UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2010-5036

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

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CORRECTED BRIEF FOR APPELLEE THE UNITED STATES

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STATEMENT OF RELATED CASES

(a) No appeal in or from the same civil action in the Court of Federal Claims was previously before this or any other appellate court.

(b) There is no case known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction over an appeal from a final decision of the United States Court of Federal Claims ("CFC") pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

Whether the Navajo Nation's regulatory takings claim first accrued no later than July 8, 1980 and is thus barred by the six-year statute of limitations of 28 U.S.C. § 2501, which limits the CFC's jurisdiction.

Whether the CFC correctly held that the Navajo Nation did not have a property right to exclusive control of the Bennett Freeze Area prior to a judicial determination of the interest of the Hopi Tribe in that land.

STATEMENT OF THE CASE

In 1934, Congress created a permanent Indian reservation encompassing some 8.2 million acres of land in northeastern Arizona (the "1934 Reservation") "for the benefit of the Navajo and such other Indians as may already be located thereon." Act of June 14, 1934, 48 Stat. 960, 961 ("1934 Act") (Nav.Add. 4).[1] The Navajo Nation concedes that Hopi Indians were "located" on the 1934

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[1] The Navajo Addendum and United States Addendum are referred to as "Nav.Add." and "US.Add." respectively. The Appendix is referred to as "App." The CFC exhibits are referred to as "Nav.Ex." and US.Ex."

Reservation on June 14, 1934. The 1934 Act did not differentiate the interests of the Navajo Tribe[2/] and Hopi Tribe by area.

In the years following 1934, the growing numbers of Navajos and Hopis living in the vicinity of the Hopi village of Moenkopi in the western portion of the 1934 Reservation led to increased friction between Navajos and Hopis in that area. In 1966, in order to preserve the rights of the Hopi and Navajo Tribes, Commissioner of Indian Affairs Robert Bennett imposed a requirement that both Tribes consent to development within an approximately 1.5-million-acre area of the 1934 Reservation. The area to which the mutual consent requirement applied became known as the "Bennett Freeze Area." In 1974, Congress authorized a suit in the United States District Court for the District of Arizona ("District Court") to determine the respective interests of the Hopi and Navajo Tribes in the 1934 Reservation and to partition the 1934 Reservation between the tribes. Pub. L. No. 93-531, 88 Stat. 1712 (1974) (the "1974 Settlement Act"); 25 U.S.C. § 640d-7. The Hopi Tribe promptly filed suit against the Navajo Tribe. In 1980, Congress codified the mutual consent requirement pending the resolution of the 1934 Reservation lawsuit. Navajo and Hopi Indian Relocation Amendments Act of 1980, Pub. L. No. 96-305, 94 Stat. 929 (July 8, 1980) (the "1980

[2/] The Navajo Nation is also referred to as the "Navajo Tribe."

Amendments"); 25 U.S.C. § 640d-9(f).

The Navajo Nation filed its Complaint in this case on August 25, 1988, claiming that the United States' imposition of the mutual consent requirement constituted a taking of private property for public use in violation of the Fifth Amendment to the United States Constitution and a breach of trust. In 2008, the United States moved for judgment on the pleadings or, in the alternative, for summary judgment as to both claims. The United States argued first that the Navajo Nation's claims first accrued no later than July 8, 1980 with the codification of the mutual consent requirement, and that the claims were thus barred by the six-year statute of limitations of 28 U.S.C. § 2501. The motion also addressed the merits of the claims.

The CFC dismissed the breach of trust claim on February 27, 2009 on the ground that the Navajo Nation failed to identify any money-mandating fiduciary duty (App. A9), and dismissed the takings claim on July 13, 2009 on the ground that the 1934 Act did not grant the Navajo Nation a property right to exclusively control development within the Bennett Freeze Area until the Hopi Tribe's interest was determined in 2006 (App. A2). The CFC did not rule on the statute of limitations. The Navajo Nation appeals only the CFC's rejection of the takings claim.

The United States argues in this appeal that this Court should order the takings claim dismissed for lack of jurisdiction. The Navajo allegation (Br. 6) that the United States imposed the "development moratorium" in 1982 is incorrect. As explained herein, the mutual consent requirement was in fact imposed by Commissioner Bennett in 1966 and codified in 1980, and any takings claim first accrued on July 8, 1980 at the latest. If this Court proceeds to the issue of the Navajo Nation's property interest, this Court should affirm the CFC's conclusion that the Navajo Nation did not possess a right to exclusive control of the Bennett Freeze Area until the areas of joint Hopi and Navajo use were finally determined and partitioned in 2006. The Navajo Nation's assertion of a right to exclusive control outside of the Hopi use area prior to that time is based on the factual premise that the area of Hopi use as of 1934 was known before the end of the 1934 Reservation litigation, and specifically that the United States knew that the Hopi Tribe only had a legitimate claim to an area of about 246,000 acres surrounding the Hopi village of Moenkopi. The United States argues below that this asserted right has no legal basis in the 1934 Act or 1974 Settlement Act, and, in any event, that the factual premise is incorrect, as demonstrated by the decisions of the District Court and Ninth Circuit in the 1934 Reservation litigation, which decisions are not subject to relitigation in this case.

STATEMENT OF FACTS

The dispute between the Hopi and Navajo Tribes to northeastern Arizona has been called "'the greatest title problem in the West.'" *Clinton v. Babbitt*, 180 F.3d 1081, 1084 (9th Cir. 1999), quoting *Healing v. Jones*, 210 F. Supp. 125, 129 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). The land conflict has a long and complicated history. It involves two reservations. The Executive Order of December 16, 1882 established a reservation of about 2.5 million acres for the Hopi Indians "and such other Indians as the Secretary of the Interior may see fit to settle thereon" (the "1882 Reservation"). App. A131 [US.Ex. 2]. The 1882 Reservation is surrounded by the 1934 Reservation. The 1934 Reservation covers an area of about 8.2 million acres, not including the land within the 1882 Reservation (App. A183 [US.Ex. 4]), and extends from the Utah/Arizona border south almost to Winslow and from the New Mexico/Arizona border west to the Grand Canyon. *See* US.Add. 1 (map depicting the 1882 and 1934 Reservations from *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1185 (D. Ariz. 1978), *aff'd in part and rev'd in part*, 619 F.2d 801 (1980)).[3]

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[3] The Navajo Reservation presently includes additional land in Arizona, and more than 4 million acres in New Mexico and Utah held by the United States in trust for the Navajo Nation. *See* App. A63 [US.Ex. 1].

As explained below, the respective interests of the Hopi and Navajo Tribes in these two reservations were determined through two long-running litigations in the District Court.

A. Hopi and Navajo Settlement in Northeastern Arizona

"'As far back as the Middle Ages,'" Hopi Indians inhabited the land later included in the 1882 and 1934 Reservations. *Sekaquaptewa*, 619 F.2d at 802-03, quoting *Healing*, 210 F. Supp. at 134. Navajo Indians entered northeastern Arizona from the east much later, likely "in the last half of the eighteenth century." *Id.*

Hopis and Navajos have distinct cultures and land use patterns. Hopis have traditionally resided in permanent villages (in structures traditionally constructed of stone blocks). *Healing*, 210 F. Supp. at 134. They traditionally used large areas of land beyond their villages for various purposes, including farming, grazing of livestock (sheep and cattle), hunting and gathering of plant and mineral resources for both subsistence and religious purposes, and other religious activities, including gathering eagles and pilgrimages to shrines. *See Masayesva v. Zah*, 793 F. Supp. 1495, 1501-30 (D. Ariz. 1992), *aff'd in part and rev'd in part*, 65 F.3d 1445 (9th Cir. 1995). In contrast, as of the nineteenth century most Navajos had adopted a pastoral lifestyle which involved raising flocks of sheep

and some agriculture. Navajos traditionally resided in relatively small family groups rather than villages, and typically moved throughout the year from residence to residence (traditionally constructed of wood and earth) with their livestock. *Healing*, 210 F. Supp. at 135. As the Navajo population grew, Navajo moved farther west into Arizona to obtain additional forage land for their sheep.

Conflicts between Navajos and Hopis were documented during the 1840s, 1850s and 1860s. *Healing*, 210 F. Supp. at 136 n.6. A reservation was established for the Navajo along the New Mexico/Arizona border pursuant to the Treaty of June 1, 1868, 15 Stat. 667 ("1868 Treaty"). *See* US.Add. 1. The Navajo Reservation was extended to the 110° West meridian by Executive Orders in 1878 and 1880. *Id.* As the Navajo population expanded farther west in Arizona, Navajos came into increasing conflict with Hopis. *Healing*, 210 F. Supp. at 135, 136, 137 n.7, 146, 147, 184.

The 1882 Reservation was established in the center of the traditional Hopi homeland to protect the Hopi Tribe from the pressures of Navajo migration and from white settlers and "intermeddlers." *Healing*, 210 F. Supp. at 137; App. A182 [US.Ex. 4]. At the time of its establishment, there were about 1,800 Hopis and about 300 Navajos residing within the 1882 Reservation. *See Hopi Tribe v. United States*, 23 Ind. Cl. Comm. 277, 306 (1970).

Thereafter, Navajos continued to expand into the area west of the 1882 Reservation (including the area which became the Bennett Freeze Area in 1966), an area occupied and used by Hopi Indians. Indeed, the Indian Claims Commission held that the Hopi Tribe held aboriginal title, based on its "actual, exclusive, and continuous use and occupancy for a long time,"[4] to a large area west of the 1882 Reservation (all the way to the Little Colorado River) as of 1882. *Hopi Tribe v. United States*, 23 Ind. Cl. Comm. at 305-06.[5]

An Executive Order of January 8, 1900 withdrew a large area west of the 1882 Reservation "from sale and settlement until further ordered," without describing a particular purpose for the withdrawal. *See* App. A132 [US.Ex. 3]; US.Add. 1 (map). Most of this land was later included in the Bennett Freeze Area.

During the first decades of the twentieth century, land-use conflicts between the Navajos and Hopis continued as the Navajo population grew both within and

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[4] *See Sekaquaptewa*, 448 F. Supp. at 1187 (quoting *Sac & Fox Tribe v. United States*, 315 F.2d 896, 903 (Ct. Cl. 1963).

[5] The Hopi Tribe filed its action in the Indian Claims Commission in 1951 (Docket No. 196) claiming aboriginal title to the 1882 Reservation as well as "over three-quarters of the 1934 Act lands." *See Sekaquaptewa*, 448 F. Supp. at 1187-88. The Hopi Tribe offered evidence of its use of these lands through 1934. The Navajo Tribe was aware of this Hopi claim and evidence because its own claim (Docket No. 229) overlapped the Hopi claim area and thus was consolidated with the Hopi claim.

surrounding the 1882 Reservation. *See Healing*, 210 F. Supp. at 184-87. The Hopi pressed their claim to exclusive use of the 1882 Reservation as well as to large areas surrounding that reservation. At a meeting with United States and Navajo representatives in Flagstaff on November 6, 1930, Hopi representatives presented a sketch of their claim to the traditional Hopi sacred area (the "Hopitutskwa") extending "to the Colorado River on the west, to some distance south of Holbrook and Winslow on the south, east to the vicinity of Fort Defiance, and north approximately to the present northern lines of the reservation." App. A134 [Nav.Ex. 3]. A similar claim was presented at a 1931 congressional hearing. *See Healing*, 210 F. Supp. at 187 n.1.

B. The 1934 Act

Through the 1934 Act, Congress "permanently [withdrew] from all forms of entry or disposal" certain lands previously withdrawn by treaty, executive orders and prior acts, along with some additional land, to establish the 1934 Reservation. Nav.Add. 4. The 1934 Act provided that it would not affect the status of the 1882 Reservation and also provided that the Act reserved the land "for the benefit of the Navajo and such other Indians as may already be located thereon." The Hopi were "such other Indians" "located" on the 1934 Reservation on June 14, 1934.

Legislation had been proposed in 1932 to define exclusive areas for the

Hopi and Navajo Tribes within and surrounding the 1882 Reservation, *Sekaquaptewa*, 448 F. Supp. at 1193-95, but no such legislation was enacted because "[t]he Hopis would not agree to boundaries proposed by the administration, and Congress was unwilling to force the issue," *Sekaquaptewa*, 619 F.2d at 807. Instead, the Hopis were assured that legislation 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." *Id.* at 808.

Given their different land use patterns, protection of Hopi land use did not necessarily require exclusive use areas. As of 1934 "Congress was not inflexibly committed to the notion of exclusive areas for the two tribes," but "preferred to allow the tribes to work out whatever cooperative arrangements they could." *Id.* at 807. The intent of the 1934 Act was to "preserve a *status quo* and not to disturb existing arrangements." *Id.* at 808.

C. *Healing v. Jones*, The First Phase of the 1882 Reservation Litigation

In 1958, Congress authorized the Hopi and Navajo Tribes to file quiet title actions against each other to determine their respective interests in the 1882 Reservation. *Healing*, 210 F. Supp. at 129-30. The Tribes promptly did so, and in 1962 the United States District Court for the District of Arizona concluded that the

Hopi Tribe had an exclusive interest in Land Management District 6 (an area of about 650,000 acres). *Id.* at 132-33, 192, The court also concluded that the Hopi and Navajo Tribes had "joint, undivided and equal interests" in the remaining 1.8 million acres outside District 6 (called the "joint use area" or "JUA"). *Id.* at 132, 192. The court held, however, that it lacked authority to partition the JUA between the two tribes. *Id.* at 189-92.

The Department of the Interior ("Interior") commenced the process of relocating Navajos living within District 6. *See* App. A141-43 [US.Exs. 7,8]. As for the JUA, the District Court's 1962 decision established a *de facto* mutual consent requirement for construction and improvements (*see* App. A194 [US.Ex. 18]), later formalized by the District Court's order of October 14, 1972 directing that "[n]o new construction shall be permitted on the Joint-Use Area without a permit issued jointly by the two tribes" (App. A177 [US.Ex. 19]). The Navajo Nation protested the deprivations caused by this development freeze. *See, e.g.*, App. A194 [US.Ex. 18, 1978 letter].

D. The Bennett Freeze

Following the Hopi Tribe's request that the United States take some action to protect its interests in the 1934 Reservation (App. A139, A144 [US.Exs. 6,9]), and the determination by the Associate Solicitor, Indian Affairs, that the "other

Indians" provision of the 1934 Act was intended to protect Hopi rights (App. A147 [US.Ex. 10]), Commissioner Bennett concluded on July 8, 1966 that "the Government can no longer continue to administer the [1934 Reservation] area as though it were owned solely by the Navajo Tribe" (App. A150 [US.Ex. 11]). He acknowledged the "unanswered questions about the nature and extent of [the tribes' respective] rights," and expressed the need to preserve both tribes' rights. App. A150-51 [US.Ex. 11]. As a matter of "prudent judgment," he decided to impose a mutual consent requirement (like the one applicable to the JUA) only to that portion of the 1934 Reservation lying west of the 1882 Reservation where the Hopi claim was strongest. App. A150.

The mutual consent requirement was administratively modified four times between 1966 and 1980. In 1967, Commissioner Bennett decided that public works projects would not be subject to the mutual consent requirement. App. A156 [US.Ex. 12]. In 1970, the mutual consent requirement was reimposed on public works projects. App. A163 [US.Ex. 13]. In 1972, the Hopi Tribe was allowed to proceed with unilateral development within a newly defined Moenkopi Administrative Area, and the Navajo Tribe was allowed to proceed with unilateral development within the newly defined Tuba City Administrative Area (except for drilling of water wells). App. A166, A171 [US.Exs. 14,15]. Finally, in 1976,

Commissioner Thompson allowed 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." App. A189 [US.Ex. 17].

E. The 1974 Settlement Act

Meanwhile, Congress enacted the 1974 Settlement Act (codified, as amended, at 25 U.S.C. § 640d *et seq.*) to "provide for final settlement of the conflicting rights and interests of the Hopi and Navajo Tribes to and in" the 1882 and 1934 Reservations. *See* App. A181 [US.Ex. 4].

With respect to the 1882 Reservation, the 1974 Settlement Act authorized the District Court to partition the JUA and provided for relocation of tribal members residing on land partitioned to the other tribe.

With respect to the 1934 Reservation, the 1974 Settlement Act authorized a suit in the District Court to determine the respective interests of the Hopi and Navajo Tribes. 25 U.S.C. § 640d-7. Those interests might be determined to be either "exclusive" or "joint or undivided." *Id.* The Act authorized the District Court to partition the joint or undivided areas "on the basis of fairness and equity." *Id.* Although Congress considered proposals to define legislatively an area of exclusive Hopi use, Congress ultimately opted for judicial resolution. *See*

App. A183-85 [US.Ex. 4]; App. A198 [US.Ex. 5]; *Masayesva*, 793 F. Supp. at 1500 n.7.

F. *Sekaquaptewa v. MacDonald*, The First Phase of the 1934 Reservation Litigation

The Hopi Tribe filed suit against the Navajo Tribe in 1974 claiming that the 1934 Act granted it an undivided one-half interest in the entire 1934 Reservation (excluding the 1868 Treaty Reservation). *See Sekaquaptewa*, 619 F.2d at 803. In contrast, the Navajo Tribe argued that the Hopi Tribe only had an interest in the small area they "occupied" on June 14, 1934, *i.e.*, the land on which the village of Moenkopi was built. *Sekaquaptewa*, 448 F. Supp. at 1193. In 1978, the District Court rejected both positions. It held that the 1934 Act protected "both Hopi occupancy and land use," which might include "grazing land and religious shrines," and that the Hopi Tribe had a one-half interest in the land it occupied or used. 448 F. Supp. at 1196. The District Court reserved ruling on "which kinds of Hopi possession or use on June 14, 1934 were substantial enough to create property rights within the area set aside by the boundary bill." *Id.*

In 1980, the Ninth Circuit generally affirmed the District Court's interpretation of the 1934 Act, but clarified that the Hopi Tribe's title was exclusive as to areas it exclusively "possessed, occupied, or used" in 1934 and

"joint or undivided" as to the areas used by both tribes in 1934. *Sekaquaptewa*, 619 F.2d at 809-10. The Ninth Circuit confirmed that "Congress did not identify Navajo-Hopi boundaries in the 1934 Act." *Id.* at 807. Because it had proceeded on a legal theory in this first phase of the litigation, the Hopi Tribe had not presented detailed evidence of its occupancy and land use within the 1934 Reservation.

G. The Partition of the 1882 Reservation Joint Use Area

The District Court partitioned the JUA in 1979, leading to a second phase of relocation of Navajo families within the 1882 Reservation. *See Clinton*, 180 F.3d at 1084-85. About 700 Navajo families and a few Hopi families had to be relocated from land partitioned to the other tribe. App. A197 [US.Ex. 5]. Congressman Udall of Arizona stated that "[t]his relocation process is and will continue to be an extremely traumatic event for the Navajo people. This is probably the largest forced relocation effort required by the Federal Government since the Indian removal policies of the 1800's." App. A196 [US.Ex. 5].

H. The 1980 Amendments to the 1974 Settlement Act

Congress acted on July 8, 1980 in an effort to mitigate this traumatic event by passing the 1980 Amendments to the 1974 Settlement Act. Most of the act's provisions were devoted to completing the partition and relocation within the 1882

Reservation (including by authorizing the purchase by the United States of 250,000 acres to be added to the Navajo Reservation).

Cognizant of the difficulties of relocation within the 1882 Reservation, Congress also amended the 1974 Settlement Act to codify the mutual consent requirement within the Bennett Freeze Area:

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

25 U.S.C. § 640d-9(f).

As enacted, this provision did not grant the Secretary of the Interior any authority to approve development projects within the Bennett Freeze Area, thus terminating the appeal procedure that Commissioner Thompson had afforded in

1976.[9]

Congressman Marriott explained that the provision was "designed to restore the status quo in the 1934 Reservation Area west of the 1882 Executive Order Area. By requiring both tribes to approve development in that area (except for limited exclusive areas where no joint consent is needed), neither tribe will be able to attain an unfair advantage over the other." App. A198 [US.Ex. 5]. He also stated that "it is expected that the Hopis will . . . be partitioned a large tract of land in this area as well – larger by far" than the approximately 250,000 acres that had been proposed as an exclusive Hopi area in 1974. *Id.*

I. The 1988 Amendments to the 1974 Settlement Act

In 1988, continuing Navajo resistance to relocation of Navajos residing on Hopi land within the 1882 Reservation and to the Bennett Freeze prompted

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[9] The Senate Bill would have given Interior authority to approve projects: "If the requesting tribe does not receive approval [for a proposed project], it can request approval from the Secretary of the Interior." S.Rep. No. 96-373, at 7-9 (1979). The House Bill did not grant such authority: "[T]he amendment adds language . . . which statutorily confirms an existing administrative freeze on development of land within the Moencopi areas as such freeze was originally implemented." H.R. Rep. No. 96-544, at 5 (1979). Congress enacted the House version of this provision. *See* App. A32-33. The legislative history thus demonstrates that Congress affirmatively intended that the tribes would be the final arbiters of development within the Bennett Freeze Area.

Congress to act again.[7] On November 16, 1988, Congress again amended the 1974 Settlement Act. In addition to reauthorizing the appropriation of funds for the relocation program, Congress modified the mutual consent requirement applicable to the Bennett Freeze Area by adding a procedure for appeals to Interior. Navajo and Hopi Indian Relocation Amendments Act of 1988, Pub. L. No. 100-666, 102 Stat. 3929 (1988); 25 U.S.C. § 640d-9(f). Interior was authorized to approve projects it determined to be "necessary for . . . health or safety." Senator DeConcini (New Mexico) stated that the Senate bill would allow Interior "to approve case-by-case exceptions to an existing ban on any form of repair, renovation, or development other than new housing construction, in a vast expanse of land known as the Bennett Freeze," which will "provide long-needed relief for thousands of Navajos subject to the so-called Bennett development freeze for over 20 years." 134 Cong. Rec. 20870 (Aug. 8, 1988).

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[7] On August 15, 1988, Peter MacDonald, Chairman of the Navajo Nation, undertook "Project Hope," a program of housing renovation and new housing construction on the 1882 Reservation for Navajos awaiting relocation and on the 1934 Reservation for Navajos residing within the Bennett Freeze Area. *See* App. A201-05 [US.Ex. 20]. The United States moved in the District Court for a temporary restraining order, arguing that this program violated the 1974 Settlement Act, as amended in 1980, as well as numerous court orders entered in 1972 and subsequent years banning construction on the JUA without consent of the Hopi Tribe. App. 205. The District Court agreed, and entered a preliminary injunction on September 26, 1988. App. A206-17.

J. *Masayesva v. Zah*, The Conclusion of the 1934 Reservation Litigation

At trial in 1989, the Hopi Tribe presented evidence that Hopis (both Moenkopi residents and those residing within the 1882 Reservation), used about 3 million acres of the 1934 Reservation in 1934.[9] *See Masayesva*, 793 F. Supp. at 1501-30. Members of the Hopi Tribe and expert witnesses retained by the Hopi Tribe testified. *Id.* The Navajo Nation similarly offered evidence of Navajo use of the 1934 Reservation in 1934 through testimony of its members and expert witnesses. *Id.*

The District Court issued its findings of fact and conclusions of law in 1992. The District Court determined what types of land use were sufficient to create a property interest in the 1934 Reservation, an issue it had reserved in 1978. *Masayesva*, 793 F. Supp. at 1499. The Hopi Tribe had argued for a standard that recognized traditional uses, based on precedent of the Indian Claims Commission and Claims Court. *Id.* at 1500. The District Court rejected that standard, concluding that the 1934 Act required more "intensive" use in order to establish a

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[9] The District Court referred to a series of maps offered by the Hopi Tribe, but did not refer to the acreage within these areas. 793 F. Supp. at 1510, 1527 nn.130 and 132, 1529 n.148. In its Brief filed in Ninth Circuit Case No. 93-15109 on May 3, 1993, the Hopi Tribe stated that the "[m]aps submitted by Hopi witnesses depicted a cumulative area of some 3 million acres within which these uses occurred, most of it also used by Navajos." Brief available at 1993 WL 13102972 at 9.

property interest:

> Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. However, since seasonal use is pervasive in Indian land use patterns, and indeed, necessary in the harsh environment of the 1934 Reservation, substantial seasonal use is sufficient for this Court to find occupation or use of the land.

Id. at 1501.

The Hopi Tribe claimed an interest in 1.25 million acres based on grazing, including about 700,000 acres west of the 1882 Reservation. *Id.* at 1509, 1513. The District Court found that the evidence supported a sufficiently intensive grazing use in some areas but not others. *Id.* at 1509-26. The Hopi Tribe also claimed an interest to large areas of the 1934 Reservation "based on the location of traditional Hopi activities, such as eagle gathering, visiting shrines, gathering ceremonial plants, ceremonial hunting, gathering edible plants and pinon nuts, gathering medicines, collecting plant materials for tools and crafts, gathering fuelwood and construction wood, subsistence hunting, and mineral gathering." *Id.* at 1526. The District Court held that religious use did not give rise to a property right under the 1934 Act because access to shrines was protected by 25 U.S.C. § 640d-20, *id.* at 1531, and rejected the other uses as not sufficiently intensive to support a property right, *id.* at 1526-30.

The court determined the area exclusively used by Hopis in 1934 (an area of

about 22,675 acres), and the area jointly used by Hopis – with the requisite degree of intensity – and Navajos in 1934 (an additional 167,819 acres). *Id.* at 1533; *see also* 816 F. Supp. at 1398, 1400.[9]

Following a trial later in 1992 on partition of the jointly used Hopi-Navajo area, the District Court rejected the Hopi Tribe's argument that the jointly used area should be divided evenly between the Hopi and Navajo Tribes. In light of its desire to avoid relocation of any Navajo families, the District Court partitioned only 25 percent of the jointly used area to the Hopi Tribe. 816 F. Supp. at 1407-15, 1418. The total acreage awarded to the Hopi Tribe was thus 60,518 acres out of the approximately 190,000 acres the District Court found the

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[9] The San Juan Southern Paiute Tribe intervened in the 1934 Reservation litigation, and the District Court concluded that the Paiutes were also "such other Indians" "located" within the 1934 Reservation. *Masayesva v. Zah*, 794 F. Supp. 899 (D. Ariz. 1992). At the 1989 trial, the Paiutes had presented evidence of their occupancy and use of substantial acreage within the 1934 Reservation, including the Bennett Freeze Area, as of 1934. Their primary use area was located to the northwest of Moenkopi and Tuba City, *id.* at 903, and their claimed grazing area, *id.* at 914-18, extended outside the Hopis' claimed grazing area. While the District Court did not credit all of this evidence, it found that the Paiutes used with sufficient intensity, jointly with the Navajos, the area depicted on the map at 794 F. Supp. at 932. The Paiutes also presented evidence of gathering basketry materials within the Bennett Freeze Area farther west than their claimed grazing area (including in the canyons west of Highway 89 and north of Shadow Mountain, and north of Bodaway Mesa). *Id.* at 925-26. The District Court acknowledged that this activity was important to the Paiutes, but held that it was not sufficiently intensive to support a property interest. *Id.* at 926.

Hopi Tribe had intensively used in 1934.

The District Court then lifted the Bennett Freeze, expressing its view that "[r]esidents of the Western Navajo Reservation, both Navajo and Hopi, have waited long enough to see this litigation resolved." *Id.* at 1416-17, 1424.

The Hopi Tribe moved to stay the District Court's lifting of the Bennett Freeze pending appeal. In an order dated December 18, 1992, the District Court agreed to continue the freeze within the area determined to be jointly used by Hopis and Navajos, acknowledging that it had ruled on "difficult legal questions, including the determination of what constituted 'use, occupancy, or possession' in 1934." App. A233 [Nav.Ex. 59].

In 1995, the Ninth Circuit upheld much of the District Court's 1992 decisions, but reversed the District Court's rejection of the Hopi claim based on religious use and remanded the case to the District Court for a determination of the Hopi Tribe's interest based on that evidence. *Masayesva*, 65 F.3d at 1453-55. Unlike the first appeal in the case, the evidence of Hopi use of the 1934 Reservation, including religious use, was before the Ninth Circuit when it decided this second appeal. The Ninth Circuit rejected the District Court's conclusion that "the religious uses were not sufficiently intensive to satisfy the statutory 'located' criterion":

> We cannot accept that once a year use is too infrequent for a tribe to be "located" at a religious site. Many religious observances take place only once a year, e.g. Yom Kippur, Christmas, Easter. Nor does use by only a few people, or people of only one sex, disqualify a religious site. Many religions require that access to a holy site be limited to a designated few people and to special times. . . . The district court demanded a level of intensity of occupancy of Hopi holy sites which would be inconsistent with the practices of many religions.

Id. at 1454-55.

The Ninth Circuit also held that the District Court had no authority to lift the Bennett Freeze and directed that the freeze remain in effect for the land still "in litigation." *Id.* at 1459-60. After the Supreme Court denied certiorari, *Secakuku v. Hale*, 517 U.S. 1168 (1996), the land remaining in litigation was the land to which the Hopi Tribe claimed an interest based on religious use.

The Hopi and Navajo Tribes entered into an agreement, confirmed by the District Court's Order of March 31, 1997, specifying the areas of religious use within the Bennett Freeze Area that remained in litigation. App. A280 [Nav.Ex. 61]. As shown on the agreed map in that Order, the areas of claimed religious use were widely spread throughout the Bennett Freeze Area. App. A282. These areas totaled between 700,000 and 800,000 acres, about half of the Bennett Freeze Area. App. A108 [Joint Status Report, Dkt. No. 40, filed Sept. 30, 1997]. In 2006, the Hopi and Navajo Tribes ultimately entered into a settlement to protect

the Hopi Tribe's religious use of the 1934 Reservation, including its shrines and eagle gathering areas spread throughout the Bennett Freeze Area. This settlement was confirmed by the District Court in its Order of December 4, 2006, which terminated the litigation and thus the mutual consent requirement. App. A283-339 [US.Ex. 21].

K. The Proceedings in the Court of Federal Claims

The Navajo Nation filed its Complaint in this action in the CFC on August 25, 1988, alleging that the statutory "freeze has been in effect for over eight years, and was preceded by similar restrictions on development imposed by administrative order in 1966." App. A102 [Dkt. No. 1]. The Complaint further alleged that "[v]irtually no development has been approved by the Hopi Tribe, which has opposed even repairs to existing structures." *Id.*

The parties undertook discovery from 1990-1993. On March 8, 1996, the CFC granted the United States' motion for summary judgment on the Navajo Nation's equal protection claim on the ground that it does not have jurisdiction over claims that do not obligate the United States to pay money damages. The Court denied the motion as to the takings and breach of trust claims, concluding that the United States had not demonstrated the absence of a genuine issue of material fact. The case was then held in abeyance pending the resolution of the

1934 Reservation litigation.

After the 1934 Reservation litigation was resolved, on June 2, 2008, the United States moved for judgment on the pleadings or, in the alternative, for summary judgment on the Navajo Nation's takings and breach of trust claims (Dkt. No. 106), asserting several different bases for its motion. The Navajo Nation did not contend that there were any genuine issues of material fact, but opposed the motion based on its view of the application of precedent to the facts. After an extensive review of the relevant facts and law, the CFC, on February 27, 2009, granted summary judgment to the United States on the breach of trust claim because the Navajo Nation failed to identify any money-mandating fiduciary duty. App. A9. After additional briefing on whether the Navajo Nation could "establish the necessary property ownership essential to a taking claim" (App. A37), the Court, on July 13, 2009, then dismissed the takings claim, holding that the 1934 Act did not grant the Navajo Nation the right to exclusive control of the area that became the Bennett Freeze Area and thus possessed no right affected by the mutual consent requirement:

> We conclude that plaintiff's right to operate unilaterally on particular [Bennett Freeze Area] 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.

App. A7. The Navajo Nation appeals only the grant of summary judgment on the takings claim.

SUMMARY OF ARGUMENT

1. The Navajo Nation's takings claim should be dismissed for lack of jurisdiction. The Navajo Nation claims that the United States' restriction of its property through imposition of a requirement for Hopi consent to development within the Bennett Freeze Area effected a taking of its property. If this restriction did effect a taking, which the United States denies, the government act that "fix[ed] the liability of the Government," *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008), was Commissioner Bennett's imposition of the mutual consent requirement in 1966, or at the latest, Congress's codification of the mutual consent requirement in the 1980 Amendments to the 1974 Settlement Act. The Navajo Nation's takings claim thus accrued on July 8, 1980 at the latest, and its Complaint filed August 25, 1988 was barred by the six-year statute of limitations of 28 U.S.C. § 2501. While the consequences of the government's act continued to be felt after 1980, in the

form of additional Hopi denials of proposed projects, it is the government's act that triggers the running of the statute of limitations.

2. If this Court does not conclude that the takings claim should be dismissed for lack of jurisdiction, this Court should affirm the CFC's conclusion that the Navajo Nation had no compensable interest that could have been taken by the mutual consent requirement. Pursuant to the 1934 Act and 1974 Settlement Act, the Navajo Nation did not have the right to exclusive control of the Bennett Freeze Area until its interests in the 1934 Reservation were determined in 2006 by the District Court and the Ninth Circuit in the 1934 Reservation litigation. The 1934 Act granted an interest in the 1934 Reservation to both the Hopi and Navajo Tribes. The legislative history made clear that the 1934 Act would protect the Hopis' right to use the land, but the 1934 Act did not set boundaries for that use or state expressly what types of land use were being protected. With population growth and associated development in the following decades, and resulting increased friction between Navajos and Hopis particularly in the area west of the 1882 Reservation, Congress decided in 1974 that the respective interests of the two tribes could no longer be left undetermined. Rather than itself drawing the boundaries of an area to become exclusively Hopi, Congress, in the 1974 Settlement Act, authorized a judicial determination of the areas exclusively used

by each tribe in 1934 and of the areas jointly used by the tribes in 1934, to be followed by a partition of the areas in which the tribes were found to have a "joint or undivided" interest. That lawsuit, commenced in 1974, was not finally resolved until 2006, at which time the Bennett Freeze was lifted.

The Navajo Nation's asserted right to exclusive control of land with multiple beneficiaries while the land was still in litigation thus has no legal basis. Moreover, the Navajo Nation's factual premise that everyone always knew that the Hopi Tribe's interest was limited to an area of about 246,000 acres surrounding the Hopi village of Moenkopi is contrary to the decisions of the District Court and Ninth Circuit in the 1934 Reservation litigation, most notably the Ninth Circuit's holding in 1995 that the 1934 Act granted the Hopi Tribe a property interest based on its religious use of the 1934 Reservation. *Masayesva*, 65 F.3d 1453-55. The Ninth Circuit had before it evidence of Hopi religious use in many areas throughout the Bennett Freeze Area, including many areas outside the 246,000-acre area described by the Navajo Nation, and reversed the District Court's lifting of the Bennett Freeze as to the areas of claimed religious use. *Id.* at 1459-60. The Hopi Tribe's rights in its shrines and eagle gathering areas was ultimately protected through the 1934 Reservation litigation that was resolved in 2006.

STANDARD OF REVIEW

This court reviews a grant of summary judgment by the CFC, including its interpretation of statutes, de novo. *Fathauer v. United States*, 566 F.3d 1352, 1353 (Fed. Cir. 2009).

ARGUMENT

A. The Navajo Nation's Takings Claim Is Barred by the Statute of Limitations

Before considering the merits of the Navajo Nation's takings claim, this Court should first determine whether the CFC had jurisdiction over the claim. *See John R. Sand & Gravel*, 552 U.S. at 134-36.[10] The Navajo Nation invoked the jurisdiction of the CFC under the Tucker Act, 28 U.S.C. § 1491. Under 28 U.S.C. § 2501, claims brought against the United States under the Tucker Act are "barred unless the petition thereon is filed within six years after such claim first accrues." This statute of limitations limits the jurisdiction of the CFC. *John R. Sand & Gravel*, 552 U.S. at 134-36. The Navajo Nation's takings claim first accrued more than six years before the Navajo Nation filed its Complaint, and the claim is thus barred by the statute of limitations.

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[10] The United States raised and briefed the statute of limitations in the CFC, and the Navajo Nation responded. Because the Navajo Nation did not address jurisdiction in its opening brief in this Court, the United States will address the arguments the Navajo Nation made in the CFC.

"A takings claim accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *John R. Sand & Gravel,* 457 F.3d at 1355 (internal quotations and citations omitted). More specifically, the claim accrues when "the plaintiff knew or should have known of the existence of the events fixing the government's liability." *Id.* at 1356. This is an objective standard. *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). In this case, it cannot be disputed that the Navajo Nation was well aware of the Bennett Freeze, in all of its various forms, throughout the duration of its existence (1966-2006).

1. The Navajo Nation's Takings Claim First Accrued at the Latest on July 8, 1980 with the Codification of the Mutual Consent Requirement

As explained above, the mutual consent requirement for development within the Bennett Freeze Area was first imposed by administrative decision of Commissioner Bennett on July 8, 1966, and was then codified on July 8, 1980 in the 1980 Amendments to the 1974 Settlement Act. The Navajo Nation's takings claim thus first accrued in 1966. As of that time, the Navajo Nation knew, or should have known, that the United States had acted to restrict any right it had to unilateral development within the Bennett Freeze Area. In any event, the takings claim accrued at the very latest on July 8, 1980 when Congress enacted the 1980

Amendments. Assuming, *arguendo*, that the 1934 Act granted the Navajo Nation a property right to unilateral development, and that the mutual consent requirement effected a taking of that right, the passage of the 1980 Amendments was the last act by the United States that "fix[ed] the liability of the Government and entitle[d] the claimant to institute an action." *John R. Sand & Gravel*, 457 F.3d at 1355. A complaint could have been filed at that time. The Navajo Nation did not file its Complaint in this case until August 25, 1988, more than six years after July 8, 1980. The claim is thus barred.

The Navajo Nation acknowledges (Br. 10) that the 1980 Amendments "prevented any development within the Bennett Freeze area . . . unless the Hopi gave written consent." However, the Navajo Nation argued in the CFC that its claim did not accrue until on or after August 26, 1982 when the Hopi Negotiating Committee wrote a letter advising that it had "postponed the processing of all construction applications for the [Bennett Freeze Area] for an indefinite period" pending an investigation of current and potential construction activities (the so-called "Hopi moratorium"). App. A199 [Nav.Ex. 20]. It argued that it was that letter, or the subsequent project denials, that triggered the running of the statute of limitations, not Congress's codification of the mutual consent requirement on

July 8, 1980.[11] This argument has no merit.

This Court's 1995 decision in *Fallini*, 56 F.3d 1378, is instructive. In *Fallini*, ranchers with permits to graze on federal land claimed that the United States took their property (water from sources they developed on the federal land) by prohibiting them from excluding wild horses from the developed water sources. This prohibition was imposed by Congress in the Wild Free-Roaming Horses and Burros Act of 1971 and was thereafter enforced by the Bureau of Land Management ("BLM"). The Fallinis' complaint, filed in the CFC in November 1992, was held to be untimely. This Court explained that the asserted property right at issue was the right to exclude wild horses from the developed water sources. *Id.* at 1383. One must then "look to the nature and timing of the governmental action that constituted the alleged taking." *Id.* This Court explained that when the government action that is claimed to take private property for public use without just compensation is a statute, a takings claim accrues "on the date of enactment of the legislation." *Fallini*, 56 F.3d at 1382-83. In *Fallini*, the legislation was enacted in 1971, and in any event, the Fallinis clearly "were aware of all the facts necessary to establish the liability of the United States for the

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[11] Without expressly addressing statute of limitations, the Navajo Nation's Brief in this Court suggests that its claim did not accrue until 1982. *See* Br. 6, 10, 30-31.

alleged taking" no later than October 1983 when they sent a bill to the BLM seeking compensation for water drunk by the wild horses. *Id.* at 1381.

The Court rejected the Fallinis' arguments for a later accrual date, finding that the only changes in the years following enactment were the number of protected horses and the amount of water they drank, i.e., the amount of damages. But "it is not necessary that the damages from the alleged taking be complete and fully calculable before the cause of action accrues." *Id.* at 1382. The "proper focus, for statute of limitations purposes, 'is upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts became most painful.'" *Id.* at 1383, quoting *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (emphasis in original). Nor may a plaintiff avoid the statute of limitations by choosing to forgo damages for the period more than six years before the complaint filing date. *Id.* at 1382-83. The Fallinis' entire claim was dismissed because "[n]othing that happened in those later years had the legal effect of triggering, for the first time, the Fallinis' obligation to sue for the alleged takings that had occurred since the enactment of the Wild Free-Roaming Horses and Burros Act in 1971." *Id.* at 1382.

In *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), this Court similarly emphasized that it is the government act that matters, not subsequent acts

of non-government parties, in deciding when a takings claim accrues. In *Caldwell*, this Court held that a takings claim arising from a conversion of a railroad right-of-way to interim trail use under the National Trail Systems Act, 16 U.S.C. § 1247(d), accrued when the Surface Transportation Board ("STB") issued a Notice of Interim Trail Use because that was the "only *government* action" that precluded the vesting of state law reversionary interests. *Id.* at 1233 (emphasis in original). Even though the process was not completed until the railroad and trail operator thereafter executed a trail use agreement, the agreement was not relevant to the statute of limitations because the STB had no significant role to play in creating the trail use arrangements.[12] *Id.*

In the instant case, Interior similarly had no role to play in individual project decisions following the 1980 Amendments. The Navajo Nation knew that it could not undertake any development within the Bennett Freeze without the Hopi Tribe's consent when Congress codified the mutual consent requirement. That was the last relevant governmental act. "What [a plaintiff] may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done." *Fallini*, 56 F.3d at 1383. Recognizing this, the Navajo Nation seeks

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[12] *Caldwell* was reaffirmed in *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), and *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008).

to characterize the "Hopi moratorium" as an affirmative act of the government: "the United States . . . took affirmative action . . . by abandoning oversight of the entire Bennett Freeze Area to the Hopi." Br. 30-31. But if the United States did "abandon" oversight, the abandonment occurred in 1980 when Congress enacted the mutual consent requirement with no procedure for appeal to Interior. As of July 8, 1980, the Department simply had no authority to override the Hopi Tribe's decision. *See* Statement of Facts Part H.[13] The Navajo Nation's argument in the CFC that the Hopi Tribe can be characterized as an "agent" of the United States fails for the same reason. "An essential element of agency is the principal's right to control the agent's actions." Restatement (Third) of Agency § 1.01 cmt. f(1) (2006); *Rotec Indus. v. Mitsubishi Corp.*, 215 F.3d 1246, 1256 (Fed. Cir. 2000). There was no such right here. *See also Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-16 (2001) (documents submitted by a tribe to Interior were not protected from disclosure as "intra-agency" communications). The railroad and trail operator were not treated as agents of the United States in *Caldwell* and the Hopi Tribe similarly should not be so treated here.

Nor can the Navajo Nation evade the statute of limitations by arguing, as it

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[13] Even when Congress did provide an appeal procedure in the 1988 Amendments, Interior could only authorize development when needed to protect "public health and safety."

did in the CFC, that it did not appreciate the impact the 1980 Amendments would have on it when Congress enacted the statute. A takings claim first accrues on the date a statute which deprives the plaintiff of a property interest is enacted, even if the plaintiff does not subjectively know that the act has deprived it of a property interest. As this Court explained in *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993), "[w]hile the Supreme Court's [interpretation of the Act] in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted [in 1962]." (emphasis in original). *See also Fallini*, 56 F.3d at 1380 (the standard for claim accrual is an objective standard).

Moreover, even if the accrual standard were subjective, which it is not, the suggestion that the Navajo Nation did not know until August 25, 1982 or later that the mutual consent requirement, in effect since 1966, would restrict its use of the Bennett Freeze Area is belied by its own evidence. *See* App. A220 [Nav.Ex. 15, July 13, 1989 Declaration of Roman Bitsuie: "Under the administrative freeze, consent to land use rights and development was occasionally, but seldom, granted by the Hopi Tribe."]; App. A238 [Nav.Ex. 54, July 27, 1993 complaint to the Senate Subcommittee on Interior Appropriations that "virtually all Navajo requests

were either ignored by the Hopi Tribe or rejected out of hand" from 1966 through 1988); App. A272-73 [Nav.Ex. 26, Jan. 24, 1995 Declaration of Glen Renner, stating that, during the administrative freeze from 1966 through July 8, 1980, the Hopi Tribe approved only 3 of 36 Navajo requests, including 2 which were conditioned on Navajo consent of Hopi projects].[14]

The Navajo Nation protested the Bennett Freeze from the outset. *See, e.g.*, App. A153 [US.Ex. 27, July 26, 1966 Navajo Tribal Council Resolution]; App. 160-61 [Nav.Ex. 11, April 3, 1970 memorandum from BIA Navajo Area Director stating that Hopis never agreed to a lease in four years and that BIA was "subjected to bitter criticism by practically all of the Navajos in the area who claimed that the Navajos were starving"); App. A189 [US.Ex. 17, July 16, 1976 letter from Commissioner of Indian Affairs acknowledging receipt of Navajo Tribal Council resolution requesting Bennett Freeze be lifted]. *See also* Statement of Facts Parts I and J (references to long duration of the Bennett Freeze).

The Navajo Nation incorrectly asserts (Br. 6) that the purpose of the mutual

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[14] Tables of project proposals compiled by the Navajo Nation in this case (App. A247, A340, A346 [US.Exs. 23,25,22]), as supplemented by the United States with some additional information from its records (App. A356, A359 [US.Exs. 26,24]), are supportive of these statements. *See also* App. A188 [US.Ex. 16, Sept. 9, 1975 letter from Hopi Tribal Council stating that it "cannot approve requests at this time until the land problem between the Navajo and Hopi Tribes has been resolved"].

consent requirement was to "preserve the evidence of the Hopi occupancy and use as of 1934 in order to assist the district court at trial." The Navajo Nation's suggestion appears to be that, if that were the purpose, perhaps it would have been reasonable to expect the Hopi Tribe routinely to approve proposed development projects after any relevant evidence was documented. But had Congress intended to provide for evidence preservation, it would have drafted quite a different provision. The Ninth Circuit explained the freeze's actual purpose in holding in 1995 that the District Court had no authority to lift the freeze:

> This statute codified the freeze imposed in 1966 by Commissioner of Indian Affairs Robert Bennett. It reduced the incentive for either tribe to develop the jointly occupied lands between the time when the freeze was imposed, and the time when the court would partition jointly held lands based on "fairness and equity." Otherwise, either tribe, anticipating that a judge would want to avoid allocating land occupied by members of one tribe to the other, would have an incentive to manipulate the expected partition by creating occupancy during the litigation period.

Masayesva, 65 F.3d at 1460;[15] *see also* Statement of Facts Part H. Partition of the

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[15] In its Proposed Findings of Uncontroverted Fact (Dkt. No. 117, filed Oct. 10, 2008), the Navajo Nation suggested that the purpose of the administrative mutual consent requirement was "to 'place a financial hardship on both tribes and . . . magnify the costs and difficulties of administration,' to the end that the tribes might voluntarily negotiate a solution to the land dispute." App. A113. While this was not the intended purpose of the mutual consent requirement, this statement does evidence the Navajo Nation's knowledge of the Bennett Freeze's impact from the outset. The Navajo Nation here (and elsewhere in its Brief) cites to its Proposed Findings without acknowledging the United States' objections to certain

1882 Reservation had proven to be quite difficult. The period 1962 through 1980 was a time of heightened tension in the long-running land dispute[16] between the Hopi and Navajo Tribes due to the relocation of Navajo families from land held to be Hopi in the *Healing* litigation, including the mutual consent requirement in effect on the JUA as of 1962. *See* Statement of Facts Parts C and G. The Navajo Nation was cognizant of the impact of the mutual consent requirement both in the JUA and in the Bennett Freeze Area well before 1982.

There is no genuine dispute of material fact as to any of this. As of the time Congress codified the mutual consent requirement on July 8, 1980, at the very latest, the Navajo Nation knew, or should have known, that the United States' imposition of the mutual consent requirement had deprived it of any right it had to exclusive control within the entire Bennett Freeze Area. That act triggered the running of the statute of limitations. Specific project denials by the Hopi Tribe

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characterizations of the referenced historical documents. *See* App. A110-30 [Dkt. No. 121, filed Oct. 31, 2008].

[16] In discussing the 1980 Amendments, members of Congress referenced "the long and often bitter dispute between two of America's ancient Indian tribes" (Cong. Clausen), the bad "feelings of these people against each other which they have had for so many years" (Cong. Rhodes), and the "century-old land dispute between the Hopi and Navajo Tribes involving millions of acres of reservation lands in Northeastern Arizona" (Cong. Marriott). App. A196-97 [US.Ex. 5].

thereafter did not somehow defer or restart the running of the statute of limitations.

2. The Navajo Nation's Takings Claim Did Not Accrue in 2006 When the Bennett Freeze Was Finally Lifted

In the alternative, the Navajo Nation argued in the CFC that its takings claim did not accrue until the mutual consent requirement was completely lifted in 2006 and it knew the full extent of its damages. Its Brief in this Court appears to disavow this alternative argument when it states (Br. 5-6) that it was appropriate to file its Complaint in the CFC and then stay the case pending resolution of the 1934 Reservation litigation "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."

In any event, the argument for a 2006 accrual date is incorrect under this Court's decisions in *Fallini* and *Caldwell*, as explained above. The Navajo Nation relied on *dicta* in *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994), but its reading of that *dicta* (which, respectfully, was not entirely clear)[17] does not

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[17] In *Creppel*, the temporary regulatory takings claim arose from a decision by the Army Corps of Engineers to halt a Louisiana land reclamation project that would have benefitted landowner plaintiffs. Brigadier General Wilson issued the order halting the project on November 16, 1976, and the federal district court overturned the Wilson Order on August 13, 1984. The CFC held that the takings claim accrued "when the Wilson Order issued on November 16, 1976," and this Court

comport with this Court's holdings on the accrual date for temporary regulatory takings in subsequent cases. The liability determination for temporary and permanent takings is identical. *See, e.g., Cienega Gardens v. United States*, 503 F.3d 1266, 1279 (Fed. Cir. 2007) ("The *Penn Central* test is the same whether the regulation is permanent or temporary in nature, although in the latter situation, the court must carefully consider the duration of the restriction under the economic impact prong."); *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 n.11 (Fed. Cir. 2004) ("Temporary takings are not different in kind from permanent takings – a temporary taking simply occurs when what would otherwise be a permanent taking is temporally cut short.").[18] This Court expressly held in *Bass Enterprises v. United States*, 133 F.3d 893, 896 (Fed. Cir. 1998), that "[w]hile cessation of regulation may be sufficient for finding a temporary taking, [precedent does not] support[] the proposition that the end of regulation is

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agreed that "[w]ith the issuance of the Wilson Order, . . . all the events had occurred to fix the supposed liability of the Government." *Id.* at 630, 632. The Court later stated, however, that "the claimants' temporary taking claims accrued with the August 1984 Order," 41 F.3d at 632. The tension between the two statements was not material to the holding because the landowners did not sue until 1991 and the takings claim was time-barred whether it accrued when the alleged temporary taking commenced or when it ended.

[18] This Court has also held that the valuation analysis is identical regardless of whether the taking is permanent or temporary. *See, e.g., Independence Park Apartments v. United States*, 465 F.3d, 1308, 1311 (Fed. Cir. 2006).

necessary."

A rule that would prohibit complaints from being filed until a property restriction has ended would make little sense. A property owner might well be aware that a government action has deprived it of use of its property, and might want to promptly file a takings claim, but it is often not obvious whether a restriction will be permanent or temporary, or if temporary, how long the restriction might last. In *Caldwell*, for example, this Court noted that at the time a takings claim accrues, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear." 391 F.3d at 1234. If it turns out that the restriction never ends, the plaintiff who waits more than six years will have missed the opportunity to assert a takings claim. And as to restrictions that do end at some point, a rule that defers accrual until the restriction's ending date is inconsistent with the purpose of statutes of limitations. *See John R. Sand & Gravel*, 552 U.S. at 133 (reviewing several purposes of statutes of limitations, including limiting the United States' waiver of sovereign immunity); *Creppel*, 41 F.3d at 633 (statutes of limitations are designed to "prevent[] claimants from surprising the Government with potentially stale claims based on events that transpired many years before").

It is true, of course, that "property owners cannot sue for a temporary taking

until the regulatory process that began it has ended," *id.* at 632, in the sense, for example, that a takings claim with respect to a statute that requires a permit is not ripe until the landowner has applied for, and been denied, a permit. *See, e.g., Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002); *see also, Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004) ("The general rule is that a claim for a regulatory taking is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). In this case, Commissioner Bennett reached a final decision in 1966 that the administrative mutual consent requirement would apply to 1.5 million acres of the 1934 Reservation – the Bennett Freeze Area – and Congress agreed in 1980 that the statutory restriction would apply to that same area. If the mutual consent requirement effected a taking, these decisions fixed the government's liability for that taking.

B. The 1934 Act Did Not Grant the Navajo Nation the Right to Exclusive Control of the 1934 Reservation

A takings claim requires a two-step analysis. *Karuk Tribe of California v. United States*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). The first step is determining "whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a 'stick in the bundle of

property rights.'" *Id.* If a plaintiff possesses such a property interest, the court then determines "whether the government action at issue constituted a taking of that 'stick.'" *Id.* The CFC properly rejected the Navajo Nation's takings claim based on its first-step determination that the tribe did not possess the right to exclusive control of the Bennett Freeze Area.

The Navajo Nation agrees (Br. 12-13) that its property rights in the 1934 Reservation derive from the 1934 Act.[19] The 1934 Act created a reservation of about 8.2 million acres in northeastern Arizona "for the benefit of the Navajo and such other Indians as may already be located thereon."[20] "When a reservation is

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[19] Most of the Bennett Freeze Area was initially withdrawn from sale and settlement by the Executive Order of January 8, 1900, which did not specify any beneficiary. App. A132. But even if it had named the Navajo Tribe as beneficiary, rights granted by an executive order may be terminated by the United States "without legal liability for compensation in any form." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[20] The Navajo Nation argues that the CFC mistakenly believed that the 1934 Reservation was created by executive order rather than statute. It points (Br. 19-20) to the following sentence from the background section of the court's July 13, 2009 Opinion (App. A3): "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')." While the inclusion of the phrase "by executive order" was an error, it does not evidence any misunderstanding by the CFC. The CFC discussed the establishment of the 1882 Executive Order Reservation and 1934 Act Reservation in its prior Opinion (App. A11-13), repeatedly referred to the "1934 Act" throughout both Opinions, and properly addressed the question of what specific rights Congress granted to the Navajo Nation by that statute.

established by a . . . statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action." *Hynes*, 337 U.S. at 103. Congress was aware when it passed the 1934 Act that Hopis claimed as their homeland most of the land that became the 1934 Reservation. *See* Statement of Facts Parts A and B. The 1934 Act's grant to the Navajo Nation was expressly limited by the interests of the other Indians "located thereon." Congress could have delineated areas of exclusive control for the Navajos and Hopis in 1934 but chose not to, preferring that the tribes work out "cooperative arrangements" for use of the land. *Sekaquaptewa*, 619 F.2d at 807.

With the 1974 Settlement Act, Congress gave up the hope that the tribes would be able to work out cooperative arrangements for joint use of the 1934 Reservation, and authorized judicial determination of the areas exclusively used by each tribe in 1934, and of the jointly used areas which would then be

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The Navajo Nation also takes issue (Br. 21) with the CFC's statement that the 1934 Act granted the Navajo Nation "joint use to an unspecific portion of the land" (App. A7), asserting that the court was confusing the 1882 Reservation and the 1934 Reservation. The Court was not confused. While the Ninth Circuit in 1980 rejected the Hopi Tribe's argument that the 1934 Act granted the Navajo and Hopi Tribes a joint interest in the entire 1934 Reservation without regard to actual use, the Ninth Circuit held that the two tribes would have a "joint or undivided" interest in the land they jointly used. *Sekaquaptewa*, 619 F.2d at 809.

partitioned. Through the partition, each tribe would gain the right to exclusive control of a portion of the areas jointly used in 1934 but would lose its rights to the balance of the jointly used areas. The partition was to be based on "fairness and equity." The CFC correctly concluded that the 1974 Settlement Act confirmed "that from the outset, i.e. 1934, neither tribe had sole control over the [Bennett Freeze Area] lands prior to the termination of the district court litigation. Consequently, the lands were inherently subject to the very restrictions that plaintiff now claims constitute a taking." App. A7.

The Navajo Nation mischaracterizes the CFC's holding when it broadly asserts (Br. 6) that "the Court found that the 1934 Act did not create a compensable property interest that was protected by the Fifth Amendment." Contrary to this assertion, the CFC did not hold that the 1934 Act granted the Navajo Nation no compensable property rights (no "sticks"). It held more narrowly that the 1934 Act did not grant the Navajo Tribe a compensable right to unilateral development of the Bennett Freeze Area, the only potential right that could be affected by the mutual consent requirement.[21] Therefore, the mutual

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[21] Had Congress acted differently and excluded all Indians from the Bennett Freeze Area (such as by adding the land to the Grand Canyon National Park or the Kaibab National Forest), the CFC would have been presented with a different situation and would have analyzed differently the relevant interests of the 1934 Act's beneficiaries (the relevant "sticks").

consent requirement did not deprive the Navajo Tribe of any "stick" it possessed. The United States was entitled to summary judgment on this first step of the takings analysis, and the Court had no need to proceed to the second step – the analysis for a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The Navajo Nation argues (Br. 24-26) that the bundle of sticks Congress granted it in 1934 included the right to control development "outside of the area used by the Hopi." But this, of course, begs the question of what area or areas the Hopis used in 1934. Throughout its Brief, the Navajo Nation incorrectly asserts that the area of Hopi use was known to be small from the outset. In fact, the interest of the Hopi Tribe under the 1934 Act was not finally determined until 2006.

The Navajo Nation principally relies on three pre-1934 studies which it says were commissioned by the United States "to determine the extent of the Hopi use and occupancy" of the 1934 Reservation. Br. 7. In fact, however, these studies addressed only the area of most intensive Hopi farming and grazing use surrounding the village of Moenkopi, and did not purport to address traditional hunting, gathering and religious uses beyond this area. Moreover, even with respect to grazing, the recommendations were in the nature of proposed partition

areas (ranging from 35,200 acres to 246,500 acres) rather than findings of the outer limits of Hopi grazing in areas also used by Navajos. For example, the District Court described the referenced February 5, 1930 letter of Superintendent Walker as "describing an informal agreement reached to prevent disputes between Navajo and Hopi stockmen." *Masayesva*, 793 F. Supp. at 1501. The District Court further noted that Walker's letter "does not explicitly state what the boundaries were and the letter notes the boundaries were not always observed by members of either Tribe." *Id.* In the 1934 Act Congress did not expressly define the Hopi interest by reference to these recommended grazing areas.[22] If it were clear that Congress in the 1934 Act had limited the Hopi interest to the area described in one or more of these proposals, the Navajo Nation should have been able to obtain summary judgment in the 1934 Reservation litigation, avoiding years of litigation about the nature of the Hopi Tribe's interest in, and its uses of, the 1934 Reservation, including for less intensive hunting, gathering and religious uses. But that, of course, is not what happened.

In the years following 1934 and before the 1974 Settlement Act, the Tribes

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[22] The Navajo Brief includes other mischaracterizations of the evidence that was before the District Court and Ninth Circuit in the 1934 Reservation litigation. Characterizing the village of Moenkopi as an "outpost" of 400 Hopis (Br. 18), the Navajo Nation goes so far as to suggest, incorrectly, that Moenkopi Hopis were not even members of the Hopi Tribe (Br. 20-21).

held widely divergent views of the Hopi interest in the 1934 Reservation. The Navajo Brief (at 8, 23-24) points to a May 13, 1969 letter from Commissioner Bennett to the Hopi Tribal Council proposing an area of about 105,000 acres for exclusive Hopi use surrounding the village of Moenkopi. App. A53-57 [Nav.Ex. 10]. He reported on the disparate views of the Navajo and Hopi Tribes on the Hopi interest in the land west of the 1882 Reservation: the Navajos proposed an area for exclusive Hopi use of only 77 acres, and the Hopi attorney presented a detailed statement as to the interest of the Hopis in the entire area, but made a counter offer of about 807,000 acres. App. A55. Commissioner Bennett proposed the 105,000-acre area as a practical "solution to the pressing human and administrative problems now existing in that area," and emphasized that he did "not view this as a settlement of any aboriginal claims of the Hopi and Navajo Tribes in the area." App. A57. The Navajo Nation's assertion (Br. 30), based on this letter, that "the United States knew that the Hopi's reasonable claim was limited to the environs of the Village of Moenkopi" is simply incorrect.

When Congress declined in the 1974 Settlement Act to carve out an area for Hopi use and instead authorized a judicial determination of Hopi use and occupancy as of 1934, no one knew how that litigation would be resolved. The Navajo Nation correctly states (Br. 26-27) that, during the period 1974-1980, the

Bennett Freeze Area was subject to the Hopi claim to half the 1934 Reservation without regard to actual use in 1934. *See also* Statement of Facts Part F. But the Navajo Nation then incorrectly asserts (Br. 27) that, with the Ninth Circuit's rejection of that claim in May 1980, "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 extent of the Hopi grazing area was still be determined and the Navajo Nation fails to mention other uses that might support a property interest in these circumstances.

The Ninth Circuit stated that "[t]he purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis," *Sekaquaptewa*, 619 F.2d at 807, but contrary to the Navajo Nation's characterization (Br. 13, 19), the court did not state that the pockets were "small." The Ninth Circuit acknowledged that there might have been areas of exclusive Hopi use and areas of joint Hopi-Navajo use, but expressed no view about the size or location of any such areas because it did not at that time have before it detailed evidence of Hopi and Navajo use as of 1934. The 1980 decision in no way confirmed any right to develop within these as-yet-undefined areas in disregard of the rights of the other beneficiaries before a determination and partition of these areas.

As of the time of the 1980 Amendments, which followed shortly after the Ninth Circuit's decision, there was no unified view of what the result of the 1934 Reservation litigation would be. While the Navajo Nation seems to concede in this appeal that it had no right to exclusive control within the "known" area of Hopi use (which ranged up to about 246,500 acres), the Navajo Nation did not concede that much area to the Hopi Tribe in the 1934 Reservation litigation. And, Congressman Marriott, for example, expressed the competing view in 1980 that the Hopi Tribe would be awarded much more than 240,000 acres. *See* Statement of Facts Part H.

More importantly, the Navajo Nation completely ignores the fact that the Ninth Circuit subsequently held in 1995 that the Hopi Tribe's interest extended beyond the area of intensive residence, farming and grazing use surrounding the village of Moenkopi to areas of less intensive religious use spread throughout the Bennett Freeze Area. The Hopi Tribe had offered at trial evidence of use of about 3 million acres of the 1934 Reservation. *See* Statement of Facts Part J. The issue as to a large portion of the claimed land was not so much whether the Hopi used the area, but whether the use was sufficiently "intensive" to support a Hopi property interest under the 1934 Act. The District Court acknowledged in 1992 that that was a difficult question. App. A233. And indeed the Ninth Circuit in

1995 reversed the District Court on its rejection of religious use evidence, which alone involved about half the Bennett Freeze Area. *Masayesva*, 65 F.3d at 1453-55. At that point, about half the land within the Bennett Freeze Area was released from the mutual consent requirement,[23] but the Hopi and Navajo Tribes agreed that about 700,000 to 800,000 acres remained in litigation. App. A108, A282 (map). The Hopi Tribe's rights based on religious use, including at locations throughout the Bennett Freeze Area, were ultimately protected through settlement with the Navajo Nation in 2006.[24] App. A283-339.

It is apparent from the 32-year course of proceedings in the District Court and Ninth Circuit that the extent of the interests of the 1934 Act beneficiaries was far from obvious, and that the Hopi Tribe had a legitimate claim to the land within the Bennett Freeze Area, even though it was ultimately awarded much less area than it had claimed. There is no genuine issue of material fact as to any of this. The Navajo Nation's assertion of a compensable property right as of 1980 to

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[23] The Navajo Nation's assertion (Br. 11) that the "development freeze on over 1,439,482 acres" was not lifted until December 4, 2006 fails to acknowledge this fact..

[24] In addition, the Navajo Nation's interest was limited by the potential beneficial interests of "other Indians" apart from the Hopis. As determined in the 1934 Reservation litigation, the San Juan Southern Paiutes also used, and thus had an interest in, land within the Bennett Freeze Area.

exclusive control of the Bennett Freeze Area outside of the area of Hopi use – based on the factual premise that "it was known by everyone that the legitimate Hopi claim was limited to the area around the Village of Moencopi" (Br. 27) – is demonstrably incorrect based on the decisions of the District Court and Ninth Circuit in the 1934 Reservation litigation, which are not subject to relitigation in the CFC in this case.

The Navajo Nation cites no persuasive authority in support of its assertion of the right to exclusive control. The two cases it relies on (Br. 27-30), *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 885-86 (Fed. Cir. 1983), and *Pettro v. United States*, 47 Fed. Cl. 136, 142 (2000), are inapposite. Both cases arose from an action by the United States to assert its own exclusive ownership of mineral rights previously believed to be owned exclusively by the plaintiffs (Yuba Goldfields had been mining for 70 years and Pettro for 20 when the United States first asserted its ownership), and both cases addressed the question whether the United States' total deprivation of their mineral interests during the period the United States' own claim was being adjudicated effected a taking. In neither case did the court find it necessary to undertake the two-step takings analysis of *Karuk Tribe* and focus first on the property interest of the miners. More specifically, neither case addressed the situation of undetermined interests (including joint or

undivided interests) of multiple beneficiaries – not including the United States – in the same land.

In *Yuba Goldfields*, the Claims Court had granted summary judgment to the United States, relying in part on *DSI Corp. v. United States*, 655 F.2d 1072 (Fed. Cir. 1981) (holding that a judicial action by the United States to determine title is not a taking). This Court reversed on that point, concluding that *DSI Corp.* was inapposite because Yuba Goldfields, rather than the United States, had filed the action to quiet title. 723 F.2d at 889. This Court appeared to agree with the Claims Court that a taking could not arise from a good faith effort by the government to protect its own property, but noted that there was no evidence in the record about the government's good faith in directing Yuba Goldfields to stop mining, and remanded for further proceedings in the Claims Court. *Id.* at 888-89. The Navajo Nation argues (Br. 29) that there is similarly a need for remand in this case for factual proceedings to determine whether Congress had a good faith belief when it passed the 1980 Amendments "that the Hopi could establish a property right in all of the Bennett Freeze Area." But neither *Yuba Goldfields* nor any other precedent of this Court stands for the proposition that determining whether the Navajo Nation had a right to exclusive control of the Bennett Freeze Area prior to the conclusion of the 1934 Reservation litigation turns on Congress's good faith,

or lack thereof, in imposing the Bennett Freeze. The Navajo Nation's interest turns instead, as the CFC correctly held, on the nature of Congress's grant to multiple beneficiaries in the 1934 Act and Congress's decision in 1974 to determine their respective interests through litigation.

Finally, in codifying the mutual consent requirement in 1980, 25 U.S.C. § 640d-9(f), Congress either recognized that the Navajo Nation never had the right to exclusive control of the Bennett Freeze Area, or, in the alternative, took away the Navajo Nation's right to exclusive control. Under either characterization, at the time the Navajo Nation argues its claim accrued, the Navajo Nation lacked the property interest it claims the United States took. Thus if this Court were to hold that the Navajo Nation's takings claim did not accrue until 1982 or later, the claim would have to be rejected on the ground that the Navajo Nation had no right to exclusive control of the Bennett Freeze Area after 1980.

C. The Navajo Nation Misstates the Test for a Regulatory Taking

The CFC did not find it necessary to address the second step of the takings analysis for a temporary regulatory taking. In the event this Court were to conclude that it is necessary for the CFC to undertake this analysis, we note briefly that the Navajo Nation's takings claim is based on the incorrect legal assertion (Br. 6) that a taking arises when the scope of a federal restriction is not narrowly

tailored or "fairly related" to its purpose, specifically that the mutual consent requirement "included far too much land." Based on this "too much land" argument, the Navajo Nation could have challenged the administrative mutual consent requirement in District Court under the Administrative Procedure Act, or could have challenged the 1980 Amendments in District Court under the Due Process Clause, but it did not do so. Instead, it filed a regulatory takings claim in the CFC. The test for a regulatory taking is set forth in *Penn Central*, and does not include a narrowly tailored or "fairly related" factor.

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Supreme Court held that a regulation could constitute a taking if it did not "substantially advance legitimate state interests," and that formula was applied in numerous cases over the next quarter century. However, in *Lingle v. Chevron*, 544 U.S. 528, 545 (2005), the Supreme Court repudiated that standard, holding that it is "not a valid takings test." The Supreme Court clarified in *Lingle* that the only applicable standard is the one articulated in *Penn Central*. The over-arching question of *Penn Central* is whether the burdens imposed by the government's actions "are functionally comparable to government appropriation or invasion of private property." *Lingle*, 544 U.S. at 529. Factors of "particular significance" are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to

which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124.

Finally, there could be no regulatory taking here under a *Penn Central* analysis. In considering economic impact, the focus is on the regulation's impact on economic use of the "parcel as a whole." 438 U.S. at 130-31; *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004). This Court has rejected as "circular" attempts by plaintiffs to define the parcel as the property interest affected by the regulation in an effort to argue that the regulation deprived the plaintiff of all economic use of the property. *Appolo Fuels*, 381 F.3d at 1346, quoting *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002). In this case, the "parcel as a whole" is at least the 1934 Reservation (and might include the entire Navajo Reservation). The 1.5-million-acre Bennett Freeze Area was only about 18 percent of the 8.2-million-acre 1934 Reservation. Moreover, the mutual consent requirement did not deprive the Navajo Nation of all use of the Bennett Freeze Area for the duration of the restriction. We are unaware of precedent of this Court or of the Supreme Court holding that a regulatory restriction with economic impact of this nature and magnitude effected a taking. *See, e.g., Concrete Pipe and Products Co. of Cal., Inc. v. Const. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (value

diminution of 75 percent did not effect taking).

CONCLUSION

For the foregoing reasons, this Court should remand this case to the CFC to dismiss for lack of jurisdiction based on the statute of limitations. In the alternative, this Court should affirm the CFC's dismissal based on the lack of a compensable property interest.

Respectfully submitted,

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April 22, 2010
DJ No. 90-2-20-1045

ADDENDUM

1. Map, *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1185 (D. Ariz. 1978).

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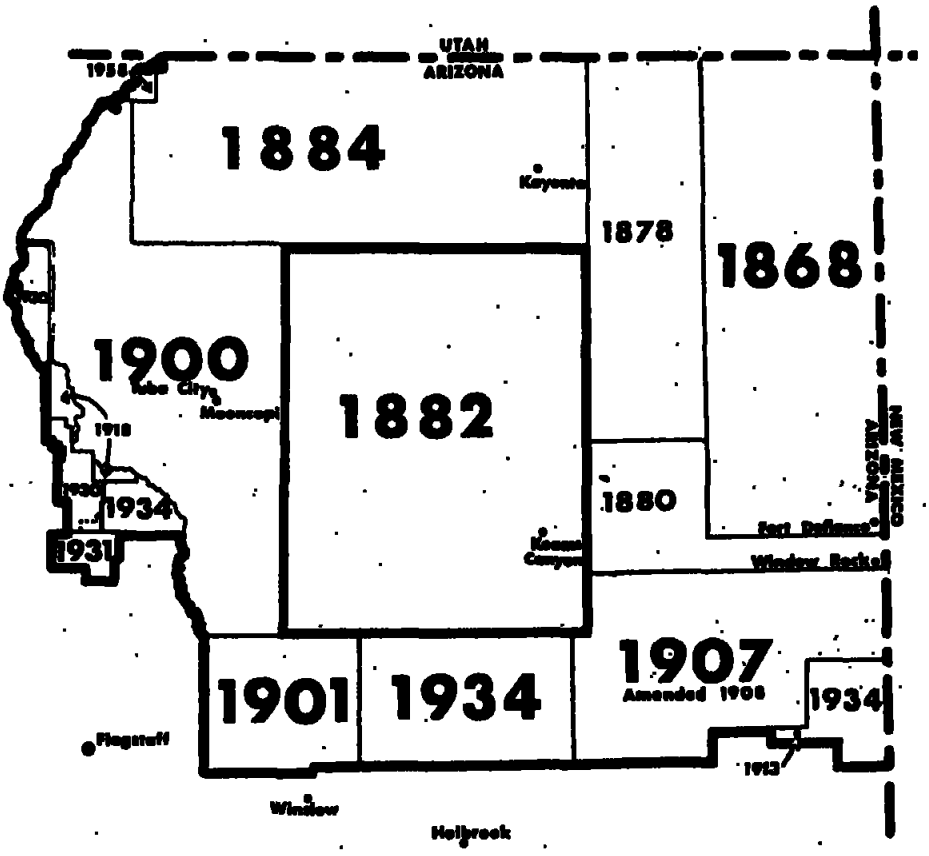
MEMORANDUM AND ORDER

COPPLE, District Judge.

Pursuant to 25 U.S.C. § 640d–7, the Hopi tribal chairman commenced an action in this district to determine the Hopi tribal rights and interests in the area described by the Act of June 14, 1934, 48 Stat. 960 (1934 Act). The 1934 Act describes the exterior boundaries of the Navajo Reservation in northeastern Arizona, and conveys an equitable interest in certain of these lands to the Navajo and "such other Indians as may already be located thereon." Before passage of the 1934 boundary bill, this area consisted of a patchwork of treaty, legislative, and executive order reservations.[1] The Hopi and Navajo tribes stipulate to the admission of the following map to illustrate the area.



1. The 1868 rectangle was made a part of the Navajo Reservation by treaty. Treaty with the Navajos, June 1, 1868, 15 Stat. 667. By executive order, other parcels were set apart as additions to the Navajo Reservation or for Indian purposes. 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. Congress added lands to the Western Navajo Indian Reservation, and created the Canyon de Chelly National Monument. 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).

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellee the United States have been served, by overnight courier, this 22nd day of April, 2010, upon the following counsel of record:

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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 13,969 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). This brief has been prepared in a proportionally spaced typeface using the Corel WordPerfect X3 word processing program in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Corrected Brief for Appellee the United States have been served, by overnight courier, this 17th day of May, 2010, upon the following counsel of record:

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