

Fort Lewis College

Native American Tuition Waiver
Briefing Paper

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This briefing paper will present the history and current status of the Native American Tuition Waiver at Fort Lewis College which is funded by the citizens of the State of Colorado. The paper includes an appendix on several treaties with Native Americans, particularly relative to the Ute people whose lands in Southwest Colorado ultimately formed the basis for the tuition waiver. This briefing paper will focus on the history and status of the contract between the United States government and the State of Colorado which defines the obligation of the State of Colorado to provide tuition expense for Native American students attending Fort Lewis College.

The original Fort Lewis was established as a United States Army post in 1878 at Pagosa Springs, Colorado, to maintain a military presence near the southern bands of Utes. The 1880 treaty between the United States and the Ute Tribe, signed on March 6, 1880, created a reservation for the Southern Utes along the La Plata River. In conjunction with the treaty, the military post was moved to a location near Hesperus, Colorado. “In 1882, The Fort Lewis Military Reservation, which included the Hesperus site, was set aside by the federal government for an Indian Reservation School. Fourteen years later, in 1896, all but 6,318 acres was released for disposition and returned to the public domain.” (Kyle) In a memo dated February 16, 1895, Daniel Lamont, United States Secretary of War, declared that all of the military reservation of Fort Lewis, Colorado, except for the land described in the 6,318 acres, was transferred to the Secretary of Interior for disposition.

“The remaining 6,318 acres continued as federally–owned Indian school land for another fifteen years. The school apparently served as many as 400 pupils at one time but the number dropped off, and only 34 pupils were in attendance during the 1909 school term.” (Kyle) The attendance decline at the Indian School prompted the United States Commissioner of Indian Affairs to report that the school was no longer of value and recommended that the property be transferred to the State of Colorado. On April 4, 1910, the Sixty-first Congress passed an Act which stated:

There is hereby granted to the State of Colorado, upon the terms and conditions hereinafter named, the property known as the Fort Lewis School, including the lands and buildings, and fixtures pertaining to said school; Provided, that said lands and buildings shall be held and maintained by the State of Colorado as an institution of learning, and that Indian pupils shall at all times be admitted to such school free of charge for tuition and on terms of equality with white pupils; Provided further, that this grant shall be effective at any time before July first, nineteen hundred and eleven, if before that date the Governor of the State of Colorado files an acceptance thereof with the Secretary of the Interior accepting for said State said property upon the terms and conditions herein prescribed; Provided further, that if said property is not accepted by the State of Colorado as hereinbefore provided, the Secretary of the Interior is hereby authorized to dispose of and convey the said property, including the real estate, buildings and fixtures, to

the highest bidder for cash at a price not less than the appraised valuation to be fixed by the Secretary of the Interior, the sale to be subject to his approval and under such rules and regulations as he may prescribe; and the Secretary of the Interior is also authorized and directed to sell, or transfer to other government Indian schools, all other property pertaining to the said Fort Lewis School for the disposition of which provision is not otherwise made herein.” (Act of Congress)

On January 25, 1911, Governor John P. Shaforth of Colorado signed the Executive Order which accepted the Fort Lewis School under the conditions named in the 1910 Act of Congress. His executive order ends with this statement:

Therefore, in consideration of the premises and of the grant aforesaid, I, JOHN P. SHAFORTH, Governor of the State of Colorado, for and on behalf of the said State of Colorado, do hereby accept the property know as the Fort Lewis School, including the lands, buildings and fixtures pertaining to said school upon the terms and conditions named in the said Act of Congress of the United States of America, passed at the Second Session of the Sixty-first Congress, entitled: “An Act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs for fulfilling treaty obligations with various Indian tribes, and for other purposes for the fiscal year ending June 30, 1911, and approved April 4, 1910.” (Executive Order)

In 1916, there was an amendment to the Act of 1910 which stated:

That the lands, buildings, fixtures, and all property rights, granted to the State of Colorado for educational purposes by section five of the Act of Congress approved April fourth, nineteen hundred and ten (Thirty-sixth Statues at Large. Page two hundred and seventy-three), may, in lieu of the use designated in said grant, be utilized by said State for the care of the insane, as an agricultural experiment station, or for such other pubic purposes as may be authorized by the legislature of the State: Provided, That Indians shall always be admitted to such institutions free of charge and upon an equality with white persons. (Amendment to Act of Congress)

Fort Lewis high school began its operations under the control of the State of Colorado in 1911 with an agricultural course lasting six months. “The State Board of Agriculture, at its April meeting (1911) formally received the school into its jurisdiction and authorized President Charles Lory to prepare a four years course of study, hire a principal, and open Fort Lewis in September.” (Smith) In 1927, the school was approved by the Colorado State legislature to become a junior college. In 1956 the College was moved to its present day location in Durango, Colorado.

Portions of Article 14 of Chapter 124 of the 1963 Colorado Revised Statutes are included here to further clarify the position of the State of Colorado regarding the tuition waivers. They are as follows:

- 124-14-2. Part of agricultural college system.-The state board of agriculture shall take and assume control of the lands, buildings and equipments at Fort Lewis school, now owned and held by the state, and the lands, buildings and equipment shall be a part of the agricultural college system of the state, and shall be controlled and managed under the same laws, rules and regulations by the state board of agriculture as the Colorado state university; provided, that Indian pupils shall at all times be admitted to such school free of charge for tuition and on terms of equality with white pupils.
- 124-14-3. Endowment fund.-In accordance with provisions of an act of congress approved April 4, 1910, which granted to the state of Colorado the property known as the Fort Lewis school, including lands, buildings, and fixtures, and providing “That said lands and buildings shall be held and maintained by the state of Colorado as an institutions of learning and that Indian pupils shall at all times be admitted to such school free of charge for tuition on terms of equality with white pupils” and in accordance with sections 124-14-1 and 124-14-2, all rentals and royalties derived from leases of coal measures, minerals deposits and oil structures contained in said lands shall constitute a permanent endowment fund for the Fort Lewis school to be known as the “Fort Lewis school endowment fund”
- 124-14-12. Name of school changed. –The Fort Lewis school at Durango, Colorado, declared to be an institution of the state by sections 124-14-2, C.R.S. 1963, shall hereafter be designated under the name and title of the “Fort Lewis college”; provided that the legal effect of any statute heretofore designating such institution by any other name, or any property rights heretofore acquired and obligations heretofore incurred under any other name, shall not be impaired hereby.

Increasing numbers of Indian students attending Fort Lewis College in the 1960s created a concern about the citizens of Colorado paying for their education. “The Colorado Commission on Higher Education in 1966 asked that the State Board of Agriculture “initiate inquiries with appropriate state and federal agencies looking either to modifications of law to provide reimbursement for the education of non-resident Indian students or to permit strict limitation of non-resident Indian students’ at Fort Lewis.” (Kyle) The Colorado legislature in its 1971 session passed a bill which included the following language:

124-14-5. Tuition fees-Indians. (1) The state board of agriculture shall fix tuition, in accordance with the level of appropriations set by the general assembly for the college, subject to the restriction that all qualified Indian pupils whose domicile lies within the geographic boundaries of the state of Colorado, who qualify for in-state tuition under article 18 of chapter 124, C.R. S. 1963, and who are not otherwise able to pay tuition shall at all times be admitted to such school free of charge for tuition and on terms of equality with other pupils.

The United States of America then brought action against the State of Colorado in United State District Court seeking a judgment, which declared the 1971 legislation a breach of contract created by acts of Congress and the Colorado legislature in 1910 and 1911, at which time Colorado agreed that Indian students would always be admitted to Fort Lewis College without paying tuition. The federal government asked for an injunction requiring State of Colorado officials to waive payment of tuition for all Indian pupils admitted to Fort Lewis College. Chief Judge Alfred A. Arraj made the following decision on August 14, 1972:

It is therefore ordered that judgment be entered declaring that the Congressional Act of April 4, 1910, and the acceptance of the terms thereof by the State of Colorado resulted in the formation of a contract which requires Colorado to admit Indian students to Fort Lewis College at Durango, Colorado free of charge for tuition. (U.S. District Court)

An appeal was filed by the State of Colorado to the United States Court of Appeals, Tenth Circuit. The decision of the Court of Appeals affirmed the decision made by Judge Arraj. The court stated:

The Court of Appeals, Seth, Circuit Judge, held that where United States granted land and buildings to State by Act which required that the land and buildings be held and maintained by State as an institution of learning at which Indian pupils shall be admitted free of charge and Act required express acceptance of provision by State which was done by act of legislature, there was not a grant by United States, in praesenti and title did not pass until express acceptance was made by State which had obligation to maintain tuition-free school for Indians at school's new location which was not within boundaries of original grant. (U.S. Court of Appeals)

The decision thus affirmed by the United States Court of Appeals has held the State of Colorado to its obligation to provide a waiver of tuition to all qualified Native American students attending Fort Lewis College, regardless of where in the United States they reside.

TREATY APPENDIX

Many Indian tribes have inhabited what is now the State of Colorado. The Utes, Apaches, Navajos, Shoshones, Comanches, Kiowas, Kiowa-Apaches, Arapahoes, and Cheyennes made their homes in the land that became Colorado. (Hughes) The Ute Indians are the oldest known inhabitants as they came to this land approximately 10,000 years ago, first migrating down the east side of the Rocky Mountains. The language spoken by the Ute people is a dialect of the Uto-Aztecan language known as Shoshonean. Historians have stated that the people who speak Shoshonean separated from other Uto-Aztecan speaking people about the time of Christ.

“Eventually the Utes became concentrated into a loose confederation of seven bands. The names of the seven bands and the areas they lived in before the coming of the Europeans are as follows:

- 1 The Mouache band lived on the eastern slopes of the Rockies, from Denver, south to near Las Vegas, New Mexico.
- 2 The Capote band inhabited the San Luis Valley in Colorado near the headwaters of the Rio Grande and in New Mexico especially around the region where the towns of Chama and Tierra Amarilla are now located.
- 3 The Weeminuche occupied the valley of the San Juan River and its northern tributaries in Colorado and northwestern New Mexico.
- 4 The Tabeguache (also called Uncompahgre) lived in the valleys of the Gunnison and Uncompahgre Rivers in Colorado.
- 5 The Grand River Utes (also called Parianuche) lived along that river in Colorado and Utah.
- 6 The Yamparicas (also called White River) band inhabited the Yampa River Valley and adjacent land.
- 7 The Uintah Utes inhabited the Uintah Basin, including the Great Salt Lake Basin.

Of the bands mentioned above, the first two (Mouache and Capote) make up the present day Southern Utes with headquarters at Ignacio, Colorado. The Weeminuches are now called the Ute Mountain Utes with headquarters at Towaoc, Colorado. The last four mentioned (Tabeguache, Grand, Yampa, and Uintah) now comprise the Northern Utes on the Uintah-Ouray Reservation with headquarters at the town of Fort Duchesne, Utah.” (Jefferson, Delaney, and Thompson)

The Spanish first came into Colorado in 1540 when Coronado and his expedition came north into a small southeast corner of the state. A number of other expeditions came into the state after that time, but the real Spanish settlements remained south in what is the State of New Mexico. The Utes were in contact with the Spanish during this time period, in fact, raiding settlements for livestock. “In 1638, Spanish governor Luis de Rosas attacked a group of Utes, killing many and enslaving the rest.” (Hughes) The Spanish did not continue with these actions, however, as they ultimately desired peace with the Utes. In the 1670s, the Spanish presented a peace treaty with the Utes, which was the first treaty made with the Utes by a European people. This treaty continued during the Pueblo Revolt in 1680 and remained intact well into the 1700s. A second peace treaty created by

alliances between the Utes and the Spanish under then Governor Juan Bautista de Anza was signed in 1789. In 1846, however, the war against Mexico by the United States resulted in the entire Ute territory being incorporated into the United States of America. On December 30, 1849, the first treaty between the Utes and the United States was signed at Abiquiu in the present State of New Mexico. The treaty was ratified by the United States Senate on September 9, 1850. It had been negotiated by James S. Calhoun, Superintendent of Indian Affairs, and thus called the Calhoun Treaty. In return for the promise of the Utes to stop attacks in northern New Mexico, the United States government stated it would pay the Utes five thousand dollars per year and promised to protect them. The Utes promised to recognize the legal power of the United States government over them and to obey the laws of the United States. Agencies of the government were allowed onto Ute lands, but the treaty made no mention of the Ute Indian land boundaries or any changes therein. Quiziachigiate was the principal Chief who signed the treaty with primarily members of the Capote and Tabeguache bands involved in the treaty negotiations and signing. Indian agencies were then established in the 1850s, the first being at Taos, New Mexico. John Greiner was the first agent with Christopher “Kit” Carson succeeding him.

The gold rush into California and the same interest in Colorado for finding precious metals spurred large migrations of non-Indian people into both regions. In 1860, gold was discovered in the San Juan Mountains of Colorado, but the advent of the Civil War postponed the ultimate rush of miners to the region. “At the urging of Colorado’s territorial politicians, President Lincoln called for another meeting with the Utes in 1863, to see if they could be enticed to sell all the land east of the Continental Divide and confine themselves to a reservation” (Decker) The United States was represented by John Nicolay, Secretary to President Lincoln, and John Evans, Governor of the Territory of Colorado. Capote band leaders attended the negotiations, but refused to sign the agreement and the Mouaches sent one leader who also refused to sign. Ten members of the Tabeguache band, including Ouray and three members of the White River band, signed the treaty. A legal point to be made on this and other treaties is “the principal of Indian consent is highly visible in the treaty-making process, and even identifiable in the exercise of the commerce clause, but is nowhere to be seen in the application of the property clause. Consent by Indians is necessary under the doctrine of discovery, and presumably the Constitution is based upon the principle of the consent of the governed. But absolute proprietorship precludes the consent of anyone except the owner in selling property, and although Indians were regarded as having equitable title to their lands, the United States consistently used every tactic available to force tribes to sell their lands. When American political history is understood in the light of the property clause, the importance of the commerce and treaty-making powers diminishes considerably.” (Deloria and Wilkins)

The treaty, known as the Evans treaty, was ratified by the United States Senate and signed by President Lincoln on December 14, 1864. The treaty had accorded the Utes a provision for the United States government to provide livestock and goods for the next ten years, as well as agencies in exchange for their land. “Since most treaties involved some kind of land cession and required some kind of annuity payment, Congress was required to pass enabling legislation to appropriate the funds or, in the case where lands were opened at a

certain price and the proceeds were to be deposited in the Treasury to the credit of the tribe, Congress had to act to establish the procedures under which this task was accomplished. And in many instances where the treaty called for the establishment of schools, trading posts, hospitals, and other social services, Congress has to authorize construction and the creation of specific positions within the Bureau of Indian Affairs. Thus, appropriations acts became the most important aspect of the legislative agenda for Indians.” (Deloria and Wilkins) As Congress did not appropriate the necessary monies to accomplish this treaty, it was not acted upon.

The treaty and agreement known as the Hunt treaty was entered into on March 2, 1868 between the United States government and representation from seven Ute bands. Nathaniel Taylor, Commissioner of Indian Affairs, Alexander Hunt, Governor of the Colorado Territory and Kit Carson represented the government with representatives of the Tabaquache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah bands for the Ute people. The treaty provided that all provisions of the 1863 Evans treaty as amended by the Senate were reaffirmed and in force for all Ute bands. The treaty established a single reservation for all seven Ute bands with an area equal to about one-third of the Colorado Territory as the Ute reservation. This agreement gave up over half of the lands traditionally occupied by the Ute people and confined them to their reservation which was the western half of the Territory of Colorado. The government agreed to establish two agencies on the reservation; one for the Grand River, Yampa, and Uintah bands on the White River, and the other for the Tabeguache, Muache, Weeminuche, and Capote bands on the Rio de los Pinos. The agencies included a warehouse, schoolhouse, and sawmill.

Among the numerous other provisions of the treaty agreement was included: “...and the United States agree that for every thirty children between said ages (seven and eighteen years) who can be induced to attend school a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as teacher...” (Kappler) The treaty also paid out (at the discretion of Congress) no more than thirty thousand dollars for food per annum for all bands needs, forty five thousand dollars for the first year only to purchase each family a cow and five sheep, and thirty thousand dollars per annum to purchase clothing and blankets for all Utes.

Article 2 of this treaty stated: “The United States agree that the following district of country...shall be set apart for the absolute and undisturbed use and occupation of the Indians herein named...and the United States now solemnly agree that no persons, except those herein authorized to do so...shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article...” (Kappler)

Article 16 of the Hunt treaty stated: “No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provide

in article seven of this treaty.” (Kappler)

The United States Congress in January of 1871 introduced a new bill for Indian appropriations and the fulfillment of treaty obligations. As part of the discussion, the government’s Indian policy was debated, which then created a discussion on treaties. A compromise on treaty making was made through a conference committee and a bill was passed and signed by President Grant in March, 1871. The language of the bill contained the following: “Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; Provided further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.” (Prucha) This action simply said that no longer would the United States treat tribes as sovereign political entities with whom the federal government would make treaties, but old treaties recognizing sovereignty were still in effect. After this point the use of bilateral agreements in a variety of forms was used for negotiated settlements and as a continuation of the treaty process. The use of agreements was first used by Felix R. Brunot, President of the Board of Indian Commissioners, appointed by the Secretary of the Interior. The first Colorado gold rush of 1859 brought thousands of miners into the territory, and many who were unsuccessful in the diggings took to farming. The expanding numbers of farmers and miners made their way to the San Juan Mountains, even though the Hunt treaty had secured those lands for the Utes. “Local and state politicians came to the defense of the miners settled in the San Juans. The Colorado legislature sent a plea to the president asking for the government to take possession of the San Juans. Newspapers across the territory supported the request and called for the Utes’ removal from Colorado altogether.” (Decker)

In 1873, the Brunot Agreement, also known as the San Juan Cession, removed 4,000,000 acres from the Ute Reservation in the San Juans and opened the land to mineral exploration and settlement. The agreement was made by Felix Brunot on behalf of the United States, and certain Ute Indians in Colorado had articles of convention entered into on September 13, 1873. Article II of the agreement made this statement concerning the four million acres: “The United States shall permit the Ute Indians to hunt upon said lands so long as the game lasts and the Indian are at peace with the white man.” (Kappler) This agreement took back from the Utes what is now most of Southwest Colorado in exchange for an annual payment of twenty five thousand dollars and a salary of one thousand dollars to Ouray, for a period of ten years or as long as he remained “headchief” of the Utes. This agreement however, was not recognized by Ignacio, leader of the southern bands of Utes.

On March 6, 1880, following events at the White River Agency and “massacre,” a peace agreement was signed, which in part created a reservation for the Southern Ute bands in southwest Colorado. The reservation’s ultimate size was reduced to six hundred thousand acres, finally determined in 1895 through a bill introduced in Congress. This bill known as the Hunter Act was signed into law on February 11, 1895. There was disagreement among the members of the Ute bands, which finally resulted in the separation of the three southern bands into two groups, the Mouache and Capote bands (now known as the

Southern Ute Indian Tribe) and the Weeminuche band (now known as the Ute Mountain Ute Tribe).

Perhaps Article 3 in the Northwest Ordinance, passed by Congress on July 13, 1787, best describes what should have been the underlying foundation for relations with Native American people and the United States government through the course of time. “Article 3 contained statements of morality unusual in an act of Congress and spelled out the policy toward the Indian inhabitants who were, after all, the original owners of the soil that was to be distributed so casually. The article reads:

Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

The utmost good faith shall always be observed toward the Indians; their lands and property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.” (Deloria and Wilkins)

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Excerpts of Executive Records of Governor John Shaforth
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