



Native American Law Watch

Spring 2013

Spring 2013 edition of Modrall Sperling's Native American Law Watch includes:

Regulatory Developments in Indian Country:

- **BIA Issues Final Regulations Governing Residential, Business, and Wind and Solar Resource Leasing on Indian Lands**

The Revised Rule: On November 27, 2012, the Bureau of Indian Affairs issued the long-awaited and substantially revised regulations addressing non-agricultural surface leasing of Indian land under the Indian Long Term Leasing Act.

Employment Law in Indian Country:

- ***Salt River Project v. Lee, Navajo Nation Held to Waive Regulation of Employment***

The Case: The federal court for the District of Arizona has issued an important order, ruling that the Navajo Nation waived its putative right to regulate a non-Indian employer in a 1969 lease. The Order is contrary to a previous ruling by the Navajo Supreme Court

Federal Courts and Indian Country:

- **Grand Canyon Sky Watch, Arizona Federal Court Addresses Arbitration Enforceability:**

The Case: The order entered February 13, 2013, in Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc. reflects important principles supporting the enforceability of arbitration awards when a dispute arises in economic development in Indian country.

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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BIA Issues Final Regulations Governing Residential, Business, and Wind and Solar Resource Leasing on Indian Lands

The Revised Rule: On November 27, 2012, the Bureau of Indian Affairs issued the long-awaited and substantially revised regulationsⁱ addressing non-agricultural surface leasing of Indian land under the Indian Long Term Leasing Act.ⁱⁱ The revised rules add new subparts to 25 CFR Part 162 specifically addressing residential leases and business leases, and for the first time specifically provide guidance for wind energy evaluation leases, and wind and solar energy development leases on Indian lands. While many of the provisions provide needed clarification to streamline business leasing, particularly for renewable energy development, other provisions create issues that may complicate economic development in Indian country.



What the New Regulations Do: The regulations are intended to streamline residential leasing, business leasing, and wind and solar resource leasing on tribal and individually owned Indian lands, breaking the regulations out for each category of leasing into separate subparts. The regulations establish specific deadlines for BIA review and action on proposed leases, lease amendments, assignments, subleases, and leasehold mortgages. The regulations may streamline leasing because they allow BIA to review a proposed lease before or during preparation of National Environmental Policy Act documentation and any evaluation to identify potential obstacles to BIA approval. The revised regulations also provide new, more detailed guidance regarding leasehold mortgages, assignments, and subleases that developers may find simplify planning for future transactions at the point of leasing.

Issues the Reg Presents: The regulations also purport to limit the scope of state law and state taxing authority over the leases and activities on such leases. Revised Section 162.014(3) declares that approved leases are not subject to state law or law of a state political subdivision unless the Indian tribe with jurisdiction, subsection (a), or Congress, subsection (b), “has made it expressly applicable” or “a federal court has expressly applied state law to a specific area or circumstance in Indian country *in the absence of federal or tribal law.*” Subsection (c). Similarly, Section 162.014(c) appears to limit the ability of the parties to a Section 415 lease to contractually stipulate to application of

state law: it provides that “the parties to lease may subject that lease to State or local law *in the absence of Federal or tribal law*” by including an express provision in the lease. However, the requirement that there be an “absence of Federal or tribal law” may leave few situations where the stipulation is assured to be effective and may prove a disincentive to economic development in Indian country.

The regulations further purport to limit application of state taxes to leases and activities on leases approved under the regulations. 25 CFR § 162.017 provides that, “subject only to applicable federal law,” (i) permanent improvements on the leased land, (ii) activities under a lease conducted on the leased premises, and (iii) the leasehold or possessory interest are not subject to any fee, tax, assessment, levy or other charge imposed by any state or political subdivision of the state, though such property interests and activities “may be subject to taxation by the Indian tribe with jurisdiction. The intent of the phrase “[s]ubject only to federal law,” in Section 162.107 may require interpretation in light of cases such as *Cotton Petroleum v. New Mexico*ⁱⁱⁱ, which upheld state severance taxation of oil and gas under a tribal oil and gas lease.

Employment Preference: The new regulations further address a sometimes controversial issue, providing that a “lease of Indian land may include a provision, consistent with tribal law, requiring the lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe.” 25 C.F.R. § 162.015. The new rule sidesteps ruling of the Equal Employment Opportunity Commission and some courts that required an Indian preference to favor “local Indians,” and not merely members of the lessor tribe. Instead, in the preamble to the regulations, BIA explains its view that tribe-specific employment preferences are “political preferences, not based on race or national origin. They run to members of a particular federally-recognized tribe or tribes whose trust or restricted lands are at issue and with whom the United States holds a political relationship. These preferences are rationally connected to fulfillment of the federal government’s trust relationship with the tribe that holds equitable or restricted title to the land at issue.”

The Technical Stuff: The new regulation replaces the existing subpart for non-agricultural leases with the more detailed provisions for specific types of leases. The new regulations do not apply to, among other things, rights of way (which are governed by 25 CFR Part 169, mineral leases, prospecting permits, or mineral development agreements (governed by 25 CFR Parts 211, 212, 213, 225, 226, and

227) or contracts or agreements that encumber tribal land under 25 USC § 81.

The revised regulations may be accessed at:

<https://www.federalregister.gov/articles/2012/12/05/2012-28926/residential-business-and-wind-and-solar-resource-leases-on-indian-land>

And the Bureau of Indian Affairs fact sheet on this final rule at:

www.bia.gov/cs/groups/public/documents/text/idc-037328.pdf

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i See Notice of Final Rulemaking, 77 Fed. Reg. 72,440 (Dec. 5, 2012).

ii 25 U.S.C. § 415.

iii 490 U.S. 163, 192 (1989)



***Salt River Project v. Lee* Navajo Nation Held to Waive Regulation of Employment:**

The Case: The federal court for the District of Arizona has issued an important order,ⁱ ruling that the Navajo Nation waived its putative right to regulate a non-Indian employer in a 1969 lease. The Order is contrary to a previous ruling by the Navajo Supreme Court,ⁱⁱ and affirms that a tribal nation's exercise of civil jurisdiction over non-Indians must comport with federal law.



In 1969, Salt River Project Agricultural Improvement and Power District ("SRP") and the Navajo Nation executed a lease for an electric power plant, the Navajo Generating Station ("NGS"), located near Lake Powell in Arizona. In the lease, the Navajo Nation waived the power to "directly or indirectly regulate or attempt to regulate the . . . operation of" NGS. SRP agreed to give a preference in employment to Navajos. In 1985, the Navajo Nation enacted the Navajo Preference in Employment Act ("NPEA"), which requires just cause for termination and disallows other adverse employment actions. In 2004 and 2005, SRP fired two employees, and each alleged that termination was without just cause, thus in violation of the NPEA. The issues in both the federal and Navajo courts was whether the NPEA

applied to NGS, and whether the Navajo Nation had waived the right to regulate employment at NGS.

In 2007, the Navajo Supreme Court ruled that the waiver of regulation of NGS's "operation" did not unmistakably include a waiver of employment, and also that the Navajo Council could not waive the right to regulate employment under Navajo Traditional Law. The Arizona District Court disagreed. "Operation" inherently includes employment because employment is part of operations, or how NGS works. Moreover, the Navajo Council has the authority to waive sovereign powers of the Navajo Nation, as the elected governing body of the Nation.ⁱⁱⁱ Before reaching these issues, the Arizona District Court determined that the issues to be decided were part of a federal question – whether application of the NPEA to a non-Indian employer was an "ongoing violation of federal law." To do so, the Court resolved several technical issues, such as joinder of the Navajo Nation, the scope of the waiver of sovereign immunity for suit against tribal officials under the doctrine of *Ex Parte Young*, 209 U.S. 138 (1908), and whether interpretation of the 1969 lease implicated federal law.

The Significance of *SRP v. Lee*: The case reflects two important principles. First, a tribal nation may waive sovereign powers, as a state or the federal government may, through an unmistakable waiver. Second, whether the tribal nation has waived a sovereign power is a matter of federal law. However, businesses should note the Salt River issues have been litigated for about eight years, with decisions by the Navajo Supreme Court and two by the Ninth Circuit Court of Appeals.

The Take Away: A business negotiating a contract with a tribal nation may pursue waiver of sovereign powers, including regulation of employment. We believe a carefully crafted dispute resolution clause, including a waiver of tribal proceedings, may allow prompter enforcement of waivers in federal court.

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i *Salt River Project Agricultural Improvement and Power District v. Lee, et al.*, No. CV-08-08028-PCT-JAT, Order (D. Ariz. Jan. 28, 2013). The case was twice previously appealed to the Ninth Circuit Court of Appeals after the district court granted motions to dismiss. *SRP v. Lee*, 371 Fed. Appx. 779 (9th Cir. 2010); *SRP v. Lee*, 672 F.3d 1176 (9th Cir. 2012).

ii *Thinn v. Navajo Generating Station*, No. SC-CV-25-06, No. SC-CV-26-06 (Nav. Sup. Ct. Oct. 19, 2007).

iii This holding relies on *Arizona Public Service v. Aspass*, 77 F.3d 1128 (9th Cir. 1995).



**Grand Canyon Sky Watch
Arizona Federal Court
addresses arbitration enforceability:**

The Case: The order entered February 13, 2013, in *Grand Canyon Skywalk Development, LLC v. ‘Sa’ Nyu Wa, Inc.*ⁱ reflects important principles supporting the enforceability of arbitration awards when a dispute arises in economic development in Indian country. Grand Canyon Skywalk Development (GCSD), a Las Vegas, Nevada developer, and ‘Sa’ Nyu Wa, a corporation chartered by and wholly owned by the Hualapai Tribe (SNW), entered into a management agreement for the construction and operation of a glass viewing bridge (the Skywalk) at the Grand Canyon on the Hualapai Indian Reservation. After the Skywalk opened, controversies arose between GCSD and SNW, and GCSD invoked the arbitration agreement contained in the management agreement between the parties. While the arbitration was pending, the Tribe submitted a declaration of taking, seeking to condemn GCSD’s interest in the project, and moved to dismiss the arbitration. However, the Hualapai Tribal Court held the arbitration agreement enforceable and that SNW had waived its immunity from mandatory arbitration and enforcement of arbitration obligations for purposes of the management agreement. SNW refused to attend the arbitration; nonetheless, after considering



testimony of witnesses, exhibits and briefs, the arbitrator ruled in favor of GCSD, awarding over \$28 million in damages and attorneys’ fees. In its recent order, the federal court confirmed the arbitration award and rejected SNW’s defenses to the jurisdiction of the arbitrators, under the Hualapai Tribe’s Constitution, and that the eminent domain proceeding mooted the arbitration.

The Significance of *Grand Canyon Skywalk*: The case reflects an important remedy that may be available in the rare circumstance in which a tribal entity repudiates its agreement and its dispute resolution provisions and a developer must rely on judicial enforcement. SNW is a corporation chartered by the Hualapai Tribe, not under state or federal law. Hence, it arguably enjoys sovereign immunity from suit. Consequently, the contractual arbitration and court enforcement provisions of the management agreement were critical to GCSD. The decisions of the Tribal Court, the arbitrator, and the Federal Court combined to afford a remedy, despite the Tribe’s efforts to condemn the developer’s interest.

The Take Away: *Grand Canyon Skywalk* reflects the importance of a clear and unambiguous waiver of immunity, a clear choice of acceptable forum, and clear remedial provisions in a development agreement with a tribe or tribal entity. It also reflects that tribal courts are capable of exercising judicial independence, even when the tribe is taking directly contrary positions.

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ⁱ No, CV-12-08183-PCT-DGC (D. Az Feb. 11, 2013)

