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**American Indian Culture and Research Journal**

**Title**

The Continuing Saga of Indian Land Claims: Zuni Claims: An Expert Witness' Reflections

**Permalink**

<https://escholarship.org/uc/item/3jx207jr>

**Journal**

American Indian Culture and Research Journal , 24(1)

**ISSN**

0161-6463

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**Publication Date**

2000

**DOI**

10.17953

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COMMENTARY

## The Continuing Saga of Indian Land Claims

### *Zuni Claims: An Expert Witness' Reflections*<sup>1</sup>

**E. RICHARD HART**

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During the twenty years between 1970 and 1990 the Zuni Tribe of New Mexico made several major claims relative to their aboriginal land and the interests they hold in that land. They claimed title to some lands, interests in other lands—a sixty-mile easement for a quadrennial religious pilgrimage, for example—and damages as a result of lands permanently lost to them. As a result of their demands for justice, three pieces of legislation were passed by the US Congress,<sup>2</sup> two major land-claim cases went before the United States Claims Court (*Zuni Indian Tribe v. United States*),<sup>3</sup> and one major case was tried in federal district court in Arizona (*United States v. Platt*).<sup>4</sup>

More than two dozen experts from disciplines as diverse as palynology and lexicography prepared extensive written expert testimony for submission to the various courts. Tens of thousands of pages of exhibits were also submitted in support of the expert reports and by 1990, in what has to be one of the greatest litigative triumphs of an American Indian tribe, the Zuni had won virtually 100 percent of the demands they made twenty years before.

During the period in which the tribe pursued both the litigation and legislation, experts conducted what may be the most intense study of a semi-arid

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landscape—an area sacred to the tribe—and claimed that though these areas were now under the control of others, title should reside with the Zuni Tribe. As a result of this claim, by 1990 title to more than 25,000 acres of land was transferred to the tribe. The Zuni also identified an area in excess of 15-million acres as being their traditional aboriginal homeland, held exclusively by them since time immemorial. Fourteen-and-a-half million of these acres had been taken from them and they asked for payment for these lands. In November of 1991 the Zuni Tribe received one of the largest land-claim judgments in history (\$25 million) for their lost lands.<sup>5</sup>

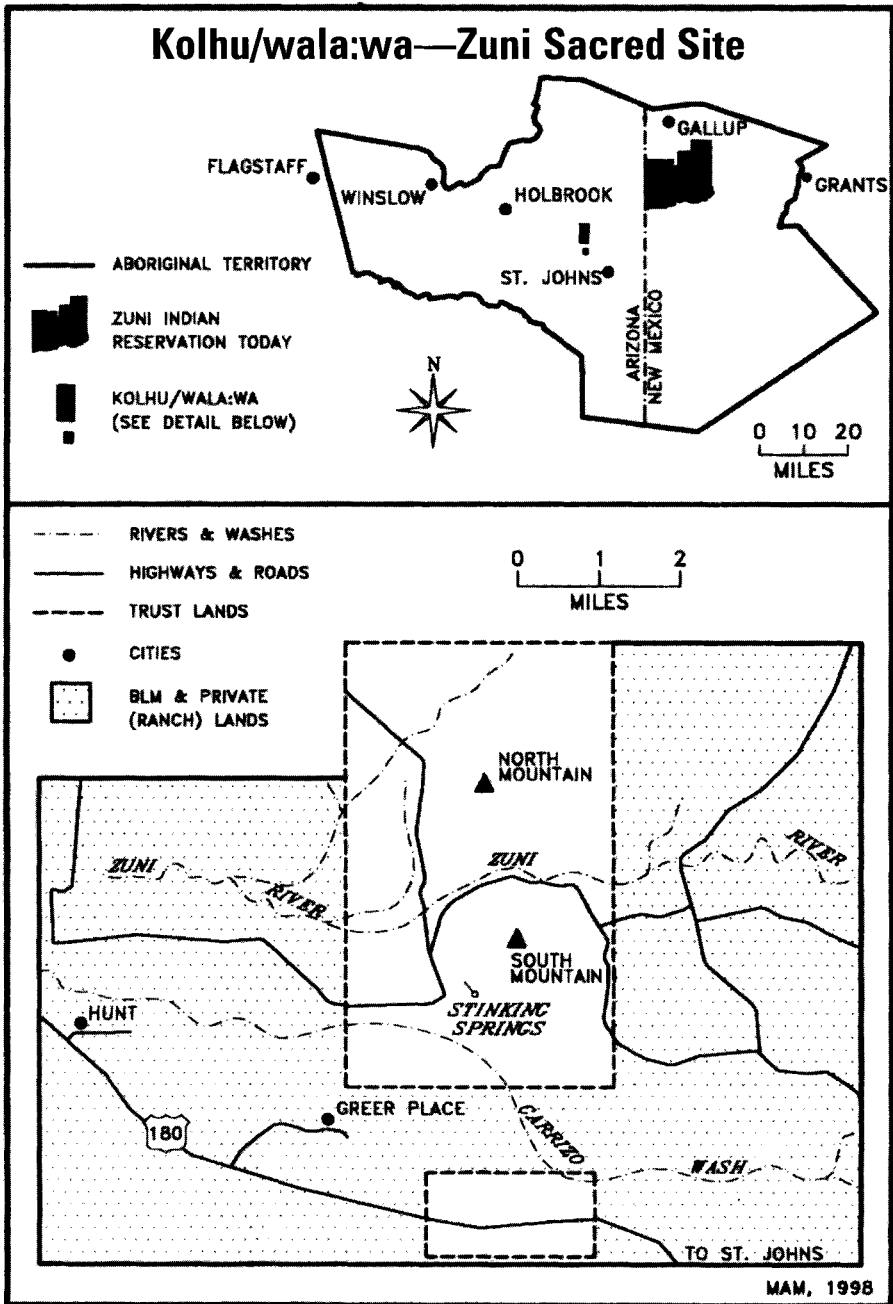
The Zuni also claimed that acts or omissions of the United States had caused damages to their remaining trust lands. The tribe's experts described damages to the Zuni Reservation that included erosion and the loss of minerals, timber, and water. The estimated damage amounted to several million dollars. In 1990, Congress passed the Zuni Land Conservation Act, which settled this claim and gave the tribe a second judgment of \$25 million.<sup>6</sup> The bulk of this money has been placed in a permanent trust fund, with the interest being used to implement a permanent sustainable resource development plan.<sup>7</sup>

The tribe also went to court in Arizona to establish a permanent easement to Kolhu/wala:wa, or the place Zuni believe they go after death (see Figure 2).<sup>8</sup> In an amazing victory for Native American religious freedom, the Zuni not only won a permanent easement across sixty miles of private lands for religious purposes, but also obtained a contempt-of-court citation against a rancher who attempted to stop the religious pilgrims from crossing his ranch.

Zuni's aboriginal land claim was brought before the US Court of Claims as Docket 161-79L. At the 1982 trial the court sought to determine (1) whether or not the United States had taken lands that had been held exclusively by the Zuni Tribe and (2) if so, when were they taken. Many complex issues were raised at the trial and there was much conflicting testimony offered by witnesses for the United States. Zuni waited five long years for a decision from the court. With so much evidence to ponder it is no wonder that Judge Judith Ann Yannello took as long as she did to reach a decision. Finally, on 27 May 1987 she filed her decisions with the US Court of Claims. The text of her decisions is more than one-hundred pages long and represents a great victory for Zuni people. Judge Yannello accepted the testimony of the Zuni and their experts and rejected the arguments set forth by the United States. She found (1) that the Zuni had held aboriginal title to a large portion of what has become the states of Arizona and New Mexico and that, as a result of acts or omissions of the United States, Zuni was deprived of 14,835,892 acres; and (2) that these lands were taken by gradual encroachment between 1876 and 1939.

Following the decision by the Court of Claims on the amount and timing of the lands taken from the Zuni, the case entered a new phase called the valuation phase. But before the valuation phase could move forward, Zuni filed a motion relative to recognized title. The court ruled that Zuni had what amounted to recognized title to its aboriginal territory.<sup>9</sup> As a result, Zuni filed a motion asking the court to issue a finding on US recognition of Zuni title.

Figure 2



Note that the sacred site lies within Zuni aboriginal territory but outside the current reservation and across a state line (map prepared by Michelle A. Mestrovich).

This would have allowed the Zuni to receive “just compensation” (values at today’s rates) or actual title to lands. When the court ruled that the United States did not recognize Zuni’s aboriginal title on the technicality that it had never been surveyed, Zuni decided it was left with no recourse but to seek payment for the lands taken at their value at the time of taking.

Between 1987 and 1990 appraisers for both the Department of Justice and the Zuni Tribe worked to determine the value of the land at the time it was taken. Many tribes have been forced to settle their claims for amounts that represent very small per-acre values—\$.80 per acre, \$.50 per acre, or even \$.25 per acre. Zuni hired two appraisers and other experts to help with the valuation phase work. As a result of historical testimony, Zuni claimed that it was due a minimum of at least \$1.25 an acre for any lands taken. The appraisers for the United States and for the tribe differed dramatically in what each believed the claim to be worth.

In late 1990 Stephen G. Boyden, representing the tribe, entered into negotiations with the Department of Justice in an effort to settle the case at a value the Zuni believed was just. He and the tribe hoped to receive the total amount that their appraisers had suggested the claim was worth. The negotiations were difficult, but the Department of Justice dealt fairly with the tribe and on 30 November 1990 the two parties agreed to a settlement of \$25 million, or about \$1.69 an acre. Boyden and tribal officials were delighted with this settlement because it was the total amount that their appraisers had concluded the claim worth. Should the case have gone to court, it might have been years before the tribe received its judgment and the judgment could have been smaller. By settling out of court, the tribe received several years of additional interest on the settlement amount.

The settlement was next approved by the US Attorney General and the secretary of the Interior. After that, the money was put in a temporary trust under the supervision of the Albuquerque area office of the Bureau of Indian Affairs and the tribe was asked to agree upon a plan for the use of the funds. On 26 May 1992 that plan was presented to the people of Zuni.

After paying attorneys fees and outstanding bills for expert services, the remainder of the judgment fund, approximately \$19 million, was placed in the special trust account, pending the tribe’s decision on a plan for the use of the funds. The tribal council submitted a plan, which was subsequently approved by the Department of the Interior and which called for the funds to be invested and managed by the secretary of the Interior. The government restricted expenditures to authorized purchases for the benefit of the tribe as a whole, and forbid the use of any funds for per capita payments. Funds were approved to repay a loan the tribe had previously obtained from the Jicarilla Indian Tribe and from a bank in order to prosecute the claims and \$1.7 million was approved to aid in paying for the construction of a new elementary school at Zuni. Funds for a purchase of land near Kolhu/wala:wa were also approved.

Both the settlement of the Zuni land claim and the Zuni Conservation Act represent payments to the tribe for damages suffered by all the Zuni people’s ancestors over the past 150 years. The settlement will have to be used wisely

for the tribe as a whole. With wise planning, it will help to make life better for all Zuni in the future.

Still, however, there was the matter of Kolhu/wala:wa and access to that sacred area. For more than a century, Zuni political and religious leaders have attempted to protect their ownership and use rights to Kolhu/wala:wa, or Zuni Heaven as it is commonly known to non-Zuni. According to Zuni religion, Kolhu/wala:wa is the place where all Zuni go after death and is the location of the supernatural Kokko, who resides under a sacred lake fed by the waters from a precious spring. Kolhu/wala:wa is located near the place where the Zuni River flows between two mountains and then into the Little Colorado River. On one of the mountains is an opening into the underworld where Zuni religious leaders can enter subterranean chambers in order to attempt communication with their ancestors and the Kokko. Near the end of the other mountain is the location where the Koyemshi, or Mudheads, were created. Many of the Kokko were themselves created in the lake under which they now reside and where departed Zuni go to dance with them. Kolhu/wala:wa is both conceptually and geographically central to Zuni religion. The ancient Zuni origin and migration narratives all tell of Kolhu/wala:wa and explain its place in the story of the Zuni's search for the Middle Place.

Every four years between forty and sixty Zuni set out on a strenuous religious pilgrimage that takes four days and covers more than 110 miles. During this solemn, ceremonial trek, the Zuni who make the pilgrimage represent all the tribal members as they make offerings, recite prayers, gather sacred paint pigments, and eventually reach Kolhu/wala:wa, where their religious activities and prayers are aimed at bringing peace, order, and prosperity to the Zuni and to the entire world. Prayers to the supernatural beings and to the Zuni's ancestors are focused on bringing rain to the Zuni region to enable the tribe's crops to grow and nurture their neighbors' fields as well. Sometimes, in periods of drought, special pilgrimages have been made in off-years to pray for rain.

The historical records of non-Zunis provide proof that Zuni have been making this quadrennial pilgrimage for many centuries. Some records suggest that Coronado interrupted a quadrennial pilgrimage in 1540. During the remainder of the Spanish and Mexican periods from 1540 to 1846, however, the Zuni seem to have kept their pilgrimages secret in order to avoid religious persecution from Spanish authorities.

While their land-claim litigation continued, the tribe continued to lobby for a satisfactory solution to protect their rights to Kolhu/wala:wa. In 1983 and 1984 the Zuni obtained the support of prominent republicans and democrats in the Senate and House of Representatives in drafting legislation that would arrange title to the area for the tribe. The Zuni and their attorney, Stephen G. Boyden, were successful in arranging a complex deal among the various and diverse entities: the two political parties, the Zuni and Navajo, the non-Indian ranchers in the area, the Bureau of Land Management, and the state of Arizona. Many amendments were necessary before Senate 2201, a bill "To Convey Certain Lands to the Zuni Indian Tribe for Religious Purposes,"

was made law on 28 August 1984.<sup>10</sup> The act established a method for Zuni to obtain the more than 11,000 acres that comprise the area around Kolhu/wala:wa. The tribe was given some of the lands outright from federal public lands and was allowed to purchase other lands and then place them all in trust status. Since the tribe was required to purchase some of the lands, Congress agreed to waive offsets, or reductions, in their claims cases. This compromise proved to be very favorable for the tribe, because it meant that their monetary settlement in the claims cases would not be offset by much of the money that the United States had spent on the tribe in the past. Later in the year, a celebration honoring Senator Barry Goldwater for his role in the passage of this legislation was held at Zuni. Today almost all of the land at Kolhu/wala:wa has been officially transferred to Zuni tribal trust status.

Zuni's problems in guaranteeing their rights to Kolhu/wala:wa were not finished, however. The following year, in 1985, as the time for the quadrennial pilgrimage approached, Earl Platt, a wealthy attorney in his mid-seventies and owner of a large ranch along the route of the pilgrimage, notified the Apache County sheriff that he wanted the Zuni religious leaders arrested for trespassing when they passed along the trail through his property. Sheriff Art Lee notified the Zuni Tribe of Platt's intent, and the Zuni, in turn, contacted their attorney. Since the pilgrimage was scheduled to begin in a few weeks, the tribe moved quickly. The Zuni, through their attorney, asked for support from the Justice Department.

The department agreed to take the case. Hank Meshorer, chief of the Indian section of the division of natural resources in the Department of Justice, took the case for the United States and immediately went to federal district court in Phoenix and was granted a temporary restraining order against Platt on 12 June 1985.<sup>11</sup>

The legal proceedings involved in suing for the easement were extremely complex. Hank Meshorer, US attorney representing Zuni, spent much of his time during the next five years learning all he could from the Zuni and the expert witnesses. Eventually it became necessary for the Bureau of Land Management to make another, formal survey of the route to Kolhu/wala:wa. This was completed in 1987. Because of the legal maneuverings, however, the trial had still not taken place by 1989 when another quadrennial pilgrimage was set to take place. During preparations for the trial Head Councilman Barton Martza acted as liaison with Zuni religious leaders and coordinated tribal efforts.

As the trial on the Zuni easement approached, Earl Platt again was reported to have threatened to disrupt the Zuni pilgrimage, which was scheduled for 21 to 24 June 1989. The United States asked for and received a second temporary restraining order, issued to ensure that Platt did not disrupt the pilgrimage. Meshorer then traveled to Zuni to be available during the pilgrimage should any problem occur. Although every precaution had been taken, on the third day of the pilgrimage Platt drove his pickup through the line of pilgrims, reportedly hitting one of the horses and riders in the group. All the Zuni on the pilgrimage had taken strict vows to avoid hostility or confrontation and they quickly veered away from Platt and completed the remainder of the pilgrimage without further incident.

The Justice Department immediately vowed to prosecute Platt for contempt of court, and on 27 July 1989 filed a petition to show cause why Earl Platt should be held in contempt. The trial was set for 31 August 1989 in Phoenix federal district court and was presided over by Judge William P. Copple, who had signed the restraining order.

At the contempt trial the government called five Zuni as witnesses, as well as the deputy and several other non-Zunis who had observed the incident. Earl Platt did not take the stand. Although his attorneys did not dispute the disruption of the pilgrimage, they claimed that he had not actually run into the horse and rider. Judge Copple rendered his decision on 14 September 1989, finding Platt guilty of civil contempt. He said that to "penalize" Platt for violating the court order, he was ordering him to make a substantial payment to the Zuni Tribe.

From 3 to 5 January 1990, Judge Earl H. Carroll presided over a second trial to obtain a prescriptive easement to Kolhu/wala:wa. Hank Meshorer represented the United States on behalf of the Zuni Tribe. He was joined at the plaintiff's table by Stephen G. and John Boyden for the Zuni Tribe, and by Melvin A. McDonald on behalf of the tribe in Phoenix.

The United States called five expert witnesses and eleven lay witnesses, three of them Zuni. After the experts and non-Zuni lay-witnesses had testified, the Zuni chosen by religious leaders to represent the tribe took the stand. The first of the three Zuni who testified was Mecalita Wytsalucy, the High Priest of the North, or Kyakwemossi. He emphasized the preeminent importance of Kolhu/wala:wa and the pilgrimage to all Zuni people. He was followed by John Niiha, who had been chosen by the Zuni and Meshorer to provide the direct testimony about the pilgrimage itself. Although many Zuni have been involved in past pilgrimages and many have significant and important knowledge about the pilgrimage, it was decided that Niiha, the Kopekwin, or the religious leader responsible for organizing kiva activities, would best represent the tribe at this proceeding. Niiha gave a detailed account of the pilgrimage, the route, the method that he used to remember the route as he helped lead the pilgrims down the trail. He also stated that the route had never changed during the decades that he had been going on the pilgrimage. Edmund J. Ladd, a Zuni and anthropologist, acted as interpreter for Niiha and Wytsalucy. Ladd also worked with the experts throughout the preparation for trial in the long and difficult process of objectively translating the comments of Zuni witnesses to establish the facts of the case from the Zuni perspective. Governor Robert E. Lewis was the final Zuni witness and spoke eloquently in English of the Zuni's claimed rights to the Kolhu/wala:wa and the trail to that place, including where it crossed Platt's property.

The United States rested its case and there was a short recess. But when the trial resumed, the Platts unexpectedly rested their case, without calling a single witness.

Attorneys for both parties gave their final arguments and then Judge Carroll immediately ruled from the bench on most of the elements of an easement in favor of the Zuni. On 7 February 1990 Judge Carroll issued his order, finding that all elements of easement law had been met and granting an ease-



ment to the Zuni over Platt's lands for their pilgrimage every four years, for up to sixty people, on foot and horseback, at the time of the summer solstice. The order also stated that the easement should be fifty feet wide, and that the Zuni should not interfere with Platt's water sources.

The decision was greeted with great joy and relief at Zuni and received newspaper headlines in both New Mexico and Arizona. Still, there were several aspects of the easement that both Zuni and the United States believed were unclear. The United States quickly notified the court that it would appeal the judgment to allow off-year pilgrimages, tribal water-use from tanks along the easement, and expansion of the width of the easement at the second-day lunch location. The United States also filed a motion to assess costs associated with the case against Platt. Platt objected and a hearing was held, but on 19 June 1990 the court assessed over court costs to Platt. He appealed, but the court upheld the order.

Later in the year, with the Platts contemplating further appeals on the contempt fine and the costs award and with the United States appealing for additional easement rights for the Zuni, discussions for a settlement of the case were initiated. On 8 November 1990 attorneys for Platt notified the Department of Justice that Platt was willing to allow the Zuni a larger easement area (200 yards by 200 yards) for the location where they stop for lunch during the second day, rights to use water tanks for their horses along the route, and the right to off-year pilgrimages in times of drought. He offered this in return for the United States asking the court to waive the contempt fine and court costs. This settlement was subsequently approved by the court.

On 5 September 1990 the Zuni Tribe held a celebration for the court victory giving Zuni its easement to Kolhu/wala:wa and honoring those who had helped carry out the complex litigation. The tribe expressed particular gratitude to Meshorer for his tireless efforts in pursuing the litigation and for providing relentless attention to the complex details of the case. After more than a century of work, the Zuni have now guaranteed their rights to go to and utilize Kolhu/wala:wa.

## NOTES

1. This essay is adapted from E. Richard Hart, "Zuni Relations with the U.S. and the Zuni Land Claims," in *Zuni and the Courts: A Struggle for Sovereign Land Rights*, ed. E. Richard Hart (Lawrence: University Press of Kansas, 1995), 72–85. Chapter ten of this book includes an instructive series of maps showing aboriginal territory and a sequence of land cessions from 1876 to 1939.

2. PL 95-280, 92 Stat. 244 (1978), a Jurisdictional Act; PL 98-408 (1984), "To Convey Certain Lands to the Zuni Indian Tribe for Religious Purposes"; PL 101-386, 104 Stat. 1174 (1990), Zuni Land Conservation Act.

3. *Zuni Indian Tribe v United States* (Dockets 161-79L, 327-81L, and 224-84L). The findings for these dockets appear in full in Hart, *Zuni and the Courts*, appendices A and B, 241–307.

4. *United States v Platt*, Civil No. 85-1478, Federal District Court, Phoenix, Arizona.

5. 16 Cl. Ct. 670 (1989).

6. 101 Stat. 1174; Dockets 327-81L and 224-84L.
7. Hart, *Zuni and the Courts*, 311-318.
8. Ferguson and Hart provide maps drawn from the evidence developed for the case showing the various pieces of land and the dates they were taken from Zuni. Cf., T. J. Ferguson and E. Richard Hart, eds., *A Zuni Atlas* (Norman: University of Oklahoma Press, 1995). Figure 2 was designed by Imre Sutton and composed on computer by Michelle Mestrovich; the upper portion was adapted from maps in Hart, *Zuni and the Courts*, 74, and the lower portion is based upon data supplied by the Bureau of Land Management in Tucson, Arizona. There is also a map accompanying T. J. Ferguson and Cal A. Seciwa, "Zuni," in *Native America in the Twentieth Century: An Encyclopedia*, ed. Mary Davis (New York: Garland Publishing Company, 1994), 723-727, 724 (quote). The Zuni are also discussed (with a print of a map depicting lands taken by 1876) in Bryan A. Marozas, "The Role of Geographic Information Systems in American Indian Land and Water Rights Litigation," *American Indian Culture and Research Journal* 15:3 (1991): 77-93.
9. For land areas subject to recognized title, see C. C. Royce, comp., *Indian Land Cessions in the United States, 18th Annual Report, 1896-97, pt. 2*, Bureau of American Ethnography (Washington, DC: Government Printing Office, 1899), plates 1, 2. For a discussion of recognized title, see Richard W. Yarborough, "Index to the Map, 'Indian Land Areas Judicially Established,'" US Indian Claims Commission, *Final Report* (Washington, DC: Government Printing Office, 1979): 127-130. Text includes comparison of Indian (aboriginal) and recognized titles. The Zuni adjudicated areas do not appear on the final map of "Indian Land Areas Judicially Established" because the claims were not heard by the ICC. To date, there is no compiled map of adjudicated claims areas determined by the US Federal Claims Court or the US Supreme Court, and thus there is no comprehensive map of land claims adjudication in print.
10. PL 98-408.
11. *United States v Platt*, Civil No. 85-1478, Federal District Court, Phoenix, Arizona.