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Tribal Governments - Limits on Debt Liability of Tribal Corporations: Navajo Tribe v. Bank of New Mexico

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TRIBAL GOVERNMENTS—Limits on Debt Liability of Tribal Corporations: *Navajo Tribe v. Bank of New Mexico*

I. INTRODUCTION

The Tenth Circuit recently announced a rule of law for determining whether an Indian tribal government is legally responsible for the debts of a tribal corporation. In *Navajo Tribe v. Bank of New Mexico*,¹ the court indicated that creditors may reach only those tribal assets that a tribal government expressly pledges for the tribal corporation's liabilities.

The issue of the relationship between a tribal government and its corporation is a timely one. Growing demands for tribal services and regulation require tribal governments to develop more sophisticated administrative devices, such as governmental corporations. Increasing commercial transactions between tribes and non-Indian parties create a need to clarify the extent of a tribal corporation's liability and the nature of the relationship between a tribal government and its corporation.²

The *Navajo Tribe* decision at first appears to introduce a new rule of construction for tribal corporate charters. Upon closer reading, it is clear the test merely subjects tribal corporations to legal principles applicable to federal corporations. The decision appears to present a new rule only because the court illustrated the test by citing a line of cases involving tribal corporations. In discussing these cases, however, the court confused issues of tribal jurisdiction, sovereign immunity, and the construction of tribal charters. The rationale of *Navajo Tribe* perpetuates the widespread confusion of the three legal principles. In *Navajo Tribe*, in particular, the incorrect application of the principles of jurisdiction and sovereign immunity needlessly created ambiguity and complexity.

In previous cases, courts have ruled on whether tribally chartered corporations can sue or be sued, and in which court.³ No such precedent was available, however, concerning the limits of a tribal corporation's debt liability. *Navajo Tribe* is the first judicial attempt to establish guidelines concerning tribal governmental liability for the debts of a tribally chartered corporation. Had the court properly analyzed the issue, the

1. 700 F.2d 1285 (10th Cir. 1983).

2. See Grimsrud, *Doing Business on an Indian Reservation: Can the Non-Indian Enforce His Contract With the Tribe?*, 1981 B.Y.U. L. Rev. 319 (1981).

3. The *Navajo Tribe* court cited many of these cases. Unfortunately, the bases for some of the cases and the court's use of them in *Navajo Tribe* were imprecise. See *infra* text accompanying notes 75-99.

decision would have greater utility for tribal governments and non-Indian parties who wish to do business with tribes.

This Note analyzes the *Navajo Tribe* decision, the rule on corporate separateness for debt liability, and the court's reasoning. The Note first explains the function of government corporations, their importance to Indian tribes, and the court's holding that tribes possess sufficient authority to create corporations. Second, the Note discusses the rule, explains the court's use of cases involving jurisdiction and sovereign immunity, and suggests a clearer method of analysis.

II. STATEMENT OF THE CASE

The dispute in *Navajo Tribe* arose when the Navajo Housing and Development Enterprise (NHDE) defaulted on loans in excess of \$280,000 which it had borrowed from the Bank of New Mexico (BNM). In return, BNM set-off⁴ funds that the Navajo Tribe had deposited in the bank.⁵ The tribe challenged BNM's action, maintaining that BNM had no right to set-off the tribe's funds because NHDE was a separate entity. The dispute centered on whether NHDE, a tribally chartered corporation, was separate from the tribe.

NHDE, one of six tribal enterprises of the Navajo Tribe, is typical of modern semi-governmental corporations.⁶ It was created by tribal resolution⁷ and charged with responsibility for planning and coordinating the development of tribal housing and community facilities.⁸ The Navajo Tribal Code specifies that the control and operation of the enterprise is to be patterned after a chartered profit-making corporation, with a management board similar to a corporate board of directors.⁹ Under the tribal code, the management board has full authority and responsibility for NHDE. The board must act in the best interests of the Navajo Tribe, within the

4. The right to set-off funds has been described as follows:

The right of a bank to apply a deposit to the payment of a debt due and payable from the depositor to the bank can only exist where each occupies the relation of a debtor and creditor, and where there exists mutual demands. Mutuality is essential to the validity of a set-off, and in order that the demand of the bank may be set-off against that of the depositor, both must mutually exist between the same parties in the same capacity of right.

5A Michie, Banks and Banking § 115(c), at 309 (1973).

5. *Navajo Tribe*, 700 F.2d at 1286-87.

6. See *supra* notes 32-42 and accompanying text.

7. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 2 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983). See also Navajo Tribal Resolution CJA-6-72.

8. 5 Navajo Tribal Code § 1903. For the complete text of the tribal resolution pertinent to NHDE, see *id.* §§ 1901-1981 (1978).

9. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 2 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983). See also 5 Navajo Tribal Code § 1904.

limits of responsible business judgment. It cannot incur contractual or other financial obligations beyond the enterprise's ability to repay those obligations.¹⁰

The tribe retains control over NHDE through the board's composition. The board is composed of the chairman and vice-chairman of the tribal council, and seven members appointed by the chairman with the consent of the council's advisory committee.¹¹ Of the seven appointees, three must be tribal members and four are selected on the basis of their business background.¹² When NHDE acquired the BNM loans, two senior vice-presidents of BNM served on NHDE's management board.¹³

Navajo Tribe involved two promissory notes which BNM issued to NHDE. The first note was a five-year real estate mortgage for \$300,000, dated March 5, 1974.¹⁴ The second was a ninety-day note for \$32,027.78, executed in December, 1975.¹⁵ In November, 1976, BNM declared NHDE in default on the loans by \$283,518.96, apparently because NHDE was insolvent.¹⁶

BNM made repeated, unsuccessful demands for payment and finally sought other funds to satisfy NHDE's debt.¹⁷ The bank reviewed its other financial holdings and discovered a six-month certificate of deposit in the tribe's name.¹⁸ In May, 1976, the tribe had purchased an \$845,000 certificate of deposit from BNM with federal revenue sharing funds.¹⁹ On November 22, 1976, the maturity date of the certificate, BNM was obligated to pay the tribe \$845,000, plus \$26,054.17 in accrued interest.²⁰ Before paying the tribe, BNM deducted the amount of NHDE's defaulted loans from the tribe's certificate. BNM contended that NHDE and the

10. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 2 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983).

11. 5 Navajo Tribal Code § 1907.

12. *Id.*

13. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 3 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983).

14. *Id.* at 2.

15. *Id.*

16. *Id.* at 2-3. The district court did not explain the cause of NHDE's insolvency.

17. *Navajo Tribe*, 700 F.2d at 1286.

18. *Id.*

19. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 2 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983). The Tenth Circuit noted that the nature of the funds deposited by the tribe was an important issue at trial. The tribe had deposited federal revenue sharing funds which have specific federal guidelines attached to their use. The court, however, did not have to rule on the question of BNM's ability to set off federal revenue sharing funds, because other issues resolved the case. *Navajo Tribe*, 700 F.2d at 1287 n.1. It is possible that the court would have denied BNM's right of set-off on these grounds, even had the bank convinced the court that the tribe and NHDE were coextensive. See State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§ 1221-65 (1976).

20. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 2 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983).

tribe were the same legal entity, giving it the right to set-off NHDE's indebtedness against the tribe's certificate.²¹

BNM's transactions with NHDE and the tribe had occurred independently.²² When NHDE executed the two promissory notes, NHDE's general manager signed each note. No one representing the tribe signed either note. Furthermore, nothing in the note indicated that the Navajo Tribe had guaranteed or agreed to act as a surety on the note.²³ When the tribe purchased its certificate of deposit, no mention was made of NHDE.²⁴

The Navajo Tribe sued BNM in New Mexico federal district court, challenging the bank's set-off of its federal revenue sharing funds against NHDE's debt.²⁵ The central issue facing the court was whether NHDE and the Navajo Tribe were legally separable.²⁶ If NHDE and the tribe were separate entities, their relationships with BNM would have been separate, and BNM would have had no right to set-off the tribe's funds against NHDE's debt.

Both the tribe and BNM moved for partial summary judgment.²⁷ The court granted the tribe's motion, leaving for trial only the question of damages.²⁸ After the district court awarded the tribe prejudgment interest, BNM appealed to the Tenth Circuit Court of Appeals.²⁹ The Tenth Circuit affirmed the district court, holding that the Navajo Tribe had sufficient authority to create a separate corporation and that the tribe and NHDE were in fact separate.³⁰ The court then attempted to shed further light on the limits of a tribal corporation's debt liability by articulating a new rule on corporate separateness.³¹

III. DISCUSSION

A. Government Corporations

Ever since the Continental Congress created the Bank of North America in 1781, American governments have used corporations for a variety of purposes.³² These corporations, as distinguished from state-chartered pri-

21. *Id.* at 2-3.

22. *Id.* at 2.

23. *Id.*

24. *Id.*

25. *Id.* at 1.

26. *Id.* at 3.

27. *Id.* at 2.

28. *Id.* at 5.

29. *Navajo Tribe*, 700 F.2d at 1287.

30. *Id.* While the Tenth Circuit affirmed the district court's decision on the issue of separation, the court remanded the case with instructions to lower the prejudgment interest.

31. *Id.* at 1287-89.

32. See Note, *The Corporation as a Federal Administrative Device*, 83 U. Pa. L. Rev. 346 (1935). For information on governmental corporations generally, see Bonapfel, *The Legal Nature of Public Purpose Authorities: Governmental, Private or Neither?*, 8 Ga. L. Rev. 680 (1974); Field, *Gov-*

vate corporations, vary in nature and function, covering the spectrum from profit seeking businesses to administrative bodies. Despite their many configurations, these corporations generally are grouped into two categories: government-owned businesses and semi-governmental corporations.³³

In a number of other countries, government ownership of private enterprise is so extensive it is almost commonplace.³⁴ In contrast, the role of governmental corporations in the United States is still relatively limited, because public ownership of segments of the economy is perceived to be at odds with a healthy capitalist economy.³⁵ In recent years, however, Congress has created a number of private enterprises, both profit and nonprofit.³⁶

The purpose of these government-owned businesses is to provide governmental assistance to United States' businesses in a manner that minimally interferes with the natural performance of private enterprise in a competitive economic system.³⁷ Creation of a government-owned business can provide the requisite assistance without disrupting or regulating private businesses. Furthermore, government-owned businesses preserve and foster particular enterprises that are essential to society but are not always economically viable.

While government-owned businesses are relatively rare in the United States, Congress frequently has created semi-governmental corporations to administer government programs and services, especially during times of crisis such as World War I and the Depression.³⁸ When government must respond quickly and efficiently, semi-governmental corporations provide autonomous administrative agencies that can streamline the process of governing.

Semi-governmental corporations and government-owned businesses encompass a mix of public and private characteristics.³⁹ Both types of

ernment Corporations: A Proposal, 48 Harv. L. Rev. 775 (1935); McIntire, *Government Corporations as Administrative Agencies: An Approach*, 4 Geo. Wash. L. Rev. 161 (1936); and Musolf, *Uncle Sam's Private, Profitseeking Corporations* (1983).

33. Musolf, *supra* note 32, at 2.

34. *Id.*

35. *Id.*

36. Government-owned, profit seeking enterprises include corporations such as the Federal National Mortgage Association, the Consolidated Rail Corporation (Conrail), the Communications Satellite Corporation (Comsat), the National Railroad Passenger Corporation (Amtrak), and the United States Synthetic Fuels Corporation. *Id.* at 1. Congress also has created a number of private, nonprofit corporations, such as the Corporation for Public Broadcasting and the Legal Services Corporation. *Id.* at 3.

37. *Id.* at 9.

38. Corporations such as the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, and the Tennessee Valley Authority were created during this time. Note, *supra* note 32, at 347-48.

39. See generally Note, *supra* note 32.

corporations generally are created legislatively but resemble private corporations in structure. Their organizations vary according to the needs of the specific function to be performed.⁴⁰ Management is entrusted to a board of directors, although the directors often are members of an existing administrative agency or are politically appointed.⁴¹ Funding is obtained from self-supporting activities, sales of stock to the sponsoring government, leases, subsidies, grants, or appropriations.⁴²

B. Tribal Power to Create Government Corporations

Until recently, tribal governments were dependent on the Bureau of Indian Affairs (BIA) for the greater part of the reservation's actual government and for the bulk of their federal financial assistance.⁴³ While tribes still depend on the BIA for the majority of their funding, the percentage of BIA funding has decreased in recent years. Beginning in the 1960's, the pervasive influence of the BIA began to lessen, allowing tribal governments to develop and mature. Congress authorized direct tribal participation in federal domestic assistance programs, which traditionally served state and local governments. With the availability of new funding sources, tribal governments were able to assume a wider range of responsibilities themselves. Congress also passed a number of statutes that strengthened tribal governments, particularly the Indian Self-Determination Act of 1975.⁴⁴ Under this act, tribes may contract with the Secretaries of Interior and Health and Human Services to administer federal service programs themselves.

Other events likewise are causing tribal governments to assume an increasing number of government functions. Congress enacted a number of programs during the 1970's in order to induce economic development on reservations.⁴⁵ As on-reservation commercial activity expands, tribal government likewise will expand, fueling the need for more varied administrative devices. Tribes, like state and federal governments, may charter a variety of corporations to help govern the reservation as well as to regulate the reservation's economy.⁴⁶ Also like state and federal

40. *Id.* at 348-50.

41. *Id.* at 348.

42. Bonapfel, *supra* note 32, at 684-85.

43. Cohen, *Handbook of Federal Indian Law* 180-206 (1982 ed.)

44. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 5 U.S.C. § 371; 25 U.S.C. §§ 13a, 450-50n; 42 U.S.C. §§ 2004b, 4762; 50 U.S.C.A. App. §§ 456, 455-58e (1982)).

45. *See* Cohen, *supra* note 43, at 200-02.

46. Tribally chartered corporations should not be confused with federally chartered tribal corporations. The Secretary of Interior issues federal charters to tribal business corporations under Section 17 of the Indian Reorganization Act of 1934 (the "IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1982)). A Section 17 corporation is one of two forms of tribal governmental organization authorized under the IRA, and its function and organization are controlled by federal statute and charter. *See* Cohen, *supra* note 43 at 147-49. In addition, a separate body of

governments, tribes are free to structure governmental corporations to suit their own needs, absent any federal law that limits their powers.

In *Navajo Tribe*, BNM made an initial challenge to the tribe's power to create a separate entity. BNM argued that although the Navajo Tribe could incorporate itself under the Indian Reorganization Act of 1934, no federal law or treaty gave the tribe specific power to create a corporation separate from the tribe.⁴⁷ BNM further argued the tribal code contained no provision for the formation of corporations.⁴⁸ NHDE also was not incorporated under any state law, and BNM asserted that it therefore could not be a separate legal entity because it had no legal basis under state law.⁴⁹

The district court rejected these arguments, stating that sovereign nations have the power to form semi-governmental corporations to act on their behalf.⁵⁰ This exercise of sovereign power extends to tribal governments because sovereignty is inherent in a tribe. While Congress can limit a tribe's sovereignty, tribal sovereignty is no less than that of the United States until Congress acts.⁵¹ Consequently, tribal governments have sufficient authority as sovereigns to create their own corporations, which become separate legal entities.⁵²

The district court also held that, even if NHDE were not a legally created corporation, BNM's dealings with NHDE were sufficient to estop BNM from denying that NHDE was a legally responsible corporation.⁵³

case law determines the relationship of tribal governments and Section 17 corporations. *Id.* at 325-27. The test developed in *Navajo Tribe* applies only to semi-governmental corporations chartered by a tribe.

47. *Navajo Tribe*, 700 F.2d at 1287. Even if BNM had succeeded in convincing the court that NHDE was not a corporation, it may still have lost the case. If NHDE was not a separate corporation, then the dispute was between BNM and the Navajo Tribe, which would have been protected by sovereign immunity.

48. Brief for Appellant at 10, *Navajo Tribe*.

49. *Id.*

50. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 3 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983).

51. *Id.* The court cited *United States v. Wheeler*, 435 U.S. 313 (1978), in stating the rule on tribal sovereignty. Other cases also have significance for the rule on tribal sovereignty. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that a tribe may not exercise powers inconsistent with their status). For a more thorough discussion of the sovereignty of Indian tribes, see Cohen, *supra* note 43, at 229-57.

52. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 3 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (1983). Unlike tribes that organized under the IRA, the Navajo Tribe has no written constitution. Its actions, therefore, are not confined by the interpretation of the tribe's authority as are some other tribes.

53. *Id.* The opinion cited generally 8 Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 3889, 3910 (1966 rev. ed.) The court also quoted from *Willis v. City of Valdez*: "'Corporation by estoppel' is actually a misnomer for the result of applying the policy whereby private litigants may, by their agreements, admissions, or conduct, place themselves in a position where they will not be permitted to deny the fact of the existence of a corporation." 546 P.2d 570, 574 (Alaska 1976).

Two senior vice-presidents of BNM served on NHDE's management board; one vice-president testified in his deposition that he knew NHDE could not obligate tribal funds.⁵⁴ The court also pointed out that BNM knew about, or should have known about, pertinent tribal code provisions which specifically delineated the limits on NHDE's abilities to incur contractual obligations on behalf of the tribal government.⁵⁵ BNM had dealt with NHDE as a legally responsible corporation and, therefore, could not argue that NHDE was merely an extension of the tribe.⁵⁶

The Tenth Circuit affirmed the district court's holding that the tribe had sufficient authority to create a separate entity, and that it did, in fact, create a separate entity.⁵⁷ The court also agreed that because of the past dealings between NHDE and the two BNM vice-presidents, the bank was estopped from denying their separateness.⁵⁸ The court noted that legal precedent regarding the separateness of the federal government and its instrumentalities supported the holding that NHDE and the tribe, even though closely connected, were separate entities.⁵⁹ This separateness is, in fact, the very purpose of semi-governmental corporations.⁶⁰

C. Determining the Limits of Debt Liability for Tribal Corporations

The Court of Appeals could have merely affirmed the district court's decision and the dispute would have been resolved. Instead, the court affirmed and then articulated a test for determining whether, in essence, it will pierce the tribal corporate veil.

The bank argued that NHDE's relationship to the tribe could not be determined simply by reviewing the tribal code or the resolution creating NHDE.⁶¹ BNM asserted that even if NHDE and the tribe were legally separate, NHDE operated as the alter ego of the tribe. BNM focused on NHDE's behavior, the closeness of its connection to the tribe, and the extent of the tribe's control over the corporation.⁶²

The Tenth Circuit rejected BNM's argument, asserting that the bank misunderstood the law regarding semi-governmental entities.⁶³ The amount of control exercised by the tribe or the closeness of the corporation to

54. *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 3 (D.N.M. 1980), *aff'd. in part, rem'd. on other grounds*, 700 F.2d 1285 (10th Cir. 1983).

55. *Id.*

56. *Id.*

57. *Navajo Tribe*, 700 F.2d at 1287.

58. *Id.*

59. *Id.* See *United States v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939); *Groves v. United States*, 533 F.2d 1376 (5th Cir. 1976).

60. *Navajo Tribe*, 700 F.2d at 1287.

61. Brief for Appellant at 14, *Navajo Tribe*.

62. *Id.* at 12-14.

63. *Navajo Tribe*, 700 F.2d at 1287.

the tribal government is irrelevant. Rather, "[t]he test used in determining whether to consider the enterprise as separate or coextensive focuses not on the indices of control but instead, . . . on the legal issue presented."⁶⁴ The test measures the "detrimental impact" of the issue "upon the attributes of sovereignty belonging to the government."⁶⁵

The court failed to cite authority for the test, although it reflects existing legal principles applicable to federal, semi-governmental corporations.⁶⁶ Under these principles, the relationship between a government corporation and the government that creates it may vary according to the legal issue presented. In determining whether a corporation is separate, the court looks to whether the issue threatens an aspect of the government's sovereignty; that is, whether the issue affects the corporation in its capacity as a government agency. The nature of the issue and its effect on the tribe's interests, therefore, determine the separateness from, or identity between, a corporation and the government.

Under the issue and facts in this case, the court held that the tribe and NHDE were separate.⁶⁷ The court would only treat NHDE as non-separable if BNM had demonstrated a threat to an attribute of the tribe's sovereignty. Proving a detrimental impact on the tribe's sovereignty, however, would have been difficult. The court stated that to treat NHDE as coextensive with the Navajo Tribe would challenge the tribe's power as sovereign to form a separate corporation.⁶⁸ To treat the two as a single entity "under these facts" would actually frustrate the tribe's sovereignty.⁶⁹

The determinative factor of a corporation's separateness is whether the

64. *Id.*

65. *Id.*

66. To regulate semi-governmental corporations, courts have developed a body of law that reflects the dual nature of government corporations. In other words, the corporate structure of these entities may dictate the use of corporate law, while the governmental function may require a totally different legal conclusion on other issues. As a result, semi-governmental corporations do not possess all the attributes of the sovereign government, nor are they governed by all the rules applicable to private corporations. Instead, the courts have developed a body of law specifically adapted to the hybrid status of these corporations. Note, *supra* note 32, at 349-50.

This body of law also determines the relationship between a semi-governmental corporation and the government that creates it. Under federal case law, the separateness of federal semi-governmental corporations varies according to the particular legal issue and the effect of the issue on the government's interest. Some courts, for example, have held that semi-governmental corporations are not subject to attachment or garnishment because these actions would interfere with governmental functions. *Id.* at 353. Yet, government corporations are not entitled to the sovereign's immunity from suit, indicating that courts view them as a separate private corporation, rather than as a governmental entity. *Id.* at 350-51. In addition, parties contracting with a federal corporation can only satisfy their claims through corporate assets. *Id.* at 354. See *United States Fleet Corporation v. Harwood*, 281 U.S. 519 (1929).

67. *Navajo Tribe*, 700 F.2d at 1288.

68. *Id.*

69. *Id.*

tribe intended to create a separate corporation that would be singularly responsible for corporate debts. In resolving this dispute, the court reviewed the Navajo Tribal Code to determine the characteristics of the corporation.⁷⁰ The court noted that NHDE could not incur liabilities beyond its own ability to repay.⁷¹ In addition, the code contained no expression of intent to incur NHDE's liability.⁷²

In determining whether to hold a tribal government liable for the debts of its corporation, the Tenth Circuit Court of Appeals will presume the two entities are separate. It will read the tribal code to determine whether a tribe intended to pledge its assets by reviewing the corporation's specific characteristics.

Based upon the facts in *Navajo Tribe*, it appears that the tribe's assumption of liability for a corporation must be express. Even though there was substantial evidence of a close connection between the corporation and the tribe, the Navajo Code itself contained no specific assumption by the tribe of liability for NHDE.⁷³ In addition, the tribal code included provisions under which the tribe could have assumed liability for the NHDE's debts.⁷⁴ Under these facts, the court found the tribe did not assume the liability. The decision suggests that unless a tribe has expressly assumed liability for its corporation's debts, creditors may not reach the tribe's assets to satisfy the corporations' debts.

D. *Where the Court Went Wrong*

The test for determining corporate separateness articulated by the court at first appears to present a new rule of construction for tribal corporate charters. The test appears to be distinguished from existing rules that determine a government corporation's liability to suit.⁷⁵ Upon closer reading, however, it is nothing more than a statement of the general principle that underlies the body of law governing governmental corporations.

Had the court merely applied the principle to tribal governments and corporations, the decision would be much clearer. The court, however, attempted to illustrate the rule with a line of cases involving tribal corporations. In discussing these cases, the court erred by misconstruing issues of jurisdiction, sovereign immunity, and construction of corporate charters. The result is a confused and ambiguous decision. A clearer understanding and use of the three issues would have resulted in a simpler,

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1288-89 n.2.

75. *See supra* note 67.

more concise analysis of the relationship¹ between a tribal government and a tribally chartered corporation.

First, the court stated that it had applied the test in another Tenth Circuit case, *Donovan v. Navajo Forest Products Industries*.⁷⁶ In *Donovan*, the Tenth Circuit held that the application of OSHA⁷⁷ standards to a tribal enterprise, the Navajo Forest Products Industries, would abrogate certain sovereign rights reserved to the Navajo Tribe by treaty.⁷⁸ The treaty prohibits the federal government from permitting any non-Indians to enter the reservation unless specifically authorized.⁷⁹ Applying OSHA standards to the tribal enterprise would have abrogated the treaty and diluted principles of tribal sovereignty and self-government recognized in the treaty.⁸⁰

In *Navajo Tribe*, the court of appeals stated that *Donovan* illustrated its test because the case involved a direct threat to the tribe's inherent powers.⁸¹ *Navajo Tribe* suggested that the issue by implication had been whether the tribal enterprise was separate from the tribe. The *Navajo Tribe* court's use and interpretation of *Donovan*, however, was wrong. Whether Navajo Forest Products Industries, the tribal entity, was separate from the tribe was never at issue because the tribe's treaty with the federal government prohibited OSHA from entering the reservation. Resolution of the case depended on whether OSHA had authority to enforce its standards on the reservation, regardless of which entity within the reservation boundary was the target.

The Tenth Circuit also cited *White Mountain Apache Indian Tribe v. Shelly*⁸² to illustrate the application of the test. In *White Mountain Apache*, a non-Indian contractor sued the Fort Apache Timber Company (FATCO)

76. 692 F.2d 709 (10th Cir. 1982).

77. Occupational Safety and Health Act of 1970 § 8(a)(1), 29 U.S.C. § 657(a)(1) (1976). The statute in question states in pertinent part:

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer. . . .

78. *Navajo Tribe*, 700 F.2d at 1287-88. The treaty provisions in question state:

[T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Donovan, 692 F.2d at 711 (quoting treaty, United States-Navajo Tribe of Indians, art. III, 15 Stat. 667).

79. *Donovan*, 692 F.2d at 711.

80. *Id.*

81. *Navajo Tribe*, 700 F.2d at 1287.

82. 107 Ariz. 4, 480 P.2d 654 (1971).

in state superior court for breach of contract.⁸³ The Arizona Supreme Court viewed the issue as whether the timber company was separate from the tribe and, therefore, was deprived of the tribe's sovereign immunity.⁸⁴ The court held that the timber company was coextensive with the tribe, and that the tribe's sovereign immunity extended to the corporation.⁸⁵ The court further found no evidence that the tribe or the company had waived FATCO's sovereign immunity.⁸⁶ FATCO, therefore, was not subject to suit.

In *Navajo Tribe*, BNM used *White Mountain Apache* to support its contentions that a tribal enterprise could be coextensive with the government.⁸⁷ The Tenth Circuit rejected BNM's view of the case and instead interpreted *White Mountain Apache* to have held that tribes have exclusive power to determine the extent of the right to sue tribal enterprises.⁸⁸ According to the *Navajo Tribe* court, a state court determination to the contrary would have been an unreasonable interference with tribal sovereignty.⁸⁹

In this instance, the Arizona Supreme Court, BNM, and the Tenth Circuit all confused and misapplied the issues of sovereign immunity, jurisdiction, and construction of corporate charters. Whether the White Mountain Apache Tribe waived sovereign immunity for FATCO was the wrong question. First, corporations by their nature are liable to suit. To hold that a corporation can be sued is not to hold that the tribe has waived sovereign immunity, but that it has succeeded in creating a corporation. If the corporation argues it is protected by the tribe's immunity, the question is whether the tribe has in fact created a corporation.

Second, assuming a tribally chartered corporation can sue or be sued, the question then is whether the jurisdictional requirements are satisfied in the court in which the plaintiff filed suit. *White Mountain Apache* involved a suit in state court against a tribal organization. The case was before the Arizona Supreme Court because the tribe sought special relief prohibiting the state superior court judge from exercising further jurisdiction over the tribe.⁹⁰ The state supreme court ruled on the jurisdiction of the lower court, but the court focused incorrectly on whether FATCO

83. *Id.* at 5, 480 P.2d at 655.

84. *Id.* at 7, 480 P.2d at 657.

85. *Id.*

86. *Id.*

87. *Navajo Tribe*, 700 F.2d at 1287.

88. *Id.* at 1288. The Tenth Circuit not only misconstrued the issue, it misstated the rule on waiving tribal sovereign immunity. Only Congress clearly has authority to waive a tribe's sovereign immunity. Cohen, *supra* note 43, at 324-28. There is considerable disagreement as to whether tribes can waive sovereign immunity. *Id.*

89. *Navajo Tribe*, 700 F.2d at 1288.

90. 107 Ariz. at 5, 480 P.2d at 655.

91. *Id.*

was coextensive with the tribe and enjoyed the tribe's sovereign immunity.⁹¹

The Arizona Supreme Court overlooked the real question—whether the state court had jurisdiction over an on-reservation transaction involving a tribal entity and a non-Indian. Tribes, individual Indians, and tribally chartered corporations all can sue in state court if they satisfy all jurisdictional requirements. They cannot, however, be sued in state court in most states⁹² because state courts lack jurisdiction.⁹³ Sovereign immunity of FATCO, the tribal entity, was a pointless inquiry.

Thus, even if a tribally chartered corporation can be sued, there is still a separate inquiry of which court has jurisdiction. As in any lawsuit, finding that an entity can sue or be sued is a separate inquiry from deciding which court has jurisdiction. Parties must still satisfy federal jurisdiction to sue a tribal corporation in federal court.⁹⁴

In the final category of cases illustrating the test for corporate separateness, the Tenth Circuit stated that courts consistently have held that tribal enterprises were separate and independent of the tribe where sovereignty was not an issue.⁹⁵ As support for this point, it cited three cases addressing federal jurisdiction over tribal corporations and waiver of sovereign immunity, although it failed to comment on the significance of these cases.⁹⁶

The cases again involved questions of jurisdiction and, therefore, provided no help in understanding the *Navajo Tribe* test. For example, one of these cases, *Navajo Tribal Utility Authority v. Arizona Dep't of Rev-*

92. In a limited number of states, Congress delegated to state courts jurisdiction over most crimes and many civil matters in Indian country. See Cohen, *supra* note 43, at 362-80.

93. For an explanation of the limits on state jurisdiction over Indian country, see Cohen, *supra* note 43, at 275-79, 332-80.

94. *Navajo Tribe*, however, said nothing about the liability of tribal corporations if sued in tribal court.

95. *Navajo Tribe*, 700 F.2d at 1288.

96. In the first case cited, *Navajo Tribal Utility Auth. v. Arizona Dep't of Revenue*, 608 F.2d 1228 (9th Cir. 1979), the Navajo Tribal Utility Authority sought injunctive and declaratory relief in federal court against a state tax imposed on the Arizona Public Service Company for payments received from the tribal utility authority for electric power. The court held that the Navajo Tribal Utility Authority failed to satisfy the statutory criteria for federal jurisdiction under 28 U.S.C. § 1362 and dismissed the suit. The statute provided jurisdiction in federal court over Indian tribes or bands and the court found that the statute did not include wholly controlled or -owned subordinate economic tribal enterprises.

Navajo Tribe also cited *R.C. Hedreen Co. v. Crow Tribal Hous. Auth.*, 521 F. Supp. 599 (D. Mont. 1981), in which a contractor sued a tribal housing authority in federal district court to collect payment on a contract. The court held that the housing authority could be considered a Montana citizen for diversity purposes because it was a separate entity under tribal ordinance.

The third case, *Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 395 F. Supp. 23 (D. Minn. 1974), held that the housing authority was a separate corporation and, therefore, subject to suit in federal court.

enue,⁹⁷ involved another Navajo enterprise, the Navajo Tribal Utility Authority. The Ninth Circuit held that the tribal enterprise could not sue in federal court under a jurisdictional statute which specifically empowered tribes to bring suit.⁹⁸ In *Navajo Tribal Utility Authority*, however, the question presented was whether a tribal department fell within the definition of "tribe" for purposes of the statute's jurisdictional provision. The case had no bearing on *Navajo Tribe* because the question in *Navajo Tribal Utility Authority* was whether a tribal entity could bring suit in federal court, rather than whether it could be sued in federal court. A sovereign protected by immunity can still sue, even though it cannot be sued.

The cases cited in *Navajo Tribe*, therefore, actually were jurisdictional in nature. These cases were wholly inapplicable to determining whether the Navajo Tribe could be held liable for NHDE's actions.

Furthermore, the court misidentified the sovereign immunity issue. As previously mentioned, sovereign immunity is not an issue when the entity involved is a tribally chartered corporation. Corporations by their nature can sue or be sued, assuming the jurisdictional requirements are met. Perhaps the only relevant comparison is whether a tribal department, which is not a corporation, can be sued if the tribe has not specifically waived sovereign immunity. Courts have considered this question in cases involving tribal housing authorities. In these instances, however, the tribe included "sue or be sued" clauses in the enacting resolutions.

The sovereign immunity question, if it arises in a case involving a tribal corporation, will focus on the immunity of the tribe, not that of the corporation. In other words, if a tribe wholly owns a tribally incorporated business and that business falls on hard times, creditors would be unable to pierce the corporate veil. They would be unable to recover from the tribe, even if they satisfied all jurisdictional requirements and all requirements for piercing the corporate veil, because the tribe would be protected from suit by sovereign immunity. Only if creditors had the foresight to secure their investments in some previously agreed upon manner would they be able to recover.

IV. CONCLUSION

In *Navajo Tribe*, the Tenth Circuit held that it would only hold a tribal government liable for the debts of its corporation if, and to the extent, the tribe expressly pledged its assets. In announcing this test, the court appeared to create a new test. The test, however, merely applied existing

97. 608 F.2d 1228 (9th Cir. 1979).

98. *Id.* at 1231.

rules applicable to federal governmental corporations. The court attempted to tailor the test to tribal governments by citing to several cases involving tribal corporations.

In discussing these cases, the court misapplied and confused issues of jurisdiction, sovereign immunity, and construction of corporate charters. When a tribal government creates a corporation, the question is never one of the sovereign immunity of the corporation because government corporations by their very nature can sue and be sued. The appropriate question is whether a tribe has in fact created a corporation. The question of sovereign immunity, if it arises, will arise in the context of whether the tribe can be sued on account of the actions of a corporation wholly owned by the tribe. Whether a court has jurisdiction over a tribal corporation is an entirely separate inquiry from whether the tribe has created a corporation.

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