A POLICY REVIEW OF THE FEDERAL GOVERNMENT'S RELOCATION OF NAVAJO INDIANS UNDER P.L. 93-531 AND P.L. 96-305

Hollis A. Whitson*

I. INTRODUCTION

The "Navajo-Hopi Land Dispute" is a misnomer[1] used to describe the "greatest title problem in the West."[2] The 100-year-old dispute has spawned three federal statutes,[3] dozens of federal[4] and state[5] court cases, a new fed-

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* B.A. 1979, University of Redlands; J.D. 1984, Yale Law School. The Author gratefully acknowledges the assistance of the following individuals: Wally Ames, Carol Bernstein-Ferry, Michael Brown, E. Donald Elliott, Dana Fisk, Kathy Keck, Presley Pang, Martha Roberge, and Robert Weisz.

1. The term "Navajo-Hopi Land Dispute:" 1) implies that there are only two major actors, and not many actors; 2) refers ambiguously to the Navajo and Hopi Tribal Governments, but does not define them as political entities; and 3) focuses attention on the differing interests of the two tribes, not their similar position vis-a-vis the United States.

2. Healing v. Jones (II), 210 F. Supp. 125, 129 (D. Ariz. 1962), *cert. denied*, 373 U.S. 758 (1963) (per curiam).

3. Pub. L. No. 85-547, 72 Stat. 402 (1958); Pub. L. No. 93-531, 88 Stat. 1712 (1974); Pub. L. No. 96-305, 94 Stat. 929 (1980) (codified as amended in 25 U.S.C. §§ 640d to 640d-28 (1982)).

4. Walker v. Navajo-Hopi Indian Relocation Commission, 728 F.2d 1276 (9th Cir. 1984); Hopi v. Watt, 719 F.2d 314 (9th Cir. 1983); Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983); Sekaquaptewa v. MacDonald, 626 F.2d 113 (9th Cir. 1980); Sekaquaptewa v. MacDonald, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980); Sekaquaptewa v. MacDonald, 591 F.2d 1289 (9th Cir. 1979); Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir. 1978); Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974); United States v. Kabinto, 456 F.2d 1087 (9th Cir.), *cert. denied*, 409 U.S. 842 (1972); Hamilton v. Nakai, 453 F.2d 152 (9th Cir.), *cert. denied*, 406 U.S. 945 (1972); Hopi Tribe v. Navajo Tribe, Civ. No. 85-801 (D. Ariz., pending June, 1985); Zee v. Watt, Civ. 83-200 PCT EHC (D. Ariz., dismissed March 29, 1985); Zah v. Clark, Civ. No. 83-1753 BB (D.N.M., filed Nov. 27, 1983); Sidney v. Navajo Tribe, Civ. Nos. 76-934, 935, 936 PHX EHC (D. Ariz., filed Dec. 15, 1976); Sekaquaptewa v. MacDonald, 448 F. Supp. 1183 (D. Ariz. 1978), *cert. denied*, 449 U.S. 1010 (1980); Healing v. Jones (II), 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); Healing v. Jones (I), 174 F. Supp. 211 (D. Ariz. 1959), *aff'd*, 373 U.S. 758 (1963); Hopi Tribe v. United States, Nos. 319-84-L, 320-84-L, 321-84-L (Ct. Cl., pending June 1985).

In addition to these lawsuits, relocatees have sued realtors for fraud. *See, e.g.*, Monroe v. High Country Homes, Civ. No. 84-189 PCT CLH (D. Ariz., filed Feb. 9, 1984). A Federal Tort Claims Act administrative complaint has been filed with the Navajo and Hopi Indian Relocation Commission (NHIRC), *see infra* note 6, by Esther and Joe Begay (filed Nov. 30, 1984), and individual actions have been filed in the United States Court of Claims. *See, e.g.*, Begay v. United States, No.

eral agency,[6] and the largest federal housing program in the country.[7] The dispute has also resulted in the largest forced relocation[8] of any racial group

268-85-L, May 8, 1985 (Ct. Cl., filed May 1985) (claim for one million dollars in damages resulting from the Relocation Commission's failure to provide a decent, safe, and sanitary house and appropriate counseling and assistance).

5. Most are lawsuits filed by relocatees against private entities for alleged fraudulent business practices related to the resale of relocation homes. *See, e.g.*, Ahasteen v. Yancy, Civ. No. 39374 (Ariz. Sup. Ct., filed Nov. 29, 1984); Interpreter v. Idea Source, Inc., Civ. No. 38977 (Ariz. Sup. Ct., filed July 23, 1984).

6. The federal Navajo and Hopi Indian Relocation Commission was created by Pub. L. No. 93-531, § 12 (1974), 88 Stat. 1716, *amended by* Pub. L. No. 96-305, § 5 (1980), 94 Stat. 932 (codified in 25 U.S.C. § 640d-11).

7. Interview with Buck McGee, Housing Programs Officer, Navajo and Hopi Indian Relocation Commission, in Flagstaff, Arizona (July 29, 1983).

8. The actual number of relocatees is undetermined and in dispute. In 1980, the Relocation Commission enumerated 9,525 Navajos residing on Hopi-partitioned lands and 109 Hopis living on Navajo-partitioned lands. One hundred-one families refused to take any part in the enumeration and were therefore excluded from the total figure. NHIRC, 1981 REP. AND PLAN 3 (April 1981). In its January 1983 Annual Report, the Relocation Commission reports that 2,831 heads of households had submitted complete applications and that 433 households had actually been moved. NHIRC, SEVENTH ANN. REP. 3 (Jan. 1983). At the Commission estimate of 4.5 persons per family, these figures put the total somewhere between 11,425 and 12,739 persons. In May 1985, the Commission reported that new homes had been acquired for 774 families since relocation began in mid-1977. NHIRC, STATISTICAL PROGRAM REPORT FOR APRIL, 1985 (May 3, 1985), *attached to* NHIRC, PROGRAM UPDATE AND REPORT FOR APRIL 1985, at 6 (May 3, 1985). A total of 1,555 families had been certified but not yet relocated. An estimated 1,707 had been neither certified nor relocated. *Id.* These figures suggest a conservative estimate of between 10,480 and 17,478 persons, 3,483 of whom had actually been relocated by May 1985. Not all of the families would be eligible for assistance. *See* NHIRC, 1981 REP. AND PLAN 3 (April 1981).

By 1985, the official estimate of the number of relocatees had doubled. U.S. DEPARTMENT OF INTERIOR SURVEYS AND INVESTIGATIONS STAFF, A REPORT TO THE COMMITTEE ON APPROPRIATIONS, U.S. HOUSE OF REPRESENTATIVES, ON THE NAVAJO AND HOPI INDIAN RELOCATION COMMISSION, at iii (January 22, 1985) (hereinafter SURVEYS AND INVESTIGATIONS REPORT). In its March, 1985 budget justification to Congress, the Relocation Commission reports that 686 Navajo and Hopi families were relocated through the end of fiscal year 1984, and predicts that, by the end of fiscal year 1986, the Commission will have moved approximately 1,100 families. NHIRC, BUDGET JUSTIFICATION FY 1986 2-3 (March 1985). The Commission also predicts that, by the end of fiscal year 1985, a program total of 2,500 families will be certified eligible for assistance. *Id.* at p. 4. Compare the program total of 2,300-2,400 families as predicted in March 1984 by Commission Director Steve Goodrich. *Id.* at 33. At the Commission's estimate of 4.5 persons per family, these figures suggest a total of about 11,250 persons relocated and receiving assistance from the Commission.

Another meaningful figure is the count of those who applied for assistance but were denied eligibility. From the program's inception in mid-1977 through the end of fiscal year 1982, a total of 2,831 applications were completed and the Commission denied 52 applicants as ineligible. NHIRC, SEVENTH ANN. REP. 25 (January 1983). During that time frame, 1,504 applications were approved as families eligible for assistance. *Id.* In 1984 and 1985, perhaps because of the criticism surrounding rising program costs, the Relocation Commission made dramatic cuts in the numbers of those determined eligible for assistance. *See, e.g.*, Notice of Denial of Eligibility for Voluntary Relocation Assistance Benefits, Navajo Times Today, March 25, 1985, at 5, col. 4 (Commission proposes to disqualify 187 persons, many of whom represent families, for assistance because the Commission has been "unable to contact" these persons); NHIRC, BUDGET JUSTIFICATION, FY 1986 3 (March 1985) (151 Navajo families who applied for benefits as District Six evictees were denied eligibility for agency assistance); 25 C.F.R. §§ 700.137 and 700.138 (1984) (published 50 Fed. Reg. 14379, April 12, 1985) (establishes July 7, 1985, as a deadline for receipt of applications for voluntary relocation); 25 C.F.R. § 700.69(5) (1984) (excludes from eligibility any single person who was not actually maintaining and supporting himself/herself on and since November 12, 1975). *See also* 49 Fed. Reg. 22277 (May 29, 1984).

By April, 1985, a total of 4,036 applications had been completed, and 1,546 applications had been denied. NHIRC, STATISTICAL PROGRAM REPORT FOR APRIL, 1985 (May 3, 1985), *attached to* NHIRC, PROGRAM UPDATE AND REPORT FOR APRIL 1985 (May 3, 1985). A program total of 2,329 applications was approved as families eligible for assistance. *Id.*

in this country since the relocation and internment of 120,000 persons of Japanese ancestry during World War II.[9]

There are at least two versions of the "Navajo-Hopi Land Dispute." Advocates of the more publicized version claim that Navajo and Hopi Indians are having a "range war" over land in the Joint Use Area (JUA)[10] of the Hopi Reservation in Arizona.[11] They say that the United States set aside land for the Hopis in 1882 but that Navajos raided and encroached on the Hopi villages. A federal court found that each tribe had joint rights to most of the land and ordered the two to share the disputed land.[12] However, Navajos continued to disregard Hopi land rights until the area of Hopi land use was completely surrounded by the Navajo. It became necessary for Congress and the courts to intervene again: a series of laws and court orders instituted a massive relocation program to transfer to the Hopi Tribe control over the land.[13]

The other version of the land dispute focuses more on the common ground between the two peoples and the problems created by decades of federal intrusion into tribal affairs.[14] Many Navajo and Hopi say they have no quarrel with one another and that federal intervention is inappropriate.[15] They say that the land dispute is a sham, created by the federal government and sustained by federally-created tribal councils, attorneys employed by the United States government, and federal bureaucrats who neither represent nor protect the Indians' interests. They also say neither tribe has benefited from federal intervention, and that the only gain is to the large financial interests that have moved in to profit from the relocation program. Many Navajo people, weary of the repeated U.S. government relocation programs carried out against their people for the last 100 years, refuse to leave.[16] In

9. On February 19, 1942, President Roosevelt signed Exec. Order No. 9066, 3 C.F.R. § 1092 (1942), which authorized the Secretary of War to establish military areas and regulate travel within them. The military adopted a compulsory relocation program requiring persons of Japanese ancestry to report to and remain at designated relocation centers and internment camps. *See generally* A. GIRDNER & A. LOFTIS, THE GREAT BETRAYAL: THE EVACUATION OF THE JAPANESE-AMERICANS DURING WORLD WAR II (1969).

10. The Joint Use Area (JUA), called the Former Joint Use Area (FJUA), consists of the portion of the 1882 Reservation which lies outside grazing District 6. *See* Appendix, Map 1.

11. This version of the history of the relocation policy is detailed in Healing v. Jones (II), 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam). Most news coverage of the issue has focused on the "range war" theory. *See, e.g., In Arizona: A New "Long Walk?"* 115 TIME MAGAZINE 4 (June 30, 1980). *But see Two Tribes, One Land*, NEWSWEEK 78 (Sept. 23, 1985) (focus on relocation program).

12. Healing v. Jones (II), 210 F. Supp. 125, 191-192 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam).

13. *See supra* notes 3 and 4.

14. For descriptions of this version, see J. KAMMER, THE SECOND LONG WALK (1981). *See also* Mander, *Kit Carson in a Three-Piece Suit*, 32 CO-EVOLUTION Q. 52-63 (Winter 1981).

15. *See* Proclamation of the Big Mountain Dine Nation (October 28, 1979) (signed by Roberta Blackgoat, Chairperson, and 65 members of the Council of Elders). Dine is the Navajo word for "people." R. LOCKE, THE BOOK OF THE NAVAJO 7 (1979). *See also* Statement delivered to the Dine of Big Mountain and Navajo People (August 9, 1979) (signed by Earl Pela and other Hopi religious leaders); Letter from Hopi traditional and religious headmen of Hotevilla Pueblo to Arizona Governor Bruce Babbitt and New Mexico Governor Tony Anaya, March 4, 1985.

16. The Relocation Commission estimates that between 75 and 100 families may not apply for relocation assistance before the statutory deadline of July 7, 1986. *Department of the Interior and Related Agencies Appropriations for 1985: Hearings Before the Subcomm. on the Department of the Interior and Related Agencies before the House of Representatives' Committee on Appropriations*, 98th

the meantime, the Hopi Kikmongwis (spiritual leaders) have taken the mutual concerns of the traditional Navajo and Hopi to the United Nations.[17]

No single forum is available for resolution of the two conflicting views of the federal government's relocation policy. Congressional policymakers seem to view their role as one responding to judicial determinations, while the federal judges say that their role is to effectuate a congressional policy.[18] Moreover, the courts and Congress have accepted only governmental representatives to speak for the relocatees; the individual relocatees have been excluded from the judicial and legislative policy-making arenas. The relocation policy has continued for almost 30 years without any direct input from those affected. As a result, the full costs of the relocation policy have escaped judicial review and congressional oversight.

This Article explores the rationale for and human costs of the relocation policy. Potential policy challenges are discussed and recommendations for a new policy are offered.

II. HISTORICAL SETTING

The Navajo-Hopi Land Dispute had already begun by 1863, when Kit Carson invaded Navajo territory.[19] His "search-and-destroy" maneuvers culminated in the relocation of 8500 Navajos and the infamous "Long Walk" to Fort Sumner, New Mexico.[20] Five years later, this catastrophic relocation policy was aborted,[21] a peace treaty was signed,[22] and the Navajos were marched back to their home within the Four Sacred Mountains.[23]

Cong., 2d Sess. 30 (March 22, 1984) (statement of Sandra L. Massetto, Vice-Chairperson, NHIRC [hereinafter Statement of Sandra Massetto]). This figure may not represent all of those who refuse to leave. The Navajo newspaper reports that a "grassroots" organization, Dine Against Relocation, opposes relocation and has about 700 members. Navajo Times, March 15, 1984, at 1, col. 1.

17. *See generally*, S. TULLBERG, R. COULTER, & C. BERKEY, INDIAN LAW RESOURCE CENTER, VIOLATIONS OF THE HUMAN RIGHTS OF THE HOPI PEOPLE BY THE UNITED STATES OF AMERICA (March 11, 1980) (communicated to the United Nations Commission on Human Rights and Sub-Commission on Prevention of Discrimination and Protection of Minorities). In their communication, the Hopi Kikmongwis claim that the United States government has used the Hopi-Navajo dispute "to divert attention from the continuing pervasive interference of the United States government in Hopi affairs." *Id.* at 71.

18. *See, e.g.*, Sekaquaptewa v. MacDonald, 591 F.2d 1289, 1292 (9th Cir. 1979); Sekaquaptewa v. MacDonald, 575 F.2d 239, 244 (9th Cir. 1978).

19. The American-Navajo "wars" began in the 1850's. Kit Carson was commissioned by General James H. Carleton, who had come with troops from California in 1863 to repel Confederate forces. When Carson learned that the Confederates had fled, the decision was made to launch a campaign against the Indians. L. KELLY, THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY 5 (1968).

20. *Id.* at 6. *See also* R. LOCKE, *supra* note 15, at 323-87 (1979).

21. *See* D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970). "The relocation effort was a catastrophe for the Navajo: 2000 died there—one quarter of the number interned—in 4 years." UNITED STATES COMM. ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY 15 (Sept. 1975). One office of Indian Affairs report quoted the lament of General Carleton's successor: "Would any sensible man select a spot for a reservation for 8,000 Indians where the water is scarcely bearable, where the soil is poor and cold, and where the muskite [mesquite] roots 12 miles distant are the only wood for the Indians to use?" UNITED STATES OFF. OF INDIAN AFF. REP. 190 (1867), quoted in O. BROWN, *supra*, at 34. *See also* L. KELLY, *supra* note 19, at 6.

22. Treaty of 1868, United States-Navajo Tribe, 15 Stat. 667.

23. The four mountains are Mount Hesperus and Mount Blanca in Colorado, Mount Taylor in New Mexico, and the San Francisco Peaks in Arizona. *See* R. LOCKE, *supra* note 15, at 113. According to Navajo oral history, the Navajo (Dine) people have lived in the area forever; even non-Indian historians admit that Navajos lived in the area from approximately 900 A.D. to 1130 A.D.

The Treaty of 1868 between the Navajo Nation and the United States[24] established a tract of land east of Hopi Country as a Navajo Reservation. The 1868 Reservation was unsurveyed, unmarked, and too small to meet the needs of the Navajo Nation. From time to time, the United States acknowledged existing Navajo land-use patterns by adding tracts of land to the Navajo Reservation.[25] However, on the eastern side of the Reservation, executive orders took back some sections of the Reservation almost as soon as they were established.[26] This fluctuation, as well as the increasing movement of Anglos into the area, pressured many Navajos into moving westward.[27]

In 1882, President Chester Arthur signed an executive order which delineated a reservation "for the use and occupancy of Moqui, [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon."[28] The reservation, about 70 miles long and 55 miles wide, excluded millions of acres of Hopi land.[29] Both Navajo and Hopi people lived within the borders of the 1882 area.[30] The executive order was signed at the request of an Indian Agent who wanted authority to evict two Anglos from Hopi Territory.[31] Anglos continued to move onto the eastern side of the Navajo Reservation. Population pressures rose, and conflicts over resource use mounted.[32]

During the 1920's and 1930's, the United States Department of Interior began to form the modern "Tribal Councils" of both the Navajo and Hopi governments. The Navajo Tribal Council emerged from a "Grand Council"

Id. at 8. For discussion of the archeological data within the context of the relocation policy, see Schifter & West, Healing v. Jones: *Mandate for Another Trail of Tears*, 31 N.D. L. REV. 73 (1974).

24. *See supra* note 22.

25. *See generally* J. CORRELL & A. DEHIYA, ANATOMY OF THE NAVAJO INDIAN RESERVATION: HOW IT GREW (2d ed. 1978).

26. *Id.* For example, in 1907, President Roosevelt added two tracts of land totaling more than three million acres to the Navajo Reservation in New Mexico. In January of 1911, President Taft revoked Roosevelt's order and restored the lands to the public domain. *Id.*

27. This is not to deny Navajo oral history and other reports that Navajos have occupied lands in what is now Arizona for centuries. *See supra* notes 19 and 20. According to former Area Director Graham E. Holmes, the more traditional Navajo say they crawled out of the rocks with their sheep when the world began. Interview with Graham E. Holmes, in Las Cruces, New Mexico (August 1983). *See supra* notes 18 and 19. However, to the extent that westward migration has been documented, population pressures on the eastern side of the Reservation are relevant.

28. Executive Order of President Chester Arthur, December 16, 1882, *reprinted in* Healing v. Jones (II), 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam). Moqui is the native word for Hopi.

29. *See* Hopi Tribe v. United States, 31 Ind. Cl. Comm. 16 (1973) (Docket 196).

30. *See* Healing v. Jones (II), 210 F. Supp. at 137. The Healing v. Jones court found that in 1882 about 1,800 Hopis and about 300 Navajos lived within the 1882 Reservation area. 210 F. Supp. at 137. The court also found that in 1882, extensive archeological studies revealed over nine hundred old Indian sites, mostly Navajo sites, within what was to become the executive order area but outside of the lands where the Hopi villages and farmlands were located. 210 F. Supp. at 137 n.8.

31. The executive order was enacted in less than 30 days after Bureau of Indian Affairs Agent, Fleming, requested authority to evict two white "intermeddlers" from Hopi Country. The whites were supporting Hopi opposition to the BIA's compulsory boarding school program. *See* INDIAN LAW RESOURCE CENTER, REPORT TO THE HOPI KIKMONGWIS AND OTHER TRADITIONAL HOPI LEADERS ON DOCKET 196 AND THE CONTINUING THREAT TO HOPI LAND AND SOVEREIGNTY 7-1.4 (March 1979) [hereinafter REPORT TO THE KIKMONGWIS]. *See also* Healing v. Jones (II), 210 F. Supp. at 136-37.

32. *See* Healing v. Jones (II), 210 F. Supp. at 146. To some degree, these conflicts preceded the 1882 Executive Order. *Id.* at 136, 137 n.7.

called by the Secretary of Interior in 1923 when the traditional *ad hoc* councils refused to lease Navajo lands for exploration and development.[33] The Hopi Tribal Council was formed under the Indian Reorganization Act of 1934.[34] The Council was elected by a mere 14% of the popular vote in a public referendum.[35] The Hopi Tribal Council was boycotted repeatedly by most of the Hopi people.[36] Today, both the traditional and modern forms of government share the respect of the people, although only the Tribal Councils enjoy formal recognition by the United States.

In 1958, Congress passed Public Law No. 85-547,[37] which authorized the Navajo and Hopi Tribal Councils to participate in a lawsuit that would determine the rights and interests in the 1882 executive order area.[38] The

33. The Navajo Tribal Council was first convened at the request of Midwest (Standard) Oil in 1921. The routine way in which a Council was called in those days is described by Kelly: "The initiative came not from the Indians themselves, but from the prospectors interested in securing leases. . . . [O]nce a council had been held, the Indians disbanded and did not reassemble unless another request for a council was approved. There was no continuity. . . ." L. KELLY, *supra* note 19, at 49-50. After four *ad hoc* community councils had been called and still the Navajos declined to lease their lands, the federal government resorted to political manipulation to get a "General Council" meeting on July 7, 1923. At that meeting, the Council's first and only act was to approve the resolution drawn up in Washington, granting the Commissioner to the Navajo Tribe the authority to sign any and all future oil and gas mining leases on the treaty portion of the Navajo Reservation. *Id.*

For a full treatment of the creation of the Navajo Tribal Council, *see* R. Allan, The Navajo Tribal Council: A Study of the American Indian Assimilation Process (1983) (unpublished report) (available at the *Arizona Law Review*).

See L. KELLY, *supra* note 19, at 167-70. The Navajo people rejected the Indian Reorganization Act (IRA) form of government. In 1937, Commissioner Collier "recognized" the constitutional assembly as the new Navajo Tribal Council and, in 1938, promulgated its governing regulations. Collier charged that, in 1923, the Secretary of Interior "by one fiat smashed the [traditional] Tribal Government. . . . It had gone on over a long time successfully and peacefully. He wiped it out and dictated a new Navajo Tribal Council." L. KELLY, *supra* note 19, at 194.

34. 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-492 (1983)) (also known as the Wheeler-Howard Act). *See generally* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 96-111 (1980).

35. F. WATERS, BOOK OF THE HOPI 316 (1963) (1983 ed.) Serious charges have been leveled at the BIA and John Collier regarding election fraud and statistical manipulation which grossly distorted the actual vote. *See* REPORT TO THE KIKMONGWIS, *supra* note 31, at 47-54. *See also* R. CLEMMER, CONTINUITIES OF HOPI CULTURAL CHANGE 60-61 (1978).

The United States Government was well aware that the majority of the Hopi people opposed the IRA constitution. After the vote was taken at one Hopi Community, Hotevilla, Oliver LaFarge wrote in his journal: "[T]here were only 13 people in the village willing to go to the polls at all out of a potential voting population of 250, [a religious leader] having announced that he would have nothing to do with so un-Hopi a thing as a referendum. Here also we see perfectly illustrated the Hopi method of opposition . . . abstention of almost the whole village from voting, should be interpreted as a heavy opposition vote." O. LAFARGE, NOTES FOR HOPI ADMINISTRATORS 19 (1934), *quoted in* REPORT TO THE KIKMONGWIS, *supra* note 31, at 49.

36. *See* REPORT TO THE KIKMONGWIS, *supra* note 31, at 55, 90, 98-119. In 1954, Commissioner of Indian Affairs Glenn Emmons outlined the Bureau of Indian Affairs' view of Hopi-United States relations:

> The Hopi Tribal Council . . . was never fully recognized by the Hopis as a representative body. . . . The Hopis, although organized under the Indian Reorganization Act, do not have now, and have not had in the past, a tribal body which has sufficient support to make decisions regarding the boundaries of any reservation for the exclusive use of the Hopis.

Id. at 112, 113 (quoting Memorandum to the Office of the Secretary of Interior, April 9, 1954). Even today, the Hopi Tribal Council often operates without a quorum. *See Hopi government running without council quorum*, Navajo Times Today, December 28, 1984, p.1, Col. 4.

37. 72 Stat. 403 (1958). The legislative history provides only a sketchy explanation for the congressional action. *See* H.R. REP. No. 1492, 85th Cong., 2d Sess. (1958) and *infra* note 168.

38. The Act authorized the Tribal governments to commence or defend an action on behalf of their tribes, "including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area" of the 1882 Executive Order Reservation. *Id.* at § 1. A three-judge

1958 Act also "vested" title to the land in both tribes.[39] What was previously "unconfirmed" title, subject to complete extinguishment by the federal government with no requirement for just compensation, became a compensable interest authorized and recognized by Congress.[40]

The Hopi Tribal Government filed suit immediately, claiming that the Navajos were using almost five-sixths of the 1882 Reservation and that the area had been reserved for exclusive Hopi use.[41] The Navajo Tribe filed a counterclaim for exclusive rights to the areas they inhabited, pointing to the language in the 1882 order which set aside the area for the Hopi and "such other Indians as the Secretary of Interior may see fit to settle thereon."[42]

In 1962, *Healing v. Jones* (II) was decided.[43] The three-judge district court held that, except for the one-sixth of the reservation the Hopis had customarily used exclusively, "[t]he Hopi and Navajo Indian Tribes have joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States."[44] The area of exclusive Hopi use was called District 6;[45] the remainder of the 1882 area became known as the Joint Use Area (JUA). The Court left the Hopi, Navajo, and U.S. governments with the task of deciding whether the Joint Use Area "can or should be fairly administered as a joint

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federal court was given jurisdiction to "determin[e their] rights and interests . . . in and to said lands and quiet title thereto." *Id.*

39. Section 1 of the 1958 Act provides that the lands described in the Executive Order of December 16, 1982, are "held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive Order."

40. *See infra* notes 43 and 185.

41. Healing v. Jones (II), 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam).

42. *Id.*

43. *Id.* In Healing v. Jones (I), 174 F. Supp. 211 (D. Ariz. 1959), *aff'd*, 373 U.S. 758 (1963) (per curiam), the district court denied the U.S. government's motion to dismiss, which was based on Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), and the "plenary power doctrine." The court denied the motion on the grounds that the title to lands in the 1882 executive order reservation was a vested equitable interest, not a matter of executive political discretion. In his opinion, Circuit Judge Frederick Hamley included language which supported the "plenary power doctrine." The court ruled that Indians do not have a legally-protected interest to their ancestral lands unless Congress acts affirmatively to convey those rights. The court specified that only Congress could vest title in the Indians. A presidential executive order, unconfirmed by Congress, did not create or vest rights to land title. Circuit Judge Hamley explained:

> An unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. . . . An executive order of the kind issued on December 16, 1882, made the Indians therein described no more than tenants at the will of the government.

174 F. Supp. at 216 (citations omitted). *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 493-99 (1982).

According to the court, prior to 1958, all interests of any and all Indians in the 1882 area lands could have been "legally" extinguished, with no liability of the federal government to the Indians. *But see infra* note 185 and sources cited therein. However, since the 1958 Act "vested title" in both the Navajo and Hopi Tribes, "the property interests which [were] authorized to be dealt with . . . [were] of a kind which can be fixed and determined through the exercise of judicial power." 174 F. Supp. at 216. Therefore, the court sustained its jurisdiction to identify and evaluate the Navajo and Hopi interests in the executive order area as directed by the 1958 Act. *Id.*

44. Healing v. Jones (II), 210 F. Supp. at 192.

45. The name District 6 comes from a Bureau of Indian Affairs stock-reduction-program-districting scheme used in the 1930s. *See* Healing v. Jones (II), 210 F. Supp. at 158-59.

reservation."[46] The Court also left open the question of how, if at all, the joint interest might be divided between the two tribes.[47]

In 1972, the Hopi Tribe sought a federal court order which would restrict Navajo land use in the JUA.[48] Navajos were still using all of the Joint Use Area. The Hopi Tribe claimed that the efforts of its people to use the area had met with stiff resistance by Navajo residents and that the Navajos were overgrazing livestock on the JUA range.[49] The tribe argued that the *Healing* (II) ruling meant that the Hopi Tribe had a right to use up to one-half of the JUA surface estate.[50] Federal District Judge James Walsh agreed with the Hopi Tribe's position. On October 14, 1972, he issued a Writ of Assistance and Order of Compliance,[51] directing Navajo Tribal Chairman Peter MacDonald and the Department of Interior to reduce Navajo livestock in the Joint Use Area by 85%, from 120,000 sheep units to 8,139.[52] The order also prohibited any "new construction" by members of the Navajo Tribe on the JUA without a permit issued by both tribes.[53]

By 1974, contempt proceedings had begun. In 1974 and 1982, the District Court held Navajo Tribal Chairman Peter MacDonald in contempt for failing to implement the 1972 Order of Compliance.[54]

Dissatisfaction with these approaches led to intense lobbying on the part of the Hopi Tribal Council and its attorney, John Boyden, for passage of legislation which would force the Navajo people off of half the JUA lands.[55]

Congress passed Public Law No. 93-531 in 1974.[56] Its most significant provision gave the United States District Court for Arizona jurisdiction to partition the JUA and directed a 50-50 division.[57] An independent, temporary Navajo-Hopi Indian Relocation Commission was established to relocate the Navajo and Hopi residents who, after partition and fencing, were on the

46. Healing v. Jones (II), 210 F. Supp. at 192.

47. 210 F. Supp. at 191, 192 (indicating that the court had no jurisdiction to partition the lands). For a discussion of the alternatives to partition that were available to Congress after Healing v. Jones (II), *see* Schifter & West, *supra* note 23, at 82-83.

48. Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1972), *cert. denied*, 406 U.S. 945.

49. *Id.* For a review of the Hopi Tribe's position, see also Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974); Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

50. *Id.*

51. Sekaquaptewa v. MacDonald, 544 F.2d 396, 398 n.1 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

52. *See id.* at 405.

53. *See supra* note 51 and *infra* notes 222-37 and accompanying text.

54. Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976); Sidney v. MacDonald, 536 F. Supp. 420 (D. Ariz. 1982), *aff'd*, Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983).

55. J. KAMMER, *supra* note 14, at 96. *See, e.g., Authorizing Partition of Surface Rights of Navajo-Hopi Indian Land: Hearings on H.R. 11128 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 92d Cong., 2d Sess. 70-137 (1972) (testimony of John Boyden) (compilation of letters, memos, and other historical documentation).

56. 88 Stat. 1714 (1974), *amended by* Pub. L. No. 96-305, 94 Stat. 930 (1980), codified in 25 U.S.C. §§ 640d-640d-28 (1983).

57. 25 U.S.C. § 640d-5 (1983). Congress mandated five criteria for partition of the JUA lands. Insofar as practicable, the boundary line had to: 1) include the higher density population areas of each tribe; 2) result in lands *equal in acreage and quality*; 3) result in partitioned lands contiguous to each tribe's reservation; and 4) facilitate fencing. In addition, Congress directed that District 6 not be reduced or limited. *Id.* (emphasis added).

"wrong side of the line."[58]

Those relocated were to receive assistance, including payment of moving expenses (up to $500),[59] purchase of the relocatee's present home and other improvements (about $6000 per family),[60] purchase of a new "decent, safe, and sanitary replacement dwelling,"[61] and incentive payments to encourage "voluntary relocation" prior to the 1986 deadline for final removal.[62] Not all persons residing in the JUA are eligible for assistance;[63] however, the Relocation Commission was to meet the congressional goal of providing a "thorough and generous relocation program."[64]

In an attempt to minimize the opposition to and disruption caused by relocation, Congress included provisions for a limited number of "life estates" for older JUA residents.[65] By the cutoff deadline in April, 1981, however, only two Navajos had applied.[66] Navajo cultural and spiritual values forbid discussion of a life estate; the older Navajos say that one should not talk of preparation for death.[67]

Another provision designed to minimize the disruptive effect of relocation gave the Navajo Tribe permission to acquire 400,000 acres of alternative land.[68] The Navajo Tribe may acquire a maximum of 250,000 acres of fed-

58. Section 640d-11.

59. Section 640d-14(b)(1).

60. Section 640d-14(a).

61. Section 640d-14(b)(2). In 1974 the maximum allowable payment for a family of three or less was $17,000 and $25,000 for a family of four or more. Section 640d-14(b)(2). The Act allows the Commission to periodically increase the replacement home assistance payment to correspond with changes in housing development and construction costs (other than cost of land). *Id.* As of July 12, 1983 amounts were at a maximum of $50,000 for a family of three or less and $66,000 for a family of four or more. NHIRC, SEVENTH ANN. REP., *supra* note 8, at 14. *See also* NHIRC, 1981 REP. AND PLAN, *supra* note 8, at 173. The Commission has not raised its upper level housing benefit since 1981. NHIRC, REPORT TO THE SUB-COMMITTEE ON INTERIOR AND RELATED AGENCIES COMMITTEE ON APPROPRIATIONS at 8 (March 1, 1985). The Commission arranges and pays the housing contract; the relocatees do not receive cash payments for housing. Housing, which sometimes costs in excess of the allowable amount, is paid for through the relocatee's compensation payment for the family's current dwelling and/or the cash incentive payment. Interview with Relocation Commission Staff, Flagstaff, Arizona (July 29, 1983).

62. Section 640d-13(b). Five thousand dollars is available for each head of household who contracts with the Relocation Commission during the first year, $4,000 during the second, $3,000 during the third, etc. The deadline for application for benefits is July 7, 1985. 50 Fed. Reg. 14379 (April 12, 1985); FY 1985 Interior Appropriations Bill, Pub. L. 98-473.

63. The Commission's 1981 REP. AND PLAN emphasizes that: "The inclusion of persons in this enumeration is not to be taken as a determination of eligibility for the relocation benefits. Eligibility for relocation benefits occurs when an applicant has met the criteria established by the Commission. The determination of eligibility requires an examination of facts relevant to each individual application." NHIRC, 1981 REP. AND PLAN, *supra* note 8, at 3. *Accord*, Walker v. Navajo and Hopi Indian Relocation Commission, 728 F.2d 1276 (9th Cir. 1984). The Commission's current regulations for eligibility determination are at 25 C.F.R. §§ 700.97, 700.147, 700.151, 700.181, 700.205 (1984).

64. NHIRC, 1981 REP. AND PLAN, *supra* note 8, at 1.

65. Section 640d-28.

66. J. KAMMER, *supra* note 14, at 215-16.

67. That this is also on the minds of Washington policymakers was confirmed by George Ramones, Legislative Director for Senator Pete Domenici (R-N.M.), when he was asked about the life estates and he replied that if the older Navajos want to die "out there, that would be o.k. with me." Interview in Washington, D.C. (March 14, 1983).

68. Section 640d-10. All acquired lands must be within 18 miles of the Navajo Reservation in either Arizona or New Mexico and must not exceed 35,000 acres in New Mexico. *Id.* Congress ordered the Navajos removed from 911,000 acres of land, but provided only 400,000 acres by the

eral lands at no cost and purchase an additional 150,000 acres of private land.[69] The Navajo Tribe has selected lands several times; however, transfer of the lands has been repeatedly delayed, and as of Oct. 1, 1985, no new lands were available for relocatee families.[70]

The 1974 Act also included a livestock reduction program.[71] It directed the Secretary of Interior to "immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands."[72]

In 1977, Judge Walsh approved the partition line drawn by a federal mediator.[73] He also issued an order of compliance to Chairman MacDonald and the Navajo Tribe to cease construction of structures that were in violation of the 1972 Writ of Assistance and Order of Compliance.[74] That order was affirmed by the Ninth Circuit on September 11, 1980.[75]

In 1980, Congress amended the 1974 Act.[76] The amendments authorized payment of attorneys' fees for both sides in the continuing litigation,[77]

Relocation Act amendments. *See* SURVEYS AND INVESTIGATIONS STAFF, *supra* note 8, at 23. Congress thus provided the Navajo Tribe with less than half of the land area taken.

69. *Id.*

70. The first selection, House Rock Valley, Arizona, was thwarted when Congress specifically removed those lands from consideration in the 1980 amendments. Section 640d-10(g). *See generally*, J. KAMMER, *supra* note 14, at 139-44, 147-52. The second selection was 35,000 acres of the mineral-rich Paragon Ranch in New Mexico. That selection was almost thwarted when Secretary of Interior James Watt withdrew the land from the public domain. *See* 47 Fed. Reg. 9290 (1982). The Navajo Tribe has filed a lawsuit in an attempt to obtain the land. Zah v. Clark, Civ. No. 83-1753 BB (D. N.M., filed Nov. 27, 1983). *See infra* note 154. The tribe's third selection was made in late 1983, but met with strong resistance from local ranchers. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 24. The tribe's fourth selection, five tracts of land in Arizona, was made when the new Navajo Tribal Chairman, Peterson Zah, changed the selection on June 24, 1983. Navajo Times, June 29, 1983, at 1, col. 1. As of May 1985, only one of the five tracts, the 50,000 acre Wallace Ranch, had been acquired by the Commission. *See* SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 31. Serious questions about the suitability of the lands and the availability of sufficient water and grazing rights have been raised. *Water Rights becomes Issue in Acquiring land for Tribe*, Arizona Daily Sun, April 7, 1985, at 16, col. 1. Water quality is also a major problem with the new land. *See* CH2M HILL, INC. (consulting firm), Planning for the New Lands: Policy Options and Synopsis of Comments, June 1985, 9-1 to 9-6 (Report prepared for NHIRC); *see also* L.J. Mann & E.A. Nemecek, Geohydrology and Water Use in Southern Apache County, Ariz. Dept. Water Resources Bull. 1, Jan. 1983 ("In the northern part [of southern Apache County], the water generally is unfit for human consumption and other uses.") The major criticism is that the Rio Puerco River, which runs next to at least one proposed housing area, has experienced uranium spills. *See Two Tribes, One Land*, NEWSWEEK 79 (Sept. 23, 1985).

Moreover, the process of acquiring the other lands has been criticized as inviting "sweetheart deals" between the agencies responsible for obtaining the land and the non-Indian ranchers who currently graze livestock on the selected lands. *See* SURVEYS AND INVESTIGATIONS REPORT, *supra* note 7, at 25-26. The Relocation Commission reported that the replacement lands for the Navajos could not be acquired and readied for the remaining relocatees by the July, 1986 deadline for removal of Navajos from Hopi-partitioned lands. *See* Statement of Massetto, *supra* note 16, at 3. When, if ever, all lands are acquired, the acreage will be adequate for 170 of the approximately 1,800 families awaiting relocation. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 31.

71. 25 U.S.C. § 640d-18(a) (1983). *See infra* notes 238-47.

72. 25 U.S.C. § 640d-18(a).

73. The unpublished partition order was signed on February 10, 1977. *See* Sekaquaptewa v. MacDonald, 575 F.2d 239, 241 (9th Cir. 1978).

74. *Quoted in part* in Sidney v. MacDonald, 536 F. Supp. 420, 422 (D. Ariz. 1982), *aff'd*, Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983).

75. Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983).

76. Pub. L. No. 96-305, 94 Stat. 932; 25 U.S.C. §§ 640d-28 (1983).

77. 25 U.S.C. §§ 640d-25, 27(a). *See infra* notes 116-17.

increased authorizations for the operating expenses of the Relocation Commission,[78] gave each tribe jurisdiction over the lands partitioned to it,[79] and directed the Secretary of Interior to "take such action as may be necessary in order to assure the protection . . . of the rights and property of individuals subject to relocation."[80]

Since 1980, litigation has continued. In March of 1982, Federal District Judge Earl Carroll issued a contempt citation against Navajo Chairman Peter MacDonald for failing to comply with the September 11, 1980 Order of Compliance.[81] In February of 1983, eighteen Navajo individuals filed suit to enjoin the Department of Interior from implementing its livestock reduction program.[82] The Hopi Tribe has also sued both the United States and the Navajo Tribe for damages resulting from injury to the Hopi-partitioned lands of the Joint Use Area.[83]

Just west of the 1882 Reservation, a similar land dispute is in the pretrial stage. At the Hopi village of Moencopi in the western Navajo Reservation, the Hopi Tribe claims an interest in approximately 5 million acres of land. Like the Navajo Tribe in *Healing v. Jones (II)*, the Hopi Tribe claims to be the "other Indians" in the language appearing in the 1934 legislation that defined the boundaries of the Navajo Reservation in Arizona.[84] In 1966, Commissioner of Indian Affairs, Robert Bennett, and Secretary of Interior, Stewart Udall, imposed a construction moratorium, called the "Bennett Freeze," which bans construction without a permit issued by both tribes.[85] In 1974, Congress sent the 1934 area dispute to Federal District Court,[86] where trial is now pending. The District Court will determine what land the Hopis "possessed, occupied, or used" in 1934.[87] Where exclusive use cannot be established for either tribe, lands may be designated "joint or undivided, subject to partition."[88] Another relocation program may be underway.

III. POLICY CONSIDERATIONS

This section explores the considerations that led to adoption of the relocation policy. Many of those considerations no longer justify continued relocation. This section concludes that a new policy direction is needed.

78. 25 U.S.C. § 640d-24(a)(5). In 1979, Congress raised the amount available for operating expenses. Pub. L. No. 96-40, 93 Stat. 318 (1979).

79. 25 U.S.C. § 640d-9(e).

80. 25 U.S.C. § 640d-9(c).

81. Sidney v. MacDonald, 536 F. Supp. 420 (D. Ariz. 1982), *aff'd*, Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983).

82. Zee v. Watt, Civ. No. 83-200 PCT EHC (D. Ariz., dismissed March 29, 1985).

83. Sidney v. Navajo Tribe, Civ. No. 76-934 PCT EHC (D. Ariz., filed Dec. 15, 1976).

84. Act of June 14, 1934, 48 Stat. 960-962. The Act withdrew certain lands "for the benefit of the Navajo and such other Indians as may already be located thereon." A federal court has allowed a group of Pauite Indians to intervene. Sidney v. Zah, No. 83-1511 (9th Cir. 1983).

85. *See infra* notes 222-24 and accompanying text.

86. Pub. L. No. 93-531, § 8, 88 Stat. 1715 (1974), *amended by* Pub. L. No. 96-305 § 2, 94 Stat. 929 (1980) (codified at 25 U.S.C. § 640d-7 (1983)).

87. Sekaquaptewa v. MacDonald, 619 F.2d 801, 809 (9th Cir. 1980).

88. Sekaquaptewa v. MacDonald, 619 F.2d at 809.

A. *The Legal Rights of the Hopi Tribe*

When the Hopi Tribe approached the Ninety-third Congress in 1972, the tribe held a trump card—the Writ of Assistance, issued by District Judge James Walsh on October 14, 1972.[89] The Writ compelled the Navajo Tribe and the United States government to respect the rights of the Hopi Tribe to use the area jointly. The picture, painted by Hopi tribal attorneys before Congress, was compelling: the smaller, more peaceful and sedentary tribe, completely surrounded by the larger, more aggressive and nomadic one,[90] was seeking to uphold the decisions of the United States courts.

The Hopi Tribe, with bi-partisan support from key members of the Arizona delegation,[91] put the hard question to Congress: "Will political expediency be once again allowed to prevail over what is moral and just, or will those who hold the destiny of the Hopi people in their hands at last find courage to make a just decision?"[92] This question came from a disadvantaged community of older residents of the tiny Hopi Indian Reservation. Perhaps that fact moved some policymakers to support the relocation program who might otherwise have identified it as an infringement on the human rights of the traditional Navajo people living in the Joint Use Area (JUA).[93]

B. *The Theory of the Range War*

The relocation policy was based on the premise that the Navajo and Hopi people were incapable of sharing the land in a peaceful manner. An extensive record was made in Congress that there were conflicts over land use in the JUA.[94] Witnesses described acts of violence perpetrated against the Hopi people by members of the Navajo Tribe.[95] Congress recognized

89. *See supra* note 51 and accompanying text.

90. This picture is based on cultural stereotypes. For generations, Hopi culture and tradition have kept the Hopi people living atop the mesas in their villages. *See generally*, F. WATERS, *supra* note 35, at 109-10, 118 (1983) (historical account of settlement on mesas). However, to use this as an argument against relocation of Navajos is to bind current and future generations of the Hopi people and to deny cultural self-determination.

The corollary image of the "nomadic" Navajo family is equally racist. Compared to the Hopi people, the Navajos have historically moved around more, but this fact does not make *forced* relocation *voluntary*. There was, after all, constant Anglo pressure on them to relocate farther and farther west. *See supra* notes 25-27 and accompanying text. Moreover, as sheepherders, the Navajo people moved with their flocks. Today, many Navajo families still have both a winter and a summer home, but they live within a very small area. *See* L. KELLY, *supra* note 19, at 10.

91. In the early 1970's, Representative, Morris Udall (D-Az.), and both Arizona Senators, Barry Goldwater (R) and Paul Fannin (R), supported passage of the legislation. Today the senatorial delegation is split, with Fannin's replacement, Dennis DeConcini (D), opposed to forced relocation.

92. *Hearings on H.R. 11128, 4753, and 4754 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 92d Cong., 2d Sess. 187 (1972) (testimony of Abbott Sekaquaptewa, Hopi Tribal Chairman in 1972).

93. Jerry Kammer describes the major congressional actors and the process of passage of the relocation act in his book. *See* J. KAMMER, *supra* note 14.

94. *Authorizing Partition of Surface Rights of Navajo-Hopi Indian Land: Hearings on H.R. 11128 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 92d Cong., 2d Sess. 70-137 (1972) (testimony of John Boyden) (compilation of letters, memos, and other historical documentation).

95. *Partition of Navajo and Hopi 1882 Reservation: Hearings before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 93d Cong. 1st Sess. 59 (1973)

that the United States was largely to blame for the loss of Hopi land rights through Navajo encroachment.[96] Adherents to the "theory of the range war"[97] argued that United States intervention was in the best interests of both Tribes. The Hopi tribal attorneys and the Arizona congressional delegation convinced Congress that the United States had a legal and moral duty to intervene on behalf of the Hopi Tribe.[98] Congress was persuaded that relocation of the Navajos was a reasonable, workable, and just solution to the age-old dispute.[99]

Viewed in retrospect, the theory of the range war seems unfounded. A review of the legislative history fails to reveal widespread instances of death and massive psychological trauma. The evidence of violence that does exist supports only the conclusion that there were conflicts over scarce resources like water in the JUA.[100]

This case is certainly one in which calm, reflective hindsight offers a perspective that was unavailable in 1973. Recall that in 1972, the American Indian Movement (AIM) had occupied and ransacked the Bureau of Indian Affairs office in Washington, D.C.[101] By the spring of 1973, a wave of Indian activism was occurring throughout the United States. The occupation at Wounded Knee, South Dakota was occurring during Senate deliberations on Public Law No. 93-531. Viewed in isolation, the relocation policy seems to be an excessive response to the typical land-use conflicts that exist throughout the arid west. Perhaps the national rise of Indian activism influenced Congress to view partition and relocation as the necessary response to a broader law-enforcement problem.[102]

(testimony of Abbott Sekaquaptewa) (two Hopi young men physically assaulted by Navajo Indians). *See infra* note 102.

Newspapers reported instances of violence by members of the Hopi Tribe against members of the Navajo Tribe. J. KAMMER, *supra* note 14, at 92 (Hopi policeman injuring Navajo during an arrest for trespassing).

96. *See infra* note 174.

97. Among the most vocal of the theory's supporters were Congressman Sam Steiger and Senator Paul Fannin, both of Arizona. *See generally*, J. KAMMER, *supra* note 14.

98. SENATE REPORT ON H.R. 10337: RESOLUTION OF NAVAJO-HOPI LAND DISPUTES, 93d Cong., 2d Sess. 19 (1974) ("overriding moral, ethical, and legal considerations").

99. HOUSE REPORT ON H.R. 11128, AUTHORIZING THE PARTITION OF THE SURFACE RIGHTS IN THE JOINT USE AREA OF THE 1882 EXECUTIVE ORDER HOPI RESERVATION AND THE SURFACE AND SUBSURFACE RIGHTS IN THE 1934 NAVAJO RESERVATIONS BETWEEN THE HOPI AND NAVAJO TRIBES, TO PROVIDE FOR ALLOTMENTS TO CERTAIN PAUITE INDIANS, AND FOR OTHER PURPOSES, 92d Cong., 2d Sess. 39 (1972). Rep. Sam Steiger says of the bill: "It may not be a perfect solution, but it is a solution, and it is a final solution." *Id.*

100. HOUSE REPORT TO ACCOMPANY H.R. 11128, *supra* note 99, at 37 (statement of Rep. Sam Steiger) (mentions series of violent and semiviolent actions, including allegedly the firing of some weapons); *id.* at 55 (testimony of Louis Bruce, Commissioner of Indian Affairs) (reporting that a "courtesy patrol" had been established to furnish Navajo livestock with water and reduce trespass).

101. For summaries on the conflict at Wounded Knee, see AKWESASNE NOTES, VOICES FROM WOUNDED KNEE, 1973 (1974); R. DUNBAR-ORTIZ, THE GREAT SIOUX NATION (1977).

102. Consider this exchange between Representative Sam Steiger and Abbott Sekaquaptewa, then Tribal Chairman of the Hopi Tribal Council:

> MR. STEIGER: Mr. Sekaquaptewa . . . you have described to me the attitude of some of the younger people in particular, and I think it would be worthwhile if you describe the potential for danger to the committee.
>
> It does not do any good for me to tell them. It is not nearly as effective as if you would tell them.
>
> Would you feel there is a potential for danger at this time, with regard to violence and ill will?

C. *The Financial Costs of Alternative Policies*

Congress acknowledged the alternatives to relocation.[103] The chief alternatives included: 1) retaining the status quo; 2) "buying out" the Hopi interests by cash transfers;[104] 3) dividing the joint interests by giving the Navajo Tribe the surface and the Hopi Tribe the subsurface;[105] 4) giving the Hopi Tribe additional land elsewhere;[106] and 5) imposing non-judicial dispute resolution techniques, such as binding arbitration.[107]

However, in 1973, partition and relocation seemed to be the least expensive alternative. Because each tribe was entitled to only a one-half interest in the JUA, the Navajo Tribe had no compensable interest in the lands it was forced to vacate. Since the Hopi Tribe had a compensable property interest in one-half the JUA, a decision to allow continued Navajo occupancy would have necessitated some form of compensation to the Hopi Tribe. While this may not have been the sole motivation for Congress' decision to relocate

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> MR. SEKAQUAPTEWA: Mr. Steiger, last year when we were here to testify before the subcommittee, there was an incident that happened just a week or two before we came here, in which two Hopi young men were physically assaulted by Navajo Indians. It was because of the strong feeling between the two tribes.
>
> I think that we would have to be willing at this point to assume the responsibility for any unfortunate incidents that might arise and probably will arise if this matter is not resolved immediately in the very near future. We have no control over our young people any more than anybody else has. It is my honest opinion that this situation is getting out of hand.

Partition of the Navajo and Hopi 1882 Reservation, supra note 95, at 59. Mr. Sekaquaptewa said that such incidents would continue until Congress defined the boundary line between the two Reservations. *Id.*

103. For a discussion of the alternatives, see RESOLUTION OF NAVAJO-HOPI LAND DISPUTES, REPORT TO ACCOMPANY H.R. 10337, 93D CONG., 2D SESS. 16-20 (1974); Schifter & West, Healing v. Jones: *Mandate for Another Trail of Tears*? 51 N.D. L. REV. 81-84 (1974); J. KAMMER, *supra* note 14, at 91-130.

104. *See, e.g.*, S. 3230, 93d Cong., 2d Sess. (1974); H.R. 7716, 93d Cong., 1st Sess. For a more recent version of this approach, see S. 3026, 97th Cong., 2d Sess. (1982). In fact, "buying out" the Indian Tribe's interest in occupied lands is the usual United States policy in cases involving non-Indian occupiers of the Tribe's land. *See, e.g.*, 60 Stat. 1049 (1946) (creating Indian Claims Commission), *codified at* 25 U.S.C. §§70-70v (1983); Maine Indian Claims Settlement Act, Pub. L. 960420, 94 Stat. 1785 (1980), *codified at* 25 U.S.C. §§ 1721-1735 (1982); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), *affirming* 601 F.2d 1157 (Ct. Cl. 1979); Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, (1st Cir. 1975). *See* Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 1 (1982); Schifter & West, *supra* note 23, at 73-106.

In 1984, Representative Sidney Yates seemed sincerely surprised to learn that the Navajo Tribe preferred to receive the land selected in Arizona instead of $23 million. *Department of the Interior and Related Agencies Appropriations for 1985: Hearings before the Subcommittee on the Department of the Interior and Related Agencies of the House of Representatives' Committee on Appropriations*, 98th Cong., 2d Sess. 36 (1984). Almost uniformly, Indian Tribes prefer the return of ancestral lands to cash transfers. *See* Barsh, *supra*. For example, the Hopi Tribe has tried for many years to obtain four million acres of land taken from it by the U.S. government. See REPORT TO THE KIKMONGWIS, *supra* note 31, at 81-87, 14-46, 159-67, 185-86. Except for the 911,000 acres of land upon which the Navajos are living, no lands have been provided to the Hopi Tribe by the U.S. government. Instead, the U.S. government has "bought out" the Hopi Tribe with a cash payment of approximately five million dollars. Hopi Tribe v. United States, 31 Ind. Cl. Comm. 16 (1973) (Docket 196). For a detailed critical account of the Hopi land claims suit see REPORT TO THE KIKMONGWIS, *supra* note 31, at 87-98.

105. *See* Schifter & West, *supra* note 23, at 82-83.

106. *See Partition of Navajo and Hopi 1882 Reservation, supra* note 95, at 116 (dialogue between Rep. Manuel Lujan and John Kyl, Assistant Secretary of the Interior).

107. *See* H.R. 7679, 93d Cong., 1st Sess. (1973).

Navajos, it was an important factor.[108]

The cost comparisons that took place at the time of passage are no longer valid indicators of the costs and benefits of the relocation policy. Initial estimates of the financial costs of relocation were far below actual costs. For example, the Navajo-Hopi Indian Relocation Commission was originally designed as a short-term agency that would operate on an annual budget of $500,000.[109] The Commission currently spends $4 million a year on administrative costs alone.[110] The estimate for the total direct costs of the relocation assistance program has risen from a projected $28 million to over $500 million.[111]

Moreover, the indirect financial costs of the relocation policy are large. These costs include: 1) welfare and other additional assistance payments provided for those who are unable to find employment or raise livestock;[112] 2) provision of health services for relocatees experiencing psychological trauma;[113] 3) increased municipal and county support for education and other local services in off-reservation communities;[114] and 4) payment for legal assistance provided to relocatees and court costs associated with loan default proceedings brought against relocatees.[115]

A final category of costs—attorneys' fees and other legal costs—deserves investigation. Public Law No. 93-531, as amended, provides for federal payment of attorneys' fees for both the Navajo and Hopi Tribes.[116] Both tribes and the federal government have already spent millions of dollars[117] and no end to the litigation is in sight. Although Congress did not

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108. *See supra* note 43 and *infra* note 186.

109. REPORT ON H.R. 10337: RESOLUTION OF NAVAJO-HOPI LAND DISPUTES, 93d Cong., 2d Sess. 23 (1974) (original requested authorization for the Commission was $4,000,000 per year for eight years).

110. The Commission is requesting $3,010,000 for operating expenses for fiscal year 1986. NHIRC, BUDGET JUSTIFICATION 1 (March 1985).

111. *See infra* notes 176 and 177.

112. No quantification of this cost is currently available. *But see infra* note 114.

113. One available statistic shows that, in 1979, the use of mental health facilities by potential relocatees was eight times that of Navajos living on the Navajo-partitioned lands in the Joint Use Area. M. TOPPER, MENTAL HEALTH EFFECTS OF NAVAJO RELOCATION IN THE FORMER JOINT USE AREA (1980) (report submitted to the Mental Health Branch, Navajo Area Office, Indian Health Service), *quoted in* T. SCUDDER, NO PLACE TO GO: EFFECTS OF COMPULSORY RELOCATION ON NAVAJOS 111 (1982).

114. In 1983, the National Association of Counties passed a resolution calling for a halt to further relocation. That resolution expresses concern over the financial costs to counties of meeting the human service needs of the relocatees. NATIONAL ASSOCIATION OF COUNTIES, NACO ANNUAL BUSINESS MEETING: PLATFORM AMENDMENTS AND RESOLUTIONS (July 19, 1983).

115. No quantification of this cost is available. While no comprehensive analysis of these indirect costs exists, interviews with local social service providers, county officials, and relocation commission staff confirm earlier predictions of substantial indirect costs.

116. In 1974, Congress authorized the Secretary of Interior to pay "any or all appropriate legal fees, court costs, and other related expenses arising out of or in connection with" the 1934 litigation. 25 U.S.C. § 640d-7(e) (1983). In 1980, Congress directed the Secretary to pay attorneys' fees, costs, and expenses for both tribes in the remainder of the litigation (excepting certain actions for accounting, fair value of grazing, and damages to land authorized in 25 U.S.C. § 640d-17(a)). 25 U.S.C. § 640d-27. The authorization in the Act reads: "For each tribe, there is hereby authorized to be appropriated not to exceed $120,000 in fiscal year 1981, $130,000 in fiscal year 1982, $140,000 in fiscal year 1983, $150,000 in fiscal year 1984, and $160,000 in fiscal year 1985, *and each succeeding year thereafter until such litigation or court action is finally completed.*" 25 U.S.C. § 640d-27(a) (emphasis added).

117. In fiscal year 1982, the Hopi tribal attorneys spent $175,000 on the 1934 litigation. If the

provide funds for legal services to relocatees, many have been involved in administrative appeals (in the Relocation Commission and the BIA), post-relocation legal actions, and related litigation.[118] The costs of these legal services have been borne by the Navajo Tribe, county legal services offices, and other publically-funded projects.[119]

D. *Miscalculations about the Hardships Relocation Would Impose on the Navajo People*

In 1974, Congress intended that relocation be carried out with a minimum of hardship. The Senate Committee on Interior and Insular Affairs adopted the following principle to guide its deliberations on Public Law No. 93-531:

> That any such division of the lands of the Joint Use Area must be undertaken in conjunction with a thorough and generous relocation program to minimize the adverse social, economic and cultural impacts of relocation on affected tribal members and to avoid any repetition of the unfortunate results of a number of early, official Indian relocation efforts.[120]

This principle led Congress to adopt a modest assistance program for relocatees.[121]

Almost immediately, it became apparent that the initial assistance levels

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same amount was spent by the Navajo Tribe, the total attorneys' fees for the 1934 litigation for the period 1974 to 1985 is $3.85 million (1982 dollars). In early 1984, congressional staff indicated that the federal government is spending $1 million per year for litigation expenses surrounding both disputes.

118. The Commission's regulations for administrative appeals are found at 25 C.F.R. § 700.321 (1984).

See, e.g., Walker v. NHIRC, 728 F.2d 1276 (9th Cir. 1984) (affirming Commission's denial of eligibility to one whose name appeared on the enumeration list in the 1981 REPORT AND PLAN but who had moved away from the JUA in 1973 or 1974); Begay v. United States, No. 268-85-L May 8, 1985 (Ct. Cl., filed May 8, 1985) (claim for one million dollars in damages sustained by family whose relocation home was never completed and still has no foundation, no proper steps to the door, no running water, no proper heating or insulation); Henry Monroe v. High Country Homes, Civ. No. 84-189 PCT CLH (D. Ariz., filed Feb. 9, 1984) (suit for damages and recission of contract between relocatee and Arizona corporation and individuals who executed a contract with the relocatee while the relocatee was drunk, and the contract was an agreement to sell the $38,000-relocation home to the corporation for a total of $7,700); Ahasteen v. Yancey, No. 39374 (Sup. Ct. Ariz., filed Nov. 29, 1984) (suit for damages against realtor and others responsible for entering into a contract which exchanged the relocatee family's new $32,500 house for $6,890.26 cash, a 1981 Subaru, and a one-half interest in a leasehold interest in worthless property in Utah); Interpreter v. Ideasource, Inc., Civ. No. 38977 (Sup. Ct. Ariz., filed July 23, 1984) (suit for damages and recission of contracts involving real estate and finance companies charging interest rates of thirty percent and higher, and finance charges which bring the annual interest rate to 127 percent).

119. For example, the Zee v. Watt case, *supra* note 4, involving grazing permit denials for individual Navajos, was brought by the Navajo Tribe's legal services agency. Other lawsuits have been filed by Coconino County Legal Aid and the Big Mountain/J.U.A. Legal Defense/Offense Committee of the National Lawyers Guild, a nonprofit organization of attorneys which provides legal services to relocatees and potential relocatees at no cost. *See, e.g.*, Ahasteen v. Yancey, No. 39374 (Sup. Ct. Ariz., filed Nov. 29, 1984); Interpreter v. Ideasource, Inc., Civ. No. 38977 (Sup. Ct. Ariz., filed July 23, 1984). For a discussion of these indirect costs, see BIG MOUNTAIN LEGAL DEFENSE/OFFENSE COMMITTEE (BMLDOC), REPORT TO CONGRESS IN OPPOSITION TO THE NHIRC BUDGET REQUEST 4-5 (March 1985).

120. *Quoted in* NHIRC, 1981 REP. AND PLAN 1 (1981), *reprinted* in S. REP. NO. 1177, 93d Cong., 2d Sess. 19-20 (1974).

121. *See supra* notes 59-70 and accompanying text.

were inadequate. The maximum allowable payment for housing for a family of four or more was $25,000.[122] Although Congress and the Commission have increased housing payments since 1974,[123] many relocatees are still unable to manage home ownership and life in the border towns.[124] This inability is attributable to both low assistance levels and the stark reality of the change in lifestyle: most relocatees have no "marketable" skills, employment, education, or means to pay utility bills, taxes, and other costs of off-reservation life.

Congress also underestimated the emotional and spiritual ties between the traditional Navajo people and their way of life. To the people of the JUA, the land is their spiritual connection with future generations. They depend upon their sheep for economic and spiritual well-being.[125] To the relocatees, the relocation policy is as much a religious issue as a political one. Statements of the traditional Navajo people provide the best indication of the intensity of their attachment to the land:

> The mountain is ours. It is the place we go to pray for our livestock, and our medicine men go there to get herbs and it is the place our women gather the medicine they use when they bear children. We need the mountain to live.
>
> —Kee Shey
>
> Let the federal government know that Big Mountain is a sacred place to my forefathers and me. This mountain is a home to all living things, and it is a religious shrine to the Navajo people.
>
> —Ashikie Bitsie
>
> The White Man does not understand that the Indian is bounded to their land and cannot be treated as parcels to be distributed like the U.S. mail.
>
> The Chaos here has a tremendous psychological effect on the Navajo people and their descendants because each is part of the whole and not separable in any situation. According to Navajo culture and tradition, the only time we leave a member physically is when we die, but we would still be bound to them spiritually because their spirit remains within our land.
>
> —Askie Betsie[126]

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122. *See supra* note 61.

123. *Id.*

124. *See infra* notes 130-42 and accompanying text. Most of those relocated have moved off-Reservation. NHIRC, APRIL 1985 PROGRAM UPDATE AND REPORT 5 (May 3, 1985) (on-Reservation moves, 40.5 percent; off-Reservation moves, 59.5 percent). This is because the current Navajo Reservation is overcrowded and few homesite leases are available. *See Department of the Interior and Related Agencies Appropriations for 1985: Hearings before the Subcommittee on the Department of Interior and Related Agencies of the House of Representatives' Committee on Appropriations*, 98th Cong., 2d Sess. 29-30 (1984) Statement of Sandra Massetto, *supra* note 16.

In addition to lack of available on-reservation homesite space, other obstacles prevent successful on-reservation moves. Unemployment rates of over 50% and unavailability of grazing permits are examples. Statement of Massetto, *supra*, at 30.

125. For descriptions of the cultural significance of sheep to the Navajo people, see R. LOCKE, *supra* note 15, at 185, 420. *See generally*, J. WOOD, A SOCIOCULTURAL ASSESSMENT OF THE LIVESTOCK REDUCTION PROGRAM IN THE NAVAJO-HOPI JOINT USE AREA (Feb. 1979) (prepared for the BIA, Flagstaff Administrative Office, Contract No. K01C14200739) (reprinted by DEPT. OF ANTHROPOLOGY, NORTHERN ARIZONA UNIV., N.A.U. ANTHROPOLOGICAL PAPER NO. 1 (1982)). *See also infra* note 133.

126. These quotations are found in a publication of the Navajo Tribes NAVAJO-HOPI LAND

The statements help explain why many Navajos adamantly refuse to leave the JUA. Such resistance is based upon a deep respect for family and tribal custom and a keen sense of history. Many residents have refused to cooperate with the Commission in any way;[127] others have resisted the relocation by confronting BIA officers who seek to impound livestock, by dismantling the partition fence, and by inviting non-residents to join them in their opposition to the policy.[128]

The resistance of the Navajo JUA residents is also based upon the "thorough and generous" relocation program that was promised in 1974. There are distressing reports about the plight of the relocatees. A 1982 Relocation Commission survey requested by Senator Dennis DeConcini (D-Arizona) revealed that at least one-third of the relocatees no longer owned their own homes.[129] Relocatees have experienced home foreclosures and have been easy prey for loan companies.[130] The relocatees' report of increased physical illness, alcoholism, stress, and family breakup[131] are consistent with earlier predictions of human tragedy.[132]

One frequently-noted case is that of Hosteen Nez.[133] In 1978, Nez, an 82-year-old relocatee, moved to Flagstaff from Sand Springs. Within a year, Nez suffered a heart attack, could not pay his property taxes or utility bills, lost his new $60,000 ranch-style home, and moved back to the Reservation. Local observers said that Nez "was not unique":

> And, if the federal government proceeds with its genocidal relocation of traditional Navajos to alien societies, it is a story that will multiply a

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DISPUTE COMMISSION, ENDANGERED DINE: THE BIG MOUNTAIN PEOPLES AND OTHER LAND-DISPUTE NAVAJOS 8, 12, 15 (1980).

127. In its 1981 REPORT AND PLAN, the Commission reported that some 101 families refused to allow the Commission even to appraise their homes and improvements to land. NHIRC, 1981 REP. AND PLAN 3, 73 (April 1981). In 1984, the Relocation Commission reported that anywhere from 75 to 100 families will probably not apply for assistance and will be forcibly relocated at the close of the "voluntary" relocation period. Statement of Sandra Massetto, *supra* note 16, at 30.

128. *See, e.g.*, J. KAMMER, *supra* note 14, at 209-10; *Navajos Refuse to Bow to Relocation by U.S.*, New York Times, May 9, 1985, p. A1, col. 2; *Non-Indians at Big Mountain talk of civil disobedience next year*, Navajo Times Today, April 29, 1985, p. 1, col. 2; *"Stay where you are," is advice from Navajos who have relocated*, Navajo Times Today, January 28, 1985, at 1, col. 4. Catherine Smith, a sheepherder who was once arrested for firing a shot in the direction of a fencing crew, said, "If they come to push me out, I will say, O.K., it is better if you just kill me now, and leave me here." *Navajos Refuse to Bow to Relocation by U.S.*, New York Times, May 9, 1985, at A24, col. 4.

129. 134 CONG. REC. S13336-37 (daily ed. Oct. 1, 1982) (statement of Sen. Dennis DeConcini).

130. *See infra* note 135.

131. Other than case files of attorneys representing relocatee families before the Relocation Commission, few documents express the distressing reports of relocatee experience that have become common knowledge in the area. *See, e.g., Navajo Relocatees express Frustration with Relocation*, Navajo Times, May 12, 1982, at 1, 5; *Relocatees Blast Plan*, Gallup Independent, May 7, 1982, at 1, 8; *see also infra* note 137 and sources cited therein.

132. Predictions were based on studies of these Navajos in the Joint Use Area facing relocation. *See* T. SCUDDER, EXPECTED IMPACTS OF COMPULSORY RELOCATION OF NAVAJOS, WITH SPECIAL EMPHASIS ON RELOCATION FROM THE FORMER JOINT USE AREA REQUIRED BY P.L. 93-531 (March 1979); M. SCHOEPFLE, K. BEGISHE, R. MORGAN, A. JOHNSON & P. SCOTT, THE HUMAN IMPACT OF THE NAVAJO HOPI LAND DISPUTE: TEESTO CHAPTER REPORT (Nov. 1979) (project sponsored by Navajo Tribal Navajo-Hopi Land Dispute Commission); J. WOOD, *supra* note 125.

133. *See Relocatees Blast Plan*, Gallup Independent, May 7, 1982, at 1, 8; *see also Hosteen Nez not Unique*, Gallup Independent, May 8, 1982, at 2 (editorial) (description of Nez case).

> thousandfold and more . . . . The fact that it is a problem manufactured in Washington does not ease the pain and suffering—nor does it still the anger that fills too many hearts.[134]

By March of 1984, even the Relocation Commission's statistics revealed a problem of tremendous proportions: almost 40% of those relocated to off-reservation communities no longer owned their government-provided house.[135] In Flagstaff, Arizona, the community which had received the largest number of relocatees,[136] nearly half of the 120 families who had moved there no longer owned their homes.[137] When county and tribal legal services offices discovered that a disproportionate amount of houses had wound up in the hands of a few realtors,[138] allegations of fraud began to surface.[139] Lawsuits were filed by local attorneys;[140] investigations were begun by the United States Attorney's Office, the Federal Bureau of Investigation, the Arizona Department of Real Estate, and the Relocation Commission;[141] and the most in-depth review of the Relocation program which has ever been undertaken by a body of Congress was prepared.[142]

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134. *Hosteen Nez not Unique*, *supra* note 133, at 2.

135. Tolan, *Relocation Housing Scandal Grows*, Navajo Times, April 2, 1984, at 1, col. 1. *See* Memorandum, Relocatees' Sale and Nonownership of their Replacement Homes, to Steve Goodrich, Executive Director, from David Shaw-Serdar, NHIRC Staff 1 (Feb. 3, 1984). By March 1983, in five Arizona communities to which 252 relocatees had moved, 97 or 38% of the families had sold their relocation home. *Id.*

136. NHIRC, REP. AND PLAN: 1983 UPDATE 64-65 (June, 1983).

137. Tolan, *supra* note 135, at 1, col. 1. Memorandum, Relocatees' Sale and Nonownership of their Replacement Homes, supra note 135, at 1 (141 homes bought in Flagstaff; 69, or 49%, sold as of March 1983). As of July, 1984, 25% of those relocated to Flagstaff who sold their relocation home did so within the first six months of ownership. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 15.

Other statistics are available which provide a better indication of financial trouble experienced by relocatees; an example are those which show home sales and relocatee indebtedness, since indebtedness is an indication that the family is experiencing trouble and/or may sell its home in the near future. Of all those relocated to Coconino County for at least thirty-six months as of October 10, 1984, 82% have either sold their homes or have a loan of greater than $10,000. BMLDOC, *supra* note 119, Appendix, Exhibit 1, Table 6 and analysis (March 1985).

138. BMLDOC, *supra* note 119, Appendix, Exhibit 1, Tables 1 and 2 (March 1985) (of 91 relocatee homes sold by relocatees who had been relocated to Coconino County by October 30, 1984, 14 were purchased from the relocatees by Don Yancey; seven individuals had purchased at least two homes from relocatees); *see also* Memorandum, Follow-Up Study on Replacement Home Sales, to NHIRC Relocation Advisory and Counseling Staff from David Shaw-Serdar, NHIRC Staff, attachment (list), at 1 (Feb. 21, 1984) (of 19 home sales by Flagstaff relocatees between July and March 1983, 9 were purchased by Don Yancey).

139. Schroeder, *U.S. Probing Fraud Claims in Relocation of Navajos*, Arizona Republic, March 7, 1984, at B-1, col. 1.

140. *See, e.g.*, Monroe v. High Country Homes, Civ. No. 84-189 PCT CLH (D. Ariz., filed Feb. 9,1984). *See also Suit Alleges a Relocation Fraud*, Navajo Times, March 15, 1984, at 1, col. 4; (Monroe suit); Schroeder, *Navajo Couple Sues Loan Firm, Claiming Fraud*, Arizona Republic, April 5, 1984, at B-1, col. 1; *Relocatees Sue Loan Company*, Arizona Daily Sun, April 5, 1984, at 14, col. 1.

141. *See* Tolan, *supra* note 135, at 1, col. 1. The Arizona Department of Real Estate determined that a number of real estate licensees have been involved in fraudulent practices while dealing with relocatee families. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 15.

142. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8. The report was requested on April 25, 1984 by the House of Representatives Committee on Appropriations. It was transmitted on January 22, 1985 from C.R. Anderson and John A. Wagenen of the Committee Surveys and Investigations Staff. The report sparked a flurry of "response" reports. *See* NHIRC, REPORT TO THE SUBCOMMITTEE ON INTERIOR AND RELATED AGENCIES COMMITTEE ON APPROPRIATIONS (March 1, 1985) (hereinafter NHIRC response to SURVEYS AND INVESTIGATIONS REPORT); BMLDOC, *supra* note 119 (reply to the NHIRC's "response" report of March 1, 1985).

The Surveys and Investigations Report was released to the Commission in January of 1985. The Report describes the result of years of Congressional neglect and unrealistic optimism. It calls the Commission's housing program an "evolutionary, hit-or-miss process"[143] and says the Commission "manages by Trial and Error."[144] The fundamental problem seems to be that the Commission never had an implementation plan to achieve relocation:

> An analysis of the "Report and Plan" disclosed that it is not a plan in the traditional sense. The principal ingredient missing is what one professional planner called "implementation." The "Report and Plan" does not set forth any patterned series of steps designed to accomplish the goal of relocation.[145]

The Surveys and Investigations Report is replete with examples of the symptoms of the Commission's failure to plan: two-hundred and fifty-one families were moved before the Commission adopted housing standards and an inspection program for relocatee housing September, 1980;[146] the Commission does not provide post-move counseling and other services;[147] no new lands can be available by the July, 1986 deadline for relocation from the JUA;[148] and, even if all new lands are acquired, it would only be adequate for about 170 of the 250 to 300 "traditional type families left on the JUA" and designated to be moved to the new lands.[149]

Part of the problem, according to the Surveys and Investigations Report, is that:

> Relocation, as the name might imply, is not simply a matter of changing residence. To the traditional Navajo family it is the end of a way of life. Most of these relocatees families will move into modern, multiroom homes. The more acculturated Navajo will be further propelled into a life toward which many were already headed but not yet prepared to live. It is clear to anyone familiar with the situation that relocation is complicated and can be tragic.[150]

In its response to the Surveys and Investigations Report, the Relocation Commission expressed the same concept in more blunt terms:

> [T]he majority of the relocatees are in some stage of transition from a traditional way of life to grappling with life in the 20th century. . . . Anyone familiar with the history of Indian affairs will realize that the effort to make a transition between a traditional reservation life and urban life has been a problem for which the entire Federal government

143. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 32.

144. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 32.

145. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 35.

146. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 21.

147. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 32. In early 1982, the Commission authorized a Housing Repair Program (HRP) to upgrade homes, particularly those acquired by relocatees prior to September 1980. *Id.* at 33. HRP cost the Commission $44,519 for rehabilitation home repairs in fiscal year 1983, with $300,000 set aside for HRP in fiscal year 1984. *Id.* Total cost of the HRP program is estimated to be $250,000 to $1.6 million. *Id.*

148. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 23-28.

149. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 31.

150. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 18.

has been unable to find an adequate solution.[151]

Throughout its response, the Commission accepted much of the criticism of the Surveys and Investigations staff, but blamed Congress for the "seemingly endless maze of conflicting goals and dual mandates" which have resulted in relocatee families who "literally have no place to go."[152]

Not quite ten years after it began, Congress's "thorough and generous" relocation program seems destined to fail the high principles of its founders. Severe hardship has been imposed on thousands of Navajo Indians.[153] Less than one-third of the families have been relocated pursuant to the Relocation Plan,[154] and an unknown number have returned to the Joint Use Area or are living unauthorized on other parts of the crowded Reservation.[155] Not one acre of "relocation lands" is ready for relocatees.[156] Resistance to the policy, both on- and off-reservation, has increased, not decreased.[157] Yet, the statutory deadline for the end of "voluntary" relocation is less than one year away.[158]

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151. NHIRC response to SURVEYS AND INVESTIGATIONS REPORT, *supra* note 142, at 1-2. A former Commissioner of the Relocation Commission used even more blunt language just before his resignation in 1982, when he called the relocation of Navajos "a tragic, tragic thing" and said he sometimes felt the commission is "as bad as the people who ran the concentration camps in World War II." *Federal Commissioner says Relocation is like Nazi concentration camps*, Navajo Times, May 12, 1982, at 1, col. 1. These statements are quite unlike those used by the Commission in material it has sent to Congress during its past efforts to raise money for the relocation effort. For example, in early 1983, Ralph Watkins called relocation a "cultural rebirth." NHIRC, BRIEFING: ARIZONA AND NEW MEXICO CONGRESSIONAL DELEGATIONS 3 (February 16-17, 1983) (briefing comments of Ralph Watkins, Jr.). A review of Commission statements reveals that, of the three current Commissioners, only Sandra Massetto consistently speaks openly to Congressional leaders and the public about the tragic impact of relocation. *See, e.g.*, Statement of Sandra Massetto, *supra* note 16.

152. Examples of the conflicting congressional mandates include: 1) the requirement that, in 1977, the Commission both draft a plan for relocation and begin to relocate families simultaneously; and 2) the inability to acquire suitable relocation lands in time to meet the July, 1986 deadline. NHIRC response to SURVEYS AND INVESTIGATIONS REPORT, *supra* note 142, at 3. The Commission explained its dilemma:

> Congress has said that the Relocation must be completed by July of 1986. Congress has also said that new lands are the single most important factor in easing relocation. The new lands will not be fully acquired and developed before the deadline.

Id.

153. *See supra* notes 59-70 and accompanying text.

154. *See supra* note 8.

155. The Commission claims that many relocatees who sell their homes do so because they have "returned to the Navajo Reservation." NHIRC, BRIEFING: ARIZONA AND NEW MEXICO CONGRESSIONAL DELEGATIONS 35 (Feb. 16-17, 1983) (Fifty-one percent of those families who had sold their homes through July, 1982, returned to the Navajo Reservation.). The Commission indicates that the families "continued to seek homesite leases while relocating off-reservation, and have returned to the reservation as soon as they acquired the lease and sold their replacement home." Memorandum, Relocatees' Sale and Nonownership of their Replacement Homes, *supra* note 135, at 2.

However, local investigators who have researched the available statistics on homesite leases report that, as of Spring 1984, *not a single family* who had sold its home was granted a homesite lease on the Navajo Reservation. Interview with Lee Phillips, Coconino County Legal Aid, in Flagstaff, Arizona (April 19, 1984). A more likely scenario is that described by Commissioner Sandra Massetto: families return to the Navajo Reservation and live unauthorized in overcrowded Reservation communities. Statement of Sandra Massetto, *supra* note 16, at 2.

156. *See supra* note 70.

157. *See supra* note 128. *See also* NATIONAL ASSOCIATION OF COUNTIES, NACO ANNUAL BUSINESS MEETING: PLATFORM AMENDMENTS AND RESOLUTIONS 78 (July 19, 1983) (resolution to repeal or delay implementation of P.L. 93-531).

158. There is no actual statutory date for relocation to be complete. However, the following language appears in the Act: "The relocation shall take place in accordance with the relocation plan

E. *"The Energy Connection"*

An important issue that has clouded the debate over relocation is coal development on JUA lands. One theory suggests that the relocation policy is part of a long-term drive to develop the rich mineral resources of the area.[159] Some opponents of relocation have made the "energy connection"[160] their chief argument against the relocation policy.[161]

The argument is as follows: 1) the relocatees live on top of 19 billion tons of coal;[162] 2) Peabody Coal Company (and other mineral interests) seek control over and development of the coal resources;[163] 3) relocation of 13,000 Indians in order to strip mine would be a politically difficult feat; therefore, 4) mineral interests have worked through a network of congressional policymakers,[164] BIA officials,[165] and attorneys[166] to exaggerate the

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and shall be completed by the end of five years from the date on which the relocation plan takes effect." 25 U.S.C. § 640d-13(a). The relocation plan was submitted to Congress on April 8, 1981, and became effective 90 days thereafter; thus, the five-year period of "voluntary relocation" is scheduled to be completed by July 7, 1986. NHIRC REP. AND PLAN: 1983 UPDATE 2 (June 1983). At that point, the Commission's "involuntary relocation" plan begins. Names of those who fail to move will be referred to the U.S. Attorney "for appropriate action." NHIRC 1981 REP. AND PLAN 271 (April 1981).

159. For descriptions of this theory, see J. KAMMER, *supra* note 14, at 133-37; Mander, *Kit Carson in a Three-Piece Suit*, 32 CO-EVOLUTION Q. 52-64 (Winter 1981); Mathieson, *Battle for Big Mountain*, 2 GEO. 9-29 (March 1980).

160. This term was used by Jerry Kammer in his book, *supra* note 14, at 133.

161. Roberta Blackgoat, an elder from the Big Mountain area of the JUA, summed up the argument:

> It is our feeling and the feeling of our Moqui [Hopi] allies that the American government created the land dispute so that it would be easier for American energy corporations to exploit the vast mineral resources in the land. The Hopi Tribal Council has made it clear that they want extra land in order to develop it. Instead of Navajos and Moquis who have learned to live with the desert land, there will be mines and cattle. . . . [A]ll the money in the world is not worth the cruelty and hatred that will result from relocation . . . All Indian people should be terrified. . . . The United States is still creating Indian refugees. . . . Some of us thought that the United States had come out of the barbaric stage.

R. Blackgoat, *Has your Money Failed You?*, Speech given at the Univ. of New Mexico, Albuquerque, New Mexico (Oct. 4, 1979). Similar claims have been made by members of the Hopi Tribe in communications to the United Nations. S. TULLBERG, R. COULTER & C. BERKEY, *supra* note 17.

162. G. KIERSCH, METALLIFEROUS MINERALS AND MINERAL FUELS, NAVAJO-HOPI INDIAN RESERVATIONS (1956) (estimated 19 billion tons of coal underneath the Black Mesa area); ARIZONA BUREAU OF MINES, BULLETIN NO. 182, COAL, OIL, NATURAL GAS, HELIUM, AND URANIUM IN ARIZONA (1970).

163. Peabody Coal operates a strip mine at Black Mesa, just north of and adjoining the JUA. Considerable controversy has surrounded the environmental, economic, and cultural effects of the strip mine. *See* P. WILEY & R. GOTTLIEB, EMPIRES IN THE SUN 44-46, 240 (1982); *see also* REPORT TO THE KIKMONGWIS, *supra* note 31, at 149-55, 162-67.

164. Concern has been expressed about congressional actors. Harrison Loesch, who urged a pro-partition policy while serving as the Department of Interior's liason to the Bureau of Indian Affairs in 1974 and worked on the legislation as Senate Interior Committee Minority Counsel in 1974, became a Peabody Coal Vice-President in 1976. J. KAMMER, *supra* note 14, at 134. In the summer of 1985, Harrison Loesch attended at least one high-level meeting regarding the negotiations taking place pursuant to President Reagan's initiative. Interview with Lee Phillips, BMLDOC Attorney, August 25, 1985. (Other participants included Senator Barry Goldwater's aide, Twinkle Thompson, Fred Kraft and Richard Morris.) *See infra* notes 187-193 and accompanying text. Wayne Owens (D-Utah), whose bill to partition the Joint Use Area was passed in 1974, became a member of John Boyden's law firm in 1976. J. KAMMER, *supra* note 14, at 166.

Evans and Associates, a public relations firm, represented the Hopi Tribal Council during the lobbying campaign for passage of Boyden's proposed relocation bill in the early 1970's. Evans and Associates also represent WEST (Western Energy Supply and Transmission Associates), a trade association of 23 utility companies and local power authorities and the Bureau of Reclamation. *Id.* at 88; P. WILEY & R. GOTTLIEB, *supra* note 163, at 233-34. Quite a scandal erupted when a Los

friction between the two tribes and achieve the ultimate removal of people from the coal-rich lands.

It is reasonable to assume that energy developers have a long-term interest in events occurring in the region. The JUA is located in the Four Corners region of the Colorado Plateau, an area of intensive energy development.[167] For decades, policymakers have linked development of this mineral wealth with resolution of the land ownership questions in the JUA.[168]

Angeles reporter uncovered evidence that the Salt Lake City public relations firm had written at least one speech for the Hopi Tribal Chairman. The speech urged support for WEST. *Id.* Jerry Verkler, staff director of the Senate Interior Committee during passage of the Act, went to work for a member of WEST after putting forth a vigorous effort to get the bill passed. J. KAMMER, *supra* note 14, at 135-36.

165. *See supra* note 164.

166. John Boyden, Sr. was Hopi Tribal Attorney from his appointment by the Secretary of Interior in 1944 to his death in 1980. Boyden, a twelve-year veteran of the Department of Interior and a former official of the Mormon Church, was the U.S. government's answer to the Hopi Tribal Council, which had been defunct for 11 years due to a boycott by the Hopi traditionalists. Boyden filed a land claim for the Tribe in the newly-created Indian Land Claims Commission (an invention of his law partner, Charles Wilkinson). The filing of the land claim, as well as the appointment of John Boyden as tribal attorney, was vigorously opposed by the majority of the Hopi people. *See* REPORT TO THE KIKMONGWIS, *supra* note 31, at 60, 81, 102-04; J. KAMMER, *supra* note 14, at 122.

Concerns about Boyden's representation of the Hopi Tribe in a conflict-of-interest situation have also been raised. *See, e.g.*, REPORT TO THE KIKMONGWIS, *supra* note 31, at 149-55. In a 1966 professional directory, "Hopi Indian Tribe" and "Peabody Coal Co." are both listed as clients of John S. Boyden's law firm of Boyden, Tibbals, Staten and Croft of Utah. III MARTINDALE-HUBBELL LAW DICTIONARY 174515 (1966). Nineteen-sixty six was the year the Black Mesa Coal lease was negotiated between the Hopi Tribal Council and Peabody Coal company. REPORT TO THE KIKMONGWIS, *supra* note 31, at 149. The apparent conflict of interest would violate professional ethics. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

The sponsor of the 1974 legislation, Wayne Owens, lost his re-election bid for Senate and went to work for Boyden's law firm in Salt Lake City. J. KAMMER, *supra* note 14, at 166. The conflict of interest position of the Hopi Tribal attorneys is a continuing point of controversy. When in early 1985 the Hopi Tribal Council requested that three law professors evaluate a potential conflict of interest between the Tribe and its Salt Lake City firm of Nielsen and Senior, all three professors reported the existence of a "positional conflict of interest" and the law firm's failure to disclose the facts to the Tribe. *Hopi Council to decide on legal conflict*, Navajo Times Today, February 6, 1985, at 1, col. 5. Without advising the Hopi Tribe, the law firm submitted an *amicus curiae* brief on behalf of Superior Oil Company and the Southland Royalty Company to the United States Supreme Court. In the brief, the attorneys argued that the Navajo Tribe lacked authority to impose a tax on Kerr-McGee's coal mining operations on the Navajo reservation, or at least that the Navajo Tribe could not do so without approval of the Secretary of Interior. Qua Toqti, *Kennedy and Romney to Sever Association with Nielson and Senior*, Feburary 15, 1985. *Hopi lawyers split firm, end conflict*, Navajo Times Today, February 12, 1985, at 1, col. 2. The Supreme Court rejected the position of the *amicus* brief and ruled that the Navajo Tribe has the authority to tax mining operations on its land. Kerr-McGee Corp. v. Navajo Tribe of Indians, 105 S. Ct. 1900 (1985). After the discovery of the conflict, Nielsen and Senior split up and several of its attorneys continued to represent the Tribe on land dispute and relocation matters. *See Hopi lawyers split firm, end conflict*, Navajo Times Today, February 12, 1985, at 1, col. 2; *Hopis decide to end contract with lawyers*, Navajo-Hopi Observer, February 27, 1985, p. 3, col. 1.

167. "Four Corners" refers to the point where Colorado, New Mexico, Arizona, and Utah all meet.

168. In 1946, John Boyden began pressuring the Department of Interior to clarify the ownership interests in the mineral estate of the 1882 executive order area. His efforts resulted in an opinion from Felix S. Cohen, then acting solicitor of the Department of Interior. Cohen held that the two tribes had joint, undivided interests in the mineral estate of the 1882 reservation. 59 DECISIONS OF DEPT. OF INTERIOR 248 (June 11, 1946). This ruling was reiterated in 1956, when Boyden again sought a determination of the Hopi Tribe's mineral interests. *See* REPORT TO THE KIKMONGWIS, *supra* note 31, at 126.

The legislative history begins in 1950, when Congress passed the Navajo-Hopi Rehabilitation Act, ch. 92, Pub. L. No. 474 (1950). The Act provided funds for, among other things, mineral studies and the construction of roads. *See, e.g.*, G. KIERSCH, *supra* note 162. When introducing the

One need not invent elaborate conspiracies to contemplate the great likelihood that both the Navajo and Hopi Tribal Councils would decide to lease land in the JUA if the land were not occupied.[169] In fact, recent developments in the region indicate a reasonable likelihood that mineral development will follow relocation.[170]

No one need deny the obvious relationship between the relocation policy and mineral development in the region.[171] However, presently available

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legislation, Representative Haley (D. Fla.) linked the Navajo-Hopi Land Dispute with the growing interest in mineral development: "The Bureau of Indian Affairs has made repeated, but unsuccessful efforts to settle the dispute which, with discovery of oil, gas, and uranium in the area, has become acute." H.R. REP. No. 1492, 85th Cong., 2d Sess. 2 (1958) (report of the House Committee on Interior and Insular Affairs).

169. This is especially true if pressure were put on the Councils by coal developers with whom the tribes are attempting to renegotiate lease terms for mines currently in operation.

170. One example is the "Turquoise Trail," a major paved road which will connect the Hopi Reservation with the Peabody Coal Mine at Black Mesa. Qua Toqti (Hopi Tribe's newspaper), Sept. 29, 1983, at 1, col. 1. Another example is the evidence of prospecting leases already signed for the area. *See* Geophysical Prospecting Permit from Hopi Indian Tribe to Dresser Minerals (signed Dec. 12, 1975). In June of 1983, Hopi Tribal Chairman, Ivan Sidney, attributed the progress in some developments to the legal action on JUA ownership:

> What we have been able to do in the last five months, an agreement on the roads, and looking at some of the mineral developments, has only been done because the Court had made these decisions.
>
> Now we are able to progress in that because we know which rightfully belongs to the other side. And also through the decisions of Courts and Congress that we have had interest in the subsurface. Now it's able to allow us to do some improvements and some cooperation.

Transcript of June 8, 1983 Status Conference, 65-66 (filed June 16, 1983) in Sidney v. Navajo Tribe, Civ. Nos. 76-934, -935, -936 (D. Ariz., filed Dec. 15, 1976). By the spring of 1985, even Hopi Tribal Chairman Ivan Sidney was willing to disclose the tentative plans for the area cleared by the relocation policy: "Mineral development for the future is probably part of the plan." *Navajos Refuse to Bow to Relocation by U.S.*, New York Times, May 9, 1985, p. A24, col. 5. Mr. Sidney also said there was currently a moratorium on mineral leasing in the JUA. *Id.*

171. Another aspect of this relationship can be seen in the current attempts by the Navajo Tribe to secure the land and mineral rights of the 35,000-acre Paragon Ranch in New Mexico. The Tribe selected the acreage as part of the process under the relocation act that allows the Tribe to select additional lands to become part of the Navajo Reservation. 25 U.S.C. § 640d-10 (1982). Although the Act allows for selection of up to 35,000 acres in New Mexico, the Department of Interior initially blocked acquisition of the Paragon Ranch because of its importance to the Interior Department's long-term plan to develop the San Juan Basin. Paragon Ranch, located in the center of coal-rich San Juan Basin, was immediately withdrawn for consideration by Secretary of Interior James Watt due to plans to transfer the site to the Public Service Company of New Mexico (PNM). PNM plans to build a 2000-MW coal-fired, water-cooled electric generating station on the site as part of a regional development plan of the Bureau of Land Management. The Navajo Tribe sued to obtain the lands. Zah v. Clark, Civ. No. 83-1753 BB (D.N.M., filed Nov. 27, 1983). In addition, several Preference Rights Lease Applications are outstanding on those lands. For a description of Preference Rights Leases, see 30 U.S.C. § 201(b) (1975) (amended 1976) (amendments eliminated prospecting permits and attending lease applications). *See also* Natural Resource Defense Council v. Berklund, 458 F. Supp. 925; 929-32 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (description of preference right lease procedures). For a discussion of energy developments in the San Juan Basin, see Monroe, *Slicing Up the Baby*, 1 MINE TALK 9 (1982) (available from Southwest Research and Information Center, Albuquerque, N.M.). Transfer of lands has been held up by protracted negotiations among tribal, New Mexico state, and Department of Interior officials. One draft agreement would have granted the Navajo Tribe the Paragon Ranch, but subject to existing mineral rights and interests and rights-of-way, and with no surface owner consent rights for lease development, and only 50% of the lease revenues going to the tribe. *See* Draft Agreement Between the Navajo Tribe and the Department of the Interior Regarding Tribal Selection, NM-54079 (July 13, 1983). In 1984, this agreement was reflected in federal law, with the passage of the San Juan Basin Wilderness Protection Act of 1984, Pub. L. 98603, 98 Stat. 3155.

Given these developments, it is reasonable to assume that the early lack of opposition to the relocation policy on the part of the Navajo Tribal government had some relationship to develop-

information does not conclusively document the coordinated machinations of an "energy conspiracy."[172] Rather than speak of an undocumented "energy conspiracy," those who are concerned about unwanted energy development should present the relocation policy as one among many which highlights the important role played by energy interests in western land and resource conflicts, particularly those conflicts involving federal Indian affairs policies.

Those who oppose relocation because of the suffering it imposes on the relocatees should not rely on the coal issue in arguing against the program. The reasons are severalfold. First, these arguments feed the perception that opponents of relocation have as their primary concern the environment, not the relocatees. Second, these arguments leave the impression that relocation opponents believe that mineral development is inherently wrong or immoral, when their primary concern is probably with tribal self-determination and control over the mineral development that does take place.[173] Finally, the arguments neglect the stronger issue, one less vulnerable to criticism—the

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ments surrounding acquisition of Paragon Ranch. Consider the statement of Bill Lavell, current attorney for the Navajo Tribe, made in 1982 when he was General Counsel for the Relocation Commission:

> The transfer of these lands to the Tribe and the ultimate planned generating plant would be a very tangible and realistic means of bringing substantial economic benefit to the Navajo people generally and the relocatees in particular. The Commission sees the transfer of the Paragon Ranch to the Tribe as *the* vital ingredient necessary to make a successful relocation program. Both the potential revenue from the land and the jobs which will be created at the site are essential ingredients.

Hearings on Proposed Withdrawal of Lands in New Mexico before the New Mexico State Office of the United States Bureau of Land Management 1 (August 3, 1982) (statement of William G. Lavell, General Counsel, Navajo-Hopi Indian Relocation Commission) (emphasis in original). *See also* SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 27-28 (reports that the Tribe views the Paragon Ranch land "as a source of income to help offset, alleviate, and solve the problems which will remain after the Commission is through with relocation."). Despite the admitted impossibility of acquiring and readying the Paragon Ranch lands in time to meet the 1986 deadlines for removal of Navajos from the JUA, the Commission continues to make the unexplained assertion that "the Commission views the Paragon Ranch as a relocation site, and envisions that a relocatee community will be established there." NHIRC response to SURVEYS AND INVESTIGATIONS REPORT, *supra* note 142, at 22.

172. Further research might reveal more interest in JUA coal development in the mid-to late 1950's and early 1960's, when the interest in coal mining was greater than at present.

173. The issue about mineral development on Indian lands has become an issue about self-determination. The major complaint concerns the lack of control that the Navajo and Hopi people have over their own destiny. Indian tribes are at a disadvantage in negotiation sessions with energy developers. They usually lack the financial and technical resources that are prerequisites to a full understanding of the costs and benefits of decisions. *See generally* Maxfield, *Tribal Control of Indian MIneral Development*, 62 OR. L. REV. 49 (1983). In 1975, the U.S. Commission on Civil Rights noted that "virtually every action of the tribal council must receive the approval of the BIA before it can become law or be acted upon by the tribe." UNITED STATES COMM'N ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY 22 (Sept. 1975). The terms of mineral leases on Indian lands are typically inferior to those on non-Indian lands; royalties of a mere 15 cents per ton are common. For example, Peabody Coal Company pays to the Navajo Tribe a royalty of 35 cents per ton (and 20 cents per ton under certain conditions). Farrell, *The New Indian Wars*, Denver Post, Nov. 21, 1983 (special supplement), at 24. Other relevant markets pay $1.50 a ton and more. Matthiessen, *Battle for Big Mountain*, 2 GEO. 9, 19 (March 1980). Deleterious health and environmental effects often accompany energy development. *See* C. GEISLER, THE SOCIAL IMPACT ASSESSMENT OF RARE RESOURCE DEVELOPMENT ON NATIVE PEOPLE (1982) (Univ. of Michigan Natural Resource Sociology Research Lab Monography). However, Indian tribes are often pressured by the economic circumstances of the tribe and the preferences of the BIA to pursue energy development. *See* Maxfield, *supra*, at 49-72 (1983).

widespread plight of the relocatees and the inconsistency between the federal government's approach to this and other Indian land claims.

IV. RECOMMENDATIONS

This next section offers policy recommendations directed at the federal actors in the dispute and relocation policy. These recommendations are not intended as substitutes for tribal solutions, but as steps the federal government should take to remedy a situation created by federal court decisions and federal legislation.[174]

A. *General Recommendations*

1. *Place the Relocation Issue on the Congressional Policy-making Agenda*

If only one recommendation could be made, it would be that congressional policy makers begin to give the relocation policy the attention it demands. That level of attention should be consistent with the economic and human costs of the policy. The program is the largest federal housing project in the country;[175] its projected cost has risen from $29 million[176] to $400 million;[177] recent revelations by the Commission indicate that the program will continue until at least 1993;[178] and recent reports indicate that the assistance program is proceeding in a manner contrary to the intent of Congress.[179] These constitute good reasons for re-opening a full discussion of the policy and its operation.

Many policymakers on Capitol Hill believe that the relocation policy is mandated by federal court decisions and cannot be disturbed by an act of Congress.[180] This argument is only partially true. The federal courts have

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174. These recommendations are directed at the federal courts, the Congress, the executive, and sometimes all three institutions. The relocation policy is a collection of decisions made by each institution. Policy reforms are much more difficult when a number of actors must take simultaneous action. One conclusion is inescapable: Congress must take action before the current relocation policy can be significantly reformed. A decision by Congress to take responsibility for any policy failures is also consistent with prior congressional commitments. In 1974, the Committee on Interior and Insular Affairs reported its belief that the program was necessitated by federal failures:

> An underlying conclusion drawn by the Committee was that the Federal government, because of repeated failure to take decisive, positive action, bears the major responsibility for the development of this most complex dispute to the point of crisis. . . . In addition, the Committee concluded that the major costs of the solution should properly be borne by the United States.

HOUSE REPORT ON H.R. 10337, AUTHORIZING THE PARTITION OF THE SURFACE RIGHTS IN THE JOINT USE AREA OF THE 1882 EXECUTIVE ORDER HOPI RESERVATION AND THE SURFACE AND SUBSURFACE RIGHTS IN THE 1934 NAVAJO RESERVATION BETWEEN THE HOPI AND NAVAJO TRIBES, PROVIDING FOR ALLOTMENTS TO CERTAIN PAUITE INDIANS, AND FOR OTHER PURPOSES, 93d Cong., 2d Sess., 12, 23 (March 13, 1974) (House Report No. 93-909).

175. *See supra* note 7.

176. House Report on H.R. 10337, *supra* note 174 (total cost $29.1 million).

According to the SURVEYS AND INVESTIGATIONS REPORT, the future costs are estimated at an average cost per family of $137,790, disregarding inflation, if any, and not including funds expended by other governmental agencies. SURVEYS AND INVESTIGATIONS REPORT, *supra* note 8, at 12.

177. Testimony of Ralph Watkins (Chairman, Relocation Commission), *supra* note 8, at 6.

178. *Id.*

179. *See supra* notes 129-56 and accompanying text.

180. This conclusion was confidentially expressed to this author by almost every Congressional staffer, Senator, Congressperson, and BIA administrator interviewed.

indicated that their affirmance of the relocation policy is based in large part on congressional intent.[181] The federal courts have also made it quite clear that alternatives to relocation exist.[182] Indeed, the fact that Congress adopted a standard for partition of the 1934 Area that is remarkably different from that adopted for the 1882 Area[183] proves that flexibility is possible. The livestock reduction program administered by the BIA also offers opportunity for congressional attention that would not conflict with judicial determinations.[184]

Another argument that might be offered against congressional review of the relocation policy is that any congressional action at this point is bound to cost millions. Providing financial compensation to the Hopi Tribe, for example, is more expensive today than such action would have been in 1958.[185] Moreover, a legislated moratorium on future forced relocation would need to address those Navajos who have acted in reliance upon the Commission's promises to provide them a relocation home and assistance. Costs incurred for those relocatees might not be recoverable. In short, almost anything Congress decides to do would have financial repercussions.

This argument, while powerful, ought not to inhibit reasoned policymaking. Certainly an investigation into the relative costs of various alternatives facing Congress at this point would be worthwhile. The complexity of the cost issues make the figures that are available subject to manipulation. If indeed the costs involved prohibit any policy other than the present one, policymakers should have that information at hand. Only then can the policy be defended as a reasonable choice among alternatives. If, on the other hand, such an investigation reveals that a savings in economic and human costs would result from a modification of the policy, Congress might avoid stumbling into the huge costs that will result from present policy.[186]

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181. *See* Sekaquaptewa v. MacDonald, 575 F.2d 239, 244 (9th Cir. 1978). At a break during a court hearing on grazing rights, Judge Earl Carroll told a group of Navajo elders that he was powerless to change the law and that his duty is to uphold legal precedents and congressional mandates. *Tribe argues for control over HPL at court hearing*, Qua Toqti, May 17, 1984, at 1, col. 1.

182. 575 F.2d at 245.

183. *See infra* note 265 and accompanying text.

184. *See, e.g., infra* notes 246-47.

185. This is because, before passage of the 1958 Act, Congress could have simply "extinguished" the Hopi Tribe's title to the land with no payment of compensation. *See* Healing v. Jones (I), 174 F. Supp. 211, 216 (D. Ariz. 1959), *aff'd*, 373 U.S. 758 (1963) (citing Hynes v. Grimes Packing Co., 337 U.S. 86, 103 (1949). *See also supra* note 41. *But see* Comment, *Tribal Property in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 626 (1969).

Congress' power to unilaterally "extinguish" Indian aboriginal rights to land is based upon plenary power doctrine. *See supra* note 43. This doctrine of law is coming under increasing attack in the academic community. *See, e.g.*, Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245 (1983); Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235 (1982); Harvey, *Constitutional Law: Congressional Plenary Power Over Indian Affairs—A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982); Strickland, *The Puppet Princess: The Case for a Policy-Oriented Framework for Understanding and Shaping American Indian Law*, 62 OR. L. REV. 11 (1983); Shreves, United States v. Sioux Nation: *The Demise of* Lone Wolf v. Hitchcock *in Fifth Amendment Tribal Land Claims*, 26 S.D. L. REV. 582 (1981). *See also generally*, V. DELORIA JR., & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983); RETHINKING INDIAN LAW (J. Leach, D. Parr, M. Roberge, J. Ryan, A. Simon, C. Strickman, ed. 1982); R. BARSH & J. HENDERSON, *supra* note 34.

186. Suppose that, after analyzing all costs, Congress concluded that altering the present policy

If Congress does not take meaningful action on its own initiative, it may be forced to do so by President Ronald Reagan. In early 1985, the President appointed former Secretary of Interior, Judge William Clark, to act as the President's aide in encouraging negotiations. The President, through Judge Clark, made it known that "finding a solution to the dispute" was a "high priority" for the Reagan administration.[187] President Reagan sent a letter to both Chairmen requesting that they cooperate with Judge Clark.[188]

The President's letter addresses the land dispute, but says nothing about the relocation policy. The President refers to the Chairmen's ongoing negotiations as an attempt to resolve "your differences"[189] and says he is sending Judge Clark to "resolve the controversy."[190] President Reagan complains that the 1974 and 1980 Acts "precipitated numerous lawsuits"[191] and that "no real resolution of the underlying dispute [is] in sight."[192] Based on his understanding of the "long-standing dispute," President Reagan concludes:

> While I am sensitive to the emotions, the history, and difficulties associated with the Settlement Act, I nonetheless see an important need for a speedy and final resolution of these issues so that old wounds may begin to heal and to minimize the hardships that are falling on individual members of the two tribes.[193]

President Reagan is using "land dispute" language. His letter does not even contain the words "relocation" or "relocate."

Unfortunately, the President's language, while familiar, does not reflect the sophistication and flexibility necessary to shape a humane and practicable federal policy. To formulate a true "final solution," policymakers must draw upon the ten years of experience under the relocation policy and devise new, creative solutions. Perhaps, as the President and his assistants learn more about the complexity and tragedy of the relocation policy, such a solution will emerge.

2. *Take Steps to Reduce the Influence of the Tribal Attorneys*

The role of the tribal attorneys is problematic. Both sides seem to be prolonging litigation for personal gain at the expense of the Congress and the people involved.[194] This applies more to the Hopi tribal attorneys than to

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would increase financial costs. Congress might still decide to modify the policy to avoid even larger economic or human costs in the future.

187. Hardeen, "*Reagan: dispute cannot persist*," Navajo Times Today, February 13, 1985, at 1, col. 5, at 2, col. 2.

188. Printed in Hardeen, *id.*, at 2, col. 4.

189. *Id.*, at 2, col. 4.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 2, col. 5.

194. Russakoff, *In Indians Dispute, Friendship to Rescue*, Washington Post, April 15, 1983, at A1, col. 5 (statements of Peterson Zah); *Hearings on H.R. 1193, Partition of the Surface Rights of Navajo-Hopi Indian Land, before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 93d Cong., 1st Sess. 116 (March 7, 1973) (testimony of Abbott Sekaquaptewa, former Hopi Tribal Chairman); REPORT TO THE KIKMONGWIS, *supra* note 31, at 149-55, 187-90; J. KAMMER, *supra* note 14, at 154; Farrell, *supra* note 173, at 19-20; Russakoff, *In Indians Dispute, Friendship to Rescue*, Washington Post, April 15, 1983, at A1, col. 5 (statement of Peterson Zah). Concern over the overbearing role of the attorneys has been confidentially expressed by sev-

the Navajo tribal attorneys, although both have been soundly criticized.[195] Specifically, the Hopi tribal attorneys have demonstrated an unwillingness to negotiate on land dispute issues.

For example, Hopi tribal attorney John Kennedy has indicated to the Federal District Court that negotiation is forbidden by the Hopi Constitution. At a June, 1983 status conference, he stated:

> The Hopi Constitution, which was adopted back in the 1930's, provided that the tribe wouldn't be empowered to negotiate with the Navajo. It's kind of an unusual constitution [sic] provision. But there is an actual clause in the Constitution that says that.[196]

This posture is odd for a man who had personally taken part in countless negotiations between the Navajo and Hopi Tribes on a variety of matters; moreover, his statement is not confirmed by a reading of the Constitution. Only one provision mentions the Navajo Tribe, and that provision suggests that negotiation is explicitly authorized by the Constitution.[197]

A recent example of the intransigence of the Hopi tribal attorneys occurred in 1983, shortly after Peterson Zah replaced Peter MacDonald as Navajo Tribal Chairman. The Hopi and Navajo Tribal Chairmen, who were old acquaintances, asked Congress for time to resolve their differences without lawyers or BIA officials.[198] Washington responded favorably; the BIA approved plans for construction of a Hopi High School[199] and a major road project.[200] The two Chairmen were discussing plans for a joint negotiating

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eral policymakers in Washington, including congressional staff, BIA officials, and a U.S. attorney. Federal District Judge Earl Carroll has expressed similar concerns. *See* Transcript of June 8, 1983 Status Conference, *supra* note 170, at 21, 34 (Judge Carroll expresses concern over "cost of the litigation" and calls for a "common sense . . . utilization of money, lawyers.").

195. Instances of attorney involvement in undermining negotiations have been cited on both sides. Abbott Sekaquaptewa, former Hopi Tribal Chairman, accused the Navajo Tribal Attorneys of sabatoging tentative agreements. *See Hearings on H.R. 1193*, *supra* note 194, at 116. Recently, charges of Hopi tribal attorney interference have surfaced. *See infra* notes 204-07 and accompanying text. Some have suggested that little incentive for negotiations existed, since, after Healing v. Jones (II), each tribe had as a minimum rights to 50% of the JUA lands. *See* J. KAMMER, *supra* note 14, at 152.

196. *See* Transcript of June 8, 1983 Status Conference, *supra* note 170, at 16.

197. Constitution of the Hopi Tribe art. I, Jurisdiction reads in full:

> The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States government and the Navajo Tribe and such lands as may be added thereto in the future. The Hopi Tribal Council is Hereby Authorized to Negotiate with the Proper Officials to Reach Such Agreement, and to accept it by a majority vote.

198. *See* Russakoff, *supra* note 194.

199. Farrell, *supra* note 173, at 19.

200. *See Turquoise Trail Funded*, Qua Toqti, September 29, 1983, at 1, col. 1. The "Turquoise Trail" was a project which had been on the drawing boards since the late 1950's. For a detailed description of the project, see A Joint Proposal by the Hopi and Navajo Tribes for Construction of Mutually Beneficial Highway Project, "The Hopi-Navajo Turquoise Trail" (April 4, 1983) (submitted to Arizona Governor Bruce Babbitt, from Chairman Ivan L. Sidney and Chairman Peterson Zah).

By August 1984, there were no more funds available for the Turquoise Trail, and it was only an eleven-mile stretch of graded dirt. *See Few Dollars Tarnish Turquoise Trail*, Navajo Times Today, August 10, 1984, at 1, col. 2. In April 1985, Samuel Pete, former director of the Navajo Tribe's Navajo-Hopi Land Dispute Commission, said of the road: "This highway is on a parallel with the progress of the Navajo-Hopi dispute. It is road that starts nowhere and goes nowhere, which is being funded by Navajo road money." Pete, *Erosion of tribal power*, Navajo Times Today, April 15, 1985, at 10, col. 3 (editorial).

team to renegotiate the Peabody Coal lease at the Black Mesa Mine.[201] They were also discussing plans for a land exchange negotiating team made up of Navajos and Hopis.[202]

However, optimism proved to be premature. In the fall of 1983, Hopi tribal attorney Steve Boyden sought and received approval from the Hopi Tribal Council to continue litigating land dispute issues.[203] The Council passed a "series of resolutions designed to strip [Chairman] Sidney of his power, cut back on his travel, and reduce his influence with the federal government and the Navajo."[204] These actions were taken on the advice of the Hopi tribal attorneys.[205]

> John Fritz, Assistant Deputy Secretary of Interior in 1983, commented:
> I would say these negotiations were hindered, damaged, derailed, or however you want to characterize it, by the lawyers in Salt Lake City, and if the theory . . . [is correct] that [mineral] interests reach into the Utah area and then come back representing the tribe in almost a conflict of interest situation . . . then we're seeing another card played out of that deck. Because the scary part to Peabody Coal was that the Navajos and Hopis would get their act together to deal on a unified basis on their coal at the Peabody coal mine.[206]

Only two months later, in October 1983, the Hopi Tribal Council enacted a severance tax on coal from the Peabody Mine at Black Mesa.[207] This unilateral action, which affected coal from the JUA, was of questionable validity.[208] Zah was reportedly angry; Peabody Coal Company broke off lease negotiations; in short, "the fragile unity that the two tribal chairmen had hoped to wield against the Peabody Coal Company [was] shattered."[209]

The role of the attorneys highlights the commonality of interests which bind the Navajo and Hopi Tribes and set them apart from the federal government.[210] The federal government has guaranteed payment of legal ex-

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201. Farrell, *supra* note 173, at 19-20.

202. This was revealed in early 1984 by Ralph Watkins. *Department of the Interior and Related Agencies Appropriations for 1985: Hearings Before the Subcomm. on the Department of the Interior and Related Agencies of the House of Representatives' Committee on Appropriations*, 98th Cong., 2d Sess. 35, 50 (1984).

203. Transcript of June 8, 1983 Status Conference, *supra* note 170, at 14.

204. Farrell, *supra* note 173, at 20.

205. *Id.*

206. Interview with John Fritz in Washington, D.C. (April 12, 1983).

207. Farrell, *supra* note 173, at 20, 25.

208. Tribal severance taxes have been authorized by the United States Supreme Court. Merrion v. Jicarrilla Apache Tribe, 455 U.S. 130 (1982). However, the joint ownership of mineral rights in the JUA poses additional legal issues. *See* Farrell, *supra* note 173, at 19-20, 25.

209. Farrell, *supra* note 173, at 20. Zah had this to say:

> Peabody was capitalizing on the dispute between the Hopi and the Navajo and they ended up getting what they want: a cheap price of coal. . . .
>
> For too long the white people have said, Let's tell the Navajo this, and let's tell the Hopi that, and they'll end up fighting each other. The end result was that people are taking our coal almost free.
>
> Indian people are competent and can settle their own problems, but we are constantly being threatened by those who benefit by creating turmoil. . . .
>
> I actually believe the lawyers are afraid Ivan Sidney and I will settle some problems between our people. . . . And this means the lawyers will be out of millions in unnecessary fees.

Id.

210. The excessive influence of attorneys over tribal affairs has been noted as a general problem

penses for both sides in land dispute litigation.[211] At the same time, Congress has withheld almost all development funds and human service assistance from the area. This congressional policy has probably encouraged negotiation on matters of economic development and human assistance, but frustrated negotiations on issues related to Navajo relocation.[212]

These considerations should be kept in mind by those policymakers attempting to resolve the problems created by the relocation policy. Congress and the BIA should give the Chairmen the opportunity they request and take steps to lessen the role of the tribal attorneys.

While reducing the role of the tribal attorneys in negotiations is an essential step, policymakers would be naive to believe that reducing the influence of the tribal attorneys will result in an "instant" remedy for the injustice imposed by the federal government on both tribes. In fact, it is unrealistic to expect the two Chairmen, bound as they are by the political, economic, legal, and social situations of their tribes, to correct years of disastrous federal policy. Both tribes have suffered greatly under federal Indian affairs policy, and it is unfair to expect the two Chairmen to determine which tribe has "suffered more" and find a solution which strikes an appropriate balance.[213]

Moreover, negotiations between the two tribes are heavily imbalanced against the Navajo Tribe. The Navajo Tribe lost in Congress and has lost every one of the related federal court cases. The Hopi Tribe's perspective must also be considered. A gift of 911,000 acres of land, coming from the same United States government which is responsible for taking millions of acres of Hopi land in the past, is irresistible to the Hopi Tribe. The Hopi

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in Indian affairs. *See* R. BARSH & J. HENDERSON, *supra* note 34, at 255-56; S. Tullberg & R. Colter, *The Failure of Indian Rights Advocacy: Are Lawyers to Blame?*, in RETHINKING INDIAN LAW, *supra* note 185, at 51-56.

211. See *supra* notes 77, 116, 117.

212. While no direct proof of the content of the Chairmen's negotiations is available, this hypothesis appears to be borne out by recent developments. *See supra* notes 198-201 and accompanying text. Approval for construction of the Hopi high school, *see* Farrell, *supra* note 173, at 19, provides an example. Despite the statutory authorization for the project in 1974, actual funding approval was held up until the recent "negotiations." A similar situation is presented by approval of a road project, the "Turquoise Trail." *See supra* note 170. In short, the Hopi and Navajo Tribal Chairmen must go through a "negotiations" process to obtain assistance that, absent a federal moratorium, would have been provided long ago. The above "products of negotiation" do not include or imply a reduction in the numbers of Navajos relocated, a lifting of the "building freezes," or other relocation-related measures. Those matters are still left to the attorneys, Relocation Commission, BIA, and Congress.

Samuel Pete, former director of the Navajo Tribe's Navajo-Hopi Land Dispute Commission, expressed the frustration caused by the negotiations:

> This 'friendship' [between the two Chairmen] so far has produced a Hopi high school, a Hopi hospital or medical facility, and a few miles of Hopi highway known as the Turquoise Trail . . . which is being mostly funded by Navajo road money. The Navajo people have nothing to show for the Chairman's friendship except a thirteenth lawsuit recently filed in federal court by the Hopis against the Navajo Tribe for rent on the Former Joint Use Area since 1979.

Pete, *Erosion of Tribal Power*, Navajo Times Today, April 15, 1985, (editorial) at 10, col. 3.

213. For a discussion of the types of agreements being discussed by the two Chairmen, see *Navajos to prepare new proposal for Hopis*, Navajo Times Today, April 24, 1984, at 1, col. 4; Tome, *Secret Negotiations By Chairmen Zah/Sidney*, Navajo Nation Enquiry, May 1984, at 1 (text of proposed agreement).

Tribe can hardly be blamed for insisting on delivery of the land given it by the federal government.

Therefore, while policymakers should take steps to reduce the improper influence of the tribal attorneys in the negotiations, such steps must be accompanied by meaningful action to protect Navajo rights and minimize relocation of Navajos; otherwise, relocation will continue, with even fewer safeguards against the infringement of Navajo rights which characterizes the present policy.

3. *Increase the Input and Participation of Those Most Directly Affected by the Relocation Program*

Policymakers should involve in policy discussions those most directly affected by the program—the relocatees and current residents targeted for relocation. Presumably, these people have the most information about their situations and can undoubtedly identify the problems with the current policy more quickly, and perhaps more candidly, than can the Relocation Commissioners and tribal leaders. Indeed, the current awareness of the severe problems and growing economic costs of the present program began shortly after individual cases of human tragedy were documented by those who work closely with relocatees.

However, there is currently no mechanism whereby policymakers can obtain needed information from the relocatees and potential relocatees. Traditional means of obtaining feedback for making policy decisions are not available in the context of the relocation policy. One of the most traditional checks on inappropriate and erroneous policies, the judicial system, has been closed to individual tribal members on most matters. Federal courts have consistently barred the potential relocatees from participating directly in lawsuits in which either of the two tribes are involved.[214] Non-judicial policymakers have looked to the Tribal Chairmen as the political representatives of the tribal members. While this policy is consistent with the general

214. The 1958 Act authorizes the Chairmen to act "on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area." P.L. 85-547, 72 Stat. 403 § 1. The action authorized by the 1958 Act was "for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians . . . ." *Id.* Courts have interpreted this language so as to bar participation of tribal members on a variety of issues related to relocation. *See, e.g.*, Zee v. Watt, Civ. No. 83-200 PCT EHC (D. Ariz., dismissed March 29, 1985) (suit by individual Navajos against BIA under Administrative Procedures Act); Sidney v. Zah, 718 F.2d 1453, 1456-1457 (9th Cir. 1983) (motion by Navjo tribal attorneys to withdraw as counsel for the individual Navajos in contempt proceeding because of alleged conflicts of interest in representing both Tribal Chairman and individuals); Sekaquaptewa v. MacDonald, 591 F.2d 1289 (9th Cir. 1979) (motion to intervene brought by individuals who were denied permission to rebuild their burned home in the 1934 Area); Sekaquaptewa v. MacDonald, 544 F.2d 396, 403 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (claim by Navajo Tribal Chairman that notice must be provided to tribal members prior to judicial cancellation of their grazing permits on theory that such notice was required by Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974)); United States v. Kabinto, 456 F.2d 1087, 1091 (9th Cir.) *cert. denied*, 409 U.S. 842 (1972) (challenge by Navajo individuals to adequacy of Tribal Chairman's representation in Healing v. Jones based on Chairman's failure to assert aboriginal claims for individuals living in District Six). A good example of the courts' logic is in the language from Sekaquaptewa v. MacDonald, 591 F.2d 1289, 1292 (9th Cir. 1979): "Congress intended rights of individuals to be determined in a suit such as that before the court. However, . . . Congress did not intend that individual tribal members be allowed to participate in such a suit." 591 F.2d at 1292.

federal policy of treating tribes as political entities which are represented by government leaders, it ignores the fact that the relocation policy is a federal policy directed specifically at tribal members. Moreover, tribal leaders may be inhibited by the need for congenial relations for negotiations, and, as a result, may not disclose the more critical views of their members.

A decision to involve potential relocatees and relocatees in policy discussions need not imply a disruption of the federal policy to respect tribal leadership. Congressional oversight hearings on the program would go a long way towards obtaining direct information. Similarly, the taking of testimony by Richard Morris, assistant to Judge Clark, would more adequately inform executive policymakers about the operation of the relocation policy. Court-appointed expert witnesses who might interview individuals might also be an appropriate means of informing the court. In short, if a decision to involve the people affected were made, policymakers could probably find a number of mechanisms by which to do so.

B. *Recommendations to Congress*

1. *Congress Needs Reliable Information and Time to Evaluate the Relocation Policy*

Congressional oversight is long overdue. The relocation program has become a major federal program.[215] Its projected total costs have multiplied more than ten-fold since enactment of Public Law No. 93-531 in 1974.[216] The 1974 Act was passed to resolve a highly complex, decades-old problem. Estimates of the numbers of people affected by the policy were unavailable at the time, but are available now. The relocation policy appears to be the kind of policy that requires monitoring and periodic re-evaluation. However, monitoring and evaluating are notably absent. Congress has had no General Accounting Office (GAO) reports,[217] oversight hearings, independent audits, or impact studies on the relocation program.

Only one congressional report—the Surveys and Investigations Staff report—has been prepared in the eleven year history of the program.[218] The Report, discussed above, is so critical of the relocation policy that further study is warranted.

The recent concern over relocatee home loss and economic plight is one example of an area where early, independent review of the relocation policy would have been beneficial. Since relocation began, the press has reported relocatee maladjustment, economic distress, and home loss.[219] Senator Dennis DeConcini (D-Arizona) expressed concern in Congress that relocatee home loss might be significant, but the Relocation Commission re-

215. *See supra* notes 2-6, 109-11, and accompanying text.

216. *See supra* notes 176-77 and accompanying text.

217. A GAO report was issued in 1973, but it dealt exclusively with Navajo construction in the JUA. COMPTROLLER GENERAL, NEW NAVAJO CONSTRUCTION ACTIVITIES ON THE NAVAJO AND HOPI JOINT USE AREA (1973) (report to the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, House of Representatives).

218. *See supra* notes 8 and 142.

219. *See supra* notes 133-142.

leased its own survey that denied his concerns.[220] By early 1984, reports from non-Commission sources revealed a problem of staggering proportions: some 50% of families relocated may have lost their homes to creditors after failing to pay their taxes, loans, bills, and other expenses of life off-reservation.[221] The situation is still under investigation and in litigation. Early, independent review by Congress or another source might have saved money, relocatee suffering, and Commission embarrassment.

Congress should hold oversight hearings immediately and make a serious effort to obtain information on the operation and impact of the relocation program. Pendency of the July, 1986 deadline may interfere with Congress' ability to fully evaluate the policy before the federal government commits itself to further expense and human tragedy. Therefore, Congress should immediately amend the law to alter the deadline for voluntary relocation.

2. *Both Congress and the Department of Interior Should Lift the Moratorium on Construction*

Building "freezes" should cease. Court orders,[222] statutes,[223] and administrative directives[224] that forbid construction work on individual property of current residents are responsible for widespread substandard housing[225] and widespread confusion throughout the JUA about what the law requires. Therefore, Congress should repeal all language that suggests the federal government is restricting construction in the JUA or the 1934 Area.

The construction moratorium is one of the least understood components of the relocation policy. The court decisions prohibit construction by the Navajo Tribe or its members on Hopi-partitioned lands without a permit from the Hopi Tribe.[226] While the federal government has not imposed an

220. Senator DeConcini's statements and the Commission response are found at 134 CONG. REC. 13336 (1982).

221. *See* Tolan, *Relocation Housing Scandal Grows*, Navajo Times Today, April 2, 1984, at 1, col. 1; Tolan, *Investigation Looks Into Frauds of Navajo Relocatees*, Navajo Times Today, August 14, 1984, at 1, col. 1. *See also supra* notes 135-155.

222. *See* Court Order of October 14, 1972, which reads: "No new construction shall be permitted on the Joint Use Area without a permit issued jointly by the two tribes. . . ." Order of October 14, 1972, par. 6, *reprinted in* Sekaquaptewa v. MacDonald, 544 F.2d 396, 399 n.1 (9th Cir. 1976). *See also* the Feb. 10, 1977, Judgement of Partition enacted pursuant to Pub. L. 93-531: "[N]o new construction in the area hereby partitioned to the Hopi Tribe shall hereafter be commenced or continued by the Navajo Tribe, or any member thereof, without the written authorization of the Hopi Tribe." *Quoted in* Sidney v. MacDonald, 536 F. Supp. 420, 422 (D. Ariz. 1982), *aff'd*, 718 F.2d 1453 (9th Cir. 1983).

223. A statutory construction freeze is in effect in the disputed 1934 Area. 88 Stat. 1716, § 10, *as amended by* 94 Stat. 929, § 3 (codified at 25 U.S.C. § 640d-9(f) (1983)).

224. The 1934 Area is often called the "Bennett Freeze" Area, named for Robert Bennett, Commissioner of Indian Affairs in 1966, who directed that all construction and development in the area be halted pending some resolution of each tribe's rights in the area.

225. Relocation Commission staff admit that "every house in the JUA is substandard" due to governmental neglect. Interview with Sarah Alaman, NHIRC Staff, in Flagstaff, Arizona (July 29, 1983).

226. "New construction" does not include repairs to existing dwellings or structure, or replacement buildings in the case of fire, lightning, or death. According to Navajo religion, a family may not continue to live in a home wherein another family member has died.

In 1974, the Ninth Circuit ruled that "the district court's order may not be properly read to

absolute ban on construction, a *de facto* moratorium is in effect. A statutory construction "freeze" is in effect in the disputed 1934 Area.[227]

The moratorium is three-faceted: 1) the federal government has frozen all development assistance for the area since the early 1970's,[228] 2) the Hopi Tribe has denied almost every application from Navajo tribal members for construction permits,[229] and 3) the repair of homes has been inhibited by uncertainty.[230]

The construction moratorium has fulfilled its purpose, namely, to decrease the amount of new Navajo construction on the Hopi-partitioned lands and Hopi and Navajo construction in the 1934 Area. However, it has also caused some unforeseen ill effects. First, the moratorium has caused overcrowding and substandard housing conditions among current residents.[231] Many of those Navajos who cannot leave the JUA without assistance are living in intolerable situations.[232]

Second, the moratorium has placed the Relocation Commission in an awkward and inappropriate role. Because other federal agencies have withheld assistance from the area, the Relocation Commission must request funds for services in "host communities" when it moves Navajos from the Hopi-partitioned lands to the Navajo-partitioned lands. Some congressional policymakers have raised the legitimate concern that the Commission wishes to fund development projects for the Reservation that would otherwise be funded by the Indian Health Service or other BIA programs.[233] The Relocation Commission, originally designed as a temporary agency to provide assistance to those relocated by the federal government, may not be the appropriate federal agency to provide community development services; however, federal agencies with jurisdiction over provision of such services may not have adequate budgetary capacity or financial resources to do so themselves.

A third unintended result of the construction moratorium has been the

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require a permit for repairs or maintenance of present structures; and . . . the district court has continuing jurisdiction to remedy any Hopi abuse of the veto power." Hamilton v. MacDonald, 503 F.2d 1138, 1150 n.19 (9th Cir. 1974) (the Hopis had conceded that point).

227. 25 U.S.C. § 640d-9(f) (1983).

228. In 1978, the Deputy Assistant Secretary of the BIA informed Congress that, due in part to the ban on construction and in part to the 20 years spent "trying to settle this issue," JUA residents have not been afforded basic BIA or Indian Health Services assistance. *Navajo and Hopi Indian Relocation Commission Amendments of 1978, Hearings before the Senate Select Committee on Indian Affairs*, 95th Cong., 2d Sess. 18 (July 25, 1978) (testimony of Rick Lavis).

229. *See* Transcript of June 8, 1983 Status Conference, *supra* note 170, at 44.

230. For a discussion of the various forms of new construction, repairs, and other activities which are brought before the courts and affect the residents, see Transcript of June 8, 1983 Status Conference, *supra* note 170, at 31-33, 43-50.

231. *See supra* note 225.

232. One example was provided by the Navajo tribal attorneys in 1982. Henry James, his spouse, and their 10 children reside in a one-room, ten-foot hogan. Brief for Defendant-Appellee/Cross-Appellant Peter MacDonald at 34, Sidney v. MacDonald, 536 F. Supp. 420 (D. Az. 1982), *aff'd*, Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983). Another example was offered by Chairman Zah in 1983. Transcript of June 8, 1983 Status Conference, *supra* note 170, at 61 (roof of hogan leaking in winter months and children "getting sick.").

233. *See Department of Interior and Related Agencies Appropriations for 1985: Hearings before the Subcommittee on Department of Interior and Related Agencies of House Committee on Appropriations*, 98th Cong. 2d Sess. 42-43, 47, 50-55 (1984).

inordinate amount of litigation over new construction in the JUA. The Hopi tribal attorneys have brought dozens of allegations of violations, each receiving the full attention of the federal court system.[234] Much court time is spent reviewing the legality of each specific structure whether the structure be a corral, woodshed, or home. The federal court system is not an appropriate body to resolve such relatively minor issues.[235] Moreover, use of the federal courts to do so creates the false impression that tribal zoning and construction matters are federal in nature. These matters are tribal and should be resolved in the tribal court systems and administrative processes.

Two arguments might be raised against withdrawing federal restrictions on building construction in the JUA: If not stopped by the federal courts, 1) the Navajo residents will disregard Hopi tribal law, build to excess, and thwart the relocation policy; or 2) the Hopi Tribe will behave ruthlessly, denying all requests and infringing on the rights of the relocatees, who have permission to remain where they are until July 6, 1986. Both arguments presume the "range war" theory; that is, that neither the tribes nor their members will follow the rule of law and a violent confrontation will result. The arguments also ignore possible alternatives, such as a joint board to review construction applications.[236] Any excessive Navajo construction will be remedied when forced relocation takes place and the structures are dismantled. In the meantime, any Hopi abuse of power could be remedied by Secretarial or Court Magistrate review under the provisions of the law which protect relocatee rights until relocation is complete.[237]

3. *The Livestock Reduction Program Should be Consistent with Sound Range Management and Due Process*

Congress required that the BIA adopt a range management program after hearing testimony of Department of Interior officials that such a program had been lacking since the 1930's and 1940's.[238] According to this testimony, in 1972 the JUA range was badly overgrazed because of this lack of range management.[239] The BIA was directed to reduce the numbers of livestock grazed "to carrying capacity of such lands."[240]

However, the BIA has gone beyond the language of the Act and or-

234. *See, e.g.*, Transcript of October 5, 1984 Hearing on the Hopi Tribe's Motion In Re Fine and Navajo Tribe's Motion to Purge Contempt, Sidney v. Zah, Civ. No. 58-579 PHX EHC (October 5, 1984).

235. Federal District Judge Earl Carroll raised this concern at a Status Conference on June 8, 1983. *See* Transcript of June 8, 1983 Status Conference, *supra* note 170, at 30-33, 46-47.

236. Proposals for a joint Hopi-Navajo Clearing Committee to review construction permit applications have been discussed. *See* Transcript of June 8, 1983 Status Conference, *supra* note 170, at 61. Perhaps a "quota system" or similar mechanism could be utilized to minimize the risk of a stalemate with such a committee.

237. 25 U.S.C. § 640d-9(c) (1983).

238. *See Hearings on H.R. 11128, Authorize Partition of Surface Rights of Navajo-Hopi Indian Land, Hearings before the Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, United States Senate*, 92d Cong., 2d Sess. 44, 47 (1972) (statement of Harrison Loesch, Assistant Secretary of Interior for Public Land Management).

239. The Department of Interior estimated that the rate of over-grazing was about 400%. *Id.* at 46.

240. 25 U.S.C. § 640d-18(a) (1983). Section 640d-13(a) also restricts each individual's grazing rights to a maximum of those held on the date of partition.

dered reductions to less than the carrying capacity of the JUA range.[241] Moreover, it restricted the number of livestock an individual may graze to the lowest number the individual was grazing on any date after partition of the JUA lands.[242] These administrative actions have left the Department open to the charge that it is acting in an arbitrary and capricious manner and that, worse yet, it is attempting to "starve out" the Navajo residents of Hopi-partitioned lands.[243]

These charges are based on the economic, social, and cultural reality that Navajo residents face after losing all (or almost all) of their livestock.[244] As a matter of policy, the BIA should be encouraged to adopt a more reasonable stock reduction program, one which recognizes the severe hardship that loss of livestock imposes on the Navajo people. Range management should proceed at a sound pace without attempts to "make up for lost time" and rectify the Bureau's failure to manage the range for fifty years. The Bureau should not go beyond the requirements of the law and cause unwarranted suffering among Navajos attempting to stay off the welfare rolls and support themselves.[245]

Specifically, the BIA should not rely upon twelve-year-old data as the basis for issuing grazing permits.[246] A new range capacity survey was com-

241. *See* Memorandum of the Federal Defendants in Opposition to Motion for Preliminary Injunction at 3, 13, Zee v. Watt, Civ. No. 83-200 PCT EHC (D. Ariz., dismissed March 29, 1985). "In view of the past over-grazing of the range, the Congressional mandate contained in 25 U.S.C. § 640d-18, and *the Department's relatively recent determination that the number of livestock grazed is now within the previous official determination of carrying capacity*, the Secretary's reluctance to increase the authorized carrying capacity of the Hopi-partitioned lands is proper." *Id.* at 13 (emphasis supplied). *See also* 25 C.F.R. § 168.6(b)(2)(ii) (1984); 47 Fed. Reg. 39,816, 39,818 (1982).

242. The Department modified this approach to allow a minimum of 10 sheep units as a subsistence level for individuals. 25 C.F.R. § 168.6(b)(2)(i) (1984); 47 Fed. Reg. 39,816, 39,818 (1982). *See* Guidelines for Implementing Modifications of CFR Part 153 to Allow Persons Awaiting Relocation to Retain a Subsistence Number of Livestock (BIA Memo), attached as Appendix (Exhibits 26 and 27) to Memorandum of Points and Authorities in Support of a Motion for Preliminary Injunction, Zee v. Watt, Civ. No. 83-200 PCT EHC (D. Ariz., dismissed March 29, 1985).

243. For an account of such charges, see Tolan, *On the Wrong Side of the Fence*, Christian Science Monitor, May 16, 1983, at 12, col. 3.

244. For a summary of such impacts, see J. WOOD, *supra* note 125.

245. Consider the following exchange between Representative Yates (D-Ill.) and Bill Benjamin, BIA Director for the JUA in 1977:

> REP. YATES: What is the economic impact on the individual who are required to reduce their livestock? Do you know what they do with the money?
> MR. BENJAMIN: They spend it.
> REP. YATES: So they have lost their sheep and have no money?
> MR. BENJAMIN: That is correct.
> REP. YATES: What happens to them after that? Are there jobs?
> MR. BENJAMIN: No, sir. We hire as many as we can. We give contracts on fencing and hire people, but I think the welfare load will increase.
> REP. YATES: The only advantage of this program is settling the Navajo-Hopi dispute.
> MR. BENJAMIN: It is caring for the land.

Supplemental Appropriations for Fiscal Year 1977, Hearings before the Subcommittee on Interior and Related Agencies of the Committee on Appropriations, United States House of Representatives, 95th Cong., 1st Sess. 1007 (1977). In 1978, a group of Navajo and Hopi Indians, the Navajo-Hopi Unity Committee, expressed their concern over welfare dependency in stronger terms: "In effect, forced relocation would have destroyed effectively a group of self-supporting Navajos and would have created out of them, a colony of welfare cases." *Hearings on S. 1714, Relocation of Certain Hopi and Navajo Indians, United States Senate Select Committee on Indian Affairs*, 95th Cong., 2d Sess. 60 (1978).

246. The range capacity survey in use was performed in 1973. *See* Memorandum of the Federal Defendants, *supra* note 241, at 9.

pleted in the fall of 1983,[247] and grazing permits should be issued in accordance with this recent information. Especially where the hardships are great and the issue controversial, the BIA should support its claim that its program is being administered with range management—not political considerations—in mind.

The BIA should provide procedural due process to those whose rights and property are affected by the program.[248] The Department of Interior claims that the livestock reduction program is exempt from the requirements of the Administrative Procedure Act and other due process requirements.[249] This claim is of questionable legal validity[250] and represents an ill-advised policy decision. The Bureau's claim lends credibility to the charge that it is insensitive to the plight of those affected by the program. Failure to provide due process protections to those affected also subjects the entire program to legal challenge and detracts from full congressional evaluation of the costs and benefits of the program. Individuals who are subject to loss of grazing rights or of livestock should be afforded the same procedural protection guaranteed all other persons whose grazing of livestock is regulated by the Department of Interior.

4. *Provision Must be Made for Relocatees who are Suffering*

The hardships experienced by the Navajo people are a continuing point of concern and controversy. At least three groups of Navajo people need immediate attention: 1) those who have relocated from the Joint Use Area and received assistance but still have problems associated with the reloca-

247. T. DAMES & W. MOORE, A BIOLOGICAL ANALYSIS OF RANGELAND OF THE HOPI-PARTITIONED AREA (October 1983) (appendices available at the BIA Area Office in Pheonix, Hopi-Partitioned Lands Office). *See also* J. Nock, *Range conditions 'drastically' improved since relocation*, Navajo Times, May 17, 1984, at 4, col. 1 (discussion by BIA officials before Judge Carroll).

248. The Navajo individuals who sued the BIA in Zee v. Watt claimed violations of notice and hearing requirements of the Administrative Procedure Act and the due process clause of the fifth amendment. *See* Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, *supra* note 242, at 38-53. Judge Carroll granted the U.S. Government's motion to dismiss for lack of standing on March 29, 1985. Zee v. Watt, Civ. No. 83-200 PCT EHC (D. Ariz., dismissed March 29, 1985).

249. *See* Memorandum of the Federal Defendants, *supra* note 241, at 24-25. This claim is based on confusion between Judge Walsh's 1972 stock reduction order and the program being administered by the BIA. In Sekaquaptewa v. MacDonald, 544 F.2d 396, 403 (9th Cir. 1976), the Ninth Circuit held that the district court's cancellation of all Navajo grazing permits on Hopi-partitioned lands did not violate the Administrative Procedure Act or the notice and hearing requirements of the due process clause. This ruling was based in part on the fact that 1) the court's order was not a federal agency action to which the Administrative Procedure Act would apply; and 2) the Navajo Tribe was already before the court and, since the Chairman represented the affected members of the Tribe, notice and hearing had been provided.

250. The federal defendants cite no cases to explain why their administrative actions should be treated as if they were court orders. Instead, the federal defendants claim that the Ninth Circuit held that "the Administrative Procedure Act does not apply to the matters involved in this controversy. . . ." Memorandum of the Federal Defendants, *supra* note 241, at 25. The Ninth Circuit actually held that the requirements of the Administrative Procedure Act "are not applicable because Congress, by the provisions of the 1958 Act, vested in the District Court of Arizona the authority to determine the rights and interests in the Joint Use Area. Therefore, the Court, not the agency, has jurisdiction." 544 F.2d at 403. This language appears in a decision upholding a contempt citation issued pursuant to a judicial writ of assistance. Judge Carroll apparently relied upon this language in dismissing the individuals' lawsuit in Zee v. Watt, even though Zee v. Watt involves administrative action pursuant to the 1974 and 1980 acts, not judicial action pursuant to the 1958 Act.

tion; 2) those who have not applied for assistance; and 3) those in limbo who applied for assistance but whose assistance has either been denied or delayed (and who may or may not want to move). Those in the third category are scattered: some live on-reservation (JUA lands or other Navajo lands), and many live off-reservation in interim situations. All three groups are experiencing hardship.[251] In some cases the hardship is severe. An impact study should be done immediately and money appropriated to assist them.

This assistance should be provided prior to continued relocation from the JUA of individuals who do not wish to leave. The adverse impact of future relocations could be softened if the problems associated with past relocations are identified and corrected. Moreover, evaluation and assistance now would alleviate "surprise" costs later. No one yet knows what will happen to those who have not moved by July 6, 1986;[252] nor is it known where relocatees who must wait until 1993 for their assistance will "wait." In addition, a relocation program for the 1934 Area has yet to be designed. Sound policy reasons support an impact study and emergency assistance for those relocatees experiencing undue hardship.

One unavoidable result of this approach might be a further extension of the 1986 deadline for completion of relocation. Congressional policymakers might legitimately ask how long relocation will take if the needs of the relocatees and those not yet relocated are met. Congressional frustration, while understandable, is misdirected. The issue is one of priority, not schedule. In 1974, Congress expressed its overriding concern that the social, economic and cultural disruptions of relocation be minimized.[253] In 1980, Congress amended the 1974 Act to remedy deficiencies by providing increased assistance, additional lands for Navajo settlement, and other funds. Congress should take action consistent with its previous statements and actions by taking the time required to relocate the Navajos in a humane manner.

The only alternative is to make an unreasonable policy decision on the priorities for moving relocatees. If the priority is to move Navajos off the JUA lands prior to 1986 (or some other deadline to be adopted), those who have already moved off the JUA lands and are living "in limbo" will be told to wait even longer. In the meantime, those least able to adjust to relocation will be moved off of the land.[254] Because the additional lands are not yet ready and no space is available on the Navajo Reservation, these most vulnerable relocatees will be moved to border towns. They will probably join the many who have lost their homes to creditors. Since Congress currently has sufficient information to avoid this result, Congress should take steps to assist the Relocation Commission in formulating priorities for future moves.

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251. *See supra* notes 125-26, 131-58, 225, 228-38.

252. Relocation Commission staff have indicated that assistance will be set aside for those individuals who do not apply. Interview with Sarah Alaman, NHIRC Staff, in Flagstaff, Arizona. (July 29, 1983). One congressional staffperson handling appropriations matters, however, indicated that those forcibly removed from the JUA lands will receive no assistance.

253. *See supra* note 116 and accompanying text.

254. *See* P. Kunyraulespericueta & M. Oxtoby, Relocation Policies, Programs, and Impacts: the Navajo and Hopi Land Dispute 85 (May, 1984) (unpublished research project) (The population of Navajos not yet relocated are likely to have different problems and a greater intensity of problems than those already relocated because of differences in age, traditions, and education.).

In addition, it should relieve the pressure and confusion caused by a deadline that even the Commission has admitted it cannot meet.[255]

5. *Forced Relocation Should Cease*

Congress should admit that the relocation program is an embarassing aberration from traditional means of resolving disputes over land use.[256]

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255. *See* Testimony of Ralph Watkins (Chairman of the Relocation Commission), *supra* note 8.

256. *See supra* note 104 and accompanying text.

Congress has, on rare occasions, restored land to Indian nations. *See* R. Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 1, 20-21 (1982). However, such lands were uninhabited and used as national forests or parks. An extensive review of the literature by this author has failed to reveal any examples of displacement of non-Indians. During the debate over return of Blue Lake and nearby land to the Taos Pueblo Tribe, senatorial policymakers expressed the congressional reluctance to return property to Indian Tribes:

> It would be literally impossible to try to satisfy Indian claims by transferring land in lieu of a cash payment. Further, such action would be in conflict with past policy and the provisions of the Indian Claims Commission Act. It . . . would set a dangerous precedent and would be the basis for claims to land by many tribes; and . . . these claims should not be satisfied by invasion upon the public estate. . . . A formal grant of national forest or other public lands to one Indian tribe will clearly stand as an example for others to seek to follow. . . .

Id. at 74.

Similar policy concerns have been expressed in the current debates about whether Congress should return portions of the Black Hills National Forest to the Lakota (Sioux) Nation.

Although land in the Black Hills National Forest was guaranteed to the Sioux Nation by treaty, no Sioux Tribe has been successful in its efforts to obtain return of the lands. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), *aff'g* 601 F.2d 1157 (Ct. Cl. 1979); Ogalala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982).

Congress has distinguished these and other cases from the Navajo-Hopi case because, in the latter, the defendants are Navajo Indians. That this is the motivating factor for the variation in treatment was confirmed in 1974, during the debates in Congress. The Navajo Tribal Attorneys asked Congress:

> Could it be . . . that where the settlers are white, we pay off the original owners in cash; but where the settlers are Indian, we find expulsion and removal an acceptable alternative? Can such a racially discriminatory approach be considered as meeting the constitutional requirement of due process?

Hearings before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. 208 (1972) (testimony of Richard Schifter). During deliberations on the legislation, Congressman Sam Steiger (R-Arizona) answered this question bluntly:

> [I]n those instances, everyone of those instances, we are dealing with non-Indians occupying, and believing they have a right in the lands. Here we are dealing with two tribes. That is the distinction.

Discussion of H.R. 10337, before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 93d Cong. 1st Sess. (remarks of Sam Steiger) (unpublished record of mark-up session of Dec. 11, 1973), *quoted in* Shifter & West, *supra* note 23, at 105.

This author could also find no other example of large-scale relocation in the United States which was undertaken to keep the peace. On many Indian Reservations around the country, Indian and non-Indian communities co-exist, despite sometimes significant racial tensions between the two communities. Intergovernmental compacts between towns and the tribe, as well as between agricultural producers and town merchants, help ease historical racial tensions. For example, the predominantly anglo city of Parker is "surrounded" by the Colorado River Indian Reservation, which exercises its lawful powers of sovereignty over businesses (e.g., licensing), health (e.g., restaurant inspections), and police (housing Indian prisoners arrested by Parker city police). *See generally*, RETHINKING INDIAN LAW, *supra* note 185, at 85-88. Indian-Anglo title disputes involving other reservation lands do not result in relocation programs. For example, on the Colorado River Indian Reservation, whites who became "trespassers" by a Secretarial boundary determination were offered long-term leases. Secretarial action in the 1960's established the "Benson Line," a boundary on the western (Calif.) side of the Reservation. While most white residents signed long-term leases, others still refuse. The U.S. filed a quiet title action, portions of which are on appeal (title to riverbed) and portions which have been remanded (aboriginal title). *See* United States v. Aranson, 696 F.2d 654 (9th Cir. 1983).

This recognition would support cessation of relocation activities which force Navajos off of their homelands. Continuation of the program will not make the program constitutionally, morally, or economically sound; it will simply add a page to a sorry history.

"Voluntary" relocation should be continued. Many families are now caught in the middle with no practical means of returning to the Joint Use Area; perhaps families have moved and relatives seek to join them in a new home, or perhaps the psychological stress of uncertainty, combined with the livestock reduction program and construction moratorium, has taken an irreversible toll on some individuals. In such cases, the only fair and humane thing to do is continue the commitment to assist these individuals.

Movement back into the Joint Use Area by individuals who never wanted to leave poses a more difficult problem. That problem should be resolved primarily by the two tribes involved. Resolution of land use problems should be left to some joint administrative committee.

Cessation of forced relocation implies less-than-absolute sovereignty of the Hopi Tribe over lands which, under U.S. law, now belong to the tribe. The 1980 amendments, for example, place the entire Hopi-partitioned lands under Hopi jurisdiction,[257] with the exception that personal rights are to be protected by the Secretary of Interior "pending relocation."[258] A decision to cease relocation must mean more than cessation of federal assistance to Navajos evicted by the Hopi Tribe. It must mean that those individuals, as members of the Navajo Tribe, have a right to be where they are and a right to pursue normal livelihoods. Therefore, portions of the 1974 and 1980 statutes which give Hopis jurisdiction over lands on which Navajos currently live must be amended or repealed.

6. *Some Meaningful Compensation Must be Provided the Hopi Tribe*

An equitable remedy for the Hopi Tribe might take several forms: money, additional lands, or other consideration. Policymakers should keep in mind that three legal actions may affect the form and amount of compensation: 1) resolution of the outstanding land claims award in Docket 196,[259] in which the U.S. has already offered cash for the Hopi Tribe's loss of one-half the 1882 Area;[260] 2) resolution of the 1934 Area dispute in federal District Court, which may result in removal of Hopis from "Navajo" land;[261] 3) resolution of the current action for damages and rent, which the Hopi Tribe has filed against the Navajo Tribe and the United States in federal district court.[262]

In addition to these vehicles for compensation, Congress should consider return of Hopi lands outside both reservations. Just as Congress

257. 25 U.S.C. § 640d-9(e) (1983).
258. 25 U.S.C. §§ 640d-9(c), (d), and (e)(1)(B).
259. A full legal analysis of the U.S. obligations to the Hopi Tribe is beyond the scope of this article. *See supra* note 104.
260. *See supra* note 104.
261. *See supra* notes 84-88 and accompanying text.
262. Sidney v. Navajo Tribe, Civ. Nos. 76-934, -935, -936 PHX EHC (D. Ariz., filed Dec. 15, 1976).

passed laws providing lands to the Navajo Tribe, Congress can pass laws providing lands to the Hopi Tribe.[263]

Since 1958, Congress has increased the costs of any potential "buying out" of the Hopi interest.[264] The costs would be substantial, but Congress should pay them.

7. *Congress Should Take Steps to Insure that the Disastrous Mistakes of the Current Relocation Policy are not Repeated in the 1934 Area*

Congress should begin discussing alternative approaches to resolution of the 1934 dispute. At the time Public Law No. 93-531 was passed, Congress sought to have "one relocation program" rather than several; however, that goal is now unattainable. The 1882 Area relocation program is well underway, but the 1934 Area dispute has yet to go to trial.

Another important difference exists between the two disputes. The congressional language and court decisions in the 1934 Area dictate that lands will be partitioned on the basis of "customary use and occupancy."[265] This standard will result in a different relocation pattern than the equal partition required in the 1882 Area. Had the standard of customary use and occupancy been employed in the 1882 Area, far fewer Navajos—almost none—would have been relocated.

At least two alternatives exist for a new congressional policy in the 1934 Area. First, Congress could revoke the federal court's jurisdiction and send the dispute to an arbitrator. This would be a severe step. Second, Congress could allow the land ownership questions to be resolved in court as is presently planned, and then provide financial or some other compensation to tribes upon whose land members of other tribes live. The second step would be best achieved by adopting statutory language which makes it clear that relocation is not among alternatives available to the court in resolving the land ownership and use questions.

Perhaps the best solution to the 1934 Area is combining resolution of both disputes through land exchange negotiations between the Navajo and Hopi Tribes. To date, policymakers have failed to select this alternative.[266] Perhaps after the ownership questions are settled, Congress could take steps to encourage such negotiations as a prelude to providing compensation to each tribe. Congress should remember that the federal courts have recently allowed a group of Pauite Indians intervention in the 1934 Area litigation;[267] any such land exchanges would have to consider interests of the Pauites as well as the Navajo and Hopi Tribes.

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263. See 25 U.S.C. § 640d-10 (1982).

264. *See supra* notes 41 and 248 and accompanying text.

265. Sekaquaptewa v. MacDonald, 448 F. Supp. 1183 (D. Ariz. 1978), *aff'd in part, rev'd in part*, 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980).

266. Executive and congressional policymakers attribute this to the preferences of the attorneys involved.

267. Sidney v. Zah, No. 83-1511 (9th Cir. 1983).

VI. CONCLUSION

> A certain rich man was enjoying a banquet. As he sat at the groaning table he could see an old woman, half starved, weeping. His heart was touched with pity. He called a servant to him and said: 'That old woman out there is breaking my heart. Go out and chase her away.'[268]

Felix Cohen told this story to introduce his discussion of Indian claims in 1945, but the approach of the "certain rich man" is strikingly similar to that taken by the United States courts and Congress in Navajo-Hopi affairs for the past 100 years. Neither institution has responded to the repeated protests of the traditional Hopi government and people to the United States-backed "Tribal Council" and the extinguishment of title to millions of acres of Hopi land. Today, the painful reality that the relocation has a devastating effect on the Navajo relocatees, like the old woman in Cohen's parable, is an unpleasant reminder of our "national sins" against Indian people.[269] Neglect in both of these areas has contributed to the disastrous federal policy in the area known to Bureau of Indian Affairs officials as "No-Hope Land."[270]

Far from being a program designed to recognize legal rights of Hopi Indians, the relocation program is another example of the contradictory, lawless nature of federal Indian policy. The federal government continues to set its own policy goals for "its wards," Indian tribes, while leaving the fate of the humans involved to a network of federally-financed tribal attorneys, federal relocation commissioners, federally-created tribal councils, and federally-supported energy companies.

The principles of justice which underlie both law and policy demand refocus in Indian law.[271] The "Navajo-Hopi Land Dispute"[272] is the place to begin.

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268. F. COHEN, INDIAN CLAIMS, THE AMERICAN INDIAN (1945), in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 264 (1970).

269. *Id.* Cohen says that Americans have assured themselves that these "national sins were of purely antiquarian significance" by "denying [the Indians'] existence as a people, or by taking refuge in the Myth of the Vanishing Indian, or by blaming our grandfathers for the wrongs that we commit." *Id.*

270. This nickname is heard in the halls of Congress and offices of the relocation commission as well as the Bureau.

271. *See supra* note 185 and sources cited therein.

272. *See supra* note 1.

APPENDIX: MAP 1