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Governance within the Navajo Nation Have Democratic Traditions Taken Hold?

David Wilkins

This essay crafts a description and analysis of the political and institutional context, structures, and issues of the Navajo Nation's government. We begin with a demographic, institutional, and ideological assessment of the nation as it currently stands, move to a historical overview of the nation from precontact times to the 1989 riots, and conclude with a short policy portfolio of three issues—land claims, gaming, and taxation—that will likely impact the shape and direction the nation will head into the twenty-first century.

The Navajo Reservation is a vast, rugged, and beautiful land. First delineated in the 1868 treaty, it has nearly quadrupled in size since then through some twenty-five additions. Today, the Diné land base is some 25,351 square miles (nearly 18 million acres), encompassing a large portion of northeastern Arizona, a part of northwestern New Mexico, and some 1,900 square miles in southeastern Utah. Interestingly, the Navajo Nation also includes three satellite (geographically separate) Navajo communities—Canoncito, Alamo, and Ramah—all in western New Mexico—and completely encircles two other tribes, the Hopi nation and the San Juan Paiute.

The Navajo Reservation represents 36 percent of all Indian lands in the continental United States.¹ This tremendous stretch of land, the largest of the 278 Indian reservations in the country, is slightly larger than the state of West Virginia. Nearly 15 million acres of Navajo tribal land is held in trust² by the federal government.

and one hundred Hopi) who were required by federal law to relocate. The relocation of members of both tribes constituted the largest relocation (forced for some, voluntary for others) of any racial/ethnic group since the Japanese-American relocations during World War II. It is also the most expensive Indian relocation, costing at least \$330 million by 1997. A wealth of literature³⁶ has also been generated by the conflicts between the tribes and others, though the reader is cautioned to read material presented from both tribes' perspectives before drawing any conclusions.

Background of the Disputes

Briefly, the issue is this. After the Navajo Reservation was created in 1868, a later Hopi Reservation, located southwest of the Navajo Reservation, was established in 1882 through an executive order issued by President Chester A. Arthur. This order set aside 2.5 million acres for the Hopi and "such other Indians" the Secretary of the Interior might see fit to settle there. As the Navajo population expanded, and with it their land base, gradually the boundaries of the Navajo Reservation came to engulf the Hopi Reservation, and Navajo people settled within the 1882 executive-order Hopi Reservation lands.

Even as this land conflict began to loom, another arose in 1934 when Congress added about 234,000 acres of land to the Navajo Reservation in the Western Agency. This acreage, just east of Tuba City, happened to include the Hopi nation's westernmost village, Moencopi. This time the language of the congressional act was the reverse of the 1882 executive order. The law stated that the land was for the benefit of Navajos and "such other Indians as are already settled thereon." The Hopi, however, claimed the entire area as compensation for Navajo occupancy elsewhere within the 1882 Hopi Reservation.³⁷

This formed the basis of what would become known as the Bennett Freeze area, named after CIA Robert Bennett, who in 1966, at the urging of Secretary of the Interior Stewart Udall, placed severe limitations on construction and development in the 1934 disputed lands. Any future development would require the consent of both tribes and all revenue from the land would go into a special account to be held until the respective rights of both tribes could be determined.

The construction freeze has left an indelible mark on the over seven hundred families living in the contested area. Although originally developed as "a means of encouraging negotiation over an age-old dispute . . . the Bennett Freeze gradually developed into an intrusive and burdensome policy . . . forcing [the Indians] to live in poverty by denying them the right to enlarge, to maintain, and even to repair their homes."³⁸

The construction ban was temporarily lifted in 1992 by federal

judge Earl Carroll. It was reinstated before it was again lifted in 1996 after the two tribes reached an agreement. However, the freeze remained on some 700,000 acres the Hopi Nation claims. Congress got involved when Representative John D. Hayworth introduced H.R. 104 on January 6, 2001, which would legislatively repeal the Bennett Freeze, ending what Hayworth called "a gross treaty violation with the Navajo Nation." As of this writing (fall 2001), this bill had not been enacted.

The land problems between the two tribal nations festered throughout the middle part of the twentieth century. Delicate negotiations between the tribal councils and their attorneys failed, and a court settlement, which called for joint use and occupancy by the two tribes, also failed to resolve the profound differences between the Navajo and Hopi governments. The Hopi, for their part, demanded a partition of the 1882 reservation that would clarify and affirm their land rights. The Navajo Nation, for its part, wanted its members to be able to remain where they were in the disputed area and preferred buying out the Hopi Nation's interests.

Congress responded in 1974 with P.L. 93-541,³⁹ which provided for partition—a fifty-fifty division of the 1.8 million acres of land—between the two tribes. An independent, temporary relocation commission was established by the law to oversee the relocation of the affected tribal members who, after land division, were found to be on the "wrong side of the line." Houses and relocation expenses were to be provided by the federal government. Relocation was scheduled to be completed by 1986.

Human conflicts like this that include issues of property rights (land, livestock, water, coal), religious freedom concerns (access to sacred shrines and eagle gathering areas and use of eagle parts), corporate involvement, and the psychological, emotional, and formal disruptions and violence they generate, rarely conform to governmental timetables. Although the vast majority of Navajos and all Hopis have been relocated, the process, as of 2001, is not yet complete. The incompleteness stems from the persistent resistance of some two to three hundred Navajos (the figures vary) who refuse to leave the lands they feel culturally and religiously connected to: lands that the Hopi Nation has legally owned since 1882 and has been spiritually and culturally linked with for many more centuries.

The fierce resistance of this group of Navajo led Congress in the fall of 1996 to enact yet another law, P.L. 104-301, the Navajo-Hopi Land Dispute Settlement Act, which implemented the Accommodation Agreement that had been worked out over the previous five years. The Land Dispute Act ratified the settlement of four claims of the Hopi nation against the federal government and provided the necessary authority for the Hopi to exercise jurisdiction over their lands by issuing

seventy-five-year lease agreements to the Navajos still residing on Hopi-partitioned lands. The Hopi are to be paid \$50 million by the United States for lost rents and to enable the tribe to buy new lands.⁴⁰

The Navajo Nation Council had already enacted resolutions in 1994 and 1995 that opposed the Accommodation Agreement in its original form because, according to the nation, it did not protect the religious rights of the Navajo residents. While morally opposed to relocation, then president Albert Hale noted in a speech on February 1, 1997, that changes in the Accommodation Agreement, implemented with the passage of Public Law 104-301 in 1996, spearheaded by the Navajo residents themselves, guaranteed them religious protection. As such, he declared that "this agreement represents the only remaining means to establish their legal basis for continued residency on Hopi Partitioned Lands. Will they accept what their fellow Navajo neighbors have negotiated? I submit to all my people: the Navajo Hopi Partition Lands residents should sign the Accommodation Agreement."

The council, however, in a special session later in February, reaffirmed its earlier resolution "opposing the Accommodation Agreement in its present form" and recommended an extension of the March 31, 1997, deadline. The council also expressed "adamant opposition" to forced eviction of Navajos.⁴¹ Navajo residents were given until March 31, 1997, to sign the seventy-five-year leases (renewable for another seventy-five years) with the Hopi Nation, although the ones who refused to sign were not evicted immediately. If they agreed to relocate, the federal government was required under the 1996 law to pay for their moving expenses and build them a home, a process that takes anywhere from six months to more than a year.

NAVAJOS AND TRIBALLY SPONSORED GAMBLING (GAMING)

Since the 1980s, many tribal governments have introduced legalized gambling as a means to generate revenue to offset dramatically decreased federal funding and to develop their own economic base. In fact, tribes were encouraged by the Reagan administration to pursue tribally owned Indian gambling enterprises as one means of counterbalancing the severe cuts in federal expenditures his administration had implemented. After an important Supreme Court decision in 1987, *California v. Cabazon Band of Mission Indians*,⁴² which held that states could not enforce their civil/regulatory gaming laws to prohibit gaming on Indian lands, Congress stepped forward the following year and enacted the Indian Gaming Regulatory Act (IGRA).⁴³

This act had three broad goals: to promote tribal economic development, self-sufficiency, and strong tribal government; to provide a regulatory base to protect Indian gaming from organized crime; and to

establish a National Indian Gaming Commission. The act separated Indian gaming into three classes. Class I was strictly social gambling and solely under tribal jurisdiction. Class II included bingo, pull tabs, etc. This type was subject to tribal jurisdiction, with federal oversight. It also had to be legal under existing state law. Class III, potentially the most lucrative, included keno, lottery, pari-mutuel, slot machines, casino games, and banking card games. This class required a tribal ordinance, permission from the Indian Gaming Commission, and the state had to permit the activity. In fact, tribes were required to conduct Class III gaming in conformance with a tribal-state compact. If a state, such as Utah, did not allow Class III gaming, then tribes were denied the chance to engage in it.

States were required under the act to make a "good faith" effort to negotiate a tribal-state compact with those tribes who wanted to pursue these gaming ventures. The act authorized a tribe to bring suit in federal court against a state in order to force performance of that duty if the state refused to act in good faith and in good time to work out a compact. This final provision, however, was changed when the Supreme Court ruled in *Seminole Tribe of Indians v. Florida*⁴⁴ in 1996 that the Eleventh Amendment to the Constitution prevents Congress from authorizing suits by tribes against states absent state consent.

In fact, the IGRA gave states a voice, for the first time, over internal economic issues that previously were left solely to the discretion of the tribes and their trustee, the federal government. The requirement that tribes have to negotiate a compact with a state for Class III gaming operations, in effect, provided state officials with powerful leverage over a tribal nation's internal economic decisions.

States, with only a few exceptions (e.g., General Allotment Act of 1887, Public Law 280 of 1953, terminated tribes), have rarely had any direct say, much less veto power, over internal tribal decisions. Several reasons account for this. First, the doctrine of tribal sovereignty recognizes the right of tribal nations to manage their own affairs without state interference. Second, the nation-to-nation treaty relationship that states were precluded from participating in provides tribes a measure of protection from state intrusion. And third, many western states—including Arizona and New Mexico—were required to insert "disclaimer" clauses in their constitutions in which they assured the federal government that they would never attempt to interfere in tribal affairs and would never attempt to tax Indian trust lands. Despite this wealth of protection, however, the ideology of states' rights activism has grown tremendously in the last ten years, and Congress and the Supreme Court are more often siding with states when they are competing with tribes.

For some tribes, such as the Mashantucket Pequot of Connecticut, the Cabazon Band of Mission Indians of California, or the Ak-Chin

Community of Arizona, Indian gaming, as the business has come to be called, has brought billions of dollars, provided jobs for tribal members, and generally enabled the successful tribes to attain a level of economic self-sufficiency they had not enjoyed since before the days of European colonialism. Indian gaming has generated jobs, revenues, and other economic benefits to local and state economies as well.

For other tribes, however, such as the Mohawk and Oneida of New York, while gaming has generated significant revenue, it has also led to severe intratribal tension, sometimes leading to violence, and has produced other negative social consequences as well. More important, it has generated a severe backlash in many state governments and among more established gambling interests in Las Vegas and New Jersey. States and the players in Vegas and Jersey are envious of the riches—both actual and perceived—that tribes are enjoying. The backlash has worked its way into Congress where bills are pending that would reduce the tribes' gaming options, and into the Supreme Court where recent decisions have restricted the sovereignty of tribes while uplifting the sovereign powers of states.⁴⁵

As of 2001, 196 of the 561 tribal entities were operating 309 gaming facilities in twenty-eight states. In Arizona alone, 17 tribal nations have gaming operations, including Cocopah, Fort McDowell Mohave-Apache, Gila River, Hualapai, San Carlos and White Mountain Apache, the Pascua Yaqui, etc. The Fort McDowell tribe, for example, in 1993 announced profits of \$41 million, which was split thus: \$12.3 million for tribal government operations; \$15.6 for economic development; \$2 million for community welfare; \$410,000 for contracts with local governments; \$410,000 for local charity; and \$10.3 million for per capita (individual) payments to tribal members—averaging about \$12,000 per person.⁴⁶ The only tribes in Arizona that do not have gaming as of 2001 are the Havasupai, Hopi, San Juan Southern Paiute, and the Navajo Nation.⁴⁷

Navajos Reject Gaming

Historically, Navajos, like most social groups, enjoyed a number of informal gambling rituals. For example, the shoe game is still very popular, and certainly gambling was done on horse and foot races. Card games were and still are played quite frequently at squaw dances and other gatherings.⁴⁸ This type of gambling is very different from the type of state or tribally sanctioned gaming that is backed by the force of law and is designed to generate revenue for governmental purposes. From a governmental perspective, the Navajo Nation passed a resolution in 1977 that criminalized gambling if the person engaging in it "intends to derive an economic benefit other than personal winnings" from the endeavor. However, seemingly in anticipation of tribal-

sponsored gambling, this law was amended in 1993 by providing an "exception" to the offense section. Resolution CN-81-93 declared that "it shall not be unlawful for any person to engage in the activities constituting this offense if done as part of an economic initiative of the Navajo Nation Government, or as a gaming licensee of the Navajo Nation Government."⁴⁹ In a footnote to this law, it was stated that the effective date of this amendment was "subject to enactments of a comprehensive statutory scheme to control gaming within the Navajo Nation by the Navajo Nation Council."

Despite the council's optimism, however, and with so many tribes having already ventured into gaming as a prime economic generator, why has the Navajo Nation not joined in the process? More specifically, why has the Navajo Nation electorate, in two separate tribal referenda—1994 and 1997—explicitly rejected the establishment of Indian gaming within the reservation?

According to research conducted by Henderson and Russell, the Navajo people rejected the gaming referendum in November 1994 by a vote of 23,450 to 23,073 largely because of moral concerns. It appears that these concerns outweighed the perceived potential for revenue because "unlike other tribal casinos which generally attract predominantly non-Indian patrons, the proposed casinos in the Navajo Nation would be patronized by large numbers of Navajos."⁵⁰ Not easily dissuaded, the council pushed forward and in 1997 authorized yet another national referendum by Resolution CAP-26-97 during the spring session. Once again, Navajos rejected the measure. While no scientific research has been done on the second referendum, in all likelihood the Navajo turned away from gaming for reasons similar to those in 1994—concern about the social welfare of tribal members. As Richie Nez, executive director of the Navajo Election Administration put it: "No matter how you educate people, especially the older people, they still associate gambling with alcoholism, and all other vices. . . . They just don't see any good coming out of it."⁵¹

This issue pits the general social and moral concerns of the Navajo electorate against the financial and economic concerns of a majority of those in the government who believe that the nation is losing out on millions of dollars and thousands of permanent jobs. Gaming is an issue that promises to be revisited yet again in the future by the council and by the nation.

An interesting question is, why has the council twice placed this issue before the people using the referendum process, yet refused to put the question of a tribal constitution, or one of the proposed alternative government ideas, or even the Title II amendments before the people for their consideration? Certainly, economic considerations are vitally important to the nation as their nonrenewable natural resource endowment (especially coal, gas, etc.) continues to decline, which

directly reduces the revenues coming into the tribal treasury. But the question of governmental legitimacy, from the standpoint of what constitutes the actual basis of tribal sovereignty, is, one could argue, even more vital to the character of the nation.

TAXATION AND THE NAVAJO NATION

Euro-Americans and taxes have coexisted uncomfortably since the beginning of the American republic. "Taxation without representation," after all, was one of the catalysts sparking the American Revolution, since American colonists resented the idea of being forced to pay taxes to a distant government, Great Britain, that they had no actual representation in. Americans then and now, including Indian peoples, knew, as Chief Justice John Marshall stated in *McCulloch v. Maryland* in 1819, that "the power to tax involves the power to destroy." Furthermore, anyone holding a job is aware, because of hefty tax deductions, of the truthfulness of the famous expression: "In this world nothing can be said to be certain, except death and taxes."

But taxes are also the lifeblood of most non-Indian governments and are becoming increasingly important to tribal governments as well. Taxes raise the revenues required to hire employees, provide essential services (libraries, roads, schools, etc.), and conduct government affairs. Of course, taxation, like many issues we have been discussing, touches Indian lives and reservation lands in a different way than it touches other Americans. For example, the U.S. Constitution, in the section describing how U.S. representatives were to be elected to Congress, required each state, when it counted its citizens for purposes of congressional apportionment, to exclude "Indians not taxed." This same expression is also found in section 2 of the Fourteenth Amendment, which was ratified and proclaimed in 1866. This expression was included because Indians were not citizens of the United States when the Constitution was drafted, and most had still not been enfranchised as late as the 1860s when the Fourteenth Amendment was ratified. Indians remained citizens of their own sovereign nations.

The passage of several laws, including the 1924 Indian Citizenship Act, altered the status of individual Indians vis-à-vis federal taxes. And after some court cases in the 1930s, 1940s, and 1950s, it was determined by the federal government that individual Indians, as citizens of the United States, were indeed required to pay federal income taxes unless a treaty or statute exempted them.⁵²

Tribal governments, however, as sovereign entities, are generally exempt from paying most federal taxes and nearly all state taxes. In fact, the Internal Revenue Service has determined specifically that tribes are exempt from federal income taxes. But the immunity from some taxation that tribes have is not nearly as secure as the immunity states enjoy

from federal taxation. Tribes periodically face concerted attempts by certain state and federal legislators to require them to pay taxes, notwithstanding tribal sovereign status. States do not face such taxation assaults by the federal government.

The Power of the Navajo Nation to Tax

Until the 1970s, the Navajo Nation did not collect taxes to finance its operations, although as we have shown, the nation was clearly entitled to collect taxes. Ironically, while the nation was not collecting taxes, state governments were using their taxing authority and were earning sizable sums of money by taxing certain businesses operating within Navajo lands. In fact, in a study done by Michael Benson in 1975, he learned that besides paying applicable federal taxes, Navajos were also paying taxes to support the state governments of Arizona, New Mexico, and Utah. They were also contributing to six county governments in those three states—Apache, Coconino, and Navajo in Arizona; Mckinley and San Juan in New Mexico, and San Juan in Utah. Benson further noted that:

State and county governments collect taxes on property located in the Navajo Nation and on income derived from activities in the Navajo Nation. They directly tax the incomes and property of non-Navajos who live, work or conduct business in the Navajo Nation. They collect a lot of taxes "indirectly" from Navajos and non-Navajos by taxing wholesalers who supply Navajo Nation retailers with such commodities as gasoline and cigarettes.⁵³

What was particularly frustrating, as this report showed, was that non-Navajo governments were receiving far more money in taxes from the development of Navajo Nation resources than the Navajo Nation was securing in income from royalties and lease arrangements from those same resources. For example, in 1972 the Navajo Nation received \$1.4 million in royalties for the coal that was used at the Four Corners Power Plant. By contrast, the state, county, and local governments were earning \$7.2 million from taxes on that same coal.⁵⁴

As a result of this kind of disparity, and with the growing realization that the nation's mineral resources were not inexhaustible, the Navajo government in 1974 enacted a resolution establishing a Navajo Tax Commission. The MacDonald administration was slow in getting the commission started, but it was eventually set up and began the process of devising a taxation program to correct the evident taxation inequities. The commission's work led to two tribally approved tax ordinances in 1984: a Possessory Interest Tax and a Business Activity Tax.

The taxes were immediately challenged by individuals and companies subject to them, although, as noted earlier, one of the inherent powers of any sovereign is the power to tax. Tribal governments, therefore, have the legal right to tax their citizens, noncitizens, and businesses and corporations doing business within their lands. As the Supreme Court said in 1982 in *Merrion v. Jicarilla Apache Tribe*:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.⁵⁵

Notwithstanding this important decision, the Navajo Nation taxes continued to be challenged by companies like the Kerr-McGee Corporation. Ultimately, in 1985, the Supreme Court ruled in *Kerr-McGee Corporation v. The Navajo Tribe*⁵⁶ that the nation possessed the sovereign power to enact and impose tax laws without approval by the Interior Department.⁵⁷

The Possessory Interest Tax (PIT) requires any owner of a lease granted by the Navajos to pay an annual tax on the value of the lease site and natural resources thereunder at a rate of between 1 and 10 percent. The Business Activity Tax (BAT) requires anyone who is engaged in production activities on the reservation to pay a tax on the gross receipt from such activities at a rate of between 4 and 8 percent. Both ordinances have been amended several times, and other taxes have since been enacted as well.

In 1985 the council established an Oil and Gas Severance Tax, a tax imposed on the severance of, producing, or taking from the soil products within the nation at the rate of between 3 and 8 percent. In addition, in 1992 the council created a Hotel Occupancy Tax that "imposed on a person who, under a lease, concession, permit . . . pays for the use or possession or for the right to the use or possession of a room or space in a hotel costing \$2 or more each day." The tax rate initially was 5 percent, but in 1994 it was increased to 8 percent. This tax was also challenged by non-Indians. In May 2001, in a landmark ruling that dramatically infringed on Navajo (and by extension other tribal nations) sovereignty, *Atkinson Trading Co. v. Shirley* (531 U.S. 645), the U.S. Supreme Court unanimously held that since the Navajo's Hotel

Occupancy Tax had not been authorized via treaty or congressional statute, and since it fell upon nonmembers on non-Indian fee land—even though the business was operated within the borders of the reservation—the Navajo Nation could not lawfully impose the tax.

The council, in 1995, instituted two new measures to generate revenue for the tribal coffers: a Tobacco Products Tax and Licensing Act (a 40 cents per pack tax is assessed on tobacco sales) and a Fuel Distributors Licensing Act (taxing any person or business delivering fuel on the reservation). The Tax Commission is also in the early stages of discussing the need for a Gross Receipts Tax, which if ever enacted would impose on the gross receipts of any person engaged in trade, commerce, manufacture, power production, or any other productive activity a tax at a heretofore unspecified rate. This tax would exempt the sale of gasoline, church-sponsored activities, prescription drugs, wages, food stamps, etc.⁵⁸

These taxes and license fees generate an average of \$30 million a year for tribal government operations, although this figure will be reduced in the wake of the *Atkinson* ruling. The BAT brings in \$15 million; the PIT \$10 million; the Oil and Gas Severance Tax about \$4 million; the Hotel Occupancy Tax about \$1 million. The remainder comes in from the tobacco and fuel taxes.⁵⁹

Importantly, the taxes are imposed on Navajo citizens as well as particular non-Navajo business activities, although the Navajo Nation itself is exempt from being taxed. As the amount of nonrenewable resources continues to decrease, taxation and the revenues it produces will become even more important to the nation's economy.

CONCLUSION

If this sampling of policy issues is any indication of what the future holds for the Navajo Nation government, then it is clear that the Navajo people and their elected and appointed representatives face a future, as they did a past and present, that is full of both promise and tension. Promise because, as we have seen, the Diné people are particularly adept at finding creative ways of taking care of themselves, their resources, and managing their affairs with others. Tension, however, because internal conflicts, a gradually diminishing pool of natural resources, and the inconsistent nature of Navajo political relations with counties, states, and the federal government mean that consistent harmony is not likely. This is understandable. But the continuing move toward full democracy, which intensified with the Title II Amendments of 1989, means that the nation is heading in a positive direction.

Of course, the Navajo people have still not had nor have they taken the opportunity via a referendum/initiative to express their collective will about what shape Diné democracy should be like, and this

must be rectified. But even after this is accomplished, assuming that it will be, everything will not be settled. Democracies, no matter their location, are not perfect governments. It is up to successive Navajo generations to nurture and strengthen the foundation of Navajo government.

Perhaps former Chief Justice Tom Tso put it best when asked by a reporter as he neared retirement what he thought his primary contributions to the Navajo court system had been. Tso responded by saying:

I don't know if I've done anything extraordinary. Basically, I did my job, which was to hear and to cite cases—giving everybody a fair shake. I've tried to be very fair about the procedures and to make decisions based on the facts and the laws. I guess what I am trying to say is, that during all of my years on the bench, I just tried to do what a judge should be doing. There is no significant magic. I've had a lot of resources and a lot of cooperation from the leadership and the staff and we just did our jobs. We tried to look to Navajo customs, tradition and culture, and we found that many of our decisions and laws were influenced by those traditions.⁶⁰

This statement by a highly respected Navajo jurist exemplifies the strength, hindsight, and foresight of the Diné spirit that entails cooperative living; respect for tradition, culture, and language; a focus on fairness and integrity; and the pursuit of justice.

N O T E S

- 1 Most of the statistical data cited are found in Duane Etsitty, compiler, *NN Fax 93* (Window Rock, Ariz.: Division of Economic Development, 1994).
- 2 Indian trust land is Indian-owned land, title to which is held in trust by the United States. This broadly means that the actual "ownership" of the land is divided between the federal government, which holds the legal title, and the tribe (or individual Indian), which holds the full equitable title. Trust land is not subject to taxation, and in general, neither the federal government nor the Indian tribe or the individual owner can sell or otherwise dispose of trust land without the consent of the other party. A major exception to this theory, however, is that the federal government has claimed and acted on a number of occasions to unilaterally "take" Indian land using the controversial and problematic doctrine of "plenary power." "Plenary" in this instance means absolute or unlimited.
- 3 Special thanks to Mr. Trib Chaudhury of the Division of Economic Development for these most recent employment and spending figures.
- 4 See Jeff J. Corntassel and Richard Witmer II, "American Indian Tribal

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- Government Support of Office-Seekers: Findings from the 1994 Election," *Social Science Journal* 34, no. 4 (1997): 518.
- 5 Kenneth Janda, Jeffrey M. Berry, and Jerry Goldman, *The Challenge of Democracy: Government in America*, brief ed., 3d ed. (Boston: Houghton Mifflin, 1998), 128–29.
 - 6 Marley Shebala, "Back to the Drawing Board," *Navajo Times*, September 7, 2000, A1.
 - 7 Author has a copy of this policy accord.
 - 8 See James W. Zion, *Navajo Peacemaker Court Manual* (Window Rock, Ariz.: Navajo Nation, 1982); Tom Tso, "The Process of Decision Making in Tribal Courts," *Arizona Law Review: Indian Law Symposium* 31, no. 2 (1989): 225–35; and Robert Yazzie, "Life Comes from It: Navajo Justice Concepts," *New Mexico Law Review: Indian Law Symposium* 24, no. 2 (spring 1994): 175–90.
 - 9 See Tom Tso, "Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct," *Judicature* 76, no. 1 (June–July 1992): 15–21.
 - 10 Wilson and John J. Dilulio Jr., *American Government: Institutions and Politics*, 8th ed. (Boston: Houghton Mifflin, 2001), 14.
 - 11 Hastóí were considered wise elders. Hataali were medicine men or singers.
 - 12 W. W. Hill, "Some Aspects of Navajo Political Structure," *Plateau* 13, no. 2 (October 1940): 24.
 - 13 Ibid.
 - 14 J. Lee Correll, comp., *Through White Men's Eyes: A Contribution to Navajo History* (Window Rock, AZ: Arizona Bicentennial Commission, 1976), 146.
 - 15 Richard Van Valkenburgh, "Navajo Government," *American Quarterly* 4 (winter 1945): 68.
 - 16 Bill P. Acrey, *Navajo History to 1846: The Land and the People* (Shiprock, N.M.: Department of Curriculum Materials Development, 1982), 114. And see J. Lee Correll's account of Antonio Sandoval, another of the so-called Enemy Navajo in "Sandoval: Traitor or Patriot?" Navajo Historical Publications, Biographical Series, no. 1 (Window Rock, Ariz.: Navajo Tribal Printing Department, 1970).
 - 17 Robert W. Young, *A Political History of the Navajo Tribe* (Tsaile, Ariz.: Navajo Community College Press, 1978), 43.
 - 18 Robert W. Young, "The Rise of the Navajo Tribe," in Edward Spicer and Raymond Thompson, eds., *Plural Society in the Southwest* (Albuquerque: University of New Mexico Press, 1972), 184.
 - 19 Ibid., 191.
 - 20 Richard White, *The Roots of Dependency: Subsistence, Environment, and Social Change among the Choctaws, Pawnees, and Navajos* (Lincoln: University of Nebraska Press, 1983), 253.
 - 21 Ibid., 248.
 - 22 Tom Dodge had resigned in May and accepted employment with the BIA.
 - 23 Young, "The Rise of the Navajo Tribe," 203–5.
 - 24 Ibid.
 - 25 Ibid., 208.
 - 26 Ibid., 211.
 - 27 Peter Iverson, *The Navajo Nation* (Albuquerque: University of New Mexico Press, 1983), 68.
 - 28 Young, "The Rise of the Navajo Tribe," 221.

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- 29 Ibid., 224.
- 30 Iverson, *The Navajo Nation*, 175.
- 31 See *ibid.* for a relatively unbiased look at these issues, and consult Iverson's article entitled "Peter MacDonald," in R. David Edmunds, ed., *American Indian Leaders: Studies in Diversity* (Lincoln: University of Nebraska Press, 1980), 222-41. And see Sandy Tolan's "Showdown at Window Rock" (*New York Times Magazine*, November 26, 1989, 28, 30-31, 36-40, 74-75) for a more critical, if abbreviated, examination of MacDonald's tenure. But see Peter MacDonald's autobiography, *The Last Warrior: Peter MacDonald and the Navajo Nation*, written with Ted Schwarz (New York: Orion Books, 1993), for a decidedly and not surprisingly pro-MacDonald perspective on these and other issues related to MacDonald's tenure.
- 32 See George M. Lubick, "Peterson Zah: A Progressive Outlook and a Traditional Style" (in John R. Wunder, ed., *Native American Sovereignty* [New York: Garland Publishing Company, 1996], 241-66), for a good overview of Zah's first term as chair.
- 33 See U.S. Senate, "Final Report: A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs," 101st Cong., 1st sess., 1989, S. Rept. 101-216, which contains a chapter on the Peter MacDonald corruption scandal. And see Sandy Tolan, "Showdown at Window Rock" (*New York Times Magazine*, November 26, 1989), for a good summary of the events leading to the violence. Also consult the *Navajo Times Today* for articles about these events.
- 34 Michael Lieder, "Navajo Dispute Resolution and Promissory Obligations: Continuity and Challenge in the Largest Native American Nation," *American Indian Law Review* 18, no. 1 (1993): 33-71.
- 35 This was a Class C resolution and did not require BIA approval.
- 36 See, e.g., Jerry Kammer, *The Second Long Walk: The Navajo-Hopi Land Dispute* (Albuquerque: University of New Mexico Press, 1980); David M. Brugge, *The Navajo-Hopi Land Dispute: An American Tragedy* (Albuquerque: University of New Mexico Press, 1994); Emily Benedek, *The Wind Won't Know Me: A History of the Navajo-Hopi Land Dispute* (New York: Alfred A. Knopf, 1992); and Maureen Trudelle Schwarz, "Unraveling the Anchoring Cord: Navajo Relocation, 1974 to 1996," *American Anthropologist* 99, no. 1 (March 1997): 43-55. See also Hollis A. Whitson, "A Policy Review of the Federal Government's Relocation of Navajo Indians under P.L. 93-531 and P.L. 96-305," *Arizona Law Review* 27 (1985), for a dated but fairly objective account of the policy implications of this conflict. And see Catherine Feher-Elston, *Children of Sacred Ground* (Flagstaff, Ariz.: Northland Publishing Company, 1988).
- 37 Iverson, *The Navajo Nation*, 195.
- 38 John D. Moore, "Justice Too Long Delayed on the Navajo Reservation: The 'Bennett Freeze' as a Case Study in Government Treatment of Native Americans," *Harvard Human Rights Journal* 6 (spring 1993): 222-29.
- 39 88 Stat. 1714.
- 40 U.S. Congress, "Providing for the Settlement of the Navajo-Hopi Land Dispute, and for Other Purposes," S. Rept. 104-363 (Washington, D.C.: Government Printing Office, 1996).
- 41 CF-19-97.
- 42 480 U.S. 202.
- 43 102 Stat. 2475.
- 44 116 S.Ct. 1114.

N O T E S

- 45 See, e.g., the 1996 *Seminole* case, *Alaska v. Native Village of Venetie Tribal Government* (1998), *South Dakota v. Yankton Sioux Tribe* (1998), and *Strate v. A-1 Contractors*.
- 46 Heidi L. McNeil, "Indian Gaming: Prosperity and Controversy," in Malcolm Merrill, ed., *American Indian Relationships in a Modern Arizona Economy*, 65th Arizona Town Hall (Phoenix: Arizona Town Hall, 1994), 120.
- 47 Loa M. Schell, comp. and ed., *1995-1996 Tribal Directory of the Twenty-One Federally Recognized Indian Tribes of Arizona* (Phoenix: Arizona Commission of Indian Affairs).
- 48 Eric Henderson and Scott Russell, "The Navajo Gaming Referendum: Reservations about Casinos Lead to Popular Rejection of Legalized Gambling," *Human Organization* 56, no. 3 (1997): 294-301. Much of this section derives from this excellent article.
- 49 Title 17, Section 421, Navajo Nation Code.
- 50 Henderson and Russell, "The Navajo Gaming Referendum," 294.
- 51 *Ibid.*, 297.
- 52 See *Carpenter v. Shaw*, 280 U.S. 363 (1930), and *Squire v. Capoeman*, 351 U.S. 1 (1956).
- 53 Michael Benson, *Sovereignty: The Navajo Nation and Taxation* (Window Rock, Ariz.: DNA-People's Legal Services, 1976), 20.
- 54 *Ibid.*, 26.
- 55 455 U.S. 130, 139 (1982).
- 56 105 S.Ct. 1900.
- 57 See Robert W. Hanula, "The Navajo Tax System," *Arizona Bar Journal* (December-January 1988): 6-9.
- 58 Interview with Amy Alderman, an attorney for the Navajo Tax Commission, August 1, 1998.
- 59 *Ibid.*
- 60 Tom Tso, "Interview," *Arizona Attorney* 28, no. 9 (May 1992): 10.