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RECENT DEVELOPMENTS: JUSTICE TOO LONG DELAYED ON THE NAVAJO RESERVATION: THE "BENNETT FREEZE" AS A CASE STUDY IN GOVERNMENT TREATMENT OF NATIVE AMERICANS

NAME: JOSH D. MOORE**SUMMARY:**

... For many years this land has been the home of the **Hopi and Navajo** Indians. ... Originally conceived as a means of encouraging negotiation over an age-old land dispute between the **Hopi and Navajo** tribes, the Bennett Freeze gradually developed into an intrusive and burdensome policy for the Navajo people, forcing them to live in poverty by denying them the right to enlarge, to maintain, and even to repair their homes. ... Virtually every proposal for development after the 1972 order was submitted by the **Navajo**. ... The modification gave his office the authority to grant unilateral approval for Navajo development requests that were denied by the **Hopi Tribe**. ... These predictable effects of the Act underscore Congress' failure not only to satisfy Commissioner Bennett's original goal, but to achieve even its own goal of protecting each tribe's interests. ... Insofar as such lands constituted less than ten percent of the Bennett Freeze area, this restriction would have had minimal impact. ... On October 16, 1992, the **Hopi Tribe** filed a motion to stay the lifting of the Freeze pending appeal. ... The Freeze may finally be lifted, but the indignities suffered by the **Navajo** remain.

...

TEXT:

[*222] The desert in northern Arizona stretches for hundreds of miles in every direction from Cedar Ridge. Juniper bushes and tumbleweeds are scattered across this high and barren region saddled upon the Colorado Plateau. For many years this land has been the home of the **Hopi and Navajo** Indians. ¹¹ Leonard Sloan, a **Navajo**, lives in Cedar Ridge with his family; his parents' home, where he grew up, is next door. ¹²

Leonard Sloan, his wife Maybelle, his mother-in-law, his father-in-law, and his four children live in a one-room octagonal hogan made of rough cedar logs and mud that measures less than twenty feet at its widest part. The floor is bare dirt. The Sloans have electric power, supplied by an extension cord running under the sand to an outlet in his father's hogan, but no running water. The beds along the walls are neatly made, and clothes enough for eight people hang from the ceiling.

Leonard Sloan has long wanted to replace his home, which has become too small for his growing family, and unsafe due to the weight of the mud roof and the age of the logs. Almost 700 families on this part of the reservation have similar aspirations. ¹³ Yet for over twenty-five years, until September 1992, these families were rendered helpless to change their living conditions by the "Bennett Freeze." The Freeze imposed an extensive and enduring ban on development on the Western **Navajo** Reservation encompassing approximately 2 million acres of land in northeastern Arizona. ¹⁴

Originally conceived as a means of encouraging negotiation over an age-old land dispute between the **Hopi and Navajo** tribes, the Bennett Freeze gradually developed into an intrusive and burdensome policy for the Navajo people, forcing them to live in poverty by denying them the right to enlarge, to maintain, and even to repair their homes. The Freeze thus came to represent a pattern of misguided administrative oversight and callous legislative action. Although it has now been [*223] lifted, ¹⁵ the damage it wrought upon families like the Sloans will not be easily remedied.

* * *

The western part of the Navajo Nation, known as the 1934 Reservation and later as the Bennett Freeze Area, was established by an act of Congress that set aside the land for the "Navajo and such other Indians as may already be located thereon." ⁿ⁶ Due to the impracticalities of sharing title to the land, a dispute developed between the Navajo and Hopi tribes. ⁿ⁷

In an effort to resolve this dispute at an early stage, Robert L. Bennett, then Commissioner of Indian Affairs, imposed the "Bennett Freeze" on the lands on July 8, 1966. ⁿ⁸ Bennett's administrative order required "formal action by the Hopi as well as the Navajo Tribe on all those cases which hypothecate the surface or subsurface resources for exploration, mining, rights-of-way, traders, or other use or occupancy authorized by permit lease or license." ⁿ⁹ In other words, the two tribes had to agree upon any proposed economic activity in the area prior to undertaking that activity. Bennett intended this temporary burden on the tribal governments to provide an incentive to come to the table and negotiate. ⁿ¹⁰ However, no agreement was ever reached.

Bennett's order virtually halted economic development on the affected lands, causing severe hardships for the residents. ⁿ¹¹ On August 4, 1972, in order to relieve some of these burdens, then Assistant Secretary of the Interior Harrison Loesch exempted two administrative areas from the freeze. ⁿ¹² The first exemption applied to Tuba City, a Navajo town, and the second to the Village of Moencopi, a Hopi village. ⁿ¹³ Because virtually the only region of the Bennett Freeze Area [*224] that was (and still is) settled by the Hopis was within the Moencopi administrative area, ⁿ¹⁴ this modification altered the fundamental balance of the Freeze. That is, since all Hopi land became exempt, the Hopi no longer had any need to submit proposals for joint-tribe approval. Virtually every proposal for development after the 1972 order was submitted by the Navajo. ⁿ¹⁵ As a result, the order allowed the Hopis to assume *de facto* unilateral regulatory power over all development in the Freeze Area. With that power, they systematically began to deny Navajo requests for development, imposing great hardships on the Navajo families who lived on the land. ⁿ¹⁶ The Freeze's original goal of bringing the two tribes to the bargaining table had been lost.

Because of the consistent Hopi denials of Navajo development requests, then Commissioner of Indian Affairs Morris Thompson decided to modify the Freeze in 1976. ⁿ¹⁷ The modification gave his office the authority to grant unilateral approval for Navajo development requests that were denied by the Hopi Tribe.

In 1980, Congress became involved in the ongoing dispute by passing a statute purporting to codify the Bennett Freeze as it then existed. ⁿ¹⁸ Although the House Report on this statute stated that the intention was simply to "statutorily confirm an existing administrative freeze on development . . . as such freeze was originally implemented," ⁿ¹⁹ the language of the statute bore little resemblance to the original language, ⁿ²⁰ and substantially broadened the impact of the freeze.

First, the Act retained one of the two prior modifications of the Freeze, the administrative areas exemptions ordered in 1972, and discarded the other, the Bureau of Indian Affairs appeals process implemented in 1976. The Act thereby restored the Hopis' unilateral [*225] power over development. Congress never enumerated the reasons for taking this step backward. ⁿ²¹

Second, the Act placed restrictions on "any new construction or improvement to the property . . . including public work projects, power and water lines, public agency improvements, and associated rights-of-way." ⁿ²² These restrictions went even further than the original Freeze, which had never limited utility extensions or housing repairs, improvements, or additions. ⁿ²³ Consequently, the 1980 legislation significantly expanded the scope of the Freeze.

That the 1980 Act both broadened the Freeze and reestablished unilateral Hopi veto power suggests that Congress misunderstood the original goal of the Freeze. ⁿ²⁴ Indeed, whereas the original goal was to encourage negotiation, Congress' goal, according to one member, was "to restore the status quo in the 1934 Reservation Area" and to assure that "neither tribe [would] be able to attain an unfair advantage over the other." ⁿ²⁵ Congress thus intended the Freeze to prevent any development that might have affected either tribe's legal interest in the disputed lands.

But the framework for resolution established by the Act frustrated even this new Congressional goal. In August 1982, asserting the renewed *de facto* regulatory powers conferred upon it by the Act, the Hopi Tribe placed a complete "moratorium on any and all construction activities" on the freeze area, "for an indefinite period." ⁿ²⁶ This moratorium extended to all types of construction, including simple repairs on dilapidated or damaged homes. ⁿ²⁷ As a consequence, Navajos who [*226] lived under the Freeze during this time were denied the right even to repair a faulty roof or weatherize their homes properly. Old homes began falling into disrepair, and large families were forced to crowd into small, rickety, and unsafe shelters.

These predictable effects of the Act underscore Congress' failure not only to satisfy Commissioner Bennett's original goal, but to achieve even its own goal of protecting each tribe's interests. According to the Act's criteria for defining these interests, the only type of new "development" that should have been prohibited was Navajo migration to unsettled lands occupied exclusively or jointly by the Hopi in 1934.ⁿ²⁸ Insofar as such lands constituted less than ten percent of the Bennett Freeze area, this restriction would have had minimal impact.ⁿ²⁹ Instead, Congress established a scheme that did not protect each tribe's interests, as it claimed, but rather burdened the Navajo with even greater hardships.

The living conditions of the Navajo residents became so bad that in 1988 Congress passed an amendment to the codified Freeze authorizing the Department of the Interior to review Hopi denials of Navajo development requests.ⁿ³⁰ In particular, the review provision allowed the Secretary of the Interior to approve construction if he could determine that it was "necessary for the health or safety of the Navajo Tribe, the Hopi Tribe, or any individual who is a member of either tribe."ⁿ³¹

Although the amendment was intended as a positive remedial measure, its requirement that applicants demonstrate necessity placed an onerous burden on the Navajos. It required them to provide thorough documentation in each case, including statements by health professionals, [*227] engineer's certificates, detailed material lists, cost estimates, and technical drawings.ⁿ³² Compiling these records, which often approached 100 pages in length, proved extraordinarily expensive and time-consuming. Requests could take up to a year to process fully and were never assured of success.ⁿ³³ Although several of the appeals were granted, the Freeze area's residents, virtually without exception, did not have adequate resources to prepare the requests.ⁿ³⁴

On September 25, 1992, after twenty-six years of development restrictions, United States District Court Judge Earl Carroll announced that the Bennett Freeze would be lifted "pending any appeal that might be taken."ⁿ³⁵ On October 16, 1992, the Hopi Tribe filed a motion to stay the lifting of the Freeze pending appeal.ⁿ³⁶ In his order, Judge Carroll stated that "continued widespread imposition of the Freeze would be inequitable and unjustified."ⁿ³⁷ He upheld the lifting of the Freeze on virtually the entire 2 million acres, excluding only the 152,843-acre joint use area. With respect to this area, he reimposed the Freeze in a very limited sense, prohibiting only the establishment of new homesites while authorizing virtually all other development.ⁿ³⁸

* * *

The Bennett Freeze was the product of careless and callous policymaking and faulty policy execution. At each point along the line of its evolution, the intention of the last policymaker was misunderstood or exploited by the next. Just as in the "telephone" game in which a phrase is whispered from one person to the next in a long line, the end result was a distorted and incoherent version of the original words. The tragic consequence of this incoherence was an enduring affront to the basic rights of the Navajo people.

One can scarcely imagine a non-Indian population tolerating, or being forced to tolerate a similar affront. Indeed, citizens of the United States consider control over one's personal property to be a fundamental [*228] right. A town ordinance preventing people from repairing their homes, thus causing properties to become dilapidated and decayed, would cause immediate public commotion. Yet, when applied to Native Americans, the twenty-six year reign of the Bennett Freeze passed virtually unnoticed.

In a number of similar land disputes between Indians and non-Indians, Congress has consistently acted to relieve any development burdens on the non-Indians.ⁿ³⁹ For example, the Massachusetts Indian Land Claims Settlement Act recognized that "the pendency of this lawsuit has resulted in severe economic hardships for the residents of the town of Gay Head by clouding titles to much of the land in the town"ⁿ⁴⁰ and provided for removal of these burdens. Congress not only failed to relieve the burdens on the Navajos, it actually added to them. As Peterson Zah, president of the Navajo Nation, once stated, "if there were white people involved, there would never be a freeze."ⁿ⁴¹

The Fifth Amendment to the United States Constitution prohibits regulatory takings without just compensation. It remains to be seen, of course, whether Indian nations could sustain a constitutional claim against restrictions like those faced by the Navajos under the Bennett Freeze. In the alternative, they could look to international human rights law,ⁿ⁴² where support is growing for the right to development.ⁿ⁴³

* * *

By the time the Bennett Freeze was lifted, the harm it had caused was irreparable. Over a period of more than a quarter of a century, new generations had been born into families, and newer generations still had been born to these; because of the Freeze, many of these [*229] people were born into physical suffering and indignity. That the Freeze

has now been lifted does little to relieve this pain. At a recent community meeting in the Cameron Chapter of the Navajo Nation, a woman said, "I am hearing that the land is unfrozen and I'm listening and I'm thinking it's all lies again." "44 Even if it's not "all lies again," for twenty-six years, the government has forced Leonard Sloan to crowd his growing family into a tiny home and has prohibited any improvements. The Freeze may finally be lifted, but the indignities suffered by the Navajo remain.

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Legal Topics:

For related research and practice materials, see the following legal topics:

Energy & Utilities Law Exploration, Discovery & Recovery General Overview Governments Native Americans Authority & Jurisdiction Governments Native Americans Property Rights

FOOTNOTES:

n1 See generally JOHN D. LOFTIN, RELIGION AND HOPI LIFE IN THE TWENTIETH CENTURY (1991); PETER IVERSON, THE NAVAJO NATION (1981).

n2 This case-specific information comes from several visits to the Sloan household by the author during the winter and spring of 1992.

n3 Statistics on file with Navajo-Hopi Legal Services, Tuba City, Ariz., and with the *Harvard Human Rights Journal*.

n4 See *Vernon Masayesva v. Peterson Zah*, CIV 74-842 PCT EHC (D. Ariz., Sept. 25, 1992) [hereinafter *Masayesva I*], *partial stay pending appeal granted in part and denied in part*, *Vernon Masayesva v. Peterson Zah*, CIV 74-842 PCT EHC (D. Ariz., Dec. 21, 1992) [hereinafter *Masayesva II*] (on file with the *Harvard Human Rights Journal*).

n5 *Masayesva I*, *supra* note 4.

n6 Act of June 14, 1934, ch. 521, 48 Stat. 960, 961 (1934).

n7 See, e.g., Letter from Robert Bennett, Commissioner of Indian Affairs, to Graham E. Holmes, Area Director, Bureau of Indian Affairs, Phoenix, Arizona (July 8, 1966) (on file with the *Harvard Human Rights Journal*).

Eventually, in 1974, Congress authorized the tribes to bring suit in District Court "for the purposes of determining the rights and interests of the tribes" in this land. 25 U.S.C. § 640d-7(a) (1974); see *Masayesva I*, *supra* note 4, at 4.

n8 Letter from Robert Bennett to Graham Holmes, *supra* note 7.

n9 *Id.* at 3.

n10 *Id.*

n11 *See, e.g.*, Letter from Harrison Loesch, Assistant Secretary of the Interior, to Peter MacDonald, Chairman, Navajo Tribal Council (Aug. 4, 1972) (on file with the *Harvard Human Rights Journal*).

n12 *Id.*

n13 *Id.*

n14 EMILY BENEDEK, THE WIND WON'T KNOW ME: A HISTORY OF THE NAVAJO-HOPI LAND DISPUTE 296 (1992).

n15 Statistics on file with the Navajo-Hopi Legal Services, Tuba City, Ariz.

n16 *See, e.g.*, United States Government Memorandum from Wilbur D. Wilkinson, Area Director, Navajo Area Office, to Assistant Secretary of Indian Affairs (June 17, 1986) (on file with the *Harvard Human Rights Journal*) (noting that the Hopi Tribe had "mercilessly pocket-vetoed nearly all Navajo requests requiring their consent").

n17 Letter from Morris Thompson, Commissioner of Indian Affairs, to Peter MacDonald, Chairman, Navajo Nation (July 16, 1976) (on file with the *Harvard Human Rights Journal*) (noting that the administrative freeze had already had a "harsh impact" and that the Navajos' "hopes and aspirations for a better standard of living have suffered through no fault of their own").

n18 25 U.S.C. § 640d-9(f) (1980). Robert Bennett recently acknowledged that he deliberately imposed the freeze as an administrative order that could be undone at any time so that Congress would not have to become involved and complicate matters. George Hardeen, '*Freeze*' Creator Did Not Expect Many Hardships, NAVAJO TIMES, Oct. 1, 1992, at 2.

n19 H.R. REP. No. 544, 96th Cong., 1st Sess., at 5 (1974).

n20 *See supra* note 9, and accompanying text.

n21 *See, e.g.*, 25 U.S.C. § 640d-9(f); 126 CONG. REC. H16824 (1980); S. REP. No. 373, 96th Cong., 1st Sess. (1979).

n22 25 U.S.C. § 640d-9(f).

n23 Letter from Robert Bennett to Graham Holmes, *supra* note 7.

n24 As an example of this misunderstanding, the Senate Report states that the Bennett Freeze was a result of the fact that "[s]ome years ago, the Department of the Interior attempted to limit development in the Moencopi area of the Navajo Reservation . . ." S. REP. No. 373, *supra* note 21, at 7, a plain distortion of Bennett's goal of encouraging negotiations. Such misunderstandings seem attributable in large part to the fact that the Freeze provision was only a small section of the much larger "Navajo and Hopi Relocation Amendments Act," 25 U.S.C. § 640d, and received scant attention compared with the rest of the Act. *See supra* note 21.

n25 126 CONG. REC. H16824 (1980) (statement of Rep. Marriott).

n26 Letter from Stanley K. Honahni Sr., Chairman, Hopi Negotiating Committee, to Calvin Nez, Caseworker, Western Navajo Agency (Aug. 26, 1982) (on file with the *Harvard Human Rights Journal*).

In view of the difficulties experienced in an earlier effort to remove Navajos from lands partitioned to the Hopis in 1974, see JERRY KAMMER, *THE SECOND LONG WALK: THE NAVAJOHOPI LAND DISPUTE* (1987), it was predictable that the government would be reluctant to embark on a similar removal effort in this case. Consequently, one way for the Hopi Tribe to protect a favorable judgement in the underlying land claim was to force all Navajo development to a halt in an attempt to lessen Navajo attachment to the land, or even encourage a large-scale exodus from the area. The moratorium can be seen as just such an attempt.

n27 The Vice-Chairman of the Hopi Tribe, Patrick Dallas, recently wrote that "the Hopi Tribe's position is, and has always been, that the construction restrictions imposed by [the Bennett Freeze statute] apply to repairs and renovations of existing structures." Letter from Patrick Dallas, Vice-Chairman, the Hopi Tribe, to Roman Bitsuie, Executive Director, Navajo-Hopi Land Commission (Mar. 16, 1992) (on file with the *Harvard Human Rights Journal*).

n28 Congress required lands jointly used in 1934 to be "partitioned by the District Court on the basis of fairness and equity," 25 U.S.C. § 640d-7(b), but did not provide specific instructions about what factors could be considered. However, there was no reason to believe that factors other than the four factors taken into consideration in the partition of the 1882 Executive Order Reservation, 25 U.S.C. § 640d-5 (b,c,e,f), would be applied, and in fact, Judge Carroll relied heavily on these standards in his decision. *Masayesva I*, *supra* note 4, at 9-11. Of these factors, only one bears any relationship to new development: "The boundary lines . . . shall be established so as to include the higher density population areas of each tribe within the portion of the lands partitioned to such tribe." 25 U.S.C. § 640d-5(b). Consequently, the Act, if properly applied to protect each tribe's interests, should have restricted new development only insofar as that development would have resulted in an increase in the population density of a disputed area.

n29 *Masayesva I*, *supra* note 4, at 15, 21.

n30 25 U.S.C. § 640d-9(f)(3)(B) (1988).

n31 *Id.* By contrast, the Senate Report on the 1980 Act suggested that an appeal process be decided on the basis of "whether the proposed use or development would adversely affect the ultimate legal right of either tribe to partition based on use of land." S. REP. No. 373, *supra* note 21, at 7.

n32 Letter from Eddie Brown, Assistant Secretary, Indian Affairs, to David L. Nash, Navajo-Hopi Legal Services Program (Mar. 16, 1990) (on file with the *Harvard Human Rights Journal*).

n33 This information is based on personal experience of author in filing numerous construction requests during 1991-1992.

n34 *Id.*

n35 *Masayesva I*, *supra* note 4, at 56.

n36 Brief for the Hopi Tribe's Motion for Partial Stay Pending Appeal at 2, *Masayesva II*, *supra* note 4.

n37 *Masayesva II*, *supra* note 4, at 4.

n38 *Id.* at 5-6.

n39 The Seneca Nation (N.Y.) Land Claims Settlement Act of 1990, the Washington Indian (Puyallup) Land Claim Settlement Act of 1989, the Massachusetts Indian Land Claims Settlement Act of 1987, the Florida (Seminole) Land Claims Settlement Act of 1987, the Connecticut Indian Land Claims Settlement Act of 1983, the Florida Indian Land Claims Settlement Act of 1982, the Maine Indian Claims Settlement Act of 1980, the Rhode Island Indian Claims Settlement Act of 1978, and the Alaska Native Claims Settlement Act of 1971. 25 U.S.C. § 1771.

n40 25 U.S.C. § 1771(2).

n41 Jason DeParle, *Tribal Dispute Keeps Some Navajos in Squalor*, N.Y. TIMES, Aug. 16, 1992, A1, A21.

n42 *See generally*, Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992).

n43 Mr. Keba M'Baye, who is generally credited for introducing this concept, stated that "development is the right of all men. Each man has the right to live and the right to live better." Hector Gros Espiell, *The Right to Development as a Human Right*, 16 TEX. INT'L. L.J. 189, 192 (1981) (quoting Keba M'Baye, *Le Droit au developpement comme un droit de l'Homme*, 5 REVUE DES DROITS DE L'HOMME 503, 505 (1972)).

n44 George Hardeen, *Navajos Play Waiting Game on 'Freeze'*, FLAGSTAFF DAILY SUN, Oct. 5, 1992.