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United States v. Hatahley: A Legal Archaeology Case Study of Law and Racial Conflict

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United States v. Hatahley: A Legal Archaeology Case Study

in Law and Racial Conflict

Debora L. Threedy

Abstract

This paper is a case study of United States v. Hatahley, a leading case in the Remedies canon, using the methodology of “legal archaeology” to reconstruct the historical, social and economic context of the litigation. In 1953, a group of individual Navajos brought suit under the Federal Tort Claims Act for the destruction of over a hundred horses and burros. The first section of the paper presents two contrasting narratives for the case. The first relates what we know about the case from the reported opinions, while the second locates the litigated case within the larger social context by examining the parties, the history of incidents culminating in the destruction of the Navajo horses, and the litigation that preceded Hatahley. As the case has been canonized for what it has to say about damages, Part II looks at the problem of cross-cultural damages, that is, the problems of translation that arise when one culture turns to another, disparate culture for redress. In the final sections of the paper, two larger, jurisprudential questions posed by the case are explored. Part III examines the intersection of race and power in the case, particularly the paradoxical role of law in both maintaining and challenging racial hierarchies. Part IV examines the question of bias from a unique perspective. The case was ultimately assigned to another judge due to the trial judge's alleged partiality to the Navajos. The section explores whether the lack of prejudice, when contrasted with a background societal prejudice, could read as partiality. The epilogue points out how this question has a modern
application.

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Introduction

"[W]e as researchers construct that which we claim to find."²
"Law ... is much more closely related to our social, economic and political
thinking than we are in the habit of believing...[L]aw conforms to community
standards. It is what we make it. Much in it that is subject to criticism is merely a
reflection of the law ideals of you and me and the community at large."³

This paper is an example of a type of legal history called "legal archaeology,"⁴ that is, the
reconstruction of the historical, social and economic context of a litigated case. The
methodology seeks to put the case and its opinion “in context.” This call for context should be seen as a normative move. As Minow and Spelman point out, “we are always in some context, as are the texts we read, their authors and readers, our problems, and our efforts to achieve solutions.”

They remind us that we all look at the world from within our own context; “there is no ‘view from nowhere.’” In a normative sense, the call for context is a call to examine “social structures of power that extend far beyond the particularities of a given situation.” Those structures of power are built along the lines of race, gender and class.

Thus, the call for context is often a reflection of a progressive, critical stance: “The attention to particularity that aims to highlight people subject to domination is not an unthinking immersion in overwhelming detail, but instead a sustained inquiry into the structures of domination in our society.”

The case of *United States v. Hatahley*, which is the first case in a well-known Remedies casebook, presents an opportunity to examine the intersection of several structures of power in mid-twentieth century America. At the most obvious level, it reveals the subordination of Native Americans by the larger Anglo society. At the same time, it also reveals the way in which the tools of power can be claimed by subordinated groups and used to challenge the dominant power structure.

At a less obvious levels, it expresses the tension of federalism, that pits national versus local control of resources, and ideological divisions involving the person of the judge. Underneath all of these, the case exposes the conflict between understandings of community and the good life, one market-based and development-oriented (think manifest destiny) and the other,
 communal-based and subsistence-oriented.

The first section of the paper presents two contrasting narratives for the case. The first is in the nature of a traditional case brief and examines what we know about the case from the reported opinions. The second, more detailed, narrative locates the litigated case within the larger social context by examining the three parties involved (the Montezuma Creek Navajos, the San Juan County ranchers, and the federal Bureau of Land Management, also BLM), the history of incidents culminating in the destruction of the Navajo horses, and the litigation that preceded Hatahley.

As the case has been canonized for what it has to say about damages, in Part II, I look at the problem of cross-cultural damages. By this, I mean the problems of translation that arise when one culture, that of the Navajos, turns to another disparate culture for redress. These problems of translation include more than language barriers, although that was itself a problem in the case. The more basic problem, however, was how to translate value from a communal, non-market society to one that is market based. I argue that, whatever flaws may exist in the trial judge's computation of damages, he was more sensitive to this basic problem than was the appellate court.

In the final sections of the paper, I look at two larger, jurisprudential questions posed by the case. In Part III, I examine the intersection of race and power in the particularities of this case. I examine the array of power structures, including law, that is arrayed against the Navajos and that includes a racial component, and then I examine how the Navajos manage to turn one of those tools of power, the law, to their own ends. Finally, I question whether this was a successful strategy in this case.

In Part IV I examine the question of bias from a unique perspective. The sensitivity of
the trial judge in this case to the lived realities of the plaintiffs' situation raises the question of partiality/impartiality in the face of societal prejudice. In other words, I explore whether the lack of prejudice could read as partiality. And in an epilogue, I point out how this question has a modern application.

I. Contrasting Narratives

In this section, I present two contrasting narratives for *Hatahley*. The first is the “official” narrative that has been preserved in the official case reports. The other is the unofficial “back story” that seeks to explain how the account preserved in the judicial opinions came to be. This is the narrative that has been “excavated” by the methodology of legal archaeology. Read together, these two provide a fuller narrative of the case than if one read only the appellate opinions.

A. The “Official” Account of the Case

*Hatahley v. United States*, on its face, involves a controversy between the Bureau of Land Management (BLM) and a band of Navajos. The Navajos brought suit under the Federal Tort Claims Act against the BLM, alleging that, between September 1952 and February 1953, 115 horses and 35 burros belonging to some thirty individuals comprising eight extended families were unlawfully seized and destroyed by the BLM. The undisputed trial evidence was that the BLM, sometimes assisted by local ranchers, rounded up the horses and burros herd by herd, drove or trucked them to near-by towns where they were held for anywhere from a couple of days to two weeks. The animals were then loaded on trucks to be shipped to the Kuhni Packing Plant outside Provo, in northern Utah, where they were rendered into fish food.
The stock was sold for no more than three cents a pound, for a total amount of $1,700, which was paid to the Grazing District Advisory Board, made up of local ranchers. The BLM asserted that the authority for doing this could be found in the Utah “Abandoned Horse” statute.

Procedurally, the case was lengthy and involved, spanning eight years, two trials, two trips to the Tenth Circuit Court of Appeals, one to the United States Supreme Court, and a mandamus proceeding. In the original trial, the lower court held in favor of the Navajo and awarded them as damages the amount prayed for in the complaint, $100,000. The Tenth Circuit reversed on the issue of liability without considering damages. The case then went up to the United States Supreme Court. The Supreme Court found that the BLM was liable for killing the horses and burros, but remanded for specific findings as to damages. The significance of this decision is that “reportedly it was the first time American Indians had successfully sued the government for intentional wrongdoing.”

On remand from the Supreme Court, another trial was held on the issue of damages before the judge who had heard the original trial and he entered judgment in the amount of $186,017.50, from which the government again appealed. The Tenth Circuit vacated the judgment and again remanded for a new trial on the damages issue. The Tenth Circuit also suggested that the case be assigned to a new judge because, the court in essence said, the original judge was prejudiced in favor of the Navajos.

The trial judge ignored this suggestion. At a hearing in the case after the Supreme Court
had denied certiorari from the Tenth Circuit's second opinion\textsuperscript{27}, Ritter stated on the record that he did not intend to follow the Tenth Circuit's suggestion that he step down “so you can lay that to one side.”\textsuperscript{28}. The government then applied to the Tenth Circuit for the entry of a judgment on the mandate from the court reversing Ritter's second verdict, prohibiting Ritter from retrying the case a third time.\textsuperscript{29} Ritter did not respond, either in person or by counsel, but counsel for the plaintiffs opposed the application.\textsuperscript{30} The Tenth Circuit then ordered Ritter “take no further action” in the case.\textsuperscript{31} "Because at that time the U.S. District of Utah had only a single sitting judge (Ritter), the Chief Judge for the Tenth Circuit, Alfred P. Murrah, assigned the case to Judge Ewing T. Kerr, U.S. District Judge for the District of Wyoming.\textsuperscript{32}

A little over a year later, the case settled. The Navajo plaintiffs received $45,000 before deduction of attorneys fees, less than half the amount awarded them at the first trial ($100,000), and less than a quarter of what they had been awarded at the second trial ($186,017.50).\textsuperscript{33}

B. The “Unofficial" Story: The Back-Story of the Case

The \textit{Hatahley} case, particularly the second Tenth Circuit opinion, has entered the academic canon for its treatment of the issues surrounding the determination of damages.\textsuperscript{34} The case can be read solely for what it has to say about damages, but I am suggesting that the case is more interesting and more valuable if the damages issue is located within a fuller understanding of the underlying controversy.

Although the lawsuit was technically about compensation for the illegal destruction of the Navajo horses and burros, the real fight was about land. The roundup of the horses was not the first time that tensions had erupted, nor would it be the last. Indeed, in a sense the fight continues
to this day. To understand the underlying controversy, we have to step back and look at the bigger picture, understand a bit of the history of this place and the people who live there. The controversy at heart is about the clash of races and cultures. It is this clash which makes the damages issue such a difficult one to resolve.

To fully understand the cultural clash it is necessary to know the historical context in which the case arose. That context, in this particular case, is exceptionally complex. It involves a time and a place that witnessed a struggle between three separate “cultures” and it came loaded with the “baggage” of more than a hundred years of inter-cultural and ethnic/racial struggle. Moreover, it involves a struggle that is not well-known.

The physical locus of this struggle is the southeastern portion of the state of Utah, where San Juan County abuts onto the “Four Corners,” the shared corner of four states, Utah, Arizona, Colorado and New Mexico. San Juan County was formed in 1880, before it had hardly any white population to speak of. The county is large, “a trifle smaller than Massachusetts, a little bigger than Rhode Island, Connecticut, and Delaware combined.”

More specifically, the locus of this case centered on an area north of the San Juan River: Montezuma Canyon and the mesas to the west, McCracken Mesa and Alkali Ridge. The area extends some 15 miles north/south and 80 miles east/west. Today, a good chunk of the area is part of the Navajo Reservation; prior to 1958, the places relevant to the lawsuit were not part of the reservation.

1. The Stake Holders

The three cultures that were struggling to co-exist in this place were: 1) a band of Navajos, sometimes called the Montezuma Creek Band or the Kai'yellis, who then and now hold
themselves apart from the main portion of the Navajo Tribe; 2) the local ranching community which was and is overwhelmingly comprised of members of the Church of Jesus Christ of the Latter Day Saints (the “LDS Church” or “Mormons”); and 3) the emerging regulator of the rangelands, the newly reorganized Bureau of Land Management (the “BLM”).

The Montezuma Creek Navajos

Most people associate the Navajos with Arizona and New Mexico; what many people do not realize is that a portion of the Navajo reservation extends into Utah, and that Utah has a significant population of Navajos. The reservation land and most of the Utah Navajos are located in San Juan County in the very southeastern corner of the state. In San Juan County at this time, the reservation occupies about one quarter of the county land and the Navajos comprise about fifty-two percent of the population. In the 1940s, the total population of the county was under 5,000 and approximately one third of those were Native Americans.

It must be emphasized that the plaintiff in this case is not the Navajo Tribe. The plaintiffs were a small group of Navajos living in the Montezuma Creek area of San Juan County, north of the San Juan River. As best as I can determine, they seem to have been inter-related by blood, marriage and clan. The decision to bring this lawsuit, and the initial financing of the litigation, were done by the individual plaintiffs. Indeed, the relationship between this group of Navajos and the Navajo Tribe was and continues to be somewhat problematic.

If the world worked the way it is supposed to, this group of Montezuma Creek Navajos would long ago have been recognized as a separate band, perhaps with their own reservation. There are actually four geographically separate Navajo reservations: the big “rez” which occupies
a large chunk of Arizona and New Mexico, as well as a part of Utah; and the Ramah, the Cañoncito, and the Alamo Navajo Reservations, all much smaller and all located in New Mexico. The existence of these separate Navajo bands and reservations is a consequence of events in the history of the Navajo people; analogous events shaped the separate identity of the Montezuma Creek Navajo, even if legally they have not been so recognized.

The experiences of the Montezuma Creek Navajo differ in significant respects from that of the main body of the tribe. The presence of Navajos in this area does not date back as far as in parts of Arizona and New Mexico, probably because the area has always been on the fringes of Navajoland. Archaeologists believe that Navajos were living in northern New Mexico by at least the 1500s, perhaps as early as 1300, whereas the earliest Utah Navajo site north of the San Juan River is “a hogan in the White Canyon area west of Bear's Ears ... probably built about 1620.”

By the 1700s, Spanish maps indicated that Navajos were living north of the San Juan River. The eruptions of violence between Europeans and Native Americans that plagued Arizona and New Mexico throughout the Spanish and Mexican periods barely touched these Navajos. In 1823, Colonel Don Francisco Salazar led a contingent of Mexican soldiers north as far as the junction of the San Juan and Colorado Rivers. He reported seeing tracks of Navajo livestock heading north of the San Juan toward the Bear's Ears but he did not cross the river in pursuit.

The first known reference to these Navajos by an American dates to 1826. An American trapper reported meeting Navajo north of the San Juan in the vicinity of the junction with the Colorado River. Maps of the region dating from 1839 through 1855 show Navajos living
Navajo oral tradition holds that Navajo territory north of the San Juan extended all the way to present day Moab. This area, north of the San Juan River and east of the Colorado, was used by three different Native American groups, the Navajos, the Utes and the Paiutes. Relationships between and among these groups were often strained and sometimes violent. The Navajos on the northern edges of Dinetah "closest to the Utes normally managed to stay friendly with them." This was due in part to the mediating presence of Paiutes in the area. Both Utes and Navajos intermarried with Paiutes, thus establishing clan connections between the two tribes through Paiute relatives. Oral traditions of the Montezuma Creek Navajo, nevertheless, do recount numerous armed engagements between Navajo and Ute.

Most significantly for their sense of self-identity, the Montezuma Creek Navajos were never captured during Carson's round-up and were never imprisoned at Fort Sumner. In the winter of 1863-64, the U.S. Army under the leadership of Kit Carson began a scorched earth campaign, like Sherman's march to the sea in Georgia, against the Navajo. The ultimate goal was to force them onto a reservation, a "tribal reformatory," at a place called Bosque Redondo on the Pecos River in New Mexico. The Army called this place Fort Sumner; the Navajo called it Hweeldi, The Place of Confinement.

Carson's campaign was carried out with "frightful thoroughness." There were relatively few battles, but the army methodically marched through Navajoland burning hogans and fields, driving off their stock and chopping down their fruit trees. To avoid starvation, the Navajo surrendered, some 8,000 in all. Under armed guard, the Navajos were marched some 400
miles from their homes to Fort Sumner. Hundreds died on the march; elders who could not keep up were left along the trail; children were seized by slavers tracking the line of march.64 

Navajo history refers to this forced march as The Long Walk and it became the formative episode in the evolution of the Navajo nation. Prior to this, Navajo life was organized around the family and the clan; there was no sense of belonging to a larger community. The Long March and four years shared captivity in Hweeldi changed that.

This was also when the three smaller, separate reservations came into existence. Both the Ramah and Alamo Navajo communities were founded by families that had escaped from Fort Sumner prior to the formal release of the Navajo in 1864. The Cañoncito (sometimes called Puertocito) Navajo had begun to separate from the main band even before the Long Walk. This group advocated peace with the whites and even acted as scouts for the Army during the round-up, earning themselves the name of Enemy Navajo.65 

These groups did not fully share in the community-creating experience of the Long Walk and Hweeldi. Neither did the Montezuma Creek Navajos. Unlike the others, however, the Montezuma Creek Navajo have never been recognized as a separate band.66 

The Navajos involved in this litigation, what I have been calling the Montezuma Creek Navajos, did not include all Navajos living in San Juan County, but a subgroup living near (from a rural point of view) one another along Montezuma Creek in the vicinity of Hatch Trading Post. It appears that this subgroup had been living in the area for at least one hundred and fifty years, unlike some of the other San Juan Navajo groups who had migrated to the area more recently. The Supreme Court opinion refers to the plaintiffs as comprising eight families.67 One descendant of a plaintiff claimed that originally there were only four clans in the area, all
inter-related through a man called K'aayelli (Man with a Quiver).68

In the second half of the nineteenth century, K'aayelli was considered leader by the Navajos living north of the San Juan River.69 K'aayelli, through his mother, belonged to the Bit'ahnii (Within His Cover) clan. He was born about 1801 near a prominent formation south of the Abajos and west of Blanding called the Bear's Ears.70 A canyon and a spring in the vicinity of his birth are named after him, using the corrupted version of his name, Kigalia.71 He spent his entire life in the area that is now southeastern Utah. He died in 1894 or 1897 along Montezuma Creek, where he is buried.72

K'aayelli had two sisters or half-sisters, Asdzaa Do Al Chi'i (Sterile Woman73) and Asdzaa Kin Diildi (Burnt House Woman). It is from these sisters that most of the Montezuma Creek Navajos seem to be descended. He also had a brother (or perhaps half-brother74), the noted Navajo war chief, Manuelito. By the 1860s Manuelito was living in the vicinity of the Little Colorado River in Arizona; he had married a woman from that region and as was customary he had moved to live with his wife's kin. While Manuelito and his followers ultimately surrendered to the Army and went to Hweeldi, K'aayelli and the people who followed him never did.

During the time of the Navajos’ incarceration in New Mexico, K'aayelli and a number of other Navajos who acknowledged his leadership took refuge in a place called Naahootso (Place to Escape From the Enemy).75 Oral histories recount many dramatic stories from this time and place: K'aayelli posting lookouts to warn of the approach of enemies; the sole entrance to the hiding place in the canyon being by means of a yucca rope; women and girls being captured by
Utes and sold as slaves to the Mexicans – sometimes escaping and returning by means of perilous journeys, sometimes not.76

The Montezuma Creek Navajo followed the traditional Navajo pastoral lifestyle, based upon herding.77 People resided in widely scattered camps or outfits, made up of an extended family living in one or more hogans clustered together.78 Each family would have at least two residences, a winter place and a summer place, and would move from place to place as dictated by grazing needs.79

The Navajo, like many Native American groups, have a strong connection to the land where they live. Traditionally, at birth, the baby's umbilical cord is buried near where the baby was born, to symbolize the person's connection to the land, which nurtures the person as a mother does.80 “To the Indians who live in this area, the land is more than just a physical place of survival. It is all part of a spiritual universe...”81

Prior to the coming of the white man, there were no other groups with whom the Navajo had to compete for grazing in the Montezuma Creek area. Although Utes were certainly present, their use of the area was primarily for hunting and for slave raids on the Navajos.82 From the beginning, Navajos objected to the white man's encroaching stock along Montezuma Creek and other areas.83 By the turn of the century, the Mormon ranchers and Navajo herders were engaged in what would be more than fifty years of grazing disputes.

**The Ranchers**

Prior to 1880, European contact was both slight and transitory in the southeastern corner of what would become the state of Utah. The Spanish friars, Dominguez and Escalante, skirted the
area in 1776 during their exploration of routes from Sante Fe to the Californian missions. Mountain men and trappers were hunting in the area by the 1820s. In the mid-1800s, Geographical Survey parties were mapping in the area. In 1874, one of the first photographs of the area was taken of an Ancient Puebloan ruin in McElmo Canyon, by a photographer with the Hayden Survey.

In the late 1870s a number of small ranchers entered the country, “drift[ing] before the movement of the larger frontier.” By the end of the decade, the large cattle outfits had arrived and began buying out the smaller operations and taking control of the best grazing areas and the water sources. The Lacy (or Lacey) Cattle Company, also called the L.C., moved into the area around Montezuma and Recapture Creeks in 1879, driving in an estimated 17,000 head of cattle from the Texas Panhandle.

A few homesteaders had also settled in the area. In 1877, “the first recorded white settler, Peter Shirts” established a homestead at the mouth of Montezuma Creek on the San Juan River. By the following year, there were some eighteen families (about seventy people) settled in lower McElmo Canyon to the east and on the San Juan River, apparently moving in from Colorado and Texas. Included in this group was an irascible individual named Henry Mitchell, who opened a trading post at the mouth of McElmo Creek.

Prospectors also began entering the region. In late 1879, James Merrick persuaded Mitchell's eighteen year old son to join him on a prospecting trip into Monument Valley, just south of the San Juan River, with some inspiring ore samples and a tale of having discovered a legendary Navajo silver mine; less than a year later their bodies were found at the foot of two
buttes that now bear their names. In 1883, the noted Navajo headman Hashkiniiinii led Cass Hite to a spot on the San Juan where placer gold could be found, supposedly to make him stop pestering the Navajos about that legendary silver mine. In any event Hite's report set off a minor gold rush that lasted off and on for a decade or so.

None of these groups was to shape the future of this area as much as the final wave of immigrants: the Mormons, as members of the Church of Jesus Christ of the Latter-Day Saints are often called. Mormon settlers entered the area from the west, moving eastward against the westward flow of pioneers. The settlers came at the behest of church officials who wished both to claim all agricultural lands in the Utah territory for Mormon settlement and to erect a bulwark against encroaching non-Mormon settlement from the east.

Unlike many other western pioneers who were looking for a better life, the Mormon settlers of San Juan County were acting under a religious imperative, which meant that in their own eyes their actions were not purely economic. They came because their God told them to; no doubt this would color their later perception of their right to the land.

Thus, both the Montezuma Creek Navajo and the Mormon settlers had a deeper connection to the land than is usual among twentieth century Americans. Both groups looked to the land for spiritual fulfillment as well as physical sustenance. This profound connection to place on the part of both these groups is the emotional engine that fuels the tension between them.

The story of the Mormon's arrival in San Juan County is a saga of epic proportions. An initial exploring party of thirty men, two women and eight children arrived in mid-1879 and established a small settlement, optimistically named Fort Montezuma, on the San Juan a little
upstream from the mouth of Montezuma Creek. Two families remained there while the bulk of the party returned to Cedar City in southwestern Utah to report on routes. Because of problems with the scouted routes, another, relatively unexplored, route was chosen for the main party, the route which was to become famous as the “Hole-in-the-Rock Trail.”

The Mormon pioneers’ journey along this route has been called “the most appalling wagon trip ever taken anywhere.” For six months, some 230 men, women and children struggled to cross a region that remains to this day one of the most rugged and inhospitable in the continental United States. They built some 180 miles of road during the winter of 1879-1880, through sand and over slickrock, down a 1,200 foot cliff (that section alone took eight weeks), across the Colorado, over more slickrock and more sand, up and down more cliffs, hacking a passageway through juniper-pinion forests, struggling through blizzards and cold, all without the loss of a single human life. It has been pointed out that some wagon trains crossed the continent in less time than it took this group to cross one corner of the state of Utah.

Although the original intent was to reach Fort Montezuma, the exhausted settlers instead chose to establish their new settlement at the site of Bluff, eighteen miles west of their intended destination. As with all Mormon settlements, the new arrivals laid out a townsite on a grid, surrounded by fields, and began farming operations, building dams, waterwheels and irrigation ditches. The San Juan, however, proved troublesome; after repeated minor floods, a major flood in 1884 wiped out most of their improvements.

Taking their cue from the big cattle outfits, after 1885, the Bluff Mormons, unlike other Mormon settlements, moved to cooperative livestock management and away from farming. They formed the Bluff Pool and engaged in head-on competition with the big outfits, using “
tactics that earned them the name of ‘Bluff Tigers’ among non-Mormons.” Although the Mormons adopted Texan ranching ways, they did not mingle with the cowboys, in fact shunning them and denouncing their hard-living life-style.

The Mormons turned out to be “better stayers.” The 1880s had been a wet era, but the 1890s were a time of drought. The national economy went bust in 1893, and “by 1895 bonanza had turned to near panic and the big [cattle] outfits began to fall apart or get out.”

Eventually the livestock industry in the area, mostly controlled by Mormon families, settled into mixed sheep and cattle operations, as it remains today.

A second “wave” of Mormon immigration to San Juan County occurred early in the twentieth century. Between 1912 and 1916, an influx of Mormon “Pachecoites” from Mexico arrived. These were the descendants of Mormon polygamists who “had fled south of the border during the intense antipolygamy activity of the 1870s and 1880s,” when federal officials were prosecuting Mormon polygamists. These Mormon expatriates were now threatened by Pancho Villa and other Mexican revolutionaries and returned to Utah to avoid the revolutionary violence.

With the demise of the big Texan outfits, by the late 1890s, the Mormon’s only significant competition for rangeland came from Navajo livestock holders. From the turn of the century until the 1950s, the tensions between these two groups ebbed and flowed, but were never resolved. It could legitimately be called a fifty-year range war.

**The BLM**

At the time the *Hataley* lawsuit began in 1953, the Bureau of Land Management was just
seven years old. Created a year after the end of World War II, the BLM was charged, among other tasks, with administering a new and comprehensive system of grazing leases under the Taylor Grazing Act. It was also struggling for legitimacy in the eyes of both the ranchers, who were suspicious of the new federal oversight, and of Congress, whose support of the new agency was ambivalent at best. The reasons for this suspicion and ambivalence are rooted in the evolution of public land policy in the American West.

“The vast majority of the BLM lands are the remnants of the original public domain following 200 years of land grants ...[and] withdrawals.” In the beginning, federal land policy focused on selling the public lands as a source of revenue for the federal government. Although initial attempts at public land sales were disappointing, due to the fact that the public lands were remote and dangerous and there was still cheap land available on the eastern coast, by 1812 sales were so brisk that Congress created the General Land Office (“GLO”) to process the issuance of patents. Originally placed within the Treasury Department (no doubt reflecting the primary purpose of generating revenue), in 1849 it was transferred to the new Department of the Interior.

From the beginning, there was a tension between the federal government's policy of generating revenue through public land sales (which tended to favor monied interests) and the desire of frontiersmen and pioneers to be able to purchase public land at a low price for settlement. Over time, this latter purpose began to predominate and in 1841 Congress passed the first general homesteading statute, The Preemption Law of 1841.

This law, which has been called a “frontier triumph,” allowed heads of families, widows and single men over twenty-one, either citizens or those intending to become citizens, a one-time
privilege of entering and cultivating up to 160 acres of public land at a minimum price.\textsuperscript{118} Under the Homestead Act of 1862, public lands could be obtained “free” after five years of residence and cultivation.\textsuperscript{119} The push for homesteads continued until the First World War, when lack of land suitable for agriculture, the draft, increasing industrialization, and drought ended the homesteading era.\textsuperscript{120}

In the second half of the nineteenth century, land was also transferred out of the public domain to further other purposes, such as the development of townsites, state colleges, Indian reservations, mining, lumbering, and irrigation projects.\textsuperscript{121} By the end of the century, as the remaining “public domain was rapidly diminishing”\textsuperscript{122}, the concept of conservation of public lands began to take hold.\textsuperscript{123}

It is interesting to note that, while grazing was always an important use of the public lands, it was not recognized as an independent basis for acquiring public land until the Stockraising Homestead Law of 1916.\textsuperscript{124} This law enlarged the typical homestead grant of 160 acres to 640 acres (a section), but even that was not large enough to support a ranching operation in the semi-arid west, so ranchers depended upon use of the public range.

Use of the range in the late nineteenth and early twentieth centuries was basically unregulated. This led to what is called the “tragedy of the commons.”\textsuperscript{125} Having no vested interest in the land, ranchers put as many animals as they could on the range, which resulted in severe overgrazing.\textsuperscript{126} As one federal official put it, “It was a clear case of first come, first served and the devil take the hindmost.”\textsuperscript{127} Even though as early as the 1870s it was recognized that there was more stock on the public lands than the land could support, it was not until the
1920s that proposals for a leasing system were being taken seriously.\textsuperscript{128}

Opposition from stockmen to grazing leases as well as a states' rights movement seeking to cede federal public lands to the states held up passage of any grazing lease bill until 1934 when the Taylor Grazing Act was passed.\textsuperscript{129} A Division of Grazing was established within the Department of the Interior\textsuperscript{130} to administer the lease program. The General Land Office, previously devoted to sales of public lands, was now directed to classify all remaining public lands according to their best and highest use.\textsuperscript{131} Public lands thought suitable for grazing were organized into grazing districts. To encourage acceptance of the new regime, local advisory boards were set up for each grazing district.\textsuperscript{132} Civilian Conservation Corps (CCC) workers were enlisted to develop water sources and erect fencing as part of the move to improve range management.\textsuperscript{133} In 1941, the Division of Grazing was renamed the U.S. Grazing Service and, reflecting its importance to western interests, moved from Washington to Salt Lake City.\textsuperscript{134}

The coming of World War II brought the conservation and range management work of the U.S. Grazing Service to a halt, as men and energy were redirected to the war effort.\textsuperscript{135} At the same time livestock trespasses increased in an effort to meet the wartime demand for beef.\textsuperscript{136} The lack of enforcement of the lease system dealt a serious blow to the Service's credibility.

The Grazing Service had other problems as well; a study in 1941 showed that the grazing fees were far below market and the Service proposed to triple them.\textsuperscript{137} Opposition to any increase was fierce, especially among the western states. At the same time, the House Appropriations Committee was pressuring the Service to become self-sufficient.\textsuperscript{138} The Service ultimately dropped the attempt to increase fees and the House retaliated by slashing its budget.
Interior officials began to consider merging the Grazing Service with the GLO in an attempt to make public land administration more efficient. In July 1946, the two were indeed merged and the new agency was named the Bureau of Land Management (BLM).139

By this time, the range in San Juan County (and indeed much of the west) was severely degraded as a result of overgrazing.140 The BLM was thus faced with a daunting task of accommodating scientific range management with the political realities of that time and place. As the direct descendant of the Grazing Service, the BLM inherited the rancher's ill will from the earlier attempt to raise grazing fees. At the same time, they needed to establish their credibility as an effective steward of the land. They needed to “mend fences” both literally and figuratively.

The BLM files give many examples of this political pressure in the context of the range disputes between white stockmen and Navajo herders.141 As the Regional Administrator explained the situation in 1948 to the director:

This Navajo trespass is a very serious matter both from the conservation and the range administration viewpoints... [Indian year-long use] is weakening the forage growth and forming “sore spots” all over the range. From an administrative viewpoint it is undermining the administration of grazing district 6 as the whiteman users cannot understand why the Federal Range Code and the rules of Fair Range Practice do not apply equally to all.142

**A Fifty Year Range War: 1900-1952**

“While other Indians were removed for depradating, the [Montezuma Creek] Navajos caused trouble by making productive use of the land in competition with the various groups of whites.”143

The round-up and destruction of the Navajo horses and burros in 1952-53 was not an isolated incident. In some ways it was the culmination of over fifty years of conflict between the Navajos and the white ranchers of San Juan County. In recounting the history of this conflict, I have divided the years into two periods, the Pre-Taylor Grazing Act period, during which time
both groups had the same legal right to use the public range, and after the passage of the Act in
1934, when use of the public lands was limited by law to permit-holders.

**Pre-Taylor Grazing Act**

Prior to the 1870s, there were no significant problems between the Navajo and white
settlers in the Montezuma Creek-McCracken Mesa area, mainly because there were almost no
white settlers. Over the next thirty or so years there were isolated incidents and the tension was
building between white ranchers and the Native Americans. By the early years of the new
century, the stage was set for conflict.

The pressures exerted by the various stakeholders in southeastern Utah are revealed by
the checkered history of the Navajo reservation boundaries in this area. Responding to pressure
from both Navajo interests and local ranchers, in 1884 President Chester Arthur signed an
executive order extending the northern boundary of the Navajo reservation to the San Juan River.
It was hoped that this would relieve pressure by giving Navajos more grazing lands of their
own, thereby reducing their use of the public domain. From the perspective of white ranchers, all
Navajos ought to be using reservation lands only and not the public lands. The Navajos,
however, had as much right as anyone else to use the public lands for grazing. Navajos living
north of the San Juan River, moreover, had little incentive to herd their stock across the river.

Over the next forty years, the reservation boundaries in the area would fluctuate five
times. After the 1884 addition to the reservation, mining interests lobbying for the return of
promising lands to the public domain caused an area known as “the Paiute Strip” (all lands in
Utah south of the San Juan River and west of longitude 110°) to be removed from the Navajo
In 1905, the Aneth Strip, a “small portion of land in the Montezuma Creek area
of Utah [north of the San Juan River] was added to the reservation.” Then in 1908, the Paiute
Strip was again added to the reservation. Mineral interests, this time in oil, almost
immediately began politicking for the return of these lands to the public domain and in 1922,
much of the Paiute Strip was again taken from the reservation and once more placed in the public
domain.

None of the additions to the Navajo Reservation in Utah solved the grazing issues of the
Montezuma Creek/McCracken Mesa area. As early as November 1917, Estep, the new BIA
superintendent at Shiprock, reported signs of impending trouble: “There are a number of Indians
living off the reservation over in Utah, at least four of whom have made considerable
improvement on their places...irrigation work of some value. I am advised that the white settlers
in their vicinity [are] beginning to want to crowd them out...” In January 1921, an Indian
agent stationed at Aneth reported to Estep “We have been having considerable trouble with the
sheep and cattlemen adjoining the reservation on the north. It has always been troublesome for
years...” Estep then wrote to the Commissioner:
The outside stock men are crowding the Indians just about as hard as it is possible to
crowd them and avoid trouble. Heretofore we have had comparatively little trouble with
the Utah stock [men]. Nearly all of these stockmen are members of the Mormon Church,
and the attitude of this church and its membership toward the Indians has always been
quite friendly, and considerate.... The present offenders are the younger stock men and
apparently the younger Mormons are not of the same caliber as their fathers were...The
larceny of Indian cattle has been a profitable industry for a number of years past. It is
claimed that several men have grown quite wealthy and influential in the practice of this
industry.

The farm agent for the Navajos at Aneth had a slightly different explanation for the increasing
tension between whites and Navajos: “On acct [sic] of the open range being taken up by settlers the sheep and cattlemen are engaged in a scramble for what range is left.”

In 1923-24, in an effort to protect the interests of Montezuma Creek Navajos who had been living “off the reservation” for many years, the Navajo Agency assigned an allotting agent to assist the Navajos in preparing homestead applications. Of the families involved in the later Hatahley litigation, several filed for their allotments. The allotments were allowed and patents issued in 1925. Not all of the Montezuma Creek Navajos were helped to make applications, however. Apparently, the allotting agent was re-assigned before all of the applications were prepared. Moreover, the allotments were only for 160 acres, which was not sufficient to provide grazing for the typical Navajo sheep herd. And in at least one instance, the fact that the Navajo family had obtained a homestead allotment on their land did not prevent them from being harassed to such an extent that they moved to the south bank of the San Juan River.

“In 1927 a renewal of the range dispute arose, with the white stockmen protesting Navajos' use of land both north and south of the San Juan.” The new superintendent at Shiprock, B.P. Six, reported in 1930: “For many years the Navajo Indians who have been living in Southeastern Utah northwest of the San Juan River, in the vicinity of Montezuma and Recapture Creeks, have been grazing their stock on the public domain in that vicinity. Continual clashes have occurred between these Indians and the white stockmen who have been using the same range.”

In 1933, the final adjustment in this period to the reservation boundaries in Utah occurred. The Paiute Strip was once more returned to the Navajo Reservation and an area called
the Aneth Extension, running from Montezuma Creek east to the Colorado state line and just to the north of the Aneth area which had been added in 1905, was now brought within the reservation.

The negotiations over the Aneth Extension extended over a number of years, 1930 through 1933, and implicated the grazing problems in the Montezuma Creek area. In September 1932, Radcliffe, Superintendent McCray, and a local stockman, S.J. Jensen, visited the area as part of the negotiations relating to the addition of the Paiute strip to the reservation.

It was reported to us that some Indian improvements [in the Montezuma Creek] area have been destroyed by the white homesteaders, and that last winter approximately 70 head of Indian horses were killed. It seems that the past year a bitter feeling has developed between the Indians and the non-Indians due to the fact that these improvements were destroyed. This was not only told us by the Indians, but by Ira Hatch, trader, on Montezuma Creek...166

Cheschillige wrote to the Commissioner of Indian affairs in late 1932 arguing in favor of the addition of the public lands from Montezuma Creek east to the Colorado state line to the reservation along with the Paiute strip lands: “There has been considerable trouble in this section on account of the white settlers not respecting the rights of Indians on the Public Domain. They have driven Navajos off land that they have occupied for many years as well as killing their horses...”167

The whites took a different view: “The land we are interested in, is the strip of land located between Montezuma Creek on the west and the State boundary line on the east, totaling approximately 52,000 acres. ... At the present time there are almost a thousand head of cattle and ten thousand head of sheep being wintered in this area. This land is used exclusively as a winter range and always has been. The few Indian families that are in this area are only trespassers that are off the reservations...”168
The alleged “trespassing” indicates the ranchers’ belief that the Navajos should be restricted to grazing on the reservation, as at that time, the range was open to all users on a first-come, first-served basis. It was not until after the passage of the Taylor Grazing Act of 1934 that the use of the range was limited to specific permitees.

The legislation adding the Aneth Extension to the Navajo reservation, as a compromise to the ranching interests, provided that no further allotments to individual Navajos would be permitted.169

After the Passage of the Taylor Grazing Act of 1934

An opportunity to resolve the range conflicts between Navajos and white ranchers arose with the passage of the Taylor Grazing Act of 1934. The Act provided for lease of grazing district lands first of all to landowners located adjacent to the public lands through leases of one to ten years duration.170 Priority was given to those with experience and with adequate private land to support their herds when not grazing on public lands.171 Other criteria for issuing leases “weighed property ownership and traditional use.”172

“In the fall [of 1934] it was decided to try to obtain Navajo rights to McCracken Mesa under the Taylor Grazing Act.”173 In a report to the Commissioner, it was stated:

The land in township 39 south, ranges 23 and 24 East, as well as in Township 40 South, Range 23 east and a portion of Range 25 east, is of the mesa type and has been used by the Indians for many years. Mr. [Radcliffe], Field Agent, states that in 1914 he was in this area with a Geological Survey crew and many of the Indians that he met recently on that area were already occupying McCracken Mesa in 1914.... Mr. Radcliffe also states that there are approximately 4500 head of Indian cattle and sheep grazing on this area. Of this number of stock, the majority are sheep.

The Indians are living along Montezuma Creek and the Recapture Wash. At the present time there are fifteen families dependent on this area for their grazing and these Indians have always lived north of the San Juan River and did not migrate into this section in recent years. The fifteen families represent approximately sixty to seventy-five Indians. I feel we have very strong and indisputable claim on the so-called McCracken
Less than a year later, it appears that the Navajos had been shut out of the permitting process.

In June 1935, Utah Grazing District No. 6 was established, encompassing San Juan County (as well as portions of other counties). The first meeting of the Advisory Board of Grazing District No. 6 was held in September 1935. “[T]he Indians were not represented and no application was made for any allocation of grazing area for their use. The entire area was allocated to the neighboring white grazers.”

In about 1935, with the establishment of the Taylor Grazing Act provisions, the local stockmen were faced with the problem of formally dividing up the range land in a way that would be acceptable to individual ranchers and to the Grazing Service. This distribution process bubbled with emotion and other complications, and it took many months, climaxed by a marathon talk session lasting more than twenty-four hours, before an agreement was reached. From the beginning, however, it was agreed that no Navajos should be with their herds in the area north of the San Juan River, and a fence was built for the purpose of keeping the Navajo sheep off the white stockmen's winter grazing range.

In November of that year the first trespass notices were served upon seven Navajos.

At a December 1935 meeting at Hatch's trading post it was agreed that whites would postpone any action until May 1936 and that Navajos could continue grazing on McCracken until then. It was hoped, rather wistfully, that when permanent allocations were made under the permitting system the Navajos would be represented.

In April 1936, the Superintendent of the Navajo Agency applied for and received a temporary permit to graze 150 horses and 3000 sheep and goats in District No. 6 from May through July. In July, he sought to have the permit renewed but it was denied.

In the 1939-40, trespass notices were served on more Navajos. In 1941, as a result of
negotiations between the Grazing Service and the Navajo Agency, grazing allotments for seven Navajo families were issued, not individually but in the name of the Navajo Agency.\textsuperscript{182} The permit allowed grazing in District 6 between October and May, that is, winter range. During the summer, the permitees were supposed to move their stock elsewhere.

These permits were renewed annually until October 1946. Until that year, the only trespassing notice issued was to Hosteen Sakizzie, in 1944. During this period, of course, World War II was raging, and everyone's attention was elsewhere.

In July 1946, the Grazing Service became the BLM. That year, the permits were issued to the seven families individually.\textsuperscript{183} In October 1947, the licenses were not renewed, due to the Navajos' failure to remove their stock during the summer months and to limit their herds to the specified numbers.

Between 1935, when the first trespass notice was issued against a Navajo for grazing without a permit, and 1946, only a handful of notices had been served on any Navajos. After 1946, it became a regular occurrence, but the BLM wasn't sure what its enforcement powers were, and so for a few years there was nothing done beyond serving the notices. Pressure was building, however, with white ranchers threatening that if the BLM wasn't going to enforce the grazing regulations against the Navajo, then they were going to ignore them as well.

2. The Range War Moves Into the Courtroom

Just as the round-up and destruction of the Navajos' horses and burros in late 1952 and early 1953 was not an isolated instance of violence, the \textit{Hatahley} case was not an isolated piece of litigation. To accurately evaluate it, the case must be considered in the context of a series of related cases.
First Salvo: *United States v. Tse-Kesi*

In February 1950, the federal government filed suit, *United States v. Tse-Kisi*. The case is significant because it was in many ways a preview of the *Hatahley* case. The same personages would feature prominently in both cases: basically the same parties, the same attorneys, and also the same judge. The underlying issue in both cases was also the same: whether the Navajos were entitled to use the range. Due to differences in the posture of the two cases, however, that issue was more explicitly presented in *Tse-Kesi*.

From the government's perspective, the case was a sort of test case, against two Navajo who were identified as ring-leaders, Eddie Nakai and Hosteen Sakizzie. I suspect that these two were chosen because they were both recognized leaders among the Navajo. They were recognized as leaders in part because they both were successful – they both had large herds, and both had access to cash. In part, their leadership was a recognition of their refusal to give in to the white ranchers. Sakizzie, in particular, emerges from the archival records as a vibrant and strong personality.

The whites are always accusing him of being a troublemaker – the range manager calls him “uppity” – but the Navajos describe him as a man who wouldn't back down, who stood up and said “no” when the whites told him to leave.

The complaint alleged that Sakizzie and Eddie Nakai were running livestock on the federally-owned range without permission and sought an injunction prohibiting them from further trespasses. The case was assigned to newly-appointed Judge Willis Ritter. Because at this point in time there was but one federal judge in Utah, Ritter would be the judge in the later
The attorney representing the Navajos was Knox Patterson. Born in Texas in 1890, he had been a Utah state senator from 1925 to 12933.\textsuperscript{191} Prior to that he had served as district attorney in Moab and as a special assistant to the United States Attorney.\textsuperscript{192} After his stint as state senator, he practiced law in Salt Lake City, where he “was recognized as one of the leading lawyers of the state.”\textsuperscript{193}

I do not know how Patterson came to represent the Navajos. The Navajos made it sound as if they retained him. They claimed that, after much discussion amongst themselves, they made the decision to hire an attorney (although it is not clear if this was in 1950 when the \textit{Tse-Kesi} lawsuit was filed, or in 1953 when the Navajo filed their lawsuit). Such a course of action had been recommended to them by Harry Rogers, a white rancher in Dove Creek, Colorado, who was married to one of Sakizzie's relatives. According to one of the plaintiffs, they “passed the hat” in order to come up with the money to retain a lawyer.

I do not know why the Montezuma Creek Navajos chose Patterson to represent them. Perhaps they or Harry Rogers knew of him from when he was the Moab district attorney in neighboring Grand County. Perhaps they knew of him from one of the high profile cases he had been involved with. For example, in 1944, he had participated in the defense of fifteen Short Creek FLDS polygamists.\textsuperscript{194} Perhaps they knew him from when he had earlier successfully defended a white trader in the Aneth area from a charge of manslaughter in the death of a Navajo.\textsuperscript{195}

In any event. Patterson introduced into the litigation the issue, intriguing but never
resolved, of whether these Navajos had aboriginal rights for use of the land. He raised as an affirmative defense to the trespass charge that the Montezuma Creek Navajos did have such rights: that they were “an independent band” that had occupied the area continuously since at least 1848; that they “have no tribal association of any kind with other tribes of Navajo, having long since severed any tribal relations with such Indians”\textsuperscript{197}; that they never entered into any treaty with the United States; and that they have their own form of government, “having three Head Men in the area who settle all disputes and controversies arising within the band.”\textsuperscript{198} All of this sounds as if Patterson were laying a foundation for claiming federal recognition for the separate existence of this band; unfortunately, this issue disappears from the litigation for reasons that will be discussed later.\textsuperscript{199}

On June 27, 1950, Ritter signed an order that added another forty individual Navajos to the two named defendants.\textsuperscript{200} In the order the court stated that these “other Navajo Indians have interest in the litigation here involved to the same extent and of the same character as that of the two record defendants.”\textsuperscript{201} There is significant overlap between the individuals named in this order and the plaintiffs in the later \textit{Hatahley} case.

On June 14, 1950, the defendants had also filed a counterclaim alleging that government agents had wrongfully destroyed hogans, corrals, farms and animals belonging to the defendants during the period of 1933 through 1950 and seeking compensation. Interestingly, at this time the defendants were claiming $10 per head for each horse killed.\textsuperscript{202} A pre-trial order entered in September 1950 makes it clear that the central issue in the case, however, was whether these Navajos had any claim to the land itself:

\textit{Now...the following summary of said issues is hereby made and ordered filed}
herein, to-wit:

(1) the issue of fact as to whether or not any of the defendants have been in
occupancy of the lands in dispute, or have been forcibly, against their will and without
right evicted from said lands...or whether or not the defendants were on the reservation
and are now trespassing upon the lands in question.

(2) The mixed issue of law and fact as to whether or not the rights of the Indians, if
any, have been extinguished by act of the sovereign. 203

As a basis for the Navajos' claim to a right of possession of the rangeland, Patterson was arguing
that these Navajos “are part of a separate and independent band of Navajo Indians who have no
relations with any Indian Reservation or other band of Navajo Indians."204

On October 31, 1950, Ritter dismissed the case. 205 In his published opinion 206 he first
noted that the defendants, the Montezuma Creek Navajos, claimed to be an independent band and
then summarized the underlying problem as he saw it:

What the government is asking the Court to do, in short, is to force the Indians to leave
their homes and fields and grazing grounds. But the Court has no authority to allot to the
Indians any other place to live, on or off the Reservation. In reality, the government is
asking the Court to order these Indians to become in effect homeless Nomads.207

He gave three reasons for dismissing the government's request for an injunction: 1) he had no
means to compel compliance with any injunction ordering the Navajos off the range “it being
impracticable to send down the numbers of United States Marshals necessary to patrol the
territory"208; 2) he had no authority to allot other lands to the Navajos; and 3) the parties had not
exhausted their administrative remedies. He dismissed the counterclaim for damages to the
Navajos' property because the district court was “not the proper forum in which to seek money
damages upon an Indian claim against the United States."209 The government appealed to the
Tenth Circuit.

Second Round: Young v. Felornia
While the dismissal was being appealed, in January 1951 several white ranchers filed suit against the Navajos in state court, *Young v. Felornia.* This case alleged that the Navajos were trespassing on grazing leases issued on state lands.

On October 12, 1951, the Tenth Circuit reinstated the federal lawsuit. The Tenth Circuit held that, while there may be cases in which a court would be justified in refusing to exercise its jurisdiction, ordinarily a judge has a duty to decide cases on the merits and may not arbitrarily refuse to exercise its jurisdiction. Ritter then stayed the case until the resolution of the Utah state case.

In September 1951, the state court ruled that the Navajos had no aboriginal grazing rights and enjoined them from trespassing on state lands. The Navajos appealed this to the Utah supreme court which upheld the lower court in May 1952. A petition for rehearing was filed and denied in July 1952. A petition for certiorari was then filed in October and denied in November.

Oddly enough, the federal lawsuit remained ongoing until June 27, 1953, which was subsequent to the filing of the *Hatahley* lawsuit. On that date, Ritter entered an order again dismissing the suit as moot, “it appearing to the Court upon representation by representatives of Bureau of Land Management that the defendants have returned to the Reservation and that there are no more trespasses.” Testimony at the first trial in *Hatahley*, which would occur in the fall of 1953, would establish that at least some of the defendants remained on the public range.

From the point of view of some of the white stockmen, the matter was resolved by the Utah Supreme Court decision in May 1952. During the spring and early summer of 1952,
tensions increased. By July 1952, enforcement action against the Navajo had begun.

In the middle of July, probably the 13th, the sheriff tried to impound horses and sheep belonging to Tom Mustash and some other Navajo. When word came that the white men were rounding up their stock, the Navajos intervened and herded the stock away from the whites. The next day seven of them were told to go to Monticello and spent the night there in jail.\footnote{217}

A few days later, on July 16th, the deputy sheriff and three stockmen tried to impound another flock of Navajo sheep grazing on state land.\footnote{218} As the men were driving the sheep to the waiting trucks, several Navajo men and women surrounded the sheep to prevent their being loaded. A scuffle broke out. Two Navajo men were handcuffed together, but the others prevented the sheep from being loaded.\footnote{219}

The deputy sheriff returned to Blanding for reinforcements; he returned with the sheriff and several more men. They tried to impound yet another herd, and the women herding this flock tried to prevent them. The sheriff handcuffed them together until the loading had been completed.\footnote{220} One of the women had a babe in arms. She'd been to school and she started swearing at the men in English. “That just made things worse.”\footnote{221} There was some more pushing and shoving, the four handcuffed women got pushed on the ground,\footnote{222} and the deputy sheriff ended up with a broken finger and a torn shirt.\footnote{223}

Starting in September 1952, the white ranchers and the BLM hit on the idea of using the Utah Abandoned Horses Act to justify seizing and destroying the Navajo horses.\footnote{224} They would locate a herd, wait until any Navajos in the vicinity had left, and then seize these “abandoned” horses. There was testimony at trial that they even placed a sentry to watch Sakizzie’s corral from
a bluff until his horses were let out to graze; they waited until the horses wandered over the next
ridge and then they rounded them up.

The horses were then driven to a corral, loaded on trucks and taken to either Blanding or
Monticello. In the process, some horses were maimed or killed. The rest were then sold, within
a short time, usually days, to a packing plant. If a Navajo managed to track his or her horses to
town before this and tried to redeem them, they were either intimidated into giving it up, or were
told that the redemption fee was some outrageous sum. This went on until February/March 1953,
when the Navajos filed suit and the judge entered an injunction prohibiting the BLM from further
roundups.

From this point in time onwards, the legal wrangling is documented in the Tenth Circuit
and Supreme Court opinions discussed earlier.

II. The Problem of Cross-Cultural Damages

As the Hatahley case features prominently in the Remedies canon, the next section will
focus on the damages issues in the case. In the litigation, the challenge of trying to compute
damages across cultures caused problems. Judge Ritter was sensitive to these problems, as is
revealed by comments he made during the first trial.\footnote{225} Yet his ability to translate the Navajos'
injuries into dollars and cents was unsuccessful, at least from the vantage of the appellate courts.

After the first trial, the trial judge made extensive findings of fact.\footnote{226} These findings
included:“that there is no reasonable market value among white men for an Indian raised and
trained horse”\footnote{227}; that the market value of a white man's horse of average quality was $300; that
the plaintiffs did not sell their horses but bartered them for cows or sheep; that it would take
plaintiffs five years to raise colts to replace the horses they had lost at a replacement cost of
$1,000 each; and that the rental value of horses was $5 a day. In awarding judgment to the plaintiffs, however, the judge indicated that the plaintiffs’ damages included “consequential damages, mental pain and suffering and the loss of the value of their horses and burros” but merely awarded them the amount requested in their complaint, $100,000, without further elaboration or break down of the damages into their constituent parts. In the Findings, he did not even indicate how many horses or burros each of the plaintiffs had lost.

On appeal, the Tenth Circuit found no liability and thus had no need to review the damage award, although in dicta the court did state “that the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered.”

The United States Supreme Court reversed the Tenth Circuit on the issue of liability, holding that plaintiffs' complaint did state a claim under the Federal Tort Claims Act. On the issue of damages, the Court reiterated the black-letter law that an award of damages must be made with “sufficient particularity” so that it may be reviewed. The Court then had this to say: Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. There can be no apportionment of the award among petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review.

The Court then remanded the case to the district court for further findings on the question of damages.

On remand, the trial judge took additional evidence and at the conclusion of this second trial made further findings of fact. Because this second trial was limited by Ritter to the sole
issue of consequential damages, the findings take up the bulk of the court's judgment: thirty-nine pages of findings of fact versus one page of conclusions of law.\textsuperscript{233} The number of animals found to have been destroyed varied slightly from the first trial: 101 horses and 39 burros.\textsuperscript{234}

This second time around the trial court awarded compensation for three elements of damages: the value of the animals destroyed; the deprivation of use; and mental pain and suffering. The court awarded $395 per head for the horses and burros; fifty percent of the value of the reduction in the size of each plaintiffs' herd of other livestock, as an approximation of the value of the loss of use of the destroyed stock; and $3,500 per plaintiff for mental pain and suffering.

On appeal from the second judgment, the Tenth Circuit accepted the three elements as appropriate for the award of damages\textsuperscript{235}, but criticized and rejected each of the district court's findings as to the amount of damages for each. In reviewing the Tenth Circuit's opinion in light of the trial transcripts and Findings of Fact, I am of the opinion that the Tenth Circuit was wrong to reject the trial judge's findings as to the value of the destroyed animals, but that it correctly rejected the formula used to compute the value of the loss caused by the lack of the riding stock. As to the third element, compensation for pain and suffering, the Tenth Circuit was justified in light of the state of the law at that time to reject the award for communal pain and suffering – but it failed to rise to the ethical the challenge of reconceptualizing harm to account for the cultural differences between the plaintiffs and western society.

Before examining each element in detail, it is helpful to review the standard of review the Tenth Circuit should be employing. An appellate court is supposed to review findings of fact by a trial judge under the clearly erroneous standard. This is out of deference to the trial judge's
ability to gauge the credibility of witnesses testifying in court. Conclusions of law, however, are subject to de novo review. Thus, on the second appeal, the Tenth Circuit would primarily be reviewing findings of fact, as liability had been established in the course of the first trial and the first set of appeals. We expect that, although the Tenth Circuit was found to be wrong when it held no liability, the court will be able to set aside its now erroneous view of the case and look at the damages issues as if the court had no reservations about liability.  

A. The Value of the Destroyed Animals

All of the evidence regarding the value of the destroyed animals came in at the first trial. Ritter refused to allow any testimony from either party in the second trial that went to their value; he limited testimony to “consequential damages.” In Ritter's view of things, the value of the destroyed animals had been determined at the first trial and upheld by the United States Supreme Court when it held generally that the findings of the trial judge were not invalid as a consequence of bias.

The question of how to value the horses and burros taken from the Navajo was the central factual issue in the first trial. Although during the first trial there was some disagreement between the parties as to the exact number of animals involved, before testimony in the five-day trial was concluded, the two sides had agreed to stipulate as to the numbers: 116 horses and 38 burros. The two sides were unable, however, to agree on the value of these animals.

In the first trial, it was established that the majority of the animals had been shipped to the Kuhni Packing Plant in Springville, Utah. Apparently, there they had been slaughtered for fish food for the local fish hatchery. The animals were sold to the packing plant for 3 cents per
pound, which means that a 500 hundred pound horse would have been sold for $15.00\textsuperscript{243}.

The money received from the packing plant, a total of $1,700, went to the Advisory Board for the Grazing District.

Several defense witnesses testified as to the market value of the destroyed horses. One of the many ways that the BLM range aid undermined his credibility with Ritter was to testify that, while the BLM received three cents a pound upon sale of the horses and burros for slaughter, the market value of the animals was only two cents a pound\textsuperscript{244}. An expert witness for the defendants in the first trial testified that the average cost of a saddle horse in the area was $100-$150 and that the stock rounded up by the BLM were below average in quality\textsuperscript{245}. In addition, the defendants' witnesses testified that the animals rounded up were mostly unbroken – an assertion which was flatly denied by the plaintiffs' witnesses\textsuperscript{246}.

The plaintiffs' witness, a horse dealer, testified that the market value of a good stock horse in the area at the time of the round-up would be from $250 to $350\textsuperscript{247}. Individual Navajos also testified as to the value of their horses, but this evidence was inconsistent\textsuperscript{248} and difficult to understand, plagued both by translation difficulties and, I suspect, by the fact that the Navajos rarely sold their animals and thus had little basis for discovering their "market" value\textsuperscript{249}. Sakizzie testified that a good horse could be traded for 5 cows or 25-35 head of sheep. According to the Findings from the second trial, the same witness testified that a good cow would sell for about $300 and a good breeding ewe for about $30\textsuperscript{250}. Doing the math, this would indicate that a good horse would be worth about $1,500 if traded for cows and between $750 and $1,050 if sold for sheep. Sakizzie also testified, however, that he would take on average $300 for a horse.
The strategy of the plaintiffs' attorney was to show that these animals had an idiosyncratic value that went beyond any "market" value. To establish the idiosyncratic value, witnesses testified as to the unique "endurance" training the animals received. Because the Navajo could not afford to provide feed for their stock, their animals had to be able to survive on what grazing was available, which in drought years would be hardly any and even in wet years would be little enough, due to the fact that the range was overgrazed. Thus, in training their animals the Navajos would tie them to a tree without food or water for three days.252

Testimony relating to the religious significance of the animals was also introduced. The plaintiffs' witnesses testified that when a person dies, they kill the person's best horse, so that they are mounted in the next life.253

Finally, there was testimony regarding how central horses and burros were to the Navajos' ability to survive. There was testimony about how the animals were used in herding sheep, hauling water, hunting, gathering pinyon nuts, pulling plows for their fields, and providing mobility, especially to the elderly members of the community.

In any case, in the second trial specific findings regarding the average value of the animals taken were made. The court justified the use of an average value as follows:

It would be impractical to attempt to place a separate valuation on each of the 140 animals taken by the Government. For that reason, the Court's findings must be based upon an overall average, taking into consideration the market value at the time of the taking, the replacement cost, and the intrinsic value derived from the unique nature of the animals involved. On this basis, the Court finds an average fair valuation per horse or burro taken of $395.00 per head.254

The Findings then recited that Navajos would trade five cows or 25 to 35 head of sheep for a
good horse; cows had a market value of $300 a head, sheep had a value of about $30 a head, giving a value of approximately $1,000 for a horse; if Sakizzie had sold horses, which he did not, he would have taken $300 a head; the horse dealer's estimate was $250 to $350 for a stock horse; rental value was five dollars a day; and specifically “The replacement cost of a horse of the type taken from the plaintiffs would be about $1,000.00 a head.”

The Findings then elaborate on the replacement cost:

The horses were original Indian stock hardened by breeding and environment to the rigors of the area and the Indian way of life. Only such horses can survive in this area. Horses which might be purchased and brought into the area will run away or die of hunger unless given special care. In order to replace the stock taken by the Government agents, it will be necessary to buy brood mares and keep them in an enclosure and feed them hay until colts from these mares can be raised to a size to be used in the range area. . . The actual replacement cost of the plaintiffs' horses would be at least $1,000.00 None of the plaintiffs have the present means to replace the horses taken from them.

A list of the individual plaintiffs with the number of horses and burros taken from each is included.

On appeal from the second trial, the Tenth Circuit held that “the plaintiffs were entitled to the market value, or replacement cost, of their horses and burros as of the time of taking.” Note that the Tenth Circuit seems to be equating market value with replacement cost. Certainly, in many cases, particularly where there is a functioning market in whatever is sought to be evaluated, market value and replacement cost are one and the same: where there is a functioning market, one can replace the lost item by purchasing another on the market. In this case, however, there was no functioning "market" for Indian horses or burros, and thus “market value” for the animals taken is difficult to determine.

The Tenth Circuit then goes on to state: “The plaintiffs did not prove the replacement cost
of the animals, but relied on a theory that the animals taken were unique because of their peculiar nature and training, and could not be replaced."\(^\text{260}\) This seems to ignore the Finding quoted above that the replacement cost would be at least $1,000.00. More surprisingly in view of that Finding, the court then states: “No consideration was given to replacement cost.”\(^\text{261}\)

The Tenth Circuit goes on to explain in particular where, in its view, the trial court stumbled: “The court rejected evidence of the availability of like animals in the immediate vicinity, and their value. This, we think, was error.”\(^\text{262}\)

It is not completely clear what the Tenth Circuit meant when it said the trial court “rejected evidence” regarding the availability of other animals.\(^\text{263}\) I suspect this refers to evidence that the government tried to introduce on a number of occasions during both trials about a BIA program that sought to reduce through voluntary relinquishment the number of horses on the Navajo Reservation by offering ten dollars for each horse turned in.\(^\text{264}\)

Ritter allowed testimony about the horse reduction program in at the first trial.\(^\text{265}\) He also allowed in rebuttal testimony that the horses turned in under this program were old, useless animals, not horses that would replace the working stock lost by the plaintiffs. During the second trial, however, Ritter would not allow this testimony, due to his view that the value of the horses had been established at the first trial.\(^\text{266}\)

If by saying the trial court rejected evidence of the availability of other animals, the Tenth Circuit means that Ritter heard evidence and rejected it as not credible, this would seem to run afoul of the standard of review. Ritter heard the conflicting testimony and found the testimony of the plaintiffs to be more credible.\(^\text{267}\) Ritter made no specific finding that the horse reduction
program was irrelevant but that is the reasonable conclusion to draw from his remarks at the time
that evidence came in. Ordinarily, the appellate court ought to defer to the trial judge who had
the chance to view the demeanor of the witnesses and is thus in the best position to assess their
credibility. Accordingly, a trial judge's findings of fact should only be overturned on appeal if
they are clearly erroneous, that is, lacking in any evidentiary support. Ritter's finding that the
replacement cost for the lost horses was approximately $1,000 had evidentiary support.

This suggests that it is more likely the Tenth Circuit was saying the trial judge rejected
evidence in the sense of refusing to hear evidence. However, as noted, Ritter did allow this
evidence at the first trial, although not at the second. This raises the question of whether the
appellate court was relying solely on the record from the second trial at this point.268

The Tenth Circuit appears to have either disregarded the appropriate standard of review
for factual findings or overlooked the relevant testimony at the first trial while only noting the
instances in the second trial where Ritter excluded the same testimony. In either case, it was
wrong for the Tenth Circuit to reject Ritter's findings of fact due to an alleged failure to consider
replacement cost.

B. Deprivation of Use

The plaintiffs suffered harm occasioned by the loss of their stock. As the Tenth Circuit
stated:

[T]he loss of their animals made it difficult and burdensome for them to obtain and
transport needed water, wood, food, and game, and curtailed their travel for medical care
and to tribal council meetings and ceremonies. Plaintiffs also testified that because of the
loss of their animals they were not able to grow crops and gardens as extensively as
before. These were factors upon which damages for loss of use could have been based. 269

The court also noted that plaintiffs could recover for loss of profits due to a reduction in the size
of their flocks of sheep and goats caused by the loss of their horse, or the actual loss of animals
due to their inability to properly care for their flocks without horses.270

To prove the dollar equivalent of all of this would be difficult, however, even for a
member of Anglo society. To do so for the Navajos would be even more difficult. How, for
example, does one attach a dollar amount to someone's inability to attend a distant “sing” or
ceremony? The cost of renting horses to get there, even though the Navajos had no money to do
so and might have had trouble obtaining horses even if they did have the money available?

To address this problem, the Findings of Fact set out a formula used to approximate a
dollar value for loss of use. The Findings note that the local trader testified that the Navajos'
credit at the trading post, which was based upon the numbers of their flocks, had been cut in half
since the taking of their horses.271 The Findings also note that the area had been in the grip of a
drouth for several years.272 The Findings then state:

Taking into consideration other factors which may have contributed to the reduction in
size of the plaintiffs' herds, the Court finds that a fair measure of the consequential
damages resulting from such deprivation of use [of their horses] would be approximately
fifty percent of the difference between the dollar value of the plaintiffs' herds of sheep,
goats, and cattle at the time the horses were taken, and the dollar value of the same herds
at the time of the Court's hearing in October and November, 1956.273

Then, no doubt due to the Supreme Court opinion requiring individual findings, the Findings list
each of the plaintiffs, the size of their herds at the time of the round-up of the horses and burros,
their size now, and the dollar equivalent of that reduction, divided in half.

The Tenth Circuit lambasts this formula as erroneous for two reasons. First, it holds as a
matter of law that, in the case of herd reductions caused by a defendant's unlawful acts, the proper
measure of damages is the loss of profits, not the overall reduction in value of the herd.274 I
question whether this is appropriate, given that although the Navajos sold off some lambs each year, the majority of their flocks were kept for their personal use as a source of food and wool. A rule using profits to be made from the flock would be appropriate where the flock is raised for sale, but not necessarily where the flock is kept for personal use.

Second, the court rejects the formula used as “arbitrary, pure speculation, and clearly erroneous.” Here, I agree with the Tenth Circuit. There were so many other factors aside from the loss of their horses and burros that were causing reductions in flock size that the fifty percent formula seems like it was pulled out of the air. Moreover, the fifty percent of the reduced value of the flock is being asked to stand in for other things that are unrelated to flock size, such as a reduction in the size of the Navajos’ gardens and their inability to travel to collect pinon nuts and harvest deer.

Possibly, plaintiffs could have used the rental value of a horse, which was given in uncontroverted testimony as five dollars a day, as a basis for computing loss of use. The problem with that, however, would be the question of how long the plaintiffs were entitled to receive that amount. The Tenth Circuit made a point of stating that damages for loss of use can not extend forever; “it is limited to the time in which a prudent person would replace the destroyed horses and burros.” That would bring the court back to the issue of whether the plaintiffs were able to obtain replacements for the destroyed horses and burros.

Based upon the Findings of Fact, an argument could be made that there was evidence that five years would be needed to raise replacement stock. At five dollars a day rental, that would come to slightly over $9,000 a head. It is unknown whether this argument was made to the Tenth Circuit, but given that the court was unsympathetic to the award of $395 a head, it seems
unlikely it would have approved of the larger number.

C. Pain and Suffering

On the topic of pain and suffering, the case presents two interesting issues. The first, which is specific to the facts of this case, is whether an award for pain and suffering due to the loss of their horses and burros was appropriate when the plaintiffs testified that, in dire circumstances, they would eat the horses. The second, which has a broader jurisprudential aspect, is whether the law should recognize the concept of communal pain and suffering.

The testimony about the Navajos' reliance on and fondness for their horses took an unexpected turn. After explaining how gentle the animals were around children and frail elders, how the children gave them names and had their favorites, one witness then added, almost as an afterthought, that when times were tough they could eat the horses, too. From the record, it appears that the judge was taken aback by this testimony; he asked the witness to confirm that they eat the horses on occasion.

Looked at from one perspective, the juxtaposition of a “personal” relationship with a potential meal seems blackly humorous. Looked at from another perspective, however, it is a striking reminder of the cultural differences involved in this case. As best as can be gleaned from a “cold” record, it seems the witness found nothing unusual in the concept of eating what he had just described almost as a family pet – but the witness was speaking from a world view that is far removed from “Black Beauty” and other sentimental representations of animals.

The government's lawyers used this incongruity as a basis for attacking the judge's findings of fact from the second trial; they argued that, in justifying the award of damages for pain and suffering, the judge erred “[i]n finding that the plaintiffs had a filial-type love for their animals ... in the face of plaintiffs' admissions, and the stipulation of their counsel, that the
plaintiffs engaged in the practice of eating their horses.\textsuperscript{280} The latter does not preclude the former. Even white farm families have shared this perspective. In the memoirs of an Eastern woman who married an Idaho rancher, she recounts how she had nursed a three-legged lamb and given it the name of Stumpy; during a flu epidemic she returned home from nursing some neighbors to a delicious lamb dinner, never considering where the lamb came from until one of her children asked “please may I have some more of Stumpy?”\textsuperscript{281}

On the issue of communal pain and suffering, the trial judge did something that was quite remarkable and, I think, very sensitive to the realities of the plaintiffs’ lives. After noting that it was “evident that each and all of the plaintiffs sustained mental pain and suffering\textsuperscript{282} and that it was “not possible for the extent of the mental pain and suffering to be separately evaluated as to each individual plaintiff,” the court found as follows: “The mental pain and suffering sustained was a thing common to all of the plaintiffs. It was a community loss and a community sorrow shared by all.” Traditional Navajo life is much more centered on the community, rather than on the rights of the individual as in American society. Thus, conceiving of the mental pain and suffering as a community injury was very much in accord with traditional Navajo world views.

The Tenth Circuit categorically rejected this understanding of the case: “Pain and suffering is a personal and individual matter, not a common injury, and must be so treated.”\textsuperscript{283} The contrast between two world views could not be more stark or more starkly articulated. The over-riding importance of community in the Navajo world view stands in contrast to the determinedly individualistic world view of American political science, as articulated by the Tenth Circuit. The question is not whether one world view is “better” than the other; the question is why the law is unable to recognize both as valid, and award compensation accordingly.
Interestingly, a similar argument regarding the existence of a compensable communal loss was raised under very different circumstances in an event referred to as the “Buffalo Creek Disaster.” In that case, a mining company dam in West Virginia failed, unleashing a flood that destroyed several rural communities along Buffalo Creek. Over a hundred individuals perished, mainly women and children, the families of the mining company's employees. A lawsuit was brought on behalf of some residents, most of whom had “merely” suffered the destruction of their homes and community. The plaintiffs' attorneys brought in experts to make their case for damages arising from the mental suffering caused by the death and destruction and argued that everyone in the community was entitled to consequential damages for this “collective trauma.” It was argued that the destruction of their community meant more to these rural coal miners who survived through the support of “tightly knit communal groups” analogous in many ways to the social structure of the Navajo clans. The case, however, settled before a jury had the opportunity to evaluate the claims.

III. “Processing” The Narrative: Law and Racial Conflict

A. Racialized Power Structures

In this section, I aim to investigate the “social structures of power” that predate, extend beyond, and outlast the particularities of the grazing dispute at the heart of this case. The first and most significant of these structures is that of race.

The controversy between the Navajo herders and the white ranchers was more than just a dispute over access to resources. The history of the West is full of stories of conflict over resources: between ranchers and homesteaders, between cattlemen and sheep men. With regard
to this conflict, however, racial issues simmered below the surface of the San Juan County range war and on occasion bubbled to the surface.

For instance, it is difficult to read through the case file, particularly the BLM files\(^{290}\), and not be upset by the casual racism they contain. It is difficult from this remove to determine whether these comments simply reflect the generalized, “background” prejudice of the times or whether they indicate a discriminatory intent specific to the individual, or both.

The sympathy of the BLM agents in San Juan County was decidedly in favor of the white ranchers. This is not surprising, as the BLM agents saw the ranchers as their primary constituents.\(^{291}\) There are many examples in the files, however, of a more pointed, and very mean- spirited, disparagement of individual Navajos and Navajo culture in general. There are memos ridiculing the way the Navajo speak English and making them the butt of jokes.\(^{292}\) There are memos questioning their integrity.\(^{293}\) The memos consistently refer to “bucks” and “squaws” when speaking of the Navajo. I suspect the range manager for the area, the author of most of the memos to the file, had a particular bias against Navajo, but the fact that he felt free to include his comments in an official government file arguably reflects a generalized, background prejudice.

Let us re-examine the “context” of this lawsuit to identify evidence of the racialized power structure that led to and shaped the litigation. We can go back to the 1870s and the initial entry of white settlers and ranchers into the area. In the first instance, this area, like the rest of the continent, is seen as “open” to appropriation because the Navajos’ use and occupation of the land is “invisible,” both literally and metaphorically. The Navajos’ presence in the Montezuma Creek area was literally not obvious to the white settlers for at least two reasons. First, their presence here was historically shaped by the need to hide, both from the U.S. Army and from their
traditional enemies, the Utes, so their homesites were chosen to be non-obvious. In addition, their pastoral lifestyle did not make intensive or permanent use of any particular area; they migrated seasonally with their herds, their homes were not physically substantial, and what “fields” they cultivated were small and not fenced in.

Metaphorically, the Navajo's presence was also invisible to the incoming whites. From the nineteenth century white perspective, the Navajos had been defeated and restricted to their reservation within the decade before whites began to claim the Montezuma Creek area as their own. The fact that some Navajos – specifically, these Montezuma Creek Navajos – were never defeated, rounded up, or sent to Bosque Redondo or later to the reservation was unknown, and no doubt irrelevant, to the arriving whites. Thus, when Navajos were inevitably discovered in the area, they were labeled “trespassers” who were “off” their reservation – even though these Navajos had never been “on” the reservation and did not see it as “theirs.”

Once Navajos were recognized as being present, their ability to lay claim to what is after all the public domain was restricted by further racialized power structures. Initially, there is an enormous language barrier, which persisted until well into the twentieth century. When this is combined with the Navajos’ lack of access to government, either state, federal, or tribal, it is not surprising that so few Navajos filed papers to homestead – what is surprising is that any of them did. And eventually, even this possibility is removed: in 1933, Navajos are barred from filing further homestead applications, a statutory ban that was patently racially discriminatory.

Being excluded from citizenship, and thus access to government, means that the Navajos are also vulnerable to the implicit violence that is the State without the mediating possibility of redress through the ballot box. The Montezuma Creek Navajos are exquisitely sensitive to the
possibility of racialized violence. Racialized violence is not the violence of the outlaw, to which anyone is vulnerable. By racialized violence, I mean violence that involves a white aggressor against a Native American victim and which is either officially sanctioned or tacitly allowed. The round-up and destruction of their horses in 1952-53 was an example of the former. In 1930-31, this same group of Navajos had some seventy head of horses killed by unknown persons, an example of the latter. They also had the example of By-a-lil-le\textsuperscript{300} and “Posey”\textsuperscript{301} as object lessons in the ever-present possibility of racialized violence. In the months leading up to, and in the months during, the round-up the Navajos had other examples of the implicit threat of violence.\textsuperscript{302} Judge Ritter commented in the first trial about the “forebearance” of the Navajos in the face of intense provocation, but they were well schooled in the futility of physical resistance.

The Taylor Grazing Act provides yet another example of racialized power structures being deployed against the Navajos. The overuse of the range was a scientific fact and it would be painful to all users to have to bring their use of the range into compliance with the new restrictions – but that pain was disproportionately shunted onto the shoulders of the Navajos. Keep in mind that all users of the range, white and Navajo, had contributed to the overuse of the range, but that whites were grazing many more animals than the Navajos, both in absolute numbers and proportionately. Yet within a very short time the Navajos are completely shut out of the permitting process.

Finally, when enforcement of the grazing permits is begun it again falls disproportionately on the Navajos.\textsuperscript{303} Any enforcement scheme will have areas of discretion: highway patrolmen, for example, rarely ticket someone who is going only one or two miles per hour over the posted speed limit, despite the fact that the speed limit is absolute in its terms. When this discretionary “
"wiggle-room" in the enforcement of the grazing permits is examined, it appears as if this
discretion was employed in a racially discriminatory manner.

At the first trial, there was testimony that a few white men's horses had been rounded-up
in addition to the Navajos' horses. This testimony was brought in to show that the round-up was
not aimed at the Navajos per se, but was aimed at any unauthorized use of the range. However,
when asked what became of the whites' horses, the range aid testified that they paid $2.50 per
horse, for the cost of collecting the horses, and the horses were returned to them. Conversely,
when Little Wagon's horses were rounded-up and he persuaded the bilingual trader, Ira Hatch, to
go with him to redeem them, he was led to believe that it would cost something like $60 per horse
to redeem them – which was far more than he could afford and decidedly more than what the
white rancher was asked to pay.304

Moreover, the enforcement actions were again shadowed by the implicit threat of
violence. There was testimony at the trial that members of Sakizzue's family – three young men
and one young woman – tracked the horses into Blanding? And discovered them in a corral. They testified that as they began to talk with the range aid about the horses, one rancher jumped
into his car and left, shortly returning with another car load of men. These men got out of their
car with weapons in their hands and, according to one of the Navajos, began playing around with
the triggers of their guns. Although the range aid testified that one of the men was just showing
the others a new weapon, even reading a cold record that explanation rings hollow, given all the
tension surrounding the round-up. If the arrival of the men with the weapons was meant to
intimidate the Navajos, it succeeded, as the young woman became very uncomfortable and talked
the others into leaving.

B. Law as a Paradoxical Tool of Power
Initially, the law is used as a tool against the Navajo. The executive orders operate to define what land is and is not available to the San Juan Navajos, without reference to the “on the ground” fact that they had been living on and using the Montezuma Creek area for at least one hundred and fifty years. Then there are the administrative actions under the Taylor Grazing Act shutting them out of the permitting process. Finally, law enforcement is used to arrest them for trespassing on lands they considered theirs and litigation is used to deny their claim to the land.

Then, in what still seems to me an amazing move (but maybe not, given the Navajos reputation for adaptability), the Montezuma Creek Navajos pick up that tool and use it themselves. They file suits against the white ranchers and the government. Law gives them a way to oppose what they felt was wrong, in a way that white society was compelled to recognize.

One of the many ironies of this case is the Supreme Court's characterization of the plaintiffs as this “primitive band of Indians.” Filing a lawsuit is not usually considered “primitive” behavior. Filing a lawsuit against the federal government is even less so. Moreover, keeping in mind that this lawsuit was brought by individuals and not the Navajo tribe. For Native Americans, almost all of whom spoke little or no English, to file a lawsuit against the federal government in the early 1950s seems both a sophisticated and gutsy thing to do. Their lawyer was again Knox Patterson.

Another of the ironies in this case is that the judge involved was Willis Ritter. Judge Ritter was a fascinating, complex, and ultimately tragic figure in Utah's legal society. In the course of this research, I was told that given that Hatahley involved one of Ritter's favorites, the Navajos, suing one of his most despised parties, the federal government, that Ritter probably was
biased in his judging. My examination of the record, however, suggests a more complicated picture. Nevertheless, Ritter's life and philosophy predisposed him to be sympathetic to the Navajos' case, and at the time this would not have been true of many other judges.

Now we could debate whether or not that use of the tool is successful. On the side of "success," no one was killed, the government was found liable, and the Montezuma Creek Navajos did get some money back to compensate them for the loss of their animals. On the side of "a draw," the lawsuit was ultimately settled and, according to some, nothing changed as a result of the lawsuit. On the side of "not successful" what they really wanted was the land and they didn't get that through the litigation.

The Navajos' complaint sought an adjudication that they had aboriginal rights to the disputed rangeland. There was testimony at the first trial that the eight families had always lived off the reservation. Nevertheless, the issue of right to access the land mostly disappears from the record, and the reason is hinted at in this exchange. Oman, the plaintiffs' attorney, reminds the court that he has taken over the case after their original attorney, Knox Patterson, died:

If the Court please, I have done what I could to find out what I could about these ancestral rights from the balance of the witnesses, the plaintiffs who are here, ...

I appreciate your Honor's interest in this other matter, but I am sure you know how much work it is to get into that question, and it was not one for which I was prepared when I came into this action, having restricted it to a claim in tort for the taking of the horses.

In some ways, this is a very sad exchange, as Oman in essence admits that he had to drop any claim for rights to the land in order to focus on the federal tort claim. However, it is unlikely that the land claims would have been resolved in the process of deciding this case, as all Indian land claims were to be resolved through the ICC. Nevertheless, I think this lawsuit had a long-lasting impact on the plaintiffs in three ways.
First, they did get some of the land, although not through the lawsuit. In 1958, with plans for Glen Canyon Dam and the filling of its reservoir going forward, the Interior Department and the BIA sat down to negotiate the transfer of land from the federal government to the Navajo Reservation, in compensation for the reservation land that was going to be submerged under Lake Powell. Although I have not (yet) found the smoking gun, I do not think it was merely coincidental that the public land transferred to the reservation was McCracken Mesa, at the heart of the Montezuma Creek Navajos’ grazing disputes. In other words, I think the squeaky wheel got the grease. Ironically, Ritter had made the suggestion of extending the reservation to include the disputed area in the course of the very first trial in 1953.  

Second, I think the experience of bringing the lawsuit “raised the consciousness” of this band. Many of the same plaintiffs, such as Eddie Nakai and Sakizzie, testified in the ICC proceedings that would decide that Navajos had indeed been deprived of land without just compensation, and since then a number of suits has been brought by this band, continuing to this day: to compel an accounting for the oil and gas revenues collected for their benefit from the Aneth oil field; to compel the county to allocate resources for schools and medical care; and for representation on jury panels.  

Finally, I suspect the lawsuit stepped up the pace of what was probably inevitable, the move from reliance on livestock to vehicles. For example, in the Fruitland area, in 1949, there were ten motor vehicles; by 1952, there were one hundred and fifty; by 1962, almost every camp had at least one vehicle. Here's an anecdote that highlights this: Sakizzie used the money he received in the litigation, not to replace his horses, but to buy a tractor.

IV. Of Prejudice and Partiality
My interest in the *Hatahley* case was sparked by a passage in the Tenth Circuit's second opinion in which the court strongly implied that the trial judge was prejudiced *in favor* of the Navajos. This seemed to me such an unlikely situation that I felt compelled to investigate further. As is often the case, I discovered that the question of judicial partiality in this case was far from simple.

Our legal system is premised on the ideal of the disinterested decision-maker: The popular conception of Justice is that of a blind-folded woman holding up the scales.313 Certainly, the idea that a judge should have no financial interest in the outcome of a case is a sound one, as is the idea that a judge should recuse him or herself if there is a close personal connection to the subject matter of the lawsuit or one of its participants. But beyond that, the concept of judicial impartiality becomes problematic.

Today, the idea of complete judicial impartiality seems somewhat naive, although first year law students are often taken aback at the suggestion that judges might be predisposed to rule in favor of one party or the other for reasons that have nothing to do with the merits of the case. It has long been acknowledged that “judicial decisions ... are at least partially attributable to the personal values and experiences of the judges."314 A recent empirical study confirmed that “extra-legal factors" played a part in judicial decisions.315 The current debate focuses on the extent to which judges are so influenced, and whether the idea of judicial impartiality should be considered a myth to legitimate judicial power, or an aspiration to which judges should strive even though they may not achieve it.

In the case of *U.S. v. Hatahley*, the issue of judicial impartiality assumed critical importance; in fact, I would argue that it determined the eventual outcome of the case. In this
section I begin my examining the person of the judge, his personal background and his path to the judiciary, which was fraught with controversy. Then I examine closely the Tenth Circuit's justification for removing Ritter from the Hatahley case and conclude that it is wanting.

A. Ritter's Background

At the time the complaint was filed in March 1953, there was but one federal judge sitting in the U.S. District Court for the state of Utah. His name was Willis Ritter and he was only the third federal judge appointed for the District of Utah.316

Ritter was the first federal judge for the District of Utah to have been born and raised in Utah.317 He was born on January 24, 1899, in Salt Lake City, to William Ritter and May Sykes Ritter.318 The first few years of his life were spent in Silver City, in the Tintic Mining District in Juab County in central Utah, where his father was mining quartz.319 In 1902, William and May moved to a small town fifteen miles outside of Park City to run a hot springs resort that had been left to William.320 When Ritter was seven, his parents moved to Park City. His father worked in the silver mines and his mother supplemented the family income by working as a nurse and midwife.321 Despite the fact that he would go on to become a member of a privileged profession, Ritter would identify with the working man his entire life.

Ritter's parents divorced when he was in his teens. His mother remarried and moved out of state, taking Ritter's three younger siblings with her. Ritter moved in with his mother's sister and her husband, after whom he had been named and who was a noted photographer.322

After high school323 and a stint in the mines and another in the Army, Ritter attended the Valparaiso University School of Law for a year and then the University of Utah for another year.
He finished his legal training at the University of Chicago where he graduated with an LL.B degree cum laude and was admitted to the Illinois bar in 1926. He practiced as a tax attorney for two years in Washington, D.C., and then was recruited to teach at the University of Utah College of Law, where he remained for nearly twenty years.

Shortly after the attack on Pearl Harbor on December 7, 1941, Ritter was recruited into the Office of Price Administration (OPA), first as rent director in Salt Lake City and later as regional rent executive based in Denver Colorado. He served with OPA until early 1944 at which point he returned to Salt Lake City and resumed private practice.

Ritter's path to the judiciary began in 1932, when he became active in politics, campaigning for the election of Elbert Thomas for United States senator. In early 1944, Ritter confided to a friend that Senator Thomas had promised the federal judgeship to him. That was one of the reasons why he quit the OPA and returned to Utah, so he could best be positioned for the judgeship. The current federal judge for Utah, Tillman Johnson, was then eighty-six years old and his retirement was widely thought to be imminent. Judge Johnson, however, did not formally announce his retirement until June 1949.

In August 1949, President Truman nominated Ritter. In the meantime, though, several things had occurred that made Ritter's appointment more controversial than it would have been in 1944. First, and perhaps most important, was that the LDS Church had abandoned its policy of political neutrality and began endorsing political candidates, mostly Republican. At the same time, Republicans nationally had raised the “bogeyman” of Communism in political campaigns. Thus, political forces in Utah were arrayed against Ritter based on his being a New Deal
Democrat and a non-Mormon.\textsuperscript{333}

Moreover, some of Ritter's personal qualities were creating questions about his suitability as well. Some of his friends had noticed a change in his temperament dating from the four years he spent in the OPA during World War II.\textsuperscript{334} His stint as an administrator was the first time in his public life that Ritter had been the center of controversy.\textsuperscript{335} It was during this time that accusations of arrogance and high-handedness were first leveled against him.\textsuperscript{336} During this same period, rumors of womanizing also began.\textsuperscript{337}

The controversy surrounding the nomination and appointment of Ritter reveals that the politicalization of the judiciary predates the era of Clarence Thomas and Richard Bork. Arthur V. Watkins, the junior senator from Utah and a Republican, spearheaded the campaign against Ritter. Probably realizing he lacked the political clout to oppose successfully Ritter's nomination, he deployed a strategy of delay. At the hearing on Ritter's nomination before the subcommittee of the Senate Judiciary Committee, Watkins pointed out that the committee had received two negative letters (out of several hundred supportive letters) and requested that the subcommittee hold public hearings in Salt Lake City.\textsuperscript{338}

Ironically, one of the negative letters came from Knox Patterson, who would file the \textit{Hatahley} case on behalf of the Navajo plaintiffs.\textsuperscript{339} In his letter, Patterson repeated rumors concerning Ritter's arbitrariness at OPA and then made the accusation that “Ritter does not believe in the Constitution of the United States... he believes it is outmoded and obstructs social progress.”\textsuperscript{340} In a subsequent letter to the Salt Lake Tribune, Patterson revealed that the source of this accusation was a 1936 lecture series that Ritter had given on the U.S. Supreme Court.\textsuperscript{341}
He also stated “I made no specific charges of disloyalty.”

In the lectures, Ritter had articulated a view of the Constitution that allowed for a flexible interpretation. From today's vantage point, where debates about the “original intent” of the framers versus the Constitution as a “living document” are common, this seems like a tempest in a teapot. However, in the red-baiting atmosphere of those times, which would soon blossom into full-fledged McCarthyism, a charge of not believing in the Constitution was tantamount to accusing someone of being a Communist.

On October 13, 1949, the subcommittee voted approval of Ritter's nomination, but Republican pressure delayed action by the full Judiciary Committee before the end of the session. President Truman appointed Ritter temporarily in a recess appointment on October 21, 1949.

In January 1950, when Congress reconvened and Ritter's appointment again came under scrutiny, the controversy moved into the press and became increasingly ugly. Watkins continued to press for public hearings and ultimately two were held, one in Salt Lake City and one in Denver, where Ritter had been working with the OPA. The process raised a lot of smoke, but little fire. In the last analysis, none of the accusations against Ritter were substantiated. On June 29, 1950, Ritter's appointment finally was voted upon and confirmed by the Senate.

Controversy would follow him throughout his career.

B. Tenth Circuit's Charge of Bias

The Tenth Circuit was convinced that Ritter was not functioning as an impartial decisionmaker. In its second opinion, this is how the Tenth Circuit described Ritter's behavior
during the two trials:

A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians in southeastern Utah by the government agents and white ranchers in their attempt to force the Indians onto established reservations. This was climaxed by the range clearance program, with instances of brutal handling and slaughter of their livestock... The Court firmly believed that the Indians were being wrongfully driven from their ancestral homes, and suggested Presidential and Congressional investigations to determine their aboriginal rights. He threatened to conduct such an investigation himself. A public appeal on behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers. From his obvious interest in the case, illustrated by conduct and statements made throughout the trial...we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside.349

My examination of the record, however, suggests a more complicated picture than the Tenth Circuit's opinion would suggest. It is accurate to say that Ritter was often harsh with the government's attorneys and particularly its witnesses.350 At the same time, however, he was often harsh with the plaintiffs' attorney.351

To understand Ritter's role in this litigation it is important to know several things about him. To begin with, he was intelligent and inquisitive. During cases, he would often get a book about whatever was the subject matter of the case and read up on it.352 This occurred during the *Hatahley* case, during which he read a book on the Long March and Bosque Redondo, and lectured the attorneys on the subject in a monologue captured on the record.353 Like many brilliant individuals. He did not suffer fools gladly. At times during the trial, he would become frustrated with what he thought was incompetent questioning of witnesses and he would take over the examination, grilling the witness with a series of succinct, pointed questions.

As noted above, the appointment process for his judgeship was incredibly partisan and
vitriolic which left him with a life-long bitterness that he was never able to get past. Finally, he had problems with alcohol. These three things – his impatience, his bitterness, both aggravated by his drinking – led to Ritter being the classic “loose cannon” in the courtroom.

But it is an interesting question whether in fact Ritter was biased in favor of the Navajos, as the government and the Tenth Circuit claimed. Without question, Ritter’s sympathies were consistently with the underdog, in large part because he was a perpetual outsider. Also without question, he had a fondness for Navajo culture, having seriously collected Navajo rugs since the 1930s.

His interest in Navajo culture dates to the early 1930s. As part of a project for the Department of Commerce, he researched the commercial potential of Navajo art. A neighbor, learning of his interest, offered to sell him a collection of Navajo weavings and baskets, which became the nucleus of his own collection. His collection became valuable enough that when in the 1970s he donated a portion of the collection to the Utah Fine Arts Museum it was worth about $80,000? In all, he made three separate donations to the Museum and shortly after his death the Museum curated an exhibit, “The Navajo Weaver: The Judge Willis W. Ritter Collection,” that contained over 130 items.

But “prejudice” involves more than a leaning or a predisposition. If not, no judge could ever sit in judgment, as everyone sees the world from their own perspective. In fact, most judges being members of a professional class lead lives of relative privilege. The tendency for members of a privileged class to view conflicts from the perspective of that class is one of the “
social structures of power" that attention to context is meant to highlight.362

So the question is was Ritter prejudiced in favor of the Navajos? Or in a social context that at the very least was stacked against the Navajo and at the worst was racially biased against them, did Ritter's attention to context come across as partiality? In other words, if everyone else is prejudiced against a group and one person is not, that person would very likely appear to be prejudiced in favor of the group, because he or she stood out from the generalized background bias.363

As discussed at the beginning of this article, the call in law to put something in context is best understood as a call to pay attention to social power structures.364 Ritter was very conscious of all the ways in which the Navajo plaintiffs stood outside of these structures. One way to read the Tenth Circuit's opinion is as a rejection of Ritter's contextualizing the Navajo's situation.

The Tenth Circuit adopted what today would be called a "color-blind" approach to the case:

Plaintiffs' claims are asserted under the Federal Tort Claims Act. In applying this Act, everyone should be treated the same. Racial differences merit no concern. Feelings of charity or ideological sympathy for the Indians must be put to one side. The deep concern which the executive and legislative branches of government should have for the plaintiffs does not justify the court in giving them any better or worse treatment than would be given to anyone else. As Justice Jackson said in his concurring opinion in Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 335, 65 S. Ct. 690, 700, 89 L.Ed. 985: “The Indian problem is essentially a sociological problem, not a legal one. We can only make a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictional assumptions.”365

This is really a most extraordinary passage and worth parsing in some detail.

“Racial differences merit no concern.”

It is somewhat ambiguous whether the court is saying racial differences merit no concern under the Federal Tort Claims Act, which would be a narrow reading of this passage, or whether
the court is saying they merit no concern legally, in a more general sense. Even taking the more narrow reading, this is a point of fundamental difference between the Tenth Circuit and Ritter.

Ritter would no doubt say that this entire case is the result of racial differences and so of course they should merit concern. He might even go so far as to say in this case race merits concern especially under the Federal Tort Claims Act. As the Tenth Circuit hinted in the quoted passage, the federal government stands in a special relationship to members of federally-recognized tribes. The relationship is of a fiduciary nature; the tribes are wards of the federal government. Ritter refers to this relationship during the first trial. A reasonable person could infer that this special relationship should matter under the Federal Tort Claims Act, just as a fiduciary relationship matters under common law tort principles.

Ironically, Ritter agreed with the quote from Justice Jackson that characterized the Indian problem as “essentially a sociological problem, not a legal one.” Ritter was acutely conscious of the limitations of any legal remedy available in this litigation: “In the final analysis, nothing that I can do will solve [the problem of how these Navajo are to survive].” Indeed, the limited legal remedy available is one of the reasons he called for congressional action.

It also seems a trifle unfair of the Tenth Circuit to imply that Ritter was unable to put “[f]eelings of charity or ideological sympathy for the Indians” to one side. In both the Hatahley and Tse-Kisi cases, Ritter made it very clear that, while he understood that the controversy at heart was about access to land and that he was outraged by the history of forced dispossession that culminated in these cases, his sympathetic feelings were irrelevant when it came to awarding any legal right to the land.

Another characterization of what was going on in Ritter's court was that he was not so
much prejudiced in favor of the Navajos as he was prejudiced against the federal government, and the U.S. Attorney's office in particular. At the time the case was filed, Pratt Kesler was the U.S. Attorney for Utah. Kesler, as Utah state chairman of the Republican party, had been a prominent player in the 1950 defeat of the Democrat Senator Thomas, Ritter's mentor. The campaign had been particularly brutal, including charges that Thomas was a "fellow traveler" and communist sympathizer. Thomas died two and a half years later; Ritter was convinced he died of a broken heart. Kesler was later appointed U.S. Attorney as a reward for his contributions to the Republican victory in 1950, and Ritter remained bitter toward him. Kesler recounts one conversation with Ritter in which Ritter accused Kesler of killing his best friend, Senator Thomas.

This interpretation is given further credence by the fact that, at the time of Ritter's death, the U.S. Attorney's office was seeking a writ of mandamus prohibiting Ritter from hearing any cases involving the federal government. In Hatahley, however, the Tenth Circuit did not characterize Ritter as being biased against the government, perhaps because a pro-Indian bias was an easier case to sell politically. Given the western support for states' rights and general ambivalence about the federal government, a charge that Ritter was anti-federal could backfire and create support for Ritter.

Finally, a case could be made that Ritter's "loose cannon" tendencies undermined the perception of rationality that we expect of judicial officers. But this begs the question why Ritter's lack of judicial temperament should be held against the Navajos.

Logically, the Tenth Circuit makes a couple of suspect moves to justify its conclusion that Ritter was biased in favor of the Navajos. In its opinion, written after the second trial, the court
purports to find examples of bias in the transcripts of both trials. However, all of the specific examples the court gives come from the first trial: the suggestion of Presidential and Congressional investigations; the threat to conduct such an investigation himself; and the public appeal for funds and supplies for the plaintiffs, to be cleared through his chambers. But it is problematic for the Tenth Circuit to rely upon instances from the first trial to justify taking the case away from Ritter.

The question of Ritter's partiality towards the Navajos had been raised by the government in the first appeal from the case. In its opinion from the first appeal the Tenth Circuit had this to say:

While the record discloses that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality, and that the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered, we shall not discuss these questions as we have concluded that the case should be [dismissed].

The Supreme Court disagreed, however. While noting that there was often more heat than light in the court proceedings, the Court concluded that the trial had been fair enough:

[The Government charges] that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied upon....After oral argument and a thorough consideration of the record, however, we do not find that the trial was conducted so improperly as to vitiate these findings.

To get around this language from the Supreme Court and to justify its reliance on incidents from the first trial to support its conclusion that Ritter was biased, the Tenth Circuit resorts to a very "lawyerly" reading of the Supreme Court's opinion. The Tenth Circuit argues thus:

In our former opinion we had occasion to make some observations concerning the conduct of the trial. The Supreme Court referred to these observations on the bias and prejudice of the presiding Judge, and said that the trial was not so improperly conducted as to vitiate the findings. This statement did not relate to any of the findings as to damages which are under consideration here.
The Tenth Circuit's final statement is debatable, however. First, the Supreme Court in its opinion did not so limit its conclusion. Moreover, the Supreme Court sent the case back for further findings as to damages due to a lack of particularity, not because the findings as to damages, for example, the finding as to the market value of the destroyed animals, were improperly determined. In other words, the Supreme Court did not say that Ritter's findings as to market value were invalid; it said that the findings were not individualized as to each plaintiff. Ritter certainly regarded his previous findings as to market value as having been upheld by the Supreme Court and in the second trial he refused to hear any further evidence as to the animals' market value.381

Ritter's findings as to consequential damages, the loss caused by the lack of their horses and burros and the pain and suffering caused by the destruction of their stock, were based on evidence presented at the second trial. But in my reading of the two transcripts, Ritter was much more circumspect in his conduct of the second trial than he had been in his conduct of the first trial. Standing on its own, the transcript of the second trial would not, in my opinion, justify taking the case away from Ritter.

I suspect the Tenth Circuit felt the same and thus felt compelled to rely on Ritter's conduct in both trials, which in turn required it to circumvent the Supreme Court's conclusion that the first trial was valid with a debatable and very narrow reading of the Supreme Court's opinion.

Ironically, it could be argued that Ritter, probably unintentionally, undermined the case the plaintiffs' attorney was attempting to present, when he cut off the plaintiffs' case-in-chief.382 It appears that Milt Oman fully intended to put on every plaintiff and elicit testimony regarding damages, but Ritter would not allow it. As the Tenth Circuit reversed due in part to the failure to
particularize damages individually, the reversal on appeal can be interpreted as a consequence of Ritter's refusal.

Epilogue: Echoes from the Past

“Real justice for these Indians may still lie in the distant future; it may never come at all.”

In one of the many ways that this case continues to resonate fifty years after it was litigated, we have recently seen another judge removed from a case involving Indian rights because of alleged bias. In another long-running case, Cobell v. Babbitt, an estimated 300,000 beneficiaries in Individual Indian Money trust accounts brought a class action in 1996 against the United States alleging a breach of fiduciary duties through mismanagement of the accounts. In 2001, The Court of Appeals for the D.C. Circuit upheld the district court's finding that the United States breached its fiduciary duty to manage the trust accounts. Just as in Hatahley, however, the finding of liability on the part of the federal government for misconduct toward its wards did not bring the litigation to a close.

After eight appeals in five years, each time resulting in reversal of the district court's order, the Court of Appeals ordered the case be assigned to another judge. In part, the appellate court justified this order by the pattern of repeated reversals, but the court also relied on language in an opinion issued by the district court. The Court of Appeals quoted extensively from the district judge's opinion and it is worth repeating the district judge's language here:

At times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet contains over 3000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our
government still treats Native American Indians as if they were somehow less deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by the politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

The Indians who brought this case are beneficiaries of a land trust created and maintained by the government. The Departments of the Interior and Treasury, as the government’s Trustee-Delegates, were entrusted more than a century ago with both the stewardship of the lands placed in trust and management and distribution of the revenue generated from those lands for the benefit of the Indians. Of course, it is unlikely that those who concocted the idea of this trust had the Indians’ best interests at heart . . . But regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our “modern" Interior department has time and again demonstrated that it is a dinosaur – the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind. 388

The parallels behind this rhetoric and many of Ritter's comments during the two Hatahley trials is inescapable, including acknowledgment of the shadows cast by a racist and imperialist past and suggestions of current racial animus. Unlike Ritter, the liberal and populist Democrat whose comments were discounted as being driven by “ideological sympathies” 389, the judge who wrote the language quoted above is a conservative Republican, appointed to the bench under President Reagan and appointed Presiding Judge of the U.S. Foreign Intelligence Surveillance Court in 1995 by then-Chief Justice Rehnquist. 390 It gives one pause to see two such disparate jurists, separated by fifty years, become enraged at the government's treatment of Indians, a rage that transcends ideological divisions and overcomes judicial reticence.
Professor of Law, S. J. Quinney College of Law, University of Utah. This research has been supported by grants from the University of Utah Research Committee and by the S. J. Quinney College of Law Summer Research Fund. My thanks to the faculties of the S. J. Quinney College of Law at the University of Utah and the James E. Rogers College of Law at the University of Arizona who participated in faculty colloquia and gave helpful feedback on portions of this project. My special thanks to my research assistant and interpreter, Bertie Kee- Lopez, without whom this project would be less rich.


The term was coined by Brian Simpson of the University of Michigan College of Law. He explains the metaphor as follows:

[A] reported case does in some ways resemble those traces of past human activity — crop marks, post holes, the footings of walls, pipe stems, pottery shards, kitchen middens, and so forth, from which the archaeologist attempts, by excavation, scientific testing, comparison, and analysis to reconstruct and make sense of the past. Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents
in the evolution of the law.

A.W. Brian Simpson, Leading Cases in the Common Law (1995). A few years ago I put together a symposium on "Legal Archaeology" at the S.J. Quinney College of Law at the University of Utah. At the same time I published the results of a legal archaeology project entitled "A Fish Story: Alaksa Packers' Association v. Domenico, 2000 Utah L. Rev. 185. Inspired in part by this symposium, Foundation developed a series called “Law Stories” which is at heart a compilation by subject matter of legal archaeology projects. E-mail from Peter L. Caron, September 30, 2002, 1:48 PM. See also Peter Caron, “Tax Archaeology" in Tax Stories, the first volume in the new series.


6Id at 1627, quoting Thomas Nagel, The View From Nowhere (1986)

7Id.

8"[M]any calls to look at context specifically refer to the traits of race, gender and class that have been ignored by a more general statement." Id. at 1629.

9Id. at 1633.

10257 F.2d 920 (10th Cir. 1958), on appeal after remand from 351 U.S. 173 (1955), rev’g 220 F.2d 666 (10th Cir. 1954).


12In narratology, the “back story” is the exposition in a work that brings the reader up to the present of the story. See http://en.wikipedia.org/wiki/Main_Page (Last visited August 28, 2008).

1328 U.S.C.A. §§ 1346(b) and 2671 et seq.
This was not the first time these Navajos had suffered such a loss. A generation before, in the winter of 1923-24, some seventy horses belonging to the Montezuma Creek Navajo were killed. David M. Brugge, Navajo Use and Occupation of Lands North of the San Juan River in Present-Day Utah to 1935, at 196 (unpublished manuscript, Special Collections, Marriott Library, University of Utah, undated, possibly 1966).

The statute defined an “abandoned horse” as one which either was unbranded or for which taxes had not been paid in the preceding year.

The Tenth Circuit held that the Taylor Grazing Act permitted the BLM to follow state procedures in this case.

Interestingly, a very similar situation is currently playing out in Nevada, where the BLM has impounded and sold at auction 232 cattle seized from Carrie and Mary Dann, who have refused to pay grazing fees, insisting that the Western Shoshone have aboriginal grazing rights on the land. See, e.g., Arizona Daily Star, A4-1, October 5, 2002.

24 257 F.2d at 922.

25 257 F.2d at 925.

26 257 F.2d at 925-26. I admit it was this passage that first piqued my interest in this case.

27 After the second Tenth Circuit opinion came down, the plaintiffs filed a petition for a writ of certiari which was denied on December 12, 1958. Memorandum and Order, December 8, 1959, in U.S. v. Ritter, No. 6238, found in Judge Willis Ritter Papers, Special Collections, Marriott Library, Box 76, Folder “Hatahley Papers”[hereinafter Ritter Papers]. The United States filed a motion before Judge Ritter requesting the appointment of a special master; Ritter denied this on August 26, 1959. Id. The government then moved for an amended judgment and a new trial before a new judge; Ritter denied the motion by order of September 10, 1959. Id.

The United States then filed a petition for a writ of mandamus with the Tenth Circuit, which, after oral argument before the Tenth Circuit en banc, was granted on December 8, 1959. U.S. v. Ritter, 273 F.2d 30 (10th Cir. 1959).

28 273 F.2d at 31.

29 Id.

30 Id.

31 Id.

32 Designation of District Judge for Service in Another District Within His Circuit, dated
December 7, 1959, Ritter Papers, supra note __. The Tenth Circuit twice stayed the effective date of the reassignment to allow Ritter to file a petition for a writ of certiorari with the U.S. Supreme Court but denied a third stay. See Motion for a Stay of Orders, filed February 23, 1960, found in Ritter Papers.

Ritter then filed with the U.S. Supreme Court a Motion for Stay of Orders, which was granted pending disposition of his petition for a writ of certiorari. Order of U.S. Supreme Court, February 25, 1960, id. The U.S. Supreme Court denied the writ of certiorari.

33 Stipulation for Compromise and Settlement and Order Approving Same, April 11, 1961.

34 See Laycock, supra note __.

35 In informal discussions with other academics, I have discovered that some assume, erroneously, that because the case involved Navajos it must have arisen in Arizona. While the largest part of the Navajo Reservation does lie within Arizona, portions of the Reservation extend into New Mexico and Utah. As will be discussed below, infra at __, that fact that the Navajo plaintiffs resided in Utah is significant to the controversy.

36 Robert S. McPherson, A History of San Juan County: In the Palm of Time 8 (1995) [hereinafter History]. San Juan County is home to Monument Valley, part of Canyonlands National Park, portions of Lake Powell and Glen Canyon National Recreation Area, and three National Monuments (Rainbow Bridge, Natural Bridges, and Hovenweep), as well as a portion of the Navajo Reservation. Id. at 10.


38 Id.
San Juan County, the largest county in the state of Utah, comprises approximately 8,000 square miles. Onlineutah.com/sanjuancountyarea.shtml. The Utah portion of the Navajo Reservation, which is located entirely in San Juan County, comprises 1,155,000 acres, or almost 2,000 square miles. onlineutah.com/navajohistory.com


Supposedly, Montezuma Creek received its name due to a legend that Montezuma, the Aztec leader defeated by Hernando Cortez, escaped to this area where he was later recaptured and killed. McPherson, History, supra note __, at 21. The same legend is assertedly the basis for the names of Recapture Creek (the creek immediately to the west of Montezuma Creek) and the near-by town of Cortez, Colorado. Id.

There are at present time sixty Navajo clans. Trimble, supra note __, at 123. The clan is the organizing principle of Navajo society.

Interview with Mary Jay, September 16, 2000.

See, e.g., Pelt v. Utah, 104 F.3d 1534, 1538 (10th Cir. 1996).

Richard J. Ansson, Jr., The Navajo Nation's Aneth Extension and the Utah Navajo Trust Fund: Who Should Govern the Fund After Years of Misuse?, 14 Thomas M. Cooley L Rev. 556,
573; other article?

48Trimble, supra note __, at 141-42 (explaining history of each).

49McPherson, Navajo Land, supra note __, at 7. Navajos and Apaches are both Athabaskan speakers, as are Native Americans living in Canada. This has led anthropologists to theorize that the ancestors of both Navajos and Apaches emigrated from the north to the southwest. Linguists theorize that Navajo and Apache had become distinct languages by about 1700, and that both languages had separated from their northern roots about 1000. Id. at 6.

50Clyde Benally, Dineji Nakee Naahane: A Utah Navajo History 83 (1982); McPherson, Navajo Land at 7 (also noting sixteen sites north of the San Juan River ranging from 1700 to 1800).

51 Benally, supra note __ at 83

52Benally, supra note __ at 99; McPherson, Navajo Land, supra note __, at 10

53Benally, supra note __, at 99


55Cite to interviews: Mary Jay, Lucille Jones

56Benally, supra note __, at 120

57Navajo social structure is organized along kinship lines. “Almost the whole of traditional Navajo social interaction is structured along kinship lines. Even today in modernized Navajo society, kinship continues to be the most important principle of organization.” Mary Shepardson & Blodwen Hammond, The Navajo Mountain Community: Social Organization and Kinship Terminology 2 (1970). Kinship is defined in terms of “clan,” which is a group of people who share
descent from a common ancestor, although clan members may be unable to trace their actual
genealogical relationship to one another. Id. at 52. Clans are not corporate groups; they own no
property. Id. Navajo clan membership is matrilineal; a Navajo belongs to his or her mother's clan.
Navajos, however, also recognize patrilineal clan associations; they are said to be “born for” their
father’s clan. Id.

58 Robert S. McPherson, The Northern Navajo Frontier, 1860-1900: Expansion through
Adversity15-19 (2001). “Marriage of Paiutes to Navajos and of Paiutes to Utes created kinship ties
that, though weak, found fruition first in trading negotiations and later, as the three groups became
more friendly, in other means of support.” Id at 15. “Kinship ties, therefore, from Ute- Paiute and
Navajo-Paiutes marriages in at least some instances had a mellowing effect on the Ute-Navajo
antagonism.” Id. at 16.

59 James Eddy Interview?

60 Their oral tradition proudly proclaims that they were never “slaves” of the white man.
James Eddy interview.

61 Trimble, supra note __, at 138.

62 Id.

63 Benally, supra note __, at 127.

64 Trimble, supra note __, at 139; other sources

65 Trimble, supra note __, at 135; other sources

66 One scholar has argued that this band is “the forgotten people of the Navajo nation.”
Richard J. Ansson, Jr., The Navajo Nation's Aneth Extension and the Utah Navajo Trust Fund: Who

67 351 U.S. at 174.

68 Frank Benally Interview

69 Benally, supra note __, at 99

70 Id

71 Correll, supra note __, at 146-47. On a visit to Blanding in October 2000, the author observed an apartment complex also named Kigalia.

72 Correll, supra note __, at 147.

73 This sister received her name while married to her first husband, with whom she had no children. Her second marriage did produce offspring. Sakizzie family genealogical records (on file with author).

74 Both men belonged to the same clan. But as K’aaayelli is said to have been born in 1801, and Manuelito appears to have been born about 1820, it seems unlikely that they shared a biological mother, although it is possible. It is also reported that K’aaayelli’s father, Man with a Hat, had more than one wife, so it seems most likely that K’aaayelli and Manuelito were half-brothers.

75 One oral history stated that “the white man named this place K’aaayelli Springs.” Ben Nakaidine’e, Duke Collection #716 (1-20-61).

76 See Duke Collection

77 “[T]ranshumance, moving about with the flocks over wide areas, constituted the typical residence patterns of Navajos both before and after Fort Sumner.” Shepardson & Blowden, supra
note __, at 38.

78Id., at 15.

79Id.

80

81McPherson, History, supra note __, at 14.

82McPherson, Northern Frontier, supra note __, at 7.

83Powell, 175. While from the Navajo perspective, the white ranchers were encroaching on their traditional grazing lands, from the white ranchers' perspective, the Navajos were themselves relative newcomers. An official San Juan County history states that only "a very few [Navajos] may have lived in San Juan County prior to 1861" and that they only became more numerous after that time. Gary L. Shumway, “Blanding: The Making of a Community,” in San Juan County: People, Resources, and History 131, 133 (ed. Allan Kent Powell 1983).

84San Juan County, Powell, p. 58: One member recounted that he “met a group of Indians in the Montezuma Creek area that forced him to beat a hasty retreat toward Colorado.”

85Smithsonian, July 2003, p. See also Richard A. Bartlett, Great Surveys of the American West 115-17 (1962)(quoting from the photographer's diary regarding the making of the photograph).

86San Juan County, powell, p. 174. See also McPherson, History, supra note __, at 172.

87McPherson, History, supra note __, at 172.

88McPherson, History, supra note __, at 172; see also Powell, p. 175-77.
89 McPherson, History, supra note __, at 96.

90 Id. at 122.

91 McPherson, History, supra note __, at 242; Powell, 58, other sources, my article. In an eerily similar occurrence, two prospectors were also killed not far to the west, in the area near Navajo Mountain, in 1884.

92 McPherson, History, supra note __, at 172; Crampton; other sources

93 McPherson, History, supra note __, at 126, 242.

94 McPherson, History, supra note __, at 97; powell, 92-93.

95 McPherson, Northern Frontier, supra note __, at 24.

96 Id. at 26-27.

97 McPherson, History, supra note __, at 97-100; powell, 95-113

98 Stegner, supra note __, at 116.

99 Powell, 89-115

100 Powell, Mcpherson, History, supra note __, at