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A BILL TO CONFER JURISDICTION ON THE U.S. CLAIMS COURT WITH RESPECT TO CERTAIN CLAIMS OF THE NAVAJO INDIAN TRIBE

APRIL 18, 1984.—Ordered to be printed

Filed, under authority of the order of the Senate of April 13 (legislative day, March 26), 1984

Mr. ANDREWS, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1196]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1196) to confer jurisdiction on the U.S. Claims Court with respect to certain claims of the Navajo Indian Tribe, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

On page 2, line 3, strike the word "required".

At the end of line 12, after the word "law" add the following:

Sec. 2. This Act shall not affect the finality of the judgments entered in Indian Claims Commission Dockets Nos. 229 and 353 or alter the effect, if any, of those judgments on other litigation brought by the Navajo Indian Tribe against the United States as third parties in other judicial proceedings.

PURPOSE

The purpose of S. 1196 is to confer jurisdiction on the U.S. Court of Claims with respect to claims of the Navajo Tribe against the United States which arose before August 13, 1946; were timely filed with the Indian Claims Commission under the act of August 13, 1946; and which were held by the U.S. Court of Claims to have been voluntarily dismissed by the tribe before the claims were considered on their merits. The bill does not authorize reinstatement of any claim previously decided on the merits nor effect any claim presently pending before the Court of Claims.

81-010 0

BACKGROUND

The relief sought through this legislation arises from claims of the Navajo Indian Tribe filed before the Indian Claims Commission prior to August 13, 1951, the last date when claims could be filed before the Commission. In 1969, the claims attorney for the tribe, Mr. Harold Mott, filed an amended petition in one of the cases (Docket No. 69) which deleted seven paragraphs originally pleaded with the result that certain claims or claim theories were withdrawn. The attorney contract with Mr. Mott required approval by both the tribe and the Secretary of the Interior for any "compromise settlement, or other adjustment of claims." The tribe does not have any records to show that it was consulted prior to the filing of the amended petition and the Department of Justice concedes that it has no record reflecting consultation with or approval by the Secretary of the Interior and the tribe.

The original petition consisting of claims 1 through 8 was timely filed in docket No. 69. Thereafter, and before the filing deadline of August 13, 1951, plaintiff filed three additional dockets, numbered 229, 299, and 353. Docket No. 229 was an aboriginal land claim substantially duplicating allegations in claims 1 and 2 of docket No. 69. Docket No. 353 was an accounting claim for mismanagement and breach of fiduciary duty regarding oil and gas resources. Docket No. 299 is an accounting claim for mismanagement and breach of fiduciary duty regarding other resources. Accounting claims had been generally alleged by claim 7 of docket No. 69.

On October 1, 1969, former Navajo counsel, Harold Mott, filed a first amended petition which withdrew from consideration nonaccounting claims 1-6 and 8 of docket No. 69. It appears this restructuring of the petition was effected at the request of Ralph Barney, claims attorney with the Department of Justice, on the basis that claim 7 was sufficient to provide appropriate relief on all the counts. In 1974, a subsequent Navajo counsel, William Schaab, filed a second amended petition in docket No. 69, which purported to reformulate and restore non-accounting claims 1-6 and 8 to the case. The Commission allowed this amendment on the ground that it was based on acts contained on claim 7 and in other paragraphs of docket No. 69 which had not been withdrawn, and otherwise concluded that the attempted withdrawal by Mott had not been effective because the attorney contract then in effect required tribal approval for any "adjustment" of the claims. (35 Ind. Cl. Comm. 305, 307, Jan. 23, 1975).

On June 3, 1976, Department counsel filed a motion to dismiss claims 1-6 and 8 of docket No. 69 on the ground that the "reformulation" by Schaab happened after the statute of limitations (25 U.S.C. 70k) had run. The Commission transferred the cases to the Court of Claims (under Public Law 94-465, 90 Stat. 1990 (1976)) without ruling on this motion. The cases were assigned to Tribal Judge Bernhardt who reaffirmed the Commission's earlier ruling that said claims related back to the original petition. On appeal, the Court of Claims reversed this ruling and dismissed these claims. (220 Ct. Cl. 360 (1979), 601 F.2d 536 (1979).) The court ruled that the withdrawal of claims 1-6 and 8 in docket No. 69 by former Navajo counsel Mott did not require tribal or secretarial knowledge or approval.

Many of the claims asserted in claims 1 through 5 and claim 8 in docket No. 69 were duplicative of claims asserted in claim 7 or in other

dockets. In a Court of Claims opinion dated June 13, 1979, dismissing claims 1 through 5 and claim 8 of docket No. 69, the court noted that a "taking claim based upon facts originally set forth in docket No. 69" was presented in docket No. 229; a claim for mismanagement of oil and gas resources in docket No. 353; and for "other resources" in docket No. 299. The court concluded that "many of the claims originally presented in the original docket (No. 69) overlapped with claims asserted in subsequent dockets." In the interim, Nos. 229 and 353 have been closed by judgments based on stipulations of the parties, and No. 299 is consolidated with claim 7 for trial.

The Department of Justice contends that dismissed claims "of any substance" are the subject of claim 7 in docket No. 69 or in docket No. 299, which are presently pending before the Claims Court. Counsel for the Navajo Tribe denies this contention because the court's 1979 opinion finally dismissed all "fair and honorable dealings" claims that were timely presented in the original petition. The tribe's position is based on the Court of Claims opinion of May 28, 1980, holding that:

"Fair and honorable dealing" claims, not involving the Government's management and use of Navajo assets, do not come at all under claim 7. (Slip Opinion, p. 8.)

Thus, no "fair and honorable dealing" claim under subsection (5) of section 2 of the Indian Claims Commission Act (25 U.S.C. 70a) can be asserted under claim 7 of docket No. 69 unless S. 1196 is enacted.

LEGISLATIVE HISTORY

In the 97th Congress, Senator DeConcini introduced S. 1613, a bill to confer jurisdiction on the Court of Claims to consider any claims that had inadvertently been dismissed. In hearings before this committee on November 18, 1981, the Department of Justice opposed this legislation on the grounds that as to claims for taking of lands or mismanagement of resources, enactment might permit the Navajo Tribe to assert or reassert claims that were duplicated in other dockets (notably docket Nos. 229 and 299) or were retained under the general accounting claim in paragraph 7 of docket No. 69. With respect to claims for failure to provide educational facilities and services through 1946, Justice opposed the bill on the ground that some aspects of the claim had been disposed of on the merits and other elements of the claim were still pending under the general accounting claim of paragraph 7 of docket No. 69. The present bill was redrafted to take those objections into account.

S. 1196 was introduced in the Senate on May 3, 1983, by Senator DeConcini and was referred to the Select Committee on Indian Affairs for consideration. A hearing was held by the committee on November 2, 1983.

A companion bill, H.R. 3533, was introduced in the House of Representatives by Mr. Richardson of New Mexico on July 12, 1983, and was referred to the Committee on the Judiciary. A hearing was held on November 2, 1983.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by unanimous vote of a quorum present, in an open business meeting on April 9, 1984, recommended that the Senate pass S. 1196, as amended.

COMMITTEE AMENDMENTS

Committee staff recommends two amendments to S. 1196 to meet concerns expressed by the Department of Justice and Santa Fe Industries, Inc. The amendments are as follows:

Amendment 1. On page 2, line 3, strike the word "required".

Although the attorney contract with the tribe did provide that any "compromise settlement, or other adjustment of claims" should be approved by the tribe and the Secretary of the Interior, the Court of Claims held that this contract provision did not legally "require" approval of the dismissal of the claims in this case in order for the dismissal to become effective. The Department of Justice is concerned that inclusion of this word may constitute a legislative reversal of a legal principle established by the Court of Claims as opposed to merely permitting reinstatement of the claims.

Amendment 2. At the conclusion of the bill, add a new section 2 as follows:

SEC. 2. This Act shall not affect the finality of the judgments entered in Indian Claims Commission Docket Nos. 229 and 353 or alter the effect, if any, of those judgments on other litigation brought by the Navajo Indian Tribe against the United States as third parties in other judicial proceedings.

The Navajo Tribe has initiated litigation for title to lands in northwestern New Mexico that were also subject to claims in I.C.C. Docket No. 229. This action is styled *Navajo Tribe v. State of New Mexico, et al.* (D.N.M., Civ. No. 82-1148JB), in which the United States, the State of New Mexico, Santa Fe Mining, Inc., and others are named defendants. The judgment in I.C.C. Docket No. 229 is an important element of the defense in this case. The purpose of this amendment is to make clear that this legislation will not affect the finality of that judgment.

SECTION-BY-SECTION ANALYSIS

Section 1. This section provides that this act shall confer jurisdiction on the U.S. Claims Court to hear, determine, and render judgment on the claim of the Navajo Indian Tribe against the United States, as amended.

Section 2. This section provides that the act shall not affect two dockets, Nos. 229 and 353, or affect other litigation.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1196, as amended, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., April 12, 1984.

HON. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart
Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1196, a bill to confer jurisdiction on the U.S. Court of Claims with respect to certain claims of the Navajo Tribe, as amended and ordered

reported by the Senate Select Committee on Indian Affairs, April 9, 1984.

The Congressional Budget Office has determined that enactment of this bill would not directly result in any significant additional costs to either the Federal Government or State and local governments in this area. The bill would allow the Navajo Tribe to pursue certain claims before the U.S. Court of Claims that it cannot pursue under existing law. Should the court rule in the tribe's favor concerning any of these claims, the Federal Government would be liable for the terms of the settlement.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The committee believes that S. 1196 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The Select Committee on Indian Affairs received the following communication from the Department of Justice.

U.S. DEPARTMENT OF JUSTICE,
ASSISTANT ATTORNEY GENERAL, LEGISLATIVE AFFAIRS,
Washington, D.C., November 1, 1983.

HON. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We are taking this opportunity to submit the Department's views on proposed legislation (S. 1196) which would confer jurisdiction on the U.S. Claims Court with respect to certain claims of the Navajo Indian Tribe. These claims were dismissed by the U.S. Court of Claims on June 13, 1979. *Navajo Tribe v. United States*, 29 Ct. Cl. 360, 601 F.2d 536 (1979). While we certainly agree that tribes must have a fair opportunity to litigate their claims, we oppose this bill on four grounds. First, the legislation would define the details of a particular attorney-client relationship. Second, we view the relief as unnecessary. Third, the bill is ambiguous. Fourth, legislation of the sort proposed portends new requests for jurisdictional authority by Indian tribes who have become dissatisfied with results obtained under the Indian Claims Commission Act (60 Stat. 1049, 25 U.S.C. § 70 et seq.) (hereafter, the act).

At the outset, we would focus on proposed language which plainly reverses the Court of Claims holding that a voluntary dismissal of certain tribal claims by tribal counsel was proper and binding on the client, even though without the prior knowledge and consent of the tribe and the Secretary of Interior. Language in S. 1196 which con-

cludes that claims were withdrawn without the "required" approval of the tribe and the Secretary accomplishes this result. We believe that the Court of Claims was correct in supporting the validity and propriety of the tribal attorney's action in that case. An ever-present legislative "requirement" of knowledge and approval by the tribe and the Secretary would impose serious restrictions on tribal counsel's actions during the normal course of litigation, making it virtually impossible for that counsel to act with dispatch and efficiency in the handling of complex Indian claims. Courts and litigants must be able to rely and act upon the representations of counsel in litigation. In their capacity as defense attorneys, this Department's lawyers would act at their peril to rely upon tribal counsel's representations without assurance in each instance that approval had been provided. Inordinate delays in the disposition of these suits would be the inevitable result.

To the contrary, we think the court's interpretation of tribal counsel's authority is persuasive:

"Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of his contract. Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action." 220 Ct. Cl. at 366, 601 F.2d at 536.

We also object to the relief afforded by the bill as unnecessary and to its general description of the claims affected as ambiguous. An adequate analysis of the proposed legislation is not possible, we would submit, without resort to the court's June 13, 1979, decision. Describing the *Navajo* case as "byzantine in complexity," the court recognized that some of the dismissed claims were viable and alive in other active *Navajo* dockets or still pending in claim 7 of docket No. 69. 220 Ct. Cl. at 362-364, 601 F.2d at 537-538. Even though some clarification might be obtained by reference to that decision, the present status of the *Navajo* claims would still not be apparent. Consequently, we have undertaken to update the status of the dismissed claims in the context of their pendency or disposition in other *Navajo* dockets.

Specifically, claims 1 and 2 sought a declaration that the treaty of June 1, 1868 was invalid and a judgment for the fair market value of Navajo aboriginal land. These claims were the subject of a judgment in docket No. 229. That judgment awarded \$14,800,000 to the Navajo Tribe on September 18, 1981, for the fair market value of their aboriginal lands.

Claim 3 complained of the adequacy of the agricultural land provided under the 1868 treaty and contended that the Government was liable for damage which allegedly occurred from mismanagement through overgrazing. The management of all lands on the reservation however, is the subject of inquiry under claim 7 of docket No. 69.

Claim 4, subtitled "Education; Schools," alleged that the United States failed to insure the civilization and education of the Navajos

under the 1868 treaty. Trial Judge Bernhardt ruled that the obligation to provide education extended for 10 years only. The Court of Claims affirmed this view. *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 179-199, 624 F.2d 981, 995-996 (1980).

Claim 5 alleged a breach of fiduciary duties by the United States with respect to the tribe's natural resources and other tribal property. This claim is also the subject of claim 7 in docket No. 69 and of docket No. 299. In addition, oil and gas mismanagement claims, as well as claims for the wrongful disbursement and handling of tribal funds and the failure to fulfill the provisions of article 8 of the 1868 treaty, were the subject of a judgment award of \$22,000,000 to the Navajo Tribe in docket No. 353 on June 8, 1982. Similar claims for mismanagement of copper, vanadium, uranium, sand, rock, and gravel resources were tried during February and March 1983 and will shortly be pending on briefs before the Claims Court in docket Nos. 69 and 299. Other resources and property claims have been scheduled for trial by the trial judge's order of July 1, 1983. Specifically, trials have been set into 1986, including: timber and sawmill claims, January 23, 1984; coal, water, rights-of-way, mission sites, and related claims, May 5, 1985; and, grazing land claims, January 10, 1986.

Claim 6 alleged that miscellaneous facilities provided under the 1868 treaty were inadequate and that their construction was delayed. To the extent that such facilities were mismanaged, the claim would then be pending under claim 7 of docket No. 69.

Claim 8 alleged the breach of an agreement in 1868 to return Navajo aboriginal homelands in return for the services of individual Navajo Indians as scouts and guides during the Apache war. Claims of individuals, however, are not justiciable under the act. The tribal claim for aboriginal lands, or the other lands, was the subject of the judgment in docket No. 229 as noted above.

From this discussion, it is evident that the "dismissed claims" of any substance, i.e., those addressing the Government's handling of tribal moneys or property, are also the subject of claim 7 in docket 69 or of claims presented in docket 299 and are therefore still viable. Specifically, claims 3, 4, 5, and 6 are, in part, the subject of claim 7 in docket No. 69; claim 5 is the subject of docket No. 299. Indeed, claims 1, 2, 5 and 8 have, in part, been the subject of substantial judgments already entered in favor of the tribe in docket Nos. 229 and 353. Claim 4, to the extent it is not available in claim 7, is addressed on the merits in the Court of Claims 1980 opinion. In these circumstances, we would submit that the proposed legislation is unnecessary to provide the tribe a fair opportunity to pursue its claims. Further, the proposed language inaccurately generalizes regarding "claims" which are, as the Court of Claims said, "byzantine in complexity."

Finally, affording an independent jurisdictional grant where judgments have already been entered, merits rulings made, and claims otherwise presented or preserved promises to unsettle and further protract the resolution of these claims. Such a grant could encourage other tribes which consider themselves to be in analogous circumstances to seek jurisdiction to reopen results already obtained under the act when those results are later though unsatisfactory.

In conclusion, for the reasons discussed, we oppose both the relief sought in the bill and the proposed language. The Office of Management and Budget has advised us that there is no objection to the submission of this report from the standpoint of the administration program.

Sincerely,

ROBERT A. McCONNELL,
Assistant Attorney General,
Office of Legislative Affairs

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the committee notes that no changes in existing law are made by S. 1196.

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