MODRALL SPERLING

LAWYERS

Native American Law Watch

Fall 2016

Articles:

- Dakota Access Controversy: *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Policy Review of Federal Government's Tribal Consultation Obligations, and Why This Matters to Us
- The ADEA Does Not Abrogate Tribal Sovereign Immunity: Eleventh Circuit Confirms Recent Trend

Of Note:

- Can a State Sell Pueblo Lands in a Tax Sale? Pueblo of Acoma Files Suit Challenging New Mexico's Attempt
- Final Rule Issued Treating Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act
- Supreme Court Grants Certiorari in *Lewis v. Clarke*
- Notes from a Recent Government-to-Government Listening Session

Deana M. Bennett and Sarah M. Stevenson, co-editors

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 50 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.

Lawyers

- Brian K. Nichols, co-chair
- Lynn H. Slade, co-chair
- Deana M. Bennett
- Jennifer L. Bradfute
- Stuart R. Butzier
- Earl E. DeBrine
- Joan E. Drake
- Stan N. Harris
- Zoë E. Lees
- Robin E. James
- George R. McFall
- Margaret L. Meister
- Lesley J. Nash
- Maria O'Brien
- Debora E. Ramirez
- Ruth M. Schifani
- Christina C. Sheehan
- Walter E. Stern
- Sarah M. Stevenson

Albuquerque
505.848.1800
500 Fourth Street NW
P.O. Box 2168
Albuquerque, NM 87103

Santa Fe
505.903.2020
P.O. Box 9318
Santa Fe, NM 87504

www.modrall.com

Dakota Access Controversy: *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Policy Review of Federal Government's Tribal Consultation Obligations, and Why This Matters to Us

Introduction: The Dakota Access Pipeline (DAPL) project has become the focal point for Native American complaints concerning the manner in which federal agencies comply with their responsibilities to engage in tribal consultation on projects in and around Indian country requiring federal approvals, permits, or licenses. The rejection by the United States District Court for the District of Columbia of an application for preliminary injunction of DAPL construction appears to demonstrate, however, that the federal agency at the heart of the DAPL controversy, the U.S. Army Corps of Engineers (Corps), engaged in efforts to consult with the Standing Rock Sioux Tribe, only to be ignored or rebuffed on multiple occasions. Nonetheless, the federal government, acting through the United States Departments of Interior, Justice, and the Army, has announced an initiative to revisit its consultation obligations under a wide range of statutes, regulations, executive orders, and policy statements. Currently, those consultation obligations arise under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA), the Archeological Resources Protection Act, executive orders, and agency and department policy statements. The obligation to consult recognizes that most tribes' reservations do not encompass those tribes' aboriginal homelands and traditional hunting and fishing grounds.

DAPL and the *Standing Rock* Preliminary Injunction Litigation: DAPL seeks to move crude oil from North Dakota to facilities in Illinois, a roughly 1,200-mile route that traverses primarily private lands and does not cross any present-day Indian reservations. Little federal permitting is required in light of the selected route, chosen to follow existing utility corridors and pipelines and to avoid previously identified cultural and historic sites. Importantly, however, DAPL crosses federally regulated waters of the United States under the Corps' jurisdiction 204 times, each of which the Corps evaluated individually. The multiple water crossings triggered the Corps' jurisdiction under Section 404 of the Clean Water Act (CWA). In turn, Section 404 obligations required the Corps to analyze whether the crossings fell within one of the Corps' Nationwide Permit regulatory schemes, Nationwide Permit 12 (NWP 12), which authorizes pipeline crossings of regulated waters where the activity will disturb no more than a half-acre of waters of the United States. Under NWP 12, a project developer must provide the Corps with a pre-construction notification (PCN) if the proposed water crossing "may have the potential to cause effects to any historic properties," including properties of cultural or religious importance to an Indian tribe or nation.

Despite efforts to avoid them, the pipeline route still implicated a number of historic and cultural properties along the route. Particularly relevant to the ongoing controversy, according to Judge Boasberg's opinion on the preliminary injunction application, "[o]ne place of particular significance to the [Standing Rock Sioux Tribe (Standing Rock or Tribe)] lies at the traditional confluence of the Missouri and Cannonball Rivers."[1] Therefore, the Corps was obligated to consult with affected tribes in accordance with its consultation obligations and NHPA Section 106, even if the areas are outside existing reservation boundaries.

Generally, NHPA Section 106 requires that federal agencies determine whether a project requiring a federal license, permit, or approval has the potential to impact sites that are listed or eligible for listing on the National Register of Historic Places. If so, additional consultation is

required to assess potential adverse impacts, determine whether there are measures available to avoid, minimize, or mitigate the impacts, and seek to resolve the impacts by agreement of the "consulting parties," which ordinarily include the federal agencies, a State Historic Preservation Officer (for off-Reservation projects), Native American groups with a cultural affiliation with the lands affected, and the project proponent.[2]

As a consequence, NWP 12 General Condition 21 required the Corps to consult with interested tribes and determine that the water crossings will not actually impact any identified historic properties. The Corps, following efforts by DAPL to communicate with stakeholders (including Standing Rock and other tribes), took up its consultation responsibilities. According to Judge Boasberg, the Corps and DAPL were able to address and resolve concerns and objections of tribes who participated actively in the consultation process.[3] Despite the Corps' repeated and good faith efforts to consult with Standing Rock, however, consultation was limited due to the Tribe's actions.[4] Yet, when Standing Rock did engage in consultation on a limited basis, its concerns were addressed.[5]

In support of its application for preliminary injunction, Standing Rock advanced three main arguments as to why the court should halt construction. First, the Tribe argued the Corps violated the NHPA by failing to pursue Section 106 consultation obligation (a) at the time it issued NWP 12, and (b) as related to its approvals for DAPL water crossings. The court concluded that the Corps did engage in NHPA consultation prior to promulgating NWP 12, and the Corps' consultation efforts included efforts to discuss proposed NWP 12 with Standing Rock, but the Tribe "ignored" the Corps' invitations to consult.[6] Moreover, Judge Boasberg noted that NWP 12 includes a consultation requirement "'for activities that have the potential to cause effects to historic properties' prior to those activities' proceeding under the general permit."[7]

Second, the court considered Standing Rock's argument that where the Corps did conduct a Section 106 review, the geographic scope of the analysis was too narrow and should have included the entire pipeline route. The Corps had considered all of the proposed water crossings for DAPL, and made its own determinations whether those crossings had the potential to impact historic properties, using extensive cultural resource survey data assembled by licensed archaeologists. From that review, the Corps concluded that 204 jurisdictional water crossings triggered more detailed review and NHPA Section 106 consultation.[8] According to the Advisory Council on Historic Preservation's NHPA Section 106 implementing regulations, consultations should be "appropriate to the scale of the undertaking and the scope of the federal involvement."[9] The court observed that "the Corps' involvement [here] was limited. It never had the ability, after all, to regulate the entire construction of a pipeline,"[10] and rejected claims that the Corps should have conducted tribal consultation in regard to historic properties at sites remote from a water crossing.

With respect to the crossings requiring PCN and cultural resources analysis, Standing Rock argued that the Corps was required to consult on the impact on cultural resources along the entire pipeline route because the NHPA defines a potential impact as including the indirect effects of the permitted activity on historic properties.[11] The court rejected this contention, citing Corps regulations providing that the scope of the Corps' NHPA obligation requires analysis of only "the federally regulated waterways—the direct effect of the undertaking—and in uplands around the federal regulated waterways—the indirect effect of the undertaking . . . ."[12] The court observed that at least three U.S. Courts of Appeals, the D.C. Circuit, the Eighth Circuit, and the Tenth Circuit, have adopted comparable reasoning in the NEPA context, another "stop, look and listen" statutory scheme.[13]

Third, Standing Rock asserted that the Corps failed to adequately consult with the Tribe even as to areas within the narrow geographic scope of the Corp's regulatory authority. Referring to a lengthy chronological review of the Corps' efforts to consult described in the opinion, the court concluded that the "it appears that the Corps exceeded its NHPA obligations at many of the PCN sites" and observed that the "Tribe largely refused to engage in consultations."[14]

The district court concluded that the Tribe had not shown that it was likely to succeed on the merits of its claims that the Corps violated the NHPA. The court ruled that injunctive relief was not justified on the record before the court. The case is now pending on appeal in the U.S. Court of Appeals for the District of Columbia.[15]

The United States' Tribal Consultation Policy Announcement: Government-to-Government Discussions Between Native Nations and the Federal Government: On September 9, 2016, the same day Judge Boasberg issued his *Standing Rock* opinion, the Departments of the Army, Justice, and Interior issued a "Joint Statement" regarding the litigation and the district court's decision and analysis.[16] (So, who says the federal government cannot act quickly?) The Joint Statement indicated an intention to take the following two steps. First, despite the district court opinion, the Department of the Army "will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act or other federal laws." This action, following issuance of Corps approvals and substantial Dakota Access reliance upon them, raises the specter that the agency may say "never mind" after authorizing a project to proceed, leaving not just Dakota Access, but the regulated community in general, in a state of uncertainty as to whether or when they may safely proceed to build their permitted infrastructure.

Second, the Joint Statement stated the Departments would initiate a "serious discussion on whether there should be nationwide reform with respect to considering tribes' views on these types of infrastructure projects." The Departments have invited tribes to government-to-government consultation sessions to consider potential improvements to the federal government's consultation obligations "to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights." As suggested above, we believe this review, depending on how it proceeds, has the potential to benefit tribal interests and other stakeholders. Clarity and specificity in statutes, regulations, and policy documents providing a balanced, efficient process would help agency officials understand their obligations and would provide certainty to tribes, project proponents, states and their historic preservation officers, and other interested groups. We support the government-to-government consultation, and trust that the views of all stakeholders will be included as the discussions proceed.

Since September 9, the departments scheduled several consultations or listening sessions during which tribal leaders are invited to provide input concerning their experiences with tribal consultation and their ideas about how to improve the process. The departments prepared a "Framing Paper" to help focus the listening sessions.[17] The Framing Paper seeks to focus the listening sessions, to gather input on how to ensure meaningful tribal input to infrastructure-related projects triggering federal review, and "to protect Tribal lands, resources, and treaty rights." Further, the Framing Paper seeks input on:

Where and when does the current framework present barriers to meaningful consultation? What changes to the

current framework would promote these goals? This category of questions includes potential change to regulations, policies, and procedures, as well as statutory changes that would increase timely and meaningful consultation.

We hope that these listening sessions will lead to recognition that effective consultation ultimately must include important stakeholders in infrastructure and other projects, such as the project proponent for an easy example. In our experience, project proponents recognize the importance of, and benefits from, consultation with stakeholders, including Native American tribes who have a cultural affinity with particular lands.

We note that one motivation behind the federal government's initiative to review its consultation obligations may arise from the relatively limited geographic scope of the Corps' consultation obligation in comparison to how other federal agencies seek to comply with NHPA Section 106 consultation obligations.[18] As the new initiative to reconsider tribal consultation obligations is ongoing as we go to print, however, we reserve further comment. That said, we observe that the myriad federal government consultation obligations have created a great deal of consternation in the regulated communities whose projects are subject to federal-tribal and broader consultation obligations. Those obligations are not well defined and consequently create uncertainty for everyone. For example, agency officials and project proponents alike often struggle with exactly how much consultation is enough to comply with the "reasonable and good faith" obligation to identify historic properties required by NHPA Section 106 implementing regulations. Thus, there may be potential benefits for all in a refinement of those federal consultation obligations.[19]

Secretarial Order No. 3342: Opportunities for Cooperative and Collaborative Partnerships with Native American Groups: On October 21, 2016, U.S. Department of the Interior (DOI) Secretary Sally Jewell issued Order No. 3342, titled "Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian tribes in the Management of Federal Lands and Resources" (Order).[20] The Order identifies a number of existing collaborative partnerships between federal agencies and various tribes, and "encourage[s]" cooperative management agreements between DOI land and resource managers and tribes. The Order distinguishes these arrangements from "co-management," which the Order defines as "situations where there is a specific legal basis that requires delegation of some aspect of Federal decision-making or that makes co-management otherwise legally necessary."[21] In other words, the Order promotes voluntary cooperation or collaboration. As a practical matter and in large measure, the Order appears to acknowledge existing practices and simply announces that DOI is open to more of these arrangements in the future. Time will tell what impact this Order may have on public land management planning and practices.

Implications and Why We Care: While we retain reservations about the Agencies' decision to reconsider the judicially supported *Dakota Access* decision, the focus on high quality and meaningful tribal consultation provides an opportunity for the federal government, working with all stakeholders, to improve these processes, promote greater understanding between tribes, federal agencies, project proponents, states and others, and provide certainty and reduced risk for all concerned.

For more information, please contact Walter E. Stern.

---

[1] *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534, 2016 U.S. Dist. LEXIS 121997 Memorandum Opinion, p. 12 (Sept. 9, 2016) (U.S. District Court for the District of Columbia denied Standing Rock's Motion for Preliminary Injunction) ("Memo Op.").

[2] *See generally* 36 C.F.R. Part 800.

[3] *See* Memo. Op. at 29.

[4] *Id.* at 15-33.

[5] *See id.* at 48-49.

[6] *See id.* at 40-41.

[7] *Id.* at 41, (quoting Corps' Nationwide Permit 12 Decision Document).

[8] *Id.* at 44.

[9] 36 C.F.R. § 800.4, *quoted in* Memo Op. at 42.

[10] Memo Op. at 42. The authors understand that this is a key concern of Native American groups. In some cases and as to some federal agencies, a limited federal approval can "federalize" an entire project, under a concept known as "small handles," where even a modest federal approval, permit, or license can trigger consultation encompassing all lands, public and private, that may be impacted not just by the specific subject or scope of the federal involvement, but for the complete project.

[11] *Id.* at 45.

[12] *Id.* at 45-46, (citing 33 C.F.R. Part 325, App. C, § 1(g)(i)).

[13] *Id.* at 46.

[14] *Id.* at 48.

[15] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Case No. 1:16-cv-01534-JEB.

[16] The Joint Statement is located here. We are unaware of any statements by the president-elect with respect to this announcement, but expect this official position may not be long-lived.

[17] The September 23, 2016 letter and framing paper is found here. We understand that transcripts from the listening session are to be posted on that site as well.

[18] The Framing Paper specifically refers to the circumstances where a "federal agency may only have authority to address a specific aspect of a larger infrastructure project (e.g., approving a right-of-way or a dredge-and-fill permit)." The Framing Paper seeks tribal input on these circumstances.

[19] The Advisory Council on Historic Preservation, which has promulgated regulations to implement NHPA Section 106 at 36 C.F.R. Part 800, has guidance concerning the "reasonable and good faith" standard, *see* website. We suggest that the guidance leaves many questions unanswered concerning how an agency is to comply when it comes to seeking engagement and consultation with Native American groups, particularly when those groups do not respond to or ignore agency inquiries.

[20] The Order is located here.

[21] *See* Order p. 4.

The ADEA Does Not Abrogate Tribal Sovereign Immunity: Eleventh Circuit Confirms Recent Trend

Introduction: It is well established that Title VII of the Civil Rights Act does not apply to Tribal Nations. The Act specifically states that the term employer does not include "an Indian tribe . . . ."[1] Whether the Age Discrimination in Employment Act (ADEA)[2] applies to tribes, however, is less established. In *Williams v. Poarch Band of Creek Indians*,[3] the United States Court of Appeals for the Eleventh Circuit recently held that, regardless of whether tribes can be held subject to the ADEA as a statute of general applicability, Congress did not waive tribal sovereign immunity under the Act. Thus, a plaintiff may not sue a tribe under the ADEA.

Procedural Background: The plaintiff, an employee of the Poarch Band of Creek Indians Health Department ("Plaintiff"), filed a complaint in the United States District Court for the Southern District of Alabama, alleging that she was discriminated against in violation of the ADEA.[4] The Poarch Band of Creek Indians moved to dismiss the claim for lack of subject matter jurisdiction, based on tribal sovereign immunity. The district court granted the dismissal and Plaintiff appealed the decision to the Eleventh Circuit.

Argument on Appeal: Plaintiff relied on a statutory construction argument, arguing that the difference in textual language between the ADEA and Title VII—after which the court acknowledged the ADEA appears to be patterned—indicates Congress' intent to abrogate tribal sovereign immunity by the ADEA.[5] Specifically, the original text of Title VII stated that the term "employer" does not include "an Indian tribe, or a State or political subdivision thereof." Although the text of the ADEA uses similar language in its description of "employer," it does not specifically mention tribes. Plaintiff argued that, because Congress did not explicitly exclude tribal nations, the court should conclude that Congress intended to abrogate tribal sovereign immunity from actions under the ADEA.[6]

The Eleventh Circuit's Decision: The Eleventh Circuit

rejected Plaintiff's argument. In holding that the ADEA does not abrogate tribal sovereign immunity, the Eleventh Circuit stated that no such intent can be drawn from a lack of reference to Indian tribes in the statute. The court stated that this was far from the "clarion call of clarity" that it has previously required to show an abrogation of tribal sovereign immunity, further stating that "[a]mbiguity is the enemy of abrogation." [7] The court clarified that, although tribes may be subject to a statute of general applicability, this does not automatically provide a right to sue the tribe for a violation of the statute: "The difference between being subjected to the requirement of a statute and the right to commence a suit demanding compliance with (or damages for violations of) that same statute may be razor-thin, but it is a distinction that has been acknowledged consistently." [8] The court also concluded that its holding is aligned with other jurisdictions, including the Tenth, Second, and Eighth Circuits.[9]

Takeaways: The affirmation of the district court's dismissal shows a continued preference towards tribal sovereign immunity, absent very clear wording by Congress or a waiver by the tribe. This reluctance to agree with arguments that attempt to evade the defense of sovereign immunity is consistent with recent decisions in other jurisdictions.[10] While a Tribal Nation may be subject to a statute of general applicability, such as the ADEA, a right to sue under that statute needs to be directly stated. It is possible that, even if a statute explicitly states that it applies to tribes, without a clear intent by Congress to abrogate sovereign immunity, the right to sue a tribe under that same statute may still be unavailable.

For more information, please contact Brian Nichols or Robin James.

---

[1] Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b).

[2] The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634.

[3] No. 15-13552, 2016 U.S. App. Lexis 18717 (11th Cir. Oct. 18, 2016).

[4] *Id.* at *1-2.

[5] *Id.* at *14-19.

[6] *Id.*

[7] *Id.* at *24.

[8] *Id.* at *27-30.

[9] *Id.* at *31-33.

[10] *See Recent Cases Confirm Sovereign Immunity*, Native American Law Watch, Summer 2016, at 6, *available* here.

OF NOTE

Can a State Sell Pueblo Lands in a Tax Sale? Pueblo of Acoma Files Suit Challenging New Mexico's Attempt: The Pueblo of Acoma (Acoma) purchased two tracts of land in Cibola County, New Mexico, and owns the property in fee simple title. On September 28, 2016, the New Mexico Taxation and Revenue Department (NMTRD) sent Acoma a notice of sale of the property for failure to pay property taxes. Acoma filed suit in the Federal District Court for the District of New Mexico on October 12, 2016, seeking a declaratory judgment that Acoma's sovereign immunity barred the State from valuing, assessing, taxing, and enforcing the tax on Acoma's property and that federal law preempts the State's efforts to tax Acoma's property, a temporary restraining order, and preliminary and permanent injunctive relief. No. 1:16-cv-01132-NCH-SCY. To date, the court has not held a hearing on the motion for a temporary restraining order. We will be following this case for its implication on a State's authority to tax land owned in fee by a Pueblo or Tribe and sell such land at tax sale.

Final Rule Issued Treating Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act: The Environmental Protection Agency issued a final rule, which will be published in 40 C.F.R. Part 130,

allowing tribes to be treated in a similar manner as States (TAS) for purposes of Section 303(d) of the Clean Water Act. Tribes that apply for and obtain TAS will have increased authority over waters resources of their reservation. Specifically, under Section 303(d) TAS, Tribes will be able to identify impaired waters on their reservations and have increased authority over attaining and maintaining water quality standards. Tribes are already able to attain TAS status to administer Clean Water Act section 303(c). *See* 81 Fed. Reg. 65901 (Sept. 26, 2016).

Supreme Court Grants Certiorari in *Lewis v. Clarke*: Certiorari was granted in *Lewis v. Clarke* on the question of "whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." No. 15-1500. The Supreme Court of Connecticut ruled that the defendant, an employee of the Mohegan Tribal Gaming Authority, was entitled to tribal sovereign immunity from suit for an automobile accident that occurred while the defendant was acting within the scope of his employment. The petition for certiorari identified a split of authority between Circuit Courts of Appeal and some state courts as to whether an action can proceed against tribal employees over claims as to which the tribe has sovereign immunity from suit. The Supreme Court will review that question this term. Oral argument has not been scheduled.

Notes From a Recent Government-to-Government Listening Session: In the first article in this edition of the Watch, we discussed the listening sessions scheduled by the federal government to discuss its consultation obligations. The listening or government-to-government consultation sessions have drawn strong attendance from tribal leaders from across the country. Among the comments presented in these sessions include the following themes or concepts for improving consultation processes, gleaned from the October 27, 2016, Albuquerque, New Mexico session:

- "Check the box" consultation is ineffective and unhelpful. Consultations must be timely and substantively meaningful. In our view, this makes good sense and is consistent with our experience in NHPA Section 106 consultations involving project proposed by the private sector.

- Tribes seek consultation that includes face-to-face meetings with agency officials who have authority, not lower level functionaries. We agree that timely, face-to-face meetings are important and that participants should include decision-makers where possible. Such meetings provide the best opportunity to build trust and understanding between the relevant stakeholders.

- Federal agency officials should respect tribal sovereignty. Where tribes have concerns or objections, those objections should be honored. Some tribal leaders have stated, although not necessarily using the term, that they should have veto power over projects. Those comments, however, have not necessarily sought to distinguish whether such veto power should be available for both on- and off-reservation projects. Giving tribes veto power for any off-reservation projects would potential risk the denial of any project on lands in which any Indian tribe assert a cultural affinity.

- The Army Corps of Engineers should expand the geographic scope of its reviews beyond the lands immediately adjacent to waters of the United States.