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Native American Law Watch

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

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Modrall Sperling's 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. 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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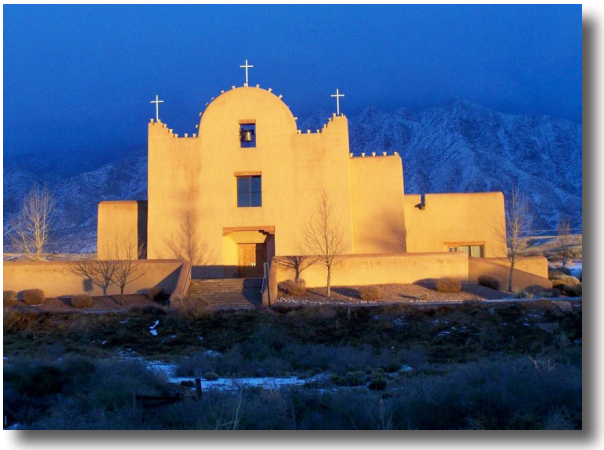
The Pueblo of Sandia's Leasing Regulations and What Businesses Need to Do to Enter into Leases

The Pueblo of Sandia ("Pueblo") was the first tribe in New Mexico, and the second in the United States, to receive approval by the Secretary of the Interior for its tribal leasing regulations promulgated under the Helping Expedite and Advance Responsible Tribal Homeownership ("HEARTH") Act Amendments to the Indian Long-Term Leasing Act, 25 U.S.C. § 415. The HEARTH Act authorized Tribes to promulgate regulations governing leases of tribal land for residential, business, and other purposes. The Sandia Pueblo Tribal Council unanimously approved the regulations on March 5, 2013, determining that the business leasing regulations "will serve and promote the Pueblo's interests of sovereignty, self-determination and economic development." Resolution 2013-037. The Pueblo then submitted the regulations to the Bureau of Indian Affairs ("BIA") for approval, as required by the HEARTH Act. On March 14, 2013, then Secretary of the Interior Ken Salazar approved the Pueblo's leasing regulations at a signing ceremony held at the Tribal Council's offices outside of Albuquerque. Sandia's new leasing regulations govern business leases of Tribally-owned land held in trust or restricted status; the Pueblo may develop regulations for residential, agricultural, and wind and solar energy resources in the future.

Companies seeking to do business with Sandia Pueblo have much to gain from the approval of Sandia's regulations. Because the Pueblo may now negotiate for and approve business leases for its trust and restricted land, prospective lessees no longer need to seek federal government approval prior to entering into the lease. This should lower transaction costs and speed up the process significantly. The regulations also provide the Pueblo with rightful autonomy in determining the uses to which its sovereign territory should be placed. This article reviews some of the key provisions of the regulations.



St. Anthony Catholic Church, Sandia Pueblo, NM
Picture by Amber Flores Jordan

What Leases Are Governed by the New Regulations?

Sandia Deer Petroglyph

The regulations govern business leases, and assignment, sublease, and mortgage thereof, of Pueblo surface land held in trust or in restricted status. This includes ground leases and leases of development land for residential purposes that are not subject to other regulation; leases for religious, educational, recreational, cultural, or other public purposes; commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, or other business purposes. Leases of Pueblo land held in fee are governed by tribal law, and are not within the purview of the new regulations. The regulations do not apply to land use agreements entered into pursuant to authority other than 25 U.S.C. § 415(a) or (h), including but not limited to, leases for timber, grazing, rights of way, or water rights. Permits for use of Pueblo land do not require approval under the regulations, but must be filed with the appropriate Pueblo office. Proposed leases that were submitted to the BIA prior to the approval of the regulations will be processed by the BIA unless the prospective lessee withdraws the lease application and submits it to the Pueblo.

Who Will Approve the Lease? The Tribal Council "must consent to any grant of a lease on Pueblo Indian land and approve the terms of the lease." Section 012. The Responsible Official, an official designated by the Governor, will ultimately approve the lease. If the Pueblo land has been assigned, the consent of the assignee may be required. In seeking a lease, the prospective lessee will meet first with the Leasing Officer, a person designated by the Governor or Tribal Council (and may be the Governor or another official) to negotiate the lease, make necessary arrangements related to the lease, and, if the lease is approved, administer the lease. If a successful lease is negotiated, the Responsible Official is tasked with overseeing the regulatory requirements for approving and administering leases, including environmental review. The Responsible Official may delegate duties within the Tribal Government as required. The Responsible Official also is authorized to take emergency action if Pueblo land is threated by natural or man-made disaster, including by the lessee. Amendments, assignments, subleases, and mortgages have separate approval processes that largely depend on the terms of the original lease.

The Responsible Official will approve the lease unless the application is not complete, the regulations would be violated, or there is "a compelling reason to withhold approval in order to protect the best interests of the Pueblo." Section 441(a)(3). Unreasonable withholding of approval is not permitted. Once approved, the lease must be recorded with the Pueblo and the BIA.

What Is Needed to Submit a Business Lease for Approval by the Responsible Official? Section 438 lists the documents required to obtain approval. These include an executed lease with Tribal Council Authorization; valuation, proof of insurance, security, if required; a statement that the proposed use conforms with tribal law; a legal description of the land; other information to assist the Responsible Official, including information regarding the business organization. Archeological reports and cultural studies may be required as well. If appropriate, a prospective lessee may need to prepare a restoration and reclamation plan, demonstrate technical capability for the leases' purposes, and a preliminary development plan. Due diligence is required if the lease will include permanent improvements. An environmental review is required for all proposed leases unless there will not be a significant change in use of the leased lands, or a separate environmental review was prepared within the prior 24 month period. The environmental review must provide public notice and the opportunity for public comment.

What Are the Required Lease Terms? The required lease terms are set forth in § 413. They include identification of the tract or parcel of land being leased; the purpose of the lease; authorized uses of the leased property; parties; term; ownership of and responsibilities related to permanent improvements; payment requirements; due diligence requirements (excused for religious, educational, or other purposes); insurance requirements; bonding requirements; a statement that the United States may enforce rights of the Pueblo; a prohibition on unlawful conduct, nuisance, or negligent use or waste of the leased premises; a statement requiring compliance with all applicable laws; a provision requiring a halt of activities if historic, archeological, or cultural items, or human remains, are discovered; a statement regarding the rights of the Responsible Official to enter and inspect; and provisions holding harmless and indemnifying the Pueblo and the United States. A business lease may provide authorization for the Pueblo to use or authorize the use of the leased premises for compatible purposes. The lease may provide for negotiated remedies in the case of a violation. Such a clause will bind the Pueblo but not the United States.

What Are the Required Fees? Compensation for a lease must be negotiated with the Tribal Council, unless the Tribal Council directs the Responsible Official to obtain a valuation or determine fair market rental value. Payment of compensation may be either to the Pueblo or to the BIA, as negotiated in the lease, and, if negotiated, may be in-kind or variable. Unless the business lease includes an authorization by the Tribal Council that compensation review is not necessary, a review must be undertaken every fifth year. The lessee may be required to pay additional costs associated with the land, or, if the leased premise is within an Indian irrigation project or drainage district, the operation and maintenance charges associated with such a district. The lessee must provide security in the form of a performance bond, unless such requirement is waived by the Tribal Council. Insurance must be obtained, with the Pueblo and the United States identified as additional insured, unless waived.

What Laws Apply to the Lease? Federal law and Tribal law. Leases approved under the regulations are not subject to State law unless the Pueblo, Congress, or a federal or tribal court has made it expressly applicable, or unless the parties have agreed to subject the lease to State or local law. Doing so does not waive the Pueblo's sovereign immunity. When Tribal law requires a preference for employment of tribal members, this may be a term of the lease. State tax laws do not apply to the lease or the activities conducted or improvements made under the lease. The lease is limited to 75 years, pursuant to 25 U.S.C. § 415(h), permitting an initial term of 25 years and two renewals. The lease may include an option to renew.

Is there an Appeals Process? Yes. Decisions by the Responsible Official to disapprove a lease may be overturned only by the Tribal Council, and an appeal bond must be posted. A nonapproved lease may be appealed by the proposed lessee, the Leasing Officer, or any other party with a material interest. Grounds for appeal include violation of the regulations or the familiar grounds for appealing an administrative action, whether the challenged action was arbitrary, capricious, an abuse of discretion, not in accordance with law, or without sufficient evidence in the record. The appeal is filed with the Tribal Court where evidence and argument may be presented. The Tribal Court's decision is appealable to the Tribal Council, who will decide based on the record before the Court. The Tribal Court's decision is final, unless a party chooses to seek review by the Secretary of the Interior.

If the Responsible Official does not act within the relevant time period stated in the regulations during the lease approval process, a request to compel action may be filed with the Governor or Tribal Council.

Other Tribes are Also Developing Regulations. In addition to Sandia, the Federated Indians of Graton Rancheria, located in northern California, have received Secretary approval of their leasing regulations. Tribes around the United States, including the Ho-Chunk Nation, located in Wisconsin, and the Confederated Tribes of the Colville Reservation, located in Washington, currently are drafting lease regulations or have submitted regulations for approval by the Secretary.

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

The Grand Canyon Sky Walk, Continued: Bad Faith, Jurisdiction, and Who's On (the Bench) First

The Case: In the latest round of the multi-pronged litigation, *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, (*GCSD I*),[1] the Ninth Circuit Court of Appeals entered a significant decision on April 26, 2013, addressing whether federal or tribal court should first address a dispute arising in economic development in Indian country.[2] The GCSD litigations are instructive because they address remedies available—or unavailable—to a contracting party when a tribe and tribal entity work hand in glove at point of dispute to divest a developer of contract rights.

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After a dispute arose between the tourist attraction developer, Grand Canyon Skywalk Development, LLC ("GCSD"), and a corporation wholly owned by the Hualapai Tribe, 'Sa' Nyu Wa ("SNW"), while litigation stormed between GCSD and SNW, the Tribe sought to use eminent domain to condemn the developer's interest under the development agreement, and the developer demanded arbitration, claiming damages for the value of the agreement. After several tribal and federal court decisions led to an arbitration, as our Spring 2013 Watch reported, *GCSD I* confirmed the arbitrator's award of $28 million for GCSD, reflecting important principles supporting the enforceability of arbitration awards when a dispute arises in economic development in Indian country (NSW responded to the district court's order by filing a notice of appeal followed quickly by a voluntary bankruptcy petition, listing the arbitration award as its only substantial debt).

The Ninth Circuit's *GCSD II* decision does not directly address the arbitration award. It reviews an earlier federal district court decision that dismissed GCSD's challenge to the Tribe's condemnation order, requiring the developer to first exhaust tribal court remedies. GCSD appealed that order, and the Court of Appeals agreed with the district court that the developer should first present its challenge to tribal court jurisdiction to the Tribal Court. On May 10, 2013, GCSD filed a petition for rehearing or for rehearing *en banc*, asking the Ninth Circuit to reconsider its decision.

The Ninth Circuit's Recent Ruling: *GCSD II* is the Ninth Circuit's most recent decision on both the doctrine of exhaustion of tribal remedies and tribal jurisdiction over nonmembers under *Montana v. United States*, 450 U.S. 544 (1981) ("*Montana*"). The U.S. Supreme Court requires a party challenging tribal court jurisdiction to first present the challenge to the tribal court, unless one of four "exceptions" to the "exhaustion rule" apply.[3] *GCSD II* addressed the first and fourth exhaustion exceptions.

The first exhaustion exception allows immediate federal court review when an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith." GCSD contended the bad faith exception applied because the Tribe adopted the condemnation ordinance specifically to take the developer's interest, the ordinance precluded effective Tribal Court review of a taking, and the Tribal Court is not independent from the Tribal Council. The Ninth Circuit's decision potentially is significant because it requires the "bad faith" to be on the part of the tribal court officials only, not that of the tribe or a party invoking tribal court jurisdiction. Given that limited scope of inquiry, the court found the evidence "does not conclusively support" bad faith by court personnel. The Ninth Circuit also rejected GCSD's contention that *Montana*'s second exception, futility, applied because the Tribe's ordinance foreclosed any effective relief.

1 No. CV-12-08183-PCT-DGC (D. Az. Feb. 11, 2013).
2 No. 12-15634 (9th Cir. 2013)
3 *See National Farmers Mutual Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 854, 856-57 (1985); *Burlington N.R.R. Co. v. Red Wolf*, 196 F3d 1059, 1065 (9th Cir. 1999).

'Sa' Nyu Wa Eagle Point

The Ninth Circuit next considered the fourth *Montana* exception, where a federal court need not require exhaustion of tribal court remedies if it is "plain" that the tribal court lacks jurisdiction over the nonmember.[1] The Ninth Circuit rejected GCSD's contention that, because the ordinance condemned only off-reservation-based contract rights and the parties stipulated to arbitration and federal court dispute resolution, the Tribal Court lacked jurisdiction over the dispute. The Ninth Circuit's based its affirmance of Tribal Court jurisdiction on a broad reading of an earlier *per curiam* decision in *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). The Ninth Circuit held, first, the *Montana* analysis is unnecessary at all, because a tribe always has regulatory jurisdiction over tribal lands, and, although the condemned property rights were off-reservation-based, they related to a project on tribal lands. But, it also held that, even if *Montana* applies, *Montana*'s first exception is satisfied because the case pertains to an agreement between GCSD and SNW, a tribally-owned corporation, establishing a "consensual relationship, and, in any event, since it agreed the project would be developed in compliance with "all applicable federal, [Hualapai] Nation, state, and local laws," GCSD had consented to tribal law and enforcement of tribal law in tribal court.

The Take Away: *GCSD II* threatens to subject numerous agreements stipulating to off-reservation dispute resolution to required exhaustion of tribal court jurisdiction, even when the developer is plainly the subject of tribal efforts to usurp its contract rights. It underscores the critical importance of a clear and unambiguous waiver of immunity, a clear choice of exclusive acceptable forum(s), and clear remedial provisions in a development agreement with a tribe or tribal entity. In drafting such provisions, parties should recognize that, unless *GCSD II* is reversed on the pending petitions for rehearing or on a later review by the Supreme Court, an agreement that recognizes tribal law and does not expressly negate exhaustion of tribal remedies engenders a risk that, notwithstanding stipulated arbitration remedies, even onerous exercise of tribal power may be subject to federal court-mandated review in tribal court. It further highlights the potential need for an agreement to address whether the applicable tribe may exercise eminent domain authority over the project—a provision that may require a separate agreement by the tribe having potential jurisdiction over the project and carefully crafted remedial provisions.

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

1 *See Strate v. A-1 Contractors*, 520 U.S. 438 (2001).

Navajo Nation Proposes to Purchase BHP Navajo Coal Company

In a unique transaction in Indian Country, BHP Billiton New Mexico Coal, Inc. (BHP) is considering selling the BHP Navajo Coal Company (BNCC), which owns and operates the Navajo Mine, to the Navajo Transitional Energy Co. LLC (NTEC), a tribally owned entity organized under the Navajo Nation's Limited Liability Act. The sale of the Navajo Mine is tentatively scheduled to be finalized in July 2013. NTEC proposes to purchase 100% of the ownership interest of BNCC and then merge the two companies; and the surviving company will be known as NTEC. Mine operations should continue unimpeded after the sale is complete. NTEC and a BHP subsidiary, BHP Billiton Mine Management Company, plan to contract for that entity to manage Navajo Mine until the end of 2016.

For more information on this transaction, please contact Walter E. Stern at western@modrall.com or Meg L. Meister at mlm@modrall.com.

New Mexico Court of Appeals Affirms Ruling that a Parcel Within the Former Fort Wingate Military Reservation is "Indian country"

In *State of New Mexico v. Steven B.*, No. 31,322 (N.M. Ct. App., April 1, 2013), the New Mexico Court of Appeals held that the State lacked criminal jurisdiction over a crime committed on Parcel Three of the former Fort Wingate Military Reservation, affirming an earlier decision holding that land was a "dependent Indian community" under 28 U.S.C. § 1151 and the Supreme Court's opinion in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Title to Fort Wingate has been held by the Bureau of Indian Affairs ("BIA") since 1950, and Parcel Three is the location of BIA-operated Wingate High and Elementary Schools and student dormitories, where the majority of students are Navajo or members of other

Indian tribes. The school board is an entity of the Navajo Nation, the school principals are BIA employees, law enforcement is provided by the Nation, the State, and McKinley County, and the Navajo Nation courts exercise jurisdiction over misdemeanors. The State, while conceding that Parcel Three is under federal superintendence, argued that it was not "set aside by the Federal Government for the use of the Indians as Indian land," relying on an order by the United States District Court for the District of New Mexico, *United States v. M.C.*, 311 F. Supp. 2d 1281 (D.N.M. 2004), which had concluded that Parcel Three was not Indian country. Citing the Navajo Nation's emergency response, court jurisdiction, and school operation, the *Steven B.* Court concluded that Parcel Three was set aside for Indian use, and thus was "Indian country," and affirmed that the State lacked jurisdiction to prosecute crimes committed on Parcel Three.

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

IRS Concludes Tribe May Pass on to Lessee Investment Credits Associated with Renewable Energy Assets

The Internal Revenue Service's ("IRS") recent non-binding decision that a Tribe could pass on investment credits associated with renewable energy assets to the Tribe's lessee may encourage future development on tribal lands because the non-tribal developer can benefit from the Tribe's investment credits.[1] As described in the IRS' decision, a federally-recognized Tribe intends to develop a renewable energy project on its lands held in trust and lands the Tribe holds in fee. The electricity generated from the renewable energy project would be sold to third-party utilities and/or used by the Tribe. The Tribe would initially lease the renewable energy project to its lessee, who would operate the renewable energy project and would be entitled to the net revenue derived from the operation of the project. At the end of the lease term, the Tribe would assume control over the project and would operate the project directly. The IRS concluded that the Tribe was not a government unit as defined by the Internal Revenue Code, 26 U.S.C. § 50(b)(4), which states that property used by government units is not entitled to investment credits. The IRS also reasoned that the tribal government was not exempt from taxes imposed by other Code provisions. Therefore, the IRS concluded that the Tribe could pass on its investment credits to its lessee. Although this decision cannot be cited as precedent, it provides guidance on the availability of investment credits for other renewable energy developers on tribal lands.

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

French Court Allows Auction of Sacred Hopi Artifacts to Proceed

A visitor looks at antique tribal masks revered as sacred ritual artifacts by a Native American tribe in Arizona which are displayed at an auction house in Paris April 11, 2013. Credit: Reuters/John Schults

A controversial auction of sacred Hopi artifacts went forward on April 12, 2013, after a Paris municipal court judge ruled that a Paris auction house could hold an action of tribal masks considered sacred by the Hopi and other tribes located in the southwestern United States. The Hopi tribe, its supporters, and the United States ambassador to France sought to intervene and delay or cancel the auction. Hours before the auction was scheduled, however, a Paris court ruled against the Hopi Tribe, rejecting the argument that the artifacts embody living spirits, the sale of which is prohibited under French law. Despite the presence of protesters inside and outside of the auction house urging patrons not to take part in the bidding, the Hopi artifacts brought in a total of $1.2 million in sales, with 65 of the 70 items listed sold. A headdress known as the Crow Mother generated the highest bid, selling for $210,000.

For more information, please contact Christina Sheehan at ccs@modrall.com.

1 *See* Internal Revenue Service, PLR-111532-11 (March 8, 2013)

Federal Regulation of Energy Development on Tribal Lands

On April 26, 2013, the Subcommittee on Indian and Alaska Native Affairs, House Natural Resources Committee, held a hearing on H.R. 1548,[1] the Native American Energy Act. H.R. 1548 has been proposed to streamline federal regulation of energy development on tribal lands. The Act seeks reform of the current appraisal process for determining fair market value of tribal lands, including imposing shorter deadlines for Secretarial review of any appraisal. The Act also intends to reduce the application of the National Environmental Policy Act ("NEPA") to projects on tribal lands by limiting review and comment on those projects to members of the Indian tribe and any other individual residing within the affected area. The Act proposes to prohibit the Bureau of Land Management from collecting certain fees relating to oil and gas development or operations. The Act also seeks to preclude an award of attorneys' fees for lawsuits brought by plaintiffs challenging an agency's decision to issue a permit, lease or other approval authorizing energy development on tribal lands. We will continue to track the Act's progress.

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

Indigenous Rights to Sacred Sites and Traditional Cultural Properties

Shareholder Stuart Butzier and associate Sarah Stevenson were featured speakers on a panel entitled "Consultation, Accommodation, and Consent in Resource Development" at the Special Institute sponsored by the Rocky Mountain Mineral Law Foundation and the International Bar Association's Section on Energy, Environment, Natural Resources, and Infrastructure Law and the Latin American Regional Forum, held in Cartagena, Colombia on April 22-24, 2013. Mr. Butzier's and Ms. Stevenson's paper, entitled *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior, and Informed Consent* is available here.

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1 Available at http://www.govtrack.us/congress/bills/113/hr1548/text.

Assistant Secretary-Indian Affairs Proposed Changes to Fee-to-Trust Procedures

On May 24, 2013, Assistant Secretary-Indian Affairs Kevin Washburn issued a proposed rule to modify the process for challenging the Secretary's decision to take fee lands into trust,[1] apparently in response to the United States Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak*"),[2] which we reported on in our Fall 2012 Native American Law Watch. As we reported, the *Patchak* Court ruled that the plaintiff in that case, who did not have an interest in the land to be taken into trust, had standing to challenge the Secretary's decision to take land into trust, that his claim could proceed under the Administrative Procedures Act ("APA"), and that the general six year statute of limitations applied to such challenges. In her dissent, Justice Sotomayor cautioned that 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. Justice Sotomayor thus explained that the majority decision "will…retard[] tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed."[3]

The proposed rule addresses some of the uncertainty caused by the *Patchak* holding and is designed to encourage economic development on Indian Reservations. As Assistant Secretary Washburn explained: "The principal purpose of this proposed rule is to provide greater certainty to tribes in their ability to develop lands acquired in trust for purposes such as housing, schools and economic development." He characterized the proposed rule as creating "a 'speak now or forever hold your peace moment' in the land-into-trust process. If parties do not appeal the decision within the administrative appeal period, tribes will have the peace of mind to begin development without fear that the decision will be later overturned." The proposed rule will be published in the Federal Register on May 29, 2013, and public comments may be submitted on the proposed rule for sixty days following publication.

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

1 Press Release, U.S. Dep't of the Interior, Bureau of Indian Affairs, Washburn Proposes Changes to Land-into-Trust Procedures to Achieve Greater Transparency, Clarity and Certainty for Tribes, May 24, 2103.

2 ___ U.S. ___, 132 S. Ct. 2199 (2012).

3 Id. at 2217