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HEALING V. JONES: MANDATE FOR ANOTHER TRAIL OF TEARS?

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I. THE ALLEGED MANDATE

On May 29, 1974, the House of Representatives, sitting in Committee of the Whole House on the State of the Union, considered amendments to a bill, H.R. 10337, "[T]o authorize the partition of the surface rights in the joint use area of the 1882 Executive Order Hopi Reservation and the surface and subsurface rights in the 1934 Navajo Reservation. . .".[1] As the House was about to vote on an amendment in the nature of a substitute offered by Mr. Meeds, Mr. Owens, the sponsor of H.R. 10337, rose to deliver a fervent appeal to his colleagues to stand by the law by defeating the amendment:

> [I] appeal to the Members of the Committee: Do not overrule the Supreme Court in a matter where you do not understand the sensitivities and the equities. . . . [L]et us uphold the Supreme Court. Let us leave this matter in the hands of the courts by defeating the Meeds amendment.[2]

The House did what Mr. Owens had requested. It voted down the Meeds substitute and passed H.R. 10337 in the form supported by Mr. Owens.[3] But as the bill moved on to the Senate, a number of legal questions continued to be raised: Was enactment of the bill really required in order "to uphold the Supreme Court"? Would Congress, by approving an amendment such as that offered by

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1. H.R. Res. 1095, 93d Cong., 2d Sess. (1974).

2. 120 CONG. REC. H4519 (daily ed. May 29, 1974) (remarks of Congressman Wayne Owens).

3. 120 CONG. REC. H4519-20 (daily ed. May 29, 1974).

Congressman Meeds, really "overrule" the Court? Beyond that, did the legislative proposal authored by Congressman Owens meet the test of constitutionality? The answer to each of these questions, in the view of the Navajo Tribe, is "no."

The decision of the Supreme Court, of which Congressman Owens was speaking was, to say the least, one of its less momentous pronouncements. It was the summary affirmance of a lower court decision, contained in a *per curiam* order filed on June 3, 1963. That order read in relevant part:

> The motion to affirm . . . is granted and the judgment . . . is affirmed.
>
> Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted and would decide the cases only after argument.[4]

It is, therefore, to the opinion of the lower court in the case here in issue that we must look if we are to find the answers to the questions posed above. In the case styled *Healing v. Jones*, a three-judge Federal District Court had decided in 1962 the respective interests of the Navajo Tribe and the Hopi Tribe in a tract of approximately 2,453,000 acres located in northeastern Arizona.[5] Some observers have referred to the case and its aftermath as the largest quiet-title action in the West.[6] But the Navajos have not viewed the matter as a real estate transaction. They have been fearful that it will result in the mass expulsion of thousands[7] of Navajo Indians from their homes, reminiscent of the "Long Walk" of the Navajos of 1864, one of the most tragic events of Navajo history, of which every Navajo child learns from his ancestors.[8]

The action in *Healing v. Jones* was initiated following the enactment in 1958 of Public Law 85-547,[8a] which conferred jurisdiction

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4. Jones v. Healing, 373 U.S. 758 (1963).
5. Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).
6. *See, e.g.*, 120 CONG. REC. H4503 (daily ed. May 29, 1974).
7. *See Hearings on H.R. 5647, H.R. 7679, and H.R. 7716 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess. 62 (1973). (Statement of the Chairman of the Navajo Tribal Council).
8. In early 1864 the United States Army interned thousands of Navajos and then removed them by force to military installations in what is now the State of New Mexico. The removal resulted in the deaths of hundreds of the captive Navajos, and always has been referred to by Navajos as the Long Walk. *See generally* D. BROWN, BURY MY HEART AT WOUNDED KNEE 27-29 (1970).
8a. The Act of July 22, 1958, was the jurisdictional statute for the District Court, and contained the following provisions:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That lands described in the Executive Order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive Order. The Navajo Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of

on the United States District Court for the District of Arizona to determine the respective rights and interests of the two Tribes or any other tribe of Indians in the area "set aside by Executive Order dated December 16, 1882". The Act further provided that the Executive Order Area was henceforth to be held by the United States in trust for the Indians having an interest in the land. Any portion in which the Navajo Indians were determined to have an exclusive interest was to be added to the Navajo Reservation and any land in which the Hopis were determined to have an exclusive interest was to be added to the Hopi Reservation.[9] The Congress struck from the bill a provision which would have authorized the disposition of land in which both Tribes were held to have a joint interest.[10]

The area of land with which the court was to deal under the provisions of Public Law 85-547 was a large rectangular tract set aside by President Arthur on December 16, 1882, "for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon."[11] There was no doubt that in 1882 some Navajos were residing within that area, in addition to the Moqui (now generally known as Hopis).[12] Navajos have lived on that land ever since, multiplying at a more rapid rate than

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any Navajo or Hopi Indians claiming an interest in the area set aside by Executive Order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive Order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive Order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28 United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navajo Indian Tribe or individual Navajo Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navajo Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navajo and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Approved July 22, 1958.

Act of July 22, 1958, 72 Stat. 403.

9. *Id.* § 2.

10. *See generally* S. REP. No. 265, 85th Cong., 1st Sess. 1 (1957); H.R. REP. No. 1942, 85th Cong., 2d Sess. 6 (1958); Letter from Hatfield Chilson to James A. Haley, quoted in S. REP. 265, 85th Cong., 1st Sess. (1957).

11. Executive Order of December 16, 1958, *quoted* in C. KAPPLER, LAWS AND TREATIES 805 (1904).

12. 210 F. Supp. at 145.

the Hopis.[13] The controversy between the two Tribes was what relative rights they had to the land. At the time of enactment of Public Law 85-547 in 1958, the Hopis contended that the Navajos had never been "settled" on the Executive Order Area and that the Hopis, therefore, had exclusive rights of use and occupancy to the entire tract of about 2,453,000 acres.[14] The Navajos, on the other hand, contended that they had indeed been "settled" within the meaning of the 1882 Executive Order and had exclusive rights to that portion of the land which the Bureau of Indian Affairs had assigned to Navajo use in 1943, consisting of approximately 1,822,000 acres. The Navajo Tribe conceded that the Hopis had exclusive rights to the land which the Bureau of Indian Affairs had set aside for Hopi use in 1943, approximately 631,000 acres.[15]

Thus, the 631,000 acres which the Bureau of Indian Affairs had set aside for Hopi use were not in controversy. What was in controversy was the area of 1,822,000 acres which the Navajos were using, almost exclusively. Both the Navajo Tribe and the Hopi Tribe claimed exclusive rights and interests to that area.

The lengthy opinion rendered by the District Court reached, in essence, the following conclusions:

(1) The 1882 Executive Order vested in the Indians a mere right to use and occupancy which could "be terminated by the unilateral action of the United States without legal liability for compensation."[16]

(2) A constitutionally protected right to the land did not vest in the Indians until 1958, when the language of Public Law 85-547, for the first time, created that right.[17]

(3) The Navajo Indians were "settled" on the tract by the Secretary of the Interior, within the meaning of the phrase in the Executive Order, in 1931.[18] This settlement gave them a right of use and occupancy in the area reserved for them by the Bureau of Indian Affairs, an area of 1,822,000 acres. Under the 1958 law, this right of use and occupancy, derived from the settlement, ripened into a constitutionally protected vested right.[19]

(4) The Hopis derived a pre-1958 right of use and occupancy of the 1,822,000 acres from the fact that they were explicity mentioned in the 1882 Executive Order.[20] The settlement of the Navajos and the exclusion of the Hopis from the area by officials of the Bureau

13. *Id.* at 168-70
14. *Id.* at 170-92.
15. *Id.*
16. *Id.* at 138.
17. *Id.*
18. *Id.* at 156-57.
19. *Id.* at 138.
20. *Id.* at 134.

of Indian Affairs did not terminate the continued rights of the Hopis to the area.[21] These rights, too, ripened into a constitutionally protected right in 1958.[22]

(5) The rights which thus vested in 1958 to the 1,822,000 acres belonged to the two Tribes. They were joint rights. They were undivided. And they were also equal.[23]

(6) The Hopis had an exclusive uncontested right of use and occupancy in the 631,000 acres set aside for them in 1943, which had also become a vested right in 1958. Under the provision of Public Law 85-547, the tract was, therefore, partitioned and the 631,000 acres set aside as the Hopi Reservation.[24]

Having decided that the two Tribes had joint rights to the 1,822,000 acres (hereinafter referred to as "the joint-interest area"), and not being empowered by Congress to allocate the rights to partition the land, the Court simply left the two Tribes with this decision in the nature of a declaratory judgment. But the land in which, according to the *Healing* court, the Hopis had had since 1958 a vested one-half interest was occupied almost completely by Navajos, had been so occupied in 1958, and for decades before.

In the years that followed there was no difficulty delivering to the Hopis a share of the income derived from mining operations on the tract owned jointly by the two Tribes. But what to do with the surface, on which Navajos resided and on which Navajo livestock grazed, became an increasingly vexing problem. During the twelve years which have elapsed since the Supreme Court affirmed *Healing v. Jones,* efforts to resolve the differences between the Tribes over the use of the surface of the joint-interest area have failed. The Navajos, whose people depend on the grazing resources of that land, had wanted to remain in possession of the surface and to recognize the property rights of the Hopis in some way other than delivering to the Hopis one half of the surface, or 911,000 acres. The Hopis, on the other hand, have insisted that they be given a contiguous block of 911,000 acres adjacent to their Reservation, and that the Navajo people now residing on that land be expelled.

In light of the fact that negotiations between the parties did not produce a satisfactory result, the Hopis have taken their case both to the courts and the Congress. On March 13, 1970, the Hopi Tribe petitioned the District Court of Arizona for a writ of assistance which would enable the Hopis to make use of fifty per cent of the surface area in the joint-interest area.[25] On October 14, 1972,

21. *Id.* at 189.
22. *Id.* at 138.
23. *Id.* at 189.
24. *Id.* at 173.
25. Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1972), *cert. denied,* 406 U.S. 945 (1972).

the District Court of Arizona issued a writ of assistance which directed the Navajo Tribe to commence a program of livestock reduction in order to allow members of the Hopi Tribe to use more of the surface of the joint-interest area.[26] In the Congress, members of the House and Senate favorable to the Hopi position introduced bills which would partition the joint-interest area by conveying half of the surface to each of the Tribes and expelling Navajos from the area conveyed to the Hopis.[27] Both the judicial and the legislative solution would make room for Hopi livestock in the joint-interest area. But whereas the former would do so without forcing Navajos to give up their homes and leave the area, the legislative solution advocated by the Hopis would indeed entail the expulsion of Navajos from their homes. It is that aspect of the matter which caused the Navajos to oppose the Hopi-supported legislative solution with all the resources which they could muster. The Navajos desperately want to avoid another Long Walk, another Trail of Tears, for thousands of their fellow tribesmen. Their struggle against expulsion legislation has been the most controversial Indian issue before both the 92nd and the 93rd Congress.[28]

II. THE PLENARY POWERS OF THE CONGRESS

The essential elements of the Hopi-sponsored legislative solution are (1) that the subsurface remain joint, undivided and equal, (2) that only the surface rights be partitioned between the two Tribes and that such partitioning must result in acreage equal in size and carrying capacity being allocated to the two parties, and (3) that the acreage so allocated be a contiguous block of land adjacent to the Hopi Reservation, from which all Navajos are to be expelled.[29] This solution, the territorial solution, its sponsors have argued, is the only legally proper legislative sequel to *Healing v. Jones*. That

26. Hamilton v. McDonald, No. Civ. 579 Pct. (D. Ariz. 1972).

27. *See* S. 2424, 93rd Cong., 1st Sess. (1973); H.R. 10337, 93rd Cong., 2d Sess. (1973).

28. On July 26, 1972, H.R. 11128, a Navajo expulsion bill supported by the Hopi Tribe, passed the House of Representatives. *See* H.R. 11128, 92d Cong., 2d Sess. (1972). The Senate Committee on Interior and Insular Affairs held hearings on the bill in September, 1972, but then failed to report the bill out of Committee. A similar bill, H.R. 10337, came to the floor of the House of Representatives in the next Congress. *See* H.R. 10337, 93rd Cong., 1st Sess. (1973). H.R. 10337 was defeated on March 18, 1974, under suspension of the rules, but passed under a rule on May 29, 1974. The Senate Committee on Interior and Insular Affairs approved a substantially different bill on August 21, 1974.

29. In the joint-interest area, it must be remembered, there live about 2,000 Navajo families. Their residential sites, with all appurtenances, do not occupy more than ten acres of land. They thus occupy residentially, at most, 20,000 acres. If it were indeed decided that 911,000 acres out of 1,822,000 acres must be partitioned to the Hopis, would it not be possible to allocate acreage in such manner as to save the not more than 20,000 acres of residential sites? Yet this possibility is negated by the requirement in the Hopi-supported bills that the area partitioned to the Hopis must be a contiguous, compact block of land adjacent to the Hopi Reservation, from which Navajo residents would be removed. The emphasis on this last point suggests that the legislation is not concerned merely with a partitioning of economic interests but with the territorial aggrandizement of the Hopi Reservation. *See* H.R. 11128, 92d Cong., 2d Sess. (1972).

such is simply not so becomes evident from a mere reading of the *Healing* case. The jurisdictional act had authorized the court to partition and award to the appropriate tribe any land within the Executive Order Reservation which it found to be owned exclusively by that Tribe. But while the original draft of the bill would have allowed the court also to partition land which it found to be jointly-owned, the final version did not. As the court pointed out:

> But then it was decided to delete the provision which would give the court power to distribute jointly-held land. This was accomplished by amending the bill to strike the third numbered clause contained in the above-quoted part of section 2 of the bill. The request for this revision came from the department, in a letter from Chilson to Honorable James A. Haley, Chairman of the subcommittee. The reason given for this deletion was as follows:
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> > [T]he purpose is to leave for future determination the question of tribal control over lands in which the Navajos and Hopis may have a joint and undivided interest. The two tribes feel that this question cannot be adequately resolved until the nature of their rights is ajudicated, and that the question is properly one for determination by Congress rather than by the courts. We agree with that position. Until the nature of the respective interests is adjudicated it is difficult to determine whether any part of or interes in the lands should be put under the exclusive jurisdiction of either tribe.[30]

Thus, while the *Healing* court found an exclusive Hopi interest in about 631,000 acres of land and awarded that land to the Hopi Tribe, it simply made a finding that both tribes had an equal and joint interest in another 1,822,000 acres. It made no disposition of that land as "the question of a partition or *other disposition thereof* 'is properly one for determination by Congress rather than by the courts.' "[31]

There is no doubt that the court was fully aware that if the jurisdictional act had given it the power to partition, it could have partitioned the jointly-owned area in a manner other than by the equal division of the surface. In a footnote, the court pointed to the testimony of a representative of the Office of the Solicitor of the Interior Department, Lewis Sigler, before a Congressional committee considering the jurisdictional act. That witness had noted that after having found a joint-interest to exist, a court might

30. Healing v. Jones, 210 F. Supp. 125, 190 (D. Ariz. 1962) *aff'd*, 373 U.S. 758 (1963).
31. *Id.* at 191 (emphasis added).

award "the surface to one group and the subsurface to another group."[32] At a later point the court noted another observation by the same witness to the effect that

> in the event there is this split ownership adjudicated . . . the feeling was Congress ought to take a look at the nature of that split ownership before it decided which tribe would get the control.[33]

Healing v. Jones thus contained no express mandate to the Congress as to the one and only proper way of apportioning the interests in the joint-interest area, as Congressman Owens suggested to his colleagues.[34] What the *Healing* decision did provide was a definition of the property rights of the Navajo and Hopi Tribes in the joint-interest area, rights which the Congress must respect in keeping with the requirements imposed by the Constitution of the United States. The question which must now be considered is how wide is the latitude of the Congress in dealing with these tribal property rights.

That the powers of the Congress in dealing with Indian land are exceedingly broad has long been a basic precept in the field of Federal Indian law:

> The control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs, and has provided most frequent occasion for judicial analysis of that power. From the wealth of judicial statement there may be derived the basic principle that Congress has a very wide power to manage and dispose of tribal lands.
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> . . . .
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> The power of Congress extends from the control of use of the lands, through the grant of adverse interests in the lands, to the outright sale and removal of the Indians' interests. And this is true, whether or not the lands are disposed of for public or private purposes.[35]

In *Lone Wolf v. Hitchcock*[36] the Supreme Court had explicitly affirmed the principle that Congress has extremely broad powers over Indian lands. There the plaintiff challenged the legal authority of Congress to dispose of Indian lands in a manner contrary to certain treaty provisions. The Supreme Court rejected the plaintiff's contention with the following analysis:

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32. *Id.* n.93 at 191 (Statement of Lewis Sigler).
33. *Id.* at 191 n.94.
34. *See* text accompanying nn. 1 & 2, *supra.*
35. F. COHEN, FEDERAL HANDBOOK OF INDIAN LAW 94-95 (1942).
36. 187 U.S. 553 (1903).

> To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.
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> . . . .
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> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.[37]

Only the Fifth Amendment of the United States Constitution imposes a limitation on this plenary power. Courts have emphasized that

> [T]he allotment by the government or its agents of property rightfully belonging to an Indian tribe to some other party is a taking of that property for which the Indians are entitled to receive just compensation [under the Fifth Amendment], which includes the payment of interest.[38]

Thus, the authority of Congress over Indian lands

> does not enable the United States without paying just compensation therefore to appropriate lands of an Indian tribe to its own use or to hand them over to others.[39]

It necessarily follows that Congress is not restricted to the territorial approach in disposing of lands in the joint-interest area. Nothing in the *Healing* decision so limits Congress, and moreover, such a restriction would contravene the legal principle that Congress has broad discretion in dealing with Indian lands. Thus, Congress possesses the power to dispose of the land in the joint-interest area in any manner it considers appropriate as long as the requirements of the Fifth Amendment are observed.

If Congress, a board of arbitrators authorized by Congress,[40] or a court similarly authorized by Congress,[41] were to make a disposition of rights derived from the judgment in the *Healing* case, what would be the options from which a choice could be made? It would appear that in developing any plan for disposition one can distinguish between a definitive allocation of rights in the land,

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37. *Id.* at 564-65.
38. Miami Tribe of Oklahoma v. United States, 281 F.2d 202, 212 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961).
39. United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123 (1938).
40. *See, e.g.*, H.R. 7679, 93rd Cong., 1st Sess. (1973).

on one hand, and a possibly more flexible allocation of use rights or rights to income on the other. The possibilities available for allocating rights in the land would fall into the following broad categories:

(1) continued undivided ownership of all or part of the joint-interest area;

(2) equal partitioning in kind of all or part of the joint-interest area;

(3) disproportionate allocation of rights in the joint-interest area and the payment of cash for the difference between the value to which the party would have been entitled and the value allocated to it in kind.

These classes of possibilities, in turn, lead to a host of specific options. One of these, based on the first and second possibilities listed above, is that supported by the Hopis. It provides, as indicated above, for a portion of the property rights in the joint-interest area, the subsurface rights, to continue to be held in joint, undivided and equal ownership, and for another portion, the surface rights, to be divided equally in kind.[42]

The Navajos, by contrast, have given their support to an option based on the first and third possibilities. They would dispose of the subsurface interests in the same manner as the Hopis. But as to the surface they favor an allocation of property rights based on the pattern of actual use of the land on the date of enactment of Public Law 85-547, July 22, 1958. As the Hopis would receive substantially less than a one-half interest, the Navajo-supported proposal provides for a payment to them in cash for the value of the rights relinquished by them.[43]

A third option would be the one mentioned by Lewis Sigler in his 1957 testimony on the jurisdictional legislation: to grant the surface to one tribe (presumably the Navajos, who are in possession of the land) and the subsurface to the other (the Hopis). As the value of the subsurface is likely to be substantially greater than the surface, the grantee of the surface would have to receive a cash payment for the deficiency in the value of the property allocated to him. Alternatively, the grantee of the surface could receive a percentage interest in the subsurface which would be large enough to equalize the values allocated to the two parties.

The examples just given illustrate the variations which can be

41. *See, e.g.*, H.R. 10337, 93rd Cong., 1st Sess. (1973) (Senate Committee Print dated August 22, 1974).
42. *See, e.g.*, S. 2424, 93rd Cong., 1st Sess. (1973); H.R. 5647, 93rd Cong., 1st Sess. (1973); H.R. 10337, 93rd Cong., 1st Sess. (1973).
43. *See, e.g.*, S. 3230, 93rd Cong., 2d Sess. (1974); H.R. 7716, 93rd Cong., 1st Sess. (1973).

considered in disposing of rights in the land. But beyond that there are, as already indicated, a number of options available for the allocation of rights to use land temporarily. One such option would provide for the equal partitioning of the land between the two Tribes but would grant a lifetime right to stay on their land to all adult Navajos born in the 1882 Executive Order Reservation.[44] Another available option would be to hold some or all the land in joint and undivided ownership, invest in programs to improve the quality of the land, and then allow the Hopis to increase their grazing use of the land over a period of time. During the time during which the Hopis would make less than fifty per cent use of the land, the Navajos would be required to make a payment in the nature of rent to the Hopis. To guarantee their collection of such payments, they could receive an assignment of the Navajo share of the mineral income from the joint-interest area.

What this brief discussion has shown is that the decision-maker in this matter has truly an arsenal of options available in making a disposition of the Navajo and Hopi tribal interests in keeping with the decision in *Healing v. Jones* and the Constitution of the United States. The question to be considered now is what factors should be weighed in choosing one option over another.

The position taken by the Navajo Tribe is that whatever option is chosen, it should be one which does not force families which now live and for a long time have lived in the joint-interest area to leave their homes, give up their way of life, and move into a setting which is alien to them and in which the heads of families, who are now engaged in sheepherding, become totally unemployed and probably unemployable. H.R. 10337, as passed by the House of Representatives on May 29, 1974, would do precisely that. To cushion the blow, it would authorize the expenditure of $28,800,000 of Federal money[45] on behalf of the people who are to be removed from their homes. What Navajos have asked for is that the Federal Government avoid a course which would cause human suffering and would cause the expenditure of substantial sums of public funds on the removal of people from a condition in which they are self-supporting to one in which they are likely to become chronic welfare dependents.

Against this argument in support of the Navajos, based on the present and on the immediate future, supporters of the Hopi cause have emphasized the past. They contend that the solution which

44. *See, e.g.*, S. 3724, 93rd Cong., 2d Sess. (1974).

45. This amount, authorized by Sec. 24(a) of H.R. 10337, 93rd Cong., 1st Sess. as it passed the House of Representatives, would also be available for Navajos who would be expelled from another tract, the so-called Moencopi area. Navajos estimated that 14% of the potential expellees would come from the Moencopi area.

they seek, aggrandizement of the Hopi Reservation, would constitute an act of historic justice. It is, therefore, appropriate to examine those aspects of the history of the area and its peoples which appear to have relevance to the present-day controversy.

III. CONSIDERATION OF "HISTORIC JUSTICE"

The proposition that enlargement of the Hopi Reservation would be an act of historic justice is based on the assertions that (a) the area now in dispute has traditionally been "Hopi country" and (b) that it was the intent of the Executive Order of December 16, 1882, to set the entire reservation area aside for the Hopi Tribe. As will now be shown, neither of these assertions is supported by the facts.

An examination of the historic and anthropological evidence makes it clear that the joint-interest area was "Hopi country" only in the same sense that the Dakotas and parts of Nebraska, Montana, and Wyoming were once Sioux country, Tennessee was Cherokee country, and parts of New York and Pennsylvania were Iroquois country. To say that the joint-interest area was Hopi country means only that at some point in the past members of the Hopi Tribe made occasional and sporadic use of the land which surrounds the present Hopi Reservation.

This occasional and sporadic use may have been sufficient, as of the time of the Treaty of Guadalupe Hidalgo in 1848, to establish an Indian title interest, the extinguishment of which entitles the Hopis to compensation under the Indian Claims Commission Act.[46] But that Act, in providing for only monetary compensation rather than a returning of the land in kind, underlines the fact that the United States Government recognizes changes in circumstances, changes in land use, and does not, in dealing with rights in Indian land, attempt to restore settled areas to a *status quo ante* of a bygone century.

What the available evidence indicates is that Hopi Indians have for hundreds of years lived in villages on mesa tops within the boundaries of the present Hopi Reservation.[47] They would farm in the near vicinity of the villages and would generally spend the night within the village. They would thus make intensive economic use only of a circular area surrounding the mesas, the radius of which would not exceed half a day's travel from the village.[48] On occasions, Hopis would travel to more distant places, "for the purpose of cutting and gathering wood, obtaining coal, gathering

46. Act of August 13, 1946, ch. 959, 60 Stat. 1049; 25 U.S.C. § 70 *et seq.* (1970).
47. Healing v. Jones, 210 F. Supp. at 134.
48. *See* H. JAMES, THE HOPI INDIANS 111-12 (1956).

plants and plant products, visiting ceremonial shrines, and hunting."[49] But such sporadic uses left a large region basically unoccupied and unused.

It is that region, surrounding the area of intensive Hopi use, which the Navajos entered and of which they began to make use in a manner which was not in conflict with sporadic Hopi use.[50] As the *Healing* court noted, the Navajos "entered what is now Arizona in the last half of the eighteenth century."[51]

After the Treaty of Guadalupe Hidalgo in 1848, when Arizona and New Mexico came under United States sovereignty, Anglo settlement of the Rio Grande valley resulted in the Navajos being pushed westward.[52] Their numbers in northeastern Arizona increased rapidly after 1850 and they began to populate the area around the Hopi mesas.[53] The *Healing* court found with specific reference to the land here in dispute:

> The evidence is overwhelming that Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958, when any rights which any Indians had acquired in the reservation became vested.[54]

Granted that Navajos lived on the land now in dispute prior to 1882, when it was part of the public domain, did its withdrawal in 1882 to create an Executive Order Reservation grant *exclusive* legal or moral rights in the area to the Hopis? A mere examination of the text of the Executive Order must result in a negative answer to that question for, as already noted, the land was set aside for "the Moqui [Hopi], *and such other Indians as the Secretary of the Interior may see fit to settle thereon.*"[55]

It has been argued in support of the Hopi cause that the "other Indians" clause was standard language, used in many other Executive Orders of that period. The answer is that it was indeed standard language where the Government wanted to keep its options open. Where the Government wanted to reserve land for one tribe alone it did so by *not* inserting the "other Indians" clause.[56]

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49. Healing v. Jones, 210 F. Supp. at 174.
50. *See* ABERLE, ANOTHER INDIAN RELOCATION? WHEN WILL THEY EVER LEARN? 1, 20-21 (June 24, 1974) (Unpublished statement on file with the Senate Committee on Interior and Insular Affairs).
51. *Id.* at 134. Some anthropologists believe that they were there as early as 1540. *See Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess. 68 (1973) (Statement of Professor David F. Aberle).
52. *See generally* F. MCNITT, NAVAJO WARS 95-156 (1972).
53. *Id.* at 385-410.
54. 210 F. Supp. at 144-45.
55. *Id.* at 129 n.1 (emphasis added).
56. *See, e.g.*, Executive Order of January 4, 1883 (establishing a reservation for the Hualapai Indians), quoted in C. KAPPLER, LAWS AND TREATIES 804 (1904); Executive Order

The conclusion that it was not the intent of the Executive Order to grant exclusive rights to the Hopi Indians is also borne out by an examination of the official correspondence preceding the promulgation of the Order. From 1876 on, the Office of Indian Affairs had given serious consideration to the creation of an Indian reservation in northeastern Arizona. Among the suggestions submitted by field officials was the idea of creating a relatively small reservation for the Hopis (the 1876 recommendation was for 32,000 acres) or a very large reservation for both Hopis and Navajos.[57] No action was taken on any of these recommendations for a number of years.[58]

It was on December 16, 1882, that a reservation was finally created by Executive Order.[59] None of the thoughtful reports on the conditions of the Indians in the area played a significant role in that decision. Instead, the Executive Order appears to have been prompted by the eagerness of the Commissioner of Indian Affairs to cause the eviction of a former employee, a Dr. Sullivan, from a Hopi village. It was only when the Commissioner discovered that he could not lawfully cause Sullivan's eviction as long as the land of the Hopis was not withdrawn from the public domain that the decision to create a reservation was made.[60] The Commissioner then ordered his local agent to send him a description of the area to be withdrawn.[61] The agent cheerfully obliged by recommending the withdrawal of about 2,453,000 acres. His recommendation was sent forward on December 4, 1882, and was received in Washington on December 12.[62] The following day, December 13, 1882, the Commissioner forwarded a draft Executive Order to the Secretary of the Interior[63] and on December 16, 1882, the Executive Order was signed. No one in Washington had ever had a chance to review critically the recommendations of the local agent. If this had been done, it would have become apparent that the area which had now been withdrawn from the public domain was an area which included not only the Hopi area of occupancy but an area of Navajo occupancy as well.

What would seem a rather cavalier way of disposing of the public domain appears in a different light when the "other Indians" clause is remembered. By inserting that clause, the Secretary of the Interior kept all his options open. The Government was not giving anything away. On the contrary, all the President did by

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of March 31, 1882 (establishing a reservation for the Yavai Suppai Indians), *quoted in* C. KAPPLER, LAWS AND TREATIES 809 (1904).

57. 210 F. Supp. at 135.
58. *Id.* at 136.
59. *Id.* at 137.
60. *Id.* at 136-37.
61. *Id.* at 136 (Telegram from H. Price to J. H. Fleming, November 27, 1882).
62. *See* Letter from J. H. Fleming to H. Price, December 4, 1882, portions reprinted in 210 F. Supp. 137.
63. Letter from H. Price to the Secretary of the Interior, December 13, 1882, at 3-4.

issuing the Executive Order was vest the power in officials of the Executive Branch to exclude from the land here in issue persons who were deemed undesirable.

That the 1882 Executive Order did not vest any legal rights in the Hopis was judicially confirmed in *Healing v. Jones*:

> The right of use and occupance gained by the Hopi Indian Tribe on December 16, 1882, was not then a vested right. As stated in our earlier opinion, an unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such use and occupancy may be terminated by the unilateral action of the United States without legal liability for compensation. The Hopis were therefore no more than tenants at the will of the Government at that time.[64]

But, the Hopis argue further, one of the major purposes of the 1882 Executive Order was to keep intruders out of Hopi land. These intruders included non-Indians as well as Indians. Among the latter, in particular, were Navajos.

There is no doubt that, perhaps because of their different life styles, Navajo sheepherders and Hopi farmers had often found themselves in disputes, disputes which may very well go back to the time when Navajos first entered this area in northeastern Arizona. What an examination of the recorded history of these disputes reveals, however, is that they would invariably involve Navajo livestock crossing Hopi fields or Navajos and Hopis arguing over watering holes in the vicinity of the mesas. In other words, the problem arose where Navajos would enter the area of intensive Hopi use and occupancy.[65] That was the area from which the Government undoubtedly wanted to see all intruders, including Navajos, removed.

Hopi economic use and occupancy did not in 1882 extend to the entire Executive Order Reservation.[66] To be sure, the *Healing* court suggested that it may have been the intent of the Government to provide for both present and future economic needs of the Hopis.[67] However, it cites no evidence to support that conclusion. The fact is that the evidence before the Commissioner of Indian Affairs, the Secretary of the Interior, and the President at the time the Executive Order was issued suggested that only the area of actual Hopi use and occupance was being protected. On December 4, 1882, when he sent his proposed boundaries to the Commissioner of Indian

64. 210 F. Supp. at 138.
65. The incidents which led to the establishment of the Parker-Keam line of 1891 are examples of the conflicts that arose when Navajos impinged upon the Hopi area of use and occupancy. *See* text accompanying note 71 *infra*.
66. 210 F. Supp. at 138.
67. *Id.*

Affairs, the Indian agent to the Hopis, J. H. Fleming, had written:

> Your telegram of Nov. 27, 1882, directing me to "Now describe the boundaries for reservation that will include Moqui villages and agency, and large enough to meet all needful purposes and no larger", and to "forward by mail immediately" is at hand, and I cheerfully submit the same, prefacing the following remarks.
>
> The lands most desirable for the Moquis, and which were cultivated by them 8 or 10 years ago, have been taken up by the Mormons and others, so that such as is embraced in the prescribed boundaries, is only that which they have been cultivating within the past few years. The lands embraced within these boundaries are desert lands, much of it worthless even for grazing purposes. That which is fit for cultivation even by the Indian method, is found in small patches here and there at or near springs, and in the valeys [*sic*] which are overflowed by the rains, and hold moisture during the summer sufficient, to perfect the growth of their peculiar corn.
>
> The same land cannot be cultivated a number of years in succession, so that they change about, allowing the land cultivated one year, to rest several years. I think that the prescribed boundaries, embraces sufficient land for their agricultural and grazing purposes, but certainly not more.[68]

The population of the Hopi Tribe at this time totaled 1,813 persons.[69] It is seriously to be doubted that Agent Fleming's superiors in Washington believed that an allocation of about 1,350 acres for every Hopi man, woman and child complied with the instruction that the area to be set aside be "large enough to meet all needful purposes and no larger." They solved the problem by not limiting the Reservation to the Hopis but by obtaining authority to place on it "such other Indians as the Secretary of the Interior may see fit to settle thereon."

It is reasonable to presume that neither the Hopis nor the Navajos had any idea that the Executive Order had been issued or had any understanding of the lines which Agent Fleming had drawn on a map.[70] But, as the years passed, the Executive Order took on a life of its own. The letters which had been exchanged between Office of Indian Affairs field officials and the central office in 1882 were probably filed away and the only point of reference was the Executive Order itself.

It was in the period from 1888 to 1891 that the United States

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68. Letter from J. H. Fleming to H. Price, December 4, 1882, at 1-2 (emphasis added); Healing v. Jones, 210 F. Supp. at 137 n.7.
69. 210 F. Supp. at 137.
70. Letter from A. McD. McCook to H. K. Bailey, January 3, 1891.

Government was called upon to deal forcefully with the question of where to draw the line between the area of Hopi occupancy and the area of Navajo occupancy. A complaint had reached the Commissioner of Indian Affairs that Navajos were destroying Hopi crops and ruining their grazing land. The Government intervened and early in January 1891 the problem was finally resolved by drawing "a circular boundary around the Hopi villages, having a radius of 16 miles, within which the Navajos were instructed not to enter."[71] That area evidently encompassed what was considered the Hopi area of economic use and occupancy.

That no one in the field, Indian or non-Indian, had any idea of where the 1882 line was is evident from the official correspondence of that period. On December 31, 1890, Captain H. K. Bailey, Acting Assistant Adjutant General for the Department of Arizona, wrote:

> It is known that the Navajoes and Moquis have intermarried and that there is continuous trading between them, and with this understanding you will be very guarded in your action, especially with the Navajoes, and under no circumstances, if it can be avoided, will any harsh measures be taken towards them at this time. The lines separating the Navajo and Moqui reservations are not marked with a degree of plainness that an ordinary Indian can understand. There was no person at or near Keams' Canyon known to the Department Commander who could even indicate points on boundary lines, and until this line is distinctly marked only persuasive [sic] measures will be used towards the Navajoes in thie regard.[72]

A few days later, on January 3, 1891, Brigadier General A. McD. McCook, Commander of the Department of Arizona, expressed a similar view:

> It is recommended that the line of demarkation between the Navajo and Moqui reservation be distinctly marked by indestructable monuments upon the natural elevations along the lines, and that the water in the neighborhood of the line and lying east thereof be reserved for the Navajos, and that to the west for the Moquis. Until this is done I do not deem it wise to use force to prevent the Navajoes from grazing near the Moqui reservation.
>
> The Navajos or Moquis do not know where the line between their reservation is, nor do I; hence any coercive action on our part would not be wise until the line is definitely settled.[73]

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71. 210 F. Supp. at 148.
72. Letter from H. K. Bailey to Charles H. Grierson, December 31, 1890.
73. Letter from A. McD. McCook to H. K. Bailey, January 3, 1891.

Various government officials then met at Keams Canyon to discuss the Navajo-Hopi problem among themselves and with representatives of the two Tribes. Among the persons present were Special Agent George W. Parker of the Office of Indian Affairs and T. V. Keam, a local pioneer. Agreement was reached on a line, thereafter known as the Parker-Keam line, which would define the area reserved for Hopi use and which Navajos would not be allowed to cross with their herds. That line, a circular boundary sixteen miles from the Hopi villages, was then marked by mounds and monuments with the cooperation of both Hopis and Navajos.[74]

The *Healing* court did not find this agreement reached in the field in 1891 to be *legally* significant.[75] But it is *historically* significant in indicating what the parties as well as other local observers considered a fair and just arrangement in the absence of any clear understanding of the meaning of the 1882 Executive Order. It is the Parker-Keam area, subsequently somewhat enlarged, which is the Hopi Reservation of today.[76]

In the years that followed the establishment of the Parker-Keam line, differing official views were held, from time to time, as to what the language of the 1882 Executive Order really meant. Some officials were of the view that the entire Executive Order Reservation was the land of the Hopis and that the Navajos had no rights in it, that they were trespassers. Other officials thought that the Navajos were the "other Indians" who had been "settled" on the land by the Secretary of the Interior. The objective fact was that the Hopis stayed in the area which they had occupied immediately before 1882 and immediately thereafter and that the Navajos, in turn, continued to occupy after 1882 the area which they had occupied in the decades preceding 1882.[77]

Following 1891, the United States Government clearly acquiesced in Navajo presence on the Reservation, although no one seemed to have considered it necessary or appropriate to take the action which a court would have considered a formal act of "settling." This failure to act, which evidently puzzled the *Healing* court, is understandable in light of the policies of detribalization which were dominant in Federal Indian policy as viewed from Washington, between the enactment of the General Allotment Act of 1887 and the advent of the Hoover Administration in 1929.[78] In that period increasingly less attention was paid to tribal rights as such, as

74. 210 F. Supp. at 148.
75. The District Court based this conclusion on the fact that the Parker-Keam line did not receive the formal approval of the Secretary of the Interior. *Id.* at 148-49.
76. The area within the Parker-Keam line would have been about 514,720 acres. The Hopi Reservation today consists of 631,194 acres.
77. 210 F. Supp. at 168-69.
78. *See* S. TYLER, A HISTORY OF INDIAN POLICY 91 (1973).

the Government followed a policy in which the powers of local agents of the Office of Indian Affairs were considered paramount and their primary effort was to turn individual Indians, regardless of tribal background, into agriculturists.[79] (This explains the attempts, in 1911, to grant allotments of land in the Executive Order Reservation to about three hundred Navajos.)[80]

The Parker-Keam line, it turned out, had not resolved the contest between Navajos and Hopis forever. In 1918, an Office of Indian Affairs official complained that the area of Hopi occupancy had been reduced to about 600 square miles (384,000 acres) as a result of Navajo pressure.[81] The Hopis, quite understandably, asked for redress and as a result the Department of the Interior began, in the Nineteen Twenties, to give serious consideration to the possibility of formally dividing the Executive Order Reservation between the Navajo and Hopi Tribes.[82] But it was only in 1931 that the Commissioner of Indian Affairs and the Secretary of the Interior officially agreed that such a division should take place.[83]

However, by the time the Department of the Interior's decision to divide the Executive Order Reservation had been made, the Executive branch of the government no longer had the authority to alter the boundaries of Executive Order reservations. The Act of March 3, 1927, vested the sole power to take such action in the Congress.[84] For a brief period of time Congressional action appeared to be a possibility,[85] but after 1933 all such attempts were abandoned. Thus, by the early nineteen thirties the Executive branch of the government was no longer legally capable of dividing the Executive Order Reservation, and Congress appeared to be unwilling to do so.

The concept of segregating land for the exclusive use of the Hopi Tribe was revived when the Commissioner of Indian Affairs began to enforce new land management regulations on Indian land. The Office of Indian Affairs divided the Navajo and Executive Order Reservations into "land management" districts, and set aside one such area, District 6, for the exclusive use of the Hopi Tribe,

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79. *See* A. JOSEPHY, JR., THE INDIAN HERITAGE OF AMERICA 350 (1st ed. 1968).
80. 210 F. Supp. at 149-50.
81. Letter from L. Crane to the Commissioner of Indian Affairs, March 12, 1918 at 4.
82. 210 F. Supp. at 154-57.
83. *See* Letter from C. J. Rhoads to H. J. Hagerman, February 7, 1931, portions reprinted in Healing v. Jones, 210 F. Supp. at 156.
84. The Act of March 3, 1927, provided that

> [c]hanges in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupancy of Indians shall not be made except by Act of Congress: Provided, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

Act of March 3, 1927, ch. 299, § 4, 44 Stat. 1347; 25 U.S.C. § 398(d) (1963).
85. *See, e.g.*, S. 5696, 72d Cong., 2d Sess. (1933).

reserving the remainder of the land for the exclusive use of the Navajos.[86]

The original District 6 included 499,248 acres,[87] but soon after this allocation was made, the Department of the Interior initiated an

> effort to make final adjustments in the boundaries of district 6 so that the district would contain all lands used or needed by the Hopis, and then to set aside that area as an exclusive Hopi reservation, leaving the remainder of the 1882 reservation for the exclusive use of the Navajos.[88]

An official investigation conducted in 1939 and 1940 resulted in a recommendation that District 6 be enlarged by adding 21,479 acres.[89] After a further review of the matter, the Department of the Interior recommended in 1941 that 29,575 acres be added.[90]

However, the Hopi Tribal Council rejected these suggested additions,[91] and in an attempt to satisfy the Hopi Tribe, yet a third study was undertaken, which resulted in a proposal that 142,549 acres be added to District 6.[92] In 1942 the Hopi Tribal Council officially approved this recommendation, which would have increased District 6 to 641,797 acres.[93] However, before the recommendation could be implemented, the Department of the Interior reduced the addition slightly, by 10,603 acres.[94] Thus, the area within District 6, which in 1958 the *Healing* court determined to be the Hopi Indian Reservation, was fixed at 631,194 acres.[95]

As a result of the establishment of District 6, all lands which the Hopi Tribe had used and occupied for decades prior and at any time since 1882 were restored to its exclusive control. Beyond that, in District 6 the Hopi Tribe received more than 98% of the area which the Hopi Tribal Council had approved as the area to be included in District 6.[96]

The conclusion is inescapable that whatever historic injustices the Hopi Tribe may have suffered at an earlier time were remedied in 1943 when 631,194 acres were segregated for the exclusive use and occupancy of the Hopi Tribe. In fact, the 1943 decision may very well have allocated more land to the Hopis than was justified, for, as the *Healing* court noted,

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86. 210 F. Supp. at 159.
87. *Id.* at 161.
88. *Id.* at 159-60.
89. *Id.* at 161.
90. *Id.* at 162.
91. *Id.* at 164.
92. *Id.*
93. *Id.* at 166.
94. *Id.* at 165.
95. *Id.* at 166.
96. *Id.*

> [m]any Navajo families, probably more than one hundred, then living within the extended part of district 6, were required to move outside the new boundaries and severe personal hardships were undoubtedly experienced by some.[97]

IV. CONGRESSIONAL AND JUDICIAL ERROR

Why did the 1943 settlement, which deviated from the proposal which the Hopi Tribal Council had considered acceptable by only 10,603 acres, fail to resolve the longstanding question as to the rights of Hopis and Navajos within the 1882 Executive Order Reservation? Legally speaking, the answer is two-fold. First of all, the Interior Department Solicitor's Office had cast doubt on the validity of an administrative division of the Reservation which denied the Hopis access to grazing areas within the Executive Order Reservation but outside of District 6. The Solicitor's Office suggested that by limiting the Hopis, the Executive Branch was doing by indirection what it could no longer do directly, that is alter the 1882 Executive Order Reservation.[98] The power to make such alteration was now entirely with the Congress. Second, there was doubt as to the precise nature of the legal rights which the Tribes had to the land in question here pursuant to the 1882 Executive Order. With the possibility of mineral exploitation of the Reservation area before them, all parties concerned were interested in seeing a clearer definition made of the tribal rights in the land. Also, as there was a question as to whether either Tribe had a vested right in the land, the Tribes were interested in legislation which would make certain that the Indian rights in the Executive Order lands were vested and thus compensable. It is against this background that both Tribes supported the legislation which became the Act of July 22, 1958, Public Law 85-547.

There is serious doubt that Congress acted wisely in 1958 when it enacted Public Law 85-547. What Congress did, in effect, was to convey the beneficial interest in 2,453,000 acres of publicly-owned land to Indian grantees, some of which were named and others of which were not named, and then left the question to the courts to calculate who, given the statutory words used by the Congress, was entitled to what. It has been established that Congress did, prior to July 22, 1958, have complete freedom in disposing of the Executive Order Reservation without creating any rights to compensation.[99] If it had tackled that job, would it have divided the land as the *Healing* court did by giving 30% of the population an interest in 63% of the land, and 70% of the population 37%

97. *Id.*
98. *Id.* at 179-80.
99. *Id.* at 138.

of the land?[100] Would Congress have made such an allocation if it had known that such a distribution could be a basis for rendering thousands of people homeless and might require the appropriation of substantial funds to relocate them? The likely answer to both questions is "no." It follows that rather than requiring the courts to wrestle with a multitude of legalisms and then having to face the possibly unintended consequences of the court decision, Congress could in 1958 have allocated the rights to the Executive Order Reservation in such manner as would best serve the public interest.

But the Congress chose another course, and it was ultimately on highly technical grounds, rather than on grounds of public policy that the court in the *Healing* case decided the issue of the ownership of what thereafter became the joint-interest area. To begin with, the court held that the very language of the 1882 Executive Order gave the Hopis

> [t]he right of use and occupancy . . . [of] the entire area embraced within the December 16, 1882, reservation, and was not limited to the part of that reservation then used and occupied by them.[101]

Further, the court held, as heretofore noted, that in 1931 the Navajos were "settled," within the meaning of the 1882 Executive Order, on that portion of the reservation which was not included in District 6.

What the court further held, and this part of the holding was crucial to its ultimate decision, was that the Hopis had never abandoned their interest in the area outside of District 6, which had been derived from the 1882 Executive Order, and that the Secretary of the Interior did not, after the Act of March 3, 1927, have the power to cut off Hopi rights in that area without the consent of the Congress. The rights of the Hopis, therefore, co-existed with the rights of the Navajos in the 1,822,000 acres of the Executive Order Reservation which lay outside District 6. The court thus concluded that the rights of the two Tribes in that land were joint and undivided.[102]

The reasoning of the *Healing* court which led to the conclusion that the interests of the two Tribes in the area are joint and undivided is entirely plausible. But the court reached one additional

100. In 1958 approximately 8,800 Navajos resided in the Executive Order Reservation. Healing v. Jones, 210 F. Supp. at 168. The Hopi population probably was no more than 3,700 in 1958. The *Healing* court observed that in 1951 approximately 3,200 Hopis resided in the Executive Order Reservation, and if an annual rate of increase of 2.5% is assumed, the Hopi population would have increased by slightly more than 500 during the period from 1951 to 1958.

101. *Id.*

102. *Id.* at 189.

conclusion, which it never explained and which is supported by neither the evidence nor established case law. It held that the rights of the two Tribes in the 1,822,000 acres were *equal* as well as joint and undivided.[103]

If the court had jurisdiction to reach the conclusion that the two Tribes had equal rights in the area of the Executive Order Reservation outside District 6, that is an adjudicated holding. The Hopi Tribe cannot be deprived of the vested property right which stems from that holding. But in analyzing the issue of whether the Hopis should now be granted 911,000 acres in the name of historic justice, or should otherwise be made whole, it is highly appropriate to analyze whether the *Healing* court was right when it reached the conclusion that the Hopis had in 1958 acquired a one-half undivided interest in the 1,822,000 acres of land which were used and occupied by Navajos. For if the conclusion is reached that the *Healing* court erred in awarding a half interest to the Hopi Tribe, the least that can be done now is to dispose of that interest in such manner as the injured party, the Navajo Tribe, suggests.

In examining the rights of Hopis and Navajos outside of District 6, the *Healing* court noted:

> It is true that, as a practical matter, the entirely valid settlement of Navajos in the part of the 1882 Reservation outside of District 6, even without the legal restraint which the government placed upon the Hopis, would have greatly limited the amount of surface use the Hopis could have made of the outer reaches of the reservation. Though Hopi and Navajo rights of use and occupancy were equal, members of both tribes could not physically utilize the same tract at the same time. This was a hazard to which the Hopis were at all times subject because of the authority reserved in the Secretary to settle other Indians on the reservation.[104]

The court then went on to stress that if there had been no Governmental restraint nor Navajo pressure, the Hopis would have used more land:

> But without such Governmental restraint and without Navajo pressure in becoming joint occupants there would unquestionably have been a substantial movement of Hopis into the area outside of District 6, which they presumably would have still been using and occupying on July 22, 1958.[105]

What the court was thus saying, in effect, is that it understood that individual Navajo families and individual Hopi families could

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103. *Id.*
104. *Id.* at 188.
105. *Id.*

not co-exist on precisely the same tract, that the area would have had to be divided between the Navajos and Hopis and that the apportionment of land as between Hopis and Navajos, granted that both of them were in the area lawfully, would have been different if the Hopis had not been restricted to District 6.

It has been shown above that the 1943 division of the Executive Order Reservation between Hopis and Navajos was eminently fair to the Hopis and came very close to what the Hopi Tribal Council had accepted as a reasonable solution to the problem. Nevertheless, the court had concluded that the grazing regulations and Navajo pressure had restricted the Hopis' economic use of lands outside District 6. Given the fact that Navajos and Hopis in the Executive Order Reservation both had rights outside District 6, how would the lands have been reasonably apportioned? Would it have been done by setting one-half aside for the Hopis and the other half for the Navajos or would it have been more likely that the land would have been apportioned so as to provide for Reservation-wide equality among all members of both Tribes? Certainly, on reservations on which allotments were made to the members of different tribes, the custom was for equal allotments to be given to individual Indians, not for the reservation to be divided equally between the interested tribes as corporate entities, and the size of the individual allotment depending on the number of members in each tribe, the members of the smaller tribes receiving more land than the members of the larger tribes.[106]

Significantly, the Indian Claims Commission and the United States Court of Claims, which have had a unique and influential role in shaping the legal rules for settling Indian title questions, consistently have refused to apply to Indian tribal lands the common law principle that joint interests are necessarily equal. In *Kiowa, Comanche, and Apache Tribes v. United States*[107] the Commission analyzed the manner in which the quantum of an Indian tribe's joint interest in land will be determined:

> In the case of *Sioux Nation v. United States* . . . the Commission . . . discussed the manner of determining the interest of separate bands or tribes who have been granted recognized title to one tract of land by the same treaty. In that case the Commission found that the most reasonable method of dividing tribal interests was by population averages near the effective date of the treaty of recognition. Alternatively, evi-

106. Among the many Indian reservations on which equal allotments were made to members of different tribes are the Fort Peck and Fort Belknap Reservotions of Montana, the Fort Hall Reservation of Idaho, and the Colville Reservation of Washington.

107. 26 Ind. Cl. Comm. 101 (1971).

> dence as to the use of the recognized title area by the respective tribes may be weighed.[108]

Furthermore, the Indian Claims Commission has indicated that it will award equal fractional interests only if adequate population figures or sufficient evidence of historical patterns of use and occupancy is lacking.[109]

Both the Indian Claims Commission and the Court of Claims have relied on patterns of use and occupancy as the basis for quantifying the joint interests of Indian tribes. In *Otoe & Missouria Tribe of Indians v. United States*[110] the Commission determined the quantum of the joint interests of plaintiffs by deciding how much of the land in question each of the three tribes historically had used and occupied.[111] In *Miami Tribe of Oklahoma v. United States*[112] the Court of Claims acknowledged the validity of this principle by observing that Indian tribes normally are required to prove the extent of their interest in land by evidence of use and occupancy.[113]

Population figures also have been relied upon as a basis for quantifying the joint interests of Indian tribes. This approach has been used in several instances as a method for settling Indian claims cases. The Commission adverted to one such case in *Blackfeet and Gros Ventre Tribes v. United States:*[114]

> The *Cheyenne-Arapahoe Tribes v. United States* case . . . was decided . . . to be a common claim on the basis of the facts of that case. The tribes had been a single entity at one time and were divided by defendant afterward. Also the evidence showed that the separate tribes each continued to occupy one-half of the original area after being separated by defendant. *The final award was made on the basis of a stipulation by the parties reflecting the population of the tribes as of* 1958.[115]

In the *Blackfeet* case the Commission applied in a decided case the legal principle that the quantum of an Indian tribe's joint interest should be determined on the basis of population figures. The intervenors in the *Blackfeet* case, the Sioux Tribe of the Fort Peck Reservation and the Assiniboine Tribe, contended that the four tribes involved in the case should be awarded equal fractional shares.

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108. *Id.* at 120.
109. James Strong v. United States, 30 Ind. Cl. Comm. 8 (1973); Pottawatomie Tribe of Indians v. United States, 30 Ind. Cl. Comm. 42 (1973).
110. 5 Ind. Cl. Comm. 316 (1957).
111. *Id.* at 346-50.
112. 146 Ct. Cl. 421 (1959).
113. *Id.* at 442-45.
114. 18 Ind. Cl. Comm. 241 (1967).
115. *Id.* at 322 (emphasis added).

The Commission rejected the intervenors' contention with the following analysis:

> Intervenors contend that their interest consists of an undivided one-fourth share each. They base this contention on the law of property which is perfectly valid in the case of individuals who take an interest under an instrument which does not specify the particular share of each. In such a case the interest is presumed to be in common and therefore equal.
>
> To apply such a rule to Indian lands would lead to an unjust result in most cases. Indian rights in land are tribal in nature and not individual. If we tried to equate tribal rights with individual rights and thereby create an equal interest in an area among the tribes using and occupying it, we would be ignoring the basic fact of Indian use and occupancy. *We would be creating a common law concept of title in an area where such a concept had never grown by custom or usage. The smallest tribe would be entitled to as much as the largest one. To do this would be contrary to reason since a subsistence use of land necessarily implies a use in proportion to numbers. Where there is no evidence of intention to the contrary and no language stating what interest shall be taken, we think the proper and just manner of dividing tribal interests in a given area is by population as of the date of cession, or an average population near that date, whichever is more reasonable under the particular circumstances.*[116]

The Indian Claims Commission affirmed the validity of this legal principle in *Sioux Nation v. United States.*[117] The Commission found that the plaintiffs, who were various bands of the Sioux Tribe and who were all parties to the Treaty of Fort Laramie, held a joint and undivided interest in certain lands. The Commission indicated that it could choose from two alternative methods for fixing the quantum of each plaintiff's undivided interest: (1) a tenancy in common formula which would result in an award to the Sioux bands of equal interests; or (2) a population formula on the basis of which each band would receive an interest proportionate to its population. The Commission rejected the first alternative and held that "the most reasonable manner of dividing tribal interests is by population averages near the effective date of the Treaty of Fort Laramie."[118]

Thus, to determine the quantum of the joint interest of Indian tribes, the Indian Claims Commission and the Court of Claims have departed from the common law maxim that in the absence of an explicit provision to the contrary the interests of joint tenants are

116. *Id.* at 321 (emphasis added).
117. 24 Ind. Cl. Comm. 147 (1970).
118. *Id.* at 158.

equal. The Commission has indicated in a number of cases that such interests should be quantified on the basis of population figures or evidence relating to patterns of use and occupancy.

An application of the correct rule of law in the *Healing* case would have resulted in a dramatic alteration of the holding that the joint interests of the Navajo and Hopi Tribes were equal. As the opinion itself explained,

> [b]y the summer of 1958,[119] the Navajo population in the 1882 reservation was probably about 8,800, not including a few Navajos living within district 6, as expanded in 1943.[120]

On the other hand, "[b]y the summer of 1958, the Hopi population was probably something in excess of [3,200]. Most of these Hopis resided within District 6, as expanded in 1943."[121] Thus, if the District Court had computed the quantum of each Tribe's interest in the entire Executive Order Reservation on the basis of comparative population figures, no reasonable doubt can exist that the Navajo Tribe would have been entitled to almost all lands in the joint-interest area.

Nor would the result have been different if the District Court had used patterns of use and occupancy as the basis for determining the quantum of each Tribe's joint interest. According to the District Court's own findings, "[t]he places of residence of the Navajos within the 1882 reservation were scattered quite generally over the entire area outside of district 6."[122] By contrast only a few Hopis "had homes, farms or grazing lands [outside district 6] in the 1882 reservation."[123] Hopi activities in the joint-interest area were limited almost exclusively to "wood cutting and gathering, obtaining coal, gathering plants and plant products for medicinal, ceremonial, handicrafts and other purposes, visiting of ceremonial shrines, and a limited amount of hunting."[124] In 1958 most of the surface area in the joint-interest area was utilized by Navajos rather than Hopis. Thus, if the District Court had computed the quantum of each Tribe's joint interest on the basis of the amount of acreage each Tribe used and occupied, there again can be no serious doubt that the Navajo Tribe would have been awarded virtually all the land which is now the joint-interest area.

V. CONSTITUTIONAL INVALIDITY OF EXPULSION SOLUTION

Earlier in this article we have shown that ever since *Lone Wolf*

119. The District Court selected this date as the measuring point because it was the year in which the interests of the Navajo and Hopi Tribes in the Executive Order Reservation vested.
120. 210 F. Supp. at 168.
121. *Id.* at 169.
122. *Id.* at 168-69.
123. *Id.* at 169.
124. *Id.*

v. Hitchcock it has been a clear principle of Federal Indian law that Congress has the plenary power to dispose of Indian land, subject only to the limitations imposed by the Fifth Amendment. We then demonstrated that Congress could settle the Navajo-Hopi land controversy in a manner other than through the expulsion of thousands of Navajos from their homes and that there is no valid reason of public policy for choosing the expulsion option over other available solutions. It is now necessary to consider whether, given the circumstances of this case, the plenary powers of Congress would allow Congress to pass a Navajo expulsion bill or whether the limitation on Congressional power imposed by the Fifth Amendment would invalidate such action.

What must be kept in mind is that it has been held that in 1931 the Navajo Indians were legally settled by the Federal Government on the land here in issue, that Congress had the freedom to deal with that land as it wished until 1958 and that it then conveyed joint, undivided and equal rights in the land to both the Navajo Tribe and the Hopi Tribe. Can Congress against this background now compel a partition which would cause thousands of Navajos to be evicted from their homes?

Before answering this question it would be appropriate to examine two laws in which Congress dealt with a problem quite similar to the Navajo-Hopi dispute. In both of these instances the landowners' interest was, as here, an Indian interest. The settlers in these cases, however, were non-Indians. That appears to have been the crucial point of difference, for in both instances there never was any doubt that the landowners' interest would be recognized in cash rather than in land.

The first law referred to is the Pueblo Lands Act of 1924.[125] Eleven years before the enactment of that law, the Supreme Court of the United Sates had rendered a decision, *United States v. Sandoval*,[126] the logical consequence of which was that persons who had settled on the land of the Indian Pueblos of New Mexico were mere squatters and were thus subject to eviction.[127] This decision had created a great deal of consternation throughout New Mexico and had caused the New Mexico delegation in Congress to sponsor bills designed to secure the rights of the non-Indian settlers to

125. Act of June 7, 1924, ch. 331, 43 Stat. 636.

126. 231 U.S. 28 (1913).

127. In the *Sandoval* case the Supreme Court held that "long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders. . . ." *Id.* at 46. Non-Indians who had settled on lands belonging to Indian Pueblos feared that the principle of Federal guardianship established by the *Sandoval* case would be used as the basis for evicting them. The concerns of the non-Indian settlers were not unwarranted, because ultimately the Federal government did so employ the *Sandoval* holding. *See* United States v. Candeleria, 271 U.S. 432 (1926).

the land which they were using and occupying.[128] The resultant legislation, the Pueblo Lands Act of 1924, provided that any settler who had used Pueblo land for twenty-two years under color of title or for thirty-five years without color of title could remain there and have title to the land quieted in him.[129] The United States, in turn, would compensate the Indian Pueblo for its loss of land.[130]

That the primary purposes of the Pueblo Lands Act was to spare non-Indian settlers the hardship of forced expulsion from their homes clearly is demonstrated by the legislative history of the Act. As one of the witnesses before a Congressional committee observed:

> [I]f the Government is correct in its contention that . . . [the settlers] can not urge a defense under [the New Mexico] adverse statute as against the Government, I think that in many, many instances settlers will come off the land when they should not.[131]

In agreeing with this statement, the then Congressman Hayden indicated:

> [T]he impression I gained . . . is corroborated by what you have just stated. Undoubtedly there are some people who have lived there long enough and have done the things they ought to have done who should obtain title to lands on which the [sic] reside or occupy. . . . But if nothing is done . . . undoubtedly every occupant will be thrown off the land as a trespasser, and that would do great injustice in many instances. It was the view of the committee . . . that there should be legislation passed by Congress to do justice to the Pueblos and at the same time do justice to people residing within the limits of the grants, who also ought to be protected.[132]

The attorney representing the non-Indian settlers also offered testimony which emphasized the rationale for the compensation approach:

> There is a serious question as to whether or not all of [the titles of the non-Indian settlers] are fundamentally good. . . . Thus we find ourselves in this turmoil and in this trouble; thus it happens that four suits have been brought in the United States District Court for the ousting of the occupants of tracts of land numbering about 600, affecting people to the number of about 1,200 men, women and children. There are

128. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 389-90 (1942).
129. Act of June 7, 1924, ch. 331, § 4, 43 Stat. 636, 637.
130. Act of June 7, 1924, ch. 331, § 6, 43 Stat. 637-38.
131. *Hearings on H.R.* 13674 *and H.R.* 13452 *Before the House Comm. on Indian Affairs*, 67th Cong., 4th Sess. 20 (1923).
132. *Id.* at 21.

> only 4 grants involved in those suits and there are some 16 other grants yet to be brought under the same form of attack. Thus you can see our trouble. . . . [T]hese people . . . shall be ousted from the possession of the lands which they and their ancestors have, in many instances, occupied for more than 300 years. There is the practical condition with which we are faced.[133]

In the Pueblo Lands Act Congress clearly detailed the manner in which it would approach Indian land questions which were complicated by the presence of non-Indian settlers on part of the Indian tribe's land. Congress indicated that it would compensate the Indian tribe for its interest in the land rather than require the removal at great human cost of the non-Indian settlers.

Congress recently has emphasized the continuing validity of the compensation approach in the Alaska Native Claims Settlement Act of 1971.[134] Section 4 of the Act provided that:

> [a]ll claims [of Alaska Natives] against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use or occupancy of land or water area in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission are hereby extinguished.[135]

Section 6 of the Act detailed the monetary settlement which the Alaska Natives would receive as a result of the extinguishment of their claims.[136]

In addition to the compensation fund established by Section 6 the Alaska Native Claims Settlement Act allowed the various Native corporations established by the Act to select land from certain designated areas, but here again Congress evidenced a clearly expressed intent not to permit such selections to result in the forced relocation of non-Native settlers. Section 14 of the Act provided the following:

> [E]ach patent issued [to a Native corporation] . . . shall be subject to the requirements of this subsection. Upon receipt of a patent or patents:
>
> (1) the Village Corporation shall first convey to any . . . non-

133. *Id.* at 286.
134. Act of December 18, 1971, 85 Stat. 688. During the period between the Pueblo Lands Act and the Alaska Native Claims Settlement Act Congress also employed the compensation approach in the Indian Claims Commission Act of 1946 and the Ute Jurisdictional Act of 1938. *See generally* Act of August 13, 1946, ch. 959, 60 Stat. 1049; 25 U.S.C. §§ 70 *et seq.* (1970); S. REP. No. 1715, 79th Cong., 2d Sess. (1946); H.R. REP. No. 1466, 79th Cong., 1st Sess. (1945); Act of June 28, 1938, ch. 776, 54 Stat. 1209.
135. Act of December 18, 1971, 85 Stat. at 689.
136. *Id.*

> Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as headquarters for reindeer husbandry. . . .[137]

The legislative history of the Alaska Native Claims Settlement Act reveals the rationale for the protective provision in Section 14. The Secretary of the Interior explained that the general purpose of the Act was to extinguish the Native claims

> in a way that would make it a final act, in a way that would be fair to the non-Native as well as to the Native so that the non-Native would have no cloud on his title. . . .[138]

Thus, the Alaska Native Claims Settlement Act confirmed the approach which Congress had used in the Pueblo Lands Act of 1924. The Alaska Native Claims Settlement Act was based primarily on the compensation approach. Even where the Act did provide for the patenting of land to Native corporations, it nevertheless guaranteed that the land selection program would not require non-Natives to abandon their homes and businesses.

The enactment by Congress of a bill to partition the joint-interest area and expel Navajo residents represents a sharp departure from the approach employed in legislation such as the Pueblo Lands Act and the Alaska Native Claims Settlement Act. Congress would be imposing a burden on the members of the Navajo Tribe which in similar circumstances it has not seen fit to impose on non-Indians. Such action would raise a serious question of invidious racial discrimination in violation of the Fifth Amendment.[139]

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137. *Id.* at 691.

138. *Hearings on H.R.* 3100, *H.R.* 7039, *and H.R.* 7432 *Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 72 (1971).

The point was made even more explicitly in an exchange between a member of the House Committee on Indian Affairs and the Presidnt of the Alaska Federation of Natives:

> *Mr. Steiger.* . . . It is not your intention, as I understand it in your bill, to claim lands which are presently patented by individuals who are nonpolitical entities. Is that correct?
>
> *Mr. Wright.* That is correct. That is the compensation portion of the bill.
>
> *Mr. Steiger.* I will refer specifically to a narrow group, the non-Native in the process of perfecting a homestead under the law, in what position does he lie with reference to your acquisition of these lands?
>
> *Mr. Wright.* We have discussed that at length with State officials and among ourselves and it is our intent to accommodate those.
>
> * * * *
>
> *Mr. Steiger.* You do agree, and of course this is one reason why I am pursuing this line because it is left as a judgment matter. You do agree that the non-Indian who has pursued an acquisition of title in good faith under the law is entitled to at least as much protection as a Native in acquiring these lands. Is that a good statement?
>
> *Mr. Wright.* That is a good statement.

Hearings on H.R. 3100, *H.R.* 7039, *and H.R.* 7432 *Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 240 (1971).

139. States are prohibited from engaging in invidious racial discrimination by the equal

Courts have found invidious racial discrimination in a variety of contexts.[140] The most obvious example is where governmental action uses a classification based explicitly on race.[141] Governmental action which is not explicitly based on race, but which does evidence a manifest purpose to exclude or otherwise burden a racial group, also constitutes invidious racial discrimination.[142] Finally, governmental action which neither explicitly nor implicitly is designed to discriminate against a racial group nevertheless violates the Constitution if its effect is felt primarily by one racial group.[143]

The proposed Navajo expulsion bills fall into at least the third and probably the second and third categories of invidious racial discrimination. A comparison of the Pueblo Lands Act, the Alaska Native Claims Act, and the proposed expulsion bills indicates no significant difference in the respective fact situations except the race of the persons who have settled on land in which an Indian tribe has an interest. Congress justified the compensation approach in the Pueblo Lands Act and the Alaska Native Claims Settlement Act on the ground that any other approach would require non-Indian settlers to abandon homes and businesses in which they had a legitimate stake. As the *Healing* opinion itself recognized, the Navajo Tribe's right to reside in the joint-interest area was established formally when the Secretary of the Interior "settled" the Tribe in the Executive Order Reservation in 1931. Members of the Navajo Tribe therefore also have a legitimate stake in not being forced at this late date to abandon their homes.

The conclusion that the governmental action in the expulsion bills is based on an invidious racial classification gains additional support from the legislative history of the most recent such bill. One of the Congressmen who advocated the expulsion approach—the same Congressman who in the Alaska context was most solicitous of the welfare of non-Indian settlers, Mr. Sam Steiger—was asked why Congress should not adopt the approach used in similar situations involving non-Indian settlers. In response to the question, Congressman Steiger offered the following explanation:

I would simply tell the gentleman that the distinction between

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protection clause of the Fourteenth Amendment to the Constitution, but courts have held that this same "admonition is applicable to the federal government through the Fifth Amendment." United States v. Falk, 479 F.2d 616, 618 (7th Cir. 1973).

140. Most of the cases cited in this section of the article involve judicial interpretations of the constitutional requirements of the Fourteenth Amendment rather than the Fifth Amendment. However, in recent years courts have applied the same equal protection standards to both State and Federal action. *See, eg.*, United States v. Moreno, 413 U.S. 528 (1973). Thus, Fourteenth Amendment cases are instructive in determining whether Federal action amounts to invidious discrimination in violation of the Fifth Amendment.

141. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

142. *See, e.g.*, Reece v. Georgia, 350 U.S. 85 (1955).

143. *See* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Hawkins v. Town of Shaw, 437

> that situation and this one is that in those instances, everyone of those instances, we are dealing with non-Indians occupying, and believing they have a right in the lands. Here, we are dealing with two tribes. This is the distinction.[144]

Thus, the expulsion bills discriminate against members of the Navajo Tribe, and according to the legislative history of the most recent expulsion bill, do so on the basis of race.

The law is settled beyond dispute that a classification based upon race must be subjected to a rigorous standard of review. Such classifications are considered to be "constitutionally suspect"[145] and must be subjected to "most rigid scrutiny."[146] In order to pass constitutional muster whatever racial discrimination flows from the government's conduct — whether in its purpose or its effect — must be necessary to achieve a valid public goal.[147] On the facts of this case, this requirement cannot be met. As has already been shown, the only appropriate public-policy goal, to deliver to the Hopi Tribe the full benefits of its co-ownership of the joint-interest area can be reached without expelling a single Navajo family from its home.

Thus, the expulsion approach represents invidious discrimination in violation of the Fifth Amendment to the Constitution. It embodies a dramatic departure from the method Congress has used in the past to resolve situations in which an Indian tribe holds title to land that over a period of time has been settled by non-Indians. More important, the expulsion bills themselves and their legislative history demonstrate that the change in approach is based on a racial classification which is not necessary for the achievement of a legitimate public purpose. Under these circumstances the expulsion bills are constitutionally defective.

VI. CONCLUSION

As these lines are being written, the outcome of the Navajo-Hopi legislative struggle in the 93rd Congress is in doubt. The House has passed the Hopi-sponsored expulsion bill. The Senate Committee on Interior and Insular Affairs has approved a substitute under which the parties would enter into negotiations and if these negotiations fail, the Federal District Court would have power to allocate the interests of the Tribes under standards which would take the

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F.2d 1286 (5th Cir. 1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

144. H.R. 10337, 93rd Cong., 1st Sess. (Unpublished record of mark-up session of Dec. 11, 1973).

145. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

146. Korematsu v. United States, 323 U.S. 214, 216 (1944).

147. Dandridge v. Williams, 397 U.S. 471, 485 n.17 (1970).

human factor as well as property rights into account. Whatever the ultimate outcome of the legislative struggle, *Healing v. Jones* is certain to remain the subject of debate and discussion for years to come.