Summer 2018

NATIVE AMERICAN LAW WATCH

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Native American Law 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, boasting 16 attorneys, 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.

Meet The Native American Law Watch Editors

Deana Bennett, Shareholder

Deana's practice is focused on natural resource development on public and tribal lands. Her experience includes permitting and environmental compliance efforts under the National Environmental Policy Act, the Endangered Species Act, the Clean Air Act and other related federal statutes.

Sarah Stevenson, Shareholder

Sarah's practice focuses on water law, including water adjudications and compacts, and Native American law, including natural resource development projects on Native American land. She is also a litigator representing public entities and private businesses.

Contributing Attorney Authors

Lynn Slade, Shareholder

Lynn serves clients' needs addressing Federal Indian law and Native American law, energy, natural resources, environmental law, project development, complex litigation and transactions for over 30 years.

Walter Stern, Shareholder

Walter brings more than thirty-five years of experience providing representation, advice and counsel to businesses and individuals in their dealings with Indian tribes and public land management agencies.

Supreme Court Ducks Addressing "Immovable Property" Exception to Tribal Sovereign Immunity

As Chief Justice Roberts put it in his concurring opinion in *Upper Skagit Indian Tribe v. Lundgren*, "There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe."[1] However, the majority opinion of Justice Gorsuch concludes that a decision determining whether such a resolution may occur, and under what legal doctrine, must await a remand of the case to the Washington Supreme Court and any further review the Supreme Court may allow.

Sharline and Ray Lundgren had owned land in Skagit County, Washington, for many years. In 2013, the Upper Skagit Indian Tribe purchased an adjacent 40 acre tract. When it surveyed the tract in preparation for asking the Department of the Interior to take the land into trust, it learned that a barbed wire fence had been in place for many years was some 1300 feet on the tribe's side of the newly-surveyed boundary. When the tribe sought to remove the fence, the Lundgren's filed suit in Washington state court seeking a declaration that they acquired title through adverse possession and mutual acquiescence, alleging that the fence had stood for many years, they had used the disputed parcel on their side of the fence, and the tribe's predecessors had accepted the Lundgren's ownership of the disputed parcel. The tribe sought dismissal of the Lundgrens' claims on grounds of sovereign immunity from suit.

The Washington Supreme Court held the tribe's sovereign immunity could not bar relief because the suit was an action *in rem*, so jurisdiction over the land, not necessarily of all parties claiming interests in the land, was required. It relied on the Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*.[2] The Supreme Court reversed, noting that counsel for the Lundgrens had disclaimed reliance on *Yakima* in the Supreme Court, and instead has advanced the "immovable property" doctrine, which holds that "a prince, by acquiring property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual." Observing that the parties had not argued, and the Washington Supreme Court had not addressed, the immovable property doctrine, the majority concluded the issue should be addressed below before it addresses the applicability of the doctrine to a tribal government. It vacated the decision below and remanded for further proceedings.

The three opinions in *Upper Skagit* present differing perspectives on the question whether a tribe, by purchasing land may evade claims by opposing owners based solely on tribal sovereign immunity. The Chief Justice's, in concurrence, does not oppose remand, but would find such an outcome "intolerable," and observes the Court recently signaled it could address in a later case whether sovereign immunity would bar a "plaintiff who has not chosen to deal with a tribe [and] has no alternative way to obtain relief for off-reservation commercial conduct.[3] Justice Thomas, joined in an extensive dissent by Justice Alito, argued remand was unnecessary because the immovable property doctrine was "well established" and "plainly extends to tribal sovereign immunity," is consistent with the principle *lex rei sitae*, holding land is governed by the law of the place where it's located, and the Court's recent decision in *Lewis v. Clark*,[4] declined to extend tribal sovereign immunity "beyond what common law sovereign immunity principles would recognize." Whether tribes' assertions of title to private, off-reservation, fee lands lie beyond legal recourse remains unanswered pending remand and further proceedings.

For more information, please contact Lynn Slade

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[1] ___ S. Ct. ___, 2018 WL 2292 445 (May 21, 2018)
[2] 502 U.S. 251 (1992).
[3] *See Michigan v. Bay Mills Indian Community*, 572 U.S.) ___, ___, 134 S. Ct. 2014, 2036 n.8 (2014).
[4] 581 U.S. ___, 137 S.Ct. 1285, 1292 (2017).

Supreme Court Declines Review of Tenth Circuit Case Holding Tribal Acquisition of an Interest in an Allotment Defeats Eminent Domain Authority

The Supreme Court recently denied a petition to review the Tenth Circuit's opinion in *Public Service Company of New Mexico v. Barboan,*[1] on which we previously reported in our Summer 2017 Watch. The Tenth Circuit affirmed the district's court ruling that tribal ownership of a fractional interest in an "allotment," land the United States holds in trust for individual Indians, bars condemnation of any interest in the allotment, despite 25 U.S.C. § 357 that authorizes condemnation of "lands allotted in severalty to Indians" under state law. The Tenth Circuit agreed that tribal ownership of a fractional undivided interest in an allotment converts an allotment from "lands allotted in severalty" to "tribal land," and so Section 357 no longer applied. The Supreme Court denied Public Service Company of New Mexico's petition for a writ of certiorari on May 3, 2018.[2]

The *PNM* decision could have significant effects on right-of-way acquisitions and negotiations with individual Indian allottees for both new rights-of-way and renewals. The decision ignores the very real consequences to entities providing necessary public commodities whose infrastructure is now or will be located on allotted lands. We have seen this play out in a federal district court in Oklahoma where that court 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.[3] In our opinion, the Tenth Circuit's now final decision 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. The impacts of the Tenth Circuit's decision are significant geographically as well because tens of thousands of fractional interests in allotments have been transferred to, and will continue to be transferred to, Tribes nationally under recent federal statutes and federal policies.

For more information, please contact Lynn Slade or Deana Bennett

[1] 857 F.3d 1101 (10th Cir. 2017).
[2] Modrall Sperling represented Transwestern Pipeline Company, LLC, in the Tenth Circuit appeal as an amicus supporting PNM, and represented the New Mexico Oil and Gas Association as an amicus supporting PNM's petition for a writ of certiorari from the United States Supreme Court. The views represented in this article are those of the authors, and not necessarily those of Transwestern Pipeline Company, LLC or the New Mexico Oil and Gas Association.
[3] *Davilla v. Enable Midstream Partners, L.P.*, 247 F. Supp. 3d 1233 (W.D. Okla. 2017), appeal filed with Tenth Circuit April 25, 2017.

Indian Law in the Next Supreme Court Term: Grants and Pending Applications

The United States Supreme Court may have the opportunity to address a number of Indian law issues in its next term starting October 2018. To date, the Court has granted certiorari in *Royal, Warden v. Murphy*, No. 17-1107, an appeal from the Tenth Circuit Court of Appeals. In *Murphy*, the Tenth Circuit ruled that the State of Oklahoma did not have jurisdiction to prosecute Mr. Murphy for murder.[1] The result in *Murphy* was based on the application of the three-part test established in *Solem v. Bartlett*[2] and its progeny to determine whether a reservation has been disestablished. Chief Judge Tymkovich issued a strong dissent suggesting the *Solem* test was inoperable in the context of Oklahoma's unique history. After receiving a number of amicus briefs[3] supporting the petition, including an uninvited brief by the United States, the Supreme Court granted the State of Oklahoma's petition for certiorari, which presented the question: "Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an 'Indian reservation' today under 18 U.S.C. § 1151(a)."

While *Murphy* is the only Indian law case granted to date, a number of petitions for certiorari are pending before the Court. In a second reservation diminishment case involving the *Solem* analysis, *Wyoming v. United States Envtl. Prot. Agency*,[4] the Tenth Circuit held that Congress diminished the Wind River Indian Reservation in 1905. The Wind River Indian Reservation is home to two Native American Tribes, and both filed petitions for certiorari: the Eastern Shoshone Tribe and the Northern Arapaho Tribe. No. 17-1159. The Tribes seek reversal of the Tenth Circuit's diminishment opinion. In contrast to *Murphy*, the United States filed a brief opposing the petitions for certiorari, arguing the Tenth Circuit correctly applied *Solem*.

Another petition for certiorari out of Wyoming raises a unique question of whether a 1868 treaty with the Crow Tribe of Indians prohibited state criminal jurisdiction over a tribal member exercise hunting rights guaranteed by the treaty. The petitioner was hunting within the reservation boundaries, when the animal he was hunting crossed into the Bighorn National Forest, where it was killed. The petitioner was convicted for a state law misdemeanor. Seeking review of an unpublished district court opinion, the petition in *Herrera v. Wyoming*, No. 17-532, asks whether the treaty right to hunt on the "unoccupied lands of the United States" survived Wyoming's entry into the United States. At the Court's invitation, the United States filed a brief encouraging the Court to grant the petition for certiorari.

Treaty rights are also at issue in *Makah Indian Tribe v. Quileute Indian Tribe and Quinault Indian Tribe*, No. 17-1592. The petition for certiorari seeks review of an opinion of the Ninth Circuit Court of Appeals[5] that held the treaty that granted the Quileute and Quinault Indian Tribes fishing rights included the right to hunt whales and seals, in a geographic region that coincided with that of the Makah Indian Tribe. The Makah Indian Tribe is seeking reversal of the Ninth Circuit's treaty interpretation. The response brief is due June 25.

Federal arbitration law, the Indian Gaming Regulatory Act, and preemption of state taxation are at issue in Citizen Potawatomi Nation v. State of Oklahoma, No. 17-1624, which seeks review of a Tenth Circuit opinion reversing an arbitration award.[6] An arbitrator resolved a dispute between the Nation and the State regarding sales of alcoholic beverages in the Nation's casinos and whether those sales were subject to State taxation, in the Nation's favor. The Tenth Circuit reversed, refusing to apply the Federal Arbitration Act. The Nation seeks review of that decision. The response to the petition is due in early July.

The final Indian law petition up for consideration is *Osage Wind v. Osage Mineral Council*, No. 17-1237, a case considering whether developers of a wind energy development project required a mining lease from the Osage Minerals Council.[7] Two questions are presented: whether the Tenth Circuit Court of Appeals erred by ruling it had jurisdiction over an appeal filed by the Osage Mineral Council, who had not participated in the district court proceeding instituted by the United States; and whether the Tenth Circuit erred by applying the Indian canon of construction where the statute and regulation being interpreted governed the mineral and surface estates in Osage County, both of which were created to favor members of the Osage Nation. The Court recently asked the United States for its views, and will consider the petition after the United States' brief has been filed in coming months.

For more information, contact Sarah M. Stevenson

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[1] 875 F.3d 896 (10th Cir. 2017).
[2] 465 U.S. 463 (1984).
[3] Modrall Sperling filed an amicus brief in support of the petition on behalf of the Environmental Federation of Oklahoma, Inc., Oklahoma Cattlemen's Association, Oklahoma Farm Bureau Legal Foundation, Mayes County Farm Bureau, Muskogee County Farm Bureau, Oklahoma Oil and Gas Association, and State Chamber of Oklahoma.
[4] 875 F.3d 505 (10th Cir. 2017).
[5] 873 F.3d 1157 (9th Cir. 2017).
[6] 881 F.3d 1226 (10th Cir. 2018).
[7] Modrall Sperling represents the petitioner in this case. The Tenth Circuit's opinion is reported at 871 F.3d 1078 (10th Cir. 2017).

Update on Dakota Access Pipeline Litigation

We previously reported on the Dakota Access Pipeline litigation, including in our Summer 2017 Watch. The Dakota Access Pipeline litigation was originally brought by the Standing Rock Sioux Tribe in 2016, quickly joined by the Cheyenne River Sioux Tribe, to challenge construction of the Dakota Access pipeline ("DAPL"), and specifically DAPL's crossing of the Missouri River at Lake Oahe. In June 2017, U.S. District Court Judge Boasberg granted in part and denied in part the Standing Rock Sioux and Cheyenne River Sioux Tribes' motions for summary judgment, and remanded certain issues to the Corps.[1] On March 19, 2018, Judge Boasberg denied claims brought by the Yankton Sioux Tribe and Robert Flying Hawk, chairman of the Tribe's Business and Claims Committee ("Tribe").[2] The court dismissed the Tribe's National Historic Preservation Act claims as moot, given that DAPL's construction has been completed. The court granted summary judgement in favor of the federal defendants on the Tribe's treaty rights claim because the Tribe had essentially withdrawn that claim. Finally, the court granted summary judgment in favor of the federal defendants on the Tribe's NEPA claim.[3] The Tribe argued that the Corps violated NEPA by improperly segmenting its review by preparing three EAs and FONSIs.[4] The court rejected this argument, in part, because "[e]ach of the EAs and FONSIs addresses geographically isolated crossings or easements, and there is no suggestion in the record that environmental impacts in one location would have repercussions for another."[5] The court concluded that the Corps' EAs and FONSIs were "discrete analyses that address ecologically and geographically disparate areas of federal jurisdiction."[6] We will continue to provide updates as this litigation progresses.

For more information, please contact Walter Stern or Deana Bennett

[1] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017).

[2] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 2018 WL 1385660 (D.D.C. Mar. 19, 2018).

[3] *Id.* at *1.

[4] *Id.* at *9.

[5] *Id.* at *14.

[6] *Id.* at *16.

Chambers USA 2018 Legal Rankings

The 2018 rankings from *Chambers USA: America's Leading Lawyers for Business* recognize Modrall Sperling and 16 of its attorneys for excellence in ten Chambers-designated areas. The firm received national accolades for its Native American practice.

Walter Stern, Lynn Slade and Brian Nichols were ranked in Nationwide Native American Law, while Deana Bennett was listed in New Mexico Native American Law.

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