THEORY AND PRACTICE:

THE CASE OF THE NAVAJO-HOPI LAND DISPUTE

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In 1997, through a series of circumstances connected to my research in Native American studies, I began what has turned out to be an ongoing relationship with a part of the Navajo community of Big Mountain in northeastern Arizona. I would describe my relationship with this community as a classic trading relationship, modeled on the collaboration implied in the extended kinship relations of American Indian communities, through which resources are shared and webs of support woven.[1] The resources I have brought to this community and was in the first instance invited to bring are the interpretive skills, including a commitment to critical theory, that inform this paper, part of which derives from a history of the Navajo-Hopi Land Dispute that I wrote to be used as a tool in community organizing at the request of the Big Mountain community with whom I trade. These are the same resources I have used to interpret legal documents, write petitions and proposals for this community. In exchange for my work, the community at Big Mountain has given me an invaluable education, oral and written, in the Land Dispute and, more broadly, in the theory and practice of Navajo lifeways, which in turn has grounded my theory of the Dispute in the historical day-to-day practices of the Navajo and Hopi communities impacted by the

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1. *See* GARRICK BAILEY & ROBERTA G. BAILEY, A HISTORY OF THE NAVAJOS – THE RESERVATION YEARS 16 (1986) (noting that the Pueblo refugees who joined the Navajos brought with them their knowledge of sheep and goat herding).

Dispute itself.

In this way practice has certainly informed theory, although I might note here that it was initially theory (a certain theory I was pursuing about cultural collaborations) that led to practice. But in this essay, more specifically, I want to suggest the way theory might revolutionize the paradigms that operate so destructively in the legal construction of what 18 U.S.C. § 1151 defines as "Indian country," which includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[2]

The Navajo-Hopi Land Dispute is typical of the way that a certain kind of translation has governed U.S./ Indian relations historically, since federal Indian law began to take shape at the end of the eighteenth century. Three early nineteenth-century Supreme Court cases in particular—*Johnson v. McIntosh*,[3] *Cherokee Nation v. Georgia*,[4] and *Worcester v. Georgia*[5]—provided a still-current legal vocabulary for a colonial structure, which the federal government began to elaborate administratively in 1824 with the creation of the Bureau of Indian Affairs (BIA).[6] This vocabulary translated typically decentralized Native societies, based on extended kinship relations to communal lands, into the Western terms of "nation" and "property," not so that Indian communities could be acknowledged as fully sovereign states with legal title to their lands; but so that Indian tribal sovereignty and title could "legally" come under the "plenary power" of Congress, which is where it rests today in the lower forty-eight states.[7] As far as land rights are concerned, Alaskan Natives come

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2. 18 U.S.C. § 1151 (2001).

3. 21 U.S. 543 (1823).

4. 30 U.S. 1 (1831).

5. 31 U.S. 515 (1832).

6. *See* Kevin Gover, *Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs*, 25 AM. INDIAN L. REV. 161 (2001) (noting that in March of 1824, President James Monroe established the Office of Indian Affairs in the Department of War and that its mission was to conduct the nations business with regard to Indian affairs).

7. *See id.* (stating that the Office of Indian Affairs was an instrument by which the United States enforced its ambition against the Indian Nations and Indian people who stood in its path).

under a different agenda codified in the Alaskan Native Claims Settlement Act of 1971.[8] The Indian Citizenship Act of 1924,[9] which made all United States Indians citizens by fiat, in no way affects the colonial status of federally recognized Indian tribes, but only contradicts it by presenting us with the legal paradox of sovereign citizens who are at the same time colonial subjects if they *choose* to reside in "the domestic dependent nations" that comprise "Indian country."[10] I emphasize "choose" here to mark it as overdetermined in any context. In the context of Indian country, this choice of residence is a complex set of cultural, social, economic, and political factors represented in the gravity exerted by the nexus of kinship, community, and land. Of the approximately two million census-identified Indians living in the United States, 1,698,483 are tribally enrolled; and of those 1,397,931 choose to live on or near reservations in the lower forty-eight states or Alaskan Native villages.[11]

In contradistinction to the narrative of Navajo-Hopi relations that girds the legal cases and has been promulgated by the Hopi Tribal Council since the 1960s — a narrative of Hopi historical priority in the Southwest, Navajo aggression, and consequent historic enmity between the two tribes based in absolute cultural contrasts[12]— both Navajo and Hopi traditional narratives tell us that that these two peoples emerged from the earth into what is the present-day Southwest at the same moment. In at least one version of the Navajo creation narrative, *Diné bahanè'*[13] (story of the people), the Navajo and Pueblo peoples meet each other in the fourth of five worlds.[14] There the Pueblo people (*Kiis'áanii*) take the Navajos in as kin and give them seeds with which they begin their own agriculture.[15] There are

8. 43 U.S.C. § 1601 (1994).

9. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1994)).

10. *See Cherokee Nation*, 30 U.S. 1 at 17 (noting that Indians may be denominated subjects of domestic dependent nation because they occupy a territory to which the United States government has title independent of their will, in effect the Indians relation to the United States resembles that of a ward to a guardian).

11. BUREAU OF INDIAN AFFAIRS, INDIAN LABOR FORCE REPORT i (1999).

12. *See* Healing v. Jones, 210 F. Supp. 125, 134-35 (D. Ariz. 1962) (noting that the Navajos entered what is now Arizona in the last half of the eighteenth century and that the Hopis occupied the area between the Navajo Mountain and the Little Colorado River and between the San Francisco Mountains and the Luckachukas).

13. PAUL G. ZOLBROD, DINÈ BAHANÈ' – THE NAVAJO CREATION STORY (1984).

14. *See id.* at 46 (stating that the Navajo are invited to the Pueblos' village in the fourth world).

15. *See id.* at 54 (noting that from the Pueblo, the Navajos received seeds and so they flourished as people who farmed the earth).

periods of strife as well.[16] However, what the narrative suggests is that the Navajo and Pueblo peoples, including the Hopis, have a long history of trade and intermarriage, as well as intermittent conflict on a small scale, but that these peoples have all lived together and shared the land from their beginnings and to this day retain traditions of such sharing. After the Pueblo Revolt of 1680, when the Spanish returned to invade and reconquer the Southwest between 1692-96, many Pueblo people moved west and took up residence with both the Navajos and the Hopis.[17] Reflecting a historic comity in Navajo/Hopi relations, author Clyde Kluckhohn notes: "In the late eighteenth century when the Hopi towns were beset by famine and plague, fairly large numbers of Hopi migrated to Canyon de Chelly and del Muerto and amalgamated with the Navajo then living there".[18] Looking at the cultures of Navajo and Pueblo peoples, there are many similarities in narratives, ceremonies, and social and economic life.[19]

There was no Navajo-Hopi Land Dispute before the United States took the Southwest from Mexico in the Mexican War, which occurred between 1846 and 1848.[20] United States settlers began invading the region, taking land and thereby putting increasing pressure on the Navajos,[21] whose population and sheep herds were growing rapidly.[22] In his book entitled GEOPOLITICS OF THE NAVAJO-HOPI LAND DISPUTE, John Redhouse[23] remarks: "Steady encroachment by white settlers forced many Navajos to move closer to the Hopi villages and into their customary use area. This in turn caused minor disputes

16. *See id.* at 53 (remarking that the descendants of the First Man and the First Woman put one of their nonchildbearing individuals in charge of the dam for fear that the Pueblo might destroy their dam or injure their crops).

17. *See* BAILEY & BAILEY, *supra* note 1, at 14-15 (noting that thousands of Pueblo Indians fled their villages along the Rio Grande, some joined the Hopis, but most took refuge with the Athabaskans living in the Dinetah region along the upper San Juan River).

18. CLYDE KLUKHOHN, NAVAJO WITCHCRAFT 74 (1967).

19. *See* BAILEY & BAILEY, *supra* note 1, at 14 (describing the fact that Pueblo refugees who fled during the Spanish reconquest of New Mexico brought with them Puebloan ideas and technology and that Navajos not only learned about Pueblo technology, but also absorbed Pueblo religious and social concepts and procedures).

20. *See id.* at 18 (stating that prior to 1846, the Navajos and the "Mexican" populations were constantly fighting, and in 1846, "the United States government inherited this war when it seized control of New Mexico").

21. *See id.* at 74-77 (illustrating the encroachment upon the Navajos by Anglo-Americans).

22. *See id.* at 19-21 (noting that the Navajo population increased by approximately 10,000 between the years of 1846-1860, in addition to an average increase of 300,000 sheep).

23. JOHN REDHOUSE, GEOPOLITICS OF THE NAVAJO-HOPI LAND DISPUTE 4 (1985).

between Hopi farmers and Navajo ranchers over scarce water supplies and land resources."[24] At the same time, the United States was in the process of bringing Indian lands under the governance of federal Indian law through the administration of the Bureau of Indian Affairs (BIA).[25] Under this law, the federal government holds title to virtually all Indian land in the lower forty-eight states, most of which the government converted to reservations or trust allotments.[26]

The Navajo-Hopi Land Dispute began on December 16, 1882, when at the request of the Secretary of the Interior, H.M. Teller, President Chester Arthur by executive order created a reservation.[27] This reservation enclosed 2.5 million acres, or 3,900 square miles, surrounding the three mesas on which all but two of the present-day twelve Hopi villages are located.[28] This reservation encompassed the entire Hopi population.[29]

The Secretary himself was responding to a complaint from the federal agent at Hopi, J.H. Fleming, who had asked the Commissioner of Indian Affairs, Hiram Price, to evict two Anglos from Hopi because they were aiding Hopi families in resisting federal attempts to send their children to boarding schools.[30] Price informed Fleming that the government had no power to evict anyone from what was then designated as "public land" under United States law.[31] Therefore, Fleming asked that the public land in question be designated a reservation because once it became federal land he

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24. *Id.* at 4.

25. 18 U.S.C. § 1151 (1994).

26. *Id.*

27. *See* Healing v. Jones, 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962) (citing the Executive Order of Dec. 16, 1882); REDHOUSE, *supra* note 23, at 5.

28. *See* REDHOUSE, *supra* note 23, at 5 ("Obsessed with geometry, bureaucrat Fleming mailed in his order – a perfect rectangular reservation, one degree latitude, one degree longitude, 70 miles by 55, and encompassing approximately 2.5 million acres or 3900 square miles of former Arizona territory.").

29. *See Healing*, 210 F. Supp. at 137 (noting that at the time of the executive order, there were 1,800 Hopis and approximately 300 Navajos living on the land); *see also* REDHOUSE, *supra* note 23, at 5 (stating that there were also 300-600 Navajos living within these boundaries).

30. *See* REDHOUSE, *supra* note 23, at 5 (explaining that the BIA imposed a "compulsory education program" for Hopi children which Hopi parents resisted. Therefore, the Hopis had elicited the help of two Anglos in fighting the BIA from taking their children away).

31. *See id.* ("Indian agent in charge J.H. Fleming then tried to arrest the pair [two white men] but was told that he lacked the proper authority to do so because the Hopi villages technically did not constitute a federal Indian reservation and therefore he did not have jurisdiction over them.").

would have the power to evict the Anglos.[32]

As a result, the 1882 Reservation was not primarily created because of a conflict between Navajos and Hopis, but because of a conflict between the federal government and Hopi families who were resisting having their children taken from them and to be sent away to boarding schools.[33] The fact that the federal government did not disturb the three to six hundred Navajos who found themselves living along with the Hopis within the reservation's boarders serves to emphasize this fact. Indeed, the language of the executive order stated that the reservation was not only for the Hopis but also "for such other Indians as the Secretary of the Interior may see fit to settle thereon."[34] In 1962, a federal court would find that those "other Indians" were the Navajos and their descendants whose traditional lands had been enclosed by the 1882 Reservation.[35]

Between 1882 and 1958, there were no legal or legislative directives involving the 1882 Reservation. During these years, all the changes on the reservation were brought about by administrative rulings within the Department of the Interior, in response, at least in part, to population growth.[36] By 1958, there were an estimated 8,800 Navajos and in excess of 3,200 Hopis living on the 1882 Reservation.[37] During

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32. *Id.*; *see also Healing*, 210 F. Supp. at 136 (noting that Fleming urged the Secretary of the Interior to create a Hopi reservation so that the Hopis would be protected from white men, other tribes, and the Mormons).

33. *See* Eric Cheyfitz, *Navajo-Hopi Land Dispute – A Brief History*, 2 INTERVENTIONS 247 (2000), stating:

> In a letter of 4 December 1882 to Hiram Price, the Commissioner of Indian Affairs, Fleming does write of the pressures on the Hopis presented by both Mormon settlers and Navajos, which, he insists, a reservation will help to relieve. But he does not mention the primary pressure from Anglo ranchers on the Navajos that were forcing them and the Hopis into narrowing spaces with diminished resources. It is, however, clear from his correspondence to the Commissioner of Indian Affairs beginning in February of 1882, when he arrived at the Hopi Agency in Keams Canyon (about 12 miles east of First Mesa), and his annual report to the Commissioner, dated 31 August 1882, that the primary force he is trying to combat is Hopi resistance to Christianization. In fact, he does not mention Navajos at all in this report except to point out that by far more of the Hopis understand Navajo than they do either Spanish or English, a circumstance that points to the long intertwined history of these two communities, to which I have alluded.

34. *See* Healing v. Jones, 210 F. Supp. 125, 138 (D. Ariz. 1962).

35. *See id.* at 144-45 (finding that this determination can be made through a two-part test: 1) whether "Indians used and occupied the reservation, in Indian fashion, as their continuing and permanent area of residence; and 2) whether the undertaking of such use . . . if undertaken without advance permission, was authorized by the Secretary, exercising the discretion vested in him . . .").

36. *See* REDHOUSE, *supra* note 23, at 6 (explaining that these administrative rulings included an expansion of tribal lands in order to accommodate the "flow of Navajo refugees").

37. *See Healing*, 210 F. Supp. at 168-69 (recognizing the population growth that occurred on the 1882 reservation).

this period, the federal government was at work segregating Navajos and Hopis on the 1882 Reservation, an agenda that along with population pressures could only have helped polarize two groups of people who had traditionally shared the land.[38] In the mid-1930s, the BIA created grazing District 6, the approximately 650,000 acres including and immediately surrounding the Hopi mesas.[39] Additionally, the BIA forbade Hopi grazing or living beyond this area without the issuance of permits.[40] Concurrently, Congress consolidated the 25,000 square miles of the Navajo reservation,[41] which by then completely enclosed the 1882 Reservation and created Hopi fears about being overwhelmed by the Navajo presence.

It was during this time, between 1882 and 1958, that a Navajo-Hopi land dispute was in the making[42] but it is important to emphasize that it was not initially the Navajos and the Hopis who instigated this dispute but the federal government through the manipulation of traditional Navajo and Hopi lands.[43]

In the 1950s, the Navajo and Hopi tribal councils, under the direction of two Anglo lawyers, John Boyden for the Hopis and Norman Littell for the Navajos, who were approved by the Interior Department as was and is customary, began to develop a legal agenda to decide which tribe held both the surface and subsurface (mineral) rights to the 1882 Reservation.[44] Both tribes, under a 1946 ruling by

38. *See id.* at 171 (noting that the segregation policy meant that Navajos were not "to use and occupy that part of the reservation in which the Hopi population was concentrated").

39. *See id.* at 158 (describing how this area was specifically created to "encompass" the area where the Hopis resided).

40. *See* Healing v. Jones, 210 F. Supp. 125, 161-65 (D. Ariz. 1962) (finding that these permits were difficult to obtain since the Navajos has exclusive use of the lands outside of District 6).

41. *See* Masayesva v. Zah, 792 F. Supp. 1172, 1177 (D. Ariz. 1992) (noting that the purpose of the 1934 Act was to consolidate the boundaries of the Navajo Reservation); *see also Healing*, 210 F. Supp. at 159 n.40 (explaining that the entire Hopi and Navajo Reservation should be viewed as "one super land management district").

42. *See Healing*, 210 F. Supp. at 158-69 (describing the evolution of the Navajo-Hopi land dispute).

43. *See id.* at 158-63 (reiterating the means by which the Office of Indian Affairs attempted to divide the lands between the Hopis and Navajos, thereby creating friction between the two tribes).

44. Boyden filed a petition arguing that "the claim of exclusive Hopi mineral ownership of the 1882 reservation should be decided separately from the issue of Navajo grazing rights to the same area. Littell answered by contending that the Navajos had historically "used and occupied most of the surface of the executive order reservation," and therefore they were entitled to the mineral rights. *See* REDHOUSE, *supra* note 23, at 10.

the Interior Department, shared the subsurface mineral rights.[45] To implement this legal agenda, Congress passed the Act of July 22, 1958 that waived the sovereign immunity of both tribes so that they could sue one another in federal court in order to determine rights to the 1882 Reservation.[46] Prior to the passage of the Act, Littell had forwarded two resolutions to the Navajo Nation Tribal Council, which it approved, recommending that Congress loan the Hopis money to pursue the suit by leasing the mineral rights to the 1882 Reservation.[47] However, Congress rejected these resolutions.[48]

Passage of the Act of July 22, 1958, resulted in *Healing v. Jones*,[49] a lawsuit named after the two tribal chairman at the time.[50] The federal district court in Arizona decided the suit in 1962[51] and the Supreme Court affirmed this decision "without comment" in June 1963.[52] The decision created grazing District 6 as the official Hopi reservation, and designated the remaining 1.85 million acres of the 1882 Reservation as the Joint Use Area ("JUA"), to be shared by the Navajos and Hopis who lived there.[53] However, the JUA was used almost exclusively by the Navajos because customary living patterns resulted in most of the Hopis remaining relatively close to the three mesas. The decision, however, did not change the 1946 Department of the Interior ruling[54] on shared subsurface rights.[55] This

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45. *See id.* at 9 ("The rights of the Navajos within the area who settled in good faith prior to 1936 are *co-extensive* with those of the Hopis with respect to the natural resources of the reservation."); *see also Healing*, 210 F. Supp. at 167; Cheyfitz, *supra* note 33, at 261.

46. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403 (1958).

47. *See* REDHOUSE, *supra* note 23, at 11 (remarking that Littell's actions in drafting these two resolutions were highly suspect since he had provided in his contract with the Navajos that he would receive ten percent of the "contested surface and mineral estate of the reservation").

48. *See id.* (noting that after rejecting the two resolutions, Congress enacted the Act of July 22, 1958, which determined the interests of the Hopis and Navajos to the mineral rights).

49. 210 F. Supp. 125 (D. Ariz. 1962).

50. *See id.* Dewey Healing was the tribal chairman for the Hopis, while Paul Jones was the tribal chairman for the Navajos. *Id.*

51. *See id.* (finding that, "subject to the trust title of the United States, a part of the reservation was the exclusive interest of the Hopi Indian Tribe, and that the remaining contested part was to be held by the Hopi Indian Tribe and the Navajo Indian Tribe, jointly, undivided and in equal interests.").

Id.

52. 373 U.S. 758 (1963).

53. *See* Healing v. Jones, 210 F. Supp. 125, 191-92 (D. Ariz. 1962) (concluding that the Hopi tribe has exclusive interest in grazing district 6, and that the remaining land in dispute was to be jointly-held).

54. *See* 59 U.S. DEP'T OF THE INTERIOR, OWNERSHIP OF THE MINERAL ESTATE IN THE HOPI EXECUTIVE ORDER RESERVATION 248 (1946) (finding that the Hopis and Navajos

collaboration, not to say collusion, between Navajo and Hopi tribal councils at the instigation of lawyers representing mineral interests, who were operating under the auspices of the federal government, drove the succeeding stages of the Navajo-Hopi Land Dispute. The collaboration showed no regard for the people, Navajos and Hopis, living on the 1882 Reservation; in its next stage, beginning in the mid-1970s, it would prove to be disastrous for the approximately 15,000-17,000 Navajos who were living there. Years later, it was proven that John Boyden, the lawyer for the Hopi Tribe, also represented Peabody Coal— a clear conflict of interest.[56]

From the time *Healing* was decided, the Hopi tribal council, with Boyden representing them, lobbied Congress for the partitioning of the JUA between the Hopis and the Navajos. The Hopi tribal council claimed that Navajo use of the area was subverting Hopi use, even though then, as now, there does not appear to have been much, if any, Hopi use of this land.[57] The lobbying effort resulted in the passage of the Navajo and Hopi Indian Land Settlement Act by Congress in December, 1974.[58] This Act mandated that the two tribes negotiate for the partition of the JUA, and that if the negotiations failed, the federal district court in Arizona would draw the partition line.[59] Predictably, because of the polarizing effects of governmental intervention over the years, the negotiations failed, and the court ordered the partition of the land. Partitioning of the JUA began in

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who entered the reservation area prior to Oct. 24, 1936 had rights to the land).

55. *See id.* (finding that the Hopi and Navajo tribes have joint interests in the surface and subsurface mineral rights).

56. *See* INDIAN LAW RESOURCE CENTER, REPORT TO THE HOPI KIKMONGWIS AND OTHER TRADITIONAL HOPI LEADERS ON DOCKET 196 AND THE CONTINUING THREAT TO HOPI LAND AND SOVEREIGNTY 150-55 (1979) (setting forth the allegations and the circumstances surrounding them that Boyden had a conflict of interest through representation of Peabody Coal and the Hopi Tribe during the same time period); *see also* Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 469 (remarking that while Boyden denied representing Peabody Coal, files released to the University of Utah after his death provide evidence of this representation through the mid-1960's while he was representing the Hopi).

57. *See* Cheyfitz, *supra* note 33 at 263-64 (commenting that, for the most part, Hopis had not settled within the JUA and observing that very few Hopi families and cattle were located in the area during the author's visits to the area between 1997 and 1999).

58. *See* Navajo & Hopi Indian Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended at 25 U.S.C. §§ 640(d)(1)-(32) (2001)) (providing for the final settlement of the conflicting interests of the tribes in the JUA).

59. *See id.* § 4(A) (stating that if an agreement is not reached, the mediator will submit a report to the court of his recommendations, and the district court is permitted to make a final adjudication, including partition of the JUA).

February 1977, creating the Hopi Partitioned Lands ("HPL") and the Navajo Partitioned Lands ("NPL"). While 100 Hopis found themselves on the Navajo side of the line and thus were forced to relocate by the court, approximately 15,000-17,000 Navajos found themselves on the Hopi side.[60]

The court ordered Navajos found on the HPL side to be relocated by the BIA, first to towns bordering the Navajo reservation, and subsequently to lands bordering the reservation to the south— the so-called "New Lands." The New Lands were added to the reservation in order to accommodate relocating Navajos, but they are far away from the Navajo homelands on the 1882 Reservation. The dislocation of these Navajos from their traditional land resulted in massive social damage, the fracturing of extended family life with its network of social and economic supports, and a resultant increase in "depression, violence, illness, and substance abuse."[61] Relocation was opposed not only by Navajo resistors living on the HPL, but also by traditional Hopi leaders (Kikmongwis), who viewed the collaboration between the Hopi tribal council and the United States government, under pressure from mineral interests, as a violation of traditional Hopi ways.[62] This collaboration between traditional Hopi leaders and HPL Navajos is another instance that belies the oppositional title "Navajo-Hopi Land Dispute."

In 1988, in response to the relocation mandate, a group of Navajos living on the HPL brought suit in the federal district court in Arizona to remain on the land.[63] One argument advanced by the HPL Navajos was violation of their First Amendment religious rights.[64] The

60. *See* HOPI TRIBE, HOPI COMPREHENSIVE DEVELOPMENT PLAN 45 (1988) (suggesting that new energy resource exploration and mining could occur on the lands once the Tribe has adopted a new energy resource development policy). Professor Cheyfitz argues that resource exploration and mining operations would undermine the lives of Navajos living within the HPL by placing them in the middle of conflicts over the use of the land. *See* Cheyfitz, *supra* note 33, at 256 (predicting conflicts will arise between use of the land for mineral extraction or for grazing and agricultural purposes).

61. EMILY BENEDEK, THE WIND WON'T KNOW ME: A HISTORY OF THE NAVAJO-HOPI LAND DISPUTE 175 (1999).

62. *See* INDIAN LAW RESOURCE CENTER, *supra* note 56, at 172-74 (referring to a letter from the traditional Hopi leaders to Congressman Sam Steiger, voicing their opposition to the bill and hoping that they would be allowed to work out an agreement with the Navajos without passage of the Settlement Act of 1974).

63. Manybeads v. United States, 730 F. Supp. 1515 (D. Ariz. 1989).

64. *See id.* at 1517 (stating that the first argument of the HPL Navajos challenging the constitutionality of the Navajo-Hopi Land Settlement Act of 1974 is that the Act is a violation of the Free Exercise Clause of the First Amendment). The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *See* U.S. CONST. amend. I.

suit was dismissed.[65] By that time perhaps 3,000 Navajos of the original 15,000-17,000 remained on the HPL. In 1991, the Ninth Circuit Court of Appeals, in lieu of hearing an appeal of the *Manybeads* case, ordered all the groups involved[66] into mediation in an attempt to resolve the dispute. The result of this mediation was the Navajo-Hopi Land Settlement Act of 1996,[67] which included an Accommodation Agreement ("AA").

The 1996 Act provided HPL Navajos who wished to remain on the HPL the option of signing the AA, which is a lease agreement, guaranteed by the United States. The lease would be between the HPL Navajos, the Navajo Nation, and the Hopi Tribe.[68] This Agreement permits the HPL Navajos to remain on their land for seventy-five years, after which time any one of the parties to the AA can discontinue it.[69] Thus, the Hopis have retained the right to eventually evict all Navajos from the HPL, if they so choose. The AA translates traditional, common land into Hopi rental property, actually owned under federal Indian law by the United States. The colonial machinations are stupefying. Navajos who refuse to sign the AA, and some have refused in active resistance to the federal process of translation, face eviction.[70] So far, no eviction proceedings have been instituted. Furthermore, major legal initiatives attempting to reverse the Settlement Acts of 1974 and 1996 appear to have come to an end in April 2000, with the Ninth Circuit Court of Appeals' affirmation of the district court's dismissal of the *Manybeads* case.[71]

The AA places HPL Navajos under both Hopi and Navajo jurisdiction.[72] While HPL Navajos are members of the Navajo Nation, they also come under Hopi jurisdiction in both criminal and civil matters relating to residency on the HPL, while remaining under

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65. *See Manybeads*, 730 F. Supp. at 1521-22 (finding that the HPL Navajos did not establish a likelihood of success on the merits and that serious questions of hardship were not raised, resulting in a dismissal of the suit).

66. *See id.* The groups involved in the dispute were the HPL Navajos, the Navajo Nation, the Hopi Tribe, and the United States. *Id.*

67. *See* Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649 (codified as amended at 25 U.S.C. §§ 640(d)(1)-(32) (2001)).

68. *See id.* § 2(3) (stating that the Act, the Settlement Agreement and the Accommodation Agreement provide the Hopis' authority to enter into agreements with eligible Navajo families so that they can remain on the HPL).

69. *Id.*

70. *See* Cheyfitz, *supra* note 33, at 253 (explaining that eviction could occur for Navajos who have refused to sign an Accommodation Agreement).

71. *See* Manybeads v. United States, 209 F.3d 1164 (9th Cir. 2000).

72. *See* S. REP. NO. 104-363, at 51-52 (1996) (reprinting the Accommodation Agreement).

Navajo jurisdiction in other civil matters, particularly in the domestic sphere.[73] Because of the history of the Land Dispute, HPL Navajos have a whole set of issues relating to the terms and enforcement of the AA that are unique to their situation, including the crucial matters of grazing and religious rights.[74] Nevertheless, these Navajos have no representation on the Hopi tribal council, and their only representation on the Navajo tribal council is through the separate chapters bordering the HPL, where they are represented not as a group but as separate persons.[75] A chapter is roughly equivalent to a congressional district, whose residents elect representatives to the tribal council. Dispersed over the 1.85 million acres of the HPL, the HPL Navajos are necessarily members of different chapters.[76] Thus, these Navajos have no representation as a distinct group with a set of special interests.[77] Due to the history of the 1882 Reservation, it is clear that they need such representation.[78] The most effective way to achieve this would be as a separate HPL chapter represented on the Navajo Nation Council, where the HPL Navajos could present their agenda as a community to the Nation.[79] The Navajo Nation, as a party to the provisions of the 1996 Act, which includes the AA, is the proper representative of this group before the Hopi Tribe. Without such representation, the HPL Navajos are effectively without a political voice in an arena where their vital interests are at stake. HPL community organizers are at present seeking to achieve such representation.

In the broad historical overview of federal Indian policy that includes the Indian Removal Act of 1831, which set the stage for the catastrophic removal of the Creeks, Choctaws, Chickasaws, Seminoles, and Cherokees from their homes in the southeast to what is present day Oklahoma; the Dawes Act of 1887, which resulted in the taking of

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73. *See id.*

74. *See* Cheyfitz, *supra* note 33, at 263. Both the Hopi and Navajo use the land for wood-cutting, ceremonial purposes, and cultivation of products for medicinal purposes. However, the Navajo have a significant grazing presence on the HPL, whereas the Hopis do not. *Id.*

75. *See id.* at 257 (explaining that under the terms of the agreement, HPL Navajos have very little representation as a group and input with respect to the renewal of the agreement).

76. *See* Healing v. Jones, 210 F. Supp. 125, 191-92 (D. Ariz. 1962) (creating the Joint Use Area where the HPL Navajos reside).

77. *See* Cheyfitz, *supra* note 33, at 257 (noting that despite the lack of group representation, the Navajo are a distinct group with special interests).

78. *See* Cheyfitz, *supra* note 33, at 271 (noting the need for more adequate representation).

79. *See* Cheyfitz, *supra* note 33, at 271 (maintaining that a community organization would address local needs and facilitate the collaborative process).

93,000,000 acres of Native land through the shattering of Indian communities in an attempt to force their inhabitants to emulate the paradigm of the American property holder; and the policy of Termination and Relocation of the 1950s and 1960s, which once again attacked Indian communalism through the closing down of reservations and the creation of a dislocated, impoverished urban Indian population, the public policy of Navajo-Hopi removal, which has fallen overwhelmingly on the Navajos, is part of an ongoing colonial war against the Indians fought now in legal and legislative battles.[80]

It is important to emphasize that applying the case-law paradigm of agonistic interaction in this dispute is not in the public's interest. Whatever its stated motives, since 1974 and the relocation mandate, the U.S. public, through Congress, has spent approximately 400 million dollars in what has amounted to an attempt, whatever the stated motives, to destroy a particular Indian community, one, moreover, that is a particularly vital repository of the theory and practice of traditional Navajo lifeways. Nor have the Hopi people, largely impoverished themselves like the rest of Indian country, benefited from the Dispute.[81] Albert Yava, a Hopi-Tewa, wrote in his book *Big Falling Snow*: "The well-off Hopi has special interests. If he owns a lot of cattle for example, that land we have been contesting with the Navajos is much more important to him than to a poor family in Shipaulovi [one of the Hopi villages]. The average Hopi isn't going to benefit very much from the land settlement."[82]

As an alternative to the case law paradigm and the distorted history of Navajo-Hopi relations it has constructed, a theory of *collaboration* in the full range of the term's meaning from coercion to co-operation, might help us construct an altogether different paradigm than the adversarial and ultimately destructive one that federal Indian law has imposed. The primary force of this different paradigm, through which one understands the complex collaborations the Dispute has historically imposed, is to deconstruct the reductive opposition *Navajo/Hopi* that has driven the Dispute, with particular virulence

80. *See id.* at 269 (noting the key issues in litigation involve the Land Dispute and their effects on the traditional structure of Indian Country). Professor Cheyfitz asserts that mediation failed, in large part, because Western-based oppositional property law could not embody the concepts of traditional cultural collaboration between the Navajo and the Hopi. *Id.*

81. *See id.* (noting that the 1990 census reported average per capita income of $4,478 for Native Americans, compared to the national average of $14,420).

82. *See* ALBERT YAVA, BIG FALLING SNOW 137 (1978) (commenting on the disparate interests of rich and poor Hopi families with regards to the contested land).

since the *Healing v. Jones*[83] decision in 1962, and that does not accord with the imbricated ethnohistories, and the historical collaborative practices of these two Indian communities.[84] A practice generated by this theory of collaboration would take the process out of the courts and the colonial bureaucratic structure, including the mechanism of tribal councils that officially governs Indian country.[85] Such a practice would place the process within traditional Navajo and Hopi structures of mediation based in community consensus.[86] Such mediation between the Hopi Tribe, the Navajo Nation, and the HPL Navajos, would, as a first step, need to acknowledge the collaborative history, one of both comity and conflict, that has been displaced by the reductive language of federal Indian law.[87]

83. 210 F. Supp. 125 (D. Ariz. 1962).

84. *See* Cheyfitz, *supra* note 33, at 269-71 (asserting that the United States Government, Peabody Coal and the tribal councils have prevented the possibility for creative collaboration between the Navajo and the Hopi).

85. *See id.*

86. *See id.* (arguing that the prevailing notion of property interests over Indian notions of communal land have had a destructive effect on the land dispute).

87. *See id.* (recognizing the need for resistance at the local level to address issues of infrastructure).