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## THE NAVAJO-HOPI LAND DISPUTE

A Brief History

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### I A brief history of how I came to write this brief history

In 1996–97, under the auspices of an NEH Fellowship and a leave supported by the University of Pennsylvania, I was in the southwest, living in Santa Fe and doing research at the Anthropology Laboratory of the state museums of New Mexico on the so-called ‘Navajo–Hopi Land Dispute’. I had known about the Dispute from Emily Benedek’s book *The Wind Won’t Know Me: A History of the Navajo-Hopi Land Dispute* (1992–93) before I journeyed west, but I had no particular intention of working on it myself until I arrived at the Anthropology Laboratory and met the librarian Laura Holt.

Rather, I had come to the Laboratory with a paradigm that needed a case through which it could be explored. The title of the paradigm

was *Cultural Collaborations*; and within the history of Native American/Euramerican conflict, which is what I consider my field to be, I intended *collaboration* in the full range of its meanings from the decidedly coerced ‘cooperation’ represented by the treaty (the US Government’s imposition of ‘chiefs’ and ‘tribal’ councils on fundamentally decentralized Indian communities) to Indian *writing*, which, in relation to traditional oral forms of Native American expression, is clearly hybrid and bears the conflictive history of this hybridity in its practice.<sup>1</sup>

But because of Laura Holt’s expert guidance through a wealth of primary materials at the Anthropology Laboratory, which included, generatively, certain papers of the anthropologists Fred Eggan and David Brugge, both of whom had been involved in certain ways in the Dispute (Eggan for the Hopis; Brugge for the



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Navajos) and one of whom, Brugge, had written a fine book about a phase of it, I came to focus on the Navajo-Hopi Land Dispute as the case to test my paradigm. Begun in 1882 and still ongoing, the Dispute focuses this paradigm so sharply because it involves the collaboration over time of a complex of cultures: Navajo, Hopi/Pueblo, Spanish, Mexican, and the Anglo culture of the United States.

The space of this essay does not allow me to fully elaborate this complex collaboration. But I hope that the partial elaboration which follows is successful in suggesting that the official version of the Dispute (the version narrated by acts of Congress, US court decisions, and adopted by the Hopi Tribal Council in its propaganda beginning in the 1950s) functions by reducing this complex to a stereotyped opposition, *Hopi v. Navajo*, in which the ongoing colonial history of the Dispute (one result of US imperialism in the Americas) is erased. Hence the need for revisionary history: to restore the complex by way of allocating responsibility.<sup>2</sup> In this case restoration means not only the reinterpretation of the written record (historical, political, and legal documents) but also the recovery of Indian oral history, which has typically been erased by official western writing.

Let me distinguish here between the transcripts of Congressional hearings and court proceedings, which include, in written form, dissenting testimony, some of which stems from this oral history; and the written outcomes (acts and laws) in which this testimony is repressed. The written record is at once utterly open and utterly closed: closed not only in terms of its outcomes, which have been rigidly determined by the history of federal Indian law, the primary thrust of which has been to convert traditionally inalienable Indian communal land into US *property* (the commodification of a sacred material resource), but

also in terms of this record's access by those most affected by it – colonial subjects – in this case those Navajos who since 1882 have increasingly made up the population of the disputed area.<sup>3</sup>

To gather, read, interpret, and strategically put into play the official written record implies a wealth of resources – grounded in money, opportunity, and cultural habit – that these predominantly traditional Navajos have not historically possessed, beginning with an advanced western education (from fluency in English to fluency in the academic languages of law, history, and anthropology); resources that can lay claim to western communication technologies (telephones and computers), and independent legal aid. It is not enough to say, then, that an ongoing US colonialism has made Indians the poorest of the poor in the United States in terms of poverty and unemployment rates, or that these Navajos are among the poorest of the poorest, whose community is without electricity, running water, or paved roads, while, since the mid-1960s, through leases signed with the Navajo and Hopi tribal councils and approved by the US Interior Department, the international conglomerate Peabody Coal has operated a mine in the disputed lands that supplies the energy for electricity in large parts of the western United States. The force of this poverty must also be specified in relation to the technology of western literacy, a specification I have elaborated in terms of *translation* in *The Poetics of Imperialism* (see note 3 for full citation).

The Navajo-Hopi Land Dispute, as I read it in this essay, offers a specific instance of such translation, the structure of which is what I term *collaborative*. In what follows, then, I want to elaborate a specific case of US colonialism, which is nevertheless paradigmatic in significant ways for the colonial relationship that obtains between the US Government and what

is known as 'Indian country': 'Broadly speaking . . . all the land under the supervision of the United States government that has been set aside primarily for the use of Indians' (Pevar 1992: 16). The legal structure that grounds this colonialism is built precisely on acts of translation, the first of which was the Trade and Intercourse Act passed by Congress on 22 July 1790. This Act, in what would prove to be the most crucial part of its language, declared:

That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, *held under the authority of the United States*. (Prucha 1994: 15; my emphasis)

In this Act, then, and in the subsequent Congressional acts and federal case law that grew out of it, to some key points of which I will return in what follows, Congress effectively assumed title to all Indian land; that is, Congress effectively assumed the decision-making power over the buying and selling of this land, a 'plenary power' which it holds to this day. Such plenary power, which from 1790 on increasingly penetrated areas of Indian social and political life, makes the use of the word *colonialism* quite precise in referencing 'Indian country' both then and now. As the previously cited definition of *Indian country* suggests, Indians within Indian country can only 'use' lands that the federal bureaucracy under the authority of Congress governs and, effectively, *owns*. And this 'use' is distinctly circumscribed by federal authority and power as well. Indian reservations (a system formally begun in the 1850s), which form the bulk if not the whole of Indian country, are distinctly colonial preserves.<sup>4</sup>

This colonial structure imposed by Congress and the federal courts has, as its basis, translated the kinship relationship of Indian communities to their land into the terms of western *property* law, thereby converting what was and still is in the various terminologies of Indian languages an inalienable communal resource into an individually held commodity, governed by the definition of *title* in western law. In this case, clearly, the US Government, not the Indian tribes themselves, acts as the individual property-holder of Indian lands.

It is this syntax of terms (*individual, commodity, alienation, title*) that is implicit in the term *property*. It is safe to say that no such syntax obtains in the traditional Native languages of the Americas, in which, therefore, no one can, quite literally, speak of individuals alienating any part or parcel of the community's land in a market economy. I would go so far as to say that in these languages there is no *place* (in the sense of the term *locus* or *topos* in western classical rhetoric) for an *individual*, for a certain kind of 'I,' to speak or be spoken about. The *individual* I have in mind is that alienated entity whose history is inseparable from the history of the term *property* in both its physical and metaphysical sense, a history I have traced in some detail in *The Poetics of Imperialism*.

In Leslie Marmon Silko's novel *Ceremony*, which is, not incidentally to the history I am writing, about the sociopsychic healing of a Laguna Pueblo man (Tayo) by a Navajo singer (Betonie), white psychiatrists tell the protagonist 'that he would never get well as long as he used words like "we" and "us" '; rather, 'he had to think only of himself, and not about the others' (Silko 1986: 125). Two models of sociopsychic health (the European and the Indian) are embodied in opposed languages containing opposed subject positions: the *individual* and the *communal*, the 'I' and the 'we.'

As I have suggested, these subject positions entail radically opposed relationships to land, such that Indian kinship relations to land cannot be translated into the terms of *property*; that is, if we understand by the term *translation* a certain collaborative relationship *between* languages based on a notion of reciprocity. There is no potential for such collaboration between Native vocabularies of land and the terms of property. Yet it has been and continues to be the *force* of federal Indian law to give in its very language (the English language) the *appearance* of such translation, so that the traces of the colonial structures of Indian country are erased or illegible. The treaty, as it developed in the post-Revolutionary War period and until 1871 when Congress ended the treaty-making process with Indian communities, is exemplary of this apparitional process of translation. Written in the language of reciprocity (of a consensual agreement between sovereign nations), the treaty increasingly represented a coerced collaboration between Indian communities and the US Government in a field of exponentially increasing discrepancies of material power, where Indian sovereignty was continually compromised in the very law that had translated Indian communities into the terms of *sovereignty* (the terms of the nation-state in the international sphere) in the first place.

Such translations (of Indian land into *property*, and of Indian communities into the parlance of international law) were effected, clearly, not so that Indian communities could hold their own in the field of western political relations but so that the United States could dispossess these communities of land and autonomy in a language that did not simply rationalize this dispossession as 'legal,' but naturalized the translation process itself so that it *appeared* to be one of reciprocal collaboration. That is, the language of western law

*appeared* to be the natural or only language in which such collaboration could take place, in which there *appeared* to be no necessity for translation at all, because both sides *appeared* to be speaking the same language.

Thus the impossibility of translation between the terms of Indian land and *property* is marked by the erasure of the need for translation itself in the implicit assertion of the universality of the language of *property*. This colonial practice of translation not only displaces the history of forced collaboration with the language of reciprocity; it also obscures and disrupts historic processes of collaboration between Indian communities, where because of transcultural affinities, particularly in the kin-based relation to land, intercultural translation has been and continues to be a complex actuality in a field of both comity and conflict.

From a theoretical perspective, then, I was drawn to the Navajo-Hopi Land Dispute because for me it focused the complex of translation/collaboration I have been outlining and of which this essay represents one history.

In early 1997, after six months or so of research at the Anthropology Laboratory and the State Supreme Court Library in Santa Fe, I gave a talk on the Navajo-Hopi Land Dispute at the School for American Research in Santa Fe. Among the audience was the anthropologist Edward T. Hall, who from 1933 to 1937 had lived in the area in Arizona that includes the Navajo and Hopi reservations and has written a graceful, perceptive book about his time at Navajo and Hopi, *West of the Thirties: Discoveries Among the Navajo and the Hopi* (1994). It was through his generous response to my talk that I, my wife, Darlene Evans, and our daughter Ilana initially came to Navajo, where we met Marybeth Sage, a member of the Navajo Nation, whose mother is Hopi and father Navajo, and who came to be our guide into the world of the Land Dispute and

ultimately our friend. It was Marybeth who introduced us to Katherine Smith and her family, who live on Big Mountain at the heart of this disputed world, whom we continue to visit and work with, and from whom we have learned what lies beyond theory, the material that theory loses touch with at its own peril.

## **II Deconstructing a legal opposition (*Navajo v. Hopi*): historical background to the 1974 Navajo-Hopi Land Settlement Act (Public Law 93-531)**

Big Mountain is an area of high desert, twenty miles north of the Hopi mesas in northeastern Arizona (see Maps 1 and 2) (Kammer 1980), sacred to the Navajos who have lived there for generations and who in 1977 found themselves on the wrong side of a partition line drawn by a federal court that, following the directives of a 1974 Congressional Act (Public Law 93-531, the Navajo-Hopi Land Settlement Act of 1974), converted traditional Navajo land into US property held in *trust* for the Hopi tribe.<sup>5</sup>

Because this essay may appear to be partial to the Navajos, I want to emphasize here that this land is also traditionally sacred to the Hopis, but that the Hopis have lived both in their storied time and in western historic time (another kind of storied time to which I accord no particular privilege) in villages dispersed across the three mesas, where the traditional emphasis has been on agriculture with herding as a significant component, yet not a component that has required the Hopis to venture very far from the mesas for their subsistence.<sup>6</sup> The reverse emphasis has conditioned Navajo life, at least since the middle of the eighteenth century, when sheep herding began to take on a central spiritual and economic force for the Navajos (Bailey and Bailey 1986: 16-21;

Witherspoon 1977: 126), though it is important to remember that the European record suggests that the Spanish first distinguished the Navajos from other Apachean groups in the seventeenth century and perhaps earlier because these Europeans recognized the Navajos as practicing agriculture (Bailey and Bailey 1986: 12-13), and that the same record suggests that the Hopis have been herding sheep since the Spanish introduced livestock to the southwest in the sixteenth century.

The Navajos, then, were farmers before they were herders. And the European record indicates that in the wake of the Pueblo Revolt of 1680 and the Spanish Reconquest (1692-96), it was 'Pueblo refugees who joined the Navajos [and] brought with them their knowledge of sheep and goat herding and probably some animals as well' (Bailey and Bailey 1986: 16). Anthropology has 'tended to view the Navajos as Athabaskans whose culture had absorbed Puebloan cultural traits.' The Baileys push it further and 'see them as biological and cultural hybrids, neither Athabaskan nor Puebloan, but a product of both' (p. 15). However one describes the relationship between Puebloans and Navajos, attempts to simply oppose these peoples require the construction of reductive stereotypes (settled agriculturalists vs. nomadic herders is one of the most common and persistent) that are betrayed by both the Native and the European record.<sup>7</sup> Both Navajos and Hopis farm and herd, though with different emphases at different historical periods, and increasingly in the twentieth century both traditional economies have been disrupted by and had to adapt to the wage-labor system of US capitalism.

I know of no record, except that specifically designed to rationalize the Land Dispute and the government partitioning of the land, which suggests that the Navajos ever prevented the Hopis from access to the common land of Big

Mountain. The record, both Native and European, does suggest that Hopi and Navajo communities have, for hundreds of years, lived a complex life of comity and conflict – of intermarriage and trade, of alliance against first the Spanish and then the Anglos, as well as occasional hostilities against each other in the midst of intense European pressures to control the southwest. It is also important to remember that until the US imposed centralized forms of government on these communities, which began to take place in the late nineteenth century, both the Hopis and the Navajos lived in decentralized communal groups amidst the social and cultural dynamics that I am suggesting here, so that when we refer to Navajo and Hopi alliances or hostilities, we are referring to exceptionally local and shifting arrangements, not the unified or oppositional forces of two tribes.<sup>8</sup> The notion of a Navajo Tribe or *Nation*, which became the official designation by Tribal Council affirmation in 1969 (Iverson 1989: xxiv), or of a Hopi Tribe is recent. From the mid-1930s, when it was first introduced by the US Government, until the early 1950s, when it finally took hold, though not without continued resistance from certain village leaders, the Hopis successfully resisted the imposition of a tribal council on their decentralized and clan-coordinated village pattern of governance.

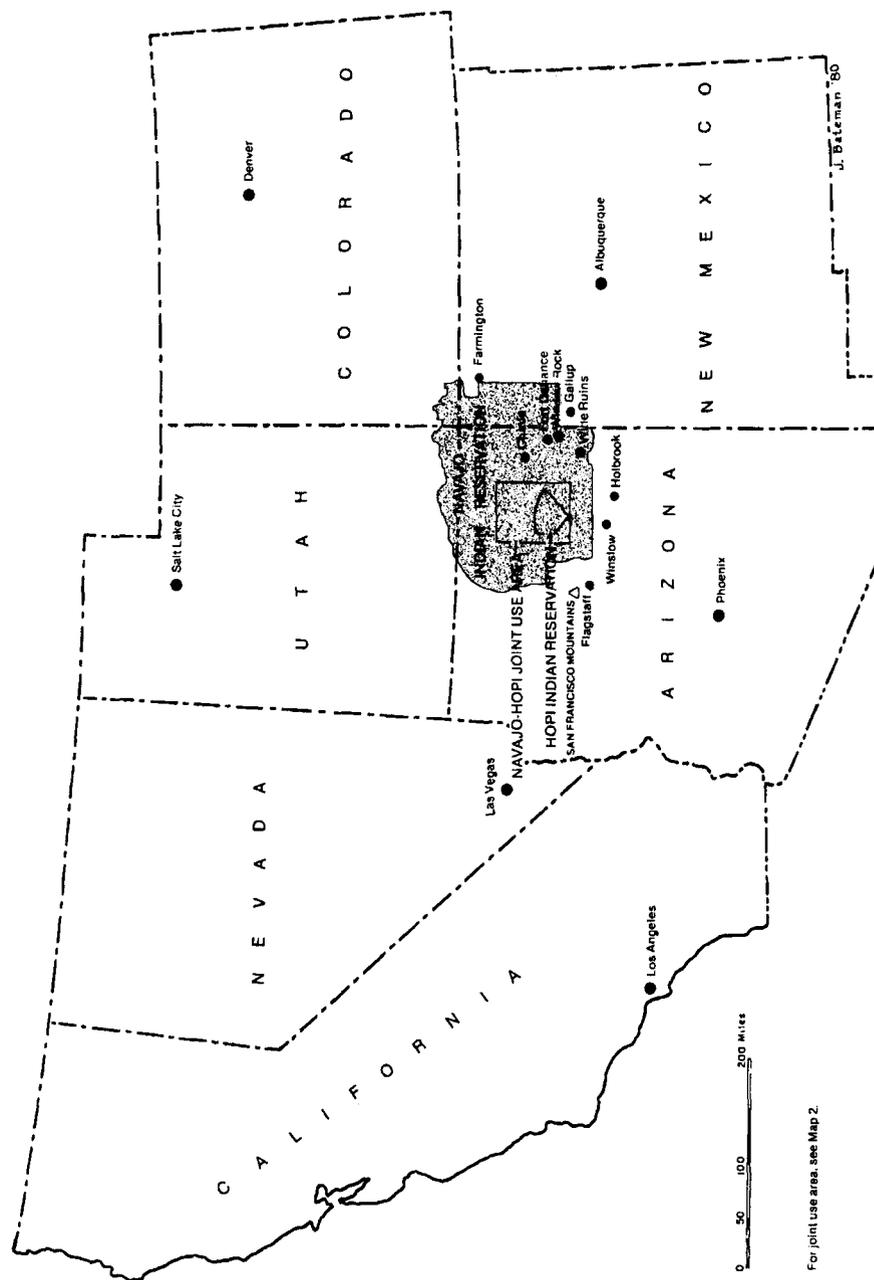
I also want to emphasize that when the US Government drew the partition line in 1977, while, because of the traditional habits of life I have outlined above, a hundred Hopis were forced to relocate from what became part of the Navajo reservation and was from that time named the Navajo Partitioned Lands (NPL; see Map 2), the same Act has forced the relocation of approximately 12,000 to 14,000 Navajos over the past twenty-two years. The 2000 to 3000 others who still live on Big Mountain and the rest of the 900,000 acres known since 1977

as the Hopi Partitioned Lands (HPL; see Map 2), find themselves, in the wake of a 1996 Congressional Act (Public Law 104-301, Navajo-Hopi Land Dispute Settlement Act of 1996), which I will discuss in subsequent sections, leaseholders of that property for seventy-five years under what is known as the Accommodation Agreement. Those who refuse to sign the Agreement, which some have, asserting traditional values, face eviction from their homes by February 2000.<sup>9</sup>

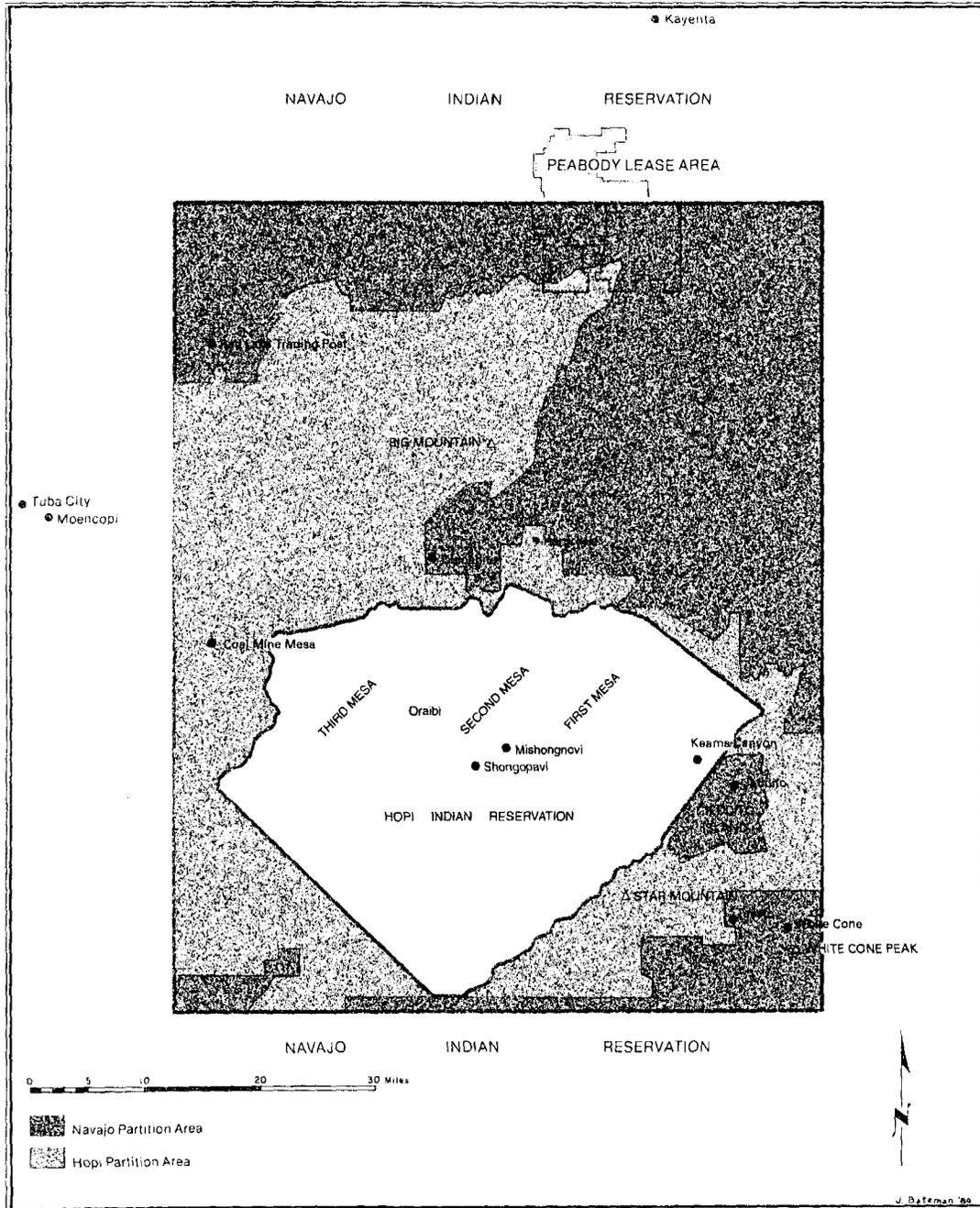
These Navajos, who have been resisting this forced relocation since its inception, have had the support of a core of traditional Hopi leaders (the Kikmongwis), who themselves resisted, in ways that I will specify and that have been elaborated in precise detail in 'The Report to the Hopi Kikmongwis,' the collusion of their own tribal council with the Federal Government and mineral interests in the taking of Hopi land for money. The most visible Hopi elders who were at the core of this resistance are now dead; and whether this resistance persists, and if it does and in what form, remains to be told. This collaboration of traditional Hopis and Navajos, among other points that I have noted, and will note below, betrays the politics behind the titling of the conflict under discussion as 'The Navajo-Hopi Land Dispute.'

### III The ongoing impact of Peabody Coal on the geopolitics of the Land Dispute

Big Mountain is situated near the southern end of Black Mesa, a 3200-square mile area within the Navajo and Hopi reservations that 'contains an estimated 23.6 billion tons of sub-bituminous to bituminous coal' (Haven 1997: 2). It is this coal and the Indians who live on it that are being exploited by Peabody Coal, the



Map 1 The southwestern United States including Navajo-Hopi areas prior to partition of joint use area



Map 2 The 1882 reservation after partition

largest coal producer in the United States, in conjunction with the Federal Government. While the Land Dispute, as noted, began in 1882, and coal was not discovered on Black Mesa until 1909 (Haven 1997: 82; Redhouse 1985: 8), it nevertheless seems indisputable that the contemporary form of the Dispute, which we can date from 1958 and the *Healing v. Jones* case, a discussion of which will follow and forms the central part of this essay, is generated by the force of western capitalism's colonial expansion into Indian country, in this case in the form of mineral companies seeking coal at the cheapest prices.

While Peabody's mining operation is, apparently, currently confined a few miles north of Big Mountain on the Navajo Reservation (see Map 2; revenues from that part of the operation that takes place on the NPL are shared equally between the Navajo Nation and the Hopi Tribe), a recent study suggests that the coal from these leases may be exhausted within a decade (Haven 1997: 72).<sup>10</sup> While more conservative estimates suggest a thirty-year period until depletion (Haven 1997: 72), mining further south on the HPL, where the richest untapped deposits appear to lie, seems an inevitability, if all the parties to the profit (Peabody, the US Government, the western utility companies that own parts of the generating stations using this coal, and the Navajo Nation and the Hopi Tribe that share equally in the subsurface rights on all the disputed lands – HPL as well as NPL) want the status quo to continue. By status quo I mean the multi-billion dollar colonial complex that is currently providing energy to Nevada, Arizona, and California at the expense of the HPL Navajos from whose traditional land this energy is coming and who receive none of it.

In his study of Black Mesa coal, which I have been citing, Henry Haven Jr. notes that while [t]he Navajo Nation's mining revenue

represents 17% of its total annual revenues . . . , the Hopis may depend 100% on the coal revenues generated from Black Mesa' (1997: 83). In terms of private sector revenues, Haven's assumption about Hopi coal revenues appears confirmed, at least in significant part, by the Hopis themselves in the *Hopi Comprehensive Development Plan*, a document not widely circulated, which states: 'The private sector economy is very limited.<sup>11,12</sup> The largest industry is the mining at Black Mesa. . . . Hopi Electronics, a small assembly plant . . . and the silvercrafts guild . . . are the only other significant industries on the reservation' (Hopi Tribe 1988: 15), and 'Coal is the only known energy mineral on the reservation' (ibid.: 45). Thus while '[i]n 1979, the Tribal Council banned new energy resource exploration and mining,' it is not surprising, given the economic situation at Hopi, to find in the *Plan*: 'This ban is to remain in place *until* the Tribe has adopted an energy resource development policy' (ibid.; my emphasis). Eleven years after the publication of the *Plan*, such a policy may already be in place.

If the mining operation expands (and the *Hopi Plan* suggests it will), it would appear to do so on to Big Mountain on the HPL, with disastrous results for the traditional life of the Navajo families who have been struggling to remain there. In Chapter xviii of the *Plan*, entitled 'Mineral resources,' one reads: 'As the Hopi Reservation develops and greater use is made of outlying areas [which can only mean the HPL], conflicts will inevitably arise between mineral extraction and uses such as grazing, recreation, and agriculture' (Hopi Tribe 1988: xviii-7). What the *Plan* fails to mention is that the people caught directly in these conflicts will be the Navajo families living on the HPL.

One of these families is the family of Katherine Smith, who has been a resistor for almost thirty years, along with numerous other elderly

Navajo women and their families, in what she considers a war against the Federal Government. At Navajo, where the tribal council, first established by the Federal Government in order to sign oil leases in 1923, has taken the form of the western patriarchy that imposed it, women are still centrally significant because, traditionally, land and clan remain centered in the female line: 'To put it simply and concisely, true kinsmen are good mothers' (Witherspoon 1977: 64). Navajo clans consider themselves to be the perpetual caretakers of the land, since it was given to them for their care by the Holy People after the Navajos, or Diné (as they call themselves), emerged into the fifth, or present, world in storied time.

As a caretaker of this fundamental and inalienable spiritual-material communal resource (and I struggle here to translate into English the meaning of *land* in Navajo), Katherine Smith has refused to sign the Accommodation Agreement that has turned her land into US rental property, as part of the 1996 Navajo-Hopi Land Dispute Settlement Act. Thus, under the law, Katherine Smith faces eviction from this land in 2000, though, if eviction is enforced, she can move on to the adjacent land of her daughter Mary Katherine, who has signed the Agreement. Nevertheless, the Agreement, which contains the leasing arrangements of the land, expires, as noted, at the end of seventy-five years, at which time any party to it (the Hopi Tribe, the Navajo Nation, the HPL Navajos, and the US Government) can refuse renewal. Thus the terms of the Agreement effectively take control of renewal out of the hands of the HPL Navajos, if their land is not already by then literally undermined by Peabody Coal in collaboration with the US, the Hopi Tribe, and the Navajo Nation, whose Tribal Council has demonstrated little regard for the well-being of the Navajos on the HPL, while officially opposing the Accommodation

Agreement ('Navajo Nation Responses to Your Questions' 1997: 20).

In the one-room home of Katherine Smith, who is well aware of the politics of this collaboration, there is a framed cartoon that represents the position of the tribal councils in the Land Dispute. In this cartoon a coyote Uncle Sam with red tongue lolling rises above the terrain of Big Mountain. In his right hand he manipulates the strings of a marionette, next to a sign stuck in the ground that reads: 'Hopi Tribal Council.' In his left hand he manipulates the strings of another marionette, next to a sign stuck in the ground that reads: 'Navajo Tribal Council.' Let it be noted that the Navajo Tribal Council has the power to stop any future mining (see note 10) that might be planned for the HPL because in order for mineral leases to take effect on the disputed lands both the Hopi Tribe and the Navajo Nation must sign them. Katherine Smith's cartoon suggests, however, that this kind of resistance is not a historical habit with the Tribal Council.

From the present official standpoint, a crucial stronghold of traditional Navajo culture faces eradication within the next century, so inseparable are culture and land in traditional Indian communities. Pauline Whitesinger, Katherine Smith's only surviving sibling and a resistor herself, has put it eloquently: 'In our traditional tongue there is no word for relocation. To move away means to disappear and never be seen again' (Quoted in Benedek 1993: 73).

#### IV The legal construction of Indian country: the federal context of the Navajo-Hopi Land Dispute

'An "Indian reservation" consists of lands validly set apart for use of Indians, under

superintendence of the government which retains title to the land' (210 F. Supp. 125: 127, 180).<sup>13</sup> This is the definition of an Indian reservation under federal Indian law. It is impossible to understand the so-called Navajo–Hopi Land Dispute without recognizing that the Federal Government of the United States owns virtually all Indian tribal lands in the lower forty-eight states under an 1823 Supreme Court decision, *Johnson v. McIntosh*, which, making explicit the logic of the Trade and Intercourse Act of 1790 (and its subsequent revisions in 1796, 1799, and 1802), found title to these lands to be in the government (8 Wheat. 543: 574). Even the Pueblo land grants from the Spanish effectively came under the jurisdiction of *Johnson* in the Pueblo Lands Act of 1924, which 'assimilat[ed] pueblo lands to the status of other tribal lands' (Cohen 1988: 390). Stemming from the 1831 Supreme Court decision in *Cherokee Nation v. Georgia*, which followed the trajectory of *Johnson* in compromising the independence of Indian communities, these communities were defined under federal Indian law as 'domestic dependent nations' (5 Pet.1: 17). This definition still holds today. The word 'dependent' in this oxymoronic categorization (for under international law *nations* are defined as precisely *foreign* and *independent*) limits the sovereignty of the tribes, who do not have the status under the US Constitution of fully independent nations with control over their traditional lands.

Thus, as noted previously, the situation of Indian country in relation to the United States is that of a colonized people, even though all Indians were made citizens of the United States under the Indian Citizenship Act of 1924 (43 US Stats. At Large. Ch. 233, p.253 [1924]). Another way of putting this is that if Indians choose to leave their tribal homelands and the extended family relationships that constitute their ties to that land, they can break the

colonial relationship and strike out as *individual* citizens of the United States. But such a break from relationships that ground Indian identity, based as it is in the *communal*, is, typically, traumatic, coupled with the fact that the goods and services provided by the Federal Government in accordance with the *trust* relationship it has with Indian peoples (see note 5) are not usually available off-reservation. The legal construction of Indian country, then, places Indians in a double-bind: economic opportunity and full *legal* autonomy are located off-reservation (as with all colonial systems the reservations remain radically underdeveloped), while the life-blood of land and kin, which are the basis of full personal autonomy, as well as federal support services, such as they are, are confined by federal Indian law and its administration.

The Navajo–Hopi Land Dispute is, then, not a dispute between Navajos and Hopis over their lands; it is a dispute generated by the Federal Government's manipulation of Navajo and Hopi land as *property*. When the Federal Government took title to all Indian land in *Johnson v. MacIntosh*, it also turned that land (communal land that could not be bought or sold but was the very spiritual and material substance of Native societies) into *property* (land that by definition can be owned and alienated if only at the will of the Government) and forced Indian communities, now created as corporate entities of a certain kind ('tribes' or 'nations'), to play the part of property-holders, without, however, giving these corporate 'individuals' the legal foundation of property-holding, title.

The Dispute, as noted above, began in 1882, when the Federal Government, through a presidential executive order, created a reservation in northeastern Arizona (see Map 1), the boundaries of which encompassed the entire Hopi population ('1813 souls' (*Healing v. Jones*

1962) 210 F. Supp. 125: 137) and approximately 300 to 600 Navajos.<sup>14</sup> The order 'set apart [the land] for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon' (210 F. Supp. 125: 129). In 1882 the eastern boundary of the reservation was virtually coextensive with the western boundary of the Navajo reservation, which had been created by treaty in 1868, following the removal from their traditional lands and four-year incarceration of approximately 9000 Navajos in a military concentration camp in eastern New Mexico.

By 1934, the Navajo reservation, which had been expanding since 1868 through executive order additions and was finally consolidated by Congress as a statute reservation through the Navajo Indian Reservation Act of 14 June 1934 (48 Stat. 960), surrounded the Hopi reservation, and was almost its present size of approximately 25,000 square miles (see Map 1). According to 1990 US census figures there were 143,305 Navajos living on their reservation, and 7061 Hopis living on theirs (today these figures are approximately 160,000 Navajos and 9000 Hopis).

The 1882 reservation, which covers 2,500,000 acres, or 3900 square miles, was primarily created in response to complaints from the Hopi agent, J. H. Fleming about two Anglos, E. S. Merritt and Dr Jeremiah Sullivan, who had been employed at the Hopi agency under Fleming's predecessor, Merritt as the agency clerk and Sullivan as its physician. Both stayed on, living on First Mesa among the Hopis, where, in Fleming's estimation, they were creating opposition to his 'civilizing' efforts, of which the primary one – and this was federal policy throughout Indian country from the 1870s until the 1960s – was to compel Hopi parents to send their children to Christian or government boarding schools, whose

programs were dedicated to eliminating Hopi culture in these children and replacing it with Anglo/Christian culture.

In a letter of 4 December 1882 to Hiram Price, the Commissioner of Indian Affairs (210 F. Supp 125: 137), 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 was forcing them and the Hopis into narrowing spaces with diminished resources.<sup>15</sup> 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 twelve 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 (*Annual Report of the Commissioner of Indian Affairs 1882*: 5). In fact, he does not mention Navajos at all in this report except to point out that far more Hopis understand Navajo than they do either Spanish or English (*ibid.*: 4), a circumstance that points to the long intertwined history of these two communities, to which I have alluded.

The 1882 reservation was *not*, then, primarily created to separate the Hopis from Navajo aggression, which is the story that the Hopi Tribal Council likes to tell in its official version of events, and the Federal Government has essentially endorsed as well with its stereotyping of the Hopis as 'peaceful' and the Navajos as 'aggressive' (210 F. Supp.125: 134–5). This stereotype goes back to the sixteenth century and the Spanish invasion of the Southwest. But in order to survive it has had to repress such facts as the Hopis' destruction of their own village of Awatovi in 1700, which temporarily united the other Hopi villages to

extirpate the Catholicism that had taken root there and would not return after these villages united to kill the resisting adult males of Awatovi. In his account of the massacre, Brugge notes that '[a]t least some of [the] survivors joined the Navajos' and were absorbed into the population (1994: 8-9).<sup>16</sup>

In fact, the language of the executive order signed by President Chester Arthur says that the 1882 reservation is not only for the Hopis but also 'such other Indians as the Secretary of the Interior may see fit to settle thereon.' And while, as noted above, there were 1800 Hopis living within the reservation in 1882, there were 300 to 600 Navajos living there as well. The total Navajo population at that time, as estimated by the District Court of Arizona in the *Healing v. Jones* case, was about 16,000 (210 F. Supp. 125: 135).

If the government had wanted to separate Hopis from Navajos, then why, in creating the 1882 reservation, would the language of the executive order leave room for the settlement of 'other Indians' there, and why, given that language, which is, admittedly, government boiler-plate, would the Federal Government have left so many Navajos relative to the Hopi population within the boundaries of the reservation? Logically, these 'other Indians' were those Navajos; and, indeed, in 1962 the Federal District Court in Arizona, upheld by the Supreme Court in the following year, would decide in *Healing v. Jones* that the Navajos were these 'other Indians,' and that they had been legally settled on the 1882 reservation 'at least by 1937, but not prior to 1931' (210 F. Supp. 125: 126). Nevertheless, on the way to this determination, the District Court admitted:

The evidence is overwhelming that Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent

area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958, when any rights which any Indians had acquired in the reservation became vested. (210 F. Supp. 125: 144-5)

#### V The *Healing v. Jones* case (1958-63): the first of the court cases in the Navajo-Hopi Land Dispute

The *Healing v. Jones* decision is decidedly at the center of the legal/bureaucratic web that constructs the Navajo-Hopi Land Dispute and turns a complex and long-standing relation of comity and conflict between two Indian communities into a legal opposition between virtual or paradoxical property-holders, that is, property-holders who do not hold the title to their property. The decision was delivered by the United States District Court of Arizona in 1962, at which time the Navajo population of the 1882 reservation had grown to approximately 9000 (210 F. Supp. 125: 145), thus surpassing the *entire* Hopi population, which was probably not even half this number. By one estimate, in 1958 there were 8800 Navajos and 3700 Hopis living on the 1882 reservation (Benedek 1993: 154).

The *Healing* decision was the result of a 1958 Congressional act (The Act of 22 July 1958, Public Law 85-547 [210 F. Supp. 125: 129]) that waiving tribal *sovereign immunity* (the status that prohibits tribes from being sued or suing each other, unless either a tribe or Congress waives the tribe's immunity), enabled the two tribes with the consent of their tribal councils and in the persons of their tribal chairs (Dewey Healing/Hopi and Paul Jones/Navajo) to sue each other to determine respective *property* rights in the 1882 reservation.<sup>17</sup> Thus, the Act of 22 July, passed with the collaboration of the tribal councils, and following

the legal logic of *Johnson v. McIntosh*, compelled these Indian communities to assume the part of property-holders in the colonial shadow play of federal Indian law, where the US Government holds all the property.

It also opened the way for what had been created in 1882 as an executive order reservation (one created by the President of the United States) to be converted by Congress into a statute reservation (one authorized by Congress). A crucial distinction in federal Indian law is articulated here. In sum the distinction between the two kinds of reservation, affirmed by the Supreme Court in 1942 in *Sioux Tribe v. United States*, is that executive-order land could be seized by the Federal Government and returned to the public domain without compensation being paid to the Indians whose reservation it had been, whereas in the case of a statute or treaty reservation seizure had to be compensated (*US v. Shoshone Tribe of Indians* 1938). In 1919 and 1927 Congress passed laws that put an end to the creation of executive order reservations, and placed the power for creating reservations exclusively in Congressional hands (see Getches et al. 1998: 267). It is rare in the history of US-Indian relations for the Federal Government to return land (determined by the federal courts to have been seized illegally) to Indian tribes. Typically, the return is monetary, a return that is far from satisfactory to peoples for whom land is traditionally not fungible but the very life of the community.

The two tribal lawyers at the time of *Healing*, both officially appointed by the Secretary of the Interior, as was and is customary in the colonial context of Indian Country, and both Anglos, John Boyden for the Hopis and Norman Littell for the Navajos, were instrumental in bringing the two tribes to litigation. The question of mineral rights to the 1882 reservation drove the suit, which was adamantly opposed, as were Boyden and the

Hopi Tribal Council, by traditional Hopi leaders (the *Kikmongwis*).

In 1946 the Solicitor of the Interior Department had 'determined that the two tribes held coextensive rights to the minerals in the 1882 area' (Benedek 1993: 133-4).<sup>18</sup> But Boyden 'challenged the . . . opinion . . . and in 1955, filed a brief claiming the opinion was in error' (ibid.: 136). According to Benedek's narrative, 'Littell suggested that the tribes sue each other over their respective rights in the area' (ibid.), and '[i]t was the pressure of oil and gas companies to determine ownership of the area' (ibid.: 134) that powered this decision to sue. Apparently, the mineral companies were not happy with the complicated situation of dual rights.

In its 'Report to the Hopi Kikmongwis', the Indian Law Resource Center, which litigates for Native rights in the Americas, produced evidence that strongly suggested that Boyden was representing both the Hopi tribe and Peabody Coal during the 1960s when Peabody was negotiating and securing highly favorable mineral leases on Black Mesa (1979: 150-5).<sup>19</sup> This evidence of conflict of interest was confirmed in 1996 in an article in the *Brigham Young University Law Review* by Charles F. Wilkinson:

John Boyden's legal files, donated to the University of Utah after his death in 1980 but only recently available for public review, show that Boyden had violated his high duty to the Hopis by working concurrently for Peabody Coal during the decisive years of the mid-1960s. (Wilkinson 1996: 469)

The Hopi Tribal Council paid Boyden one million dollars for his work on the *Healing* case (Indian Law Resource Center 1979: 143), which, ironically, came to the same conclusion as the solicitor's decision of 1946 in the matter

of mineral rights, awarding them jointly to Hopis and Navajos. He made another half million in legal fees for a land claims case he handled for the Hopi Tribal Council (*ibid.*: 188), which was militantly opposed by traditional Hopi leaders who refused to accept money for land. The 'Report to the Hopi Kikmongwis' fully documents this resistance, which ultimately failed in the face of western law and its fetishizing of property.

In sum, the *Healing* decision, grounded in the Act of 22 July 1958, officially created a Hopi statute reservation from what was estimated at the time to be 631,194 acres (210 F. Supp. 125: 173) in the south central part of the 1882 reservation (see Map 1; the land including and immediately surrounding the three mesas on which the Hopis have traditionally lived in villages). A BIA survey done in 1965 determined the exact acreage to be 650,013 (Kammer 1980: 41).

The Court also determined that the administrative 'policy of segregating Navajos from Hopis' (210 F. Supp. 125: 171) had commenced in 1931. This policy was accomplished beginning in 1936 'by means of land-use regulations under which land management districts were created, one of which (No. 6) was designed to include most of the Hopis in the 1882 reservation' (*ibid.*). By 1937 'the practice was initiated of forbidding Hopis to move outside district 6, or even to graze outside that district, without first securing permits. These permits were usually issued only on a showing of past Hopi use' (*ibid.*). *Healing* continues:

It was then sought to formalize this segregation practice by means of a Secretarial order. This attempt was abandoned when the solicitor ruled, on February 12, 1941, that such an order would be invalid unless consented to by the Hopis. But then the Office of Indian Affairs continued to accomplish the same result through its previous land-use regulations and associated practices . . .

none of which was ever approved by the Hopis. It was on this basis that the segregation practice was continued without interruption until all rights became vested on July 22, 1958 [the date of the Congressional Act]. (210 F. Supp. 125: 171)

The final boundaries of District 6 were worked out by BIA bureaucrats, without the input of either Navajos or Hopis and finalized on 24 April 1943 to include the 650,013 acres that would become the Hopi statute reservation in 1962 (210 F. Supp. 125: 173). Approximately one hundred Navajo families found themselves living within these finalized boundaries and were forced to relocate outside of District 6 (Kammer 1980: 41).

The *Healing* court further determined, as noted, that the two tribes would share equally the surface and mineral rights of the remainder of the 1882 reservation. The remainder of 1,849,987 acres became known as the Joint Use Area, or JUA (see Map 1). When the Supreme Court affirmed the *Healing* decision in 1963 by denying a writ of *certiorari*, Navajos outnumbered Hopis in the 1882 reservation by over two to one. These Navajos were settled outside the District 6 area, which *Healing* had created as the official Hopi reservation, in the JUA, where almost no Hopis lived because of the customary Hopi living patterns, which I have described above, of locating in the villages on the three mesas, while herding and farming on land that lies relatively close to the mesas.

## VI The relationship of *Healing* to the Navajo-Hopi Land Settlement Acts of 1974 And 1996 within the context of the politics of livestock management

The *Healing* decision would prove a disaster for the Navajos living on land within the

boundaries of the 1882 reservation – many of whom, as noted above, were among the most traditional people in the Navajo Nation, people who often spoke only Navajo and who were practicing a way of life that is the foundation of values in their community – because it set the stage for Public Law 93–531, the Navajo–Hopi Land Settlement Act of 1974, which we looked at in part in Section 2. The forced relocation of thousands of Navajos from their traditional homeland on the 1882 reservation, stemming from the Act, has cost US taxpayers close to 400 million dollars (McCain 1996). These citizens are financing a contemporary Trail of Tears (to borrow a figure of speech from Cherokee history) or, in terms of Navajo history itself, another Long Walk: the forced march in 1864, near the end of the US war against the Navajos, of over 9000 Navajos from their traditional homeland in Arizona and northwestern New Mexico to a concentration camp at Fort Sumner in the eastern part of New Mexico at a place called Bosque Redondo.

From the moment of the *Healing* decision and as a logical continuation of it, the logic of *property* rights, the Hopi Tribal Council under the guidance of attorney Boyden pressed hard for the partition of the JUA in both the courts and Congress. The complaint was simple: the Hopis could not share the JUA with the Navajos because of the overwhelming Navajo presence on the JUA. This presence took the form not only of settled Navajos but, crucially, of Navajo sheep and goats. While the Hopis used the land for “wood cutting and gathering, obtaining coal, gathering plants and plant products for medicinal, ceremonial, handcrafts and other purposes, visiting of ceremonial shrines, and a limited amount of hunting” (Benedek 1993: 154, quoting from 210 F. Supp. 125), they were not for the most part settled there; nevertheless, the Hopi Tribal

Council claimed that Hopi use was ‘irreconcilable with Navajo use’ (Benedek 1993: 149) and that therefore, partition of the JUA was the only solution to the *Healing* decision:

At Hopi in early 1980 [in the wake of partition], workshops were held to discuss possible Hopi use of the HPL once all Navajos had been removed. *Qua Toqti* [the Hopi newspaper] reported that forty to fifty people attended the first, most of whom were tribal employees. The second workshop brought out ten people. The third workshop could only count two people interested in making use of the land to be vacated by the Navajos. An editorial accompanying the news report complained about weak response to a coupon distributed in the newspaper requesting ideas about how to use the land. After running the coupon for three weeks, the office received only three completed forms, including one from a Navajo. (ibid.: 156)

On the other hand, a small minority of Hopis, led by Abbott Sekaquaptewa, the tribal chair from 1973–81, had extensive cattle interests and saw Navajo herds ranging over the JUA as an obstacle to the development of those interests (it takes four times as much range to graze a cow as to graze a sheep (Bailey and Bailey 1986: 84, 190); as I understand it, approximately eighty acres per cow in the semi-arid conditions of the high desert). 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” (Quoted in Benedek 1993: 143).

The *Hopi Comprehensive Development Plan* supports this information: ‘Cattle grazing

is the dominant land use on the reservation, although only about 5 percent of the Hopi population own [*sic*] livestock. Approximately 70 percent of livestock owners have 15 or fewer cattle' (Hopi Tribe 1988: 31). The *Plan* reports the 1986 Hopi reservation population as 9454, with 'approximately 200 non-Hopis living on the reservation' (p. 13). This means that in 1988 463 Hopis owned livestock; and of those, 324 owned '15 or fewer cattle,' leaving only 139 Hopis with herds larger than fifteen (1988: XIII-16; all my calculations have been rounded to whole numbers).

My own casual observations from traveling around the HPL between 1997 and 1999 and talking with the Navajo residents suggest that there are, as in the past, very few if any Hopi families living in this area, and cattle are not much in evidence either, at least not yet. In 1985 there were only about forty Hopis grazing livestock on the HPL (Hopi Tribe 1988: XIII-16). According to the Accommodation Agreement that is part of the 1996 Navajo-Hopi Land Settlement Act, all the Navajo families combined are allowed 2800 sheep units (SUYL – sheep units year long), up from 1200 under the 1974 Act (Phillips (1997) 'A comparison of the 1974 Relocation Law and proposed accommodation agreement': 3). The Accommodation Agreement uses the measure ('sheep unit') '[d]eveloped by the Soil Conservation Service for the Indian Service to use on the Navajo reservation in the 1930s' (Bailey and Bailey 1986: 84), a time when the BIA, in order to control what it considered to be overgrazing (a condition the Navajos dispute), ordered the elimination of several hundred thousand head of Navajo livestock, many through outright slaughter (Bailey and Bailey 1986: 185-93). With the Long Walk, where we have accounts of women and children and elders, who couldn't keep up with the punishing trek, murdered by US soldiers, the

Navajos recall this stock reduction as one of the two most traumatic moments in their history.<sup>20</sup> One must remember that sheep are integral to the Navajo notion of kinship and thus of personhood. Witherspoon recounts the following from the stock reduction period:

The words of Tall John, confronting the stock reduction officials, strongly testify to how one's own identity is irrevocably attached to his sheep: 'If you take my sheep you kill me. So kill me now. Let's fight right here and decide this thing.' (1977: 89)

The Accommodation Agreement records the standard conversion factors involved in the 'sheep unit': 'one goat-to one sheep, four sheep-to one cow, and five sheep-to one horse' (Phillips (1997) 'Attorney Lee Phillips' Explanation of the Proposed Accommodation Agreement': 6). Based on these conversions, Phillips figured: 'If all 112 homesites [offered by the Hopis on the HPL] sign the Accommodation Agreement we could provide a grazing permit for 25 sheep units per homesite. If, on the other hand, only 70 of the homesites sign an Accommodation Agreement, each homesite would receive a grazing permit for 40 sheep units per homesite' (Phillips (1997) 18 December, 'Memorandum from Lee Brooke Phillips, RE: *Update on Mediation Activities*': 5). Based on the figures I develop in note 9 (nine people per homesite), this would mean a human-to-sheep ratio of between 1: 2.8 and 1: 4.4, depending on how many homesites are finally occupied. To subsist on an economy centered on sheep 'require[s] a human-to-sheep ratio of between 1: 40 and 1: 50' (Bailey and Bailey 1986: 94).

We may wonder at this point who determined why 900,000 acres of high desert can only carry 2800 sheep units – a ratio of approximately one sheep for every 321 acres –

when it is my understanding that twenty acres is the pasturage necessary to graze a sheep under normal conditions on this range. The *Hopi Comprehensive Development Plan* rates the 1984 'HPL carrying capacity . . . [at] 5,686 animal units yearlong,' in which '[a]n animal unit (AU) is equal to one mature cow or the equivalent based upon average daily forage allowance' and '1 sheep = .20 AU' (Hopi Tribe 1988: XIII-9-11; we notice here a difference from the SUYL system in which four sheep are equivalent to one cow). This means that in 1984, with the range 'improved greatly since 1973' (ibid.: XIII-9) because of the stock reductions mandated by the *Healing* panel (see below), the carrying capacity of the HPL in terms of sheep per acre was 1: 32 (using the AUYL rather than the SUYL).

Because of the freeze on grazing mandated by the 1974 Settlement Act, the range should be no less fertile now than then. Indeed, it should be more fertile. A range inventory conducted by the Phoenix Area Office of the BIA in 1996 suggests as much: 'Overall, range conditions on the Hopi Reservation have continued to improve. This trend commenced in the late 1970's and though slowed by periods of drought, it has continued to the present. It is logical to conclude that most of the range area is not being overgrazed during most years' ('Results of a range inventory of the Hopi Indian Reservation' 1996: 10).

The *Hopi Plan* estimates that 'the potential capacity of the HPL is 14,865 AUYL' (Hopi Tribe 1988: XIII-11), which would yield a sheep-to-acre ratio of 1: 12 (AUYL). In 1985 there were only 390 sheep on the Hopi reservation, 'owned by about six people,' and none of these sheep were grazed on the HPL and '[o]nly one Hopi own[ed] more than 95 cattle'(ibid.: XIII-16). What these figures suggest is that a tiny minority of Hopis have large plans for the HPL, either in terms of

cattle-raising or mineral development or both, plans that have mandated the radical restriction of Navajo sheep-raising to far below subsistence levels.

These figures and the question of what they mean for the future of the Navajos on the HPL should be presented to the Hopi Tribal Council, which represents the mineral and cattle interests of the Tribe. First elected in 1936 – with only a minority of Hopis voting positively, in a community where an abstention typically means a decided 'no' (Indian Law Resource Center 1979: 47-8) – the Council has had decidedly little support historically from the Hopi community, which traditionally exists in a highly decentralized form of governance: autonomous villages tied together through matrilineal clan alliances.

Hopi 'factionalism,' or 'fissioning,' the conflict of clans and villages that has led to the formation of new villages up to the very recent past, is a commonplace of the anthropological literature (Schlegel 1979; Titiev 1992). The classic modern instance, the fissioning of Oraibi in September 1906 into the villages of Oraibi and Hotevilla, has its roots in a conflict over leadership and land issues between the linked Bear and Spider clans complicated by their respective political stances ('friendly'/'progressive'; 'hostile'/'conservative')<sup>21</sup> toward the US Government's policy of compulsory Christian schooling for Hopi children (Titiev 1992: 72-87). While Titiev interprets this fissioning as a weakness of Hopi political structure (ibid.: 67-8), hence his use of 'faction' with its negative connotations in the context of western political structures, one might read fissioning as a creative mechanism for coping with conflict, a process of distancing without severance, through the creation of new villages that nevertheless remain connected to the trans-village community: a process that avoids the kind of inter-village destruction represented by Awatovi.

Both before and after *Healing*, Boyden, collaborating with a small minority of relatively wealthy Hopis, in his efforts to fabricate a tribal council at Hopi, worked against both this traditional social structure that historically has allowed conflict-in-comity between Hopi institutions and the conflict-in-comity that has characterized traditional Navajo–Hopi relations. Benedek gives a detailed account of Boyden’s work leading up to the 1974 Settlement Act and the resulting partition, and I quote this account at length, with some bracketed comments:

By 1970, Boyden was proceeding vigorously with a two-pronged attack – in the courts and in Congress. He convinced Arizona Representative Sam Steiger to sponsor another partition bill [one sponsored by Wayne Aspinall had gone ‘nowhere’]. At the same time, Boyden petitioned the district court in Tucson for the Writ of Assistance, claiming the government had failed to provide for Hopi possession of half the JUA. Judge Walsh, one of the *Healing* court’s three judges, wrote that he didn’t have the power to enforce the *Healing* decision and he dismissed the writ. The Ninth Circuit Court of Appeals, however, told Walsh he was wrong; he did have the power to grant such a Writ. The appellate court decision was confirmed by the U.S. Supreme Court, and in 1972, Judge Walsh heard the Hopis’ claims about damage to the range. The Hopis presented the following facts: The BIA had determined the carrying capacity of the JUA in 1964 to be 22,036 ‘sheep units.’ According to a 1968 livestock count, there were animals equivalent to 88,484 sheep units on the JUA. The JUA was overstocked by 400 percent.

On October 14, 1972, Judge Walsh ordered the Navajos to allow the Hopis ‘full and peaceable possession of its undivided, one-half interest in and to said premises’ [even though, as I have argued, the great majority of Hopis had no

demonstrated economic need for this range]. Walsh set out specific steps. He commanded the Navajos to reduce their stock to one half the carrying capacity of the land within a year and a half. After that time, all existing livestock permits would be canceled and new ones issued. Then the Navajos and Hopis would each be permitted to graze animals at one half the carrying capacity of the land.

The reductions proved a tremendous assault on the Navajos’ already tenuous attempts to subsist on the land. BIA figures showed that the 1,150 Navajo families on the JUA ran 63,000 sheep and goats, 5,000 horses and 8,000 cattle, which the BIA calculated to equal 120,000 sheep units [a 1: 15 sheep-to-acre ratio on the 1,800,000 acres of the JUA]. The land was so badly damaged it could only carry 22,036 sheep units [this is a 1: 82 sheep-to-acre ratio and was a BIA assessment that runs counter to HPL Navajos understanding of land management (1: 20 ratio), which is based on the ability to move herds between summer and winter pastures, something the BIA in accordance with partitioning mandates restricted, thus putting more pressure on the range in use]. In order to bring their animals to half the carrying capacity, the Navajos had to reduce their stock by 90 percent, leaving each family with 9.5 sheep units, enough for one cow and one horse, or nine sheep or goats.

To further provide the Hopis access to their half of the land, Judge Walsh forbade any new construction on the JUA unless it was approved by both tribes. . . .

‘The Hopis had built up a lot of political steam,’ says a Washington lobbyist who had worked on the Senate Interior Committee at the time. ‘Boyden had set up a two-track system with the courts and Congress, and the Navajos were being caught between the two forces.’ (Benedek 1993: 147–8)

Thus abstract notions of equity rather than

some reasonable assessment of actual use of the land became the law. Meanwhile, Abbott Sekaquaptewa was lobbying Congress for the partition bill by deploying the historic stereotypes of Hopis and Navajos, conjuring images of range war with marauding Navajos mutilating peaceful Hopis and their herds (ibid.: 150). Sekaquaptewa and Boyden also convinced the Congress that the Navajo reservation, with its comparatively vast expanse, could easily accommodate the relocatees (ibid.: 152), who being 'nomadic' would not mind the move (ibid.: 150). The economic/social/spiritual relationship of Navajos to their land did not penetrate an ignorant and essentially indifferent Congress. Senator James Abourezk of South Dakota, who fought against the partition and relocation legislation, said: "Basically, Congress has no interest in Indians" (ibid.: 151). Considering that Congress has constitutional plenary power over Indian affairs, we might wonder what right it has to such indifference.

Traditional Hopi leaders appeared before Congress in support of the Navajos' right to remain on the land. Sekaquaptewa successfully argued that these traditionals were merely a dissident minority (Benedek 1993: 150-1), when in fact that statement more closely described the Hopi Tribal Council itself. In spite of the facts presented for the Navajos by the population expert Thayer Scudder on the typically devastating impact of compulsory relocation, Senators Barry Goldwater and Paul Fannin of Arizona distributed a letter to their colleagues in the Senate 'warning [them]not to be misled by the "emotional campaign put on by the Navajo Tribe to prevent the relocation of any Navajos living in the Joint Use Area. There is no relocation problem. This is a once in a lifetime opportunity for their families to better their living conditions as well as educational and job opportunities"' (Benedek 1993: 152-3).

In an article published in the *North Dakota Law Review* while the partition bill was before Congress, Attorney Richard Schifter pointed out that whites had never been forced to relocate in the face of wrongful-taking claims against them by Indians (Benedek 1993: 154). Benedek reports:

Sam Steiger was asked in 1974 why the Congress was considering an approach it had not considered in situations where white settlers were living on Indian land. He made Schifter's point for him when he replied, 'I would simply tell the gentleman that the distinction between that situation and this one is that in those instances, every one of those instances, we are dealing with non-Indians occupying, and believing they have a right in the lands. Here, we are dealing with two tribes. This is the distinction.' (Benedek 1993: 154-5)

None of this information, apparently, mattered. Congress passed Public Law 93-531, the Navajo-Hopi Land Settlement Act, on 22 December 1974. In its repression of the complex history of cultural and political collaboration I have been elaborating, the language of Section 1, subsection (a) of the Act epitomizes the legal history of the Land Dispute, implicitly representing the government's assertion in *Healing* that it was merely playing 'the passive role of observer,' that of 'stakeholder,' in this game of property between two Indian tribes (210 F. Supp. 125: 132):

Within thirty days after enactment of this Act, the Director of the Federal Mediation and Conciliation Service shall appoint a Mediator . . . who shall assist in the negotiations for the settlement and partition of the relative rights and interests, as determined by the decision in the case of *Healing v. Jones* . . ., of the Hopi and Navajo Tribes . . . to and in lands within the reservation established by the Executive order of December

16, 1882, except land management district no. 6 (such lands hereinafter referred to as the 'joint use area'). (88 Stat. 1712)

The Act mandated the appointment by the respective tribal councils of two five-person negotiating teams to enter into mediation (Sec. 2 [a]). It also specified that if the negotiating teams could not reach an agreement on partition within six months of the first negotiating session, then the District Court with the mediator's advice had the authority to draw the partition line (Sec. 4 [a]). Given the forces at work – embodied particularly in the property-based oppositional structure of western law that could not comprehend the traditional cultural collaboration between Navajos and Hopis – mediation inevitably failed. The Court drew the line and on 10 February 1977 issued an Order of Partition. Shortly after that, relocation began.

The result has been predictable. As of this moment, between 12,000 and 14,000 Navajos have been removed to other homes far from their sustaining communal relationship to the land, with, by and large, devastating sociocultural effects: 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' (Benedek 1993: 175). Since 1974, the American public has been financing this destructive policy at a cost approaching 400 million dollars. In the broad historical overview that includes the Indian Removal Act of 1831, which set the stage for the catastrophic removal of the Cherokees from their homes in the southeast to what is present-day Oklahoma; the Dawes Act of 1887, which resulted in the taking of 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.

The 1974 Act 'established . . . an independent entity in the executive branch the Navajo and Hopi Indian Relocation Commission' (Sec. 12 [a]) to oversee the process, the destructiveness of which it compounded, at least for the first ten years of its existence, by the ways in which it managed or, more precisely, mismanaged the removal: from sheer insensitivity to the plight of its constituency, to the construction of substandard housing and the lack of counseling offered to people who had to assume the alien role of individual homeowners in towns bordering the reservation (Benedek 1993: 174–5).<sup>22</sup>

The Act directed the Commission to formulate a 'relocation plan,' which was supposed to speak to the material and emotional difficulties of relocation (Sec. 13 [c 1–4]) and to complete the relocation 'by the end of five years from the date on which the relocation plan takes effect' (Sec. 14 [a]). That date for completion was initially set as 6 July 1986. Relocation is still going on. The Settlement Agreement (between the US and the Hopi Tribe), incorporated into the Navajo–Hopi Land Settlement Act of 1996, set a new date for the completion 'of the activities with regard to *voluntary* relocation of Navajos residing on the HPL' at 1 January 2000 (9 [c]; my emphasis).

There are provisions for eviction of those HPL Navajos who, like Katherine Smith, both refuse to sign an Accommodation Agreement and refuse to relocate, though as of the writing of this essay (October 1999) no evictions have

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been set in motion as far as I know. What this refusal points to is an ongoing resistance on the part of a core of HPL Navajos to the government's appropriation of their land as property. This resistance began as a response to the relocation mandate of the 1974 Act. It has largely taken the form, first, of a refusal to relocate 'voluntarily,' as it has pointed to the fact that so-called voluntary relocations have themselves been coerced by the very nature of the legislative process and its enforcement; and second, a refusal, as noted at the beginning of this essay, to sign an Accommodation Agreement with its seventy-five-year leasing arrangements because such an agreement undermines the very basis of the traditional Navajo relationship with the land. For some of these Navajos, the resistance has also taken the form of a legal case, *Jenny Manybeads v. the United States*, which, begun in 1988, is still ongoing in the federal courts and focuses both key issues in the Land Dispute and their implications for the colonial structure of Indian country.

#### VII From the *Manybeads* case of 1988 to the Navajo-Hopi Land Settlement Act of 1996

On 26 January 1988, forty-seven HPL Navajos, represented by Lee Brooke Phillips, sued the US Government 'in the United States District Court for the District of Columbia. The case was subsequently transferred to' the Federal District Court in Phoenix Arizona before Judge Earl Carroll (730 F. Supp. 1515: 1516), who had taken over a complex of Navajo-Hopi cases from Judge Walsh of the *Healing* panel in the wake of partition (Benedek 1993: 388). The Plaintiffs in the case, known as *Jenny Manybeads v. the United States* (after one of the appellants),

assert[ed] seven reasons (claims) why they, and other Navajo tribal members residing on the Hopi Reservation and with similar religious beliefs and practices, have the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings as they wish, and to utilize unlimited water claimed necessary to their needs. (730 F. Supp. 1515: 1516)

The first claim asserted that under the First Amendment's Free Exercise [of Religion] Clause the Navajos had a right to remain on the HPL, which was their sacred land, entrusted to them in the beginning of the world by the Holy People. Removal violated this trust and thus *prohibited* freedom of religion. Judge Carroll, who has proved himself to be no more sensitive to the cultural complexities of Navajo and Hopi life than any other official who has ruled in the Dispute since it began in 1882, rejected this principal claim (three of the other seven claims related to it [730 F. Supp. 1515: 1516-17]), basing his decision on the then recently decided Supreme Court case *Lyng v. Northwest Indian Cemetery Protective Association* (1988), which essentially asserted governmental property rights over Native American notions of communal land. In framing his opinion, Carroll noted:

The principal issue in *Lyng* was whether the Free Exercise Clause prevented the government from constructing a road through a portion of a National Park 'that has traditionally been used for religious purposes by members of three American Indian Tribes.' . . . [The Court held] that the Free Exercise Clause neither restrained the government in such instance nor required it to demonstrate a compelling need to use its property for building a road in the manner contemplated. (730 F. Supp. 1515: 1517)

Writing for the majority in *Lyng*, Justice O'Connor put it succinctly: 'Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land' (Getches *et al.* 1998: 759). Acknowledging that 'for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories"' (ibid.: 761), the dissent in *Lyng*, written by Justice Brennan and joined by Justices Marshall and Blackmun, clearly recognized that in Native American traditional practices *land is religion* and thus to be alienated from the land is to be *prohibited* (to use the key word in the Free Exercise Clause) from practicing one's religion:

Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives form [*sic*] the Native American perception that land is itself a sacred, living being. . . . Within this belief system, therefore, land is not fungible. (Getches *et al.* 1998: 762)

After Judge Carroll, who was clearly not affected one iota in his opinion by the dissent in *Lyng*, granted the defendants' motion to dismiss all claims (730 F. Supp. 1515: 1522), the *Manybeads* case went on appeal to the Ninth Circuit in San Francisco. In 1991 this court mandated the case to mediation between the HPL Navajos, the Hopi Tribe, the Navajo Nation, and the United States. It is this mediation that led to the Accommodation Agreement and the Navajo-Hopi Land Settlement Act of 1996, discussed above.

The history of this mediation is not a happy one from the perspective of the HPL Navajos,

many of whom felt betrayed by Phillips and the negotiating team of HPL Navajos he formed. It would be particularly interesting to find out if the negotiators for the Navajos had studied the *Hopi Comprehensive Development Plan*, which is cited in the Accommodation Agreement, and raised questions of the kind I have raised in this essay, both about plans for coal development on the HPL and the extremely low carrying capacity allowed the HPL Navajos for grazing under the Agreement.

In spite of the protests of a significant number of HPL Navajos, who considered the signing of the leases to be a violation of their sacred obligations to the land, Congress, as noted, incorporated the Accommodation Agreement as Public Law 104-301 (the Navajo-Hopi Land Settlement Act of 1996) and the President signed it into law on 11 October 1996. A hearing on the Accommodation Agreement and its relation to the *Manybeads* case was held in the District Court in Phoenix before Judge Carroll in February 1997 (see 'Closing Arguments Hearing' 1997). By then many of the Navajos on the HPL had rejected the representation of Lee Phillips and had retained other lawyers to press their case for an annulment of the Accommodation Agreement and a continuation of the *Manybeads* suit. But Judge Carroll did not appear at all inclined to roll back a Congressional Act backed by the Hopi Tribal Council, and so the hearing did not concentrate on the fairness of the Accommodation Agreement *per se*, which appeared to be assumed, but on legalistic points related to the continuation of the *Manybeads* case as a class action suit. In point of fact, if Carroll had declared the Accommodation Agreement unfair and thus unraveled the 1996 Act, it would have simply returned all the HPL Navajos to the relocation mandate generated by the 1974 Act and returned the *Manybeads* case to the Ninth Circuit.

Judge Carroll has recently ruled that the *Manybeads* case can continue, even as the 1996 Act and the Accommodation Agreement are in force, and the case is scheduled to come before the Ninth Circuit again; but there is no reasonable expectation of a decision that would in any way change the Act of 1996 and the Accommodation Agreement.<sup>23</sup>

As I understand from the precedent set in *Lyng*, from the history of the Navajo-Hopi Land Dispute, indeed from the whole history of federal Indian law, property interests are going to prevail in the US legal system over Indian conceptions of communal land, unless that system is revolutionized.

In the history of the Land Dispute to date, Congress and the courts have proved destructive, and are now, I believe, exhausted as avenues for any kind of global remedy, though there are always lawyers willing to take tribal money to travel these avenues yet again. At this point resistance should take place on a local level: community organizing to address issues of infrastructure (water and electricity) and services; healthcare, and education, particularly as the latter addresses the issues of critical literacy that I broached at the onset of this essay. Eventually, such a community organization on the HPL might prove effective in helping to change the business-as-usual attitude of the two tribal councils and thus break the collaboration between these councils, the US Government, and Peabody Coal that have stymied but not entirely stopped the potential for traditional creative collaborations between Hopis and Navajos that are grounded in the living notion of sacred, communal land.

The poet Simon Ortiz, a native of Acoma Pueblo in New Mexico and former worker in the uranium industry in the area, places the Land Dispute in a global perspective in his poem 'Our Homeland, A National Sacrifice

Area,' and I would like to quote from this work as a way of ending this brief history:

The Southwestern U.S. is caught in the throes of economic ventures and political manipulation which are ultimately destructive if the U.S. government and the multi-national corporations do not have people and the land and their continuance as their foremost concern. . . . If the survival and quality of the life of Indian peoples is not assured, then no one else's life is, because those same economic, social, and political forces which destroy them will surely destroy others. . . . Those lands can be productive to serve humanity. . . . But it will take real decisions and actions and concrete understanding by the poor and workers of this nation. They will have to see that the present exploitation of coal at Black Mesa Mine in Arizona does not serve the Hopi and the Navajo whose homeland it is. They will have to understand that the political and economic forces which have caused Hopi and Navajo people to be in conflict with each other and within their own nations are the same forces which steal the human fabric of their own American communities and lives. They will have to be willing to identify capitalism for what it is, that it is destructive and uncompassionate and deceptive. (Ortiz 1992: 360-1)

## Notes

1 It probably goes without saying that the term *traditional* is always vexed, because 'tradition' itself is an ongoing dynamic process of cultural construction marked by change, so that *tradition* always contains within it the notion of the disruption of tradition. For example, the 'traditional' Navajo art of silversmithing was not developed until the latter part of the nineteenth century (Bailey and Bailey 1986: 53). When I use the word *traditional* in this essay, I use it with this sense of complication; and, typically, as a marker of practices (as in the notion of *traditional* land use) that oppose certain practices in western culture or those practices as adopted by Indian cultures in situations of conflict, as, for

example, in the conflict, which I will describe in this essay, between the Hopi Tribal Council and the traditional village leaders, the Kikmongwis. I use the term *tradition* in this essay, then, in a political way.

2 While I do not have the space to assess each work critically, I should acknowledge here briefly that revisionary histories of the Land Dispute have been written and in one case filmed, the 1985 Academy Award winning documentary, *Broken Rainbow*. I have mentioned Benedek and alluded to the important Brugge book, *The Navajo–Hopi Land Dispute: An American Tragedy* (1994). In addition, Jerry Kammer's *The Second Long Walk: The Navajo–Hopi Land Dispute* (1980) and Catherine Feher-Elston's *Children of the Sacred Ground* (1988) are visible parts of the written record, as is John Redhouse's exceptionally important monograph *Geopolitics of the Navajo–Hopi Land Dispute* (1985) and the equally crucial 'Report to the Hopi Kikmongwis and other traditional Hopi leaders on Docket 196 and the continuing threat to Hopi land sovereignty' issued by the Indian Law Resource Center in 1979. This list by no means exhausts the published record; neither do these works present a unified viewpoint; nor is anyone of them necessarily consistent with my own. Benedek's work, for example, while providing important information on the political details of the dispute, particularly in the 1970s, lacks a complex view of the historic cultural relations between Navajos and Hopis, and has been criticized by the Navajos with whom I work, whose families and friends are represented in the book, for transgressing the privacy of its subjects. But for anyone interested in understanding the Land Dispute, this list constitutes an important beginning. Whatever its actual heterogeneous origins, my own work, of which this essay is a small part, begins in a critical relationship with this basic bibliography before branching out in various directions, including research in the National Archives on the letters of J.H. Fleming, the Indian agent at Hopi in 1882, long conversations with Navajos involved in the dispute and some time spent with Hopis as well, and extensive reading and analysis of the political and legal documents involved, a barrage of paper that is ongoing and seems unending.

3 For a discussion of this conversion process and its history, see Eric Cheyfitz, *The Poetics of Imperialism: Language and Colonization from The Tempest to Tarzan* (1991; rpt. in expanded edition, Philadelphia: University of Pennsylvania Press, 1997).

4 According to Title 18 of the US Code, Section 1151, 'Indian country,' in addition to reservation land, also includes 'all dependent Indian communities within the borders of the United States' and 'all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same' (see Pevar 1992: 16). There are, then, Indian communities without a reservation land mass, and individual Indians holding land that also come under the colonial bureaucracy of Indian country. 'Indian title' is the right to 'use' that Indians have

on the land to which the Federal Government has absolute title (see Pevar 1992: 19–22). By law, Congress has the right to extinguish Indian title when it will, and need only offer monetary compensation for such taking (I discuss this 'right' in more detail in the course of my argument).

5 Pevar (1992: 26–36) has a concise discussion of the *trust* relationship between Indians and the Federal Government, which stems from the government's obligations under treaties signed with Indian communities and extends past the end of the treaty period (1871) into the present as a question of federal obligation to Indians. The trust relationship begins as an explicitly colonial relation, defining Indians as 'wards' and the government as 'guardian.' 'The modern view is that to the maximum extent possible the trust doctrine should recognize and encourage the autonomy of Indian tribes' (Pevar 1992: 27). Clearly, though, because the colonial structure of Indian country has remained in place, there is a tension, if not a complete contradiction, between the historic and the 'modern' view.

6 'The general trend of the Hopi economy from 1900 to 1940 was a gradual decline in farming and an increased emphasis on herding. Today cattle grazing is the dominant land use on the reservation, although only 5 percent of the reservation population own livestock' (Hopi Tribe 1988: XIII–1). The shift from sheep to cattle is a post-1940 development. 'Traditional Hopi agriculture remains important for cultural and religious reasons. Crops such as corn and beans are used in a variety of foods and play an extensive role in religious ceremonies. About 7,800 acres are currently farmed using traditional methods, a decline of more than 40 percent since 1950' (ibid.: 41). The *Hopi Plan* points to the desirability of increasing agricultural production through irrigation: 'Over 1,000,000 acres of reservation land is arable (capable of being farmed) if irrigated' (ibid.).

7 A particularly fine example of the Native record is the Navajo emergence narrative, the *Diné bahanè: The Navajo Creation Story*, translated by Paul Zolbrod (Albuquerque: University of New Mexico Press, 1984), which as part of its story presents a version of the comity and conflict between Navajos and Hopis.

8 For a history of comity and conflict between the Navajo and Hopi see Brugge 1994: 3–39.

9 The population figures I offer in this paragraph are reasonable, I think, and commonplace (see Benedek 1993: 395), but it should be noted that the official record is unstable because I also think, among other reasons, of the difficulty of defining the numbers that constitute a Navajo family. The numbers that official counts seem to be using for a family is four people, which represents the current paradigm for a western nuclear family (Benedek notes that the Navajo and Hopi Indian Relocation Commission, created by the 1974 Act to oversee relocation was using in the 1980s the figure of '4.5 people per family' (1993: 174)). The problem is that at Navajo we are dealing with extended families, more or fewer of whose members at any given

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time may be on or off the land for various reasons. In 'Navajo nation responses to your questions regarding S.2111' (1997: 2) we find the following: 'It appears that as of December 6, 1996: (1) a total of 2,815 families have received relocation benefits and have had their replacement homes built; (2) 585 families have been certified eligible and are awaiting home construction at various stages of the ONHIR [Office of Navajo-Hopi Indian Relocation] process; and (3) another 405 families are at some stage of appeal [for their benefits], either before ONHIR, in the Courts, or are still eligible to seek review by the Courts. All of these families have sought to comply with the terms and conditions of the 1974 Settlement Law.' Using a problematic multiple of four, we would say that as of the date given, 11,260 people had been relocated (assuming that every family who had a home built for it moved into that home) and that another 2,340 people were in the process of being relocated, a process that should have been finished by now, for a total of 13,600 people, with the fate of another 1620 people in limbo (clearly if one uses a multiple of 4.5 these numbers increase). The population figures for those remaining on the HPL and who as of today have signed or were eligible to sign lease agreements is even more difficult to stabilize because of apparent population movement and uncertain tabulation of family members. As of 18 December 1996, there were 253 families considered as full-time residents of the HPL, and another 317 families, also eligible but who were 'considered to be temporarily away from the H.P.L. homesites and therefore may have to be notified by mail'(Phillips (1997) 18 December 1996, 'Memorandum from Lee Brooke Phillips, RE: *Update on Mediation Activities*': 2). Using the multiple of four again, this gives us a total of 2280 residents, full- and part-time, of the HPL. But this does not take into account residents of the HPL who do not fall under either of these categories; and, of course, one must note the conditional language used in the case of the 317 families, who may or may not be in residence but are still considered residents of the HPL, while even in the case of the full-time residents there are questions raised as to their presence (ibid.) There is the further problem that as of the date of Phillips' documents the Hopis were only offering 112 homesites (Accommodation Agreements) to the 570 families that were deemed eligible to reside on the HPL under the Settlement and were even suggesting 'that they will only be offering 72 Accommodation Agreements because there are only 72 homesites which are still occupied on a full-time basis' (ibid.: 4). Thus the Agreement posits more eligible families than there are homesites, an apparent contradiction in terms. From these figures, we understand that at some point when a census on the HPL was taken, 253 families were living full-time on 112 homesites (approximately 2.26 families per homesite or nine people) and that at some point this number may have been reduced to 72 homesites, which staying with the figures we are using would mean a total of 162.7 families. Where the 317 part-time families were/are

living or might live is not mentioned, but it would appear that while these families are eligible for homesites, there are no homesites for them. This contradiction was broached by Robert Malone, one of the lawyers representing the HPL Navajos, at the 'Closing Arguments Hearing' held in the District Court in Phoenix on 21 February 1997 before Judge Earl Carroll (1997: 12-13), but I know of no resolution to it. (By the way, each homesite is limited to three acres of living space (adjustable) and ten acres of farm land, with common grazing land beyond these limits included (Phillips (1997) 'Attorney Lee Phillips' explanation of the proposed accommodation agreement': 4-6). One should also remember that we are considering a highly dispersed population (2000 to 3000 people on 900,000 acres) without phones or paved roads, making census tabulation very difficult. Because there are no jobs in the immediate area, except for a limited number at the Peabody mines, people have to travel long distances to work and so cannot be in residence full-time in their homes.

10 Map 2 shows a small area of the lease extending on to the HPL. This extension also appears in maps reproduced in Redhouse (1985: 32) and Haven (1997: 59). Haven states: 'Currently the mining is only taking place on the Navajo Partitioned Lands, while the Hopi Partitioned Lands are not being mined. The Hopis do not want mining on their HPL and Peabody has agreed to stop mining within 500 feet of the HPL' (ibid.: 57). As I will discuss in what follows, since 1979 the Hopis have a stated ban on mining on their reservation. But, apparently, the current leases do provide for a small section of the HPL to be mined; and according to a recent conversation (2 November 1999) I had with someone in the Navajo Mineral Office, that mining is taking or about to take place. Nevertheless, if Peabody wants to mine any further into the HPL it will need new leases, requiring the consent of both tribes.

11 'In 1985, tribal revenues totalled about \$16.1 million. . . . About 90 percent of these revenues were derived from three sources: grants and contracts from federal agencies and the State of Arizona (55 percent), coal royalties and water sales from the Black Mesa-Kayenta Mine (20 percent), and interest and dividends from tribal investments (15 percent)' (Hopi Tribe 1988: VI-2).

12 While this document is supposed to be open to the public and should be widely available to those Navajos living on the HPL because it impacts on their future and is in fact referred to in the leases they have signed (discussed below), it has not been made available to them. It was only in the past few days as I finished a first draft of this paper (7-9 August 1999) that I was able to obtain a copy. I understand that the Navajo-Hopi Land Commission (an entity formed by the Navajo Nation Council to aid residents of the HPL) has a copy, which, as of writing, they have not yet circulated to their constituency, which has a right and a need to read it.

13 In *Healing v. Jones and Manybeads v. the United States*, the number referenced is the page number; in *Johnson v.*

*McIntosh and Cherokee Nation v. Georgia*, the number is that of the section in which the reference occurs.

14 In Map 1, the entire area inside the rectangle represents the 1882 reservation.

15 For a discussion of increasing Anglo pressure on the Navajos, see Bailey and Bailey 1986: 74–77.

16 Many accounts of this massacre exist. See, for example, Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533–1960* (1962; reprinted, Tucson: University of Arizona Press, 1992), pp. 192–3.

17 For authoritative discussions of *sovereign immunity* in Indian affairs see Cohen 1988: 283–85; and Getches *et al.* 1998: 383–8.

18 Benedek attributes this ruling to Felix Cohen, whom she calls ‘The Solicitor General of the United States’ (1993: 133). Redhouse (1985: 9) attributes this decision to the Solicitor of the Interior Department, which makes sense, though he does not name Cohen specifically.

19 ‘In 1964 and 1966, Peabody Coal Company consolidated a 64,858 acre coal lease that straddled the Navajo land and the recently partitioned Navajo–Hopi JUA [see below for an explanation of the JUA]. The lease provided Peabody up to 400 million tons of coal from the Navajo lease and from the Navajo and Hopi Joint Use area. The coal lease was renegotiated in 1987 between Peabody Coal Company and the Navajo Nation, which authorized removal of an additional 270 million tons of coal from the lease (Navajo Minerals Dept., 1995). . . . The amended lease was renegotiated up to the mandated minimum royalty rate of 12.5% (Navajo Minerals Dept., 1995). The Federal Coal Lease Amendment Act of 1975 mandated a 12.5% royalty on federal coal leases. . . . The original Navajo coal royalty was 30 to 37.5 cents per ton before the lease was renegotiated up to the 12.5% royalty rate (Navajo Minerals, 1995). When the arrangement was originally negotiated, thirty cents per ton was approximately equivalent to about 10% royalty at three dollar per ton figure. As the price of coal increased, however, the royalty did not. Therefore by 1987 when the contract was renegotiated the effective royalty had shrunk to about 1–2% royalty. . . . Both tribes receive a 6.25% royalty rate from the 12.5% that is mandated. . . . The B.I.A. lease No. 9910 carries a 6.25% royalty to each tribe while the B.I.A. lease No. 8580 carries a full 12.5% royalty interest to the Navajo Tribe [because this lease covers land solely on the 1934 Navajo Reservation]’ (Haven 1997: 59–60). The Navajos are now suing Peabody Coal and the government because apparently, through Peabody lobbying efforts, the Secretary of the Interior quashed a recommendation from within the department to raise the royalty rate to 20 percent in 1987 (Barry Meier, *New York Times*, 18 July 1999, A1).

20 There are numerous accounts of the brutality of this march. See, for example, *Navajo Stories of the Long Walk Period* (Tsaile, Navajo Nation, Arizona: Navajo Community College Press, 1973).

21 These are decidedly western terms that reduce complex Hopi interactions to easy-to-grasp political oppositions that privilege as ‘progressive’ ‘friendly’ attitudes toward US colonialism.

22 In November 1988, the Relocation Commission was designated through Congressional legislation (Public Law 100-666) ‘The Office of Navajo and Hopi Indian Relocation’ (ONHIR). There was a provision in the 1974 Act to add 250,000 acres of land to the Navajo reservation to accommodate those who were relocated but because of political and legal problems this land, the so-called New Lands, was not selected until 1983, not acquired until 1985, and no families were relocated there until 1987 (personal communication from Tim Varner of ONHIR, 22 October 1999), so that for the first ten years of relocation most relocations took place off-reservation, thus compounding the pressures of the removal. Remarking that the ‘Commission’s counseling program failed utterly,’ Benedek notes: ‘By 1985, more than one third of the Navajos who had received relocation houses had already sold them or lost them, and another thirty percent had seriously encumbered their homes’ (1993: 176).

23 On 19 April 2000, the Associated Press reported that the Ninth Circuit had rejected the *Manybeads* suit.

## References

- Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1882* (1882) Washington: Government Printing Office.
- Bailey, Garrick and Bailey, Roberta Glenn (1986) *A History of the Navajos: The Reservation Years*, Santa Fe, NM: School of American Research Press.
- Benedek, Emily (1993) [1992] *The Wind Won’t Know Me: A History of the Navajo–Hopi Land Dispute*, New York: Vintage Books.
- Brugge, David (1994) *The Navajo–Hopi Land Dispute: An American Tragedy*, Albuquerque: University of New Mexico Press.
- Cherokee Nation v. Georgia* (1831) 30 US (5 Pet.) 1, 8 L. Ed. 25.
- ‘Closing Arguments Hearing’ (1997) Transcript of the proceedings of 21 February before Judge Earl Carroll to hear matters having to do with the relation of the Accommodation Agreement between the Hopi Tribe and the HPL Navajos and the *Manybeads* case, Phoenix, Arizona: United States District Court.
- Cohen, Felix (1988) [1942] *Handbook of Federal Indian Law*, Buffalo, NY: William S. Hein Co.
- Getches, David H., Wilkinson, Charles F. and Williams, Robert A. Jr. (1998) *Cases and Materials on Federal Indian Law*, 4th edn, St Paul, MI: West Group.

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- Haven, Henry W. Jr. (1997) *Stratigraphy and Coal Resources of the Wepo Formation (Late Cretaceous), Black Mesa Basin, Northeastern Arizona*, MS thesis in Geology, Northern Arizona University.
- Healing v. Jones* (1962) Cited as 210 F. Supp. 125.
- Hopi Tribe (March 1988) *Hopi Comprehensive Development Plan*, Kykotsmovi, Arizona.
- Indian Law Resource Center (1979) 'Report to the Hopi Kikmongwis and other traditional Hopi leaders on Docket 196 and the continuing threat to Hopi land and sovereignty,' Washington DC.
- Iverson, Peter (1989) [1981] *The Navajo Nation*, Albuquerque: University of New Mexico Press.
- Jenny Manybeads v. United States of America* (1989) cited as 730 F. Supp. 1515.
- Johnson v. McIntosh* (1823) 21 US (8 Wheat.) 543, 5 L. Ed. 681.
- Kammer, Jerry (1980) *The Second Long Walk: The Navajo-Hopi Land Dispute*, Albuquerque: University of New Mexico Press.
- McCain, John (1996) 'Press release: McCain charts course for 5 year phase-out of Navajo-Hopi relocation program', 24 September.
- 'Navajo Nation responses to your questions regarding S.2111' (1997) Letter to Senator John McCain signed by Herb Yazzie [Attorney General of the Navajo Nation], Albert Hale [then President of the Navajo Nation] and Steven C.Boos [Chief Legislative Counsel], 7 March.
- Ortiz, Simon (1992) *Woven Stone*, Tucson: The University of Arizona Press.
- Pevar, Stephen (1992) *The Rights of Indians and Tribes*, 2nd edn, Carbondale: Southern Illinois University Press.
- Phillips, Lee Brooke (1996) 'Understanding the Accommodation Agreement and the *Manybeads v. United States* settlement process: educational documents prepared for the Navajo families residing on the HPL by *Manybeads* Attorney Lee Phillips,' Flagstaff, AZ. (The documents contained in this package are each numbered separately, so when citing this package in the body of my text I have included the particular document title as well as the page number.)
- Prucha, Francis Paul (ed.) (1994) [1975] *Documents of United States Indian Policy*, 2nd edn, expanded, Lincoln: University of Nebraska Press.
- Redhouse, John (1985) *Geopolitics of the Navajo Hopi Land Dispute*, Albuquerque: Redhouse/Wright Publications.
- 'Results of a range inventory of the Hopi Indian Reservation' (1996) Conducted by Knoll-Smith Range Consultants of Ignacio, Colorado, 20 November, Phoenix, Arizona: Bureau of Indian Affairs.
- Schlegel, Alice (1979) 'Sexual antagonism among the sexually egalitarian Hopi,' *Ethos* 7: 124-41.
- Silko, Leslie Marmon (1986) [1977] *Ceremony*, New York: Penguin Books.
- Titiev, Mischa (1992) [1944] *Old Oraibi: A Study of the Hopi Indians of Third Mesa*, Albuquerque: University of New Mexico Press. Originally published in Cambridge, MA: The Peabody Museum of American Archaeology and Ethnology, Harvard University.
- Wilkinson, Charles F. (1996) 'Home dance, the Hopi, and black mesa coal: conquest and endurance in the American southwest,' *Brigham Young University Law Review* 1996: 449-82.
- Witherspoon, Gary (1977) [1975] *Navajo Kinship and Marriage*, Chicago, IL: The University of Chicago Press.