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

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UNITED STATES V. HATAHLEY: A LEGAL ARCHAEOLOGY CASE STUDY IN LAW AND RACIAL CONFLICT

*Debora L. Threedy**

Abstract

This article is a case study of *United States v. Hatahley* 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 one hundred horses and burros. The first section of the article 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*.

The remainder of the article examines the role of racial conflict in various aspects of the case. Part II looks at the problem of cross-cultural damages and how the courts grappled with assigning money damages where the plaintiffs live in a non-market-based society. Part III examines the intersection of race and power, particularly the paradoxical role of law in both maintaining and challenging racial hierarchies. Part IV examines the question of judicial bias from a unique perspective. The case ultimately was assigned to another judge due to the trial judge’s alleged partiality in favor of the Navajos. The section explores whether the lack of prejudice, when contrasted with a background societal prejudice, could be read as partiality. The epilogue points out how this question has a modern application.

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Introduction

What is needed here is . . . a responsible way of paying attention to what is before us: to the social and cultural context of the text, in as much fullness and detail as we can manage; to the "unsaid" that can render a simple statement complex, or a superficially complex one foolish; to the nature, in short, of the relation between text and world.¹

1. JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 107, 122 (1985).

In this article, I take up the challenge articulated by James Boyd White: to find “a responsible way of paying attention” to the social and cultural context of a reported opinion. The methodology of “legal archaeology”² provides such a way. Legal archaeology is a type of legal history that takes the form of a case study, reconstructing the historical, social, and economic context of a litigated case.³

The case under examination in this article is *United States v. Hatahley*.⁴ The litigation was part of a long-running controversy between Navajo herdsmen and white ranchers in San Juan County, Utah over access to public grazing land. The event that triggered the litigation was the destruction of over one hundred horses and burros belonging to the Navajos. The litigation was protracted, lasting for nearly a decade and involving two trials, two appeals to the Tenth Circuit Court of Appeals, a United States Supreme Court decision, and a mandamus proceeding before the case was finally settled in 1961.

2. 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* 12 (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. Inspired in part by this symposium, Foundation Press developed a series called “Law Stories,” which is at heart a compilation by subject matter of legal archaeology projects. E-mail from Paul L. Caron, Professor, University of Cincinnati College of Law, to Debora L. Threedy, Professor, S.J. Quinney College of Law, University of Utah (Sept. 30, 2002) (on file with author); see also Paul L. Caron, *Tax Archaeology*, in *TAX STORIES* 1, 1 (Paul L. Caron ed., 2d ed. 2009).

3. This call for context should be seen as a normative move. Normatively, the call for context is a call to examine “social structures of power that extend far beyond the particularities of a given situation.” Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1605 (1990). These structures of power are built along the lines of race, gender, and class. “The attention to particularity . . . is not an unthinking immersion in overwhelming detail, but instead a sustained inquiry into the structures of domination in our society.” *Id.* at 1633.

4. 257 F.2d 920 (10th Cir. 1958).

I have chosen to do an in-depth reconstruction of this case for several reasons. First, I have selected it for what it is. The case has often been cited for a number of propositions. The Supreme Court opinion has been cited the most frequently, in more than two hundred lower-court opinions and nearly one hundred secondary sources. It is cited mostly for issues arising under the Federal Tort Claims Act and the Taylor Grazing Act.⁵ The second Tenth Circuit opinion, the last opinion in the case, has been cited much less often, but has entered the “pedagogical canon” for what it says about damages.⁶ It currently appears as the first case in a leading Remedies casebook,⁷ and in the past it has appeared in the remedies section of a leading Civil Procedure casebook.⁸

Conversely, another reason I have chosen to do a study of this case is because of what it is not. Despite the centrality of race and Native American rights to the case, it is not part of the Indian Law or Civil Rights Law canons.⁹ This omission is understandable because, looked at from a doctrinal perspective, the case has little to say about Indian Law or Civil Rights. Doctrinally, the case involves torts, remedies, and civil procedure. Nevertheless, this omission is regrettable because the case presents a window into a fascinating and complex moment in the history of race relations in this country.¹⁰ In the post-World War II era, civil rights for minorities was a paramount issue. Historically, the focus when examining that era has been

5. *E.g.*, *United States v. Shenise*, 43 F. Supp. 2d 1190, 1193-95 (D. Colo. 1999). The terms of the Federal Tort Claims Act are contained in 28 U.S.C. §§ 1346(b)(1), 2671-2680 (2006). The provisions of the Taylor Grazing Act are contained in 43 U.S.C. §§ 315-315r (2006).

6. The “pedagogical canon” refers to those key cases that are taught in law school classes and reprinted in casebooks. J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in *LEGAL CANONS* 3, 7 (J.M. Balkin & Sanford Levinson eds., 2000).

7. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 11 (3d ed. 2002).

8. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 315 (5th ed. 2000).

9. Randall Kennedy has suggested that the law school curricular canon should include “a course that investigates the ways in which race relations have affected and been affected by legal institutions.” Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, in *LEGAL CANONS*, *supra* note 6, at 211, 211.

10. “[R]ace is a central and generative feature of the American legal canon, but . . . its role and significance have too often been obscured or written out of the conventional wisdom transmitted through American legal education and scholarship.” Fran Ansley, *Recognizing Race in the American Legal Canon*, in *LEGAL CANONS*, *supra* note 6, at 238, 241.

primarily on race relations between blacks and whites; less attention has been paid to race relations between Native Americans and whites.¹¹

The *Hatahley* case involves this latter racial conflict. Moreover, it is an utterly enthralling and practically unknown story and one that deserves to be better known. The case has much to teach us about how societal racism infects, in indirect and subtle ways as well as in obvious ways, the administration of justice. At the same time, the case shows that law can be a tool, albeit a flawed and compromised one, in the fight to combat injustice arising from that racism.

The first section of the paper presents two contrasting narratives of 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 narrative¹² 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 U.S. Bureau of Land Management (BLM)), the history of incidents culminating in the destruction of the Navajo horses and burros, and the litigation preceding *Hatahley*.

Conflict between Native Americans and Anglo society is implicated in every aspect of the case. In the remainder of the article, I examine different portions of the case through this lens. In Part II, I look at the problem of cross-cultural damages: the problems of translation that arise when one culture (the Navajos) turns to another, disparate culture for redress. These problems of translation include more than language barriers, although such barriers were 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

11. Kennedy, *supra* note 9, at 222 (arguing that race-relations law is dominated by black-white conflicts, that “[w]hite-red racial conflict” has been segregated “under the rubric of federal Indian law[,]” resulting in such conflict being isolated outside of the major currents of legal academia, and that such “isolation” of white-red racial conflict “ought to be reconsidered and undone”).

12. This second narrative is a kind of “counternarrative”:

[L]egal academics, in their roles as teachers, scholars, and public intellectuals, should challenge the grand racial narratives and “grand racial silences” of the official canon. . . . they should help to resurrect and construct counternarratives, in important part by attending to the experiences and words of those who can offer perspectives from the bottom and from the margins of the racial order as it is currently constituted.

Ansley, *supra* note 10, at 241.

of damages, he was more sensitive to this basic problem than was the appellate court.

In Part III, I take a pragmatic perspective and look at how racialized power structures in the legal system “stacked the deck” against the Navajos, but did not shut them out completely. I examine how the Navajos manage to turn one of those tools of power, the law, to their own ends. Finally, I investigate the consequences of that move, both within and without the litigation, and pose the question of whether this was a successful strategy in this case.

In Part IV, I look at the issue of judicial partiality and ask whether the record supports the charge that the trial judge was biased *in favor* of the Navajos. The sensitivity of the trial judge in this case to the lived realities of the plaintiffs’ situation raises the question of what constitutes impartiality in a society tainted by prejudice. In other words, I explore whether his lack of prejudice in a society that was prejudiced against the Navajos, which is in fact impartiality, could appear to others as partiality.

Finally, the article concludes with an epilogue that draws striking parallels between *Hatahley* (a 1950s case) and current litigation challenging the government’s administration of Indian trust funds.

I. Contrasting Narratives

*[W]e as researchers construct that which we claim to find.*¹³

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”¹⁴ that seeks to explain how the account preserved in the judicial opinions came to be. This is the narrative that has been “excavated” by the methodology of legal archaeology. Read together, these two provide a fuller narrative of the case than if one read only the appellate opinions.

A. The Official Account of the Case

Hatahley v. United States, on its face, involves a controversy between the BLM and a band of Navajos. The Navajos brought suit against the BLM

13. Elizabeth Mytton, *Lived Experiences of the Law Teacher*, 37 LAW TCHR. 36, 43 (2003) (quoting Frederick Steier, *Introduction: Research as Self-Reflexivity, Self-Reflexivity in Social Process*, in RESEARCH AND REFLEXIVITY (Frederick Steier ed., 1991)).

14. In narratology, the “back story” is the exposition in a work that brings the reader up to the present time of the story. See Back-story, http://en.wikipedia.org/wiki/Back_story (last visited Feb. 1, 2010).

under the Federal Tort Claims Act,¹⁵ alleging that 115 horses and 35 burros belonging to them were unlawfully seized and destroyed by the BLM in 1952 and 1953.¹⁶ The undisputed trial evidence was that the BLM, sometimes assisted by local ranchers, rounded up the horses and burros herd-by-herd and drove or trucked them to a nearby town, where they were held for a short time.¹⁷ The animals were then loaded on trucks and shipped to the Kuhni Packing Plant outside Provo, in northern Utah, where they were rendered into by-products.¹⁸ The stock was sold for no more than three cents per pound, for a total amount of \$1700, which was paid to the Grazing District Advisory Board, made up of local ranchers.¹⁹ The BLM asserted that the authority for doing this could be found in the Utah “Abandoned Horse” statute.²⁰

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 Navajos and awarded them the amount prayed for in the complaint, \$100,000 as damages.²¹ The Tenth Circuit reversed on the issue of liability without considering damages.²² The case then went up to the United States Supreme Court.²³ The Supreme Court found that the BLM was liable for killing the horses and burros, but remanded for specific findings as to damages.²⁴ The significance of this decision is that “reportedly it was the

15. 28 U.S.C. §§ 1346(b)(1), 2671-2680 (2006).

16. *United States v. Hatahley (Hatahley I)*, 220 F.2d 666, 667-69 (10th Cir. 1955), *aff'd in part and rev'd in part*, 351 U.S. 173 (1956). This was not the first time these Navajos had suffered such a loss. A generation before, in the winter of 1931-1932, some seventy horses belonging to the Montezuma Creek Navajos 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 (Aug. 1966) (unpublished manuscript, on file with the *American Indian Law Review*).

17. *Hatahley I*, 220 F.2d at 669.

18. Reporter’s Transcript of Testimony and Proceedings at 130, 467, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954) [hereinafter *First Trial Transcript*].

19. *Hatahley I*, 220 F.2d at 669, 672 n.2.

20. UTAH CODE ANN. § 47-2-3 (West 2004). State law defined an “abandoned horse” as one that was unbranded or for which taxes had not been paid in the preceding year. UTAH CODE ANN. § 47-2-1 (West 1953).

21. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 921 (10th Cir. 1958).

22. *Hatahley I*, 220 F.2d at 672. The Tenth Circuit held that the Taylor Grazing Act permitted the BLM to follow state procedures in this case. *Id.* at 667.

23. *Hatahley II*, 257 F.2d at 922.

24. *Hatahley v. United States*, 351 U.S. 173, 181-82 (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. *Id.* Interestingly, a very similar situation recently played out in Nevada. The BLM impounded and

first time American Indians had successfully sued the government for intentional wrongdoing.”²⁵

On remand from the Supreme Court, another trial was held on the issue of damages before the judge who had heard the original trial, Willis Ritter, and he entered judgment in the amount of \$186,017.50, from which the government again appealed.²⁶ The Tenth Circuit vacated the judgment and again remanded for a new trial on the damages issue.²⁷ The Tenth Circuit also suggested that the case be assigned to a new judge because the original judge was biased in favor of the Navajos.²⁸

Judge Ritter ignored this suggestion.²⁹ His answer to the government’s application for a special master to determine damages was that he did not intend to follow the Tenth Circuit’s suggestion that he step down, “so you can lay that to one side.”³⁰ The government then applied to the Tenth Circuit for the entry of a judgment on the mandate prohibiting Ritter from retrying the case a third time.³¹ The Tenth Circuit ordered that Ritter “take no further action” in the case.³² Because at that time the U.S. District Court for the 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.³³

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).³⁴

sold at auction 232 cattle seized from Western Shoshone tribal members Carrie and Mary Dann, who had refused to pay grazing fees, insisting that the Western Shoshones have a treaty right to the land. See, e.g., Scott Sonner, *Federal Government Sells Seized Cattle Amid Dispute over Tribal Rights*, NEV. APPEAL (Carson City, Nev.), Oct. 5, 2002, at A1.

25. Nancy C. Maryboy & David Begay, *The Navajos of Utah*, in A HISTORY OF UTAH’S AMERICAN INDIANS 265, 301 (Forrest S. Cuch ed., 2000).

26. *Hatahley II*, 257 F.2d at 922.

27. *Id.* at 926.

28. *Id.* at 925-26. I admit it was this passage that first piqued my interest in this case.

29. *United States v. Ritter*, 273 F.2d 30, 32 (10th Cir. 1959).

30. *Id.*

31. *Id.* at 31. Ritter did not respond either in person or by counsel, but counsel for the plaintiffs opposed the application. *Id.*

32. *Id.* at 32.

33. Designation of District Judge for Service in Another District Within His Circuit (10th Cir. Dec. 7, 1959) (contained in Judge Willis Ritter Papers, Special Collections, Marriott Library, University of Utah, Box 76, Folder “Hatahley Papers”).

34. Stipulation for Compromise and Settlement and Order Approving Same at 4, *Hatahley*

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.³⁵ The case can be read solely for what it has to say about damages, but I am suggesting that the case is more interesting and more valuable if the damages issue is located within a fuller understanding of the underlying controversy.

Although the lawsuit was technically about compensation for the illegal destruction of 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, look at the bigger picture, and 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 that made 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 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 one hundred years of inter-cultural and 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,³⁶ where San Juan County abuts the “Four Corners,” the shared corner of four states: Utah, Arizona, Colorado, and New Mexico.³⁷ San Juan County was “formed in 1880, before it had any white population.”³⁸ The county is

v. United States, No. C-36-53 (D. Utah Apr. 11, 1961).

35. See LAYCOCK, *supra* note 7, at 11; YEAZELL, *supra* note 8, at 315.

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

37. ROBERT S. MCPHERSON, *A HISTORY OF SAN JUAN COUNTY: IN THE PALM OF TIME* 8 (1995) [hereinafter MCPHERSON, *HISTORY*]. San Juan County is home to part of Monument Valley, most 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.

38. WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 103 (Penguin Books 1997)

large, “a trifle smaller than Massachusetts, a little bigger than Rhode Island, Connecticut, and Delaware combined.”³⁹

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 fifteen miles from north to south and eighty miles from east to west.⁴⁰ Today, a good chunk of the area is part of the Navajo Reservation. Prior to 1958, however, 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 Kaiyellis,⁴¹ 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 Latter-day Saints (the LDS Church, whose members are often called Mormons), and (3) the emerging regulator of the rangelands, the newly reorganized BLM.

a) 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 Utah reservation land and most of Utah’s Navajos are located in San Juan County in the very southeastern corner of the state. At this time, the reservation occupies one-quarter of the county’s land,⁴² and the Navajos comprise about

(1969).

39. *Id.*

40. Findings of Fact and Conclusions of Law at 5, *Hatahley v. United States*, No. C-36-53 (D. Utah Apr. 5, 1957) [hereinafter Findings (1957)].

41. STEPHEN TRIMBLE, *THE PEOPLE: INDIANS OF THE AMERICAN SOUTHWEST* 183 (1993) (noting many Utah Navajos call themselves Kaiyellis, “after the nineteenth-century Bears Ears headman, K’aayeli”). Many, if not all, of the *Hatahley* plaintiffs are descended from K’aayeli and his sisters or are related to someone who is. *See, e.g.*, Interview with Rose Sakizzie, Member, Navajo Tribe, in Blanding, Utah (Oct. 6, 2000); Interview with James Eddie, Member, Navajo Tribe, on the Navajo Reservation, San Juan County, Utah (Sept. 16, 2000); Interview with Mary Jay, Member, Navajo Tribe, on the Navajo Reservation, San Juan County, Utah (Sept. 16, 2000).

42. San Juan County, the largest county in the state of Utah, comprises 7725 square miles. San Juan County Area, <http://onlineutah.com/sanjuancountyarea.shtml> (last visited Feb. 3,

fifty-two percent of San Juan County's population.⁴³ In the 1940s, the total population of the county was under 5000, and approximately one-third of those were Native Americans.⁴⁴

It must be emphasized that the plaintiff in this case is not the Navajo Tribe itself. The plaintiffs were a small group of Navajos living in the Montezuma Creek⁴⁵ area of San Juan County, north of the San Juan River. As best as I can determine, they seem to have been interrelated by blood, marriage, and clan.⁴⁶ The decision to bring this lawsuit and the initial financing of the litigation were made by the individual plaintiffs.⁴⁷ Indeed, the relationship between this group of Navajos and the Navajo Tribe was and continues to be somewhat problematic.⁴⁸

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.⁴⁹ There are actually four geographically separate Navajo reservations: the main portion (which occupies a large chunk of Arizona and New Mexico as well as a part of Utah)⁵⁰ and the Ramah,

2010). The Utah portion of the Navajo Reservation comprises 1,155,000 acres, or just over 1800 square miles. Robert S. McPherson, Navajo Indians, <http://onlineutah.com/navajohistory.shtml> (last visited Feb. 10, 2010). San Juan County encompasses the entirety of the Navajo Reservation in Utah.

43. ROBERT S. MCPHERSON, *NAVAJO LAND, NAVAJO CULTURE: THE UTAH EXPERIENCE IN THE TWENTIETH CENTURY* 228 (2001) [hereinafter MCPHERSON, *NAVAJO LAND*]. As of 1993, some 6000 Navajos lived in San Juan County. That number represents only three percent of the entire Navajo population. TRIMBLE, *supra* note 41, at 182.

44. STEGNER, *supra* note 38, at 103.

45. Supposedly, Montezuma Creek received its name due to a legend that Montezuma, the Aztec leader defeated by Hernando Cortez, escaped to this area, was later recaptured, and then killed at this creek. MCPHERSON, *HISTORY*, *supra* note 37, at 21. A similar legend is assertedly the basis for the names of Recapture Creek and the nearby town of Cortez, Colorado. *Id.*

46. There are at present time sixty Navajo clans. TRIMBLE, *supra* note 41, at 123. The clan is the organizing principle of Navajo society.

47. Interview with Mary Jay, *supra* note 41.

48. See, e.g., 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 T.M. COOLEY L. REV. 555, 577, 595 (1997).

49. *Cf. id.* at 575-77, 585, 589-93, 595-96 (describing the friction between the Utah Navajos and the tribe as a whole); TRIMBLE, *supra* note 41, at 183 (quoting Mark Maryboy, a Navajo and former San Juan County Commissioner: "Utah Navajos live in no-man's land. The Navajo Tribe ignores them; the state of Utah ignores them. Each thinks the other is taking care of them.").

50. Map of the Navajo Nation, http://www.lapahie.com/Navajo_Map_Lg.cfm (last visited Feb. 11, 2010) (depicting a map of the Navajo Reservation). The main portion of the reservation is often referred to as the "rez." See TRIMBLE, *supra* note 41, at 154.

Cañoncito, and Alamo Navajo Reservations (which are all much smaller and all located in New Mexico.)⁵¹ 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 Navajos, even if legally they have not been so recognized.

The experiences of the Montezuma Creek Navajos 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.⁵² 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,”⁵³ whereas archaeologists date the presence of Navajos in northern New Mexico back at least one hundred years earlier.

Most significantly for their sense of self-identity, in the 1860s the Montezuma Creek Navajos were never defeated by the U.S. Army.⁵⁴ In the winter of 1863-1864, the U.S. Army under the leadership of Kit Carson began a scorched-earth campaign against the Navajos, like Sherman’s march to the sea in Georgia. 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.⁵⁵ The Army called this place Fort Sumner; the Navajos called it Hwééldi.⁵⁶

Carson’s campaign was carried out with “frightful thoroughness.”⁵⁷ There were relatively few battles, but the Army methodically marched through

51. TRIMBLE, *supra* note 41, at 141-42, 183-87 (explaining history of the three smaller portions of the reservation).

52. Archaeologists believe that Navajos were living in northern New Mexico by at least the 1500s and perhaps as early as 1300. MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 7. Navajos and Apaches are both Athabaskan speakers, as are Native Americans living in Canada. This has led many anthropologists to theorize that the ancestors of both Navajos and Apaches emigrated from the north to the southwest. Archaeologists studying linguistic differences theorize that Navajo and Apache had become distinct languages by about 1700 and that both languages had separated from their northern roots about one thousand years ago. *Id.* at 6.

53. CLYDE BENALLY ET AL., *DINÉJÍ NÁKÉÉ’ NÁÁHANE’*: A UTAH NAVAJO HISTORY 83 (1982); MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 7 (noting sixteen dates indicating Navajo sites north of the San Juan River ranging from 1700 to 1800).

54. Their oral tradition proudly proclaims that they were never “slaves” of the white man. Interview with James Eddie, *supra* note 41; *see also* Maryboy & Begay, *supra* note 25, at 284.

55. TRIMBLE, *supra* note 41, at 138.

56. Hwééldi is thought to be a corruption of the Spanish word for fort, “fuerte.” LAURANCE D. LINFORD, *NAVAJO PLACES: HISTORY, LEGEND, LANDSCAPE* 207 (2000).

57. TRIMBLE, *supra* note 41, at 138.

Navajoland, burning hogans and fields, driving off the Navajos' livestock, and chopping down their fruit trees.⁵⁸ To avoid starvation, the Navajos surrendered, some eight thousand in all.⁵⁹ Under armed guard, the Navajos were marched the three hundred miles from their homeland to Fort Sumner.⁶⁰ The winter of the march was extraordinarily cold.⁶¹ Hundreds died on the march; elders who could not keep up were sometimes shot; children were seized by slavers tracking the line of march.⁶²

Navajo history refers to this forced march as the Long Walk, and it became a formative episode in the evolution of the Navajo nation.⁶³ 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 Walk and four years of shared captivity in Hwééldi changed that.⁶⁴

The three smaller, separate reservations came into existence at this time. Both the Ramah and Alamo Navajo communities were founded by families that had escaped from Fort Sumner prior to the formal release of the Navajo in 1864.⁶⁵ The Cañoncito Navajos had begun to separate from the main band even before the Long Walk.⁶⁶ This group advocated peace with the whites and even acted as scouts for the Army during roundups, earning themselves the name "Enemy Diné."⁶⁷ These groups did not fully share in the traumatic experience of the Long Walk and Hwééldi. Neither did the Montezuma Creek Navajos. Unlike the others, however, the Montezuma Creek Navajos have never been recognized as a separate band.⁶⁸

The Navajos involved in this litigation, whom I have been calling the Montezuma Creek Navajos, did not include all Navajos living in San Juan County, but rather a subgroup living near (from a rural point of view) one

58. BENALLY ET AL., *supra* note 53, at 127-29; Maryboy & Begay, *supra* note 25, at 281.

59. BENALLY ET AL., *supra* note 53, at 130.

60. *Id.*

61. Maryboy & Begay, *supra* note 25, at 282.

62. TRIMBLE, *supra* note 41, at 139; Maryboy & Begay, *supra* note 25, at 282-83.

63. Maryboy & Begay, *supra* note 25, at 279 (referring to the Long Walk and the incarceration at Fort Sumner as "seminal" events in Navajo history).

64. BENALLY ET AL., *supra* note 53, at 136 (referring to the Navajos' "new sense of unity gained from their experience at Hwééldi").

65. TRIMBLE, *supra* note 41, at 141-42. The Alamo Navajo community was also partially founded by refugees from Spanish slavemasters. *Id.* at 142.

66. *Id.* at 135.

67. *Id.* "Diné" is the Navajo word describing the Navajo people collectively. *See id.* at 123.

68. One scholar has argued that the Utah Navajos are "the forgotten people of the Navajo nation." Ansson, *supra* note 48, at 573; *see also* TRIMBLE, *supra* note 41, at 183.

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 150 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.⁶⁹ One descendant of a plaintiff claimed that originally there were only four clans in the area, all interrelated through a man called K'aayeli (Man with a Quiver).⁷⁰

The Montezuma Creek Navajos followed the traditional Navajo pastoral lifestyle based upon herding.⁷¹ People resided in widely scattered camps or outfits made up of extended families living in one or more hogans clustered together.⁷² 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.⁷³

The Navajos, like many Native American groups, have a strong connection to the land where they live. Traditionally, at birth, a 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.⁷⁴ "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."⁷⁵

Prior to the coming of the white man, there were no other groups with whom the Navajos had to compete for grazing in the Montezuma Creek area. Although Utes were certainly present, their use of the area was primarily for hunting.⁷⁶ From the beginning, Navajos objected to the white man's

69. *Hatahley v. United States*, 351 U.S. 173, 174 (1956).

70. Interview with Frank Benally, Member, Navajo Tribe, in Blanding, Utah (Oct. 6, 2000). "[A]lmost 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.

71. "[T]ranshumance, moving about with the flocks over wide areas, constituted the typical residence pattern of Navajos both before and after Fort Sumner." SHEPARDSON & HAMMOND, *supra* note 70, at 38.

72. *Id.* at 15.

73. *Id.*

74. ROBERT S. MCPHERSON, *SACRED LAND, SACRED VIEW: NAVAJO PERCEPTIONS OF THE FOUR CORNERS REGION* 4 (1992) [hereinafter MCPHERSON, *SACRED LAND*].

75. MCPHERSON, *HISTORY*, *supra* note 37, at 14.

76. ROBERT S. MCPHERSON, *THE NORTHERN NAVAJO FRONTIER 1860-1900: EXPANSION*

encroaching livestock along Montezuma Creek and other areas.⁷⁷ By the turn of the century, the ranchers and Navajo herders were engaged in what would become more than fifty years of grazing disputes.

b) The Ranchers

Prior to the late 1870s, European contact was both slight and transitory in the southeastern corner of what would become the state of Utah. The Spanish friars Dominguez and Escalante skirted the area in 1776 during their exploration of routes from Sante Fe to the California missions.⁷⁸ Mountain men and trappers were hunting in the area by the 1820s.⁷⁹ In the mid-1800s, Geographical Survey parties were mapping in the area.⁸⁰

In the late 1870s, a number of small ranchers entered the country, “drift[ing] before the movement of the larger frontier.”⁸¹ By 1880, the large cattle outfits had arrived and began buying out the smaller operations and taking control of the grazing areas and the water sources.⁸² The Lacy (or Lacey) Cattle Company, also called the L.C., moved into the area around

THROUGH ADVERSITY 51 (1988) [hereinafter MCPHERSON, NORTHERN NAVAJO FRONTIER]. Utes also entered the area to conduct slave raids against the Navajos. *Id.* at 7.

77. Charles S. Peterson, *San Juan: A Hundred Years of Cattle, Sheep, and Dry Farms*, in SAN JUAN COUNTY, UTAH: PEOPLE, RESOURCES, AND HISTORY 171, 175 (Allan Kent Powell ed., 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. A piece published by the Utah State Historical Society states that only “a very few . . . [Navajos] may have lived in San Juan County prior to 1861” and that they became more numerous only after that time. Gary L. Shumway, *Blanding: The Making of a Community*, in SAN JUAN COUNTY, UTAH: PEOPLE, RESOURCES, AND HISTORY, *supra* note 77, at 131, 133.

78. Allan Kent Powell, *Introduction* to SAN JUAN COUNTY, UTAH: PEOPLE, RESOURCES, AND HISTORY 1, 1-2 (Allan Kent Powell ed., 1983); MCPHERSON, HISTORY, *supra* note 37, at 76-77.

79. MCPHERSON, HISTORY, *supra* note 37, at 85-86.

80. Gregory C. Thompson, *Utah’s Indian Country: The American Indian Experience in San Juan County, 1700-1980*, in SAN JUAN COUNTY, UTAH: PEOPLE, RESOURCES, AND HISTORY, *supra* note 77, at 51, 57-58. One member of the survey party “met a group of Indians in the Montezuma Creek area that forced him to beat a hasty retreat toward Colorado.” *Id.* at 58. In 1874, one of the first photographs of the area was taken of an Ancestral Puebloan ruin in McElmo Canyon by William Henry Jackson, a photographer with the Hayden Survey. David Roberts, *Riddles of the Anasazi*, SMITHSONIAN, July 2003, at 72, 78; *see also* RICHARD A. BARTLETT, GREAT SURVEYS OF THE AMERICAN WEST 115-16 (1962) (quoting from Jackson’s diary regarding the making of the photograph).

81. Peterson, *supra* note 77, at 174; *see also* MCPHERSON, HISTORY, *supra* note 37, at 172.

82. MCPHERSON, HISTORY, *supra* note 37, at 172.

Montezuma and Recapture Creeks, driving in an estimated 17,000 head of cattle from the Texas Panhandle.⁸³

A few homesteaders had also settled in the area. In 1877, “the first recorded white settler, Peter Shirts” established a homestead at the mouth of Montezuma Creek on the San Juan River.⁸⁴ By the following year, there were eighteen families (seventy people) settled in McElmo Canyon and along the San Juan River.⁸⁵ Prospectors also began entering the region. In 1883, Cass Hite found placer gold on the San Juan at the mouth of White Canyon.⁸⁶ Hite’s report set off a minor gold rush that lasted off-and-on for a decade or so.⁸⁷

None of these groups was to shape the future of this area as much as the final wave of immigrants: the Mormons. Mormon settlers entered the area from the west,⁸⁸ moving eastward against the westward flow of most pioneers. The settlers came at the behest of church officials who wished both to claim agricultural lands in the Utah territory for Mormon settlement and to erect a bulwark against encroaching non-Mormon settlement from the east.⁸⁹

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,⁹⁰ which meant that, at least in their own eyes, their actions were not purely economic. They came to San Juan County because their God had “called” them on a mission to settle it and appointed it as their piece of the promised land; no doubt this would color their later perception of their right to the land.⁹¹

Thus, both the Montezuma Creek Navajos and the Mormon settlers had a deeper connection to the land than was usual among twentieth-century Americans. Both groups had a spiritual connection to the land⁹² that went

83. *Id.* at 172; see also Peterson, *supra* note 77, at 175-77.

84. MCPHERSON, HISTORY, *supra* note 37, at 96.

85. *Id.* at 122.

86. *Id.* at 242.

87. *Id.* at 126, 242, 244.

88. Allan Kent Powell, *The Hole-in-the-Rock Trail a Century Later*, in SAN JUAN COUNTY, UTAH: PEOPLE, RESOURCES, AND HISTORY, *supra* note 77, at 89, 95.

89. *Id.* at 92-93; MCPHERSON, HISTORY, *supra* note 37, at 97.

90. MCPHERSON, NORTHERN NAVAJO FRONTIER, *supra* note 76, at 24.

91. *Id.* at 26-27. “[T]he Mormon God was with His elect, guiding and directing them to the lands in which they were to live, just as the Navajos were supernaturally guided and protected in their territory.” *Id.* at 26.

92. *E.g.*, Shumway, *supra* note 77, at 137 (quoting one of the original settlers of Blanding, Utah, who said the townsite “had been appointed as our promised land”). “An important concept shared by both religions [Mormon and Navajo] was that of a promised land.”

beyond merely looking to it for physical sustenance. This profound connection to place on the part of both groups is the emotional engine that drives the tension between them.

The story of the Mormons' arrival in San Juan County is a saga of epic proportions. An initial exploring party of thirty men, two women, and eight children arrived in mid-1879 and established a small settlement, optimistically named Fort Montezuma, on the San Juan a little upstream from the mouth of Montezuma Creek.⁹³ 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 would 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.”⁹⁴ 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 forty-five-foot sheer cliff followed by a dugway across a long slickrock slope, across the Colorado River, over more slickrock and more sand, up and down more cliffs, hacking a passageway through juniper-piñon forests, struggling through blizzards and cold, all without the loss of a single human life.⁹⁵ It has been pointed out that some wagon trains “traveled half the continent in less time than it took [this group] to cross the corner of one state.”⁹⁶

Taking their cue from the big cattle outfits, the Mormons in San Juan County, unlike Mormons who settled elsewhere, moved away from farming and into cooperative livestock management.⁹⁷ 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.”⁹⁸ Although the Mormons adopted Texan ranching ways, they did not mingle with the

MCPHERSON, NORTHERN NAVAJO FRONTIER, *supra* note 76, at 24-25.

93. MCPHERSON, HISTORY, *supra* note 37, at 97; *see also* Powell, *supra* note 88, at 95-113.

94. STEGNER, *supra* note 38, at 116.

95. Powell, *supra* note 88, at 89-114. The river gorge at the Hole-in-the-Rock crossing is 1200 feet deep. MCPHERSON, HISTORY, *supra* note 37, at 98.

96. *Id.* at 113 (quoting DAVID LAVENDER, ONE MAN'S WEST 184 (1964)).

97. Peterson, *supra* note 77, at 175.

98. *Id.*; *see also* MCPHERSON, HISTORY, *supra* note 37, at 173.

cowboys. In fact, they shunned them and denounced their hard-living lifestyle.⁹⁹

The Mormons turned out to be “better stayers.”¹⁰⁰ The early 1880s had been a wet era, but the 1890s were a time of drought.¹⁰¹ 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.”¹⁰² Eventually, the Mormons took control of the livestock industry in the county. Their descendants would continue to dominate the industry through the middle of the twentieth century.

A second wave of Mormon immigration to San Juan County occurred early in the twentieth century. Between 1912 and 1916, an influx of Mormon “Pachecoites” from Mexico arrived.¹⁰³ These were descendants of Mormon polygamists who “had fled south of the border during the intense antipolygamy activity of the 1870s and 1880s.”¹⁰⁴ These Mormon expatriates were now threatened by Pancho Villa and other Mexican revolutionaries and returned to Utah in order to avoid the revolutionary violence.¹⁰⁵ Because the available ranching land had been claimed by the original Mormon settlers, these new immigrants tended to be craftsmen and laborers, ranch hands rather than ranch owners.¹⁰⁶

With the demise of the big Texan outfits by the late 1890s, the ranchers’ only significant competition for rangeland came from Navajo livestock holders.¹⁰⁷ 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.

99. Peterson, *supra* note 77, at 176.

100. *Id.* at 181.

101. MCPHERSON, HISTORY, *supra* note 37, at 174; Peterson, *supra* note 77, at 180.

102. Peterson, *supra* note 77, at 180.

103. Coincidentally, one of the government’s primary witnesses, Dee Black, the range aide 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 1912. First Trial Transcript, *supra* note 18, at 383, 457.

104. MCPHERSON, HISTORY, *supra* note 37, at 112.

105. *Id.*

106. Clarence Rogers, *Personal Reminiscences of San Juan County*, in SAN JUAN COUNTY, UTAH: PEOPLE, RESOURCES, AND HISTORY, *supra* note 77, at 153, 158.

107. MCPHERSON, HISTORY, *supra* note 37, at 173.

c) *The BLM*

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

“The vast majority of the BLM lands are the remnants of the original public domain following 200 years of land grants . . . [and] withdrawals.”¹⁰⁸ In the beginning, federal land policy focused on selling the public lands as a source of revenue for the federal government.¹⁰⁹ By 1812, sales were so brisk that Congress created the General Land Office (GLO) to oversee the transfers of title.¹¹⁰ Originally placed within the Treasury Department (no doubt reflecting its primary purpose of generating revenue), in 1849 it was transferred to the new Department of the Interior.¹¹¹

In 1841, Congress passed the first general homesteading statute, the Preemption Law of 1841.¹¹² This law, which has been called a “frontier triumph,”¹¹³ allowed heads of families, widows, and single men over twenty-one, who were either citizens or intending to become citizens, a one-time privilege of entering and cultivating up to 160 acres of public land at a minimum price.¹¹⁴ Under the Homestead Act of 1862, public lands could be obtained “free” after five years of residence and cultivation.¹¹⁵ 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.¹¹⁶

108. Rod Greeno, *Who Controls the Bureau of Land Management?*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 51, 51 (1990-1991).

109. 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 until the Civil War. *Id.* at 11-12.

110. *Id.* at 9.

111. *Id.*

112. *Id.* at 13.

113. *Id.* (quoting historian Roy Robbins).

114. *Id.*

115. *Id.* at 14, 16.

116. *Id.* at 35.

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, mining, lumbering, and irrigation projects.¹¹⁷ By the end of the century, as the remaining “public domain was rapidly diminishing,”¹¹⁸ the concept of conservation of public lands began to take hold.¹¹⁹

It is interesting to note that, while grazing was always an important use of the public lands, it was not recognized as an independent basis for acquiring public land until the Stockraising Homestead Law of 1916.¹²⁰ 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 public range in the late nineteenth and early twentieth centuries was basically unregulated. This led to what is called the “tragedy of the commons.”¹²¹ Having no vested interest in the land, ranchers put as many animals as they could on the range, which resulted in severe overgrazing.¹²² As one federal official put it, “It was a clear case of first come, first served and the devil take the hindmost.”¹²³ 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 taken seriously.¹²⁴

Opposition from stockmen to the idea of paying for what they were currently using for free, as well as a states’ rights movement seeking to cede federal public lands to the states, held up passage of any grazing-lease bill until 1934, when the Taylor Grazing Act was passed.¹²⁵ A Division of Grazing had been established within the Department of the Interior in the

117. *Id.* at 16-20, 22-23.

118. *Id.* at 26.

119. *Id.* at 28.

120. *Id.* at 36.

121. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968). 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.” *Id.*

122. It is estimated that in the mid-1880s the large cattle companies were grazing as many as 100,000 head of cattle in southeastern Utah. MCPHERSON, *NORTHERN NAVAJO FRONTIER*, *supra* note 76, at 56.

123. MUHN & STUART, *supra* note 109, at 35 (quoting Will C. Barnes, Chief of Grazing for the Forest Service, in 1926).

124. *Id.* at 35-36.

125. *Id.* at 37.

1930s to administer the leases under the Act.¹²⁶ 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.¹²⁷ Civilian Conservation Corps (CCC) workers were enlisted to develop water sources and erect fencing as part of the move to improve range management.¹²⁸ In 1941, the Division of Grazing was renamed the U.S. Grazing Service and, reflecting its importance to western interests, moved from Washington, D.C. to Salt Lake City.¹²⁹

World War II brought the conservation and range-management work of the U.S. Grazing Service to a halt,¹³⁰ as men and energy were redirected to the war effort. At the same time, livestock trespasses increased in an effort to meet the wartime demand for beef.¹³¹ 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 value and the Service proposed to triple them.¹³² Opposition to any fee increase was fierce, especially among the Western states. At the same time, the House Appropriations Committee was pressuring the Service to become mostly self-sufficient.¹³³ The Service ultimately dropped the attempt to increase fees, and the House retaliated by slashing its budget.¹³⁴

Interior Department 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.¹³⁵

By this time, the range in San Juan County (and indeed much of the West) was severely degraded as a result of overgrazing.¹³⁶ The BLM was thus faced

126. *Id.* at 37-38. There had been some question as to whether the Department of the Interior or the Department of Agriculture (which included the Forest Service) would administer the grazing leases, but the Forest Service had alienated ranching interests by proposing to raise grazing fees in the national forests. *Id.* at 36.

127. *Id.* at 39.

128. *Id.* at 41.

129. *Id.*

130. *Id.* at 45-47.

131. *Id.* at 47.

132. *Id.*

133. *Id.* at 48.

134. *Id.*

135. *Id.* at 48-49.

136. *See, e.g.,* Memorandum from Warren J. Gray, Acting Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Sept. 2, 1949) (contained in Plaintiffs' Exhibit 13,

with the daunting task of accommodating scientific range management to the political realities of the time and place. As the direct descendant of the Grazing Service, the BLM inherited the ranchers' ill will from the earlier attempt to raise grazing fees. At the same time, it needed to establish its credibility as an effective steward of the land. It 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.¹³⁷ 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.¹³⁸

Hatahley v. United States, No. C-36-53 (D. Utah Jan. 22, 1954)).

137. See, e.g., Memorandum from Dale H. Kinnaman, Dist. Grazier, BLM, to Reg'l Adm'r, Branch of Range Mgmt., BLM (Aug. 31, 1948) (contained in Plaintiffs' Exhibit 13, *Hatahley*, No. C-36-53) (stating 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 W. Redd, rancher, to Chelsey P. Seely, Reg'l Chief, BLM (Sept. 20, 1948) (contained in Plaintiffs' Exhibit 13, *Hatahley*, No. C-36-53) (asking for the BLM to do something about Indian use of the range); Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Apr. 29, 1949) (contained in Plaintiffs' Exhibit 13, *Hatahley*, No. C-36-53) (reporting that a cattleman threatened to take his stock to another part of the range if Indian use was not halted and stating that "if this organization expects to gain any respect . . . someone certainly had better get hot on the job"); Memorandum from H. Byron Mock, Reg'l Adm'r, Col.-Utah Region, BLM, to Dir., BLM (May 26, 1949) (contained in Plaintiffs' Exhibit 13, *Hatahley*, No. C-36-53) (noting "[n]umerous complaints . . . from the white users of the range in this district"); Memorandum from Dale H. Kinnaman, Range Manager, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Nov. 1, 1950) (contained in Plaintiffs' Exhibit 12, *Hatahley*, No. C-36-53) (noting that "[a]ll of the stockmen . . . have again been in this office requesting relief"); Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Jan. 24, 1951) (contained in Plaintiffs' Exhibit 8, *Hatahley*, No. C-36-53) (complaining that "our apparent inability to do anything about these matters, certainly hasn't caused our stock to boom the least bit").

138. Letter from H. Byron Mock, Reg'l Adm'r, BLM, to Dir., BLM (Oct. 18, 1948) (contained in Plaintiffs' Exhibit 13, *Hatahley*, No. C-36-53).

2. A Fifty-Year Range War: 1900-1952

The roundup and destruction of the Navajo horses and burros in 1952 and 1953 was not an isolated incident. It was the culmination of over fifty years of conflict between the Navajos and the white ranchers of San Juan County. In some ways this conflict was unusual: "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."¹³⁹ In other words, this ongoing conflict was in the nature of a "range war" over access to grazing lands.

In recounting the history of this conflict, I have divided the years into two periods, the pre-Taylor Grazing Act period, during which time both groups had the same legal right to use the public range, and after the passage of the Act in 1934, when use of the public lands was limited to permit-holders by law.

a) Pre-Taylor Grazing Act

Prior to the 1870s, there were no significant problems between the Navajos 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, but the tension was building between white ranchers and the Native Americans.¹⁴⁰ 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. In 1884, responding to conflict between Navajos and local ranchers over land, President Chester Arthur signed an executive order extending the northern boundary of the Navajo reservation from the Arizona-Utah state line to the San Juan River.¹⁴¹ The hope was 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 have been using only reservation lands, not the public lands. The Navajos, however, had as much right as anyone else to use the public lands for

139. Brugge, *supra* note 16, at 16.

140. "Turbulence was characteristic of events in this period . . ." MCPHERSON, NORTHERN FRONTIER, *supra* note 76, at 82. Although the Navajos were the only tribe that engaged in substantial grazing, both the Utes and Paiutes had run-ins with white residents over hunting and access to other subsistence resources. *Id.* at 61-62.

141. *Id.* at 83.

grazing.¹⁴² Navajos living north of the San Juan River, moreover, had little incentive to herd their stock across the river.¹⁴³

Over the next forty years, the reservation boundaries in the area would fluctuate five times.¹⁴⁴ None of the additions to the Navajo Reservation in Utah solved the grazing issues in the Montezuma Creek-McCracken Mesa area. As early as November 1917, Evan W. Estep, the new Bureau of Indian Affairs (BIA) superintendent at Shiprock, New Mexico, reported signs of impending trouble¹⁴⁵: “There are a number of Indians living off the reservation over in Utah, at lease [sic] four of whom have made considerable improvement on their places. [S]ome irrigation work of some value. I am advised that the white settlers in their vicinity [are] beginning to want to crowd them out”¹⁴⁶ In January 1921, an Indian agent stationed at Aneth, Utah reported to Estep, “We have been having considerable trouble with the sheep and cattlemen adjoining the reservation on the north. It has always been [sic] troublesome problem for years”¹⁴⁷ Estep then wrote to the Commissioner of Indian Affairs:

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 it's [sic] membership towards

142. *Id.* at 82.

143. In the traditional Navajo world-view, the San Juan River is a powerful being, and crossing it inspired fear. MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 68.

144. After the 1884 addition to the reservation, mining interests lobbying for and receiving the return of 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 degrees) to be removed from the Navajo reservation. MCPHERSON, *NORTHERN NAVAJO FRONTIER*, *supra* note 76, at 88; MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 18-19. 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].” MCPHERSON, *NORTHERN NAVAJO FRONTIER*, *supra* note 76, at 91; Ansson, *supra* note 48, at 576 n.153. Then, in 1908, the Paiute Strip was again added to the reservation. MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 18. Owners of mineral interests, this time in oil, almost immediately began politicking for the return of these lands to the public domain and, in 1922, much of the Paiute Strip was again taken from the reservation and once more placed in the public domain. MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 19.

145. Perhaps it is no coincidence that this was right after the second wave of Mormon immigration to the county, an event that probably put new pressure on the already-stretched-thin grazing resources. *See supra* text accompanying notes 103-106.

146. Brugge, *supra* note 16, at 166.

147. *Id.* at 168.

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.¹⁴⁸

The farm agent for the Navajos at Aneth had a slightly different explanation for the increasing tension between whites and Navajos: "On [account] of the open range being taken up by settlers the sheep and cattlemen are engaged in a scramble for what range is left"¹⁴⁹

In 1923 and 1924, in an effort to protect the interests of Montezuma Creek Navajos who had been living "off the reservation" for many years, an allotting agent was sent to assist the Navajos in preparing homestead applications.¹⁵⁰ Of the families involved in the later *Hatahley* litigation, several filed for their allotments.¹⁵¹ The allotments were allowed in 1923, and patents were issued

148. *Id.* at 169-70 (letter of Feb. 5, 1921).

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

150. Brugge, *supra* note 16, at 171.

151. 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 Navajos adopted European names, e.g., Carolyn (sometimes spelled Caroline) Rentz, but would still be known among other Navajos by their Navajo names, e.g., Carolyn Rentz was also known as Nagashi Bitashie. *Id.* at 167-68. Adding further confusion, the spelling of Navajo names at that time was not standardized, e.g., Tse-Kisi/Sakizzie.

Comparing the list of the allotments noted *id.* at 171-76 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. Apparently by the time of the litigation he was deceased, as Widow Sleepy is one of the plaintiffs.

Natone Begay/Bega. 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/T. T. Sone. He had been living on his allotment since 1921.

In addition, Carolyn Rentz, the mother of plaintiff Mary Jay, filed an application asserting she had been living on her land since 1903.

Based upon the similarity in the last names, another possible correlation exists between Slim Todachennie and the allotment application of Laura Deschenne.

in 1925.¹⁵² Not all of the Montezuma Creek Navajos, however, were helped in making applications. Apparently, the allotting agent was re-assigned before all of the applications were prepared.¹⁵³ Moreover, the allotments were for only 160 acres, which was not sufficient to provide grazing for the typical Navajo sheep herd.¹⁵⁴ And in at least one instance, the fact that a 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.¹⁵⁵

“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.”¹⁵⁶ 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.¹⁵⁷

In 1933, the final adjustment in this period to the reservation boundaries in Utah occurred.¹⁵⁸ 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 then north just past the Aneth area (which had been added in 1905), was now brought within the reservation.

The negotiations over the Aneth Extension spanned several years (1930-1933) and implicated the grazing problems in the Montezuma Creek area. In September 1932, Field Agent Radcliffe, Superintendent McCray, and local stockman S.J. Jensen visited the area as part of the negotiations relating to the addition of the Paiute Strip to the reservation.

152. Brugge, *supra* note 16, at 176.

153. *Id.* at 177.

154. 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. *Id.* at 176B.

155. See First Trial Transcript, *supra* note 18, at 171-75 (testimony of Jim Joe’s Daughter).

156. Brugge, *supra* note 16, at 176.

157. *Id.* at 177.

158. Additional land was added to the reservation in 1959. See *infra* text accompanying notes 345-46.

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 Creek¹⁵⁹

Cheschillige, the Chairman of the Navajo Council, wrote to the Commissioner of Indian Affairs in late 1932 arguing in favor of the Aneth Extension: "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" ¹⁶⁰

The whites took a different view. In opposing the addition of the Aneth Extension to the reservation, one said:

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 [by the white ranchers] and always has been. The few Indian families that are in this area are only trespassers that are off the reservations¹⁶¹

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.¹⁶² It was not until after the passage of the Taylor Grazing Act of 1934 that the use of the range was limited to specific permittees. The legislation adding the Aneth Extension to the Navajo reservation provided that no further allotments to individual Navajos would be permitted north of the San Juan River as a compromise to the ranching interests.¹⁶³

159. Brugge, *supra* note 16, at 196.

160. *Id.* at 197-98 (letter of Dec. 11, 1932).

161. *Id.* at 198 (letter of Jan. 25, 1933).

162. *See supra* text accompanying notes 121-24.

163. MCPHERSON, NAVAJO LAND, *supra* note 43, at 20. In 1934, Congress ended all allotments to individual Native Americans under the Indian Reorganization Act. 25 U.S.C. §§ 461-479 (2006). From our twenty-first-century perspective, this legislation appears patently discriminatory, precluding a segment of the population from the right to homestead based on their race.

b) Post-Taylor Grazing Act

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 the lease of grazing-district lands first “to landowners and homesteaders in or adjacent to the [public lands]” through leases with a term of one to ten years.¹⁶⁴ Priority was given to those with experience and with adequate private land to support their herds when not grazing on public lands.¹⁶⁵ Other criteria for issuing leases “weighed property ownership and traditional use.”¹⁶⁶

“In the fall [of 1934] it was decided to try to obtain Navajo rights to McCracken Mesa under the Taylor Grazing Act.”¹⁶⁷ A report to the Commissioner of Indian Affairs 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. Rodcliffe [sic], 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 the 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 thier [sic] 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 that we have [a] very strong and indisputable claim on the so-called McCracken Mesa.¹⁶⁸

Less than a year later, it appears that the Navajos had been shut out of the permitting process.

164. MUHN & STUART, *supra* note 109, at 37.

165. *Id.* at 38.

166. *Id.*

167. Brugge, *supra* note 16, at 203.

168. *Id.* at 203-04 (quoting letter of forester William Zeh, dated Nov. 9, 1934).

In June 1935, Utah Grazing District No. 6 was established,¹⁶⁹ encompassing San Juan County (as well as portions of other counties). The first meeting of the Advisory Board of Grazing District No. 6 was held in September 1935. “[T]he Indians were not represented and no application was made for any allocation of grazing area for their use. The entire area was allocated to the neighboring white grazers.”¹⁷⁰ A local historian summarized the allocation process that excluded the Navajos as follows:

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.¹⁷¹

In November of that year, the first trespass notices were served on seven Navajos.¹⁷²

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 Mesa until then.¹⁷³ It was hoped, rather

169. BUREAU OF LAND MGMT., CHRONOLOGICAL HISTORY OF NAVAJO TRESPASS, UTAH DISTRICT #6 (1953) (contained in Plaintiffs’ Exhibit 11, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954)) [hereinafter CHRONOLOGY].

170. Brugge, *supra* note 16, at 212, 216 (quoting letter of allotting agent Charles E. Roblin to Forestry Service, Mar. 3, 1936). The “white grazers” were the ranchers in the Blanding area, members of Grazing District No. 6, who were primarily descendants of the original Mormon settlers. This connection between the white ranchers in the Montezuma Creek area and the LDS Church is illustrated by an incident from 1950 where an LDS Church official was present at a meeting of the white ranchers and indicated that the Church would support the ranchers. Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg’l Adm’r, BLM (Nov. 19, 1950) (contained in Plaintiffs’ Exhibit 12, *Hatahley*, No. C-36-53).

171. Shumway, *supra* note 77, at 147-48; *see also id.* at 148 (recounting the story of Jim Vijil, 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).

172. CHRONOLOGY, *supra* note 169, at 1. The following were noted as being served: Jim Hammond, Anteze, Jim Jo Son-in-Law, Randolph, Big Girl, Caroline, and Goat Man. *Id.* at 12.

173. Brugge, *supra* note 16, at 215.

wistfully, that when permanent allocations were made under the permitting system the Navajos would be represented.¹⁷⁴

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.¹⁷⁵

In 1939 and 1940, trespass notices were served on more Navajos.¹⁷⁶ 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.¹⁷⁷ The permit allowed grazing in District No. 6 between October and May, the "winter range." During the summer, the permittees 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 1944.¹⁷⁸ During this period, of course, World War II was raging, and everyone's attention was elsewhere.

In July 1946, the Grazing Service became the BLM. During that year, the permits were issued to the seven families individually.¹⁷⁹ In October 1947, the

174. *See id.* at 216.

175. CHRONOLOGY, *supra* note 169, at 1.

176. *Id.* at 12 (noting Hosteen Hoskcon, Eddie Nockie, Randolph Benally, Jim Hatathaly, and S.P. Jones were served notices in 1940); Memorandum from Hugh M. Bryan, Range Conservationist, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Dec. 11, 1949) (contained in Plaintiffs' Exhibit 13, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954)) [hereinafter Dec. 1949 Memo] (noting that Bill Hattley, Randolph Benally, Nottony Baga, and Bece Laca Ason were served in October 1939; that S.P. Jones was in trespass but could not 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 CHRONOLOGY, *supra* note 169, were served in August 1940, with Sakizzie, Jim Hernandez, and Caroline Hugh Rentz also reported in trespass but not noted as served).

177. Dec. 1949 Memo, *supra* note 176 (noting that the families were those of Nakai Denet Begay, James Hatathly, Jim Joe, Randolph Bennally, S.P. Jones, Eddie Nockie, and Hosteen Hoskcon; noticeably absent from this list are Hosteen Sakizzie and Cyrus Begay, who would become prime movers in the litigation). In April 1942, the Office of Indian Affairs applied for grazing permits for an additional eleven Navajo families. "No adjudication of these applications are [sic] on record." CHRONOLOGY, *supra* note 169, at 2.

178. CHRONOLOGY, *supra* note 169, at 12.

179. 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, although I suspect the latter. *See* Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, BLM (Dec. 26, 1950) (contained in Plaintiffs' Exhibit 12, *Hatahley*, No. C-36-53) ("Issuance of individual

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.¹⁸⁰

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 was unsure what its enforcement powers were, and so for a few years nothing was done beyond serving the notices. Pressure was building, however, with white ranchers threatening to ignore the grazing regulations if the BLM was not going to enforce them against the Navajos.¹⁸¹

3. *The Range War Moves into the Courtroom*

Just as the roundup and destruction of the Navajo 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 evaluate it accurately, the case must be considered in the context of a series of related cases.

a) *First Salvo: United States v. Tse-Kesi*

In February 1950, the federal government filed a trespass suit, *United States v. Tse-Kesi*.¹⁸² 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,¹⁸³ 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 factual and procedural differences in the two cases, however, that issue was more explicitly presented in *Tse-Kesi*.

licenses . . . was done in order to treat them as individuals or like any other stockman operating on the Federal Range.”).

180. See Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Jan. 24, 1951) (contained in Plaintiffs' Exhibit 11, *Hatahley*, No. C-36-53). See also Memorandum from H. Byron Mock, Reg'l Adm'r, BLM, to Dir., BLM (Dec. 26, 1950) (contained in Plaintiffs' Exhibit 12, *Hatahley*, No. C-36-53).

181. See Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM at 2 (Apr. 29, 1949) (contained in Plaintiffs' Exhibit 13, *Hatahley*, No. C-36-53).

182. 93 F. Supp. 745, 746 (D. Utah 1950), *rev'd*, 191 F.2d 518 (10th Cir. 1951).

183. The individual Assistant U.S. Attorney was different, O.K. Clay for *Tse-Kesi* and Llewellyn O. Thomas for *Hatahley*. See, e.g., *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 921 (10th Cir. 1958); *Tse-Kesi*, 93 F. Supp. at 746. Knox Patterson was the attorney for the Navajos in both cases until his death in 1952, at which time he was replaced by Milton A. Oman. See, e.g., *Hatahley II*, 257 F.2d at 921; *Tse-Kesi*, 93 F. Supp. at 746.

From the government's perspective, the case was a sort of test case against two Navajos, Eddie Nakai and Hosteen Sakizzie.¹⁸⁴ I suspect that these two were chosen because they were both recognized leaders among the Navajos. They were recognized as such in part because they both were successful—they both had large herds, and both had access to cash. But in part, their leadership was also 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 were always accusing him of being a troublemaker,¹⁸⁵ but the Navajos describe him as a man who would not back down, one who stood up and said “no” when the whites told him to leave.¹⁸⁶

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.¹⁸⁷ A few months later, another forty-one individual Navajos were added as defendants.¹⁸⁸ There is significant overlap between all of these Navajos and the plaintiffs in the later *Hatahley* case.

184. There are several variations on the name Sakizzie in the records. In addition to Tse-Kizi, the name is also given as Sakeisy. See *supra* note 176. Eddie Nakai also appears as Eddie Nocki. *Id.*

185. See, e.g., Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt., BLM (Apr. 5, 1951) (contained in Plaintiffs' Exhibit 11, *Hatahley*, No. C-36-53).

186. NAVAJO OSHLEY, *THE JOURNEY OF NAVAJO OSHLEY: AN AUTOBIOGRAPHY AND LIFE HISTORY* 153 (Robert S. McPherson ed., 2000) (“They always tried to do things to a man called Tsék'izí [Crack between the Rocks], but his answer was always no.”); 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 Sakizzie and men like Bitter Water, Mister Jelly (Hastiin Jélii), and Old Eddie (Eddie Sání), who lived by the windmill. These men refused to move off their land. “We were born here,” they said, and stayed even when the white men came to chase them off. . . . When the 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.

Id.

187. Complaint at 2-3, *United States v. Tse-Kesi*, 93 F. Supp. 745 (D. Utah 1950) (Civ. No. 1803).

188. Authorization to Bring in Other Parties Defendant at 1-2, *Tse-Kesi*, 93 F. Supp. 745 (Civ. No. 1803). 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.” *Id.* at 1.

The case was assigned to Utah's newly appointed federal judge, Willis Ritter.¹⁸⁹ Because at this point in time there was but one federal judge in Utah, Ritter would sit as judge in the later *Hatahley* case as well.

The attorney representing the Navajos in this case was Knox Patterson. He would also represent them in the *Hatahley* case until his untimely death shortly before the case went to trial. Born in Texas in 1890, Patterson had been a Utah state senator from 1925 to 1933.¹⁹⁰ Prior to that he had served as district attorney in Moab and as a special assistant to the United States Attorney.¹⁹¹ 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."¹⁹²

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 Navajos filed their lawsuit).¹⁹³ 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.¹⁹⁴ According to one of the plaintiffs, they "passed the hat" in order to come up with the money to retain a lawyer.¹⁹⁵

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 Grand County district attorney in neighboring Moab. Perhaps they knew of him from one of the high-profile cases with which he had been involved.¹⁹⁶ Perhaps they knew of him from when he had earlier successfully

189. See *infra* text accompanying notes 356-94.

190. *S.L. Attorney, Ex-Senator, Claimed at 73*, SALT LAKE TRIB., Sept. 17, 1953, at 41.

191. *Id.*

192. *Id.*

193. Interview with James Eddie, *supra* note 41; Interview with Mary Jay, *supra* note 41.

194. Interview with James Eddie, *supra* note 41; Interview with Allen Ben, Member, Navajo Tribe, on the Navajo Reservation, San Juan County, Utah (Sept. 16, 2000).

195. Interview with Mary Jay, *supra* note 41.

196. For example, in 1944, he had participated in the defense of fifteen Short Creek FLDS (Fundamentalist Church of Jesus Christ of Latter-day Saints) polygamists arrested in a raid on their compound on the Utah-Arizona border. MARTHA SONNTAG BRADLEY, KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS 79 (1993). The Short Creek FLDS polygamists are the same group targeted in the Texas raid on the YFZ Ranch in 2008. *Polygamist Sect Faces Charges After Raid*, OKLAHOMAN (Oklahoma City), Apr. 9, 2008, at 8A. One of his oral arguments was recounted in the *Deseret News* article about the case. BRADLEY, *supra*, at 80 (citing *Cult Decision Due Saturday: Court Will Rule on Polygamy Charge*, DESERET NEWS (Salt Lake City), May 15, 1944, at 9).

defended a white trader in the Aneth area from a charge of manslaughter in the death of a Navajo.¹⁹⁷

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.¹⁹⁸ He argued that they were “an independent band” that had occupied the area continuously since at least 1848,¹⁹⁹ that they had “no tribal association of any kind with other tribes of Navajo Indians, having long since severed any tribal relations with such Indians”,²⁰⁰ that they never entered into any treaty with the United States,²⁰¹ and that they had their own form of government, “having three Head Men in the area who settle all disputes and controversies arising within the band.”²⁰² All of this sounds as if Patterson were laying a foundation for claiming federal recognition for the separate existence of this band.²⁰³ If the Montezuma Creek Navajos were recognized as a separate band, then any aboriginal rights they had to the disputed land would not have been terminated by any treaty signed by the Navajo Tribe. Unfortunately, this issue disappears from the litigation for reasons that will be discussed later.²⁰⁴

Patterson also filed a counterclaim that anticipated the later *Hatahley* case. The counterclaim alleged that government agents had wrongfully destroyed hogans, corrals, fields, and animals belonging to the defendants during the period of 1933 through 1950.²⁰⁵ It also reiterated the claim 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.”²⁰⁶ 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.²⁰⁷

197. MCPHERSON, NAVAJO LAND, *supra* note 43, at 59-60.

198. Answer, Affirmative Defense & Counterclaim at 1, 3-7, *United States v. Tse-Kesi*, 93 F. Supp. 745 (D. Utah 1950) (Civ. No. 1803).

199. *Id.* at 3.

200. *Id.* at 4.

201. *Id.*

202. *Id.* at 5.

203. According to one of the Navajos involved in the litigation, Patterson had said he was going to try to have them recognized as a separate and independent band. Interview with James Eddie, *supra* note 41.

204. *See infra* text accompanying notes 342-44.

205. Interestingly, at this time the defendants were claiming ten dollars per head for each horse killed. Particulars Under Counterclaim at 3, *Tse-Kesi*, 93 F. Supp. 745 (Civ. No. 1803).

206. *Id.* at 1.

207. Pretrial Order at 1, *Tse-Kesi*, 93 F. Supp. 745 (Civ. No. 1803).

On October 14, 1950, Judge Ritter dismissed the case.²⁰⁸ In his published opinion 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.²⁰⁹

He gave three reasons for dismissing the government's request for an injunction: first, he had no means to compel compliance with any injunction ordering the Navajos off the range, "it being impracticable to send down the numbers of United States Marshals necessary to patrol the territory"; second, he had no authority to allot other lands to the Navajos; and third the parties had not exhausted their administrative remedies.²¹⁰ 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."²¹¹ The government appealed to the Tenth Circuit.²¹²

b) Second Round: Young v. Felornia

While the dismissal of the federal case was being appealed, several white ranchers filed suit in January 1951 against the Navajos in state court in *Young*

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

(1) [T]he 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.

Id.

208. *United States v. Tse-Kesi*, 93 F. Supp. 745, 747 (D. Utah 1950), *rev'd*, 191 F.2d 518 (10th Cir. 1951).

209. *Id.* at 746.

210. *Id.* at 747.

211. *Id.*

212. *United States v. Tse-Kesi*, 191 F.2d 518 (10th Cir. 1951).

v. Felornia.²¹³ This case alleged that the Navajos were trespassing on grazing leases issued on state lands.²¹⁴

On August 30, 1951, the Tenth Circuit reinstated the federal lawsuit.²¹⁵ 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 the court's jurisdiction.²¹⁶ Judge Ritter then stayed the case at the district-court level until the resolution of the Utah state court case.²¹⁷

In September 1951, the state district court ruled that the Navajos had no aboriginal grazing rights and enjoined them from trespassing on state lands. The Navajos appealed to the Utah Supreme Court,²¹⁸ which upheld the lower court's decision in May 1952.²¹⁹ A petition for rehearing was filed and denied in July 1952.²²⁰ A petition for certiorari was then filed in October and denied in November.²²¹

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

213. 244 P.2d 862, 863 (Utah 1952).

214. 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. See LINCOLN INST. OF LAND POLICY, UTAH TRUST LANDS AND EDUCATION FUNDING I (2007), available at <http://www.lincolninst.edu/subcenters/managing-state-trust-lands/state/ed-funding-ut.pdf>.

215. *Tse-Kesi*, 191 F.2d at 521.

216. *Id.* at 520.

217. See Order at 2, *United States v. Tse-Kesi*, 93 F. Supp. 745 (D. Utah 1953) (Civ. No. 1803). Oddly enough, the federal lawsuit remained ongoing until June 27, 1953, which was subsequent to the filing of the *Hatahley* lawsuit. On that date, Ritter entered an order again dismissing the suit as moot, "it appearing to the Court upon representation by representatives of Bureau of Land Management that the defendants have returned to the Reservation and that there are no more trespasses." *Id.* at 3. Testimony at the first trial in *Hatahley*, which would occur in the fall of 1953, would establish that at least some of the defendants remained on the public range. See, e.g., First Trial Transcript, *supra* note 18, at 194-95.

218. At the time, Utah had no intermediate appellate court. The Utah Court of Appeals was created in 1987. Utah State Courts, Overview of the Court of Appeals, <http://www.utcourts.gov/courts/appell/overview.htm> (last visited Jan. 26, 2010).

219. *Young v. Felornia*, 244 P.2d 862, 865 (Utah 1952).

220. CHRONOLOGY, *supra* note 169, at 4.

221. *Felornia v. Young*, 344 U.S. 886 (1952) (denying certiorari to the Supreme Court of Utah).

and early summer of 1952, tensions increased. By July 1952, enforcement action against the Navajos 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 Navajos. When word came that the white men were rounding up their stock, the Navajos intervened and herded the stock away from the whites.²²² The next day, seven of them were told to go to the San Juan County seat, Monticello, and spent the night in jail.²²³

A few days later, on July 16, the deputy sheriff and three stockmen tried to impound another flock of Navajo sheep grazing on private land.²²⁴ 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 managed to prevent the sheep from being loaded.²²⁵

The deputy sheriff returned to the town of 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 from doing so. The sheriff handcuffed four of them together until the loading had been completed.²²⁶ One of the women had a babe in arms. She had been to school, and she started swearing at the men in English. "That just made things worse."²²⁷ There was some more pushing and shoving, the four handcuffed women got pushed on the ground,²²⁸ and the deputy sheriff ended up with a broken finger and had his badge torn from his shirt.²²⁹

Starting in September 1952, the BLM range manager for the district and the white ranchers on the advisory board for the federal grazing district hit on the idea of using the Utah Abandoned Horses Act to justify seizing and destroying the Navajo horses.²³⁰ They would locate a herd, wait until any Navajos in the

222. Transcript of Proceedings at 205-07, *United States v. Hatahley*, No. C-36-53 (D. Utah Apr. 5, 1957) [hereinafter Second Trial Transcript].

223. *Id.* at 207.

224. Memorandum from Dee Black, Range Aide, BLM & Robert C. Krumm, Range Manager, BLM, to Range Manager, BLM at 3 (July 21, 1952) (contained in Plaintiffs' Exhibit 11, *Hatahley*, No. C-36-53) [hereinafter Memo July 1952].

225. Second Trial Transcript, *supra* note 222, at 327-28.

226. Memo July 1952, *supra* note 224, at 3.

227. Interview of Rose Sakizzie, *supra* note 41.

228. *Id.*

229. Memo July 1952, *supra* note 224, at 3.

230. Although the Act did not require actual abandonment, at trial government witnesses damaged their credibility with Ritter by swearing that they did not know the owners of the

vicinity had left, and then seize the so-called 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.²³¹

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 to a packing plant within a short time, usually days. If a Navajo managed to track his or her horses to town before this occurred and tried to redeem them, he or she was either intimidated into giving up the horse, or was told that the redemption fee was a large sum. This went on until February and March of 1953, when the Navajos filed suit and Judge Ritter entered an injunction prohibiting the BLM from initiating further roundups. From this point in time onward, the legal wrangling is documented in the Tenth Circuit and Supreme Court opinions discussed above.

II. The Problem of Cross-Cultural Damages

*[W]e are dealing with a people who do not think about the value of a horse in terms of what we know as value, and somehow we have got to translate their term about that into our own conception*²³²

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.²³³ Yet his attempt to translate the Navajos' injuries into dollars and cents was unsuccessful, at least from the vantage of the appellate courts.

horses. *See, e.g.*, First Trial Transcript, *supra* note 18, at 572-73. Ritter noted: "[W]hen these fellows say they didn't know they were running off Indian horses. I just don't believe it. And I observed their conduct on the witness stand. They were evasive." *Id.* at 572.

231. First Trial Transcript, *supra* note 18, at 117-18, 197-200.

232. First Trial Transcript, *supra* note 18, at 365-66 (quoting Ritter, J.).

233. 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 . . ." First Trial Transcript, *supra* note 18, at 355. "[S]omehow we have got to translate their term about [the value of a horse] into our own conception . . ." *Id.* at 365-66. "I have to know what is the value of those horses in money. Now, I know that is a troublesome thing." *Id.* at 368.

After the first trial, the Judge Ritter made extensive findings of fact.²³⁴ These findings included “that there is no reasonable market value among white men for an Indian raised and trained horse”; “that the reasonable market value of a white man’s horse of average quality was \$300.00 per head”; that the plaintiffs did not sell their horses but bartered them for cows or sheep; that it would take the plaintiffs “not less than five years” to raise colts to replace the horses they had lost at a replacement cost of one thousand dollars each; and that the rental value of horses was five dollars per day.²³⁵ In awarding judgment to the plaintiffs, Judge Ritter 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 breakdown of the damages into their constituent parts.²³⁶ Indeed, in his findings, Judge Ritter 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 damages award, although the court did state “that the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered.”²³⁷ The United States Supreme Court reversed the Tenth Circuit on the issue of liability, holding that the plaintiffs’ complaint did state a claim under the Federal Tort Claims Act.²³⁸ On the issue of damages, the Court reiterated the black-letter law by stating that an award of damages must be made with “sufficient particularity” so that it may be reviewed.²³⁹ The Court then stated:

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 the 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.

234. The court’s findings of fact cover twenty-two legal-size pages. Findings of Fact & Conclusions of Law, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954) [hereinafter *Findings* (1954)].

235. *Id.* at 20.

236. *Id.* at 26.

237. *United States v. Hatahley (Hatahley I)*, 220 F.2d 666, 670 (10th Cir. 1955), *aff’d in part and rev’d in part*, 351 U.S. 173 (1956).

238. *Hatahley v. United States*, 351 U.S. 173, 181 (1956).

239. *Id.* at 182.

These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review.²⁴⁰

The Court then remanded the case to the district court for further findings on the question of damages.²⁴¹

On remand, Judge Ritter took additional evidence and at the conclusion of this second trial made further findings of fact. Because this second trial was limited by Ritter to the sole issue of consequential damages, the findings take up the bulk of the court's judgment: thirty-nine pages of findings of fact versus one page of conclusions of law.²⁴² The number of animals found to have been destroyed varied slightly from the first trial: 101 horses and 39 burros.²⁴³

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;²⁴⁴ fifty percent of the value of the reduction in the size of each plaintiff's herd of other livestock as an approximation of the value of the loss of use of the destroyed stock;²⁴⁵ and \$3500 per plaintiff for mental pain and suffering.²⁴⁶

On appeal from the second trial-court judgment, the Tenth Circuit accepted the three elements as appropriate for the award of damages, but criticized and rejected the district court's findings as to the amount of damages for each.²⁴⁷ 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

240. *Id.*

241. *Id.*

242. Findings (1957), *supra* note 40.

243. *Id.* at 5. 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 (1954), *supra* note 234. At trial, the number of destroyed animals was given as 116 horses and 38 burros. First Trial Transcript, *supra* note 18, at 365. No explanation is given in the second set of Findings for the difference.

244. Findings (1957), *supra* note 40, at 4.

245. *Id.* at 17.

246. *Id.* at 14-15.

247. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 924-25 (10th Cir. 1958). 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 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 the plaintiffs' animals and nothing else. *Id.* at 925.

correctly rejected the formula used to compute the value of the loss of use of the horses and burros. 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 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 outline the standard of review employed by appellate courts. 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. It is expected that, although the Tenth Circuit was found to be wrong when it held no liability existed, the court would be able to set aside what the Supreme Court held was an erroneous view of the case and look at the damages issue as if the court had no reservations about liability at all.²⁴⁸

A. The Value of the Destroyed Animals

The question of how to value the horses and burros taken from the Navajos was the central factual issue in the first trial.²⁴⁹ Although during the first trial there was some disagreement between the parties as to the exact number of animals involved,²⁵⁰ 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.²⁵¹ 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 between the Utah towns of Springville and Provo.²⁵² The animals were sold to the packing plant for three cents per pound, which means that a five-hundred-pound horse would have been sold for fifteen

248. Perhaps this is asking too much of the human mind.

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

250. First Trial Transcript, *supra* note 18, at 347-48.

251. *Id.* at 365. *But see* Findings (1957), *supra* note 40, at 5 (giving the total number as 101 horses and 39 burros).

252. First Trial Transcript, *supra* note 18, at 130.

dollars.²⁵³ The money received from the packing plant, a total of \$1700, went to the Advisory Board for the Grazing District.²⁵⁴

Several defense witnesses testified as to the market value of the destroyed horses. One of the many ways that the BLM range aide undermined his credibility with Judge Ritter was by testifying that, while the BLM received three cents per pound upon sale of the horses and burros for slaughter, the market value of the animals was only two cents a pound.²⁵⁵ An expert witness for the defendants in the first trial testified that the average cost of a saddle horse in the area was from \$100 to \$150, and that the stock rounded up by the BLM were below-average in quality.²⁵⁶ In addition, the defendant's witnesses testified that the animals rounded up were mostly unbroken—an assertion that was flatly denied by the plaintiffs' witnesses.²⁵⁷

The plaintiffs' expert witness, a horse dealer, testified that the market value of a "good bred use horse" in the area at the time of the roundup would be from \$250 to \$350.²⁵⁸ Individual Navajos also testified as to the value of their horses, but this evidence was inconsistent²⁵⁹ and difficult to understand, plagued both

253. *Id.* at 136. The BLM range aide testified that the horses shipped to the packing plant were "very small horses" weighing about 500 pounds each and that the BLM received three cents per pound. *Id.*

254. *Hatahley v. United States*, 351 U.S. 173, 176 (1956).

255. First Trial Transcript, *supra* note 18, at 135-36. The three-cents-per-pound figure was for the animals delivered to the plant, so perhaps the range aide was subtracting a penny on the theory that it reflected a delivery charge.

256. *Id.* 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 Paiute/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.

257. Compare *id.* at 136 (range aide testifies horses were "small, unbroke horses, most of them poor in flesh") with *id.* at 307 (plaintiff testifies, "These were all gentle horses, usable horses.").

258. *Id.* at 435.

259. 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. *Id.* at 370-71. This would indicate that he would take other animals worth from \$750 to \$1050 for a horse. But he also testified that he would sell a horse like those taken for \$300. *Id.* at 371. As a further complication, during the second trial, the findings of fact indicate that a cow was worth \$300; I suspect this was a typographical error, as both the trial testimony and findings from the first trial indicated the number was \$200. See Findings (1954), *supra* note 234, at 20. The court was thus faced with inconsistent testimony from the same witness. *Id.* at 373. According to the interpreter, what Sakizzie was getting at with the \$300 cash figure for a horse was an average value for all the horses taken, including colts. *Id.* at 374.

by translation difficulties and, I suspect, by the fact that the Navajos rarely sold their animals and thus had little basis for discovering their “market” value.²⁶⁰

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.²⁶¹ Because the Navajos 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 barely enough for survival due to the fact that the range was overgrazed. Thus, in training their animals the Navajos would tie them to a tree without food or water for up to three days.²⁶²

Testimony relating to the religious significance of the animals was also introduced. The plaintiffs’ witnesses testified that when a person dies, Navajos kill the person’s best horse, so that he or she is mounted in the next life.²⁶³ 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 in their fields, and providing mobility—especially to the elderly members of the community.²⁶⁴

At the second trial, Judge Ritter refused to allow any testimony from either party that went to the animals’ value, limiting testimony to consequential damages.²⁶⁵ In Judge Ritter’s view of things, the value of the destroyed animals had been determined at the first trial and upheld by the United States Supreme Court when it held generally that the findings of the trial judge were not invalid as a consequence of bias.²⁶⁶

Nevertheless, Judge Ritter made specific findings in the second trial regarding the average value of the animals taken. He justified the use of an average value as follows:

260. 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 somehow we have got to translate their term about that into our own conception” *Id.* at 365-66.

261. *Id.* at 288-89.

262. *E.g., id.*

263. *E.g., id.* at 204-05, 301.

264. *E.g., id.* at 202-04; *see also* Findings (1954), *supra* note 234, at 7.

265. *See, e.g.,* Second Trial Transcript, *supra* note 222, at 2, 112-13, 196.

266. *Id.*; *see also* *Hatahley v. United States*, 351 U.S. 173, 177 n.3 (1956) (finding that the trial was not “conducted so improperly as to vitiate [the trial court’s] findings”). *But see* *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 925 (10th Cir. 1958) (court’s statement does not apply to factual findings regarding damages).

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.²⁶⁷

The Findings then recited that Navajos would trade five cows or twenty-five to thirty-five head of sheep for a good horse; cows had a market value of \$300 a head and sheep had a value of about \$30 a head, giving a value of approximately \$1000 for a horse; if Sakizzie had sold horses, which he did not, he would have taken \$300 a head; the horse dealer's estimate was \$250 to \$350 for a stock horse; rental value was \$5 a day; and specifically "[t]he replacement cost of a horse of the type taken from the plaintiffs would be about \$1,000.00 a head."²⁶⁸

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.²⁶⁹

A list of the individual plaintiffs with the number of horses and burros taken from each is included.²⁷⁰

On appeal from the second trial, the Tenth Circuit considered itself free to review all of Ritter's findings as to damages:

267. Findings (1957), *supra* note 40, at 4.

268. *Id.* at 1-2. Judge Ritter's finding that cows had a market value of \$300 may be a typographical error. *See supra* note 259.

269. Findings (1957), *supra* note 40, at 3.

270. *Id.* at 4-5.

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.*²⁷¹

The Tenth Circuit's conclusion is debatable, however. 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 value (for example, the finding as to the market value of horses and burros) 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 damages were not individualized as to each plaintiff. The Supreme Court's opinion could be read as approving the finding as to market value of an average animal, but critiquing the trial court for failing to determine whether each animal lost was at, above, or below average. Nevertheless, the Tenth Circuit reviewed all aspects of damages, including the value of the destroyed animals.

As damages for the destroyed animals, 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."²⁷² Note that the Tenth Circuit seems to be equating market value with replacement cost. Certainly, in many cases, particularly where there is a functioning market in whatever is sought to be evaluated, market value and replacement cost are one and the same: where there is a functioning market, one can replace the lost item by purchasing another on the market. In this case, however, there was no functioning "market" for Indian horses or burros, and thus "market value" for the animals taken is difficult to determine.

The Tenth Circuit then goes on to state: "The plaintiffs did not prove the replacement cost of the animals, but relied upon a theory that the animals taken were unique because of their peculiar nature and training, and could not be replaced."²⁷³ This seems to ignore the finding quoted above that the replacement cost would be at least one thousands dollars. More surprisingly in view of that finding, the court then states that "[n]o consideration was given to replacement cost."²⁷⁴ The Tenth Circuit goes on to explain in particular where,

271. *Hatahley II*, 257 F.2d at 925 (emphasis added).

272. *Id.* at 923.

273. *Id.*

274. *Id.*

in its view, the trial court stumbled, stating, "The court rejected evidence of the availability of like animals in the immediate vicinity, and their value. This, we think, was error."²⁷⁵

It is not completely clear what the Tenth Circuit meant when it said the trial court "rejected evidence" regarding the availability of other animals.²⁷⁶ 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 up to ten dollars for each horse turned in.²⁷⁷

Judge Ritter allowed testimony about the horse-reduction program at the first trial.²⁷⁸ He also allowed 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.²⁷⁹ 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.²⁸⁰

If by saying the trial court rejected evidence of the availability of other animals the Tenth Circuit meant that Judge Ritter heard evidence and rejected it as not credible, then the appellate court's decision would seem to run afoul of the correct standard of review. Judge Ritter heard the conflicting testimony and found the testimony of the plaintiffs to be more credible.²⁸¹ He made no specific

275. *Id.*

276. 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 briefs.

277. *E.g.*, First Trial Transcript, *supra* note 18, at 305, 451; Second Trial Transcript, *supra* note 222, at 59, 112, 125.

278. *E.g.*, First Trial Transcript, *supra* note 18, at 305-06.

279. *Id.*

280. Second Trial Transcript, *supra* note 222, at 112.

281. 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 range aide that he sold the horses for meat at three cents per pound, but that the market value was two cents per pound. *See* First Trial Transcript, *supra* note 18, at 135-36. In addition, the range aide categorically denied having watched the release of Sakizzie's horses from his corral prior to rounding them up, *see id.* at 117, while the BLM's own files, put into evidence in the case, contain a letter from a rancher who wrote that the range aide did exactly that. *See* Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg'l Adm'r, Div. of Range Mgmt. (Nov. 13, 1952) (contained in Plaintiffs' Exhibit 11, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954)) (enclosing a letter dated Nov. 10, 1952 from Leland W. Redd, a prominent San Juan County rancher, to Wilford M. Burton, a Salt Lake City attorney). The same witness testified that he had no problems personally with the Navajos. First Trial Transcript, *supra* note 18, at

finding that the horse-reduction program was irrelevant, but that is the reasonable conclusion to draw from his remarks at the time that evidence was admitted.²⁸² 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 be overturned on appeal only if they are clearly erroneous, that is, lacking in any evidentiary support. Judge Ritter's finding that the replacement cost for the lost horses was approximately one thousand dollars had evidentiary support.

All of 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. As noted, however, Judge 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.²⁸³

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:

122. But this testimony was contradicted by testimony from several plaintiffs about run-ins they had had with him, leading Judge Ritter to comment that such testimony "is directed to the credibility of [the range aide]. He said he had no trouble with these people at all." *Id.* at 184. Moreover, the government's witnesses continually insisted that the abandoned-horse program was not targeting Indian livestock. *See, e.g., id.* at 78-80, 487. As Ritter noted:

One of the things that has been interesting in this lawsuit is how little everyone has ever heard about these Indians down there, no problems with the Indian livestock, we just have a general program to eliminate abandoned horses. It does not concern the Indians.

Now, somebody isn't being exactly frank with the Court about that. *Id.* at 491-92; *see infra* note 413 (commenting on racial silences).

282. *See* First Trial Transcript, *supra* note 18, at 305 (Judge Ritter commenting that the horses available through the program "are not first-class horses . . . [b]ut . . . are still eating up forage").

283. This would be ironic, given that in other instances the appellate court seems to have relied solely on the record from the first trial. *See infra* text accompanying notes 428-31. 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.

[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.²⁸⁴

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 for the actual loss of animals due to their inability to care properly for their flocks without horses.²⁸⁵

To prove the dollar equivalent of all of this would be difficult, even for a member of Anglo society. To do so for the Navajos would be nearly impossible. How, for example, does one attach a dollar amount to someone's inability to attend a distant "sing" or ceremony? Is it 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.²⁸⁶ The Findings note that the local trader testified that the Navajos' credit at the trading post, an amount based on the size of their flocks, had been cut in half since the taking of their horses.²⁸⁷ The Findings also note that the area had been in the grip of a drought for several years.²⁸⁸ 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, 1956.²⁸⁹

284. United States v. Hatahley (*Hatahley II*), 257 F.2d 920, 924 (10th Cir. 1958).

285. *Id.*

286. Findings (1957), *supra* note 40, at 17.

287. *Id.*

288. *Id.* at 16.

289. *Id.* at 17.

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 roundup of the horses and burros, their size at the time of trial, and the dollar equivalent of that reduction, divided in half.²⁹⁰

The Tenth Circuit lambastes this formula as erroneous for two reasons. First, it held 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.²⁹¹ I question whether this is appropriate, given that, although the Navajos sold off some lambs each year, at least half of their sheep and all of their goats were kept for their personal use as a source of food and wool.²⁹² A rule using profits to be made from the flock would be appropriate as a measure of damages where the flock is raised for sale, but not necessarily where the flock is kept for personal use.

Second, the court rejects the Ritter formula as "arbitrary, pure speculation, and clearly erroneous."²⁹³ 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 as if it were pulled out of the air.²⁹⁴ Moreover, the fifty percent of the reduced value of the flock is being asked to stand in for other things that are unrelated to flock size, such as a reduction in the size of the Navajos' gardens and their inability to travel to collect pinyon nuts and hunt deer and elk.²⁹⁵

The plaintiffs possibly could have used the rental value of a horse, an amount 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: "[I]t is limited to the time in which a prudent person would replace the destroyed horses and burros."²⁹⁶ That would bring the court back to the issue of whether the plaintiffs were able to obtain replacements for the destroyed horses and burros.

290. *Id.* at 22-40.

291. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 923 (10th Cir. 1958).

292. *See, e.g.*, Second Trial Transcript, *supra* note 222, at 25-26 (featuring testimony by Sakizzie that he sold "[j]ust a few lambs" every fall and killed sheep and goats for food); *id.* at 130 (containing testimony by Sakizzie that he sold about half of his lamb crop each year "[b]efore his horses were taken").

293. *Hatahley II*, 257 F.2d at 924.

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

295. Findings (1957), *supra* note 40, at 18-20.

296. *Hatahley II*, 257 F.2d at 924.

C. Pain and Suffering

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

The testimony about the Navajos' reliance on and fondness for their horses took an unexpected turn. After explaining how the loss of his horse was like a death in the family and how his wife had her favorite horse,²⁹⁷ one witness then added, almost as an afterthought, that they could eat the horses too.²⁹⁸

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 horses . . . in the face of plaintiffs' admissions, and the stipulation of their counsel, that the plaintiffs engaged in the practice of eating their horses."²⁹⁹ The latter does not preclude the former. Even white farm families have shared this perspective. In the memoirs of an eastern woman who married an Idaho rancher, she recounts how she had nursed a three-legged lamb and given it the name of Limpy; one day she cooked dinner, never considering where the lamb came from until one of her children asked, "Gi'me some more Limpy, please!"³⁰⁰

On the issue of communal pain and suffering, Judge Ritter 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

297. Second Trial Transcript, *supra* note 222, at 129.

298. *Id.* at 134-35.

299. Appellant's Statement of Points on Appeal at 3, *Hatahley II*, 257 F.2d 920 (No. 5717).

300. ANNIE PIKE GREENWOOD, *WE SAGEBRUSH FOLKS* 77 (1934).

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.”³⁰¹ Traditional Navajo life is much more centered on the group than is common in American society.³⁰² 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.”³⁰³ The contrast between two world-views could not be more stark or more starkly articulated. The overriding importance of community in the Navajo world-view stands in contrast to the determinedly individualistic world-view of American political science, as articulated by the Tenth Circuit. The question is not whether one world view is “better” than the other; the question is why the law is unable to recognize both as valid and award compensation accordingly.

Interestingly, a similar argument regarding the existence of a compensable communal loss was raised under very different circumstances in an event referred to as the “Buffalo Creek Disaster.”³⁰⁴ In that case, a mining-company dam in West Virginia failed in 1972, unleashing a flood that destroyed several rural communities along Buffalo Creek. Over one hundred individuals perished, mostly women and children.³⁰⁵ A lawsuit was brought on behalf of some six hundred residents,³⁰⁶ most of whom had suffered no physical injuries,³⁰⁷ had not been caught in the flood waters, and had not seen anyone die; indeed, some were not even in the valley that day.³⁰⁸ The plaintiffs’ attorneys brought in experts to make their case for damages arising from the mental suffering caused by the destruction of the plaintiffs’ community and argued that everyone in the

301. Findings (1957), *supra* note 40, at 14.

302. *E.g.*, TRIMBLE, *supra* note 41, at 189 (quoting a Navajo woman, who says her grandmother taught her that “[w]ithout your family, you were nothing. She taught me to be there for all my family”; quoting a Navajo man who says that “when you give a paycheck to a Native American[,] it’s supporting a lot of people”). Recall that the *Hatahley* plaintiffs were all interrelated by blood, marriage, or clan. *See supra* text accompanying notes 46 and 69-70.

303. *Hatahley II*, 257 F.2d at 925.

304. GERALD M. STERN, *THE BUFFALO CREEK DISASTER: THE STORY OF THE SURVIVORS’ UNPRECEDENTED LAWSUIT* (1976).

305. *Id.* at ix.

306. *Id.* at 185.

307. *Id.* at 60.

308. *Id.* at 110.

community was entitled to consequential damages for this “collective trauma.”³⁰⁹ 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”³¹⁰—analogous in many ways to the social structure of the Navajo clans. The case, however, settled before a jury had the opportunity to evaluate the claims.³¹¹

The destruction of the Montezuma Creek Navajos’ horses and burros was meant to drive them from their homes on the public range. It was an attack on their community. This attack was as much a “collective trauma” as the destruction of the coal miners’ community. Twenty years before the dam failed on Buffalo Creek, Judge Ritter had sought to remedy a similar communal loss.

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

*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.*³¹²

A. Racialized Power Structures

In this section, I 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 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 sheepmen. 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.

309. *Id.* at 212.

310. *Id.* at 213.

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

312. Willis W. Ritter, *Law and Social Progress*, Lecture 8: Our Changing Social World (Feb. 11, 1932), *quoted in* PATRICIA F. COWLEY & PARKER M. NIELSON, *THUNDER OVER ZION: THE LIFE OF CHIEF JUDGE WILLIS W. RITTER* 51-52 (2007).

For instance, it is difficult to read through the case files, particularly the BLM files,³¹³ and not be upset by the casual racism they contain. It is difficult from this remove to determine whether these comments reflect the generalized “background” prejudice of the times, a discriminatory intent specific to the individual, or both.

The sympathy of the BLM agents in San Juan County was decidedly in favor of the white ranchers.³¹⁴ This is not surprising as the BLM agents saw the ranchers as their primary constituents.³¹⁵ 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 memoranda ridiculing the way the Navajos spoke English and making them the butt of jokes.³¹⁶ There are memos questioning their integrity.³¹⁷ The memoranda consistently refer to “bucks” and “squaws” when speaking of the Navajos.³¹⁸ I suspect the range manager for the area, the author of most of the memoranda contained in the file, had a particular bias against Navajos. But the fact that he felt free to include his comments in an official government file arguably reflects a generalized, background prejudice.

313. 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 at the first trial, the original files were received into evidence with the understanding that copies would be made and the originals returned to the BLM. First Trial Transcript, *supra* note 18, at 565-66, 585-86. The exhibits in the court file at the National Archives, however, look suspiciously like they are the original agency files.

314. *Id.* at 261.

315. It has been claimed that “in the 1950s the BLM was a virtual captive of grazing interests.” Greeno, *supra* note 108, at 52.

316. *See, e.g.*, Memorandum from Dale H. Kinnaman, Dist. Grazier, BLM, to Reg’l Adm’r, Branch of Range Mgmt., BLM at 2 (Aug. 31, 1948) (contained in Plaintiffs’ Exhibit 13, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954)) [hereinafter Kinnaman Memo (1948)] (“Belitso’s outfit and Nocki’s outfit claim they can’t stay on Indian range in summer – ‘No watah’”); Navaho Case Pictures at 6 (Nov. 17, 1950) (contained in Plaintiffs’ Exhibit 12, *Hatahley*, No. C-36-53) (Dale H. Kinnaman describing a series of photographs: “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 Navaho. He carried a sharp pencil, for what, we could not find out. Ha Ha.”); Memorandum from Dale H. Kinnaman, Range Manager, to Reg’l Adm’r, Div. of Range Mgmt., BLM at 2 (Apr. 5, 1951) (contained in Plaintiffs’ Exhibit 11, *Hatahley*, No. C-36-53) (describing Sakizzie and Eddie Nakai as “bold[] and belligerent[]”).

317. *See, e.g.*, Kinnaman Memo (1948), *supra* note 316, at 2-3 (questioning the “apparent poverty stricken condition of these Indians”).

318. *See, e.g., id.* at 1.

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.” 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.³¹⁹ 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 unfenced.

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 in the first place 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. Initially, there was an enormous language barrier, which persisted until well into the twentieth century. When this was combined with these Navajos’ lack of access to government, either state,³²⁰ federal,³²¹ or tribal, it was not surprising that so few Navajos filed papers to homestead—what *is* surprising is that any of them did at all.³²² And eventually, even this possibility was removed. In 1933, Navajos were barred from filing further homestead applications, a statutory ban that was patently racially discriminatory.

319. See, e.g., Brugge, *supra* note 16, at 120 (noting that a sightseer from Bluff, Utah reported seeing Navajos only twice in an area where a number were known to be living).

320. In 1957, “Utah [became] the last state to allow Indians to vote.” Maryboy & Begay, *supra* note 25, at 296.

321. Federal citizenship was granted in 1924. *Id.* at 295.

322. Not that this helped. See *supra* text accompanying note 155 (testimony from Jim Joe’s Daughter that she was intimidated until she left her allotment and moved onto the reservation).

Being excluded from citizenship, and thus from access to government, meant that the Navajos were also vulnerable to the implicit violence that is the State³²³ 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 roundup and destruction of their horses in 1952 and 1953 is an example of the former. In 1931 and 1932, this same group of Navajos had some seventy head of horses killed by unknown persons, an example of the latter.³²⁴ They also had the example of By-a-lil-le³²⁵ and Posey³²⁶ as object lessons in the ever-present possibility of racialized violence. In the months leading up to and during the roundup, the Navajos had other examples of the implicit threat of violence.³²⁷ Judge Ritter commented in

323. See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610 n.22 (1986).

324. Brugge, *supra* note 16, at 196.

325. In 1907, an Indian agent and two cavalry troops conducted a surprise attack on the camp of a Navajo “troublemaker” named By-a-lil-le. Two Navajo men were killed, and another nine were incarcerated for two years at hard labor. MCPHERSON, HISTORY, *supra* note 37, at 130.

326. This 1923 incident, which started with the escape of two young Utes from jail and ended with Posey’s death, was called the “Posey War” or the “Last Indian Uprising.” See *id.* at 159-63.

327. 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 head, and another struck him in the leg. Second Trial Transcript, *supra* note 222, at 157-59.

This was not the only such incident. See, e.g., Letter from Knox Patterson to Sheriff and County Attorney, San Juan County, Utah (Jan. 15, 1951) (contained in Plaintiffs’ Exhibit 11, *Hatahley v. United States*, No. C-36-53 (D. Utah Jan. 22, 1954)) (alleging that three Navajo horses had been shot, two corrals burned, and a watering trough destroyed); Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg’l Adm’r, Div. of Range Mgmt., BLM at 1-2 (Sept. 10, 1951) (contained in Plaintiffs’ Exhibit 11, *Hatahley*, No. C-36-53) (describing a “fracas” at a “[s]ing” where shots were fired “into the ground” by law enforcement as a warning; it is not clear whether this is the same ceremony where Jimmy Jelly’s auto was shot); *cf.* Memorandum from Dale H. Kinnaman, Range Manager, BLM, to Reg’l Adm’r, BLM at 2-3 (Nov. 19, 1950) (contained in Plaintiffs’ Exhibit 12, *Hatahley*, No. C-36-53) (describing an incident of “gunplay” that consisted of a Navajo man “unstrapp[ing] the lid on his holster and put[ting] his hand on the butt of his pistol”).

One reader commented that this section on the background violence seemed like a

the first trial about the “great restraint” of the Navajos in the face of intense provocation,³²⁸ 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 while all users of the range, white and Navajo, had contributed to its overuse, whites were grazing many more animals than the Navajos, both in absolute numbers and proportionately. Yet within a very short time, the Navajos were completely shut out of the permitting process.

Finally, when enforcement of the grazing permits began, it again fell disproportionately on the Navajos.³²⁹ Any enforcement scheme will have areas of discretion—highway patrolmen, for example, rarely ticket someone who is going only one or two miles per hour over the posted speed limit, despite the fact that the speed limit is absolute in its terms. When this discretionary “wobble-room” in the enforcement of the grazing permits is examined, it appears that 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.³³⁰ This testimony was brought in to show that the roundup was not aimed at the Navajos per se, but instead was aimed at any unauthorized use of the range. Yet when asked what became of the whites’ horses, the range manager testified that the ranchers paid \$2.50 per horse for the cost of collecting the horses³³¹ and that the horses were returned to them.³³² 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 sixty dollars per horse to redeem them—far more than he could afford and decidedly more than what the white rancher was asked to pay.³³³

stereotype of a Hollywood Western come to life, only in the wrong century. It is precisely this aspect of the case that makes it so relevant to the history of race relations.

328. First Trial Transcript, *supra* note 18, at 580.

329. “There is considerable evidence in the record to show that the Utah abandoned horse statute was applied discriminatorily against the Indians.” *Hatahley v. United States*, 351 U.S. 173, 176 (1956).

330. First Trial Transcript, *supra* note 18, at 140.

331. *Id.* at 98.

332. *Id.* at 49, 99.

333. *Id.* at 315. 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

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—four young men and one young woman—tracked the horses into Blanding and discovered them in a corral.³³⁴ They testified that as they began to talk with the range aide about the horses, one rancher jumped into his car and left, shortly returning with another carload of men.³³⁵ These men got out of their car with weapons in their hands and, according to one of the Navajos, began playing around with the catches of their guns.³³⁶ Although the range aide testified that one of the men was just showing the others a new weapon,³³⁷ that explanation rings hollow given all the tension surrounding the roundup. 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.³³⁸

B. Law as a Paradoxical Tool

Initially, the law was used as a tool against the Navajos. The executive orders defining the Navajo reservation lands operated to define what land was and was not available to the Montezuma Creek Navajos. These orders were made without reference to the “on the ground” fact that they had been living on and using the Montezuma Creek area for at least 150 years and that they may have

about redeeming the horses, the range aide telephoned his boss, who said that it would cost sixty dollars per head to redeem them. *Id.* at 332. The range aide testified that his boss said that the cost of redeeming a horse would be two dollars per month and that he believed the Navajos' horses had been trespassing for two years. *Id.* at 414-15 (two years at two dollars per month would equal forty-eight dollars for a single horse). 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 sixty dollars per head, and the government tried to use his testimony to show that his horses were not worth that much, but Hatch, the trader who accompanied him to translate, claimed that what he said was that he did not have that much money. *Id.* at 340; *see also Hatahley*, 351 U.S. at 177.

There was another instance brought into testimony, again to show that enforcement was not aimed exclusively at Navajos. The range manager testified that four or five 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. First Trial Transcript, *supra* note 18, at 45. 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.

334. First Trial Transcript, *supra* note 18, at 249-50.

335. *Id.* at 250.

336. *Id.* at 252.

337. *Id.* at 410.

338. *Id.* at 250-51.

been functioning as a separate and independent band.³³⁹ Then there were the administrative actions under the Taylor Grazing Act shutting them out of the permitting process. Finally, law enforcement was used to arrest them for trespassing on lands the Montezuma Creek Navajos considered theirs, and litigation was used to deny their claim to the land.

Then, in what still seems to me an amazing move (but maybe not, given the Navajos' reputation for adaptability),³⁴⁰ the Montezuma Creek Navajos picked up the tool of the law and used it themselves. They filed lawsuits against the white ranchers and the government. Law gave 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 a "simple and primitive" band of Indians.³⁴¹ 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.

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, he probably was biased in his judging. My examination of the record, however, suggests a more complicated picture. Nevertheless, Ritter's life and philosophy predisposed him to be sympathetic to the Navajos' case, and at the time this would not have been true of many other judges.

Now, we could debate whether that use of the tool was 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 did not get that through the litigation.

339. See, e.g., *id.* at 257.

340. See, e.g., MCPHERSON, *NAVAJO LAND*, *supra* note 43, at 65-66. "Historically, the Diné have selectively adopted new ideas and technologies that fit their beliefs and physical needs." *Id.* at 85.

341. *Hatahley v. United States*, 351 U.S. 173, 174 (1956).

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.³⁴² Nevertheless, the issue of the right to access the land mostly disappears from the record, and the reason is hinted at in the following exchange. Milton Oman, the plaintiffs' attorney, reminded the court that he had 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.³⁴³

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. It is, however, unlikely that the land claims would have been resolved in the process of deciding this case, as all Indian land claims were to be resolved through the Indian Claims Commission (ICC).³⁴⁴ 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 1959, with plans for Glen Canyon Dam and the filling of its reservoir going forward, the federal government negotiated the transfer of land to the Navajo Reservation in compensation for the reservation land that was going to be submerged under Lake Powell.³⁴⁵ 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, which was 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 1953.³⁴⁶

342. First Trial Transcript, *supra* note 18, at 325-27.

343. *Id.* at 361.

344. *See, e.g., id.* at 258. *See generally* MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 59-68 (1997); H.D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* (1990).

345. *Maryboy & Begay*, *supra* note 25, at 301.

346. "The next natural extension [of the reservation] I should suppose would be right where

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.³⁴⁷ 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.³⁴⁸

Finally, I suspect the lawsuit stepped up the pace of what was probably inevitable: the Navajos’ move from reliance on livestock to vehicles. For example, in the Fruitland, Utah area in 1949, there were ten motor vehicles; by 1952, there were 150; by the mid-1960s, almost every camp had at least one vehicle.³⁴⁹ Here is an anecdote that highlights this: Sakizzie used the money he received in the litigation not to replace his horses, but to buy a tractor.³⁵⁰

IV. Of Prejudice and Partiality

*There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. . . . We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.*³⁵¹

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.³⁵² This seemed to me such an

these folks are living” First Trial Transcript, *supra* note 18, at 268-69.

347. See J. Lee Correll, *Navajo Frontiers in Utah and Troublous Times in Monument Valley*, 39 UTAH HIST. Q. 145, 147 n.6 (1971) (referring to testimony before the ICC by Tse K’izzi and Eddie Nakai).

348. See, e.g., *Sakizzie v. Utah Indian Affairs Comm’n*, 198 F. Supp. 218 (D. Utah 1961) (regarding royalties from oil production on Navajo lands); see also *Pioneer Hosteen Sakizzie Dies at 101*, NAVAJO TIMES (Window Rock, Ariz.), Sept. 28, 1972, at A-14 (Northern Navajo Fair edition) (stating that Sakizzie had testified in the horse case, the land case, and the oil case).

349. MCPHERSON, NAVAJO LAND, *supra* note 43, at 95.

350. *Pioneer Hosteen Sakizzie Dies at 101*, *supra* note 348, at A-14.

351. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 140-41 (1976) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921)).

352. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 925-26 (10th Cir. 1958).

unlikely situation that I felt compelled to investigate further. Not surprisingly, 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 blindfolded woman holding up the scales of justice.³⁵³ 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 himself or herself if there is a close personal connection to the subject matter of the lawsuit or to one of its participants. But beyond that, the concept of judicial impartiality becomes problematic.

Today, the idea of complete judicial impartiality seems somewhat naïve, although first-year law students are often taken aback at the suggestion that judges might be predisposed to rule in favor of one party or the other for reasons that have nothing to do with the merits of the case. It has long been acknowledged that “judicial decisions . . . are at least partially attributable to the personal values and experiences of the judges.”³⁵⁴ A recent empirical study confirmed that “extra-legal factors” played a part in judicial decisions.³⁵⁵ 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 created to legitimate judicial power or an aspiration to which judges should strive even though they may not achieve it.

In *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 by examining Judge Ritter’s personal background and his path to the judiciary, which was fraught with controversy. Then I closely examine the Tenth Circuit’s justification for removing Ritter from the *Hatahley* case and conclude that it is wanting.

353. “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, 178 (2000).

354. Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1552 (1966).

355. Sisk, *supra* note 353, at 179 (citing Gregory C. Sisk et al., *Charting the Influences on 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 judicial decisions, it also confirmed that, in accord with the prevailing model of the rule of law, judges are indeed influenced by precedent. *Id.*

A. Judge Ritter's Background

At the time the complaint was filed in March 1953, there was but one federal judge sitting in the U.S. District Court for the District of Utah. His name was Willis William Ritter, and he was only the third federal judge appointed for the District of Utah.³⁵⁶

Ritter was the first federal judge for the District of Utah to have been born and raised in Utah, although his family was not Mormon.³⁵⁷ He was born on January 24, 1899 in Salt Lake City.³⁵⁸ 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.³⁵⁹ In 1903, his family moved to a small town eight miles outside of Park City to run a hot-springs resort that had been left to his father.³⁶⁰ When Ritter was seven, his parents moved to Park City.³⁶¹ His father worked in the silver mines, and his mother supplemented the family income by working as a nurse and midwife.³⁶² 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.³⁶³ His mother remarried and moved out-of-state, taking Ritter's three younger siblings with her.³⁶⁴ Ritter moved in with his mother's sister and her husband, after whom he had been named and who was a noted photographer.³⁶⁵

After high school³⁶⁶ and a stint in the mines and another in the Army, Ritter

356. 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. Tenth Judicial Circuit Historical Society, *The Lore of Chief Judge Willis W. Ritter: The Good, the Bad & the Unbelievable 3* (Apr. 17, 2007) (unpublished handout from Continuing Legal Education presentation, on file with the *American Indian Law Review*).

357. COWLEY & NIELSON, *supra* note 312, at 2.

358. *Id.* at 9.

359. *Id.* at 8-9.

360. *Id.* at 9-10.

361. *Id.* at 14.

362. *Id.* at 16.

363. *Id.* at 20.

364. *Id.*

365. *Id.* at 22.

366. In an ironic coincidence, 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

attended the Valparaiso University School of Law for one year and then the University of Utah for another year.³⁶⁷ 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 1924.³⁶⁸ 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.³⁶⁹

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.³⁷⁰ He served with OPA until early 1944, at which point he returned to Salt Lake City and resumed private practice.³⁷¹

Ritter's path to the judiciary began in 1932 when he became active in politics as a Democrat, campaigning for the election of Elbert Thomas for United States Senator.³⁷² In early 1944, Ritter confided to a friend that Senator Thomas had promised the federal judgeship to him—one of the reasons he quit the OPA and returned to Utah was so he could best be positioned for the judgeship.³⁷³ The federal judge for the District of Utah at the time, Tillman Johnson, was eighty-six years old, and his retirement was widely thought to be imminent.³⁷⁴ Judge Johnson, however, did not formally announce his retirement until June 1949.³⁷⁵

In August 1949, President Truman nominated Ritter to replace Tillman Johnson on the bench. 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 had begun endorsing political candidates, mostly Republicans.³⁷⁶ At the same time, Republicans nationally had begun to raise the "bogeyman" of Communism in political campaigns.³⁷⁷

salutatorian at their graduation. *Id.* at 21.

367. *Id.* at 27.

368. *Id.* at 28.

369. *Id.* at 29-30, 59, 64.

370. *Id.* at 59.

371. *Id.* at 62, 64.

372. *Id.* at 47.

373. *Id.* at 62.

374. *Id.*

375. *Id.* at 109.

376. *Id.* at 76.

377. *Id.* at 77.

Thus, political forces in Utah were arrayed against Ritter based on his being a New Deal Democrat and a non-Mormon.³⁷⁸

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 two years he spent in the OPA during World War II.³⁷⁹ His stint as an administrator was the first time in his public life that Ritter had been the center of controversy.³⁸⁰ It was during this time that accusations of arrogance and high-handedness were first leveled against him.³⁸¹ During this same period, rumors of his womanizing also began.³⁸²

The controversy surrounding the nomination and appointment of Ritter reveals that the politicalization of the judiciary predates the era of Clarence Thomas and Robert 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 Ritter's nomination successfully, 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.³⁸³

Ironically, one of the negative letters came from Knox Patterson,³⁸⁴ who would file the *Hatahley* case on behalf of the Navajo plaintiffs. In his letter, Patterson repeated rumors concerning Ritter's arbitrariness at the 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."³⁸⁵ In a subsequent letter to the *Salt Lake Tribune*, Patterson revealed that the source of this accusation was a 1936 lecture series that Ritter

378. "Many said that he disliked Mormons. The truth is probably that he resented those who wielded and abused power, which in Utah was centered in the Mormon Church . . ." *Id.* at 2.
379. *Id.* at 86.

380. 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.

381. *Id.* at 60.

382. *Id.* at 96.

383. *Id.* at 118-19.

384. *Id.* at 117.

385. *Id.* at 118.

had given on the U.S. Supreme Court.³⁸⁶ He also stated, “I made no specific charges of disloyalty.”³⁸⁷

In the lectures and letters, Ritter had articulated a view of the Constitution that allowed for its flexible interpretation.³⁸⁸ 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. But in the red-baiting atmosphere of those times, which would soon blossom into full-fledged McCarthyism, a charge of not believing in the Constitution was tantamount to accusing someone of being a Communist.

On October 13, 1949, the subcommittee voted to approve Ritter’s nomination, but Republican pressure delayed action by the full Judiciary Committee before the end of the session.³⁸⁹ President Truman appointed Ritter temporarily in a recess appointment on October 21, 1949.³⁹⁰

In January 1950, when Congress reconvened and Ritter’s appointment again came under scrutiny, the controversy moved into the press and became increasingly ugly.³⁹¹ 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.³⁹² On June 29, 1950, Ritter’s appointment finally was voted

386. *Id.* at 121.

387. *Id.*

388. “‘There are terms in the Constitution which are absolute, but there are other terms, and they are by far the more important, which are flexible, which are relative . . . It is a live, vital instrument, flexible and adaptable enough to change and accommodate itself . . . to our changing needs and conditions.’” *Id.* at 52-53 (quoting Ritter’s lecture notes).

389. *Id.* at 135-36.

390. *Id.* at 137.

391. *See, e.g.,* Katherine Johnsen, *Watkins Fights Shielding Ritter*, DESERET NEWS (Salt Lake City), Mar. 14, 1950, at A1 (“[Watkins says there have been] questions raised about [Ritter’s] character, his integrity, and morals . . .”); Frank Hewlett, *Thomas Offers List of 91 to Press Ritter Okeh*, SALT LAKE TRIB., Apr. 7, 1950, at 25 (“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.”).

392. 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 prophecy. 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. *See, e.g.,* COWLEY & NIELSON, *supra* note 312, at 254-55. Again, failure of

upon and confirmed by the Senate.³⁹³ Controversy would continue to follow him throughout his career.³⁹⁴

B. The Tenth Circuit's Charge of Bias

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

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

proof at the time, or self-fulfilling prophecy?

393. *Id.* at 156-58.

394. When I arrived in Salt Lake City in 1986, I soon was hearing stories, perhaps apocryphal, about Ritter. The stories were always colorful, sometimes uncomplimentary. Here is a recent example of the type of stories still told about him:

Don Carlos Wells might be wondering: Where is Judge Willis Ritter when you really need him? . . . Wells challenged a parking ticket he received in Provo on constitutional grounds. . . . He was basically laughed out of the Provo Justice Court If only he could have had that problem 30 years ago, when the eccentric federal Judge Willis Ritter reigned over the federal court in Salt Lake City like Caesar on steroids.

When a University of Utah student during the 1970s filed a pro se motion with Ritter asking that parking tickets be ruled unconstitutional because the defendant was not allowed to face the accuser, Ritter issued a temporary restraining order on parking tickets in Salt Lake City.

It took the 10th U.S. Circuit Court of Appeals one day to overturn Ritter, but not before the city was awash in illegally parked autos

Paul Rolly, *Rolly: Utah Not 'Celebrity' Material*, SALT LAKE TRIB., Sept. 12, 2008 (second item in article), available in LEXIS, News & Business Library, Salt Lake Tribune file. See generally William T. Thurman, Sr., *Vignettes of the Late Chief Judge Willis W. Ritter*, UTAH B.J., Dec. 1994, at 12, 12.

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.³⁹⁵

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.³⁹⁶ At the same time, however, he was often harsh with the plaintiffs' attorney as well.³⁹⁷

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 the subject matter of the case and read up on it.³⁹⁸ This occurred during the *Hatahley* case, during which he read a book on the Long Walk and Bosque Redondo and lectured the attorneys on the subject in a monologue captured on the record.³⁹⁹ 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 lifelong bitterness he was never able to get past.⁴⁰⁰ Finally, he had problems with alcohol. His impatience and

395. United States v. Hatahley (*Hatahley II*), 257 F.2d 920, 925-26 (10th Cir. 1958).

396. E.g., First Trial Transcript, *supra* note 18, at 69 (Ritter warns a witness that the "penalty of perjury [is] hanging over you"); *id.* at 556-57 (Ritter expels government witness from the courtroom for laughing).

397. *Id.* at 163 (Ritter tells plaintiffs' attorney he cannot have as much time to try the case as requested).

398. Personal Conversation with James Holbrook, Former Law Clerk to Judge Ritter, in Salt Lake City, Utah (Apr. 2003).

399. First Trial Transcript, *supra* note 18, at 348-53.

400. "Emotionally, [the confirmation process] was like a cancer that metastasized over the next 28 years and affected almost every action he took." Bruce S. Jenkins, *Hon. Willis W. Ritter: Lessons Learned from the Principles, Practices, and Personality of Utah's First Chief U.S. District Judge*, FED. LAW., Mar.-Apr. 2009, at 26, 28.

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 as contributing to the unraveling of his marriage. Although they were never divorced, his wife took up a separate residence after his appointment.

bitterness, which were both aggravated by his drinking, led to Ritter being the classic “loose cannon” in the courtroom.

But it is an interesting question whether Ritter was in fact biased in favor of the Navajos, as the government and the Tenth Circuit claimed. Without question, Ritter’s sympathies were consistently with the underdog, in large part because he was a perpetual outsider.⁴⁰¹ Also without question, he had a fondness for Navajo culture, having seriously collected Navajo rugs since the 1930s.⁴⁰²

As part of a project for the Department of Commerce in the early 1930s, he researched the commercial potential of Navajo art.⁴⁰³ 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.⁴⁰⁴ His collection became valuable enough that when in the 1970s he donated a portion of the collection to the Utah Museum of Fine Arts, it was worth about \$67,000.⁴⁰⁵ 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,” which contained over 130 items.⁴⁰⁶

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 his or her own perspective.⁴⁰⁷ In fact, most judges, being members of a professional class, lead lives of relative privilege. The tendency for members of a privileged class to view conflicts from the perspective of that class is one of the “societal structures of power” that attention to context is meant to highlight.⁴⁰⁸

It is also significant for this case that the U.S. Attorney for Utah who represented the defendant, A. Pratt Kesler, had prior to his appointment to that office been a player in the opposition to Ritter’s appointment.

401. 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, and being a Democrat in an increasingly Republican state.

402. By the end of his life he had amassed a sizeable and valuable collection, which he donated to the University of Utah. COWLEY & NIELSON, *supra* note 312, at 300-01.

403. *Id.* at 35.

404. *Id.*

405. In 1974, Ritter made a gift of Navajo weavings to the Utah Museum of Fine Arts that was appraised at \$45,000. Judge Willis Ritter Papers, Special Collections, Marriott Library, University of Utah, Box 207, Folder 8. A year later, he made another gift that was appraised at almost \$23,000. *Id.* at Folder 9.

406. COWLEY & NIELSON, *supra* note 312, at 301.

407. See *supra* text accompanying note 351.

408. Minow & Spelman, *supra* note 3, at 1605.

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 Navajos 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 would stand out from the generalized background bias.⁴⁰⁹

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.⁴¹⁰ 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 the government should have for the plaintiffs does not justify the court in giving them any better or worse treatment than would be given to anyone else. As Justice Jackson said in his concurring opinion in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 355 . . . : "The Indian problem is essentially a sociological problem, not a legal one. We can make only a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictional assumptions."⁴¹¹

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

*Racial differences merit no concern.*⁴¹²

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

409. Consider the epithet of "n*****-lover" that was hurled at civil-rights activists.

410. See *supra* note 3.

411. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 926 (10th Cir. 1958).

412. *Id.*

reading of this passage, or that 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 have no doubt said that this entire case is the result of racial differences, and so of course they should merit concern.⁴¹³ He might have even gone so far as to say in this case race merited concern *especially* under the Federal Tort Claims Act.⁴¹⁴ As the Tenth Circuit hinted in the quoted passage, the federal government stands in a special relationship to members of federally recognized tribes.⁴¹⁵ The relationship is of a fiduciary nature; the tribes are wards of the federal government. Ritter refers to this relationship during the first trial.⁴¹⁶ A reasonable person could infer that this special relationship should matter under the Federal Tort Claims Act, just as a fiduciary relationship matters under common-law tort principles.⁴¹⁷

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 here will solve [the problem of how these Navajo are to survive].”⁴¹⁸ Indeed, the limited legal remedy available is one of the reasons he called for congressional action.⁴¹⁹

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 . . .

413. “Another type of silence that warrants more attention is that which stems from the apparent desire of decision makers to ignore the racial element of a controversy even when that element is, in fact, a major presence in the controversy.” Kennedy, *supra* note 9, at 220.

414. 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., First Trial Transcript, *supra* note 18, at 263-64, 274-75 (Ritter notes that the government stands in the position of guardian to the Navajos but is not acting as one).

415. Patterson, the plaintiffs’ original attorney, had argued that this band of Navajos should not be considered part of the Navajo Tribe, which would mean that they were not wards of the government. 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.

416. First Trial Transcript, *supra* note 18, at 263.

417. E.g., *McCandless v. Furlaud*, 296 U.S. 140, 163 (1935) (noting that “a tort growing out of the [fraud] by men chargeable as trustees” is “something more” than an ordinary tort). The Court warned, in language arguably applicable to this case: “Confusion of thought is inevitable unless the position of the wrongdoers as trustees is steadily kept in mind.” *Id.*

418. First Trial Transcript, *supra* note 18, at 272.

419. *Id.* at 273.

to one side."⁴²⁰ In both the *Hatahley* and *Tse-Kisi* cases, Ritter made it very clear that, while he understood that the controversy at heart was about access to land and that he was outraged by the history of forced dispossession that culminated in these cases, his sympathetic feelings were irrelevant when it came to awarding any legal right to the land.⁴²¹

Another characterization of what was going on in Ritter's courtroom 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 Democratic Senator Thomas, Ritter's mentor.⁴²² The campaign had been particularly brutal, including charges that Thomas was a "fellow traveler" and communist sympathizer.⁴²³ Thomas died two-and-a-half years later; Ritter was convinced he died of a broken heart.⁴²⁴ Kesler was later appointed Assistant U.S. Attorney as a reward for his contributions to the Republican victory in 1950,⁴²⁵ and Ritter remained bitter toward him. Kesler recounts one conversation with Ritter in which Ritter accused Kesler of killing his best friend, Senator Thomas.⁴²⁶

This interpretation is given further credence by the fact that, at the time of Ritter's death, the Justice Department was seeking to have Ritter prohibited from hearing any cases involving the federal government.⁴²⁷ 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.

420. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 926 (10th Cir. 1958).

421. *E.g.*, First Trial Transcript, *supra* note 18, at 578.

422. COWLEY & NIELSON, *supra* note 312, at 165.

423. *Id.*

424. *Id.* at 167.

425. *Id.*

426. *Id.* at 168.

427. *Id.* at 299. In 1976, the government had successfully brought a mandamus proceeding resulting in the Tenth Circuit disqualifying Ritter from continuing to hear a criminal antitrust prosecution. *United States 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.

But this begs the question why Ritter's lack of judicial temperament should be held against the Navajos.

The Tenth Circuit makes a questionable argument 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;⁴²⁸ the threat to conduct such an investigation himself;⁴²⁹ and the public appeal for funds and supplies for the plaintiffs, to be cleared through his chambers.⁴³⁰ 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 toward 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]⁴³¹

The Supreme Court, however, disagreed. 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 on. . . . 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.⁴³²

428. First Trial Transcript, *supra* note 18, at 273.

429. *Id.* at 579-80.

430. *Id.* at 360, 366.

431. *United States v. Hatahley (Hatahley I)*, 220 F.2d 666, 670 (10th Cir. 1955), *aff'd in part and rev'd in part*, 351 U.S. 173 (1956).

432. *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 has been 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.

A comparison of the two transcripts reveals that Ritter was much more circumspect in his conduct of the second trial than he had been at 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 the first trial, despite the fact that the Supreme Court had rejected the argument that Ritter had been biased in the first trial.

Epilogue: Echoes from the Past

*Real justice for these Indians may still lie in the distant future; it may never come at all.*⁴³³

In one of the many ways that *United States v. Hatahley* 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 (Cobell V)*,⁴³⁴ 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 duty 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.⁴³⁵ 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 (or similar action) of the district court's order, the court of appeals ordered the case be assigned to another judge.⁴³⁶ In part, the appellate court justified this order by the pattern of repeated reversals, but the court also relied on language in an

433. *Cobell v. Norton (Cobell XV)*, 229 F.R.D. 5, 23 (D.D.C. 2005) (Lamberth, J.), *vacated sub nom. Cobell v. Kempthorne (Cobell XIX)*, 455 F.3d 317 (D.C. Cir. 2006).

434. 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd sub nom. Cobell v. Norton (Cobell VI)*, 240 F.3d 1081 (D.C. Cir. 2001). On December 7, 2009, the parties entered into a settlement agreement pursuant to which the federal government would put more than three billion dollars into trust accounts for the plaintiffs. See Settlement Agreement Reached in *Cobell v. Salazar*, <http://www.cobellsettlement.com> (last visited Apr. 5, 2010). The agreement, however, is contingent upon enabling legislation being enacted. As of April 1, 2010, that legislation had not yet been enacted.

435. *Cobell VI*, 240 F.3d at 1110.

436. *Cobell XIX*, 455 F.3d at 319-20, 330, *vacating Cobell XV*, 229 F.R.D. 5.

opinion issued by the district court.⁴³⁷ The court of appeals quoted extensively from the district judge's opinion, and it is worth repeating the district judge's language here:

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

437. *Id.* at 325.

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.⁴³⁸

The parallels behind this rhetoric and many of Ritter’s comments during the two *Hatahley* trials are 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 sympath[ies],”⁴³⁹ the judge who wrote the language quoted above, Royce C. Lamberth, 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.⁴⁴⁰ 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.

438. *Cobell XV*, 229 F.R.D. at 7, *vacated*, *Cobell XIX*, 455 F.3d 317.

439. *United States v. Hatahley (Hatahley II)*, 257 F.2d 920, 926 (10th Cir. 1958).

440. Chief Judge Royce C. Lamberth, <http://www.dcd.uscourts.gov/lamberth-bio.html> (last visited Jan. 27, 2010).

