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Of Note:

- Modrall Sperling Attorneys Nationally Ranked in Native American Law by *Chambers USA: America's Leading Lawyers for Business*
- Modrall Sperling Attorney Lynn Slade to Speak at the New Mexico State Bar Annual Meeting on August 20, 2016

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 50 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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Equally Divided United States Supreme Court Affirms Tribal Jurisdiction over Tort Claims Against Nonmembers

On June 23, 2016 the Supreme Court issued its much anticipated decision in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*.[1] The one sentence per curiam opinion by an equally divided Court affirmed the opinion of the United States Court of Appeals for the Fifth Circuit which concluded that a tribal court had jurisdiction over tribal members' tort action against a nonmember defendant.[2] The per curiam affirmance leaves in place the Fifth Circuit's decision. The Court's decision does not give the Fifth Circuit's decision greater precedential authority, but it stands as a marker of what divides the current eight-member Court.

Background: *Dollar General* arose from the alleged abuse of a tribal youth by a manager of a Dollar General store located on the Mississippi Band of Choctaw Indians' (the Band) Reservation in Mississippi. The alleged victim was a participant in the Band's internship program, which placed tribal youth in local businesses to get work experience. The accused store manager had agreed on behalf of Dollar General to participate in the internship program with the Band. The youth, "John Doe" in the pleadings, filed suit in tribal court seeking compensatory and punitive damages. Dollar General moved to dismiss on grounds that the tribal court lacked subject matter jurisdiction over the case under the Supreme Court's decision in *Montana v. United States*.[3] The tribal court denied the motion to dismiss, and the tribal court of appeals affirmed. Dollar General then filed suit in the District Court for the Southern District of Mississippi which denied Dollar General's motion to dismiss under *Montana*. A divided Fifth Circuit affirmed.

The Fifth Circuit Decision: The Fifth Circuit recognized that "generally" a Tribe's inherent power does not extend to nonmember activities and that tribal court jurisdiction over Dollar General under *Montana* turned on whether one of the two "exceptions" to *Montana*'s general rule applied.[4] The Fifth Circuit majority found that Dollar General's decision to participate in the Band's internship program was a sufficient basis under *Montana*'s first exception to subject Dollar General to tribal tort law and tribal court jurisdiction. The majority held that the store's agreeing to participate in the Band's program and hiring Doe as an "unpaid intern" created a "commercial" relationship and satisfied *Montana*'s "nexus" requirement, that there be a "nexus" between the consensual relationship and the assertion of jurisdiction, because it is foreseeable that an agreement to hire minor tribal members could give rise to tort claims. The majority found protection of youth from abuse is a legitimate tribal interest and that the Band had an interest in regulating "the working conditions… of Tribe members employed on reservation land."[5]

In a footnote, the majority referenced provisions of the store's lease agreement with the Band for the tribal land for the store in which the tort occurred. In the lease Dollar General agreed to "comply with all codes and requirements of all tribal . . . laws and regulations pertaining to the leased premises," including the Choctaw Tribal Tort Claim Act, and agreed to "exclusive" dispute resolution in tribal court, though those agreements arguably were limited to "lease disputes."[6] However, the Fifth Circuit expressly declined to decide whether the lease agreement "would have a sufficient nexus to support tribal court jurisdiction over Doe's tort claims."

Take Away: The Supreme Court's affirmance of the Fifth Circuit decision could be read to support future assertions of tribal jurisdiction, even without express consent to tribal law and jurisdiction. It does not provide guidance on

whether lease agreements pertaining generally to the lease that do not expressly provide consent to jurisdiction over activities occurring on the lease can support tribal law and court jurisdiction.[7]

A Further Note: Interestingly, just days after issuing its per curiam affirmance in *Dollar General* the Supreme Court denied certiorari in *EXC Inc. v. Jensen*,[8] a case in which the Court of Appeals for the Ninth Circuit narrowly construed the *Montana* exceptions in a case arising from injury to Navajo Nation members in a vehicular collision with a nonmember charter bus on a state highway on the Navajo Nation Reservation.

For more information, please contact Lynn H. Slade.

[1] *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. ___ , 135 S. Ct. 2159 (June 23, 2016) (per curiam).
[2] *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, (5th Cir. 2014).
[3] 450 U.S. 544 (1981).
[4] Under the first *Montana* exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Under the second exception (not at issue here), "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The significance of fee versus trust land status in *Montana* determinations continues to provoke debate. *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).
[5] *Dolgencorp, Inc.*, 746 F.3d at 173-75.
[6] *Id.* at 174 n.4.
[7] Modrall Sperling filed a brief amicus curiae in *Dollar General* on behalf of the Association of American Railroads.
[8] *EXC Inc. v. Jensen*, 588 Fed. Appx. 720 (9th Cir. 2014) (unpublished), *cert. denied*, U.S.L.W. 84 USLW 3062 (June 28, 2016).

The Silver Lining: Efficiencies in BIA's Newly Effective Right-of-Way Regulations

As we have previously reported, the Bureau of Indian Affair's (BIA) recently revised the regulations governing grants of right-of-way (ROW) on Indian lands compiled at 25 C.F.R. Part 169 (Final Rule).[1] The Final Rule became effective on April 22, 2016.[2] While many of the Final Rule's provisions are concerning because of the impediments they pose to obtaining and maintaining ROWs across tribal and allotted lands, the Final Rule includes provisions that create efficiencies by carving out exceptions to landowner consent and BIA approval and by adding more detail to certain regulations regarding consent. Given the complexity of the new regulations, a full review is necessary to inform any action or decision. However, we discuss here landowner consent/BIA approval exceptions for renewals, assignments, and mortgages in turn. We also identify provisions that may be advised to be included in future ROW grants to take advantage of the Final Rule's efficiencies for future grants.

Efficiencies for Existing Grants:

Renewals: Under 25 C.F.R. § 169.202, the BIA will renew an existing ROW grant without landowner(s) consent only if the original grant expressly allowed for automatic renewal or option to renew and specifies compensation or how compensation will be calculated. Of course, these provisions may inform how new agreements should be crafted. To determine whether the grant at issue can be renewed without landowner consent at the time of renewal, consider reviewing your existing grants (and any tribal agreement/resolution if tribal lands are involved) for the following language:

- Landowner consent to automatic renewal;
- Language providing for option to renew;
- Language identifying how much compensation will be paid to landowner upon renewal or agreement as to a method to determine compensation.

The regulations indicate a grant may authorize automatic renewal or an option to renew if it provides no further landowner consent is required, identifies compensation or method for determining compensation at the time of renewal, and the grantee or assignee provides BIA with copy of the assignment documents. 25 C.F.R. § 169.202(a)(2). In addition to the landowner consent requirements, BIA will renew a grant only if there are no

changes to the location or use authorized by the original grant, and the initial term and renewal term together do not exceed the maximum reasonable term as set forth in 25 C.F.R. § 169.201.

If the proposed renewal involves a change to the original grant or the original grant was silent regarding renewals, then BIA requires the grantee to reapply for a new ROW and BIA will treat the application as an original application for a ROW. 25 .C.F.R. § 169.202(c).

Assignments: Under 25 C.F.R. § 169.207, the Final Rule states that a grantee may assign a ROW grant without landowner(s) consent and without BIA approval only if the original grant expressly allowed for assignment without landowner(s) consent and BIA approval. To determine whether the grant at issue can be assigned without landowner consent and without BIA approval, consider the following:

- Was the assignment the result of corporate merger, acquisition, or transfer by operation of law? If so, then no landowner consent and BIA approval required. 25 C.F.R. § 169.207(c). The assignee, however, must comply with requirements to provide documentation to the BIA.
- If the assignment is not a result of a corporate merger, does the grant state that it is binding on "successors and assigns"? If so, BIA has indicated in its "Preamble" commentary on the new regulations that no landowner consent or BIA approval should be required.[3] The assignee must comply with requirements to provide documentation to the BIA.
- If the assignment is not the result of a corporate merger or the grant does not state that it is binding on "successors and assigns," does the grant contain a landowner consent to future assignments without further landowner consent and without BIA approval; then BIA indicates no further negotiations with the landowner should be required and no BIA approval necessary. 25 C.F.R. § 169.20.
- Note however, that even if landowner consent and BIA approval are not required, the assignee and grantee must provide a copy of the assignment and supporting documentation to the BIA within 30 days of the assignment.

In addition, the Final Rule requires all assignees to file all prior assignments with the BIA by, as extended, August 16, 2016, or request an extension of that date. *See* 25 C.F.R. § 169.7. If BIA does not have a record showing legal right to occupy the ROW, then, according to BIA's FAQs, the assignee "risk[s] BIA pursuing an enforcement action against you for trespass."

Mortgages: Under 25 C.F.R. § 169.210, a grantee may only mortgage a ROW if the grant "expressly allows mortgaging." This appears to mean that a ROW grantee is precluded from mortgaging existing ROW grants after the Final Rule's effective date unless the existing grant expressly authorizes the grantee to mortgage its interest. The BIA has not indicated it considers "successors and assigns" language also authorizes mortgages, though there are good reasons it should have similar effect. In addition, the Final Rule requires landowner(s) consent, unless the existing grant expressly allowed for mortgage without landowner(s) consent. It appears that BIA approval is required even if landowner consent is not required.

"So Numerous" Exception to Landowner Consent: If the grant does not contain the language authorizing renewal, assignment, mortgage or amendment, the Part 169 regulations allow for BIA approval without landowner consent when the landowners are so numerous that it

would be impracticable to obtain consent. The "so numerous" exception, which also applies to original grants of ROWs, existed in the prior regulations, but BIA has added clarity about what constitutes "so numerous" in the Final Rule. 25 C.F.R. § 169.107(b)(1)(2). If there are 50 or more co-owners of undivided trust or restricted interests in an allotment, then an applicant may want to consider requesting BIA approval under the "so numerous that it would impracticable to obtain consents" regulation. The Final Rule sets forth the process to follow if an applicant wants to proceed under the "so numerous" exception, which includes providing notice and request for consent to the landowners, along with a statement that BIA can proceed under Section 169.107(b)(1) if consent is not obtained. BIA has identified the following information as relevant to its decision whether to approve under the "so numerous" exception and this information may be useful to include in an application:

- Statement that the grant will cause no substantial injury to the land or any landowner. BIA considers the following in the substantial injury review: Term, amount of acreage, type of disturbance, type of activity, potential for environmental or safety impacts, and objections by the landowners.
- Statement that the landowners will be adequately compensated for consideration and damages. If the grant specified the amount of compensation or a method for determining compensation, that information may be evidence of adequate compensation.
- BIA must provide notice to all owners at least 60 days in advance of approval. *See* 25 U.S.C. § 324; Final 25 C.F.R. § 169.107(b)(1).

Language to Include in New Grants.

If you cannot simply renew your grant, or if you are acquiring a new grant, then the following language may be helpful to include to enhance certainty with respect to future renewals, assignments, or mortgages.

Renewals: Consider including the following concepts regarding your right to renew your grant (25 C.F.R. § 169.202):

- Landowner consent to automatic renewal or an option to renew, and without further BIA approval;
- An agreement with the landowner for how much compensation will be paid to landowner upon renewal or agreement as to a method to determine compensation (CPI adjustment, etc.);
- A definition of the initial term and renewal term and, if the initial term and renewal term agreed to is different than the duration specified in 25 C.F.R. § 169.201(c), a statement that the landowner agrees that the initial term and renewal term will benefit the Indian landowner and, if true, the initial term and renewal term is consistent with the duration of the ROW crossing tribal lands.

Assignments: Consider including the following concepts regarding your right to assign the grant (25 C.F.R. § 169.207):

- Landowner consent to future assignments without further landowner consent;
- Statement that grant is binding on "successors and assigns";
- Landowner agreement that no BIA approval is required.

Mortgages: Consider including the following concepts regarding your right to mortgage the grant (25 C.F.R. § 169.210):

- Ensure that the grant expressly authorizes mortgaging;

- Landowner consent to future mortgages;
- Landowner agreement that BIA approval is not required, although it is unclear whether BIA will agree that its approval is not required.

For more information, contact Deana M. Bennett or Lynn H. Slade.

[1] The BIA's website has additional information on the Final Rule and its implementation, including templates for ROW applications, grants, consents for renewals, amendments, mortgages, and assignments, available here.
[2] An industry group, Western Energy Alliance, challenged the Final Rule in the United States District Court for the District of North Dakota, but then dismissed its challenge. Modrall Sperling represented the New Mexico Oil and Gas Association in that challenge.
[3] *See* 80 Fed. Reg. 72491, 72502 (Nov. 19, 2015) ("[M]any current grants include language granting to the grantee and the grantee's assignees," which the comments state the BIA interprets as "contain[ing] explicit language allowing the grant to be freely assigned without landowner consent or BIA approval, and that explicit grant language would govern.").

Recent Cases Confirm Sovereign Immunity

The Ninth Circuit Court of Appeals and the New Mexico Supreme Court recently issued opinions which reject arguments to evade the defense of sovereign immunity.

Ninth Circuit: A claim against a sovereign entity seeking non-monetary relief is barred by sovereign immunity.

The simpler issue, at least to explain, arose in *United States v. State of Washington*,[1] which relates to the seminal 1974 "*Boldt*"[2] decision, in which the United States District Court for the Western District of Washington outlined the contours of Indian Treaty fishing rights,[3] which generally include access to Treaty-era fishing locations, and a right to a fair catch of the available fish. Relying on the *Boldt* decision, the Ninth Circuit affirmed the district court's determination that Washington had violated its obligations under the Treaties by building and maintaining culverts that caused the size of salmon runs to diminish by blocking salmon migration,[4] and therefore it had to remove or replace culverts under roadways which do so.[5]

The Ninth Circuit's sovereign immunity holding regarded Washington's "cross-request," essentially a counterclaim against the United States, which had joined the suit brought by twenty-one Tribal Nations.[6] Washington sought an injunction declaring that culverts maintained by the United States also violated Treaty fishing rights and therefore also must be removed or replaced. The Ninth Circuit adopted the criteria set out in Tenth Circuit case law[7] for the "recoupment" test for counterclaims allowed against sovereign entities despite the immunity defense:

> To constitute a claim in recoupment, a defendant's claim must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim.[8]

In filing suit and invoking a court's jurisdiction, a sovereign entity waives immunity for such recoupment claims. The Ninth Circuit held that a claim seeking non-monetary relief, here an injunction, does not meet the recoupment test. Consequently, Washington's cross-request for an injunction requiring the United States to correct its barrier culverts was barred by sovereign immunity.[9] This holding might be ameliorated by a third party suit against federal officials for injunctive relief under the *Ex parte Young*[10] doctrine.

While the Ninth Circuit's holding does not apply to Tribal Nations, the Tenth Circuit Court of Appeals, from which the Ninth Circuit adopted its "recoupment" criteria, has done so.[11] Therefore, either the Ninth or Tenth Circuits could extend the holding of *United States v. Washington* to Tribal Nations to conclude that a recoupment claim that

does not seek monetary relief is barred by the Tribe's sovereign immunity. Given that tribal officials, like federal officials, may also be sued for injunctive relief when acting contrary to law,[12] seeking injunctive relief against one or more tribal officials should be borne in mind, instead of seeking such relief against a Tribe.

New Mexico: Tribal sovereign immunity bars suit seeking to confirm access to private property.

In the second case, *Hamaatsa, Inc. v. Pueblo of San Felipe*,[13] the New Mexico Supreme Court rejected several theories advanced by the plaintiff, a non-profit located in a rural area that sought to confirm access to its property over a road that had been transferred to the Pueblo of San Felipe, to evade the sovereign immunity defense raised by the Pueblo.

According to the allegations described in the New Mexico Supreme Court's opinion, since 1906, Hamaatsa accessed its land via a road crossing land owned by the Bureau of Land Management (BLM). In 2001, the BLM transferred the land to the Pueblo, subject to an easement for the road. In 2002, the BLM transferred its interest in the easement to the Pueblo. In 2009, the Pueblo informed Hamaatsa that it could no longer use the road to access its property. Hamaatsa sued, and the Pueblo moved to dismiss based on sovereign immunity.[14] The state district court denied the motion to dismiss, concluding that that the action was an *in rem* proceeding not barred by sovereign immunity and, in a split decision, the New Mexico Court of Appeals affirmed, albeit on different grounds. Specifically, the court of appeals' majority reasoned that the use of the road did not threaten or otherwise affect the Pueblo's sovereignty and that equitable considerations militated against application of sovereign immunity. The New Mexico Supreme Court reversed.

The New Mexico Supreme Court rejected all of Hamaatsa's arguments why sovereign immunity did not bar suit. The court first outlined the familiar doctrine of sovereign immunity, noting that neither Congress nor the Pueblo waived immunity here, and then addressed the "novel" arguments by Hamaatsa.[15] The court noted that "[c]ourts time and again have sought to alleviate similar claims of inequity resulting from the imposition of sovereign immunity," but ruled that such efforts fail to overcome the immunity defense.[16]

The first issue was whether the sovereign immunity defense applies equally to *in rem* and *in personam* actions. While the court noted that some state courts have held that immunity does not bar an *in rem* action, it relied on the United States Supreme Court's *Bay Mills* decision[17] (which upheld tribal sovereign immunity for off-reservation commercial ventures but did not address an *in rem* proceeding) to reject that conclusion.[18]

The second issue was whether the relief Hamaatsa sought, declaratory, made the defense of immunity inapplicable. Again, the court noted a line of authority holding that immunity only barred claims against Tribes for monetary damages. But the court reasoned otherwise and held that New Mexico courts lack jurisdiction to hear a claim "against a Tribe in New Mexico for any relief—be it monetary, declaratory, or injunctive."[19] Because Hamaatsa's claims were only against the Pueblo itself, the New Mexico Supreme Court did not address a claim against tribal officials analogous to *Ex parte Young*,[20] though it recognized such a claim may avoid sovereign immunity defenses.[21] The *Hamaatsa* court also rejected equitable considerations due to the "venerable interests" served by tribal sovereign immunity, including self-governance and self-sufficiency.[22]

The New Mexico court's rejection of equitable interests has analogues in federal cases. This term, in *Nebraska v.*

Parker,[23] the United States Supreme Court rejected equitable considerations in determining whether the Omaha Tribe's Nebraska reservation was diminished by an 1882 statute. Finding an absence of the required clear congressional intent to diminish a reservation in the 1882 Act that provided for the survey, sale, and allotment of the reservation lands, the Court declined to consider "justifiable expectations" of non-Indians living on the land with respect to continued reservation status, though, in a closing paragraph, it suggested its decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*[24] might be applied to bar enforcement of the tribal rights at issue in the case.[25] And, a few years ago, in *Carcieri v. Salazar*,[26] the United States Supreme Court held that an unambiguous statute precluded the Department of the Interior (DOI) from taking land into trust for any Tribal Nations that was not recognized and under federal jurisdiction in 1934, when the relevant congressional act was passed. This disrupted the practice of the DOI, which had taken into trust lands for Tribes recognized after 1934.

Take Away:

Both the Ninth Circuit and the New Mexico high court confirmed the importance of sovereign immunity, the latter relying, in part, on the United States Supreme Court's recent *Bay Mills* decision. Both cases give narrow scope to exception to the immunity defense. *Hamaatsa* reflects what could be a trend building upon *Carcieri* and extended in *Parker* to decline to rely upon expectations or equities in interpreting statutes in light of clear statutes or established case law. However, expectations or equities may have a role with respect to remedies. For instance, in *Parker* the Supreme Court indicated that expectations may play a role in determining whether certain relief is time-barred.

For more information, please contact Brian K. Nichols.

[1] No. 13-35474, 2016 U.S. App. LEXIS 11709 (9th Cir. June 27, 2016) ("*Washington* Slip op.").
[2] *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). The decision is referred to as the "Boldt decision" because it was authored by Judge George H. Boldt.
[3] The treaties at issue are commonly referred to as "Stevens Treaties," after the then-Governor of the Washington Territory and Superintendent of Indian Affairs, who entered into treaties with the Pacific Northwest Tribes during 1854-1855.
[4] *Washington* Slip op. at 26-31.
[5] *Id.* at 32-33.
[6] *Id.* at 37.
[7] *Berrey v. Asarco Inc.*, 439 F.3d 636, 645 (10th Cir. 2006).
[8] *Washington* Slip op. at 38 (quoting *Berrey*, 439 F.3d at 645).
[9] *Id.* at 38-39.
[10] In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that suits alleging violation of federal law for prospective injunctive relief may proceed against state officials notwithstanding state immunity from suit. *Ex parte Young* has been extended to apply to tribal officers as well. *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002).
[11] *See, e.g.*, *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).
[12] *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, ___. U.S. ___, ___, 134 S. Ct. 2024, 2035 (2014).
[13] No. S-1-SC-34287, 2016 N.M. LEXIS 148 (June 16, 2016) ("*Haamatsa* Slip Op.").
[14] *Id.* at 1-3.
[15] *Id.* at 11-15.
[16] *Id.* at 16.
[17] *Michigan*, ___ U.S. at ___, 134 S. Ct. at 2035.
[18] *Haamatsa* Slip op. at 19-21.
[19] *Id.* at 22.
[20] 209 U.S. 123 (1908).
[21] *Hamaatsa* Slip op. at 14-15.
[22] *Id.* at 30-31.
[23] *Nebraska v. Parker*, ___ U.S. ___, 136 S. Ct. ___ (March 22, 2016).
[24] 544 U.S. 197 (2005).
[25] *Hamaatsa* Slip op. at 12.
[26] 555 U.S. 287 (2009).

Native American Trust Asset Reform Act Becomes Law: New Tribal Options, Questions Unanswered

On June 10 2016, Congress passed the Native American Trust Asset Reform Act and on June 22, 2016, President Obama signed it into law.[1] According to the Senate Committee on Indian Affairs, the purpose of the Act "is to reaffirm the Federal government's fiduciary trust responsibilities to Indian Tribes."[2] Of particular note is Congress' findings that treaties and agreements with Indian Tribes "provided legal consideration for permanent, ongoing performance of Federal trust duties" and the historic Federal-tribal "relations and understandings…have established enduring and enforceable Federal obligations."

The Act is intended to facilitate tribal management of tribal trust assets and does so by establishing a voluntary demonstration project. Under the Act, a Tribe must apply to take part in the demonstration project, and, if

approved, must submit a proposed Indian trust asset management plan to the Secretary for approval. Among other things, the plan must identify the trust assets that will be subject to the plan, which can be assets "located within the reservation, or otherwise subject to the jurisdiction of, the Indian Tribe," establish objectives and priorities, allocate funding, establish procedures for nonbinding mediation or resolution of disputes between the Tribe and the United States relating to the plan, and identify federal regulations that will be superseded by the plan. The Secretary has 120 days to approve or disapprove a proposed plan, and if the Secretary does not act within 120 days, then the plan is deemed approved. The Act's structure is similar to that enacted in 2005 providing for Tribes to enter into tribal energy resource agreements ("TERA"), to directly administer energy and resource agreements. *See* 25 U.S.C. § 3504. Few, if any, TERA agreements are in effect as yet.

Significantly, if approved, an Indian trust management plan can authorize an Indian Tribe to enter into "surface leasing transactions" or "forest land management activities" without Secretarial approval if, among other things, the Tribe has adopted regulations, approved by the Secretary, that provide for environmental review and public notice and opportunity to comment on significant environmental impacts of the proposed project. The Act defines "Surface Leasing Transaction" as "a residential, business, agricultural, or wind or solar resource lease of land the title to which is held--in trust by the United States for the benefit of an Indian Tribe; or in fee by an Indian Tribe, subject to restrictions against alienation under Federal law." This definition would exclude oil and gas or mining leases.

The Act authorizes the Secretary, "upon reasonable notice from the applicable Indian Tribe," to cancel any lease executed by a Tribe. Surprisingly, the Act does not require notice be given to the lessee or provide any process for lessee involvement in lease cancellation. The Act provides that "[a]n interested party" may petition the Secretary for review of an Indian Tribe's compliance with tribal regulations, but only after exhaustion of tribal remedies. The Act's definition of "interested party," includes "an Indian or non-Indian individual, entity, or government the interests of which could be adversely affected by a tribal land leasing decision…." If the Secretary concludes that there has been a violation of tribal regulations, then the Secretary may rescind the approval of the tribal regulations and reassume responsibility for the approval of leases of tribal trust land. Before doing so, the Secretary must provide the Tribe with a hearing on the record and an opportunity to cure.

The Act also authorizes the use of appraisals and valuations without Secretarial approval, so long as the appraisal or valuation is prepared by an individual who meets certain minimum qualifications and if the Tribe or Indian landowner acknowledges an intent to have that appraisal or valuation considered for the transaction. Under those circumstances, no additional review is required and the appraisal or valuation "shall be considered final for purposes of effectuating the transaction for which the appraisal or valuation is required." The Act authorizes the Secretary of the Interior to transition the functions of the Office of Special Trustee to other agencies, offices, or bureaus in the Department of the Interior.

Take-Away: One benefit of the Act is the potential to streamline the approval process for surface leasing transactions, once a tribal trust asset management plan is approved. Authorizing Tribes to approve such transactions not only encourages tribal self-determination and governance of tribal assets, it also removes sometimes inefficient federal approvals and associated regulatory review that can slow down project development. The Act, however, does have some potentially problematic

components, including requiring exhaustion of tribal remedies, authorizing the Secretary to cancel a lease apparently without notice to the lessee, and promoting reliance on appraisals prepared for Tribes or individual Indian landowners that are not reviewed by the Secretary or other office within the Department of the Interior. Although requiring that the appraiser meet certain minimum requirements somewhat ameliorates that concern, the Act's provisions do not suggest consideration of lessees' evidence of valuation.

For more information, contact Deana M. Bennett.

[1] 25 U.S.C. § 5601.
[2] S. Rep. 114-307 (Feb. 8, 2016).

BLM's Hydraulic Fracturing Rule Applicable to Indian Lands Is Back in Play—For Now

Introduction:

In two articles appearing in Modrall Sperling's companion newsletter, *Energy Resources Notes*, we reported first on the substantive provisions of BLM's March 26, 2014 hydraulic fracturing rule (HF Rule),[1] and later on the rule's preliminary injunction postponement of its effectiveness by a United States District Court in Wyoming.[2] In a nutshell, BLM's HF Rule established a program designed to work in tandem with existing BLM programs for oversight and approvals of oil and gas drilling on federal and Indian lands. The HF Rule requires operators to make substantial public disclosures to BLM officials in advance of HF operations as well as after completion (including, among many other things, identifications of chemicals and sources of water to be used in the operations), to diligently assess the casing of wells and address inadequate casings before commencing operations, to monitor operations and carefully manage and handle HF flowback fluids, and to do extensive monitoring of HF operations, take corrective actions when needed, and provide extensive reports (utilizing the widely used FracFocus source) and certifications to BLM during and after the completion of HF operations.

This article provides an update on the current status of the HF Rule and the litigation and congressional activity it has spawned, together with a more focused discussion of the HF Rule's applicability to Indian lands and bases therefor, as well as the tribal consultation and coordination processes that were both employed in the development of the Rule itself and contemplated in the wake of the Rule's adoption.

BLM's HF Rule Struck Down by Federal Judge, But No Longer Enjoined During Appeal:

After postponing the HF Rule in June of 2015,[3] and enjoining it in September of 2015,[4] the federal court in Wyoming ultimately struck down the HF Rule at the behest of various industry, state and tribal parties, rejecting BLM's asserted authority for the fracking rule in federal and Indian lands leasing statutes. According to the court's June 21, 2016 decision on the merits, the federal and Indian lands leasing statutes do not delegate to BLM a broad grant of authority to regulate for the protection of ground water resources or other environmental values, and instead provide BLM authority over oil and gas drilling operations only to the extent of protecting petroleum resources, including protection of those resources against water incursions.[5]

In late June 2016, the federal government appealed on the merits to the Tenth Circuit Court of Appeals, followed soon thereafter by separate appeals and interventions by various environmental groups. These parties, which had also appealed the trial court's earlier injunction of the HF Rule, urged the Tenth Circuit to reinstate the HF Rule by lifting the injunction. The Tenth Circuit granted their request on July 13, 2016, resulting in the HF Rule's

reinstatement during the pendency of the continuing appeal on the merits of whether BLM had authority to adopt it in the first place.[6]

Application of the HF Rule to Indian Lands:

The HF Rule applies to oil and gas operations on federal public lands, as well as operations on Indian lands. BLM derives what authority it has over Indian oil and gas leases on trust lands from a delegation from the Secretary of the Department of the Interior (DOI),[7] who, in turn derives her regulatory authority from three federal statutes: an Act of March 3, 1909,[8] the Indian Mineral Leasing Act,[9] and the Indian Mineral Development Act.[10] Pursuant to statutory exclusions, however, the Secretary's regulatory authority does not extend to Indian oil and gas leases on the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, and the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma. The Bureau of Indian Affairs' (BIA) regulations recognize the application of BLM's leasing regulations appearing at 43 CFR Part 3160 to oil and gas operations on trust and restricted Indian lands, both tribally and individually owned.[11]

During the comment period leading to adoption of the HF Rule, which largely—though not exclusively—is designed to protect water quality, several commentators questioned BLM's authority over surface and groundwater given that States and Tribes generally administer and regulate rights to use surface and groundwater. In response, BLM agreed with the observations of these commenters, but nonetheless asserted (and continues to assert) that its authority over oil and gas operations includes, as a "key component of BLM's jurisdiction and responsibility," the protection of water zones during well drilling and hydraulic fracturing.[12]

Tribal Consultation Processes Leading Up to the HF Rule:

According to BLM's final rulemaking publication, BLM attaches great importance to tribal consultation. Pursuant to statutory responsibilities and executive policies, including DOI's Tribal Consultation Policy[13] and Executive Order 13175, BLM initiated government-to-government consultation with Tribes on the proposed rule and offered to hold follow-up consultation meetings with any Tribe that expressed a desire to have an individual meeting. BLM recites that it held several regional tribal consultation meetings around the West, Midwest and Southwest, to which 175 tribal entities were invited, resulting in substantive participation in regional meetings by 27 Tribes on such issues as the applicability of tribal laws, the validation of water sources, inspection and enforcement issues, wellbore integrity proposals, and water management. Individual consultations occurred as well, in addition to meetings at the National Congress of American Indian Conferences in Lincoln, Nebraska and New Town, North Dakota.

Some comments received argued that, rather than adopt a single HF Rule applicable to both federal and Indian lands, certain differences in the administration of leases on federal versus Indian lands justified different regulatory treatment. Specifically, some argued BLM should promulgate different rules for Indian lands because of BIA's involvement in cancellation of Indian leases and differing royalty valuation criteria applied for operations on Indian lands. BLM rejected the idea of creating parallel regulations and regulatory personnel within BIA, citing economy of administration as support for fulfilling the Secretary's trust responsibility.

Other commenters argued that Tribes should be allowed to opt out of the HF Rule, and cited BIA regulations providing for a tribal constitution or charter under the Indian Reorganization Act of 1934 to supersede

regulations in 25 CFR Part 211.[14] BLM, however, pointed to a proviso in the BIA rule that tribal law may not supersede the requirements of federal statutes applicable to Indian mineral leases, and to the fact that the BIA regulations apply to tribal leases and permits that require the Secretary's approval.[15] BLM also rejected comments to the effect that the HF Rule should become inoperative once a Tribe has demonstrated its regulatory program is sufficient to govern hydraulic fracturing operations, pointing out that the Indian mineral leasing statutes do not authorize tribal primacy. Similar comments urging secretarial delegation to tribal authorities were rejected on essentially the same grounds.

Tribal Consultation Processes Contemplated in the Rule Itself:

According to the BLM's final rule publication, BLM "will continue its coordination with . . . Tribes to establish or review and strengthen existing agreements related to oil and gas regulation and operations." BLM stated intent for these coordination efforts will be to "minimize duplication and maximize flexibility" in hopes that new and improved agreements will "reduce regulatory burdens and increase efficiencies" pursuant to the Secretary's statutory mandate as trustee for Indian lands.[16]

House Reacts to HF Rule During Appeal:

Attempting to undermine both the HF Rule and the government's continuation of its appeal on the merits of the Rule to the Tenth Circuit, the House of Representatives on July 13 attached a measure to an annual spending bill for various agencies of the administration including DOI. The White House issued a veto threat that suggests the House's measure may not have a realistic chance of becoming law.

Take-Away:

Although both opponents and proponents of the HF Rule have scored interim victories, and the preliminary injunction entered by the federal judge in Wyoming has been lifted by the Tenth Circuit, the long-term fate of the HF Rule remains uncertain. The ultimate outcome of the pending appeal will impact the contours of tribal oversight of oil and gas operations on Indian lands, and provide much needed guidance on the extent of BLM jurisdiction afforded by the federal and Indian mineral leasing laws in the areas of oil and gas operations and environmental protection.

For more information, please contact Stuart R. Butzier.

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[1] *See* http://modrall.com/BLM-Publishes-New-Rules-for-Hydraulic-Fracturing.
[2] *See* http://modrall.com/BLMs-Controversial-Hydraulic-Fracturing-Rule-is-Postponed-Nationwide.
[3] *See Wyoming, et al. v. U.S. Dep't of Interior*, Cons. Case Nos. 2:15-CV-043-SWS and 2:15-CV-041-SWS, Order Postponing Effective Date of Agency Action (D. Wyo. June 24, 2015).
[4] *See id.*, Order on Mots. For Prelim. Inj. (Sept. 30, 2015).
[5] *See id.,* Order on Pet. for Rev. of Final Agency Action (June 21, 2016); Judgment (June 22, 2016).
[6] Order, *State of Wyoming, et al. v. Sierra Club, et al.*, Case No. 15-8126 (10th Cir. July 13, 2016).
[7] *See* DOI Departmental Manual (235 DM 1.K).
[8] 25 U.S.C. § 396.
[9] 25 U.S.C. § 396d.
[10] 25 U.S.C. § 2107.
[11] *See* 25 C.F.R. §§ 211.4, 212.4 and 225.4.
[12] 80 Fed. Reg. 16128, 16186 (March 26, 2015).
[13] *See* Secretarial Order 3317.
[14] *See* 25 C.F.R. § 211.29.
[15] 80 Fed. Reg. at 16185.
[16] *Id.* at 16132.

OF NOTE

Modrall Sperling Attorneys Nationally Ranked in Native American Law by *Chambers USA: America's Leading Lawyers for Business*

Three Modrall Sperling attorneys, Lynn Slade, Walter Stern, and Brian Nichols, have been nationally ranked in Native American Law by *Chambers USA: America's Leading Lawyers for Business*. In addition, in recognition of the breadth of Modrall Sperling's Indian law practice, the firm was once again nationally ranked in Native American Law. The firm

engages lawyers with Indian law experience and strength in multiple practice areas to address complex challenges facing companies with business interests in Indian country. That seasoned depth and strong relationships developed with Indian country communities has created an environment for sound and efficient client representation.

For almost 40 years, Lynn has been serving clients' needs addressing Federal Native American law, energy, natural resources, and environmental law, project development, complex litigation and transactions. He also leads litigation teams in disputes concerning resource development, environmental regulation and business activities on Indian lands. Lynn received Tier 1 national recognition from *Chambers USA,* which notes that he is widely considered to be *"one of the best Native American law attorneys"* in New Mexico and on a nationwide basis. He is described by one commentator as *"an outstanding lawyer with superb expertise in Native American law. He has very good negotiation skills and knows the law very well."*

Walter brings over thirty years of experience providing representation, and advice and counsel to clients regarding dealings with Native American groups and related subjects. Clients throughout the west and across the country seek Walter's advice in matters involving transactions, disputes, and consultations with Indian Tribes and other Native American groups. In addition, clients look to Walter when pursuing federal and Indian land leasing, development, and related permitting and environmental compliance efforts under the National Environmental Policy Act, Section 106 of the National Historic Preservation Act, the Endangered Species Act, and related federal statutes. Nationally recognized in Native American Law by *Chambers USA,* Walter "*is held in very high esteem in terms of abilities and character."* Clients say we "*feel he is part of our business."*

Brian's practice is primarily in federal Indian law and litigation, including litigation in tribal courts. He focuses on energy, natural resources, transportation and employment. He has negotiated for clients with Tribal Nations. He regularly advises and represents clients regarding tribal employment, tort, contracting, and other issues. As reported in *Chambers USA*, he is well known for his Native American employment law expertise. Brian received national recognition from *Chambers USA* as "*a litigator with strong experience in Native American matters, including those involving natural resources matters and employment law*." Sources describe him as a *"very bright young lawyer"* who brings a *"smart and diligent"* approach to matters. He handles both contentious and non-contentious matters, and as a member of the Navajo Nation Bar, has appeared before the Navajo Labor Commission and Navajo Supreme Court.

A total of eighteen Modrall Sperling lawyers were selected as leaders in 24 Chambers-defined practice areas. *Chambers USA* ranks the leading firms and lawyers in an extensive range of practice areas throughout America. Chambers' in-depth and client-focused research is relied upon by leading industries and organizations throughout the U.S. and worldwide.

Modrall Sperling Attorney Lynn Slade to Speak at the New Mexico State Bar Annual Meeting on August 20, 2016

Modrall Sperling attorney Lynn Slade will be part of an esteemed panel discussing the United States Supreme Court's recent Indian Law decisions at the New Mexico State Bar Annual Meeting -- Bench and Bar Conference on August 20, 2016 in Pojoaque, New Mexico. Along with University of New Mexico School of Law Professor Barbara Creel and Navajo

Nation Department of Justice Litigation and Employment Unit Assistant Attorney General Paul Spruhan, Mr. Slade will discuss and debate the importance and effect of the United States Supreme Court's most recent Indian Law opinions: *United States v. Bryant*, *Nebraska v. Parker*, and *Dollar General v. Mississippi Band of Choctaw Indians*. The presentation will explain the importance of these three decisions, as well as other recent and significant cases, to the body of Indian Law addressing the jurisdictional powers of Tribes, and the extent of non-tribal police, regulatory, and judicial authority on tribal land. More information on the conference is available here.