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ABSTRACT

Maintaining that a Federal policy re: unresolved American Indian claims is a necessary element for an overall Federal policy toward Indian affairs, this statement by the Assistant Chief of the Indian Claims Section/Land and Natural Resources Division argues against enactment of: H.R. 2664 (a bill "to amend the Indian Claims Commission Act of August 13, 1946, and for other purposes") and H.R. 3377 (a bill "to authorize the Wichita Indian Tribe of Oklahoma, and its affiliated bands and groups of Indians, to file with the Indian Claims Commission any of their claims against the United States for lands taken without adequate compensation, and for other purposes"). Specifically, this statement contends "H.R. 2664, as written, would be an amendment to Section 20 of the Indian Claims Commission Act. The amendment provides private relief to the Sioux only", while all sections of the Act as originally enacted and as amended provide for the claims of all tribes equally. This statement recommends, therefore, that action on H.R. 2664 be deferred until the administration can complete a general study of ancient Indian claims and that if this recommendation is not accepted, the bill be modified as specified in this statement. Recommending deferment or specific modifications of H.R. 3377, this statement maintains that waiver of res judicata and collateral estoppel in all Indian claims would be so far reaching that Congress would want to establish this precedent only after most careful consideration. (JC)

Department of Justice

STATEMENT

OF

CRAIG DECKER
ASSISTANT CHIEF
INDIAN CLAIMS SECTION
LAND AND NATURAL RESOURCES DIVISION

BEFORE

THE

HOUSE INTERIOR & INSULAR AFFAIRS COMMITTEE
SUBCOMMITTEE ON INDIAN AFFAIRS AND PUBLIC LANDS
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2664 - TO AMEND THE INDIAN CLAIMS COMMISSION ACT

AND

H.R. 3377 - TO AUTHORIZE THE WICHITA INDIAN TRIBE OF OKLAHOMA TO FILE CERTAIN CLAIMS WITH THE INDIAN CLAIMS COMMISSION

ON

MAY 10, 1977

Mr. Chairman and Members of the Subcommittee: My name is Craig Decker. I am the Assistant Chief of the Indian Claims Section, Land and Natural Resources Division, Department of Justice. The Department of Justice has been asked to present its views on H.R. 2664, a bill "To amend the Indian Claims Commission Act of August 13, 1946, and for other purposes" and H.R. 3377, a bill "To authorize the Wichita Indian Tribe of Oklahoma, and its affiliated bands and groups of Indians, to file with the Indian Claims Commission any of their claims against the United States for lands taken without adequate compensation, and for other purposes."

The Administration recognizes the significance which native Americans place on efforts to correct past injustices to them and to their ancestors. The Administration further believes that the United States must address these past injustices with an emphasis on compassion for the victims of injustice rather than on technical interpretation of the law. Accordingly, the Administration believes that a federal policy towards unresolved Indian claims is a necessary element for an overall federal policy toward Indian affairs. Since the Administration has not yet had the opportunity either to develop its overall policies on Indian affairs or to complete the review of all unresolved Indian claims,

we strongly recommend that the Congress defer action on both H.R. 2664 and H.R. 3377.

It may be that the two bills under consideration, the instant one for the Sioux and H.R. 3377 for the Wichita, represent appropriate correction of past wrongs. However, it would appear that there may be other claims in the same or similar situations. Since the magnitudes and merits of these other claims are not now known, we are very concerned over the implications of acting on the two in question at this time. This concern stems from our view that both bills will change longstanding Congressional policy for Indian claims. If this policy is changed for two tribes, there is a great potential that much of the past effort which has gone into the resolution of Indian claims may have been for naught. Therefore, we recommend that Congress defer action on these bills, pending an Administration submission of a comprehensive recommendation of such claims. If this recommendation is not accepted by the Congress, we would recommend that certain technical changes be made to these two bills.

The bill as written may imply that the Sioux claim for a Fifth Amendment taking of the Black Hills has not been decided "on the merits." However, in a prior case, the Court of Claims considered the same claim and decided on the merits that the Black Hills transfer did not constitute a Fifth Amendment taking of the Sioux land. See Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942), cert. den., 318 U.S. 789. The Court's examination into the applicable facts and law in that case seems to have been very thorough and its conclusion arrived at only after a number of years of litigation and the writing of extensive findings and a well-considered opinion. Id. at 618-689. In later litigation arising under the Indian Claims Commission Act, the Court of Claims concluded that the Sioux had their day in court on the Fifth Amendment taking claim in the earlier case and declined to relitigate that issue but provided the Sioux a large judgment under the special provisions of the Indian Claims Commission Act. United States v. Sioux Nation, 207 Ct. Cl. 234 (1975), cert. den., 423 U.S. 1016.

The purpose of the Indian Claims Commission Act was to provide all the tribes an equal opportunity to have their day in court on any past wrongs that they might elect to file against the United States and which had not been

previously disposed of on the merits. Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70. The resulting monetary awards have been beneficial to the tribes and with the act being a general statute embracing all tribal claims it has relieved Congress from the piecemeal, case-by-case method of considering such claims as had been the onerous procedure before enactment of the general act.

But we believe there was another important provision in the statute. This was the express provision in the act prohibiting the submission of any more claims based on ancient wrongs. See Section 70k:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

This provision effectuated a congressional objective of making final settlement of all ancient claims in the judicial forum established by the act, rather than have Congress address these claims on a case-by-case basis into the forseeable future.

Whether there is more equity in the Sioux claim than in some of the claims possessed by other tribes is not

clear at this time. True, in any complex litigation, parties plaintiff, unsatisfied with a judgment, can always select excerpts from the record and develop arguments explaining why they should have been awarded more. This is particularly true of Indian claims involving alleged wrongs covering multitudinous incidents over periods as long ago as 200 years. The actual facts are frequently obscured and their reconstruction often difficult from the limited records available. Meting out perfect justice in such circumstances or knowing whether it has already been meted out is, at best, most difficult.

It might be suggested by some that without this proposed legislation the Sioux will be peculiarly uncompensated. But they now have pending before the Indian Claims Commission one of the Commission's larger final judgments of approximately $17.55 million for their Black Hills claim. See Sioux Nation v. United States, Docket No. 74-B, before the Indian Claims Commission. In addition, they have another judgment pending of $45,685,000, subject to the United States' offset claims. See Sioux Tribe v. United States, Docket No. 74, 38 Ind. Cl. Comm. 469 (1976). This is the largest interlocutory judgment ever made to an Indian tribe in these cases. Moreover, the same Sioux have general accounting cases pending before the Indian

Claims Commission which no doubt will also end in additional judgments in their favor. See Sioux Tribe v. United States, Docket No. 115; Sioux Tribe v. United States, Docket No. 116; Sioux Tribe v. United States, Docket No. 117; Sioux Tribe v. United States, Docket No. 118; and Sioux Tribe v. United States, Docket No. 119, before the Indian Claims Commission.

It is also noted that the Sioux involved here constitute the descendants of essentially only two of the seven historical Sioux Tribes. The descendants of the other somewhat smaller five tribes have also received, or are receiving, various sizable awards for the claims they have filed.

If H.R. 2664 were enacted and the Sioux were successful thereunder they would be granted approximately an additional $85 million on the Black Hills claim. Based on these particular facts the bill would seem to provide more favorable treatment to the Sioux than to the other Indian tribes.

For the above reasons, the Administration's recommendation is that action on this bill be deferred.

If this recommendation should be rejected, we recommend that the material in quotation marks in Section (a) of H.R. 2664 be changed to the following:

> Notwithstanding any other provision of law and without regard to the defense of res judicata or collateral estoppel the Court of Claims shall hear and determine de novo the Sioux Tribes' claim that the Act of February 28, 1877 (19 Stat. 254) effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the Fifth Amendment and shall enter judgment accordingly.

Under the bill's present Section (a) provision, the Court of Claims would serve merely an appellate review function to the Indian Claims Commission's decision entered February 15, 1974. If the Commission's 1974 decision had been arrived at after a trial and after a careful consideration of the material facts and law, there might be some merit for the Court of Claims providing only an appellate review. But this was not the case. Rather, no opportunity to adduce evidence relevant to the Sioux Fifth Amendment claim was presented to the parties by the Indian Claims Commission, no trial was held thereon, and the parties were not given a chance to submit written briefs on the issue. Sioux Nation v. United States, 33 Ind. Cl. Comm. 151 (1974).

In the circumstances, we submit the Commission's 1974 decision does not represent a fair test of whether there was no was not a Fifth Amendment taking of the Black Hills in 1877. Our above-recommended change would permit the Court of Claims to consider all the applicable facts and

law, via a trial de novo, and therafter enter an appropriate judgment. This would provide a valid test of the claim, without regard to any prior litigation (either that of the Court of Claims in 1942 or that of the Commission in 1974), and would promote, as we understand it, the desired purpose of the bill.

Section (b) of the bill would eliminate any other award relating to the Black Hills tract from serving as a defense, estoppel or setoff. This seems to provide a further special treatment for the Sioux as compared to the other tribes because the claims of all the other tribes are subject to the defenses and offsets as set forth in Section 2 of the Indian Claims Commission Act, 25 U.S.C. sec. 70(a). While we are unaware, at this time, of any such defense or offset that may be applicable to the Sioux Black Hills claim, there would appear to be no basis for treating the Sioux claim differently from those of the other tribes in this respect. It is, accordingly, recommended that Section (b) of the proposed bill be eliminated.

H.R. 2664, as written, would be an amendment to Section 20 of the Indian Claims Commission Act. The amendment provides private relief limited to the Sioux only. Section 20 (25 U.S.C. sec. 70a) and all the other sections and subsections of the Indian Claims Commission Act, as originally enacted and as amended, instead of private relief, provide for the claims of all tribes equally. See 25 U.S.C. sec. 70 et. seq. We merely call this proposed anomaly to

your attention with the thought that you may decide a private relief bill would be more appropriate in any event.

Your attention is invited to the fact that as the case stands at present the attorneys for the Indians, serving on a contingent fee basis and having received a judgment of $17.55 million, are entitled to a fee of approximately $1.75 million. Under the proposed bill, if the Sioux are successful, it will result in a recovery of about $85 million in addition. The attorneys would presumably be entitled to approximately 10 percent of this, or $8.5 million. Your Subcommittee may wish to investigate whether some limit ought to be placed on any attorneys' fees in this case arising under the proposed legislation.

For the above reasons, the Department of Justice submits, for the Subcommittee's consideration, the following recommendations with respect to H.R. 2664: I. That action on the bill be deferred until the administration can complete its general study of ancient Indian claims. II. That if recommendation I is not accepted by the Subcommittee, H.R. 2664 be modified as noted above.

H.R. 3377

This bill would confer jurisdiction notwithstanding section 12 of the Act of August 13, 1946, 60 Stat. 1049, 1052, 25 U.S.C. sec. 70k. Section 12 is a key part of the policy adopted by Congress in its enactment of the Indian Claims Commission Act. It was adopted to end more than 65 years of congressional consideration of old Indian claims on a case-by-case basis.1/ Congress in section 2 of the Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. sec. 70a, bestowed on all tribes, bands and identifiable groups of American Indians probably the most liberal jurisdictional act ever enacted. The intent was to give on very generous terms the tribes, bands and identifiable groups of American Indians their day in court in matters arising before August 13, 1946. However, Congress imposed a limitation pertinent here. Section 12 provided that all claims accruing prior to August 13, 1946 had to be presented by August 13, 1951 or be forever barred. The text of section 12 states: 2/

1/ See Act of March 3, 1881, 21 Stat. 504, Choctaw Nation v. United States, 21 Ct. Cl. 59 (1886), rev'd 119 U.S. 1 (1886).

2/ 60 Stat. 1049, 1052, 70 U.S.C. sec. 70k.

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may therafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

Congress, by section 12, put the American Indians on notice that all claims arising prior to August 13, 1946 had to be brought before August 13, 1951 or be forever barred.

Congress has not in the 30 years since its enactment seen fit to amend the bar against granting fresh jurisdiction for consideration of the pre-1946 claims. During the 94th Congress several such bills were considered, but none of them was enacted.

The land claims of the Wichitas were first presented to the Court of Claims pursuant to the Act of March 2, 1895, 28 Stat. 876, 898. That jurisdictional act resulted in Choctaws, et. al. v. United States, et. al., 34 Ct. Cl. 17 (1899), rev'd sub nom. United States v. Choctaw Nation, 179 U.S. 494 (1900). As a result of this litigation, the Wichitas, with the support of the United States, were held entitled to the proceeds resulting from the sale of their

surplus reservation lands after all tribal members had received 160-acre allotments. See 179 U.S. at 548 et seq. On remand, the Court of Claims entered judgment for the Wichita and their affiliated bands in the amount of $675,371.91. Wichita Indians, et al. v. United States, 89 Ct. Cl. 378, 418 (1939).

Because of the holding that the 1895 jurisdictional act was concerned only with the Wichita Reservation, Congress gave the Wichitas a second jurisdictional act covering "all claims of whatsoever nature which the Wichita and affiliated bands * * * may have against the United States * * * for determination of the amount, if any, due said tribes or bands of Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said tribes or bands, or for the failure of the United States to pay said tribes or bands any moneys or other property due * * *." Act of June 4, 1924, 43 Stat. 366. Under the 1924 jurisdictional act, the Wichita sued for $12,290,738,13, but recovered nothing. Wichita Indians, et al. v. United States, 89 Ct. Cl. 378 (1939). Although the court did not believe that recovery for loss of aboriginal Indian title was permitted under the jurisdictional act, it stated that "even if it should be held that the Jurisdictional Act confers authority to consider such [aboriginal title] claim, we are nevertheless

of the opinion, from the record, that such a claim is not sustained by the record." 89 Ct. Cl. at 414. In both findings and opinion, the Court of Claims surveyed the evidence of Wichita aboriginal title. The court noted that from 1719 until about 1835" * * * the Wichita and affiliated bands did not occupy the territory herein claimed or any very considerable portion thereof alone as, prior to 1833, some twenty-seven other tribes resided, roamed, and hunted over the territory between the Red River and the Canadian, as was pointed out and found as a fact by this court upon the claim made by the Wichitas in the case of The Choctaw and Chickasaw Nations v. The United States and the Wichita and Affiliated Bands of Indians (34 C. Cls. 17, 73)." 89 Ct. Cl. at 415. The Court of Claims in 1939 found again as a fact that: "At no time prior or subsequent to 1835 did the Wichita tribe and its affiliated bands exclusively possess, occupy, or hunt over the entire territory herein claimed; nor did they possess and occupy at any time any very large portion of such territory to the exclusion of other tribes or bands of Indians or with the full recognition by such other tribes or bands to the right of the Wichitas to exclusive possession and occupancy. The southern Comanches, Kiowas, and Kiowa-Apaches, who appear for the most part to have been on reasonably friendly terms with the Wichitas, were among the other Indians who also occupied, roamed, and hunted over the territory for which the Wichitas now seek

to recover compensation during the time the Wichitas were in this territory, and while they were being driven or moved from near the Arkansas westward and south of Red River." 89 Ct. Cl. at 384.

As with H.R. 2264 we recommend that Congress defer action on H.R. 3377. Should Congress desire to enact H.R. 3377, it is noted that the language in section (a), "Such jurisdiction is conferred notwithstanding any defense of res judicata or collateral estoppel, or any failure of such tribe, band, or groups to exhaust any available administrative remedies," is more favorable treatment than Indian tribes have received under the Indian Claims Commission Act. Claims have frequently been denied on grounds of either res judicata or collateral estoppel. See, e.g., United States v. Southern Ute Indians, 402 U.S. 159 (1971); United States v. Sioux Nation, 207 Ct. Cl. 234, 518 F.2d 1298 (1975), cert. den., 423 U.S. 1016; United States v. Creek Nation, 196 Ct. Cl. 639 (1971). But since as noted above, the courts did not have jurisdiction of the Wichita aboriginal title claims in the 1899 and the 1939 cases; such claims are not barred by res judicata. Accordingly, no harm is actually caused in this instance if section (a) of H.R. 3377 is left intact.

Of course as precendent legislation this provision may be objectionable because if Congress waives the defenses of res judicata and collateral estoppel here, it

will have to consider whether it should do so for all prior Indian litigation, including all cases which have been disposed of under the Indian Claims Commission Act. The magnitude of litigation which would follow a blanket waiver of res judicata and collateral estoppel in all Indian claims is so far reaching that Congress would want to establish this precedent only after the most careful consideration. It is our recommendation that the language above quoted be deleted from the bill.

Section (b) of the bill is unnecessary. The Wichitas have not been a party to any litigation before the Indian Claims Commission. In one attempt, they were denied a right to intervene. United States v. Kiowa etc. Tribes, 202 Ct. Cl. 29, 43 et. seq. (1973). Accordingly, they would not be bound by any litigation before the Commission. C.W. McGhee v. United States, 194 Ct. Cl. 86, 93-94 (1971).

There are possible unforeseen and inintended consequences which may arise from the designation of the beneficiaries of this bill as "the Wichita Indian Tribe of Oklahoma and its affiliated bands and groups." In prior litigation these "affiliated bands and groups" have been identified as the "Wacos, Towaconies, Caddos, Ionis, Keechies and Delawares, with apparently a few Comanches." 34 Ct. Cl. 40; 89 Ct. Cl. 378. It is apparently the intent of this bill to litigate

Wichita claims in Oklahoma and Texas. These are the areas, with possibly Kansas, prior to the 18th century, where the Wichita and the bands with which they were affiliated aboriginally roamed. However, with a liberal interpretation of the bill favorable to the Indians a court might decide that it was the intent of Congress to reopen claims which, for example, the Caddos had in Louisiana, the Comanches over wide areas of the southern Great Plains and the Delawares over various areas of the eastern United States. Congress as a safeguard, may wish to add to the pertinent language of the first sentence of section (a) the proviso, "provided, however, that no affiliated band or group may bring a claim not held in common with the Wichita Indian Tribe."

This bill would confer jurisdiction on the Indian Claims Commission. Pursuant to the Act of October 8, 1976, 90 Stat. 1990, the existence of the Indian Claims Commission will terminate on September 30, 1978, and all uncompleted claims will be transferred to the Court of Claims. Since the Indian Claims Commission cannot realistically begin hearings on any petition filed pursuant to the proposed legislation, Congress may wish to consider vesting jursidiction in the Court of Claims.

The Department of Justice recommends that action on this bill be deferred pending a full development of the administration's Indian policy. If this cannot be done, we recommend that H.R. 3377 be amended as suggested above.