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Articles:

- The Congressional Review Act: Regulations on the Chopping Block
- Wind River Reservation Held Diminished: EPA's Contrary Determination Set Aside Despite Reliance on Solicitor Opinion
- Dakota Access Pipeline Project Update
- The Demise of Deference? Chevron's and Auer's Uncertain Future
- Tule Wind Farm Passes NEPA Test, Again

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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 50 Tribes in over 20 states. Our Practice Group combines exceptional knowledge of core federal Indian and Native American law principles and recent developments, experience in federal, state, and tribal courts, 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 Congressional Review Act: Regulations on the Chopping Block

Since it was enacted, the Small Business Regulatory Enforcement Act of 1996, better known as the Congressional Review Act,[1] has been rarely used and certainly has not been the topic of headlines or water-cooler conversations. That has changed of late, however, and the CRA is now being used as a tool of the Republican-controlled Congress to revoke regulations passed in the final months of the Obama administration. A number of regulations finalized in the latter half of 2016, including some that affect Native American lands, have been repealed by the President's signature or are the subject of a resolution of disapproval in one or both houses of Congress.

The CRA: The CRA requires agencies to submit final regulations and a cost-benefit analysis to Congress and the Comptroller General, and, significantly, allows Congress to adopt a joint resolution disapproving the regulations within a certain period of time. If the joint resolution is signed by the President, the regulation will be nullified. The time within which Congress may use the CRA to nullify regulations depends on whether the regulation is a "major" rule, one that likely will have an effect on the economy of $100 million or more per year, or a major increase in costs, or "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets."[2] For major rules, submission to Congress occurs before publication, and Congress has 60 days to consider the rules. For other rules, which are not effective until 30 days after publication in the Federal Register, Congress must be provided notice of publication and may consider nullification of the rule during that 30-day period. Given the method for counting Congressional days, this means rules submitted to Congress on or after June 13, 2016, may be subject to review and nullification by Congress.

Rules Repealed under the CRA: Before 2017, the CRA had been successfully used only once by Congress under President George W. Bush to reject an Occupational Health and Safety Administration rule on ergonomic standards promulgated under President Clinton.[3] A recent review of the House Rules Committee's legislation page, however, indicates 14 rules already have been disapproved by the House.[4] Three disapprovals have been passed by both houses and signed by the President, meaning the regulations have been repealed under the CRA: (1) the Securities and Exchange Commission's major rule promulgated under the Dodd-Frank Act requiring resource extraction companies "to include in an annual report information relating to any payment made . . . to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals";[5] (2) the Department of the Interior's Office of Surface Mining Reclamation and Enforcement's "Stream Protection Rule" requiring that permits issued to coal mines require permittees to identify impacts of discharges on ground and surface water, land, and threated or endangered species, make changes to data collection and monitoring practices, and use the best available technology;[6] and (3) the Social Security Administration's reporting to the National Instant Criminal History Background Check System of certain individuals with mental impairments, which would result in their inability to purchase or possess firearms.[7] Of these now former rules, only the Stream Protection Rule would have applied to Native American lands and waters, because the Surface Mining Control and Reclamation Act is administered by the Office of Surface Mining Reclamation and Enforcement when a coal mine is situated on Native American lands.

Rules Targeted for Repeal: Approximately 30 resolutions in total have been introduced in either the House or the Senate to repeal rules, and at least six target regulations that would apply on Native American lands.[8] One rule that the House has disapproved that expressly applies to Native American lands is the Bureau of Land Management's (BLM) rule on venting and flaring during oil and natural gas production on federal and Indian (other than the Osage Tribe) leases (the Venting and Flaring Rule), which updated regulations that had been in place for over 30 years.[9] The Venting and Flaring Rule purported to end the waste of gas that could be captured, resulting in increased royalties to federal, state, and tribal lessors, less air pollution, and decrease impact of oil and gas production on climate change. The Venting and Flaring Rule had been drafted after consultation with tribal governments and other stakeholders. The Rule's preamble noted that the Environmental Protection Agency (EPA) and some tribes had overlapping requirements, and specifically provided for operators to obtain a variance if state, local, or tribal requirements were equally or more effective than the BLM's Venting and Flaring Rule. The repeal by Congress of the Venting and Flaring Rule will not affect the requirement that oil and gas producers continue to comply with other applicable laws. The House resolution disapproving this rule is now before the Senate. It is unclear whether this proposed rule will actually help public land lessors, as proposed. The Oil and Gas Industry has criticized the rule, indicating that it will delay development and cause marginally producing oil and gas wells to be prematurely shut-in. These impacts would also affect energy companies owned and operated by Native American Nations or Native American owned entities.

Two other regulations that would impact mineral leases on Native American land have been identified by the House for disapproval. The Department of the Interior Office of Natural Resources Revenue's rule governing valuation for onshore federal oil and gas leases and federal and Indian coal leases had a goal, among others, of ensuring Native American lessees receive "maximum revenues" for coal leases, although the rule itself effected little change to the provisions specifically targeted toward governing Indian leases, and found no cost was imposed by those provisions.[10] Also targeted is the BLM's rules governing oil and gas site security and measuring, reporting, and accounting for oil and natural gas leases on Native American (except Osage Tribe) land, replacing Onshore Orders 3 and 5 and certain state-specific notices to lessees and operators.[11] These rules have also been highly criticized by members of the oil and gas industry because each rule would require significant amounts of new equipment and technologies to be installed on both federal and Indian leases. Industry indicates that, if imposed, these rules will disincentivize the drilling of oil and gas wells which could ultimately reduce the amount of royalties received by Native American Nations and the federal government. In contrast, advocates for these new rules state that updated requirements are needed and, in some cases, support increased restrictions being imposed on Industry. If the resolutions repealing these regulations are signed into law, Onshore Orders 3 and 5 will remain in place.

An EPA rule governing accidental releases under the Clean Air Act has been targeted for repeal. The repeal of this rule would affect approximately 260 facilities located on Native American lands that are required to submit risk management plans under the Clean Air Act.[12] Also a candidate for disapproval is EPA's rule on cross-state air pollution standards under the 2008 ozone National Ambient Air Quality Standards, which apply to electric generating units on tribal lands, although none were to be affected by implementation of the rule.[13] Additionally, the United States Fish and Wildlife Service's Endangered Species Act Compensatory Mitigation Policy for endangered and threatened wildlife and plants, which may

affect Native American lands, is the subject of a House resolution of disapproval.[14]

Take-Away: While structural restrictions within the CRA should limit the number of Obama-era regulations that can be repealed, the complex method of counting Legislative days means Congress' review of major rules will continue in the coming months, and we expect to see more resolutions disapproving regulations presented to the President for signature. While we are not aware of any Bureau of Indian Affairs regulations being targeted under the CRA at this time, we expect other regulations that have an effect on Native American lands to be repealed prior to enactment. Not surprisingly for 2017, there is a Twitter account dedicated to monitoring Congressional resolutions introduced under the CRA.[15]

For more information, please contact Sarah Stevenson or Jennifer Bradfute.

[1] 5 U.S.C. §§ 801-808.
[2] 5 U.S.C. § 804(2)(c).
[3] Pub. L. 107-5 (March 20, 2001).
[4] *See* rules.house.gov (last visited March 1, 2017). The George Washington University Columbia College of Arts & Sciences' Regulatory Studies Center's website on federal regulations has a very helpful "CRA Tracker." *See* https://regulatorystudies.columbian.gwu.edu/reg-stats.
[5] Disclosure of Payments by Resource Extraction Issuers, published July 27, 2016, 81 Fed. Reg. 49359. Repealed by Pub. L. 115-4 (Feb. 14, 2017).
[6] Stream Protection Rule, published December 20, 2016, 81 Fed. Reg. 93066. Repealed by Pub. L. 115-5 (Feb. 16, 2017).
[7] Implementation of the NICS Improvement Amendment Act of 2007, published December 19, 2016, 81 Fed. Reg. 91702. Repealed by Pub. L. 115-8 (Feb. 28, 2017).
[8] As of March 1, 2017.
[9] Waste Prevention, Production Subject to Royalties, and Resource Conservation, published November 18, 2016, 81 Fed. Reg. 83008. House Joint Resolution 36 introduced February 3, 2017.
[10] Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, published July 1, 2016, 81 Fed. Reg. 43337. House Joint Resolution 71 introduced February 13, 2017.
[11] Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Site Security, published November 17, 2016, 81 Fed Reg. 81356. House Joint Resolution 56, introduced February 1, 2017; Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Measurement of Gas, published November 17, 2016, 81 Fed. Reg. 81516. House Joint Resolution 82 introduced February 16, 2017.
[12] Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, published January 13, 2017, 82 Fed. Reg. 4594. House Joint Resolution 59 introduced February 1, 2017.
[13] Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, published October 26, 2016, 81 Fed. Reg. 74504. Senate Joint Resolution 21 introduced February 3, 2017.
[14] Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, published December 27, 2016, 81 Fed. Reg. 95316. House Joint Resolution 60 introduced February 2, 2017.
[15] @EyeonCRA, provided by the Pillsbury Law Firm.

Wind River Reservation Held Diminished: EPA's Contrary Determination Set Aside Despite EPA Reliance on Solicitor Opinion

On February 22, 2017, the Tenth Circuit Court of Appeals issued a decision finding that the Wind River Reservation in Wyoming, established by, as relevant here, an 1896 treaty, was diminished by a 1905 Act of Congress in which the Eastern Shoshone and Northern Arapahoe Tribes (Tribes) which share the Reservation agreed to cede certain of their lands.[1] The appeal came to the Tenth Circuit because the United States Environmental Protection Agency (EPA) had determined, in 2011, that the Tribes qualified to administer certain non-regulatory provisions of the Clean Air Act (CAA) on the Reservation.[2] As part of the CAA application process, the Tribes were required to demonstrate jurisdiction, and the Tribes asserted jurisdiction over most of the land within the original 1868 boundaries of the Wind River Reservation.

In response to the Tribes' application, Wyoming and others submitted comments to the EPA arguing that the Reservation had been diminished by the 1905 Act and, as a result, some of the land identified in the Tribes' application was no longer under their jurisdiction. EPA disagreed, concluding that the Reservation had not been diminished, and granted the Tribes' application. EPA relied, in part, on a Department of the Interior legal opinion concluding that the 1905 Act did not change the 1868 Reservation boundaries. Wyoming and the Wyoming Farm Bureau appealed to the Tenth Circuit.[3]

The Tenth Circuit relied on "well-settled approach described in *Solem* [*v. Bartlett*]"[4] to analyze whether a subsequent congressional act, the 1905 Act, diminished the Reservation's 1868 boundaries. The *Solem* approach is

a three-step analytical framework. First, a court looks to the text of the statute that is purported to diminish or disestablish a reservation here, the 1905 Act. Second, a court examines the circumstances surrounding the passage of the relevant statute. Finally, the court looks, to a lesser extent, at "the subsequent treatment of the area in question and the pattern of settlement."[5]

Language of the 1905 Act: The operative language of the 1905 Act provided that the Tribes, "for the consideration hereinafter named, do hereby *cede, grant, and relinquish to the United States, all right, title and interest* which they may have"[6] to the land at issue. The language of the 1905 Act, according to the Tenth Circuit, "is nearly identical to the statutory language in cases where the Supreme Court has found a congressional purpose to diminishing a reservation."[7]

Historical Context of the 1905 Act: The Tenth Circuit held that the circumstances surrounding the enactment of the 1905 Act confirmed Congress' intent to diminish the Wind River Reservation. During the negotiations with the Tribes, the then-United States. Indian Inspector stated that the boundaries of the reservation would change and cession of the lands to the United States would leave a "*diminished reservation*."[8] Statements made by tribal representatives during the negotiations reflected the Tribes' understanding that the Reservation would be diminished. The Court noted that the legislative history and negotiations leading to the 1905 Act's passage evidenced Congress' intent to sever part of the original reservation and exclude it from the continuing reservation.

Subsequent Treatment of the Area: The Court first noted that the parties had supplied volumes of materials supporting their respective positions from which the Court was "unable to discern clear congressional intent."[9] The Court thus found, consistent with *Solem*, the materials regarding subsequent treatment of the area had "little evidentiary value."[10] The Court nevertheless reviewed the most germane material and concluded that it supported a finding of diminishment.

Judge Lucero's Dissent: Judge Lucero dissented from the majority opinion, primarily based on his reading of the 1905 Act, which, as the majority conceded contains no language providing for a sum certain payment to the Tribes, nor did it contain language restoring the lands to the public domain. Rather than providing for sum certain payment, the 1905 Act provided that the United States would act as the Tribes' trustee and pay to the Tribes the proceeds received from the sale of the ceded lands. According to Judge Lucero, the majority's reliance on cases that analyzed acts containing "sum certain" language was misplaced. Judge Lucero analogized the 1905 Act to language at issue in *Ash Sheep Co. v. United States*,[11] a 1920 Supreme Court decision in which the Supreme Court held that the release of the possessory interest in the tribes' land did not diminish the tribes' reservation, and those lands remained Indian lands because the benefits of those lands belonged to the Indians until the lands were sold. Judge Lucero analyzed the 1905 Act as not diminishing the Reservation, but simply providing for the sale and opening of lands. Judge Lucero found the historical context of the 1905 Act to be mixed regarding Congress' intent and insufficient to overcome what he considered ambiguous language in the 1905 Act.

Take-Away: *Wind River* demonstrates that the era in which reservation diminishment issues may arise is not over. It is interesting, however, that the Tenth Circuit did not defer to the Department of the Interior Solicitor's legal opinion concluding that the 1905 Act did not diminish the Reservation boundaries, given that such a legal opinion would be within the Department of the Interior's expertise. The Tenth Circuit cites the Solicitor's opinion in several places in the *Wind River* decision, but only

discusses the opinion's conclusions with respect to the Solicitor's findings under the third prong, subsequent treatment of the area. The Solicitor opinion concluded that evidence after 1905 "indicates some inconsistent treatment of the 1905 area." The Solicitor opinion also concluded that the maps referencing the ceded lands as "open lands" were "ambiguous and inconsistent at best." The Tenth Circuit ultimately concluded that the evidence of the subsequent treatment of the land neither bolstered nor undermined the Court's diminishment decision. The Tenth Circuit also did not defer to the EPA, which is not entirely surprising, given that the EPA has no special expertise in ascertaining whether a reservation has been diminished.

For more information, contact Deana Bennett.

[1] *Wyoming v. Envtl. Prot. Agency,* Nos. 14-9512 & 9514, 2017 U.S. App. LEXIS 3120 (Feb. 22. 2017).
[2] In 1990, Congress amended the Clean Air Act to allow the EPA to treat tribes as states for purposes of the Act. This authority is known as "treatment as state" status or TAS.
[3] *See* 42 U.S.C. § 7607(b)(1).
[4] 465 U.S. 463 (1984).
[5] *Wyoming*, No. 14-9512, at *12 (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998)).
[6] *Id.* at *13 (emphasis in original) (quoting 1905 Act, 33 Stat. at 1016).
[7] *Id.* at *14.
[8] *Id.* at *27 (emphasis in original).
[9] *Id.* at *34.
[10] *Id.*
[11] *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920).

Dakota Access Pipeline Project Update

The Dakota Access Pipeline (DAPL) project continues to be the subject of extensive news coverage and ongoing controversy. Last quarter's Watch discussed U.S. District Judge Boasberg's memorandum opinion denying the Standing Rock Sioux Tribe's Motion for Preliminary Injunction, which was immediately followed by the joint decision by the Departments of the Army, Justice, and Interior to administratively halt portions of the DAPL project, to require additional consultation with the Standing Rock Sioux Tribe, and to require the Army Corps of Engineers' (Corps) preparation of an environmental impact statement before proceeding with any further decision to authorize pipeline construction of the last segment of the line under Lake Oahe in the Dakotas. We provide here a brief summary of events that have occurred since our last report.

- **Executive Branch Update:**
  - On December 4, 2016, Department of the Interior Solicitor Hilary Tompkins issued Solicitor's Opinion No. M-37038 titled, "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline," in which the Solicitor discussed the extent of the Treaty rights of the Standing Rock and Cheyenne River Sioux Tribes, including federally reserved water rights and off-Reservation hunting and fishing rights. The Solicitor expressed the opinion, among others, that the Corps consider impacts of DAPL permitting decisions on these treaty rights.
  - In mid-January 2017, immediately prior to President Trump's inauguration, the Departments of the Interior, Army and Justice issued their joint report, "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions," which reported on the nationwide government-to-government listening sessions and consultations that the Departments held in an effort to understand the perspectives of Native American leaders regarding existing federal consultation processes, programs and obligations.
  - On January 18, 2017, the Corps published a Notice of Intent to Prepare an Environmental Impact Statement (EIS) in the Federal Register. *See* 82 Fed. Reg. 5,543 (Jan. 18, 2017).

- On January 24, 2017, President Trump issued a "Presidential Memorandum" to the Secretary of the Army directing the Secretary to "take all actions necessary and appropriate" to review and issue any federal approvals necessary for DAPL to proceed. While the January 24, 2017 Memorandum did not specifically order the Corps to halt the preparation of the EIS, it did order the Secretary and the Corps to consider withdrawing the Notice of Intent and to consider whether the prior environmental reviews that were undertaken satisfy the requirements of the National Environmental Policy Act (NEPA) and other federal laws, including the Endangered Species Act. A presidential memorandum, like an executive order, is binding on the executive branch.
- On January 31, the acting Secretary of the Army instructed the Corps to grant the necessary easement to DAPL.
- On February 7, 2017, the Department of the Army provided a notice of intent to approve the easement and provided notice that it was terminating the environmental review process.

- **Judicial Challenges:**
  - As we previously reported, the Standing Rock Sioux Tribe filed a complaint in federal court seeking to halt the DAPL project.[1] Since our last report:
    - On January 25, 2017, the day after President Trump issued his memorandum, discussed above, the Cheyenne River Sioux Tribe moved for both a temporary restraining order and a preliminary injunction on grounds that oil flowing through DAPL under Lake Oahe would violate the Tribe's rights under the Religious Freedom Restoration Act (RFRA). This was the first time the Tribe raised a religious exercise claim under RFRA, although the Tribe previously had expressed that water was sacred and of religious and cultural importance – in the context of National Historic Preservation Act (NHPA) consultations and in previous pleadings.
    - On February 14, 2017, focusing on the fact that there was no current plan to flow oil through the line, Judge Boasberg denied the Cheyenne River Sioux Tribe's motion for a temporary restraining order based on RFRA.
    - On Tuesday, February 15, 2017, the Standing Rock Sioux Tribe moved for partial summary judgment on its claims that the Corps violated NEPA by granting Dakota Access the easement and terminating the EIS process.
    - On February 22, 2017, the Cheyenne River Sioux Tribe filed a motion for partial summary judgment on failure to consult, violation of trust responsibility, and treaty rights grounds, among others.
    - On February 28, 2017, members of several Sioux tribes filed a motion to intervene in the Standing Rock Sioux Tribe's challenge to the DAPL project, including in their intervention papers claims that President Trump acted beyond his lawful authority in advancing the project and alleging that he has or recently had stock in the parent company of Dakota Access, LLC.
    - On March 7, 2017, the federal court denied the Cheyenne River Sioux Tribe's request for a preliminary injunction based on the Tribe's recent assertion that construction of DAPL underneath Lake Oahe interferes with the Tribe's right to exercise religion under RFRA. Generally, the court found (a) the assertions lacked merit or that the Tribe had not shown a likelihood of success on the merits and (b) the January, 2017 request for injunctive relief based on a RFRA claim was raised too late given that the Tribe learned of the proposed DAPL routing in October 2014 and that

the Corps had issued certain authorizations for the line in July 2016.

- Additional challenges to the DAPL project are occurring in other judicial venues.
  - On February 11, 2017, the Oglala Sioux Tribe filed suit against the Corps, in the United States District Court for the District of Columbia seeking declaratory and injunctive relief to stop construction of DAPL until the Corps completes an EIS.
  - On February 16, 2017, an Iowa state court judge ruled against several landowners and the Sierra Club, affirming the Iowa Utilities Board's grant of a permit to Dakota Access LLC, which included the right to condemn an easement over the landowners' properties.
  - A challenge to the project is pending before the North Dakota Public Service Commission regarding compliance with a Commission order governing discovery of cultural sites during construction. On January 31, 2017, the Commission denied Dakota Access' motion to dismiss the complaint filed by Commission staff.

- **Economic Pressure:**
  - The Seattle, Washington City Council voted to divest $3 billion of the city's funds from Wells Fargo Bank, one of DAPL's lenders.
  - Similarly, the Davis, California City Council voted to divest $125 million from Wells Fargo. The cities of Santa Monica and San Francisco, California have taken steps to divest from banks that finance DAPL. Citizens of Los Angeles have called upon the city council to divest from Wells Fargo.
  - Mayor Bill de Blasio of New York City sent a letter to 17 banks asking the banks to withdraw their financing of the project, citing the rights of the Standing Rock Sioux and impacts to the banks' "reputations."
- **Other Developments**
  - On December 2, 2016, the Standing Rock, Cheyenne River, and Yankton Sioux Tribes requested the Inter-American Commission on Human Rights to "call on the United States to adopt precautionary measures to prevent irreparable harm to the Tribes . . . from the ongoing and imminent construction of" DAPL and stop "harassment and violence being perpetrated against people gathered in prayer and protest in opposition to DAPL."[2]

For more information, please contact Walter E. Stern.

[1] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534 (D.D.C.).
[2] Available here.

The Demise of Deference? *Chevron*'s and *Auer*'s Uncertain Future

Introduction: President Trump's recent executive orders and ongoing commitment to regulatory reform are finding complimentary provisions in the form of a number of bills being considered in Congress. One of those bills, the Regulatory Accountability Act of 2017,[1] includes a provision that seeks to repeal both the *Chevron*[2] and *Auer*[3] doctrines, established by the United States Supreme Court in 1984 and 1997, respectively. The doctrines establish the deference due to an agency, either when it is interpreting its organic statute or when it is interpreting its implementing regulations. The doctrine has an enhanced role in Indian country because of the central responsibilities of federal agencies in Indian country.

Background: The Supreme Court in *Chevron* established what is referred to as the "*Chevron* Two-Step" test. Pursuant to this test, a federal court reviewing an agency's interpretation of a statute will first determine if

Congress has addressed the precise question at issue, and if so, then the reviewing court must give effect to that intent.[4] If not, then the reviewing court must defer to the agency's interpretation of the statute so long as that interpretation is reasonable.[5] This concept, commonly known as *Chevron* deference, instructs courts to defer to an agency's reasonable interpretations of statutes it administers that are silent or ambiguous on a specific issue. Similar to *Chevron* deference, under the *Auer* doctrine, if an agency's regulations are ambiguous, courts will defer to the agency's interpretation of its own regulations, even if the agency's own view of the regulation has changed over time and the interpretation in question has never been subject to notice-and-comment or other regulatory procedures.[6]

Both doctrines have critics and supporters. Critics largely argue that these deference principles operate in tension with the Constitution's separation of powers mandate, because the concept of deference combines law-drafting and law-exposition in administrative agencies. Defenders of the doctrines stress that administrative agencies are experts and are in the best position to interpret the laws that they apply and interpret.

Deference's Demise: With the introduction of the Regulatory Accountability Act of 2017, Congress has entered the fray. The Regulatory Accountability Act seeks to eliminate these two doctrines by amending, in part, the Administrative Procedure Act, 5 U.S.C. § 706. The proposed legislation inserts a "de novo" review standard for "questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." With respect to ambiguous statutes or gaps in statutory language, the proposed legislation prohibits the court from interpreting the gap or ambiguity "as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law."

Congress targeted the *Chevron* doctrine under the prior administration, but no bills ever made it to President Obama for approval. Since the inauguration of President Trump, many in Congress who support the legislation see a path forward. On January 11, 2017, the United States House of Representatives passed the Regulatory Accountability Act of 2017 by a vote of 238-183. The proposed Regulatory Accountability Act of 2017 was received in the United States Senate and referred to the Committee on Homeland Security and Governmental Affairs on January 12, 2017.

Recently, the Supreme Court declined to reconsider *Auer* deference when it denied the petition for a writ of certiorari in *United Student Aid Funds v. Bible*.[7] However, President Trump's Supreme Court nominee, Judge Neil Gorsuch, has previously expressed interest in reconsidering the *Chevron* doctrine. In a concurring opinion in *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch wrote "the fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."[8] Judge Gorsuch opined on "a world without *Chevron*":

> Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*.[9]

Judge Gorsuch, like the drafters of the Regulatory Accountability Act of 2017, advanced a de novo review standard to avoid agency ability to alter or amend existing law.[10]

Take-Away: The judicial landscape of administrative law could greatly change in the future should Congress pass the proposed Regulatory Accountability Act of 2017 or should the Supreme Court, perhaps with Judge Gorsuch, choose to revise the *Chevron* and *Auer* deference doctrines.

For more information, please contact Christina Sheehan.

[1] H.R. 5, 115th Congress (as passed by House, January 11, 2017).
[2] Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837 (1984).
[3] *Auer v. Robbins*. 519 U.S. 452 (1997).
[4] 467 U.S. at 842-843.
[5] *Id.* at 843-844.
[6] 519 U.S. at 462-463.
[7] 2016 WL 2842875 (May 16, 2016).
[8] 834 F.3d 1142, 1149 (10th Cir. 2016).
[9] *Id.* at 1158.
[10] Id.

Tule Wind Farm Passes NEPA Test, Again

On March 6, 2017, the United States District Court for the Southern District of California rejected a challenge to a wind project in southeastern San Diego County, with known potential impacts to golden eagles.[1] The project consisted of two phases, Phase I which involves Bureau of Land Management (BLM) approval of construction of sixty-five turbines on federal land, and Phase II involves Bureau of Indian Affairs (BIA) approval of construction of twenty turbines on land held in trust from the Ewiiaapaayp Band of Kumeyaay Indians on the ridgelines above the McCain Valley. The March 6 decision involved a challenge to the BIA approval, and the court granted summary judgment in favor of the United States and the project proponent, Tule Wind, LLC (Tule).

Background: In 2011, the BLM issued an environmental impact statement (EIS) for Phase I of the project, The BIA served as a cooperating agency. The 2011 EIS discussed Phase II, including the fact that all, none, or part of Phase II could be authorized pursuant to the BIA's discretion. The EIS stated that the BIA would determine risk to eagles in consultation with required agencies and tribes. The 2011 EIS further stated: "Turbine locations exceeding acceptable risk levels to eagles…were not to be authorized for construction."[2] After 2011, the BIA continued to assess the impacts of Phase II, including the impacts on eagles. Both the United States Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG) sent formal memoranda to the BIA cautioning that Phase II had "a high potential to result in injury or mortality of golden eagles…and the loss of golden eagle breeding territories."[3] Both USWFS and CDFG recommended project modifications to minimize risks to eagles. In its decision authorizing Phase II, the BIA adopted some, but did not agree with or adopt all of USFWS' or CDFG's recommendations

The Protect Our Communities Foundation first challenged the BLM's approval of Phase I as violating NEPA. BLM's approval was upheld by both the district court and the Ninth Circuit Court of Appeals.[4] In 2014, the Protect Our Communities Foundation filed suit against the BIA alleging that the BIA violated National Environmental Policy Act (NEPA), the Eagle Act, and the Migratory Bird Treaty Act (MBTA). Tule, the project proponent, and the Tribe were granted leave to intervene. On March 6, 2017, the court upheld the BIA's NEPA process, including the BIA's decision to rely on the 2011 EIS and the BIA's decision not to prepare a supplemental NEPA document.[5]

The BIA Properly Relied on 2011 EIS: The United States District Court for the Southern District of California

first held that the BIA properly relied on the 2011 EIS. Protect Our Communities, while acknowledging that the BIA was a cooperating agency in the 2011 EIS, nevertheless argued that the BIA's exclusive reliance on that EIS was improper because it included specific mitigation measures with which the BIA did not comply and because it allegedly did not consider a reasonable range of alternatives for the Phase II portion of the project. Protect Our Communities argued that the BIA was absolutely prevented from approving Phase II by the other agencies' risk classification with respect to eagles. The court, however, found that BIA, as the appropriate land management agency for the portion of the project on tribal lands, properly exercised its discretion in concluding that the risk to golden eagles was not significant in light of mitigation measures "and that any remaining risk was acceptable in light of the countervailing benefits flowing from approving the lease."[6] The court further concluded that the 2011 EIS only required the BIA to consult with FWS and CDFG and consider their comments, which the record reflected that the BIA did.

The court also upheld the range of alternatives that the BIA considered. First, the court rejected the argument that BLM never intended the EIS to be a "hard look" at both phases, based on the language of the EIS. The court next rejected the argument that the alternatives analysis was flawed because it considered only two alternatives, the no-build alternative and the 18-turbine alternative. Relying on *Department of Public Transportation v. Public Citizen*,[7] the court first noted that the range of alternatives argument was "almost certainly precluded" because no plaintiff objected to a lack of mid-range alternatives until the lawsuit. The court held, however, that even if not waived, the 2011 EIS provided "guideposts as to the spectrum in which the BIA was to work," including approval of all, none, or part of Phase II.[8]

The BIA Was Not Obligated to Prepare a Supplemental NEPA Document: The court rejected Protect Our Communities' argument that the BIA was required to supplement the EIS based on post-2011 data and substantial changes in the project design. With respect to the new data, the court noted that while the data may have been new, it was not significant, as required by NEPA's implementing regulations. The post-2011 data confirmed or "slightly augment[ed]" the 2011 EIS's concerns regarding potential eagle fatalities.[9] With respect to the changed project designs, which were based on the BIA's approval of construction of 20 turbines instead of the 18 discussed in the EIS (although the EIS mentioned the potential for two additional turbines in areas straddling BLM and trust lands), the court noted that the BIA provided a plain and accurate explanation of what it termed a numerical discrepancy. In addition, maps in the cumulative impacts section of the EIS contemplated up to 21 turbines, and thus the proposal of 20 turbines was not a design change at all.

Take-Away: The federal district court's decision reflects the deference due to agency decision-making under NEPA. The court acknowledged Protect Our Communities Foundation's "genuine and deep concern for our shared environment."[10] The court also acknowledged that NEPA and its implementing regulations are designed to give full consideration to those types of concerns. The court, however, concluded that NEPA's requirements were "adequately observed" by the BIA, in that the BIA prepared a "carefully considered" record of decision, "based on and calibrated by a 2011 EIS that engaged in coherent and comprehensive analysis of potential eagle harm."[11] The court's decision upholding the BIA's discretion to approve the project, in the face of known eagle impacts, demonstrates the court's understanding of NEPA's procedural mandate—the BIA's approval of Phase II was done "with full knowledge of potential impacts and

after considering the relevant factors and articulating a rational connection between the factors found and the choices made."[12]

For more information, please contact Deana Bennett or Joan Drake.

[1] *The Protect Our Communities Foundation v. Black*, Case No. 14-cv-02261, 2017 U.S Dist. LEXIS 31541 (March 6, 2017) (*POC II*).
[2] *Id.* at *4 (quoting EIS, alternations omitted).
[3] *Id.* at *6 (quoted authority omitted).
[4] Protect Our Communities Foundation v. Jewell, 825 F.3d 571 (9th Cir. 2016).
[5] The court also found the BIA adequately disclosed information to the public.
[6] *POC II*, 2017 U.S Dist. LEXIS 31541, at *15.
[7] 541 U.S. 752, 764-65 (2004).
[8] *POC II*, 2017 U.S Dist. LEXIS 31541, at *20.
[9] *Id.* at *23.
[10] *Id.* at *28.
[11] *Id.* at *28-29.
[12] *Id.* at *29.