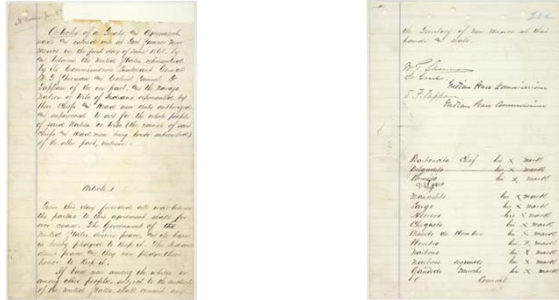


THE LIVING TREATY PAUL SPRUHAN NAVAJO DOJ





Fort Defiance, October, 1852
Sketch by Captain Joseph Horace Eaton
(National Archives)







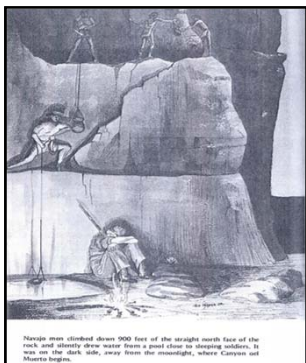




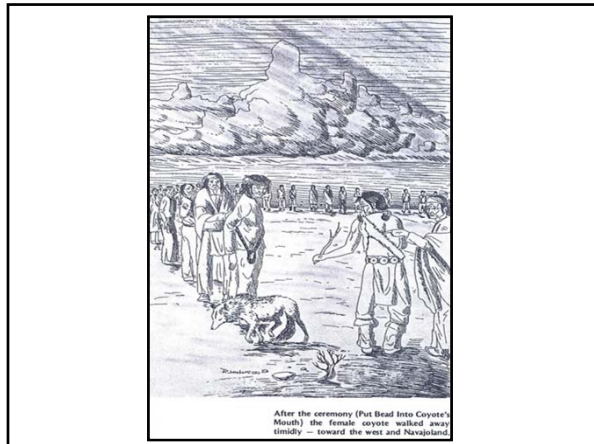
General James Henry Carlton, circa 1850-1852
Carlton Library of Congress







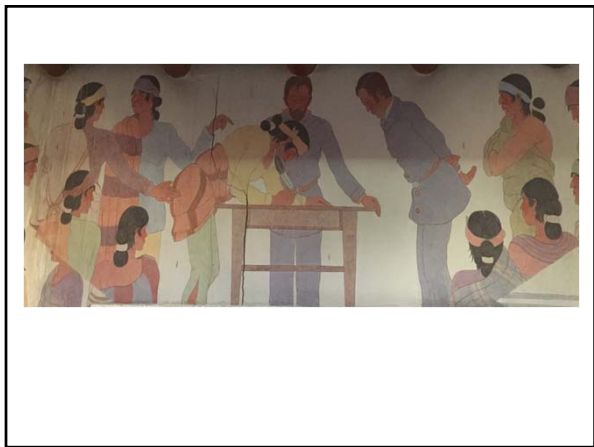
People men climbed down 900 feet of the straight north face of the rock and silently drew water from a pool close to sleeping soldiers. It was on the dark side, away from the moonlight, where Kansas and Missouri began.

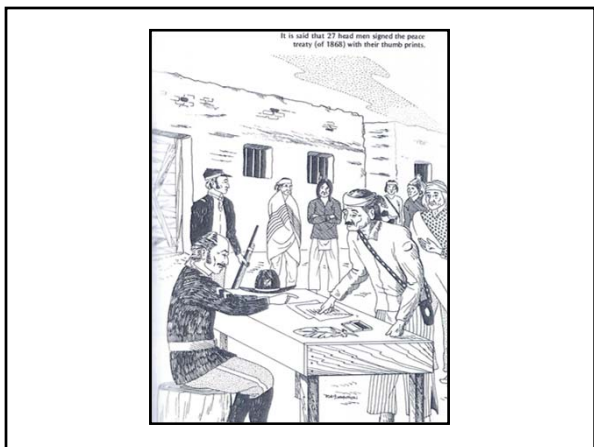


















FEDERAL CONCEPTION OF TREATIES

- Bi-lateral agreement between sovereigns.
- President authorized to negotiate and ratified by 2/3 of U.S. Senate. US Const. Art. 2, Sec. II.
- Included among other laws as "Supreme law of the land". US Const. Art. VI, Clause 2
- Were entered into with Indian tribes until 1871, then agreements.
- Still in effect unless unilaterally abrogated by Congress.

US SUPREME COURT INTERPRETATION OF TREATIES

- Text-based analysis using special interpretative rules:
- **Rights not surrendered are retained.** *United States v. Winans*, 198 U.S. 371, 381 (1905)
- **Interpret treaties as tribal negotiators would have understood them.** *Minnesota v. Mille Lac*, 526 U.S. 172, 196 (1999)
- **Resolve ambiguities in favor of tribes.** *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McClanahan v. Arizona State Tax Comm'n*, 41 U.S. 164, 174 (1973)

CONTEXTUAL INTERPRETATION

"We look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Mille Lacs*

TREATIES AS BROAD RECOGNITION OF TRIBAL SOVEREIGNTY

Beyond strict text, treaties recognize and guarantee sovereign authority of tribes, including exemption from state law and civil jurisdiction over non-Indians:

E.g. *Williams v. Lee*, 358 U.S. 217 (1959) (Article II of Navajo Treaty recognizes inapplicability of Arizona law within reservation)

Montana v. United States, 450 U.S. 544 (1981) (Similar article in Crow treaty recognizes civil jurisdiction over non-Indians on trust lands)

Donovan v. Navajo Forest Products Industry, 692 F.2d 712 (10th Cir. 1982) (Article II of Navajo Treaty exempts tribal business from jurisdiction of federal Occupational Safety and Health Administration)

QUESTION ABOUT INTERPRETATION OF NAVAJO TREATY

- Language is identical or practically identical with several other treaties entered into by Grant Peace Commission
- *Compare* Navajo Nation Treaty with treaties with Crow Nation, Sioux Nation, Ute Nation, Shoshone Nation.
- Does contemporaneous understanding of those different tribal nations change the analysis of the same or similar language in their specific Treaty?

Recent Lower Federal Court Treaty Interpretation

- Moving away from treaties as broad guarantor of sovereignty to strict textual analysis of specific provision language.
- Moving farther away from historical contextual analysis to strict, modern interpretation of English language provisions.

***SOARING EAGLE CASINO v. NLRB*, 791 F.3d 648 (6th Cir. 2015)**

- Saginaw Chippewa argued its treaty right to exclude prohibited application of National Labor Relations Act to union activities at its casino.
- Sixth Circuit majority analyzed text with little mention of contemporaneous understanding by tribe.
- Distinguished between “general” and “specific” rights to exclude to hold treaty did not block NLRA.
- Distinguished *Donovan v. Navajo Forest Products Ind.*
- However, dissent recognized exemption based on contemporaneous understanding of tribe.

BUT SEE.....

- *Chickasaw Nation v. International Brotherhood of Teamsters*, 362 NLRB No. 109 (2015)
- National Labor Relations Board concludes Chickasaw Treaty of 1830 exempts tribal casino from National Labor Relations Act
- NLRB interprets provision applying only federal laws dealing with Indian affairs to tribe under treaty rules of interpretation.

RECENT MOU AMONG FEDERAL AGENCIES ON TREATY RIGHTS

- Members of White House Council on Native American Affairs, Environmental, Climate Change and Natural Resources Subgroup
- Entered into 9/2016
- Purpose to “affirm our commitment to protect tribal treaty rights . . . through consideration of such rights in agency decision making processes and enhanced interagency coordination and collaboration.”

NAVAJO CONCEPTION OF TREATY

- Referred to as *Naltsoos sání* (“old paper”).
- Navajo Supreme Court refers to the Treaty as a “sacred document” and as “the primary organic law in reservation matters” similar to view of United States Constitution.
- Court recognizes context as ending exile as Bosque Redondo.

NAVAJO SUPREME COURT STATEMENTS ON TREATY

- *Hwéeldidi Beehaz'áani' Sání Nihizázini' nee'niji bee hoot'ih dooleel yiniyé nihá áyiilaaígíí.*
- (The Treaty done by our Ancestors was done for the purpose of guiding us into our future as Navajo people).
- *Ford Motor Co. v. Kayenta Dist. Ct.*, No. SC-CV-33-07, slip op. at 4 (December 18, 2008).

ANOTHER STATEMENT

- *Naayéé' yee ak'ehdeesdǫ́'go Hózhóǫ́jǫ́ yee ak'idiyaa silǫ́'*
- (They overcome adversity through Protective Way to restore peace and harmony)
- (by defending the Navajo way of life our ancestors restored peace and harmony with the United States).
- *Ford Motor Co. v. Kayenta Dist. Ct.*, No. SC-CV-33-07, slip op. at 4 (December 18, 2008).
- *EXC v. Kayenta Dist. Ct.*, No. SC-CV-07-10, slip op. at 21 (September 15, 2010).

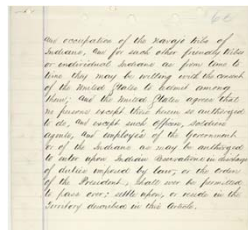
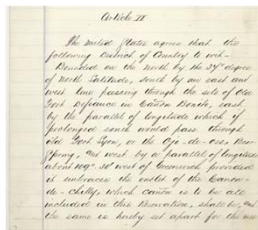
NAVAJO SUPREME COURT RULES OF INTERPRETATION

- Embraces “contemporaneous understanding” of Navajo leaders as shown in written transcript of negotiation proceedings.
- Also applies other federal rules of treaty interpretation, such as ambiguities construed in favor of the tribe.
- However, “[w]e have the authority to interpret the treaty as Navajos understand it today. That includes knowledge passed on to us by our ancestors through oral traditions.” *Means v. District Ct. of the Chinle Judicial Dist.*, 7 Nav. R. 383, 389 (1999).

NAVAJO SUPREME COURT INTERPRETATIONS OF TREATY

- ***Means v. Chinle District Court***, 7 Nav. R. 382 (1999) (treaty recognizes criminal jurisdiction over non-member Indian)
- ***Dale Nicholson Trust v. Chavez***, 8 Nav. R. 417 (2004) (Right to exclude transcends *Montana v. U.S.* exceptions)
- ***Ford Motor Co. v. Kayenta Dist. Ct.***, No. SC-CV-33-07 (2008) (Jurisdiction over non-Indian manufacturer not present on Reservation; Long-Arm Statute codifies Treaty jurisdiction)
- ***EXC v. Kayenta Dist. Ct.***, No. SC-CV-07-10 (jurisdiction over non-Indian accident on state right-of-way)

ARTICLE II, BOUNDARIES OF THE TREATY RESERVATION



ARTICLE II TEXT

"The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through Old Fort Lyon or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109 degree 30' west of Greenwich, *provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation,*"

ARTICLE II CONTINUED:

"shall be, and the same is hereby, set apart for *the use and occupation of the Navajo tribe of Indians,* and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them;"

"and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in the article."

Navajo Nation v. U.S. Dept. of Interior

- Concerns removal of remains and objects from Canyon de Chelly without Navajo Nation consent by National Park Service
- Canyon de Chelly included in Treaty Reservation as specifically requested by Barboncito
- NPS denied return under Treaty based on alleged need to follow NAGPRA
- Federal District Court denied Nation's claims, and ignored Treaty.
- Pending on remand from 9th Circuit on whether Hopi is indispensable party under FRCP 19

EXC v. Jensen

- Concerns head-on collision between Navajo family and non-Indian tour bus company on Highway 160 outside Kayenta
- Family sued tour bus company for wrongful death in Kayenta District Court
- One argument for jurisdiction was Treaty recognized right to jurisdiction over state highway
- Jurisdiction denied by 9th Circuit summarily based on surrender of right to exclude based on *Strate v. A-1 Contractors*
- No discussion of Treaty

***Window Rock Unified School Dist.
v. Nez***

- Concerns whether the Navajo Preference in Employment Act applies to Arizona public schools leasing Navajo trust land
- Federal District Court ruled Treaty does not authorize jurisdiction based on quasi-textual analysis with no discussion of contemporaneous understanding of Navajo negotiators.
- Pending in 9th Circuit since oral argument 9/27/2015

ARTICLE I, BAD MEN CLAUSE



BAD MEN CLAUSE TEXT

"If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, *the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States*, to be tried and punished according to its laws;"

REEHAHLIO CARROLL INCIDENT NOVEMBER, 2009

- Arrested by Navajo Nation Police for Navajo criminal offense.
- Tried to be "badged out" by federal law enforcement for murder of nun.
- Federal Court issued writ and Carroll released to federal custody.
- Attempt by Navajo Chief Prosecutor to have Carroll returned to Navajo custody denied.
- Navajo Public Defender seeks Order to Show Cause against Navajo Corrections Department and Law Enforcement for releasing Carroll in violation of Navajo court order.

Federal Extradition/Detainer Policy

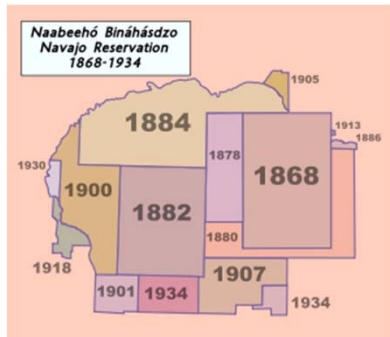
- Amendment to Title 17 of Navajo Nation Code negotiated by the Nation and U.S. Attorney's Offices of Arizona, New Mexico, and Utah.
- Requires formal written request with supporting evidence of allegation of federal crime before the Nation will release Indians to federal custody.
- Alleged offender has right to hearing before Navajo Nation judge before being transferred to federal custody.

OTHER TREATY PROVISIONS POTENTIALLY IN DISPUTE:

- Right to education- Article VI:
- United States agrees to build school house for every 30 children
- States "The provisions of this article to continue not less than ten years"
- Does this obligation continue and does it include state public school districts?

TERRITORIAL SCOPE OF TREATY

- Art. IX: Nation ceded all lands outside bounds of Treaty reservation.
- Art. XIII: Any Navajos who leaves Treaty Reservation surrenders rights under the Treaty
- In reality, many Navajos returning from Bosque Redondo settled outside those invisible lines.
- Do provisions of Treaty apply to lands added to original reservation?



ANOTHER ISSUE

- Requirement that $\frac{3}{4}$ of "adult male Indians" agree to alienate Navajo land. Art. X
- Does literal language prohibit vote by women?
- Does the provision prohibit alienation of land or water rights by elected officials?
- *Yazzie v. Navajo Nation*, case pending in Dilkon District Court challenging Council approval of Utah water rights settlement.

OTHER RIGHTS NOT EXPLICITLY MENTIONED IN TEXT OF TREATY

- Implied reserved water rights through creation of treaty reservation. *Winters v. United States*, 207 U.S. 564 (1906).
- Treaty date establishes right of priority but quantification methodology still unclear, but based on purposes of reservation.

RIGHT TO MEDICAL SERVICES

- Right to medical care through Indian Health Service
- No right explicitly stated in treaty but believed to be part of Treaty.
- Right to certain amount of hospitals or certain level of medical care?

FEDERAL VIEW OF TREATY RIGHTS

- “Originalist view”:
- Symbolic recognition of sovereignty ultimately unnecessary for tribes to be sovereign
- Specific treaty rights interpreted as historically-limited based on intent of parties at time of signing
- increasingly limited by ahistorical textual analysis

Navajo View on Treaty Rights

- “Living view”:
- Sacred document reflecting sovereignty of the Nation directly relevant to modern relationships with federal and state governments.
- Guarantees sovereign rights as understood by contemporary Navajos as informed by oral history and written records.
- Rights not necessarily contemplated in 1868 or explicitly mentioned in the text of the treaty are recognized and protected by broad meaning of treaty.
