ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Native American Resources Committee Newsletter

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MESSAGE FROM THE CHAIR

Ronnie P. Hawks

The Native American Resources Committee is excited to bring you this newsletter with some great articles on issues of interest to practitioners in the field. I would like to thank Dean Suagee for his hard work in pulling this together, as well as the authors themselves for volunteering their time to help all of us learn through their articles.

Unfortunately, this may be the only newsletter we manage to produce this year. We are one of the smaller committees in the Section and we are in dire need of members, old and new, who are willing to devote time to helping this committee produce newsletters, articles, web content, and presentations of benefit and interest to our members. No, the time spent is not billable and yes, it does take time away from work, family, friends, and leisure. But the time required is not burdensome, especially if we have a strong core of active members sharing the load. And the benefits are well worth the time. You get to collaborate with great lawyers who share your interests. You learn from your interactions and collaborations with the group and develop a network of contacts that are an invaluable resource in your practice. And it is fun and fulfilling to give back to the legal community.

I encourage you to become more involved in the committee in any way you can. We have plenty of vice chair positions available for the upcoming year. These positions involve a 30-minute call once a month and whatever additional work is needed to accomplish the goals that the committee sets for itself. Even if you don't feel you have the time to take over a vice chair position, we'll gladly accept help from anyone on particular projects of interest. And we're always open to suggestions for committee activities and involvement.

***Ronnie P. Hawks**, Committee Chair, is a partner with Jennings, Haug & Cunningham LLP, in Phoenix, Arizona.*

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Dean B. Suagee, Editor

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SELIŠ KSANKA QLISPĖ DAM TRANSFERRED TO THE CONFEDERATED SALISH AND KOOTENAI TRIBES

Sarah Roubidoux Lawson

On September 5, 2015, the Confederated Salish and Kootenai Tribes (Tribes) assumed ownership of Sėliš Ksanka Qlispė Dam, which includes a hydropower facility. This great achievement is a testament of the Tribes' long-term vision and strategic planning.

Construction on the dam, located entirely on the Flathead Indian Reservation, began in 1930 under Rocky Mountain Power. The dam is located on a culturally significant site for the Tribes, but there was no formal tribal government to stand in opposition of the project when construction began. Tribal consultation for hydropower projects was not required, and dam construction was continued over the objection of tribal members. In 1931, construction on the dam stopped due to the Great Depression. In 1934, the tribes of the Flathead Indian Reservation (Salish, Pend d'Oreille, and Kootenai) organized under the Indian Reorganization Act as the Confederated Salish and Kootenai Tribes. The following year, Congress passed the Federal Power Act, which required the Federal Power Commission to consider the recommendations of tribes affected by proposed power projects. 16 U.S.C. § 803(2)(B). The new tribal government was able to secure rental payments for the use of tribal land that the project occupied adjacent to the dam. Federal funds were secured to complete the project in 1936, and Montana Power Company operated the dam upon completion in 1938.

The original license issued for the dam was issued for a 50-year term in 1930. Anticipating expiration of the Montana Power license in 1980, the Tribes filed for their own license in 1976. After many years of negotiation, the Tribes and Montana Power agreed to co-license with the Federal Energy Regulatory Commission (FERC) (successor to the FPC). The Tribes also negotiated the exclusive option to acquire the dam in 2015, in exchange for reduced payments for the use of the Tribes' adjacent lands by Montana Power. Anticipating expiration of the Montana Power license in 1980, the Tribes filed for their own license in 1976. After many years of negotiation, the Tribes and Montana Power agreed to co-license with FERC. The Tribes also negotiated the exclusive option to acquire the dam in 2015, in exchange for reduced payments for the use of the Tribes' adjacent lands by Montana Power.

Despite the Tribes' decreased income due to reduced rental payments, the Tribes set aside more than $500,000 a year during the next 30 years to be ready to purchase the dam in 2015. Perhaps more importantly, 15 elected tribal councils maintained their focus on dam acquisition during that time. In 2012, the Tribes founded Energy Keepers, Inc., a tribally owned and federally chartered corporation under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, to handle the conveyance and subsequent operation of the dam. Energy Keepers also manages water levels in Flathead Lake and executes agreements for the sale of power generated by the dam.

The Tribes formally acquired the dam upon payment of $18.3 million to Northwestern Energy, the successor to Montana Power. Electricity produced by the dam is sold on the open market, and the funds go to the Tribes' general fund. The dam transfer has also created more local jobs for residents. Many essential functions of dam management had been performed elsewhere under Northwest Energy, some as far away as Pennsylvania. Those positions have been brought back to the dam site in Montana, adding jobs for tribal members and area residents alike.

The dam was originally named Kerr Dam when it opened in 1938, after the-then president of Montana Power Company. When the Tribes took ownership, they renamed the dam under the traditional names of the tribes of the reservation: Sėliš (Salish), Ksanka (Kootenai), and Qlispė (Pend d'Orielle).

Sarah Roubidoux Lawson *is of counsel at Schwabe, Williamson & Wyatt in Seattle, Washington. She can be reached at slawson@schwabe.com.*

COURTS SIDE WITH TRIBES IN THE FIRST TAX DISPUTES TESTING THE OBAMA ADMINISTRATION LAND LEASING REGULATIONS

F. Michael Willis

The Eleventh Circuit began its opinion in the Seminole Tribe's recent tax dispute with the state of Florida by emphasizing the confounding legal complexity that undermines American Indian tribal governments' efforts to secure the revenues needed to serve their tribal citizens. The circuit panel wrote, "Ben Franklin said, '[I]n this world nothing can be said to be certain, except death and taxes.' He was almost right. As this case illustrates, even taxes are not certain when it comes to matters affecting Indian tribes." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (2015).

The Eleventh Circuit's ruling in the Seminole case and the recent district court decision in *Agua Caliente Band of Cahuilla Indians v. Riverside County, et al.*, No. CV 14-0007 (C.D. Cal. Feb. 8, 2016) (*Agua Caliente*), mark a new generation of cases in a long line of disputes in which the federal courts have been called upon to decide whether a particular state or local tax may be levied on commercial activity taking place within the boundaries of an Indian reservation. In these two recent cases, the courts' examinations were bolstered by a new set of federal regulations clarifying that strong federal and tribal interests in commercial activity undertaken pursuant to leases on Indian lands leave no room for taxation by state and local governments. The Indian land leasing regulations (25 C.F.R. pt. 162) were promulgated in December 2012 to improve tribal governments' ability to generate revenue and stimulate economic development through more streamlined and flexible leasing procedures. 77 Fed. Reg. 72,440 (Dec. 5, 2012). Importantly, the regulations contain provisions intended to shield tribal revenue generation activities from taxation by state and local governments as decades of particularized fact-specific rulings have exposed commerce in tribal territories to multiple layers of taxation that chill investment and stifle economic development.

Supreme Court Precedents

Since the 1970s the federal courts have been called upon to resolve numerous disputes over the authority to tax economic activity on Indian lands. The Supreme Court has been clear that states and their governmental subdivisions are categorically barred from taxing tribes and tribal members within Indian country. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). When non-Indians engage in commerce on tribal lands, however, the Court has applied a "flexible preemption analysis." *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 176 (1989).

The leading case involved Arizona's attempt to tax a non-Indian company doing business with the White Mountain Apache Tribe's timber enterprise. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, the Court explained that when a state regulatory action is directed toward non-Indians within Indian country, there are two "independent but interrelated" barriers to state regulatory authority: (1) state authority may be preempted by federal law; and (2) state law may unlawfully infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Id*. at 142. Where non-Indians are involved, the Court has said it is "often confront[ing] the difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 836–37 (1982).

In its application, *Bracker* has required the federal courts to employ a balancing test that considers numerous factors, weighing the federal and tribal interests in preemption of the tax against the state's interest in the tax. Administering this flexible preemption doctrine adds a layer of legal uncertainty to an already challenging environment for economic development. Whether state and

local governments can tax an on-reservation activity depends on such factors as the extent of the involvement of non-Indians, the status of the land, the characterization of the state tax, the nature of the activity, and the degree to which the state provides services associated with the activity. Through this approach, state and local governments have been allowed to tax on-reservation economic activity when the court perceives that the specific type of on-reservation commerce with non-Indians justifies the outside jurisdiction's tax. The result has been the loss of tribally generated revenues to those outside jurisdictions, legal uncertainty that stifles economic development in tribal communities, and frequent resort to litigation.

It is well established that tribal governments face tremendous obstacles generating sufficient revenues to deliver services to their citizens. Real property taxes are out of the question: Indian lands are held in trust by the federal government in restricted status. Income taxes on tribal members are not viable: per capita incomes in Indian country are less than half the national average. Although some services are federally funded, such as the programs that were historically provided by the Bureau of Indian Affairs (BIA) and the Indian Health Service, the funding levels are not commensurate with the need.

Tribal governments must be able to generate revenues from their own enterprises and through economic development on their reservations. The Supreme Court has affirmed tribal power to tax non-Indians on Indian reservations. In *Merrion v. Jicarilla Apache Tribe*, the Court recognized the power to tax to be an inherent power of tribal governments that "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services" [by requiring those acting within the territory to contribute]. 455 U.S. 130, 137 (1982).

Not long after *Merrion*, however, the Court in effect divested tribal tax jurisdiction of its effectiveness to the detriment of tribal citizens. In *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), the Court held that although a state cannot tax tribes directly or tax the reservation lands held in trust by the United States for tribes, the state may tax private parties with whom an Indian tribe does business—even though the ultimate financial burden of those taxes may fall on the tribe. Because of the threat that the outside jurisdiction's tax will apply on the reservation, tribes are deprived of the ability to offer tax incentives to companies to entice them to locate in Indian country. Indeed, tribes often must wholly forego their own taxes simply to offer businesses a tax rate that is equivalent to the off-reservation rate. With the outside jurisdiction collecting the tax from the on-reservation activities of non-Indian businesses, tribes and their members have little say as to whether those revenues are invested in their communities or appropriated for programs in another part of the state with little to no benefit to the tribe or its members.

The Revised Regulations

Tribal nations and tribal organizations for many years have called upon Congress and the executive branch to establish clarity over tax jurisdiction so that revenues generated by economic development activity in Indian country stay in Indian country. Congress has not taken action, but the tribes found a willing partner in the Obama administration. Most notably, in revised regulations governing the leasing of Indian lands, the administration has affirmed and clarified that the strong federal and tribal interests associated with activities on those lands leave no room for state and local government taxation. The regulatory terms appeared to set forth the type of bright line rules that tribal leaders have been seeking with respect to state and location taxation.

In the preamble of the final rule on Indian land leasing, the BIA provided explanatory commentary, saying:

> Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination,

> and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted land is an instrumental tool in fulfilling "the traditional notions of sovereignty and [] the federal policy of encouraging tribal independence."

77 Fed Reg. 72,440, 72,447 (Dec. 12, 2012) (quoting *White Mountain Apache v. Bracker*, 448 U.S. 136, 145 (1980)).

Recent Court Decisions

The federal courts that have reviewed state and local government taxes on non-Indian activity within tribal territory since promulgation of the new regulations have largely found the outside jurisdiction's tax to have been preempted, but have not viewed the regulations as establishing a bright line rule. The first review of these regulations arose in *Seminole Tribe of Florida v. Florida*, 49 F. Supp. 3d 1095 (S.D. Fla. 2014). After concluding that federal statute (25 U.S.C. § 465) prevented Florida from imposing its rental tax on non-Indian businesses who lease Indian trust land on the Seminole Tribe's reservation, the court offered an alternative basis for preempting the tax. It held that if the statute did not expressly prohibit the rental tax, the tax impermissibly interfered with tribal sovereignty and was preempted by federal law. 49 F. Supp. 3d at 1098–102. In reaching this holding, the district court gave a high level of deference to the taxation terms of the Indian land leasing regulations. *See id*. at 1099–100.

On appeal, the Eleventh Circuit agreed with the district court's conclusion that federal law preempts the state's rental tax. The circuit, however, found the district court's alternative argument based on the new regulations to be in error. *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (2015). The circuit emphasized that in Bracker the Supreme Court required a "*particularized* balancing of the specific federal, tribal, and state interests involved." *Id*. at 1338 (emphasis in original). Given that the regulations did not examine Florida's interests with regard to the particular tax at issue, the circuit concluded that the terms in the regulations balancing the respective governmental interests "cannot substitute for the particularized inquiry required by *Bracker*." *Id*. The Eleventh Circuit noted, however, that the regulations may be accorded some weight, especially given their clear analysis of the strong federal and tribal interests at stake. The circuit then proceeded to conduct its own *Bracker* balancing test to reach its conclusion that the particularized federal and tribal interests outweigh the interests of the state. (Additionally, the circuit reversed the district court's determination that another tax at issue in the case, Florida's utility tax, was preempted because the legal incidence of the tax was imposed directly on the tribe. Under the circuit's analysis, the incidence of the utility tax fell upon the power company. The Seminole Tribe's petition for Supreme Court review of the circuit's ruling on the utility tax has since been denied.)

Earlier this year, the U.S. District Court for the Central District of California concluded that Riverside County (County) could not impose a possessory interest tax (PIT) on non-Indian lessees of reservation land because it was preempted by Supreme Court precedent under the *Bracker* balancing test. *Agua Caliente, supra*. In reaching its decision, the district court undertook an extensive analysis of the *Bracker* balancing factors with attention given to case law and the federal government's interpretation of how California state law affects the federal land leasing regulatory scheme set forth in the new regulations. In its analysis, the court looked to the comprehensiveness of the federal regulatory scheme governing Indian leases, including the statutory authority (25 U.S.C. § 415, authorizing the leasing of Indian lands with secretarial approval, as well as 25 U.S.C. § 465, which prohibits the taxation of Indian lands held in trust by the federal government) along with the provisions in the new leasing regulations prohibiting the imposition of taxes and other fees on any leasehold or possessory interest absent

contrary federal law (25 C.F.R. § 162.017). The court concluded that federal regulation of leased Indian lands "is both detailed and pervasive, and there is no indication that Congress has delegated any authority over the leasing of Indian lands to the States." *Agua Caliente*, No. CV 14-0007, at *20.

In expressing the tribe's satisfaction with this result, Agua Caliente in-house counsel John Plata pointed out another inequity that plays out when outside governments tax activities on Indian lands: that revenues collected are not used to serve the community from which they are drawn. Mr. Plata stated, "We hope the ultimate resolution of this litigation will also alleviate another major concern for the Tribe—ensuring that these taxes paid by on-reservation lessees ultimately return to the reservation and local communities, rather than being collected here and distributed in areas of the county that are far removed from the reservation." Facing this phenomenon where tribal governments lack a procedural mechanism to call for taxes collected on their lands to serve tribal communities, intertribal organizations such as the United South and Eastern Tribes (USET) have urged policymaking based on the principle that economic activity in Indian country must generate revenues that serve Indian communities.

The application of the *Bracker* balancing test by the courts in Agua Caliente and Seminole in the context of the recently revised federal land leasing regulations offers important guidance that may help tribes further their economic development through the generation of leasing revenues in Indian country that are free from burdensome taxation by state or local governments. In *Agua Caliente*, as in the Eleventh Circuit ruling in *Seminole*, the BIA's land leasing regulations were evaluated and treated as entitled to deference with regard to the federal government's demonstration of strong federal and tribal interests with respect to the leasing of tribal trust lands. Because of *Bracker*'s requirement of a "particularized" inquiry, however, neither court could rule that the preemptive force of the regulations was in itself enough. Instead, the court analyzed the specific federal, tribal, and state interests associated with the tax under the balancing test that has been in place since 1980 and found the taxation provisions in the Indian land leasing regulations to express strong federal and tribal interests that, based on the facts of each case, outweighed the interests of the state and local governments. As a result of the new regulations, the weight on the scale has been markedly tipped to the federal and tribal side. The objective of certainty through a bright line rule, however, remains allusive.

F. Michael Willis *is a partner with Hobbs, Straus, Dean & Walker, LLP, in Washington, D.C. He may be reached at mwillis@hobbsstraus.com.*

THE CLEAN POWER PLAN AND CARBON EMISSION TRADING IN INDIAN COUNTRY: EXPLORING OPPORTUNITIES AND IMPLEMENTATION ISSUES

Anjali G. Patel and Jessica R. Bell

On August 3, 2015, the Environmental Protection Agency (EPA) released its final Clean Power Plan (CPP) to regulate carbon dioxide (CO2) emissions from existing fossil fuel-fired power plants. The CPP has garnered significant press and discussion, and ongoing legal challenges have resulted in a historic stay from the Supreme Court. In this article, we will cover some brief background about the CPP and discuss possible roles for tribes in its implementation and some potential implementation issues.

Background on the CPP

To further its goal of combating greenhouse gas pollution, EPA has issued a suite of three rulemakings to reduce CO2 emissions from power plants. (The rules were posted on EPA's website on August 3, 2015, and published in the *Federal Register* on October 23, 2015.) Using its authority under section 111(b) of the Clean Air Act (CAA), EPA promulgated new source performance standards for new, modified, and reconstructed power plants, 80 Fed. Reg. 64,510. Citing its authority under section 111(d) of the CAA, EPA also simultaneously finalized the CPP, 80 Fed. Reg. 64,662. The CPP involves the cooperative federalism approach so common in environmental law; EPA has issued final emission reduction goals for each state, and it is now up to states to develop, submit, and implement plans to achieve those goals. When it finalized the CPP, EPA also proposed a federal implementation plan (FIP or federal plan) for states that do not submit an approvable plan, as well as model trading rules, which will, once final, assist states in plan development, 80 Fed. Reg. 64,966.

It comes as no surprise that the CPP has spurned a lawsuit or two—or thirty-nine, to be exact. Consolidated as *West Virginia v. EPA*, these cases are pending in the D.C. Circuit. States are participating on both sides (27 seeking review, 18 supporting EPA), and a long list of local governments, industry groups, environmental groups, and others are also involved. In addition to attacking the substance of the rule, the petitioners sought a stay pending judicial review. After the D.C. Circuit denied their request, they petitioned the Supreme Court for relief; in an unprecedented move, the Court issued a stay on February 9, 2016. The stay will be in effect pending review at the D.C. Circuit and disposition of any petition for certiorari.

The CPP, as promulgated, required states to submit by September 6, 2016, either a final plan or an initial submittal with an extension request; those states that are granted an extension must submit final plans by September 6, 2018. Final emission goals must be met by 2030. The stay suspends these deadlines, and there is no certainty about what the new deadlines would be if the rule is ultimately upheld. As states react differently to the stay—some continuing to pursue development of compliance plans and others putting efforts on hold—the prospect of regional collaboration may be more difficult as well. Nevertheless, EPA and many states remain committed to achieving the goals laid out in the CPP and are continuing to push forward by working with stakeholders and developing plans.

Emission Reduction Goals

The goals that EPA set for each state in the CPP are based on what EPA has determined is the best system of emission reduction (BSER). EPA finalized three building blocks as the BSER, and analyzed: (1) reductions in CO2 emissions at coal-fired units by improving heat rates; (2) substitution of generation from existing natural gas units for generation from existing coal units; and (3) substitution of generation from new, zero-emitting resources for generation from existing coal units. Using the BSER, EPA developed interim and final CO2 performance rates for coal units and for natural gas combined cycle units. EPA then established interim and final state goals in both pounds of CO2 per MWh (the rate goal) and short

tons of CO2 (the mass goal). States may choose between a rate-based and a mass-based compliance path.

In addition to promulgating carbon emission guidelines for 47 states with affected electric generating units (EGUs), EPA also set guidelines for four electric generating units located on tribal lands: the South Point Energy Center on the Fort Mojave Reservation, the Navajo Generating Station and the Four Corners Power Plant on the Navajo Indian Reservation, and the Bonanza Power Plant on the Uintah and Ouray Indian Reservation.

EPA has proposed to make a finding that it is "necessary or appropriate" to implement the emission guidelines for the affected EGUs based in part on the interconnected nature of the units. 80 Fed. Reg. 64,966, at 65,033–34. In so doing, EPA has proposed to develop a federal plan to cover the affected EGUs. The Fort Mojave, Navajo, and Ute tribes have the option, but not the obligation, to take further action. As amended in 1990, the CAA authorizes EPA to treat Indian tribes as states. 42 U.S.C. §§ 7410(o), 7601(d). Pursuant to this authority, EPA promulgated the Tribal Authority Rule. 63 Fed. Reg. 7254 (Feb. 12, 1998). Accordingly, these tribes may seek "treatment as state" either to develop and implement tribal implementation plans or to receive delegated authority to administer all or portions of the federal plan.

In an effort to introduce flexibility and cost-efficiency measures, the CPP also allows the states to participate in the Clean Energy Incentive Program (CEIP) and emission trading programs. These programs are intended to afford entities that are required to comply with emission reductions opportunities to offset actual emissions with tradable credits or allowances. The emission rate credits (ERCs) and allowances are obtained from eligible renewable energy generation, zero-emitting carbon generation, and energy efficiency programs. Under a simple rate-based program, affected EGUs will be required to meet an emission standard that is derived from the state's rate-based goal. If an EGU emits above its assigned rate, then it must acquire a sufficient number of ERCs—each of which represents a zero-emitting MWh—to bring the emission rate into compliance. Under a simple mass-based program, the affected EGUs will be required to meet a mass limit. The EGU does so by acquiring and turning over a quantity of emission allowances equivalent to its actual emissions during a compliance period.

CPP Impacts on Tribes Without Affected EGUs

In addition to the generalized climate effects, the potential economic and reliability impacts of the CPP are projected to permeate through the interconnected grid, affecting consumers of electricity from the national grid (including tribes and people residing in Indian country) as well as the EGUs subject to the regulations. In addition, the CPP may alter the dispatch dynamics (and thus the emissions and economics) of existing fossil fuel-fired units potentially affecting tribes located in close proximity to those plants.

For those tribes looking to actively offer their own resources in support of carbon reductions and CPP implementation, both the CEIP and CPP trading programs offer potential avenues for participation. By submitting qualifying generation and energy efficiency programs into the CEIP and trading programs, tribes may be eligible for monetary compensation. Moreover, the programs have the potential to foster economic and electric autonomy, as participating tribes will have resources to supply power to their members and/or to better control the electric load demand on their lands.

EPA is currently developing the details of the CEIP and the model trading rules. Although there is significant potential for participation by tribes, some changes may need to be made to the program requirements to promote effective participation. In the remainder of this article we discuss the contours of CEIP and CPP trading programs, and then we explore tribal reactions to the CPP and proposed FIP and model trading rules.

Participating in the CPP

Clean Energy Incentive Program

The Clean Energy Incentive Program incentivizes early investment in solar and wind renewable energy (RE) generation and energy efficiency (EE) programs in low-income communities. EPA

proposed additional details about the CEIP on June 30, 2016, 81 Fed. Reg. 42,940, with comments due September 2, 2016. (A notice published on July 21 extended the original deadline. 81 Fed. Reg. 47,325.) States and tribes with emission goals may elect to participate in the CEIP through their implementation plans. Under the CEIP, states and tribes may award "early-action" ERCs (or set aside a portion of their allowance budget) to new renewable generation projects and new EE programs in low-income communities that commence construction or operations after the submission of the final implementation plan.

In turn, EPA will award the participating state with matching early-action ERCs or allowances, up to a specified cap, that the state may then award to the project. Every two MWh of qualifying RE generation are eligible for up to two ERCs (one from the state and one from EPA), and every two MWh of EE savings in low-income communities are eligible for up to four ERCs (two from the state and two from EPA). EPA has also proposed that certain solar projects in low-income communities would be eligible for this increased match and to expand the RE category to include geothermal and hydropower generation. These earned credits and allowances may be applied or transferred during the compliance period to meet the state's CPP emission goals. Qualifying projects must be located in or benefit the participating state, and must generate (in the case of RE) or save (in the case of EE) MWh during the years 2020 and 2021.

The Court's stay will complicate parties' decision-making processes with respect to CEIP participation. EE and RE projects typically have a long lead time that (depending on the project) may require parties to start planning now in order to generate or save MWh in the 2020 and 2021 time period. If the rule is struck down or if upheld and EPA shifts the deadlines to accommodate the litigation-related delays, then parties commencing development of these projects in the near future may not receive the benefits they expected. On the other hand, if the rule is upheld and the deadlines stand, then parties that wait to plan and develop EE and RE may find that their projects are not ready in time to earn early credits and allowances. Parties will wish to structure any contracts to address potential CPP delays, and to take into account the possibility that it might be struck down in its entirety.

Planning for CEIP implementation is further complicated by the fact that there are many procedural details that are still up in the air, including the question of how states, tribes, and territories that do not have set emission guidelines may participate in the CEIP. EPA is currently seeking comment on this and other issues as part of its CEIP design details proposal in Docket No. EPA-HQ-OAR-2016-0033. For tribes without affected EGUs, EPA is proposing that an eligible project that is located "in Indian country within the borders of a state" will be considered to be "located" in the state for purposes of the CEIP to facilitate such project's participation in the CEIP through the state. EPA has requested that parties resubmit CEIP-related comments previously submitted in other contexts (e.g., Docket Nos. EPA-HQ-OAR-2015-0734, EPA-HQ-OAR-2015-0199) to EPA if you would like them to be considered in the current proposal.

CPP Trading Programs

In addition to supporting certain early actors, the CPP authorizes states and tribes with affected EGUs to meet their carbon emission goals by engaging in mass- or rate-based allowance trading programs. EPA has not mandated a particular form of trading but has set trading "guidelines," which include a prohibition against trading across platforms, i.e., a rate-based program may not trade with a mass-based program. The guidelines also require that eligible low- or zero-emitting generation and electric savings be evaluated, measured, and verified.

States and tribes that want to participate in a trading program must propose such a program as an element of their implementation plan; EPA, itself, plans to include it as an element of any federal plan that it issues. Trading programs may be regional in nature, with no formal agreement needed, so long as each participating state or tribe proposes a plan that is "trading ready" with other entities that are implementing the same (rate-based

or mass-based) approach. The plan must also meet certain minimum requirements, such as an EPA-approved or -administered emission and allowance tracking system.

The resources that may be eligible to earn ERCs or allowances include wind, solar, geothermal, hydro, wave, or tidal RE projects; qualified biomass; the biogenic portion of waste-to-energy; nuclear power; certain combined heat and power units; and demand-side EE or demand-side management measures that have quantified actual electricity savings.

As the rule is written, states and areas of Indian country that do not have any affected units within their borders but that are connected to the U.S. grid may participate in the rate-based market (i.e., in earning and trading ERCs) if their projects meet all of the eligibility guidelines set forth in 40 C.F.R. § 60.5800. The only exceptions are demand-side resources, 40 C.F.R. § 60.5800(a)(4)(vi). If a tribe does not have affected units on their lands, then ERCs may only be issued for demand-side EE resources that are in areas of Indian country if the resources are located within the geographic boundaries of a state with a rate-based plan. If the area of Indian country is located within the geographic boundaries of a state with a mass-based plan, then the demand-side EE resources cannot receive allocated ERCs or allowances.

The Roles for Tribes

While many tribes are engaged in EE and RE development that could contribute to achieving the CPP's goals, as noted above, participation in the CPP may be difficult for the tribes that do not have affected EGUs on their lands—that is, all but three tribes. And participation in the CPP through a state plan raises concerns about jurisdiction and tribal sovereignty. Representatives of tribal governments were among the millions of commenters on the CPP and proposed FIP and model trading rules; their comments focused on these and other issues and advocated for the needs of tribes in the development of these rules.

As a starting point, many tribes highlighted the issue that the impacts of climate change on tribes can be pronounced, disrupting communities and threatening cultural practices and treaty rights. The Regional Tribal Operations Committee (RTOC) for Region 10, a partnership between EPA Region 10 and elected tribal representatives from Alaska, Idaho, Washington, and Oregon, explored current and potential impacts of climate change on tribes in the Pacific Northwest. RTOC Comments on CPP, EPA-HQ-OAR-2013-0602-22953, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22953. Among the issues they raised were that: water scarcity further complicates unresolved water rights claims; wildfires pose health, property, and ecosystem threats; and flooding and rising sea levels damage homes and infrastructure. Id. Further, several studies have found that over 200 Alaska Native villages have been impacted by flooding and erosion, and 31 villages should consider relocating. Id. Beyond Region 10, flooding has destroyed wild rice crops, and northern Minnesota has seen a steep decline in the moose population, likely exacerbated by hotter summers and increased numbers of pests. Fond du Lac Band of Lake Superior Chippewa Comments on CPP, EPA-HQ-OAR-2013-0602-25005, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-25005. Power plant emissions also have more immediate air quality impacts in surrounding areas. Ute Indian Tribe Comments on CPP, EPA-HQ-OAR-2013-0602-27340, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-27340 (discussing EPA's trust responsibility in calling for stricter requirements for the Bonanza Power Plant that impacts the Uintah Basin's air quality).

In spite of these impacts, the role for tribes in CPP implementation is somewhat limited, particularly for tribes that do not directly regulate EGUs or choose to work through state programs. Forest County Potawatomi Community (FCPC) Comments on FIP, EPA-HQ-OAR-2015-0199-0267, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2015-0199-0267 (arguing that this regulatory gap is inconsistent with tribal sovereignty, the CAA, EPA Indian policy, the federal trust responsibility, and environmental justice). If

EPA were to provide tribes with a mechanism to directly participate in the CPP, it would generally increase air quality protections and promote tribal sovereignty, as well as provide potential economic benefits in areas such as RE and EE development. See Indian Country Energy & Infrastructure Working Group (ICEIWG) Comments on FIP, EPA-HQ-OAR-2015-0199-0960, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2015-0199-0960.

State implementation in Indian country is not an adequate solution as it raises several complications, first and foremost of which is jurisdiction. FCPC Comments on FIP (noting that under the CAA and the Tribal Air Rule, states can only assert authority over tribal air resources in limited instances). A state generally cannot regulate projects or programs that would generate ERCs or allowances in Indian country. Certain tribes noted that it would be helpful in protecting tribal interests if states engage in consultation with tribes as they develop state implementation plans that apply to EGUs located near Indian country. Keweenaw Bay Indian Community Comments on CPP, EPA-HQ-OAR-2013-0602-23606, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23606. Another significant issue with relying on state implementation for tribal participation is that, depending on a state's decision to implement a rate- or mass-based plan, a tribe's trading avenues could be curtailed. ICEIWG Comments on FIP. The states of Arizona and Utah allege that their energy portfolios incorporate generation located in Indian country and that they are harmed by the possible foreclosure of trading opportunities with tribes. *West Virginia v. EPA*, Opening Brief of Petitioners on Procedural and Record-Based Issues, Document #1599898, Case No. 15-1363. Further, several of the state petitioners seeking review in the D.C. Circuit have identified a need to be able to trade between rate-based and mass-based plans. *Id.*

The ability to fully engage in earning CPP allowances and participate in CPP trading would afford tribes the opportunity to contribute to the achievement of CPP goals as well as to benefit economically from EE and RE projects. Further, participation in the CEIP, particularly if it were to include a separate incentive for projects in Indian country, would be a strong way for EPA to engage tribes early in CPP implementation. National Tribal Air Association (NTAA) Comments on CEIP, EPA-HQ-OAR-2015-0734-0127, https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2015-0734-0127. Several commenters encouraged EPA to work with tribes to discuss ways to foster such participation and to consider creating a National Tribal Implementation Plan, which would include the CEIP, to allow all tribes to fully participate in the CPP and the CEIP. *Id.; see also* Dean B. Suagee, *Clean Power: A Federal Plan for Indian Country?*, 30:4 NAT. RES. & ENVT. 55 (Spring 2016). There also could be a role for tribes in discussing multistate plans with states. RTOC Comments on CPP; NTAA Comments on CEIP.

Conclusion

While tribes may stand to benefit from the CPP generally from CO2 reductions that address climate change as well as economically through ERCs and allowances, there are significant steps that may need to be taken to ensure that all tribes are able to choose to participate in a manner consistent with tribal sovereignty. EPA's model trading rules, if finalized, may provide additional guidance on how tribes can participate in the CPP. EPA has heard from tribes through comments and consultation, but there are likely still many future opportunities to continue working with (and educating) EPA on crafting the roles for tribes, as well as opportunities to work collaboratively with other tribes or with states on implementation issues.

Anjali G. Patel *and* **Jessica R. Bell** *are associates at Spiegel & McDiarmid LLP, Washington, D.C. They can be reached at anjali.patel@spiegelmcd.com and jessica.bell@spiegelmcd.com. The views expressed herein are those of the authors and do not necessarily represent the opinions of Spiegel & McDiarmid LLP or its clients*

FEDERAL DELEGATION TO STATES OF CLEAN WATER ACT SECTION 404 PERMITTING MAY RESULT IN REDUCED CONSULTATION WITH TRIBES REGARDING HISTORIC PRESERVATION

Gussie Lord

The Michigan Department of Environmental Quality (DEQ) currently is reviewing a non-ferrous metallic mining permit for the Back Forty Project, http://www.deq.state.mi.us/documents/aquila/ (permit application). The proposed open-pit mine is expected to produce gold, zinc, copper, silver, and lead, and is to be located near Stephenson, Michigan, on the banks of the Menominee River, a 116-mile waterway separating Michigan's Upper Peninsula from Wisconsin and emptying into Lake Michigan.

The proposed footprint of the Back Forty mine contains a significant number of archaeological and historical resources that have not been fully surveyed or studied, including rare raised garden beds and ceremonial mounds that are extremely likely to contain human remains. See Permit Application, app. F, section 7.2.3. The Archaeological Investigation Report (Report) for the proposed project area identified several archaeological sites that are likely to be eligible for listing in the National Register of Historic Places, and several more that require further study. Report, section 8.2.1, 2. Under the National Historic Preservation Act (NHPA), 54 U.S.C. § 300101 et seq., properties that are eligible for the National Register are "historic properties" regardless of whether they have been formally listed. 54 U.S.C. § 300108. In addition to the archaeological sites, the proposed mine is very near other sites of known religious, cultural, and historical significance to the Menominee Tribe of Wisconsin. Report, section 2.2.1.

If approved, construction of the Back Forty mine would be subject to a state-administered dredge and fill permit under section 404 of the Clean Water Act, as Michigan is one of only two states that has been delegated the authority to administer a 404 program. 40 C.F.R. § 233.70. EPA retains authority to review and object to state-issued permits, including permits that may impact waters of other states and permits that may impact "sites identified or proposed under the National Historic Preservation Act." 40 C.F.R. § 233.51(b)(3), (6). Further, the U.S. Army Corps of Engineers (USACE) retains jurisdiction in Michigan over dredge and fill permits for navigable rivers under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq., but the USACE has determined that its jurisdiction over the Menominee River for such purposes ends at a point several miles south of the proposed mine site. See Approved Jurisdictional Determination, U.S. Army Corps of Engineers, Detroit District (Mar. 2010) (http://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/GENSEC10.pdf). Accordingly, the proposed mine application process is subject only to state permits, albeit with possible EPA review.

Under NHPA section 106, 54 U.S.C. § 306108, federal agencies must take into account the possible effects of federal undertakings on historic properties, i.e., those that are listed on or eligible for the National Register. In so doing, the statute requires each federal agency to consult with any Indian tribe that "attaches religious and cultural significance" to a historic property that would be affected by the proposed undertaking. 54 U.S.C. § 302706. This requirement is implemented through numerous provisions in the regulations promulgated by the Advisory Council on Historic Preservation (ACHP). 36 C.F.R. pt. 800. For example, the ACHP regulations require federal agencies to engage in consultation with tribes in the identification of historic properties of religious and cultural significance, regardless of whether those properties are within the affected tribe's reservation. 36 C.F.R. § 800.4(b).

States administering federal programs under delegated authority are not obligated to comply with section 106. In *National Mining Association v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003),

the court held that "section 106 applies only to federally funded or federally licensed undertakings, and not to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." Prior to the ruling in *Fowler*, permits issued by state agencies pursuant to a delegated authority were considered to be undertakings subject to section 106. *See Indiana Coal Council v. Lujan*, 774 F. Supp. 1385 (D.D.C. 1991). In fact, the ACHP took the position that when Congress amended the NHPA definition of "undertaking" in 1992, it intended to specifically include permits issued by a state or local government pursuant to a federal delegation of authority. 69 Fed. Reg. 40,544, 40,550 (July 6, 2004). However, despite the ACHP's position and its stated disagreement with the D.C. Circuit's interpretation of the NHPA, it remains bound by the decision in *Fowler*. In addition, courts have held that even where federal funds are expended on a project, if a state rather than a federal agency is controlling the expenditure of funds, the project is not considered federally funded, and section 106 is not triggered. *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584, 593 (2nd Cir. 2005).

While Michigan's non-ferrous metallic mining regulations require a permit applicant to consider impacts to "cultural, historical, or archaeological resources," part 632 of Michigan's Natural Resources and Environmental Protection Act (NREPA), MICH. COMP. LAWS §§ 324.63201 to 324.63223, Rule 425.202(2)(ee), Michigan's definition of such resources is narrower than the federal definition and includes only those sites that are "listed as a national historic landmark; listed on the national register of historic places; listed on the state register of historic sites; or recognized under a locally established historic district created pursuant to the local historic districts act." Rule 425.102(1)(g). It does not include consideration of impacts to sites that are eligible for listing on the National Register of Historic Places. Further, Michigan law requires DEQ to provide public notice of a mining permit application and proposed decision only to federally recognized Indian tribes in Michigan. See MICH. COMP. LAWS § 324.63205(6)-(7). The memorandum of agreement (MOA) between Michigan DEQ and USEPA Region 5 for the administration of CWA section 404 requires Michigan to consult with a tribe when a permit application has a reasonable potential to impact tribal waters. See MOA, section 4 (2011), https://www.michigan.gov/documents/deq/wrd-jpa-404-moa_483185_7.pdf. For the Back Forty Project, the impacted Menominee Tribe is located out of state and has no jurisdiction over the potentially impacted waters.

It is clear that EPA intended for tribes to be consulted when impacts to tribal cultural and historical resources may occur, see MOA section 4; 40 C.F.R. § 233.51(b)(6), but the delegation of CWA section 404 permitting authority nevertheless has resulted in a complete lack of procedural requirements for consideration of impacts to archaeological resources at a site with clear historic and cultural significance to an out-of-state tribe. Absent a listing of the site on the National Register of Historic Places, which cannot occur if the property owner objects, 54 U.S.C. § 302105(b), or the state register of historic sites, the state's requirements to seek the affected tribe's input are almost entirely voluntary and certainly ill-defined. The absence of adequate process for a site of such clear archaeological and historical significance is particularly evident in this instance because, had it occurred in any one of 48 other states, section 106 would apply.

NHPA regulations provide an avenue to a possible solution to this issue. A federal agency could enter into a programmatic agreement under 36 C.F.R § 800.14 to govern situations in which nonfederal parties are delegated major decision-making responsibilities. 36 C.F.R. § 800.14(b)(iii). In negotiating a programmatic agreement, a federal agency could require that the state or local government in question undertake a process that is the equivalent of 36 C.F.R. § 800.2(c)(2)(ii), which mandates consultation on historic properties of significance to Indian tribes and Native Hawaiians

when such properties are not located on tribal lands. Such requirements would acknowledge that a site's location off-reservation does not diminish its historical, cultural, or spiritual significance to an affected tribe.

Use of programmatic agreements does not present a perfect solution. States historically have not been friendly to tribal interests. This may particularly be true where, as here, the impacted tribe is located outside of the state, and state interests in economic development are likely to override tribal interests in cultural resource protection. Further, state historic preservation offices may not be equipped with sufficient resources to carry out appropriate reviews of all permit applications received, or adequate experience in considering sites of importance to tribes.

It is evident that, in this case, federal delegation of CWA section 404 permitting authority to Michigan has resulted in diminished procedural requirements attached to potential impacts upon tribal cultural and historical resources. In delegating program authority to states, federal agencies should be required to ensure that they do not create gaps in the already thin level of protection for sites of significance to tribes, particularly where the sites may be located off-reservation.

Gussie Lord *is an associate with Jill Grant & Associates, LLC in Washington D.C. She is a member of the Oneida Nation of Wisconsin. She may be reached at glord@jillgrantlaw.com*


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