2010-5036

# United States Court of Appeals for the Federal Circuit



THE NAVAJO NATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in case no. 88-CV-508, Senior Judge Eric G. Bruggink.

## BRIEF FOR PLAINTIFF-APPELLANT

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March 8, 2010

FORM 9. Certificate of Interest

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Navajo Nation v. United States

No. 2010-5036

## CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Dale S. Zeitlin certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

The Navajo Nation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

McElroy, Meyer, Walker & Condon, P.C.: Scott B. McElroy and M. Catherine Condon
Peter Osetek

1/18/2010
Date

Signature of counsel

Dale S. Zeitlin
Printed name of counsel

Please Note: All questions must be answered

cc: _____

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## STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, the Navajo Nation states that no prior appeal has been taken in this or any other appellate court from the same civil action or proceeding in the lower court.

The following cases, although not directly arising from the same civil action or proceeding, are directly related to the case at bar. The Navajo Nation believes that these cases are dispositive (the law of the case) to the narrow issue before the Court regarding whether the Congressional Act of 1934 created a compensable property interest in the Navajo Nation. These cases are as follows:

*Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183 (D. Ariz. 1978), *aff'd in part, rev'd in part, and remanded*, 619 F.2d 801 (9th Cir. 1980), *cert. denied* 449 U.S. 1010 (1980). The Ninth Circuit Court of Appeals opinion has two case numbers 78-3504 and 78-3505. The opinion was written by Judge Skopil, and the three judge panel was comprised of Judge Skopil, Judge Anderson, and the Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York sitting by designation.

*Masayesva v. Zah*, 793 F.Supp. 1495 (D. Ariz. 1992) and 816 F.Supp 1387 (D. Ariz. 1992) *aff'd in part, rev'd in part, and remanded* 65 F.3d 1445 (9th Cir. 1995), *cert. denied Secakuku v. Hale*, 517 U.S. 1168 (1996).

This series of cases was finally settled resulting in an order and final

judgment entered in *Honyoama v. Shirley*, No. Civ. 74-84-PHX-EHC (D. Ariz. December 4, 2006).

The Navajo Nation is not aware of any other case pending in this or any other court that will directly affect or be affected by this Court's decision in the pending appeal.

## JURISDICTIONAL STATEMENT

The Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491 and the Indian Tucker Act, 28 U.S.C. § 1505. The Court of Appeals for the Federal Circuit has jurisdiction over the Navajo Nation's appeal of the Court of Federal Claims' dismissal of the complaint for money damages against the United States, under 28 U.S.C. 1295(a)(3).

The Court of Federal Claims granted the United States' motion to dismiss and directed entry of judgment on July 13, 2009. The Navajo Nation filed a timely appeal on September 8, 2009. This appeal is from a final judgment that disposed of all of the Navajo Nation's claims.

## STATEMENT OF ISSUE

Did the Court below err when it determined that the Congressional Act of 1934 (Act of June 14, 1934, ch. 521, 48 Stat. 960) (reproduced in Addendum 4), which established the boundaries of the Navajo Reservation subject only to those pockets of Hopi use and occupation therein, did not create a property interest in the Navajo Nation that is subject to the constitutional protection of the Fifth Amendment?

## STATEMENT OF THE CASE

This is an action brought by the Navajo Nation against the United States for breach of trust and for a constitutional taking of its property rights within the western portion of the Navajo Reservation – an area consisting of about 1,500,000 acres of land (known as the Bennett Freeze Area). The Bennett Freeze Area abuts to the west land in which the Navajo and Hopi have also disputed, the 1882 Executive Order Area.[1] See maps reproduced in Appendix (A–62, 63).[2]

The Navajo Nation's property rights in the Bennett Freeze Area were established by Congress in 1934: Act of June 14, 1934, ch. 521, 48 Stat. 960 (the 1934 Act).[3] Section 1 of the 1934 Act provides:

> To define the exterior boundaries of the Navajo Indian Reservation in Arizona ... the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, identified as follows: [legal description of land omitted]. All vacant unreserved, and appropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the

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[1] The 1882 Executive Order Area is not involved in this case, but will be discussed in the context of the different rights that were created by it as compared to the congressional act of 1934.

[2] Appendix is referenced as "(A )"

[3] Throughout this brief the land and property rights set aside for the Navajo Nation by the 1934 Act will be referred to as the "1934 Navajo Reservation".

> Navajo[4] and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882.

In 1974, Congress authorized the Hopi and Navajo to sue each other "for the purpose of determining the rights and interest of the tribes" to the lands covered by the 1934 Act and "quieting title thereto in the tribes." 25 U.S.C. § 640d-7(a)(the "1974 Settlement Act") (reproduced in Addendum 5). Pursuant to the 1974 Settlement Act, the Hopi Tribe sued the Navajo Nation in federal district court. This underlying district court litigation involved the determination of what pockets of land the Hopis had historically occupied and used as of 1934 and, which would therefore be excluded from the 1934 Navajo Reservation.

The pockets of Hopi use and occupation in 1934 were centered in the area where approximately 400 Hopis lived in the Village of Moenkopi. *Masayesva v. Zah,* 793 F.Supp at 1502. Although the precise boundaries of the Hopi occupation and use in 1934 were not determined by the 1934 Act, the United States had commissioned three studies that the area occupied by the Hopis was between roughly 35,000 and 246,000 acres and was centered in the environs of the Village of Moenkopi. Navajo Nation's Proposed Findings of Uncontroverted Fact p.1 ¶1 (hereafter "NFOF"). See letter at (A–49-52). Confirming the limited historical

[4] A copy of the 1934 Act is set forth in Addendum 4.

land use by the Hopis within the 1934 Navajo Reservation, the district court set aside 60,518 acres for the Hopi (including 22,675 acres of Hopi exclusive use area and 37,843 acres that had been jointly occupied by both Navajo and Hopi), all of which was located in the area around the Village of Moenkopi. *Masayesva v. Zah,* 816 F.Supp. at 1398, 1423. See map (A–62).

During the course of the quiet title litigation, Congress amended the 1974 Settlement Act in 1980 and 1988. These amendments imposed a requirement that both tribes consent to any "new construction or improvements" within the Bennett Freeze Area. 25 U.S.C. § 640d-9(f) (reproduced in Addendum 6).

In 1982, the Hopis, pursuant to their newly created power that allowed them to veto **any** Navajo development on the **entire** portion of the Bennett Freeze Area, promulgated a complete development moratorium on any development on Navajo land. NFOF p.8 ¶ 32; pp. 10-11, ¶¶ 38-42. The United States did not intervene, but allowed the Hopi to effectively stop all development within the Bennett Freeze Area. NFOF pp. 12-13 ¶¶ 43-48. This development freeze began in 1982 and did not end until 2006, when the litigation between the Navajo and Hopi was finally concluded.

The Navajo Nation filed this action against the United States in 1988, although for most of the intervening years, it had been stayed until the quiet title district court litigation between the Navajo Nation and the Hopi Tribe was

resolved. The stay was necessary because the precise geographical extent of the taking and the duration of the temporary taking could not be determined until the underlying litigation between the Hopi Tribe and Navajo Nation concluded.

The Navajo Nation's takings claim is that the United States temporarily took its land by imposing a development moratorium (including acquiescing in the Hopi moratorium) on the 1,500,000 acres of land within the 1934 Navajo Reservation from 1982 through the end of the litigation in 2006. The development moratorium was not restricted to the relatively small area of Hopi use and occupation, and constituted a taking of its property rights because the moratorium lasted far too long (over twenty years), included far too much land – 1.5 million acres, most all of which was solely used and occupied by Navajo – and was not fairly related to accomplish its purpose which was to preserve the evidence of the Hopi occupancy and use as of 1934 in order to assist the district court at trial in being able to draw a boundary around the Hopi enclave.

The Court of Federal Claims did not reach the substantive issues regarding whether the moratorium was a taking of the Navajo Nation's property rights. Instead, the Court found that the 1934 Act did not create a compensable property interest that was protected by the Fifth Amendment. The lower court, therefore, granted the United States' motion to dismiss and directed the entry of judgment in favor of the United States on July 13, 2009. The Navajo Nation filed a timely

notice of appeal on September 9, 2009.

## STATEMENT OF FACTS

1. In 1934, Congress enacted the 1934 Act, which defined the boundaries of the Navajo Indian Reservation in Arizona. The 1934 Act is reproduced in Addendum 4.

2. Prior to Congress' passing the 1934 Act, the United States commissioned three studies to determine the extent of the Hopi use and occupancy within the 1934 Navajo Reservation. These studies found that the Hopi use and occupancy was limited to an area in and around the Village of Moenkopi, where a small group of Hopis lived. Special Commissioner Hagerman's report recommended that an area of 35,200 acres be set aside for the Hopis; Superintendent Walker's report recommended an area of between 36,000 to 246,500 acres; and, Hutton's report recommended that the area used by the Hopi in Moenkopi should be about 110,000 acres. NFOF p.1 ¶ 1 (A–49-52).

3. In 1937, the United States commissioned three additional studies. These studies confirmed the early reports that the Hopi Tribe's use and occupancy of the 1934 Navajo Reservation was limited to the Moencopi area: (i) Page's report recommended an area of 72,900 acres be set aside for the Hopi; (ii) O'Neal-Hohnani's report recommended an area of 118,200 acres; and (iii) Miller's report recommended an area of 200,000 acres. NFOF p.2 ¶ 3; (A–49-

52).

4. In 1969, the Bureau of Indian Affairs ("BIA") Area Director Graham Holmes recommended to Commissioner Bennett that the Hopis be assigned approximately 54,809 acres in the Moenkopi area. NFOF p.4 ¶ 13 (A–53-61).

5. Commissioner Bennett modified and enlarged the Hopi area of occupancy to 105,000 acres. Commissioner Bennett relied primarily on a field survey by Gordon B. Brown of the Division of Economics of the Soil Conservation Services for a land management unit in the Moencopi area. The Page report included where the Hopis lived, their stock ownership, agricultural plots, and outlined the area used by Hopi stockmen for grazing sheep, cattle, and horses. The Page report also recognized that Navajo lived in and operated stock within the designated area. NFOF p.4 ¶ 14 (A–53-61).

6. In 1974, Congress passed 25 U.S.C. §§ 640d (1974) (the 1974 Settlement Act). The 1974 Settlement Act authorized the two tribes to bring a quiet title action against the other for the purpose of determining their respective rights in the 1934 Navajo Reservation. 25 U.S.C. § 640d-7(a). Lands in which the Navajo Nation had exclusive interest would continue to be a part of the Navajo Reservation, while any lands in which the Hopi Tribe was determined to have an exclusive interest were thereafter to become part of the Hopi

Reservation. 25 U.S.C. § 640d-7(b). Pertinent sections of the 1974 Settlement Act are reproduced in Addendum 5.

7. Pursuant to the 1974 Settlement Act, the Hopi Tribe brought a quiet title action against the Navajo Nation to determine the Hopi Tribe's rights to the 1934 Navajo Reservation.

8. The district court limited the Hopi Tribe to the land it actually "possessed, occupied or used" and held that the intent of Congress was to "withdraw all reservation land for the Navajos except for pockets occupied by Hopis." *Sekaquaptewa v. MacDonald,* 448 F. Supp. 1183, 1196 (D. Ariz. 1978), *aff'd in part, reversed in part, and remanded*, 619 F.2d 801 (9th Cir. 1980), *cert. denied* 449 U.S. 1010 (1980).

9. In 1980, Congress amended the 1974 Settlement Act. ("1980 Amendment"). The 1980 Amendment provided:

> **Any development of lands in litigation** pursuant to section 8 of this Act and further defined as "that portion of the Navajo Reservation lying west of the Executive Order Reservation of 1882 and bounded on the north and south by westerly extensions, to the reservation line, of the northern and southern boundaries of said Executive Order Reservation," **shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City.** Each such area has been heretofore designated by the Secretary. "Development" as used herein shall mean any new construction or improvement to the property and

> further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

25 U.S.C. § 640d-9(f)(1)(emphasis supplied). The 1980 Amendment is reproduced at Addendum 6.

10. In 1982, the Hopi Tribe implemented a moratorium on all Navajo development proposals. NFOF p.8 ¶ 32, pp.10-12 ¶¶ 38-43.

11. The 1980 Amendment primarily affected the Navajo Nation as virtually all Hopis were residing in Moenkopi, an area excluded from the development restrictions. NFOF p.5 ¶¶ 18-19; p.8 ¶ 29.

12. The land area affected by the 1980 Amendment was approximately 1,500,000 acres, the Bennett Freeze Area. NFOF p.2 ¶ 4; p.7 ¶ 26; 25 U.S.C. § 640 d-9(f)(1).

13. The 1980 amendment prevented any development within the Bennett Freeze area, including the vast majority of the acreage that was exclusively Navajo, unless the Hopi gave written consent. 25 U.S.C. § 640 d-9(f)(1). And since the Hopi, in 1982, promulgated its far sweeping decision not to allow any Navajo development anywhere within the Bennett Freeze Area, including the vast area of exclusive Navajo use and occupancy, the Navajo simply could no longer develop their land. NFOF p.8 ¶ 32; p.10-12 ¶¶ 38-43.

14. After the Hopi's enacted the complete development moratorium over the Bennett Freeze Area, the United States did not intercede, but allowed the Hopi to stop Navajo development. NFOF p. 12 ¶¶ 43-47; p.13 ¶ 48.

15. In November 1988, Congress modified the terms of 25 U.S.C. § 640d-9 to create an exception for certain improvements, such as those for public health and safety and to create a limited appellate mechanism whereby a development proposal that had been declined might be appealed to the Secretary of the Interior. 25 U.S.C. § 640d-9(f)(2)-(3) (reproduced at Addendum 6).

16. In 1992, the District Court determined that the Hopi Tribe's claims to the 1934 Navajo Reservation were limited to approximately 60,518 acres of land. Of the 60,518 acres awarded to the Hopi Tribe, 22,675 acres were lands exclusively used by the Hopi Tribe (the Village of Moenkopi) and approximately 37,843 acres had been jointly used by Navajo and Hopi for farming and grazing activities. *Masayesva v. Zah,* 816 F. Supp. at 1398, 1417-18, 1423.

17. On December 4, 2006, the District Court entered the settlement agreement between the Navajo Nation and Hopi Tribe as an Order and Final Judgment of the Court, and finally lifted the development freeze on over 1,439,482 acres of Navajo Indian Reservation land. *Honyoama v. Shirley,* No. 74-842-PHX-EHC (D. Ariz. Dec. 4, 2006).

## SUMMARY OF ARGUMENT

The Navajo Nation believes that the issue regarding what property rights the 1934 Act created in the Navajo Nation were litigated and decided in the following cases: *Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183 (D. Ariz. 1978), *aff'd in part, rev'd in part, and remanded,* 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980); and in *Masayesva v. Zah*, 793 F.Supp. 1495 and 816 F. Supp 1387 (D. Ariz. 1992), *aff'd in part, rev'd in part, and remanded* 65 F.3d 1445 (9th Cir. 1995*), cert. denied, Secakuku v. Hale*, 517 U.S. 1168 (1996). These cases decided that the 1934 Act gave the Navajo Nation a compensable property interest in the entire 1934 Navajo Reservation, except only the land are that was used and occupied by the Hopi. These decisions established the law of the case. Fundamentally, the Court of Federal Claims' decision, which failed to recognize the Navajo Nation's compensable property rights, is inconsistent with these federal courts' decisions.

Prior to the 1934 Act, neither tribe had a recognized (compensable) title to areas withdrawn by executive order. Both tribes' property interests were limited to a temporary tenancy at will, which could be terminated at any time without compensation. *Sekaquaptewa v. MacDonald,* 619 F.2d at 804. The 1934 Act specifically changed the Navajo property rights from a tenancy at will "to a permanent compensable interest" and recognized and confirmed Indian title.

"To consolidate reservation ownership it was necessary to change the status of reservation land title from a 'tenancy at will to a permanent compensable interest.'" *Id.* at 805 (quoting the district court). Significantly, the Ninth Circuit held that Congress intended the 1934 Act to "immediately vest rights in both tribes." *Id.* at 806-807.

The Ninth Circuit also found that the 1934 Act did not leave open for later judicial interpretation the nature of the property rights Congress had created.

> We acknowledge the absence of Navajo – Hopi boundary as we must. **We do not concede that question of Navajo and Hopi property interests was left open.** It was a mistake to assume that the absence of a boundary negates standards for determining title. The purposes, history, language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis.

*Id.* at 807 (emphasis supplied).

The 1934 Act thus vested compensable property rights in the Navajo Nation to the entire land encompassed within the boundaries of the 1934 Navajo Reservation, except for the small pocket of land of Hopi use.

The purpose of the 1974 Settlement Act was simply to provide a judicial court mechanism, which would allow the Hopi and Navajo to sue each other to quiet title and resolve the actual area of land that the Hopi occupied as of 1934. The 1974 Settlement Act, however, did not amend or alter the compensable property rights that were vested in the Navajo Nation as of 1934.

The 1980 and 1988 Amendments to the 1974 Settlement Act created a statutory freeze on new construction or improvements imposed on the entire 1,500,000 acres of land (the "Bennett Freeze Area). 25 U.S.C. § 640d-9. The statutory freeze acted as a gigantic evidence preservation act. Its purpose was to preserve the evidence of Hopi occupation and use that existed as of 1934 so that a court could more easily adjudicate the actual land area to be set aside for the Hopi. It had nothing to do with creating permanent additional property rights for the Hopi or reducing Navajo property rights. Those property interests were defined and vested as of 1934.

Not surprisingly, the district court held that only a small area of land around the Hopi Village of Moenkopi (60,518 acres) would be set aside exclusively to the Hopi and excluded from the 1934 Navajo Reservation. *Masayesva v. Zah,* 816 F.Supp. at 1423. The entire rest of the Bennett Freeze Area, an area of 1,439,482 acres, belonged exclusively to the Navajo. The district court's decision was similar both in location and size to the six studies performed by the Department of Interior in the 1930's. NFOF p.1 ¶ 1 and p.2 ¶ 3. It was also similar to the BIA's 1969 Hopi boundary proposals. NFOF p.4 ¶¶ 13 and 14. Thus, the Navajo Nation has asserted that the United States took the residue of the area – the non-Hopi area – of approximately 1,400,000 acres upon which the statutory freeze and Hopi moratorium had been imposed from 1982 through 2006.

## STANDARD OF REVIEW

An order granting summary judgment is reviewed *de novo* "in all respects." *Cienega Gardens v. United States* 331 F.3d 1319 (2003). The lower court's decision to grant the government's motion to dismiss is a conclusion of law to which this Court owes no deference. *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007).

## ARGUMENT

### I. THE NAVAJO NATION'S PROPERTY RIGHTS IN THE 1934 NAVAJO RESERVATION VESTED WHEN CONGRESS ENACTED THE 1934 ACT. FROM THAT DATE ON, THE NAVAJO NATION'S PROPERTY RIGHTS COULD NOT BE TAKEN WITHOUT JUST COMPENSATION PURSUANT TO THE FIFTH AMENDMENT.

#### A. The Court below erred when it failed to follow established precedent that the 1934 Act granted the Navajo Nation a permanent compensable property interest in the 1934 Navajo Reservation.

There are two important federal government actions, the Executive Order of Chester A. Arthur (Dec. 16, 1882) which created the 1882 Executive Order Area and the 1934 Congressional Act which created the 1934 Navajo Reservation, that are the basis of most of the land use litigation between the Hopi Tribe and the Navajo Nation. The 1882 Executive Order Area is comprised of approximately 1,800,000 acres of land. See maps reproduced in (A–62-63). Although not directly

relevant to the case at bar[5], it is important due to its geographic adjacency to the Bennett Freeze Area, and the vastly different rights that were created by the executive order as compared to the property rights created by Congress in the 1934 Act.

The 1882 Executive Order, as an executive order, did **not** create compensable property rights in the Navajo, but did create a co-tenancy between the two tribes. *Healing v. Jones*, 210 F.Supp 125 (D. Ariz. 1962), *aff'd,* 373 U.S. 758 (1963). Thus, even though vast areas of land within the 1882 Executive Order Area were used exclusively by the Navajo, the Hopi had equal co-tenancy rights in that land due to the Executive Order. *Id.* Further, the 1882 Executive Order was primarily concerned with Hopi rights since the Hopi Tribe was predominantly located within its boundaries. First, Second, and Third Mesas – all of the major historic Hopi villages – are located within the 1882 Executive Order Area. *Masayesva v. Zah*, 793 F.Supp at 1502; See map (A–62, 63). None of these areas, however, were a part of the 1934 Navajo Reservation.

In contrast to the 1882 Executive Order, the 1934 Act was all about the Navajo Reservation and Navajo Property Rights:

> The 1934 Act is concerned primarily with Navajo affairs. The boundaries described are of "the Navajo Indian Reservation". The Act provides for the purchase of

[5] The 1934 Act expressly excluded the 1882 Executive Order Area from its purview.

> additional Navajo lands with Navajo funds. Navajos are precluded from receiving royalties from water developments on lands added to the Navajo reservation. Further allotments to Navajos are restricted. The Secretary is authorized to acquire private land for the Navajos. The State of Arizona is authorized to exchange school sections "within the boundary of the Navajo Reservation . . . in favor of said Indians". Funds are authorized to purchase the State's improvements on school sections if the State assigns its interest in the sections to the Navajos.

*Sekaquaptewa v. MacDonald,* 619 F.2d at 806.

The only specific mention of the Hopis in the 1934 Act is in the provision excepting the 1882 Executive Order Areas from the Act's affects. The Ninth Circuit found that the legislative intent of the 1934 Act was clear:

> Nevertheless, legislative intent is clear enough to enable us to identify Hopi interests by areas settled. Navajo interests are identifiable as the residue. Congress recognized Hopi concern over the 1882 reservation and their villages, shrines, and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis as protecting their rights to areas occupied outside the 1882 reservation. **There is no indication that anyone contemplated joint title to the entire area involved here.** ... The Act was not intended to disturb then-existing land tenure patterns. Hopi villagers were told the Act would "protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed."... [T]he 1934 Act would not disturb the Hopis' right to occupy the land they were then occupying...

*Sekaquaptewa v. MacDonald*, 619 F.2d at 808 (emphasis supplied).

The only Hopi outpost within the borders of 1934 Navajo Reservation was the Village of Moenkopi, which consisted of approximately 400 Hopis. *Masayesva v. Zah*, 793 F.Supp. at 1502. Prior to adoption of the 1934 Act, the Department of the Interior had provided detailed reports to Congress that discussed and confined the nature of Hopi use within the 1934 Navajo Reservation. NFOF p.1 ¶ 1. And, although Congress did not create a metes and bounds legal description of the boundary setting land aside for the Hopi Tribe, the 1934 Act limited Hopi rights to those limited lands the Hopis actually occupied in 1934. *Masayesva v. Zah*, 816 F.Supp. at 1393.

The purpose of the 1934 Act was to describe the exterior boundaries of "the Navajo Indian Reservation" and to consolidate land ownership within the boundaries of the Reservation. *Sekaquaptewa v. MacDonald,* 619 F.2d at 804. Prior to the 1934 Act, neither the Navajo nor the Hopi had recognized (compensable) title to areas within the boundaries of the 1934 Act. "To effectuate consolidated reservation ownership it was necessary to change the status of reservation land title from a 'tenancy at will to a permanent compensable interest.'" *Id.* (quoting from the district court opinion). Thus, according to the Ninth Circuit, the 1934 Act specifically changed the Navajo and Hopi rights in the 1934 Navajo Reservation from a tenancy at will to a permanent compensable interest and recognized and confirmed Indian title. *Id.* at 804, 805. Significantly,

the Ninth Circuit held that the 1934 Act "immediately vested rights in both tribes." *Id.* at 806-807.

Therefore, as has been previously adjudicated, the 1934 Act vested title to the entire 1934 Navajo Reservation, including the land in the Bennett Freeze Area, in the Navajo Nation, except for those small pockets of land that were concentrated in and around the Village of Moenkopi where the Hopis lived in 1934. *Id.*

There are two significant legal differences between the presidentially created 1882 Executive Order Area and the congressionally created 1934 Navajo Reservation. First, the 1934 Act created a **compensable property interest** in the Navajo Nation to all of the lands within its boundaries, except the area of historic Hopi use and occupancy. *Id.* at 804, 805. And the second major legal difference was that the 1934 Act did **not** create a co-tenancy in lands that were exclusively Navajo. Thus, the area exclusively used by the Navajo (including all of the land that was unoccupied by either tribe) was not subject to Hopi co-tenancy rights. Similarly, the land used exclusively by the Hopi was not subject to any Navajo co-tenancy rights. *Id.* at 807.

The distinction between the rights conferred in the 1934 Act as compared to the 1882 Executive Order and the nature of the Hopi occupancy of the 1934 Navajo Reservation are critical to understanding the error in the Court of Federal Claims' decision. That the lower court misapprehends this critical distinction is

shown in the first paragraph under the background section of its opinion that states, "The land in question the 1934 Navajo Reservation was granted by executive order in 1934 to the Navajo ..." (A–3).

The problem with the lower court's misidentifying the 1934 Act as an "executive order" is serious because, as set forth by the Ninth Circuit, much of the early litigation regarding the 1934 Act involved whether the land set aside was of a temporary tenancy-at-will and non-compensable nature, such as that created by an executive order, or whether the 1934 Act intended to vest a permanent compensable property interest in the Navajo Nation within the boundaries of the 1934 Act. The Ninth Circuit has found that Congress by legislation – not executive order – changed the status of the 1934 Navajo Reservation from what had previously been a tenancy-at-will to a "permanent compensable interest." *Sekaquaptewa v. MacDonald*, 619 F.2d at 804.

Even further, the court below also appears to misapprehend the nature of the Hopi occupancy of the 1934 Navajo Reservation when it states that "at the time of the 1934 Act, the Hopi tribe ("Hopi") was located on a portion of the land located directly west of the 1882 reservation area, commonly referred to as the Bennett Freeze area ("BFA")." (A–3). The Hopi Tribe itself was actually located on the Hopi Indian Reservation that was contained within the 1882 Executive Order Area. It was not the "Hopi Tribe" but just the small Village of Moenkopi where Hopis

lived, which was protected in the 1934 Act.

The Court of Federal Claims' holding that the Navajo only had "joint use" would only have been correct if it applied to the 1882 Executive Order Area where the Navajo's property rights were limited to a cotenancy right of occupancy shared with Hopi. But, the Court's description of Navajo rights within the 1934 Navajo Reservation as only "joint use" and not "exclusive" (A–7) is simply wrong and is directly contrary to the Ninth Circuit's decision in *Sekaquaptewa v. MacDonald* that the property rights conferred to the Navajo by the 1934 Act were identifiable, permanent, and compensable.

Because Congress vested Indian compensable title in the Navajo Nation to all of the land except the pockets of Hopi use in 1934, from that date on, the Navajo Nation's property rights could not be taken without just compensation pursuant to the Fifth Amendment.[6]

"The United States must pay compensation when it takes tribal title recognized by treaty or statute." Cohen's Handbook of Federal Indian Law 1026 (2005 ed.); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955). *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 496, 497 (1937). See also *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375-376 (1937) ("Our decisions, while recognizing that the government has power to

[6] The Hopi Tribe's property rights within the confined pocket of Hopi use around the Village of Moenkopi vested in 1934 as well.

control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own.").

**B. The 1974 Settlement Act did not change the Navajo Nation's Property Rights which had vested in 1934.**

The 1974 Settlement Act did nothing to change the fact that the Navajo Nation's property rights in the 1934 Navajo Reservation vested on June 14, 1934. The purpose of the 1974 Settlement Act was simply to provide a mechanism whereby the tribes could adjudicate the precise boundary of Hopi use and occupation within the 1934 Navajo Reservation.

**C. It had been known since before the passage of the 1934 Act, that the Hopi use and occupancy was within a limited area in and around the Village of Moenkopi.**

Because Congress vested the Navajo Nation with property rights in all of the lands within the 1934 Reservation, in the ensuing litigation between the Navajo Nation and Hopi Tribe, the Navajo Nation did not have to prove any occupation or use of the 1934 Reservation. The burden of proving a metes and bounds legal description around the Village of Moenkopi based on actual Hopi occupation and use in 1934 fell solely on the Hopi. *Sekaquaptewa v. MacDonald*, 619 F.2d at 806.

The Navajo Nation never disputed that Hopis occupied the Village of Moenkopi in 1934 and thus, the only issue at trial before the district court was to

draw an outer boundary of Hopi use and occupancy that extended somewhat beyond the Village of Moencopi itself. There was never any good faith argument that the Hopi used and occupied the entire Bennett Freeze Area. And, most importantly, the United States was aware of the limited geographic extent of the potential Hopi interest in the 1934 Navajo Reservation. Prior to Congress' passing the 1934 Act, the United States had commissioned three studies, all of which located Hopi used and occupancy to between 35,000–246,000 acres around the Village of Moenkopi. NFOF p.1 ¶ 1. In 1937, the Department of Interior commissioned three additional studies, which confirmed that Hopi use and occupancy was confined to the environs around the Village of Moenkopi, and recommended to set aside areas for the Hopi Tribe ranging from 72,900 acres to 200,000 acres. NFOF p.2 ¶ 3.

In 1969, the Bureau of Indian Affairs ("BIA") Area Director Graham Holmes recommended to Commissioner Robert Bennett that the Hopi Tribe be assigned 54,809 acres in and around the Village of Moenkopi. NFOF p.4 ¶ 13. Commissioner Bennett modified the area for Hopi use to 105,000 acres, and in so doing relied heavily on a report written by Gordon B. Page in 1937, which comprehensively looked at all of the Hopi uses of land in and around the Village of Moencopi, including farming and grazing operations, finding that the totality of all Hopi uses was limited to an area of about 102,000 acres. NFOF p.4 ¶ 14 (A–53,

56).

And finally, in 1992, the district court set aside 60,518 acres for Hopi use and occupancy, which was centered on the Village of Moencopi. All of the rest of the Bennett Freeze Area – approximately 1,438,000 acres – was exclusively Navajo.[7]

**D. Congress did not carve out from the bundle of sticks that it gave to the Navajo Nation when it created 1934 Navajo Reservation the ability of the Hopi Tribe to control development on the land that was exclusively Navajo.**

The lower court's decision is predicated on its mistaken view that Congress intended that the proscribed uses – the prohibition of development without Hopi approval over the entire Bennett Freeze Area – were not part of the Navajo title to begin with. See *Lucas v. South Carolina Coastal Commission*, 505, U.S. 1003, 1027, 112 S.Ct. 2886, 2899 (1992). The lower court, however, did not cite any legislative history of the 1934 Act that supported its view that Congress intended to convey to the Navajo Nation less than the full bundle of sticks inherent in Indian title. There was no suggestion in the legislative history that the 1934 Navajo Reservation, outside of the area used by the Hopi, would be subject to the ability of

[7] The district court found that the vast majority of the Bennett Freeze Area, an area of about 1,320,00 acres was never used or occupied by the Hopi and therefore was a part of the 1934 Navajo Reservation. The district court found that the Hopi exclusive use area was limited to the 22,675 acres in the Village of Moenkopi. The district court found that the Hopi and Navajo jointly used about 152,000 acres around the Village of Moenkopi. The court partitioned 37,843 acres exclusively to the Hopi and the balance of the 114,157 acres was exclusively Navajo.

the Hopi Tribe to regulate Navajo land use.

The Ninth Circuit's analysis in *Sekaquaptewa v. MacDonald* and its thorough digest of the 1934 Act's legislative history leads to the opposite conclusion. The Ninth Circuit found that the 1934 Act was concerned "primarily with Navajo affairs", that Congress intended to "vest Indian title" and to create a "compensable property interest" in the Navajo. 619 F.2d at 806. Given that the 1934 Act was all about describing the boundaries of the "Navajo Indian Reservation" and determining Navajo rights therein, the Navajo Nation had a reasonable expectation that it could use and develop its land, without the Hopi Tribe's ability to regulate – and prevent – its land use. Although the 1934 Act carved out a geographic exception for the Hopi, it did not create a future interest, a cotenancy, or grant a right to either tribe to control the development of land occupied and used by the other tribe. The Navajo property rights created by the 1934 Act, therefore, included the right to develop. See *Lucas v. South Carolina Coastal Council,* 503 U.S. 1003, 1017 (1992). "What is the land but the profits thereof." 1 Edward Coke, *The Institutes of Laws of England*, ch.1 § 1 (1797) (1st Am.ed. 1812)

The United States Supreme Court has described property rights as "created" and "defined" by "existing rules or understandings that stem from an independent source such as State law..." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499

U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

When the Ninth Circuit determined that the 1934 Act vested Indian title in the Navajo Nation, the Navajo Nation had a reasonable expectation under the common Indian law that it could use the land it occupied without interference from the Hopi Tribe. *Chippewa of Minnesota v. United States*, 301 U.S. 355 (1937); *Shoshone Tribe of Indians v. United Sates*, 299 U.S. 476 (1937); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

### E. The Hopi/Navajo dispute over where to draw the boundary around the general vicinity of Moencopi did not affect either Navajo title or property rights in lands in the vast Bennett Freeze Area.

The lower court's opinion is premised on what is essentially a mistaken (and inappropriate) finding of fact: "the intolerable ambiguity as to how much land would have to be set aside for the Hopi" clouded title to **all** of the land within the Bennett Freeze Area, and until that cloud was lifted in 2006, "plaintiff cannot assert the necessary elements of its property interest." (A–7).

First, the lower court's factual finding is incorrect. The Hopi had initially asserted a title claim to all of the Bennett Freeze Area when the district court litigation was commenced in 1974. The Hopi had argued that the 1934 Act vested it with equal title. But, the Hopi argument was rejected by the Ninth Circuit in *Sekaquaptewa v. MacDonald* in May 1980. The Hopi interest was limited to their

actual occupancy and use as of 1934. Thus, before the 1980 Amendment was passed, it was known by everyone that the legitimate Hopi claim was limited to the area around the Village of Moencopi, since that was the only area in which the Hopis lived, farmed, and grazed their animals. The Hopi claim simply did not legitimately involve the vast 1,500,000 of the Bennett Freeze Area.

Second, it was inappropriate for the lower court to make any finding of fact in a motion to dismiss, where the evidence submitted by the Navajo showed that all of the United States' studies showed the Hopis used and occupied only the area around the Village of Moencopi.

Even if title was technically clouded until the resolution of the district court litigation in 2006, that clouding of title did not reduce the Navajo Indian title that vested in 1934.

In *Pettro v. United States*, 47 Fed.Cl. 136 (2000), the Court of Federal Claims found a compensable taking of a plaintiff's right to sand and gravel where the United States, after receiving the results of a title search, informed the plaintiff that title to the minerals had merged with the surface estate and had been conveyed to the United States by the surface estate owner. Believing in good faith that the United States was the owner of the mineral rights, the United States sued the property owner in federal court to quiet title. The property owner filed a counterclaim alleging that he owned the mineral estate. The parties settled the

lawsuit, in which the parties agreed that the property owner did in fact own the mineral estate.

Prior to the quiet title action and throughout its duration, the United States had told the property owner that they had to cease all work on the site. The property owner then sued the United States for a taking of their property interests, which was based on the government's refusal to allow the property owner to use the mineral estate during the time period in which the litigation over the cloud on title was litigated. The court found that the government had effectively deprived plaintiff of his ownership interest: "[T]he government's words and actions indicated to all involved that the United States considered itself the owner of the sand and gravel rights. Thus, the court holds that the Forest Service's actions constituted a taking, as they temporarily deprived [plaintiff] of his entire property interest." *Id.* at 148 (citations omitted). *Pettro* stands for the proposition that a good faith dispute over title, pursuant to which the government acts to protect its property interest, is not a defense to a takings claim. The lower court's opinion must be reversed under *Pettro.*

*Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983) presents a very similar factual background to the case at bar. In *Yuba Goldfields,* the U.S. Corps of Engineers wrote the property owner Yuba, stating, *inter alia,* "that Yuba had no extraction or other rights, that Yuba would be held accountable

for removal of any precious metals that may legally belong to the government..." *Id.* at 885-886. Yuba sued the United States to confirm its title to the mineral interests. The district court granted summary judgment to Yuba holding that the United States claim to the mineral right was unsound. The United States filed a motion for summary judgment to Yuba's takings lawsuit, which the Claims Court granted *inter alia*, because "there was no taking where, as here, the United States 'acts' in good faith to protect what it deems to be its property." *Id.* One of the issues on appeal was whether the United States' "good faith" effort to "protect what it deems to be its property" is a defense to a Fifth Amendment takings claim. The Federal Circuit reversed, finding that there was no evidence in the record that the United States acted in good faith, and that the "record reflects genuine issues of material fact relating to the prohibition portion of the government action..." *Id.* at 889.

The Claims Court decision in the case at bar, however, does not attempt to ascertain whether the United States in enacting the 1980 Amendment and then ceding all development authority to the Hopi Tribe over exclusively Navajo lands, acted under a good faith belief that the Hopi could establish a property right in all of the Bennett Freeze Area. In fact, all of the evidence that was before the Claims Court, including the six studies commissioned by the United States in the 1930's and the BIA's directive limiting the Hopi land use just prior to Congress' passage

of the 1974 Settlement Act indicate directly to the contrary: that the United States knew that the Hopi's reasonable claim was limited to the environs of the Village of Moenkopi. In any event, at a minimum, whether the United States had a good faith belief as to the validity that a Hopi claim that would have encompassed all of the Bennett Freeze Area presented a genuine issue of material fact, which should have precluded summary judgment.

In both *Pettro* and *Yuba* the United States had in effect restrained property owners from exercising mining rights during the time when the cloud on title was being litigated. The courts concluded that government title claims did not preclude a taking claim where the government did more than simply assert a claim, but interfered with private property rights pending resolution of the quiet title action. Under *Pettro* and *Yuba* the existence of the Hopi's title claim does not preclude the Navajo Nation from having a compensable property interest due to its Indian title to the land within the Bennett Freeze Area, which vested in 1934.

Had the United States simply allowed the quiet title action to proceed, it would not have deprived the Navajo of its property rights. But, the United States did not just allow the two tribes to quiet title to these lands: it took affirmative action that deprived the Navajo of their property rights by first passing the 1980 Amendment, which ignored all of the studies regarding the location of Hopi use and occupancy, and then by abandoning oversight of the entire Bennett Freeze

Area to the Hopi. The Navajo Nation has therefore presented a cognizable takings claim, which should not have been dismissed.

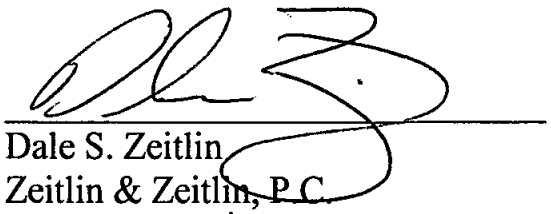
## CONCLUSION

The Navajo Nation's property rights vested in 1934 when Congress created the 1934 Navajo Reservation for the Nation's benefit. The 1974 Settlement Act and its amendments did not change the property right that Congress created in 1974. The Navajo Nation has a compensable property right in all of its lands set aside for its benefit by Congress in the 1934 Act, and is therefore entitled to prove that a Fifth Amendment temporary taking occurred.

The Navajo Nation respectfully requests that the Court reverse the Court of Claims and remand for further proceedings.

March 8, 2010.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2010, two copies of the foregoing Appellants' Opening Brief were served by U.S. Mail addressed to the following counsel of record:

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& Natural Resources Division
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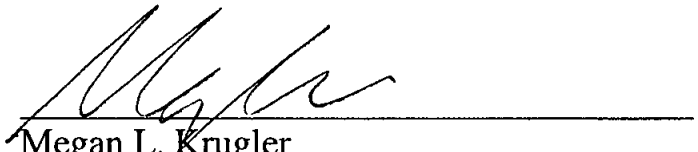
I further certify that, on March 8, 2010, the original and eleven copies of the foregoing brief were filed with the United States Court of Appeals for the Federal Circuit by sending the same to the Court by UPS next day service, addressed to Clerk of the Court, United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Room 401, Washington D.C. 20439.



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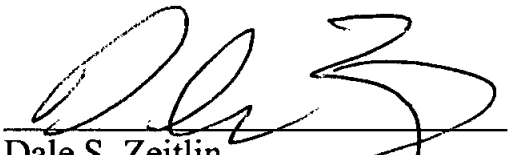
## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 7,224 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14–point Times New Roman font.



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MARCH 8, 2010

## ADDENDUM

# ADDENDUM 1

# In the United States Court of Federal Claims

No. 508-88 L

THE NAVAJO NATION,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Opinion, filed July 13, 2009, granting defendant's motion to dismiss plaintiff's constitutional taking claim, and the court's prior dismissal of plaintiff's only other claim,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant and the complaint is dismissed. No costs.

John S. Buckley
Acting Clerk of Court

July 13, 2009 By: s/Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

# ADDENDUM 2

# In the United States Court of Federal Claims

No. 508-88L
(Filed: July 13, 2009)

* * * * * * * * * * * * * * * * * * * * * * *

THE NAVAJO NATION,

*Plaintiff,*

v.

Constitutional Taking; Property Interest.

THE UNITED STATES,

*Defendant.*

* * * * * * * * * * * * * * * * * * * * * * *

*Scott B. McElroy, M. Catherine Condon*, Boulder, CO, and *Peter J. Osetek*, Ann Arbor, MI, for plaintiff.

*William J. Shapiro*, Trial Attorney, Department of Justice, Environment and Natural Resources Division, Sacramento, CA, *Mark S. Barron*, Trial Attorney, Department of Justice, Environment and Natural Resources Division, Washington, DC, *John C. Cruden*, Acting Assistant Attorney General, Environmental and Natural Resources Division, for defendant.

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OPINION

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BRUGGINK, *Judge.*

This is an action by the Navajo Nation for breach of trust and for a constitutional taking of its rights to develop land originally granted to it by

the United States in 1934. The case has been pending since 1988, although, for most of the intervening years, it has been stayed until related district court litigation was resolved. In an opinion dated February 27, 2009, we granted defendant's motion to dismiss plaintiff's breach of trust claim. Pending now is defendant's motion to dismiss, or in the alternative, motion for summary judgment, with respect to plaintiff's remaining taking claim.

The court has subject matter jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) (2006), and the Indian Tucker Act, 28 U.S.C. § 1505. The issue is now fully briefed. For the reasons discussed below, defendant's motion to dismiss plaintiff's constitutional taking claim is granted.

## BACKGROUND[1]

Plaintiff filed its amended complaint on June 29, 1990, alleging that the United States breached its trust relationship with the tribe and that it took Navajo land without just compensation. The land in question was granted by executive order in 1934 to the Navajo and "such other Indians as may already be located thereon." Act of June 14, 1934, ch. 521, 48 Stat. 960 ("1934 Act"). At the time of the 1934 Act, the Hopi Tribe ("Hopi") was located on a portion of the land located directly west of the 1882 Reservation Area, commonly referred to as the Bennett Freeze Area ("BFA"). The Hopi and the Navajo disputed ownership rights to the BFA for decades thereafter.

Congress adopted three statutes in which it attempted to address the inherent ambiguity of the tribes' rights to the BFA under the 1934 Act. The first was the 1974 Settlement Act[2] which permitted, *inter alia*, the Hopi and the Navajo to sue one another in district court to resolve their dispute over title to the 1934 Reservation Area. *See* 25 U.S.C. § 640d-7(a). Litigation between the tribes commenced in the District Court for the District of Arizona ("district court") immediately thereafter.

Second, in 1980, Congress amended the 1974 Settlement Act, thereby limiting the tribes' ability to develop unilaterally in the BFA pending the

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[1] The reader's knowledge of the background facts and procedural history of this case as set forth in our prior opinion is assumed.

[2] Pub. L. No. 95-531, 88 Stat. 1712 (codified at 25 U.S.C. §§ 640d, *et seq.* (1974)) ("1974 Settlement Act").

outcome of the district court litigation.[3] The 1980 Amendment stated:

> [a]ny development of lands in litigation pursuant to section 8 of this Act . . . shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. 'Development' as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

Pub. L. No. 96-305, 94 Stat. 929 (codified at 25 U.S.C. § 640d–9(f) (1980)).

The purpose of the 1980 Amendment was to "preserve the parties' rights subject to a final adjudication," *Masayesva v. Zah*, 816 F. Supp. 1387, 1393 (D. Ariz. 1992). In August 1982, the Hopi Tribe implemented a moratorium[4] on approval of all Navajo development proposals.

The third piece of legislation was the 1988 Amendment to the 1974 Settlement Act, which created an appeals mechanism within the Department of the Interior ("DOI") for the tribes to challenge project application denials pending the outcome of the pending litigation.[5]

It was not until December 4, 2006, that the district court approved a final settlement agreement between the Navajo and the Hopi regarding the BFA land. *Honyoama v. Shirley*, No. 74-842-PHX-EHC (D. Ariz. Dec. 4, 2006). The effect was to grant each tribe an agreed-upon portion of the land within the Bennett Freeze Area. The individual tribes now hold exclusive title to the lands granted them in the settlement agreement.

According to plaintiff, the DOI took Navajo land when it acquiesced in the Hopi's implementation of a development moratorium on the BFA.

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[3] *See* 25 U.S.C. § 640d–9(f) (1980) (referred to herein as "1980 Amendment").

[4] Commonly referred to as the "Hopi moratorium."

[5] *See* 25 U.S.C. §640d-9(f)(2)-(3) (1988) (referred to herein as "1988 Amendment").

Plaintiff argues that its claim commenced at some point after the beginning of the Hopi moratorium in August 1982. It contends that "[t]he restrictions imposed by defendant, and its unlawful delegation of federal police power [to the Hopi], are a continuing taking of plaintiff's property without just compensation." Pl.'s Amend. Compl. at 1. Although the implementation of the moratorium varied over time, we assume for purposes of ruling on this motion that without the Hopi's consent to development proposals by the Navajo–or without the government's override of Hopi denials–the Navajo were prohibited from undertaking any development in the BFA.

Defendant filed a dispositive motion on June 2, 2008, with regard to plaintiff's breach of trust and taking claims. Oral argument was held in Albuquerque, New Mexico on January 8, 2009. On February 27, 2009, we granted defendant's motion with respect to plaintiff's breach of trust claim. We held that the statutes cited by plaintiff did not identify a money-mandating fiduciary duty on the part of the government sufficient to support a claim for money damages. We declined, however, to rule with respect to the only remaining claim–that of a constitutional taking. Instead, we held that we had not yet received adequate briefing on the issue of what property interest plaintiff was asserting had been taken:

> [t]he essence of the status quo–arguably from the inception of the 1934 Act, but certainly after 1974– is that neither tribe was able to assert with any finality what it owned. The very reason for the implementation of the Bennett Freeze and the 1980 Amendment was the intolerable ambiguity as to how much land would have to be set aside for the Hopi. Before that problem was solved, the Navajo [Nation] could only assert its rights through litigation. Litigation was not complete as of 1980, however, nor was it complete in 1982. Indeed, title to the Bennett Freeze Area was not conclusively established between the tribes until 2006.

Op. of Feb. 27, 2009, at 29. For this reason we sought further briefing on the issue of how plaintiff could successfully assert a constitutional taking claim "if the very essence of the legislation which forms the basis of the claim precludes any definitive assertion of the Navajo Tribe's title to the land." *Id.*

DISCUSSION

Plaintiff's taking claim is based on the Fifth Amendment of the United States Constitution. *See* U.S. Const. amend. V, cl. 4 ("nor shall private property be taken for public use without just compensation."). A constitutional taking claim generally accrues on the date that the taking occurs. *Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). Before deciding the appropriate accrual date in the case at hand, however, we must determine "whether plaintiff possesse[d] a valid interest in the property affected by the governmental action." *Karuk Tribe v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000).

Plaintiff contends that the 1934 Act vested in the Navajo Nation compensable property rights to the reservation at issue. Plaintiff asserts in its sur-response that:

> although Congress did not create a metes and bounds legal description of the boundary setting land aside for the Hopi Tribe, the [1934 Act] limited Hopi rights to those limited lands the Hopis actually occupied in 1934, at which time only about 400 Hopis lived in the Village of Moenkopi.

Pl.'s Sur-resp., at 3 (citing *Masayesva v. Zah*, 793 F. Supp. 1495, 1502 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 65 F.3d 1445 (9th Cir. 1995)). Thus, according to plaintiff, "the entire 1934 Reservation, including the lands governed by the 1980 Amendment, belonged to the Navajo Nation except for . . . the village of Moenkopi where the Hopis lived in 1934." *Id.* The constitutional taking occurred, plaintiff argues, when the Hopi Tribe, acting as agents for the United States government, "imposed its unilateral moratorium in 1982." *Id.* at 8.

Defendant contends that the language of the 1934 Act expressed Congress' unambiguous intent to protect not only Navajo rights to the entire land, but "to preserve the rights of all Indians located thereon." Def.'s Sur-reply, at 5. According to defendant, the Navajo Nation "lacked an exclusive compensable right to use the Bennett Freeze Area" upon which it could assert a constitutional taking claim at the time the complaint was filed. *Id.* at 6. Congress' adoption of the 1974 Settlement Act, the 1980 Amendment, and the 1988 Amendment confirms this fact, according to defendant.

It is clear that whatever rights plaintiff had in the BFA were limited to

those granted to it by Congress. We therefore agree with defendant that the effect of the 1974 Settlement Act and its two subsequent amendments was to confirm that from the outset, i.e. 1934, neither tribe had sole control over the BFA lands prior to the termination of district court litigation. Consequently, the lands were inherently subject to the very restrictions that plaintiff now claims constitute a taking. Whatever plaintiff's property interest was prior to 2006, it incorporated the fact of ambiguity. That ambiguity lead to the subsequent statutorily-endorsed restrictions on use and was only eliminated at the conclusion of the district court litigation.

There is therefore an irreconcilable conflict between the rights plaintiff claims it had from the inception of the 1934 Act and the rights Congress gave the tribe. Inherent in plaintiff's claim is the assertion that it had the right to exclusive control to develop in the BFA without Hopi interference, as well as the right to compensation for any such interference. Even if plaintiff did have some compensable right to the land, it amounted to less than exclusive control. Congress made clear through legislation implemented decades after the 1934 Act that plaintiff did not–and never did have–exclusive control of the land in question.

Instead, Congress implemented, through the 1974 Settlement Act, the device of litigation to determine the tribes' respective rights to exclusive control in the BFA. The very adoption of the 1974 Act reaffirms the ambiguity that was not resolved until 2006. Plaintiff's rights were thus limited by Congress' grant of joint use to an unspecific portion of the land. Until that limitation was eliminated, the Navajo did not have the unfettered right to unilaterally develop in the BFA.

We conclude that plaintiff's right to operate unilaterally on particular BFA lands (i.e., unencumbered by restrictions originating in Hopi claims) was not part of plaintiff's property interest until the conclusion of the district court litigation in 2006. As we stated in our prior opinion, "[t]he very reason for the implementation of the Bennett Freeze and the 1980 Amendment was the intolerable ambiguity as to how much land would have to be set aside for the Hopi." Op. of Feb. 27, 2009, at 29. As title to the lands in question was unsettled before the end of district court litigation in 2006, plaintiff cannot assert the necessary element of its property interest. We therefore grant defendant's motion to dismiss plaintiff's constitutional taking claim.

## CONCLUSION

For the reasons stated above, we grant defendant's motion to dismiss plaintiff's constitutional taking claim. In view of our prior dismissal of plaintiff's only other claim, the clerk is directed to enter judgment in favor of defendant, dismissing the complaint. No costs.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Judge

# ADDENDUM 3

# In the United States Court of Federal Claims

No. 88-508L
(Filed: February 27, 2009)

* * * * * * * * * * * * * * * * * * * * * * * *

THE NAVAJO NATION,

*Plaintiff,*

v.

THE UNITED STATES,

*Defendant.*

Indian Trust Claim; Statute of Limitations; Claim Accrual; Temporary Regulatory Taking

* * * * * * * * * * * * * * * * * * * * * * * *

*Scott B. McElroy, M. Catherine Condon*, Washington, D.C., and *Peter J. Osetek*, Ann Arbor, MI, for plaintiff.

*William J. Shapiro, Mark S. Barron*, Trial Attorneys, Civil Division, Department of Justice, Washington, D.C., *Ronald J. Tenpas*, Assistant Attorney General, Department of Justice, Washington, D.C., for defendant.

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OPINION

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BRUGGINK, *Judge*.

The Navajo Nation brings this action against the United States asserting a constitutional taking and a breach of trust. The suit originates in the federal government's decades-long efforts to delineate reservation lands between the Navajo and Hopi Tribes. These efforts were particularly difficult because the

tribes have not occupied physically separated lands. They have co-occupied some of the disputed lands. Plaintiff contends that these efforts resulted in such severe restrictions on the use of its lands that the government breached its fiduciary duties to the tribe and took its property on a temporary basis.

Both of plaintiff's claims stem from the same government action, namely, the Department of the Interior's ("DOI") alleged misinterpretation of the 1980 Amendment[1] to the 1974 Settlement Act.[2] The amendment, in general terms, had the effect of forcing the two tribes to live with a stay in place on the land pending the outcome of litigation resolving their respective rights. In 1982, the Hopi adopted a moratorium against all Navajo development proposals, including those relating to the repair and restoration of dilapidated Navajo structures in the area affected by the 1980 Amendment. Plaintiff argues that DOI's alleged acquiescence in the Hopi moratorium violated the government's trust duties to the Navajo, or, alternatively, caused a temporary taking of Navajo land and property.

The action was stayed for several years at the parties' joint request so that collateral litigation could be terminated. That litigation ended on December 4, 2006, triggering defendant's motion. *See Honyoama v. Shirley*, No. 74-842-PHX-EHC (D. Ariz. Dec. 4, 2006). Defendant argues that the complaint should be dismissed pursuant to Rule 12(b)(1), Rule 12(b)(6) or Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC") either because it was filed too late or because it fails to state a claim upon which relief can be granted. The court has subject matter jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505 (2000).

Oral argument was held in Albuquerque, New Mexico on Thursday, January 8, 2009. For the reasons discussed below, defendant's motion for summary judgment is granted with respect only to plaintiff's breach of trust claim. We defer ruling on defendant's motion with respect to plaintiff's takings claim. Further briefing on the issue is outlined below.

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[1] Pub. L. No. 96-305, 94 Stat. 929 (codified at 25 U.S.C. § 640d–9(f) (1980)).

[2] Pub. L. No. 95-531, 88 Stat. 1712 (codified at 25 U.S.C. §§ 640d, *et seq.* (1974)).

## BACKGROUND[3]

Accessing the dispute requires a recitation of the numerous treaties and statutes underlying the creation of the Navajo and Hopi reservations as well as the government's ongoing trust responsibilities to the tribes.

*The 1868 Navajo Reservation*

On June 1, 1868, President Andrew Johnson entered into a treaty with the Navajo Nation, setting aside a parcel of land commonly knows as the "1868 rectangle" for the "use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them." Treaty with the Navajos, June 1, 1868, 15 Stat. 667.

Other parcels of land were thereafter set apart for the Navajo through executive orders and legislative actions, which served to expand the reservation's boundaries. *See, e.g.*, Exec. Order of Oct. 29, 1878; Exec. Order of Jan. 6, 1880; Exec. Order of May 17, 1884; Exec. Order of Jan. 8, 1900; Act of May 23, 1930, 46 Stat. 378; Act of Feb. 14, 1931, 46 Stat. 1161 (codified at 16 U.S.C. §§ 445 to 445b. In 1880, the Navajo reservation consisted of approximately eight million acres, which, in turn, created the eastern border of the reservation territory later granted by executive order to the Hopi in 1882. *See Healing v. Jones*, 210 F. Supp. 125, 134-135 (D. Ariz. 1962). The Navajo reservation also extended to the south and southwest of what would be the 1882 Hopi reservation, which is described below. *Id.*

*1882 Hopi Reservation*

President Chester Arthur, on December 16, 1882, signed an executive order establishing for the Hopi a reservation of approximately two-and-a-half million acres in Arizona which is commonly known as the "1882 Reservation." In this treaty with the Hopi (formerly known as the "Moqui"), President Arthur proclaimed that the 1882 Reservation was "for the use and occupation of the Moqui and such other Indians as the Secretary of the Interior may see fit to

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[3] The facts are taken from the parties' undisputed proposed findings of fact and exhibits, as well as from prior reported decisions involving the tribes.

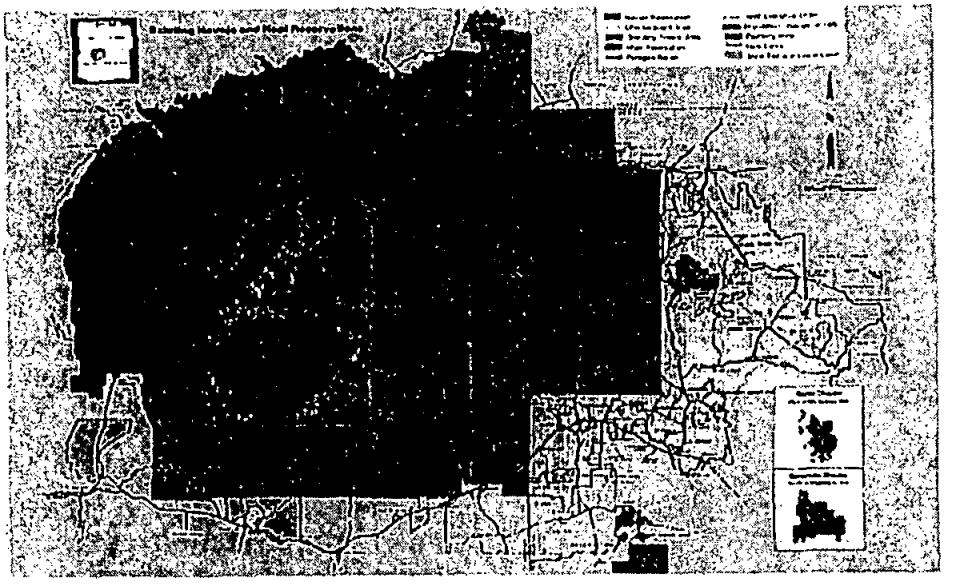
settle thereon." Treaty with the Hopi, *Executive Orders Relating to Indian Reservations: 1855-1922* (Dec. 16, 1882). The executive order of 1882, however, did not include the Hopi village of Moenkopi, located to the west of the reservation. The 1882 Reservation is located in the center of the map at page five below and is marked with a rectangle outlined in black.

As the Navajo had "used and occupied parts of the 1882 reservation . . . from long prior to the creation of the reservation in 1882," the 1882 Reservation later became the subject of quiet title litigation between the Hopi and the Navajo. *Healing*, 210 F. Supp. at 144-45. In 1962, the United States District Court for the District of Arizona ("district court") determined that it lacked jurisdiction to partition the jointly-held land (known commonly as the "joint use area" or the "JUA"). *Id.* at 190. Instead, the district court held that the two tribes had "joint, undivided, and equal interests in and to all of the 1882 reservation lying outside the boundaries of land management district 6 . . . ." *Id.* at 132. In 1972, the district court officially imposed a mutual consent requirement between the tribes for proposed development on the area. *Hamilton v. MacDonald*, Civ. 579-PCT (D. Ariz. 1972). The Hopi and the Navajo engaged in litigation regarding their respective rights to the JUA for decades after the mutual consent requirement was originally imposed. *See Jones v. Healing*, 373 U.S. 758 (1963), *aff'g*, 210 F. Supp. 125 (D. Ariz. 1962); *Clinton v. Babbitt*, 180 F.3d 1081, 1083 n. 2 (9th Cir. 1999); *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 115 n. 3 (9th Cir. 1980). By 1934, however, the 1882 Reservation was completely surrounded by the expansion of Navajo lands. This expansion created an entirely new and distinct conflict between the tribes, discussed below.

*The 1934 Navajo Reservation Extension*

Congress extended the boundaries of the Navajo Reservation on June 14, 1934 and created a joint interest in these additional lands for the Navajo and "such other Indians as may already be located thereon." Act of June 14, 1934, ch. 521, 48 Stat. 960 ("1934 Act"). At the time, both Navajo and Hopi tribal members lived on the land covered by the 1934 Act. *See Hopi Tribe v. United States*, 55 Fed. Cl. 81, 83 (2002). The Hopi "lived in the Village of Moenkopi and used adjacent areas in 1934, and were 'such other Indians' entitled to an equitable interest in the 1934 Reservation." *Masayesva v. Zah*, 816 F. Supp. 1387, 1393 (D. Ariz. 1992). The map below depicts the Navajo and Hopi Reservations as they currently exist. The expanded 1934 Navajo Reservation is depicted in light-red and medium-red as the lands surrounding

the 1882 Executive Order. The Hopi village of Moenkopi and the Navajo village of Tuba City are shown on the map in the medium-red area located just west of the 1882 Reservation area.



*1882 Reservation Area Litigation Effects on the 1934 Reservation Area*

On June 3, 1963, the Supreme Court affirmed the district court's ruling in *Healing* that the Navajo and the Hopi held the 1882 Reservation Area in joint and common ownership. *Healing*, 373 U.S. at 758, *aff'g*, 210 F. Supp. at 125. During the *Healing* litigation, the Hopi began to express concerns to DOI regarding their rights to the 1934 lands. In 1966, based on the Supreme Court's ruling in *Healing*, DOI Commissioner of Indian Affairs ("Commissioner") Robert Bennett wrote a letter answering the Hopi concerns about the 1934 Reservation Area to Navajo Area Director, Graham E. Holmes:

> The conflict between the Navajo and Hopi Tribes over their respective rights in the [1882 Reservation] was resolved by *Healing v. Jones* . . . . Thus, the ownership and rights in that particular area are forever settled insofar as this Bureau is presently concerned. All actions whatsoever taken by officials

> of the Bureau . . . must be guided by the reality of common ownership.
>
> Another problem which has perplexed the Bureau for years is the administration of [the 1934 Reservation Area] . . . .
>
> . . . .
>
> It is evident that the Government can no longer continue to administer the area as though it were owned solely by the Navajo Tribe . . . . [I]t does not appear reasonable to administer the total of the reservation area in Arizona, confirmed by the Act of June 14, 1934, as though it were jointly owned by the Hopi and Navajo Tribes. Effective administration requires of me a prudent judgment.
>
> Therefore, the following instructions shall apply only to that portion of the [1934] Navajo Reservation lying west of the [1882 Reservation] . . . .
>
> . . . .
>
> . . . No action shall be taken by an official of the Bureau that does not take full cognizance of the undetermined rights and interests of the Hopi Indians in the said area. This will necessitate formal action by the Hopi as well as by the Navajo Tribe on all those cases which hypothecate the surface or subsurface resources for exploration, mining, rights-of-way, traders, or other use or occupancy authorized by permit, lease, or license.

Letter from Robert Bennett, Commissioner, to Graham E. Holmes, Navajo Area Director, dated July 8, 1966.

The mutual consent requirement set forth in Commissioner Bennett's letter for development in the 1934 Reservation Area became known as the "Bennett Freeze." The affected area is the portion of the 1934 Reservation Area located directly west of the 1882 Reservation Area and is commonly referred to as the "Bennett Freeze Area." This includes the location of the

Hopi village of Moenkopi and the Navajo village of Tuba City. The Bennett Freeze Area is located on the above map in a medium-red color.

DOI amended the Bennett Freeze in 1967 to allow unilateral approval of public works projects by the DOI Commissioner. *See* Letter from Robert Bennett, Commissioner, to Graham E. Holmes, Navajo Area Director, dated Oct. 31, 1967. DOI simultaneously announced the approval of two new public works projects– the Two Grey Hills School and the Tuba City Hospital. *Id.* In 1970, however, DOI eliminated the 1967 public works project exception, effectively reinstating the original mutual consent requirement of the Bennett Freeze. *See* Letter from Acting Commissioner to Area Directors, dated Dec. 28, 1970.

The policy changed again in 1972 when DOI Assistant Secretary of the Interior, Harrison Loesch, wrote a letter exempting Moenkopi and Tuba City from the mutual consent requirement. *See* Letter from Harrison Loesch, Asst. Secretary of the Interior, to Peter MacDonald, Navajo Tribal Chairman, dated Aug. 4, 1972; *see also* Letter from Deputy Commissioner to Area Directors, dated Aug. 15, 1972. Thus, the Hopi Tribe could proceed with unilateral development in the Moenkopi vicinity, and the Navajo were allowed to develop without Hopi consent in Tuba City. *Id.*

The Commissioner further modified the consent requirements in 1976 "in order to alleviate [the Freeze's] harsh impact during the pendency of the litigation" to permit an appeal to him of "any Navajo project . . . for which the Hopi Tribe has specifically refused to grant its consent . . . or that failed to consider granting its consent within 30 days after being requested to do so." Letter from Morris Thompson, Commissioner, to Chairman Peter MacDonald, Navajo Chairman, dated July 16, 1976. The Commissioner's purpose in the modification was to reduce the "arbitrarily imposed obstacle to meeting Navajo needs." *Id.*

*The 1974 Settlement Act*

Congress enacted legislation in 1974 which significantly impacted the tribes' competing interests in the 1934 Reservation Area. Pub. L. No. 93-531, 88 Stat. 1712 (codified at 25 U.S.C. §§ 640d to 640d-31 (1974)) ("1974 Settlement Act"). The 1974 Settlement Act "required members of each tribe to move from lands partitioned to the other tribe by 1986 and created a commission to pay for the major costs of such relocations." *Clinton*, 180 F.3d

at 1084 (citing 25 U.S.C. §§ 640d-11 to 640d-14). A lengthy and difficult relocation program of more than 10,000 tribal members followed after a district court order of partition. *See id.*

Importantly for the present litigation, the 1974 Settlement Act also authorized the tribes to bring suit against each other in district court to resolve the dispute over rights within the 1934 Reservation Area. *See* 25 U.S.C. § 640d-3; *see also Sekaquaptewa*, 626 F.2d at 117-119. The authorized litigation began in 1974 and did not end until 2006, when the district court adopted a settlement agreement between the Navajo and the Hopi regarding land remaining under the Bennett Freeze. *Honyoama v. Shirley*, No. 74-842-PHX-EHC (D. Ariz. Dec. 4, 2006).

*The 1980 Amendment to the 1974 Settlement Act*

Before the authorized litigation concluded, Congress in July 1980 amended the 1974 Settlement Act to codify the Bennett Freeze. *See* Pub. L. No. 96-305, 94 Stat. 929 (codified at 25 U.S.C. § 640d-9(f) (1980)). In part, the amendment stated:

> Any development of lands in litigation pursuant to section 8 of this Act . . . shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. 'Development' as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

*Id.* The purpose of the 1980 Amendment, like that of the original 1966 administrative freeze, was to "preserve the parties' rights subject to a final adjudication." *Masayesva*, 816 F. Supp. at 1397.

DOI's Office of the Solicitor opined in June 1982 that the 1980 Amendment did not affect "ordinary maintenance and repair of existing structures" but instead prohibited "all new developments or new construction." Memorandum from William D. Back, DOI Acting Field Solicitor, to Superintendent, Western Navajo Agency, dated June 2, 1982. According to DOI's Bureau of Indian Affairs ("BIA") Western Navajo Agency

Superintendent, Mr. Wilbur Wilkinson, "the [Bennett] freeze primarily impact[ed] the Navajo people as virtually all Hopis reside[d] in the Moencopi area which [wa]s exempt from the freeze." Memorandum from Superintendent, Western Navajo Agency, to Asst. Secretary- Indian Affairs, dated June 17, 1986. The 1980 Amendment did not provide for the possibility of appeal to the DOI Secretary of the Interior in cases in which the Hopi denied or failed to respond to a Navajo application for a development project in the Bennett Freeze Area.

Between July 1980 and August 1982, the Navajo submitted several public works project applications to the Hopi. The Hopi granted consent for a well in Tuba City, an electrical line at some of the Tuba City wells, and an expansion of the Tuba City/Moenkopi landfill. Hopi consent to Navajo development proposals suddenly ceased, however, following the Hopi Tribe's implementation of a development moratorium.

On August 26, 1982, the Hopi Tribal Council wrote a letter to the Western Navajo Agency Division of Social Services stating:

> The Hopi Negotiating Committee . . . unanimously voted to place a moratorium on any and all construction activities, more specifically within the Bennett Freeze Order Area (BFOA), until certain issues have been addressed satisfactorily surrounding current and potential construction activities in the litigated BFOA and the entire 1934 Reservation. The Committee has postponed the processing of all construction applications for the BFOA for an indefinite period which will allow the Hopi Tribe to conduct a complete investigation on the matter.

Letter from Stanley Honahni, Chairman, Hopi Negotiating Commission, to Calvin Nez, Caseworker, Division of Social Services, dated Aug. 26, 1982.

At least eleven[4] Navajo requests for residential construction and repair were pending at the time of the Hopi's moratorium in August 1982.[5] The Hopi

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[4] Plaintiff and defendant disagree on the number of pending requests.

[5] Plaintiff concedes that it does not have standing to seek compensation on behalf of individual Navajo tribal members. See Pl.'s Resp. at 2 n. 1

Tribe did not give its consent to any of these individual Navajo projects. *See* Def.'s Ex. 24 ("United States' List of Navajo Nation Proposals").

Upon the implementation of the moratorium in 1982, the Hopi Tribe began to monitor Navajo activity within the Bennett Freeze Area. In an effort to ensure Navajo compliance with the moratorium, the Hopi posted notices on individual Navajo residence sites considered to be in violation of the moratorium. The Hopi considered renovations and repairs of individual Navajo residences (called hogans) and the development of a water tank to be illegal activity. Claims against the Hopi for harassment of Navajo residents, impoundment of Navajo livestock, and destruction of individual hogans, also arose as a result of the tribe's moratorium enforcement efforts.

A Hopi employee, Patrick Dallas, participated in aerial reconnaissance over the freeze area as part of the Hopi enforcement effort. Mr. Dallas and other Hopi employees circled helicopters over suspect Navajo structures and then took photographs which they later used to conduct field visits. Some Hopi field visits resulted in field trip reports of the structure being reviewed.

By June 1986, concern regarding the Hopi moratorium had reached Mr. Wilbur Wilkinson, DOI's BIA Western Navajo Agency Superintendent. Mr. Wilkinson wrote a letter to the DOI Assistant Secretary- Indian Affairs regarding the moratorium:

> [A]ll activities in the Bennett Freeze Area need to be closely regulated to ensure compliance with existing regulations by each tribe . . . .
>
> . . . .
>
> . . . The Hopi Tribe has mercilessly pocket-vetoed nearly all Navajo requests requiring their consent. We request a review of the procedures established . . . on July 16, 1976, where the Commissioner will entertain and act upon requests which the Hopi Tribe has failed to respond to.
>
> . . . .

> . . . The overriding duty of the Federal Government is to deal with Indian people, wherever located, and that is and will continue to be the policy of the Navajo area.

Memorandum from Wilber Wilkinson, BIA Superintendent, Western Navajo Agency, to Asst. Secretary - Indian Affairs, dated June 17, 1986. In July, Mr. Wilkinson followed up with a letter to the Hopi Agency Superintendent, Mr. Alph Secakuku:

> [N]umerous complaints have been received by this office to the activities by Hopi Tribal employees in the 1934 Bennett Freeze Area. These employees are posting notices on Navajo homes and improvements with reference to the freeze requirements.
>
> We are requesting your assistance in stopping the issuance of these notices and any other Hopi Tribal activities . . . .
>
> If the Hopi Agency and the Hopi Tribe are concerned with a specific activity in the 1934 Executive Order Area, then contact should be made to this office to investigate.
>
> As a reminder, the Hopi Agency and the Hopi Tribe does not have jurisdiction in Western Navajo Agency and further activities of this nature may be construed as unlawful.

Letter from Wilber Wilkinson, BIA Superintendent, Western Navajo Agency, to Alph Secakuku, Agency Superintendent, Hopi Agency, dated July 2, 1986.

Mr. Wilkinson sent a letter on July 7, 1986, to the Western Navajo Agency requesting a determination from the BIA and permission to "notify local Navajo residents on . . . the Bennett Freeze Area that minor improvements to their residence will not require Hopi consent . . . ." Memorandum from Wilbur D. Wilkinson, Superintendent, Western Navajo Agency, to William D. Back, Acting Field Solicitor, Navajo Area, dated July 7, 1986. In October 1986, another request for a BIA policy statement on the issue of Navajo home repairs was submitted by the Western Navajo Agency. As of 1988, however, BIA had not adopted any change in policy on the issue.

BIA's Hopi Agency Superintendent, Mr. Alph Secakuku, responded to Mr. Wilkinson's letters on July 9, 1986, stating that the Hopi Tribe has a "legal

obligation to protect the interests of its citizens" and that in order to protect Hopi interests, "tribal employees are in the area protecting the rights of the Hopi Tribe by posting notices on Navajo improvements which have not received Hopi Tribal consent . . . ." Letter from Alph Secakuku, Superintendent, Hopi Agency, dated July 9, 1986. Mr. Secakuku recommended that the Navajo obtain consent from the Hopi before attempting further development in the Bennett Freeze Area to minimize "local agitation and ill feelings." *Id.* Mr. Secakuku concluded his letter by stating, "[a]s a Federal government entity, the Bureau of Indian Affairs has a responsibility to protect all Indian citizens under its jurisdiction in an impartial manner." *Id.*

BIA Agency Superintendents for the Western Navajo Agency and the Hopi Agency met to discuss issues relating to development in the Bennett Freeze Area on July 29, 1986, and submitted their joint proposal to the Area Directors in the Navajo and Phoenix Areas. *See* Memorandum from Wilber Wilkinson and Alph H. Secakuku, Agency Superintendents, Western Navajo Agency and Hopi Agency, to Area Directors, Navajo Area and Phoenix Area, dated July 29, 1986. The proposal stated, in part, that:

> A very key issue has arisen in the discussions on new construction procedures. The once established procedures by Commissioner Morrison Thompson in 1976 whereby a proposal for new development that did not receive consent of both tribes could after 30 (later 60) days be forwarded to the Commissioner's Office for final consideration and determination. The procedure has not been specifically cancelled or superceded and it is our position that P.L. 96-305 did not have the effect of replacing other prior administrative procedures relating to the 1934 SOA. We assume the Assistant Secretary for Indian Affairs will entertain development requests such as public work type projects where consent is not granted by both tribes.
>
> Both tribes need a clarification of what constitutes a new development requiring both tribe's [sic] consent.
>
> . . . .
>
> Recommendation: Any maintenance or betterment would not require with [sic] tribe's [sic] consent. Anything beyond

> maintenance and/or betterment would require consent from each respective tribes [sic].

*Id.* The policy recommendations were not implemented.

The Navajo Superintendent submitted a request to the Navajo Area Director to implement clarifying policies on issues such as "new construction procedures if Hopi Tribal consent is not attainable" as well as "the definition of home improvements as it applies to existing homesite leases and residences" on October 20, 1986. Memorandum from Agency Superintendent, Western Navajo Agency, to Area Director, Navajo Area, dated Oct. 20, 1986. As late as August 24, 1988, the Navajo Superintendent had not received a response to this request.

On August 15, 1988, Navajo Tribal Chairman Peter MacDonald announced in a letter to the Navajo-Hopi Indian Relocation Commission that he would begin a building and relocation campaign called "Project Hope" on behalf of the Navajo residing in the Hopi Partitioned Lands ("HPL") area and in the Bennett Freeze Area, notwithstanding the 1980 Amendment restrictions:

> I am compelled by this reality to tell you that if I do not receive by August 25, 1988 the clearest possible commitment from the federal government to conduct the needed repairs and related construction, I will personally undertake to provide more suitable housing from [sic] those on the HPL, including resistors, and for those most in need on the Bennett Freeze, and especially to find housing, on the HPL itself if need be, for the refugee families who left the HPL but have no place else to go. I will spare no effort in this regard.

*Sidney v. MacDonald*, No. CIV 58-579, at 2 (1988). The United States Department of Justice sought a preliminary injunction against Mr. MacDonald and his building campaign on September 14, 1988. *Id.* On September 26, 1988, the district court issued an injunction. *Id.*

*The 1988 Amendment to the 1974 Settlement Act*

Less than two months later, on November 16, 1988, Congress amended the 1974 Settlement Act again. Navajo and Hopi Indian Relocation Amendments Act of 1988, Pub. L. No. 100-666, § 6, 102 Stat. 3929

(amending 25 U.S.C. § 640d-9(f)) ("1988 Amendment"). The amendment stated in relevant part:

> Each Indian tribe which receives a written request for the consent of the Indian tribe to a particular improvement, construction, or other development on the lands . . . shall respond in writing to such request by no later than the date that is 30 days after the date on which the Indian tribe receives the request. If the Indian tribe refuses to consent . . . the response shall include the reasons why consent is being refused.
>
> . . . .
>
> [A]fter the Navajo Tribe or Hopi Tribe has refused to consent to such improvement, construction, or development . . . the Secretary shall, by no later than the date that is 45 days after the date on which such request is submitted to the Secretary, determine whether [it] is necessary for the health or safety of . . . either Tribe. _

*Id.* The 1988 Amendment thus created an appeals mechanism within DOI for tribes to challenge project application denials.

On July 8, 1991, Attorney General of the Navajo Nation, Ms. Donna M. Christensen, wrote a letter to the DOI Asst. Area Director for Indian Programs, stating, "[p]lease be advised that the Hopi Tribe has been posting residents of the Bennett Freeze area for making any repairs of existing structures." Letter from Donna M. Christensen, Attorney General, Navajo Nation Department of Justice, to DOI Assistant Area Director, dated July 8, 1991. In March 1992, the Hopi Tribe wrote in a letter to Mr. Roman Bitsuie, Executive Director of the Navajo-Hopi Land Commission, that "the Hopi Tribe's position is, and always has been, that the construction restrictions imposed by 25 U.S.C. § 640d-9 apply to repairs and renovations of existing structures" and that "the Hopi Tribe will bring appropriate legal action if such activities occur." Letter from Patrick Dallas, Vice-Chairman, Hopi Tribe, to Roman Bitsuie, Executive Director, Navajo-Hopi Land Commission, dated March 16, 1992.

On July 27, 1993, Attorney General of the Navajo Nation, Mr. Herb Yazzie, testified to the Subcommittee on Interior Appropriations of the United States Senate regarding the Navajo-Hopi land dispute. *See* Supplemental

Statement of Herb Yazzie, Attorney General of the Navajo Nation, to the Subcommittee on Interior Appropriations, United States Senate, dated July 17, 1993. Regarding the 1988 Amendment, he stated, "[a]fter 1988, denials were generally phrased in terms of the Hopi Tribe's policy against approving any request not meeting the strict criteria of the 'health and safety' amendment." *Id.* Mr. Yazzie continued by giving a list of individual Navajo projects which the Hopi denied "applying its own unilaterally-decreed standard of 'direct medical necessity.'" *Id.*

On June 6, 1997, Department of Health & Human Services ("Indian Health Services") sought assistance from the Executive Director of the Navajo and Hopi Land Commission, Mr. Colbert Dayzie, in obtaining an easement for water lines to complete a water supply and waste-water project for which it had acquired funding in 1994. Letter from C. Lewis Fox, Jr., Chief, Sanitation Facilities, Navajo Area Indian Health Services, to Colbert Dayzie, Executive Director, Navajo and Hopi Land Commission, dated June 6, 1977. The Indian Health Services letter stated:

> In late 1992, when the Freeze area was partitioned, we were able to begin funding projects which we had suppressed in our priority system because of the land dispute. Now, as we understand it, the Hopi Tribe still has legitimate concerns in areas partitioned for exclusive Navajo use. If we are unable to get a Grant of Easement in a timely manner, we will deobligate funding from the projects (approximately $1.6 million and service to 250 existing homes) and move the funding to projects outside the Former Freeze Area.

*Id.* The easement was not timely granted to Indian Health Services and funding for the project was deobligated.

On March 31, 1997, the district court entered an order confirming a partial settlement agreement between the Hopi and the Navajo regarding the Bennett Freeze Area lands. *Secakuku v. Hale*, No. CIV 74-842 PCT EHC ORDER (1997). This settlement agreement, however, left 700,000 acres of land still subject to the 1980 Amendment restrictions. Joint Status Report ¶ 4, at 3 (Oct. 1, 1997). It was not until December 4, 2006 that the order and final judgment approving a stipulation between the Navajo and the Hopi was entered by the district court, lifting the freeze in its entirety, and resolving the

land dispute between the tribes. *Honyoama v. Shirley*, No. CIV 74-842 PHX EHC (2006).

## PROCEDURAL HISTORY

Plaintiff filed its claim here on August 25, 1988, shortly before the enactment of the 1988 Amendment. Defendant filed a motion to dismiss on April 7, 1989. That motion was denied on March 28, 1990, although we permitted plaintiff to file an amended complaint, which plaintiff subsequently did on June 29, 1990.

The amended complaint sought relief for three distinct claims: (1) constitutional taking without just compensation, (2) breach of trust, and (3) denial of equal protection. Plaintiff attributed these claims primarily to defendant's prohibition on Navajo development of "their land except with the consent of . . . the Hopi Tribe." Pl.'s Amend. Cmpl. at 1. Plaintiff argued that the claim commenced sometime after the beginning of the Hopi moratorium in August 1982, stating that "[t]he restrictions imposed by defendant, and its unlawful delegation of federal police power, are a continuing taking of plaintiff's property without just compensation" as well as a breach of trust and a denial of the tribe's equal protection rights under the Fifth Amendment of the U.S. Constitution. *Id.*

From 1990-1993, the parties conducted discovery and submitted status reports apprising the court of the ongoing district court litigation concerning ownership of lands covered by the 1980 Amendment. In March, 1996, defendant filed a motion for summary judgment. Judge Roger B. Andewelt granted summary judgment for defendant as to the equal protection claim, but denied it with respect to the two remaining claims. The case was stayed in 1997 pending resolution of the district court litigation.

In 2001, the case was reassigned to the undersigned judge. In 2006, the district court litigation concluded. In February 2008, we lifted the stay and defendant filed its pending motion to dismiss, or alternatively, for summary judgment. Briefing on the motion concluded on December 1, 2008, and oral argument was heard in Albuquerque, New Mexico on January 8, 2009. For the reasons discussed below, defendant's motion is granted in part.

## DISCUSSION

Defendant contends that the six-year statute of limitations set forth in 28 U.S.C. § 2501 bars both of plaintiff's claims. In the alternative, defendant argues that the breach of trust claim fails to state a claim because it is not grounded on a specific, money-mandating fiduciary obligation and that plaintiff's taking claim has a number of fatal conceptual problems.

Plaintiff's breach of trust and taking claims both have their origin in the 1980 Amendment, which codified the Bennett Freeze. The breach of trust argument is premised on DOI's alleged misinterpretation of that legislation. Plaintiff contends that it is the government's post-1982 failure to keep the Hopi from interfering with the Navajo's rights which constitutes the breach of trust. The taking claim, as we understand it, alleges that the 1980 legislation made possible the subsequent taking of Navajo tribal property by the Hopi Tribe. Although the complaint was filed in 1988, plaintiff contends that the taking claim did not ripen until at least 1982, with the Hopi moratorium. From that point, it contends, a continuing claim has accrued until 2006.

Both claims are subject to a six-year limitations period. *See* 28 U.S.C. § 2501. Defendant contends that plaintiff has not alleged that the government has *done* anything after August 25, 1982, and that both claims are therefore untimely.

Plaintiff's explanations for why these claims are not untimely further calls into question their substantive underpinnings. Consequently, resolving the timeliness issue becomes virtually impossible to separate from the question of whether plaintiff has stated a cause of action in either breach of trust or taking. In the case of the breach of trust claim, we have to understand what plaintiff alleges were the government's duties to the tribe, and how and when those duties were breached. Similarly, it is difficult to assess the taking claim without better understanding what plaintiff asserts were its property rights, and how and when they were taken. In short, we cannot conclusively rule on when the causes of action accrued without better grasping the substance of the claims.

*1) The Breach of Trust Claim*

The Indian Tucker Act provides general consent for Indian tribes to sue the United States government in this court. *See* 28 U.S.C. § 1505. It does not, however, create a substantive right to recover money damages against the United States. Like any other claimant, an Indian tribe must demonstrate a specific statutory or regulatory source of substantive law that can fairly be interpreted as mandating compensation by the federal government. *United States v. Mitchell*, 463 U.S. 206, 216-217 (1983) ("*Mitchell II*"). A general trust relationship between the federal government and Indian tribes does not create the "money-mandating" fiduciary duty contemplated by *Mitchell II* to allow the recovery of damages. *Id.* at 225. Instead, a tribe must allege that the government breached a specific fiduciary duty which has its source in substantive law. *Id.* at 218-24.

The federal government's control or supervision of tribal assets is a key factor in the analysis of whether a rights-creating or duty-imposing statute or regulation exists. *Id.* It is not necessary that there be an explicit provision in the law providing for money damages for breach of the legal duty. *White Mountain Apache Tribe v. United States*, 537 U.S. 465, 474-75 (2003) ("*White Mountain Apache*"). Where a trust relationship is created through control or supervision given to the federal government, general trust law may then infer that Congress intended to remedy a breach of the obligation. *Id.* at 477.

Plaintiff assembles three sources of substantive law which it contends, when considered together, create fiduciary obligations which can be enforced through an action for money damages: (1) the four founding documents that created or defined the Navajo reservation's boundaries; (2) the Navajo-Hopi Rehabilitation Act of 1950, codified at 25 U.S.C. § 631; and (3) the 1974 Settlement Act, codified at 25 U.S.C. §§ 640d to 640d-31, as amended in 1980. According to plaintiff, these statutes create the trust obligation which plaintiff claims was breached beginning in 1982, with DOI's misinterpretation of the 1980 Amendment.

Plaintiff asserts that the 1980 Amendment did not cover ordinary repairs and routine maintenance of existing structures but merely regulated new developments. Plaintiff therefore posits that interpreting the 1980 Amendment as limiting DOI's authority and responsibility to protect Navajo interests in the repair of existing structures "directly contravenes the express language, purpose and intent of the 1980 Amendment." Pl.'s Reply at 2.

According to plaintiff, "the Department's inaction, and, indeed, acquiescence in the Hopi Tribe's unwarranted actions gave rise to the Navajo Nation's breach of trust claim against the United States." *Id.* at 3. Moreover, plaintiff claims that DOI failed to maintain the status quo in the Bennett Freeze Area, and therefore breached its trust relationship with the Navajo.

We analyze below each of the statutes upon which plaintiff relies to determine whether the statutes, taken individually or as a whole, impose a money-mandating trust duty on DOI.

*a) Four Navajo Foundational Documents*

Plaintiff begins with the Treaty of Sept. 9, 1849, arts. I, IX, 9 Stat. 974; the Treaty of June 1, 1868, art. II, 15 Stat. 667; the Executive Order of May 17, 1884; and the Act of June 14, 1934, 48 Stat. 960, as sources of law which create a general trust relationship between the Navajo and the United States. *See* Pl.'s Resp. at 27-32. These are the founding documents which defined and expanded the Navajo reservation. Plaintiff concedes that the general trust relationship created in these documents is "not, in and of itself, sufficient to support the conclusion that there was a money-mandating obligation on the part of the United States in the event it failed to properly discharge its duties . . . ." Pl.'s Resp. at 27. This is consistent with the Federal Circuit decision in *Navajo Nation v. United States*, which, when analyzing these same treaties and executive orders, concluded that:

> [t]he substantive sources of law cited by the Nation contain explicit trust language. Because such language is necessary but not sufficient for an Indian Tucker Act breach of trust claim, we proceed to evaluate whether the network of statutes and regulations asserted by the Nation established specific fiduciary or other duties that can fairly be interpreted at mandating compensation for damages sustained.

501 F.3d 1327, 1341 (Fed. Cir. 2008) (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)).

It is necessary, therefore, to proceed to the two other sources of substantive law cited by plaintiff to determine whether one or both of these statutes, in conjunction with the founding documents, establishes a specific money-mandating fiduciary obligation on the part of the United States.

*b) The Navajo-Hopi Rehabilitation Act of 1950*

Plaintiff cites the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 ("Rehabilitation Act"), as a part of the "network of statutes that enumerate and impose upon the Department specific fiduciary duties for the benefit of the Navajo Nation and its members." Pl.'s Resp. at 31. The Rehabilitation Act authorized and appropriated $500,000 for the Secretary of the Interior to develop "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation . . . ." 25 U.S.C. § 631. Plaintiff argues that the DOI's implementation of the Rehabilitation Act in the "1980 Amendment area has been flatly inconsistent with Congress's articulated goals and the fiduciary standards it established and imposed upon the Secretary to implement." Pl.'s Resp. at 33.

Defendant cites the Federal Circuit's decision in *Navajo Nation v. United States*, 501 F.3d at 1341, for the proposition that the Rehabilitation Act is insufficient by itself as a money-mandating source of law. In *Navajo Nation*, the Federal Circuit considered whether the Navajo "had a cognizable money-mandating claim . . . against the United States for a breach of trust in a lease of the Nation's lands for coal mining." *Navajo Nation v. United States*, 501 F.3d at 1329. Plaintiff Navajo Nation relied, *inter alia*, on the Rehabilitation Act as the basis for its claim for relief. *Navajo Nation v. United States*, 501 F.3d at 1341.

While the Federal Circuit in *Navajo Nation* held that the government had a duty pursuant to the Rehabilitation Act to "keep the Nation informed regarding the development of its coal resources," the court did not find that this duty alone could be enforced through an action for money damages. *Id.* Instead, it was in the Surface Mining Control and Reclamation Act of 1977 ("SMCRA")[6] that the Federal Circuit found the key duty of the Secretary of the Interior, which was to "include and enforce terms and conditions requested by the Nation" as well as to "provide the Nation with representation in a matter related to coal mining operations." *Id.* at 1347. The Federal Circuit

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[6] Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of 30 U.S.C.S.).

acknowledged that the Rehabilitation Act "may contribute to the Nation's asserted network" but implicitly held that it did not on its own constitute the money-mandating statute necessary for plaintiff's recovery. *Id.* The Federal Circuit cited common law trust duties, the Rehabilitation Act, and the SMCRA as the network supporting a "cognizable money-mandating claim," while relying most heavily on SMCRA. *Id.* at 1349.

Plaintiff's claims in the current case are distinguished from *Navajo* because here, there is no statute assigning specific management duties to the government comparable to SMCRA. The founding documents and the 1980 Amendment to the 1974 Settlement Act, as we hold in our analysis below, do not confer upon the federal government the comprehensive control necessary to create a money-mandating fiduciary duty. The Rehabilitation Act therefore fails to impose a rights-creating duty on the Secretary upon which plaintiff's claim can be founded.

*c) The 1974 Settlement Act, as Amended in 1980*

Congress enacted the 1974 Settlement Act for the purpose of providing a method of settling the Hopi and Navajo Tribes' competing land claims in the JUA. Notably, the Act authorized the district court to partition the JUA, which it did in 1979, by requiring tribes to move from lands partitioned to the other, and by setting up a commission to pay for relocations. *See* 25 U.S.C. § 640d-3; *see also Clinton*, 180 F.3d at 1084. The 1974 Settlement Act also permitted the two tribes to sue one another in district court to resolve their dispute over title to the 1934 Reservation Area. *See* 25 U.S.C. § 640d-7(a).

Plaintiff points specifically to 25 U.S.C. § 640d-9(c), adopted as part of the 1974 Settlement Act. This provision addressed the relocation of individuals between Hopi and Navajo portions of the reservation. It vested in the Secretary of the Interior the authority to "take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation pursuant to this Act . . . or any judgment of partition pursuant thereto . . . ." 25 U.S.C. § 640d-9(c). Whatever obligations this provision creates, however, related to individuals subject to relocation, not to the Navajo Tribe as a whole. Moreover, the Federal Circuit affirmed that the relocation provisions of the 1974 Settlement Act did not "evince Congressional intent to create a trust." *Begay v. United States*, 865 F.2d 230, 231 (Fed. Cir. 1988).

*d) The 1980 Amendment to the 1974 Settlement Act*

The 1980 Amendment to the 1974 Settlement Act, as previously stated, was intended to "preserve the parties' rights subject to a final adjudication." *Masayesva*, 816 F. Supp. at 1397. In relevant part, it provides:

> [a]ny development of lands in litigation pursuant to section 8 of this Act . . . shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. 'Development' as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

25 U.S.C. § 640d-9(f)(1). The question we must determine herein is whether the 1980 Amendment created a trust duty in DOI to prevent the Hopi from asserting its rights in the Bennett Freeze Area.

Defendant argues that the plain language of the 1980 Amendment grants authority over development decisions solely to the two tribes, encouraging Indian tribal autonomy and releasing governmental control over the Bennett Freeze Area in this respect. It contends that "[w]hen Congress codified the consent requirement in 1980, it did not authorize the Department of the Interior to review proposed development projects" and therefore did not establish any additional fiduciary duties on the part of the federal government. Def.'s Reply at 18. Plaintiff, however, argues that "the United States exercised total control over [the land subject to the 1980 Amendment], either directly or acting through its *de facto* agent, the Hopi Tribe." Pl.'s Resp. at 26. Plaintiff therefore posits that "the 1974 Settlement Act, as amended in 1980, embodies the exact same type of control over the 1980 Amendment area that was evidenced in *Mitchell II* and *White Mountain Apache*." Pl.'s Resp. at 28.

In *Mitchell II*, 463 U.S. at 206, the Supreme Court analyzed whether the United States was financially accountable to the Quinault Indian Tribe for breach of trust regarding mismanagement of the tribe's forest resources. The Court determined that the statutes and regulations at issue in the case "clearly establish[ed] fiduciary obligations of the Government in the management and

operation of Indian lands and resources" even though express trust language did not exist. *Id.* at 225. Specifically, the Court noted that a section of the statute it was reviewing mandated the Secretary of the Interior's involvement in the payment of timber proceeds to the Indian owners, consideration of the best interest of the Indians, and "'manag[ement of] the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests.'" *Id.* at 224. This "elaborate control over forests and property belonging to Indians," deemed the Court, implied the existence of a fiduciary responsibility to the Indians beyond the minimum level of general trust duties, and therefore established a basis for the Quinault Indians to recover money damages for a breach of said responsibility. *Id.* at 225. In sum, the Court concluded that a money-mandating fiduciary duty may be implied if, and only if, a fair interpretation of the statute creates a right to ground a claim against the federal government for compensation. *Id.* at 217 (quoting *U.S. v. Testan*, 424 U.S. 392, 400 (1976)).

In *White Mountain Apache*, 537 U.S. at 465, the Court analyzed a statute granting the Secretary of the Interior rights to occupy buildings on White Mountain Apache tribal lands using the "fair inference" test set forth in *Mitchell II*. The Court reviewed the relevant statute to determine if it imposed a money-mandating fiduciary duty upon the federal government to maintain and preserve the buildings it used on the former Fort Apache Military Reservation. *Id.* The Court concluded in the affirmative, noting that the statutory language vested the United States with both general trust responsibilities and "the discretionary authority to make direct use of portions of the trust corpus." *Id.* at 475. The statute subjected the trust property to the authority and actual use of the Secretary of the Interior which, the Court posited, allowed the United States to obtain "daily occupation, and . . . control at least as plenary as its authority over the timber in *Mitchell II*." *Id.*

The present facts are clearly distinguishable from *White Mountain Apache* and *Mitchell II*. The 1980 Amendment to the 1974 Settlement Act did not confer on the federal government the type of control, authority, or resource management responsibilities that the Court identified in those cases. The Secretary of the Interior is mentioned only once in the 1980 Amendment, when referring to lands "heretofore designated by the Secretary." 25 U.S.C. § 640d-9(f)(1). Indeed, it could fairly be observed that the statute had the opposite import. Each tribe was left with apparently unfettered control of development by the other. This is fully consistent with the incontestable fact that in 1974, and again in 1980, ownership of the reservation lands was left unresolved.

The 1980 Amendment's total silence with respect to DOI's role in development decisions cannot fairly be construed as an assignment of affirmative powers, much less duties, to stop the exercise of a veto by one tribe.

When interpreting a statute, we must look first to the language of the statute, and attempt to "construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). In the absence of "an 'extraordinary showing of contrary intentions,'" *Sharp v. United States*, 80 Fed. Cl. 422, 434 (2008) (citing *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 396 (Fed. Cir. 1990)), we will presume that the plain language of the 1980 Amendment expresses Congress' intent to remove control from the DOI and place it in the hands of the tribes with regard to development decisions. *See Bull v. U.S.*, 479 F.3d 1365, 1377 (Fed. Cir. 2007). The "unambiguously expressed intent of Congress" generally ends a discussion on legislative intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

Reviewing the legislative history of the 1980 Amendment does not reveal the necessary contrary intent of Congress. Indeed, in 1979, the Senate added a section to an earlier draft of the bill which would have given DOI review authority over proposed development projects denied by a tribe in the Bennett Freeze Area. S. Rep. No. 96-373, at 7-9 (1979):

> [d]uring the pendency of litigation in the [district court] . . . any new use or development of the lands contained within [the Bennett Freeze area] . . . shall be carried out only upon the written consent of the two tribes or upon the written approval of the Secretary: *Provided*, That if the Secretary approves such use or development over the objection of one of the tribes, that tribe may petition the district court having jurisdiction over the litigation for an order or orders prohibiting such use or development, including an order staying any such use until such matter is finally resolved by the court. In reaching a final decision regarding such petition the court shall consider the matter de novo to determine whether the proposed use or development would adversely affect the ultimate legal right of either tribe to partition based on use of land.

Navajo and Hopi Indians Relocations Amendments Act of 1979, S. 751, 96th Cong. § 3(c) (Oct. 24, 1979). Five days later, however, the House of

Representatives struck that language from the proposed legislation, and inserted in its place the following:

> [a]ny development of lands in litigation pursuant to section 8 of this Act . . . shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. 'Development' as used herein shall mean any new construction or improvement to the property and shall include placement of mobile homes and buildings on the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

Navajo-Hopi Relocation Act, H.R. 5262, 96th Cong. § 3(d) (Oct. 29, 1979).

The final version of the 1980 Amendment adopted language strikingly similar to H.R. 5262, which omitted DOI review powers. *See* Pub. L. No. 96-305, 94 Stat. 929 (codified at 25 U.S.C. § 640d-9(f) (1980)):

> Any development of lands in litigation pursuant to section 8 of this Act . . . shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. 'Development' as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

*Id.* DOI review authority was not adopted until the passage of the 1988 Amendment. *See* Pub. L. No. 100-666, § 6, 102 Stat. 3929 (amending 25 U.S.C. § 640d-9(f)).

It is clear that the 1980 Amendment did not grant authority to DOI to intervene in Navajo-Hopi development decisions in the Bennett Freeze Area. The statute did not strengthen DOI's hand in reviewing Navajo development proposals denied by the Hopi, and it was silent as to DOI's role in the administration of development-related issues on the Bennett Freeze Area. The

1980 Amendment expressly vests that authority in the Hopi and the Navajo Tribes.

*e) Conclusion*

In sum, none of the statutory components cited by plaintiff individually impose a money-mandating fiduciary duty upon which its claim for relief may be grounded. Nor do they collectively comprise a network of statutes which assign sufficient trust management responsibilities to the government to support a claim for money damages. The very ambiguity of the condominium created by Congress in 1934 is illustrated by the continued vacillation by all parties, over decades, about whether it was possible or proper to limit the Hopi Tribe's role in Navajo development. Such ambiguity is completely inconsistent with fairly interpreting the statutes as a rights-creating source of substantive law. The 1974 and 1980 statutes were Congress' effort to end this ambiguity. The litigation and the stay were remedies adopted by Congress to end the stalemate. They are not grounds for an action in breach of trust suit against DOI for failure to referee what was a mare's nest of competing claims.

What this means is that, even if DOI misinterpreted the 1980 statutory language in some way, it was not assigned duties by that statute, or any preceding statutes, separately or in concert, so that a breach of those duties could be enforceable here with an action for money damages. We note, in any event, as defendant points out, that the best evidence that DOI was not misinterpreting the statute was the district court's willingness in *Sidney v. MacDonald*, No. CIV 58-579, to enjoin the Navajo from unilaterally proceeding with its projects.

It is thus unnecessary to examine the statute of limitations defense, which raises disputed issues of fact. Defendant's motion for summary judgment is granted on the issue of plaintiff's breach of trust claim. We now turn to an analysis of plaintiff's takings claim.

*2) Regulatory Taking Claim*

The takings clause of the Fifth Amendment of the United States Constitution, "nor shall private property be taken for public use, without just compensation," can be enforced in this court with a claim for compensation. *See* U.S. Const. amend. V, cl. 4. In this case, the Navajo Tribe asserts that its land has been, effectively, taken for public use because of the regulatory

impact of the 1980 Amendment. *See Penn Central Transportation Co. v. City of New York*, 483 U.S. 104 (1978). A successful claim of this sort would require plaintiff first to establish that it has a property interest, and then that the interest has been taken. *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003).

Plaintiff argues that "Congress recognized and vested, for the benefit of plaintiff and its members, a compensable property interest in the 1934 Reservation lands, except for pockets of land on which the Hope Tribe can prove its members were actually located in 1934." Pl.'s Amend. Cmpl. ¶ 6. Plaintiff recognizes, however, that in 1974, "Congress authorized the Hopi Tribe to sue for a determination of its interest, if any, in the reservation established by the 1934 Act." *Id.* ¶ 7. While plaintiff argues that the vast bulk of the 1934 grant was never meaningfully subject to a claim of Hopi occupation, the effect of the 1974 Act, particularly when enforced by the 1980 Amendment, was to create a cloud on the Navajo's ownership rights in the entire area subject to the freeze, until the statutorily-authorized quiet title proceeding was resolved. With hindsight, we now know that title was not resolved until the litigation over ownership was settled in 2006.

In its complaint, plaintiff identifies the 1980 Act as the source of the restriction on the tribe's ability to use its own land. It recognizes that the "freeze statute has been in effect for almost ten years," and that it was preceded by "similar restrictions on development imposed by administrative order in 1966." *Id.* ¶ 11. Plaintiff goes on to argue, however, that the "freeze statute, *as applied*, has prohibited development and construction of new homes, sheds, corrals, roads, water lines, sewers, . . . businesses, and other critical facilities needed by plaintiff and its members." *Id.* ¶ 15 (emphasis supplied). Plaintiff also contends that the "*application* of the freeze statute" restricted repairs and renovations to such facilities. *Id.* (emphasis supplied).

We interpret plaintiff's claims as set forth in its amended complaint to contend that the last affirmative action by the United States that could have constituted a taking was Congress' enactment of the 1980 Amendment. Plaintiff argues, however, that DOI misinterpreted the 1980 Amendment to permit the Hopi a more extensive veto than Congress contemplated. Plaintiff also contends that "between 1982 [the Hopi moratorium] and the filing of this lawsuit, virtually no development was approved by the Hopi Tribe. . . ." *Id.* ¶ 13. Plaintiff therefore claims that DOI's policy of inaction in the protection

of Navajo interests after the 1982 Hopi moratorium constituted a temporary regulatory taking:

> From the plain language of the 1980 Amendment, it is clear that it was not a bar to development within the geographic area it governed, but instead permitted development so long as the Hopi Tribe consented. Had the Hopi Tribe acted reasonably and consented to projects after 1980, and recognized the rights and needs of the Navajo Nation and its members, no taking would have occurred. However, any hope that the Hopi Tribe would reasonably exercise its consent evaporated on August 31, 1982, when the Hopi Tribe imposed its blanket development moratorium . . . .
>
> . . . .
>
> Here, where Congress specifically delegated the approval process to the Hopi Tribe, the deprivation of the Navajo Nation's property interests was directly and substantially impacted by Congress itself. The United States is liable because the Hopi Tribe misused the very power granted to it by Congress, which resulted in the taking of the Navajo Nation's property rights.

Pl.'s Resp. at 46, 57. In the alternative, plaintiff argues that its takings claim accrued in December 2006 with the district court's lifting of the Bennett Freeze in its entirety.

This explanation of plaintiff's claim suggests at least four possible flaws. First, plaintiff can only sue with respect to its own property interests, i.e., the land it owns as a tribe. The scope of the claim, at a minimum, must be limited in that respect. The tribe cannot recover compensation with respect to the impact on individual member's property. Plaintiff concedes this fact.

The second problem is that the Hopi Tribe was the relevant actor in the alleged taking, not the United States. The government's last affirmative act was Congress' enactment of the 1980 Amendment, which confirmed the Hopi's rights to oppose Navajo development projects. Beyond 1980, it is the United States' *failure* to act that plaintiff alleges caused a taking. Takings, of course, are founded on what the government did, not what it did not do. For

the claim to have any viability, therefore, the Hopi would have to be treated as agents of the United States, a proposition which defendant has challenged.

This brings up the third problem with plaintiff's taking claim– timeliness. If the Hopi are not the agents of the United States, and if the last relevant action of the United States occurred in 1980, then the action would appear to be filed too late, unless there is some reason to delay the accrual of the cause of action until at least 1982. Plaintiff, of course, asserts that the claim did not accrue until the Hopi moratorium in 1982. Defendant contends, however, that this alleged "damage" to plaintiff began to occur well before the moratorium.

The fourth and most fundamental question is whether plaintiff is able to establish the necessary property ownership essential to a taking claim. The essence of the status quo- arguably from the inception of the 1934 Act, but certainly after 1974- is that neither tribe was able to assert with any finality what it owned. The very reason for the implementation of the Bennett Freeze and the 1980 Amendment was the intolerable ambiguity as to how much land would have to be set aside for the Hopi. Before that problem was solved, the Navajo could only assert its rights through litigation. Litigation was not complete as of 1980, however, nor was it complete in 1982. Indeed, title to the Bennett Freeze Area was not conclusively established between the tribes until 2006.

The briefing heretofore, although extensive, has only addressed the first three of these apparent difficulties with the taking claim. It has not addressed the last question raised, namely, how plaintiff can assert a taking claim if the very essence of the legislation which forms the basis of the claim precludes any definitive assertion of the Navajo Tribe's title to the land. Although defendant points out in its briefing that plaintiff has not plead with particularity what property interest it claims has been taken, the larger question raised by the court has not been briefed. We therefore consider it appropriate to offer plaintiff an opportunity to address the fourth potential flaw in its taking claim prior to ruling on defendant's motion.

Accordingly, we defer ruling on defendant's dispositive motion insofar as it seeks dismissal of the taking claim. Plaintiff is directed to file a supplemental brief, limited to ten pages of text, in which it responds to the court's concerns. Plaintiff may also address any other outstanding issues at the same time. Defendant may file a sur-reply of comparable length.

## CONCLUSION

For the reasons stated above, we grant defendant's motion for summary judgment with respect only to plaintiff's breach of trust claim. We defer ruling on defendant's motion with respect to the takings claim. Plaintiff's sur-response brief on the takings claim shall be filed on or before March 27, 2009. Defendant's sur-reply shall be filed on or before April 10, 2009.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Judge

# ADDENDUM 4

# THE
# STATUTES AT LARGE

OF THE

# UNITED STATES OF AMERICA

FROM

MARCH 1933 to JUNE 1934

CONCURRENT RESOLUTIONS
RECENT TREATIES AND CONVENTIONS, EXECUTIVE PROCLAMATIONS
AND AGREEMENTS, TWENTY-FIRST AMENDMENT
TO THE CONSTITUTION

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EDITED, PRINTED, AND PUBLISHED BY AUTHORITY OF CONGRESS
UNDER THE DIRECTION OF THE SECRETARY OF STATE

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## VOL. XLVIII

IN TWO PARTS

PART 1—Public Acts and Resolutions.

PART 2—Private Acts and Resolutions, Concurrent Resolutions Treaties and Conventions, Executive Proclamations and Agreements, Twenty-first Amendment to the Constitution.

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## PART 1

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UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1934

For sale by the Superintendent of Documents, Washington, D.C. - - - - - - - - - - - - - - Price $4.00 (Buckram)

[CHAPTER 521.]

AN ACT

June 14, 1934.
[H. R. 8527.]
[Public, No. 358.]

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Navajo Indian Reservation, Ariz.
Exterior boundaries defined.
Vol. 15, p. 667.
Post, pp. 935, 1053.
Description.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: Beginning at a point common to the States of Arizona, New Mexico, Colorado, and Utah, thence west along the boundary line between the States of Arizona and Utah to a point where said boundary line intersects the Colorado River; thence down the south bank of that stream to its confluence with the Little Colorado River; thence following the north bank of the Little Colorado River to a point opposite the east boundary of the Grand Canyon National Park; thence south along said east boundary to the southeast corner of section 5, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence east to the southeast corner of section 4; thence south to the southwest corner of section 10; thence east to the southeast corner of section 10; thence south to the southwest corner of section 14; thence east to the northwest corner of the northeast quarter section 23; thence south two miles to the southeast corner of the southwest quarter section 26; thence west one half mile to the southeast corner of section 27, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence south seven miles to the southwest corner of section 35, township 29 north, range 6 east; thence east one mile; thence south one and one half miles to the southwest corner of the northwest quarter section 12, township 28 north, range 6 east; thence east through the center of section 12 to the range line between ranges 6 and 7 east; thence south along said range line five and one half miles to the southeast corner of section 1, township 27 north, range 6 east; thence west three miles to the southwest corner of section 3, township 27 north, range 6 east; thence south five miles to the southeast corner of section 33, township 27 north, range 6 east; thence east along township line between townships 26 and 27, six and one half miles, to the northeast corner of the northwest quarter section 3, township 26 north, range 7 east; thence south two miles to the southeast corner of the southwest quarter section 10, township 26 north, range 7 east; thence east four and one half miles to the southeast corner of section 8, township 26 north, range 8 east; thence north four miles to the northwest corner of section 28, township 27 north, range 8 east, Gila and Salt River base and meridian; thence east one mile to the southeast corner of section 21; thence north four miles to the northeast corner of section 4, township 27 north, range 8 east, thence east along township line between townships 27 and 28 north to its intersection with the Little Colorado River; thence up the middle of that stream to the intersection of the present west boundary of the Leupp Extension Reservation created by Executive order of November 14, 1901; thence south along the present western boundary of said extension to where it intersects the fifth standard parallel north; thence east along said standard parallel to the southwest corner of township 21 north, range 26 east, Gila and Salt River base and meridian; thence north six miles to the northwest corner of township 21 north, range 26 east; thence east twelve miles to the northeast corner of township 21 north, range 27 east; thence south two miles; thence east twelve miles; thence south four miles; thence east along the township line between townships 20 and 21 north to the boundary line between the States of New Mexico and Arizona; thence north along said boundary

Executive order.

line to the point of beginning. All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the authority of the United States: *Provided*, That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat.L. 1063), and amendments thereto, shall operate for the benefit of the State of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

Moqui Indian Reservation, not affected.

Lands suitable for power sites excluded. Vol. 36, p. 575.

*Proviso.* Payment of royalties to Indians, not authorized.

Vol. 41, p. 1063.

Prior legal rights protected.

SEC. 2. The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept relinquishments and reconveyances to the United States of such privately owned lands, as in his opinion are desirable for and should be reserved for the use and benefit of the Navajo Tribe of Indians, including patented and nonpatented Indian allotments and selections, within the counties of Apache, Navajo, and Coconino, Arizona; and any Indian so relinquishing his or her right shall be entitled to make lieu selections within the areas consolidated for Indian purposes by this Act. Upon conveyance to the United States of a good and sufficient title to any such privately owned land, except Indian allotments and selections, the owners thereof, or their assigns, are hereby authorized, under regulations of the Secretary of the Interior, to select from the unappropriated, unreserved, and nonmineral public lands of the United States within said counties in the State of Arizona lands approximately equal in value to the lands thus conveyed, and where surrendered lands contain springs or living waters, selection of other lands taken in lieu thereof may be of like character or quality, such values to be determined by the Secretary of the Interior, who is hereby authorized to issue patents for the lieu lands so selected. In all selections of lieu lands under section 2 of this Act notice to any interested party shall be by publication. Any privately owned lands relinquished to the United States under section 2 of this Act shall be held in trust for the Navajo Tribe of Indians; and relinquishments in Navajo County, Arizona, excluding Indian allotments and selections, shall not extend south of the township line between townships 20 and 21 north, Gila and Salt River base and meridian. The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguous or noncontiguous, located within

Landowners within, may relinquish holdings and select lieu lands from public domain.

Indian allotments excepted.

Notice of selections to be by publication.

Relinquished lands to be held in trust for Navajos.

Area limited

Exchanges permitted Arizona. Vol. 36, p. 558.

the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 558), except as to the payment of fees or commissions which are hereby waived. Pending the completion of exchanges and consolidations authorized by section 2 of this Act, no further allotments of public lands to Navajo Indians shall be made in the counties of Apache, Navajo, and Coconino, Arizona, nor shall further Indian homesteads be initiated or allowed in said counties to Navajo Indians under the Act of July 4, 1884 (23 Stat.L. 96); and thereafter should allotments to Navajo Indians be made within the above-named counties, they shall be confined to land within the boundaries defined by section 1 of this Act.

Payment of fees waived.

No further allotments to Navajos in designated counties.

Vol. 23, p. 96.

Arizona may select its school lands in area, after completing exchanges, etc.

SEC. 3. Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

Acquisition, through purchase of certain property within.

Sum authorized; reimbursable.

Proviso.
Title may be for surface only.
Use of funds for improvements.

SEC. 4. For the purpose of purchasing privately owned lands, together with the improvements thereon, within the boundaries above defined, there is hereby authorized to be appropriated, from any funds in the Treasury not otherwise appropriated, the sum of $481,879.38, which sum shall be reimbursable from funds accruing to the Navajo tribal funds as and when such funds accrue and shall remain available until expended: *Provided*, That title to the land so purchased may, in the discretion of the Secretary of the Interior, be taken for the surface only: *Provided further*, That said funds may be used in purchasing improvements on any land within said boundaries or on leased State school land within the boundaries above defined, provided the State of Arizona agrees to the assignment of said leases to the Navajo Tribe of Indians on a renewable and preferential basis, and provided the Legislature of said State enacts such laws as may be necessary to avail itself of the exchange provisions contained in section 2 of this Act, and disclaim any right, title, or interest in and to any improvements on said lands.

Approved, June 14, 1934.

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[CHAPTER 522.]

June 14, 1934.
[H. R. 6992.]
[Public, No. 353.]

## AN ACT

To reclassify terminal railway post offices.

Postal service.
Terminal railway post offices.
Vol. 43, p. 1063; U.S.C., p. 1272.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the terminal railway post office system shall be maintained for the purpose of handling and distributing mail not handled or distributed in railway post office lines or post offices, and the clerks in said terminal railway post offices shall be classified as railway postal clerks and progress successively to grade 4. Clerks in charge of terminals, tours, or crews consisting of less than twenty employees shall be of grade 5. Clerks in charge of terminals, tours, or crews consisting of twenty or more employees shall be of grade 6. When a terminal railway post office is operated in three tours there shall be a relief clerk in charge: *Provided*, That the clerk in charge of terminals having seventy-five or more employees shall be of grade 7: *Provided further*, That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.

Classifications of clerks in charge.

Relief clerks.

Proviso.
Rating of clerks in charge of large terminals.
No reduction in pay.

Approved, June 14, 1934.

# ADDENDUM 5

C

**Effective:|See Text Amendments|**

United States Code Annotated Currentness
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXII. Navajo and Hopi Tribes: Settlement of Rights and Interests
→ **§ 640d-7. Determination of tribal rights and interests in land**

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) Allocation of land to respective reservations upon determination of interests

Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

(c) Actions for accounting, fair value of grazing, and claims for damages to land; determination of recovery; defenses

(1) Either as a part of or in a proceeding supplementary to the action authorized in subsection (a) of this section, either tribe, through the chairman of its tribal council for and on behalf of the tribe, including all villages, clans, and individual members thereof, may prosecute or defend an action for the types of relief, including interest, specified in section 640d-17 of this title, including all subsections thereof, against the other tribe, through its tribal chairman in a like representative capacity, and against the United States as to the types of recovery specified in subsection (a)(3) of section 640d-17 of this title and subject to the same provisions as contained in said subsection, such action to apply to the lands in issue in the reservation established by the Act of June 14, 1934 (48 Stat. 960).

(2) In the event the Hopi Tribe or Navajo Tribe is determined to have any interest in the lands in issue, the right

of either tribe to recover hereunder shall be based upon that percentage of the total sums collected, use made, waste committed, and other amounts of recovery, which is equal to the percentage of lands in issue in which either tribe is determined to have such interest.

(3) Neither laches nor the statute of limitations shall constitute a defense to such proceedings if they are either prosecuted as a part of the action authorized by this section or in a proceeding supplemental thereto, if instituted not later than twenty-four months following a final order of partition and exhaustion of appeals in an action filed pursuant to this section.

(d) Denial of Congressional interest in merits of conflicting claims; liability of United States

Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

(e) Payment of legal fees, court costs and other expenses

The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo, San Juan Southern Paiute or Hopi Tribe under this section.

(f) Provision of attorney fees for San Juan Southern Paiute Tribe

(1) Any funds made available for the San Juan Southern Paiute Tribe to pay for attorney's fees shall be paid directly to the tribe's attorneys of record until such tribe is acknowledged as an Indian tribe by the United States: *Provided*, That the tribe's eligibility for such payments shall cease once a decision by the Secretary of the Interior declining to acknowledge such tribe becomes final and no longer appealable.

(2) Nothing in this subsection shall be interpreted as a congressional acknowledgement of the San Juan Southern Paiute as an Indian tribe or as affecting in any way the San Juan Southern Paiute Tribe's Petition for Recognition currently pending with the Secretary of the Interior.

(3) There is hereby authorized to be appropriated not to exceed $250,000 to pay for the legal expenses incurred by the Southern Paiute Tribe on legal action arising under this section prior to November 16, 1988.

CREDIT(S)

(Pub.L. 93-531, § 8, Dec. 22, 1974, 88 Stat. 1715; Pub.L. 96-305, § 2, July 8, 1980, 94 Stat. 929; Pub.L. 100-666, § 9, Nov. 16, 1988, 102 Stat. 3933.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Act of June 14, 1934, referred to in subsecs. (a) and (c)(1), is Act June 14, 1934, c. 521, 48 Stat. 960, which is not classified to the Code.

The Indian Claims Commission, referred to in subsec. (d), was terminated on Sept. 30, 1978. See Codification Notes under former § 70 et seq. of this title.

Amendments

1988 Amendments. Subsec. (e). Pub.L. 100-666, § 9(a), substituted "Navajo, San Juan Southern Paiute" for "Navajo".

Subsec. (f). Pub.L. 100-666, § 9(b), added subsec. (f).

1980 Amendments. Subsec. (c). Pub.L. 96-305 substituted provision authorizing, as part of the determination of tribal rights and interests in land, actions for accounting, fair value of grazing, and claims for damages, specifying the formula for determining recovery, and limiting defenses for provision authorizing exchange of reservation lands.

LIBRARY REFERENCES

American Digest System

Indians ⚿ 13(1).
Key Number System Topic No. 209.

RESEARCH REFERENCES

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 46:1015, Actions Involving Land.

Federal Procedure, Lawyers Edition § 46:1017, Legal Fees, Costs, and Expenses.

Federal Procedure, Lawyers Edition § 46:1020, Attorney's Fees, Costs, and Expenses.

NOTES OF DECISIONS

Accounting 17
Activities intensity, property interests 9
Burden of proof 26

# ADDENDUM 6

**Effective: May 8, 2009**

United States Code Annotated Currentness
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter XXII. Navajo and Hopi Tribes: Settlement of Rights and Interests
**§ 640d-9. Partitioned or other designated lands**

(a) Lands to be held in trust for Navajo Tribe; exception

Subject to the provisions of sections 640d-8 and 640d-16(a) of this title, any lands partitioned to the Navajo Tribe pursuant to sections 640d-2 and 640d-3 of this title and the lands described in the Act of June 14, 1934 (48 Stat. 960), except the lands as described in section 640d-7 of this title, shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation.

(b) Lands to be held in trust for Hopi Tribe

Subject to the provisions of sections 640d-8 and 640d-16(a) of this title, any lands partitioned to the Hopi Tribe pursuant to sections 640d-2 and 640d-3 of this title and the lands as described in section 640d-7 of this title shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation.

(c) Protection of rights and property of individuals subject to relocation

The Secretary shall take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation pursuant to this subchapter, or any judgment of partition pursuant thereto, including any individual authorized to reside on land covered by a life estate conferred pursuant to section 640d-28 of this title.

(d) Protection of benefits and services of individuals subject to relocation

With respect to any individual subject to relocation, the Secretary shall take such action as may be necessary to assure that such individuals are not deprived of benefits or services by reason of their status as an individual subject to relocation.

(e) Tribal jurisdiction over partitioned lands

(1) [FN1] Lands partitioned pursuant to this subchapter, whether or not the partition order is subject to appeal, shall be subject to the jurisdiction of the tribe to whom partitioned and the laws of such tribe shall apply to such partitioned lands under the following schedule:

(A) Effective ninety days after July 8, 1980, all conservation practices, including grazing control and range restoration activities, shall be coordinated and executed with the concurrence of the tribe to whom the particular lands in question have been partitioned, and all such grazing and range restoration matters on the Navajo Reservation lands shall be administered by the Bureau of Indian Affairs Navajo Area Office and on the Hopi Reservation lands by the Bureau of Indian Affairs Phoenix Area Office, under applicable laws and regulations.

(B) Notwithstanding any provision of law to the contrary, each tribe shall have such jurisdiction and authority over any lands partitioned to it and all persons located thereon, not in conflict with the laws and regulations referred to in paragraph (A) above, to the same extent as is applicable to those other portions of its reservation. Such jurisdiction and authority over partitioned lands shall become effective April 18, 1981.

The provisions of this subsection shall be subject to the responsibility of the Secretary to protect the rights and property of life tenants and persons awaiting relocation as provided in subsections (c) and (d) of this section.

(f) Repealed. Pub.L. 111-18, § 1, May 8, 2009, 123 Stat. 1611

CREDIT(S)

(Pub.L. 93-531, § 10, Dec. 22, 1974, 88 Stat. 1716; Pub.L. 96-305, § 3, July 8, 1980, 94 Stat. 929; Pub.L. 100-666, § 6, Nov. 16, 1988, 102 Stat. 3932; Pub.L. 111-18, § 1, May 8, 2009, 123 Stat. 1611.)

[FN1] So in original. Subsec. (e) enacted without a par. (2).

HISTORICAL AND STATUTORY NOTES

References in Text

The Act of June 14, 1934 (48 Stat. 960), referred to in subsec. (a), is Act June 14, 1934, c. 521, 48 Stat. 960, which is not classified to this Code.

Amendments

2009 Amendments. Subsec. (f). Pub.L. 111-18, § 1, repealed subsec. (f), which formerly read:

**"(f) Development of lands in litigation; exception**

"(1) Any development of lands in litigation pursuant to section 640d-7 of this title and further defined as 'that portion of the Navajo Reservation lying west of the Executive Order Reservation of 1882 and bounded on the north and south by westerly extensions, to the reservation line, of the northern and southern boundaries of said Executive Order Reservation,' shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated

by the Secretary. 'Development' as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

"(2) Each Indian tribe which receives a written request for the consent of the Indian tribe to a particular improvement, construction, or other development on the lands to which paragraph (1) applies shall respond in writing to such request by no later than the date that is 30 days after the date on which the Indian tribe receives the request. If the Indian tribe refuse to consent to the improvement, construction, or other development, the response shall include the reasons why consent is being refused.

"(3)(A) Paragraph (1) shall not apply to any improvement, construction, or other development if--

"(i) such improvement, construction, or development does not involve new housing construction, and

"(ii) after the Navajo Tribe or Hopi Tribe has refused to consent to such improvement, construction, or development (or after the close of the 30-day period described in paragraph (2), if the Indian tribe does not respond within such period in writing to a written request for such consent), the Secretary of the Interior determines that such improvement, construction, or development is necessary for the health or safety of the Navajo Tribe, the Hopi Tribe, or any individual who is a member of either tribe.

"(B) If a written request for a determination described in subparagraph (A)(ii) is submitted to the Secretary of the Interior after the Navajo Tribe or Hopi Tribe has refused to consent to any improvement, construction, or development (or after the close of the 30-day period described in paragraph (2), if the Indian tribe does not respond within such period in writing to a written request for such consent), the Secretary shall, by no later than the date that is 45 days after the date on which such request is submitted to the Secretary, determine whether such improvement, construction, or development is necessary for the health or safety of the Navajo Tribe, the Hopi Tribe, or any individual who is a member of either Tribe.

"(C) Any development that is undertaken pursuant to this section shall be without prejudice to the rights of the parties in the civil action pending before the United States District Court for the District of Arizona commenced pursuant to section 640d-7 of this title, as amended.".

1988 Amendments. Subsec. (f)(1). Pub.L. 100-666, § 6(1), designated existing provisions as par. (1).

Subsec. (f)(2), (3). Pub.L. 100-666, § 6(2), added pars. (2) and (3).

1980 Amendments. Subsecs. (c) to (f). Pub.L. 96-305 added subsecs. (c) to (f).

LAW REVIEW COMMENTARIES

Native America and the Rule of Law. Dr. Joe Shirley, Jr., 42 U. Rich. L. Rev. 59 (2007).