



United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

1 NOV 1983

Honorable Mark Andrews
Chairman
Select Committee on Indian
Affairs
United States Senate
Washington, D.C. 20510

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 United States Claims Court with respect to certain claims of the Navajo Indian Tribe. Those claims were dismissed by the United States Court of Claims on June 13, 1979. *Navajo Tribe v. United States*, 220 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 Language in S. 1196 which concludes that claims were withdrawn without the "required" approval of the Tribe and the Secretary accomplishes this result.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 this 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 up-date 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 \$14,800,000.00 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 ensure 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, 197-199, 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 \$22,000,000.00 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-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 15, 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 monies or property, are also the sub-

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ject 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 thought 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's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
 Assistant Attorney General
 Office of Legislative Affairs

Senator DECONCINI. Today our first witness will be Anthony Liotta, Deputy Assistant General, Land and Natural Resources Division, Department of Justice.

Mr. LIOTTA. Mr. Chariman, I would like to introduce Mr. Jim Brookshire, who is the chief of our Indian Claims Section. I would like to have him sit with me.

Senator DECONCINI. Please come and join us.

Mr. BROOKSHIRE. Thank you.

Senator DECONCINI. Gentlemen, please proceed. Your full statements will be inserted in the record, without objection, and if you will summarize them for us, we would appreciate it.

STATEMENT OF ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JIM BERKSHIRE, CHIEF, INDIAN CLAIMS SECTION

Mr. LIOTTA. I certainly will, Mr. Chairman, and good morning. It is a pleasure to appear before the committee.

The Department of Justice opposes passage of S. 1196, which would confer jurisdiction on the U.S. Claims Court to hear certain claims of the Navajo Indian tribe previously filed and voluntarily withdrawn in October 1969 by counsel for the tribe.

In 1979, the Court of Claims ruled the withdrawal valid, though it was made without the knowledge of the tribe or the Secretary of the Interior.

The Department also opposed passage of the legislative predecessor of S. 1196, which was S. 1613, which was rejected by the committee in 1981.

The Department then believed that Congress should not reverse the clear holding of the court and set a precedent for reviving claims for which the statute of limitations has long ago run.

We oppose S. 1196 for the same reasons. Moreover, the language of S. 1196 is even more general and imprecise than that contained in the prior bill, since it allows resubmission of withdrawn claims which would not have been considered or decided on their merits and which are no longer pending before the Claims Court and have not been previously determined on the merits by the U.S. Court of Claims.

This circular language invites further confusion by merely referencing prior pleadings and hearings in this very complex and protracted case.

That concludes my summary, Mr. Chairman, and I would be glad to answer any questions I can.

Senator DECONCINI. Thank you very much.

I do have some questions, and maybe you can help me have a better understanding of this, too. I know we have been around this thing so many times, but I do not want to miss anything.

One thing that troubles me, Mr. Liotta, is that in paragraph 6 of the attorney contract between the Navajo Tribe and Mr. Harold Mott, it says, and I would like to read it:

Any compromise settlement or other adjustment of the claim shall be subject to the approval of the tribe and the Secretary.

That means the Secretary of the Interior, of course.

Does the Department of Justice have any evidence to indicate that the Navajo Tribe or the Secretary of the Interior ever approved the dismissal of the tribe's fair and honorable dealings with these claims?

Mr. LIOTTA. In that particular situation, no.

I might say this, Mr. Chairman. As I understand it, the contract has two provisions. One, of course, is the one you are referring to. It is our interpretation of that, and the court's interpretation—I believe it was Judge Freedman in the Claims Court—that this refers to settlements or that type of thing.

He also indicated—that is the judge—that the attorney under section 2, I think, of the contract—I believe that is correct, but one section of the contract—has duties and obligations to conduct the litigation, and in order to do that, an attorney, any attorney, has to have certain prerogatives; and he found that the withdrawal of these claims was within the prerogatives and not in violation of paragraph 6 of the contract, in my recollection.

Senator DECONCINI. What troubles me, and maybe it has always been a problem where the Secretary is acting as a trustee and the Government is acting as the attorney, is that in the case before the Court of Claims, in claims such as this, is it not common practice to obtain the consent of the tribe and Secretary before a claim is compromised or adjusted or, in this case, withdrawn?

Mr. LIOTTA. Well, again, I think, insofar as any compromise or settlement, our position has been that it has to be approved by the Secretary of the Interior and the tribe.

However, as Judge Freedman said—and we were in agreement with that—this does not come within the purview of that particular clause in the contract. This is not a settlement. This is a lawyer, for whatever reasons, readjusting his claims, withdrawing his claim, et cetera.

Now, Senator, you could readily understand, I think, the problems that would be upon the courts and upon lawyers if, for example, the attorney wanted to amend a claim or to make any kind of a move with his legal pleadings, if he had to go back to the Secretary of the Interior and the tribe to get approval. He is hired for that specific purpose, to use his judgment as an expert attorney in handling these matters, and I would assume that he was hired with the full confidence of the tribe, and that is what he was doing.

I think the previous attorney who did that was Mr. Mott, I believe.

Senator DECONCINI. Mott, yes.

Mr. LIOTTA. So, yes, insofar as settlements, I would assume that they have to go back to the Secretary of the Interior and the tribe, and in fact it is being done and has been done. But this does not fall, in my opinion, within the ambit of that restriction.

Senator DECONCINI. You expressed some concern in your statement of establishing a precedent, that S. 1196 would, if it is enacted, and you cite the Sioux Nation legislation as an example. In that legislation, the Department of Justice itself cited the additional cases which rested on similar principles. What cases can you identify for this committee that are similar to the Navajo case?

Mr. LIOTTA. I think attached to my testimony, if you will bear with me a moment, Senator, in the back of my statement that has

been admitted to the record, we cite a number of cases where there was a waiver of *res judicata* by Congress. Senator, I would refer you to that.

It also indicates the judgments that later arose because of that. What we are suggesting here, as we have suggested in other cases—and I know I have appeared before you, sir, before on this case, and I have appeared a number of other times—is that litigation must come to an end. ♦

This case has been pending, as I understand it, for approximately 33 years. An attorney, a member of the bar, made certain judgments in the course of these proceedings, and we feel that those judgments should be upheld, otherwise, this litigation is never going to end.

I would say one other thing.

Senator DECONCINI. Let me interrupt you there.

Mr. LIOTTA. Yes, sir.

Senator DECONCINI. If you say it never would end, would it not end if we gave the Court of Claims jurisdiction to make the final determination? Would that not eventually end it?

Mr. LIOTTA. I was going to address that, Senator.

Senator DECONCINI. Thank you. I did not mean to interrupt you if you had something else there, but I wanted to catch that.

Mr. LIOTTA. No, sir, that is fine. That is exactly where I was going at the moment, if you will just give me a moment to find my papers here.

Senator DECONCINI. Yes. Take your time.

Mr. LIOTTA. If I may, Senator, I would like to address these one at a time.

As far as claim No. 1 that was eliminated, this was a suit for the fair market value of aboriginal lands as alleged protected by the Treaty of Guadalupe-Hidalgo, 1848, and the treaty of 1849, ratified by the Senate on September 9, 1850.

These are the same facts as alleged in another docket, docket 229.

Claim No. 2 was an alternative claim for aboriginal lands, the suit for the fair market value of the aboriginal lands by fraud and duress, which Indian title claim was extinguished by the invalid 1863 treaty.

Claim Nos. 1 and 2 were subject to a judgment in docket 229—I do not know whether it was a settlement or not—for \$14,800,000. I believe it was a settlement.

So those two claims they received money for. Now, that is part of what this bill that you are proposing would revive.

Claim No. 3 was a suit for inadequacy of agricultural lands provided under the treaty of 1868 and for damage to treaty lands by overgrazing. A claim for mismanagement of grazing and other lands is included in claim 7, which is in the same docket, 69, and in docket 229. I might say the trial date on that claim is set for January 10, 1986, which is quite a ways off.

Claim 4 was a suit for failure to provide educational and other services under article 6 of the 1868 treaty. The Court of Claims sustained the trial judge's holding that the obligation to provide civilization and education extended for 10 years only or until 1878.

Claim 5 was a suit for breach of fiduciary duty by the United States by exploiting or allowing others to exploit the tribe's natural resources—oil, gas, vanadium, timber, et cetera, without adequate consideration. That claim is also included in claim 7, docket 69, and in docket 229.

The oil and gas case, along with claims for wrongful disbursement of tribal funds and failure to fulfill terms of article 8 of the 1968 treaty were subject to a judgment for \$22 million in docket 353 on June 8, 1982. Docket 353 has thus been closed.

Similar claims for mismanagement of copper, vanadium, uranium, sand, rock, and gravel were tried in 1983 and are pending plaintiff's briefs in dockets 69 and 229.

Timber and sawmill mismanagement claims are set for trial on January 23, 1984. Coal, water, rights-of-way, mission sites, and related claims are slated for trial on May 15, 1985. Grazing land claims covering an area of 25,000 square miles are set for trial in dockets 69 and 299 on January 10, 1986.

Claim 6, the suit for violation of the 1868 treaty by failing to provide adequate construction of buildings and shops, this mismanagement of property claim is pending under claim 7 in the same docket, 69. That has not been scheduled for trial.

Now, claim 8, which was another part of this bill, is a suit on a breach of agreement in 1868 to restore aboriginal homelands in return for services of individual Navajos in the Apache wars. The aboriginal lands were paid for in the judgment of \$14,800,000, covering claims 1 and 2. That is docket 229, I believe.

So my point is, Senator, that these claims have been addressed either by settlement judgment or are included to a great extent in the other dockets and in claim number 7; and that this bill would open some other claims, whatever they may be.

I think that the counsel who—this is just my guess—the counsel who did this in withdrawing these claims was pretty well aware of what he was doing, and he felt, as their attorney, that the Indians were protected.

Senator DECONCINI. I think I understand. What you are saying is that, really, the reason we do not need this is because the substance, at least, of these claims that were dismissed by Mr. Mott on behalf of the Navajos are really covered in these other dockets that you cite.

Mr. LIOTTA. Yes.

Senator DECONCINI. Let me just finish.

Mr. LIOTTA. Certainly.

Senator DECONCINI. Now, that being the case, that you feel they are, and the Navajos feel that they may not be, if the legislation were drawn—and I think perhaps it is, but maybe you could offer some suggestions to it—if the legislation were drawn that the Court of Claims came to your same conclusion, then there would be no case for them to hear, and would not that be a fair resolution when we have two different positions here on whether or not the substance is covered?

You say the substance is covered. The Navajos say that in some cases, yes, it is; in some cases, it is not; and I do not know. I cannot tell you. I am not a judge, and I have not had time to study it.

But I am a legislator trying to resolve something that would be fair, where the Government would not be subject to being obligated or liable more than once for any claims that might be validly proved. On the other hand, if there is some substance from one side left out, it may be that substance is what is in the eyes of the beholder. You may consider it to be substantive, and the attorneys now for the Navajos may feel otherwise.

What damage would be caused if the legislation were drawn in such a manner that if the claims court found that your position is right, that the substance is covered in a previously filed docket, then they would not take jurisdiction?

Mr. LIOTTA. Well, there are two difficulties with that, as I see it. One of course, the legislation as now drawn, and you are referring to tightening it up, would leave open the ability of the tribe to proffer claims that, based on their view of the claims as stated, are broader than what is anticipated.

For example, as I understand it, in reference to the educational claim—that would be claim No. 4—we believe, and I think the court held, that they were circumscribed by the 10-year period. That was the treaty period. I would assume they would make a claim concerning possibly fair and honorable dealings in reference to that claim, which would again open that.

I think the difficulty is the broadness of the legislation as it now stands, and I do not quite know how you can tighten it up. But in any event, my main thrust is this, that they have had their opportunity. This attorney withdrew these claims in 1969, and here we are today, in 1983. In 1979, they had a hearing before the court on this very subject matter. In 1980, again the Court of Claims—I think it was Judge Davidson—finally resolved this matter.

I believe they have had their day in court, and I think the litigation has to come to an end. If the legislation is drawn so that it is very tight, we still have the same problem as to the interpretation of what they are asserting, what the Court of Claims would do, and the litigation would never end.

The harm that would be done would be the court's time, the other claims of the various tribes. They will be coming in and asking for the same type of relief sooner or later, I would assume, and these cases would never end.

We are not anti the tribe. We certainly want justice done. But it just seems to me they have had their day in court, and all tribes would have some reason why, I would assume, their attorneys did or did not do this, and I would assume that you may have other applications for the same kind of legislation.

I think that the main problem, aside from the vagaries of the present legislation, is that the litigation will never end.

I might say that the evidence of that, of course, is some of these other tribes that have had this special legislation.

Senator DECONCINI. Well, thank you. I cannot say you have convinced, mostly because of the fairness that we are involved with here. I do not want the Government to have to pay any more than they paid, if they owe anything, and I do not want to see the administration pegged as anti-Indian; I want to see them pegged as doing what is right and fair.

It just seemed to me that this legislation was a decent approach. From your statement, I gather you want justice accomplished, and you just feel that this legislation is not the way to go, and we ought to rely on the claims that are still pending.

In light of that, I would just ask the Justice Department if you have any other suggestions. I certainly am open to other suggestions, legislation-wise, if this legislation is too onerous or sets too much of a precedent. There must be some way to have at least a hearing on whether or not the substance is covered by the existing claims.

In my opinion, that is the ultimate question. The Indians now claim that it is not, or may not be, and the Justice Department feels that it is, and I am left in the quandary of not knowing. And so, it seems like the best way to do it is to let an impartial court make the determination whether they are covered by previously filed claims, and then it is settled.

Mr. LIOTTA. Well, again, Senator, we certainly are interested in justice, and I think that justice has, in a sense—and I don't mean to be—

Senator DECONCINI. Already prevailed.

Mr. LIOTTA. I think it has prevailed, and I think it is time for the end of this litigation.

Senator DECONCINI. Thank you.

Mr. LIOTTA. Thank you, sir.

[The prepared statement follows. Testimony resumes on p. 33.]

NOVEMBER 2, 1983

PREPARED STATEMENT OF ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

I am Anthony C. Liotta, Deputy Assistant Attorney General for the Land and Natural Resources Division, of the Department of Justice. Thank you for giving the Department this opportunity to present our views concerning S. 1196, which would confer jurisdiction on the United States Claims Court to hear claims of the Navajo Tribe of Indians which were previously filed with the Indian Claims Commission and voluntarily withdrawn in October, 1969 by the Tribe's counsel of record, and which have not been considered or decided on their merits.

As you may recall, I testified in November, 1981 in opposition to a similar bill (S. 1613), which was eventually rejected by this Committee. A copy of my statement on that occasion is attached to my present statement for your reference. I have also attached to today's statement, letters from former Assistant Attorney General, Carol E. Dinkins and Assistant Attorney General Robert A. McConnell to Congressman James V. Hansen, in response to questions raised by the Congressman and Counsel for the Tribe in regard to the subject of this legislation. Those letters explain in detail the Department's reasons for opposing passage of S. 1196.

The Department of Justice is opposed to passage of S. 1196 for three basic reasons. First we believe that counsel for litigants in Indian Claims cases, as with all cases, must be recognized as having the authority to conduct the prosecution of a claim, and that the subject claims were duly withdrawn by

counsel for the Navajo Tribe. Second, the Tribe has been and is being given a full and fair opportunity to present its claims under the Act of 1946, to dispute the validity of the actions of its counsel, and to litigate all remaining claims under remaining counts of its various petitions. Finally, the Department believes that the Congress should not directly reverse the decisions and orders of the Claims Court regarding claims voluntarily withdrawn, and allow by special exception the litigation of claims which would otherwise be barred by the operation of a statute of limitation.

The apparent purpose of this bill, as it was with S. 1613, is to allow the refiling of claims which were asserted in the Tribe's petition in Docket No. 69 (claims 1 through 6 and 8), originally filed on July 11, 1950. Those claims were voluntarily withdrawn nineteen years later, when the Tribe's counsel filed an amended petition asserting only the seventh claim of the original petition. Since then, his action has been the subject of extensive examination and second-guessing. In 1979, the Court of Claims ruled that the attorney had authority under his contract to withdraw the claims, notwithstanding any lack of knowledge or consent by the Tribe or the Secretary of the Interior. Navajo Tribe of Indians v. United States, 601 F.2d 536, 539 (Ct. Cl. 1979). The Court found that his action was "a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney."

The trial judge's initial decision was clarified in an order of September 28, 1979, which was sustained by the Claims Court in a decision finding that if the surviving seventh claim did not include certain claims, those claims may not be reasserted because of the statute of limitations. I have attached a copy of the trial judge's clarification and would be happy to furnish copies of the opinions of the Court of Claims to the Committee, if you desire.

The Department's second concern is that this bill would expressly overrule a decision which was arrived at after a fair and full hearing by a court of competent jurisdiction. As is evident from the extended period over which the issue of claims withdrawal was considered and by the number of decisions and clarifications which were precipitated by that consideration, this Tribe has received its due process -- to provide it with additional opportunities will be to delay consideration of the claims of others which are still to be considered. All claims which they have properly prosecuted under the Act of 1946 have either been legally withdrawn, settled, considered, decided, or are still pending on an extremely complex and detailed docket. The bill would expressly contradict an unequivocal finding of the trial judge and the Court of Claims by declaring that prior claims "were withdrawn without required approval by the Tribe and the Secretary of the Interior," and would severely complicate the pleadings in a case already characterized as "byzantine" by the Court. Since the bill does not specify what specific claims would be allowed and

simply refers back to prior petitions and hearings, it invites a whole new layer of disputes over the scope of the bill itself. . . a dispute which would hardly serve the interests of justice and the public.

Finally, the Department believes that the passage of S. 1196 would set an unfortunate precedent, and could invite similar future petitions for relief from the operation of the statute of limitations for claims under the Act of 1946. Since the right of the Tribe to present additional claims under the Act has been litigated and denied, the passage of the bill would constitute the granting of a special exception to the operation of the Act's statute of limitation -- thus frustrating a major purpose of the Act and encouraging similar untimely requests for private relief on behalf of others whose claims have been withheld or denied in similar circumstances or who may argue some other justification for an exception. A similar incident, involving special relief from the operation of the defense of res judicata and allowing the relitigation of a claim by the Sioux Nation, has been followed by the allowance of three more exceptions to other tribes. Sioux Nation v. United States, 220 Ct. C. 442 (1979), aff'd 448 U.S. 371 (1980). I have attached a list of those cases to my statement.

In conclusion, the Department is opposed to S. 1196, because it expressly reverses the lawful actions of counsel for the Tribe, as fully and fairly considered and sustained by a court of competent jurisdiction, because its language is vague and will only serve to hinder the fair and prompt resolution of the underlying dispute, and because it sets an unfortunate precedent which may well lead to similar requests for relief from the operation of a fair and reasonable statute of limitations.

ATTACHMENTS

PREPARED STATEMENT OF ANTHONY C. LIOTTA, DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION NOVEMBER 18, 1981

I am Anthony C. Liotta, Deputy Assistant Attorney General for the Land and Natural Resources Division. As the Committee is aware, S. 1613 would confer jurisdiction on the United States Court of Claims to hear claims of the Navajo Tribe of Indians which were previously filed with the Indian Claims Commission under Section 2 of the Act of August 13, 1946 (60 Stat. 1050, 25 U.S.C. 70a) and dismissed by withdrawal in October, 1969, by the attorney of record for the Navajo Tribe.*/ The claims that were withdrawn were Claims 1 through 6 and 8 in Docket No. 69.

In the bill the claims are rather generally represented to be:

* * * claims that (1) Navajo Reservation lands were taken by the United States or disposed of to others without payment of adequate compensation; (2) the United States failed to fulfill Article 6 of the Treaty of June 1, 1868, 15 Stat. 667, and to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946, and (3) that the United States mismanaged the lands and resources of the tribe: * * *

We wish to point out at the outset that the description of the claims in S. 1613 is entirely too broad and imprecise. Nevertheless, each category of claims warrants attention since

*/ In 1979 the Court of Claims ruled that the Tribe's attorney possessed authority to withdraw the claims in question and stated that the "decision to withdraw . . . was a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney." See Navajo Tribe of Indians v. United States, 601 F.2d 536, 539 (Ct. Cl. 1979).

enactment of this legislation would have very serious consequences with respect to the conduct of ongoing litigation in several dockets.

As to the first category of claims, it is the Government's position that the Navajo Tribe has not asserted any claim for the taking of reservation lands in Claims 1 through 6 and 8. There is no good reason to grant the Navajo Tribe jurisdiction to file any such claim now, more than thirty years after the jurisdictional bar of Section 12 of the Indian Claims Commission Act. (Act of August 13, 1946, 60 Stat. 1049, 1052, 25 U.S.C. 70k).

The second category of claims may contain two matters. The first is a claim for the failure of the Government to fulfill Article VI of the Treaty of June 1, 1868 (15 Stat. 667). This claim for the nonfulfillment of Article VI of the 1868 Treaty is currently being litigated under Claim 7 of Docket No. 69, in the Court of Claims. The second of these two claims is the alleged failure of the Government to deal fairly and honorably with the tribe in providing educational facilities and services through August 13, 1946. If this is meant to be a claim based on some obligation beyond the terms of the 1868 Treaty, then the Government submits that such a claim has never been previously presented. Furthermore, if this second claim is based on some general obligation to provide adequate educational facilities, instructors and instruction, then to grant jurisdiction to the Court of Claims would be to give the Court jurisdiction to entertain a claim that is not available to other Indian claimants. This was the holding in Gila River Indian Community v. United

States, 190 Ct. Cl. 790, 801 (1970).

The third category of claims include allegations that the Government mismanaged the lands and resources of the Navajo Tribe. Claims for mismanagement of lands and resources are already being litigated in Claim 7 of Docket No. 69, and in Docket Nos. 299 and 353.

In conclusion, it is the Department's position that enactment of S. 1613 would create confusion and prolong litigation on claims that are already before the Court of Claims. Moreover, to the extent that these claims are included in Claim 7, it should be pointed out that the United States has relied on the dismissal of Claims 1 through 6 and 8 and has framed its litigation strategy accordingly. Reopening these issues would not only duplicate prior litigation, it would undercut the Government's position. Consequently, we strongly believe that there is no justification whatsoever for enacting S. 1613.

Furthermore, enactment of this bill would be contrary to the policy stated in Section 12 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1052, 25 U.S.C. 70k) which provides that all tribal claims which arose prior to August 13, 1946, had to be filed within five years and that no claim not so presented "may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress." We have repeatedly stated that the erosion of this policy will lead to many applications for special jurisdictional acts to allow the litigation of forgotten claims and the relitigation of previously adjudicated claims. We therefore urge the Committee not to sanction the further erosion of this policy.

Honorable James V. Hansen
House of Representatives
Washington, D.C. 20515

Dear Congressman Hansen:

Re: Navajo Tribe v. United States, Docket
Nos. 69 and 299, before the United
States Claims Court

Your letter of May 18, 1983 requests explanation of the Department's actions in seeking dismissal of Navajo Tribal Claims 1-6 and 8 in Docket No. 69 after such claims had been voluntarily withdrawn by plaintiff's counsel without the apparent knowledge or approval of the Navajo Tribal Council or the Secretary of Interior. You suggest that such action may be inconsistent with a position taken by Department counsel in an earlier case (Jicarilla Apache Tribe v. United States, Docket No. 22-A), and ask whether such earlier action should not serve as a precedent to allow such claims to be reinstated by legislative action. You further ask whether the dismissed claims 1-6 and 8 are still pending in current dockets before the United States Claims Court. Briefly summarized, the facts are as follows:

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, 1946, plaintiff filed three additional dockets, numbered 229, 299 and 353. Docket No. 229 was an aboriginal land claim duplicating allegations pled 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 all other resources. These resource claims had been generally alleged by claim 7 of Docket No. 69. Accordingly, these accounting claims were consolidated for trial.

- 2 -

On October 1, 1969, former Navajo counsel, Harold Mott, filed a First Amended Petition which withdrew from consideration non-accounting claims 1-6 and 8 of Docket No. 69. 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 facts contained on claim 7 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, January 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 P.L. No. 94-465, 90 Stat. 1990 (1976)) without ruling on this motion. The cases were assigned to Trial 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 on appeal 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. The Court construed the relevant paragraph of the attorney's contract (i.e., par. 6, Compromises and Settlements) as requiring:

• • • tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, i.e., the termination of claims in return for some consideration given in exchange therefor. 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 this 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.

Consequently, the Court held there was nothing before the Commission to which the 2nd amended petition in 1975 could "relate back", and the situation stood as if the withdrawn claims had never been filed. The Commission thus lacked jurisdiction to hear them. (Pages 366-367 of the Court's opinion.)

We agree with the above conclusions and the result. We do not find this view inconsistent with the Commission's interpretation of the attorney's contract in the Jicarilla Apache case. There, the Commission had ordered a consolidated hearing of the aboriginal land claims of certain Pueblo Tribes in the areas and to the extent these claims overlapped the similar claims of the Jicarilla Apache. The Commission's order of consolidation further provided that any petitioner who would disclaim any interest in the area claimed by the Jicarilla could avoid the consolidated hearing of the Jicarilla Apache land claims. Thereafter, five stipulations were executed between the Jicarilla Apache counsel and the separate counsel of five Pueblo tribes. Department counsel perceived this action as an "adjustment of claims" requiring approval of the tribe and the Secretary. The Commission recognized the validity of the contention that such approval should be required where historical boundaries were being adjusted in aboriginal land claims (12 Ind.Cl.Comm. 439, 476-477 (1963)). The Commission found, however, that there was absolutely no evidence of historical overlap of bordering claims, but that Jicarillo Apache counsel by "mistake and oversight" had erroneously claimed Pueblo lands. The stipulations which served to correct the mistake did not constitute an arbitration or compromise of a controversy between them since none had ever existed and there was only a mistake of pleading. The Commission concluded (Id., p. 478):

* * * This correction of an error in pleading made by counsel's inadvertence in failing to exclude lands claimed by subject Pueblos is not difficult to distinguish from a situation where a historic boundary dispute between adverse Indian groups or tribes is sought to be settled by arbitration and compromise. Here there was a mistake in the pleading of the description of Jicarilla Apache's claimed lands and its correction.

We have accepted the Commission's correction of our mistaken perception of the Jicarilla Apache transactions and see no precedent which would support legislative revival of the dismissed Navajo claims.

It is our view that the dismissed claims of any substance are the subject of claim 7 in Docket 69 or in Docket Nos. 229, 299 and 353, either presently before the Claims Court or for which judgment has been entered.

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. A judgment of \$14,800,000.00 was awarded to the Navajo Tribe on September 18, 1981 for the fair market value of their aboriginal lands.

Claim 3 complains of the adequacy of the agricultural land provided under the 1963 treaty and contends that the government is liable for the damage which allegedly occurred from overgrazing. The management of all lands on the reservation is the subject of inquiry under claim 7 of Docket No. 69.

Claim 4, subtitled "Education; Schools," alleged that the United States failed to ensure 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. (224 Ct. Cl. 171, 197-199 (1980); 624 F.2d 981, 995-996 (1980)).

Claim 5 alleges a breach of fiduciary duties by the United States with respect to the Tribe's natural resources and other tribal property. These claims are also the subject of claim 7 in Docket No. 69 and in Docket Nos. 299 and 353. Oil and gas mismanagement claims, as well as claims for wrongful disbursement and handling of tribal funds, and the failure to fulfill Article 8 provisions of the 1868 Treaty, were the subject of a judgment award of \$22,000,000.00 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-March 1983 and are pending on briefs to be filed before the Claims Court in Docket Nos. 69 and 299. Other resource and property claims were scheduled for trial in these dockets by the Trial Judge's order of March 24, 1982. Trials have been thus set into 1985 (e.g., timber and sawmill claims - October 24, 1983; coal, water, rights-of-way, mission sites, etc. - May 15, 1984; and grazing lands - January 10, 1985).

act upon 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.

Present counsel also argues that the Department of Justice has, or had, some fiduciary duty under 25 U.S.C. § 81a "to protect Indian tribes against the unauthorized or imprudent actions of their attorneys." Letter of May 31, 1983, at 4. It is the breach of this duty which is said to justify the proposed legislation. *Id.* This proviso would alter the role of defense lawyers and judges involved in adversary proceedings under the Act by adding an overriding obligation of assuring that tribal counsel's strategy, tactics, and actions were not only authorized but also prudent and, presumably, likely to succeed. We do not understand that to be the role which Congress intended for this Department when it established a tribunal for the litigation of Indian claims.

Mr. Schaab's July 13, 1983 letter principally focuses upon the Court of Claims dismissal of "fair and honorable dealings claims" allegedly contained in Clauses 1-6, and 8 of the original petition in Docket No. 69. He reasons that the dismissal of those claims precludes any further consideration of them by the Court of Claims. As we discuss in some detail below, most of such claims are clearly not precluded. Mr. Schaab's proposition, or one very similar to it, was proffered by the government itself to the Court of Claims in *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 181, 624 F.2d 981, 986 (1980). In the 1980 opinion, the Court described Claim 7 as "an all-inclusive claim that asked the Government to account generally and properly for its handling of the Tribe's monies or property over which the Government had exercised control or supervision." *Id.* Plaintiff's exception to the government's accounting report, we argued, sought to reassert claims which had been dismissed in the 1979 ruling. We submitted that the earlier dismissal precluded the reassertion of the "fair and honorable dealings" claims. The Court rejected our proposition, reasoning as follows:

[The 1979 order] was not meant to delete any true accounting claims already included in Claim 7 * * * Simply because the specific item happens to deal with the same subject matter (e.g., land, oil, gas or education) as a dismissed claim. What the [1979] order did, and was meant to do, was to prevent plaintiff from attempting to restate and reinvigorate the dismissed claims, which were not accounting claims, in the form (if not the substance) of accounting claims in order to try to bring them now, for

the first time under Claim 7. But true accounting claims, involving the disposition of tribal funds and property, have always been warp and woof of Claim 7, and they remain so. If the issue is whether the Government, as fiduciary, faithfully managed or used Navajo assets, Claim 7 covers the question.

224 Ct. Cl. at 181-182, 624 F.2d at 986. (Emphasis in text.)

The Court offered an example of how a dismissed claim could remain viable in Claim 7. It pointed to the government's alleged failure to provide educational and other services to the Navajos and concluded that dismissal of that claim did not:

prevent the plaintiff from urging [in Claim 7] that defendant must account for the use and disposition of educational monies appropriated by Congress to or for the use of the Navajos specifically; the latter aspect is and has always been fully a part of the general accounting claims we are now considering.

Id. In contrast, the Court indicated that a "broader contention" apparently within the dismissed claims, i.e., the United States' failure to appropriate or make available sufficient funds to educate the Navajos, could not be restated in Claim 7. An analysis of the specifics of the claims becomes essential.

One of the bases for our opposition to the Bill, in fact, is that it generalizes regarding claims which have been described by the Court of Claims as "byzantine in complexity." *Navajo Tribe v. United States*, 220 Ct. Cl. at 362-364, 601 F.2d at 537-538. Even though some clarification might be obtained by reference to the 1979 decision, the present status of the dismissed claims would still not be apparent. Consequently, we undertook, in our letter of June 14, 1983, to up-date the status of the dismissed claims in the context of their pendency or disposition in other Navajo dockets. Because that analysis demonstrates, we submit, that the relief sought in the Bill is unnecessary to assure that the Tribe has had a fair opportunity to litigate its claims, we restate it here.

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 \$14,800,000.00 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 ensure 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. 224 Ct. Cl. at 197-199, 624 F.2d at 995-996.

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 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 \$22,000,000.00 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-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 15, 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 monies or property, are also the subject of Claim 7 in Docket No. 69 or of claims presented in Docket No. 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 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, merit rulings made, and claims otherwise presented or preserved, promises to unsettle and further protract the resolution of these claims. The grant could encourage other tribes to seek jurisdictional authority to reopen results already obtained under the Act when those results are later thought unsatisfactory or, with new counsel, to present entirely new ideas and theories of their past or current claims with the hope of greater success before the current tribunal.

For the reasons discussed, we continue to 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's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

September 28, 1979

ORDER

ON PLAINTIFF'S MOTION FOR
CLARIFICATION

The plaintiff has filed a motion for clarification of our opinion of June 13, 1979, in which we dismissed claims 1 through 6 and claim 8. In so doing, we stated that "This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets." (Footnote 1). Plaintiff now asserts that in this footnote we contemplated the possibility that the dismissed claims still might be asserted as part of claim 7 in docket No. 69, a general accounting claim that has been consolidated with the accounting claims in docket Nos. 299 and 253, and which therefore was not before us.

Plaintiff is mistaken. Footnote 1 was intended to make clear that despite the dismissal of claims 1 through 6 and claim 8, those claims could be asserted in the other pending dockets (Nos. 229, 299 and 353) if in fact they "are present in those dockets." The determination whether the dismissed claims are so present is a matter for the trial judge. Obviously, we would not have dismissed claims 1 through 6 and claim 8 in docket No. 69 if we had contemplated that all of those claims could be fully pressed under claim 7 in that docket. To the contrary, we held that the plaintiff's previous withdrawal of claims 1 through 6 and claim 8 in docket No. 69 precluded plaintiff from subsequently reasserting those claims because at the time of reassertion the statute of limitations had run on them. The plaintiff may pursue these dismissed claims only if, and to the extent they are also part of the claims asserted in the dockets other than docket No. 69.

WAIVER OF RES JUDICATA DEFENSE BY CONGRESS

Assiniboine Nation, et al. v. United States, Docket No.

10-81L (Order of August 13, 1981).

Judgment - \$16,394,625.16.

Blackfeet Tribe of the Blackfeet Reservation v. United

States, Docket No. 649-80L (Order of June 19, 1981).

Judgment - \$29,357,453.00

Three Affiliated Tribes of the Fort Berthold Reservation

v. United States, Docket No. 54-81L (Order of September 30, 1981).

Judgment - \$22,690,625.00

Senator DeCONCINI. For our next witness, we will call Jerome C. Muys, attorney for Sante Fe Industries, who has a short statement, I understand, in relation to this subject matter.

STATEMENT OF JEROME C. MUYS, ATTORNEY FOR SANTA FE
MINING, INC. AND SANTA FE PACIFIC RAILROAD CO.

Mr. Muys. Thank you, Mr. Chairman.

My name is Jerome C. Muys, and I am appearing this morning on behalf of Sante Fe Mining Co. and Sante Fe Pacific Railroad Co.

I have a short statement I would just like to have copied into the record, and I would like to summarize it for you if I may.

Senator DeCONCINI. Without objection, it will appear in the record. Please proceed.

Mr. Muys. Santa Fe owns about 4 million acres of reserved mineral rights throughout Arizona and New Mexico. This is the residue of the original land grant that was granted to the Sante Fe's predecessor company, Atlantic and Pacific Railroad, for building the transcontinental railroad from Missouri to California.

Presently pending in the Federal District Court in New Mexico is a suit by the Navajo Tribe which claims title to about 1.9 million acres of northwestern New Mexico; that is a good chunk of that State.

A portion of those lands are the lands that were included in docket No. 69, which is the subject of this legislation, and also for which the tribe received \$14.8 million in a judgment entered in docket No. 229 before the Indian Claims Commission.

In the pending New Mexico litigation, the tribe, in addition to claiming title, is requesting damages for trespass, seeking to invalidate the conveyances from the United States to third parties, including the State of New Mexico, and an injunction against any kind of further trespass on those lands.

Now, the defendants, which are the United States, the State of New Mexico, Santa Fe Mining, and Santa Fe Pacific Railroad, and a host of other unnamed defendants of a class alleged by the plaintiffs, have moved to dismiss the lawsuit.

One of the principal grounds is that the judgment in Indian Claims Commission docket 229 operates as a bar to the tribe's assertion of these new claims in New Mexico.

Santa Fe believes that it is essential in this legislation to make it clear that Congress is not in any way attempting to express its views on the merits of the questions that are before the District Court in New Mexico as to the finality of the judgment in docket 229 or its legal effect, if any, on the pending litigation.

We have drafted a short disclaimer to that effect which we have discussed with the staff and the Navajo Tribe, and I believe it is acceptable to them. We would urge that the committee give that favorable consideration in your deliberations.

[The prepared statement follows:]

PREPARED STATEMENT OF JEROME C. MUYS, ATTORNEY, REPRESENTING SANTA FE MINING, INC., AND SANTA FE PACIFIC RAILROAD CO.

Mr. Chairman, my name is Jerome C. Muys. I am a partner in the Washington office of the Denver law firm of Holland & Hart, 1875 Eye Street, N.W. My testimony is presented on behalf of Santa Fe Mining, Inc. and Santa Fe Pacific Railroad

Company, both headquartered in Albuquerque, New Mexico. We appreciate this opportunity to present our views on S. 1196.

Santa Fe Pacific holds title to over 4 million acres of fee mineral estates in New Mexico and Arizona which are derived from the original land grant from the United States to the Atlantic and Pacific Railroad as consideration for building a railroad from Missouri to California. After Santa Fe Pacific acquired these lands, it sold nearly all of the surface estates and retained the mineral estates.

The Navajo Tribe is currently claiming title to 1.9 million acres of land in Northwestern New Mexico in a class action suit filed on October 6, 1982 in the United States District Court for the District of New Mexico, *Navajo Tribe v. State of New Mexico, et al.*, Civil No. 82-1148 JB. These lands are a portion of the lands which formed the basis for the claims brought by the Tribe in Indian Claims Commission Docket No. 69, and which are the subject of S. 1196. These lands were also the subject of claims for which the Navajo Tribe received \$14.8 million pursuant to a judgment entered in Indian Claims Commission Docket No. 229.

In the pending New Mexico lawsuit the Tribe has also requested trespass damages, the invalidation of conveyances from the United States to third parties, and an injunction against further trespass with respect to a large area of Northwestern New Mexico. This area includes the lands described in the first, second, and eighth claims of Docket No. 69 and in the two counts of Docket No. 229. The United States, the State of New Mexico, Santa Fe Mining, Inc., and Santa Fe Pacific Railroad Company are defendants in that action, and the alleged class of other defendants includes all land owners in the 1.9 million acres subject to that litigation. In addition to other contentions, Santa Fe and other defendants have moved to dismiss the pending action on grounds that the Tribe was previously compensated for loss of these lands by the payment of the judgment in Docket No. 229, and that that judgment is, therefore, res judicata of the claims asserted in the pending action. The Tribe has countered this contention and has taken the position that the satisfaction of the judgment in Docket No. 229 does not prevent it from asserting new claims for money damages or to actual ownership of the same lands. All of the title held by Santa Fe is derived from conveyances from the United States or grantees of the United States.

Santa Fe believes that it is imperative that Congress, in legislating with respect to the narrow issue with which this bill purports to deal, make it clear that it does not intend its action to have effect on the finality of the judgment in Docket No. 229 or the legal contentions as to its effect in the pending litigation in New Mexico. Consequently, Santa Fe proposes that the following disclaimer be added as section 2 of the bill:

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 or third parties in other judicial proceedings.

Senator DECONCINI. Are you concerned that the present legislation would reopen cases that have already been finalized?

Mr. MUYS. It might provide the basis for an argument that somehow or other the judgment in docket 229 lacks finality.

Senator DECONCINI. If my understanding is correct—and I will ask the Navajo representatives—that is not their intent here. But we will certainly consider your amendment. You make a very good case.

Mr. MUYS. Thank you.

Senator DECONCINI. Thank you very much.

Mr. MUYS. Thank you.

Senator DECONCINI. Next we will hear from the Navajo Claims Committee, Mr. Guy Gorman, chairman of the Chinle; Thomas Boyd, member of Fort Defiance; Marshall Plummer, member of the Tohatchi, N. Mex., and Paul Barber, an attorney from Albuquerque; and Mr. Schaab, also an attorney from Albuquerque.

Mr. GORMAN, how are you this morning?

Mr. GORMAN. Just fine, sir.

Senator DECONCINI. How come you did not bring any sunshine from Arizona and New Mexico?

Mr. GORMAN. We thought about it.

Senator DECONCINI. We will put your full statement in the record. Would you please summarize it for us.

**STATEMENT OF GUY GORMAN, COMMITTEE ON TRIBAL CLAIMS,
NAVAJO TRIBAL COUNCIL**

Mr. GORMAN. Thank you, Mr. Chairman.

Since the written statement is going to be made part of the record, I will summarize.

I have been a member of this Navajo Tribal Council since 1963. Why we are here today is kind of the concern of the Navajo people about the tribal claims case.

I can assure you that the council was never informed of the withdrawal of the seven claims cases that we are talking about here at this point.

We are only trying to request that we have a day in court on this, to have fair and honorable dealings, as stated in my statement that we have presented here.

During my growing up days, the opportunity was not there to get an education. I would say that all of the English that I am using today I picked up when I was serving in the Armed Forces with the U.S. Army. I had no choice but to speak English. That is where I picked up my English.

So these are the concerns that I think the Government needs to address; to live up to its trust responsibility and the treaty of 1868.

Thank you very much, Senator.

[The prepared statement follows. Testimony resumes on p. 53.]

**PREPARED STATEMENT OF GUY GORMAN, SENIOR MEMBER, COMMITTEE ON TRIBAL
CLAIMS, NAVAJO TRIBAL COUNCIL**

Mr. Chairman: My name is Guy Gorman. I am the Senior Member of the Committee on Tribal Claims appointed by the Advisory Committee of the Tribal Council. I have been authorized to present this statement on behalf of the Navajo Nation by Chairman Peterson Zah and the Claims Committee.

The Navajo people are asking Congress to correct the failure of the United States, as our trustee, to protect our right to obtain a fair hearing on our "fair and honorable dealing" claims that were properly filed under the Indian Claims Commission Act more than 30 years ago. In 1979 the Court of Claims held that these claims had been dismissed by an amendment filed by our second claims attorney despite the fact that the Tribe and the Secretary of the Interior had never approved such action, as required by the attorney's contract.

Our principal "fair and honorable dealings" claim was that the Government failed to keep its historic promises in our 1868 Treaty to give Navajo children the opportunity for an education. Every Navajo realizes the great misfortune suffered by the Tribe because the Government reneged on its promise over 100 years ago. When I was growing up, most Navajo children didn't go to school because there were only a few schools and they were overflowing. Even fewer Navajos in my parents' generation had schools to attend.

Lacking an education, we could only look to the Government as our trustee to manage our resources, but the trustee made many mistakes over the years. When Congress in 1946, for the first time, gave the Navajos the right to bring these wrongs before the Indian Claims Commission, we did so. Maybe, we thought, some good will come of these claims, and we will be able to educate ourselves. In fact, we have allocated a good part of the first two recoveries on these claims for scholarships and other educational uses. Unfortunately, those funds are far too small in comparison to our needs. The great bulk of our people still live in poverty, in the remote desert, without local schools and with nothing but rough dirt trails for busing to distant schools.

Now it seems that the right to a full hearing granted us by Congress 35 years ago on the Government's failure to give us the educational benefits of the 1868 Treaty,

and the hope for some compensation to help undo past wrongs, have been taken away by new wrongs. Our "fair and honorable dealings" claims have been thrown out on a technicality in a way that neither Congress nor the Tribe ever intended.

In 1969, without Tribal approval or consent, the second claims attorney for the Tribe filed an amended petition in one of the cases (Docket No. 69) which deleted seven paragraphs, and "withdrew" Claims 1 through 6 and Claim 8.¹ That action violated Section 6 of the claims attorney's contract,² which required approval by both the Tribe and the Secretary of the Interior for any "compromise, settlement, or other adjustment of the claims." Although the Secretary had required such a provision in the attorney's contract for the Tribe's protection,³ the Department of Justice neither informed the Secretary of the claims attorney's action nor advised the Commission that the Secretary had not approved such action.

The claims attorney has advised the Committee⁴ that he acted under pressure from the Department of Justice to "consolidate" the claims originally pleaded in eight separate counts, and that he did not intend to dismiss any claim originally presented by the Petition. Since the attorney never advised the Tribe of his "amendment" of its Petition, the Tribe was unable to act for its own protection.

That situation was precisely the kind calling for the Government, which did know of the attorney's action, to exercise its oversight function under 25 U.S.C. § 81a. The Department of Justice should have called the "withdrawal" of seven claims to the attention of the Tribe and the Secretary of the Interior and demanded their review and approval in accordance with the attorney's contract. Instead, Justice let the matter lie dormant until the claims attorney had been replaced; then it claimed his action was a voluntary dismissal of important claims that cannot now be considered on their merits.

In other cases, such as the overlapping land claim areas of the Jicarilla Apache Tribe and certain Pueblos,⁵ the Justice Department objected to an agreement between attorneys that reduced the Jicarilla's claim area because the secretary had not given his approval. The Justice Department itself agreed that "the attorney . . . is prohibited from making any adjustment of any claim pending on behalf of the tribe without the approval of the Commissioner of Indian Affairs." The attorneys then obtained the approval of the Commissioner, and the Claims Commission accepted the agreement as valid.⁶ Although the Navajo Tribe's claims attorney's contract had a provision like the Jicarilla's, the same caution was not observed in the Navajo cases. Instead, the Department of Justice took advantage of our attorney's unauthorized action for the Government's benefit.

In this hearing, the department suggests that its failure to demand tribal and Secretarial approval of our attorney's "withdrawal" of our claims should be excused because the Commission held in the Jicarilla case that tribal attorneys are free to correct "mistakes" in a pleading without such approval. Yet the Department did not treat our attorney's action as correcting a pleading "mistake"; it pressed for a court decision that he had deliberately dismissed our claims. In 1974, five years after the unauthorized amendment of the petition, after our third and present claims attorney moved to amend the petition to restore to it all of our claims, the Justice Department asked the Indian Claims Commission to enter final judgment dismissing the "withdrawn" claims. The Commission denied that request because the 1969 amendment had not been approved by the Tribe or the Secretary, and a new amendment was allowed to restore all of the claims that had been originally filed before the deadline of August 13, 1951. The Government then moved to dismiss Claims 1 through 6 and Claim 8 on the technical ground that they were presented after the 1951 cutoff date.

After transfer of the case to the Court of Claims, the Trial Judge filed his opinion in 1978 upholding the Commission's approval of the Tribe's revised petition. But the Justice Department appealed to the Court, and on June 13, 1979, the Court dismissed Claims 1 through 6 and Claim 8. The Court held that the attorney's contract

¹ Exhibit A, p. 57a.

² Exhibit A, p. 54a.

Editor's Note: Exhibit A (Retained in committee files), "Petition for a writ of certiorari to the United States Court of Claims, The Navajo Tribe, petitioner, v. The United States of America, respondent", filed in the United States Supreme Court, Nov. 9, 1979, was previously printed in the hearing "Conferring of Jurisdiction on the U.S. Court of Claims Over Claims of the Navajo Tribe", on S. 1613 of the 97th Congress, dated Nov. 18, 1981, on page 19.

³ Exhibit A, p. 56a. The Secretary acted under Congress' mandate in 25 U.S.C. § 81a to supervise tribal attorney contracts.

⁴ Exhibit B.

⁵ 5 Exhibit C.

⁶ 6 Exhibit D.

required tribal and Secretarial approval only where some payment was made to the Tribe. We think the Court's holding is absurd: the trustee's approval must be given if claims are settled for a sum of money, but no approval is needed if the attorney gives up claims without any payment whatever. The U.S. Supreme Court refused on February 19, 1980, to hear our appeal. In this way, The Department of Justice took advantage of the Government's failure to review our attorney's unauthorized action and, as our trustee, to protect the Tribe from loss of its valuable claims. The Department flouted both the requirements of 25 U.S.C. § 81a and our attorney's contract for its own benefit, and only Congress can correct that error.

The present bill, S. 1196, will merely allow the Tribe to obtain a hearing on the dismissed claims in the case still pending before the U.S. Claims Court. The claims were properly filed before the 1951 deadline. No withdrawal was authorized, and they should not have been dismissed. The Tribe is entitled to have them considered by the Court once and for all on their merits.

The bill is carefully drawn to prevent the Tribe from obtaining a double hearing on claims now pending before the Court under the Seventh "general accounting" Claim, or on those that have been determined on their merits. In 1979, the Justice Department took the position on a motion to the Court for clarification⁷ and in a later appeal in the "general accounting" docket that none of the dismissed claims could be considered in the remaining Seventh Claim. In May, 1980 the Court rejected the Government's argument, allowing all claims based on breach of the Government's fiduciary duty to the Tribe to be heard under Claim 7 notwithstanding their inclusion in Claims 1 through 6. But with respect to "fair and honorable dealing" claims under clause (5) of § 2 of the Claims Commission Act [25 U.S.C. § 70a], the Court held:⁸

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

Those claims were, therefore, finally dismissed by the 1969 Amended Petition and cannot be considered unless Congress passes this bill.

The bill will allow the Navajo Tribe to obtain a hearing before the U.S. Claims Court on its dismissed claims and thus carry out the intent of the Indian Claims Commission Act. The legislative history of that Act shows that Congress meant to have tribal claims heard and decided on the merits, and that tribes could recover whenever the facts showed that, in good conscience, recovery was justified. Congress expected, as the Report of the House Committee on Indian Affairs [H.R. Rep. No. 1466, 79th Cong., 1st Sess.] stated:

"* * * that an impartial determination of the facts will in many, if not in most, cases eliminate the need for further legal proceedings by showing either that there is no basis whatever for recovery on the part of a given tribe or that such recovery, if indicated, does not involve any controverted legal principles."⁹

The comments of the Department of Interior on the bill, printed in the House Report, pointed to the "lack of finality attending dismissal of a case by the Court of Claims on technical legal grounds without consideration of the claims on its merits" and suggested that authority to try "moral claims" as well as strictly legal or equitable claims "would overcome the defect in the present system under which many of the claims of the Indians are precluded from a hearing on the merits, on technical legal grounds, even though the claims may be such as would challenge the conscience of a court of equity."¹⁰ The Department repeatedly stressed the Commission's "power to consider the merits of all existing Indian Tribal claims."¹¹ and to overcome technical legal barriers to trail. The Court of Claims' dismissal of the Navajo claims by a technical and unnecessary interpretation of the claims attorney's contract, was thus entirely wrong and contrary to the intent of the Act. We ask prompt passage of S. 1196 to correct that error and prevent adding a new wrong to the deprivations still suffered by our people.

⁷ Exhibit A, p. 9a.

⁸ Exhibit E, p. 8.

Editor's Note: Exhibit E (Retained in committee files), "Decision of Claims, dated May 28, 1980 (Nos. 69, 299 and 353), The Navajo Tribe of Indians v. The United States, 624 F. 2d 981 (1980) was previously printed in the hearing "Conferring of Jurisdiction on the U.S. Court of Claims Over Claims of the Navajo Tribe", on S. 1613 of the 97th Congress, dated Nov. 18, 1981, on page 133.

⁹ Page 13.

¹⁰ Page 15.

¹¹ Page 16.

HAROLD E. MOTT
EXHIBIT B RE-

1983

B

1983 JUL 11 PM 1: 36 1306 SOUTH ALBERT PIKE
POST OFFICE BOX 3864
FORT SMITH, ARKANSAS 72903

7/8/83

Honorable Mark Andrews:
Chairman, Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Andrews:

While serving as Claims Attorney
for the Navajo Indians, Ralph Leroy,
an attorney for the Department of
Justice, in charge of Indian Claims,
requested me, on three occasions to
consolidate the several Claims then
pending before the Indian Claims
Commission. In particular, his
argument to me was that the
"Cover all" Complaint of Case # 69 (#7)
was sufficient to provide
appropriate relief on all the Navajo
Counts.

HAROLD E. MOTT

1306 SOUTH ALBERT PIKE
POST OFFICE BOX 3864
FORT SMITH, ARKANSAS 72903

I had my assistant review the
Claims and certain consolidations
were made.

The present Claims attorney, Mr.
Schaut, believes, and has many
times asserted that #7 does in fact
cover the Navajo Claims, yet to be
certain of full protection for the
Navajo Tribe he wishes the Claims
consolidated to be unconsolidated.

If Mr. Schaut feels this is
necessary, and considering the
Government's early position, I
strongly believe legislation should
be passed to allow Council to proceed
and he feel may be in the best
interest of the Navajo Tribe. I feel
certain that the Government itself, having
the Navajo Indians as its trust should
take all measures to insure their
Welfare.

Sincerely,
Harold E. Mott

EXHIBIT C

357

BEFORE THE INDIAN CLAIMS COMMISSION

John B. Hamant

THE JICARILLA APACHE TRIBE OF
THE JICARILLA APACHE INDIAN
RESERVATION, NEW MEXICO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Docket No. 22A

THE PUEBLO OF SAN ILDEFONSO
ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 354

THE PUEBLO OF SANTO DOMINGO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 355

THE PUEBLO OF SANTA CLARA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 356

-2-

THE PUEBLO OF TAOS,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 357

THE PUEBLO OF NAMBE,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 358

MOTION TO VACATE STIPULATIONS
FILED MAY 4, 1959

Comes now the defendant, by its Assistant Attorney General, and moves this Commission for an order vacating and striking from the record in the above-entitled cases, the stipulations filed by the petitioner in Docket No. 22A on May 4, 1959. This motion is made on the following grounds:

1. Said stipulations diminish the aboriginal claim of the Jicarilla Apaches as set forth in the amended petition on file in Docket No. 22A.

2. The petitioner in Docket No. 22A has presented evidence, by expert testimony, which purports to show the exclusive use and

occupancy by the Jicarilla Apaches of the areas which said stipulations now purport to relinquish to other Indian claimants.

3. The said stipulations, being an attempt to adjust a claim alleged and purportedly proved by the Jicarilla Apaches, cannot be adjusted without the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribal Council.

4. That the petitioner, during the first hearing in this case, specifically stated that it claimed the areas which it now seeks to relinquish. (Tr. 560).

In support of this motion defendant states:

1. That by his contract with the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico, the attorney for said tribe is prohibited from making any adjustment of any claim pending on behalf of the tribe without the approval of the Commissioner of Indian Affairs.

2. That it appears that the stipulations filed on May 4, 1959 with the Commission are an attempt to make an adjustment of the claim of the Jicarilla Apache Tribe without the approval of the Commissioner of Indian Affairs.

3. That such an attempt on the part of the attorney for the Jicarilla Apache Tribe is an act outside the scope of his employment as more fully appears from his contract of employment on file with the Commission.

4. That neither this Commission nor any court has the power to enlarge the scope of the attorney's employment without the consent of the Jicarilla Apache Tribe and the Commissioner of Indian Affairs.

5. That the stipulations filed on May 4, 1959 purport to do something which the Jicarilla Apache attorney is expressly, by his contract, prohibited from doing without the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribe.

6. That the consent of the Commissioner of Indian Affairs and the Jicarilla Apache Tribe not having been given, the said stipulations are a nullity and should be expunged from the record in these cases.

7. That the letter of the attorney for the petitioner in Docket No. 22A, transmitting the said stipulations, states that said stipulations are based on the best evidence available to the respective claimants, including the Jicarilla Apache Tribe.

8. That heretofore and during the week of December 1, 1958, a partial hearing was held on the Jicarilla Apache claim and at such hearing the petitioner offered the testimony of two expert witnesses, namely Dr. Albert S. Thomas, Historian, and Dr. Frank C. Hibben, Anthropologist.

9. That both Drs. Thomas and Hibben testified that the Jicarillas occupied and exclusively used the areas which the said stipulations now attempt to relinquish to the claimants in Dockets

Nos. 354, 355, 356, 357 and 358.

10. That the attorney for the petitioner in Docket No. 22A is repudiating the testimony of his own experts given at the hearings of December 1-5, 1958 when he states that " * * * the best evidence available * * * " shows that his own experts' testimony is not to be relied upon.

11. That the action of the attorney for the petitioner in Docket No. 22A, in repudiating the testimony of his own experts, should certainly be carefully considered by the Commission before allowing stipulations, which in essence repudiate such testimony, to remain in the record of these cases.

WHEREFORE, defendant requests:

1. That the Commission enter an order directing the stipulations filed by the petitioner in Docket No. 22A on May 4, 1959 be expunged and stricken from the record in these cases.

2. That pursuant to Section 22(a) of the Commission's Rules of Procedure, an oral hearing be held hereon.

Respectfully submitted,

PERRY W. MORTON
Assistant Attorney General

William H. Lundin
Attorney

I hereby certify that on the 13 day of May, 1959 one (1) copy of the above and foregoing motion was mailed to each of the attorneys of record in the above-captioned cases as follows:

Docket No. 22A

Guy Martin, Esquire
910 - 17th Street, N. W.
Washington 6, D. C.

Dockets Nos. 354,
355, 356, 357 and
358

Darwin P. Kingsley, Jr., Esq.
230 Park Avenue
New York 17, New York

William H. Lundin
Attorney

Senator DECONCINI. Are there other short statement summaries you care to make?

Mr. GORMAN. Senator, I would like to introduce two of my committee members. Over on my right side is Marshall Plummer, council delegate from Coyote Canyon, and Councilman Thomas Boyd from Crystal, N. Mex.

Senator DECONCINI. Very good.

We will be glad to put your full statements in the record if you care to summarize them, please.

**STATEMENT OF THOMAS BOYD, COMMITTEE ON TRIBAL CLAIMS,
NAVAJO TRIBAL COUNCIL**

Mr. BOYD. Thank you.

Mr. Chairman, I would like to reemphasize some of the things that my fellow colleague, Mr. Gorman, has stated.

Education is recognized by all Navajos as the area where we are most seriously limited by our Government's failure in honoring its promises within the treaty of 1868.

We hope that a recovery on our claims will help to offset the lack of educational opportunities that has handicapped the past generation of Navajo people.

We very much want our day in court on our important education claims, and we are confident that Congress intended us to have a fair hearing on the merits of all claims properly pleaded in our original petition.

The bill will give us that opportunity, and it will fully protect the Government against relitigation of any claims already heard or presently pending before the U.S. Court of Claims.

With this, we are urging and pleading that we be given a day in court for the benefit of our constituents in the Navajo Nation.

Thank you.

[The prepared statement follows:]

**PREPARED STATEMENT OF THOMAS BOYD, COMMITTEE ON TRIBAL CLAIMS, NAVAJO
TRIBAL COUNCIL**

Mr. Chairman: My name is Thomas Boyd. I am the Tribal Councilman from Crystal Chapter and a member of our Claims Committee. I want to protect the Navajo Tribe from the unjustified dismissal of its fair and honorable dealings claims. Our second claims attorney's contract was intended to prevent the result of the Court of Claims' decision in 1979. It specifically required both Tribal and Secretarial approval of any "compromise, settlement, or other adjustment" of the claims originally pleaded by our first attorney in 1950. That provision was intended to fulfill the duty imposed on the Secretary of the Interior by 25 U.S.C. § 18a to supervise tribal attorneys and protect the Tribe against their mistakes.

We didn't know in 1969 what our second claims attorney was doing on our claims. He never reported his proposed amendment of our original Petition to the Tribal government. His letter of July 8, 1983, to the Chairman of this Committee indicates that he did not intend to dismiss our "fair and honorable dealings" claims, and the Tribe certainly had no intention of dismissing any claims covered by our original Petition. Particularly, we would never have dismissed our claim based on the Government's failure to provide education in accordance with its 1886 promises and Congress' later recognition of its special obligation to educate our children. Education is recognized by all Navajos as the area where we are most seriously limited by the Government's failure in honoring its promises. We hope that a recovery on our claims will help to offset the lack of educational opportunities that handicapped past generations of Navajo people.

The Department of Justice attorneys should have asked the Secretary of the Interior to approve the 1969 amendment of our original Petition as an "adjustment" of

the claims, dropping all claims based on the Government's failure to deal fairly and honorably with the Tribe. In the case of the reduction of the Jicarilla Apache Tribes' claimed aboriginal area stipulated by its attorney, the Justice Department refused to accept the attorney's action until the Commissioner of Indian Affairs had approved, as required by the attorney's contract. However, the Jicarilla stipulation was contrary to the Government's interest, while the amendment of our Petition was in the Government's favor. The Navajo Tribe thus suffered the loss of valuable claims because the Government had failed to supervise its attorney's dismissal of claims based on fair and honorable dealings. The Government's present position that it was not required to protest the Tribe's interest under the Claims Commission's ruling in the Jicarilla case is not applicable because our original claims Petition had not made any mistake in claiming lands owned by others. Our second attorney now says he was attempting to consolidate our claims and did not intend to dismiss any claims in the Petition. Since a "withdrawal" of claims was ambiguous—it obviously does not suggest a "mistake"—the Department of Justice should have demanded Tribal and Secretarial approval.

Enactment of the bill is needed to reverse the Government's regrettable failure to fulfill its duties under 25 U.S.C. § 81(a) and our attorney's contract. We very much want our day-in-court on our important education claim, and we are confident that Congress intended us to have a fair hearing on the merits of all claims properly pleaded in our original Petition. The bill will give us that opportunity, and it fully protects the Government against relitigation of any claims already heard or presently pending before the U.S. Claims Court.

Senator DECONCINI. Thank you very much.

Mr. Plummer.

STATEMENT OF MARSHALL PLUMMER, COMMITTEE ON TRIBAL CLAIMS, NAVAJO TRIBAL COUNCIL

Mr. PLUMMER. Thank you, Senator.

It is a pleasure to be here in Washington to have the select committee hear our case.

I am not going to cover basically what Mr. Gorman or Mr. Boyd have said, but I think that the thing that I would want to impress you with is the concern we have regarding education.

I think you can see, just based on Mr. Gorman and myself, what education has meant on the reservation, and I think that you are aware of that.

Since 1868, the Indian tribes of the United States, including the Navajo people, have had to adapt to a foreign way of life, and I think that based on that, and we are caught in the situation of not being able to provide for ourselves. I think that is the key point that we are asking Congress to look at; that we want our case to be heard in the courts so that we may have that opportunity to adapt into Western society.

I think, just to give you some facts about the consequences of what has happened in the 115 years since the treaty has been signed, you see now unemployment as high as 85 percent on the reservation. I noticed also the counselor before us said that we would be opening up litigation which would include more than possibly 10 years, and that he is not against the tribe but that the litigation must end.

We totally agree with that, but you must provide us what has been stated in the treaty of 1868. I think that is what we are after. We are asking to be heard, and now we are asking for approximately \$31 million in welfare funds.

Again, another case of a consequential effect that has happened on the reservation as far as provision of social welfare is concerned, we have gotten out a contract with the Government.

So those are just symptoms or consequences of what has happened because we have not been given what was approved in the treaty of 1868.

So, Senator, I would like to say that all we are asking for is a day in court, to be heard, and maybe we can change as far as the tribe is concerned into adapting ourselves into Western society.

Thank you.

[The prepared statement follows:]

PREPARED STATEMENT OF MARSHALL PLUMMER, COMMITTEE ON TRIBAL CLAIMS, NAVAJO TRIBAL COUNCIL

Mr. Chairman: My name is Marshall Plummer. I am the Tribal Councilman from Coyote Canyon Chapter and the youngest member of the Claims Committee.

Mr. Gorman's statement has covered the terms and effect of the bill, and I will not elaborate on his remarks. I want to focus the Committee's attention on the feelings of the Navajo people concerning education. Throughout our Reservation there has been a sense of betrayal and loss because the Government failed to provide education for our people as its 1868 agreement promised.

We are fully aware of the fact that under Article VI of the 1868 treaty the Government promised to give us the "advantages and benefits" of "civilization" and an "English education." At the same time, the Government took our land, and our leaders recognized that we could survive as a people only if we were able to achieve the benefits of "civilization" because we no longer had our original land base. We therefore readily agreed to the Government's terms in Article VI of the Treaty. Almost immediately after the Treaty was signed, our ancestors began to petition the United States Government to live up to its promises by providing educational facilities and teachers for all of our children. Those pleas fell on deaf ears in Washington, where under the United States' own laws we were not allowed to seek judicial relief until passage of the Indian Claims Commission Act in 1946. The Navajo Tribe promptly filed a claim under Section 2 of that Act (25 U.S.C. § 70a) based in part on the Government's failure to deal fairly and honorably with the Tribe in meeting its educational commitments. Despite the contentions of the Justice Department that some parts of our claims survive the 1969 "withdrawal," the fact remains that our "fair and honorable dealings" education claim will never be heard on its merits without legislation such as S. 1196.

We were appalled to learn that the Court of Claims dismissed our "fair and honorable dealings" claims because of the unauthorized action by our attorney. This is a clear case of the Government's taking advantage of our attorney's mistake in the face of its duty under 25 U.S.C. § 81a to protect us against such unwarranted action. In opposing this bill, the government is still taking advantage of the Navajo Tribe.

June 1st of this year marked the One Hundred Fifteenth anniversary of the Navajo Treaty. Because of a technicality and the Government's own failure to monitor the attorneys' contract it had approved, we are still waiting for our first day in court on the merits of our claim that it did not honor its side of the bargain. I ask the Committee to approve the bill.

Senator DECONCINI. Thank you, gentlemen.

The Justice Department says, as you heard this morning, that these claims that we would like to authorize the Court of Claims to have jurisdiction to hear on the merits, that the substance is already covered in other claims which they say are still pending. One of them is set for trial in January. Can you give us a response for the record of why you feel that is inaccurate?

Mr. SCHAAB. Senator, let me respond to that.

The bill was very carefully written in the revision since the last Congress to eliminate any possibility that it would allow the tribes to reopen questions that have been closed by decided matters or to relitigate matters that are presently pending.

The danger, I think, that has been referred to by the witness for the Justice Department has now been successfully dealt with in the revised language of the bill.

Senator DECONCINI. Well, you bring up another question. Let me get this one behind us first.

The amendment offered by Mr. Muys in relation to already litigated, closed, final—

Mr. SCHAAB. Oh, I see—right.

Senator DECONCINI. No, that was not my question, but you raised it.

Does that language that he has suggested pose any problem?

Mr. SCHAAB. No. I think we met with Mr. Muys and another representative of Sante Fe yesterday. I think their concern really is sort of in apposite in connection with this bill, but we have no objection to the language that they have recommended.

Senator DECONCINI. Now, getting back to what I would like to have you address: Give me an example of substance in your legal determination, in behalf of your client, that you feel is not before the court now in one of these other consolidated cases, so we will have something on the record. It seems to me, as the testimony unveils here, that what we are talking about is whether or not what we want to accomplish by S. 1196 is indeed already accomplished and before the court.

Mr. SCHAAB. The principal issue that has been dropped from this litigation as a result of the Court of Claims decision in 1979 is the tribe's education claim based on fair and honorable dealings.

Senator DECONCINI. That is not pending in any of these other cases, in any reference, or in any manner.

Mr. SCHAAB. That is correct. There is still pending, as part of the accounting case, the question of the application of Government appropriations for education during 10 years after the treaty of 1868.

But for periods beyond that 10-year treaty commitment, there is a question of the Government's obligation to provide education for the tribe as a matter of fair and honorable dealings, based on the existence of a special relationship.

Senator DECONCINI. Now, if the Court of Claims has jurisdiction under the Indian Claims Commission law to hear, besides law, equity, fairness, and what have you, why would they not have the right—why would you not have the right on behalf of your client to bring that up as part of the matters before the court, even though they are not specifically set out in those consolidated cases?

Mr. SCHAAB. Because the Court of Claims, in its decision in May 1980, expressly held that the education claim based on fair and honorable dealings was not a claim that could be asserted under the surviving claim 7.

Senator DECONCINI. So you have already tried that?

Mr. SCHAAB. We have already raised this issue.

We were arguing before the Court of Claims in 1979 and 1980 exactly what Mr. Liotta has been saying this morning; that the claims that were presented in claims 1 through 6 of the original petition all survived as part of claim 7.

Therefore, Mr. Mott's withdrawal of those claims did not have any substantive effect. It was simply a matter of reorganizing the pleadings, as Mr. Liotta is suggesting.

The court rejected that and said that it was not merely a matter of reorganizing the pleadings; that claim 7 was an accounting claim based on the Government's fiduciary responsibilities to the tribe,

and the fair and honorable dealings claims that were not connected with specific tribal assets like education could not be raised as part of claim 7.

Now, there may, in addition to the education claim, be other issues that are of that general character. We are not in a position today to specify any others, and as the litigation involves, there may not in fact be any others, but the issue that you have raised is dealt with by the court's opinion in May 1980.

Senator DECONCINI. If this legislation were passed and you were able to bring the educational claim under the treaty, what is your best estimate—you or Mr. Barber or anyone else—as to what we are discussing? What are you going to request?

Mr. SCHAAB. Do you mean in the time that would be taken to reach a final decision about that claim, or the amount of money that might be approved as damages?

Senator DECONCINI. What is the amount? What is the claim likely to be?

Mr. SCHAAB. Because the claim has been dismissed by Mott's 1969 amendment, we have not developed evidence of the amount of damages of that claim.

Senator DECONCINI. Well, you must have some estimate.

Mr. SCHAAB. Well, our estimate is that it is a substantial figure.

Senator DECONCINI. What do you mean, it is substantial?

Mr. SCHAAB. Several million dollars.

Senator DECONCINI. Several million. \$10 million?

Mr. SCHAAB. Well, more than 10.

Senator DECONCINI. \$20 million?

Mr. SCHAAB. Perhaps.

Senator DECONCINI. \$30 million?

Mr. SCHAAB. Perhaps.

Senator DECONCINI. \$50 million?

Mr. SCHAAB. Conceivably.

Senator DECONCINI. \$100 million?

Mr. SCHAAB. I would hate to venture that high, but—

Senator DECONCINI. So we are talking somewhere between \$10 million and \$50 million?

Mr. SCHAAB. Something of that sort, I would think, yes, would be a very reasonable estimate of what the damages might establish once we have an expert witness work up the evidence.

There is a serious question of liability. The court has held that the treaty agreement to provide education is limited to a 10-year period. So the basis for liability in establishing the education claim is not the precise terms of the treaty. It is based on other evidence that Congress recognized a special obligation to the Navajo people to provide education. It really failed to do so during the 10 years specified by the treaty.

Senator DECONCINI. Well, if you were to succeed, if this legislation passes and you get your claims board and you can prove your case and the court gives you a judgment of \$50 million or \$60 million, you then would have to come back to Congress in order to collect that judgment, would you not?

Mr. SCHAAB. I think, under the Indian Claims Judgment Act, the appropriation is an automatic response to the entry of the judgment.

There is, however, Senator, a difference between the evidence that could be presented through an expert witness to establish an amount of damage and the amount of a judgment that the court may enter on the basis of that finding. The figures that I was talking about are what we might reasonably expect our expert witness to testify to about damage.

On the Government side of those issues, I am sure there would be other experts with a different opinion and certainly a different figure in damages.

The damage concept is based upon the treaty provision that the Government will provide a schoolhouse and a teacher for every 30 Navajo children.

Senator DECONCINI. Is that what the treaty specifies?

Mr. SCHAAB. That is in the treaty. And our approach to the question of damage has been that the Government failed to provide the schoolhouse and the teacher for every 30 kids. How much did the Government thereby save itself in appropriations not spent for that purpose? So it is kind of an unjust enrichment theory of quantifying damages.

There are other ways to quantify damages that could produce higher figures. This is a rather conservative approach to that, and I think that is the approach we would take.

Senator DECONCINI. The Government's case would be that they have satisfied the education requirements in another manner.

Mr. SCHAAB. Sure, that is right. The figure of \$80 million or more sticks in my head of expenditures of Government funds for educational purposes for the Navajo tribe over the years.

Senator DECONCINI. The Justice Department, as you heard today, gave one of the weaker arguments, but I wanted to have a chance to let you respond to it, and that is, this legislation might encourage other tribes with analogous circumstances to seek similar legislation. Are you aware of any other tribes with such similar cases?

Mr. SCHAAB. I think, Senator, that any time Congress permits relief to be granted to someone coming before it with a meritorious position, it opens the possibility for other people with other grievances and claims for special treatment to come forward and assert those claims.

In this case, however, the Navajo Tribe's position is based upon the action of its claims attorney, that he had a contract that required tribal approval and secretarial approval for the settlement or disposition of the claim. He withdrew claims. In his letter, he said he thought this was merely reorganizing the complaint, but the court held he had dropped them; he had voluntarily dismissed them.

The tribe had no opportunity to decide whether it wished him to drop those claims or not. It did not know about it. This is a very narrow area, a very narrow window for any other tribe to try to climb through and get some special treatment from Congress. I certainly do not know of any other tribe with the same kinds of circumstances involving one of its claims attorneys.

Senator DECONCINI. Mr. Gorman, maybe you can answer this question for me, or maybe the tribal council could get me an answer. When you have contracts with law firms and lawyers now, do you require in every contract that the lawyer, before they dis-

miss a claim, must get approval from the tribe, or is it, as usual, the lawyer can do what he determines is best for the client without getting the approval of the client?

Mr. GORMAN. We feel that whatever is of concern to the Navajo tribal council or the tribe, its attorney should, whatever he is going to do, come back and tell the tribe what he is going to do. But in this case, it did not happen.

Senator DECONCINI. Is it true with the legal counsel that you have on contract now, that for every decision, they must come back to you, or is it only if they dismiss a case?

Mr. GORMAN. Well, our justice department certainly has a tab on this now. It seems like every day when the advisory committee is in session or the tribal council is in session, they have to be there, and whatever are the concerns of the people, they have to come back to the tribe for approval of what the legislation is going to be about.

Senator DECONCINI. Is that true with you, Mr. Barber or Mr. Schaab?

Mr. SCHAAB. Yes.

Senator DECONCINI. Do you have to get approval of the tribe for your decisions or dismissals?

Mr. BARBER. I think virtually every decision that affects whether or not a part of the case is going forward, or not going forward, is made after consultation with both the tribe's justice department and the tribal council.

I think provisions similar to the one in the contract in the record here are required in our contract. To my knowledge, it was required in virtually every Indian Claims Commission Act claims contract that was approved by the Interior Department. I think it is a provision they insisted on in claims attorneys' contracts across the board.

As far as I know, this is the only case where something of this consequence slipped by, slipped through the approvals, the protections that were designed into the system.

Senator DECONCINI. Mr. Barber, the letter to Senator Andrews from the Department of Justice which we just received, and I put in the record here, complains that the bill is ambiguous in its description of the affected claims. What response can you give to that?

Mr. BARBER. I think that the bill as drafted this Congress, as opposed to before, is as specific as it can be; that is, it says that the tribe can file claims that arose before 1946 that were already presented under the Indian Claims Commission Act; that were withdrawn, and that they were held to have been voluntarily dismissed. In other words, the tribe would be able to present under this bill claims 1 through 6 and claim 8.

The letter to Senator Andrews gives a short summary of each of those claims, and that summary—I just barely received this letter, and I have looked through it. In a general sense, the summaries are accurate, but really, the claims are what the claims were in the petition, and they should not be limited. You cannot be more precise in describing those claims than by referring to the claims themselves, and that is what the bill does. It allows the refile of claims—

Senator DECONCINI. I have not read all of the Justice letter. Does each claim, 1 through 6, and claim 8 go primarily to education? Maybe Mr. Schaab or you, Mr. Barber, can answer that.

Mr. BARBER. No. Each of those claims is not directly tied to education.

I think that what Justice has said is largely a smokescreen to the extent they are saying that they overlap. If the refiled complaint overlaps with something that is pending, then it will be consolidated and they will march along to trial with no additional delay, no harm done.

Senator DECONCINI. Well, there must be something other than just the education, then, that is of substance. That was only one example you were giving, is that right?

Mr. SCHAAB. That is the only specific claim of which we are sure.

Senator DECONCINI. I see.

Mr. SCHAAB. There are other kinds of claims that are——

Senator DECONCINI. That is good enough. I just wanted to know if there is more than just the education.

Mr. SCHAAB. The others, we will have to take a look at, if the bill passes and we have a chance to——

Senator DECONCINI. I see.

Mr. SCHAAB. I would like to point out that Mr. Liotta conceded that he had no additional suggestions on the language of the bill. He has no proposals for improving or tightening the language.

Senator DECONCINI. I got that, too.

Thank you, gentlemen. I have no other questions. If I do have other questions, I will submit them to you in writing.

Mr. SCHAAB. Thank you, Senator.

Mr. BOYD. Thank you, Senator. It has been a pleasure to come before you.

Mr. SCHAAB. The committee will stand in recess and reconvene immediately on the other bill, H.R. 2898.

[Whereupon, at 10:59 a.m., the hearing adjourned.]

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