



## **SALT RIVER PROJECT v. LEE**

### **Navajo Nation Held to Waive Regulation of Employment:**

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

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

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

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

**The Take Away:** A business negotiating a contract with a tribal nation may pursue waiver of sovereign powers, including regulation of employment. We believe a carefully crafted dispute



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resolution clause, including a waiver of tribal proceedings, may allow prompter enforcement of waivers in federal court.

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- i *Salt River Project Agricultural Improvement and Power District v. Lee, et al.*, No. CV-08-08028-PCT-JAT, Order (D. Ariz. Jan. 28, 2013). The case was twice previously appealed to the Ninth Circuit Court of Appeals after the District Court granted motions to dismiss. *SRP v. Lee*, 371 Fed. Appx. 779 (9th Cir. 2010); *SRP v. Lee*, 672 F.3d 1176 (9th Cir. 2012).
- ii *Thinn v. Navajo Generating Station*, No. SC-CV-25-06, No. SC-CV-26-06 (Nav. Sup. Ct. Oct. 19, 2007).
- iii This holding relies on *Arizona Public Service v. Aspass*, 77 F.3d 1128 (9th Cir. 1995).