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The Exhausted Doctrine

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RECENT DEVELOPMENTS

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The Exhausted Doctrine

The Supreme Court has been busy deciding one particular Indian law case that may have far-reaching negative repercussions. That case, *El Paso Natural Gas Co. v. Neztsosie*,[1] is very troubling due to the fact that it weakens the exhaustion doctrine, and by extension tribal sovereignty. Formulated in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,[2] the exhaustion doctrine requires non-Indian parties in civil actions involving tribes or tribal lands to exhaust tribal court remedies prior to bringing an action in a federal court. This simple imprimatur has enhanced the extent and power of the tribal court system in a way that few rulings have. *Iowa Mutual Insurance Co. v. LaPlante*[3] further expanded the scope of the exhaustion doctrine, holding that once a case had proceeded through the tribal court system including its appellate review, the federal district court would review the propriety of tribal jurisdiction. The federal court could only address the merits of the case should it find that the tribal court did not have jurisdiction. The issue of whether a statutory prohibition of tribal jurisdiction would be recognized was affirmatively answered in *Blue Legs v. United States Bureau of Indian Affairs*.[4] Citing *Iowa Mutual*, the Eighth Circuit stated, "[c]ivil jurisdiction over such activities [of non-Indians on reservation land lies] in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[5] When a statute designates federal courts as the appropriate forum for adjudicating a matter without making specific reference to tribal court jurisdiction has been somewhat controversial. Most courts, however, have followed a strict textual statutory analysis and have held that absent specific mention of tribal court in a statute, the requirement to exhaust tribal court remedies is applicable in that instance. Leading cases promoting this analysis are *Kerr McGee Corp. v. Farley*[6] and *El Paso Natural Gas Co. v. Neztsosie*.[7] That was until *Neztsosie* was granted certiorari and argued before

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1. 526 U.S. 473 (1999). *Neztsosie* involves various personal injury and wrongful death claims against a uranium mining corporation including claims brought under the Price-Anderson Act.
2. 471 U.S. 845 (1985).
3. 480 U.S. 9 (1987).
4. 867 F.2d 1094 (8th Cir. 1989).
5. *Iowa Mutual*, 480 U.S. at 14.
6. 915 F. Supp. 273 (D.N.M. 1995).
7. 136 F.3d 610 (9th Cir. 1998).

the Supreme Court in the spring of 1999. In *Neztsosie* the Court critically limited the exhaustion doctrine by broadening its textual analysis of statutory language and holding that when Congress passes legislation relating to state courts without mentioning tribal courts, by inference, includes tribal courts also.[8] The regulation of tort claims related to nuclear industry is a particularly volatile and significant issue. The court makes a powerful argument that the complete preemption of all state court litigation evidences a strong desire on the part of Congress to consolidate these claims.[9] However, deciding that the principles of "duplicative determinations"[10] and "consequent inefficiencies"[11] are adequate principles to allow Congress to draft legislation without the necessity of giving any conscious thought to the existence of tribal courts is troubling. One of the greatest battles tribes have fought in the past and continue to fight is that against invisibility. The need for asserting tribal recognition occurs on many levels and is a constant struggle for tribes. That tribes and tribal members continue to be overlooked is plainly evidenced in the language of this decision when the court states,

> Why, then, the congressional silence on tribal courts? . . . We have not been told of any nuclear testing laboratories or reactors on reservation lands, and if none was brought to the attention of Congress either, Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like these. Now and then silence is not pregnant.[12]

In the *Neztsosie* decision, the Court ignored the obvious historical connections between tribes and the nuclear industry. In addition, the Court made an assumption that Congress intended tribal courts to be equivalent to state courts specifically with respect to the Price-Anderson Act[13] claims. The decision, which essentially undermines tribal authority, is contrary to fact and precedent on several counts. First, with respect to the jurisdiction of tribes, the tribal connection with the nuclear industry is well known. Uranium is mined primarily in the Southwest. One of the largest reservations, the Navajo, is located in the Southwest. Tribal members have for years been employed in the uranium mining industry. The mainstream media has publicized tort claims against employers in this industry by tribal members. One of the most notorious corporations associated with the nuclear industry, Kerr-McGee

8. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 487 (1999).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 42 U.S.C.A. § 2210 (West Supp. 1999) (Atomic Energy Damages Act). The Act regulates tort litigation arising from nuclear incidents or the nuclear industry. From the smallest claims to the most catastrophic events, the Act creates a federal civil action and provides for removal of those claims from a state court to the federal court system.

Corporation, has its corporate headquarters in Oklahoma. Its negligence in the nuclear industry was popularized in an Academy Award-nominated motion picture.[14] Based on these general facts alone, any trial court could take judicial notice of the connection and easily predict that tribal courts would hear such claims. Certainly members of Congress aided by their staff members would be aware these facts.

Second, with respect to the presumption of Congress' intent towards tribal court jurisdiction over Price-Anderson Act claims, it is incumbent upon Congress to explicitly state that for a fact. While it may have been likely, as the Court states in *Neztsosie*, that Congress would have included tribal courts explicitly when drafting this act, why should the judiciary be allowed to infer congressional impact. Does such inference, in the face of legislative silence, not fly in the face of textual statutory analysis? Congress should be required to acknowledge tribal courts when drafting legislation preempting specific federal laws from state and tribal court jurisdiction.

Third, with respect to the question of whether tribes as sovereigns are equivalent to states, the court in *Farley* was clear in the importance of the necessity for plain statutory language to abrogate the exhaustion doctrine when it stated,

> Plaintiffs err in assuming that tribes are to be treated as states. Indian tribes and federal government are dual sovereigns. Tribes have a unique relationship with the federal government and occupy a unique status under the law . . . . It is clearly established that Indian tribes do not derive their sovereign powers from congressional delegation. Rather, tribal sovereignty is inherent, and tribes retain attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty.[15]

Unfortunately, the Court in the *Neztsosie* case did not agree.

If this decision stands, it deals a heavy blow to the exhaustion doctrine. The Supreme Court has effectively made tribal courts the proverbial phantom of the judiciary — a position which clearly weakens tribal sovereignty. It will certainly empower all non-Indian parties who face claims in tribal courts seeking removal. Prior to this decision a federal court in South Dakota allowed removal when the defendant plaintiff filed for bankruptcy, then remanded the contract dispute claims — clearly within the jurisdiction of the tribal court — to the state court instead![16] As tribal courts have evolved and continue to evolve into effective systems of adjudicating a wide variety of

14. SILKWOOD (20th Century Fox 1983).

15. Kerr McGee Corp. v. Farley, 915 F. Supp. 273, 277 (D.N.M. 1995).

16. Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co., 84 B.R. 638, 639-40 (D.S.D. 1988).

claims they rely on recognition of their progress from the state and federal judiciary to succeed. However, it is clear that even at the highest level of our political system tribes must still struggle for recognition of their rights within that system. The *Neztsosie* Court, as led by the Four Horsemen of the Indian Law Apocalypse,[17] is a hostile forum in which those rights can be effectively asserted. Here is a clear example of how "lawyers dwell on small details"[18] while neglecting the "weightier provisions of the law: justice and mercy and faithfulness."[19] The solution at this point is that the tribes increase their lobbying efforts on Congress and publicize their struggle through increased exposure in the media. The *Neztsosie* decision can be addressed through legislative action. It is only through such efforts that tribal existence and needs will acknowledged and accommodated

But What If Superman Squeezed It into a Diamond?

In contrast to the broad reading of the Price-Anderson Act to include the unstated, the Court returns to its hallowed strict textual analysis in *Amoco Production Co. v. Southern Ute Indian Tribe*.[20] In this case, the Ute tribe brought suit asserting ownership interests in coalbed methane gas (CBM) contained in coal owned by the tribe.[21] The tribe had acquired ownership of these coal beds from the federal government. The government had reserved these coal rights through the Coal Land Acts of 1909 and 1910 when it issued limited land patents to homesteaders following an energy crisis.[22] The issue in this case revolved around the meaning of the word "coal." Coalbed methane gas is a byproduct of the process of mining coal, and as such was considered a waste product until the 1970s. Most of CMB is absorbed on the surface of the coal itself, though part of the gas is contained in water in the coal and as a free gas.[23]

The Court centered its analysis on what Congress, in 1909, would have understood the term "coal" to mean.[24] It also considered whether Congress meant to only to preserve the solid fuel portion of coal.[25] In a complex decision the Court held that coal was not an ambiguous term and that Congress would not have understood the term coal broadly enough to encompass CBM. Instead, the Court said that the gas was a separate mineral

17. Justices Rehnquist, Scalia, Thomas, and Kennedy.

18. DON HENLEY, *The End of the Innocence*, *on* THE END OF THE INNOCENCE (Geffen Records 1989).

19. *Matthew* 23:23 (New American Standard).

20. 119 S. Ct. 1719 (1999).

21. *Id.*

22. *Id.* at 1722.

23. *Id.* at 1724.

24. *Id.* at 1725.

25. *Id.*

estate and noted that it would have needed to have been explicitly reserved by the U.S. government in order for the CBM mineral rights to pass to the Ute tribe.[26] Of course, this decision is an unfortunate result for the Ute tribe. Although the tribe mines the coal, the CBM produced by their efforts may be captured without the tribe receiving the economic benefit. Instead, the surface landowners reap the economic benefit from the CBM. One could interpret the holding of this case as giving the surface landowners the right to extract CBM should the tribe decide not to mine the coal.[27] Whichever decision they make, the economic outcome of *Amoco Production* is certainly problematic and costly for the tribe.

The dissent in *Amoco Production* presents a logical and eloquent argument that the landowner who, at one time, had the responsibility for disposing of an unwanted waste product would accrue the benefit if that same waste product were one day found to be of value.[28] Most notable, is the dissent's reliance on "the canon that ambiguities in land grants are construed in favor of the sovereign."[29] That a substance which is an essential component of coal and would not exist but for coal is not considered part of the coal is a perplexing notion. What is even more baffling than this paradox of "what is coal" is the contrast between the legal analysis *Amoco Production* and *Neztsosie.* In *Neztsosie* non-existent terms are inferred to the detriment of tribal jurisdiction, while in *Amoco Production* the term coal is construed in the most meager fashion, to the detriment of the tribe. It makes one wonder if the doctrine of construing ambiguous terms in favor of the plaintiff (or sovereign) is altered if the party happens to be associated with an Indian tribe in some way. Truly, the chill of winter has descended upon the tribes this judicial season.

26. *Id.* at 1726.
27. *Id.* at 1727.
28. *Id.* at 1728.
29. *Id.*