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Ms. Taylor examines the propriety of allowing potentially responsible parties (PRPs) under CERCLA to bring cost recovery actions against other PRPs. Ms. Taylor argues that in its recent decision, *Pinal Creek v. Newmont Mining Corp.*, the Ninth Circuit should have followed the lead of other circuits and allowed the plaintiff PRP to bring a suit for cost recovery under section 107 of CERCLA.

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damage. Exxon subsequently moved for summary judgment on the noneconomic claims.

The Alaska Natives class claimed that noneconomic damages were recoverable under general maritime law, the Alaska Environmental Conservation Act,¹⁵³ and the common law of Alaska. The class essentially stated a public nuisance claim for noneconomic damage under federal maritime law. In granting Exxon's motion for summary judgment, the district court relied on the "special injury rule" as defined through common law and the Restatement (Second) of Torts.¹⁵⁴ According to the special injury rule, a private party can bring suit for a public nuisance only if she can show a special injury different in kind, not just in magnitude, than that suffered by the general public. In affirming Exxon's motion for summary judgment, the Ninth Circuit held that the noneconomic injury suffered by the class was not different in kind than that suffered by the general public and therefore the special injury rule was not satisfied.

The Ninth Circuit acknowledged that the oil spill affected the communal life of the Alaska Natives. However, it held that although the injury suffered by the class might be different in magnitude, it was not different in kind than that suffered by other Alaskans. In reaching this conclusion, the court reasoned that the Alaska Constitution does not limit the right to a subsistence lifestyle to Alaska Natives.¹⁵⁵ Accordingly, the Ninth Circuit held that the class failed to show any special injury sufficient to support a claim for public nuisance, and therefore affirmed the district court's grant of summary judgment in Exxon's favor.

4. *Masayeva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997).

The Ninth Circuit heard three appeals involving the long-running dispute between the Navajo Nation and Hopi Tribe over the ownership, control, and use of 1.8 million acres of Native American reservation land in northeastern Arizona and the neighboring portions of Utah and New Mexico. These cases arose out of remedial provisions of the Navajo-Hopi Settlement Act of 1974,¹⁵⁶ which allowed partition of reservation land that the courts had declared jointly owned by both tribes, but which had been used exclusively by the Navajo. The Navajo overgrazed the land, at least in part because the Department of the Interior had a policy of refusing Hopi grazing permits while simultaneously granting Navajo permits for more grazing than the land could support. Congress hoped to resolve this inequity, and the Settlement Act specifically authorized litigation between the Hopi and Navajo for enumerated damages. The Settlement Act mandated partition of the disputed reservation land, a 1.8 million acre plot known as the Joint Use Area (JUA). The first of the three Settlement Act cases before the Ninth Circuit involved a judgment entered in favor of the Hopi for the

¹⁵³ ALASKA STAT. § 46.03.822 (Michie 1996).

¹⁵⁴ RESTATEMENT (SECOND) OF TORTS § 821C(1) cmt. b (1989).

¹⁵⁵ ALASKA CONST. art. VIII, §§ 3, 15, 17.

¹⁵⁶ Navajo-Hopi Settlement Act of 1974, 25 U.S.C. § 640d to 640d-28 (1994).

fair value of the grazing and agricultural use of the JUA between 1962, when the JUA was established by court order, and 1979, when the land was partitioned. The second appeal is known as the "owelty case," and involved an action for the difference in value between the land awarded to the Hopi Tribe and the land awarded to the Navajo Nation. The third appeal arose out of an action by the Hopi against the Navajo and the United States to recover damages to the JUA caused prior to partition.

In the first case, on appeal, the district court awarded the Hopi \$18,187,132 for the Navajo's grazing and agricultural use of the Hopi's one-half interest in the JUA from 1962 to 1979. The Navajo appealed, contending that the Settlement Act was unconstitutional because it divested the Navajo of a vested property right to use the entire JUA for grazing. The Navajo also argued that the district court lacked jurisdiction because determination of the fair value of grazing and agricultural use of the JUA constituted a nonjusticiable political question. The Ninth Circuit affirmed the judgment of the district court, concluding that the Navajo never had, either by contractual promise or court decree, a right to use the JUA to the exclusion of the Hopi. The Navajo argued that they had been given such a right by the court in *Healing v. Jones*,¹⁵⁷ a case in which an Arizona district court found that the Navajo had no right to use the land until 1931, when the Secretary of the Interior impliedly exercised his authority under an 1882 executive order to "settle" the Navajo.¹⁵⁸ However, the Ninth Circuit found that the *Healing* decision granted the Hopi and Navajo joint and undivided interests in the JUA, and that the Settlement Act was a legitimate effort by Congress to implement the *Healing* decision. As to the argument that the court lacked jurisdiction to determine fair value of grazing and agricultural use because it was a nonjusticiable political question, the Ninth Circuit found that calculating "fair value" was within the expertise of the judiciary.

The Navajo also challenged several evidentiary rulings and factual findings regarding the valuation of their grazing and agricultural use of the JUA. The Navajo challenged the district court's decision to admit the testimony of two of the Hopi's expert witnesses concerning the fair value of grazing and growing corn on the JUA. The Hopi's grazing expert, Dr. Workman, was an economist. The Navajo argued that Dr. Workman lacked foundation to support his testimony because he was not a real estate appraiser, and that his methodology did not meet the test for expert scientific testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁵⁹ The Ninth Circuit held that Dr. Workman's twenty-five years as a professor of Range Economics and his numerous peer-reviewed publications on subjects related to his testimony qualified him as an expert witness, and therefore the district court did not abuse its discretion in allowing his testimony. The Ninth Circuit also held that the Navajo's *Daubert* argument was misplaced because Dr. Workman's testimony was based on a straight-

¹⁵⁷ 210 F. Supp. 125 (D. Ariz. 1962).

¹⁵⁸ *Id.* at 157.

¹⁵⁹ 509 U.S. 579 (1993).

forward application of range economics, rather than a novel scientific theory.

The Navajo also challenged the decision to admit testimony from Robert Francy, the Hopi's expert appraiser who discussed the value of corn grown on the JUA. Francy's opinion was based on what others had told him about corn prices, and the Navajo argued that this was inadmissible hearsay. The Ninth Circuit held that the Navajo had failed to timely object to Mr. Francy's opinion and therefore had waived their right to assign error on appeal. Furthermore, the Ninth Circuit held that the third party statements provided Mr. Francy with background information from which he formed his own conclusions, and that this kind of reliance is a regular practice of appraisers and not improper.

The Navajo had two challenges to the district court's valuation of the agricultural use. First, they argued that the court erred in adopting Mr. Francy's conclusion that the Navajo had actually farmed the JUA from 1962 to 1979, because Mr. Francy's conclusion was based on speculation. The Ninth Circuit held that because the record showed that the conclusion was based on Bureau of Indian Affairs reports, aerial photographs, maps, documents, and personal spot checks, the district court did not clearly err. The Navajo also argued that there was insufficient evidence to support the conclusion that there was a commercial market for the corn grown by the Navajo on the JUA. The evidence showed that most of the corn was consumed by the Navajo themselves, but the Ninth Circuit concluded that this personal consumption supported the finding that a market existed for the corn.

The Navajo made three challenges to the district court's valuation of grazing on the JUA. First, they contended that the value of their grazing should have been calculated in the manner that ranch land is typically valued: based on the land's carrying capacity (the amount of grazing the land can sustain without irreparable damage). The Navajo grazing practice had exceeded the carrying capacity of the land by as much as seven times. Because of this overgrazing, the land's carrying capacity was drastically reduced, and therefore the land's rental value was only one-fifth the typical rate in Arizona. Instead of relying on carrying capacity, the district court valued the land according to estimates of the actual amount of grazing done by Navajo animals on the JUA. The Ninth Circuit concluded that consumption beyond the carrying capacity should exact a premium charge and that the district court did not err in so charging the Navajo for their overgrazing. The Navajo also argued that the court overestimated the number of animals grazed on the JUA, but the Ninth Circuit held that the district court's estimates of the number of animals were not clearly erroneous. Finally, the Navajo contended that the district court should have valued grazing by using federal land lease rates, rather than adjusted private Arizona lease rates. The Ninth Circuit concluded that because there were no federal lease rates for the first decade of the use, and federal lease rates reflect policy decisions and not market realities, the district court did not err in using private rates.

The second appeal before the Ninth Circuit was called the owelty case. When land is unequally divided in a partition, one former joint tenant pays a sum of money to another to compensate her for receiving the lesser value. This sum is the owelty. In the owelty case, the district court determined that there was no difference in value between the Navajo half of the land and the Hopi half, so it did not order an owelty award. The Settlement Act authorized the district court to award damages for any difference in value between the halves of the land with improvements and grazing capacity fully restored. The Hopi appealed, arguing the district court undervalued the Navajo land by misinterpreting the owelty statute. The Navajo cross-appealed, arguing that the Hopi should have been judicially estopped from seeking owelty, adding that the Hopi got the better land and should give the Navajo an owelty payment. The Ninth Circuit held that the district court erred in its interpretation of the Settlement Act and remanded for a new calculation of the amount of owelty due the Hopi. The court affirmed the district court's denial of owelty to the Navajo, and concluded that the Hopi were not judicially estopped from seeking owelty and were entitled to prejudgment interest on the payment.

The Ninth Circuit first addressed the Hopi's argument that the district court misinterpreted the language of the Settlement Act directing that the value of the partitioned land "shall be not less than its value with improvements and its grazing capacity fully restored."¹⁶⁰ The district court determined the value of the land with its grazing capacity fully restored and with only the improvements that were necessary to restore the grazing potential, such as roads, stream diversions, irrigation canals, and fences. The Hopi argued on appeal that the district court misconstrued the statute and should have valued all improvements, including schools, hospitals, churches, hogans, trading posts, and other buildings that contribute to the value of the land as an Indian reservation with potential for grazing, agriculture, residential use, and commercial enterprise. The Navajo contended that the land should be valued strictly as a cattle ranch and that most of the buildings were worthless.

The Ninth Circuit first examined the legislative history of the Settlement Act to determine which valuation method was correct. Because the legislative history referred to improvements without indicating what type of improvements Congress indicated, the court turned to the language of the statute itself. Congress did not qualify the word "improvements," so the Ninth Circuit found that the statute did not expressly limit the type of improvements to be considered in valuing the land. After reaching this conclusion, the Ninth Circuit then examined the Hopi argument that the value of the partition should include all structures that contribute to the value of the land as an Indian reservation. Because the structures were owned either privately or by the United States and were not partitioned to either party, the court rejected the Hopi argument. Instead, the Ninth Circuit followed the Hopi's alternative theory and held that while the value of the improvements should not be calculated, the district court should have

¹⁶⁰ 25 U.S.C. § 640d-5(d) (1994).

calculated the land's enhanced value due to the presence of the improvements. The court remanded on this issue, instructing the district court to make findings of fact regarding the contributing value of the schools, hospitals, churches, and other structures to the value of the JUA.

The Navajo cross-appealed for an owelty payment from the Hopi based on testimony at trial of an expert who believed that the Hopi land fully restored would support more grazing than the Navajo land fully restored. The district court had noted that the same expert had admitted to a ten to fifteen percent margin of error in his estimates of grazing capacity. Based on this margin of error, the Ninth Circuit concluded that the district court correctly found that any difference between the value of the Hopi and Navajo lands was not statistically relevant. In addition, the court held that the Hopi were entitled to prejudgment interest, affirming its decision in *Hopi Tribe v. Navajo Tribe*¹⁶¹ that the Settlement Act provision permitting the Navajo and Hopi to sue one another in federal court allowed for recovery of such interest.

The third and final appeal before the Ninth Circuit involved the Hopi's suit against the Navajo and the United States for damages to Hopi land caused by Navajo overgrazing prior to the 1979 partition. The district court concluded the Hopi could recover the postpartition difference in value "between the land 'as is' and the land fully restored."¹⁶² None of the parties contested this ruling. However, both the Hopi and Navajo challenged the district court's calculation of damages and its decision to absolve the United States of liability on the grounds that the government had made reasonable efforts to protect the range. The Ninth Circuit found that the challenges to the district court's calculations lacked merit, except for the Hopi argument that the district court wrongly denied damages for lost grazing opportunity on lands that the Hopi had set aside for wildlife.

The Ninth Circuit then affirmed the district court's determination that the United States was not liable for the overgrazing of the JUA. The district court applied a reasonable person standard, and while the Ninth Circuit held that a reasonable trustee standard would have been more appropriate, it did not reverse because the Hopi had not argued that the district court measured the government's fault by the wrong standard. The Ninth Circuit concluded that the government was not strictly liable.

In his dissenting opinion, Judge Fletcher argued that the district court should have applied a reasonable trustee standard in measuring the government's action or inaction, and that the government had not taken reasonable steps to prevent overgrazing by the Navajo. Judge Fletcher asserted that a reasonable trustee must do more than a reasonable person to prevent destruction to property, and the Ninth Circuit should have acknowledged this important distinction. The judge recommended remanding to the district court to properly apply the heightened reasonableness standard.

¹⁶¹ 46 F.3d 908 (9th Cir. 1995).

¹⁶² *Masayeva*, 118 F.3d at 1382.