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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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Professor Kevin Washburn: Reflections on Service as Assistant Secretary-Indian Affairs, the State of Indian Law in 2016, and Returning Home to New Mexico

Kevin Washburn recently returned to his position as a professor at the University of New Mexico School of Law after serving more than three years as the Department of the Interior's Assistant Secretary-Indian Affairs. A member of the Chickasaw Nation and a graduate of University of Oklahoma and Yale Law School, Professor Washburn has served as a federal prosecutor, a civil litigator in the Department of Justice, as general counsel of the National Indian Gaming Commission, as a law professor at the Universities of Minnesota and Arizona, and as dean of the University of New Mexico School of Law. He recently reflected on his experiences and discussed current issues in Indian law with the attorneys of Modrall Sperling's Native American Law practice group, and agreed to answer questions about his service as Assistant Secretary-Indian Affairs and current issues and opportunities in Indian law:

After serving as general counsel of the National Indian Gaming Commission and as the assistant secretary for Indian affairs at the U.S. Department of the Interior, what have you learned about the federal government's relationship with tribes?

That the relationship between tribes and the United States, at least in Congress and the Executive Branch, has been improving steadily for forty years. During my 20-plus year legal career in and out of the federal government, I have seen words like "sovereignty," "self-governance," and the "trust responsibility" become much more ingrained in federal policies and federal employees. Some native people fail to credit this progress and raise the same criticisms that our elders might have made in the 1950s. Most of those criticisms are no longer true, and holding on to them can be counterproductive to progress. If Indian country will engage federal employees in a more constructive manner, tribal communities will find tribal leaders and federal employees capable of working together to be incredibly productive. A lot has changed in the last 30 or 40 years. Indian country must embrace those changes.

Why did you leave the BIA when you did?

My family and I missed New Mexico. When I took the job, I stated publicly that I would serve for only two years. I knew that many people leave this job with their reputation in tatters or they leave one step ahead of an angry mob. I did not want that to happen to me. But early on, Secretary Ken Salazar heard me say "two years" out loud at a public meeting and he took me aside and said, "stop saying that; you will make yourself a lame-duck." When I stopped saying it, I stopped thinking about it. The truth is that I ultimately stayed much longer than I ever intended, and longer than anyone since Ada Deer left in 1997. It was a rare privilege to work with Sally Jewell and Mike Connor and with Deputy Assistant Secretaries Larry Roberts and Ann Marie Bledsoe Downes and the rest of the team. Together, we accomplished so much to be proud of, and all of those people are still in place, working hard for Indian country.

That a few people saw my departure as "abrupt" is a tribute to the professionalism of my team and the leadership at the Department of the Interior. Washington is a very leaky environment where it is hard to keep secrets. My departure date was known for months by numerous people inside the Department and I had moved my children home in August of 2015, but my impending departure was kept secret outside the Department until we announced it in December. That is a stunning feat in Washington.

If you had it to do over again, would you have accepted the job of assistant secretary for Indian affairs? Why or why not?

Yes, in a heartbeat. I would not have accepted the job in the first term because I viewed the job as impossible while the Cobell litigation was pending. I believe that it is impossible to serve Indian people well while simultaneously litigating aggressively against them. But when President Obama, Secretary Salazar, and Deputy Secretary David Hayes settled that fifteen-year-old litigation in 2010, the job suddenly seemed much more attractive. The job has long thought to be one of the hardest in Washington, but I was lucky to serve at a historic time, when the Assistant Secretary had the full support of the President and the Secretary to make strides in Indian country. No Assistant Secretary has ever had such broad support directly from the Commander-in-Chief. Accordingly, we accomplished a number of major initiatives regarding land, self-determination, child welfare, tribal recognition and criminal justice. We also increased federal appropriations for Indian affairs substantially during my tenure, with the strong support of Congress, from $2.3 billion to $2.8 billion, despite facing sequestration and difficult fiscal constraints.

While some in Indian Country applauded you for going nose to nose with members of Congress, others complained that you were disrespectful and your pushback was counterproductive. How would you respond to those critics?

Being direct and honest with officials in Washington, D.C., is unusual, I suppose, but I don't think that it was a handicap. Most of Indian country's issues are complex and cannot be reduced to sound bites. These issues require cooperation on both sides of the aisle in Washington. I worked well with most members of Congress on issues of mutual interest and I never saw honesty as disrespectful. I did sometimes become combative with certain members when I saw issues of real concern to Indian country, but tribal organizations were always standing by my side in those battles.

Some people treat high-profile positions like assistant secretary as a job interview, a stepping stone to a higher position. Consequently, they avoid the hard issues and tough messages. I am grateful to UNM for holding my faculty position for me. Knowing that I had a great career waiting for me in Albuquerque meant that I was never tempted to compromise my views or hold my tongue. I felt liberated to do what was right.

I testified before Congress on 30 separate occasions while serving as Assistant Secretary. If I had really been viewed as disrespectful, I doubt that powerful members of Congress would have kept inviting me. Some of them, like Senators John McCain and Tom Udall, seem to appreciate frank discussion. Policymakers must be accountable for their actions and beliefs. If I occasionally turned the tables at oversight hearings and forced members of Congress to be accountable to Indian country for their views, I see that as the ordinary clash of ideas that we should celebrate in a democracy. I won't apologize for fighting for Indian people.

Under your tenure, President Obama set an Administration goal of 500,000 acres into trust for tribes. How many acres were taken into trust under your watch and where did this rank on your list of priorities?

No priority is more important. Tribes have lost so much land and trust land is crucial to tribal self-governance. When the Obama Administration first came into office, some acquisitions were nearly complete on paper but were being held up because of the de facto moratorium that existed under the Bush Administration. The Obama Administration began by quickly restarting the land-into-trust machinery. By the time I arrived, just before the beginning of the second term, the Obama Administration

had taken almost 182,000 acres in trust. The President was very much about establishing clear metrics and deliverables. At the beginning of the second term, the President and the Secretary asked us to set an ambitious goal for land into trust and make ourselves accountable to it. We settled on 500,000 acres, knowing that meant that we would need another 300,000 plus before the end of the Obama Presidency. We quickly realized that it would be challenging to meet, in part, because we face litigation on some of the acquisitions. But we streamlined the processes, developed the Patchak Patch, improved the appeals process, and continually implemented improvements (including one that is still in process on title standards). All of this work made a difference. Within weeks of my departure three years later, the Department passed the 400,000 acre mark, and I am confident that the BIA will hit the 500,000 acre mark. I would add that the Land Buy Back Program for Tribal Nations set up pursuant to the Cobell settlement has already restored roughly 1.5 million acres of existing trust land to tribes in only two years of operation. In sum, tribal land holdings have already expanded by nearly two million acres and that number will continue to rise significantly before the end of the Obama Administration.

What was your proudest achievement as the assistant secretary for Indian affairs?

Without question, the most important achievement was working with now-Acting Assistant Secretary Larry Roberts and Secretary Jewell to build an excellent Indian affairs team at Interior. The proof is in the accomplishments. We succeeded in reforming the rules to allow land into trust in Alaska; we settled the Ramah class action lawsuit for $940 million (and numerous other cases involving individual tribes) and began providing full funding to tribes for self-determination contracts and compacts; we reformed the tribal acknowledgment regulations with an unprecedented level of consultation and public input; we updated the Indian Child Welfare Act guidelines and regulations to better protect Indian children and preserve Indian families; we helped stand up the Tribal Land Buy Back Program which has already restored 1.5 million acres of interests in fractionated trust lands to tribes; we improved tribal sovereignty over leasing and rights of way on Indian lands and implemented the HEARTH Act at more than 25 reservations; we instituted important reforms to place Indian education on a more successful path; we also stood up the White House Native American Affairs Council and, during my time, I presided over four (of the seven so far) annual White House Tribal Nations Conferences; we also helped develop a pathway to recognize a Native Hawaiian government; and we made countless decisions for individual tribes, such as recognizing the Pamunkey Tribe, granting criminal jurisdiction retrocession to the Yakima Nation, supporting concurrent jurisdiction under the Tribal Law and Order Act for the White Earth Nation and the Mille Lacs Band, and creating the Mashpee Wampanoag Tribe's initial reservation and setting them on a path to gaming success. We increased the federal budget serving Indian tribes by more than a half billion dollars at Interior alone, and supported even larger increases by the Administration at the Indian Health Service. And these are only some of the highlights. None of this could have happened without a great political team and very committed career officials throughout Interior. Secretary Jewell was a very successful CEO at REI before joining the Department and I learned a lot from her about building an excellent team and then supporting them to accomplish incredible results.

What was your biggest disappointment as the assistant secretary for Indian affairs?

The hardest issue that we faced was the epidemic of youth suicide in some communities in Indian country. Getting a call or message almost every day about another youth suicide took a toll on our souls, just as each of those deaths took a toll on each of those communities. President Obama characterized the suicide epidemic as

kids "dying of broken hearts." We worked hard through policy changes at BIA and BIE, increased funding for social services, and initiatives like Generation Indigenous and the White House Native Youth Gathering to attempt to address the problem. But ultimately, poverty, substance abuse and loneliness are tough foes. I came away convinced that economic development was the long term solution to the serious social problems that continue to plague Indian tribes. But history has had a powerful effect over many decades and it will be a long road to solve those underlying problems.

Please comment on the role of recent Supreme Court decisions on the Department of the Interior's Trust mission.

Over the past decade, the Supreme Court has taken an increasingly literal approach to the laws governing the federal government's relationship to tribes, at least in areas involving the Department of the Interior and the trust responsibility. In some ways, earlier decisions recognizing a broad general (but somewhat undefined) trust responsibility have receded from view in favor of close parsing of statutory words. Despite the literal approach, which might suggest more predictability, the Supreme Court never fails to surprise us. One might wonder if it is good for parties or the field of Indian law in general to have such unpredictability in outcomes at the Supreme Court level.

Modrall Sperling thanks Professor Washburn for sharing his experiences and knowledge with us.

Reservation Diminishment: Implications for Tribal Taxing Powers over Non-Members

Introduction: Writing another chapter in its long-running book regarding whether boundaries of Indian Reservations across the country have been diminished or reduced by Congressional action, on March 22, 2016, the United States Supreme Court issued its opinion in *Nebraska v. Parker*.[1] In a unanimous opinion authored by Justice Thomas, the Court held that the boundaries of the Omaha Indian Tribe's ("Tribe") reservation in eastern Nebraska were not diminished by an 1882 Act of Congress proclaiming that certain "lands are open for settlement under such rules as the [Secretary of the Interior] may prescribe."[2] The opinion, and the line of cases it applied, has important implications for state, local, and tribal jurisdiction and the communities potentially regulated and taxed by governmental authorities in areas that once were, or remain, part of Indian Reservations.

Factual Background: Following passage of the 1882 Act, the Secretary of the Interior ("Secretary") surveyed 50,000 acres of the Tribe's Reservation in Nebraska and, in accordance with the 1882 Act, issued a proclamation announcing that the lands were open for purchase after members of the Tribe were given the opportunity to select allotments (essentially homesteads) in the area. Proceeds from any sales to non-members of the Tribe were to be held by the United States for the Tribe's credit. In accordance with the statutory scheme, a settler in the area purchased a 160-acre tract of land and established the town of Pender, Nebraska on that site. Today, Pender's population is 1,300, predominantly non-members of the Tribe. And, less than 2% of the population in the 50,000-acre tract described in the 1882 Act are tribal members—which has been true since the early 20th century.

In 2006, the Omaha Indian Tribe enacted an ordinance imposing a 10% sales tax on liquor sales in Pender. Pender and its retailers sued the Omaha Indian Tribal Council members, challenging the Tribe's power to impose the tax and asserting that the Tribe lacked the power to

tax since Pender was not within the boundaries of the Omaha Indian Reservation (or otherwise in Indian Country).[3] Nebraska intervened to support Pender; the United States intervened to support the Tribe.

The Decision Analyzed: With the Supreme Court's decision, all three courts that considered the question whether the 1882 Act diminished the boundaries of the Omaha Indian Reservation concluded that the answer was "no," despite the current demographics of the area.

This case presented the Court with the opportunity to review over 50 years of Supreme Court precedent—starting with *Seymour v. Superintendent* in 1962[4]—considering whether acts of Congress have served to diminish reservation boundaries. As a result of the several cases the Court has decided in this arena, Justice Thomas observed that "[t]he framework we employ to determine whether an Indian reservation has been diminished is well settled. '[O]nly Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear."[5]

The Court described the rest of the diminishment "framework:" The Court starts with the statutory text of the relevant Act of Congress. "'The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands.'"[6] Beyond the statutory text, the Court's test also examines (i) the circumstances surrounding the opening of a reservation, and (ii) "'unequivocal evidence' of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as by the United States and the State of Nebraska."[7]

In examining the text of the 1882 Act, the Court concluded that the statute fell into a category of surplus lands acts that simply opened a reservation to settlement and entry by non-Indians, without either restoring the area to the public domain or compensating the tribe for its loss of the area subject to the statute. The Court's prior decisions had held that statutes restoring lands to the public domain or providing for the surrender of an area with fixed compensation to a tribe for the loss of the area were tantamount to congressional disestablishment.[8]

In this case, the Court considered early treaties with the Omaha Indian Tribe that stood in stark contrast to the 1882 Act. The treaties expressly provided for the Tribe to "cede" and "relinquish" certain lands in exchange for fixed sums of money.[9] The juxtaposition of the treaties with the 1882 Act supported the Court's conclusion that the 1882 Act did not diminish the reservation. Consequently, the Court concluded that the 1882 Act did not "evince[] an intent to diminish the reservation."[10]

Next, the Court considered contemporaneous understandings and the subsequent jurisdictional history regarding the area, and concluded "[t]he mixed historical evidence relied on by the parties cannot overcome the lack of a clear textual signal that Congress intended to diminish the reservation." *Id*. In other words, there was no "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed reservation."[11]

Finally, in accordance with its long-standing diminishment analytical framework, the Court considered the subsequent demographic history and the United States' treatment of the area from a jurisdictional standpoint,[12] while commenting that the Court has "never relied solely on this third consideration to find diminishment."[13] While the Tribe "was almost entirely absent from the disputed territory for more than 120 years," and doesn't seek to exercise jurisdiction over any other lands within the disputed area, the Court found that insufficient to

overcome the express language of the 1882 Act. The Court found the post-enactment history and subsequent treatment of the area—considered to be of "limited interpretive value" in the Court's overall analysis—to be a "mixed record."[14]

The Court also considered Nebraska and Pender's "concerns about upsetting the 'justifiable expectations' of the non-Indian settlers," describing those concerns as "compelling."[15] Nonetheless, the Court opined that those expectations alone cannot diminish reservation boundaries. "Only Congress has the power to diminish a reservation . . . [and the Court] 'cannot remake history.'"[16]

Leaving open a sliver of hope for the residents and business people of Pender in their quest to avoid tribal taxation, the Court confirmed that the Court expresses no view as to whether "equitable considerations of laches and acquiescence may curtail the Tribe's power to tax . . . in light of the Tribe's century-long absence from the disputed lands."[17]

Take-Away: Generally, the Court's analysis and application of its reservation diminishment authority, as summarized here, suggests that *Nebraska v. Parker* was decided in a manner squarely consistent with the Court's applicable precedent. The consequences of the decision—in light of the long-standing absence of any tribal presence—of course, should be troubling to communities and business located on lands that were formerly part of an Indian Reservation and were the subject of some form of surplus lands act.

For more information, please contact Walter E. Stern.

[1] *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).
[2] Act of Aug. 7, 1882, 22 Stat. 341 ("1882 Act").
[3] The Court did not reach questions pertaining to non-Reservation lands that might be considered "Indian Country."
[4]368 U.S. 351 (1962).
[5] Slip Op. at 5 (quoting *Solem v. Bartlett*, 465 U.S. 463, 472 (1984)).
[6] *Id.* at 5-6 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)).
[7] *Id.* at 6 (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)).
[8] *Id.* at 6-7 (citing, *inter alia*, *Solem*, *Hagen*, and *Yankton Sioux*).
[9] *Id.* at 7-8.
[10] *Id.* at 8.
[11] *Id.*, (quoting *Solem*, 465 U.S. at 471).
[12] *Id.* at 10 (citing *Solem*, 465 U.S. at 471-72).
[13] *Id.* at 10.
[14] *Id.* at 11-12 (quoting *Yankton Sioux*, 522 U.S. at 355-56).
[15] *Id.* at 12.
[16] *Id.* at 12 (quoting *DeCoteau v. District Cnty. Ct. for the Tenth Judicial Dist.*, 420 U.S. 425, 449 (1975).
[17] *Id.* at 12.

Tribal Nations, CERCLA Litigation, and Sovereign Immunity

Introduction: In *Atlantic Richfield Co. v. Pueblo of Laguna*, The Federal Court in New Mexico recently ruled that a tribal entity had partially waived sovereign immunity, allowing a limited claim against it under the Comprehensive Environmental, Response, Compensation, and Liability Act ("CERCLA").[1] Although the Pueblo has requested reconsideration, the case adds to a small body of case law regarding tribal nations and CERCLA.

Tribal liability under CERCLA: Under CERCLA, the costs of remediating past deposits of hazardous waste are allocated. Unlike other statutes, it does not regulate the issuance of waste or pollution. Litigation is usually contentious because the cost of cleanup is allocated under CERCLA.[2] It is settled that a tribe may state a claim under CERCLA to be compensated, so long as it does so consistent with statutory scheme.[3] What is not settled is whether tribes may be sued for liability under CERCLA. Both the statute and sovereign immunity are barriers.

Certain "persons" may be liable under CERCLA,[4] and the statutory definition of person does not expressly include a

tribal nation.[5] The Federal Court for the Eastern District of Washington, in *Pakootas v. Teck Cominco Metals, Ltd.*, determined that tribal nations were not a "person" for purposes of CERCLA liability.[6] In *Pakootas*, the Confederated Tribes of the Colville Reservation (among others) are suing a Canadian company for cleanup costs. The Court relied, in part, on statutory construction and familiar canons of construction. The Court noted that tribes are separately defined in CERCLA, are expressly allowed to be compensated, but are not expressly exposed to potential liability.[7] Moreover, regulatory statutes, such as the Resource Conservation and Recovery Act, expressly apply to tribal nations. The exclusion of tribes from the definition of "persons" who may be liable under CERCLA was, therefore, a purposeful exclusion of tribes.[8] The Court also relied in part on principles of sovereign immunity, noting that a Congressional waiver of a tribe's immunity must be express.[9]

Interestingly, it appears the *Pakootas* Court has not had to address whether the tribe's suit has waived immunity for "recoupment claims" in common law. The Tenth Circuit Court of Appeals, in *Berrey v. ASARCO Inc.*, has determined that when a tribe files suit, it waives immunity for common law counterclaims of contribution and indemnity.[10] In *Berrey*, the Quapaw Tribe sued under CERCLA. Defendants counterclaimed under CERCLA, and stated the common law claims. Counterclaims are styled as recoupment if three elements are met: the claims arise from the same transaction or occurrence, the relief is of the same type sought by the tribe, and the amount sought does not exceed the amount sought by the tribe.[11] Counterclaims for contribution and indemnity meet these criteria,[12] and are therefore not barred by a tribe's immunity from suit. Other courts have reached the same conclusion.[13] In *Berrey*, the Tenth Circuit did not determine whether the counterclaim under CERCLA was viable.

The Pueblo of Laguna Remediation: The Federal District Court in New Mexico recently addressed sovereign immunity in a case brought by Atlantic Richfield against the Pueblo of Laguna and Laguna Construction Company ("LCC"). LCC is now a federally-chartered entity under Section 17 of the Indian Reorganization Act.[14] However, a previous entity was formed under New Mexico law, and it merged into the Section 17 entity. A tribal nation drafts a charter through its governing body which is then approved by the Department of the Interior and ratified again by the tribe's governing body. Section 17 entities are wholly owned by the tribal nation. There is considerable ambiguity and disagreement about the nature of these entities, and how separate they are from the tribal nations which own them.

In *Atlantic Richfield*, the parties appeared to agree that the Section 17 LCC enjoyed the Pueblo's immunity. However, as the Court explained, that is not always the case, and the Court flagged this issue for later consideration.[15] The Court rejected two arguments by Atlantic Richfield, that LCC waived immunity in a 1986 Agreement,[16] and the claim may proceed under a New Mexico statute regarding the survivorship of corporations.[17] The first was rejected because the Agreement did not expressly waive immunity, and the second because the state statute was inapplicable as LCC merged, it did not dissolve.

This left Atlantic Richfield's argument that LCC's Articles of Merger, filed with the State of New Mexico, waived immunity for claims the Section 17 entity was assuming from the New Mexico entity. The Court first found that the New Mexico LCC did not enjoy the Pueblo's immunity. In the Articles, LCC promised to "preserve unimpaired" the claims of creditors to the New Mexico LCC, and that any "action" would proceed "as if the merger had not taken place."[18] While not an express waiver, or even mention, of

sovereign immunity, the promise that creditor's rights would not be impaired is meaningful only if the Section 17 LCC promised to waive the sovereign immunity defense for debts is assumed from the New Mexico LCC.[19] Thus, Atlantic Richfield's claim, to the extent based on debts owed by the New Mexico LCC, could proceed. The Court did not address whether the Pueblo and the Section 17 LCC were "persons" for purposes of CERCLA liability.[20]

Take-Away: Taken together, *Atlantic Richfield*, *Berrey*, and *Pakootas* indicate that sovereign immunity and CERCLA are barriers to CERCLA claims against tribal nations, and likely Section 17 entities. However, if a tribal nation prosecutes CERCLA claims, common law counterclaims sounding in recoupment may be stated.

For more information, please contact Brian K. Nichols.

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[1] No. 15-cv-0056, Memorandum Opinion and Order [Doc. 75] (D. N.M. March 1, 2016).

[2] *See generally Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1072-74 (9th Cir. 2006).

[3] *See* 42 U.S.C. §§ 9607(a)(4)(A), 9607(f).

[4] 42 U.S.C. § 9607.

[5] 42 U.S.C. § 9601(21).

[6] No. 04-cv-0256, Order [Doc. 357] (E.D. Wash. June 19, 2009).

[7] *Id.* at 3-4.

[8] *Id.* at 5-8.

[9] *Id.* at 7, 10.

[10] 439 F.3d 636 (10th Cir. 2006).

[11] *Id.* at 643.

[12] *Id.* at 644-45.

[13] S*ee, e.g., Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir. 1995).

[14] 25 U.S.C. § 477.

[15] No. 15-cv-0056, Memorandum Opinion and Order at 6, n1.

[16] *Id.* at 7-8.

[17] *Id.* at 17-18.

[18] *Id.* at 9.

[19] *Id.* at 10.

[20] *Id.* at 19.