

Navajo Nation Labor Commission Rules it Lacks Jurisdiction

In recent litigation, Modrall Sperling represented Local 611 of the International Brotherhood of Electrical Workers (“Local 611”). Local 611 employed a Navajo tribal member, Mr. Benson Bitsui, whose duties included organizing throughout most of New Mexico. He performed certain tasks within the Navajo Nation’s Reservation, such as making presentations at colleges, attending meetings, and communicating with high-ranking Navajo Nation officials.

Local 611 terminated Mr. Bitsui’s employment. He filed a claim before the Navajo Nation Labor Commission (“NNLC” or “Labor Commission”). While it has similarities to the federal Equal Employment Opportunity Commission, the NNLC is a fact-finding body and presides over trials. Appeals are taken to the Navajo Nation Supreme Court.

The Labor Commission has jurisdiction only over claims arising under the Navajo Preference in Employment Act (“NPEA”), which has several provisions. *See* 15 N.N.C. §§ 601-619. For instance, the NPEA requires that a Navajo preference in employment, requires “just cause” for termination of employment, and prohibits harassment, intimidation and prejudice. Mr. Bitsui’s claims included termination without just cause and harassment based on his status as Navajo or a Native American.

Local 611 contended that the Labor Commission lacked subject matter jurisdiction over the case as a matter of Navajo and federal law.

The NPEA applies to employers “doing business” on or near the territorial boundaries of the Navajo Nation. Local 611 argued that it was not doing business on the Navajo Nation and therefore the Commission lacked jurisdiction. Factually, Local 611 asserted several points, among them: (a) there is no Union Hall was on the Navajo Nation; (b) Bitsui’s activities on the Nation were limited; and, (c) Bitsui was hired in and supervised from Albuquerque, New Mexico – well outside the boundaries of the Navajo Nation. The last point distinguished case law in which the Navajo Nation Supreme Court held that human relations activities occurring on the Nation, such as hiring and training, formed a “sufficient nexus” between the Navajo Nation and an employer for the employer to be “doing business” on the Nation and therefore subject to the Nation’s jurisdiction. *See Jackson v. BHP World Minerals*, No. SC-CV-36-00, (Nav. Sup. Ct. October 7, 2004). In a decision entered on December 31, 2008, the Labor Commission agreed with Local 611, concluding that Local 611 was not “doing business” on the Navajo Nation and therefore the Commission did not have jurisdiction over the matter.

Local 611 made a second jurisdictional argument, contending that the Labor Commission lacked jurisdiction because all the alleged misconduct took place on land which is not held in trust for the Navajo Nation. Thus, pursuant to both Navajo and federal law, the Nation has civil jurisdiction only if the Nation could meet its burden of establishing that one of the two narrow exceptions to the general rule that Indian tribes lack jurisdiction over non-members’ activities on non-Indian fee lands. *See Montana v. United States*, 450

U.S. 544 (1980). Generally, tribal Nations have civil jurisdiction over non-Indian activities on fee lands only when there is a consensual relationship between the tribe and the putative defendant supporting exercise of tribal jurisdiction, or when the non-Indian conduct has a “direct effect on the political integrity, economic security, or health or welfare” of the Navajo Nation. *See Dale Nicholson Trust v. Chavez*, SC-CV-69-00 (Nav. Sup. Ct. January 6, 2004); *Montana v. United States*, 450 U.S. 544 (1980); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008). It does not appear the Labor Commission directly addressed this argument, but it noted that federal law “severely limits” its jurisdiction.

More information on the Navajo Preference in Employment Act, the Navajo Nation Labor Commission and other aspects of Navajo law may be obtained by contacting Brian Nichols, 848-1852, bkn@modrall.com.

The Modrall Sperling Law Firm regularly represents clients, principally businesses, with legal issues involving the Navajo Nation and other Native American tribes and groups across the United States. Our representation regards litigation, permitting and administrative proceedings, transactions, consultation and advice, and due diligence.