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LAWYERS

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Native American Practice Group

Modrall Sperling's Native American law practice focuses 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. 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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Successful Transaction: BHP Billiton Sells Navajo Mine Coal Company to Navajo Nation

On December 30, 2013, working shoulder to shoulder with its client BHP Billiton New Mexico Coal, Inc. and co-counsel, Modrall Sperling completed a series of interrelated transactions between BHP Billiton New Mexico Coal, Inc. (BBNMC) and its subsidiaries and the Navajo Nation and Navajo Transitional Energy Company, LLC (NTEC), a wholly owned enterprise of the Navajo Nation. The successful closing followed execution of confidentiality agreements and a non-binding term sheet or memorandum of understanding, lengthy due diligence efforts, detailed discussion of risk allocation and creative deal structuring, the crafting of several agreements and related documents, and the navigation of Navajo Nation legislative and executive approval processes to ensure the enforceability of the transactions with sovereign entities.

The multi-faceted transaction included, among other elements, the sale of BHP Navajo Coal Company (BNCC), the owner and operator of the Navajo Mine, a large surface coal mining operation located on the Navajo Reservation in New Mexico, to NTEC. The Navajo Mine is the sole supplier of coal to the Four Corners Power Plant (FCPP), a coal-fired generating station located on the Navajo Reservation in northwestern New Mexico, and the $85 million purchase price will be paid off through coal sales to FCPP. In addition, BHP Billiton Mine Management Company (MMCo), a new company, will operate the Navajo Mine for a period of years under a management agreement with NTEC.

To put these pieces together required careful coordination of agreements, negotiation and crafting of provisions for the waiver of immunity from suit of the Navajo Nation-owned NTEC, together with forum selection and choice of law clauses. In addition, because BHP Billiton entities were financing the purchase price, it was important to secure the purchase price through a secured promissory note and leasehold mortgages, to be approved by the Bureau of Indian Affairs. To ensure these provisions were consistent with, and enforceable under both federal and Navajo Nation law, the parties collaborated on several occasions to achieve Navajo Nation legislative and executive branch approvals, some of which required super-majority votes of the Navajo Nation Council.

Hand in hand with the pursuit of the matters described above, NTEC, Navajo Nation and BBNMC negotiators negotiated new and amended coal supply agreements with Arizona Public Service Company (APS) and the other owners of FCPP. These new coal sales arrangements were necessary to help ensure that future operation of the Navajo Mine by the new owner would be profitable, while also ensuring that FCPP could operate beyond the term of the pre-existing coal supply agreement, which was to expire in 2016. Given its experience with mine operations and the terms and conditions of the coal supply agreement, BBNMC representatives remained involved in the coal contract negotiations in support of NTEC, even though NTEC would be the owner on a going forward basis.

The coal supply agreement negotiations were complicated by U.S. Environmental Protection Agency and Clean Air Act directives requiring dramatic pollution control steps to address regional haze and related concerns. As part of the solution to the regulatory requirements, the FCPP owners opted to close three of the five units of the power plant, representing about 30 percent of the capacity of the plant, resulting in a comparable percentage reduction of the coal supply necessary to supply the needs of FCPP. Other complications arose also, but space limitations preclude addressing those details.

Needless to say, it was critical to consider carefully the needs of the coal customers as the negotiation of (a) the arrangements of the sale of BNCC to NTEC; and (b) the management of Navajo Mine proceeded. For example, the coal customers sought a commitment from NTEC that a BHP Billiton entity, MMCo, be retained to manage the Navajo Mine for a certain period to help smooth a transition to NTEC management over time.

The practical implications of these interrelated transactions are that: a) the Navajo Mine and FCPP will continue to operate for an additional fifteen years; b) hundreds of high-paying jobs at FCPP and at the Navajo Mine which supplies the power plant will be preserved for the predominantly Native American workforces; and c) significant royalty and tribal tax revenue streams will continue to flow to the coffers of the Navajo Nation to support material portions of its governmental services to the Navajo Reservation and Navajo Nation members.

Modrall Sperling was counsel for the BHP Billiton entities involved. For more information, please contact Walter E. Stern at walter.stern@modrall.com.

Recent Challenges to EPA's "Indian Country" Clean Air Act Jurisdictional Determinations

Introduction: Two recent challenges to EPA's jurisdictional determinations regarding "Indian country" lands under the Clean Air Act (CAA) illustrate the necessity for, and potential complexity of, the Indian lands jurisdictional determinations under the CAA.

Challenge to Indian country NSR Rule: In a recent decision, the United States Court of Appeals for the District of Columbia Circuit confirmed the CAA[1] requires the Environmental Protection Agency ("EPA") to make mandatory jurisdictional determinations before it can step into a tribe's shoes and regulate in "non-reservation" Indian country areas.[2] On January 17, 2014, the D.C. Circuit vacated that portion of the EPA's 2011 regulation entitled "Review of New Sources and Modifications in Indian Country" ("Indian country NSR Rule")[3] that purported to authorize EPA to establish a federal implementation plan regulating certain sources in non-reservation "Indian country" nationwide, as described in 18 U.S.C. § 1151, including non-reservation Indian allotments and "dependent Indian communities."[4]

Section 301(d) of the Clean Air Act, adopted in 1990, authorized EPA to delegate certain authorities to tribal nations with qualifying programs for areas "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[5] The Oklahoma Department of Environmental Quality ("ODEQ")[6] petitioned the court for review of the Indian country NSR Rule arguing, among other grounds, that EPA was without statutory authority to displace state implementation plans with respect to non-reservation areas of States because EPA failed to make required jurisdictional determinations that such areas were "within a tribe's jurisdiction" as required by Section 301(d). The court first rejected EPA's threshold jurisdictional arguments and concluded that ODEQ had standing to petition the court for review of the Rule and that ODEQ's challenges to the Rule were neither time-barred nor forfeited. On the merits, the court held that, because the CAA requires a tribe to demonstrate jurisdiction over non-reservation Indian country before the EPA can grant the tribe "treatment as state" status, EPA was similarly required to demonstrate tribal jurisdiction over non-reservation Indian country areas before EPA could itself regulate those areas. The D.C. Circuit relied on its prior holding that jurisdiction "must either lie with the state or with the tribe—one or the other—and EPA does not have a third option of not deciding."[7]

In so holding, the court declined to recognize a "regulatory gap" in Indian country that might make EPA jurisdiction appropriate. Rather, the court ruled that "a state has regulatory jurisdiction under the Clean Air Act over all land within its territory and outside the boundaries of an Indian reservation except insofar as an Indian tribe or the EPA has demonstrated a tribe has jurisdiction. Until such a demonstration has been made, neither a tribe nor the EPA standing in the shoes of a tribe may displace a state's implementation plan with respect to a non-reservation area of the state."[8] The court vacated the Indian country NSR Rule as it pertains to non-reservation Indian country. On March 17, 2014, the EPA filed a petition for rehearing.

Wyoming Challenges EPA's Conclusion Regarding Reservation Boundaries: Even in the context of jurisdictional determinations regarding reservations, which are presumptively within a tribe's jurisdiction,[9] the EPA is subject to challenge, as demonstrated by Wyoming's challenge of the EPA's approval of the Northern Arapaho Tribe's and the Eastern Shoshone Tribe's ("Tribes") application for treatment as a state under the CAA for certain limited purposes.[10] The EPA's decision included a determination of the geographic scope of the Tribes' jurisdiction, which defined the exterior boundaries of the Wind River Reservation in Wyoming, and which relied on a Department of the Interior Solicitor opinion regarding the Reservation boundary. The EPA determined that the Reservation boundaries had not been diminished by certain Congressional enactments. The Tribes requested that the EPA not address certain lands, and EPA's approval did not include those lands in its scope.[11] On January 6, 2016, Wyoming petitioned the EPA for reconsideration and stay of EPA's decision to grant the Tribes' TAS status, arguing that EPA improperly determined that the Reservation's boundaries had not been diminished. On February 6, 2014, the Northern Arapahoe Tribe also requested that EPA stay its TAS decision, and on February 12, 2014, the Eastern Shoshone Tribe requested a partial stay with respect to those lands Wyoming contends should not be included within the Reservation's boundaries. On February 13, 2014, EPA administratively stayed its TAS decision, but only with respect to those lands that the State did not challenge. Thus, the TAS determination remains in effect for all the undisputed Reservation lands included within the geographic scope of EPA's TAS decision. On February 14, 2014, the State of Wyoming appealed EPA's decision to the Tenth Circuit Court of Appeals.

Why It Matters: Under *ODEQ*, states with approved state implementation plans will retain jurisdiction to regulate in non-reservation "Indian country," unless EPA makes jurisdictional determinations that specific non-reservation lands are "within the tribe's jurisdiction." Wyoming's challenge to EPA's reservation boundary determination, if successful on appeal, illustrates a potential avenue for

1 42 U.S.C. §§ 7401 *et seq*.
2 *See Oklahoma Dept. of Envtl. Quality v. Envtl. Prot. Agency*, 740 F.3d 185, 2014 U.S. App. LEXIS 931 (D.C. Cir. 2014).
3 76 Fed. Reg. 38,748 (2011).
4 *See Oklahoma Dept. of Envtl. Quality*, 740 F.3d at 4, 2014 U.S. App. LEXIS 931 at *2.
5 *See* 42 U.S.C. § 7601(d).
6 ODEQ is represented by Modrall, Sperling, Albuquerque, New Mexico.
7 *Oklahoma Dep't of Envtl. Quality*, 740 F.3d at 15, 2014 U.S. App. LEXIS 931 at *21 (quoting *Michigan v. Envtl. Prot. Agency*, 268 F.3d 1075, 1086 (D.C. Cir. 2001)).
8 *Id*. at *26.
9 *Id*. at *21-22
10 78 Fed. Reg. 76829, 76830 (Dec. 19, 2013).
11 *Id*. at 76830.

states and local governments to challenge EPA's delegation of authority to tribes under the CAA.

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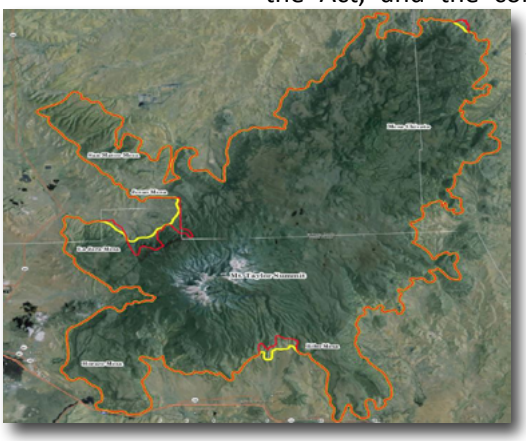
New Mexico Supreme Court Validates Designation of Mt. Taylor as a Traditional Cultural Property[1]

Introduction: In a case that may have national significance, the New Mexico Supreme Court upheld the New Mexico Cultural Properties Review Committee's ("Committee") permanent designation of approximately 400,000 acres of public lands on Mt. Taylor in west-central New Mexico as a traditional cultural property ("TCP"), *Rayellen Resources, Inc. v. N.M. Cultural Properties Review Committee*.[2] The decision affirms listing this large area on the State Register of Cultural Properties under the New Mexico Cultural Properties Act (the "Act"). The court reduced the original TCP listing, however, by approximately 19,000 acres comprising common lands of the Cebolleta Land Grant,[3] a Mexican land grant-merced, the private rights to which were confirmed by the United States under the Treaty of Guadalupe Hidalgo.[4] The ruling gives the State Historic Preservation Officer ("SHPO") greater input into state approval processes for activities proposed on the lands comprising the TCP or on nearby lands where proposed activities may affect the cultural values recognized by the TCP, but leaves several uncertainties in its wake.



Background and Procedural History: In early 2008, only days after a United States Forest Service archeological report determined the cultural and ethnographic history of Mt. Taylor made it eligible for listing on the National Register of Historic Places, the Pueblos of Acoma, Laguna and Zuni, the Hopi Tribe, and the Navajo Nation (the "Nominating Tribes") nominated a somewhat different delineation of Mt. Taylor for an emergency listing on the State Register of Cultural Properties under provisions of the Act allowing for emergency listings.[5] The Committee approved separate variants of the Mt. Taylor area for emergency listing once on February 22, 2008, and then again on June 14, 2008. On April 22, 2009, the Nominating Tribes nominated another variant of the area for permanent listing. Efforts ensued to provide the public with notice, including publication in newspapers and personal notice mailed only to surface owners despite knowing that mineral owners existed. Following a public hearing and certain post-hearing adjustments to the TCP area, the Committee voted to approve still another variant of the area for permanent listing on June 5, 2009, issuing a final order on September 14, 2009.

Several parties appealed the TCP to the state district court, which reversed the listing on the grounds that due process was violated, the size of the TCP was not permissible under the Act, and the common lands of the Cebolleta Land Grant were improperly included. The Acoma Pueblo appealed to the New Mexico Court of Appeals, which granted intervention to additional appellants, the Committee and Laguna Pueblo. The court of appeals certified the appeal to the New Mexico Supreme Court as "an issue of substantial public interest." After oral argument was held, the New Mexico Supreme Court issued its opinion on February 6, 2014.

The New Mexico Supreme Court's Key Holdings:

Notice was adequate: In the district court, the parties challenging the TCP listing alleged multiple due process deficiencies including lack of sufficient notice, time allocation problems during hearings, and the multiple adjustments made to the area proposed for listing. The district court found that the notice provided by the Committee was insufficient because mineral interest owners in the area of the TCP were not provided with personal notice despite the undisputed fact that the Nominating Tribes had expressly cited impending mineral development in the uranium mining district as a basis for seeking the original emergency listing.

The New Mexico Supreme Court reversed, however, finding that the Committee provided notice "reasonably calculated to inform interested parties of the Mount Taylor permanent nomination."[6] In so ruling, the court distinguished cases prescribing notice for adjudication of private property rights, considering the Committee's action in listing Mt. Taylor as a TCP "is a regulatory one more akin to general rule-making than adjudication, one undertaken to effectuate the Committee's statutory powers to identify and preserve our state's cultural and historic heritage."[7] The court concluded that personal notice to every affected person would be unduly burdensome and impractical.

1 For a more detailed discussion of this decision, please read Stuart Butzier's article of the same title published in the Rocky Mountain Mineral Law Foundation, Mineral Law Newsletter, Vol. 31, No. 1, available here.
2 2014 N.M. LEXIS 40, ___ N.M. ___, ___ P.3d ___, No. 33,497 (Feb. 6, 2014) (hereafter "Slip op.").
3 *Id.* at 14-16.
4 *See* Treaty of Peace, Friendship, Limits & Settlement, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 922, T.S. 207.
5 NMSA 1978, § 18-6-12.
6 Slip. op. at 10 (citation omitted).
7 *Id.* at 11.

The designation satisfied the Act's integrity, maintenance, and inspection requirements: The district court held that the approximately 400,000 acres of public lands included within the Mt. Taylor TCP lacked integrity of location as required by the federal guidelines upon which the Committee had relied. In reversing based on the substantial evidence standard, the New Mexico Supreme Court relied on the fact that the Forest Service's 2008 archeological report had found integrity of location due to "the site's ongoing relationship with traditional cultural practices and because the physical attributes of the mountain remain largely unchanged."[8]

The district court also held that the Mt. Taylor TCP was too large to be capable of maintenance and inspection under the Act's requirements. The Supreme Court, however, saw "no reason, either in the text of the Act or in logic, why our state authorities are prohibited from listing a property simply because it is large."[9] The court further reasoned that the state and federal public land management agencies have inspection programs, and there was no reason for the Committee to reach a conclusion regarding maintenance because the question of whether and how to inspect and maintain the property are statutory considerations that follow rather than precede the listing.

The Cebolleta Land Grant common lands are not "State Lands" under the Act: The Supreme Court upheld the district court's conclusions that that Committee improperly included common lands of the Cebolleta Land Grant in the designated TCP area and also held that excluding the lands would not undermine the overall listing.[10] Interestingly, the Committee took no position on this issue on appeal, leaving it to Acoma Pueblo to argue that the inclusion was proper. The Supreme Court relied on the history and background of the Land Grant Act to reject Acoma Pueblo's arguments. According to the court, privately held land grants are to be "inviolably respected" under the Treaty of Guadalupe Hidalgo, and construing the Land Grant Act amendment in 2004 as transforming those private rights to public lands would constitute a "legislative taking."[11] The court found itself compelled to favor "an interpretation that complies with the international treaty, the New Mexico Constitution, and our long-standing jurisprudence recognizing the private property rights inherent in a community land grant's common lands."[12]

Implications: The New Mexico Supreme Court's decision may encourage tribes or conservationists nationally to seek large scale designations of TCPs. As a practical matter, upholding the Committee's designation of 400,000 acres creates administrative burdens and uncertainty for future projects in this uranium and resource-rich area. State agencies asked to authorize or permit projects in or near the TCP area now must consult with the SHPO, which in turn will consult with the Tribes. In essence, the issue for any undertaking requiring state approval within or adjacent to the TCP area will be whether and to what extent the project might impact historic and cultural values sought to be preserved by the designation, and whether plan adjustments could be made or alternatives pursued that might better promote those values.

This likely will be an issue not only for projects on the public lands that the court seemingly confined the TCP to by its decision, but also on most or all of the private "noncontributing" lands within the outer boundary of the TCP, as well as on adjacent lands that now would include the Ceboletta Land Grant's common lands. Exactly what types of projects will be asserted as having impacts on the TCP, and in what locations, remains to be seen.

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8 *Id*. at 13.
9 *Id*.
10 *Id*. at 14.
11 *Id*. at 16.
12 *Id*.

Divergent Decisions on Tribal Jurisdiction over Public School Districts and Their Employees

Introduction: The question of civil jurisdiction over claims against public schools located within the boundaries of a tribe's reservation has been analyzed by both tribal and federal courts, with conflicting outcomes. When tribal members, employees or parents, bring suit against a school or school district, they usually do so in tribal court. In response, school districts have brought suit in federal court to determine whether the tribal court has jurisdiction. Recent decisions highlight the differences between tribal and federal tests for jurisdiction and demonstrate that challenges to tribal jurisdiction are not always successful.

Navajo Test for Jurisdiction: The Navajo Nation Supreme Court has concluded that tribal courts have jurisdiction over public schools in several cases. For example, in *Cedar Unified School District and Red Mesa Unified School District v. Navajo Nation Labor Commission*,[1] the Navajo Nation Supreme Court concluded that the Navajo Nation Labor Commission ("NNLC") had jurisdiction to adjudicate tribal employee claims under the Navajo Preference in Employment Act ("NPEA") against two Arizona public school districts operating on the Navajo Nation. The court held that under the Treaty of 1868, the Navajo Nation has inherent authority to regulate non-Indian entities on trust land, including school districts organized under state law.

1 *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm'n & Red Mesa Sch. Dist. v. Navajo Nation Labor Comm'n*, Nos. SC-CV-53-06 and 54-04 (2007) (Nav. Sup. Ct. Nov. 21, 2007) (consolidated cases).

In *Hasgood v. Cedar Unified School District*,[2] the Cedar Mesa School District, an Arizona school district located within the Navajo Nation reservation, prevailed on the merits after it had been sued again in the NNLC. The tribal employees appealed, but before the Navajo Supreme Court could render its decision, the United States District Court of Arizona, in a decision discussed below, held that the Navajo Nation lacked regulatory and adjudicative jurisdiction over the matter. The Navajo Court dismissed the appeal, but disagreed with the Arizona federal district court, and, in so doing, emphasized the negative cultural effects of complete state control over educational decisions.[3]

Federal Tests for Jurisdiction: The United States District Court for the District of Arizona and the United States for the District of North Dakota Northwestern Division have reached opposite conclusions when faced this issue, with the Arizona federal court finding tribal jurisdiction lacking, while the North Dakota court found tribal jurisdiction present.

District of Arizona decisions: In two decisions, an Arizona federal district court concluded that the Navajo Nation lacks jurisdiction over claims against state school districts which operate within Navajo Nation reservation boundaries.[4] In each case, the court considered it dispositive that the public school districts in question are state political entities and there was thus no private, commercial relationship allowing Navajo jurisdiction.

In both cases, the federal court applied the general rule from *Montana v. United States*[5] that an Indian tribe's inherent powers do not extend to nonmembers' activities on fee lands within the exterior boundaries of the tribe's reservation. *Montana*'s rule against tribal jurisdiction over nonmembers is subject to two exceptions: a tribe may have civil jurisdiction over nonmembers 1) who enter into consensual commercial relationships with the tribe, or 2) whose conduct has a direct effect on the tribe's political integrity, economic security, or health or welfare.[6] The NNLC argued that *Montana*'s first exception applied because the school districts had consented to Navajo jurisdiction through their leases on fee lands, employment, and commercial contracts.[7] The Arizona federal court held that the first *Montana* exception did not apply because the districts are not private actors but "political subdivisions" of the State who are operating pursuant to mandates by the State.[8]

The district court's decision in *Window Rock* was also grounded on the court's conclusion that the Treaty of 1868 did not authorize tribal court jurisdiction and that tribal court exhaustion was not required because it would "serve no purpose other than delay."[9] *Window Rock* is on appeal to the Ninth Circuit Court of Appeals.

District of North Dakota decisions: Federal courts in North Dakota, however, have reached the opposite conclusion, notwithstanding the fact that the school districts involved were political subdivisions of the State of North Dakota. In two recent decisions, the United States District Court for the District of North Dakota Northwestern Division concluded that the tribal courts in question had jurisdiction over the school districts and their employees.[10] Importantly, in both decisions, the North Dakota federal court first concluded that *Montana* did not apply "when determining the adjudicatory authority over nonmembers who consensually agree to operate and conduct business in conjunction with the tribe on tribal trust lands."[11] The court further concluded that, even if *Montana* applied, the tribal courts would have jurisdiction because the relationship of the school district with the tribe "fits squarely within the plain language" of the consensual relationship exception.[12] In reaching its conclusion that the tribal courts had jurisdiction, the court relied on the situs of the schools, which were on trust lands, the fact that the schools entered into contractual agreements with the tribes, which was the only reason the schools were on the reservation, and the nature of the claims involved.[13] The court also relied on the federal policy of promoting tribal self-government, and the fact that a tribal court's determination of its own jurisdiction is entitled to some deference.[14] The court was "unpersuaded" by the reasoning of the District of Arizona court in the cases discussed above.

Take Aways: These cases demonstrate that public schools sued in tribal courts or other tribal venues might test tribal jurisdiction through a collateral proceeding in federal court. The outcome of that "test" will largely depend on how the court construes *Montana*'s first exception. When faced with an argument that exhaustion of tribal remedies is required, public schools may argue that exhaustion is not required because it is plain that there is no tribal jurisdiction under the *Montana* rule and therefore exhaustion would serve no purpose but delay.[15] As these cases reflect, the outcome of the argument is uncertain.

2 *Hasgood v. Cedar Unified Sch. Dist.*, No. SC-CV-33-10, 9 Am. Tribal Law 492 (Nav. Sup. Ct. May 9, 2011).
3 *Id*. at 4.
4 *Red Mesa Unified Sch. Dist. v. Yellowhair* ("*Red Mesa*"), 2010 WL 3855183 (D. Ariz. Sept. 28, 2010); *Window Rock Unified Sch. Dist. v. Reeves* ("*Window Rock*"), 2013 WL 1149706 (D. Ariz. Mar. 19, 2013).
5 *Montana v. United States*, 450 U.S. 544 (1981).
6 *Id*. at 565-66.
7 *Red Mesa*, 2010 WL 3855183, at 3; *Window Rock*, 2013 WL 1149706, at *6.
8 *Red Mesa*, 2010 WL 38551833, at *3; *Window Rock*, 2013 WL 1149706, at *6. In *Window Rock*, the court also considered, and rejected, *Montana*'s second exception, and ruled that lack of jurisdiction over employment at schools would not be catastrophic to the Navajo Nation. 2013 WL 1149706, at 7.
9 *Id*. at 2, 3. *See Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846-47 (9th Cir. 2009) for a discussion of the exhaustion requirement and its four exceptions.
10 *Belcourt Pub. Sch. Dist. v. Davis* ("*Belcourt*"), No. 4:12-cv-117, 2014 WL 458075 (D.N.D Feb. 4, 2014); *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy* ("*Fort Yates*"), No. 1:12-cv-135, 2014 WL 458054 (D.N.D. Feb. 4, 2014).
11 *See Belcourt*, 2014 WL 458075, at *1; *Fort Yates*, 2014 WL 458054, at *1.
12 *Id*.
13 *See Belcourt*, 2014 WL 458075, at *5; *Fort Yates*, 2014 WL 458054, at *4.
14 *See Belcourt*, 2014 WL 458075, at *5; *Fort Yates*, 2014 WL 458054, at *5.
15 *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997).

Stay Tuned: With the *Window Rock* case on appeal, we await the Ninth Circuit's opinion on the issue of tribal jurisdiction over public school districts. If the divergent North Dakota opinions are appealed to the Eight Circuit, we may see a split and possible eventual Supreme Court review.

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Of Note

Tax-Advantaged Borrowing for Indian Tribal Governments

Introduction: Indian tribal governments[1] borrowing money may, under specific circumstances, avail themselves of unique federal tax advantages not enjoyed by non-government borrowers, resulting in lower borrowing costs. There are three basic types of tax-advantaged borrowing: tax-exempt bonds, tax credit bonds, and direct-pay bonds. Interest payments made on tax-exempt bonds are not treated as taxable income for the bond holder. Tax credit bonds result in interest being taxable income to the bond holder, but the bond holder receives a federal tax credit to offset the tax liability. Finally, direct-pay bonds result in interest being taxable income to the bond holder, and the issuer of bonds receives a payment from the federal government to use toward payment of interest on the bonds. Borrowing money on a tax-exempt or otherwise tax-advantaged basis results in lower borrowing costs for Indian tribal governments because, in the case of tax-exempt and tax-credit bonds, the entity providing funds is willing to charge a lower interest rate because it avoids paying income tax on the interest payments (for tax-exempt bonds), or the income tax is offset (for tax credit bonds). In the case of direct-pay bonds, all or a portion of the interest payments Indian tribal governments make is offset by the payment received from the federal government. Each of these types of bonds that Indian tribal governments may issue is discussed below, along with a brief overview of the requirements for issuing each type of bond.[2] Finally, other considerations involved in issuing tax-advantaged bonds are set out.

Tax-Exempt Bonds under IRC Section 7871: Section 7871(c) of the Internal Revenue Code ("IRC") provides the two basic requirements for issuance of tax-exempt debt by Indian tribal governments. First, the issuer must qualify as an "Indian tribal government" or be a subdivision thereof. 26 U.S.C. § 7871(c)(1). This means the Internal Revenue Service ("IRS"), as opposed to the Bureau of Indian Affairs, must recognize the issuer as an "Indian tribal government." The most current list of Indian tribal governments is in IRS Revenue Procedure 2008-55. A tribal entity not currently listed may apply with the IRS for listing. Second, the proceeds of tax-exempt bonds must be used "in the exercise of any essential governmental function." 26 U.S.C. § 7871(c)(1). The IRC provides that "the term 'essential governmental function' shall not include any function which is not customarily performed by State and local governments with general taxing powers." 26 U.S.C. § 7871(e). Stated affirmatively, bond proceeds must be used for functions customarily performed by state and local governments. Permissible projects include, for example, roads, water and sewer facilities, government buildings, and police and emergency services. Additionally, in very limited circumstances Indian tribal governments may issue tax-exempt private activity bonds for manufacturing facilities.

Tribal Economic Development Bonds: The 2009 American Recovery and Reinvestment Act ("ARRA") authorized Indian tribal governments to issue tax-exempt Tribal Economic Development Bonds ("TEDBs"). *See* 26 U.S.C. § 7871(f). Unlike traditional tax-exempt bonds issued by Indian tribal governments, TEDBs are not limited to "essential government functions." The bonds may be issued for any purpose for which a state or local governmental entity may issue tax-exempt bonds. For example, TEDBs may be used for hotels, golf courses, and convention centers. The primary limitations on issuance of TEDBs are: 1) the project must be located on a reservation[3]; 2) proceeds may not be used to finance property used in gaming or any portion of a building in which gaming occurs; and 3) issuers must apply for and receive an allocation of "volume cap" from the IRS. ARRA authorized a maximum of $2,000,000,000 in TEDBs. This limitation is referred to as "volume cap," which is allocated among issuers of the bonds.

Qualified Environmental Conservation Bonds: Qualified Energy Conservations Bonds ("QECBs") may be issued by Indian tribal governments for "qualified conservation purposes" including: reducing energy consumption in public buildings by at least 20%; implementing green community programs; rural development involving the production of electricity from renewable energy resources; and certain renewable energy facilities, such as wind, solar and biomass. *See* 26 U.S.C. § 54D. Like TEDBs, QECBs are subject to a volume cap, which was allocated among the 50 states based on population. Each state then allocates its share of volume cap among applicants. An issuer of QECBs may elect that the bonds be either tax credit bonds or direct-pay bonds.

1 The term "Indian tribal government" is a term of art used in the Internal Revenue Code. *See* 26 U.S.C. § 7871(c)(1).

2 This article provides information only and was not written to be used or intended to be used as legal or tax advice.

3 The term "reservation," as defined in 26 U.S.C. § 168(j)(6), includes all categories of lands described as "Indian country," under 18 U.S.C § 1151, including off-reservation allotments and "dependent Indian communities," and, in addition, former reservations in Oklahoma.

Qualified School Construction Bonds: Indian tribal governments may issue Qualified School Construction Bonds ("QSCBs"). *See* 26 U.S.C. § 54F. QSCBs were authorized by the ARRA. Proceeds of QSCBs must be used for the construction, rehabilitation, or repair of a public school facility, or for the acquisition of land on which a public school facility is to be constructed. Like QECBs, QSCBs are subject to a volume cap allocated by the federal government among the 50 states, and subsequent allocations by each state among issuers. An issuer of QSCBs may elect that the bonds be either tax credit bonds or direct-pay bonds.

Other Tax Advantaged Bonds: The federal government periodically authorizes other tax-advantaged bonds in addition to those discussed above. For example, until recently qualified issuers such as Indian tribal governments could issue two types of Clean Renewable Energy Bonds (known as "Old CREBs" and "New CREBs"). The time period within which to issue Old CREBs and New CREBs has expired. Additionally, in his budget proposal for the federal Fiscal Year 2015, the President has proposed a new type of direct-pay bonds called "American Fast Forward" bonds.

Important Considerations: All of the bonds discussed above are subject to many complex rules regarding use and investment of proceeds, disclosure obligations, and other requirements applicable to tax-advantaged bonds generally. Failure to comply with the rules could result in the IRS declaring the bonds taxable. Additionally, the federal sequester has resulted in a decrease in the amount of federal direct subsidy payments. As a result, issuers of direct-pay bonds have had to pay a larger portion of each interest payment on direct-pay bonds than was anticipated. The direct-pay subsidy could be further reduced or eliminated by future sequester orders.

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Interpreting Exemption for Taxpayer Who Lives and Works on Tribal Lands

The New Mexico Taxation and Revenue Department ("Department") recently held that an enrolled member of the Navajo Nation who was domiciled in Farmington, New Mexico, but was employed by an employer located within the boundaries of the Navajo Nation, is not subject to New Mexico income taxation on income earned while he was physically present and living within the boundaries of the Navajo Nation. The decision may correctly interpret the New Mexico statutes, but appears to have incorrectly equated the statutory term, "reservation," with the term "Navajo Nation." The question at issue in *In the Matter of the Protest of James and Nora Tutt*, Case No. 13-36 (N.M. Dep't Tax & Rev. 2013), was whether personal income earned by the taxpayer while he was employed at the Crownpoint Institute of Technology in Crownpoint, New Mexico, was exempt from New Mexico personal income tax in tax years 2002-2006 pursuant to NMSA 1978, § 7-2-5.5, which provides an exemption from state income tax to a member of a New Mexico federally recognized Indian nation if the income is earned from work performed and the member lives within the boundaries of his tribal nation's "reservation or pueblo grant" or on lands held in trust for his nation, tribe or Pueblo. The hearing officer found that the taxpayer was domiciled in Farmington, New Mexico throughout the relevant period based on the fact that the taxpayer and his wife owned a home there, his wife and son lived there, he attended medical appointments there, registered his vehicles there, and was registered to vote using his Farmington address. The Department argued that the place of domicile determines whether a taxpayer is entitled to the exemption.

The hearing officer, in disagreeing with the Department, relied on the plain meaning of the statute in rendering his decision after hearing arguments from the taxpayer and the Department as to the taxpayer's movement between his home in Farmington and his activities on the Navajo Nation. The hearing officer concluded that the taxpayer lived within the boundaries of the Navajo Nation during the relevant periods of work and was physically present within the Navajo Nation or conducting business there more than half the time during each relevant year. The taxpayer was not physically present in New Mexico outside of the Navajo Nation for 185 days or more in any of the relevant years. For these reasons, the taxpayer was entitled to the exemption.

The decision states the taxpayer worked and lived "within the exterior boundaries of the Navajo Nation." While it is correct that the Navajo Nation defines its boundaries to include Crownpoint, the decision does not address whether Crownpoint is also within the federally recognized boundaries of the Navajo Nation's "reservation." In fact, the Tenth Circuit Court of Appeals has determined that a large area surrounding Crownpoint, lying east of the reservation established for the Navajo in 1880, lies outside of the Navajo reservation.[1] Consequently, while the hearing officer's interpretation of the statute may be correct, his determination that the taxpayer's working and living at Crownpoint for over half the year satisfies the statute's "reservation" requirement appears to be incorrect.

Under this decision, a taxpayer can be domiciled outside tribal lands, but still qualify for the exemption if the taxpayer works and lives on tribal lands more than half

1 *See Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1422 (10th Cir. 1990) (reservation diminished by Executive Orders in 1908 and 1811).

the year. The time for appeal of this decision has expired. Although the Department's rulings are based on the facts and circumstances of each particular case, this case appears to indicate that, if a member of a federally recognized Indian nation, tribe, band or pueblo works within the boundaries of that member's reservation, pueblo or trust lands and maintains a home there for more than 185 days in a tax year, the member's income from that work will be exempt from New Mexico personal income tax.

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Navajo Nation Supreme Court Affirms
Navajo Labor Commission's Just Cause Determination

In an unpublished decision, *Jones v. BHP Billiton*,[1] No. SC-CV-07-11 (Navajo Nation S. Ct. Dec. 6, 2013), the Navajo Nation Supreme Court affirmed the decision of the Navajo Labor Commission, which had found that BHP Navajo Coal Company had just cause to fire an employee who had undisclosed conflicts of interest. The employee, a Navajo medicine man, contended that his termination was religious discrimination. By contrast, both the Commission and the Supreme Court found that the mine accepted and promoted Navajo culture and valued the employee's expertise in that area.

Brian Nichols of Modrall Sperling conducted both the trial and appeal of the case and may be contacted via e-mail for more information.

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

1 Turtle Talk has provided the following link to this decision.