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Tom Tso

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"THE PROCESS OF DECISION-MAKING IN TRIBAL COURTS"

by:

Honorable Tom Tso, Chief Justice
Navajo Nation Judicial Branch

For Presentation at the

Natural Resource Development in Indian County
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Natural Resources Law Center
University of Colorado School of Law
Boulder, Colorado

"The Process of Decision-Making in Tribal Courts"

I have been asked to speak on the topic of "The Process of Decision Making in Tribal Courts". I will speak about the Navajo Tribal Courts because that is what I know.

It is difficult to discuss the process without discussing the history and the background from which the tribal courts developed.

The history of the Navajo Nation and the history of the Navajo Tribal Courts is one of challenges. Today the challenges are to our sovereignty, our jurisdiction, our right to exist as a people different from the dominant society.

The ultimate challenge to the Navajo has always been survival. Those of you familiar with the history of the Navajo will recall that the Spanish and the United States Cavalry all attempted to wipe us out. In 1864 the United States Cavalry under Kit Carson succeeded in rounding up and driving thousands of Navajo several hundred miles to Fort Sumner. It is not clear what was the objective of this mass removal. Whatever the goal of the U.S. Government toward the Navajo, it didn't work. After four years, the U.S. Government threw up its hands and told us to take our sheep and go home.

This event marked the beginning of the end of federal governmental efforts to terminate our physical existence.

Since that time the challenge has been to our cultural identity and existence. These challenges reflect the false assumption on which relations between Indians and the Anglo world are conducted.

The false assumption is that the dominant society operates from the vantage point of intellectual, moral and spiritual superiority. The truth is that the dominant society became dominant because of military strength and power.

Examine this from the Navajo perspective. I quote from an article by Tom Tso:

"When people live in groups or communities they develop rules or guidelines by which the affairs of the group may proceed in an orderly fashion and the peace and harmony of the group may be maintained. This is true for the Navajos. As far back as our history can be verified and further back into the

oral traditions of our origins, there is a record of some degree of formal organization and leadership. In the earliest world, the Black World, which was the first phase of our existence, it is said that the beings knew the value of making plans and operating with the consent of all. In a later World, Changing Woman appointed four chiefs and assigned one to each of the four directions. These chiefs convened a council, established clans, and organized the world. The chiefs and councils of Navajo oral history made decisions for the larger group and regulated the clans. The oral traditions indicate that there was a separation of functions between war leaders and peace leaders. One of the major responsibilities of these headmen was advice and guidance....

The headman were chosen by the people from among those who possessed the necessary qualities. The headman needed to be eloquent and persuasive, as power was exerted by persuasion rather than coercion. Teaching ethics and encouraging the people to live in peace and harmony was emphasized. One of the important functions of a headman was dispute resolution. When a dispute or conflict arose in the community the people would go to the headman for advice. If the matter involved what we, today, would call a criminal offense, the headman would meet with the wrongdoer, his family, the victim, and the victim's family to discuss how to handle the matter. The discussion usually involved two issues: how to compensate the victim or his family for the wrong and how to deal with the wrongdoer. The discussion continued until everyone was in agreement as to what should be done".

Prior to Kit Carson we lived in communities. You might say we had decentralized grass roots government. We had our own mechanisms for resolving disputes. We had a profound respect for the separation of functions. Not only did we have the various leaders for war and peace, we had our medicinemen who have a very important role in the operation

of our society. The training and the teachings of the medicinemen were respected and no one interfered with their function. We had our own concepts of fairness in the way we handled disputes and we sought both to compensate the victim and to rehabilitate the wrongdoer.

After we returned to our land in 1868 we began to be told all the things we had to have. We had to have an organized government and a tribal council. We had to have courts. We had to have jails. We had to have separation of powers.

These things and many more have been instituted. They work very well in the Navajo Nation. I believe the main reason the Navajos have, by Anglo standards, the most sophisticated and the most complex tribal court system is that we were able to build upon concepts which were already present in our culture. Navajos are also flexible and adaptable people. We find there are many things which we can incorporate into our lives that do not change our concept of ourselves as Navajo.

I regret that the outside world has never recognized that Navajos were functioning with sophisticated and workable concepts before the American Revolution. I regret even more that the ways in which we are different are neither known nor valued by the dominant society. Because we are viewed as having nothing to contribute a lot of time has been wasted. Let me be more specific. Anglo judicial systems are now paying a great deal of attention to alternative forms of dispute resolution. Before 1868 the Navajos settled disputes by mediation. Today our Peacemaker Courts are studied by many people and governments. Anglo justice systems are now interested in compensating victims of crime and searching for ways to deal with criminal offenders other than imprisonment. Before 1868 the Navajos did this. Today Anglo courts are recognizing the concept of joint custody of children and the role of the extended family in the rearing of children. Navajos have always understood these concepts. We could have taught these things one hundred and fifty years ago.

Today the Navajo Courts are structured very much like the state and federal systems. We have six judicial districts and a seventh just being established. Each district has a trial court and a children's court. The Navajo court system has a second tier which is the Navajo Nation Supreme Court which has three justices. In addition there are the Peacemaker Courts which use traditional mediation processes supported by court supervision and enforcement of agreements reached through mediation.

The Navajo Nation Supreme Court hears appeals from final court orders and from some administrative decisions. The tribal government is rapidly developing an extensive network of administrative bodies with quasi-judicial functions. The final decision of bodies such as the Tax

Commission and the Board of Election Supervisors are appealable directly to the Navajo Supreme Court. Recourse from the decisions of other administrative bodies is by an original action in the trial court.

All opinions of the Supreme Court and some of the opinions of the District Courts are published in the Navajo Reporter.

The Navajo courts have rules of procedure for criminal, civil, probate and appellate matters.

Navajo judges and justices are selected by a process designed to insulate them from politics. When a judge is to be selected, interested persons submit applications to the Judiciary Committee of the Navajo Tribal Council. The Judiciary Committee screens the applicants and selects a list of the most highly qualified according to the qualifications set forth in the Navajo Tribal Code. This list is then sent to the Tribal Chairman. The Chairman appoints a judge from the list for a two year probationary period. This appointment must be approved by Tribal Council. During the probationary period the judge receives training from carefully selected judicial education establishments offering quality legal/judicial education. There are two; the National Judicial College in Reno, Nevada, and the National Indian Justice Center, Petaluma, California. The probationary judge is evaluated by the Navajo Nation Bar Association, the Judiciary Committee and the Chief Justice. If the probationary judge receives a satisfactory performance evaluation and satisfactorily completes his or her course of training the Chief Justice and the Judiciary Committee recommend the judge for permanent appointment. This permanent appointment must be confirmed by Tribal Council. Thereafter the judge remains in office until retirement or removal under the procedures established in the Tribal Code.

Permanent judges continue to be evaluated each year and receive training in areas where the evaluations show that knowledge and skills are lacking.

All parties may represent themselves in the courts. If a party chooses to be represented by counsel, it must be a member of the Navajo Nation Bar Association. Membership in the Navajo Nation Bar Association requires passing the Navajo bar examination which is given twice a year. Both law school graduates and those who have not been to law school may practice in tribal courts. The practitioners who have not been to law school are called advocates and must complete either a certified Navajo Bar Training Course or serve an apprenticeship.

The contribution of the advocates to the Navajo Court system is beyond measure. Both our language and our traditions made Anglo court systems strange to us. In traditional Navajo culture the concept of a

disinterested, unbiased decision maker is unknown. Concepts of fairness and social harmony are basic to us. However, we achieved fairness and harmony in a different fashion. Dispute settlement required the participation of the community elders and all those who knew the parties and a history of the problem. Everyone was permitted to speak. Private discussions with an elder who could resolve a problem was acceptable.

It was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case and where who could speak and what they could say was closely regulated.

The advocates helped the Navajos through this process and the advocates continue to be an important link between the two cultures.

The law the Navajo courts must use consists of any applicable federal laws and tribal laws and customs. The structure of our courts is based upon the Anglo court system but generally the law we apply is our own.

When the Navajo Tribal Courts were established in 1959 the Navajo Nation did not have extensive laws of its own and we had no reported opinions to guide the judges in the decision - making process. In 1959 the Navajo Tribal Code required the courts to apply laws of the United States which were applicable, authorized regulations of the Interior Department, and any ordinances or customs of the Tribe not prohibited by such federal laws. Any matters not covered by tribal or federal law were required to be decided by the law of the state in which the case arose. As the Navajo Nation is in three states, this sometimes led to confusion and different laws being applied in different parts of the reservation.

In 1985 the Tribal Code sections regarding applicable law were amended. Now the courts are required to apply the law of the United States which is applicable and laws or customs of the Navajo Nation which are not prohibited by federal law. If the matter is not covered by tribal or federal law the courts may look at any state laws and decisions for guidance or we may fashion our own remedies. As the Navajo Nation Supreme Court makes the ultimate decision on these issues, we are developing an internal body of law and many of the briefs filed in the Supreme Court and many of the opinions issued by the Supreme Court cite only Navajo cases.

It is easy to understand that the Navajo Tribal Code contains the written law of the Navajo Nation and that this law is available to anyone. When we speak of Navajo customary law, however, many people become uneasy and think it must be something strange. Customary law will sound less strange if I tell you it is also called "common law".

Common law is the customs and long used ways of doing things. It is

also court decisions recognizing and enforcing the customs or filling in the gaps in the written law. The common law of the Navajo Nation consists of both customary law and court decisions.

In a case decided in 1987 the Navajo Supreme Court said:

"Because established Navajo customs and traditions have the force of law, this court agrees with the Window Rock District Court in announcing its preference for the term 'Navajo Common Law' rather than 'custom', as that term properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law".

We have statutes, rules and case law setting forth the procedural aspects of pleading and proving Navajo common law.

Once a decision is made by a court, that decision is subject to change only through judicial processes. No other part of the tribal government has the authority to overrule that decision.

The concept of a separate and independent judiciary is based in both Navajo common law and in the Tribal Code. The Tribal Code establishes the Judicial Branch as a separate branch of government. The integrity of court decisions, however, has its basis in the respect given to the peacemakers or leaders who helped settle community disputes. In a case decided in 1978 the Navajo Supreme Court said that the respect given the peacemakers extends to the courts because Navajos have "... a traditional abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo people did not learn this principle from the white man. They have carried it through history... Those appointed by the people to resolve their disputes were and are unquestioned in their power to do so. Whereas once the clan was the primary forum (and still is a powerful and respected instrument of justice), now the people through their council have delegated the ultimate responsibility for this to their courts".

I could talk for a long time about all the details of the Navajo Tribal government, how many concepts which appear to be Anglo actually have their roots in our culture as far back as we can trace, and about how concepts which are foreign to our culture have been accommodated in such a way they have become acceptable and useful to us.

It is instructive that the Indian tribe whose governmental structure and operation is most like the Anglo world is the tribe that has no constitution. The Anglo world places much value on the written word and there is a tendency to believe that if things are not written down, they don't exist.

Navajos have survived since before the time of Columbus as a separate and distinct people. What holds us together are not words on paper but a set of values and customs that are the strongest glue. I am speaking of a sense of community so strong we had no need to lock up wrongdoers. If a person injured another or disrupted the peace of the community, he was talked to and often ceremonies were performed to restore him to harmony with his world. There were usually no repeat offenders. Only those who have been subjected to a Navajo "talking" session can understand why this would work. Today we have police, prosecutors, jails, written laws and procedures. I am convinced our Anglo system of law enforcement is no more effective than the way we traditionally handled law enforcement problems. Our present system certainly requires more money, more facilities, more resources and more manpower. But we have this system and it works as well as those of our brother and sister jurisdictions. The point I am now making is that the Anglo world has said to tribes, "Be like us. Have the same laws and institutions we have. When you have these things maybe we will leave you alone". Yet what the Anglo world has offered, at least as far as Navajos are concerned, is either something we already had or something that works no better than what we had.

I know that the popular concept of tolerance in America is the melting pot or stew pot where everyone blends into an indistinguishable ingredient. This is fine for people who come to this country and want to jump into the pot. The melting pot, however, can become a good place to hide people. If differences cause discomfort or problems, make everyone the same. The real measure of tolerance and respect for tribes, however, may well be how well the outside world can coexist with tribes. We are part of the total environment of America and at least as important as the snail darter or the California condor. What a tragedy if fifty years from now some news commentator is doing a broadcast on how the government has set aside a preserve in the desert where nine Indians are being saved from extinction and it is hoped they will reproduce in captivity.

At this time the Navajo Supreme Court has decided few cases that specifically relate to the issues of this program. It is my understanding that some cases dealing with oil and gas leases have been initiated in the tribal courts but have been settled during pendency of the litigation.

I am sure that the economic development plans of the Navajo Nation will result in many questions regarding the doing of business on the

reservation.

Jurisdictional issues will no doubt be a significant part of future litigation involving the land and resources of the Navajo Nation. Based upon the decisions in National Farmers Union Insurance and in Iowa Mutual it appears that the Navajo Tribal Courts will be deciding many challenges to jurisdiction.

The jurisdictional statutes of the Navajo Nation provide that the tribal courts have jurisdiction of all civil causes of action if the defendant resides within Navajo Indian Country or has caused an action to occur within the territorial jurisdiction of the Navajo Nation. The definition of Navajo Indian Country is consistent with the federal definition.

Beyond the threshold jurisdictional issues lie the questions of what law will be applied.

Whether federal laws will be applicable in a specific case I cannot say at this point. Obviously tribal law, both statutory and common law, will be used. There are tribal statutes and rules and regulations regarding the doing of business on the reservation and regulating the use of natural resources. For example there are the Navajo Uniform Commercial Code, Navajo Nation Corporation Code, Water Code, Mining Code and others. Those are obvious and available to those who need them.

I assume there are concerns regarding the role of tradition and custom in case decisions. Navajo custom and tradition is not likely to call for entirely new law. It is more likely to be an additional factor to consider in an already familiar context. For example, the Anglo system is familiar with the concept of land valuation and payment for the taking of land. It is not a new or different concept that the surface user of land should be compensated for loss of use. The difference will be in the valuation. Land that may appear to have little value to a non-Indian may be very valuable to a Navajo. It may have spiritual or historical value that has little to do with the income it can produce. A dollar figure will have to be assigned to things that have no value in the market. This is not impossible. It is done every day in tort cases where damages are assessed for pain and suffering, for intentional infliction of emotional distress, for loss of companionship.

The difference will be in the traditional relationship between Navajos and nature. We refer to the earth and sky as Mother Earth and Father Sky. These are not catchy titles. They represent our understanding of our place. The earth and the sky are our relatives. Nature communicates with us through the wind and the water and the whispering pines. Our traditional prayers include prayers for the plants, the

animals, the water and the trees.

A prayer is like a plant. The stem or the backbone of the prayer is always beauty. By this beauty we mean harmony. Beauty brings peace and understanding. It brings youngsters who are mentally and physically healthy and it brings long life. Beauty is people living peacefully with each other and with nature.

Just like our natural mother, our Mother Earth provides for us. It is not wrong to accept the things we need from the earth. It is wrong to treat the earth with disrespect. It is wrong if we fail to protect and defend the earth. It would be wrong for us to rob our mother of her valuable jewelry and go away and leave her to take care of herself. It is just as wrong for us to rob the Mother Earth of what is valuable and leave her unprotected and defenseless.

If people can understand that the Navajo regards nature and the things in nature as relatives then it is easy to see that nature and the Navajos depend upon each other.

This is basic to understanding any traditional Navajo concepts which may be applied to natural resources and the environment.

It is difficult to separate our lives into fragments or parts. Our ceremonies are religious, medical, social, and psychological. The seasons tell us how to live and what ceremonies to have. The earth gives us our food, the dyes for our rugs and the necessities for our ceremonies. These may be seen as everyday things.

The earth today gives us income and jobs from mining, from oil, from forests. The water and the earth give us the ability to produce large amounts of food through Navajo Agricultural Products, Incorporated. The snow and rain and proper runoff from the mountains give us lakes for fishing. These may be seen as commercial things.

We cannot separate our needs and our relationships in such a fashion. This is why our laws and our decisions must accommodate both of these things. For example, our tribal law requires that persons who want to harvest or remove anything from the forests must have a permit. The exception is for persons who need to gather plants and forest products for ceremonial purposes. In a recent Supreme Court opinion the court held that further division of land in a probate case would defeat the agricultural purposes of the land. Under Navajo common law the parcel went to the heir who was best able to use the land for agricultural purposes. The other heirs were given set-offs in other items of decedent's property.

I have tried to give you a brief overview of the judicial decision making process in the Navajo Tribal Courts and indicate some of the

ways we attempt to accommodate the best from two cultures so that the Navajo Nation may proceed to develop within a framework that is familiar to us.

We, the people, are a natural resource. Our culture and our history are natural resources. We are so related to the earth and the sky that we cannot be separated without harm. The protection and defense of both must be provided. The dominant society views things in terms of separateness, compartmentalization. For this reason the Navajo Nation is best able to make the laws and the decisions as to our own preservation and development.

I have spoken today of the Navajos. I believe much of what I have said applies to all Indian tribes.

Natural Resource Development in Indian Country presents a these challenge. Understanding the challenge is the first step toward meeting it. The challenge inherent in Natural Resource Development is only a variation of that faced continually by tribes. The process of making judicial decisions in the Navajo Nation reflects a response to challenges.

Thank you.