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

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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

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1 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.
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.”

“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.”

This paper is an example of a type of legal history called “legal archaeology,” 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


4 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.
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


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

7 Id.

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.

9 Id. at 1633.

10 257 F.2d 920 (10th Cir. 1958), on appeal after remand from 351 U.S. 173 (1955), rev’d 220 F.2d 666 (10th Cir. 1954).

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 level, 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 power structures, including law, that are 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”\(^{12}\) 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

\(^{12}\) In 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).
*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\(^{13}\) 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.\(^{14}\) 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.\(^{15}\) 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.\(^{16}\) 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.\(^{17}\) The BLM asserted that the authority for doing this could be found in the Utah “Abandoned Horse” statute.\(^{18}\)

\(^{13}\) 28 U.S.C.A. §§ 1346(b) and 2671 et seq.

\(^{14}\) 220 F.2d at 668. 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).

\(^{15}\) 220 F.2d at 669.

\(^{16}\) 1st Trial Transcript at 130.

\(^{17}\) 220 F.2d at 669.

\(^{18}\) Utah Code Ann. 47-2 (1953). The statute defined an “abandoned horse” as one which either was unbranded or for which taxes had not been paid in the preceding year.
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.\textsuperscript{19} The Tenth Circuit reversed on the issue of liability without considering damages.\textsuperscript{20} The case then went up to the United States Supreme Court.\textsuperscript{21} The Supreme Court found that the BLM was liable for killing the horses and burros, but remanded for specific findings as to damages.\textsuperscript{22} The significance of this decision is that “reportedly it was the first time American Indians had successfully sued the government for intentional wrongdoing.”\textsuperscript{23}

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.\textsuperscript{24} The Tenth Circuit

\textsuperscript{19} 257 F.2d at 921.

\textsuperscript{20} 220 F.2d 666 (1955). The Tenth Circuit held that the Taylor Grazing Act permitted the BLM to follow state procedures in this case.

\textsuperscript{21} 257 F.2d at 922.

\textsuperscript{22} Hatahley v. U.S., 351 U.S. 173 (1956). The Supreme Court held that “the Utah abandoned horse statute was not properly invoked” and that the BLM was required to follow the notice provisions of the Taylor Grazing Act, which it failed to do. 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.

\textsuperscript{23} Nancy C. Maryboy and David Begay, The Navajos, in A History of Utah's American Indians 265, 301 (Forrest S. Cuch, ed. 2000).

\textsuperscript{24} 257 F.2d at 922.
vacated the judgment and again remanded for a new trial on the damages issue.\textsuperscript{25} 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.\textsuperscript{26}

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

\begin{footnotes}
\item[25] 257 F.2d at 925.
\item[26] 257 F.2d at 925-26. I admit it was this passage that first piqued my interest in this case.
\item[27] After the second Tenth Circuit opinion came down, the plaintiffs filed a petition for a writ of certiorari 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).
\item[28] 273 F.2d at 31.
\item[29] Id.
\item[30] Id.
\end{footnotes}
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 *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.

\textsuperscript{31} Id.

\textsuperscript{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 certiari 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 certiari. Order of U.S. Supreme Court, February 25, 1960, id. The U.S. Supreme Court denied the writ of certiari.

\textsuperscript{33} Stipulation for Compromise and Settlement and Order Approving Same, April 11, 1961.

\textsuperscript{34} See Laycock, supra note __.
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,\(^35\) where San Juan County abuts onto the “Four Corners,” the shared corner of four states, Utah, Arizona, Colorado and New Mexico.\(^36\) San Juan County was formed in

\(^{35}\) 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.
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 K’aayellis, 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

38 Id.
39 Findings of Fact and Conclusions of Law 5, P. 7, April 5, 1957 (Second trial)
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

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40 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


42 Stegner, supra note __, at 103.

43 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.

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

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

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

47 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?

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

49 McPherson, 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
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 north of the San Juan. Navajo oral tradition holds that Navajo territory north of the San Juan extended all the way to present day Moab.

distinct languages by about 1700, and that both languages had separated from their northern roots about 1000. Id. at 6.

50 Clyde 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

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

53 Benally, supra note __, at 99


55 Cite to interviews: Mary Jay, Lucille Jones
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

56 Benally, supra note __, at 120

57 Navajo 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?
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.

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

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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.
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).\(^{68}\)

\(^{65}\) 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 Should Govern the Fund After Years of Misuse?, 14 Thomas M. Cooley L Rev. 556, 573 (1997).

\(^{67}\) 351 U.S. at 174.

\(^{68}\) Frank Benally Interview
In the second half of the nineteenth century, K’aayelli was considered leader by
the Navajos living north of the San Juan River.\textsuperscript{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.\textsuperscript{70}
A canyon and a spring in the vicinity of his birth are named after him, using the corrupted
version of his name, Kigalia.\textsuperscript{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.\textsuperscript{72}

K’aayelli had two sisters or half-sisters, Asdzaa Do Ał Chi’i (Sterile Woman\textsuperscript{73})
and Asdzaa Kin Diilidi (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-brother\textsuperscript{74}), 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

\begin{flushright}
\footnotesize
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’aayelli 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’aayelli’s father, Man with a Hat, had more than one wife, so it seems most likely that
K’aayelli and Manuelito were half-brothers.
\end{flushright}
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). 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.

The Montezuma Creek Navajo followed the traditional Navajo pastoral lifestyle, based upon herding. People resided in widely scattered camps or outfits, made up of an extended family living in one or more hogans clustered together. 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.

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75 One oral history stated that “the white man named this place K’aayelli 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.

78 Id., at 15.

79 Id.
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.\textsuperscript{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...”\textsuperscript{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.\textsuperscript{82} From the beginning, Navajos objected to the white man’s encroaching stock along Montezuma Creek and other areas.\textsuperscript{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.

\textit{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, Domínguez and

\textsuperscript{80} McPherson, History, supra note __, at 14.

\textsuperscript{81} McPherson, Northern Frontier, supra note __, at 7.

\textsuperscript{82} Charles S. Peterson, “San Juan: A Hundred Years of Cattle, Sheep, and Dry Farms”, in San Juan County, Utah: People, Resources, History 171,175 (ed. Allan Kent Powell 1983). 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).
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.\textsuperscript{84} 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.\textsuperscript{85}

In the late 1870s a number of small ranchers entered the country, “drift[ing] before the movement of the larger frontier.”\textsuperscript{86} 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.\textsuperscript{87} 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.\textsuperscript{88}

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

\textsuperscript{84} Gregory C. Thompson, “Utah’s Indian Country: The American Indian Experience in San Juan County, 1700-1980,” in San Juan County, Utah: People, Resources, History 51, 58 (ed. Allan Kent Powell 1983). 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.”

\textsuperscript{85} Smithsonian, 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).

\textsuperscript{86} Peterson, supra note __, at 174. See also McPherson, History, supra note __, at 172.

\textsuperscript{87} McPherson, History, supra note __, at 172.

\textsuperscript{88} McPherson, History, supra note __, at 172; see also Peterson, supra note __, at 175-77.
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 Hashkiniinii 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,

89 McPherson, History, supra note __, at 96.

90 Id. at 122.

91 McPherson, History, supra note __, at 242; Thompson, supra note __, at 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.
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.\textsuperscript{94}

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.\textsuperscript{95} They came because their God told them to; no doubt this would color their later perception of their right to the land.\textsuperscript{96}

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 McPherson, History, supra note __, at 97; Allan Kent Powell, “The Hole-in-the-Rock Trail a Century Later,” in San Juan County, Utah: People, Resources, History 89, 92-93 (ed. Allan Kent Powell 1983).

\textsuperscript{95} McPherson, Northern Frontier, supra note __, at 24.

\textsuperscript{96} Id. at 26-27.
Montezuma, on the San Juan a little upstream from the mouth of Montezuma Creek.\textsuperscript{97} 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.”\textsuperscript{98} 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.\textsuperscript{99} 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.\textsuperscript{100}

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.\textsuperscript{101} As with all Mormon settlements, the new arrivals laid out a

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\textsuperscript{97} McPherson, History, supra note __, at 97-100; Powell, supra note __, at 95-113.

\textsuperscript{98} Stegner, supra note __, at 116.

\textsuperscript{99} Powell, supra note __, at 89-115.

\textsuperscript{100} Powell, McPherson, History, supra note __, at

\textsuperscript{101} McPherson, History, supra note __, at 99.
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

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102 Peterson, supra note __, at 175.
103 Id.; see also McPherson, History, supra note __, at 173.
104 Peterson, supra note __, at 176.
105 Id., at 181.
106 McPherson, History, supra note __, at 174; Peterson, supra note __, at 180.
107 Peterson, supra note __, at 180.
Mexico arrived. Conjecturally, 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 Hatahley 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

108 Conjecturally, one of the government’s primary witnesses, Dee Black, the range aid who oversaw the roundup and disposal of the Navajo horses, was one of these returning Mormons. He testified that he had been born in Mexico and moved with his family to San Juan County in 191? Transcript at x.

109 McPherson, History, supra note __, at 112.

110 Id.

111 Id. at 173.
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.”¹¹² In the beginning, federal land policy focused on selling the public lands as a source of revenue for the federal government.¹¹³ 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,¹¹⁴ by 1812 sales were so brisk that Congress created the General Land Office (“GLO”) to process the issuance of patents.¹¹⁵ 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.¹¹⁶

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


¹¹³ James Muhn & Hanson R. Stuart, Opportunity and Challenge: The Story of the BLM 5-13 (1988). Federal land policy also provided land to reward military service. This practice began with the Revolutionary War and continued through the Civil War. Id. at 12.

¹¹⁴ Id. at 6.

¹¹⁵ Id. at 9.

¹¹⁶ Id. at 9.
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. Under the Homestead Act of 1862, public lands could be obtained “free” after five years of residence and cultivation. 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.

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. By the end of the century, as the remaining “public domain was rapidly diminishing,” the concept of conservation of public lands began to take hold.

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

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117 Id. at 12-13.
118 Id. at 13.
119 Id. at 14-16.
120 Id. at 35.
121 Id. at 16-26.
122 Id. at 26.
123 Id. at 28.
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

\begin{footnotes}
\item[124] Id. at 36.
\item[125] Where land is held in common among a community, each individual herdsman tries to maximize the benefit to him by grazing as many animals as possible, with the inevitable consequence that the commons becomes overgrazed. “Freedom in a commons brings ruin to all.” Hardin, \textit{The Tragedy of the Commons}, 162 Science 1243 (1968).
\item[126] In the mid-1880s it is estimated that the large cattle companies were grazing as many as 100,000 head of cattle in southeastern Utah. McPherson, Northern Frontier, supra note __, at 56.
\item[127] Muhn & Stuart, supra note __, at 35, quoting Will C. Barnes, Chief of Grazing for the Forest Service, in 1926.
\item[128] Id. at 35-36.
\end{footnotes}
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

\textsuperscript{129} Id. at 37.

\textsuperscript{130} There had been some question as to whether the Department of the Interior or the Agricultural Department (which included the Forest Service) would administer the grazing leases but the Forest Service had alienated ranching interest by proposing to raise grazing fees on the national forests. Id. at 36.

\textsuperscript{131} Id. at 41.

\textsuperscript{132} Id. at 39.

\textsuperscript{133} Id. at 41.

\textsuperscript{134} Id.

\textsuperscript{135} Id. at 45-47.
demand for beef. 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. 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. 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).

By this time, the range in San Juan County (and indeed much of the west) was severely degraded as a result of overgrazing. 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

136 Id. at 47.
137 Id.
138 Id. at 48.
139 Id. at 48-49.
140 See ,e.g., material from BLM files
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 degrading, 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

\(^{141}\) Memo 8/31/48, p2, Ex 13 – “It is needless for me to again repeat that the stockmen in this area are very much disturbed about this Indian use yearlong and the ultimate damage to their winter range.” Letter from Leland Redd, 9/20/48 (asking for the BLM to do something about Indian use of the range); memo 4/29/49 (cattleman threatened to take his stock to another part of the range if Indian use not halted; “if this organization expects to gain any respect...someone certainly had better get hot on the job.”); memo to director 5/26/49: “Numerous complaints are received constantly from the white users of the range in this district.”

\(^{142}\) Letter from Regional Administrator, Utah-Colorado region, to Director, 10/18/48:

\(^{143}\) Brugge, supra note __, at 16.
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

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144 “Turbulence was characteristic of events in this period.” McPherson, Northern Frontier, supra note __, at 82. Although the Navajo were the only tribe that engaged in substantial grazing, both the Utes and the Paiutes had run-ins with white residents over hunting and access to other subsistence resources. Id. at 61-62.

145 Id. at 83.
right as anyone else to use the public lands for grazing.\textsuperscript{146} Navajos living north of the San Juan River, moreover, had little incentive to herd their stock across the river.\textsuperscript{147}

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 reservation.\textsuperscript{148} 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.”\textsuperscript{149} Then in 1908, the Paiute Strip was again added to the reservation.\textsuperscript{150} Mineral interests, this time in oil,\textsuperscript{151} 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.\textsuperscript{152}

\textsuperscript{146} Id. at 82

\textsuperscript{147} In the traditional Navajo world-view, the San Juan River is a powerful being and crossing it inspired fear. McPherson, Navajo Land, supra note __, at 68.

\textsuperscript{148} McPherson, Northern Frontier, supra note __, at 88 -91; Navajo Land, supra note __, at 17.

\textsuperscript{149} McPherson, Northern Frontier, supra note __, at 91; Ansson, The Aneth Extension, 14 Thomas M. Cooley L. Rev. 576 n. 153

\textsuperscript{150} McPherson, Navajo Land, supra note __, at 18.

\textsuperscript{151} Oil had been discovered in the Aneth area north of the San Juan River in 1907. Brugge, supra note __, at 131.

\textsuperscript{152} McPherson, Navajo Land, supra note __, at 19.
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

153 Perhaps it is no coincidence that this was right after the second wave of Mormon in-migration to the county, which probably put new pressure on the already-stretched-thin grazing resources. See fn x, supra.

154 Brugge, supra note __, at 166.

155 Id. at 168.

156 Id. at 169-70 (letter of Feb 5, 121).
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 alloting agent to assist the Navajos in preparing homestead applications. Of the families involved in the later *Hatahley* litigation, several filed for their allotments. The

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157 Id. at 168 (letter of Jan 29, 1921).

158 Tracking individuals through the documentation is often difficult, as Navajo names were fluid in this period. Often an individual would be known by several names, depending on the context. For example, many Navajo adopted European names (e.g., plaintiff Carolyn Rentz) but would still be known among other Navajos by their Navajo names (e.g., Caroline Rentz was also known as Nagashi Bitashie). Brugge, supra note __, at 167-68. Moreover, a single individual might be known by different names at different periods of their life. See, e.g., McPherson, Navajo Land, supra note __, at 72 (discussing Navajo practice of giving a name that described a prominent physical or personality feature, although that name would not be used directly with the person). And on top of all this, the spelling of Navajo names at that time was not standardized. (E.g., Tse-Kisi, Sakizzie).

Comparing the list of the allotments noted in Brugge with the list of plaintiffs in the *Hatahley* lawsuit the following names appear on both lists:

Widow Sleepy/Sleepy. In his 1923 application, Sleepy claimed to have been living on his land in the Montezuma Creek area since 1903.

Natone Begay. This individual prosecuted an application in his own name in which he asserted he had been living in his home since 1915. In addition, his name means Son of Natone and a Not-ton-ne (a phonetic spelling of Natone) was living in the area in 1909.

Mark Tootsonian. He had been living on his allotment since 1921. In addition, Caroline Rentz, the mother of plaintiff Mary Jay, filed an application asserting she d been living on her land since 1903.

Another possible correlation exists between Slim Todachennie and the allotment application of Laura Deschenne, based upon the similarity in the last names. There could also be a correlation between the individual identified as “Sleepy’s Nephew” in the 1923 allotment application (who had been living on his land since 1913) and plaintiff Hosteen Sakizzie. In the allotment application, Sleepy’s Nephew was said to have a substantial reservoir on his property and in the *Hatahley* trial Sakizzie testified that he had such a reservoir. As the existence of a privately owned reservoir was a matter of some note in the litigation it seems possible that the two are one and the same.
Allotments were allowed and patents issued in 1925.\textsuperscript{159} 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.\textsuperscript{160} Moreover, the allotments were only for 160 acres, which was not sufficient to provide grazing for the typical Navajo sheep herd.\textsuperscript{161} 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.\textsuperscript{162}

“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.”\textsuperscript{163} 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.”\textsuperscript{164}

\textsuperscript{159} Brugge, supra note __, at 176.

\textsuperscript{160} Id. at 177.

\textsuperscript{161} It would take ten acres to support one sheep, and a Navajo family would need a herd of at least two hundred sheep to support themselves. Brugge, supra note __, at 176.

\textsuperscript{162} See testimony of Jim Joe’s Daughter. First trial at xx.

\textsuperscript{163} Brugge, supra note __, at 176.

\textsuperscript{164} Id. at 177
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

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165 Additional land was added to the reservation in 1958, see text accompanying notes __, infra.

166 Brugge, supra note __, at 196.
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...”\textsuperscript{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.\textsuperscript{169}

\textbf{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.\textsuperscript{170} Priority was given to those with

\textsuperscript{167} Id. at 196-97 (letter of Sept 29, 1932).

\textsuperscript{168} Id. at 198 (letter of Jan. 25, 1933).

\textsuperscript{169} McPherson, Navajo Land, supra note __, at 20. From our twenty-first century perspective, this legislation appears patently discriminatory, precluding a segment of the population from the right to homestead based upon their race.

\textsuperscript{170} Muhn & Stuart, supra note __, at 37.
experience and with adequate private land to support their herds when not grazing on public lands.\textsuperscript{171} Other criteria for issuing leases “weighed property ownership and traditional use.”\textsuperscript{172}

“In the fall [of 1934] it was decided to try to obtain Navajo rights to McCracken Mesa under the Taylor Grazing Act.”\textsuperscript{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 Mesa.\textsuperscript{174}

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?).\textsuperscript{175} The first meeting of the Advisory

\textsuperscript{171} Id. at 38.

\textsuperscript{172} Id.

\textsuperscript{173} Brugge, supra note __, at 203.

\textsuperscript{174} Brugge, supra note __, at 203-04, quoting letter of William Zeh, forester, to BIA, dated Nov. 9, 1934.
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.

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175 Kinnaman’s Chronology, dated July 30, 1953, and included as part of Ex. 11

176 Brugge, supra note __, at 212, quoting Roblin to Forestry, Mar 3, 1936.

177 Shumway, supra note __, at 147-48. See also the story of Jim Vijil, at 148, a Navajo who lived near the mouth of Recapture Creek and refused to be budged from his land, even at the point of a gun.

178 Chronology; served: Jim Hammond, Anteze, Jim Jo son-in-law, Randolf, Big Girl, Caroline, Goat Man – none are unambiguously plaintiffs

179 Brugge, supra note __, at 216.
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. 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.

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180 Kinnaman s Chronology, Ex 11
181 K chronology says Hosteen Hoskoon, Eddie Nockie, Randolf Benally, Jim Hatathaly, S.P. Jones were served notices in 1940. Bryan memo, 12/11/49, says four served in October 1939: Bill Hattley, Randolph Benelly, Nottony Begay, Bece Laca Ason; that S.P. Jones was in trespass but couldn t be located to be served; that Sakeisey, Randolph Benally, Honey Squaw, and Charlie Boy Wife were served in March 1940; and that the five from K chronology were served in August 1940, with Sakizzie, Jim Hernandez and Carline Hugh Rentz also reported in trespass but not served.

182 Memo, 12/11/49, Ex. 13. The families were: Nakai Denet Begay, James Hatathly, Jim Joe, Randolph Bennally, S.P. Jones, Eddie Nocki, Hosteen Hoskoon. Noticeably absent from this list are Hosteen Sakizzie and Cyrus begay, who would become prime movers in the litigation. In April 1942, the Gaency applied for grazing permits for an additional eleven families. “No adjudication of these applications are [sic] on record.” Chronology
In July 1946, the Grazing Service became the BLM. That year, the permits were issued to the seven families individually.\(^{183}\) 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 *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*.\(^{184}\)

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\(^{183}\) I have been unable to determine whether this was due to a change in regulations or due to the exercise of discretion by the range manager. The 49 memo refers to an earlier memo dated 10/8/46, but that memo was not included in the court files and the BLM FOIA agent was unable to locate the earlier files.

\(^{184}\) 191 F.2d 518 (Tenth Cir. 1951), rev'g 93 F. Supp. 745 (D. Utah 1950).
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.

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185 The individual Assistant US Attorney was different, O. K. Clay for *Tse-Kesi* and Thomas for *Hatahley*. Knox Patterson was the attorney for the Navajos in both cases until his death in 1952, at which time he was replaced by Milt Oman.

186 Note the variations on his name.

187 BLM file

188 Robert McPherson, *The Journey of Navajo*; John Holiday & Robert S. McPherson, *A Navajo Legacy: The Life and Teachings of John Holiday* 39 (2005): At one time, my father lived across the San Juan River to the north...until the white men started coming through there. My family was afraid of the Anglos, so they moved back to Monument Valley. I think they should have stayed across the river, like Mister Sakizzle and men like Bitter Water, Mister Jelly (Hastiin Jélii), and Old Eddie (Eddie Sání), who lived by the windmill. These men refused
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 Hatahley case as well.

The attorney representing the Navajos was Knox Patterson. Born in Texas in 1890, he had been a Utah state senator from 1925 to 1933. Prior to that he had served as district attorney in Moab and as a special assistant to the United States Attorney. 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.”

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 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.

“...We were born here,” they said, and stayed even when the white men came to chase them off. ... When they white men came, they told my family that they would be handcuffed and taken away, so my family moved. But Mister Sakizzie refused to move, and to this day, his children live there.

\[189\] Complaint, Civ No 1803, at 2-3.

\[190\] See text accompanying notes __ through __.

\[191\] Salt Lake Tribune at 41, September 17, 1953

\[192\] Id.

\[193\] Id.
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.\(^{194}\) 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.\(^{195}\)

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.\(^{196}\) 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”;\(^{197}\) 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

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\(^{194}\) Martha Sonntag Bradley, Kidnapped From That Land: The Government Raids on the Short Creek Polygamists 79 (1993). One of his oral arguments was recounted in the Deseret News article about the case. Id., citing the Deseret News, may 15, 1944.

\(^{195}\) CANT FIND SOURCE AGAIN

\(^{196}\) Answer, Affirmative Defense and Counterclaim, June 14, 1950.

\(^{197}\) Answer at 4.
disputes and controversies arising within the band.” 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.

On June 27, 1950, Ritter signed an order that added another forty individual Navajos to the two named defendants. 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.” There is significant overlap between the individuals named in this order and the plaintiffs in the later 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. 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:

198 Id at 5.

199 See text accompanying notes ___.

200 U.S. v. Hosteen Tse-kesi (also known as Hosteen Sikizzie) and Eddie Nocki (also known as Eddie Nakai), Civil No. 1803, June 27, 1950.

201 Id.

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 opinion206 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

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203 Pretrial Order, US v/ Tse-Kesi, Civ No 1803, Sept. 5 [maybe 3], 1950.

204 Particulars Under Countercliam, Us v. Tse-Kesi, July 7, 1950, paragraph 1 at 1.

205 Order, June 27, 1953.


207 Id. at 746.
range “it being impracticable to send down the numbers of United States Marshals necessary to patrol the territory”;\textsuperscript{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.”\textsuperscript{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*.\textsuperscript{210} This case alleged that the Navajos were trespassing on grazing leases issued on state lands.\textsuperscript{211}

On October 12, 1951, the Tenth Circuit reinstated the federal lawsuit.\textsuperscript{212} 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.\textsuperscript{213} Ritter then stayed the case until the resolution of the Utah state case.\textsuperscript{214}

\textsuperscript{208} Id. at 747.

\textsuperscript{209} Id.

\textsuperscript{210} 244 P.2d 862 (Utah 1952).

\textsuperscript{211} At statehood, Utah, like most of the western states, was allocated lands within the boundary of the state to be used by the state to generate funds for public education. These lands were not contiguous, but were scattered over the territory of the state in a checkerboard pattern. These lands are commonly referred to as state lands or state trust lands. The checkerboard pattern has presented the states with a challenge in the administration of the lands.

\textsuperscript{212} 191 F.2d 518 (Tenth Cir. 1951).

\textsuperscript{213} Id. at 520.
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\textsuperscript{215} which upheld the lower court in May 1952. A petition for rehearing was filed and denied in July 1952. A petition for certiari 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 \textit{Hatahley} lawsuit. On that date, Ritter entered on 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.”\textsuperscript{216} Testimony at the first trial in \textit{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

\textsuperscript{214} Order of June 27, 1953, at 2.

\textsuperscript{215} At the time there was no intermediate appellate court.

\textsuperscript{216} Order of June 27, 1953.
away from the whites. The next day seven of them were told to go to Monticello and spent the night there in jail.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{221} There was some more pushing and shoving, the four handcuffed women got pushed on the ground,\textsuperscript{222} and the deputy sheriff ended up with a broken finger and a torn shirt.\textsuperscript{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

\textsuperscript{217} Tom Mustash, p. 207, 1956 Trial

\textsuperscript{218} Black & Krum memo, 7/21/52, Ex.11

\textsuperscript{219} Testimony of Sadie Jones, p. 328, 1956 trial

\textsuperscript{220} Black & Krum memo, 7/21/52, Ex 11

\textsuperscript{221} Rose Sakizzie interview, 10-6-00.

\textsuperscript{222} Id.

\textsuperscript{223} B&K memo
horses. 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. Yet his

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224 Although the act did not require actual abandonment, at trial gov witnesses damaged their credibility with Ritter by swearing that they did not know the owners of the horses – even Sakizzie’s.

225 Some examples: after noting that owners can testify as to the fair market value of their possessions, he says of the Navajos “I don’t know whether they would understand what “fair market value” is.” 1st T at 355; “Somehow we have got to
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. These
findings included: “that there is no reasonable market value among white men for an
Indian raised and trained horse”, 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

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translate their terms about [the value of the horse] into our own conception.” 1st T at 365-66. “I have to know what is the value of those horses in money. Now, I know that is a troublesome thing.” 1st T at 368;


227 Id at 20.
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

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231 351 U.S. at 182.

232 Findings of Fact and Conclusions of Law, April 5, 1957. It appears that Ritter signed the Proposed Findings of Fact and Conclusions of Law prepared by plaintiffs’ attorneys, as the plaintiffs’ Notice of Submission of proposed Findings of Fact and Conclusions of Law and Judgment is attached to the copy of Findings of Fact and Conclusions of Law signed by Ritter in the court file.
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

\textsuperscript{233} Id.

\textsuperscript{234} Id at 5, P. 6. The Findings of Fact and Conclusions of Law from the first trial do not include any information about how many horses and burros, in total or individually, were destroyed. Findings of Fact and Conclusions of Law, January 30, 1954. At trial, the number of destroyed animals was given as 116 horses and 38 burros. 1st T at x. No explanation is given in the second set of Findings for the difference.

\textsuperscript{235} The court did express some hesitation about the appropriateness in this case of damages for pain and suffering. It noted that such damages are awarded only in extreme cases. It then hinted that it suspected that the trial court had awarded pain and suffering damages more for the general harassment of the plaintiffs than for the specific removal of the horses and burros by cautioning that such damages in this case must relate to the wrongful taking of plaintiffs’ animals...and nothing else. 257 F.2d at 925.
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.\textsuperscript{236}

\textbf{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.”\textsuperscript{237} In Ritter’s view of things, the value of the destroyed animals had been determined at the first trial and

\textsuperscript{236} Perhaps this is asking too much of the human mind.

\textsuperscript{237} See, e.g., Transcript of Second Trial at 195-96.
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. The money received from the packing plant, a total of $1,700, went to the Advisory Board for the Grazing District.

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238 Id. See also, 351 U.S. at 177n.3 (Court finds trial conducted properly enough to uphold findings). But see 257 F.2d at 925 (Court’s statement does not apply to factual findings regarding damages).

239 The central legal question was whether the BLM had the authority to eradicate the stock.

240 1st T at 347-48

241 1st T at 365. But see Findings (Second) giving the total number as 101 horses and 39 burros.

242 1st T at 130

243 The BLM range aide testified that the horses shipped to the packing plant were very small horses weighing about 500 pounds each, and that they received three cents per pound. 1st T at 136.
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. 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. In addition, the defendants witnesses testified that the animals rounded up were mostly unbroken – an assertion which was flatly denied by the plaintiffs’ witnesses.

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. Individual Navajos also testified as to the value of their horses, but this evidence was inconsistent and difficult to understand, plagued both by translation difficulties and, I

244 1st T at x (Dee Black)

245 1st T at 517. Ritter would not allow the witness to testify as to the market value of the horses he saw as the witness did not know whether the horses were Navajo horses or white or Piute/Ute horses that were also rounded up. The government made a proffer that the witness would testify that twenty dollars a head was a fair market price for the horses he saw. Id at 522.

246 Cf. 1st T at 136 (range aide testifies horses were “small, unbroke horses, most of them poor in flesh”) with 1st T at 307(Hatahley testifies “These were all gentle horses, usable horses.”).

247 1st T at 435.

248 Sakizzie, for example, testified that he would take five cows or twenty-five to thirty-five sheep in exchange for a horse and that a cow was worth about $200 and a ewe about $30. 1s T at 370-71. That would indicate that he would take other animals worth
suspect, by the fact that the Navajos rarely sold their animals and thus had little basis for
discovering their “market” value. 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. 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

from $750 to $1,050 for a horse. But he also testified that he would sell a horse like
those taken for $300. Id. at 371.

249 As Judge Ritter noted: “Now, of course, we are dealing with a people who do
not think about the value of a horse in terms of what we know as value, and some how we
have got to translate their terms about that into our own conception.” 1st T at 365-66

250 Findings of Fact (Second) p.2 The fixing of the market value for a cow at $300
a head was perhaps a typo, as the first Findings and the trial testimony were $200 a head.

251 The court was thus faced with inconsistent testimony from the same witness.
Ordinarily, this could be a basis for rejecting the witness’s testimony as untrustworthy,
but in this case there were certainly a variety of other explanations for the inconsistency.
This could be a reflection of the witness’s lack of knowledge of the dollar value of his
stock, it could be a reflection of language difficulties, or it could reflect a willingness on
the witness’s part to in effect give a “cash discount” by exchanging his horse for less if
the buyer paid in cash.
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 $300 255 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

252 1st T at 288-89
253 1st T at 204, 301.
254 Findings of Fact p.4
255 This may be a typo, as the testimony at the first trial and the first Findings put this figure at $200 a head.
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.” 256

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. 257

A list of the individual plaintiffs with the number of horses and burros taken from each is
included. 258

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.” 259 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

256 Findings (Second) at 2, P 1.
257 Findings (Second) at 3, P 4.
258 Id. at 4, P 6.
259 257 F.2d at 923.
“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.” 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.” 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.” 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. 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. 264

260 257 F.2d at 923.

261 Id.

262 257 F.2d at 923.

263 The parties’ briefs on appeal no doubt would throw light on this, but
unfortunately at this time I have not been able to locate the appellate file or the briefs.

264 1st T at x, 2nd T at x
Ritter allowed testimony about the horse reduction program in at the first trial. 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.

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. 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.

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265 1st T at x

266 2nd T at x

267 I do not think it is fair to accuse Ritter of reflexively believing the Navajos over the government witnesses. While that may have been the case, the record gives ample reason for the trier of fact to call into question the veracity, and thus credibility, of the government witnesses. Reference has already been made to the testimony from the same witness that they sold the horses for meat at three cents a pound, but that the market value was two cents a pound. In addition, the range aid categorically denied having watched the release of Sakizzie’s horses from his corral, so that they could be rounded up, see 1st T at x, while the BLM’s own files, put into evidence in the case, contain a letter from a rancher who had helped the range aid do exactly that. See x.
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.\footnote{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:

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

\footnote{268} Which would be ironic, given that in other instances it seems to have relied solely on the record from the first trial. See discussion of bias, infra. But again, without the briefs, it is impossible to know what had been argued to the appellate court and thus whether the fault should be ascribed to the lawyers and not the court.

\footnote{269} 257 F2d at 924.
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 horses, 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

270 Id.
271 Findings (second) at 17, P 33.
272 Id. at 16, P 32.
273 Id. at 17, P. 33.
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. 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

274 257 F2d at 923.

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276 Id. at 924.

277 If this had been a jury trial, a jury possibly could have used such a formula without challenge, but in a trial to the court, the judge must give reasons for the judgment rendered.
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

\[278\] 257 F.2d at 924.

\[279\] 365 days x 5 years = 1825, plus 1 day for the leap year. 1826 x $5 = $9,130.00
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.”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

²⁸⁰ Appellant’s Statement of Points on Appeal, ¶22, p.3, September 9, 1957.
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?”

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” 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.” 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

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281 Annie Pike Greenwood, We Sagebrush Folks (1934). See also E.B. White, The Death of a Pig (recounting how he was upset by the premature death of a hog he was raising, even though eventually the animal would have been slaughtered for food).

282 Findings at 14.
283 257 F.2d at 927.
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


285 Id. at 3.

286 Id. at 101, 111

287 Id. at 212.

288 Id. at 213.
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, 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.

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289 Id. at 269. The claims did, however, survive a motion to dismiss the claims of thirty-three plaintiffs who were not present when the dam broke. Id. at 248.

290 Plaintiffs’ exhibits 8, 11, 12, and 13 are files labeled “United States Department of the Interior, Official File/Grazing Service/Trespass/4 Grazing/Navaho Indians/Utah No. 6” or a slight variation thereof. According to a colloquy on the record, the original files were received into evidence with the understanding that copies would be made and the originals returned to the BLM. 1st T at 565-66, 585-86. However, the exhibits in the court file at the National Archives look suspiciously like they are the original agency files.
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. 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. There are memos questioning their integrity. 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

291 It has been claimed that “in the 1950s the BLM was a virtual captive of grazing interests.” Greeno, supra note X at 52 [check out Foss, Politics & Grass and Calef, Private Grazing & Public Lands]

292 Examples: Range Manager, memo dated 8-31-48 in Ex. 13, p 2: “Beletso’s outfit and Nocki’s outfit claim they can’t stay on Indian range in the summer – “No watah.”; Range Manager, memo dated 11-18-50: “Herder on small burro with gun under his arm. Said the herd was owned by “Little Wagon.” He was “Little Wagon’s” boy. He would not talk any English and very little Navajo. He carried a sharp pencil, for what, we could not find out. Ha. Ha.”; Range manager, memo dated 4-5-51, describing Sakizzie as an insolent troublemaker; many instances referring to Navajo men as “bucks” and women as “squaws.”

293 Examples: Memo 8/31/48, p 2-3, Ex. 13 (questioning the “apparent poverty stricken condition of these Indians”)

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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.\textsuperscript{294} 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.\textsuperscript{295} When this is combined with the Navajos’ lack of access to

\textsuperscript{294} See, e.g., Brugge, supra note __, at 120 (sightseer from Bluff reports only seeing Navajos twice in an area where a number were known to be living).

\textsuperscript{295} Trespass notices in English
government, either state,\textsuperscript{296} federal,\textsuperscript{297} or tribal, it is not surprising that so few Navajos filed papers to homestead – what is surprising is that any of them did.\textsuperscript{298} 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\textsuperscript{299} 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

\textsuperscript{296} “Utah was the last state to allow Indians to vote,” in 1957. Maryboy & Begay, supra note __, at 296.

\textsuperscript{297} Federal citizenship was granted in 1924. Id. at 295.

\textsuperscript{298} Not that this helped Trial Testimony about being run off their homestead.

\textsuperscript{299} See eg Cover

\textsuperscript{300} In 1907, the Indian agent and two calvary troops conducted a surprise attack an the camp of a Navajo troublemaker named By-a-lil-le. Two Navajo men were killed and another ten were incarcerated for two years at hard labor. McPherson, History, supra note __, at 130.

\textsuperscript{301} This 1923 incident, which started with the escape of two young Utes from jail and ended with Posey’s death, was called “Posey’s War” or the “Last Indian Uprising.” See McPherson, History, supra note __, at 159-63.
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. 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. 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

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302 At the second trial, there was testimony about an incident that had occurred around the time the horses were being rounded up. A Navajo by the name of Jimmy Jelly and his family had been at a squaw dance and had driven off in their auto. They were chased by at least two white men, who shot at them, leaving fourteen bullet holes in the truck. One bullet grazed Jelly’s hand and another struck him in the leg. Transcript of the second trial at 157-59, 337.

303 “There is considerable evidence in the record to show that the Utah abandoned horse statute was applied discriminatorily against the Indians.” 351 U.S. at 176.
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.\(^{304}\)

\(^{304}\) Construing the trial testimony most generously, at the very least there was a misunderstanding about what Little Wagon was told. Hatch testified that when they asked about redeeming the horses, the range aid telephoned his boss, who said that he believed the Navajos’ horses had been trespassing for at least two years and that the cost of redeeming a horse that had been trespassing that long would be $60. There of course was never any factual determination that Little Wagon’s horses had been trespassing that long, and it is hard to believe that could ever be proven. Little Wagon clearly believed that he was being asked to pay $60, and the range aid was aware of this, as this testimony came in to show that Little Wagon had said his horses weren’t worth $60 apiece. Although even that was disputed, as Hatch claimed that what he said was he didn’t have that much money. See also 351 U.S. at 176-77.

There was another instance brought into testimony, again to show that enforcement was not aimed exclusively at Navajos. The range aid testified that a couple of Utes’ horses were rounded up. But again, as with the white ranchers, the Utes were allowed to reclaim their horses when the Navajos were not. This difference in treatment is no doubt a consequence of the fact that the Utes did not keep herds of livestock and thus were not in competition with the white ranchers.
Moreover, the enforcement actions were again shadowed by the implicit threat of violence. There was testimony at the trial that members of Sakizzie’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.\(^{305}\) 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.

\(^{305}\) Aside about whether 1864 treaty should be applied to this band
Then, in what still seems to me an amazing move (but maybe not, given the Navajos reputation for adaptability\textsuperscript{306}), 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, keep 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.\textsuperscript{307} Nevertheless, Ritter’s life and

\textsuperscript{306}See e.g., McPherson, Navajo Land, supra note __, at 65-66. And “Historically, the Diné, have selectively adopted new ideas and technologies that fit their beliefs and physical needs.” Id. at 85.

\textsuperscript{307}See text accompanying notes __ infra, for a discussion of Ritter’s alleged partiality.
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

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308 Testimony of Ira Hatch at 325-27.

309 Transcript of First Trial at 361.
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 1953.310

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 several lawsuits have 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.311

310 “The next natural extension [of the reservation] I would suppose would be right where these folks are living.” 1st T at 268-69,

311 Navajo Times article after Sakizzie’s death, stating that he had testified in three cases, the horse case, the land case, and the oil case.
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. 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

312 McPherson, Navajo Land, supra note __, at 95.

313 “Under the traditional view of our judicial system, judges are supposed to be perfectly impartial and objective in making decisions, unaffected by personal values or their backgrounds.” Gregory C. Sisk, Judges are Human, Too, 83 Judicature 178 (2000).
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.”

A recent empirical study confirmed that “extra-legal factors” played a part in judicial decisions. 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

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315 Gregory C. Sisk, Judges Are Human, Too, 83 Judicature 178, 179 (2000), referring to Sisk, Heise & Morriss, Charting the Influences o the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. rev. 1377 (1998). Although the study identified a number of factors that were statistically significant in predicting the judicial decision, it also confirmed that, in accord with the prevailing model of the rule of law, judges are indeed influenced by precedent. 83 Judicature at 179.
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.\footnote{The first federal judge appointed for the state of Utah (as opposed to Utah Territory) was John A. Marshall, a grand-nephew of the famous Chief Justice John Marshall. He was appointed when Utah became a state in 1896 and served until August 1915. He was followed by Tillman Johnson, who was appointed in 1915 and served until 1949? Background Information About the Court and the Courthouse, handout, CLE presentation: The Lore of Chief Judge Willis W. Ritter: The Good, The Bad & The Unbelievable, April 17, 2007 by The U.S. District Court for the District of Utah, The Federal Bar Association, and the Tenth Circuit Historical Society.}

Ritter was the first federal judge for the District of Utah to have been born and raised in Utah.\footnote{Cowley & Nielson, supra note __, at 2.} He was born on January 24, 1899, in Salt Lake City, to William Ritter and May Sykes Ritter.\footnote{Id. at 9.} 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.\footnote{Id.} 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.\footnote{Id. at 9-10.} 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.\footnote{Id. at 16.} 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 school\(^{323}\) 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.\(^{324}\) 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.\(^{325}\)

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.\(^{326}\) He served with OPA until early 1944 at which point he returned to Salt Lake City and resumed private practice.

\(^{322}\) Id. at 20.

\(^{323}\) In one of those ironic coincidences, one of Ritter’s classmates at Park High School (out of a class of eighteen) was Roger Traynor, the future chief justice of the California Supreme Court. Apparently Ritter never quite got over the fact that Traynor was valedictorian to Ritter’s saltutatorian at their graduation. Id. at 21.

\(^{324}\) Cowley & Nielson, supra note __, at 28.

\(^{325}\) Id. at 29-30, 59, 64.

\(^{326}\) Id. at 59.
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.\textsuperscript{327} 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.\textsuperscript{328} The current federal judge for Utah, Tillman Johnson, was then eighty-six years old and his retirement was widely thought to be imminent.\textsuperscript{329} Judge Johnson, however, did not formally announce his retirement until June 1949.\textsuperscript{330}

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.\textsuperscript{331} At the same time, Republicans nationally had raised the “bogeyman” of Communism in political campaigns.\textsuperscript{332} Thus, political forces in Utah

\textsuperscript{327} Id. at 47.
\textsuperscript{328} Id. at 62.
\textsuperscript{329} Id.
\textsuperscript{330} Cowley & Nielson, supra note __, at 109.
\textsuperscript{331} Id. at 76.
\textsuperscript{332} Id. at 77.

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were arrayed against Ritter based on his being a New Deal Democrat and a non-Mormon.\footnote{333}{Fn on his not being anti-Mormon?}

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.\footnote{334}{Cowley & Nielson, supra note __, at 86.} His stint as an administrator was the first time in his public life that Ritter had been the center of controversy.\footnote{335}{The controversy arose from an OPA regulation requiring owners of motor courts to establish monthly rental fees for long-time residents, as opposed to the higher daily fees. This was an unpopular regulation and Ritter bore the brunt of the public disapproval, although he was charged with administering the policy and had nothing to do with its being adopted. Id. at 60-62.} It was during this time that accusations of arrogance and high-handedness were first leveled against him.\footnote{336}{Id. at 60.} During this same period, rumors of womanizing also began.\footnote{337}{Id. at 96.}

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.  

Ironically, one of the negative letters came from Knox Patterson, who would file the *Hatahley* case on behalf of the Navajo plaintiffs. 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.” 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. 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.

338 Cowley & Nielson, supra note __, at 118-19.
339 Id. at 117.
340 Id. at 118.
341 Id. at 121, letter of October 1, 1949.
342 Id.
343 Quote?
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.\footnote{Cowley & Nielson, supra note __, at 135-36.} President Truman appointed Ritter temporarily in a recess appointment on October 21, 1949.\footnote{Id. at 137.}

In January 1950, when Congress reconvened and Ritter’s appointment again came under scrutiny, the controversy moved into the press and became increasingly ugly.\footnote{See, e.g., “[Watkins says there have been] questions raised about his [Ritter’s] character, his integrity, and morals.” Watkins Fights Shielding Ritter, Deseret News, March 14, 1950 at A2; “Sen. Thomas enumerated 13 charges which have been spoken or intimated against Judge Ritter, ranging from disbelief in the U.S. Constitution to engaging in unethical legal practices to questionable private conduct and personal life.” Thomas Offers List of 91 to Press Ritter Okeh, Salt Lake Tribune, April 7, 1950 at A1.} 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.\footnote{There is an irony here, and a mystery. The accusations that Ritter had an affair with a secretary in Albuquerque were not proven – but Ritter’s wife and daughter apparently believed there was something to it, and subsequently Ritter was unfaithful. We are left to wonder whether the accusations were correct even though unproven, or whether they became a sort of self-fulfilling prophesy. Similarly, the accusations that Ritter had a drinking problem were denied by witnesses supporting his appointment, but in later years Ritter indisputably suffered from alcoholism. Again, failure of proof at the time, or self-fulfilling prophesy?} On June 29, 1950, Ritter’s appointment finally was voted
upon and confirmed by the Senate. Controversy would follow him throughout his career.\textsuperscript{348}

**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.\textsuperscript{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.\textsuperscript{350} At the same time, however, he was often harsh with the plaintiffs’ attorney.\textsuperscript{351}

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\textsuperscript{348} When I arrived in SL in 1986, I soon was hearing stories, perhaps apocryphal, about Ritter. The stories were always colorful, sometimes uncomplimentary.

\textsuperscript{349} 257 F.2d at 925-26.

\textsuperscript{350} Give examples from the record

\textsuperscript{351} Give example
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.\textsuperscript{352} This occurred during the \textit{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.\textsuperscript{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.\textsuperscript{354} 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

\textsuperscript{352} Jim Holbrook, April 2003 conversation.

\textsuperscript{353} Record cite

\textsuperscript{354} The attacks against Ritter during the appointment process were often ad hominem and included allegations, never substantiated, of adultery nearly a decade earlier. Ritter perceived the public and personal attacks for contributing to the unraveling of his marriage, although his subsequent dalliances with other women were no doubt contributing factors as well. Although they were never divorced, his wife took up a separate residence after his appointment.

It is also significant for this case that Kessler, the U.S. Attorney for Utah who represented the defendant in the case, prior to being appointed to that office, had been a player in the opposition to Ritter’s appointment.
sympathies were consistently with the underdog, in large part because he was a perpetual outsider.\textsuperscript{355} Also without question, he had a fondness for Navajo culture, having seriously collected Navajo rugs since the 1930s.\textsuperscript{356}

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.\textsuperscript{357} 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.\textsuperscript{358} 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.\textsuperscript{359} 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.\textsuperscript{360}

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.\textsuperscript{361} In

\textsuperscript{355} The sources of his outsider status were many, and included being orphaned, being a non-Mormon in Utah, being a Westerner at his midwestern college, being a Democrat in an increasingly Republican state.

\textsuperscript{356} By the end of his life he had amassed a sizeable and valuable collection, which he donated to the University of Utah.

\textsuperscript{357} Cowley & Nielson, supra note __, at 35.

\textsuperscript{358} Id.

\textsuperscript{359} Ritter private papers

\textsuperscript{360} Cowley & Nielson, at 301.

\textsuperscript{361} Cardozo quote
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item[362] Cite to Alaska Packers
\item[363] Consider the epithet of “n – lover” that was hurled at civil rights activists.
\item[364] X ref
\end{footnotes}
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.”

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

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365 257 F.2d at 926.

366 To some extent I am of course putting words in Ritter’s mouth, but the position I attribute to him is supported by comments he made during the trials. See, e.g.,

367 There is an irony here, as Patterson, the plaintiffs’ original attorney, had argued that this band of Navajos should not be considered part of the Navajo Tribe. Of course, he was also probably preparing to argue that they should be recognized as a separate and independent band by the federal government, which would then continue the trust relationship.
relationship should matter under the Federal Tort Claims Act, just as a fiduciary
relationship matters under common law tort principles.\textsuperscript{368}

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].”\textsuperscript{369} 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 \textit{Hatahley} and \textit{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.\textsuperscript{370} The campaign had been particularly brutal,

\textsuperscript{368} Example from banking law.

\textsuperscript{369} First Trial Transcript at 272.

\textsuperscript{370} Thunder Over Zion at
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.

371 Id.
372 Id.
373 Id. at 168.
374 Jim again – Brent Ward was the US Atty then. Also, Bill Lockhart said that Dan Berman was representing Ritter. In 1976, the government had successfully brought a mandamus proceeding resulting in the Tenth Circuit disqualifying Ritter from continuing to hear a criminal prosecution. U.S. v. Ritter, 540 F.2d 459 (10th Cir, 1976). In its opinion, the Tenth Circuit recounts the proceedings leading up to Ritter’s disqualification in Hatahley, with an emphasis this time on his anti-government slant rather than any pro-Navajo slant. Id. at 464.
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

375 First Trial Transcript at x
376 Id at x
377 Id. at x
378 220 F.2d 666, 670 (10th Cir. 1955).
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. 379

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. 380

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

379 Hatahley v. United States, 351 U.S. 173, 177 n.3 (1956). My reading of the transcript of the first trial concurs with the Supreme Court’s opinion. As will be discussed, there are criticisms one can level at Ritter’s handling of the first trial, but they do not rise to the level of partiality.

380 257 F.2d at 925 (emphasis added).
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.\textsuperscript{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.\textsuperscript{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.

\textbf{Epilogue: Echoes from the Past}

\textsuperscript{381} Transcript from the second trial at x.

\textsuperscript{382} Ritter saying you are not going to take three or four days 1st T at 183-84.
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.

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384 No. CIV.A. 96-1285 (RCL)(D.D.C.)

385 Cobell v. Norton (“Cobell VI”), 240 F.3d 1081, 1088 (D.C.Cir.2001)


387 Id. at 325.
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

³⁸⁸ 455 F.3d at 325-26, quoting 229 F.R.D. at 7.
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,” 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. 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.

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389 257 F.2d at x
