

## Property Outline

- Topics covered: real property, personal property and housing.
- For appellate issues relating to real property and housing cases, *see* Appellate Procedure Outline.
- For cases holding that there is no remedy for land disputes under the Domestic Abuse Protection Act, *see* Family Law Outline.
- For cases relating to the interpretation of leases as contractual instruments, *see* Contracts Outline.
- For cases relating to NHA's statutory exemption from levy, *see* Remedies Outline.
- For cases relating to *inter vivos* gifts of property, *see* Probate Outline.

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## I. Navajo land policy

### A. *Diné Bi Beenahaz'áanii*

#### 1. Value of land to the Navajo people generally

- The most valuable tangible asset on the Navajo Nation is its land. The land belongs to those who live on it and depend upon it for survival – the Navajo Nation. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- The Navajo Nation, within the four sacred mountains, is the Tribe's hogan and source of strength and wisdom. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).
- There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would exist and without which the Navajo People would be caused to disperse like the Jewish People following the fall of Jerusalem. Land is basic to the survival of the Navajo People. *Tome v. Navajo Nation*, 4 Nav. R. 159 (W.R. Dist. Ct. 1983).

#### 2. Communal nature of Navajo land tenure

- Generally, lands within the Nation are held in trust by the United States for the Navajo Nation as a collective entity. Individual Navajos may possess interests in such lands, through customary use, or through modern interests such as homesite leases, business site leases, or land use permits. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- The decision of the people through their local and national governments on how to use particular tracts of land is premised upon the "importance of *k'e* to maintaining social order." *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- A land use decision by the people through their governments is the balance struck between the individual land user and the needs and desires of the community. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- The statutory laws of the Nation and the ordinances or resolutions of the Chapters are thus the regulatory scheme for land use set by Navajo governments. Individuals may not change these laws unilaterally or may not take such actions as will jeopardize the interests of the Navajo Nation in the land. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- The collective Navajo people, who have chosen to utilize their common land for economic benefit, should be respected under *k'e*. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- There is no ownership of land on the Navajo Nation as exists in the States. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- The concepts and rights associated with "fee land" in American jurisprudence do not always apply when sorting out analogous property rights to Navajo land. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Traditionally, Navajos have always occupied land in family units, using the land for subsistence. Families and substance residential units hold land in a form of communal ownership. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- As a general principle, Navajoland tenure is based on communal or family land use, and "that which is beneath [the] feet" (*shi keyah*) of most Navajos is held for general family use. *Matter of Harvey and Begay*, 6 Nav. R. 413 (Nav. Sup. Ct. 1991).

- While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival the Navajo People. Therefore, as a matter of Navajo common law, the *Navajo Times* is the property of the Navajo People and not particular individuals or government administrations. Since it is the property of the Navajo People, this court is required to assume the jurisdiction of a guardian or custodian over it to determine whether it is being managed in the best interests of the Navajo People. *Tome v. Navajo Nation*, 4 Nav. R. 159 (W.R. Dist. Ct. 1983).

### 3. Traditional Navajo land usage

- There is a traditional tenure by way of customary residence where there were traditional winter and summer sheep camps. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).

### 4. Homes

#### a) Spiritual nature of home

- A home is not just a dwelling, but a place at the center of Navajo life. Based on this principle, the Supreme Court scrutinizes procedures to make sure they protect a home owner's ability to maintain a healthy home and family. *Green Tree Servicing v. Duncan*, No. SC-CV-44-06, slip op. (Nav. Sup. Ct. August 18, 2008).
- The home, the *hooghan*, is more than a dwelling place. It is also the center for Navajo relationships, the place for children to develop an understanding of *k'é*, as well as a spiritual center. The home is made a special place by the prayers said by the residents, prayers not just for the present for the future and the future generations who will live within it. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).
- The loss of a home deeply affects Navajo concepts of family and spirituality. There is a strong policy to provide significant procedural safeguards before a home is lost, including heightened appellate protections through a new factual review by the Navajo Nation's court of last resort. *Allen v. Fort Defiance Housing Corp.*, 8 Nav. R. 759 (Nav. Sup. Ct. 2005).
- The Navajo people do not refer to their mode of living as a way of life; it is the way of life. At the center of the Navajo world is their shelter, the Hogan. There are two types of hogans; Male hogan is the forked poles hogan and the Female hogan is the six sided pole dwelling with a dirt dome. A fire place is always part of the hogan and is located at the center of the hogan. *Curtis v. AMCO Ins.*, 8 Nav. R. 838 (Ship. Dist. Ct. 2005).
- The Navajo hogan is more than just a place to eat and sleep and the concept of it as a "home" bears little resemblance to a white person's attitude towards his dwelling place. The hogan is a gift of the gods and as such occupies a place in the sacred world. *Curtis v. AMCO Ins.*, 8 Nav. R. 838 (Ship. Dist. Ct. 2005).
- The first hogans were built by the Holy People of turquoise, white shell, jet and abalone shell. The round hogan is symbolic of the sun and its door face east, so that the first thing that a Navajo sees in the morning is the rising sun ... Father Sun, one of the most revered of the Navajo deities. Construction of a hogan is a community affair and once completed, the new hogan is consecrated with a Blessing Way rite, whereby the Holy People are asked to "let this place be happy." *Curtis v. AMCO Ins.*, 8 Nav. R. 838 (Ship. Dist. Ct. 2005).

- Even the positions of persons and objects within the hogan are prescribed in the legends: the south side of the hogan belongs to the women, the north to the men. The male head of the family, and any distinguished visitors, sits on the west side facing the doorway. The placement of all persons and seating arrangement during ceremonies or other important events are prescribed in considerable place. The Hogan song is sung before the set ceremony is performed. *Curtis v. AMCO Ins.*, 8 Nav. R. 838 (Ship. Dist. Ct. 2005).
- The Navajo home is not only a roof over one's head, but the place where families are established and children grow and learn; it is the center of all Navajo relationships. Children are conceived in the home. Certainly in the recent past children were born at home and some may still be, even in this modern era of hospitals. In the home children are given their education and knowledge of who they are and their place in the world. In the home children learn their responsibilities to themselves and to their family members, and where children learn the concept of *k'e* that will guide their relationships throughout their life. The home in Navajo thinking is not a mere piece of property in which one holds an equity interest, but *hooghan* rises to a level of spiritual centrality. *Green Tree Servicing v. King*, 8 Nav. R. 833 (W.R. Dist. Ct. 2005).
- The Navajo home is not only a roof over one's head, but the place where families are established and children grow and learn; it is the center of all Navajo relationships. Children are conceived in the home. Certainly in the recent past children were born at home and some may still be, even in this modern era of hospitals. In the home children are given their education and knowledge of who they are and their place in the world. In the home children learn their responsibilities to themselves and to their family members, and where children learn the concept of *k'e* that will guide their relationships throughout their life. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).
- The home in Navajo thinking is not a mere piece of property in which one holds an equity interest, but *hooghan* rises to a level of spiritual centrality. Navajo families perform sacred ceremonies and say prayers in the home. After successive prayers and ceremonies by the introduction and reintroduction of corn pollen on the retaining beams, the sprinkling of white and yellow corn and the spreading out of soil to the west, the blessedness of the home is compounded, building in power and spirituality. This concept of home is not a mere concept of property ownership. It is much more. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).

b) Home must be fit for habitation before it is blessed

- Navajo courts will recognize the implied warranty of habitability for new home construction as an expression of the Navajo cultural view that a hogan must be complete and fit for habitation before it is blessed. *Brown v. Todachoney*, 7 Nav. R. 37 (Nav. Sup. Ct. 1992).

c) Life centers around the home

- Navajo life centers on the home, traditionally a hogan. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).

d) Does not apply to commercial property

- Unlike a residential land situation, in which a home in the context of Navajo custom and tradition is more than just a dwelling place, there is no comparable interest held by individuals using land owned by the collective Navajo people for commercial purposes. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

e) *Diné bi beenahaz'áanii* in eviction proceedings

- *K'e* does not mandate an attempted negotiation for a “renewal” when the alleged lessee has no underlying right to the property and has operated without respect for the community. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- As long as landlord followed the procedures laid out in the forcible entry and detainer statute, allowing tenant to be heard by the court, there is no additional requirement under *k'e* to perfect eviction. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

5. Matriarchal nature of Navajo land tenure

- The factors for awards of grazing permits are to be considered and applied consistent with the Navajo Fundamental Law which defines the role and authority of Diné women in our society. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- The legal factors to be considered in awarding grazing permits and the traditional law on women's role in Navajo society should be considered together to decide the most logical trustee. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- Because they are keepers of the clan line and land base, Navajo women are often the most logical persons to receive land use rights to hold in trust for the family. They are also the ones who are burdened with putting the land base to its most beneficial use by managing the herd and the land upon which the herd graze for the benefit of the clan group. This means that keepers have to balance the number of sheep units with the size of the land base, making sure the land base remains compatible, sustainable and feasible for sufficient continued beneficial use. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).

6. Right of authority over the property

- Matriarch, as the remaining original proprietor of the property and as an elder of the family, has the authority to make decisions regarding the property, including who is or is not to live there. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- Clan and family relations are paramount in deciding the control and authority over the land. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).

7. Traditional water easements

- Traditional Navajo custom states that while certain areas may be designated for exclusive use by an individual or a family, a source of water would be available for all, no matter whose exclusive area for grazing the source water was situated within. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).

B. Navajo land policies

*Note: See supplement on Navajo land policies, Section VII of this outline.*

1. Authority of Navajo Nation to resolve land disputes

- The Navajo Nation has full jurisdiction to resolve land disputes, particularly with regard to subleases. *Window Rock Mall, Ltd. v. Day*, 3 Nav. R. 58 (Nav. Ct. App. 1981).



## 2. General cases on Navajo land policy

- Navajo statutes establish the following policies to be considered when determining the award of a grazing permit: 1) animal units in grazing permits must be sufficiently large to be economically viable, 2) land must be put to its most beneficial use, 3) the most logical person should receive land use rights, 4) use rights must not be fragmented, and 5) only those who are personally involved in the beneficial use of land may be awarded it. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- Navajo land is to be utilized for the beneficial use of the Navajo people. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- The land policies of the Navajo Nation are as follows: (1) animal units in grazing permits must be sufficiently large to be economically viable; (2) land must be put to its most beneficial use; (3) the most logical heir should receive land use rights; (4) use rights must not be fragmented; and (5) only those who are personally involved in the beneficial use of the land may inherit it. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- The land policies of the Navajo Nation are as follows: (1) animal units in grazing permits must be sufficiently large to be economically viable; (2) land must be put to its most beneficial use; (3) the most logical heir should receive land use rights; (4) use rights must not be fragmented; and (5) only those who are personally involved in the beneficial use of the land may inherit it. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

## 3. One must use land or lose it

- Navajo Nation lands are to be used wisely and well, and that those who actually live on them and nurture them should have rights to their use. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Another aspect of the Navajo land system that differs from the land system of the States is the “use it or lose it” aspect of possession in Navajo property rights. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- While the “use it or lose it” requirement would not apply as rigorously to range management units, it certainly applies to possessory interests that are utilized through grazing permits or customary usage. It operates like the legal concept of adverse possession, except that adverse possession rules are very strict and are protective of the named owner's possessory rights. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Such a system does not permit recourse to a fee system, where an owner can hold exclusive use against all other users simply because the owner has his or her name on a piece of paper. The holder of a grazing permit must regularly assert the possessory interest by taking advantage of that right through actual use and possession. If it is not exercised, someone else can take over the right to use the same land by putting it to good use. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Grazing permit, and all accompanying grazing rights, would be deemed valid where permittee grazed without challenge for sixty-five years. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- As noted in the discussion above concerning the principle of “use it or lose it” which is tied to Navajo land use, individuals do not hold symbolic claims for land use. There are no prescriptive rights in land. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- A person continues to use a certain area and that use is the basis for a person's claim. If a person moves to another area, the person cannot maintain a claim to another area simply on the basis that

he or she once used that area. Maintaining a cornfield in an area that is tolerated by others using the area for grazing does not mean that one maintains the same rights to grazing over another individual who took over grazing in that area. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).

- What counts is who continues to use the land, not who uses the land first. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- One must use land or lose it. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- One who does not use property for a prolonged period of time has relinquished their rights to it. *Matter of Estate of Evans*, 6 Nav. R. 494 (W.R. Dist. Ct. 1989).

#### 4. All transfers of land interests are regulated by land boards and grazing committees

- Transfers of land rights are subject to regulation by district land boards and grazing committees. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

#### 5. Forms of Navajo land ownership

- Unless a Navajo has a grazing or agricultural use permit, a homesite or business lease, or rights to a customary use area, he or she has no rights or interest in trust land beyond those of every other member of the Navajo Nation. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- Grazing permits, homesite leases and land-use permits are interests in land. *Johnson v. Dixon*, 4 Nav. R. 108 (Nav. Ct. App. 1983).
- Land use permits are an interest in land and not personal property. *Matter of Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971).

#### 6. Preservation of land resources

- The Navajo Government has a policy to preserve the forage, land and water resources of the Navajo Reservation and to build up those resources where they have deteriorated. *Johnson v. Yellowman*, 7 Nav. R. 545 (Ship. Dist. Ct. 1997).

#### 7. Policy against fragmentation of land

- Overgrazed land cannot be put to beneficial use. This practice is consistent with preserving a large area by discouraging the fragmentation of grazing permits and the land base. The Navajo Nation policy is to discourage the breaking up of land. Progressive fragmentation of the land decreases usefulness of the land. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- The Navajo Supreme Court developed the concept of a customary trust to insure that agricultural land did not become subdivided too far through inheritance to no longer be practicable. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- The Navajo Nation has long disapproved of fragmenting land. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

## 8. Abandonment of property

- Because so many individuals and families make use of specific plots of land, but federal law prohibits those individuals from possessing title to it, it is essential that concepts of Navajo common law be examined, relative to the specific facts of the case, to determine who has possessory interest in the land and whether someone has abandoned it. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- Under Navajo custom, abandonment of land has considerations far beyond whether a person physically lives on the land, and the fact that a person physically moves away from the property does not create a presumption that another person may claim or use that property. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- Under Navajo custom, considerations regarding whether land has been abandoned include landmark identification, *k'é* and the placement of one's umbilical cord. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).

## C. Role of the federal government

### 1. Secretary of Interior must sign contracts relating to trust land

- The Secretary of Interior must approve all contracts relating to trust land, and contracts not bearing that signature are null and void. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).

### 2. Navajo land is held in trust by United States

- Trust land is not held in fee. It is owned by the United States in trust for the Navajo people. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).

### 3. Federal allotments of land for the benefit of individual Navajos

- Tribal courts have jurisdiction over allotted land in divorce actions. *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).
- The statute which deals with allotment claims provides that an Indian may bring an action in a United States district court and that such courts have jurisdiction. The statute is permissive and not mandatory. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- Cases to transfer allotments to and from Indians can be brought in state court. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- Allotted lands were given to the Navajo Nation with a condition attached to them, the condition being they would be held for individuals and alienated under the authority of the United States. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- There is a strong federal interest in allotted lands and their transfer, an interest which is not assumed by the government of the Navajo Nation. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- It has been the policy of the executive and legislative arms of the Navajo Nation to permit the United States to engage in transactions relating to allotted lands, and under the doctrine of immunity in the exercise of jurisdiction over a foreign state and its property, Navajo courts should not normally exercise jurisdiction over such matters. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).

- Since the activities of the United States in the area of allotted lands have been permitted and the sphere of interest of the United States has been consistently exercised, Navajo courts should defer to the United States as a matter of comity when dealing with allotted lands. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- The Navajo courts will not try allotment actions where the United States would have to be a party. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- Where a party desires a declaration that a transfer of allotted land is fraudulent and coercive and a judgment requiring the current individuals holding the deed to the land to sign it back and account for its use, a Navajo court can order them to sign one and hold them in contempt if they refuse to do so. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).
- Navajo courts will not (1) directly deal with allotment titles until the law is further clarified, (2) try title to allotted land or (3) attempt to compel United States officials to transfer it, but in any action where action upon the person only is demanded, Navajo courts may act. *Benally v. John*, 4 Nav. R. 39 (Nav. Ct. App. 1983).

#### D. Role of the Resources Committee

- The Resources Committee is authorized to oversee and regulate all activities within Navajo Nation land including action which may involve disposition or acquisition of resources, surface disturbance or alteration of the natural state of the resources. *Boyd & McWilliams Energy Group v. Tso*, 7 Nav. R. 458 (Ship. Dist. Ct. 1994).
- There is no express provision that the Resources Committee must approve rights of way for split estates. *Boyd & McWilliams Energy Group v. Tso*, 7 Nav. R. 458 (Ship. Dist. Ct. 1994).

#### E. Land Exchange Act

- The Navajo Nation Government and the BIA are the entities charged with the responsibility of ensuring that the Land Exchange Act is complied with. *Boyd & McWilliams Energy Group v. Tso*, 7 Nav. R. 458 (Ship. Dist. Ct. 1994).

#### F. General Allotment Act/Dawes Act

- As part of the allotment program authorized by the General Allotment Act, also known as the Dawes Act, Act of February 8, 1887, 24 Stat. 388, the United States set aside lands both within and outside the current Navajo Reservation in trust for individual Navajos, and not for the Nation itself. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).

#### G. Authority of the Office of Hearings and Appeals

- Under prior law, grazing disputes, initially heard by the Grazing Committee for the purpose of mediation, were referred to the Resources Committee empowered, at that time, to act as the Central Grazing Committee (the final administrative arbiter in land disputes). In 2003, this hearing system was repealed by the enactment of Navajo Nation Council Resolution CO-59-03 (October 31, 2003). Resolution CO-59-03 amended 2 N.N.C § 695, the authority of the Resources Committee by delegating to the Office of Hearings and Appeals (OHA) the authority to resolve all grazing, land, and fencing disputes, except those appeals pending an official decision by the Resources Committee. Thereafter, the Resources Committee no longer heard grazing disputes; this responsibility was transferred to OHA. The OHA is now the hearing body for disputes; it makes

decisions via findings of fact and conclusions of law. *Charlie v. Benally*, No. SC-CV-19-07, slip op. (Nav. Sup. Ct. December 10, 2008).

- The Office of Hearings and Appeals has jurisdiction to hear and decide a grazing dispute which predates Navajo Nation Council Resolution CO-59-03 where an official decision is inadequate to conduct an appellate review. The OHA has the expertise for conducting hearings and the means to provide an expeditious mechanism to resolve such disputes. *Charlie v. Benally*, No. SC-CV-19-07, slip op. (Nav. Sup. Ct. December 10, 2008).

## II. Customary trusts and customary use areas

### A. Customary trusts

#### 1. Nature of the Navajo customary trust

- Land use on the Navajo Nation is not a land title; it is a “customary trust,” giving the right to the individual, usually for a group, to use a section of land. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).
- When property is conveyed in trust, the trustees generally take on the estate as is necessary to enable them to perform the trust. The legal estate of a trustee is measured by the purposes of the trust and their performances. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).
- A customary trust is where an elderly Navajo permittee gives a grazing permit to a child, to be held in trust for other children or grandchildren. The “trustee” is the person who holds the grazing permit for the benefit of those who actually graze sheep or cattle on the land. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- Land placed in a customary trust is held for the benefit of the family unit. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- Customary trusts hold property for the family. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- Wife of decedent had right and duty to manage livestock for benefit of beneficiaries. *Matter of Trust of Benally*, 1 Nav. R. 10 (Nav. Ct. App. 1969).

#### 2. May be used for business purposes

- Trusts are not limited to land titles. Trusts have been used for many different business purposes. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).

#### 3. Impact of customary trust on land ownership

- Once a customary trust is set up, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among more and more owners. Rather the permits remain intact, and the last surviving member of the original trust will end up owning the entire permit. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- Where heir is not last surviving member of the original trust, but is the only one using the permit, she may be entitled to inherit the permit if the Court finds it has been abandoned by the last surviving member of the original trust. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- Once a customary trust is set up, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among

more and more owners. Rather the permits remain intact, and the last surviving member of the original trust will end up owning the entire permit. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

#### 4. Trustee should be one who will put land to its most beneficial use

- Customary trusts hold property for the family. The trustee is the person most likely to make beneficial use of the land. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

#### 5. Duty to cooperate

- Members of a trust must cooperate. The court may exclude from the trust any person unlikely to cooperate. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- The most important limitation on a court's use of the customary trust in probating an estate is that the members of the trust must be able to cooperate if the trust is to be viable. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- The most important limitation on a court's use of the customary trust in probating an estate is that the members of the trust must be able to cooperate if the trust is to be viable. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

### B. Customary use areas (CUA)

- Navajo courts do recognize a possessory interest that is often tied to customary usage. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- In addition to grazing, Navajos use customary use areas for small agricultural plots. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- When a person uses or improves the land with buildings, corrals, fence, or other landmarks, he creates for himself a customary use ownership interest in the property. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- Landmarks used for the indemnification of customary use are usually dwellings, and may include a house, a hogan, a *chaha'oh* (summer shade house), or even a foundation for a planned dwelling. Sheep and livestock corrals or enclosures are other landmarks that identify prior usage or a claim to an area. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- Land rights for livestock usually are held as a CUA on land occupied by the user's family for generations. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- A CUA is a land right bestowed upon those who have improved land, typically inhabited by their ancestors. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- With a CUA, ownership vests in the builder and includes the right to sell or dispose of land, the right to exclude others and of exacting damages for willful destruction. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- To obtain a CUA, the improvement must be "from the ground up," and does not include refurbishing an existing structure. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- One may not obtain a CUA where, at the time of building, they knew the Navajo Nation proposed to dispose of the land. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- Customary use is a Navajo concept that defines an individual Navajo's prescribed boundary of the use and occupancy of land to an area traditionally inhabited by his/her ancestors. *Joe v. Willie*, 6 Nav. R. 545 (Ship. Dist. Ct. 1990).

- A CUA is a land right bestowed upon those who have improved land, typically inhabited by their ancestors. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).
- Customary usage is a property right for which the owner deserves compensation if taken by the sovereign. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

### III. Livestock

#### A. General cases regarding the nature of Navajo grazing permits

##### 1. Permits necessary for livestock grazing

- Livestock grazing is not allowed on Navajo trust land without a valid grazing permit. Such a permit allows its holder to own livestock and to graze that livestock on Navajo trust lands to which he or she has use rights. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- The Navajo Nation grants permits for agricultural use within irrigation project areas and for livestock grazing across the reservation. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- Livestock grazing is not allowed on Navajo trust land without a valid grazing permit. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- No person is entitled to more range area than needed to support the number of livestock allowed on his or her grazing permit. *Joe v. Willie*, 6 Nav. R. 545 (Ship. Dist. Ct. 1990).
- All livestock grazed on the Navajo Reservation must be covered by an authorized grazing permit issued by the Superintendent based upon the recommendation of the District Grazing Committee. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- All livestock grazing on the reservation must be covered by a grazing permit. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

##### 2. Valuable nature of permits to Navajo people

- The grazing permit given to a family is special and cared for with *hózhóǫ́jǫ́* (Blessing Way) prayers and instructed by family members to always keep alive and within the family unit out of respect for the forefathers and mothers. *In the Matter of the Estate of Luna*, 8 Nav. R. 779 (Kay. Fam. Ct. 2003).
- A grazing permit is *lina* – life, food, clothing, responsibilities, teachings, prayer, etc., for the family. *In the Matter of the Estate of Luna*, 8 Nav. R. 779 (Kay. Fam. Ct. 2003).
- A grazing permit is like the sacred mountain bundle where life exists and should continue to be cared for and remain within the caretaker's clan. For example, if the permit came from the paternal side, then it should remain with them. Likewise, if it came from the maternal side, then it should remain with them. Only if children exist, then the children should be included and the surviving spouse should hold the permit for the welfare of the children. This is the teaching of the grazing permit holders in the *Diné* Culture. *In the Matter of the Estate of Luna*, 8 Nav. R. 779 (Kay. Fam. Ct. 2003).
- Livestock grazing permits are valuable and precious to Navajos. *Black v. Bigman*, 8 Nav. R. 177 (Nav. Sup. Ct. 2001).
- A grazing permit is one of the most important items of property a Navajo can own. *Joe v. Willie*, 6 Nav. R. 545 (Ship. Dist. Ct. 1990).
- In Navajo common law a grazing permit is one of the most important items of property which a Navajo may own. A permit means that an individual may have the means of sustenance of a

traditional Navajo sheep provide income, food, and clothing. *Estate of Joe*, 4 Nav. R. 99 (Nav. Ct. App. 1983).

### 3. Permittee generally holds permit for benefit of family or group

- Most grazing permits are held in individual names for the benefit of families or groups. *Matter of Harvey and Begay*, 6 Nav. R. 413 (Nav. Sup. Ct. 1991).

### 4. Land rights associated with grazing permits

- Generally, grazing permits are based upon traditional customary use areas maintained by families from before the time grazing permits were issued. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- A grazing permit is a more formalized version of customary usage. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Certain aspects of fee ownership also attach to this possessory interest and grazing permits can be willed, inherited or transferred through gift or sale. The maintenance of grazing permits by the BIA allows a formal method to record such transfers, even if their original intent may have been only to limit the numbers of livestock in order to preserve grazing land. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Grazing permits do not indicate precisely where the land transferred begins and ends. Range management units may do this, but grazing permits do not. This is different from the American fee system, which very precisely records the limitations of the area of land in which a person has rights, so that when the land is transferred, the spatial limits of that transfer are precisely known. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- No one can hold a grazing permit unless he also holds use rights to land sufficient to support the livestock authorized. A grazing permit alone does not give its owner the right to use land. A permit holder must also have use rights to a particular piece of land in order to keep and exercise his or her permit. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- A grazing permit is only a license to graze animals in a given area. It gives no land ownership interest. *In the Matter of the Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).
- A grazing permit alone does not give one the right to use land. No one can hold a grazing permit unless he also holds rights to land sufficient to support the livestock authorized. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- A grazing permit is not a form of land title, but the right of a named permittee to graze a certain number of animals in a large common grazing area. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).

### 5. Functional equivalent to a deed

- A grazing permit is the functional equivalent of a deed and is therefore an instrument which transfers real property. *Joe v. Willie*, 6 Nav. R. 545 (Ship. Dist. Ct. 1990). *Note: Counsel should exercise caution in relying upon this District Court holding. Compare the Supreme Court cases holding that a grazing permit is not a form of land title.*
- A grazing permit is the functional equivalent of a deed and is therefore an instrument which transfers real property. *Matter of Estate of Nelson*, 1 Nav. R. 162 (Nav. Ct. App. 1977). *Note: Counsel should exercise caution in relying upon this Court of Appeals holding. Compare the more recent Supreme Court cases holding that a grazing permit is not a form of land title.*



## 6. Permittee must be a member of the Navajo Tribe of Indians

- When a permittee relinquishes his membership in the Navajo Tribe, his grazing permit terminated at the point of relinquishment. *Matter of Grazing Permit of Notah*, 6 Nav. R. 533 (W.R. Dist. Ct. 1989).

## 7. Limitations on subdividing permits

- Grazing permits may not be subdivided into units lower than three. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

# B. Authority of Grazing Committee

## 1. Fencing

- The Council clearly authorizes OHA to hear fencing disputes on appeal from a recommendation of a district grazing committee. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- Favorable recommendation by a grazing committee and from the Bureau of Indian Affairs Superintendent is required before any fences can be placed in non-agricultural areas. 3 N.N.C. § 713. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- 3 N.N.C. § 713, which requires favorable recommendations from the BIA and the grazing committee before fences can be placed in non-agricultural areas, does not apply to allotted land. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- Grazing committees are empowered to approve fencing on Navajo Nation land. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- In the Eastern Navajo Agency, district lands boards are empowered to arbitrate land disputes. Unresolved disputes are referred to the Eastern Navajo Joint Land Board. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- Fencing on land within the Eastern Navajo Agency, including allotments, must be approved by the district land board. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- Given that fencing on all lands, including allotments in the Eastern Navajo Agency, are subject to some local Navajo board or committee's approval, the Supreme Court concludes that, read together, the purpose of the various provisions is to deal with fencing within the Nation comprehensively. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- The Council's policy of fostering a uniform, predictable system of regulating fencing within the Reservation is facilitated by requiring district grazing committee approval of allotment fencing within the Reservation. Under this analysis, elected officials within local communities may hear and decide disputes when land owners propose to fence their land off from other users. Such fencing affects not just the parcel proposed to be fenced, but affects all other surrounding land users. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).
- Livestock may not pass through the area, roads may be blocked for those both within and outside the fenced land, and activities such as ceremonies may be negatively affected by blocking access within and across the allotment. The comprehensive nature of the fencing regulations in Title 3 reflects these concerns, and to fulfill the purpose of Title 3, the provision of district grazing committee oversight and approval authority must include authority over allotments within the Navajo Reservation. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).

- Exempting allotments from grazing committee oversight would mean that allotments within Arizona, of all lands within the Nation, would be free from grazing committee or board oversight. That cannot have been the intent of the Council as it would single out a group of Navajo land users for different treatment, and would disrupt a land use system that fosters community notice and cooperation. *Gishie v. Morris*, No. SC-CV-36-06, slip op. (Nav. Sup. Ct. June 4, 2008).

## 2. Disputes

*Note: Care should be given to the practitioner's approach to the following cases. Two Council Resolutions have substantially changed the law regarding grazing disputes: Navajo Nation Council Resolution Nos. CO-59-03 and CN-72-92. As a result of these cases, in the context of grazing, the District Grazing Committee has the power to "serve as mediators in adjusting and settling range difficulties between parties and groups within their respective districts." 3 N.N.C. § 875(A)(7). The Grazing Committee in serving as mediator is not to assume the role of judge and jury. Difficult cases not settled through mediation must be referred to the Office of Hearings and Appeals "in an attempt to settle differences out of court." *Id.* For irrigation districts, the District Grazing Committee has the power to "arbitrate land disputes and recommend action to be taken to the Office of Hearings and Appeals." 3 N.N.C. § 173(C).*

- The authority of the District Grazing Committee is limited to that of mediator. *Charlie v. Benally*, No. SC-CV-19-07, slip op. (Nav. Sup. Ct. December 10, 2008).
- District Grazing Committees have no authority to settle land disputes. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- The role of a District Grazing Committee is to mediate disputes. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- The Grazing Committee does not have authority to terminate grazing permits unless they were transferred by agreement. *Johnson v. Yellowman*, 7 Nav. R. 545 (Ship. Dist. Ct. 1997).
- The District Grazing Committee has no authority to decide a land dispute. They can mediate, but not act as judge or jury. *Johnson v. Yellowman*, 7 Nav. R. 545 (Ship. Dist. Ct. 1997).
- Navajo Nation Council Resolution No. CN-72-92 overruled the finding of *In Re: Joe Customary Use Area* that the District Grazing Committee does not have authority to decide land disputes. *Malone v. Yazzie*, 7 Nav. R. 88 (Nav. Sup. Ct. 1994).
- The District Grazing Committee has no authority to decide a land dispute. They can mediate, but not act as judge or jury. *Weston v. Tso*, 6 Nav. R. 309 (Nav. Sup. Ct. 1990).
- The District Grazing Committee has no authority to decide a land dispute. They can mediate, but not act as judge or jury. *In Re: Joe Customary Use Area*, 6 Nav. R. 177 (Nav. Sup. Ct. 1990).

## C. Transfers of permits

- Grazing permit transfer was presumed valid where (1) grazing committee implicitly approved transfer; (2) BIA accepted application; and (3) permit itself recited purchase and transfer agreement on its face. *Black v. Bigman*, 8 Nav. R. 177 (Nav. Sup. Ct. 2001).
- Grazing permits can be sold, inherited or otherwise transferred and can be subleased to anyone entitled to receive the permit by inheritance. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).

- All grazing permit transfers are subject to the approval of the District Grazing Committee and the Agency Superintendent. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- If an individual cannot use or does not want a grazing permit, he or she can give it up in favor of their children. *Begay v. Keedah*, 6 Nav. R. 416 (Nav. Sup. Ct. 1991).
- If an individual cannot use or does not want a grazing permit, he or she can give it up in favor of their children. *Matter of Trust of Benally*, 1 Nav. R. 10 (Nav. Ct. App. 1969).

#### D. Withdrawal of land from grazing area

- Land cannot be withdrawn for two purposes simultaneously. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).
- Land cannot be withdrawn for two purposes simultaneously. *Yazzie v. Jumbo*, 5 Nav. R. 75 (Nav. Sup. Ct. 1986).

#### E. Borders of grazing area

- The grazing of livestock covers a wide area, so that an exact boundary is not necessary. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Because there are no fences on open land, a grazing permit holder can change the area in which he or she grazes livestock while still maintaining the number of animals allowed under the permit. The only limitation on movement is the neighboring permittees. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Customary use in the grazing of livestock, either through traditional use or through grazing permits, is normally done on land that overlaps with other family members or neighbors who are doing the same thing. Boundaries are usually agreed upon on an informal basis, without recourse to written documents, and the boundaries can change over time, due to changes in family and neighbors who use the land. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).

#### F. Branding

##### 1. Branding required

- Every individual owning range livestock must adopt and record a brand and earmark with which to brand and mark such livestock. A brand can be obtained with a grazing permit or applied for from the state. The point is that all livestock must be branded. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- If an individual does not have a grazing permit but has an animal which he keeps impounded all the time, that particular animal also has to be branded and the brand can be obtained through the state. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- Every animal, whether covered or not by a grazing permit, has to be branded. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- It is unlawful to be in possession of an unbranded animal. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

## 2. Authority of livestock inspectors

- Livestock inspectors are required to seize all livestock not branded as required. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- Livestock inspectors appointed may authenticate bills of sale of livestock, brands and marks, and deliver certificate of acknowledgement thereto under their hands and seals. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- Any bill of sale not authenticated by the livestock inspectors are invalid and are illegal. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

## 3. Transportation of livestock

- The law does not specifically prohibit selling and transporting animal from one district to another district, however it should be done with knowledge of the grazing committee member from the area from which the animal is sold and also with the knowledge of the grazing committee member from the area to which the animal is being transported. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

## 4. Licensure

- It is illegal to trade, sell and buy livestock without a written license. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

# IV. Landlord/tenant relations

## A. Types of tenancies

### 1. Common law tenancies

- A “tenancy at will” occurs when land is held by a party with the landlord’s consent, but without fixed terms. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- A “tenancy by sufferance” occurs when a tenant once had lawful consent to be a tenant, but then unlawfully remains on the property. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

### 2. Subleases

- Generally, a sublease is subject to the limitations, terms and conditions of the primary leasehold. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).
- Subletting does not affect the liability of lessee to lessor for rent. *Gordon v. James*, 6 Nav. R. 525 (W.R. Dist. Ct. 1989).

### 3. Business site leases

- Son of deceased business owner has not right to occupy Navajo business site land without being a party to a lease. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- Unlike a residential land situation, in which a home in the context of Navajo custom and tradition is more than just a dwelling place, there is no comparable interest held by individuals using land

owned by the collective Navajo people for commercial purposes. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

- The Economic Development Committee [formerly the Advisory Committee] of the Navajo Tribal Council is authorized to negotiate and grant leases of, and permits and licenses for, the use of tribal lands for all business purposes, now or hereafter authorized by law and upon such items and conditions as in the discretion of the Advisory Committee are deemed in the best interests of the Navajo Tribe. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).
- In order to do business on Navajo Tribal land a license is required, and without a license a business is operated illegally. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

#### 4. Equitable leases

- *K'e* does not create an “equitable lease” in business property. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- The concept that an individual can gain an “equitable lease” for business purposes is counter to the long established principle that no individual can gain any prescriptive right in land belonging to the Nation or in land dedicated to a community use. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- *K'e* does not mandate an attempted negotiation for a “renewal” when the alleged lessee has no underlying right to the property and has operated without respect for the community. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

### B. Forcible entry and detainer actions

#### 1. Unique remedy

- FED claims are unique because they remove families from a place of central importance to Navajo thinking. *Allen v. Fort Defiance Housing Corp.*, 8 Nav. R. 759 (Nav. Sup. Ct. 2005).
- F.E.D. actions are unique, because they seek to remove a family from a place of central importance in Navajo thinking. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).

#### 2. Due process issues

- A tenant has an absolute right to due process in eviction proceedings. *Green Tree Servicing v. King*, 8 Nav. R. 833 (W.R. Dist. Ct. 2005).
- Given the importance of a home to Navajos, a tenant has an absolute right to due process in eviction proceedings. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).
- Under Navajo due process the Supreme Court cannot take the separation of a Navajo person from his or her home lightly. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).
- It is fundamentally unfair to impose harsh and difficult timelines and to penalize a person by taking away their homes without some strict requirements to assure due process. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).

### 3. Statutory eviction procedure

- A forcible entry and detainer action is a procedure by which a Navajo person or family can be involuntarily separated from their home. *Green Tree Servicing v. King*, 8 Nav. R. 833 (W.R. Dist. Ct. 2005).
- The FED statute sets up a process for a “landlord” to remove someone who has no right of possession or for a “tenant” to remove someone who is interfering with his or her right of possession. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- The FED statute authorizes, among other claims, an action by a “landlord” to evict a “tenant” for not paying “rent.” *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- The F.E.D. statute provides a landlord with a procedure to involuntarily separate a Navajo family from their home. *Fort Defiance Housing Corp. v. Lowe*, 8 Nav. R. 463 (Nav. Sup. Ct. 2004).
- F.E.D. actions are not civil actions. At common law they were criminal. Now, they are statutory, but the short time period for the cases marks it as a special type of action not to be included in statute addressing “all civil actions.” *Navajo Tribe v. Orlando Helicopter Airways, Inc.*, 1 Nav. R. 40 (Nav. Ct. App. 1972).

### 4. May be used against party possessing property without a valid lease

- Son of deceased business owner who holds business property without lease and without lawful right to possess land may be evicted by forcible entry statute. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- When a party bases his right of possession on a lease, the validity of the lease is properly reviewed in an F.E.D. action. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).

### 5. May be used for all forms of wrongful possession

- Forcible entry statute to address occupancy by trespass or squatting and other wrongful possession of land. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

### 6. Right to possession is the only issue in FED proceedings

- The FED statute does not cover disputes between two parties who each claim a property interest. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- Where F.E.D. is part of a bigger dispute, and resolution of the F.E.D. will not resolve the entire dispute, the dispute over all parties interest in the land must be decided before lease issues can be resolved. *Tome v. Marshall*, 7 Nav. R. 569 (Ship. Dist. Ct. 1998).
- F.E.D. is a summary proceeding that should not be burdened by issues not related to possession. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).
- The Navajo Nation F.E.D. statute encompasses (1) actions asserting a superior right of possession, (2) actions regarding breach of agreement giving defendant possession, (3) actions challenging validity of agreement on which right of possession is based, (4) actions questioning plaintiff’s motivation for bringing the action, and (5) actions for trespass. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).
- Where lease dispute is part of a bigger dispute, and resolution of the F.E.D. will not resolve the entire dispute, the dispute over all parties interest in the land must be decided before lease issues can be resolved. *Malone v. Yazzie*, 7 Nav. R. 88 (Nav. Sup. Ct. 1994).

## 7. Statutory requirements for remedy

- As long as landlord followed the procedures laid out in the forcible entry and detainer statute, allowing tenant to be heard by the court, there is no additional requirement under *k'e* to perfect eviction. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- Landlord under the Forcible Entry and Detainer statute is only required to show that the tenant's right of possession terminated, that landlord is entitled to possession and that landlord has made a written demand for possession. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- A person is guilty of F.E.D. if he or she willfully holds over any lands, tenements or other real property after termination of his right to possession thereof. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).
- To regain possession, plaintiff lessor must show (1) defendant's right to possession has terminated, (2) plaintiff is entitled to possession; (3) plaintiff has made written demand for possession. *Burnside v. Thriftway Marketing Corp.*, 7 Nav. R. 152 (Nav. Sup. Ct. 1995).

## 8. Remedies available in FED actions

### a) Generally

- If defendant is found guilty of forcible entry, the court shall give judgment for plaintiff for restitution of the premises and for costs and at plaintiff's option, for all rent found to be due and unpaid at the date of judgment. *Gordon v. James*, 6 Nav. R. 525 (W.R. Dist. Ct. 1989).
- Damages for breach of sublease may not be based upon speculation. *Hall v. Arthur*, 3 Nav. R. 35 (Nav. Ct. App. 1980).

### b) Recovery of rent

- Landlord may not recover rent accrued during term of lease from son of deceased tenant who is not a party to contract. Where son was guilty of forced entry after expiration of term, lower court could find son liable for rent for period of forced entry. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).

### c) Punitive damages

- Punitive damages are unavailable in forcible entry cases. *Gordon v. James*, 6 Nav. R. 525 (W.R. Dist. Ct. 1989).

## V. Housing and homesite leases

### A. Homesite leases

- The lack of grazing permit in one's name does not prevent a Navajo from obtaining homesite leases. *Riggs v. Estate of Attakai*, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- The Navajo Nation grants homesite leases throughout the Navajo Nation. *Yazzie v. Catron*, 7 Nav. R. 19 (Nav. Sup. Ct. 1992).

## B. Mutual help home purchases

- A mutual help homebuyer differs from an “ordinary tenant” because he or she has a “property interest” in the home that a tenant does not. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- The homebuyer’s “property interest” is clearly more than a tenant’s right to possess the property. Unlike tenants, a homebuyer 1) has the expectation of eventually purchasing the home; 2) must provide a “contribution” valuing \$1500 and a “down payment;” 3) may assign his or her rights, including to a mortgagee to pay off the purchase price set by the agreement; 4) may make structural changes and additions with NHA’s approval; and 5) has an interest in the equity accounts he or she contributes to during the term of the agreement. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- The FED statute does not apply to mutual help homebuyers. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- The word “title” is consistently used with the unique real property situation on the Navajo Reservation, where homes may be separately “owned” from the land underneath it. The FED statute’s reference to “title” means, in the context of mutual help homes, the “ownership” of the home, regardless of the ultimate “title” of the trust land the home sits on. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- To repossess a mutual help housing home, NHA must bring a breach of contract or foreclosure action, and follow the rules that apply to general civil actions. *NHA v. Clark*, No. SC-CV-53-05, slip op. (Nav. Sup. Ct. April 4, 2006).
- An interest in NHA Mutual Help Housing is a property interest. *Begay v. Begay*, 6 Nav. R. 160 (1989).
- Husband and wife’s interest in a Mutual Help Housing home is defined primarily by their agreement with the Housing Authority and has dual aspects. The agreement is essentially a “lease-purchase” agreement entitling them to lease the home and, upon discharging their contractual obligations, to become homeowners. Both interests are legally cognizable property interests. *Begay v. Begay*, 6 Nav. R. 160 (1989).
- Participants in the housing programs overseen by the United States Department of Housing and Urban Development have property interests subject to the due process protections of the Indian Civil Rights Act. Procedures for termination of property interest must satisfy due process. *NHA v. Betsoi*, 5 Nav. R. 55 (Nav. Ct. App. 1985).

## C. Homes awarded under the Navajo/Hopi Settlement Act (NHSA)

### 1. Purposes of NHSA

- The intent of NHSA is to compensate families and individuals who lost their ancestral lands in the relocation process. The governing principle in the creation of an equitable relocation program is that relocatees be made whole. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- People facing relocation are under tremendous economic and emotional stress. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Compensation under NHSA was to take into account all of the social, economic, cultural, and other adverse impacts of persons involved in the relocation and to avoid or minimize them. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- The purpose of the NHSA was to insure that displaced persons were treated fairly, consistently, and equitably so that these persons would not suffer the disproportionate adverse, social,



economic, cultural and other impacts of relocation. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

## 2. Relocation benefits under NHTSA

### a) Dwellings

- One of the relocation benefits under NHTSA provides for the reasonable cost of a decent, safe, and sanitary replacement dwelling to accommodate a displaced household. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Relocation benefits under NHTSA are intended for those relocatees who have lost their homes and ancestral lands due to forced removal. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

### b) Other benefits

- Under NHTSA, families designated for relocation were offered moving expenses, benefits and incentives. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

## 3. Requirements to qualify for home under NHTSA

- Under NHTSA, a Navajo relocatee must be a head of household and must have resided on Hopi partitioned lands in order to be eligible for relocation housing. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- A certified eligible head of household is a person who has received notice from the Navajo and Hopi Indian Relocation Commission that he or she has been certified as eligible to receive certain relocation assistance benefits. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

## 4. Effective date for vesting of property interest in home

- Interest in residence given as a benefit under NHTSA vested on date individual was certified as eligible for relocation benefits as a head of household. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- The fact that the house was constructed subsequent to the head of household getting married is not relevant. The date the relocatee is determined eligible is the most vital because several years may pass from the date of certification to the date the relocation house is actually constructed. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

## 5. Title vests in head of household

- If a head of household contracts with the NHIRC to have a house built, the title to such house vests in the head of the household for which it was constructed. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Where head of household contracts with NHIRC to have a house built while he is single, home is his sole and separate property. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

D. Improvements on real property are the personal property of the individual

- The custom of the Navajo Nation is that improvements on unwithdrawn Navajo Tribal lands are considered as the personal property of such Indians and not of the Tribe. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- The custom of the Navajo Nation is that improvements on unwithdrawn Navajo Tribal lands are considered as the personal property of such Indians and not of the Tribe. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

E. Mobile homes

- A mobile home is personal property and ordinarily ownership is defined through transfer of title as a motor vehicle. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).
- Where occupant of mobile home could not provide a certificate of title to the Court, but the occupant had lived in the mobile home openly and freely for over nine years before her possession was challenged, her ownership would be recognized. *Green Tree Servicing v. Bahe*, 8 Nav. R. 885 (Chin. Dist. Ct. 2005).
- A mobile home is a motor vehicle. Title to the mobile home is evidenced by a certificate of title issued by the state motor vehicle division. *Damon v. Damon*, 8 Nav. R. 226 (Nav. Sup. Ct. 2002).

VI. Other land issues

A. No private ownership of trust land

- Private ownership of land, as by fee simple, is unknown in the Navajo Nation. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- Private ownership of land, as by fee simple in the Anglo legal system, is unknown in the Navajo Nation. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).

B. “Restricted” vs. “unrestricted” property

- Restricted property includes reservation land for which the N.N holds title for the common use and equal benefit of all tribal members. Unrestricted property includes property owned by individuals and for which the Navajo Nation does not hold title for all tribal members. *Matter of Estate of Wauneka*, 5 Nav. R. 79 (Nav. Sup. Ct. 1986).

C. Adverse possession

- The concept that an individual can gain an “equitable lease” for business purposes is counter to the long established principle that no individual can gain any prescriptive right in land belonging to the Nation or in land dedicated to a community use. *Navajo Nation v. Arviso*, 8 Nav. R. 697 (Nav. Sup. Ct. 2005).
- There is no prescriptive right against the Navajo Nation, the ultimate owner of all Navajo land. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- Such a lack of prescriptive right also pertains to claims to customary use areas that are no longer used by the holders of that customary right. This makes the Navajo possessory interest in customary use areas different from the holders of land in fee simple. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).

- The ownership of the land always remains vested in the Navajo Nation as a whole, and cannot be wrested away through adverse possession or prescription by individual occupiers. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).
- The ownership of the land always remains vested in the Navajo Nation as a whole, and cannot be wrested away through adverse possession or prescription by individual occupiers. *Yazzie v. Jumbo*, 5 Nav. R. 75 (Nav. Sup. Ct. 1986).
- The elements of prescription are continual, actual, adverse, open and notorious use. *Yazzie v. Jumbo*, 5 Nav. R. 75 (Nav. Sup. Ct. 1986).
- No prescriptive right or easement by necessity can be acquired in property belonging to the Navajo Nation or dedicated to community use. *Yazzie v. Jumbo*, 5 Nav. R. 75 (Nav. Sup. Ct. 1986).
- Land cannot be lost to adverse possession, laches, delay or execution on a judgment. Judgments may not be enforced against grazing permits, homesite leases or land-use permits. *Johnson v. Dixon*, 4 Nav. R. 108 (Nav. Ct. App. 1983).

#### D. Quiet title actions

- Quiet title is appropriate to determine title to grazing permit and other property where limitations period for probating estate has expired. *In the Matter of Grazing Permit No. 12-1445*, 8 Nav. R. 815 (Ship. Dist. Ct. 2004).
- The quiet title action is used to settle or define property rights in a particular piece of real property where there are multiple claimants and the chain of title is inconsistent or nonexistent. *Matter of Harvey and Begay*, 6 Nav. R. 413 (Nav. Sup. Ct. 1991).
- The quiet title action should be brought in family court. *Matter of Harvey and Begay*, 6 Nav. R. 413 (Nav. Sup. Ct. 1991).
- The quiet title action involves a person filing a suit in a court of equity to clear title to property. *Matter of Estate of Evans*, 6 Nav. R. 494 (W.R. Dist. Ct. 1989).
- Surviving wife in possession of grazing permit is proper party to bring quiet title action. *Matter of Estate of Evans*, 6 Nav. R. 494 (W.R. Dist. Ct. 1989).

#### E. Common law land tenure

- Under the American fee system, once a person “owns” property, that person has total rights to use it or not use it, as he or she fits, assuming of course there is no other violation of tax, zoning or other government restrictions legally placed upon the property. *Williams v. Peabody Western Coal Co.*, 8 Nav. R. 842 (Kay. Dist. Ct. 2005).
- At common law, there were two types of life estates: conventional life estates created by a party and those which come into existence by operation of law. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).
- The title or fee, whether by way of reversion or remainder, must always be left in somebody when a life estate is created. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).
- An instrument creating the estate manifests intentions on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use or enjoy property during the period of life. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).
- If a life estate is made determinable on some event, it may be terminated prior to the death of the life tenant or upon the happening of that event. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).

- A life estate may terminate under a provision for the immediate vesting of the property in the remainderman upon failure to comply with prescribed conditions. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).
- Life estate terminated upon failure to put it to beneficial use. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997).

#### F. Disputes over failure to convey real property

- It is common for purchasers of real estate, upon the refusal or inability of the vendor to convey, to bring an action to recover back the purchase price, instead of an action to recover damages for a breach of the contract. The action also lies to recover back money paid for property entirely worthless. *Hood v. Bordy*, 6 Nav. R. 349 (Nav. Sup. Ct. 1991).

#### G. Trespass

- Ownership, with a right of possession, or a claim of a right of possession of land from another having ownership, is a defense to trespass. The trespasser must show justification of his acts from his own title and not from defects in the plaintiff's title. *Plummer v. Plummer*, 6 Nav. R. 271 (Nav. Sup. Ct. 1990).

### VII. Supplement on Navajo land policy

*Tome v. Marshall*, 7 Nav. R. 569 (Ship. Dist. Ct. 1998)

*In Re: Mary Ellis Joe ' Customary Use Area, District 9, Shiprock Agency. Navajo Nation*, 6 Nav. R. 545 (Ship. Dist. Ct. 1990)

#### **Navajo Nation Grazing Policies**

The facts so far presented must be viewed in light of any Navajo Nation policies regarding grazing rights. Thus, this Court, in order to address this continuing problem must look to the policies of the Navajo Nation regarding grazing. This Court is also required to look to the grazing policies in order to establish boundaries.

In, *In Re: Mary Ellis Joe ' Customary Use Area, District 9, Shiprock Agency. Navajo Nation*, No. SR-CV-949-83 [6 Nav. R. 545], the Shiprock District Court judge stated:

1. A grazing permit gives one the right to use the land for grazing, however, "no person is entitled to more range area than needed to support the number of livestock allowed on his or her grazing permit" as set forth in the 1957 *Navajo Reservation Grazing Handbook* at page 14. The primary purpose of grazing permits is to control the number of livestock to protect and preserve the land. Mary Ellis Joe testified that she has a grazing permit which allows her to have 83 sheep units. However, according to her testimony, she maintains 150 goats and sheep, 20 cows and 6-7 horses. One cow or one horse is equal to 5 sheep units; therefore, 27 cows and horses would be equivalent to 135 sheep units. May Ellis Joe currently grazes 285 sheep units on a 83 sheep unit permit. Note, under the current poor grazing conditions, she alone needs 17,100 acres to support 285 sheep units on a 83 sheep unit permit. At trial, Mary Ellis Joe alleged that the respondents were responsible for depletion of grass. But, Mary Ellis Joe is also contributing to the poor conditions especially in light of Mr. Randy D. Cornett's testimony that the number of livestock is downplayed by the owners. To exacerbate the situation, there are three other permittees who are allowed 221 sheep

units. It is not unreasonable to conclude that these other valid permittees within .0216 are also grazing beyond their limit and thus contributing to the poor grazing conditions in violation of the Navajo land policy.

2. Initially, grazing permits were issued to persons who had livestock and could identify customary use to a specified area. Customary use is a Navajo concept that defines one individual Navajo's prescribed boundary for the use and occupancy of land to an area traditionally inhabited by his/her ancestors. *In the Matter of the Estate of Charley Nez Wauneka Sr.*, 5 Nav. R. 79, 81 (1987). Grazing permits were also issued to those people who claimed a specific area of land known as "claimed use area."

3. A grazing permit is one of the most important items of property a Navajo can own. *Estate of Navajo Joe*, 4 Nav. R. 99 (1983). Grazing permits are extremely valuable property items due to the limited land base and land use rights embodied by the permit.

5. Grazing permits, from their inception have been controversial and fraught with conflict.... [T]he court will ... adhere to the Navajo land policy adopted by the Navajo Supreme Court. The court recognizes that land is a resource and the increasing pressure on the land threatens its viability. Hence, the primary goal of the Navajo land policy is to keep the land economically viable.

The court is forced [to deal] with the extremely difficult and emotional issue of land disputes. Land to the Navajo people is life which embodies the concept of spiritual, mental, physical and emotional well being. Navajo thinking and values accord land with survival and sustenance. Since the Long Walk, Navajos have maintained a subsistence lifestyle based on livestock production, which livestock ownership among the Navajo is a symbol of wealth, prestige, and stability.

Since the land plays a central and sacred role in the Navajo culture it follows that the Navajo will fight long and hard for their land. Many of the land disputes arising on the Navajo Nation are between common [descendants] and between siblings. The rapid population growth of the Navajos along with a strong cultural tradition of having land with livestock and a home where they grew up inevitably causes land disputes. The Navajo population has increased from approximately 9,000 (upon return from Ft. Sumner) to 169,157 in 1989. See *Chapter Images: 1989, General Facts on Navajo Chapters*, 1990, Larry Rodgers, Division of Community Development, Window Rock, Arizona.

Evidence of the spiritual and mental ties to livestock ownership clearly surfaced when the government forced Navajos to reduce their stock by 64 to 80 percent during the late 1930's and early 1940's. Navajos were devastated by the massive killing and irreverent conduct by government officials. See *Navajo Livestock Reduction: A National Disgrace*, Navajo Community College Press, 1974. The purported purpose of the stock reduction was to restore the land which had been overgrazed by an over abundance of livestock. This era initiated a reservation-wide grazing policy which gave birth to the Grazing Permit in 1937. The majority of Navajos reacted strongly against the regulation of grazing and Grazing Permits, but it was eventually accepted. The maximum amount of permissible sheep units an individual Navajo could receive was set at 350 to be authorized by the Bureau of Indian Affairs.

Unfortunately, when dealing with the ancestral use of the land, we must look to the family tree which gets ever wider with more and more people, who all claim to have use rights by virtue of common ancestors. This is exactly what we are faced with in this case. Petitioner Mary Ellis Joe is the daughter of Hosteen Kitseally's old wife and Respondent Grace Oldman is the daughter of

Hosteen Kitseally's new wife. When Hosteen Kitseally separated from his old wife and began to live exclusively with his new wife, he gave his old wife the majority of the sheep and the land to her right as she faced east on top of Toh Atin Mesa. Hosteen Kitseally, with his new wife, moved to the North of Toh Atin Mesa and began to build the herd again. When boundaries are delineated by fences, it is possible Mary Ellis Joe may have grazed at one time or another on the land north of Toh Atin Mesa and further south and west of the .0216 area. But, when such a claim is made, we have to look to the rights of the other descendants of common ancestors in light of the Navajo land policy.

The semi-desert and arid region of Navajoland requires livestock control to protect the land from becoming a wasteland. Although the amount of stock owned by individual Navajos is much less than what it was prior to forced stock reduction fifty-five years ago, the Navajo population has almost quadrupled since the issuance of grazing permits in 1940. See *Navajo Nation FAX 88; A Statistical Abstract*, p. 2, September 1988, Division of Community Development, Window Rock, Arizona. Within Shiprock Agency District 9, the population was estimated to be 2,285 in 1940 and 4,994 in 1980 - a 118.56% increase. It is projected to increase to 6,242 by 1988. See *Navajo Nation FAX, Id.* at p. 7.

The 27,000 acres claimed by Mary Ellis Joe disturbs the court for the following reasons. The estimated land size of Sweetwater Chapter is 152,006,300 acres. Her claim amounts to over one fifth of the Sweetwater Chapter area within District 9. The estimated 1989 Sweetwater population is 1,698. See Chapter Images 198, *Id.* at 104. To grant Mary Ellis Joe her claim of 27,000 acres would not only deny the rights of descendants who have been born and raised in the area, but it would grant Mary Ellis Joe a special privilege which is no longer practical or realistic. Almost every middle aged Navajo sheep owner can recall when their families made seasonal herds over great distances and could probably show reminiscences of camps upon request. The tremendous increase in population has rendered it inequitable for any one Navajo or family to continue that life-style because in effect, it would force 90 percent of the remaining Navajos to forfeit their identity with the land. It's unlikely that a subsistence life-style entirely based on raising stock is possible because of the massive land base that is required to make it profitable without destroying grazing land.

Although time has changed the extent of subsistence livestock economy of the Navajo people, stockraising today retains its traditional position. Many young educated Navajos trained in various fields have sources of income other than subsistence stockraising. Contrary to what the officials from the Bureaus of Indian Affairs had hoped for forty years ago, many of these Navajos have inherited the Navajo way of thinking. They maintain ties to the land and value stockraising, even if it is just one sheep, one horse or one cow and return back to where they were raised whenever possible. The BIA believed that the spread of education would de-emphasize stockraising. See *The Navajo Year Book, Report No. viii, 1951-1961, A Decade of Progress*, Robert Young, Assistant to the General Superintendent; Navajo Agency, Window Rock, Arizona 1961.

Petitioner contends that those Navajos who reside and graze in the area she is claiming are responsible for the deterioration of grazing land. Petitioner further contends that given the poor range conditions, the 304 sheep units would require 18,240 acres. This figure is based on the testimony given by Randy D. Cornett, Supervisory Range Agency, Bureau of Indian Affairs. Mr. Cornett estimated that the range condition in the lands in dispute is estimated to be poor north of Toh Atin Mesa and poor to fair in the south. Mr. Cornett stated that given poor conditions, it takes 50-60 acres to graze one sheep unit.

The purpose of the Navajo land policy is to keep Navajoland economically viable. The problem of overgrazing is widespread and each individual Navajo should take responsibility to protect our Nation from becoming a wasteland. This can be achieved by controlling the amount of livestock or give them supplemental feeding or both. This court is not in the position to promulgate rules and regulations that may reconcile customary use claims with grazing permits. Nor is this Court responsible for the enforcement of grazing regulations. This Court suggests to the lawmaking body to create a competent administrative agency to hear and determine land disputes. That Navajo Nation administrative agency can promulgate procedures which guarantee due process and rights guaranteed by the Navajo Bill of Rights and Indian Civil Rights Act.