



Native American Resources Committee Newsletter

Vol. 4, No. 1

May 2007

A MESSAGE FROM THE CHAIR

Dean Suagee

Well, it's about time. It has been three years since the Native American Resources Committee has published an issue of its newsletter. A lot of newsworthy stories have come and gone since then. When I was honored to be offered an appointment as committee chair, one of the reasons that I agreed to take this on was the opportunity to restore this committee newsletter to the status of a real periodical—in the sense that we actually publish an issue on a periodic basis. So, this is the first of what we plan to be three issues over the course of each year. I want to thank all of the committee vice chairs who helped put this issue together. We have a great group of vice chairs, and I want to thank each and every one of them for accepting the challenge of bringing this committee back to life.

The Native American Resources Committee Newsletter can serve a valuable service by providing a forum for committee members to share their knowledge and expertise with each other. The newsletter gives us a vehicle in which to publish articles on topics that appeal to the interests of our committee members but which that may not have a broad enough appeal to fit within the Section's hard copy periodicals, *Trends* and *Natural Resources & Environment*. In addition, our committee controls the publication schedule for our newsletter—when we have enough copy, we can post an issue. For our newsletter to fulfill

its potential, though, we need committee members to volunteer to write articles for us to publish. There are no hard and fast requirements for subject matter—as long as it relates to Native American environmental, natural resources, or energy law. There are no hard and fast rules for length—1,000 words might be too much, 3,000 might not be enough. We do have a total limit per issue of about 18,000 words. In terms of style, references and citations should be included in the text, instead of using footnotes. One or two levels of headings are acceptable, outline format is not. It is acceptable to supplement information and analysis with opinion, but opinion should be identified as such. So, please help us bring this committee newsletter back to life. If you want to write an article, please get in touch with the vice chair in charge of the newsletter, Pablo Padilla. Contact him at PPadilla@NordhausLaw.com.

In addition, I want to bring to the attention of committee members that the next two issues of *Natural Resource & Environment* to go into production will be on the themes of: Climate Change (Issue 22:3, Winter 2008); and Environmental Litigation (Issue 22:4, Spring 2008). The production schedule for Climate Change begins on March 20, 2007—that is the date that the editors initiate contact committee chairs seeking suggestions for topics and authors. The corresponding date for Environmental Litigation is June 19. Anyone out there who wants to write for either of those issues of NR&E should get me your topic and a few sentences describing your idea for an article in time for me to get the idea into the mix for consideration.

Native American Resources Newsletter
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Pablo H. Padilla, Jr. and
Connie Rogers, Editors

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Thank you all for signing up for membership in the Native American Resources Committee. I hope you find this issue of the newsletter useful.

TRIBAL ENERGY RESOURCE
AGREEMENTS: COMMENTARY ON
THE PROPOSED REGULATIONS

Thomas H. Shippo

After several years of stops and starts, Congress enacted a voluminous piece of energy legislation when it passed the Energy Policy Act of 2005. Pub. L. No. 109-58, 119 Stat. 594. Title V of this legislation, known as the “Indian Tribal Energy Development and Self-Determination Act of 2005,” establishes a number of new funding mechanisms and programs related to Indian energy projects and administration. 25 U.S.C. §§ 3501, et seq. Significantly, Title V also adds a new Section 2604 to the Energy Policy Act of 1992 (codified at 25 U.S.C. § 3504) that responds specifically to tribal requests for elimination of Department of Interior (Department) Secretarial approval of energy resource development agreements.

A tribe and the Secretary of the Interior must first enter into a master agreement, known as a “Tribal Energy Resource Agreement” (TERA), addressing the manner in which a tribe will process energy-related leases, business agreements, and rights-of-way. 25 U.S.C. § 3501(d).

Additionally, a TERA must require that any lease, business agreement, or right-of-way address at least sixteen other enumerated matters. 25 U.S.C. § 3501(e)(2)(B)(iii) (I)-(XVI). Among those sixteen matters are items that would ordinarily be included in any negotiated agreement, such as identification of the contracting party, the term of the agreement, compensation, compliance with substantive environmental laws, and dispute resolution provisions. However, those sixteen matters also include provisions for providing public notification of final approval of a lease, business agreement, or right-of-way, and for engaging in consultation with affected States regarding

the off-reservation impacts, if any, of such instruments. A TERA must also incorporate a tribal environmental review process similar to, but not identical to that employed by federal agencies under NEPA. 25 U.S.C. § 3501(e)(2)(C). That tribal process must contain a mechanism for incorporation of appropriate mitigation measures and an opportunity for public comment, and tribal responses to comments, related to the environmental impacts of a proposed lease, business agreement, or right-of-way.

Before approving a TERA, the Secretary must provide notice to the public and provide an opportunity for public comment regarding such approval; however, the Secretary's review of a TERA under NEPA is limited to "activities specified by the provisions" of the TERA, if any. 25 U.S.C. § 3501(e)(3). Once a TERA is approved, then copies of any leases, business agreements, or rights-of-way subsequently approved by a Tribe must be provided to the Secretary. 25 U.S.C. § 3501(e)(5).

While Section 2604 is itself a complex statute, Congress left many of the details of its implementation to regulations, which are currently being drafted. *See* 25 U.S.C. § 3501(e)(8) (requiring the Secretary to promulgate regulations by Aug. 8, 2006). On Aug. 21, 2006, the Secretary issued proposed regulations. 71 Fed. Reg. 48625 (Aug. 21, 2006). The public comment period ended on Sept. 20, 2006 and, as of this writing, no further drafts have been issued by the Department. The draft regulations emphasize the optional nature of a TERA. As a general matter, the proposed regulations also advance the self-determination goals of Section 2604, with three notable exceptions.

First, the proposed regulations restrict the scope of TERAs, in my view unduly, by prohibiting tribes from assuming "inherently Federal functions." *Id.* at 48,633, proposed § 224.52(c). This term is not defined in the regulations. The inherently federal functions exception is not required by the statute. Moreover, it is inconsistent with other provisions of the draft regulations, which expressly allow tribes to assume the responsibility for such functions as: review and approval of applications for permits to drill; review of

affected archeological, historical, or cultural resources; royalty accounting, collection, or auditing; production accounting; or other review and enforcement activities associated with compliance, all of which the federal government performs on a regular basis. *Id.* at 48,634, proposed § 224.53(e)(2).

The legal basis and policy motivations for reservation of "inherently Federal functions" are not clear. This is not the first time, however, that agencies within the Department have shown reluctance to turn administrative programs over to tribes as directed by Congress, and the Solicitor of the Department of the Interior has previously questioned the legal justification for such institutional inertia. For example, in the context of the Tribal Self-Governance Act, the Department Solicitor has advised the Department that there is no clear constitutional limitation or an independent Secretarial responsibility to withhold delegation of inherently federal functions from tribes. *See* Memorandum to the Assistant Secretaries and Bureau Heads from Interior Solicitor John Leshy Regarding Inherently Federal Functions under the Tribal Self-Governance Act (May 17, 1996). The inherently federal functions exception is, thus, not necessary, invites uncertainty and dispute, and threatens to largely contravene the self-determination purposes of Section 2604.

Second, the draft regulations expand the intended scope of NEPA review of proposed TERAs beyond that contemplated in the TERA statute. The draft regulations require NEPA review of "the energy resource developments the Tribe is proposing to undertake as specified by the provisions of the [TERA]." *Id.* at 48637, proposed § 224.70. Because TERAs are intended to authorize tribes to enter into multiple energy development agreements, NEPA review of all future projects at the TERA-establishment stage—rather than by the TERA tribe under its own procedures as specific projects arise—would be impractical, at best, and, at worst, would completely frustrate the intent of Section 2604. TERAs are not intended to present substantive development proposals, but rather are intended to be procedural vehicles under which tribes may evaluate and approve development proposals.




The Department's proposed scope of NEPA review for a TERA stands in stark contrast to the Department's proposed scope of NEPA review for TERA regulations. The Department has asserted that the draft TERA regulations "do not constitute a major Federal action significantly affecting the quality of the human environment" because "the impact of the proposed rule would be limited to *administrative* and *economic* effects." See 71 Fed. Reg. 48625, 48630 (emphasis added). Correspondingly, in my view, the regulations should limit NEPA review of a proposed TERA to effects resulting from the change in general regulatory responsibilities contemplated in the TERA, not those arising from specific projects or proposals the tribe may consider once its TERA has been approved.

Third, the proposed regulations are inflexible with regard to enforcing and modifying established TERA terms. In cases of tribal violations of TERA terms or federal law, the proposed regulations direct the Secretary to reassume all activities assumed by the tribe if it "does not respond to or does not comply with" an order to cure the violation. *Id.* at 48,642, proposed § 224.140. The proposed regulations supply no standard of materiality against which to measure a tribe's violation and give the Secretary no discretion to determine whether partial reassumption or some other response to violations would be appropriate in the circumstances. Furthermore, the regulations do not authorize tribes to amend a TERA to partially rescind its terms and allow partial reassumption by the Secretary; rather tribes may only voluntarily completely rescind the TERA. *Id.* at 48,644, proposed § 224.172. The lack of flexibility in the rescission and reassumption provisions is likely to result in costly and disruptive interference with established TERAs and therefore may deter tribes from entering into TERAs, which is counter to the intent of Section 2604.

In enacting Section 2604, Congress attempted to provide electing tribes new opportunities to manage their energy resources upon a demonstration of their capacity to do so prudently. As contemplated by the statute, the draft implementing regulations would eliminate the requirement for Secretarial approval of tribal resource development under the conditions and

controls established in a TERA. In my view, the implementing regulations need revision in the three areas discussed above before TERAs can become effective tools for tribal energy resource management.

Mr. Shipps is a partner with Maynes, Bradford, Shipps & Sheftel, LLP, general counsel to the Southern Ute Indian Tribe. He may be reached at tshipps@mbsslpp.com. A general discussion by the author of the issues addressed here will be published in Natural Resources & Environment in Vol. 22:1, Summer 2007.



LIKE TO WRITE?

The Native American Resources Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor, Pablo Padilla, at PPadilla@NordhausLaw.com.

To learn more about the ABA, the Section of Environment, Energy, and Resources, and the Native American Resources Committee, visit:

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“INDIAN ENERGY” TITLE OF THE 2005 ENERGY POLICY ACT—AN OVERVIEW

Dean B. Suagee

The “Indian Tribal Energy Development and Self-Determination Act of 2005” (ITEDSDA) was enacted as Title V of the Energy Policy Act of 2005 (“EPAAct 2005” or the “2005 Act”). Pub. L. No. 109-58. Title V is captioned “Indian Energy”; section 501 provides that Title V may be cited as the ITEDSDA. Most, though not all, of the provisions of EPAAct 2005 that expressly refer to Indian tribes or Indian country are found in Title V. The scope of this article is limited to Title V. In addition to the provisions in EPAAct 2005 expressly referring to tribes or Indian country, it should be noted that, while beyond the scope of this article, many other provisions of the statute have implications for energy development in Indian country. A few such provisions are briefly noted at the end of this article.

The ITEDSDA includes a number of mandates for the Department of the Interior (DOI) and the Department of Energy (DOE), most of which will require appropriations to be fully carried out. The subject of appropriations, however, is beyond the scope of this article. In addition to the DOI and DOE provisions, there are also statutory provisions directed to the Bonneville Power Administration, Western Area Power Administration, and the Department of Housing and Urban Development.

Amendment to the Department of Energy Organization Act

Section 502 of Title V amends the Department of Energy Organization Act by adding a new section 217, 42 U.S.C. § 7144e, which says, in part: “There is established within the Department an Office of Indian Energy Policy and Programs . . . headed by a Director.” The duties of the director are to “provide, direct, foster, coordinate, and implement energy planning, education, management, conservation, and delivery programs of the Department that.—

- (1) promote Indian tribal energy development, efficiency, and use;
- (2) reduce or stabilize energy costs;

- (3) enhance and strengthen Indian tribal energy and economic infrastructure relating to natural resource development and electrification; and
- (4) bring electrical power and service to Indian land and the homes of tribal members located on Indian lands or acquired, constructed, or improved (in whole or in part) with Federal funds.”

As of the date of this article, such an office has not yet been formally established within DOE. Rather, the Tribal Energy Program is administered by the Office of Weatherization and Intergovernmental Program within the DOE Office of Energy Efficiency and Renewable Energy.

Most of Title V is contained in section 503 of the act, which takes up more than fourteen pages. 119 Stat 764–78. Section 503 amends Title XXVI of the Energy Policy Act of 1992 (1992 Act), which is codified at 25 U.S.C. §§ 3501 to 3506. In fact, the amendments to the 1992 Act that were enacted in section 503 of the 2005 Act could be called “an amendment in the nature of a substitute” in that the statutory text previously codified at 25 U.S.C. §§ 3501–3506 was repealed and replaced by the text in section 503. The statutory text of section 503 uses numerical designations that correspond to the 1992 Act: paragraph (a) of section 503, begins with, “In General.—Title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 *et seq.*) is amended to read as follows: . . .” with the major headings after that designated sections 2601 through 2606. Paragraph (b) of section 503 (fifteen pages later in Statutes at Large) simply makes conforming changes in the table of contents for the 1992 Act. Fortunately, the potential for confusion is reduced somewhat by referring to the Public Law as published in Statutes at Large or U.S. Code Cong. & Admin. News, both of which show the numerical designations for sections in 25 U.S.C. that correspond to the Title XXVI designations in the text of the Public Law. This article uses both numerical designations.

Definitions, Section 2601 of the 1992 Act as amended, to be codified at 25 U.S.C. § 3501.

This section adds a number of definitions, several of which are rather nuanced, and not all of the nuances

are noted here. “Director” means the director of the office in DOE established by Section 502. The definitions of “Indian lands,” “Indian reservation,” “Indian tribe,” and “tribal lands” are all somewhat interrelated. (“Indian tribe” and “Indian reservation” were the only defined terms in the 1992 Act, but both of these definitions have been changed by the 2005 Act.) The term “Indian lands” is defined broadly to include all lands within the boundaries of an Indian reservation and several kinds of lands outside of reservation boundaries, including tribal and individual Indian trust and restricted lands, lands held by a “dependent Indian community,” and certain lands owned by Indian tribes in Alaska. The term “tribal land” is more narrowly defined as trust or restricted land owned by a tribe. For purposes of the definition of “tribal land,” the term “Indian tribe” does not include Alaska Native corporations. (The definitions of the terms “Indian land” and “tribal land” are different from the definitions in some other federal statutes, such as the cultural resources statutes. *See* 16 U.S.C. § 470w(14) (“tribal land”), 16 U.S.C. § 470bb(4) (“Indian lands”); 25 U.S.C. § 3001(15) (“tribal land”); *see generally* FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW ch. 20 (2005 ed.).)

The definition of “Indian reservation” has been changed from the version in the 1992 Act. This definition no longer includes “former Indian reservations in Oklahoma” or “land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [ANCSA].”

The other newly defined terms in the 2005 Act include: “integration of energy resources,” “Native Corporation” (which refers to ANCSA), “organization,” “Program” (which means the DOI tribal energy program), “Secretary” (which means the Secretary of the Interior, not of Energy), “sequestration,” and “tribal energy resource development organization.”

Indian Tribal Energy Resource Development, Section 2602 of the 1992 Act as amended, to be codified at 25 U.S.C. § 3502.

This section provides mandates for both DOI and DOE to administer programs to help tribes in the general subject matter of energy resource development. The statutory language does not express a preference between renewable energy resources (such as solar and wind) and non-renewable resources (energy minerals). The departments can provide assistance for both general categories, as well as for energy efficiency.

Subsection (a) is the basic mandate for the DOI Program to “assist Indian tribes in the development of energy resources and further the goal of Indian self-determination.” In carrying out this program, the secretary is directed to provide grants to tribes and tribal energy resource development organizations for capacity building and carrying out project, as well as low-interest loans for “use in the promotion of” energy development and integration of energy resources. This subsection also directs DOI to make grants and provide technical assistance to an intertribal organization “to establish a national resource center to develop tribal capacity to develop and carry out tribal environmental programs in support of energy-related programs and activities . . .” Appropriations are authorized for the DOI Program through FY 2016 at the level of “such sums as are necessary.”

Subsection (b) directs DOE (or, more specifically, the director of the DOE Office established by section 502) to establish an Indian energy education, planning, and management assistance program. This subsection authorizes a competitive grant program for four specified purposes:

- (A) energy, energy efficiency, and energy conservation programs;
- (B) studies and other activities supporting tribal acquisitions of energy supplies, services, and facilities, including the creation of tribal utilities to assist in securing electricity to promote electrification of homes and businesses on Indian lands;

(C) planning construction, development, operation, maintenance, and improvement of tribal generation, transmission, and distribution facilities located on Indian land; and

(D) development, construction, and interconnection of electric power transmission facilities located on Indian land with other electric transmission facilities.

In making grants, the director “shall give priority” to applications from tribes with “inadequate electric service.” The director is authorized to develop, in consultation with tribes, a formula for making grants. In addition to the grant program, the director has a mandate to develop a program to provide opportunities for tribes to participate in carbon sequestration programs. The authorization level for the DOE program under subsection (b) is \$20,000,000 per year through FY 2016. The secretary of Energy has authority to issue rules to implement subsection (b).

Subsection (c) authorizes a DOE loan guarantee program for loans to tribes for energy development. The limit on the aggregate outstanding amount of loans guaranteed at any time is set at \$2 billion. The secretary of Energy is authorized to issue regulations to implement this subsection. This subsection also directs the secretary of Energy to submit a report to Congress, within one year, on the “financing requirements of Indian tribes for energy development on Indian land.”

Subsection (d) authorizes federal agencies and departments, in purchasing electricity or any other energy product or byproduct, to give preference to an energy and resource production business in which the majority owner is one or more tribes.

Indian Tribal Energy Resource Regulation, Section 2603 of the 1992 Act as amended, to be codified at 25 U.S.C. § 3503.

This section authorizes the secretary of the Interior to make grants to tribes for several purposes, including: developing a tribal energy resource inventory; conducting a feasibility study or other report needed to develop energy resources on Indian land; and training employees that are engaged in development of energy

resources on Indian land or are responsible for protecting the environment. Grants under this subsection to tribes may also be used to develop and enforce tribal laws and regulations relating to energy resource development and to develop technical infrastructure to protect the environment, with the exception that no tribe in Alaska (other than Metlakatla) is eligible for grants for this purpose. Alaska Native Corporations can use grant funds under this subsection to develop and implement corporate policies and to develop technical infrastructure to protect the environment under applicable law.

Subsection (c) of this section directs the secretary of the Interior, on request of a tribe and within available resources, to help ensure that the tribe has available to it scientific and technical information and expertise for use in the regulation, development, and management of energy resources on Indian land.

Leases, Business Agreements, and Rights-of-Way Involving Energy Development or Transmission, Section 2604 of the 1992 Act as amended, to be codified at 25 U.S.C. § 3504.

This section authorizes tribes to enter into leases and business agreements for energy resource development on tribal land, and to grant rights-of-way for pipelines or electric transmission or distribution lines on tribal lands, without the approval of the Bureau of Indian Affairs (BIA), if such a tribe has a “tribal energy resource agreement” (TERA) that has been approved by the secretary of the Interior. The secretary has a mandate to issue regulations to implement this subsection. Proposed regulations have been published. 71 Fed. Reg. 48,625 (Aug. 21, 2006). A TERA must include an environmental review process that meets minimum requirements set out in the act. Subsection (e)(2)(C). The minimum procedural requirements are similar to, but somewhat less stringent than, the requirements under the National Environmental Policy Act, which is triggered by federal agency action such as approval by the BIA.

The subject of TERAs is discussed at length in a Thomas H. Shipps, “*Tribal Energy Resource*

Agreements: Commentary on the Proposed Regulations.” In light of that coverage, this part of the 2005 Act is not discussed further in this article.

Federal Power Marketing Administrations, Section 2605 of the 1992 Act as amended, to be codified at 25 U.S.C. § 3505.

This section directs the administrator of the Bonneville Power Administration (BPA) and the administrator of the Western Area Power Administration (WAPA) to take actions to encourage tribal energy resource development. In particular, WAPA is authorized to purchase power from tribes to meet firming and reserve requirements, and allows WAPA power allocations to tribes to be used to meet firming and reserve requirements for Indian-owned projects on Indian lands. This section also authorizes each administrator to provide technical assistance to tribes seeking to use high voltage transmission lines.

This section also mandates a study, to be completed by August 2007, relating to the use by tribes of allocations of power from federal power marketing administrations, including identification of barriers and an assessment of opportunities to remove barriers.

Wind and Hydropower Feasibility Study, Section 2606 of the 1992 Act as amended, to be codified at 25 U.S.C. § 3506.

This section directs the secretary of Energy, in coordination with the secretaries of the Army and the Interior, to conduct a study on the cost and feasibility of using tribal wind power projects and Army Corps of Engineers hydropower on the Missouri River to supply firming power to WAPA. That report was to be submitted to Congress by August 2006.

Consultation with Tribes, Section 504 of the 2005 Act.

Section 504 is short section directing the secretaries of Energy and the Interior to consult with tribes in implementing Title V of the 2005 Act.

Four Corners Transmission Line Project and Electrification, Section 505 of the 2005 Act.

This section expressly provides that the Dine Power Authority, an enterprise of the Navajo Nation, is eligible for grants and other assistance pursuant to the 2005 Act for a transmission line from the Four Corners area to southern Nevada. This section also amends certain provisions in Pub. L. No. 106-511 relating to Navajo electrification.

Energy Efficiency in Federally Assisted Housing, Section 506 of the 2005 Act.

This section directs the secretary of Housing and Urban Development to promote energy conservation in federally assisted housing on Indian land, including the use of energy efficient technologies and appliances and promotion of shared savings contracts. This section also amends section 202(2) of the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4132(2), by adding “improvement to achieve greater energy efficiency” to the list of eligible affordable housing activities.

Notes on a Few Other Provisions

Section 203. Federal Purchase Requirement, To be codified at 42 U.S.C. § 15852.

This section sets a goal (a “requirement” but “to the extent economically feasible and technically practical”) of increasing the amount of electricity purchased by the federal government from renewable energy sources: not less than 3 percent in FY 2007 through 2009, not less than 5 percent in FY 2010 through 2012, and not less than 7.5 percent in FY 2013 and afterwards. Subsection (c) provides a double credit for three categories of renewable projects, one of which is renewable energy produced on Indian land and used at a federal facility.

Section 241. Hydroelectric Licensing,
amending 16 U.S.C. §§ 797(e), 811.

This section made a rather sweeping change in the authority of the secretary of the Interior, under the Federal Power Act, to impose conditions on licenses issued by the Federal Energy Regulatory Commission (FERC) for hydroelectric projects within federal reservations, including Indian reservations, to protect the use of the reservation for the purpose for which it was established. 16 U.S.C. § 797(e). As amended, the license applicant (and any other party to the proceeding) has a right to a trial-type hearing on issues of material fact, with a right to propose an alternative condition to the condition deemed necessary by the secretary. A similar change was made in the authority of the secretary of Interior and secretary of Commerce to direct FERC to require that fishways be incorporated into hydroelectric projects. *Id.* § 811. An interim final rule implementing these amendments has been issued. 70 Fed. Reg. 69,804 (2005).

Section 1813. Energy Rights-of-Way on Tribal Lands.

This section directs the secretaries of Energy and Interior to conduct a study and submit a report to Congress on energy rights-of-way on tribal lands. A draft report was circulated for review and comment in August 2006 and a revised draft was released in December 2006. The final report has not been delivered as of this date, but is expected soon. Information on this report, including the two drafts and all the written comments that have been filed, are available on a Web site maintained by Argonne National Laboratory at <http://1813.anl.gov>.

Conclusion

There are many other provisions in EPA 2005 that have implications for tribal governments, Indian country, Native Alaska, and/or might otherwise be of interest to members of the Native American Resources Committee. If you have expertise or commentary to offer, please let us know. Also, please let us know if you want to share information to elaborate on the points covered in this overview. We are looking for contributors to this newsletter.

Mr. Suagee is of counsel to the firm Hobbs, Straus, Dean & Walker, LLP, Washington, D.C. He is the chair of the Native American Resources Committee, ABA Section of Environment, Energy, and Resources.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events

**Key Environmental Issues in
U.S. EPA Region 1**

May 8, 2007
Boston, Massachusetts

Wetlands Law and Regulation

May 9-11, 2007
Washington, D.C.
Cosponsored with ALI-ABA and
Environmental Law Institute

**Key Environmental Issues in
U.S. EPA Region 4**

May 17, 2007
Atlanta, Georgia

ABA Annual Meeting

Aug. 9-14, 2007
San Francisco, California

15th Section Fall Meeting

Sept. 26-30, 2007
Pittsburgh, Pennsylvania

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**NAVAJO NATION V. UNITED STATES
FOREST SERVICE: NINTH CIRCUIT
HOLDS THAT FOREST SERVICE
APPROVAL VIOLATES TRIBES' RIGHTS
UNDER THE RELIGIOUS FREEDOM
RESTORATION ACT**

**Peter Hack
Davis Graham and Stubbs LLP**

In *Navajo Nation v. U.S. Forest Service* several Indian tribes and environmental groups challenged the Forest Service's approval of the use of treated sewage effluent to make artificial snow for a ski area in the San Francisco Peaks (Peaks) in northern Arizona. On March 12, the United States Court of Appeals for the Ninth Circuit held that the Forest Service's approval of the ski area's proposal violated the Religious Freedom Restoration Act (RFRA) by creating a substantial burden on the Indian tribes' religious practice related to the Peaks. The Ninth Circuit's decision could have broad impact on federal land use decision making. The background of the case and highlights of the decision are briefly summarized below.

Conflict over the presence of the ski area in the San Francisco Peaks has a long history. The Peaks, located within the Coconino National Forest, are considered sacred by several Indian tribes. The Arizona Snowbowl, a privately run commercial ski area, has operated in the Peaks since 1938. In 1979, the Forest Service approved a substantial expansion of the ski area over objections by certain Indian tribes. The D.C. Circuit upheld the Forest Service's decision against a challenge by the tribes based on the Free Exercise Clause. *See Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983). Congress designated most of the Peaks as the Kachina Peaks Wilderness Area in 1984, but that designation did not affect the Snowbowl ski area. The Forest Service has since determined that the Peaks are eligible for the National Register for Historic Preservation as a traditional cultural property. In connection with that designation, the Forest Service has carried out consultation with concerned tribes to document the religious and cultural significance of the Peaks. In 2002, the owners of Snowbowl submitted to the Forest Service a proposal to improve existing facilities that included the use of treated waste water,

referred to as "reclaimed water," to make artificial snow.

The Forest Service approved the proposal. Tribes and environmental groups filed administrative appeals opposing the project. After those appeals were denied, the opponents of the project filed a lawsuit in federal district court. That lawsuit raised claims based on RFRA, the National Environmental Protection Act (NEPA), and the National Historic Preservation Act (NHPA). The district court granted summary judgment to the Forest Service as to the NEPA and NHPA claims. After a bench trial on the RFRA claim, the district court ruled in favor of the Forest Service on that claim as well. *See Navajo Nation v. U.S. Forest Service*, 408 F. Supp. 2d 866, 872-80, 907 (D. Ariz. 2006).

RFRA was enacted in response to the U.S. Supreme Court ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that a law of general applicability that incidentally resulted in a burden on religious exercise does not violate the Free Exercise Clause of the First Amendment. The Court declined to apply the "compelling governmental interest" test that it had applied in earlier Free Exercise cases when determining whether a burden on religious exercise was justified. Congress perceived this decision as abandoning longstanding protections for religious exercise and enacted RFRA to reestablish those protections. Specifically, RFRA was intended to "provide a claim or defense to persons whose religious exercise is substantially burdened by government [and] to restore the compelling interest test . . . [and] to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb. In 2000, Congress expanded the definition of religious exercise protected by RFRA through a related enactment.

In *Navajo Nation*, the Ninth Circuit identified a four-part analysis for the RFRA claim: (1) What is the exercise of religion with respect to the Peaks? (2) What 'burden' if any would be imposed on the religious exercise by the expansion? (3) Would the burden be substantial? (4) If there would be substantial burden can it be justified by a compelling governmental

interest and implemented through the least restrictive means of furthering that interest? See *Navajo Nation v. U.S. Forest Service*, No. 06-15371, slip op. at 2845 (9th Cir. March 12, 2007). (The page numbers included in citations to the decision refer to the page numbers of the slip opinion as published at the Ninth Circuit’s Web site <http://www.ca9.uscourts.gov>.)

The court identified a number of religious practices which would constitute an exercise of religion under RFRA including ceremonies conducted at the Peaks and at areas far removed from the Peaks. Some of the practices identified utilize plants, materials, and water collected from the Peaks. The information on these practices was documented both in the administrative record and the trial testimony. In addressing whether the proposed action would burden religious exercise, the court focused on the religious implications of using treated waste water to make snow. The court noted that the Arizona Department of Environmental Quality requires precautions to avoid human ingestion of the treated water because the treatment standards allow for the presence of bacteria, as well as other pathogens and unregulated residual organic compounds. The record showed that religious practitioners from several tribes believe that the Peaks themselves, as well as materials gathered there, would be contaminated by the treated waste water and because of that contamination could not be used in religious practice. Based on these beliefs, the court described two types of burdens on the tribes’ religious practices: “(1) the inability to perform a particular religious ceremony because the ceremony requires collecting natural resources from the Peaks that would be too contaminated—physically, spiritually, or both—for sacramental use; and (2) the ability to maintain daily and annual religious practices . . . because the practices require belief in the mountain’s purity . . . that would be undermined by the contamination.” *Navajo Nation*, slip op. at 2856.

The court also concluded that these burdens would be substantial. In order to be a substantial burden, the court held that “the burden need not concern a religious practice that is compelled by, or central to, a system of religious belief, [but] the burden must be more than an inconvenience. The burden must prevent the plaintiff from engaging in religious conduct or having

a religious experience.” *Navajo Nation*, slip op. at 2862 (citations and quotations omitted). The court had little difficulty concluding that this standard had been met, stating that for at least one tribe, “contamination by the effluent [used in snow making] would fundamentally undermine their entire system of belief and associated practices . . . that depend on the purity of the Peaks.” *Id.*

The court rejected the argument that any burden on the tribes’ religion was justified by the compelling governmental interests in (1) implementing the multiple use mandate of the National Forest Management Act by supporting the recreational opportunities at Snowbowl, (2) protecting public safety by allowing the upgrades, and (3) complying with the Establishment Clause. *Navajo Nation*, slip op. at 2863-68. The court held that the multiple use mandate is too generalized a governmental interest, standing alone, to justify the specific actions at issue in this case. As to the recreational opportunities offered by the Arizona Snowbowl, the court ruled that the Forest Service could not have a compelling *governmental* interest in supporting a private enterprise. The court concluded that there had been no specific evidence that the proposal would advance public safety. Finally, the court noted that accommodating religious practices was a constitutional requirement that did not run afoul of the Establishment Clause and so rejected the alleged interest in avoiding a violation of that clause.

In addition to the RFRA holdings described above, the court reversed the district court on NEPA grounds. The court held that the Forest Service had failed to adequately consider the potential effects on children from direct exposure to the snow made from reclaimed water.

On April 13, the Ninth Circuit granted the Forest Service’s motion to extend the deadline for filing a request for rehearing en banc. While the owners of Snowbowl have asserted that the decision to seek Supreme Court review will be made by the Forest Service, they have stated that “Snowbowl intends to vigorously pursue further judicial review.” Statement From Eric Borowsky, General Partner, Arizona Snowbowl, available at www.arizonasnowbowl.com/news/press_releases.html.

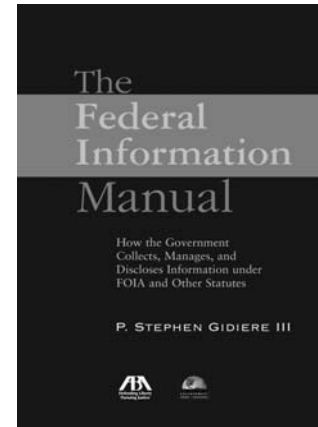
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