10-1984

Kerr-McGee Corporation v. Navajo Tribe of Indians

Lewis F. Powell, Jr.

2

Discuss - could join 3 but will be interested in review of BRW, WHR & SOC

Involves authority of Navajo Tribe — not organized under Indian Reorganization Act & w/o a Tribal Const. — to tax oil & gas production w/out any approval from Sec. of Interior Q seems important.

PRELIMINARY MEMORANDUM

September 24, 1984 Conference
Summer List 23, Sheet 2

No. 84-68

KERR-McGEE CORPORATION

v.

THE NAVAJO TRIBE, et al. ok

Cert to CA9 (Merrill, Skopil, Ferguson)

Federal/Civil Timely

1. SUMMARY: Petr argues that the Navajo Tribe, which has not become organized under the Indian Reorganization Act of 1934 and which has not adopted a tribal constitution, may not tax its oil and gas production without obtaining the approval of the Secretary of Interior.

Deny. It looks as if there is no requirement in the IRA that tax ordinances be approved by the Secretary. There is

2. FACTS & DECISION BELOW: Petr extracts oil and gas from certain lands of the Navajo Indian Reservation in Arizona pursuant to leases with the Navajo approved by the Secretary of Interior. In 1978 the Navajo Tribal Council adopted a "Business Activity Tax" currently set at 5% on the gross receipts of certain business activities conducted on the Reservation, including every sale within or without the Reservation of a "Navajo good or service," and a "Possessory Interest Tax" currently set at 3% on the value of mining leasehold interests on reservation lands of a value in excess of $100,000.

The DC rejected most of petr's contentions that the Tribe was without power to tax, but it held that the taxes were invalid because the Tribe had not secured approval of the taxes from the Secretary. It noted that the Navajo had chosen not to organize under the Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq., or the Navajo-Hopi Rehabilitation Act, 25 U.S.C. §631, et seq. A tribe that had organized under either Act was required to secure the Secretary's approval of its taxes. The DC reasoned that the IRA reflected a congressional policy in favor of tribal organization under constitutions approved by the Secretary and, therefore, that a requirement that an unorganized tribe obtain the Secretary's approval of its taxes could be inferred to avoid giving unorganized tribes greater power than tribes that had followed the congressional preference.

The CA9 observed that the DC had relied heavily on a case involving the same taxes in D.C. Utah, which subsequent to the DC's decision was reversed on this issue by the CA10. Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486, 489 (CA10 1983). The CA9 agreed with the CA10, reasoning that nothing in either of the Acts requires tribes, organized or unorganized, to submit their ordinances or resolutions to the Secretary for approval. The CA9 acknowledged that tribal constitutions and charters of incorporation adopted pursuant to the IRA had to be approved by the Secretary, but noted that specific legislation had to be submitted to the Secretary for approval only if the tribe chose to include such a requirement in its constitution, bylaws, or charters.

3. CONTENTIONS: Petr argues that the CA9 decision conflicts with Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), which, in upholding tribal power to tax, observed that Congress has imposed "a series of federal checkpoints that must be cleared before a tribal tax can take effect." Under the IRA, Merrion noted, a tribe has to obtain the Secretary's approval before adopting or modifying its constitution to allow taxation of nonmembers and again before a specific tax ordinance can take effect. Petr further points to Merrion's distinction between tribal taxation and state and federal taxation:

> "These additional constraints minimize potential concern that Indian tribes will exercize the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies."

Id. at 141.

Petr next argues that the CA9's decision upsets the federal scheme of supervision over relations between Indians and non-Indians. Under the Mineral Leasing Act of 1938, 25 U.SC. §§396a et seq., all oil and gas leases between Indians and non-Indians must be approved by the Secretary. Under the CA9's decision, the Tribe can unilaterally tax and regulate oil and gas leases it could not have contracted without the Secretary's approval. In addition, this Court in Merrion noted that §396b expressly excepted tribes from needing the Secretary's approval for mineral leases if they had a constitution or charter approved by the Secretary pursuant to the IRA. Thus the Mineral Leasing Act made a special provision for such tribes allowing them to tax leases, but subject to the approval of the Secretary under the IRA. This belies the CA9's conclusion that the IRA was not intended to distinguish between organized and unorganized tribes. Finally, petr argues that the CA9's decision creates serious problems of fundamental fairness and basic liberties in permitting tribes to exercise unconstrained and unreviewable authority over non-Indians. It also rewards tribes that have rejected the IRA and refused to adopt constitutions.

Resps argue that the CA9 decision flows directly from the principles of Merrion, which recognized that tribal taxing power is an "inherent power necessary to tribal self-government and territorial management" and that it derives from the tribe's inherent sovereignty and not from any federal

grant of power. Merrion also determined that this tribal taxing power remains intact unless divested by the federal government and that this Court will find divestment only from clear indications that Congress intended such. Thus, tribal taxing power existed before the IRA and the Navajo-Hopi Indian Rehabilitation Act. These Acts did not require tribes to adopt constitutions, but offered a range of choices as to tribal government. Nothing in the Acts indicates that Congress intended to divest the taxing power from tribes that declined to adopt a constitution or to require Secretarial approval for all tribal tax laws.

Resps also argue that the exception in the Mineral Leasing Act is very narrow, applying only to tribes that have both organized and incorporated under the IRA, and does not indicate a general scheme in which organized and unorganized tribes are distinguished. Moreover, the Mineral Leasing Act has nothing to do with taxes.

Resps next argue that the need for constraints to prevent unprincipled tribal taxes is satisfied by the ever-present power of Congress to intervene. The fact that Congress has chosen not to act cannot be taken to mean that it intends to condition all tribal taxes on Secretarial approval.

Finally, resps observe that there is no conflict for this Court to resolve. The lower court decisions are all consistent with the CA9's decision. Moreover, the Navajo Tribe submitted the taxes in question to the Secretary, who determined that they did not require his approval.

Four amici briefs have been filed by various oil and utility companies extracting or dependent on oil and coal from the Navajo reservation. One argues that the Najavo have never effectively adopted a government of the Tribe and that the Tribal Council is merely an agency of the Secretary. The IRA and the Navajo-Hopi Rehabilitation Act are remedial measures to enable tribes to free themselves from absolute domination by the Secretary, but the Najavo have chosen not to do so. Thus the CA9 has appointed the Navajo Tribal Council as the tribal government by judicial fiat. Resps point to the 55,000 Navajos who voted in the last tribal election (there are 79,000 registered voters out of a tribal population of 161,000), and note in any event that this argument was not made or addressed below. Another amici brief argues that this Court has assured continued federal supervision of tribal energy taxes, that the producers relied on this supervision in undertaking development of Navajo lands, and that unrestrained tribal taxes will impose economic burdens on the entire country.

4. DISCUSSION: In Merrion, this Court dealt with a severance tax on oil and gas extracted from tribal lands imposed pursuant to both a tribal constitution and an ordinance that had been submitted to the Secretary for approval as required by the IRA. In holding that the tribal power to tax nonmembers derived from tribal sovereignty, the Court emphasized that the power was subject to federal constraints. In Merrion, such constraints were obviously

present, in the form of the IRA's requirment of Secretarial approval. The CA9, however, in upholding the Navajo's sovereign power to tax, made no reference to this Court's limiting language. Apparently, the CA9 agrees with resps that the only restraint on Navajo taxing power is the potential for congressional intervention. Whether or not this position is correct, it is not mandated by Merrion.

The issue is an important one because of the potential for abusive or excessive taxation and the potentially far-reaching economic consequences. Despite the lack of a conflict in the lower courts and the concurrence of the Secretary, the issue warrants this Court's attention.

I recommend grant.

There is a response and four amici briefs.

August 30, 1984 Vickery Opn in ptn

certainly no statutory authority for such a requirement if the tribe has not reorganized under the Act. If Congress is unhappy with the rulings of CA2 and CA9, it can take the desired action.

I also wonder how much effect CA9's ruling will have in the future. If the contracting party is also the entity with taxing power, can it not contractually bind itself not to implement any new taxes during the course of a project?

Lee

September 24, 1984

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 84-68

Submitted ....., 19... Announced ....., 19...

KERR_MCGEE CORP.

vs.

NAVAJO TRIBE

BRW put on list.
CA9 held that Tribe did not need approval of Sec/Interior.

Granted but BRW agreed to take a second list.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.					join 3								
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.			✓										
.....													

Court ..... Voted on ...., 19... October 5, 1984

Argued ....., 19... Assigned ....., 19... No. 84-68

Submitted ....., 19... Announced ....., 19...

KERR_MCGEE CORP.

vs.

NAVAJO TRIBE

Grant

Same vote on 9/24

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

April 3, 1985

84-68 Kerr-McGee v. Navajo Tribe

Dear Chief:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 3, 1985

No. 84-68 Kerr-McGee Corp. v. Navajo Tribe of Indians

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 3, 1985

Re: 84-68 - Kerr-McGee v. Navajo Tribe of Indians

Dear Chief:

Please join me.

Respectfully,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 4, 1985

Re: No. 84-68, Kerr-McGee v. Navajo Tribe

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 4, 1985

Re: No. 84-68 - Kerr-McGee Corp. v. Navajo Tribe

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 4, 1985

84-68 - Kerr-McGee Corporation v.
Navajo Tribe of Indians

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 8, 1985

No. 84-68

Kerr-McGee Corp. v. Navajo Tribe of Indians, et al.

Dear Chief,

I agree.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 10, 1985

Re: No. 84-68 Kerr-McGee Corp. v. Navajo Tribe of Indians

Dear Chief,

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

84-68 Kerr-McGee v. Navajo Tribe (Lee)

LFP Out - letter 4/3/85
CJ for the Court 3/4/85
1st draft 4/3/85
Joined by SOC 4/4/85
TM 4/4/85
JPS 4/4/85
HAB 4/4/85
BRW 4/4/85
WJB 4/8/85
WHR 4/10/85