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any member thereof, without
Navajo Tribe.

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any member thereof, without
Hopi Tribe.

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sively modified as herein

1977.

James A. Walsh
District Judge

MEDIATION
Federal Mediation and Conciliation Service
HOPI - NAVAJO LAND DISPUTE
Public Law No. 93-531
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HOPI-NAVAJO LAND DISPUTE

Public Law 93-531

MEDIATOR'S REPORT AND RECOMMENDATIONS

Volume I

Summary Recommendations

*See p. 20 water studies
67-68 " recommendations
47 wells & potential irrigation*

SUMMARY

of

MEDIATORS' REPORT AND RECOMMENDATIONS

I. THE MEDIATORS MAKE THE FOLLOWING RECOMMENDATIONS TO THE DISTRICT COURT:

A. Land Partition

1. The Joint Use Area should be partitioned by the Court to the Hopi Tribe and to the Navajo Tribe on a 50-50 acreage basis as set forth in detail in Volume IV (quarter quad maps) and as illustrated by Exhibit A attached hereto.

2. Such partition must necessarily be preceded by the Court's decision in a preliminary interpretation of *Healing vs. Jones* concerning the total acreage to be partitioned (II A below).

3. The Court should order that the lands partitioned to each tribe be placed in trust to each tribe by the United States Government and become parts of the Reservations of each tribe.

B. Sacred Places

1. Criteria should be established by the Court to effectuate the Act, as set forth in the text of this report.

2. The Court should order that the two Tribal Councils establish a Hopi-Navajo Sacred Places Committee, as recommended in the text of this report.

*References to applicable sections and to pages of the text of the Mediators' Report and Recommendations are intended to provide primary references. They may not always be completely inclusive.

Applicable Sections of F.L. 93-531*

Pages Text of Report (Volume II)*

36-57

6(b), (d), (e) & (f)

36-40 and 41

5(a)(5)

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4(a)

58-60

6(c)

59

6(c)

60

6(c) and 5(a)(5)

Applicable Sections of F.L. 93-531

Pages Text of Report (Volume II)

5(a)(4)

60-63

5(a)(4)

60-63

C. Life Estates
1. The Court should establish criteria regarding: eligibility for life estates, permitted and prohibited activities within the area limits of life estates, and termination of life estates, as set forth in the text of this report.

16(a)

63

2. The Court should order that the Navajo Tribe pay to the Hopi Tribe fair rental value for the land occupied by life estates, as shall be determined by the Secretary of the Interior.

5(a)(4)

64-65

5(a)(4), 5(a)(5) and 16(a)

65

D. Phased Relocations
The Court should order that the Navajo Tribe pay to the Hopi Tribe fair rental value for all lands occupied by Navajo individuals after the effective date of partition and until dates of actual relocation, provided however, that the United States Government should be responsible for such payments to the extent that phased relocation may be caused by negligence or undue delay on the part of the Secretary of the Interior in approving additional lands for the Navajo Tribe under Sections 11(a) and 5(a)(1). The Secretary of the Interior shall determine the amounts of fair rental value.

5(a)(5)

65-66

E. Mixed Marriages
The Court should establish criteria, related to possible relocation, for mixed marriages, as set forth in the text of this report.

17(b)

66-67

17(b)

66-67

F. Federal Employees
The Court should establish criteria for effectuation of Section 17(b), as set forth in the text of this report.

Applicable Sections of P.L. 93-531	Pages Text of Report (Volume II)
5(a)(5)	67-68
5(a)(5)	68
5(a)(5)	68
6(d)	54-56
6(d)	56
5(a)(5)	30-31
6(c)	58-60
5(a)(4)	60-63
5(a)(4)	64-65
5(a)(5)	65-66
17(b)	66-67
5(a)(5)	67-68

G. Water Commission

- The Court should order that the two Tribal Councils establish a Navajo-Hopi Water Development Commission to resolve certain mutual problems, as set forth in the text of this report.
- The Court should determine the jurisdiction of the Navajo-Hopi Water Development Commission.

H. Fencing

The Court should order that the BIA in its construction of fences along roads that are a part of the partition line, should observe the provision for double fencing set forth in the text of this report.

I. Administration and Disputes Settlement

The Court should order that the Navajo and Hopi Indian Relocation Commission be designated as the appropriate agency to administer certain provisions of the Court order, as set forth in the text of this report and noted below.

The Court should also order that the Relocation Commission be authorized to initially decide disputed issues that may arise between the two tribes that are within its designated jurisdiction, recommended in the text of this report, subject to Court determinations of such jurisdiction. In all instances, a decision by the Relocation Commission should be subject to appeal by either tribe to the Court.

- Land Use by Navajos After the Effective Date of Partition
- Sacred Places
- Life Estates
- Phased Relocations
- Mixed Marriages
- Federal Employees
- Water Commission

Applicable Sections of P.L. 93-531	Pages Text of Report (Volume II)
5(a)(5)	36-40 and 42
18(a)(1)	31
18(a)(2)	31-32
18(a)(3)	32
19(a) and 2(e)(2)	32-35
16 and 5(a)(5)	30-31
6(d)	46-50
5(a)(5)	40-42
5(a)(5)	70

II. THE MEDIATORS MAKE NO SPECIFIC RECOMMENDATIONS TO THE DISTRICT COURT ON THE FOLLOWING MATTERS BUT THEY ARE REFERRED TO IN THIS REPORT AND SOME OF THESE MATTERS MUST BE DECIDED BY THE DISTRICT COURT TO EFFECTUATE P.L. 93-531 FULLY.

A. Preliminary Interpretation of Healing vs. Jones Concerning the Total Acreage to be Partitioned

B. Trader Fees and Commission

C. Compensation to Hopi Tribe for Land Use by Navajos Since September 28, 1962 and up to Date of Partition

D. Compensation to the Hopi Tribe by the Navajo Tribe and/or the United States Government for Damage to Joint Use Lands Since September 28, 1962 and up to Date of Partition

E. Land Restoration, Livestock Reduction and Fencing

F. Compensation to Hopi Tribe by Navajo Tribe and Possibly by the United States Government for Use by Navajos of Lands Partitioned to the Hopi Tribe from the Effective Date of Partition to Actual Dates of Relocation

G. Possible Compensation Due to Possible Differential of Quality of Land to be Partitioned

H. Compensation to Navajo Tribe by Hopi Tribe After Effective Date of Partition Due to Non-Use by Navajos for Normal Purpose of Unequal Portion of Peabody Coal Company Lease Area

I. Administration of Lands After Partition

Applicable Sections of P.L. 93-531
Pages Text of Report (Volume II)

III. THE MEDIATORS RECOMMEND TO THE SECRETARY OF THE INTERIOR, OR CALL ATTENTION TO THE SECRETARY, CERTAIN PARTS OF THIS REPORT THAT ARE OR MAY BE OF PARTICULAR INTEREST TO THE DEPARTMENT OF THE INTERIOR.

A. The Mediators recommend that the Secretary transfer to the Navajo Tribe 250,000 acres of BLM land in the House Rock Valley - Paris Plateau area at the earliest possible date, title to such land to be taken by the United States in trust for the benefit of the Navajo Tribe.

B. The Mediators recommend that the Secretary approve the acquisition by the Navajo Tribe of additional acreage up to 270,000 acres, title to such additional lands to be taken by the United States in trust for the benefit of the Navajo Tribe. Some time will necessarily be required for negotiations between the Navajo Tribe and the Secretary or his authorized representatives. However, the Mediators recommend that this matter be completed as soon as possible.

C. Because of very substantial savings of relocation costs below the costs authorized by Congress, it is made possible only by full cooperation of both negotiating teams during negotiations, as set forth in the text of this report, the Mediators recommend that:

1. The Secretary request the OMB and Congress to appropriate \$6,000,000 to the Navajo Tribe for purposes of defraying part of the costs of acquiring additional Section 5(a)(1) lands.

2. Supplemental relief and assistance funds, if required, during drastic livestock reduction as a part of land restoration.

3. Survey and fencing

4. Work of the Navajo and Hopi Indian Relocation Commission

Applicable Sections of P.L. 93-531
Pages Text of Report (Volume II)

2. The Secretary request the OMB and Congress to appropriate \$6,000,000 to the Hopi Tribe for purposes of improvements in lands to be partitioned to the Hopi Tribe.

As respects both of these recommendations, discussions will necessarily be required between the Secretary or his authorized representatives and officials of the two tribes. However, the Mediators recommend that such discussion be completed as soon as possible.

D. The attention of the Secretary is called to the following parts of this report under which the United States Government might be held responsible for all or part of certain costs:

1. Damage to JUA lands since September 28, 1962 and up to effective date of partition. 19(a)(3) 32

2. Possible land quality differential. 6(d) 46-50

3. Fair rental value of Hopi lands used by Navajos after effective date of partition, if late relocations should be caused by undue delay or negligence on the part of the Secretary in effectuation of acquisition of Sections 11(a) and 5(a)(1) lands (A and B above). 5(a)(3) and 16 30-31 and 65

E. The Mediators recommend to the Secretary that he request OMB and Congress to appropriate additional funds, if existing authorizations should be inadequate, for the following purposes:

1. Land restoration 19(a) and 25(a)(2) 34

2. Supplemental relief and assistance funds, if required, during drastic livestock reduction as a part of land restoration. 5(a)(2) 35

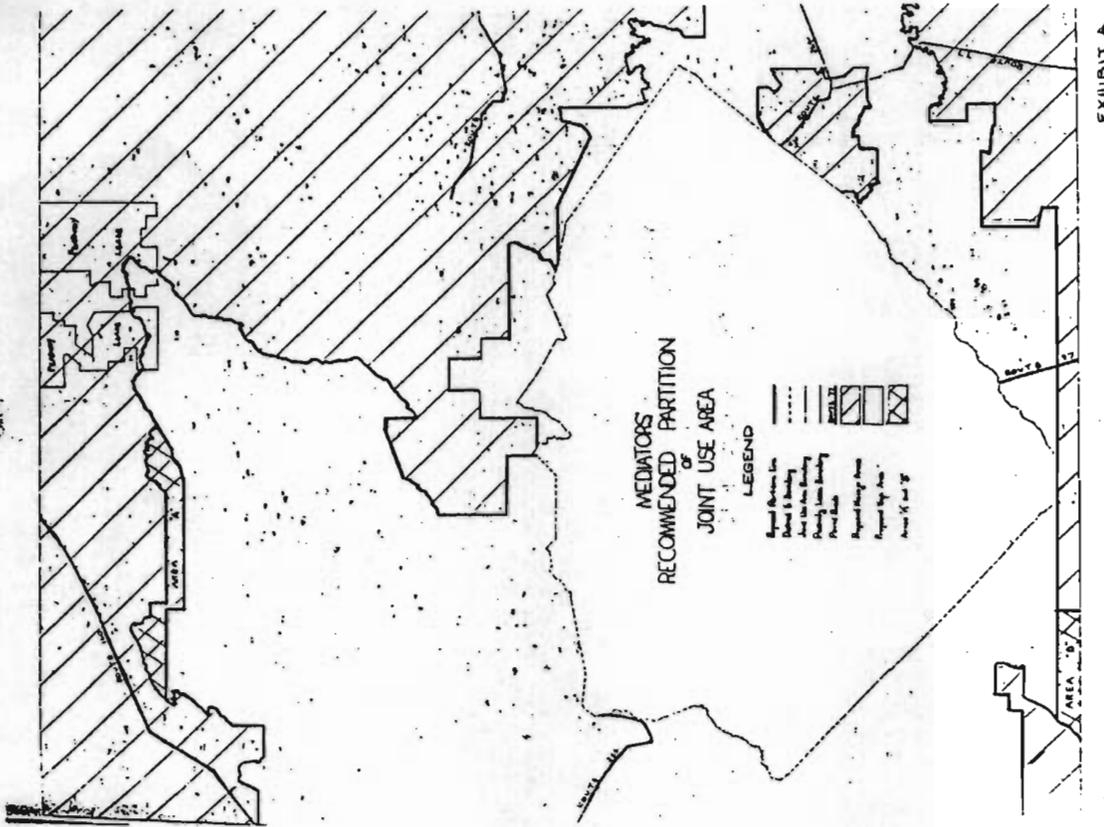
3. Survey and fencing 5(a)(2) and 25(a)(3) 35

4. Work of the Navajo and Hopi Indian Relocation Commission 25(a)(3) 69

Applicable Sections of P.L. 93-531	Pages	Text of Report (Volume II)
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IV. MISCELLANEOUS

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C. No recommendations are made by the Mediators as respects the Act of June 16, 1934 Lands dispute.	8, 9, & 10	29
D. If certain duties and responsibilities delegated to the Navajo and Hopi Indian Relocation Commission by the District Court and by the Secretary of the Interior, not an integral part of the Relocation Commission's duties specified specifically in P.L. 93-531, should remain after the end of the Relocation Commission's natural life, the Secretary and officials of the two tribes should confer to determine how any such residual duties and responsibilities should be handled.	5(a)(5)	70



Federal Mediation and Conciliation Service
HUPI - NAVAJO LAND DISPUTE
Public Law No. 93-531

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HUPI-NAVAJO LAND DISPUTE
Public Law 93-531

MEDIATOR'S REPORT AND RECOMMENDATIONS

Volume II

Text of Report and Recommendations

(a)

Volume II

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1. BACKGROUND OF RECOMMENDATIONS

A. Historical Background

The Court is thoroughly and intimately familiar with the history of this dispute. In particular, the opinion of the Court (p. 1-106), the Appendix to that opinion (p. 107-205), and the Findings of Fact (p. 207-224), in the *Healing vs. Jones* decision, filed September 28, 1962, provide a detailed and complete analysis of that history and its significance. For this reason, no attempt will be made here to do more than outline a few of the more salient aspects of that history for the benefit of other persons who may have occasion to read this report.

1. 1882 Executive Order

On December 16, 1882, President Chester A. Arthur issued an Executive Order, setting aside an area of approximately 2,500,000 acres in Northern Arizona:

"---for the use and occupancy of the Hopi, and such other Indians as the Secretary of the Interior may see fit to settle thereon." (underscoring supplied)

The area, commonly referred to as the 1882 Reservation, is a rectangle about 70 miles long, north to south, and about 55 miles wide, east to west.

In 1882, some 1800 members of the Hopi Tribe (referred to in the Executive Order as Moqui) were living primarily in villages in the south-central part of the total area as had their ancestors for many years. Actual use by the Hopi of some outlying parts of the 1882 Reservation was then limited primarily to a source of supply for wood and coal, as a hunting area, and for visits to sacred places and shrines. In 1882, some 300 members of the Navajo Tribe were living in certain outlying parts of the 1882 Reservation but without any authorization for such occupancy.

The basic purpose of the 1882 Executive Order appears to have been to provide protection to the Hopis against encroachments by the Navajo, by Mormon settlers, or by other white intermeddlers.

2. 1882 - 1962

During this period, the two tribes increased in population in the 1882 Reservation but at vastly different rates of growth. By July 22, 1958, the Hopis had increased from about 1800 to about 3200 and the Navajos from about 300 to about 8800.¹

One underlying reason can be traced indirectly to the difference in life style of the Hopi and Navajo peoples. The Hopi are a pueblo tribe, residing primarily in villages. They graze their livestock and engage in agricultural pursuits outside the villages but without

¹ *Healing vs. Jones, Findings of Fact #20, p. 213.*

establishment of permanent living quarters away from the general area of the villages. The Navajo typically reside in hogans or other type houses, the location of their homes being determined by the land utilized for grazing of their sheep, cattle and horses. Thus, the Navajo homes are widely scattered except as small clusters are created by different members of a family or except as small villages have developed around schools, trading posts, or other tribal centers. This basic difference of life style resulted in substantial Hopi restriction within their accustomed area. However, Navajos gradually but relatively rapidly moved into outlying parts of the 1882 Reservation. Particularly during the latter part of this 80 year period, Navajos were encroaching into the areas traditionally occupied by Hopis.

Also contributing to these developments was a higher rate of population increase of Navajos than of Hopis. Among other reasons, the Hopi Tribe suffered rather drastic epidemics with significant population decline during those periods of illness.

The Department of the Interior and its Bureau of Indian Affairs (BIA) contributed materially to Navajo expansion within the JUA by a curious and negligent ambiguity. At no time² did any one of twenty-two Secretaries of the Interior or an authorized subordinate official exercise the prerogative of the Executive Order by directly and officially acting to "settle" any Navajos on the 1882 lands. However, nothing effective was done to stop or deter Navajo use and occupancy of much of the land. In fact, there was indirect governmental encouragement to Navajos to use the land, eventually effectuated by establishment of grazing districts.

In 1931, a proposal for division of the reservation between the Hopi and the Navajos was considered but not effectuated. The primary administrative action actually taken a few years later was the establishment by the BIA of Land Management Districts. District No. 6 was created as exclusively Hopi and was entirely within the 1882 Reservation. Its borders were changed several times but were finalized on April 24, 1943. All the other Land Management Districts were considered by the BIA as essentially Navajo and included areas both inside and outside the 1882 Reservation.

Especially after the establishment of final boundaries for Hopi District No. 6, the various actions and inactions of the Department of the Interior and of the BIA had the effect of attempting to segregate Navajos outside District No. 6 and to confine Hopis primarily within District No. 6. Permits granted to Hopis to graze outside District No. 6 were limited in number and confined to proof of past use of the land involved. As the Court subsequently found, while the Department of Interior did not directly and officially "settle" Navajos on the 1882 Reservation, by implication and indirection that had been done. The Court determined that an internal Department of the Interior communication, dated February 7, 1931, had the effect of settling Navajos within the 1882 Reservation.

² A possible exception was an abortive program (1907-1911) to grant allotments to some 300 unidentified Navajo families.

³ *Healing vs. Jones, Findings of Fact #36, page 216.*

The Hopi Tribe never accented Navajo use and occupancy of 1882 lands. Moreover, almost continually after 1882 and with increasing frequency, complaints were made about damage to Hopi crops by Navajo livestock and various other acts of depredation actually or allegedly perpetrated by Navajos against Hopis.

Finally on July 22, 1958, by Act of Congress, the Chairman of the Hopi and Navajo Tribal Councils and the Attorney General of the United States were authorized to commence or defend actions against each other to determine the respective rights and interests of the parties to and in the 1882 lands and to quiet title thereto.

3. Healing vs. Jones Decision (1962)

Following extensive court proceedings, the Court decision was issued on September 28, 1962 by a District Court, composed of three Judges. The Judgment of the Court can be summarized as follows:

1. Title to District No. 6 (the boundaries of which had been finalized on April 24, 1943 and which were described in the Judgment) was quieted exclusively in the Hopi Tribe, both as to surface and subsurface, including all resources, subject to the trust title of the United States.
 2. As respects the balance of the 1882 Reservation, title was quieted in the Hopi Tribe and in the Navajo Tribe, share and share alike, subject to the trust title of the United States. The two tribes were found to have "joint, undivided and equal rights and interests both as to the surface and subsurface" to the part of the 1882 Reservation surrounding District No. 6 which is now commonly known as the Joint Use Area (JUA).
 - The Court also found that it had no jurisdiction to partition the Joint Use Area.
 - The Healing vs. Jones decision was appealed to the Supreme Court and affirmed in 1963.
 4. 1962 - 1974
- The Court decision did not effectively resolve the dispute. Navajos still occupied and used the Joint Use Area. Some Hopi efforts to expand into the Joint Use Area for grazing and agricultural purposes were only partially successful. A few meetings of negotiating committees to attempt to resolve conflicts of rights and interests were held but without tangible results on most issues. In many respects, joint use on a fully equal basis could not have been expected to be successful while Navajos physically occupied the bulk of the JUA area. An exception was the matter of subsurface rights. The two tribes were able to negotiate agreements with the Peabody Coal Company concerning leases of lands near the northern boundary of the Joint Use Area. Such leases provide equal benefits to the two tribes.

⁴ Healing vs. Jones, Findings of Fact, pp. 49-51, page 221.

Beginning during this period, the Hopi Tribe instituted proceedings in the District Court seeking in various ways to obtain or protect the Hopi share of the surface rights and interests. As this report is being written, some of these Court proceedings are continuing. While no attempt will be made here to extensively examine these proceedings, two general observations will be made since they may have a bearing on matters discussed subsequently in these recommendations.

The Court ordered livestock reduction to protect Hopi interest in the surface area from further deterioration by overgrazing.

The Court also ordered that new construction in the Joint Use Area be limited to improvements jointly authorized by the Navajo and the Hopi Tribes. As this part of the matter was developed, the Hopi Tribe has approved relatively few Navajo requests. Navajos in the Joint Use Area are extremely reticent because of an effective legal stalemate on construction or improvement of schools, clinics, houses, roads, light and power facilities, water development and similar projects.

The Hopis claim some violations of these two types of Court restrictions and there is evidence to support some of these claims.

5. Public Law 93-531

Beginning in the 92nd Congress and continuing in the 93rd Congress a number of bills were introduced dealing with this controversy. Although the Healing vs. Jones decision was not in question, proponents of legislation both in and out of Congress became convinced that the Court's lack of jurisdiction to partition the Joint Use Area militated against a final settlement of the dispute.

This report will not attempt to examine or summarize all the bills introduced in the Congress. Public Law 93-531 was passed in the 93rd Congress and became law when signed by President Ford on December 22, 1974.

At this point, comment on Public Law 93-531 will be restricted to evident intent of the Congress as respects required procedures.

The Act provides for a negotiating period of 180 days with mediation assistance. Despite a background of earlier negotiation failures, it is clear that the Congress decided to give the two tribes one last opportunity to resolve the dispute by direct agreement. It was hoped that the subsequent provision of imposed settlement by Court decision would provide adequate stimulus for successful negotiations.

Recognizing that settlement by negotiation might not be achieved, in whole or in part, the next procedural step of the act is to provide a 90 day period for preparation of a report and recommendation to the District Court by the Mediator.

Finally, the District Court is specifically empowered to decide the dispute, including partition of the Joint Use Area if the Court so determines.

B. Negotiations (March 17, 1975 - September 13, 1975)

1. Appointment of Negotiating Teams

Section 2(a)⁵ of the Act provides for the appointment of negotiating teams by each tribe.

On January 27, 1975, the Hopi Tribal Council, by a 13-0 vote, passed Resolution H-18-75 in conformance with the Act. The Mediator was so advised by a letter dated February 5, 1975. The following individuals were named as regular members of the Hopi Negotiating Team:

Abbott Sakaquaptewa, Tribal Chairman
Nathan C. Begay
Stanley N. Honshai
John P. Kennedy
Emory Sakaquaptewa

These five members continued to serve throughout the negotiations. Other persons were named as alternate team members.⁶

Upon designation by the Chairman, some of the alternate members served at various times during the negotiations.

On January 29, 1975, the Navajo Tribal Council, by a 41-1 vote, passed Resolution CJA-3-75 in conformance with the Act. The Mediator was so advised by a letter dated January 30, 1975. On February 13, 1975, the Navajo Tribal Council, by a 63-0 vote, passed Resolution CF-12-75 providing that the Chairman of the Navajo Tribal Council be authorized to fill vacancies, should they occur, from a list of suggested names recommended by the Navajo-Hopi Land Dispute Commission. Pursuant to these resolutions, the following individuals were named as regular members of the Navajo Negotiating Team:

Wilson C. Sleet, Vice-Chairman, Tribal Council
Samuel Pete, Director, Land Dispute Commission and Chairman of Negotiating Team
Ray Gilmore
Howard Gorman
Mary Lou White (replacement for Annie Waunake who resigned on January 30, 1975)

⁵ Section 2(a) - "Within thirty days after enactment of this Act, the Secretary shall communicate in writing with the tribal councils of the tribes directing the appointment of a negotiating team representing each tribe. Each negotiating team shall be composed of not more than five members to be certified by appropriate resolution of the respective tribal council. Each tribal council shall promptly fill any vacancies which may occur on its negotiating team. Notwithstanding any other provision of law, each negotiating team, when appointed and certified, shall have full authority to bind its tribe with respect to any other matter concerning the joint use area within the scope of this Act."⁷

⁶ Clarence Hamilton
Logan Kumpce
Dewey Kealing
Ferrell Secakuku
Thomas Balenquah
Phillip Talas
Robert Adams
Raymond Coin
Harry Kevanimpawa
John S. Boyden
Stephen G. Boyden
Wilson Williams
David Fred

These five regular members served throughout the negotiations. Other persons were named as alternate team members. All except Mr. Yellowhair served as alternate members at various times during the negotiations.

Section 2(e)⁸ of the Act provides that a negotiating team may act by majority vote in the absence of a resolution providing otherwise.

In this connection, Hopi Resolution H-18-75 provides that:

"The Negotiating Team is authorized to act only upon this unanimous vote of all five of its members."

The Navajo resolutions provide no exception to the majority vote provision of the Act.

2. Appointment of Mediators

Section 1(a) of the Act provides that the Director of the Federal Mediation and Conciliation Service shall appoint a Mediator.

On January 29, 1975, William J. Usary, Jr., Director of the Federal Mediation and Conciliation Service, appointed William E. Simkin as Mediator.

Later, on March 5, 1975, the Director designated Robert H. Johnston as Associate Mediator.

Both Mediators have served throughout the negotiations and in the preparation of this report and of these recommendations.

In addition, James F. Searce, Deputy Director of the Federal Mediation and Conciliation Service, was designated by the Director as the liaison person to act for the Federal Mediation and Conciliation Service in any matters involving the Washington office of the Service.

3. Beginning of the Negotiating Period

a. Preliminary meetings of Mediator with the parties separately

On February 6, 1975, the Mediator met with the Navajo Negotiating Team in Window Rock, Arizona and on the following day, February 7, 1975, he met with the Hopi Negotiating Team at Second Mesa, Arizona.

The purpose of these meetings was to permit the Mediator to become acquainted with the negotiators and vice versa, as well as to discuss procedural matters and methods of operation for the forthcoming negotiations.

⁷ Alternate Navajo Team Members:

Peter MacDonald, Chairman, Tribal Council
Chester Yellowhair
Lawrence A. Ruzov
George P. Vlassia

⁸ Section 2(e) - "In the event of a disagreement within a negotiating team the majority of the members of the team shall prevail and act on behalf of the team unless the resolution of the tribal council certifying the team specifically provides otherwise."

As one result of these meetings, the Mediator prepared and forwarded to the parties on February 19, 1975 a "Tentative Outline of Procedural Matters" to be discussed at the first official negotiation session and to be adopted or revised as might be required.

It is to be noted that a problem developed as to the date for the first negotiation sessions.

b. Question of starting date for 180-day negotiation period

At both the February 6 and 7 meetings, the Mediator suggested that the first official negotiation sessions begin on a date sometime in mid-March. The primary reasons for that suggestion were: (1) the necessity for the Mediator to complete certain prior business commitments that could not honorably be cancelled, and (2) the Mediator's need to acquire some background of the dispute prior to responsible chairing of negotiation sessions.

The Navajo Team had no objections to the suggested starting date; however, the Hopi Team did object. The reasons for the Hopi position were two-fold. One was a general objection to delay. The other was the Hopi interpretation of the first sentence of Section 2(c) of the Act which reads:

"Within fifteen days after formal certification of both negotiating teams to the Mediator, the Mediator shall schedule the first negotiating session at such time and place as he deems appropriate." (underscoring supplied)

The Mediator was sympathetic to the Hopi objection to delay and, in this regard, made a firm commitment to both tribes to forego any new business commitments and to give top priority to this dispute once commitments incurred prior to appointment had been fulfilled.

The Hopi interpretation of Section 2(c) was that the first official negotiation session must be held with fifteen (15) days following notification of Team appointments.

The Mediator's interpretation of Section 2(c) can be summarized as follows: The "formal certification(s) of both negotiating teams to the Mediator" had been January 30, 1975 (Navajo) and February 5, 1975 (Hopi). Clearly, notice of a scheduled meeting had to be given on or prior to February 20, 1975. Accordingly, under date of February 19, 1975 the Mediator served formal notice of the first official negotiating session to begin in Tucson, Arizona on Monday, March 17, 1975. It was the Mediator's basic interpretation that "such time--as he deems appropriate" did not mean that the first official negotiating session must be held within the fifteen day limit.

9 It is unlikely that this matter will be of present importance but if the Court should so request there are three documents that could be added to this record. One is a letter, dated February 11, 1975, from John Paul Kennedy, Esq. to the Mediator, confirming the Hopi objections to a mid-March beginning of formal negotiations as expressed orally at the February 7 meeting at Second Mesa. The second is a letter dated February 19, 1975 from the Mediator to John Paul Kennedy (copies to the Chairman of both tribes) providing the Mediator's interpretation of Section 2(c) and explaining the reasons for a March 17, 1975 beginning of negotiations. The third is a March 5, 1975 "confidential" letter from John Paul Kennedy to the Mediator, restating and amplifying the Hopi objections but concluding that the Hopi Team would attend the March 17 opening meeting, under protest.

Negotiations did begin at 10:00 a.m. on Monday, March 17, 1975 in Tucson, Arizona, as scheduled.

March 17, 1975 is the official beginning date of formal negotiations and of the 180-day negotiating period provided by the Act.

4. Joint Negotiating Meetings

a. Dates and Places		Days of
Scheduled Meetings	Places	Joint Meetings
3/17-20/75	Tucson, Arizona	1 1/2
4/9-12/75	Tucson, Arizona	2 1/2
4/30/75-5/2/75	Albuquerque, N. M.	1
5/19-21/75	Tucson, Arizona	2 1/2
6/9-11/75	Phoenix, Arizona	2
6/30/75-7/3/75	Salt Lake City, Utah	2 1/2
7/16-16/75	Kayenta, Arizona	2
8/4-6/75	Flagstaff, Arizona	3
9/12-13/75	Salt Lake City, Utah	12
		<u>TOTAL</u> 19 1/2

Both Negotiating Teams utilized much of the time between meetings to study proposals made, to formulate new proposals, and to confer with other Tribal officials. Because required relocations will be confined almost solely to Navajo residents of the Joint Use Area, Navajo Negotiating Team members spent substantial amount of time between negotiations conferring with other members of the Navajo Tribal Council, as well as with members of the Navajo-Hopi Land Dispute Commission. In addition, members of the Navajo Team met with local residents at a large number of Chapter meetings throughout the area.

10 The Hopi Team attended meetings on April 30, 1975 but declined to attend on May 1, 1975 for reasons officially recorded by a letter dated May 6, 1975, from Abbott Sakaquappiyya, Hopi Tribal Chairman, to the Mediator.

11 At these meetings, the Hopi Team expressed orally some questions as to whether additional meetings would be advisable.

12 These meetings were scheduled as meetings of a sub-committee of regular Team members. The full Navajo Team attended for part of the day on September 12, 1975 but did not attend on September 13, 1975. An informal 2 Navajo - 1 Hopi sub-committee met most of the day on September 12, 1975. The Hopi Team arrived at 2:00 p.m. on September 13, 1975 after departure of the Navajo Team. No days of "Joint Meetings" are recorded for the September 12 thru September 13, 1975 period.

b. Subject Matters Discussed

Throughout the 19 1/2 days of joint negotiating meetings, at least some mention was made of all issues in dispute between the two tribes under Public Law 93-331. However, some items were discussed at great length; others relatively briefly.

By far the greatest amount of time was spent on the problem of partition. The most specific vehicles stimulating such discussion were a series of nine alternative maps proposed by the Hopi Team and a series of ten alternative maps proposed by the Navajo Team.

c. Mediator's General Appraisal of Proposals Made By the Two Teams

It can be reported here that, as negotiations proceeded, the proposals on the major issue of partition came progressively closer to agreement. In terms of land mass only (acreage), there was general agreement of the two teams on some 80% to 85% of the total acres to be partitioned. However, the remaining unresolved 15% to 20% of the total area reflected very strong differences of opinion.

On other issues, the proposals made by the two teams varied, issue by issue, both as to extent of detail relevant to the issue and degrees of agreement and disagreement.

Two somewhat general differences of approach of the two teams, throughout the negotiations, should be recorded here.

In general, it was a Navajo position that all issues in dispute should be resolved by agreement and that possible agreement on any one issue should not be finalized as an agreement until all other issues were resolved. On several issues, in addition to partition, the Navajos made quite specific proposals in writing.

In contrast, it was a basic Hopi position that agreement on a partition line was a first and essential requisite and that agreement on other issues should be deferred until the partition line had been established. This Hopi position did not prevent discussion of other issues. It did mean that the Hopi Team made few written proposals on issues other than the partition line.

d. Agreements Reached in Principle

No specific agreements were reached that could qualify as a "full agreement" (Section 3(a) of the Act) or even as a "partial agreement" under Section 3(b).¹³ However, there were informal agreements of principle that should be noted in this report.

¹³Section 3(b)--"If, within the one hundred and eighty day period referred to in subsection (a) of this section, a partial agreement has been reached between the tribes and they wish such partial agreement to go into effect, they shall follow the procedure set forth in said subsection (a). The partial agreement shall then be considered by the Mediator in preparing his report, and the District Court in making a final adjudication, pursuant to section 4." (underlining supplied)

Following the first joint negotiating meetings held in Tucson, Arizona, on March 17-20, 1975, a brief press release, authorized by the negotiators, included the following principles:

"Both Tribes agreed that the resolution must take into account the personal hardships of the Navajo people affected. In addition, the parties agreed that the resolution will result in the near future in the restoration to the Hopi Tribe of its exclusive use of an equal share of the surface area of the Joint Use Area."

Due to certain inaccurate or misleading press accounts following that meeting, these two important principles were restated in a jointly approved press release subsequent to the next negotiating session, held in Tucson on April 9-12, 1975. The restatement includes the following:

"There was and is a specific agreement that in the near future the Hopi Tribe will be restored its exclusive use and ownership of one-half of the surface area of the Joint Use Area. Any implication that the parties agreed that the Hopis would receive less than their one-half of the land surface area is completely false. There was also agreement that the tribes would take into account the personal hardships of the Navajo people affected."

In addition, there were other agreements of principle reached by the Negotiating Teams on other issues.

5. End of Negotiating Period

Public Law 93-331 provides a negotiating period of 180 days, subject to certain possible contingencies.

A first contingency (Section 2(b)) would apply in the event that either or both tribes should fail to select and certify a negotiating team within 30 days after notification by the Secretary of the Interior, or, if replacements for regular team members should not be made within 30 days after a vacancy. Both tribes fulfilled their obligations in this particular.

A second contingency (Section 2(d))¹⁴ would apply in the event that either negotiating team should fail to attend two consecutive sessions. The Hopi team did not attend one scheduled meeting on May 1, 1975 at Albuquerque, New Mexico after one day of meetings. Also, some questions could be raised about failure of the Hopi team to attend a meeting on September 17, 1975 at Salt Lake City, Utah and failure of the Navajo team to attend a meeting on September 13, 1975. However, throughout the 180-day period, there was no failure of either team to attend two consecutive sessions. Accordingly, this exception does not apply.

¹⁴Section 2(d)--"In the event either negotiating team fails to attend two consecutive sessions or, in the opinion of the Mediator, either negotiating team fails to bargain in good faith or an impasse is reached, the provisions of subsection (a) of section 4 shall become effective."

A third possible exception (also Section 2(d)) is dependent on whether the Mediator should find that "either negotiating team fails to bargain in good faith or that an impasse is reached." In the judgment of the Mediators, there was no failure to bargain in good faith. Nor do we find that an impasse was reached during the 180-day period.

The 180-day negotiating period expired at midnight on September 13, 1975 under the provisions of the Act and in the absence of agreement by the negotiators prior to that date.

The Chairmen of both the Navajo and Hopi Tribal Councils stated, after September 13, 1975, that if a basis for settlement could be found prior to submission of the matter to the District Court, the expiration of the 180-day negotiation period should not interfere with such settlement. The Mediators did make further attempts to achieve settlement but these efforts were unsuccessful.

6. Other Mediator Activities

a. Inspections of the Joint Use Area

On April 21, 1975, the Mediators and Navajo representatives engaged in an aerial reconnaissance by helicopter of large segments of the Joint Use Area, primarily over the eastern half. On the following day, April 22, 1975, certain areas, notably in the southwestern, western, and northwestern portions of the JUA were visited by the same group using land vehicles.

On April 23, 1975, the Mediators accompanied by Hopi representatives were taken on a low-altitude reconnaissance in a Cessna plane. This flight generally followed the so-called "Steiger line" as well as other areas. On April 24, 1975, a land vehicle trip with the Hopi group was conducted primarily to visit certain Hopi sacred shrines.

Other visits to the Joint Use Area, in conjunction with visits to Chapter meetings and to the Peabody Coal Mine area, afforded the Mediators the opportunity to observe certain parts of the terrain that is in dispute.

In total, the Mediators spent about eight (8) days visiting and inspecting the disputed land.

b. Inspections of Land Outside the 1882 Reservation for Possible Purchase by the Navajo Tribe and Meetings Related to such Purchase

Sections 11(a) and 11(b) of the Act provide for possible purchase by the Navajo Tribe of not to exceed 250,000 acres in Arizona or New Mexico, contiguous to or adjacent to the existing Navajo Reservation, such lands to be taken in trust by the United States for the benefit of the Navajo Tribe. Further, Section 5(a)(1) of the Act provides that the Mediator may recommend, subject to the consent of the Secretary, that additional lands be acquired for the benefit of either tribe.

The purpose of the above noted provisions is to provide additional land on which some Navajo facilities, displaced from the Joint Use Area, may be relocated.

On May 23, 1975, the Mediators met in Phoenix, Arizona with Navajo representatives, Bureau of Land Management (BLM) representatives, BIA representatives, and members of the Department of the Interior Solicitor's office to discuss BLM lands possibly available for purchase under Section 11(a). The Mediators had previously attended a similar meeting in the office of the Under Secretary of the Department in Washington on May 15, 1975. Subsequent meetings at the BLM office in Phoenix on the same subject matter were attended by the Associate Mediator.

On June 23, 24 and 25, 1975, the Associate Mediator inspected certain lands in the House Rock Valley, Paria plateau, and Mineral areas (all in Arizona) with Navajo, BLM and BIA representatives.

On July 17, 1975, the Mediators inspected certain so-called "checkerboard" BLM lands south of Gallup and in the vicinity of Crown Point (both in New Mexico). A representative group similar to that noted earlier participated in this visit. At a briefing session prior to these visits, a BLM representative made a presentation regarding certain BLM lands near Farmington, New Mexico.

On August 27, 1975, the Mediators and Navajo representatives inspected certain privately owned ranch lands, possibly available by purchase.

On August 28, 1975, the Mediators and Navajo representatives explored the implications of this dispute with local residents of the Joint Use Area at Chapter Meetings, the Mediators were invited to attend some of these meetings.

On April 21, 1975, in conjunction with a JUA land inspection, the Mediators, Navajo Team members and Tribal Council members met at the Finon Chapter House. The meeting was attended by approximately 100 Navajos.

On August 8, 1975, the Mediators, Navajo Team members, and Tribal Council members met at the Hard Rock Chapter House with approximately 75 Navajos in attendance. This meeting had been preceded on August 7, 1975 by visits to a few Navajo homes in the northwestern portion of the JUA and by a visit to the Peabody Coal Mine area in the north central part of the JUA.

On August 10, 1975, the Mediator met at a similar meeting conducted at the White Cone Chapter House with approximately 90 Navajos in attendance.

On September 9, 1975, the Mediators met at the Rocky Ridge Boarding School with Navajo Team members, Tribal Council members, Navajos from a number of Chapters, and others, including press representatives. Some 150 persons, in attendance, attended the meeting.

During these various Chapter meetings, Navajo Team members and the Mediators made initial brief presentations of the provisions of Public Law 93-531 and its implications. The bulk of the time following these presentations was devoted to statements by members of the audience regarding problems of partition. The sessions were completed by a period of questions and answers.

From the Mediators' point of view, these meetings were especially valuable because Navajos who might possibly be affected by relocation had an opportunity of being heard, thus supplementing the like observations of the members of the Navajo Negotiating Team. The Mediators also believe that these meetings, as well as the much larger number of other Chapter meetings attended by Navajo Team members in the absence of the Mediators, were important because a Court decision in this matter will not come as a surprise to those Navajos affected by it.

d. Meetings with Relocation Commission

The Navajo and Hopi Indian Relocation Commission (Sections 12, 13, 14 and 15 of Public Law 93-531) was appointed officially on June 27, 1975 but had been unofficially designated at an earlier date.

The three members and their respective positions are:

- Robert E. Lewis, Chairman
- Hewley Atkinson, Vice Chairman
- Paul D. Urbano, Secretary

Because of obvious interrelation between the future work of the Commission and the progress of negotiations, the Mediators contacted the newly designated members. On June 10, 1975, the Secretary of the Commission met briefly with the Negotiating Teams and the Mediators during negotiations in Phoenix. On June 20, 1975, the Vice Chairman of the Commission conferred with the Mediators and with FMS Deputy Director Scearce in Tucson.

Subsequently, the full Commission met separately with the Navajo and with the Hopi Negotiation Teams in Window Rock and at Second Mesa. On September 18, 1975, the Mediators met for the better part of the day with the full Relocation Commission in Phoenix.

e. Meetings with the Parties Separately

On September 4, 1975, the Mediators met with the Hopi Team at New Oraibi and, September 8, 1975, the Mediators met with the Navajo Team at Window Rock. On September 12 and 13, 1975, the Mediators met separately with the Navajo Team and the Hopi Team in Salt Lake City.

On many occasions, during joint negotiations, the Mediators met separately with the Hopi or the Navajo Negotiating Teams or with individual members of such teams. No attempt was made to make a record of the numbers, times, or places of such meetings.

At all times, both teams were fully aware of the fact of separate meetings. The matter was discussed and agreed to, at the beginning of negotiations, as a normal aspect of mediation activity.

7. Mediator Appraisal of Value of these Negotiations

The Mediators conclude, without reservation, that these negotiations have been immensely valuable to the process of eventual resolution of this long-standing dispute. Absence of complete agreement, or even of partial specific agreement, is not a true measure of success or failure.

Both teams have been open, candid and positive in expression of their positions, hopes, and aspirations. For the most part, members of each team have faced up to the very real problems of both sides of the controversy. Sincere efforts were made to accommodate to each others needs. By and large, these negotiations were held in an atmosphere of mutual seeking for viable compromise. The general approach has not been that of an adversary proceeding in which only extreme positions are voiced or sought. Finally, and perhaps most truly reflective of these proceedings, there has existed a surprising degree of good humor.

Absence of agreement is an unhappy result. However, it should not be unexpected in view of the magnitude and complexity of this dispute.

Now that it becomes necessary for us to prepare this report and recommendations, we believe that it is our duty and responsibility to distill from these negotiations those aspects that were most constructive and to recognize those virtues, consistent with the law and the facts.

C. Mediator Recommendations (90 day period)

Section 4(a) of the Act reads, in part, as follows:

"If the negotiating teams fail to reach full agreement within the time period allowed in subsection (a) of Section 4 (180 days)---the Mediator, within ninety days thereafter, shall prepare and submit to the District Court a report containing his recommendations for the settlement of the interests and rights set out in subsection (a) of Section 1 which shall be most reasonable and equitable in light of the law and circumstances and consistent with the provisions of this Act." (underlining supplied)

The 90 day period expired 30 days after September 13, 1975 of, to be specific, at midnight on December 12, 1975.

II. GENERAL BASIS FOR MEDIATOR RECOMMENDATIONS

A. Legal Requirements

1. Conformance to Healing vs. Jones

Public Law 93-531 provides that the proceedings in which the Mediators are acting shall be supplemental proceedings.¹⁵ It provides also that the Mediators' recommendations shall be in conformance with the Court decision in Healing vs. Jones.¹⁶ In addition, it directs that the rights and interests of the Hopi Tribe to District 6 lands, as defined in the Healing case, "shall not be reduced or limited in any manner."¹⁷

Obviously, the Mediators are bound by these requirements and our recommendations are intended to observe them.

2. Congressional Criteria of Public Law 93-531

Section 6(a), (b), (c), (d), (e), and (f) of the Act provide criteria for consideration by the Mediators and by the District Court.

The Mediators have also reviewed certain aspects of the legislative history. These include: (a) Hearings before the Subcommittee on Indian Affairs, House of Representatives (April 17 and 18, 1972); (b) Hearings before the Committee on Indian Affairs, Senate (March 7, 1973); (c) Report of the Senate Committee on Interior and Insular Affairs (September 23, 1974); and (d) The Congressional Record with particular attention to the floor debate in the Senate just prior to passage of Public Law 93-531.

¹⁵ Section 1(b)--"The proceedings in which the Mediator shall be acting under the provisions of this Act shall be the supplemental proceedings in the Healing case now pending in the United States District Court for the District of Arizona (hereinafter referred to as 'the District Court')."

¹⁶ Section 6 states in part--"The Mediator in preparing his report, and the District Court in making the final adjudication, pursuant to section 4, shall consider and be guided by the decision of the Healing case--"

¹⁷ Section 6(a)--"The rights and interests, as defined in the Healing case, of the Hopi Tribe in and to that portion of the reservation established by the Executive order of December 16, 1882, which is known as land management district no. 6 (hereinafter referred to as the 'Hopi Reservation') shall not be reduced or limited in any manner."

3. Surface Rights Only

Section 718 of Public Law 93-531 provides clearly that partition of the surface area shall not affect the joint ownership status of the coal, oil, gas, and all other minerals underlying the lands in the Joint Use Area.

B. Factual Considerations

This preliminary section of our report is intended to describe, as briefly as possible, the nature and source of the factual information available to the Mediators.

Section 1(d)¹⁹ provides for the appointment by the Secretary of the Interior of a representative to act as his liaison with the Mediators. Pursuant to this provision, William L. Benjamin, Project Officer, BIA-Joint Use Administrative Office, Flagstaff, Arizona, was appointed to this post. Lynn R. Montgomery, Assistant Project Officer at the same office, was appointed Acting Project Officer for the duration of Benjamin's service as liaison person. These officials and other members of the BIA staff at the Flagstaff office have been fully cooperative with the Mediators. In fact, the BIA has been the primary source of factual data.

Section 1(c)(1) of the Act provides that the Mediator may request assistance from any department or agency of the Federal Government. To aid in implementation of that provision, Section 1(c)(2) of the Act provides for the appointment by the President of an interagency committee chaired by the Secretary of the Interior. On January 6, 1975, President Ford appointed a Hopi-Navajo Land Settlement Interagency Committee consisting of the Secretary of the Interior (Chairman), the Attorney General, and five other Cabinet Secretaries (Agriculture, Commerce, Labor, HEW, and HUD). As the negotiations progressed, direct assistance from departments or agencies other than the Department of the Interior has not been extensive. When and as required, such assistance and information has usually been arranged for by the Department of the Interior.

Section 1(e)²⁰ of the Act provides that the Mediator may retain the services of staff assistants and consultants.

¹⁸ Section 7--"Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, oil, gas, and all other minerals within or underlying such lands. All such coal, oil, gas, and other minerals within or underlying such lands shall be managed jointly by the two tribes, subject to supervision and approval by the Secretary as otherwise required by law, and the proceeds therefrom shall be divided between the tribes, share and share alike."

¹⁹ Section 1(d)--"The Secretary shall appoint a full-time representative as his liaison with the Mediator to facilitate the provision of information and assistance requested by the Mediator from the Department of Interior."

²⁰ Section 1(e)--"The Mediator may retain the services of such staff assistants and consultants as he shall deem necessary, subject to the approval of the Director of the Federal Mediation and Conciliation Service."

As noted earlier, Robert M. Johnston was appointed Associate Mediator and Roy T. Harmon was appointed Administrative Assistant. Both of these appointments were made by the Director of the Federal Mediation and Conciliation Service after consultation with the Mediator. Dr. Melvin E. Hecht, Professor of Geography, University of Arizona, was retained by the Mediator as Consulting Geographer and Frank Norris has acted as Cartographer under Dr. Hecht's supervision. The Mediator appointed Margaret FitzPatrick as Office Manager and other individuals²¹ have worked under her supervision as secretarial and analytical assistants. Legal advice has been provided primarily by the legal staff²² of the Washington office of the Federal Mediation and Conciliation Service and also by Robert C. C. Reaney, Tucson, Arizona, retained by the Mediator.

1. BIA Census Enumeration

Section 6(b) of the Act provides that the Mediators and the Court should give consideration to establishment of boundary lines

"so as to include the higher density population of each tribe within the portion of the lands partitioned to such tribe--"

As a practical matter, the application of this provision would affect Navajos almost solely since there are very few Hopis resident in the JUA.

The BIA conducted a detailed study to determine current population and other data, including specific locations of residence.

The BIA study began by the taking of aerial photographs of the entire JUA during a period from June through August, 1974. Practice locations of all man-made structures available from the aerial survey were then marked on 7.5 minute (quarter quad) U.S.G.S. maps.²³ These structures included dwellings, sheds, corrals, etc. that could be identified. Identification numbers were then allocated to each such structure. It was not possible in this "spotting" process to delineate the exact nature of a structure. The BIA made two major distinctions by symbol markings. A square (■) was used to indicate a building of some sort. A separate marking (□) was used to indicate a corral.

In addition to the quarter quad maps, the BIA also prepared larger scale maps, showing the same information but the markings were correspondingly smaller. These various maps were made available to the two tribes and to the Mediators early in the negotiation period. They provided tentative general information on "population density" but did not include an actual population count.²⁴

²¹ Nancy Duckwiler
Barbara Nogal
Ruth Phipps
Timmy Sabor
Coven Townsend

²² Herbert Fishgold
John Martin

²³ A "quarter quad" map may be better understood when it is known that there are 64 quarter quads in the entire 1882 Reservation.

²⁴ By a manual count of the squares (all structures except corrals), the negotiators and the Mediators had available a rough and ready measure for the purpose of preparing proposals. The manual count of all structures except corrals that the negotiators labeled as "improvements" for discussion purposes came to a total of 4579 for the entire JUA.

The next step in the BIA program was to conduct a population survey. Four teams, each consisting of an enumerator and an interpreter, were sent out into the JUA. Consulting the appropriate quarter quad map, each team found the location already marked on the map. If any responsible person was found at home at a dwelling, the enumerator used a standard one page form and completed that form. The enumeration form includes certain basic information.²⁵

The enumeration teams also compiled information to up date and correct the original quarter quad maps. Structures were further referred to show (a) liveable dwellings, (b) abandoned or destroyed dwellings or corrals, (c) sheds or "shade houses" (summer structures not completely enclosed or roofed) and (d) corrals. Some structures were found that were not depicted on the aerial maps. These were identified and subsequently given identification numbers.

The enumeration teams began their work in December, 1974. A "first round" of the enumeration of the entire JUA area was completed by mid-summer in 1975.

Based on the enumeration data supplied to a computer, the BIA furnished to the two tribes and to the Mediators preliminary computer printouts²⁷ on August 3, 1975.

To complete the study, the enumeration teams returned to the areas where no residents had been found in liveable dwellings or where other data required for the enumeration forms were not complete. Such return visits occurred from one to four times, depending on the area.²⁸

Subsequently, the BIA delivered to the Mediators revised alpha and numeric printouts and revised quarter quad maps, reflecting additional information that had been obtained by the enumerators.

The Mediation staff has examined these computer printouts and the revised quarter quad maps. After manual tabulation, summaries have been prepared, as shown in Appendices 6, 7, and 8. In Appendix 6, summaries made available by the BIA to the Mediators on December 5, 1975 from data in the computer as of December 4, 1975 are shown alongside of the Mediator's manually computed summaries.²⁹

²⁵ Blank enumeration form shown as Appendix 5.

²⁶ (a) Nature of each numbered structure, (b) Name of each "head of household" and other members of the family or other persons residing in a dwelling with dates of birth, social security numbers, tribal census numbers, and (c) Location and description of other properties owned by the "head of household."

²⁷ These printouts were large books of pages in two forms. One was a "numeric" printout, reflecting enumeration data by location numbers in each quarter quad. The other was an "alpha" printout, showing in alphabetical order all the persons residing in the JUA area, as recorded up to that date.

²⁸ It will be noted that the two studies do not show identical figures. This may be due, in part, to the fact that the BIA has been periodically refining its data. In fact, it continues to do so as this report is being written. The Mediators' manual count is based on data less recent than December 4, 1975. In any event, the two studies by different methods tend to be confirming.

2. Water Resources Data

Another important factor to be considered in land partition is the availability of water, including existing resources and future potential. Under dates of September 18 and 25, 1975, the BIA delivered to the Mediators two maps showing existing water resources in the following categories: (a) drilled wells, (b) dug wells, (c) developed springs, and (d) undeveloped springs. Dr. Melvin E. Hecht and his staff have plotted these water resources on the same quarter quad map that show other structures.

Further, the BIA has contracted with the Water Development Corporation of Tucson, Arizona to conduct a water survey of the JUA. Briefly, these studies encompass:

- a. Availability of surface and ground water
- b. Suitable locations for additional stock ponds
- c. Potential irrigation areas together with possible flash flood controls
- d. Hydrologic properties of major aquifers, particularly as they relate to livestock and irrigation requirements
- e. Possible sites for construction of new wells

A U.S.G.S. water survey map and report (E. H. McGavock and R. J. Edmonds), dated December, 1973, has also been secured by the Mediators through the BIA. This report supplies information somewhat paralleling but less complete than the Water Development Corporation study.

What these studies show, reported here briefly, is that there are water resources in the JUA not yet developed and that could be developed at less than prohibitive cost for domestic use, for live stock, and for minor irrigation projects.

We are advised by the BIA that budget requests for land restoration in the JUA (Section 25(a)(2) of Public Law 93-531) include enough funds for about 25 new drilled wells.

Under dates of May 15 and 22, 1975, the BIA forwarded to the two tribes and to the Mediators a statistical summary of the carrying capacity of the JUA.

This summary shows, by quarter quad, the total number of "sheep units year long" (SUYL) for three different time periods: (a) 1963, (b) 1973, and (c) potential (after complete land restoration as is possible).

At the request of the Mediators, the BIA has supplemented these data by a breakdown of SUYL for those quarter quads that are divided by our recommended partition lines. Appendix 3 shows this information and the total division of SUYL (both 1973 and potential).

Both tribes have raised some questions as to whether the enumeration is as complete and accurate as might be desired.

Objections were addressed partially to the fact that a substantial number of liveable dwellings were not shown by the BIA as being occupied. The Navajo Team complains because the enumeration teams confined their visits to weekdays, Monday through Friday. The Hopi Team does not object to this aspect of the matter, believing that it may neglect counting only those Navajos who are not real residents of the JUA anyway. The Mediators' examination of the data would suggest a number of possible reasons for seemingly unoccupied liveable dwellings. In a substantial number of instances, there are two or more liveable dwellings in a "cluster", owned by one "head of household", but all the population was scribbled by a BIA enumerator to one of these dwellings. In reality, various numbers of the family may actually occupy all or most of these dwellings. Secondly, the "summer hogan" and "winter hogan" aspect of Navajo life style may mean that when the enumerators made their visits, the family was absent from one of the dwellings. Thirdly, because of the weekday visitations by the enumerators, a dwelling may appear to be unoccupied because the family has temporary or even semi-permanent employment at nearby locations, but is present at the family dwelling on the reservation on weekends with varying degrees of regularity. Fourthly, despite repeated visits, the enumerators may not have found anybody at home even though there is normal residency. Finally, some of the unoccupied dwellings may simply be liveable but unoccupied at any time.

The Hopi Team questions the accuracy of the study on the premise that there were more Navajos than Hopis employed on the enumeration teams, implying that the enumeration data may be "skewed" in one way or another. It is obvious that at least half of the total number of persons on the teams had to be Navajo because one member of each team was an interpreter. Some Hopis were employed. The BIA has assured the Mediators of the integrity of the enumeration process.

After careful appraisal of the BIA study, the Mediators are convinced that the data are as accurate and complete as can reasonably be expected. The only criticism that appears to us to have possible validity is that enumerators were necessarily required to accept personal data submitted by the residents. If the information submitted to the enumerators was false, inaccurate, or incomplete, there is no reasonable way to determine the extent of inaccuracy.

In closing this section, we assume that the Relocation Commission will take note of this aspect of our report but will also undoubtedly determine its own methods of analysis.

Handwritten notes: "M. J. Hecht", "H. Penny", "M. J. Hecht".

4. Other Evidence Bearing on Land Quality

During 1964 the BIA prepared a Soil and Range Inventory of the 1882 Executive Order areas. The results of the inventory have been plotted on 16 fifteen minute quad maps which comprise the total area. Said maps were derived from aerial photographs and mosaics taken prior to and during 1964.

Following a physical inspection and analysis of the area by BIA soil scientists and range conservationists, that office then plotted the findings by means of professionally accepted symbols on the above mentioned quad maps.

These symbols reflect such information as range soil, classes and groups, land slopes and erosion classes, climatic zones, acreage and stocking rates, water and drainage factors, etc. Together, these symbols give the viewer a general perspective of the quality of the land in the JUA.

Subsequent to the 1972 District Court Order of Compliance, the BIA updated its 1964 Soil and Range Inventory. To complete this revision, the BIA utilized six range conservationists, each of whom physically reinspected the above lands for any changes which had occurred since the 1964 inventory. Such changes were then evaluated and retabulated, from which an updated Soil and Range Inventory was prepared and issued in 1977.

Accessibility to paved roads could be a factor affecting value of land. Accordingly, the Mediators requested Dr. Melvin E. Hecht and his staff to plot on the quarter quad maps the paved roads in the JUA and a very limited number of unpaved roads that carry a state road symbol.

B. Judgment Factors

In the recommendations made later in this report, the Mediators have examined carefully all the available factual data. We have also been influenced materially by the valid positions of the two tribes, as they have appraised and evaluated these same data. It is the leadership and the peoples of both tribes who will necessarily be required to "live with" the results of the Court determinations for many years to come. Their valid judgments should govern, in so far as is possible.

Needless to say, where the two tribes differ in any material respect, it is incumbent on the Mediators to ascertain their best impartial judgment as to the relative validity of the conflicting positions. Some ten thousand acres of land were temporarily leased to the Navajo Tribe in 1964. This lease was developed since the end of the negotiation period. It will be necessary for the Mediators to appraise and evaluate the significance of such factors. To the extent possible, the Mediators have attempted to obtain the reactions of the two tribes to any new data.

D. Relationship of These Recommendations to Purchase by Navajo Tribe of Lands Outside 1882 Reservation

1. Section 11 Lands

Section 11 of Public Law 93-531 reads as follows:

"(a) The Secretary is authorized and directed to transfer not to exceed 250,000 acres of land under the jurisdiction of the Bureau of Land Management within the States of Arizona or New Mexico to the Navajo Tribe. Provided, That the Navajo Tribe shall pay to the United States the fair market value for such lands as may be determined by the Secretary. Such lands, shall if possible, be contiguous or adjacent to the existing Navajo Reservation. Title to such lands which are contiguous or adjacent to the Navajo Reservation shall be taken by the United States in trust for the benefit of the Navajo Tribe."

"(b) Any private lands the Navajo Tribe acquires which are contiguous or adjacent to the Navajo Reservation may be taken to the United States in trust for the benefit of the Navajo Tribe; provided, That the land acquired pursuant to subsection (a) and this subsection shall not exceed a total of 250,000 acres."

Under date of June 11, 1975, the Director, Bureau of Land Management, in a letter to the Secretary of the Interior, identified certain lands in Arizona and New Mexico which in the then stated opinion of the BLM, could be made available to the Navajo Tribe under Section 11 of the Act.

All of the lands noted in the June 11, 1975 letter were physically inspected by members of the Navajo Tribe. For various and sundry reasons, the Navajos do not believe that these lands adequately meet their needs and the requirements of Section 11.

The land expressly desired by the Navajo Tribe under Section 11(a) consists of 250,000 acres of BLM land. The land is located in the House Rock Valley - Paria Plateau area, along and north of Arizona State Highway 89.

A number of meetings have been held, at which times the Navajo Tribe has presented to the BIA its reasons for requesting land in the House Rock Valley - Paria Plateau area. Formal application has been made for the land, supported most recently by a November 11, 1975 resolution of the Navajo's Land Dispute Commission and an accompanying plan for Navajo use of the area.

Acquisition of the House Rock Valley - Paria Plateau lands by the Navajo Tribe has been bitterly opposed by numerous sections, outstanding of which are the "Save the Arizona Strip Committee" and its constituent groups.

The BLM, has commenced its analysis of the factors involved in sale of the House Rock Valley - Paria Plateau lands to the Navajo Tribe. In a letter, dated December 1, 1975, from the State Director of the BLM to the Mediators, the BLM indicates a schedule including an Environmental Analysis Report, public meetings, and other possible procedural steps.

Some reasonable time requirements are obviously needed. However, the predictable effects of long delay are ominous. Doubts about availability of the 250,000 acres have already influenced negotiations adversely. Moreover, once a partition line has been drawn, Navajos who must be relocated will ask the obvious question: "Where can we go?" In fact, this question has already been raised by many Navajos who fear that they will be relocated. If additional land is not available, the work of the Relocation Commission will be hampered in a major way.

As indicated earlier in this report, the Mediators have personally inspected all the lands considered up to this date under the 250,000 acre provision of Section 11(a). It is our considered opinion that the House Rock Valley - Paria Plateau area is the only presently known BLM land in Arizona or New Mexico that qualifies under the "contiguous or adjacent" criteria and under the necessity to find land for relocation purposes. If this is the case, and if no adequate presently unknown alternative can be presented, there is no satisfactory answer but for the Secretary of the Interior to "bite the bullet" and make the House Rock Valley - Paria Plateau Lands available for purchase by the Navajo Tribe. It should be noted that the words of Section 11(a) are: "The Secretary of the Interior is authorized and directed...". Moreover, "time is of the essence" and such action should be taken at the earliest possible moment.

2. Section 5(a)(1) Lands

Section 5(a)(1) of the Act reads as follows:

"(a) For the purpose of facilitating an agreement pursuant to section 3 or preparing a report pursuant to section 4, the Mediator is authorized--

(1) notwithstanding the provisions of section 2 of the Act of May 25, 1918 (40 Stat. 570), to recommend that, subject to the consent of the Secretary, there be purchased or otherwise acquired additional lands for the benefit of either tribe from the funds of either tribe or funds under any other authority of law."

The quite obvious purpose of Section 5(a)(1) is that the Congress recognized the possibility that the 250,000 acres provided in Section 11 might be insufficient to accommodate all the Navajo families that must be relocated. It must be remembered that with a 50-50 partition by acreage, the Navajos must give up 911,041 acres in the JUA now utilized primarily by Navajo families.

The Navajo Tribe can purchase private land at any time it chooses to do so. However, in the absence of Congressional approval, the Act of May 25, 1918 (40 Stat. 570) makes it difficult if not impossible for any such purchased land to be held in trust by the United States.

It will be noted that Section 5(a)(1) does not restrict the Mediator in his recommendations as to the additional land. The "contiguous or adjacent" and "in the States of Arizona or New Mexico" requirements of Section 11(a) are not present in Section 5(a)(1). Nor is there any specification as to whether the additional land be private land, BLM land, other land owned by the Federal Government, or land owned by any state government. Partly because there are no specific limitations on the scope or nature of the Mediator's recommendation, the consent of the Secretary of the Interior must be obtained before any recommendation can be effectuated.

Elsewhere in this report, it has been determined that approximately 3495 Navajos now reside on lands to be partitioned to the Hopi Tribe and therefore are subject to relocation. It is not possible to determine with any exactness how many families are represented by this total of 3495 individuals. A precise family total will not be obtainable until after the Relocation Commission has completed its report to Congress. However, for the purpose of this section it is necessary for us to make estimates.

Our enumeration data reflect that 3495 individuals are associated with 1151 liveable dwellings. This would indicate an average of slightly more than three persons per liveable dwelling. However, this is not a useable family size figure for reasons indicated on page 19.

Census data compiled by the Navajo Tribe indicate average family size to be 5.6 persons per family. However, that figure is for the entire Navajo reservation; whereas our data for the JUA suggests that the average JUA Navajo family is somewhat smaller.

We estimate that the total number of families subject to required relocation is somewhere in a range of 625 to 775 families.²⁹

The Navajo Tribe's presentation to the BLM indicates its intention to move 60 families to the House Rock - Paria Plateau area at an early date. Additional subsequent relocations to that area may be possible for families who will not depend on grazing for their livelihood. Some elderly or handicapped persons may elect life estates. An unknown number of families, eligible to receive relocation monies as determined by the Relocation Commission, may move to locations outside a reservation, to Navajo portions of the JUA, or to the larger Navajo reservation.

²⁹ Average family size--range of 5.6 to 4.5.

An estimate of the effects of all these factors results in the following computation:

Estimated number of Navajo families subject to relocation.	625 - 775 (mid-point 700)
Less:	
Approximate number of families estimated to move to the House Rock - Paria Plateau area at an early date.	60
Estimated number of additional families who may subsequently move to the House Rock - Paria Plateau area who will not depend on grazing for their livelihood.	60
Estimated number of families electing life estates.	30
Estimated number of families eligible to receive relocation funds, as determined by the Relocation Commission, and who move to locations outside a reservation, or to Navajo portions of the JUA, or to other places in the larger Navajo reservation.	200
Sub-total	350
BALANCE	275 - 425 (mid-point 350)

This range of 275 - 425 families identified above as "balance", should have available to them new lands not heretofore occupied by Navajos.

It is obvious to the Mediators, that we must exercise the authority of Section 5(a)(1) and recommend additional lands.

It is equally obvious that we could not recommend total additional acreage for the Navajo Tribe that would be in excess of the land vacated in the JUA. In other words, the maximum possible acreage under 5(a)(1) would be 911,042 acres less 250,000 acres (Section 11) or a net figure of 661,042 acres. Furthermore, our examination of the legislative history does not suggest that it was the intent of Congress to fully compensate the Navajo Tribe, acreage wise, by a combination of Section 11 and Section 5(a)(1), for all lands to be partitioned to the Hopi Tribe.

In determining the acreage that should be recommended, we have first examined the existing situation in the JUA. There are a total of 11,798 Navajos now living in the JUA according to the Mediation office count. Using the same methods noted earlier, this translates to a range of approximately 2100 to 2600 families or a mid-point figure of 2350 families. These families occupy all but a small portion of the 1,822,082 acres of the JUA. The average acres now occupied per estimated average family is approximately 775 acres. If we should estimate additional land needs of 350 families at an average of 775 acres per family, the required acres would be 271,250 acres of land at least as good as the JUA land.

The Mediators recommend under Section 5(a)(1) that the Navajo Tribe be permitted to acquire an additional 270,000 acres and that such lands should be placed in trust to the Navajo Tribe by the United States Government.

The Navajo Tribe has submitted to the Mediators a presentation showing certain lands in Arizona, New Mexico, and Utah that might be acquired. No specific priority order has yet been determined by the Navajo Tribe and the total acreage of all the lands indicated is several times the 270,000 acres recommended. Some of this land is private land, probably available for purchase. Some is United States Government land under the jurisdiction of the BLM while others are National Forest or state-owned lands. The many segments of land suggested as possibilities are at varying distances from the existing larger Navajo reservation.

In order that this particular recommendation may be effectuated, the approval of the Secretary of the Interior will be required. It is clear that discussion by the Navajo Tribe with the Secretary or his authorized representatives and negotiation with private land owners, if any, will also be required.

3. Funding of Section 5(a)(1) Lands to be Acquired by the Navajo Tribe and Comprehensible Recommended Funds to the Hopi Tribe

Funding of the purchase of the additional 270,000 acres is referred to in Section 5(a)(1) as "----from the funds of either tribe or funds under any other authority of law." The Mediators have insufficient knowledge of all possible "funds---under any other authority of law." However, there is one source of funds that appears to us as being logical and fully justifiable. In Section 25 of the Act, the Congress authorized funds for relocation purposes as follows:

Authorized Amount

Purchase by the Relocation Commission of habitations and improvements individually owned by heads of households where relocation is required, moving expenses, and certain additional payments for replacement habitations, etc. (Section 25(a)(1))	\$31,500,000
Incentive payments to heads of household who must be relocated and who elect to relocate voluntarily by arrangement with the Relocation Commission (Section 25(a)(4))	5,500,000
TOTAL	\$37,000,000

This total of \$37,000,000, authorized for relocation purposes, is clearly much larger than the amount required. Our recommendations would result in 3495 Navajos subject to relocation in contrast to 4634 under the "Steiger Line" and in contrast to much larger figures discussed in the Congress at a time when accurate population data were not available. Even larger numbers were feared by the Navajo Tribe.³¹ Allowing for inflation and reservation of some authorized funds for a limited number of 1934 dispute relocations, we believe that there is a surplus of \$12,000,000 by conservative calculations.

Incidentally, another saving will be realized. Final figures are not available but it is reasonably certain that the total costs of the Mediation office will not exceed more than 40 per cent of the authorized amount of \$500,000.

We recommend that \$6,000,000 be allocated to the Navajo Tribe for use in purchase of Section 5(a)(1) lands. While this is a much smaller sum than will be needed for acquisition of 270,000 acres, it will materially assist in such acquisition.

We further recommend that \$6,000,000 be allocated to the Hopi Tribe for use in improvement of its portion of the JUA lands. Such use could be for bridges across major washes, roads, irrigation projects, or other similar uses as may be recommended by the Hopi Tribe and approved by the Secretary of the Interior.

These recommendations are supported by cogent considerations. The Mediators' ability to make a recommended partition that requires far fewer relocations than contemplated by the Congress is due almost solely to two factors. The Navajo team at all times gave major priority to Section 6(d)³²--even at the expense of other considerations. The Hopi team cooperated in good faith in this endeavor. It would have been impossible for the Mediators to develop our recommended partition, absent this cooperation in negotiations. Even though both the Hopi and the Navajo Tribes are likely to contest certain specifics of our recommended partition, this probability does not detract from the major achievements of negotiation. The fruits of those achievements by the two negotiating teams should not be reflected simply in a major reduction of costs to the United States Government.

³⁰The BIA made a computation of the effects of the "Steiger Line" after the enumeration had been completed.

³¹A telegram addressed by Peter MacDonald, Chairman of the Navajo Tribal Council, to members of Congress in the later stages of Congressional debate stated that H.R. 10337 "----would deprive 10,000 Navajo people of their homes."

³²Preservation of more densely populated areas in the JUA to the Navajo Tribe.

To effectuate these recommendations, we recommend to the Secretary of the Interior that he propose to the OMB and to the appropriation committees in the Senate and in the House of Representatives that \$6,000,000 be appropriated to the Navajo Tribe and that \$6,000,000 be appropriated to the Hopi Tribe. Discussions by the Secretary or his authorized representatives with the two tribes concerning the specific content of the proposals will necessarily precede such proposals to OMB and to the Congress. However, the proposals should be developed as rapidly as possible for obvious reasons. The paramount reason is that the additional Section 5(a)(1) lands will be needed by the Navajo Tribe at an early date in order to expedite relocation.

Z. Unity Committee

During the course of these negotiations, a so-called Unity Committee was organized and several meetings were held by that group.

The individuals who comprise this Committee came from two principal sources. One group includes certain Hopi "Traditionalists". The second group consists of certain individual Navajos.

The announced objective of the Unity Committee has been to attempt to prevent, by legal and other means, effectuation of Public Law 93-531.

During the course of these negotiations, notably at the time of the negotiating sessions held at Kayenta and Flagstaff, certain representatives of the Unity Committee appeared and made two requests. The first was that one or more Unity Committee members should sit in and participate in the negotiations. The second and alternate request was that Unity Committee representatives appear before the Negotiating Teams, at a time during official negotiations, to make formal presentations.

After consulting with the two Negotiating Teams, the Mediators declined to grant either request. It was our position that the only negotiators authorized by Public Law 93-531 are the Hopi and Navajo Negotiating Teams, provided for in Section 2(a) of the Act and officially designated by appropriate Resolution of the Tribal Councils. Moreover, we have believed it more appropriate for the Unity Committee representatives to make any formal presentations directly to Tribal Council officials, rather than at a negotiating session.

Despite these rulings against Unity Committee requests, the Mediators did confer separately with the representatives. During these informal conferences, the Unity Committee representatives raised no considerations that had not been fully and adequately explored in negotiations. The sole exception was the Unity Committee position that Public Law 93-531 should be rescinded in its entirety. Each of the two Negotiating Teams also conferred separately with the representatives.

The Mediators do not believe that the Unity Committee will succeed in its attempt to prevent effectuation of Public Law 93-531. However, we consider it advisable to include reference to the Unity Committee in this report.

F. Exclusion of Act of June 14, 1934 Lands from these Recommendations (Sections 8, 9, and 10 of Public Law 93-531)

Sections 8, 9, and 10 of the Act are provisions dealing with the Act of June 14, 1934 Lands, sometimes referred to as the Hvenkopi dispute. These lands, outside the 1932 Reservation, are also in dispute between the Hopi and Navajo Tribes.

Section 1(a) of the Act confers specific authority on the Mediator only to assist in negotiations involving the Joint Use Area of the 1932 Reservation. Section 4(a) refers back to Section 1(a) and therefore provides that the Mediator's authority to make recommendations is confined to the Joint Use Area.

Section 3(c) gives broad authority to the negotiators to make any settlement "not inconsistent with existing law". Conceivably, the Negotiating Teams could have made a settlement of the 1934 Lands dispute along with or after a settlement of the JUA dispute. In fact, that possibility was mentioned briefly by some negotiators. However, those references were few and nothing tangible developed.

The Mediators conclude that we have neither the authority nor any sound basis for making any recommendations whatsoever regarding partition of the 1934 Lands.

Unfortunately, the finding made above does not permit a conclusion that the 1934 Lands dispute can be ignored entirely. Sections 12, 13, 14, and 15 of the Act provide that the Relocation Commission shall have the authority and the responsibility to deal with relocations required both from the JUA and the 1934 Lands. Also, the Section 25 Congressional authorization of funds for relocation purposes technically provides that the authorized funds are for the purpose of payments occasioned by relocations from both the JUA and the 1934 Lands.

It would appear that there may be some inconsistency in the Act occasioned by the fact that, until late in its legislative history, the Congress intended to legislate a specific partition line in the 1934 Lands. That legislative partition was stricken at a late date and court proceedings were substituted in lieu thereof.

The 1934 Lands dispute is currently before the District Court in Phoenix, Arizona at an early stage of proceedings. It is difficult to predict when it may be concluded.

There are two very practical problems that might develop out of the separation of the two disputes.

One is the reasonable certainty that the two disputes will not be resolved simultaneously. Probable difference of timing may present real problems for the Relocation Commission. It does not affect this mediation report except as noted below.

The second problem concerns funds for relocation purposes. As Mediators, we believe it to be our responsibility to recommend a partition of the JUA that will require relocation costs within the limits of the Congressional authorization. Obviously, there is no sound basis for us to make any estimate of the relocation funds that

will be needed for the 1934 dispute after it has been concluded. Our examination of the legislative history suggests that the total amounts of authorizations for relocation purposes were predicted almost solely on relocations from the JUA. The occasional references to 1934 relocations in this connection are few and inconclusive.

We conclude this section of our report by stating our belief that our recommendations on residual savings to be allocated to the Navajo Tribe and to the Hopi Tribe (\$6,000,000 each) plus the actual predictable costs of relocating 3495 Navajos from the JUA represent total costs well within the Congressional authorizations. In fact, we believe that enough authorized money will remain to cover any 1934 relocations that were contemplated by Congress.

C. Claims by Either Tribe not Directly Related to Partition

1. Use of Lands After Effective Date of Partition

Section 16³³ provides for payment by either tribe to the other of fair rental value for use of lands after the effective date of partition.

Under almost any set of circumstances following partition, many members of the Navajo Tribe will use land to be allocated to the Hopi Tribe for some presently unknown period of time. The very few Hopi families who will be subject to relocation will likewise use Navajo land. Even longer periods of time may be involved in any life estates or phased relocations that may be arranged as a result of these proceedings.

Since the Act provides that the Secretary of the Interior shall determine the amount of "fair rental value", the Mediators make no specific recommendation as respects any formulae that the Secretary may develop to effectuate this purpose. As the Act reads, we assume that any basic formulae are within the prerogative of the Secretary. Presumably, the BIA will administer many aspects of this Section.

However, disputes could arise between the two tribes as to the nature and extent of land use. The Mediators recommend that the Relocation Commission be designated by the Court and by the Secretary of the Interior as the agency to decide initially any differences of opinion between the two tribes on such aspects of the matter. Any decision by the Relocation Commission in a disputed case should be subject to appeal by either tribe to the Court. A reason for this recommendation is that the Relocation Commission will necessarily be best informed of the facts as to the nature and extent of such land use after the effective date of partition.

The Mediators also recommend that the United States Government, not the Navajo Tribe, be held accountable for payment to the Hopi Tribe of such portion of "fair rental value" total sums as might be caused by negligence or delay on the part of the Department of the Interior.

33 Section 16(a)--"The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 8 and 3 or 4 subsequent to the date of the partition thereof."

Section 16(b)--"The Hopi Tribe shall pay to the Navajo Tribe the fair rental value as determined by the Secretary for all use by Hopi individuals of any lands partitioned to the Navajo Tribe pursuant to sections 8 and 3 or 4 subsequent to the date of the partition thereof."

As we see it, such "negligence or delay" could possibly arise out of: (a) delay in providing the 250,000 acres of BLM land (Section 11(a)) to which the Navajos may be relocated, or (b) undue delay by the Secretary of the Interior in acting on the Mediators' recommendations regarding additional lands to which Navajos may be relocated (Section 5(a)(1)).

2. Trader Fees and Commissions, etc.

Section 18(a)(1) provides that either tribe is authorized to proceed in Court:

"---for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so collected, and not paid to the other tribe, together with interest at the rate of six (6) per centum per annum compounded annually;---"

Section 6(g) is a substantially identical provision except that it is one of the criteria established by the Congress to guide the Mediators in these recommendations.

This is one of the issues that the Navajo Negotiating Team hoped would be settled in negotiations. However, it was not resolved and, due to the press of other more important matters, no detailed evidence is available to the Mediators. It does appear that some accountings and some payments have been made but it also appears that additional accounting and payment may be required.

Under these circumstances, the Mediators can make no recommendations regarding this issue.

It is concluded that this is an issue that the District Court must decide, subject to certain time limits for commencement of such claims (Section 18(b)).

3. Land Use Since September 28, 1962

Section 18(a)(2) provides that either tribe is authorized to proceed in Court:

"---for the determination and recovery of fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands;---"

Section 6(h) is a similar provision except that it is a Congressional guide to the Mediators for purposes of this report.

As has been noted earlier, members of the Navajo Tribe have had actual use of the bulk of the land in the JUA for grazing purposes since September 28, 1962. Members of the Hopi Tribe have had limited and less extensive use of land in the JUA for grazing purposes. No specific facts on this matter were presented or discussed by the Negotiating Teams during the negotiation period.

For reasons comparable to those noted for Trader Fees and Commissions, the Mediators can make no recommendations regarding this issue. The Court will have to decide the matter, subject to certain time limits for commencement of such claims (Section 18(b)).

4. Damage to Lands Since September 28, 1962

Section 18(a)(3) provides that either tribe is authorized to proceed in Court:

"---for the adjudication of any claims that either tribe may have against the other for damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: Provided, That the United States may be joined as a party to such action and, in such case, the provisions of sections 1346(a)(2) and 1505 of title 28, United States Code, shall not be applicable to such action."

Except for being made aware by the Navajo Negotiating Team of its belief that the United States Government should be held liable for any assessment of possible damages under this section, there was limited discussion of this issue during negotiations.

For reasons similar to those noted earlier as respects Trader Fees and Commissions, as well as land use, the Mediators can make no recommendations regarding this issue. It appears that the Court will have to decide the matter, subject to certain time limits for commencement of such action (Section 18(b)).

H. Relationship of these Recommendations to Land Restoration and Fencing (Section 19 and Section 5(a)(2) of Public Law 93-531)

There are three different but interrelated provisions of the Act or orders of the District Court having possible bearing on the matter of land restoration in the JUA.

Section 19(a) of the Act reads as follows:

"Notwithstanding any provision of this Act, or any order of the District Court pursuant to section 3 or 4, the Secretary is authorized and directed to immediately commence reduction of the numbers of livestock now being grazed upon the lands within the joint use area and complete such reductions to

carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after the date of enactment of this Act. The Secretary is directed to institute such conservation practices and methods within such areas as are necessary to restore the grazing potential of such area to the maximum extent feasible."

Section 25(a)(2) of the Act authorizes appropriations not to exceed \$10,000,000 for effectuation of Section 19(a).

The Joint Use Administrative Office of the BIA has, in order to implement Section 19(a), proposed, early in 1975, a plan whose purpose is to:

- (a) Reduce livestock to allocated numbers
- (b) Fence certain areas to facilitate land restoration
- (c) Apply restoration measures
- (d) Issue livestock grazing permits to both the Navajo and Hopi Tribes as well as to apply conservation restrictions and enforce compliance.

The plan proposed to carry out reduction, fencing, water developments and range restoration on a staggered basis, completing one of five areas each year. According to the BIA, the five year period fits into human needs--both social and economic--and permits an orderly program.

The Department of the Interior has submitted to the Congress a specific request for actual appropriation of funds for this program.

The second series of matters bearing on land restoration are certain Orders of the District Court.

Following Hopi claims that excessive numbers of Navajo livestock were further depleting the already overgrazed ranges in the JUA, the Court issued an Order on October 14, 1972 providing for drastic livestock reduction within one year after the date of the order. Further court proceedings were concerned with non-compliance with the Order.

Finally, recent proceedings were concerned with a question as to whether the provisions of Public Law 93-531 superceded earlier Findings and Orders of the District Court.

On October 14, 1975, the District Court issued two Orders. One includes a finding that Public Law 93-531 does not supercede earlier Orders and does not alter or modify them. The other was an Order directing the Department of the Interior to proceed immediately with livestock reduction and therefore casting some doubt on certain aspects of the BIA's proposed five year plan. The period for possible appeal of these Orders expires almost simultaneously with the due date of this report.

Since the Court and the two tribes are fully familiar with this aspect of the matter, the Mediators have indicated here only a very brief outline.

The third matter is Section 5(a)(2) which reads:

"... the Mediator is authorized---to recommend that, subject to the consent of the Secretary, there be undertaken a program for restoration of lands lying within the joint use area, employing for such purpose funds authorized by this Act, funds of either tribe, or funds under any other authority of law;---" (underlining supplied)

Livestock reduction, referred to above both under the proposed BIA plan and the Court Orders, is an important ingredient of land restoration. As we understand the situation, there is no fundamental difference of opinion between the BIA and the Court as to the ultimate purpose and result of livestock reduction. There is a difference of opinion as to the time period to be allowed and, possibly due to different timing, as to method (voluntary vs. involuntary). As Mediators, we believe it inadvisable to make any recommendations regarding the livestock reduction aspect of land restoration.

Other aspects of land restoration appear not to be affected materially by Court Orders issued to date. As we have appraised these other aspects of the BIA's so-called five year plan, we believe the basic thrust and import of the plan to be sound. Its intent is to continue restoration, even after final partition, and on both sides of the partition line. We believe this to be essential to the long term well being of both tribes.

Our only basic concerns go to three points:

Certain features of the BIA plan raise serious questions as to whether the Congress authorized enough funds to fully accomplish the intended result. For example, limitation of funds is stated by the BIA to be a reason for treatment of only 130,000 acres out of a total of 500,000 acres that should be treated by seeding, brush control, etc. It is fairly obvious that both the Navajo and Hopi populations utilizing the JUA after partition should not look to livestock as their sole economic base. Other economic pursuits must be continued and amplified. However, livestock will continue to be an important ingredient of the economic survival and life style of both tribes. The Congress has already recognized in Public Law 93-531, the partial responsibility of the United States Government for the overgrazed situation that now exists. It has also provided some funds for correction. If those funds should be inadequate, the Secretary of the Interior should request Congress to appropriate reasonable additional funds to complete its own program, as outlined in Public Law 93-531.

Secondly, it should be obvious that drastic livestock reductions, particularly prior to the earliest feasible date for relocation, will impose serious financial hardship on those Navajos who are now primarily dependent on livestock for their livelihood. This is so, irrespective of the side of the recommended partition on which the Navajos now reside. There will be an interim period of several years, pending gradual land restoration to its potential, during which period the land will support even fewer people than it now does in its overgrazed condition. There is probably no answer to this problem except amplified welfare payments of one sort or another. The BIA anticipates some increase in the cost of its General Assistance Program. We understand that the BIA has alerted certain other governmental relief and assistance agencies of probable impact.

Although not so intended, livestock reduction can be a practical but hard inducement to relocation at the earliest possible date. In some respects it is a legitimate pressure. However, Navajo hunger should not be a valid weapon. Nor would Navajo hunger assist the Hopi in their objectives. To the contrary, it would have a tendency to stimulate Navajo depredations on Hopi livestock and land.

As Mediators, we obviously are unable to estimate costs of this factor at this time. Nor can we estimate accurately the time periods during which such costs may be incurred. We do note the possible significance of this matter under the "or funds under any other authority of law" portion of Section 5(a)(2).

The third aspect of our concern under Section 5(a)(2) is in regard to costs of surveying and fencing of boundaries.

Section 19(b) reads:

"The Secretary, upon the date of issuance of an order of the District Court pursuant to Sections 8 and 3 or 4, shall provide for the survey location of monuments, and fencing of boundaries of any lands partitioned pursuant to Section 8 and 3 or 4."

Section 25(a)(3) of the Act authorizes a total sum of \$500,000 for survey and fencing.

The linear miles of new boundary fence, including double fencing along roads, that would be required by the partition recommended by the Mediators is approximately 385 miles.

Even though our recommended partition requires less fencing of new boundaries than many of the partition lines proposed by the two tribes, it is already certain that the \$500,000 authorized will be insufficient to cover the survey costs and the costs of fence erection. Already inflated costs and possible further inflation of costs appear to be a reason.

In any event, under the "funds under any authority of law" portion of Section 5(a)(2), the Mediators hereby recommend that the Secretary of the Interior request that Congress appropriate funds over and above the \$500,000 authorization of Section 25(a)(3) as may be required to complete the survey of boundary and adequate fencing of boundary. We cannot, at this time, accurately estimate the additional sums that will be required.

III. MEDIATOR RECOMMENDATIONS ON SPECIFIC ISSUES

A. Land Partition

1. Preliminary Questions Affecting Acres to be Divided

The total acreage of the JUA, properly surveyed, is 1,822,082 acres. This acreage figure, supplied by the BIA to the negotiators and to the Mediators, is derived as follows:

Total acreage of 1882 Reservation (1965 survey)	2,472,095
Less--acreage of District 6 (1965 survey)	650,013
BALANCE - JUA	1,822,082

JUA acreage by quarter quads is also available.

Two preliminary questions have been raised by the Navajo team regarding total acreage to be divided.

a. Inaccurate 1914 Survey

According to information supplied to the negotiating team and to the Mediators by the Department of the Interior, a survey of the 1882 Reservation was made in 1914. The next survey, made by the BLM, was completed in 1965, approximately three years after the Healing vs. Jones decision. The 1965 survey disclosed that the southern boundary of the 1882 Reservation is approximately 1 1/4 miles south of the 1914 surveyed boundary and the western boundary is approximately 1/4 miles west of the 1914 surveyed boundary for a distance of approximately 24 miles, south to north. Parts of the larger Navajo reservation meet these southern and western boundaries.

What these earlier survey errors mean is that the Navajo Tribe had assumed, until 1965, that its larger reservation included the following approximate acreage, now known to be within the JUA:

	Approximate Acres within JUA
Southern Boundary (approximately 1 1/4 miles wide and extending the entire width of the 1882 Reservation)	45,400
Western Boundary (approximately 1/4 mile wide and approximately 24 miles long)	4,054
TOTAL	49,454

A subsidiary fact, relevant to part of this total acreage, is that certain lands within the area of the survey error are covered by allotments and lands placed in trust to the Navajo Tribes by the

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United States Government. These lands can be summarized as follows:

Approximate Acres within JUA
758 ³⁴

Allotments

7 Allotments, issued to individual Navajos by the United States Government during a period from 1920-1925. (1,120 total acres but some allotments straddle the correct 1882 Reservation boundary)

Lands Placed in Trust to Navajo Tribe

6,412³⁴

a. Checkerboard quit claims by a railroad to the U.S. Government--Ranges 15 through 20 along southern boundary. (These quit claims straddle the correct 1882 Reservation.)

916³⁴

b. Checkerboard warranty deeds to U.S. Government--Range 21 along southern boundary and straddling the correct 1882 Reservation.

c. Checkerboard unsurveyed lands placed in trust by the U.S. Government to the Navajo Tribe.

3,840³⁵

(1) Ranges 12 1/2, 13 and 14 along southern boundary and straddling the correct southern boundary (equivalent of approximately 6 sections).

2,134³⁵

(2) Areas straddling the correct western boundary (equivalent of approximately 3 1/3 sections).

14,060

TOTAL

³⁴Acres data supplied to Mediators by BIA

³⁵ Approximate acreage calculated by Cartographer retained by Mediators based on maps supplied by BIA. After these calculations were made and partition maps prepared, BIA has indicated some question about accuracy of these maps. BIA's "high" acreage figures in both instances are higher than those noted above but "low" figures are lower.

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When the BIA began to build a fence along the southern boundary, soon after the 1965 survey, the individual Navajos who held allotments that straddled the correct 1882 Reservation boundary complained. Moreover, we have been advised by the Navajo team that some of the seven persons who hold allotments have threatened to sue the Navajo Tribe and the United States Government if their land should be partitioned to the Hopi Tribe. It may also be presumed that some individual Navajos built homes, prior to 1965, within the other lands that had been placed in trust to the Navajo Tribe by the United States Government at a time when they thought that they were building within the larger Navajo reservation. There is not much doubt that they would complain if the land they now occupy should be partitioned to the Hopi Tribe. The data available to us disclose that there are several such homes and a school within the 1 1/4 mile wide strip along the southern boundary but none within the narrow strip along the western boundary.

The Mediators have deemed it advisable to recognize these potential problems in our recommended partition. We recommend that the entire southern strip (approximately 1 1/4 miles wide) be included in the Navajo reservation except for one relatively small area (Area B) in which only a very few Navajos reside. As will be developed immediately hereafter, Area B will be Navajo or Hopi dependent upon the decision of the Court. As respects the western strip (approximately 1/4 mile wide), we do recommend that most of that strip, in which no Navajo individuals reside, should be partitioned to the Hopi Tribe. We believe that these recommendations will avoid any unnecessary problems involving individuals. For example, it would be intolerable if either a Navajo allottee or a Navajo living on lands that have been placed in trust to the Navajo Tribe and whose lands straddle the correct 1882 Reservation border should be placed in a situation where he would be partly under Navajo jurisdiction and partly under Hopi jurisdiction.

The recommendations made above and which will be incorporated in our detailed recommended partition do not solve a larger question as to the total acreage that should be partitioned.

Both negotiating teams, though holding quite different positions on the merits, agree in principle that this larger question must be decided by the Court as an interpretation of *Sealing vs. Jones*.

The Mediators make no specific recommendations on this issue. However, without being presumptuous as to the arguments that will be made before the Court by both tribes or as to the Court's decision, we do believe that there are three and possibly four alternative decisions that the Court might make. We suggest these alternatives in no necessary priority order.

(1) Alternatives Available to the CourtAlternative No. 1

The Court could decide that all 1,822,082 acres should be available for partition.

The basic arguments for this alternative, presumably to be supported by the Hopi Tribe, are that Healing vs. Jones quieted title to the entire JUA, that the JUA was correctly described in the Healing vs. Jones decision, and that any errors of earlier surveys or any allotments granted to Navajos or any other lands within the JUA that were placed in trust to the Navajo Tribe do not affect the total acres to be partitioned.

The basic arguments against this position, presumably to be supported by the Navajo Tribe, are that both the Navajo and Hopi Tribes were unaware of these survey errors in the presentations by the parties in the Healing vs. Jones case. Moreover, the Court was not aware of these errors when the Healing vs. Jones decision was written. The correct survey was not made until 1965. The allotments and the lands placed in trust to the Navajo Tribe may be cited as specific evidence to this effect.

If the Court should decide entirely for the Hopi Tribe under this alternative, the Mediators have made allowance for this possibility in our recommended partition. Specifically, both Area A and Area B on our partition maps would be partitioned to the Hopi Tribe.

Alternative No. 2

The Court could decide that the total acreage available for partition should be the acres known in 1962 to be within the JUA. Such acreage would be 1,822,082 acres less 49,454 or 1,772,628 acres.

The arguments against and for such a decision are essentially the same as those noted for Alternative No. 1.

If the Court should decide entirely for the Navajo Tribe under this alternative, the Mediators have made allowance for this possibility in our recommended partition. Specifically, both Area A and Area B would be partitioned to the Navajo Tribe.

Alternative No. 3

The Court could decide that the survey errors should be ignored, as such, but that the allotted lands and the lands placed in trust to the Navajo Tribe should be recognized as lands that are not subject to partition. Acreage to be divided would then be 1,822,082 acres less 14,060 acres or 1,808,022 acres.

We do not presume to speculate as to how the Hopi Tribe and the Navajo Tribe will argue this alternative. The essential question would be how the Court in Healing vs. Jones would have reacted to these allotted lands and to the lands placed in trust to the Navajo Tribe if the information had been available to the Court while Healing vs. Jones was being tried and decided.

If the Court should decide on this alternative, the Mediators have made allowance for this alternative in our recommended partition. Specifically, Area A would be partitioned to the Hopi Tribe and Area B would be partitioned to the Navajo Tribe.

Alternative No. 4

A fourth possible alternative would be for the Court to decide that under Healing vs. Jones, the correct map should have been a map, bordered on the south by an irregular indented border reflecting the allotments and the lands placed in trust to the Navajo Tribe and on the west by an indented, irregular border reflecting the lands placed in trust to the Navajo Tribe. The resulting total acreage of the JUA to be partitioned would be 1,808,022 acres--identical to Alternative No. 3.

As a practical matter, this alternative is substantially identical to Alternative No. 3 except that if the Court should adopt it, it might possibly result in an irregular border, after partition, especially along the west side of the JUA.

The Mediators have made no specific allowance for this alternative in our recommended partition lines, believing that the solutions noted under Alternative No. 3 should apply. We believe that an irregular, indented border along the west side between the land to be partitioned to the Hopi Tribe and the larger Navajo reservation would be undesirable.

b. Peabody Coal Lease

In quarter quads 55 NW, 55 NE, and 56 NW along the northern border of the JUA, there are a total of approximately 40,000 acres leased by the two tribes to the Peabody Coal Company in June, 1966. These leased lands consist of two irregularly shaped prongs extending south from the northern boundary of the JUA to a distance of about one mile from the southern line of these three quarter quads. There is an irregular area between the two prongs that is not included in the lease. The two tribes share equally in the royalty payments from this lease.

The terms of the lease provide that Peabody will restore the land after open pit mining to a condition compatible with the surrounding mesa. The lease terms also state that the Company will compensate those individuals who are temporarily displaced while mining and restoration occur on land on which they have lived by providing for alternative living arrangements.

The Navajo team insists that in determining the total acreage to be partitioned or in some other appropriate manner, these leased lands should be taken into account. The Navajo team requests consideration for two reasons.

Some question has been raised as to whether the land will actually be restored after completion of mining to a condition fully comparable to its original state. Essentially, this is a question of land quality. The BIA has advised us that, in its determination of sheep units (SUYL), that will be discussed hereafter under the subject of land quality, it has assumed that SUYL, both 1973 and potential, will be the same as would have been computed if no mining should be in progress. The lease provides that the Black Mesa will be returned to the tribes "in as good condition as received, except for ordinary wear, tear and depletion incident to mining operations." The Peabody restoration is being undertaken under what it calls "Operation Green Earth", a reclamation program developed out of experience at some 40 Peabody Mines located in various states. We have observed some parcels of land in this Peabody lease area that have been restored and reseeded.

In preparing this report and recommendation, the Mediators have assumed that land reclamation by Peabody will result in restoration to a condition comparable to its values, both 1973 and potential SUYL, prior to mining. However, we do not presume to be experts in this matter.

A second aspect of the matter, stressed even more vigorously than the first by the Navajo team, is the unquestioned fact that, for periods of time beginning with the start of open pit mining in a specific area and continuing until restoration has been completed, successive parcels of land will be totally unavailable for habitation, grazing, and other normal uses by individuals. The acreage of land unavailable for normal use may vary from time to time but some will be unavailable throughout the 35 year term of the lease. The average duration of unavailability of each parcel of land, from the start of mining to completion of restoration, can be estimated at about five years.

It is also apparent that land over and above the open pit areas, will be unavailable for normal individual use for much longer periods of time. This additional land consists of acres occupied by Peabody for mining equipment, loading facilities, conveyors, access roads, etc. Much of such land will be unavailable for normal use continuously until 2001, the terminal year of the lease.

In total, we estimate that there will be an average of 5000 acres throughout the Peabody lease area that will be unavailable for normal use until the year 2001.

Until the effective date of partition, no important questions could logically be raised regarding these problems. The land is joint use land and the royalties from the lease are divided equally.

Following partition, the problem may be different. Specifically, should the Navajo Tribe be granted some concession if the Peabody lease lands should be wholly or primarily on the Navajo side of the partition?

As we see it, there are at least three possible solutions to this problem.

One possibility would be to draw partition lines that would give approximately one-half of the Peabody Lease to the Navajo Tribe and divide the problem equally. We have rejected this "half and half" possibility for two primary reasons. One, the Hopi portion would extend farther north than is logical to provide adequate accessibility to the Hopi Tribe. Secondly, a one-half Hopi portion in the southern part of the lease would include a very sizeable number of Navajo homes, thereby requiring more relocations than are advisable. Our recommended partition line does include approximately 6070 acres or 15.2 per cent of the Peabody lease on the Hopi side of the partition. This Hopi portion contains only a limited number of existing Navajo homes.

A second possibility would be to subtract acreage from the total acreage of the JUA for purposes of partition in recognition of the problem. We reject this possibility because the partition is a permanent partition. It would not be feasible or desirable to make a compensating land adjustment to the Hopi Tribe in 2001, after the 35 year lease has expired.

A third possibility would be to require the Hopi Tribe to pay to the Navajo Tribe a specific sum throughout the lease period after effective date of partition to compensate the Navajo Tribe for non-use of the Peabody lease area of that portion that is in excess of an equal division.

Our recommended partition line includes approximately 6070 acres of the Peabody lease on the Hopi side and approximately 32,930 acres on the Navajo side. The excess recommended for partition to the Navajo Tribe beyond an equal division is 27,860 acres (40,000 acres less 12,140 acres). This is 69.65 per cent of the total Peabody lease area.

It seems to us that this future situation is generally comparable to the "Land Use Since September 28, 1962" problem (Section 18(a)(2) of the Act) that was discussed on pages 31-32 of this report, except that it is in reverse. The Hopi Tribe will petition the Court for monetary payment from the Navajo Tribe for non-use of certain joint land since September 28, 1962 and up to the effective date of partition. We do not presume to speculate how the Court will decide that matter. However, if the Court does award monetary sums to the Hopi Tribe under Section 18(a)(2), we believe that the Court should award monetary payments to the Navajo Tribe for future non-use of Peabody lease lands.

Specifically, we recommend that such payments be made on a yearly basis, beginning as of the effective date of partition and continuing until the terminal date of the Peabody Lease, based on 3,475 acres (69.5 per cent of 5,000 acres). We do not recommend a dollar sum, believing that the annual rate per acre would be determined by the Court, including some reasonable relationship to the Court's decision under Section 18(a)(2).

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2. Healing vs. Jones Requirements

In Healing vs. Jones, the Court found that it then had no authority to partition the JUA. However, the Court did make a very significant finding that is relevant to partition now that partition is required by Public Law 93-531. Said finding states that:

"The Hopi and Navajo Indian Tribes for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, individual and equal rights and interests both to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6,..." (underscoring supplied)

This "equal rights and interests" finding is binding on the two tribes, on the Mediators and on the District Court.

Now such "equal rights and interests" are to be effectuated by partition is now the major issue in this case.

3. Latitude Given to the Negotiators and to the Mediators

The first sentence of Section 3(c) of the Act reads:

"For the purpose of this section, the negotiating teams may make any provision in the agreement or partial agreement not inconsistent with existing law."

This wide latitude permitted the negotiators either to ignore or modify many provisions or criteria contained in the Act. The Congress clearly intended that mutual agreement could supercede certain of the specific content of the congressional stipulations, subject only to the "not inconsistent with law" limitation and subject to approval of the Secretary of the Interior and of the Attorney General (Sections 3(a) and 3(b)). Since no complete or partial agreement has been reached, this provision is now inapplicable.

The amount of latitude granted to the Mediators for purposes of this report and recommendations was considered in general terms in the preliminary portion of this report (pages 15 and 21). With specific reference to partition, this aspect of the matter will be subsequently noted.

4. Public Law 93-531 Criteria

Sections 6(b), (d), (e) and (f) of the Act are the four Congressional criteria most directly relevant to partition of the surface of the JUA.

In our examination of the legislative history, we have endeavored to determine whether the Congress intended any priority order of these four criteria. The results of this examination are not conclusive. However, we do believe that if there were any priority order, it would be:

- a. Acreage and quality of land (Section 6(d))
- b. Higher density populations and social, economic and cultural disruption (Section 6(b))
- c. Contiguous land (Section 6(e))
- d. Fencing (Section 6(f))

No evidence of priority exists as between the last two criteria.

As Mediators, our own appraisal of the partition problem tends to follow that same sequence. Moreover, we believe that the negotiating teams did, in fact, accord a similar informal priority sequence to these four criteria except that the Navajo team emphasized higher density population and social, economic and cultural disruption above all others.

In any event, we do not believe that any possible priority order is a matter of great significance. All four factors are closely interrelated; some tend to be contradictory. There is no escape from exercise of judgment in these recommendations.

It should also be noted that the Congress recognized that effectuation of these four criteria need not be precise. In Section 6(b), (d), and (f) the words: "...insofar as (is) practical..." are used. In Section 6(e) the qualifying words are: "...where feasible and consistent with the other provisions of this section..."

We now turn to consideration of each criterion.

a. Acreage and Quality

Section 6(d) of the Act reads:

"In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality; Provided, That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: Provided further, That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship."

Acres will be considered first.

(1) Acres

In the very early stages of negotiations and occasionally thereafter, the Navajo team proposed that acreage of the JUA should not be divided equally. These proposals took three forms. One type of proposal was that the Navajo Tribe receive more than half the JUA area and that the Hopi Tribe receive monetary compensation for any differential. A second proposal was that the Navajo Tribe might purchase certain ranch lands outside the JUA for use by the Hopi as a part of the Hopi reservation in lieu of a full 50 per cent division of the JUA to the Hopi Tribe. A third type of proposal was that certain lands in the larger Navajo reservation should be exchanged for equivalent acreage of lands in the JUA.

The Hopi negotiating team, however, firmly rejected all of these proposals. Throughout the negotiations, the Hopi team has insisted on receiving not less than 50 per cent of the JUA acreage.

It is clear from the text of Section 6(d) that the Navajo proposals are permissible solutions by negotiation. It is equally clear to us that a 50-50 acreage partition is not mandatory on the Mediators for purposes of these recommendations or on the Court for purposes of final determination.

At the first and second negotiating meetings as well as those thereafter, the Mediators supported a 50-50 acreage division. We did so for three primary reasons. First, as a practical matter, the Hopi team would continue negotiations on no other basis. Secondly, although we believe that Healing vs. Jones and Public Law 93-531 would permit appropriate effectuation of any one of the Navajo alternatives, we also believe that a 50-50 acreage partition is the most logical result of both. Finally, a 50-50 acreage division is subject to reasonably precise computation whereas all other factors require exercise of judgment.

As noted on pages 9 and 10, the two teams did reach an agreement, in principle, on this issue. They agreed to a 50-50 acreage partition of the JUA. Undoubtedly, that agreement in principle was a result, at least in part, of oral pressures on the Navajo team by the Mediators and, in view of the Hopi team position, the desire of the Navajo team to continue the negotiation process.

The partition recommended by the Mediators will result in a 50-50 acreage division of the JUA, based on as accurate a computation as can be obtained. Appendix 2 shows that division, by quarter quad acres and in total. Moreover, a 50-50 division will be the result of any of the alternative decisions that may be reached by the Court on the questions that have arisen out of the survey errors that were found in 1965. The various alternatives available to the Court in this matter are premised on equal division of the net surface area subject to partition, to be effectuated by the suggested alternative dispositions of Area A and Area B.

(2) Quality

Both tribes have insisted on obtaining at least equal quality of land. However, there has been some mutual recognition of the fact that to obtain both equal acres and equal quality may not be a fully obtainable goal. Moreover, quality measures cannot be as precise as computation of acreage and the two tribes have somewhat different concepts of quality.

It will be noted that Section 6(d) refers specifically to "...value with improvements and its grazing capacity fully restored..." as the only stated measure of quality.

Examination of the legislative history gives us no completely clear clues as to Congressional intent. It is not known with certainty what is meant by "improvements". Some earlier bills in Congress tended to define quality almost solely in terms of grazing capacity, however, this was subsequently replaced by the single word "quality".

We will examine the quality question under a number of sub-headings suggested by the discussion during negotiations. As noted in pages 20 and 21, a substantial amount of factual data has been made available to the Mediators.

(a) SUYL (Sheep Units Year Long)

Data on SUYL, computed by the BIA on the basis of the Mediators' recommended partition, are shown both by quarter quads and by totals in Appendix 3. Sheep units can be converted to cattle units by a 4 to 1 ratio.³⁶ We will use sheep units exclusively to avoid confusion.

The BIA data for 1973 show that the Mediators' recommended partition would result in 9248 SUYL on the Hopi side and 7254 SUYL on the Navajo side. In other words, the Hopi Tribe would obtain the better half of the JUA in terms of grazing capacity under present range conditions.

Reflecting the very serious extent of overgrazing in the JUA, the potential SUYL for the entire JUA are 159,470 in contrast to 1973 SUYL of 16,502.

The BIA data for potential grazing capacity after full restoration reflect that the Mediators' recommended partition would result in 78,524 SUYL on the Hopi side and 80,946 SUYL on the Navajo side.

The SUYL figures quoted above are all based on division of the entire 1,822,082 acres in the JUA (Court decision - Alternative No. 1). If the Court should decide on Alternatives 2 or 3, relatively small differences would occur, as shown in Appendix 3.

Since Section 6(d) refers to "grazing capacity fully restored", 1973 SUYL data must be ignored for purposes of possible compensation. The difference of 2,422 SUYL potential units, in favor of the Navajo Tribe, does raise a question of possible compensation to the Hopi Tribe.

³⁶The BIA suggests this 4 to 1 ratio; however, some other data suggest a ratio of 5 to 1.

(b) Water Resources

The Section 6(d) reference to "improvements" possibly includes approximate monetary value of existing wells and developed springs.

Based on data supplied by the BIA to the Mediators, our Consulting Geographer has developed data by quarter quadrats for Appendix 4.

The partition recommended by the Mediators would result in distribution of existing wells and springs as follows:

Type of Resource and Source of Funds for Construction	Hopi Side of Partition	Navajo Side of Partition
Drilled Wells - Government	23	32
Drilled Wells - Navajo	13	27
Drilled Wells - Private	3	1
Dug Wells - Government	27	22
Dug Wells - Navajo	6	0
Dug Wells - Private	0	1
Developed Springs - Government	27	50
Developed Springs - Navajo	7	2
Developed Springs - Private	0	0
Undeveloped Springs	28	31

In preparation of our recommended partition lines, the Mediators have attempted, wherever possible, to leave a nearby water source on the Navajo side of the partition for the Navajo families who will not be relocated. We have also attempted to leave water sources on the Hopi side of the partition for Hopi use of the land. As will be noted hereafter under the heading "Water Commission" this has not always been possible. Some new wells will be required to supply an appropriate water source for both the Navajo and the Hopi. Some Navajo families not relocated may have to change their source of water.

In preparation of our recommended partition, the Mediators have not attempted to make any calculations of the extent of possible undeveloped water resources for wells on each side of the partition. However, we estimate that there is no substantial differential.

It should be noted that SUTL data include average rainfall as one important ingredient in the total computation, thereby indirectly reflecting recommended division of land in terms of rainfall available for forage and agriculture.

(c) Agricultural Potential

Both the Hopi and Navajo Tribes depend to some extent on agricultural production. The Hopis, in particular, have developed methods of "dry farming" to utilize land that would otherwise be non-productive.

At the present time, there is limited use of irrigated land in the JUA. However, there is some potential for such development.

In our recommended partition lines, the Mediators have been conscious of the need for an equitable division of lands that can be used for "dry farming" and of lands that can be further developed by means of irrigation. We believe that an equitable division is implicit in our recommendations; however, we have not attempted to make any precise computations.

37 Wherever "Government" is indicated, the costs of these water developments was from Government funds. Similarly, "Navajo" or "Private" means that the costs of these developments were assumed either by the Navajo Tribe or private individuals, primarily Navajo.

(d) Roads

The 1882 Reservation, particularly the JUA, is not well served by paved roads. The great bulk of road mileage consists of unpaved roads in varying stages of maintenance. Many of these unpaved roads, especially those that cross washes, are not useable for powered vehicles during parts of the year.

Accessibility by road could be an important aspect of land value. Even though most roads can be used in common by both tribes and the general public, accessibility to good roads can be considered as a factor affecting land value.

The Mediators' recommended partition divides paved roads in the following manner.

Probably the principal paved road is State Route 264. It crosses the entire width of Hopi District 6 and extends approximately 19.2 miles west in the JUA and approximately 12.2 miles east in the JUA. All of the eastern segment of State Route 264 would be partitioned to the Hopi Tribe except for approximately 3.2 miles across what may be called a "Navajo Island" around Jeddito. The recommended division of all of State Route 264 that lies within the JUA is approximately 26.2 miles to the Hopi Tribe and approximately 5.2 miles to the Navajo Tribe.

U. S. Route 160 is a paved road that cuts across the northwest corner of the JUA for a distance of approximately 28.1 miles. The recommended partition would place all of U. S. Route 160 in the Navajo portion.

State Route 77 is a paved road in the southeast corner that runs south from State Route 264 through the JUA to Holbrook, Arizona. The recommended partition would place approximately 14.1 miles in the Navajo portion and approximately 4.0 miles in the Hopi portion of the divided land.

State Route 87 is a paved road that runs south from State Route 264 through Hopi District 6 and through a portion of the JUA to Winslow, Arizona. The recommended partition would place approximately 4.2 miles of the JUA section in the Hopi portion and approximately 1.3 miles in the Navajo portion.

Indian Route 4 is a road that is primarily unpaved, but a paved portion runs east from Pinon for a distance of approximately 15.4 miles to the eastern boundary of the JUA. Under the recommended partition all of this paved road would be in the JUA area partitioned to the Navajo Tribe.

38 This western segment of State Route 264 includes approximately 8.6 miles that are part of the existing boundary between District 6 and the JUA. These miles will be entirely within the Hopi Reservation under our recommended partition, as well as the rest of the western segment.

(f) Compensation for Possible Unequal Quality of Land

In the various preceding sections, the Mediators have indicated to the Court and to the two tribes the factual data presently available to us that may have a bearing on land quality. The critical words in Section 6(d) are: "---value with improvements and its grazing capacity fully restored---".

Another important feature of Section 6(d) is the "provided further" part of the section. It states that the Federal Government may be required by the District Court to pay all or part of any differential in value under certain circumstances.

The BIA has advised the Mediators that it has retained expert advice on translation of the difference of potential SUYL into money terms. That information is not presently available to us or to either tribe.

We do not presume to speculate as to how the Navajo Tribe, the Hopi Tribe, or the United States Government will argue the question of the total amount of compensation, if any, that may be required under Section 6(d). Nor do we speculate as to how the various parties will argue the second question as to who shall pay the value difference, if a difference is found by the Court. Both of these questions must be reserved for the Court to decide inasmuch as we have no sound basis for a recommendation.

b. Higher Density Populations and Social, Economic and Cultural Disruptions

Section 6(b) of the Act reads:

"The boundary lines resulting from any partitioning of lands in the joint use area shall be established so as to include the higher density population areas of each tribe within the portion of the lands partitioned to such tribe to minimize and avoid undue social, economic, and cultural disruption insofar as practicable."

Our examination of the legislative history indicates that the Congress considered this to be a major criterion. An amendment introduced by Senator Montoya³⁹ would have given this factor priority over all others, including acreage and quality of land. However, it was withdrawn. Withdrawal of the amendment followed discussion in the Senate⁴⁰ that suggested the importance of this criterion even though not to the extent intended by the Senator. Other portions of the legislative history stress the importance of the major problems that would arise due to forced reallocation of very large number of Navajo families.

³⁹Congressional Record--Senate, December 2, 1974, S-20333.

⁴⁰Congressional Record--Senate, December 2, 1974, S-20333 to S-20337.

The effect of the recommended partition on all paved roads in the JUA and outside District 6 can be summarized as follows:

Route	APPROXIMATE JUA MILEAGE IN	
	Hopi Portion	Navajo Portion
State 264	26.2	5.2
U.S. 160	0	28.1
State 77	4	14.1
State 87	4.2	1.3
Indian Route 4	0	15.4
TOTAL	34.6	64.1

One of the practical effects of Healing vs. Jones and the subsequent Court Orders banning new construction except by mutual agreement of the two tribes is the fact that there has been little or no construction of new paved roads in recent years.

Once partition has been effectuated, both tribes will undoubtedly want to propose new paved roads and bridges, funded by sources not directly relevant to this dispute. This may be especially the case as respects bridges across some of the deep washes, even if other portions of those same presently unpaved roads are not improved.

Elsewhere in these recommendations, we have proposed that certain funds be made available to the Hopi Tribe for improvements in the Hopi part of the divided land, possibly including bridges and roads. Assuming effectuation of that recommendation, the Mediators believe that this will tend to address any imbalance of division of existing paved roads within the JUA. Moreover, the road mileages noted earlier in this section ignore the substantial mileage of State Routes 264 and 87 within District 6 which will become an integral part of the paved road system within the enlarged Hopi reservation.

Although not relevant to the preceding discussion, it may be noted that, where feasible, our recommended partition lines follow existing unpaved roads in order to facilitate accessibility to lands on both sides of the partition.

(e) Wood Supply

An adequate supply of wood for heating homes and for other purposes is a necessity for members of both tribes:

In total, there are reasonably sufficient sources of wood in the JUA. However, they are confined primarily to the higher elevations with the result that there are large areas of land which afford little or no wood supply. The Navajos residing in those areas must travel appreciable distances to secure wood. Most of District 6 is lacking in wood supply sources and, for centuries, the Hopis have journeyed into the JUA for wood. Although the Hopis have encountered problems because of Navajo occupancy, this is one of the situations where the Hopis have been able to take advantage of joint use.

The Mediators' recommended partition lines have recognized the problem of wood supply to the extent possible to do so. We believe that both tribes will have adequate sources of wood within the borders of their respective reservations. In some instances, it may be necessary for residents of particular areas to obtain their wood supply in locations different from those customarily utilized prior to partition.

undistinguishable on the quarter quad maps from "liveable dwellings". These data are shown by quarter quad breakdown in Appendix 7. The totals are indicated below as follows:

Structures Other Than Liveable Dwellings in the JUA

As Divided by Mediators' Recommendations

Type of Structure	On Hopi Side of Partition	On Navajo Side of Partition	Totals	Percent on Hopi Side of Partition
Corrals	671	1429	2100	32.0%
Barns or Sheds	187	441	628	29.8%
Destroyed or Abandoned	296	491	787	37.6%
Other (Schools, Missions, Chapter Houses, Trading Posts, some but not all wells, & a few miscellaneous structures)	29	114	143	20.3%

In summary, the Mediators believe that our recommended partition conforms with the intent of the Congress as expressed in Section 6(b) and even more so with the very general total "target figure" discussed by the negotiators. Because of strong differences of opinion between the two tribes, approximate conformity with the "target figure" is only reflected in totals. Each tribe would prefer different breakdowns within certain quarter quads.

It should also be noted that the Mediators' recommended partition reflects greater emphasis on Section 6(b) than was the case for the one specific partition that was once considered in an earlier bill in Congress but subsequently abandoned. The BIA has made a computation of the results of the so-called "Steiger Line", now that data are available. The "Steiger Line" would have placed 1558 (39.3 per cent) of the "liveable dwellings" on the Hopi side of that partition and would have required relocation of 4634 (41.0 per cent) of the Navajo population.

We are also pleased to note here that the number of Navajo individuals who will be required to relocate under our recommendations is very substantially less than estimates that were made in Congress while the Act was under consideration. All the Congressional estimates were conjectural in the absence of an accurate census. However, our manual count of required relocations of 3495 Navajo individuals is in contrast to a Congressional range of 6000 (including the Moenkopi area) to 8500 (JUA only).

As noted earlier in this report (pages 9 and 10), this factor was given very important consideration by the negotiating teams. At the first two meetings, one of the two major agreements in principle was stated as follows:

"Both tribes agreed that the resolution must take into account the personal hardships of the Navajo people affected." (March 17-20, 1975)

"There was also agreement that the tribes would take into account the personal hardships of the Navajo people affected." (April 9-12, 1975)

Subsequent negotiating meetings gave practical effect to this agreement in principle. Although not agreed to in any firm or exact manner, a "target figure" was established to suggest that the percentage of Navajos residing in the JUA who would be required to relocate should be in the neighborhood of 28.4 per cent.⁴¹

The Mediators have sought to effectuate both the intent of Congress and the "target figure" suggested in negotiations. We now have more factual information than was available when the 28.4 per cent "target figure" was first discussed by the negotiators. Specifically, we now have data regarding "liveable dwellings" and population counts. These have been computed manually at the Mediation Office and by the BIA using computer techniques. Both counts are premised on the enumeration data compiled by the BIA. Appendix 6 shows this information by quarter quads and by totals.

Under the Mediators' partition recommendations, the total number of "liveable dwellings" in the JUA is 3992 according to manual count by the Mediation Office. Of this total, 1151 or 28.8 per cent would be on the Hopi side of the partition. The comparable data from the BIA computer count would be a total of 3984 "liveable dwellings" in the JUA and 1147 on the Hopi side of the partition. The percentage figure on the Hopi side would also be 28.8 per cent.

An even more important figure is total population. The Mediation manual count indicates a total of 11,798 Navajos now residing in the JUA. Of these, 3,495 Navajo individuals would be subject to relocation since they now reside on the Hopi side of the recommended partition. This would be 29.6 per cent of the total. The comparable population count derived from BIA computer techniques would be a Navajo population total of 11,579 of which 3,429 now reside on the Hopi side of the recommended partition. The percentage figure is also 29.6 per cent.

Although not as relevant to this subject matter, the Mediation Office has also made manual counts of other structures in the JUA. Corrals are shown on the quarter quad maps by the symbol \square . The other categories are shown by the symbol \blacksquare and are therefore

⁴¹This 28.4 per cent figure is obtained by dividing a "target figure" of 1,300 "improvements" by the total of 4,579 total "improvements" then known to exist in the JUA.

c. Contiguous Land

-Section 6(1) of the Acts reads:

"Any lands partitioned to each tribe in the joint use area shall, where feasible and consistent with the other provisions of this section, be contiguous to the reservation of each such tribe."

At an early stage of the negotiations, the Navajo team proposed a partition map that became characterized as the "small post" or "measles" map. It would have created a very large number of both Hopi and Navajo "islands" within the JUA. The Hopi team promptly and vigorously rejected this proposal on two counts. One was that the resulting boundaries would be unduly long and indefensible. The other was that it violated Section 6 (c). The Mediators gave no support to this Navajo proposal.

The Hopi team tended to define "contiguous" in a strict manner. For quite understandable reasons, the Hopi team generally preferred land close to District 6 and have strongly objected to certain lands in the two tiers of quarter quads along the northern boundary of the JUA. An underlying basis for these Hopi positions is that the Hopi historical and cultural pattern is to live in villages or nearby and not to establish permanent residences at substantial distances from the villages. Agricultural and livestock pursuits have been developed away from the villages.

The problem regarding the Hopi position is that it is, at least partially, in conflict with insistence on acquiring a full half share of the JUA as well as with Section 6(b). In certain JUA areas bordering District 6, notably the Hard Rock, Jeddito and Pinon areas, Navajo population is relatively dense. There are two probable reasons for this fact. One, the boundaries of District 6 have been changed and expanded on several occasions over the years with the last such change being made in 1943. Some Navajo families have already been required to move because of these boundary changes; in fact, a few have moved as many as two or three times. When such earlier relocation had been required there was a tendency to move only a short distance across the new boundary line. Secondly, some of the land just outside District 6 is relatively good grazing land. At least, it was regarded as such at the time the Navajos located thereon and prior to overgrazing.

It is apparent that the Congress recognized some of these problems. The qualifying language in Section 6(e) is: "---where feasible and consistent with the other provisions of this section---"; a qualification that is broader than: "----insofar as is practical----".

In our recommended partition lines, the Mediators have exercised their best judgment. District 6 would be expanded all around its present borders except for about 11 miles of boundary. For those 11 miles, the future boundary would be the same as the existing District 6 boundary. However, certain lands to be partitioned to the Navajo Tribe would come very close to the existing District 6 border in the Jeddito, Hard Rock and Pinon areas. Moreover, our recommended partition would give to the Hopi Tribe some northern land that is low priority land from the Hopi point of view.

With one exception, all lands under our recommendation would be contiguous to existing reservations of the two tribes. There would be unbroken access from District 6 to all lands to be partitioned to the Hopi Tribe except as such access might be realistically limited by inadequate roads. Existing exclusive Navajo reservations border the JUA on all sides except as such situation might possibly be altered by the future decision of another Court in the 1934 land case. Good access to some lands recommended for partition to the Navajo Tribe could be hampered by inadequate roads. While we would not be presumptuous enough to predict a future decision in the 1934 case, there is evidence of possible Congressional intent. At one stage in Congress, certain 1934 lands immediately west of the western boundary of the JUA would have been partitioned to the Hopi Tribe. Under our recommendations most of the area in the western edge of the JUA would be partitioned to the Hopi Tribe. Our recommended partition is not likely to create "Navajo islands" after the court decision in the 1934 case.

The one exception to contiguity is a "Navajo island" in the Jeddito area. Despite our general adverse reaction to "islands", we have recommended this one for three reasons. First, this is an area of relatively dense Navajo population. Hence, Section 6(d) is applicable. The second and very practical reason is that this "island" is traversed by two major paved roads (State Routes 264 and 77). In fact, the "island" includes the junction of these two roads. This makes Navajo access to the "island" much better in fact than access to many other Navajo areas. Finally, both negotiating teams recognized the necessity of partitioning some land around Jeddito to the Navajo Tribe despite Hopi wishes that this was not so. A seriously discussed solution was to partition to the Navajo Tribe an area around Jeddito, slightly smaller than our recommended "island" and with a narrow corridor extending south towards White Cone, thereby making the Jeddito area contiguous. We believe that this one island is a better solution for both tribes. The slightly larger area around Jeddito will provide the resident Navajos with a little more "living room". The elimination of the corridor to the south will shorten boundaries materially, make the total boundary more defensible from the Hopi point of view, and give the Hopi Tribe an uninterrupted sweep of land around the "island".

In summary, we believe that our recommended partition is in conformance with Section 6(e).

d. Fencing

Section 6(f) of the Act reads:

"Any boundary line between lands partitioned to the two tribes in the joint use area shall, insofar as is practicable, follow terrain which will facilitate fencing or avoid the need for fencing."

Under this somewhat protean title of "fencing" there are broader possible meanings.

Over a long period of years and up to the present time, the Hopi Tribe has complained about real and alleged depredations by Navajos living in the JUA, especially those residing near District 6. Destruction of Hopi agricultural products, Navajo livestock grazing on Hopi land sometimes facilitated by fence cutting, theft of Hopi livestock and other property, as well as damage to water tanks and other Hopi structures have all been cited. We do not presume to

judge the extent and overall significance of these problems, but it appears that there is factual proof of such activity by some Navajo individuals, identified and not identified. Conversely, the Navajo Tribe has occasionally complained about similar acts perpetrated by Hopi individuals, but with substantially less frequency.

District 6 is now fenced around its entire boundary. In addition, the Hopi Tribe maintains vigilance around the District 6 boundaries, including almost daily aerial reconnaissance, border rangers who impound Navajo livestock found in District 6 lands, as well as utilizing other measures.

Partition of the JUA by whatever boundaries will inevitably increase the total border line between the two tribes. A substantially extended boundary would probably increase the problems of the two tribes. This possibility could be expanded if Navajos remaining on the Navajo side of the partition should be further weakened financially by drastic livestock reduction.

One of the possible solutions to the population density problem (Section 6(d)) that has been seriously discussed by the negotiators has been the creation of "corridors". A corridor, as the word has been used in negotiations, is a relatively narrow strip of Navajo land bordered on three sides by Hopi land. A corridor would include relatively dense Navajo population whereas the surrounding Hopi land typically would include much less dense Navajo population. The obvious purpose of a corridor is to conform to Section 6(d) and at the same time accord to the Hopi Tribe its half share of the JUA.

The Hopi negotiators have looked with great disfavor on corridors because of the defensible border problem. However, under the conflicting pressures of equal division of land and Section 6(d) with their own commitment about Navajo personal hardships, the Hopi negotiators have reluctantly proposed some corridors. The Navajo negotiators have generally favored corridors and believe that the Hopi Tribe is unduly concerned with the defensible border problem.

The Mediators' recommendations include two areas that could properly be characterized as corridors and one area that is the equivalent. The Hard Rock sector that would be partitioned to the Navajo Tribe is a fairly large Navajo area containing a relatively narrow neck. Although the Mediators' recommended shape of these geographical locations is slightly different, both were reasonably acceptable to the two tribes at one time or another during negotiation. The equivalent of a corridor is the "Navajo island" found in the Jeddito area; this subject was previously discussed in another connection.

We have not recommended a corridor in quarter quads 124 SW and 124 SE. It is to be noted that the Navajo Tribe has pressed very strongly for such a corridor. The Hopi Tribe did not totally reject the idea of a corridor in this area; but any possible agreement by the Hopi Tribe would have been contingent on an extremely narrow corridor and on a resolution of all other partition problems satisfactory to the Hopi Tribe. We have recommended against the Navajo Tribe on this

particular corridor issue for three reasons. First, there is an area of population density; however, that relatively small area is some distance from a paved road and a narrow neck of access territory would be essential. The resulting boundary would be long in relation to the population. Secondly, the total area that could realistically be created as a corridor would be extremely confining. Insufficient "living space" would be provided. Finally, such a Navajo corridor would automatically create a Hopi corridor between it and the Navajo land farther to the east.

We believe that our recommendations concerning the corridor issue are consistent with the Act. With particular reference to the title of this sub-section, we believe that the fencing required by our two recommended corridors and the "Navajo island" around Jeddito is the minimum amount of fencing consistent with Section 6(d).

We expect vigorous opposition by the Navajo Tribe to our failure to create a corridor in quarter quads 124 SW and 124 SE. We also expect substantial opposition by the Hopi Tribe to the specific shape of the recommended corridors as well as to the shape of the "Navajo island".

Section 6(f) reference to "follow terrain which will facilitate fencing or avoid the need for fencing" has specific reference to escarpments and deep washes. Both are types of terrain that might provide natural boundaries.

In our recommended partition lines, we have recommended that escarpments be the boundary in a number of instances. In such cases, the boundary line will normally follow the highest altitude levels of the escarpment. We realize that an escarpment is a "surveyor's nightmare"; however, we believe that the advantages of the natural boundary more than offset any such considerations. All of the discussion during negotiations regarding this matter indicate that both teams support our point of view on the desirability of utilizing escarpments as a border, whenever possible.

On the other hand, we have limited the use of terrain washes as a boundary wherever possible to do so. If a wash is not deep enough and its sides not steep enough, it is not a natural boundary. Regardless of depth or shape, a wash tends to change its course from time to time. Washes were utilized as boundaries for certain parts of the border of District 6. The resultant effect was that two fences were built at some distance from the then centerline of the wash, thus creating an appreciable area of "no man's land".

In our recommendations, we have utilized existing roads, mostly unpaved, as a border. In such instances, the centerline of the road is recommended as the official border. Use of a road accomplishes two purposes. First, it facilitates legitimate access to lands on both sides of the partition. Secondly, double fencing tends to make crossings by livestock more difficult.

Wherever an existing road is a border, we recommend that fences be built on each side at an appropriate distance from the centerline of the road with cattleguard facilities to permit vehicle entrance to other roads that enter the border road.

Under our recommended partition, the total fencing obligation to be assumed by BIA after the effective date of partition can be summarized as follows:

Partition Fencing	
New Fence	Mediators' Recommendation
	Approximate Linear Miles
Along Existing Roads	74.
Along Escarpments	62.
Straight and Miscellaneous	175.
Sub-Total	311.
Existing Fence Utilized	
Along District 6 Boundary	11.
Along JUA Boundary	77.
Sub-Total	88.
TOTAL	399.

The new fence total, adjusted for double fencing along roads is 305 miles.

Less utilization of corridors in the Mediators' recommendation is reflected in fencing requirements. Our total of 311 linear miles of new border to be fenced is in contrast to a minimum of 352 miles on one map discussed by the parties in the latter stages of negotiations.

5. Format of Mediators' Recommendations

The official method employed by the Mediators to record our detailed recommended land partitions is to draw lines of delineation on quarter quad maps. These maps (7.5 minute series, U.S.G.S. and U.S.C. & G.S.) are contained in Volume IV of our report. They are of three types: (a) "All Hopi", (b) "All Navajo" and (c) quarter quads that are divided between the two tribes.

To facilitate overall examination of the recommended partition and because Volume IV cannot feasibly be distributed to all persons who may read our report, we have also prepared Exhibit A which is placed in Volume I (Summary Recommendations). Exhibit A is a small scale map outlining the recommended partition lines for the entire JUA. It should be regarded as a map for reference purposes only. It is an accurate translation of our recommendations; however, the small scale of the map may result in some minor distortions.

B. Sacred Places

Section 6(c) of the Act lists the following criterion to be considered by the Mediator and by the District Court:

"In any division of the surface rights to the joint use area, reasonable provision shall be made for the use and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes."

Section 20, not reproduced here in full text, contains quite specific provisions for perpetual use by the Hopi Tribe of Cliff Spring, an important Hopi religious shrine. It is not clear from the legislative history why only one shrine was selected.

Section 21 of the Act is essentially a repetition of Section 6(c) except that it is an admonition to the Secretary of the Interior to assume responsibility for continued use of and access to shrines after partition.

Data submitted to the Mediators by the BIA identifies a total of 145 Hopi shrines and other types of sites of religious significance. Smaller BIA data shows 19 Navajo sacred places, scenic sites, and historical or archeological locations (13 in the JUA and 6 within District 6). A Navajo presentation to the Mediators expands that total to 32 (25 in the JUA and 7 within District 6). If the Hopi data were to include scenic sites or archeological locations without particular religious significance, the Hopi total would be appreciably larger than the figure of 145 noted above.

As Anglo Mediators, we do not presume to judge the relative importance of these various sacred places. On the basis of the discussion during negotiations, it appears that each tribe has some rough scale of priority it attaches to the importance of its various shrines and religious sites. However, even within the Hopi Tribe or within the Navajo Tribe, it is probable that it would be difficult to determine any precise priority scale. A particular shrine may be especially significant to some one clan or group of religious leaders. It also appears that religious tradition and practice sometimes suggest well defined time periods during which pilgrimages to a shrine are made. However, frequency of pilgrimages is not necessarily a measure of relative importance.

An important aspect of this matter is a problem of vandalism. Some defacement, damage, and pilferage has occurred at various shrine locations. Identity of vandals has not often been determined. Whether they be Anglos or non-religious members of the other tribe or even of the same tribe, the problem is no less acute. Both tribes are reluctant to publicly identify precise locations of all shrines for fear that vandalism and pilferage may increase.

It is almost too obvious to state that the best way to resolve this issue would be to draw partition lines that would encompass within the lands of each tribe, those sacred places that are most significant to that tribe. The Mediators have attempted to recognize this truth in the partition lines that we recommend. However, it is impossible to accomplish more than partial effectuation of this objective.

Discussion during negotiations included mutual recognition of the principle that this matter can best be resolved by Indians, including religious leaders of both tribes. However, preoccupation with the major problem of partition prevented any mutual agreement on this issue, either as to specific effectuation of Section 6(c) and Section 21 of the Act or a procedural method to accomplish these purposes.

As matters now stand, the explicit provision regarding Cliff Spring (Section 20) and the general language of Section 6(c) and of Section 21 are inadequate to provide dispute-free implementation of the intent of the Act. As Anglo Mediators, we are not qualified to make detailed recommendations. Furthermore, with all due deference to the Court, the Mediators do not believe that this is an issue that should be handled in extensive specific detail in Court proceedings.

After the Court has determined the partition line, the identity of shrines of either tribe that will be located in the lands of the other tribe will be known with certainty. The Mediators believe that a committee or commission of trusted members of each tribe, could and should then develop mutually agreeable arrangements that would take account of some or all of the factors noted below, limited to shrines that will be located in lands of the other tribe. At times during negotiations the two teams agreed to this type of procedure but such agreement was not effectuated, primarily because the partition lines were not then known.

1. Establishment of access arrangements to Finger Point Rock, a Navajo shrine, that are commensurate with the Section 20 mandate for Cliff Spring but modified in an appropriate manner because of different physical surroundings.
2. Identification of other sacred areas and burial sites that are of sufficient importance to require such identification. In this connection, we question whether such a committee or commission would have jurisdiction over Navajo sites within District 6 except by mutual agreement. Moreover, we do not recommend that sites be identified or considered that do not have religious significance. Section 6(c) is limited to "religious shrines".
3. Development of arrangements for police responsibility and other methods to prevent vandalism or desecration of shrines and to limit access to shrines to visits for religious purposes.
4. Identification, where feasible, of religious leaders or other members of a tribe who have legitimate rights of access to a shrine.
5. Possible indication of time periods during which access to a particular shrine is needed for religious purposes.
6. Arrangements for access to water supply by residents outside the boundaries of a shrine where the water source is within the shrine boundaries (i.e. last paragraph of Section 20).
7. Arrangements for fencing, when and where required.
8. Arrangements for future "clearance" or projects proposed by either tribe or the United States Government or private entities when such project would impinge upon sacred areas or identified burial sites.

The list of factors noted above is not intended to be all inclusive if other matters require consideration.

The Mediators recommend that the Court decide this issue under Section 6(c) by directing that each Tribal Council take appropriate action to designate three members each, with alternates if needed, to serve on a joint body to be called the Hopi-Navajo Sacred Places Committee with appropriate authority to act in matters within the jurisdiction of the Committee. We also recommend that the Secretary of the Interior recognize the same Committee as the appropriate body to act under Section 21.

The Mediators believe that such a Hopi-Navajo Sacred Places Committee would be able to resolve all questions that may arise in effectuation of Section 6(c) and of Section 21. However, in case a dispute should arise within the Committee, we further recommend that the Navajo and Hopi Indian Relocation Commission be designated by the Court as the appropriate body to decide initially any possible disputes within the Committee under Section 6(c) and that the same Commission be designated by the Secretary of the Interior to resolve possible disputes within the Committee under Section 21. Decisions of the Relocation Commission in disputed cases should be subject to appeal to the Court by either tribe.

C. Life Estates

Section 5(a)(4) of the Act reads, in part, as follows:

"for the purpose of facilitating an agreement pursuant to section 3 or preparing a report pursuant to section 4, the Mediator is authorized:-- (4) to recommend in exceptional cases where necessary to prevent personal hardship, a limited tenure for residential use, not exceeding a life estate,---" (underlining supplied)

Throughout the course of these negotiations, the subject of life estates was periodically discussed by the two teams. Agreement in principle was reached on a few criteria but there was wide divergence of position on many important factors.

The Mediators believe that some provision for life estates is merited and is in conformance with the Act. Moreover, the agreement of the negotiators, in principle, to recognize personal hardships applies to life estates as realistically as to Section 6(b).

Quite obviously, life estates need be considered only where present residence in the JUA is on land partitioned to the other tribe and the residents do not choose to relocate voluntarily.

The Mediators do not possess sufficient evidence to recommend all details on this subject matter but we do make the following recommendations and a procedure for full effectuation of Section 5(a)(4):

1. Criteria for Life Estates

a. Age

One group of "exceptional cases" are those individuals of advanced age for whom relocation might be a very real "personal hardship" that must be recognized.

c. Other Eligibility Requirements

Obviously, no one individual or couple should be eligible for more than one life estate.

Secondly, we recommend that a life estate should not be granted if the individual or couple has not maintained continuous residence in the JUA for ten years or longer prior to the effective date of partition. No data are available as to the extent by which this requirement would reduce the number of potential eligibles. However, we do not believe that relatively recent residents can have a major claim of personal hardship.

Finally, requests for a life estate should be presented within a reasonable time after effective date of partition if they are to be considered seriously.

d. Permitted and Prohibited Activities Within Area Limits

The amount of land to be made available with a life estate is an important aspect of this issue.

The Mediators believe that grazing is not consistent with the "for residential use" provision of Section 5(a)(4), especially in view of the large acreage required to graze even a few sheep. As a practical matter, we conclude and recommend that a life estate be approximately five acres except where lesser land is indicated because the home is in a village or in a very closely knit cluster of homes.

We also recommend that each life estate be fenced to protect gardens and other properties of the grantees from Hopi livestock and to prevent grazing outside the life estate by the grantees. The cost of fencing life estates should be assumed by the Navajo Tribe or by the grantees. If adequate fence maintenance is not provided by the Navajo Tribe or by the grantees, it may be undertaken by the Hopi Tribe with reimbursement by the Navajo Tribe.

Another aspect of permitted activity concerns other members of a family. Aged persons and physically handicapped persons may require regular assistance of some members of the family other than the spouse. Only a limited number of other members of the family should be permitted to reside regularly with the grantees. Family visitation should be permitted, but the life estate privilege should not be abused by attempts to bring sizeable numbers of other members of the family under the umbrella of the life estate.

Navajos holding life estates on Hopi land would continue to be members of the Navajo Tribe but would be subject to the jurisdiction of the Hopi Tribe.

9. Criteria for Termination of Life Estates

The basic concept of a life estate is that it is a right of tenure for a period of time not to exceed the lives of the grantee or grantees, if age is the basis for the life estate. The younger spouse of a person aged 70 years or more when the life estate was granted by reason of age could continue to exercise the life estate right until his or her death but the life estate should be terminated by remarriage prior to age 70. If a grantee should be over 70 years of age at date of remarriage, the new spouse could live with the grantee on the life estate until his or her death but the new spouse would acquire no life estate rights, regardless of age.

The statistical staff retained by the Mediators have examined the enumeration data compiled by the BIA. We find that there are a total of 122 households on the Hopi side of the partition, with one or both of the spouses age 65 or over, thereby creating potential eligibility for 122 life estates if age 65 should be a criterion. The BIA data indicates a total of 124 individuals age 65 or over on the Hopi side of the partition. The Mediators' count of 122 and the BIA count of 124 are not fully comparable because the mediation staff counted households whereas the BIA counted individuals. The totals by quarter quad are shown in Appendix B.

The Mediators conclude that an age 65 criterion would create potential eligibility that is in excess of a reasonable number of life estates. Accordingly, the mediation staff has examined the data further at other age levels.

If age 70 or over should be a criterion, if households with either one or two individuals age 70 or over are counted as one potential life estate, and if duplications (summer and winter hogans, etc.) are eliminated, we find a total of 76 potential life estates on the Hopi side of the recommended partition line. Of the very few Hopis now living in parts of the JUA that will become Navajo, none are age 70 or older.

It would be helpful if we could know how many potential eligibles would actually elect a life estate. It is probable that many would prefer to accept the financial benefits associated with relocation and move with the younger members of their families. However, if life estates are offered, there may be some acceptances. We hazard an admitted guess that not more than 30 of the potential eligibles would actually elect life estates.

The Mediators recommend that age 70 be the eligibility age, as of the effective date of partition. We further recommend that both spouses be eligible for life estate and be considered as joint grantees if one or both are over 70 as of the effective date of partition.

b. Physically Handicapped

The only other group of persons potentially eligible for life estate under the "exceptional cases" limitation are physically handicapped persons who could not qualify under the age criterion recommended above.

The Mediators believe that persons afflicted by serious physical handicaps, especially disabled veterans, may have as meritorious a case under the "personal hardship" part of Section 5(a)(4) as persons of advanced age. Applications of physically handicapped persons for life estate would almost necessarily be handled on a case by case basis. Such life estates should be granted on a very limited basis and only in instances of very clearly proven merit. Minor physical handicaps should not be considered as a qualification for life estate. We do not believe that the number of applications would be large.

In a case of a physically handicapped person, less than 70 years of age when the life estate is granted, the death of that person should terminate the life estate.

In situations where a life estate is terminated but some full-time or part-time residents of the household remain who have been assisting the grantee or grantees, those persons remaining have no rights to continue the life estate but some reasonable period of time, not to exceed six months, should be permitted for those persons to make other plans.

A grantee should have no right to transfer or assign a life estate to his or her issue.

A life estate could be abandoned at any time by a voluntary decision of both spouses.

A life estate could be cancelled in the event it is proven that the grantee or grantees have seriously abused the privilege of residence on Hopi lands by theft of Hopi livestock or other property or by other comparable acts. A possible dispute as to whether the abuse is sufficient basis for termination of the life estate should be decided by the procedure recommended below.

f. Payments to Other Tribes

Life estates granted to Navajos to reside on land to be partitioned to the Hopi Tribe clearly fall within the coverage of Section 16(a) of the Act.

Therefore, the Secretary of the Interior or his authorized agent should determine the "fair rental value" of all life estates and the Navajo Tribe will be required to pay such sums to the Hopi Tribe for the effective duration of the life estates after the date of partition.

Failure of the Navajo Tribe to pay the required amounts to the Hopi Tribe within a reasonable period of time could be a reason for termination of a life estate.

2. Administration

Administration of any life estates will be a matter closely related to relocations. Therefore, the Mediators recommend that the Navajo and Hopi Indian Relocation Commission be assigned the authority and responsibility by the Court and by the Secretary of the Interior to issue "all life estates" to administer such life estates during their terms, and to decide any disputes that may arise between the Navajo Tribe and the Hopi Tribe arising out of life estates. Decisions by the Relocation Commission in disputed matters should be subject to appeal to the Court by either tribe.

D. Leases or Phased Relocations

Section 5(a)(4) of the Act reads, in part, as follows:

"For the purpose of facilitating an agreement pursuant to section 3 or preparing a report pursuant to section 4, the Mediator is authorized: -- (4) to recommend, in exceptional cases where necessary to prevent personal hardship--a phased relocation of members of one tribe from lands which may be partitioned to the other tribe in the joint use area;" (underscoring supplied)

1. Leases

This provision makes no specific reference to leases. However, the negotiating teams did discuss the possibility of fixed term leases by the Navajo Tribe from the Hopi Tribe of certain areas that would become Hopi by partition but which the Navajos did not want to vacate at early dates after partition. Thus, in a very real sense, the negotiators were discussing leases as a type of phased relocation. No agreements were reached about leases.

The Mediators do not recommend fixed term leases. A basic reason is that, under the circumstances here prevailing, a lease could be essentially a deferral of the inevitable, serving no good long run purpose. Secondly, to the extent that valid reasons exist for leases, it would be extremely difficult to forecast a fixed duration.

The Mediators do believe that there may be necessary reasons for another type of phased relocation as discussed below.

2. Phased Relocations

Earlier in this report (pages 22-28) the matter of acquisition of additional lands, outside the 1882 Reservation, for purposes of relocation of Navajos from the JUA was discussed.

The critical question for which no answer is now known is: "When will additional lands be available in relation to date of partition?"

Date of partition by the District Court can be estimated very roughly. If the District Court decision is not appealed, the final partition line should be known to everybody sometime in 1976. Knowledge of a final partition line is highly desirable to both tribes for many reasons. Only then can both tribes begin tangible long-range plans for their respective portions of the JUA. Only then will Navajo individuals know with certainty whether they will or will not be required to relocate.

If the additional 250,000 acres provided for in Section 11 and any other new land that may be acquired under Section 5(a)(1) could be available prior to or not later than date of partition, plans for relocation could proceed promptly on a total relocation plan basis.

However, if additional lands are not available until long after the effective date of partition, it is obvious that a major problem will exist. The Relocation Commission could proceed promptly with specific relocation plans and action for all those Navajos who are not

dependent on the additional lands. However, for those who do intend to relocate voluntarily on the additional lands and who so assure the Relocation Commission by some appropriate procedure, we see no answer except a type of phased relocation other than a fixed term lease.

We cannot suggest specific forms of phased relocation. That is clearly within the province of the Relocation Commission to determine in the light of the facts then prevailing. The duration of continued residences on JUA lands would be dependent on the dates of availability of additional lands, subject to the maximum time period stated in Section 14(a) of the Act.

Under any type of phased relocation beyond the effective date of partition, Section 16(a) would require payment by the Navajo Tribe to the Hopi Tribe at a fair rental value. For reasons noted on pages 30-31 of this report, payment of some portion of such amounts should be assumed by the United States Government to the extent that the phased relocation is caused by negligence or undue delay on the part of the Secretary of the Interior in connection with acquisition of additional lands by the Navajo Tribe.

E. Mixed Marriages

For the purposes of this report, a mixed marriage is defined as one between a Hopi and a Navajo with the husband and wife living together in the Joint Use Area for at least six months prior to partition and as of the effective date of partition.

While the Act is silent regarding the subject, mixed marriages have, nevertheless, been discussed by the two tribal committees at various times during the negotiations.

At an early negotiating meeting, a Navajo exhibit was introduced, i.e. a list of mixed marriages. However, it is of limited statistical value for two reasons. Admittedly, it is out of date. Secondly, it includes persons living both within and outside the 1882 Reservation. Thus, it is not possible for us to estimate accurately how many mixed marriages exist in the JUA. What is known is that there are enough mixed marriages to create a potential problem on both sides of the recommended partition line.

The negotiating teams did reach a verbal understanding on an important principle. It was that the family should decide. To illustrate that principle, let us assume that a Navajo husband and a Hopi wife now reside on land in the JUA that will be partitioned to the Hopi Tribe. The husband and wife could decide to remain where they are and thus become subject to the jurisdiction of the Hopi Tribe. Or, they could decide to relocate in which event they would be treated by the Relocation Commission just as if both spouses were Navajo. Similarly, the two spouses in a mixed marriage, living on the Navajo side of the partition, could decide either to remain where they are or relocate.

The Mediators recommend that this basic principle be adopted by the Court.

There are potential disputes or questions of interpretation. Some of these potential problems can be noted. What if a spouse claims to be Hopi but is not accepted by the Hopi Tribe as an enrolled member? What if a spouse claims to be Navajo but has no Navajo census number or is otherwise not considered by the Navajo Tribe as a member? What happens if a mixed marriage is informally or formally dissolved by separation or by divorce after the family decision has been made? These and other possible questions can be complicated materially by the various customs, practices and mores of the two tribes regarding marriage and divorce.

The Mediators believe that adoption of the basic principle will solve most potential problems and that it would be both impossible and inadvisable for us to attempt to recommend further on specific aspects of this subject matter. We do recommend, however, that the Navajo and Hopi Indian Relocation Commission be authorized by the District Court to decide any disputes arising out of partition that may be complicated by a mixed marriage. This is a subject matter that is quite directly an aspect of relocation. We further recommend that a decision by the Relocation Commission in a disputed case should be subject to appeal to the Court by either tribe.

F. Federal Employees

Section 17(b) of the Act reads as follows:

"Nothing in this Act shall require the relocation from any area partitioned pursuant to this Act of the household of any Navajo or Hopi individual who is employed by the Federal Government within such area or to prevent such employees or their households from residing in such areas in the future: Provided, that any such Federal employee who would, except for the provisions of this subsection, be relocated under the terms of this Act may elect to be so relocated."

Federal employees in the Joint Use Area are Hopi and Navajo individuals employed by the Bureau of Indian Affairs and other agencies of the Federal Government in various capacities.

The wording and intent of Section 17(b) appears to be generally clear. However, the question arises as to when a Federal employee ceases to be a Federal employee.

The Mediators recommend that a Federal employee should be considered as having ceased to be such when he voluntarily severs himself from governmental service or is discharged by the government for reasons other than retirement or disability. Such terminated Federal employees should cease to enjoy the provision of Section 17(b) effective as of date of termination but subject to a reasonable period of time, not to exceed one year, in which to make other plans. If a terminated employee of the Federal Government is required to relocate because of termination, the financial benefits of relocation provided in the Act should be made available to him at the time relocation is required.

We also recommend that Federal employees who become regular or disabled pensioners of the Federal Government after the effective date of partition (but not those who became pensioners prior to partition) be permitted to continue to enjoy the rights of Section 17(b).

It is the Mediators' additional recommendation that the authority for administration of this section of the Act, as well as all problems attendant thereto, be assigned by the Court and by the Secretary of the Interior to the Navajo and Hopi Indian Relocation Commission. Decisions by the Relocation Commission in disputed cases should be subject to appeal to the Court by either tribe.

G. Water Commission

The Act is silent regarding future water development in the Joint Use Area except as the subject matter may be an integral part of land restoration. However, some time was devoted to this matter throughout the course of the negotiations.

The possibility of establishing a joint water commission or water development authority with some sort of tie-breaking procedure was discussed. Briefly, this body would be comprised of an equal number of representatives from the two tribes. Its primary function would be to insure that water requirements, sources, and distribution be equitably shared. On several occasions, agreement in principle was achieved but the Hopi negotiators subsequently withdrew support. As matters now stand, there are important differences of opinion between the two tribes--both as to the need for, or the desirability of such a commission and details as to its possible functions.

The Mediators believe that there are significant reasons for creation of such a commission and we are making recommendations under the authority of Section 5(a)(5).

A first reason for creation of a commission is probable problem situations immediately following partition. To the best of our ability, we have recommended partition lines that indicate fair distribution of existing wells or springs. However, there will be some situations where a fence along the partition line may create an immediate problem. For example, one or more Navajo families may have been using a particular well as the sole source of water both for domestic purposes and for livestock but the partition line places the well on the Hopi side of the line or, a partition line may leave inadequate water supply on the Hopi side of the line.

As mentioned earlier in this report, the BIA has authorized certain water surveys, has allowed for the cost of construction of some 25 new wells in its land restoration budget, and has otherwise made tentative plans dealing with water supply.

We believe that a joint water commission could be an effective instrument to deal with these immediate problems as well as to work with the BIA in formulating the most desirable and equitable means of implementing projects to be financed with government funds.

A second longer range reason for a joint commission is that totally independent water development on each side of the partition line could be undesirable. For example, if a dam should be built by one tribe close to a partition line with the result that no water would flow in the other tribe's lands further down the wash, such action could cause immediate harm and invite retaliation. As the partition lines are drawn, there is no automatic protection to either tribe against such a development. Closely related to this one inherent future problem is the possibility of development of relatively small irrigation projects. The water resource study commissioned by the BIA suggests the feasibility of such projects. Some of these could be undertaken by one tribe without the necessity of cooperation from the other tribe. However, there could be mutual interest in others. A third possible future problem could be the drilling of extremely deep wells that might draw water from under the lands of the other tribe.

As non-lawyers, the Mediators do not presume to know all the complications of law in a state where water rights are of paramount importance. It may well be that some water rights problems might go beyond the Hopi and Navajo Tribes in that other parties may be involved or that applicable laws would dictate a particular answer. However, it is clear to us that there are important potential water supply problems of both immediate and longer range practical import that should be resolved by the two tribes without the necessity of petitioning the Court.

The Mediators recommend that there be established, by the Court and by approval of the Secretary of the Interior for activities after partition, a Navajo-Hopi Water Development Commission of three members from each tribe. The respective Tribal Councils would be requested to appoint the regular members of the Commission, with alternates if necessary, and with appropriate authorization to act in the following matters:

1. To consider and resolve water development matters, that might have a significant effect on both tribes or on the members of the tribes and that could properly be within the jurisdiction of the Commission.
 2. To work with and advise the BIA in regard to water development improvements to be funded by the United States Government and that would affect both tribes.
- The Commission would not have jurisdiction if a water development problem should extend beyond the two tribes and involve other parties. It may also be possible that some of these potential water development problems would be so enmeshed in applicable law that the Commission could not appropriately assume jurisdiction. The Court is best qualified to define the details of the Commission's jurisdiction.

The Mediators further recommend that the Navajo and Hopi Indian Relocation Commission be designated by the Court and by the Secretary of the Interior to resolve any disputes that may arise within the Water Development Commission, limited to those matters which are properly within the Commission's jurisdiction. The Relocation Commission should be empowered to retain expert and technical advice as might be required. Decisions by the Relocation Commission in disputed cases should be subject to appeal to the Court by either tribe.

M. Possible Successor to Relocation Commission for Certain Recommended Functions

At several places in this report, the Mediators have recommended that the Navajo and Hopi Indian Relocation Commission be designated by the Court and by the Secretary of the Interior for certain functions. In our considered opinion, some of these are very closely related to, in fact, almost inseparable from the Commission's obligation and duty under the Act to administer the relocation program. Admittedly, others do not flow directly from designated powers in the Act but our reasons for recommendations in these instances are noted in the text of this report.

Obviously, delegation of authority by the Court or by the Secretary to the Relocation Commission should not extend beyond the life of the Commission. Sections 13(a) and 14(a) provide, in total, that the Commission will continue to function for a period of up to seven years after the effective date of partition of the JUA by Order of the District Court. Conceivably, its life could be continued further if a decision of another Court in the 1934 Lands dispute should be issued after the District Court Order in the instant case.

Section 12(1) of the Act provides:

"The Commission shall cease to exist when the President determines that its functions have been fully discharged."

As we visualize the situation, most of the functions recommended to be assumed by the Relocation Commission will have been completed prior to the end of its natural life under the Act. However, a few could continue indefinitely. It is not the Mediators' intention that any functions other than those intimately related to the Commission's duties, as stated in the Act, should prolong a Presidential decision to terminate the work of the Commission.

Accordingly, we recommend that the Secretary of the Interior confer with appropriate officials of the Navajo Tribe and the Hopi Tribe at or prior to the date the Relocation Commission is terminated to determine functions that will continue, if any. At the same time, selection of a successor to the Commission for any remaining functions could be determined, if a successor is needed.

During the period that the Relocation Commission does function in those matters recommended in this report, it should be noted that some of these functions were not contemplated by the Congress. Accordingly, these additional functions should be taken into account by the Secretary of the Interior in requests for appropriations for the work of the Commission.

I. Administration of Lands After Partition

Certain Court restrictions on new construction and on other types of improvements are now in effect in the JUA except upon joint approval of both tribes. Necessarily, these will be altered once partition becomes final. The question is whether different restrictions will be in effect or whether each tribe will have exclusive jurisdiction of its portion of the former JUA territory, subject only to such requirements as may be made by the Department of the Interior for all reservations.

If all Navajos could leave all land partitioned to the Hopi Tribe simultaneously with the effective date of partition, there could be no question but that all restrictions on either tribe should be removed. The problem is whether continued presence of Navajos on land to become Hopi land because of time requirements for relocation makes any change in the situation.

The Hopi team believes that there should be certain continued restrictions on new construction and improvements as a necessary inducement to speedy relocation.

The Mediators understand the Hopi desire to obtain full use of the land on the Hopi side of the partition at the earliest possible moment. Long standing inability of the Hopis to effectively utilize all their rights to land is what this dispute is all about. There is a very real Hopi past hardship over many years that has sometimes been obscured by concern for the personal hardships of Navajos who must now be relocated. Moreover, the agreements in principle that were reached by the negotiators include reference to early restoration to the Hopi Tribe of use of its half of the JUA.

However, Section 13 and Section 14(a) of the Act set forth the basic procedures and requirements for relocation under the auspices of the Relocation Commission. The total time period provided by the Act can run as long as seven years after effective date of partition. The Act encourages early voluntary relocation and it can be hoped that the full seven year period will not be needed. However, availability of new Navajo lands could complicate early relocation.

It appears to us that the Hopi position superimposes something on the Congressional plan that was not intended. If the Relocation Commission should be unable to accomplish its objectives within the time limits established by the Congress, it might then be appropriate for the Hopi Tribe to go to Court for relief. We do not believe it to be appropriate now to establish new construction or improvement restrictions on the Navajo side of the partition. We do not believe that such restrictions after effective partition were contemplated in the Act. The existing Court Orders were based on "equal and undivided" interest in the JUA, not on Navajo land after actual partition.

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Mediation and Conciliation Service
HOPI - NAVAJO LAND DISPUTE
Public Law No. 93-531

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HOPI-NAVAJO LAND DISPUTE

Public Law 93-531

MEDIATOR'S REPORT AND RECOMMENDATIONS

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