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Of Note:

- Modrall Sperling Attorneys Nationally Ranked in Native American Law by *Chambers USA: America's Leading Lawyers for Business*

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

Native American Practice Group

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BIA Regulations on Appraisal/Valuation of Indian Property

On June 10, 2016, Congress passed the Indian Trust Asset Reform Act (ITARA), and on June 22, 2016, President Barack Obama signed it into law.[1] According to the Senate Committee on Indian Affairs, the purpose of the Act "is to reaffirm the Federal government's fiduciary trust responsibilities to Indian Tribes."[2] Although the ITARA contains the outline of an ambitious program pursuant to which a Tribe may take over administration of tribal trust resources from the Bureau of Indian Affairs (BIA), the first element of the Act to be reflected in final regulations are those contained in the Final Rule published June 26, 2017. The new Rule establishes an alternative procedure for the appraisal or valuation of Indian lands when a Tribe or Individual Indian landowner submits to the Department of the Interior (DOI) an appraisal or valuation and requests the DOI to use the appraisal submitted to value the land or other trust resources. Parties acquiring rights-of-way or other interests in trust land or resources should be aware of this new, alternative procedure—and its consequences.

The ITARA authorizes the BIA to use appraisals and valuations *without specific Secretarial approval of the appraisal report* in its decisions whether to approve agreements, so long as three conditions are met, as discussed in more detail below. Under those circumstances, the Act provides that no additional BIA review of the appraisal or valuation is required and the appraisal or valuation "shall be considered final for purposes of effectuating the transaction for which the appraisal or valuation is required."[3]

The implementing regulations, published at 82 Fed. Reg. 28777 (June 26, 2017), form a new 25 CFR Part 100, (entitled, "Waiving Departmental Review of Appraisals and Valuations of Indian Property"). As summarized in the published final rule, the regulations "establish the minimum qualifications for appraisers employed by or under contract with an Indian tribe or individual Indian, to become qualified appraisers who may prepare an appraisal or valuation of Indian property that will, in certain circumstances, be accepted by the DOI without further review or approval."[4] Specifically, the regulations provide that the DOI "will not review the appraisal or valuation of Indian property and the appraisal or valuation will be considered final," as long as these three conditions are met: (1) the submission of the appraisal or valuation "acknowledges the intent of the tribe or Individual Indian landowner to waive Departmental review and approval" of the appraisal or valuation; (2) "the appraisal or valuation was completed by a qualified appraiser meeting the requirements of [Part 100]"; and (3) "[n]o owner of an interest in the Indian property objects" to use of the appraisal or valuation without Departmental review and approval.[5]

Applicability: If the three conditions in Section 100.301 are satisfied, the new Rule may apply to all valuations of trust or restricted real property and of timber, minerals or other property, whether or not such elements "contribute to the value of real property."[6] To grasp the possible effect of the Rule, one might contemplate the case where a seller's appraiser can set any value he or she may determine, and the other parties to the transaction must accept it. Under several statutes, BIA may not approve or grant an interest in trust property for "not less than the fair market value" of the interest to be acquired. *See, e.g.*, 25 C.F.R. § 169.112(a). Because, under the new Part 100 regulations, the DOI or BIA must accept an appraisal or valuation by a properly qualified appraiser *submitted by the Indian landowner*, the only limitations upon acceptance of the appraisal become those setting the requirements appraisers must satisfy to insulate their appraisal from DOI's review.

Appraiser qualifications: The critical determinant of the qualifications of an appraiser is whether the appraiser holds a "current Certified General Appraiser license in the State in which the property appraised or valued is located" and is in good standing.[7] Although the Rule references the Uniform Standards of Professional Appraiser Practice (USPAP), which applies to all appraisals of value for United States' acquisitions of property, it does so only with respect to the *qualifications* of the appraisers, including their qualifications to value specific interests such as timber or minerals. However, the regulation does not require the appraiser's *appraisal* to comport with the many USPAP criteria to which a USPAP appraisal must conform. Consequently, under the new regulations, whatever value the "qualified appraiser" may place on a property in an appraisal submitted by the Indian landowner, it will be immune from review by Interior and Interior must accept it.

What's the upshot? Although it is difficult to predict the effect of the new Rule, it is clear that Indian landowners and parties seeking to acquire interests in Indian lands should be aware of the changes and fashion conduct accordingly.

It's just an alternative**.** It bears noting that Part 100 does not require any appraisal to be submitted under its provisions: the new Rule does not require a change from prevailing current practice, *i.e.*, a party acquiring a right-of-way or other interest required to be appraised prepares an appraisal and submits it to the Indian landowners and BIA to establish value. In fact, if the Indian landowner accepts the value so determined, it could submit a company-prepared appraisal under Part 100 to expedite BIA approval.

Escalating values? It is difficult to predict the effect the new rule will have on valuation of interests valued by a Part 100 appraisal. One suspects that the absence of BIA review and approval of appraisals submitted by Indian landowners may encourage appraisers to estimate values more favorable to Indian clients. In addition, prior BIA appraisal approval standards incorporated compliance with USPAP standards governing preparation of appraisals, which contain detailed guidance to ensure that it is the *property* that is being valued—and *not the use* to which the acquiring party will put the property. It is difficult to predict the extent to which State-licensed appraisers, with knowledge that their reports will be accepted without either independent review or approval, will yield to the temptation to report values more favorable to tribal or individual Indian clients than they would have if they expected BIA review and approval.

Focus on qualifications. Appraiser qualifications are the single factor that may support an opposition to use of an appraisal or valuation submitted by an Indian landowner. New Part 100 likely will lead to increased emphasis on State standards for appraiser certification—and the standing of licensure of appraisers at the time an appraisal is prepared or submitted.

For more information, please contact Lynn Slade.

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[1] 25 U.S.C. § 5601 *et seq.*
[2] S. Rep. 114-307 (Feb. 8, 2016).
[3] 25 U.S.C. § 5635.
[4] 82 Fed. Reg. 28778.
[5] 25 C.F.R. § 100.301(a)(1)-(3).
[6] *See* 82 Fed. Reg. 28778; 25 C.F.R. § 100.100 ("Indian trust property"). The only exemptions from the Rule's applicability are for (1) valuations required by statute to be reviewed or determined by the Secretary, including the valuation of interests tribes acquire under the widely used "Land Buy-Back Program" and (2) acquisitions by the United States. *See id.*; 25 C.F.R. § 100.301.
[7] 25 C.F.R. § 100.200(a)(1), (2).

Dakota Access Pipeline Project Update—Corps' NEPA Analysis Flawed-In Part

Introduction: On June 14, 2017, U.S. District Court Judge Boasberg issued a lengthy Memorandum Opinion granting in part the Standing Rock Sioux Tribe's (Standing Rock) and Cheyenne River Sioux Tribe's (Cheyenne River) Motions for Summary Judgment.[1] The Dakota Access Pipeline (DAPL) project is a roughly 1200-mile pipeline route that traverses primarily private lands and does not cross any present-day Indian reservations. DAPL does, however, cross federally regulated waters of the United States under the United States Army Corps of Engineers' (Corps) jurisdiction and crosses under Lake Oahe, a federally regulated lake on the Missouri River that has "special significance for the Standing Rock and Cheyenne River Sioux Tribes."[2] DAPL crosses the Lake 0.55 miles north of the Standing Rock Sioux Reservation. According to the pleadings filed by Standing Rock, and as found by the court in the June 14, 2017 opinion, Standing Rock also has treaty rights in the Missouri and the Lake reserving to the Tribe and its members the right to fish and hunt, and the right to water to the extent necessary to fulfill the purposes of the treaty with the Tribe.[3] DAPL began operations on June 1, 2017.

As we have previously reported on November 22 and July 20, Judge Boasberg denied Standing Rock's motion for preliminary injunction alleging inadequate consultation under the National Historic Preservation Act, and Cheyenne River's motion for preliminary injunction alleging violations of the Tribe's right to free exercise of religion under the Religious Freedom Restoration Act. In his June 14 Opinion, Judge Boasberg stated that, while those two legal challenges had not yielded success, the Tribes' "third shot. . . [at] DAPL's environmental impact. . . meets with some degree of success."[4] In their third challenge, the Tribes argued that the Corps, to comply with its National Environmental Policy Act (NEPA) obligations, should have prepared an Environmental Impact Statement (EIS), an often lengthy environmental review document, rather than an Environmental Assessment (EA), which is intended to be a "concise" document that briefly provides evidence and analysis to determine whether an EIS is required. Applying NEPA's "hard look" analysis, Judge Boasberg concluded that while the Corps' EA was adequate in many respects, the Corps failed to "sufficiently consider the pipeline's environmental effects" on treaty-based hunting, fishing, and water rights arising from potential oil spills, as opposed to impacts from construction.[5]

The Corps substantially complied with NEPA "in many areas": In his June 14 Opinion, Judge Boasberg concluded that the "Corps substantially complied with NEPA in many areas."[6] Specifically, Judge Boasberg concluded that the Corps properly concluded that the risk of an oil spill under Lake Oahe was "low." He reasoned that the Corps appropriately relied on applicable regulatory standards as part of its NEPA analysis, and that the Corps' conclusion regarding the low risk of a spill was supported by the record, including a risk analysis conducted by Dakota Access that was derived from criteria set out in a published methodology. The court also relied on the general principle that mere disagreement with an agency's experts is not enough to demonstrate a NEPA violation. In addition, the court concluded that the Corps adequately discussed cumulative impacts, based on the fact that the EA the Corps prepared to document its NEPA analysis contained an eleven-page discussion of cumulative impacts on eleven types of resources. The court confirmed that the Corps was not required to analyze the impacts from the entire pipeline, but only those impacts from the part of the pipeline subject to federal control or permitting.

The court also upheld the Corps' alternatives analysis. One point of contention that was highlighted in much of the press about DAPL was the fact that an alternative route north of Bismarck, which would have routed the pipeline further from the Standing Rock reservation, was rejected. Judge Boasberg, however, concluded that the Corps' alternatives analysis was appropriate, although it was not without flaws. He was persuaded by the fact that the EA "identif[ied] and compar[ed] several features of the two routes as described, [which] easily clears NEPA's hurdle requiring 'brief discussion' of reasonable alternatives."[7]

Judge Boasberg also concluded that the Corps' discussion of construction impacts on Standing Rock's treaty rights was adequate, as opposed to impacts from an oil spill which he found inadequate as discussed below. The court first framed the treaty rights analysis, rejecting the broad, "existential" approach advanced by Standing Rock, and instead reasoning that the Corps' analysis properly focused on impacts to resources intended to be protected by the treaty, *i.e.*, water resources, fish, and game. The court noted that the "EA discussed in several places the potential impact of DAPL's construction" on those treaty resources. The court held that "[b]ecause the EA 'clearly addressed' these impacts and concluded that they would either be insignificant or could be mitigated, the Court finds that, in this respect, it was adequate."[8]

With so much going right, where did it go wrong?

The Corps did not adequately assess impacts on treaty resources, environmental justice, and the degree to which the Pipeline's effects could be controversial: While finding much of the Corps' NEPA analysis adequate, Judge Boasberg concluded that the Corps "did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."[9] Each of these conclusions are addressed in turn.

The Corps did not adequately address impacts on treaty resources from an oil spill: While the court concluded that the Corps' EA adequately analyzed DAPL's potential impacts on treaty resources from construction of the project, the court held that the Corps did not adequately analyze the impacts on treaty resources with respect to an oil spill. The court acknowledged that the "Corps did not wholly ignore the consequences of a possible oil spill," even after concluding that the risk of a spill was low. In fact, the court held that the Corps adequately discussed the impacts of a spill on water resources, but "was not similarly attentive" to the potential impacts of a spill on hunting or aquatic resources. The court characterized the Corps' discussion of the effects of an oil spill on aquatic resources as cursory and without explanation of what the impacts would be. The court also remarked that the EA did not address the impacts of a spill on hunting at all. Yet, as the court noted, Standing Rock had alerted to the Corps to its fish/game concerns in its comments, including the way in which an oil spill could affect game along the shores of Lake Oahe. Ultimately, the court held: "Without any acknowledgment of or attention to the impact of an oil spill on the Tribe's fishing and hunting rights, despite [the Tribe's] efforts to flag the issue, the EA — in this limited respect — was inadequate."[10]

The Corps' environmental justice discussion was inadequate: Federal agencies are required to address environmental justice as part of their NEPA obligations.[11] As Judge Boasberg stated: "The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations."[12] The court first addressed the limited geographic unit of the Corps' environmental justice analysis, which, once determined,

is compared against the baseline of counties in the general vicinity of the project, to determine whether the project will have a disproportionate adverse effect on minority and low-income populations within the geographical unit. The Corps selected a geographical unit consisting of 0.5-mile radius around the Lake crossing, which in turn identified two census tracts to measure against the baseline. Significantly, one of the counties that the Corps included in the baseline was Sioux County, where the Standing Rock Reservation is located.

The Tribe leveled several arguments against the adequacy of the Corps' geographic unit. First, the Tribe argued that the Corps' decision to limit the geographic unit to a 0.5 mile radius of the Lake crossing was arbitrary and capricious, pointing to the fact that the Reservation was just 80 yards beyond the Corps' imposed 0.5-mile limit, and downstream from the Lake Oahe crossing. The Tribe alleged the Corps' decision was also arbitrary because the two census tracts within the 0.5 mile radius were mostly upstream of the Lake crossing, with a 98% white population. The Tribe faulted the EA because it compared the two upstream, largely white census tracts to a baseline of three counties that included Sioux County, where the Reservation is, to conclude that the affected area, *i.e.*, the two census tracts, would not have a higher population of minority and low-income people than the baseline, which the Tribe alleged allowed the Corps to dismiss environmental justice concerns.

While acknowledging that identifying the geographic area is entitled to deference, the court was "hard pressed to conclude that the Corps' selection of a 0.5-mile buffer was reasonable."[13] The court rejected the Corps' reliance on the scope accepted for a transportation project or a natural-gas pipeline as justification for its 0.5 mile radius, because DAPL involved a crude oil line, and the EA failed to identify any other crude-oil pipeline project for which a 0.5-mile radius had been employed. The court noted that Standing Rock identified two other crude-oil pipeline projects for which a much larger affected area was used to assess environmental-justice impacts, one 14 miles downstream of crossings and one 40 river-miles downstream. The court noted that EPA also criticized the 0.5 mile radius choice, encouraging the Corps to consider a broader scope because of the potential downstream impacts. And, the court again noted the different treatment of construction impacts, as opposed to spill impacts.

Judge Boasberg was not entirely critical of the EA's treatment of environmental justice. He recounted that the EA acknowledged that the Standing Rock community has a high percentage of minorities and low-income individuals, and could be affected by an oil spill, given the downstream location of the Reservation. But, according to the court, the EA's statements were not enough. The court pointed to the fact that the EA did not address the "distinct cultural practices of the Tribe and the social and economic factors that might amplify its experience of the environmental effects of an oil spill."[14] The court considered not only downstream domestic drinking water intake systems but also the Tribe's hunting, fishing, and subsistence gathering activities along the river. The court held that the Corps "needed to offer more than a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill."[15]

The Corps failed to address contrary scientific data and reports: One factor that agencies are required to consider when assessing whether an EIS is required is whether the effects of the project are likely to be highly controversial. As courts have explained, highly controversial does not mean opposition to a proposed

project, but rather means that a substantial dispute exists regarding the size, nature, of effect of the project, as evidenced by contrary scientific evidence or reports that demonstrate a flaw in the agency's methodology or data. Standing Rock submitted expert reports to the Corps that critiqued the EA's methodology for considering spill volumes, the data used for river-flow rates, and contended that the EA failed to consider all factors required to conduct a complete risk analysis, among other things. According to the court, the Corps failed to adequately discuss the methodological and data flaws identified by experts in reports submitted to the Corps. The court noted that the Corps' failure was not necessarily in rejecting the conclusions in the expert reports, but rather the fact that the EA was "devoid of any discussion of the methodological and data flaws identified in the reports."[16] Because the Corps "did not demonstrate that it considered, as the CEQ regulations require, the degree to which the project's effects are likely to be highly controversial, despite being presented with evidence of scientific flaws," the court held that it could not "conclude that the Corps made a convincing case of no significant impact or took the requisite hard look."[17]

Remedy: The court ordered the Corps to reconsider its environmental analysis on remand, but did not immediately order that DAPL operations cease.[18] In so doing, the court acknowledged that the standard remedy in the D.C. Circuit for a NEPA violation is vacatur, *i.e.*, setting aside the approved permit, which in turn would foreclose DAPL from further operations until the Corps complied with the court's order on remand. The court acknowledged that it has discretion to depart from the standard remedy, based on factors including "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[19] Recognizing that whether to vacate, or not, had not been fully briefed, the court ordered the parties to submit briefs on that issue in light of the deficiencies the court found in the NEPA process and the disruptive consequences that would result given that the pipeline is operational.

Take-Away: The DAPL litigation demonstrates the myriad ways a federal approval can be challenged, from consultation under the National Historic Preservation Act, to impacts on treaty rights under NEPA. Judge Boasberg's June 14 Opinion illustrates how many separate challenges can be advanced against a federal approval, just under NEPA. It also highlights the importance of complying with NEPA's procedural mandates. As Judge Boasberg noted, NEPA's requirements are procedural—NEPA does not mandate a particular result and its procedural requirements do not prohibit unwise decisions, only uninformed decisions. Judge Boasberg's NEPA analysis hews to NEPA's procedural mandate, both as to the portions of the Corps' NEPA analysis he accepted and those he did not.[20]

Consider as an example his discussion of the Corps' analysis of the potential impacts from *construction* versus the potential impacts from an *oil spill* on Standing Rock's treaty resources. With respect to construction, the court noted that the EA clearly addressed impacts on treaty resources, and then concluded that the impacts would either be insignificant or could be mitigated. Conversely, with respect to the potential impacts from an oil spill on those same resources, the court's criticism of the EA was that the Corps failed to demonstrate in its EA that it had considered the impacts of an oil spill on the Tribe's fishing and hunting rights, even after the Tribe alerted the Corps to its concerns. Although he concluded that NEPA's procedural mandate had not been met with respect to impacts from an oil spill, consistent with NEPA's requirements that a court not substitute its own judgment for that of the agency, Judge Boasberg did not weigh in

on whether an oil spill would, in fact, impact aquatic or game resources, nor did he mandate that the Corps reach a particular decision, *i.e.*, deny the permit. Instead, and appropriately, he left that analysis for the Corps to undertake on remand.

For more information, please contact Walter Stern or Deana Bennett.

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[1] *Standing Rock Sioux Tribe v. U. S. Army Corps of Engineers*, No. 1:16-cv-1534-JEB, 2017 U.S. Dist. LEXIS 91297 (June 14, 2017).
[2] *Id.* *10.
[3] *Id.* *55.
[4] *Id.**5.
[5] *Id.*
[6] *Id.* The court rejected some of Cheyenne River's additional arguments, including that the Corps failed to adequately consult with it. The court deferred ruling on certain other arguments raised by Cheyenne River. *Id.* *103-39.
[7] *Id.* *70-71.
[8] *Id.* *59-60.
[9] *Id.**5.
[10] *Id.* *65-66.
[11] *See id.* *71-73 (discussing federal environmental justice guidance).
[12] *Id.* *81-82.
[13] *Id.* *76.
[14] *Id.* *82.
[15] *Id.* *83.
[16] *Id.* *51.
[17] *Id.* *52.
[18] *Id.* *101-03.
[19] *Id.* *102.
[20] Whether Judge Boasberg's characterizations of the record and his conclusion that the Corps' EA is, in some ways, deficient, is beyond the scope of this article and the authors offer no opinion on his holdings.

A Historic Moment in Indian Water Rights in New Mexico: Entry of the *Aamodt* Final Decree

The United States District Court for the District of New Mexico entered its final decree in *State of New Mexico, ex rel. State Engineer v. Aamodt*, a state stream adjudication filed in 1966 (*Aamodt*) to determine the rights of water users in the Nambé-Pojoaque-Tesuque River Basin (Basin) in northern New Mexico.[1] With entry of the final decree, the water rights of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque (Pueblos),[2] the United States, and thousands of individual water users in the Basin are established, and a critical step in the construction of a regional water system pursuant to a Congressionally-approved settlement agreement is met.

Background: The *Aamodt* litigation is a general stream adjudication determining the rights of users to ground and surface waters in the Basin, including the right of each user of the Basin's water to a specific amount of water, which will be administered by the State Engineer under New Mexico's system of priority adjudication. The water rights of individual non-Pueblo claimants have been determined based on state law pursuant to individual subfile orders. The water claims of the Pueblos, determined under federal law, were addressed by a 2006 settlement agreement among the State, the United States, the Pueblos, the County of Santa Fe and the City of Santa Fe ("settling parties"), which was approved by Congress in the *Aamodt* Litigation Settlement Act on December 8, 2010.[3]

The Final Decree: At a hearing on July 14, 2017, Judge William P. Johnson noted the historic significance of the entry of a final decree in one of the longest-lasting cases in the federal court system, acknowledged the work of the judges who had preceded him on the case, and allowed counsel for each party—none of whom were of record when the case was filed in 1966—to address the court. The final decree incorporates the water rights of the Pueblos, adjudicated in the Partial Final Judgment and

Decree of the Water Rights of the Pueblos[4] adopting the rights established by the settlement agreement as approved by the Settlement Act, and the court's Memorandum Opinion and Order adjudicating the proprietary water rights of the United States.[5] The final decree finally adjudicated the water rights of all individual non-Pueblo water users, rights which had been determined by separate subfile orders and are listed in an addendum to the final decree. The final decree denied any remaining objections to the entry of the final decree. The court previously had overruled more than 800 objections to the approval of the settlement agreement.[6] The Tenth Circuit dismissed an appeal of that ruling for lack of jurisdiction.[7]

The Regional Water System: In addition to settling the Pueblos' water rights, the settlement agreement, as approved by the Settlement Act, provides for the construction of a Regional Water System to serve the Basin's water users, including the Pueblos. The settlement agreement provided individual water users the opportunity to become a party to the agreement and transfer their water rights to the County of Santa Fe and become users of the Regional Water System, provide for transfer of their water rights upon the sale of their property, or retain their water rights and continue to use their wells within the limits provided for in the settlement agreement. The Regional Water System is being designed and developed by the United States Bureau of Reclamation. The water that will be delivered through the Regional Water System, in addition to water rights transferred to the County, consists of water adjudicated to the Pueblo of Nambé as part of the settlement, San Juan-Chama Project water rights pursuant to a contract with the Secretary of the Department of the Interior, and water purchased by the County of Santa Fe from the Top of the World farm in Taos County. The New Mexico State Engineer issued a permit to the United States, the Pueblos, and Santa Fe County, permitting the transfer of the Top of the World water rights for use in the Regional Water System.[8] Pursuant to the settlement agreement, the Regional Water System should be substantially complete by 2024.

The Water Master Rules: Another requirement of the settlement agreement, as approved by the Settlement Act, was the promulgation of rules to govern water use in the Basin. The State Engineer released proposed rules, entitled "Nambé-Pojoaque-Tesuque Water Master District: Active Water Resource Management," on June 22, 2017.[9] A public hearing on the rules will be held on August 16, 2017.

It's Not Over Yet: The entry of the final decree, the issuance of the proposed water master rules, and the issuance of the Top of the World water rights permit are each significant achievements towards the ultimate settlement of water rights in the Basin. The *Aamodt* lawsuit and related administrative matters are not over yet, though. An appeal of the final decree is expected (the deadline for appeal is October 12, 2017), and an appeal from the Top of the World permit is possible. The regional water system must be to a point of substantial completion by June 30, 2024. The district court has "retain[ed] continuing jurisdiction to interpret and enforce the terms, provision, and conditions of the Settlement Agreement, the Interim Administrative Order, and the Final Decree." While no party can hang up their *Aamodt* hat yet, the years of contentious litigation over water rights in the Basin appears to be at an end.

For more information, contact Maria O'Brien or Sarah M. Stevenson.

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[1] No. 6:66-cv-6639-WJ-WPL, Doc. 11560, July 14, 2017.
[2] The Pueblo of Pojoaque is represented by Modrall Sperling in the *Aamodt* litigation and related administrative proceedings.
[3] Pub.L. No. 111-291, 124 Stat. 3064, 3134-3156.
[4] Doc. 10547, March 23, 2016.

[5] Doc. 2752, Jan. 24, 1986, as confirmed, Doc. 2781, June 18, 1986.
[6] Doc. 10543, March 21, 2016.
[7] *N.M. ex rel. State Eng'r v. Aamodt*, 171 F. Supp. 3d 1171 (D.N.M. 2016).
[8] New Mexico State Engineer, Hearing No. 15-078, OSE File Nos. RG-1442-S through RG-1441-S-11 into SP-5081, July 18, 2017.
[9] The proposed rules are available here.

Potential Hurdle to Right-of-Way Acquisition and Renewals: The Tenth Circuit Holds Tribal Acquisition of an Undivided Interest in an Allotment Defeats Congressional Eminent Domain Authority

On May 26, 2017, the Tenth Circuit issued its decision in *Public Service Company of New Mexico v. Barboan*,[1] upholding a New Mexico federal district court's ruling[2] that tribal ownership of even a very small fractional interest in an allotment bars condemnation of any interest in the allotment, despite Congress' intent in 25 U.S.C. § 357 that "lands allotted in severalty" be subject to condemnation under state law. In so doing, the Tenth Circuit, in our view,[3] misread Section 357 and the historical background against which it was enacted and misapplied Tenth Circuit and Supreme Court precedent. Under the Tenth Circuit's reading of Section 357, if a negotiated right-of-way cannot be obtained, and if a Tribe owns even a minute fractional interest in the allotment, current right-of-way holders serving a public purpose, such as electric and water utilities, state and local transportation agencies, and oil and gas pipelines, may not be able to resort to Section 357 to keep that important infrastructure in place. Instead, the current right-of-way holders may find themselves facing trespass actions, including trespass damages and court orders requiring operations to cease and infrastructure removed. In addition to impacting continued operations on existing rights-of-way, the uncertainty the Tenth Circuit's opinion creates may also deter companies from locating new infrastructure on allotted lands and, consequently, inhibit extension of public utilities and transportation in some areas.

Background: 25 U.S.C. § 357 ("Section 357"), enacted in 1901, states: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." Section 357 was enacted against the backdrop of the General Allotment Act (GAA), which, along with similar acts, "allotted" approximately 41 million acres of formerly tribal lands to individual Indian landowners.[4] Those allotments were "checker-boarded" with millions of acres of newly patented non-Indian lands. In enacting Section 357, the 1901 Congress intended to provide a right of eminent domain for public infrastructure and to ensure that the right was effective as to the millions of acres of allotted lands that would be interspersed with private lands.

PNM's Attempts to Renew Its Right-of-Way: Public Service Company of New Mexico (PNM) was granted an easement for electrical transmission lines across multiple allotments in 1960. The transmission line at issue is "a crucial component of PNM's system for the transmission of electricity" to a portion of New Mexico. The transmission line crosses 57 allotments in total. The original term of the right-of-way was fifty years, and PNM began the renewal process in 2009. Under the Bureau of Indian Affairs' (BIA) regulations governing rights-of-way across allotted lands,[5] PNM was required to obtain consent to the renewal from a majority of the interest holders. PNM attempted to do so, but ultimately failed to secure the requisite percentage with respect to five allotments. PNM

then filed a condemnation action pursuant to Section 357. In its condemnation action, PNM named the tract of land, the individual Indian landowners (the allottees), and the Navajo Nation, which had previously obtained an undivided interest in two of the five allotments, 13.6% in one and 0.14% in the second.

The Navajo Nation obtained its interests in the two allotments under the Indian Land Consolidation Act (ILCA) and the American Indian Probate Reform Act (AIRPA), a 2004 amendment to ILCA.[6] Under the ILCA, a Tribe may acquire an interest in an allotment by gift or purchase, and under the AIRPA amendment to ILCA, a Tribe acquires an interest by operation of law under the "single heir rule", when an individual Indian landowner with a 5% or smaller interest in an allotment dies intestate, without eligible heirs. In addition to these statutory mechanisms, Tribes may acquire, and have been acquiring, interests in numerous allotments under the "Cobell Buy-Back program." Based on its ownership interests in two of the five allotments, the Navajo Nation moved to dismiss the condemnation case as to those two allotments.

District Court Ruling: Judge James A. Parker, a New Mexico federal district judge, concluded that the Navajo Nation's ownership of a fractional interest in the two allotments precluded condemnation under 25 U.S.C. § 357 for two reasons. First, he concluded that tribal ownership of a fractional undivided interest in an allotment converted the land from allotted land to "tribal land," and therefore the statute no longer applied. Second, because the Navajo Nation is immune from suit, the court held that the action had to be dismissed as to the allotments in which the Nation owns an interest under Federal Rule of Civil Procedure 19, because it is an indispensable party. The district court dismissed the condemnation action as against the two allotments. The district court granted PNM's motion to certify for interlocutory appeal the controlling questions of law presented in the case.

Tenth Circuit Upholds District Court Decision: The Tenth Circuit agreed with the district court that tribal ownership of a fractional undivided interest in the allotment converts the land from allotted land to "tribal land," rendering Section 357 inapplicable. Because the Tenth Circuit affirmed the district court on this issue, it did not address the effect of the Navajo Nation's sovereign immunity, although the court suggested that, had it done so, it would have affirmed the district court.

In reaching its decision, the Tenth Circuit relied on the fact that Section 357 "does not mention any condemnation authority for rights-of-way through Indian reservations and other types of non-allotted tribal lands."[7] While acknowledging that Section 357's silence with respect to tribal lands was consistent with the allotment-era goals to reduce Tribes' roles and tribal land holdings, the court nevertheless was persuaded by the fact that Congress had not amended Section 357 to specifically address tribal interests in allotted lands, despite it "becom[ing] clear that tribes and reservations are here to stay."[8]

The Tenth Circuit cited *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County* (*NNPD*)[9] in support of its affirmance of the district court. In *NPPD*, the Eighth Circuit concluded that land in which a Tribe had acquired an interest was "tribal land, beyond § 357's condemnation reach."[10] *NPPD*, in turn, relied on a BIA right-of-way regulation defining "tribal land." The Tenth Circuit acknowledged that the BIA right-of-way regulations "have a limited impact on our interpretation of § 357 because they do not apply to condemnation actions,"[11] but relied on the regulatory definitions to "amplify" its conclusion about Section 357's meaning.

On July 24, the Tenth Circuit denied PNM's petition for rehearing *en banc*, and on July 31, the Tenth Circuit

denied PNM's petition to stay the mandate pending appeal.

Take-Away: In our opinion, the Tenth Circuit opinion suffers from several flaws. First, the opinion conflicts with Section 357's plain language and Congress' intent. In our view, Congress' silence as to "tribal lands" in Section 357 is entirely appropriate given that the statute referred to "lands allotted in severalty," the lands at issue in *PNM* undisputedly had been allotted, and Congress would have expected the allotted ownership to change over time. The historical backdrop against which Section 357 was enacted reinforces Congress' intent to make condemnation available for public utilities and transportation across the thousands of allotments it authorized. In our view, the lack of any language regarding "tribal lands" or tribal acquisition of interests in allotments should not be read as an indication that Congress intended subsequent ownership of undivided interests in an allotment to affect Section 357's condemnation authority.

Second, it appears to us that the Tenth Circuit mischaracterized or ignored Tenth Circuit precedent. For example, the Tenth Circuit incorrectly characterized *Transok Pipeline Co. v. Darks*[12] as holding that Section 357 applies to "allotted land even after that land has passed to individual heirs of the allottees." Importantly, however, in *Transok*, the appellants were non-Indians, not indicated to be allotted heirs, whose interests were not held in trust by the United States. In addition, the Tenth Circuit also ignored the practical considerations underlying *Yellowfish v. Stillwater*[13]: "If condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines." In our view, the opinion provides a roadmap for this result.

Third, the Tenth Circuit gave little weight to Section 357's "*in rem*" nature, despite substantial briefing on the issue. "*In rem*" statutes are those that apply to a thing, a "*res*," in this case the land to be condemned, and do not act upon, or require joinder of, the parties with ownership interests in the "*res*." The Tenth Circuit, from our point of view, failed to give effect to the Supreme Court's distinction in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*[14] between *in rem and in personam* jurisdiction. *Yakima* affirmed "*in rem*" state taxation of formerly allotted *land* reacquired by a Tribe within its reservation, but invalidated "*in personam*" taxation of excise tax on *sales* of such lands. As we read Section 357, it operates *in rem* because it applies to identified *lands*, those "allotted in severalty." Consequently, under *Yakima*, tribal, or others', acquisition of an interest in "land allotted in severalty" should not insulate that interest from actions under Section 357's *in rem* authority.

Fourth, in our view, the Tenth Circuit's decision is flawed because the court gave little weight to the language of the "congressionally approved mechanisms"[15] by which the Navajo Nation acquired its interest. In ILCA, Congress repeatedly used the word "allotted land"[16] when discussing allotted lands in which a Tribe has acquired an undivided interest under ILCA. We read these provisions as confirming that Congress did not intend for allotted lands to lose their allotted status when a Tribe acquires an interest in an allotment.

Finally, it appears to us that the Tenth Circuit dismissed the very real consequences to PNM and other entities providing necessary public commodities whose infrastructure is now or will be located on allotted lands that could arise from the Tenth Circuit's opinion. For example, a federal district court in Oklahoma, cited favorably by the Tenth Circuit, recently found a pipeline company in trespass, after concluding that the pipeline company could not invoke Section 357 because of tribal ownership of fractional interests in allotments, and

ordered the pipeline to cease operations immediately and remove the pipeline within six months.[17] In our view, the Tenth Circuit's decision could significantly affect right-of-way access across allotted lands both for new rights-of-way and renewals because it deprives utilities and other public entities of the ability to ensure access for fair market value without regard to allotment landowner consent, which in turn may negatively impact continued, reliable transportation of necessary public commodities—and the public—across allotted lands.

For more information, please contact Lynn Slade, Emil Kiehne, or Deana Bennett.

[1] 857 F.3d 1101 (10th Cir. 2017).
[2] *Public Service Company of New Mexico v. Approximately 15.49 Acres of Land in McKinley County, New Mexico*, 155 F. Supp. 3d 1151 (D.N.M. 2015).
[3] While Modrall Sperling represents Transwestern Pipeline Company, LLC, an *amicus curiae* supporting PNM in this matter, the views represented in this article are those of the authors, and not necessarily those of Transwestern Pipeline Company, LLC.
[4] *See Cohen's Handbook of Federal Indian Law*, § 16.03[2][b], p. 1073 to 1074 (Nell Jessup Newton ed., 2012 ed.).
[5] *See* 25 C.F.R. Part 169 (pre-April 2016).
[6] *See* 25 U.S.C § 2206 (AIRPA single heir rule); *id.* § 2212 (tribal acquisition).
[7] *PNM*, 857 F.3d at 1105.
[8] *Id.*
[9] 719 F.2d 956 (8th Cir. 1983).
[10] *PNM*, 857 F.3d at 1110.
[11] *Id.*
[12] 565 F.2d 1150 (10th Cir. 1977).
[13] 691 F.2d 926 (10th Cir. 1982).
[14] 502 U.S. 251 (1992).
[15] *PNM*, 857 F.3d at 1110-11.
[16] *See, e.g.*, 25 U.S.C. § 2213(c) (describing tribally-acquired fractional interests as an "undivided interest in allotted land held by the Secretary in trust for a tribe"); 25 U.S.C. § 2218(d)(2) (describing an allotment in which a Tribe acquires an interest as "allotted land held in trust for a tribe").
[17] *Davilla v. Enable Midstream Partners, L.P.*, No. CIV-15-1262-M (W.D. Okla. March 28, 2017) (related proceeding cited *PNM*, 857 F.3d at 1110 n.4).

OF NOTE

Modrall Sperling Attorneys Nationally Ranked in Native American Law by *Chambers USA: America's Leading Lawyers for Business*

Four Modrall Sperling attorneys, Lynn Slade, Walter Stern, Brian Nichols, and Deana Bennett have been nationally ranked in Native American Law by *Chambers USA: America's Leading Lawyers for Business*. Modrall Sperling was once again nationally ranked in Native American Law. A total of 19 Modrall Sperling lawyers were selected as leaders in 7 Chambers-designated practice areas. *Chambers USA* ranks the leading firms and lawyers in an extensive range of practice areas throughout America. Chambers' in-depth and client-focused research is relied upon by leading industries and organizations throughout the U.S. and worldwide. More information on Modrall's Chambers USA 2017 Rankings is available here.