COURT CASES INVOLVING FORMER OPERATORS IN THE DINEH BI KEYAH FIELD

A SMALL FIELD WITH BIG IMPLICATIONS FOR DINÉ SOVEREIGNTY

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1. INTRODUCTION

This report provides an overview of two important court cases that involved operators in the Dineh Bi Keyah (DBK) field. Both cases were subject to Supreme Court rulings. The first, *Kerr-McGee Corp.* v. *Navajo Tribe,* made it to the U.S. Supreme Court. The second, *Neptune Leasing, Inc*. v. *Mountain States*, led to an important jurisdictional determination in the Navajo Nation Supreme Court. Both cases involved operators who have had, at best, shady dealings with Diné communities. And in both instances, court rulings have led to affirmations of Navajo Nation sovereignty.

These cases are still instructive today. As confusion regarding operations in the DBK field continues to proliferate among residents and regulators, these cases are important reminders of the *sovereign rights and responsibilities* of the Navajo Nation when it comes to governing resource extraction conducted by outside corporations on Navajo lands.

2. Kerr-McGee Corp. v. Navajo Tribe

Kerr-McGee Corp. v. *Navajo Tribe* 471 U.S. 195 (1985) is a U.S. Supreme Court Case decided in April 1985 that concerns the authority of the Navajo Nation in particular, and Tribes in general, to tax non-Indians. It is a highly significant case for the Navajo Nation and for Indian Country more broadly.

A) Case Background:

In 1978, the Navajo Tribal Council established two taxes: The Possessory Interest Tax and the Business Activity Tax, each of which applied to Indians and non-Indians conducting business on the Navajo Nation. The Possessory Interest Tax was a tax on leaseholds on the Navajo Nation, based on a value of those leases, at a rate of 3%. The Business Activity Tax was a 5% tax on sales of products extracted or produced on the Navajo Nation, after standard expenses and deductions.

Upon establishing these taxes, the Navajo Tribal Council submitted the new rules to the Bureau of Indian Affairs (BIA) in case approval was needed. BIA informed the Council that there was no regulation that stipulated federal approval or disapproval for taxes set by the Tribe.

Before any taxes were collected, Kerr-McGee Corp., who owned substantial leases and produced both uranium and oil on Diné lands, brought a lawsuit against the Navajo Tribal Council in the United States District Court for the District of Arizona. Kerr-McGee argued that it was unlawful for the Navajo Tribe to implement taxes without approval from the Secretary of the Interior. The District Court concurred with Kerr-McGee and enjoined the Navajo Tribe from enforcing its tax laws against Kerr-McGee.

The Navajo Tribe appealed the District Court's ruling to Ninth Circuit Court of Appeals in 1983, which ruled in favor of the Tribe in 1984. The Ninth Circuit looked to a substantially similar case that had been decided by the Tenth Circuit in 1983: *Southland Royalty Co.* v. *Navajo Tribe of Indians*, which also concerned the validity of Tribal taxes on mineral leases and royalties. In this case, the 10th Circuit ruled that approval from the Secretary of the Interior is not required for Tribal taxation.

In *Kerr-McGee Corp* v. *Navajo Tribe*, the Ninth Circuit found that Tribes have the right to tax as part of their inherent sovereignty. Contrary to Kerr-McGee's claims, the court found that the Navajo Tribe's tax constituted neither a breach of the 1850 or 1868 Treaties, the Mineral Leasing Act, the Commerce Clause, nor a breach of the Tribe's contract with Kerr-McGee.

In 1984, the U.S. Supreme Court "granted certiorari", which means that at least four justices agreed to review the Court of Appeals' decision. The U.S. Supreme Court affirmed the Ninth Circuit's decision, in favor of the Navajo Tribal Council and the United States (amicus curiae) and against the petitioner (Kerr-McGee).

In its opinion, the U.S. Supreme Court cited its decision in *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130 (1982), in which the Court found that the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management" (*Id.,* at 137). In the *Merrion* v. *Jicarilla Apache Tribe* case, the Court also found that Congress may establish "checkpoints that must be cleared before a tribal tax can take effect" *Id., at 155.* The issue at the heart of *Kerr-McGee Corp* v. *Navajo Tribe* is whether Congress had enacted legislation that required the Secretary of the Interior to approve Navajo tax laws.

B) DISMANTLING KERR-MCGEE'S ARGUMENT

Indian Reorganization Act of 1934

Kerr-McGee had argued that the Indian Reorganization Act of 1934 (IRA) required Tribes to seek Secretarial approval for the enactment of taxation laws. The Supreme Court found several flaws in this argument. First, the Navajo Tribe never adopted the provisions of the IRA. While not mentioned in the Court's opinion, the IRA's chief proponent, John Collier, was also the architect of the livestock reduction program in Diné Bikeyah, which was one of the primary reasons the Tribal Council refused to adopt the terms of the Act.[i]

Second, the Supreme Court notes that there is considerable variation among tribal constitutions written and adopted under the IRA. While the IRA does mandate Secretarial approval of constitutions, it does not require that taxation in particular be subject to Secretarial approval. In its opinion, the Court provided examples of instances where Tribes were required to obtain Secretarial approval for tax laws affecting non-Indians, as well as exceptions to this practice. To the Court it was clear that Congress did not intend to only recognize tribal taxation laws authorized by constitutions adopted under the IRA. Kerr-McGee's argument failed to convince the Court.

Indian Mineral Leasing Act of 1938

Kerr-McGee had argued that the Indian Mineral Leasing Act of 1938 (IMLA) required Secretarial approval of Navajo tax laws. The IMLA outlines rules and procedures for leasing mineral interests on tribal lands and provides that operations under any mineral lease on tribal lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. But the Secretary does not, under the IMLA or other statute, require that taxation laws be submitted for Secretarial approval.

Kerr-McGee suggested that the Secretary's decision not to review tribal tax laws of non-Indians was inconsistent with the IMLA. The Court disagreed, emphasizing what it had established in *Merrion* v. *Jicarilla Apache Tribe* regarding the difference between a Tribe's role as "sovereign" versus its role as "commercial partner". The Court wrote that the Navajo Tribe "acts as a commercial partner when it agrees to sell the right to the use of its land for mineral production, but the tribe acts as a sovereign when it imposes a tax on economic activities within its jurisdiction" (200) and in passing the IMLA, the U.S. government could make the same distinction. Thus, the Court found that Kerr-McGee's argument failed – it should be amply clear to Congress that Secretarial approval for Indian taxation laws was not required under the IMLA.

C) IMPLICATIONS FOR INDIAN COUNTRY AND THE NAVAJO NATION:

Taxation as Part of Tribal Sovereignty

The Supreme Court's 1985 decision in *Kerr-McGee Corp.* v. *Navajo Tribe* affirmed an important principle of tribal sovereignty for the Navajo Nation and Indian Country more broadly: the power to tax both tribal members and non-Indians within tribal jurisdiction is an inherent right of the Tribe as a sovereign nation.

The Court noted that insofar as the federal government is "firmly committed to the goal of promoting tribal self-government" (200), "the power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." (201)

On the Navajo Tribal Council in particular, the Court said:

"The Navajo Government has been called "probably the most elaborate" among tribes. The legitimacy of the Navajo Tribal Council, the freely elected body of the Navajos, is beyond question. We agree with the Court of Appeals that neither Congress nor the Navajos have found it necessary to subject the Tribal Council's tax laws to review by the Secretary of the Interior." (201)

The above passage is copied in the Navajo Nation Code, under Annotations, "Legislative body; jurisdiction of Secretary of Interior".

Navajo Sovereignty Day

The 1985 Supreme Court decision in *Kerr-McGee Corp* v. *Navajo Tribe* became the basis for the Navajo Nation's "Sovereignty Day", established on May 3, 1985 and celebrated as a tribal holiday on the fourth Monday in April.[ii]

The Resolution establishing the holiday read:

The Supreme Court by a vote of 9 – 0, stated that the Navajo Tribal Government as a Sovereign Nation has the inherent right to impose taxes without review and approval of the Secretary of the Interior; and said that the Navajo Government, "probably the most elaborate among Tribes", is legitimate and has the absolute right to Self-Government."[iii]

Permanent Trust Fund, Other Funds and Taxes

The Supreme Court decision in *Kerr-McGee Corp* v. *Navajo Tribe* prompted the Navajo Tribal Council, under the leadership of President Zah, to establish the Permanent Trust Fund in 1985, which reserved 12% of all tribal revenue – including revenue collected from taxation. The Permanent Trust Fund was intended to provide an alternative revenue stream to oil and gas royalties. As President Joe Shirley put it in his 2009 Presidential statement on Navajo Sovereignty Day, "a huge influx of payments poured in" from companies like Kerr-McGee who had refused to

respect Navajo tax law until the Supreme Court issued its decision. Shirley proclaimed that in 2009, the Nation's seven taxes had brought in over $94 million.[iv]

These other taxes, which would contribute to the Permanent Trust Fund and other funds, are the Oil and Gas Severance Tax, passed in 1985 after the *Kerr-McGee Corp.* ruling, the Hotel Occupancy Tax (1992), Tobacco Products Tax (1995), the Fuel Excise Tax (1999), and the Sales Tax (2001).[v]

The Navajo Nation later established other funds, including Chapter Government Nation Building Fund, College Scholarship Fund, Vocational Education Scholarship, Handicap Trust Fund, Elderly Senior Citizen Trust Fund, Navajo Academy/Preparatory School, Land Acquisition Fund, and Veterans Trust Funds.[vi]

By the end of 2017, the Navajo Nation had $3.28 billion in its Master Trust Program.[vii] The Nation now develops five-year plans to spend interest from its trust fund income on projects that benefit the people.

3. Neptune Leasing, Inc. v. Mountain States Petroleum Corporation and Nacogdoches Oil and Gas Inc.

Neptune Leasing, Inc. v. Mountain States is a Navajo Nation Supreme Court Case (No. SC-CV-24-10) decided in May 2013. The Supreme Court made important jurisdictional decisions regarding the case but remanded the specific matter at hand back to the Shiprock District Court. During the COVID-19 pandemic, Diné CARE was unable to obtain information from the court system to ascertain how or if the case was ultimately resolved. The decision at the Navajo Nation Supreme Court level was significant because it clarified important questions around Tribal jurisdiction with regards to non-Navajo companies operating on trust lands.

A) CASE BACKGROUND

The Parties:

Neptune Leasing Inc
Texas-based company. Operator of a helium plant on Navajo trust land in the DBK field from an unknown period until 2006.

Mountain States Petroleum
New Mexico-based company. Acquired DBK assets from Kerr-McGee in 1994 and bought helium plant from Neptune in 2006. Sold assets, including helium plant, to Nacogdoches in 2007-2008.

Nacogdoches Oil and Gas Inc
Texas-based company. Acquired DBK assets, including helium plant, from Mountain States in 2007-2008. Began selling assets to Nordic Oil USA 2 and Nordic Oil USA 4 in 2016.

Case background: In November 2006, Neptune sold a helium processing plant in the DBK field to Mountain States. As part of the sale, Mountain States worked out a multi-year payment plan or security agreement with Neptune. But then, in August 2007, Mountain States sold the plant, along with its other assets, to Nacogdoches. Neptune claimed that Mountain States' sale of the plant constituted a breach of its security agreement, as well as a breach of Diné Fundamental Law.

Neptune first brought its case against Mountain States and the plant's new owner, Nacogdoches, to the Shiprock District Court in 2010.

Mountain States and Nacogdoches argued that the Navajo Nation did not have jurisdiction over them or over the subject matter. Nacogdoches later withdrew this claim, but Mountain States argued that the case should be heard in Texas based on a clause in its agreement with Neptune.

The Shiprock District Court ultimately found that it had jurisdiction over the subject property (the helium plant) but that its jurisdiction to adjudicate the breach of contract was ambiguous. It thus decided to yield jurisdiction on the contractual matter to an unnamed Texas court. With regards to personal jurisdiction, the Shiprock District Court found that it had jurisdiction over Neptune, which consented to as much, and over Nacogdoches, who had clear business dealings on the

Navajo Nation, but found that it did not have jurisdiction over Mountain States because the company no longer had business dealings on the Navajo Nation.

The Helium Plant:
The helium plant in question is on Navajo trust land, in the DBK field. The last known business lease written for the site, at the time of the Supreme Court decision, was in 1974 for a party unrelated (and unnamed) to the case. There is no lease record for Neptune, Mountain States, or Nacogdoches' use of the site. Neptune could not produce a record of its ownership of the helium plant. The sale of the plant to Mountain States was done without knowledge of the Navajo Nation, while Nacogdoches stated that the Navajo Nation was aware of its purchase of the plant from Mountain States and that the Nation was aware of its operations of the plant as well as other oil, gas, and helium recovery activities on and near the Navajo Nation. Because the Shiprock District Court found that it did not have personal jurisdiction over Mountain States, it dismissed the case.

Neptune appealed the case to the Navajo Nation Supreme Court.

B) THE NAVAJO NATION SUPREME COURT DECISION:

The Supreme Court considered the following issues and analyzed them both as they pertained to Navajo Nation Common Law and U.S. Common Law:

> "Whether the district court properly dismissed the action below for lack of personal jurisdiction over Mountain States".
>
> "Whether the district court properly "yielded" subject matter jurisdiction to an unnamed Texas court conducting unspecified proceedings involving some or all of the parties".

Question 1:

Navajo Common Law:

The authority of the Navajo Nation to regulate non-members is recognized in the Treaty of 1868 and codified in the Navajo Nation Long-Arm Statute at 7 N.N.C. § 253(a). One of the grounds for jurisdiction established in the long-arm statute is when a non-member consents to jurisdiction through "commercial dealings" with the Nation, as was the case with Neptune, Mountain States, and Nacogdoches, insofar as they operate(d) on the Navajo Nation. However, the Shiprock District Court had determined that what was relevant for establishing jurisdiction was that Mountain States no longer operated on the Navajo Nation at the time that the suit was brought. The Supreme Court found that the District Court had erred in this decision. According to the Supreme Court, it is not relevant whether the non-member entity (Mountain States) is currently conducting business on the Navajo Nation so long as they once did. The Supreme Court thus reversed this decision.

Federal Common Law:

To determine whether the Navajo Nation has personal jurisdiction over Mountain States under federal common law, the Navajo Nation Supreme Court applied a two-pronged jurisdictional test (the Montana test) established in a U.S. Supreme Court Case, Montana v. United States, 450 U.S. 544 (1981) for personal jurisdiction over non-members.

The Montana Test: In Montana, the U.S. Supreme Court held that while Tribes generally do not have jurisdiction over non-members on non-member fee land, Tribes do retain civil jurisdiction over non-members on the reservation in two instances:

When non-members enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" OR

When non-member "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, supra at 566.

The Navajo Nation Supreme Court noted that the District Court failed to perform the Montana test in analyzing the Neptune v. Mountain States case. The Supreme Court found that if the District Court had done such an analysis, it would have found that the Navajo Nation had personal jurisdiction over Mountain States because Mountain States did indeed enter into consensual relationships with the Tribe by virtue of its commercial dealings. The Supreme Court rejected the notion espoused by the District Court that the Nation's jurisdiction over Mountain States had ended when Mountain States' commercial relationship with the Nation ended.

In the security agreement (purchase plan) between Neptune and Mountain States, both companies had agreed that conflicts between the two would be addressed in a Texas Court. Mountain States argued that due to this clause in the agreement, the Navajo Nation did not have jurisdiction over its dispute with Neptune. The Navajo Nation Supreme Court rejected this argument:

"If we apply Montana, the private party transfers of Navajo land in this case [between Neptune and Mountain States], without written leases, surely threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe under Montana's second prong. Navajo land belongs to the people, and management of Navajo land carries a solemn responsibility" (8).

Citing the poorly documented practices around the helium plant at the DBK field, the Supreme Court wrote:

"The practice of swift re-sale without involving the Nation clearly interferes with the Nation's ability to manage our land. While being able to point to a lease's terms would be crucial to a jurisdictional challenger under Montana in seeking to limit the Nation's reversionary interest in this case, the lack of a lease, and lack of involvement of the Nation across generations of valuable transfers, does not remove private entities from regulation or adjudication under Navajo law" (12).

The Supreme Court thus found that under the two-prong Montana test, which is applicable under federal common law, the Navajo Nation did indeed have personal jurisdiction over Mountain States.

Question 2:

The Navajo Nation Supreme Court found that the Shiprock District Court erred in "yielding" subject matter jurisdiction to a Texas court because it did not determine what proceedings, if any, were ongoing in Texas on the matter. In other words, the Shiprock District Court did not confirm whether there was an ongoing case in Texas, in which Court, and involving what parties. In passing off the case, the Court did not do its due diligence to make sure justice would be served in Texas.

Outcome:

The Navajo Nation Supreme Court remanded the case to the Shiprock District Court. Records of the case are not available.

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[i] Weisiger, Marsha. *Dreaming of Sheep in Navajo Country*. Seattle: University of Washington Press, 2009.
[ii] See Shirley, Joe. "President's Statement on Sovereignty Day," April 27, 2008.
Sovereignty Day was initially set for April 16th, the day of the Supreme Court decision, but was later changed to the fourth Monday in April so as to not interfere with the Spring Council Session.
[iii] CMY-25-85, cited in Krakoff, Sarah. "A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation." *Oregon Law Review* 83, no. 4 (2004): 1109–1202.
[iv] Shirley, Joe. "President's Statement on Sovereignty Day," April 27, 2008.
[v] Krakoff, Sarah. "A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation." *Oregon Law Review* 83, no. 4 (2004): 1109–1202.
[vi] Office of the President and Vice President. "Zah Sees Uncertainty Ahead and Continues to Caution the Public About Rushing to Spend the Permanent Trust Fund." June 21, 2016.
[vii] Donovan, Bill. "Nation's Trust Funds Looking Good." *Navajo Times*. 2018. https://navajotimes.com/reznews/nations-trust-funds-looking-good/.