

# THE NAVAJO TREATY OF 1868

## PAUL SPRUHAN NAVAJO DOJ

*Article of a Treaty and Agreement made and entered into at Fort Sumner New Mexico on the first day of June 1868, by and between the United States represented by its Commissioner Beaufort General W. T. Sherman and Colonel Samuel F. Tappan of the one part, and the Navajo Nation or tribe of Indians represented by their Chiefs and Head men duly authorized and empowered to act for the whole people of said Nation or tribe (the names of said Chiefs and Head men being hereunto subscribed) of the other part, witness:-*

*Article 1*

*From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace and they now pledge their honor to keep it.*

*If bad men among the whites or among other people, subject to the authority of the United States shall commit any*

*the Territory of New Mexico at their hands or state.*

*W. T. Sherman*  
*General*  
*Indian Peace Commissioner*

*S. F. Tappan*  
*Indian Peace Commissioner*

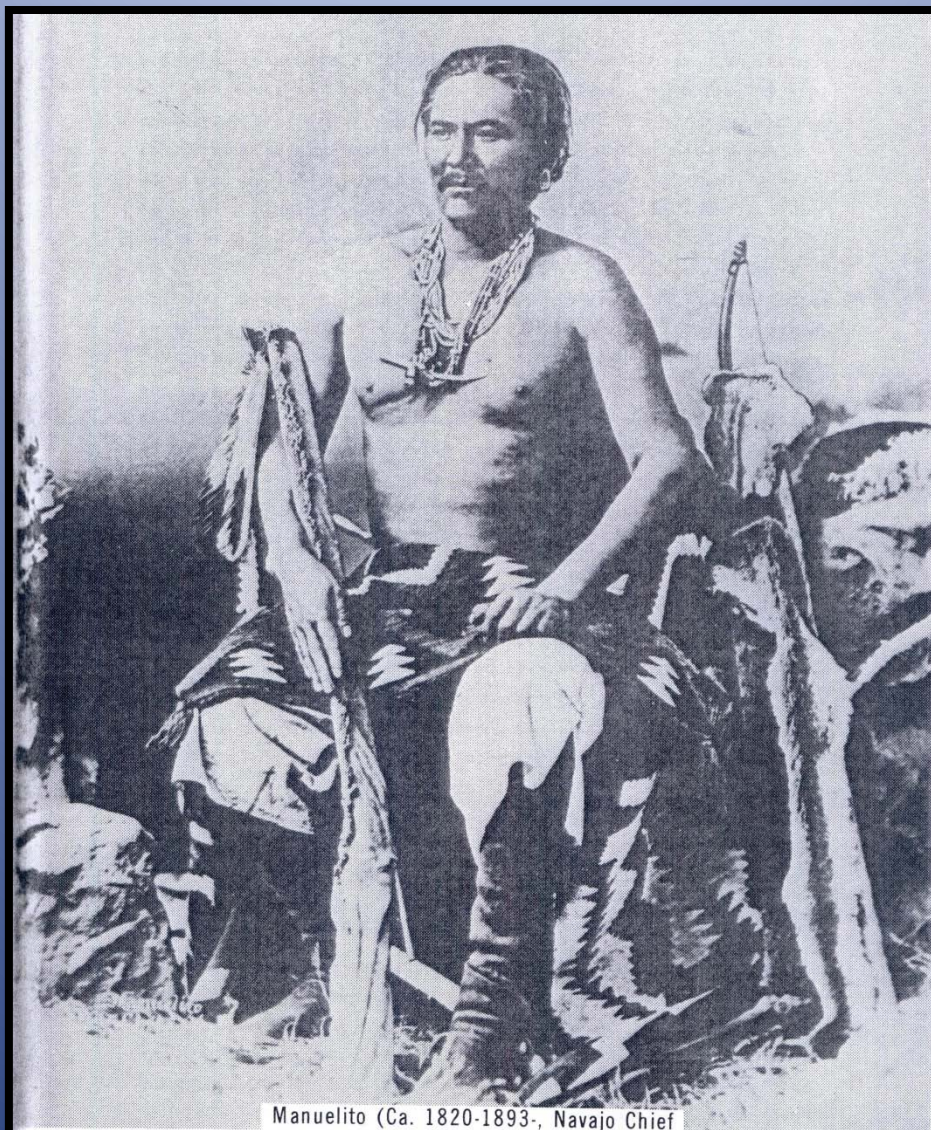
<i>Barboncito</i>	<i>Chief</i>	<i>his X mark</i>
<i>Dulgadito</i>		<i>his X mark</i>
<i>Chonje</i>		<i>his X mark</i>
<i>Manuelito</i>		<i>his X mark</i>
<i>Large</i>		<i>his X mark</i>
<i>Alviero</i>		<i>his X mark</i>
<i>Chiquito</i>		<i>his X mark</i>
<i>Muerto de Hombre</i>		<i>his X mark</i>
<i>Hombre</i>		<i>his X mark</i>
<i>Narboni</i>		<i>his X mark</i>
<i>Ganado</i>	<i>segundo</i>	<i>his X mark</i>
<i>16</i>	<i>Mucho</i>	<i>his X mark</i>
	<i>Comit</i>	











Manuelito (Ca. 1820-1893-, Navajo Chief





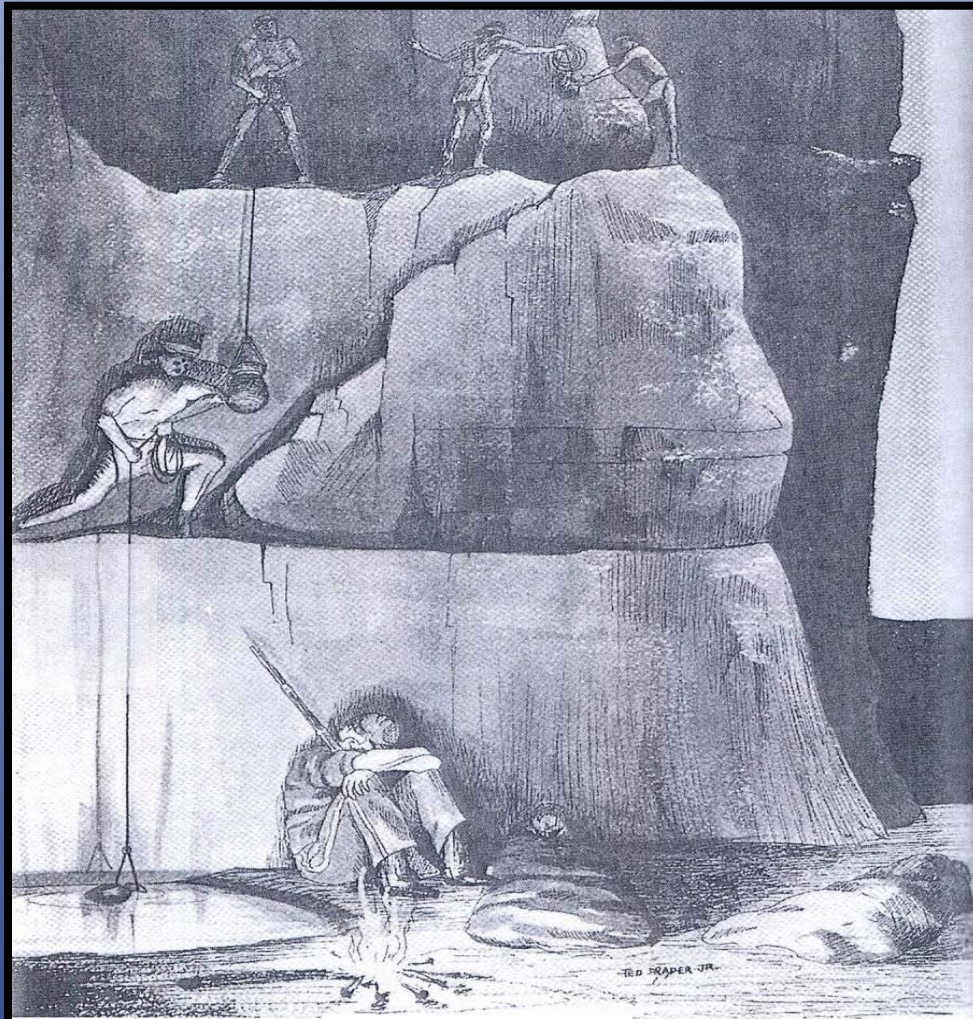
*General James Henry Carlton, circa 1861-1862*  
Courtesy Library of Congress





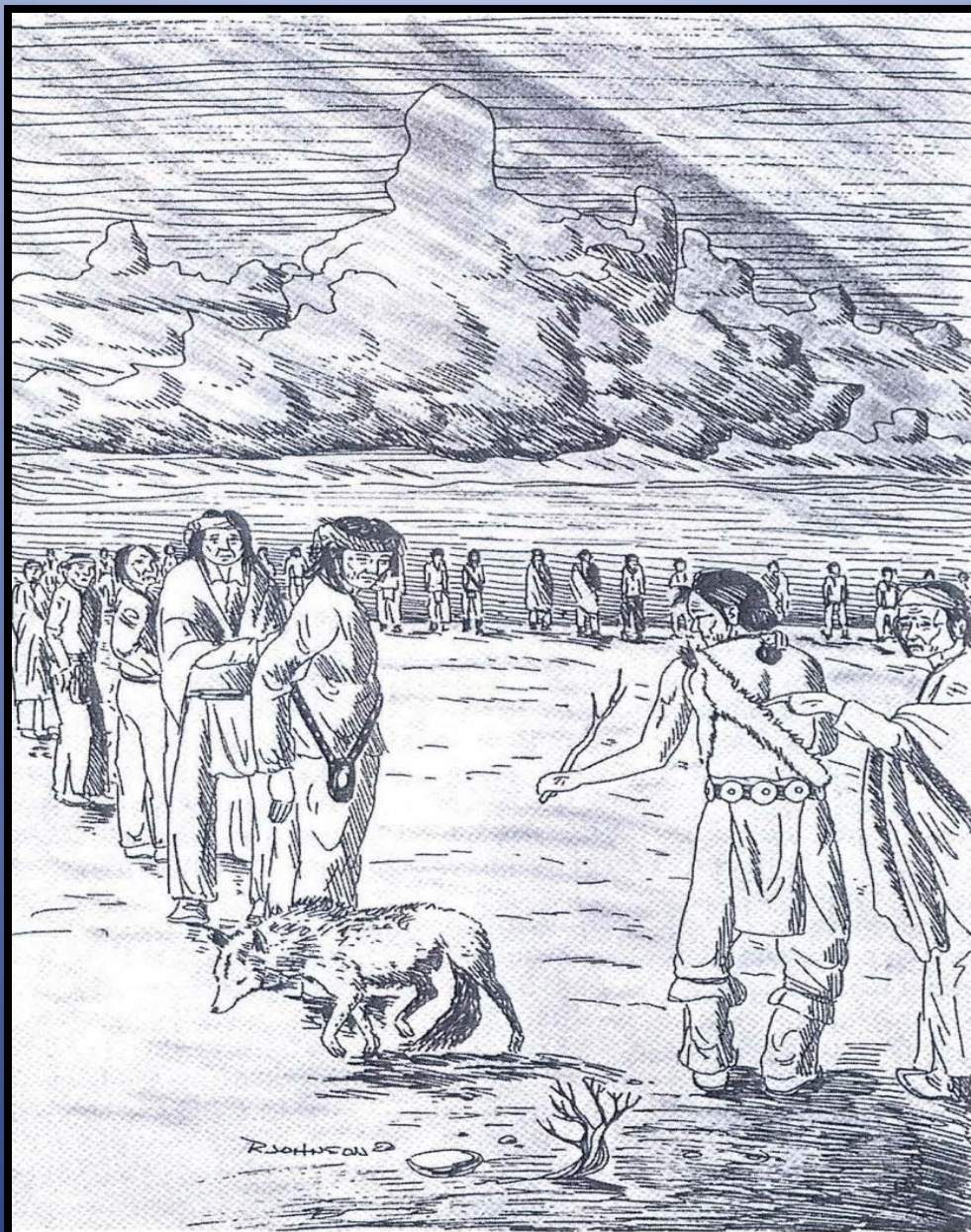






Navajo men climbed down 900 feet of the straight north face of the rock and silently drew water from a pool close to sleeping soldiers. It was on the dark side, away from the moonlight, where Canyon del Muerto begins.

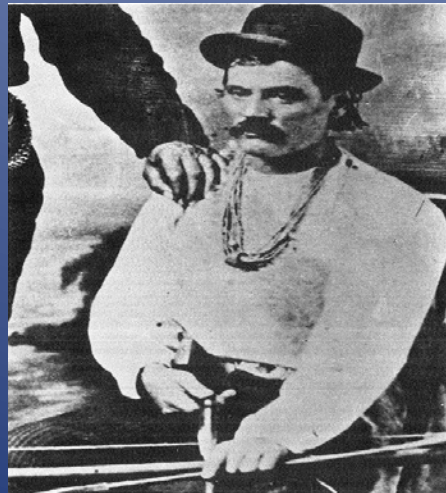




After the ceremony (Put Bead Into Coyote's Mouth) the female coyote walked away timidly — toward the west and Navajoland.



# TREATY OF 1868, JUNE 1, 1868, HWÉÉLDI















# FEDERAL CONCEPTION OF TREATIES

- Bi-lateral agreement between sovereigns.
- President authorized to negotiate and ratified by 2/3 of U.S. Senate. US Const. Art. 2, Sec. II.
- Included among other laws as “Supreme law of the land”. US Const. Art. VI, Clause 2
- Were entered into with Indian tribes until 1871, then agreements.
- Still in effect unless unilaterally abrogated by Congress.



# US SUPREME COURT

## INTERPRETATION OF TREATIES

- Text-based analysis using special interpretative rules:
- **Rights not surrendered are retained.** *United States v. Winans*, 198 U.S. 371, 381 (1905)
- **Interpret treaties as tribal negotiators would have understood them.** *Minnesota v. Mille Lac*, 526 U.S. 172, 196 (1999)
- **Resolve ambiguities in favor of tribes.** *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *McClanahan v. Arizona State Tax Comm'n*, 41 U.S. 164, 174 (1973)

# CONTEXTUAL INTERPRETATION

“We look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *Mille Lacs*



# TREATIES AS BROAD RECOGNITION OF TRIBAL SOVEREIGNTY

Beyond strict text, treaties recognize and guarantee sovereign authority of tribes, including exemption from state law and civil jurisdiction over non-Indians:

***E.g. Williams v. Lee***, 358 U.S. 217 (1959) (Article II of Navajo Treaty recognizes inapplicability of Arizona law within reservation)

***Montana v. United States***, 450 U.S. 544 (1981) (Similar article in Crow treaty recognizes civil jurisdiction over non-Indians on trust lands)

***Donovan v. Navajo Forest Products Industry***, 692 F.2d 712 (10th Cir. 1982) (Article II of Navajo Treaty exempts tribal business from jurisdiction of federal Occupational Safety and Health Administration)

# QUESTION ABOUT INTERPRETATION OF NAVAJO TREATY

- Language is identical or practically identical with several other treaties entered into by Grant Peace Commission
- *Compare* Navajo Nation Treaty with treaties with Crow Nation, Sioux Nation, Ute Nation, Shoshone Nation.
- Does contemporaneous understanding of those different tribal nations change the analysis of the same or similar language in their specific Treaty?



# NAVAJO CONCEPTION OF TREATY

- Referred to as *Naltsoos sani* (“old paper”).
- Navajo Supreme Court refers to the Treaty as a “sacred document” and as “the primary organic law in reservation matters” similar to view of United States Constitution.
- Court recognizes context as ending exile as Bosque Redondo.

# NAVAJO SUPREME COURT STATEMENTS ON TREATY

- (The Treaty done by our Ancestors was done for the purpose of guiding us into our future as Navajo people).
- *Ford Motor Co. v. Kayenta Dist. Ct.*, No. SC-CV-33-07, slip op. at 4 (December 18, 2008).



# ANOTHER STATEMENT

- (They overcome adversity through Protective Way to restore peace and harmony)
- (by defending the Navajo way of life our ancestors restored peace and harmony with the United States).
- *Ford Motor Co. v. Kayenta Dist. Ct.*, No. SC-CV-33-07, slip op. at 4 (December 18, 2008).
- *EXC v. Kayenta Dist. Ct.*, No. SC-CV-07-10, slip op. at 21 (September 15, 2010).

# NAVAJO SUPREME COURT RULES OF INTERPRETATION

- Embraces “contemporaneous understanding” of Navajo leaders as shown in written transcript of negotiation proceedings.
- Also applies other federal rules of treaty interpretation, such as ambiguities construed in favor of the tribe.
- However, “[w]e have the authority to interpret the treaty as Navajos understand it today. That includes knowledge passed on to us by our ancestors through oral traditions.” *Means v. District Ct. of the Chinle Judicial Dist.*, 7 Nav. R. 383, 389 (1999).



# NAVAJO SUPREME COURT

## INTERPRETATIONS OF TREATY

- ***Means v. Chinle District Court***, 7 Nav. R. 382 (1999)  
(treaty recognizes criminal jurisdiction over non-member Indian)
- ***Dale Nicholson Trust v. Chavez***, 8 Nav. R. 417 (2004)  
(Right to exclude transcends *Montana v. U.S.* exceptions)
- ***Ford Motor Co. v. Kayenta Dist. Ct.***, No. SC-CV-33-07 (2008) (Jurisdiction over non-Indian manufacturer not present on Reservation; Long-Arm Statute codifies Treaty jurisdiction)
- ***EXC v. Kayenta Dist. Ct.***, No. SC-CV-07-10 (jurisdiction over non-Indian accident on state right-of-way)

# ARTICLE II, BOUNDARIES OF THE TREATY RESERVATION

## Article II

The United States agree that the following District of Country to wit—

Bounded on the north by the  $34^{\circ}$  degree of north Latitude, south by an east and west line passing through the site of Old Fort Defiance in Canon Bonito, east by the parallel of longitude which if prolonged south would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about  $109^{\circ} 30'$  west of Greenwich provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this Reservation, shall be, and the same is hereby set apart for the use

and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing with the consent of the United States to admit among them; and the United States agree that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government or of the Indians as may be authorized to enter upon Indian Reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in the Territory described in this Article.



## ARTICLE II TEXT

“The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through Old Fort Lyon or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109 degree 30' west of Greenwich, *provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation,*”

## ARTICLE II CONTINUED:

“shall be, and the same is hereby, set apart for *the use and occupation of the Navajo tribe of Indians*, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them;”



*“and the United States agrees that **no persons** except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, **shall ever be permitted to pass over, settle upon, or reside in, the territory described in the article.**”*

# *Navajo Nation v. U.S. Dept. of Interior*

- Concerns removal of remains and objects from Canyon de Chelly without Navajo Nation consent by National Park Service
- Canyon de Chelly included in Treaty Reservation as specifically requested by Barboncito
- NPS denied return under Treaty based on alleged need to follow NAGPRA
- Federal District Court denied Nation's claims, and ignored Treaty. Reversed by Ninth Circuit
- Settled between US/Hopi/Navajo to transfer remains to the Nation for reburial



# *Window Rock Unified School Dist. v. Nez*

- Concerns whether the Navajo Preference in Employment Act applies to Arizona public schools leasing Navajo trust land
- Federal District Court ruled Treaty does not authorize jurisdiction based on quasi-textual analysis with no discussion of contemporaneous understanding of Navajo negotiators.
- Reversed by Ninth Circuit- Treaty recognizes the right to exclude and therefore right to regulate unless abrogated by Congress

# ARTICLE I, BAD MEN CLAUSE

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will on proof made to their agent, and on notice by him, deliver up the wrong-doer to the United States to be tried and punished according to its laws. And in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys, due or to become due to them under this Treaty, or any others that may be made with the United States. And the



# BAD MEN CLAUSE TEXT

“If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, *the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States,* to be tried and punished according to its laws;”

# REEHAHLIO CARROLL INCIDENT

## NOVEMBER, 2009

- Arrested by Navajo Nation Police for Navajo criminal offense.
- Tried to be “badged out” by federal law enforcement for murder of nun.
- Federal Court issued writ and Carroll released to federal custody.
- Attempt by Navajo Chief Prosecutor to have Carroll returned to Navajo custody denied.
- Navajo Public Defender seeks Order to Show Cause against Navajo Corrections Department and Law Enforcement for releasing Carroll in violation of Navajo court order.

# Federal Extradition/Detainer Policy

- Amendment to Title 17 of Navajo Nation Code negotiated by the Nation and U.S. Attorney's Offices of Arizona, New Mexico, and Utah.
- Requires formal written request with copy of federal arrest warrant and federal complaint or jury indictment.
- Alleged offender has right to hearing before Navajo Nation judge before being transferred to federal custody.



# TREATY LANGUAGE IN COUNCIL RESOLUTION

- “The extradition and detainer statutes implement the sovereign right of the Navajo Nation, **as set out in Article I of the Treaty of 1868**, not to release tribal defendants to other sovereigns except in accordance with appropriate procedures.” Resolution No. CJY-29-13, Section 1(C) (Findings and purpose)

# OTHER TREATY PROVISIONS POTENTIALLY IN DISPUTE:

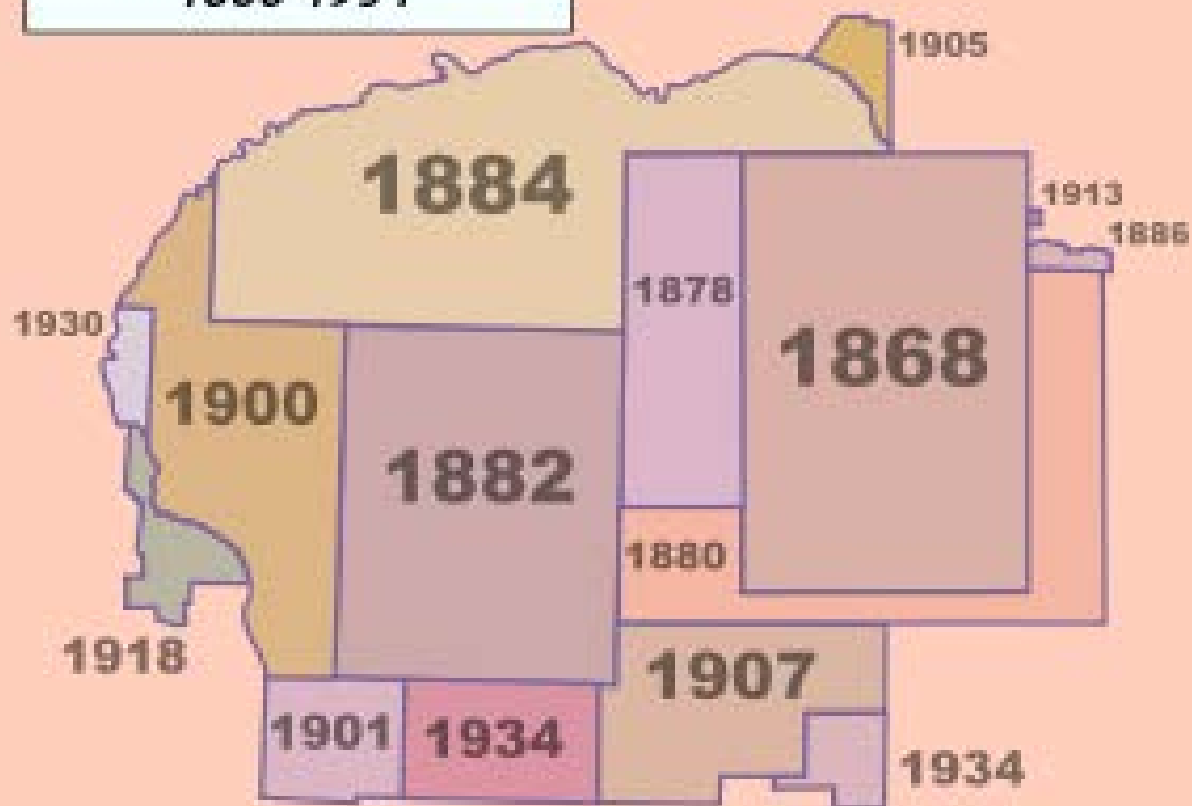
- Right to education- Article VI:
- United States agrees to build school house for every 30 children
- States “The provisions of this article to continue not less than ten years”
- Does this obligation continue and does it include state public school districts?
- *Meyers v. Bd. of Educ. of San Juan Cty*, 905 F.Supp. 1544 (D. Utah 1995)

# TERRITORIAL SCOPE OF TREATY

- Art. IX: Nation ceded all lands outside bounds of Treaty reservation.
- Art. XIII: Any Navajos who leaves Treaty Reservation surrenders rights under the Treaty
- In reality, many Navajos returning from Bosque Redondo settled outside those invisible lines.
- Do provisions of Treaty apply to lands added to original reservation?



***Naabeehó Bináhásdzo***  
***Navajo Reservation***  
**1868-1934**



# ANOTHER ISSUE

- Requirement that  $\frac{3}{4}$  of “adult male Indians” agree to alienate Navajo land. Art. X
- Does literal language prohibit vote by women?
- Does the provision prohibit alienation of land or water rights by elected officials?
- *Yazzie v. Navajo Nation*, case pending in Dilkon District Court challenging Council approval of Utah water rights settlement.

## OTHER RIGHTS NOT EXPLICITLY MENTIONED IN TEXT OF TREATY

- Implied reserved water rights through creation of treaty reservation. *Winters v. United States*, 207 U.S. 564 (1906).
- Treaty date establishes right of priority but quantification methodology still unclear, but based on purposes of reservation.



# RIGHT TO MEDICAL SERVICES

- Right to medical care through Indian Health Service
- No right explicitly stated in treaty but believed to be part of Treaty.
- Right to certain amount of hospitals or certain level of medical care?