the ancestors of its Mohave and Chemeheuvi members occupied the Mohave Desert since time immemorial, using trails that cross the Blythe Project site and leaving behind burial grounds, grindstones, hammerstones, petroglyphs and trails. CRIT alleges that the BLM has placed this, and many other solar projects, on a “fast track” review program that leaves little time for meaningful consultation with the Tribes and, improperly according to CRIT’s complaint, typically defers any “on-the-ground” analysis of cultural resources to post project approval. In particular, CRIT objected to the Draft EIS’ statement that BLM had “consulted” with the Tribes in preparing the document, noting there had been only two meetings between CRIT

and BLM prior to approval where the project had been listed for discussion.

Take-Away: While the CRIT case is in the early stages of litigation, it provides an important lesson for clean energy developers. BLM is working on unprecedented volumes of projects. Private developers of projects on or adjacent to federal lands near reservations should engage their own legal counsel throughout the permitting process to help navigate the application process and ensure that any leases or permits are legally defensible. Further guidance for developers, Tribes, and communities should be available in the future, as the comment period for the BLM’s Draft Competitive Leasing Rule for Wind and Solar Leasing closed December 1, 2014.⁴

For more information, please contact [Deana M. Bennett](#) or [Benjamin Nucci](#).

¹ See BLM Fact Sheet, Renewable Energy: Solar, U.S. Dept. of Interior, http://www.blm.gov/style/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/solar_and_wind.Par.99571.File.dat/fact_Solar.pdf

² See *generally* The Hopi Tribe And The US Environmental Protection Agency Clean Air Partnership Report, September 2004, <http://apps1.eere.energy.gov/tribalenergy/pdfs/hopi03final.pdf>

³ Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

⁴ 79 Fed. Reg. 59022 (Sept. 30, 2014).

Supreme Court denies certiorari in *Seminole Tribe of Florida v. Florida Department of Revenue*; a device potentially avoiding *Ex parte Young* challenges escapes review

On January 12, 2012, the United States Supreme Court denied the Seminole Tribe’s (“Tribe”) petition for certiorari, declining to review the Eleventh Circuit Court of Appeals’ opinion, which held the Eleventh Amendment barred the Tribe’s federal court suit to invalidate a Florida Department for Revenue state fuel tax.¹ The State collects the fuel tax from off-reservation suppliers before

the fuel is sold to consumers including the Tribe, but under Florida law the legal incidence of the tax is on the ultimate consumer of the fuel; in this case, the Tribe. The case presented the question whether, by structuring a tax to deprive a taxpayer of standing until after the tax has been paid, a government can evade *Ex parte Young*

review that otherwise would be available by action against officials.

A short version of a long background: The Tribe sought a declaration that it was exempt under the Indian Commerce Clause and federal common law from the fuel tax, an injunction establishing it is entitled to a refund of taxes the Tribe paid when it purchased fuel off of Tribal land. First, the Tribe filed suit for declaratory judgment and refund in state court. This suit ended with a Florida appellate court affirming the dismissal of the suit on grounds the fuel tax did not violate the Indian Commerce Clause because the tax was collected from the Tribe outside of Tribal land. Then, the Tribe filed suit against the Department of Revenue and its director in federal court seeking declaratory and injunctive relief, and damages, representing the fuel taxes paid by the Tribe in the preceding three years. The federal district court dismissed the complaint.

On appeal, victory for the State: On appeal, the Court of Appeals did not address the district court's grounds for dismissal, because it determined sovereign immunity barred the Complaint. The Court recited that the Eleventh Amendment barred a suit against a State unless Congress had abrogated the State's immunity from suit, or the State had waived its immunity. Neither had occurred prior to the Tribe's filing suit, and thus "Florida, an unconsenting State, is immune from suit regardless of the nature of the relief sought."² The Court of Appeals also held that the *Ex parte Young* doctrine³ did not provide an exception to sovereign immunity permitting suit against the director because the Tribe sought damages from the Florida treasury; "the relief the Tribe seeks is equitable in name

only." If the Tribe was exempt from the fuel tax, it would be entitled to a refund under Florida law, which requires pre-payment of the tax and request for a refund. "We cannot declare the Tribe exempt from the fuel tax, nor can we enjoin the Department and its individual officer to pay the Tribe a refund. Granting either form of relief would be tantamount to a judgment that Florida must pay the Tribe cash from state coffers. State sovereign immunity forecloses that relief."⁴ The majority opinion refused to re-write Florida law to fashion prospective relief for the Tribe.

"Granting either form of relief would be tantamount to a judgment that Florida must pay the Tribe cash from state coffers. State sovereign immunity forecloses that relief."

In dissent, Judge Jordan argued that the Tribe sought only prospective relief. The majority opinion, however, dismissed this argument, because the prospective relief sought was the "functional equivalent" of a money judgment.⁵ The suit was different from one enjoining a tax collector, according to the majority opinion, because it was not merely asking for a declaration that a tax collector enter onto the Tribe's land to collect tax. Rather, the Tribe sought a declaration that the State be required to refund to the Tribe fuel taxes collected outside of Tribal land.

Take-away: The Supreme Court's denial of the petition for certiorari leaves in place a ruling that allows a State (or officials of the federal government or a tribal government, who can also be sued under the *Ex parte Young* exception to sovereign immunity), to structure a taxing program to immunize it from federal court review. As Judge Jordan said in dissent, the majority decision "allow[s] a state to shield the enforcement of any tax, no matter how constitutionally untenable, from challenge in federal court simply by enacting a precollection

procedure.⁶ While the majority decision comports with the traditional *Ex parte Young* structure, permitting only *prospective* declaratory or injunctive relief, it fails to satisfy a central purpose of the doctrine, to prevent sovereign immunity from foreclosing federal court relief, even against officers, for ongoing violations of federal law.

For more information, please contact [Lynn Slade](#) or [Sarah Stevenson](#).

¹ 750 F.3d 1238, 1239 (11th Cir. 2014) *cert. denied*, No. 14-351, 2015 WL 132969 (U.S. Jan. 12, 2015).

² *Id.* at 1243 (internal quotation marks and citations omitted).

³ *Ex parte Young*, 209 U.S. 123 (1908).

⁴ 750 F.3d at 1244.

⁵ *Id.* at 1245.

⁶ *Id.* at 1251.

OF NOTE

High Court could rule on arbitration in a tribal forum

On December 31, 2014, CashCall, Inc., petitioned the United States Supreme Court for a writ of certiorari to review the Eleventh Circuit Court of Appeals' decision in *Inetianbor v. CashCall, Inc.*¹ The case arises out of a dispute over a loan issued by Western Sky Financial, LLC, which is owned by an enrolled member of the Cheyenne Sioux River Tribe, and which operates on the Cheyenne River Indian Reservation in South Dakota. The Eleventh Circuit upheld the district court's conclusion, under the Federal Arbitration Act ("FAA"),² that arbitration could not be compelled under the arbitration clause included in the loan agreement, because the arbitral forum selected by the parties, the Cheyenne River Sioux Nation, was not available. The questions presented by the petition focus on the interpretation of the FAA, but the issues of the availability of a tribal arbitral forum may play a role in the Court's decision, if it grants the petition for a writ of certiorari. For more information, contact [Deana M. Bennett](#) or [Lynn Slade](#).

¹ 768 F.3d 1346 (11th Cir. 2014).

² 9 U.S.C. § 1 *et seq.*

Navajo Nation Code cannot be invoked by Chapter 11 trustee

On November 19, 2014, the Fifth Circuit Court of Appeals issued *In re Vallecito Gas*,¹ ruling that a provision of the Navajo Nation Code preventing the transfer of an overriding royalty interest could not be used by a trustee appointed in a Chapter 11 bankruptcy case to void the transfer. The underlying overriding royalty in a gas lease of tribal minerals interest at issue was transferred by the debtor six months before it filed for bankruptcy and thereafter transferred to purchasers in good faith. Neither of the transfers were approved by the Mineral Department Navajo Nation, as required by 18 N.N.C. § 605(A)(6). The Chapter 11 Trustee was appointed several years into the bankruptcy and sought to void the transfer and use the royalty to repay creditors. One of the key pieces of evidence sought to be introduced by the Trustee was a letter from the Navajo Nation Department of Justice stating that any purported transfer of the overriding royalty interest is invalid and void. The Bankruptcy Court excluded the letter from evidence as hearsay, a ruling affirmed on appeal. As to the substantive ruling, the Fifth Circuit held that the Trustee could not assert the Navajo Nation Code provision as a defense, because neither he nor the debtor (whose shoes he stands in) was entitled to its protections,

stating: “[W]e see no basis to allow a third party like [the Trustee] to raise lack of compliance with that provision to void the overriding royalty interests.” For more information, please contact [Spencer Edelman](#).

¹ 771 F.3d 929 (5th Cir. 2014).

New Mexico Supreme Court upholds criminal convictions of Navajo Nation members

Two Navajo Nation members, in separate incidents, were arrested for driving while intoxicated from State land onto the Navajo Reservation, were stopped on the Reservation by State police officers, and were transported to the State police office for chemical testing. In *State v. Charlie*, the New Mexico Supreme Court upheld the convictions of both defendants.¹ The arresting officers in both cases were cross-commissioned by the Navajo authorities, and testified that the Navajo Nation authorized the transport of members onto State land to conduct investigation where resources on the Reservation were limited. In neither case was a written cross-commission agreement introduced. Citing to Navajo law, the Supreme Court held that the police officers did not err by failing to follow extradition protocols, as the individuals were transported off the Reservation for investigation, and were not booked or otherwise placed into the custody of the State. For more information, please contact [Sarah Stevenson](#).

¹ 2014 WL 7187049 (Dec. 18, 2014) (unpublished).

Tenth Circuit relies on Bay Mills to reverse Oklahoma v. Hobia

Relying on the Supreme Court’s opinion in *Michigan v. Bay Mills Indian Community*, the Tenth Circuit Court of Appeals reversed the preliminary injunction granted by the Northern District of Oklahoma in *Oklahoma v. Hobia* and remanded for dismissal for failure to state a claim in a suit challenging the construction and operation of a casino by the Kialegee Tribal Town.¹ After finding the National Indian Gaming Commission chairwoman’s letter concluding the Kialegee Tribal Town could not conduct gaming on the property at issue did not moot the case, the Tenth Circuit held that Oklahoma had failed to state a claim under the Indian Gaming Regulatory Act because the complaint did not allege the casino would be built on the Indian lands of the Kialegee Tribal Town. For more information, please contact [Lynn Slade](#), [William Scott](#), or [Sarah Stevenson](#).

¹ ___ F.3d ___, 2014 WL 7269688 (10th Cir. Dec. 22, 2014) (on panel rehearing). Disclaimer: Modrall Sperling represents Oklahoma in this matter.

Modrall Sperling News

[Walter E. Stern](#), Modrall Sperling President and regular contributor to the Native American Law Watch, was recently selected as the Natural Resources, Energy and Environmental Law (NREEL) Section of the State Bar of New Mexico Lawyer of the Year. The Awards Committee, comprised of members of the section’s Board of Directors, recognized Walter from among his peers for his outstanding contributions in the areas of natural resources, energy and environmental law. In other news, [Deana M. Bennett](#), co-editor of the Native American Law Watch, was recently elected shareholder. She practices in Modrall Sperling’s natural resources and environment practice group.
