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LAWYERS

Native American Law Watch

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Native American Practice Group

Modrall Sperling is one of a very few firms nationally which focuses its Native American law practice primarily 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. Modrall Sperling's Native American Law Practice Group is a unique set of professionals with expertise and experience in the wide range of disciplines critical to successful economic development in Indian country. Our Practice Group combines exceptional knowledge of core federal Indian and Native American law principles and recent developments with practitioners who bring specialized expertise applying those principles in finance, land and resource acquisition, employment law, environmental and cultural resource permitting and management, and related fields—in Indian country.

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Supreme Court Exposes Interior Fee-to-Trust Actionsto Broader Challenges and Extends Periods for Challenges, with Possible Silver Lining for Some Developers

The Case: The Supreme Court addressed two issues affecting economic development in Indian country in its June 27, 2012, decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,i ("Patchak")*: First, whether any suit challenging the United States' acquisition of land for Native Americans is barred by the federal Quiet Title Act ("QTA"); and, second, whether strict "standing to sue" requirements limit the classes of persons who can maintain such suits. Mr. Patchak, a non-Indian land owner, challenged the Secretary of the Interior's ("Secretary's") decision to take land neighboring Patchak's into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Band"). The Court's 8-1 decision in Patchak, allowing the suit to proceed, creates disincentives for economic development in Indian country, but may also have positive implications.

In 2009, the Court decided *Carcieri v. Salazar,*[ii] interpreting 25 U.S.C. § 465, part of the Indian Reorganization Act of 1934 ("IRA"), which authorizes the Secretary to take land into trust for a tribe. However, *Carcieri* held the IRA authorizes such action only for a tribe that "was under federal jurisdiction" when the IRA was enacted in June 1934. *Carcieri* has spawned an outcry from tribes, correctly noting its rejection of the Bureau of Indian Affairs' ("BIA") longstanding contrary interpretation, and Congress has been asked to enact a "*Carcieri*-Fix" to overturn the decision. Invoking Carcieri, Mr. Patchak sued claiming the Secretary lacked power under the IRA to take the land into trust because the Band was not federally recognized in 1934 when the IRA was enacted. The district court did not reach the merits of Patchak's *Carcieri* claim, but instead dismissed his action, holding that he lacked standing to sue and interpreting the QTA to bar the action. The QTA waives the United States' sovereign immunity for quiet title suits, but it also states that the Act "does not apply to trust or restricted Indian lands." The district court held that provision implies that any action, including one that might otherwise lie under the federal Administrative Procedure Act ("APA"), is barred if it would affect title to trust or restricted Indian lands. The District of Columbia Court of Appeals reversed both holdings, and the Supreme Court granted the writ of certiorari to review the decision.

The Decision: In the final days of its 2011 Term, a Supreme Court majority affirmed the Court of Appeals. The Supreme Court concluded that the general waiver of sovereign immunity in the APA, which allows review of federal agency action, applied to allow the claim and was not impliedly over-ridden by the "trust of restricted lands" exception to the QTA. Because Mr. Patchak did not claim an adverse ownership interest in the land taken into trust, the Court concluded that Patchak's claim was not of the sort covered by the QTA; consequently, the trust lands exception to the QTA did not bar Patchak's suit under the APA.[iii]

With respect to standing, the Court's majority concluded that, despite not having an interest in the land to be taken into trust, Patchak had standing to contest the Secretary's decision. Patchak argued that, as a neighboring land owner, he would be injured by effects of the use of the land, including lowered property values, increased traffic, and aesthetic injuries. The United States and the Band argued that Patchak's injuries resulting from the use of the land were not within the "zone of interests" sought to be protected by the IRA, contending its statutory language limited the statute's interests to "providing land for Indians."[iv] The Court disagreed, holding that Patchak had prudential standing, because, under the BIA's regulations and practices, the Band's ultimate use of the land was relevant to the Secretary's decision to take the land into trust for the Band.[v] On remand, the lower courts will decide the merits of Patchak's *Carcieri* claim.

Justice Sotomayor's dissent argued that the majority's decision would engender three negative "consequences." First, the majority decision may enable plaintiffs to "easily circumvent" the QTA's limitations by artful pleading. Second, the majority decision may frustrate the United States' ability to quickly resolve challenges to fee-to-trust decisions, because, under the BIA's regulations (and before the *Patchak* decision), challenges to a fee-to-trust decision had to be raised within 30 days of the Secretary's decision, a far shorter deadline than the 6-year period under the APA.[vi] Justice Sotomayor thus cautioned: "Today's result will…retard tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed." Third, she argued, it is now uncertain "who exactly is barred from bringing APA claims."

What It Means: *Patchak* has several implications for both tribes and landowner/developers when projects involve lands that the United States has taken, or intends to take, into trust for a tribe, as well as for affected landowners. Economic development in Indian country, including gaming develop-

ment, often involves the United States taking fee land into trust for a tribe's benefit. First, by concluding that an adjacent landowner has standing to challenge the Secretary's decision, the *Patchak* decision opens the door to a broader range of challengers to fee-to-trust transfers and possibly, to other actions. Second, because the Court held that the APA's 6-year statute of limitations may apply, previously approved fee-to-trust acquisitions may still be challenged, so long as the 6-year statute of limitations has not yet run. Third, as Justice Sotomayor's dissent points out, tribes and developers now may be leery of beginning a project on fee-to-trust land until after the 6-year limitations period has expired—and may not just delay, but not pursue, economic development. Tribes that have urged Congress to enact a "*Carcieri*-fix" may add a "*Patchak*-patch" to the to-do list.

Broader Implications? *Patchak's* standing analysis may have impacts beyond the fee-to-trust setting. By stepping beyond the strict statutorily expressed interests, and considering interests reflected in regulations and practical implications, it also may broaden the class of plaintiffs who can sue to challenge federal approval of leases or development agreements on Indian lands. That may be either chilling or helpful for developers: fear of project delay or invalidation of agreements through litigation filed by project opponents often concerns developers; conversely, it may allay developers' concerns, arising from much-discussed decisions that hold a developer/lessee lacks standing under the applicable Indian leasing and environmental statutes to challenge BIA's cancellation of its agreement with a tribe. Such decisions have held the developer's interests were not within the tribal- and environmental-protective interests articulated in the statutes involved.[vii] Thus, *Patchak's* holding may not only create uncertainty and disincentives for developing tribal lands to be taken into trust under the IRA, it may also factor—favorably or unfavorably—into tribal and developer incentives for development agreements on tribal lands.

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i __ U.S. __, 132 S. Ct. 2199 (2012).
ii 555 U.S. 379 (2009).
iii 132 S. Ct. at 2209-10.
iv Brief of Federal Petitioners at 30.
v 132 S. Ct. at 2211-12.
vi See 25 C.F.R. § 151.12.
vii See, e.g., Rosebud Sioux Tribe v. Sun Prairie, 286 F.3d 1031, 1036-1040 (8th Cir. 2002), cert. denied, 537 U.S. 1188 (2003).

"Tribal" vs. "Indian" Employment Preference

The Conflict: Ever since the Ninth Circuit Court of Appeals held tribal member employment preference violates Title VII of the Civil Rights Act of 1964 and its provision allowing certain preferences for Indians,[ii] employers and Tribes have struggled to accommodate Tribes' desires to enhance employment for their own members without violating federal law. On October 18, 2012, the U.S. District Court for the District of Arizona addressed this issue and concluded that Title VII did not prohibit tribal member preference where required by a lease of tribal lands that has been approved by the Secretary of the Interior or his delegate acting pursuant to federal laws governing Indian land leasing.[iii] *EEOC v. Peabody Western* addressed a lease between Peabody Western and the Navajo Nation, which was approved by the Department of the Interior ("DOI") and requires a preference for Navajo Nation members in employment over all other Indians and non-Indians. Title VII expressly provides that a preference for Indians (of any federally recognized tribe) living "on or near a reservation" is lawful.[iv] Supported by *Dawavendewa*, the Equal Employment Opportunity Commission ("EEOC") has long asserted the position that an employment preference for members of one tribal nation over members of other tribes and non-Indians represents unlawful discrimination based on national origin.

The Decision: U.S. District Court Judge Sheffield departed from blanket application of the EEOC's policy position, relying on the preference being required in a lease approved by DOI and a record reflecting DOI's approval of hundreds of Navajo Nation leases containing tribal member preference. That record, the case holds, transformed the tribal member preference into a "political classification,"[v] not one based on national origin. The District Court concluded that the political classification was enforceable because it promotes Navajo "economic self-sufficiency," tribal "economic development," and, by enforcing the tribe's policy reflected in the lease, tribal "self-governance."[vi] Tension remains between EEOC v. Peabody Western and *Dawavendewa*, because *Dawavendewa* also involved a preference included in a federally-approved lease of tribal lands. However, unless this recent decision is appealed and reversed, it affords tribes and employers comfort in addressing tribal member employment preferences.

Related Issues: The case did not consider the Navajo Preference in Employment Act, which also requires a Navajo

member preference in employment. We address a recent Navajo Nation Supreme Court decision interpreting that Act in another note in this issue.

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i. Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist., 154 F.3d 117, 1120 (9th Cir. 1998).
ii. Equal Employment Opportunity Comm'n v. Peabody Western Coal Co., No. 2:01-cv-050 JWS (Op. & Order, October 18, 2012) ("EEOC v. Peabody Western").
iii. 42 U.S.C. § 2000e-2(i).
iv. Citing Morton v. Mancari, 417 U.S. 535, 552 (1974), which concerned employment preference for Native Americans, not members of specific tribes, within the Bureau of Indian Affairs, a federal agency.
v. Slip Op. at 19.

Dealing with Tribal Traditional Law: The Navajo Supreme Court Develops a Practical Jurisprudence

The Issue: Businesses often have concerns about the effect of unwritten tribal law on doing business in Indian country[i]. Among these concerns are how to identify such unwritten laws and assess their impact in dispute resolution in tribal forums, and how to bridge the cultural differences and historical legacies between Native Americans and corporations. Almost all tribes implement laws requiring preference in employment in contracting for Native Americans or Native American contractors. The Navajo Nation has an employment law, the Navajo Preference in Employment Act ("NPEA"), which requires just cause for any adverse employment action.[ii]

The Case: A recent Navajo Supreme Court case provides a good example, and therefore a roadmap, for how such concerns may be addressed in a manner beneficial to both tribal nations and their business partners. Adding to a substantial body of case law developing the NPEA, the Navajo Supreme Court recently determined that an employer, a law firm, had just cause to terminate its receptionist, Ms. Marlene Johnson. [iii] Ms. Johnson is a Navajo tribal member, and worked for a firm that was wholly owned by non-members of the Nation, but which had offices on the Navajo Reservation.

In essence, Ms. Johnson was fired for being rude to persons visiting the firm, undermining office morale, making or sending demeaning or sexually offensive comments, and failing to perform her duties. She was counseled, but not disciplined, over a period of eight months and then fired. The Navajo trial court found that the law firm lacked just cause, but the Navajo Supreme Court reversed.

What is of greatest interest in this case, at least culturally, is the Navajo Supreme Court's explanation of Diné Fundamental Law, which may be generally understood as the traditional practices of the Diné, or Navajo people. The court stated that personal accountability and responsibility are emphasized in Diné Fundamental Law, reflected "through oblique methods of speaking that emphasizes voluntariness[iv]." For instance, should someone say that there is not enough firewood, the listener should understand she or he is being asked to take action to address the situation. The listener is expected to understand what is needed and take appropriate steps.

In turn, according to the court, threats, reprimands, and punishments are not traditional means of direction or instruction, in part because such methods are not consistent with an important principle of Diné Fundamental Law, k'é, which may be understood as maintaining proper relationships and harmony. The implications of these principles for employment are clear, and may have made the difference for the employer law firm.

The law firm had counseled Ms. Johnson over eight months, explaining the deficiencies in her performance and the standards of conduct she was expected to meet. That course of conduct was consistent with Diné Fundamental Law, and was accepted, though not without reservations, by the court (it appears the employer could have, instead, applied progressive discipline or warnings, which would have comported better with Navajo custom). Ms. Johnson's failure to correct her misconduct, and instead "demand[ing] endless opportunities to correct [the firm's alleged] deficiencies," was a "deliberate violation of the employer's standards[v]." Thus, the firm had just cause to terminate her employment.

The Take-Away: From the economic development perspective, the *Johnson* case strengthens a series of cases in which the Navajo Supreme Court has developed a body of law based on common sense, Diné common sense, which allows employers to take appropriate measures. In the context of the NPEA, we believe the Navajo Nation's developed body of

law and procedure is at least as simple and fair as most non-Navajo employment law. The Navajo Supreme Court has demonstrated the willingness to outline and explain cultural differences.[vi] While there remain significant unpredictable elements of Dine′ Fundamental Law,[vii] the court has made significant progress in developing comprehensible standards to complement the text of the NPEA.

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i For instance, issues of sovereign immunity require careful analysis, as demonstrated by New Gaming Systems v. National Indian Gaming Comm'n, No. CIV-0800698-HE (W.D. Ok., Sept. 13, 2012) (finding that the Sac and Fox Business Enterprises did not waive sovereign immunity), and a non-Indian developer has recently been subject to a tribal eminent domain acquisition of its business interest, as reflected in In the Matter of Grand Canyon Skywalk Development, LLC, Amer. Arb. Ass'n No. 76 517 Y 0091 11 S1M, Final Award at 3, available at: http://turtletalk.files.wordpress.com/2012/08/419831135_v-1_finalaward-120816.pdf.

ii 15 N.N.C. § 604(B)(8).

iii Rosenfelt & Buffington, P.A. v. Johnson, No. SC-CV-34-08 (Nav. Sup. Ct., Oct. 21, 2011). The opinion may be found on the Navajo Supreme Court's website, http://www.navajocourts.org/indexsuct.htm.

iv Slip. Op. at 8.

v Slip Op. at 5, 6 (citing previous authority).

vi As always, a few cautionary notes are warranted. The law firm's employment policies, which the Navajo judiciary will enforce as a contract, did not promise progressive discipline. The policies also expressly allowed discipline, including termination, for repeated misconduct. The employer was required to provide Ms. Johnson notice of both her misconduct and the proper standards. Navajo employment law has some complexities, and one should not rely on the Johnson case alone.

vii In a potentially problematic decision, the Navajo Supreme Court held Dine′ Fundamental Law prevented enforcement of a contractual provision exempting the employer from compliance with Navajo Nation employment law. Thinn v. Navajo Generating Station, Nos. SC-CV-25-06 & SC-CV-26-06 (Nav. Sup. Ct., Oct. 19, 2007).

HEARTH Act Presents Opportunity for Tribes to Improve Business Site Leasing in Indian Country

The Act: On July 30, 2012, President Obama signed the Helping Expedite and Advance Responsible Tribal Homeownership ("HEARTH") Act, sponsored by Representative Martin Heinrich (D.N.M.) and passed with strong bipartisan support. The HEARTH Act grants Indian tribes the authority to implement their own programs to approve leases for business, residential, and other purposes, pursuant to tribal regulations approved by the Secretary of the Interior ("Secretary"). Although much of the commentary on the Act focuses on its effect for residential leasing and mortgaging, we focus here on its impact on business site leasing, which complements the beneficial economic development effect of its residential application. If tribes implement this program, this change in the law promises to reduce delays arising from Bureau of Indian Affairs ("BIA") approval processes for business leases on tribal lands.

The HEARTH Act amends the Indian Long-Tem Leasing Act (a/k/a Business Site Leasing Act), 25 U.S.C. § 415, to extend to all federally recognized tribes the authority currently enjoyed by the Navajo Nation and certain other Congressionally-authorized tribes to enter into leases pursuant to tribal regulation, and without the requirement of federal lease approval. Excluded from the HEARTH Act's process for transfer of authority to tribes are leases for exploration, development, or extraction of mineral resources. Business or agricultural leases that may be approved by tribes are limited to twenty-five years (with the possibility of two renewal terms of equal length), while leases for public, religious, educational, recreational, or residential purposes may be up to seventy-five years. Tribes may not approve leases for individually owned Indian allotted land.

Significantly, the HEARTH Act permits tribes with approved programs to conduct environmental analyses in lieu of federal agency compliance with federal environmental law, such as the National Environmental Policy Act, enabling faster review, particularly in coordination with prospective lessees. Tribal leasing regulations submitted to the Secretary for approval must include a process for identifying and evaluating potentially significant environmental effects of the lease and associated activities, seeking public comment on those effects, and responding to any comments and projected effects. If requested by a tribe, the Secretary will provide a tribe with technical assistance in developing an environmental regulatory review process. For federally-funded projects, a tribe may rely on a federal environmental analysis.

Parties seeking review of actions taken pursuant to tribal regulations approved by the Secretary under the HEARTH Act must exhaust tribal remedies before appealing to the Secretary. If the Secretary concludes that tribal regulations were violated, after notice, a hearing, and an opportunity to cure, the Secretary may take reasonable action (as a part of the federal government's trust responsibilities), including re-

scinding the approval of the tribe's regulations and reasserting federal responsibility for leasing of the tribe's lands.

The Effect: With the passage of the HEARTH Act, Indian tribes now have the opportunity to assume substantially increased authority to develop private investment and economic development in Indian country. Although tribes must develop programs and expertise in environmental compliance before being able to conduct the necessary environmental assessments prior to lease approvals, the ability to approve leases will allow tribes to exercise greater autonomy over tribal economies.

The HEARTH Act also presents opportunities for increased economic development in Indian country. The law allows businesses to work directly with tribes for the approval of all leases save those for the mineral extractive industries. The law will benefit businesses as they seek to attract a qualified workforce, as the HEARTH Act makes it easier for tribal members to own homes, and for non-tribal members to lease homes on Indian lands, which have been inhibited by delay and uncertainty arising from BIA approval processes.

A Proviso: Until such time as tribes pass and receive Secretarial approval of the necessary regulations, and develop environmental expertise, businesses in Indian country must continue to seek approval from the Secretary of the Interior for business on trust or restricted tribal lands. Although historically tribal leasing regulations have not been approved quickly (it took approximately six years for the leasing regulations of the Navajo Nation to receive approval, and over a decade for regulations to be approved for the Tulalip Tribes), it is to be hoped that the HEARTH Act will result in a speedier process for regulation approvals.

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