Native American Law Watch

Fall 2013

This edition of Modrall Sperling's Native American Law Watch includes:

Tribal Sovereign Immunity Application

* **New Mexico Court of Appeals Split Opinion Rules Tribal Sovereign Immunity Does Not Apply in Action to Declare Road Status on Tribal Fee Land**

Tribal Jurisdiction

* **The Navajo Supreme Court Highlights Importance of Jurisdiction to Tribal Courts**

* **Eighth Circuit Holds that Dish Network Must Exhaust Tribal Remedies**

Emerging Issues

* **Tribal Payday Lending**

* **BLM's Proposed Rule on Hydraulic Fracturing Covers Drilling on Indian Lands**

Native American Practice Group

Modrall Sperling's Native American law practice primarily focuses on the representation of developers, tribal business corporations, financial sector participants, utilities, and others doing business, engaged in dispute resolution, or addressing policy issues in Indian country. The firm has represented clients in matters involving more than 40 tribes in over 20 states. Our Practice Group combines exceptional knowledge of core federal Indian and Native American law principles and recent developments with practitioners who bring specialized expertise applying those principles in finance, land and resource acquisition, employment law, environmental and cultural resource permitting and management, and related fields in Indian country.

Lawyers

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

New Mexico Court of Appeals Split Opinion Rules Tribal Sovereign Immunity Does Not Apply in Action to Declare Road Status on Tribal Fee Land

In a 2-1 opinion, the New Mexico Court of Appeals in *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-___, No. 31,297 (July 23, 2013), took a very narrow view of tribal sovereign immunity and concluded equitable considerations of a non-tribal entity's ability to seek redress in state court for a dispute with the Pueblo of San Felipe ("Pueblo") outweighed the Pueblo's sovereign interest in freedom from being subjected to the judicial process.

Case Background: Hamaatsa owns property in northern New Mexico that it accesses by a road that was a BLM road since at least 1906, and has been a public road since at least 1935. In 2001, the Bureau of Land Management ("BLM") conveyed property over which the road runs to the Pueblo in fee simple. While the BLM initially reserved an easement for use of the road for public purposes, in 2002 the BLM quitclaimed its interests in the road to the Pueblo. The Pueblo subsequently threatened to restrict Hamaatsa's use of the road. In response, Hamaatsa filed a lawsuit seeking a declaration that the road in question was a state public road and that the Pueblo cannot restrict Hamaatsa's use of the road. The Pueblo moved to dismiss for lack of subject matter jurisdiction based on the Pueblo's sovereign immunity from suit. Since this litigation has commenced, the Pueblo has withdrawn its application to take the property into trust.[1]

The Majority Opinion: *Sovereign Immunity Does Not Apply:* The Court of Appeals construed the Pueblo's challenge to the court's jurisdiction by a motion to dismiss as the Pueblo's concession, for purposes of the motion, that Hamaatsa's allegations regarding the history and status of the road were true. The Court used the procedural posture of the case to avoid determining whether the case required the Court to exercise *in personam* jurisdiction over the Pueblo, or *in rem* jurisdiction over the road crossing land owned by the Pueblo in fee. Because the Court equated the Pueblo's challenge to subject matter jurisdiction with the Pueblo's agreement that the road was a state road, the Court found "no basis for a sovereign immunity defense at this stage of the proceeding."[2]

Taking a narrow view of tribal sovereign immunity, the Court of Appeals faulted the Pueblo for not providing "evidence of any property or governance interests whatsoever in the road or that the road, concededly a state public road, would threaten or otherwise affect its sovereignty."[3] The Court relied on Supreme Court cases involving tribal authority over non-members—which hold a tribe does not have regulatory or adjudicatory jurisdiction over, *inter alia*, state roads within the outer boundaries of a reservation—to equate the Pueblo's assertion of sovereign immunity with the Pueblo's attempt "to assert control over a state public road, yet to deprive Hamaatsa, or any other member of the public, any opportunity for legal recourse."[4] The Court found that the assertion of sovereign immunity in a motion to dismiss improper because it would prevent any person from invoking state court jurisdiction in a dispute with a tribe.[5] The Court also relied on minority opinions of the United States Supreme Court that questioned the utility of sovereign immunity, apparently in an attempt to encourage the acceptance of a limited view of immunity.

The Dissent: *Tribal Sovereign Immunity Applies and Was Not Waived:* In his dissent, Judge Wechsler asserts that the majority improperly diminished tribal sovereign immunity in violation of the rule that tribal sovereign immunity can only be waived by a tribe or abrogated by Congress: there is no role for the State.[6] He faulted the majority for relying on cases involving tribal authority over tribal land, *not* tribal immunity from suit in state court.[7] He further objected to the consideration of equitable factors in a "pure jurisdictional question."[8] Finally, Judge Wechsler found the majority's consideration of the timing of the motion to be irrelevant.[9]

Judge Wechsler then considered the merits of the motion to dismiss, and concluded that he would have reversed the district court's denial of the motion. Construing Hamaatsa's action as an *in rem* proceeding as to the road status,[10] Judge Wechsler concluded that tribal sovereign immunity applied. "[A]n action essentially to declare a tribally owned property a public highway is in effect an action against the tribe."[11] Judge Wechsler also rejected Hamaatsa's argument that tribal sovereign immunity only applied to actions for monetary relief, rejecting the Fifth Circuit's contrary rule.[12]

The Pueblo has 30 days from the entry of the order to file a writ of certiorari with the New Mexico Supreme Court. As of this writing, the Pueblo does not appear to have filed a writ of certiorari.

For more information, please contact Sarah M. Stevenson at sms@modrall.com.

The Navajo Supreme Court Highlights Importance of Jurisdiction to Tribal Courts

The Navajo Supreme Court issued a recent opinion addressing jurisdiction and forum selection clauses in the

1 *Hamaatsa, Inc. v. Southwest Regional Director, Board of Indian Affairs*, 55 IBIA 132 (June 22, 2012).
2 *Hamaatsa*, 2013-NMCA-___,¶ 10.
3 *Id.* ¶ 11.

4 *Id.* ¶¶ 14-15.
5 *Id.* ¶ 16.
6 *Id.* ¶¶ 26-27.
7 *Id.* ¶ 29.
8 *Id.* ¶ 30.
9 *Id.* ¶ 31.
10 *Id.* ¶ 35.
11 *Id.* ¶ 44.
12 *Id.* ¶ 52 (citing *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999)).

context of real property on the Navajo Nation. *Neptune Leasing, Inc. v. Mountain States Petroleum Corp, et al.*, No. SC-CV-24-10 (2013).[1] The Court's focus highlights the importance of jurisdiction to tribal courts, the difference between the federal and Navajo tests for jurisdiction, and implicates whether forum selection clauses will be enforced.

Case Background: The lawsuit regarded a helium condensing plant located on trust land within the Navajo Nation and owned by Nacogdoches Oil and Gas, Inc. The plant was on land subject to a 1974 Business Site Lease between the Nation and predecessors of Nacogdoches. The 1974 Business Site Lease provided that "all structures, alterations, improvements, additions, machinery or fixtures" on the leased land would become the property of the Nation if such remained in place 90 days after expiration of the lease. The plant was related to several mining and pipeline leases between Nacogdoches and the Nation.

In 2006, Neptune Leasing sold the helium plant to Mountain States Petroleum. However, Neptune accepted a promissory note for the entire sales price, $2,500,000, and Mountain States provided a security agreement with the plant as collateral for the note. Mountain States then sold the plant, and other assets, to Nacogdoches in 2007.

District Court Proceedings: Neptune sued in 2009, seeking repossession of the plant. Mountain States contended that the Court lacked personal jurisdiction over it. Nacogdoches contended that Neptune should establish the debt owed to it by Mountain States in a Texas court under Texas law, consistent with the 2006 contract between Neptune and Mountain States. If that debt was established, Neptune could then seek repossession in Navajo court.

The District Court decided it would "yield jurisdiction" to a Texas court to determine whether a debt was owed and whether the plant secured the debt. The Court retained "exclusive jurisdiction" over the plant, and attempts to repossess the plant. The District Court also determined that it lacked personal jurisdiction over Mountain States, as it had no current contracts or leases with the Nation, and did not have a presence on the Nation.

Supreme Court Proceedings: The Navajo Supreme Court determined that the Nation had personal jurisdiction over Mountain States based on its past business relations with the Nation. The Court also held that contractual agreements cannot devoid the Nation of jurisdiction over transactions regarding trust land, because the Nation has an interest in that land as a beneficiary of the trust relationship, or, as here, in improvements to the land, and transactions regarding land require Navajo consent. The Court declined to enforce the forum selection clause in the contract between Neptune and Mountain States.

Why the Case Matters: The Supreme Court's ruling is important in highlighting the different tests applied by Navajo and federal courts with regard to Navajo jurisdiction. The Navajo Supreme Court relies on inherent sovereign powers, particularly the right to exclude non-members. These powers are retained by the Nation, and further guaranteed by the Treaty of 1868. Thus, the Nation does not need to apply the test from federal law announced in *Montana v. United States*, 450 U.S. 544 (1981).

Associate Justice Eleanor Shirley, Chief Justice Herb Yaffee and, by special designation, Justice Wilson Yellowhair courtesy of Yale Law School. ·

The *Montana* test differs from the Navajo test in at least two significant ways. First, the Navajo test presumes that jurisdiction exists, while *Montana* presumes that jurisdiction is lacking. Second, the Navajo test essentially requires only physical presence on the Nation (akin to the federal test for personal jurisdiction) to confirm jurisdiction. By contrast, and reduced as far as possible, the *Montana* test requires either a consensual relationship or a direct effect on the internal relations or political integrity of the tribal nation to overcome the presumption against jurisdiction. To date, the United States Supreme Court has never found these alternative requirements (usually called the "*Montana* exceptions") to be met, and have narrowed the exceptions since they were announced in 1981.

The Navajo Supreme Court has directed Navajo District Courts to test jurisdiction under both Navajo law and *Montana*. This is due to several recent cases in which federal courts have determined that the Nation lacks jurisdiction under the *Montana* test.[2] In this case, the Supreme Court determined that the business site lease established jurisdiction because it evidenced a "consensual relationship" between the parties and the Nation. Also, the transfer of Navajo lands (allegedly without a written lease and consent of the Nation) had a direct effect on the "political integrity, the economic security, or the health or welfare of the tribe."

It is notable that the Navajo Supreme Court primarily focused on the issue of subject matter jurisdiction. However, the District Court never claimed it lacked such jurisdiction. It only "yielded" to a Texas court to decide whether Mountain States owed Neptune a debt. Repossession of the plant was

1 Modrall Sperling was counsel for one of the parties, Nacogdoches Oil and Gas, Inc.

2 Examples include *Window Rock Unified School Dist. v. Reeves*, No. 12-CV-08059 (D. Ariz., March 19, 2013) and *EXC, Inc. v. Jensen*, No. 10-CV-8197 (D. Ariz., Aug. 9, 2012).

within the exclusive jurisdiction of the Nation, the District Court held. The focus of the Navajo Supreme Court reflects, we believe, the importance of jurisdiction to tribal courts and the divergence of the federal and Navajo tests for jurisdiction.

The ruling may complicate commercial and financing transactions regarding Navajo leased lands. In contracts involving Navajo interests, for instance financing, non-Indian parties routinely select a non-tribal forum for resolution of disputes between themselves. The Supreme Court held such a provision was unenforceable in Navajo courts because private agreements cannot deprive the Nation of jurisdiction over transactions regarding Navajo trust land. By calling into question the enforceability of a routine contract term, and characterizing forum selection clause to be a jurisdictional issue, the Court has made dispute resolution more complex and uncertain.

For more information, please contact Brian K. Nichols at bkn@modrall.com.

Eighth Circuit Holds that Dish Network Must Exhaust Tribal Remedies

In *Dish Network Service LLC v. Laducer*, 2013 U.S. App. LEXIS 16097 (8th Cir. 2013), the Eighth Circuit Court of Appeals ruled that it was not "plain" that tribal courts lack jurisdiction over a tribal member's abuse of process claim and upheld the federal district court's refusal to enjoin tribal court proceedings on that claim.

Background: The dispute arose from service account that Brian Laducer, a member of the Turtle Mountain Band, opened with Dish Network in 2007. Mr. Laducer used his daughter's credit card to open that account. Both Mr. Laducer and his daughter, Lacy, reside on the Turtle Mountain Indian Reservation. When Mr. Laducer stopped making payments on the account, Dish charged $323 to Lacy's credit card, which included a prorated cancellation fee and a partial unreturned equipment fee. Shortly thereafter, Lacy filed a complaint against Dish in state court alleging consumer fraud and conversion. Dish removed the case to federal court and filed a third party complaint against Mr. Laducer alleging conversion, breach of contract, fraud, and implied indemnification. Before being served with the federal court summons, Mr. Laducer filed his own action in tribal court alleging that Dish's third party complaint was an abuse of process.

The federal court remanded the case to state court and Dish sought and was granted leave to join Mr. Laducer as an indispensable party. Mr. Laducer responded by filing an abuse of process counterclaim. In January 2011, the state court granted summary judgment in Dish's favor dismissing Laducer's abuse of process counterclaim. The state court dismissed all remaining claims several months later. Dish next moved the tribal court to dismiss Mr. Laducer's abuse of process claim for lack of jurisdiction. The tribal court denied that motion and the Turtle Mountain Court of Appeals declined to review the question until after the tribal trial court had conducted a trial on the merits.

Dish then filed suit in federal court seeking a preliminary injunction barring the tribal court from proceeding with the abuse of process claim. The federal district court denied Dish's motion and Dish appealed to the Eighth Circuit.

Holding: The Eighth Circuit affirmed, holding that it "is not 'plain' that a tribal court lacks jurisdiction over tort claims closely related to contractual relationships between Indians and non-Indians on matters occurring on tribal lands." The Eighth Circuit explained that "Dish's sole argument in its brief for why it does not need to exhaust tribal remedies was its claim that tribal courts plainly lack jurisdiction." The court noted that "[o]ur court has not discussed how 'plain' the issue of tribal court jurisdiction need to be before the exhaustion requirement can be waived, but the Supreme Court indicated in *Strate [v. A-1 Contractors*, 520 U.S. 438 (1997)] that the bar is quite high." In the Eighth Circuit's view, the requirement to exhaust "should be waived only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law." The court elaborated, asserting that in "circumstances where the law is murky or relevant factual questions remain undeveloped, the prudential considerations outlined in *National Farmers Union [Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)] require that the exhaustion requirement be enforced."

The Eighth Circuit then declared that "[s]everal factors prevent us from accepting Dish's position as 'plain.'" First, the court rejected Dish's position that the "abuse of process occurs at the location where the allegedly abusive legal filing was made." The court explained that "under North Dakota law abuse of process occurs through the extortionate effect the process has on the target, rather than the filing of the process itself," and that the location of the tort "may properly be wherever the alleged victim resides, which in this case was on the Turtle Mountain Indian reservation." Next, the court noted that even if "the alleged abuse of process occurred off tribal lands, jurisdiction would not be lacking in the tribal court because the tort claim arises out of and is intimately related to Dish's contract with [Laducer] and that contract relates to activities on tribal land." As a consequence, the Eighth Circuit concluded that "it is not plain that the tribal court lacks jurisdiction over the . . .

abuse of process claim. When contracting with [Laducer] to provide satellite television, Dish could have reasonably anticipated that any litigation over this contract would occur in tribal courts."

Take Away: This decision is a reminder of the importance of addressing dispute resolution in contracts with tribes and tribal members involving delivery of goods or services in Indian country.

For more information, please contact Bill Scott at bscott@modrall.com.

Emerging Issues

Tribal Payday Lending

Summary of Tribal Payday Lending Models: Tribes that are not geographically situated to profit from gambling have turned to consumer payday lending via the internet.[1] Two Indian pay-day lending models have developed. Under the first model, a tribe forms a Tribal Legal Entity (TLE), a tribally chartered business organization, which provides payday loans to consumers nationwide, either via the internet or via store-front operations.[2] Under the second, less prevalent model, a tribal member establishes either a store-front or internet only pay-day lending company.[3] In this less common model, it is not always clear whether the payday lending company is a TLE or simply a registered business organization in the state where it operates. Both models have allowed payday lenders to benefit from a tribe's sovereign immunity.

State and Federal Assertions of Regulatory Authority: The recent emergence, and prevalence, of tribal payday lenders, either operating as TLEs or owned by tribal members, calls into question the authority of states,[4] the Federal Trade Commission (FTC), and the Consumer Financial Protection Bureau (CFPB) to regulate tribal payday lending companies. For example, states struggle with enforcing state lending and usury laws in cases involving tribal lenders, because state law only applies to tribal activities under certain limited circumstances, and second, tribal sovereign immunity makes state-court discovery rules inapplicable.[5] Thus, TLEs and member owned payday lending operations may be able to avoid state regulation that applies to other, non-tribal payday lending entities.

Similarly, federal regulators struggle with tribal sovereign immunity as it applies to federal lending and usury laws. In *Federal Trade Commission v. Payday Financial, LLC*,[6] for example, the FTC brought suit against Payday Financial, LLC and its wholly owned subsidiaries alleging violations of the Federal Trade Commission Act, 15 U.S.C. § 56(a)(1), for garnishing borrowers' bank accounts without first obtaining a court order and the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r, and its implementing Regulation E, 12 C.F.R. § 205.10, requiring borrowers to authorize electronic withdrawals from their bank accounts as a condition for obtaining a loan. The case ultimately settled and thus provides little guidance on litigating lending enforcement actions when a tribal pay-day lender asserts sovereign immunity. On another federal front, the new director of the CFPB has indicated his intent to regulate tribal payday lenders.[7] However, a question remains as to whether the Dodd-Frank Act applies to tribes or tribal entities because Congress did not include tribes within the definition of "covered persons."[8]

Tribal Response: In response to New York's assertion of regulatory jurisdiction over tribal payday lenders, the Native American Finance Services Association ("NAFSA"), which represents 16 tribes, sent letters to various financial institutions "arguing the New York Department of Financial Services' action infringes on their rights." Andrew R. Johnson, *Indian Tribes to Banks: Ignore That Man Behind the Curtain*, Wall Street Journal, August 14, 2013 ("Indian tribes are urging banks to ignore attempts by New York's top banking regulator to stop processing transactions for online lenders whose loans allegedly violate state interest-rate caps."). The NAFSA, however, distinguished between payday lenders operating under tribal law, and those who do not. Id. Thus, the NAFSA has stated that it supports the

---

1 This summary of the emergence and regulation of tribal payday lending draws from the recent articles of Hilary Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, A.B.A.J. 1, 1 (Mar. 2013), and Richard P. Eckman, Catherine M. Brennan, H. Blake Sims, and Justin B. Hosie, *Update on Tribal Loans to State Residents*, 68 Bus. Law 677, 682 (Feb. 2013), available here. Thanks also to Cristina Mulcahy for her work on this article.

2 *Wright v. Colville Enter. Corp.*, 147 P.3d 1275 (Wash. 2008) (tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit, unless Congress explicitly waives or abrogates such immunity).

3 *See, e.g.*, *Jackson v. Payday Financial,* 2012 U.S. Dist. LEXIS 94095 at *2 (N.D. Ill. July 9, 2012) (forum selection clause selecting tribal court upheld in a suit involving claims filed by a group of individual, non-tribal borrowers against *Payday*, an entity doing business as Lakota Cash, and owned by a tribal member but not registered as a TLE in federal court).

4 States, however, are attempting to enforce state law against payday lenders. *See, e.g.*, Jessica Silver-Greenburg and Ben Protess, *New York Tells Online Lenders to Abide by State's Interest Rate Cap*, New York Times, August 5, 2013, available here (discussing New York's Superintendent of Financial Services recent cease-and-desist letters written to Western Sky, a tribal member-owned payday lender); see also *New York v. Western Sky Financial, LLC*, Case No. ____ (filed 08/12/2013) (alleging that the defendants "have engaged in an illegal and deceptive scheme to originate high-interest, personal loans to consumers in New York").

5 *Ameriloan v. Superior Court*, 169 Cal. App. 4th 81 (2008); *State of Colorado v. Cash Advance*, 242 P.3d 1099 (2010).

6 *FTC v. Payday Financial,* No. 3:11-cv-03017-RAL, FTC File No. 112 3023 (S.D.S.D. filed Sept. 12, 2011).

7 *See* Carter Dougherty, *Consumer Bureau 'Zoning In' on Tribal Payday Firms*, Bloomberg (March 6, 2012), available here.

8 Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, 12 U.S.C. § 5481 (2010).

lawsuit against Western Sky because "Western Sky does not operate under tribal law as its members do." *Id*.

In response to the CFPB's assertion of regulatory authority over tribal payday lenders, the Executive Director of the Native American Fair Commerce Coalition countered that tribes "regulate business practices through the enactment of tribal laws and the implementation of regulatory authorities to provide consumer protections" and that tribal payday lending businesses provide "economic development on the reservation, while serving thousands of consumers nationwide with short term financing required to help address emergency needs."[9]

Stay Tuned: Although the TLE or member-owned payday lender may be immune from suit, the non-tribal financial institution is likely not immune. In many instances the "true lenders" are non-tribal financial institutions. These non-tribal financial institutions both finance the payday loans and receive the majority of the economic benefits from the payday lending transactions. Because these non-tribal financial institutions lack the protection of sovereign immunity, the next trend in tribal payday lender litigation may be targeted at non-Indian financial institutions.

For more information, please contact Deana M. Bennett at deanab@modrall.com.

9 Alan S. Kaplinsky, The Native American Tribes respond to Director Cordray, CFPB Monitor (March 8, 2012), available at http://www.cfpbmonitor.com/2012/03/08/the-native-american-tribes-respond-to-director-cordray/.

BLM's Proposed Rule on Hydraulic Fracturing Covers Drilling on Indian Lands

The Proposed Rule: On May 24, 2013 the Bureau of Land Management (BLM), published an updated draft of its proposed rule governing hydraulic fracturing (fracking) of oil and gas wells on federal and Indian lands.[1] The May 24 proposal by BLM, which is charged with managing oil and gas operations on both Federal and Indian Lands, updates earlier proposals. As the BLM notes, in FY 2012, "production from Indian leases was almost 29 million barrels of oil, 256 million Mcf of natural gas, and 155 million gallons of natural gas liquids, with a production value of $3.4 billion and generating royalties of $561 million" to tribes and individual allotted landowners.[2] Whether the Proposed Rule will appropriately balance production efficiency with environmental protection is of considerable consequence to Indian country.[3]

The Proposed Rule covers hydraulic fracturing (HF), injecting fluids into the host rock through the wellbore to induce cracks in the rock facilitating the flow of oil or gas to the wellbore, and also upon "re-fracturing," when HF operation are performed on a previously "completed well. The current version of the Proposed Rule would impose (1) construction and verification standards for fracturing operations: (2) disclosure of the chemical components of the fracturing fluid; and (3) requirements for the management of "flowback" fluids from fracking operations. Comments on the proposal were due August 23, 2013.

The Role of Tribes: The Comments to the Proposed Rule state that "The BLM is committed to working with the tribes to coordinate implementation of this revised proposed rule with the tribes' laws, rules, and permitting and inspection programs. The contents of such agreements or understandings might be different for each tribe . . . ."[4] In addition, the Proposed Rule allows that a tribe (or state) may designate waters under Indian lands from protection under the regulation,[5] and provides that it will cooperate with a tribe as to Indian lands (or a state as to non-Indian lands) in considering an operator's request for a variance from requirements of the Proposed Rule.[6]

© iStockphoto.com/darlah

Stay Tuned: Tribes and tribal exploration and development affiliates, and private oil and gas developers holding development agreements or considering development on leases or minerals agreements for tribal or allotted minerals, should pay close attention to the progress of the Proposed Rule.

For more information, please contact Lynn H. Slade at lynn.slade@modrall.com.

1 *See* Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636-31677 (May 24, 2013).
2 78 Fed. Reg. at 31661..5.
3 *See* Eloise Odgen, Tex Hall: Proposed Fracking Regs Will Hurt Energy Development on Reservations, MHA News (March 30, 2012) available here; *see also,* Summary of comments of tribal leaders and states.

4 78 Fed. Reg. at 31645.
5 *See* 78 Fed. Reg. at 31674 (Proposed § 3160.0-5 (Definition of "Usable Waters")).
6 See 78 Fed. Reg. at 31640; see also id. at 31677 (Proposed § 3162.3-3(k)).