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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.

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Assistant Secretary-Indian Affairs Issues Final Rule for Fee-to-Trust Procedures

On November 13, 2013, Assistant Secretary of the Department of the Interior-Indian Affairs, Kevin Washburn, issued a final rule which modifies the process for challenging the Secretary's decision to take fee lands into trust. 78 Fed. Reg. 67928 (Nov. 13, 2013). We reported on the draft rule in our Summer 2013 Native American Law Watch. According to a press release issued by Washburn, the final rule "demonstrates the Obama Administration's continuing commitment to restoring tribal homelands and further economic development on Indian reservations."

The final rule provides clarification regarding the Department of the Interior's process for issuing decisions, ensures that the official rendering a decision on a fee-to-trust application provides notice to interested parties, which includes notice by publication in a newspaper of general circulation, and repeals the 30-day waiting period in the prior rule, while at the same time making exhaustion of administrative remedies explicitly required. *See* Preamble, 78 Fed. Reg. 67928, 67929. The final rule clarifies that a decision by the Assistant Secretary-Indian Affairs is a final agency decision for purposes of judicial review under the Administrative Procedures Act. If the decision is issued by a Department official, the decision is subject to the administrative exhaustion requirements of 25 C.F.R. Part 2. *See* Preamble, 78 Fed. Reg. 67928, 67929. While acknowledging that certain claims may be barred by the Quiet Title Act, *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199 (2012), the Department nevertheless relied on the lengthy title examination process in the regulations to conclude that "the likelihood that a person with a valid competing interest in the property will not be identified is too low to justify delaying implementation of every final decision." *See* Preamble, 78 Fed. Reg. 67928, 67934.

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Jurisdiction for Injuries Arising at Tribal Casinos: The Importance of Clear Dispute Resolution Terms

The State supreme courts in Oklahoma and New Mexico both have recently determined that their state courts lack jurisdiction over tort claims arising from conduct at tribal casinos. These cases are a reminder of the importance of clear dispute resolution and forum selection clauses in agreements with tribal nations.

Case Background: Congress passed the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 – 2721 ("IGRA") in 1988. Apparently as a compromise, IGRA provided that tribal-state compacts may include provisions relating to "the allocation of the criminal and civil laws and regulations . . . that are directly related to, and necessary for, the licensing and regulation of such [gaming] activity." 25 U.S.C. § 2710(d)(3)(C). For about nine years, parties in Oklahoma and New Mexico have contested whether that statutory language encompasses compact authority to delegate civil jurisdiction over tort claims arising at tribal casinos.

Tribal nations in both Oklahoma and New Mexico entered into tribal-state compacts which did not conclusively allocate civil adjudicatory jurisdiction over tort claims, but appear to have reserved the issue for litigation. Beginning in 2004, several Oklahoma based Indian nations and the State of Oklahoma entered compacts providing that tribal gaming enterprises would be subject to tort claims "in a court of competent jurisdiction," and that the compact "shall not alter tribal, federal, or state civil adjudicatory or criminal jurisdiction." *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 5.[1] In 2001, the State of New Mexico entered compacts with several tribal nations, providing that tort claims could be brought in "a court of competent jurisdiction," including a state court "unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." *Pueblo of Santa Ana v. Nash*, No. 11-CV-00957, Mem. Op. and Order at 4 (D. N.M. Sept. 25, 2013); *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 7-8, 141 N.M 269, 154 P.3d 644.

Oklahoma Proceedings: In 2009, the Oklahoma Supreme Court ruled that Oklahoma state courts had jurisdiction over tort claims arising at several tribal casinos. *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507; *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488; *Cossey v. Cherokee Nation Enters.*, 2009 OK 6, 212 P.3d 447. Subsequently, two tribal nations that were not party to those cases and the State of Oklahoma agreed to binding arbitration to decide whether state courts had jurisdiction over claims arising in those nations' casinos. The arbitrator determined that Oklahoma's courts lacked jurisdiction over such tort claims. Federal courts in Oklahoma thereafter issued injunctions, putatively barring Oklahoma's courts from exercising jurisdiction over tort claims arising at tribal casinos (at least as to those tribes involved in the litigation). *See Sheffer*, 2013 OK 77, ¶¶ 7-9 (describing the arbitration process).

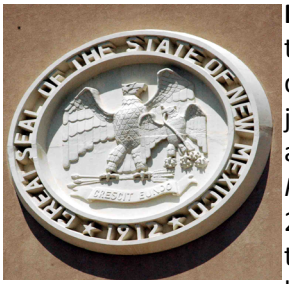
The Peoria Tribe was not a party to the either the 2009 Oklahoma Supreme Court cases or the subsequent arbitration. The Tribe and its tribal gaming enterprise were sued in state court by three persons injured in a 2006 vehicle

1 As of publication of this article, *Sheffer* had not been released for publication, and is subject to revision.

accident. The plaintiffs alleged that the casino over-served alcohol to the alleged tortfeasor. In *Sheffer*, the Oklahoma Supreme Court overruled a 2009 decision, and held that Oklahoma's state courts lack jurisdiction over the tort claim.

The *Sheffer* court began its analysis by noting that "recent decisions from federal courts of this state and the above-mentioned arbitration proceedings have caused us to re-examine our previous holdings. . . ." *Sheffer*, 2013 OK 77, ¶ 11. The court explained, "[a]s the arbitrator pointed out and as the federal courts of this state have concluded, Part 9 of the gaming compact preserves the civil-adjudicatory status quo – that 'states are generally presumed to lack jurisdiction in Indian Country.'" *Id*. ¶ 22. The court noted that "[o]nly an express grant of jurisdiction by Congress or adoption of Public Law 280 will confer civil-adjudicatory jurisdiction to the State of Oklahoma." *Id*. The court then explained that it was "undisputed that Oklahoma was not a state which was allowed to assert civil jurisdiction over Indian Tribes under Public Law 280," and that IGRA did not expressly grant civil adjudicatory jurisdiction to the State over tort claims. *Id*. Accordingly, the court held that the "gaming compact preserved the civil-adjudicatory jurisdictional status quo, and Oklahoma state courts are not courts of competent jurisdiction" to adjudicate tort claims against Indian tribes for tribal activities on tribal land." *Id*. ¶ 25.

Finally, it appears that in Oklahoma at least some tribal purveyors of alcohol are licensed by the state for sales for off-premises consumption. In this area, the United States Supreme Court has ruled that Congress has divested tribal nations of inherent authority, and has delegated to states the right to regulate. *Rice v. Rehner*, 463 U.S. 713 (1983). Notwithstanding, the Oklahoma Supreme Court held that application for and issuance of such licenses does not waive immunity.



New Mexico Proceedings: In 2004, the New Mexico Supreme Court determined that its courts had jurisdiction over tort claims arising at tribal casinos. *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M 269, 154 P.3d 644. *Doe* framed the issue as: whether the Pueblo had waived sovereign immunity, or whether the IGRA did not permit such a waiver. The court determined that the Pueblo could consent to state court jurisdiction without the express authorization from Congress to do so, and that the legislative history of the IGRA indicated that tribes could consent to state jurisdiction. As a result, *Doe* held New Mexico's courts had jurisdiction.

In 2011, relying on *Doe*, the New Mexico Supreme Court found that its courts had jurisdiction over tort claims arising from over-serving alcohol at a casino. *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-030, 150 N.M. 258, 258 P.3d 1050. In contrast to Oklahoma, the casino in New Mexico was not licensed by the state of New Mexico. The Pueblo and its gaming enterprise then brought a collateral suit in federal court to challenge the New Mexico Supreme Court's ruling. *Pueblo of Santa Ana v. Nash*, No. 11-957-LH/LFG (D.N.M. Sept. 25, 2013). The federal court determined that New Mexico state courts lacked jurisdiction over the tort claims arising from the Pueblo's casino. The Court relied on the same rationale as the *Sheffer* court. Pueblo of Santa Ana also determined that adjudicatory jurisdiction over tort claims was not "necessary for" tribal gaming within the meaning of IGRA. Thus, Congress had not authorized tribes and states to agree to state jurisdiction over tort arising at tribal casinos. The case currently is on appeal to the Tenth Circuit Court of Appeals.

Why the Cases Matter: These cases serve as a warning regarding dispute resolution terms in agreements with tribal nations. The United States Supreme Court has ruled that tribal nations may be bound to agreements which waive sovereign immunity, select a forum other than tribal court, including arbitration, and select state law, including for enforcement of an arbitration award. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001). The terms, however, must be clear and express. Ambiguous terms may result in costly litigation and collateral proceedings.

Moreover, the dispute resolution and forum selection clauses will be interpreted in light of treaties, Congressional actions, and federal Indian law. These areas of law differ by topic and provide a complex backdrop, against which dispute resolution terms will be interpreted. For instance, the backdrop results in opposite presumptions about on-reservation sales of alcohol for consumption off premises, which states may regulate, and on-reservation sales of alcohol for consumption anywhere which result in tort claims, over which the states lack adjudicatory jurisdiction. If Congress has provided a specific procedure or framework for tribal consent to state jurisdiction, that may limit a tribe's authority to waive its immunity or consent to jurisdiction in another forum.

In *Pueblo of Santa Ana*, the Pueblo appears to have shied away from an argument that it may agree to state jurisdiction only if Congress permits it to do so. Rather, the Pueblo argued that its putative consent to state jurisdiction, in the compact, relied only on Congressional intent to permit such consent. By not relying on its inherent authority to consent to state jurisdiction, the Pueblo avoided both state jurisdiction, and any limit on its authority to consent without Congressional permission.

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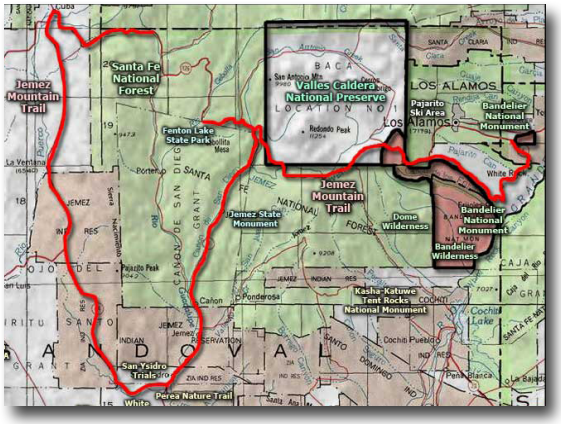
Jemez Pueblo's Aboriginal Title Claims to the Valles Caldera Dismissed; Pueblo Appeals

Case Background: The Valles Caldera, was, along with surrounding areas in the Jemez Mountains, the ancestral home of the people of the Jemez Pueblo. The Caldera was made a National Preserve in 2000 by the Valles Caldera Preservation Act, 16 U.S.C. §§ 698v-609v, and is currently the subject of a Senate Bill to designate it as a National Park (S. 285, introduced Feb. 12, 2013). The crater of a volcano that last erupted between 50,000 and 60,000 years ago,[1] the rim has a diameter of approximately twenty miles, and the Caldera contains four high mountain valleys and eleven resurgent volcanic domes.[2] The Jemez settled in the region near and around the Valles Caldera in approximately 1300, with at least sixty pueblos disbursed throughout the region.[3] The present-day Jemez Pueblo is located south of the Caldera, and, although within the historical area of the Jemez, was founded as a mission by the Spanish in approximately 1621.[4] The diverse populations of the multiple villages began settling in the current Pueblo in increasing numbers in the early eighteenth century, and the pueblos in the area immediately surrounding the Caldera were no longer inhabited.[5] The Jemez people, however, continued to use the Caldera for hunting and cultural purposes.

In 1860, the United States granted the Valles Caldera, as part of a large grant of over 99,000 acres, to the heirs of Luis Maria Cabeza de Baca ("Baca heirs").[6] The Valles Caldera became known as the Baca Ranch. The Jemez people were permitted by the Baca heirs to use the Valles Caldera.[7] To create the Valles Caldera National Preserve, the United States purchased the Baca Ranch from the Baca heirs.[8]



The Litigation: In 2012, the Pueblo of Jemez filed suit against the United States under the Quiet Title Act, 28 U.S.C. § 2409a, asserting aboriginal title to over 1,100 square miles the drainage of the Rio Jemez, incorporating the Valles Caldera.[9] Central to the Pueblo's claim was that the Baca heirs obtained title subject to the Jemez' aboriginal title.[10] The Federal District Court for the District of New Mexico denied the Pueblo's claims, ruling that the suit was barred because the United States had not waived its sovereign immunity.[11]

The court's ruling "[was] determined by binding Tenth Circuit precedent": *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987), in which the court ruled that claims asserted by the Navajo Nation against the United States, New Mexico, and individual grantees were barred because they were within the exclusive jurisdiction of the Indian Claims Commission, and thus were barred by the statute of limitations of the Indian Claims Commission Act, 25 U.S.C. §§ 70 – 70n-2 ("ICCA").[12] The ICCA, enacted in 1946, provided Tribes five years to file claims against the United States; the statute of limitations for claims permitted by the ICCA was August 13, 1951.[13]

The court explained that the ICCA provides the exclusive remedy for pre-1946 Indian tribal claims against the United States.[14] The Court rejected the Pueblo's claim that the Pueblo did not have a claim against the United States as of 1946 because, either the United States' grant to the Baca family in 1860 extinguished aboriginal title and the Pueblo could not now claim aboriginal title, or it did not extinguish that title, in which case, the Pueblo's claim existed prior to 1946 and was barred by the ICCA.[15] The Court also relied on the fact that the Pueblo had brought an ICCA claim in 1951—and received a final judgment against the United States—but did not include in that claim title to lands that now comprise the Valles Caldera National Preserve.[16] Because the Pueblo did not comply with the requirements of the ICCA, the court concluded that the United States' sovereign immunity was not waived and dismissed the case.[17]

Stay Tuned: This ruling demonstrates that, although the aboriginal title doctrine continues to exist in the United States, the ability of Native American tribes and pueblos to assert aboriginal title is curtailed by Congressional action establishing limitations periods for claims of aboriginal title. The Jemez Pueblo has appealed the district court's decision to the Tenth Circuit Court of Appeals. A decision is not expected until 2014.

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

1 Smithsonian Institution Global Volcanism Program, Valles Caldera, Background.
2 Memorandum Opinion and Order, *Pueblo of Jemez v. United States of America*, No CIV 12-0800 BB/RHS, slip op. at 1 (Sept. 24, 2013).
3 Joe A. Sando, 9 Handbook of North American Indians , Southwest 418 (William C. Sturtevant, gen. ed., Alfonso Ortiz, vol. ed., Smithsonian Institution 1979); *Pueblo of Jemez v. United States*, No. Civ-12-0800 (D.N.M., Sept. 24, 2013).
4 Sando, supra n. 3, 418.
5 Sando, supra n. 3, 422; Joe S. Sando, Nee Hemish: A History of Jemez Pueblo 12 (Clear Light Publishing 2008).
6 *Pueblo of Jemez v. United States of America*, No. CIV-12-0800 RB/RHS (Sept. 24, 2013), Memorandum Opinion and Order, slip op. at 3.
7 *Id*. at 3.
8 16 U.S.C. § 698v (2000).
9 Memorandum Opinion and Order, slip op. at 2.
10 *Id*. at 3.
11 *Id*. at 5.
12 *Id*. at 5-6 (Modrall Sperling was involved in the *Navajo Tribe* case).
13 *Id*. at 6-7.
14 *Id*. at 8.
15 *Id*. at 8-9.
16 *Id*. at 9.
17 *Id*. at 9-10.

Of Note

Extractive Industries and Indigenous Peoples

The United Nation's Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, presented his report entitled "Extractive Industries and Indigenous Peoples" to the United Nations Human Rights Council on September 18, 2013. The report, which focuses on resource extraction and development by indigenous peoples and state and indigenous regulation of third-party resource extraction, is available here. For more information, please contact Sarah M. Stevenson at sms@modrall.com.

Tribal Court Jurisdiction

The Fifth Circuit's opinion in *Dolgencorp, Inc. v. The Mississippi Band of Choctaw Indians*, 732 F.3d 409 (5th Cir. 2013), held that a tribal court could exercise jurisdiction over the claims brought by a minor tribal member against a non-member. In that case, the minor tribal member, Doe, brought suit against Dolgencorp, the operator of a Dollar General Store located on land held in trust for the Mississippi Band of Choctaw Indians and operated pursuant to a business license with the Tribe, and the store manager, in tribal court, alleging that he was sexually molested by the store manager. Dolgencorp sued in federal court to enjoin Doe from adjudicating his tort claims in tribal court. The Fifth Circuit held that a consensual relationship sufficient to permit the tribal court to exercise jurisdiction under the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), was established by Doe's work as an unpaid intern at the Dollar General Store, rejecting the argument that a "consensual relationship" requires a commercial relationship. The court also concluded that the tribe had an interest in regulating the safety of a child's workplace when the business is on tribal land and involves a tribal member. A dissent challenged the majority's holding because it found tribal court jurisdiction without the concomitant finding that such jurisdiction was necessary to protect tribal self-government or control internal relations. The dissent further cautioned that the majority opinion is "alarming for its breadth." On October 17, 2013, Dolgencorp, Inc. and Dollar General Corp. filed a Petition for Rehearing *En Banc*. For more information on this opinion and its potential implications, please contact Deana M. Bennett at deanab@modrall.com.

Grand Canyon Skywalk Update

The saga of the Grand Canyon Skywalk project continues. The United States District Court for the District of Arizona granted the Hualapai Indian Tribe's Motion to Dismiss Grand Canyon Skywalk Development, LLC's ("GCSD") Amended Complaint to Compel Arbitration. *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of Arizona*, CV-13-08054-PCT-DGC, 2013 WL 4478778 (D. Ariz. Aug. 20, 2013). The court dismissed for lack of subject matter jurisdiction because an unincorporated Indian tribe is not a citizen of any state within the meaning of the diversity jurisdiction statute, 28 U.S.C. § 1332. Although the court noted that GCSD could, perhaps, invoke federal question jurisdiction under 28 U.S.C. § 1331, the court refused to allow GCSD to amend its complaint to assert federal question jurisdiction because it would be "futile" since GCSD would have to exhaust tribal court remedies. The court also rejected GCSD's argument that it was a third-party beneficiary to the Tribe's contractual waiver of immunity from suit, because the argument was based on an implied wavier which fails as a matter of law under United States Supreme Court precedent requiring that waivers of sovereign immunity be unequivocally expressed.

On December 16, 2013, the United States Supreme Court denied the petition for *certiorari* in *Grand Canyon Skywalk Development, LLC v. Grand Canyon Resort Corporation*, No. 13-313. For more information, please contact Deana M. Bennett at deanab@modrall.com.

Tribal Police and State Law Immunity

In *Loya v. Gutierrez*, the New Mexico Court of Appeals held the County of Santa Fe does not have a duty to defend or indemnify a tribal police officer who was cross-commissioned as a county sheriff's deputy and arrested a non-Indian within the exterior boundaries of the Pueblo of Pojoaque. 2013 WL 6044354 (N.M. Ct. App. Nov. 13, 2013). The officer, against whom a complaint for constitutional violations was brought, sued the county for defense and indemnification under the state's Tort Claims Act. Although cross-commissioned with the county, at the time of the arrest, the officer "was on duty as a full-time Pueblo tribal law enforcement officer...[and] was dressed in his tribal police uniform including wearing his tribal badge, and driving his tribally-issued police vehicle." *Loya* affirmed the district court's grant of summary judgment on the defendant's complaint against the county, ruling that under the New Mexico Tort Claims Act, the officer was not a "law enforcement officer" or a "public employee" to whom the county owed a duty to defend and indemnify against a claim of violation of constitutional rights. The officer may now appeal this ruling to the New Mexico Supreme Court. For more information, please contact Sarah M. Stevenson at sms@modrall.com.