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Authorizing the Blackfeet and Gros Ventre Tribes to File in the U.S. Court of Claims Any Claims Against the United States for Damages for Delay in Payment of Lands Claimed to be Taken in Violation of the U.S. Constitution, and for Other Purposes

United States Congress

US Senate

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AUTHORIZING THE BLACKFEET AND GROS VENTRE TRIBES TO FILE IN THE U.S. COURT OF CLAIMS ANY CLAIMS AGAINST THE UNITED STATES FOR DAMAGES FOR DELAY IN PAYMENT OF LANDS CLAIMED TO BE TAKEN IN VIOLATION OF THE U.S. CONSTITUTION, AND FOR OTHER PURPOSES

JUNE 25 (legislative day JUNE 12), 1980.—Ordered to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs and on behalf of Mr. KENNEDY, from the Committee on the Judiciary Jointly, submitted the following

REPORT

[To accompany S. 1795]

The Select Committee on Indian Affairs and the Committee on the Judiciary, to which jointly were referred the bill (S. 1795) to authorize the Blackfeet and Gros Ventre Tribes to file a claim in the U.S. Court of Claims and for other purposes, having considered the same, jointly report favorably thereon with an amendment in the nature of a substitute and recommend that the bill as amended do pass.

AMENDMENT IN THE NATURE OF A SUBSTITUTE

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. Notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1052; 25 U.S.C. 70k), and notwithstanding the lapse of time, statutes of limitations, or the defense of res judicata or collateral estoppel, or any other provisions of law, jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment on any claim filed by the Blackfeet and Gros Ventre Tribes within one year from the date of this Act for the taking under the fifth amendment of the Constitution of the twelve million two hundred and sixty-one thousand seven hundred forty-nine and seventy-six one-hundredths acres of land defined as the territory of the Blackfeet and Gros Ventre Tribes in the Treaty of October 17, 1855 (11 Stat. 657) to which the Blackfeet and Gros Ventre Tribes and the United States were parties, being the same land determined by the Court of Claims to have an average value of 50 cents per acre for a total of \$6,130,874.88 in Blackfeet and other Nations versus United States (81 Ct.

Cl. 101) (1935) thereafter "prior case"): *Provided*, That the value of the land fixed at an average of 50 cents per acre in the prior case shall be binding on the parties in any suit brought under this Act.

SEC. 2. If the Court of Claims determines that the claimant is entitled to just compensation under the fifth amendment, the Court shall enter an award computed on the basis of established judicial precedent: *Provided*, however, That as a measure of just compensation the Court shall compute interest at the rate of 5 per centum per annum. No offsets, including gratuities, subsequent to the terminal date of the accounting in the prior case shall be allowed or deducted from any judgment entered under authority of this Act, except that the United States shall be entitled to an offset, against any judgment entered under authority of this Act, of the sum of money, if any, awarded as a judgment in the prior case.

SEC. 3. The provisions of section 15 of the Act of August 13, 1946 (60 Stat. 1053; 25 U.S.C. 70n) shall be applicable with respect to any claim filed pursuant to this Act in the same manner and to the same extent as if such claim were pending before the Indian Claims Commission except that the functions of the Commission shall be performed by the Court of Claims.

SEC. 4. The provisions of the Act of November 4, 1963 (77 Stat. 301; 25 U.S.C. 70n-1-7), shall be applicable with respect to any claim filed pursuant to this Act in the same manner and to the same extent as if such claim were pending before the Indian Claims Commission except that reference to the Commission shall be deemed to be the Court of Claims.

Amend the title so as to read:

An act to authorize the Blackfeet and Gros Ventre Tribes to file in the Court of Claims any claims against the United States for damages for delay in payment for lands claimed to be taken in violation of the United States Constitution, and for other purposes.

PURPOSE

S. 1795 authorizes the U.S. Court of Claims to hear and decide whether certain lands of the Blackfeet and Gros Ventre Tribes were taken in violation of the Fifth Amendment of the U.S. Constitution, thus entitling the tribes to just compensation for these lands.

The general rule of law on Indian claims is that interest is not allowed unless title to the lands had already been recognized by the United States, either through treaty or statute, prior to the taking. Additionally, the land must have been taken without tribal consent and the taking must have been ratified by Congress.

The vast majority of the Indian claims presented to either the Court of Claims or the former Indian Claims Commission involved takings of "aboriginal" or "unrecognized" title. The Blackfeet and Gros Ventre Tribes contend that title to the lands taken from them had in fact been recognized by the United States and the taking of their lands was within the Fifth Amendment in the same way as any taking of private property where just compensation (interest) is due. The Tribes were never given the opportunity to litigate the issue.

The bill specifically waives on behalf of the United States the defense *res judicata* and *collateral estoppel* and vests the Court of Claims with jurisdiction to hear this claim on its merits.

In the 95th Congress, a similar bill was enacted that allowed the Sioux Tribes to seek judicial review of the taking of the Black Hills. In testimony on the Black Hills legislation, the Department of the Interior and the Indian Claims Commission identified five tribes having interest claims similar to the Sioux: The Blackfeet and Gros Ventre Tribes, the Three Affiliated Tribes of the Fort Berthold Reservation, the Assiniboine Tribe, and the Creek and Chickasaw Tribes of Oklahoma.

Of the five potential claimants, the Blackfeet-Gros Ventre, Fort Berthold, and Assiniboine are the largest, averaging \$22.5 million each if all calculations are figured to the benefit of the Tribes. The Chickasaw and Creek claims appear to be much smaller.

The proposed legislation does not automatically entitle the Tribes to any monetary sum. It only authorizes them to put their case before the Court of Claims to determine whether the historical taking by the United States was of lands to which the Tribes had recognized title, and whether such taking is therefore subject to the Fifth Amendment and the Tribes are entitled to interest.

BACKGROUND

The Blackfeet and Gros Ventre Tribes formerly resided on the same reservation. (The Gros Ventre now reside on the Fort Belknap Reservation.) The two Tribes originally filed a claim against the United States in the U.S. Court of Claims in 1925 for damages involving over 12 million acres of land. The suit was filed pursuant to a special jurisdictional Act passed March 13, 1924. In 1935, the Court entered a judgment in favor of the Tribes for loss of the 12 million acres taken without compensation. The award was \$6,130,874 less \$5,508,409 in offsets, leaving a net award of \$622,465. The court did not address the Fifth Amendment issue and no interest was awarded.

Following passage of the 1946 Indian Claims Commission Act, the two Tribes filed suit with the Commission seeking interest on the land from the date of taking to the date of the award. The Commission, in 1952, denied the petition on the grounds of *res judicata*. The Court of Claims affirmed the decision of the Indian Claims Commission but stated that:

The (Tribes') right to the designated territory granted to them by the treaty of 1855 represented a property right protected by the Fifth Amendment . . . A right arose in (the Tribes) for just compensation under the Fifth Amendment when the United States in exercising the power of eminent domain took their property for public use. (127 Ct. Cl. at 881).

Thus, the Court held that although the tribes were legally entitled to interest on the taking, their rights had previously been adjudicated and the court could not now reconsider this issue. The Tribes sought Supreme Court review but were denied certiorari in 1954. Thus, while the courts recognized the potential validity of the claim they refused to entertain the claim on the grounds that the 1935 decision closed the door to any further consideration. The maximum liability on this claim would be \$28.5 million, if all calculations are figured to the benefit of the tribe and just compensation can be proved to the satisfaction of the court as to all of the land in question.

EXPLANATION OF COMMITTEE AMENDMENT

The Committees recommend a bill in the nature of a substitute. As originally introduced, S. 1795 did not clarify that only one land claim was authorized to be reopened and the bill did not give sufficient direction to the Court of Claims on what formula would be used to determine just compensation. The bill, as amended, cites the actual

case that is to be reopened. *Blackfeet et al. Nations v. United States*, 81 Ct. Cl. 101 (1935). It also cites the acreage figures and the initial award amount involved in the prior case.

S. 1795, as amended, directs the court to make its award, if any, on the basis of "established judicial precedent". The intent is to refer to the formula used in *Uintah etc. Indians v. United States*, 139 Ct. Cl. 1 (1957). By following the procedure used in that case, the court will compute any award by calculating interest on the principal value from the date of the taking up to the date of the award in the prior *Blackfeet et al.* case. Any payment by the United States in satisfaction of the judgment in the prior case would be credited against the award on a pro-rated basis as to principal and interest (just compensation) due to the tribes. Thereafter, to the date of any award made pursuant to S. 1795, interest would accrue on the reduced principal amount. Interest is fixed at 5 per centum per annum and the value of the land is fixed at 50 cents per acre and may not be reopened. Additionally, the bill includes an amendment recommended by the Justice Department to clarify that any award made in the prior case would not be paid twice.

As introduced, S. 1795 authorized the Court to reopen offsets and gratuities. Even though testimony revealed ample instances where gratuities and offsets were unfairly deducted, the Committees believe that the reopening of gratuities and offsets would set an untenable precedent. Therefore, S. 1795 does not permit the tribes to relitigate this issue. The bill also does not permit the United States to assert any new gratuities or offsets in any case brought pursuant to S. 1795. This should cause no serious hardship to the United States, since all allowable pre-1966 offsets have already been assessed against the tribe in other litigation.

Additionally, a technical error misaligned the Blackfeet portion of the Blackfeet-Gros Ventre claim with the Assiniboine claim in another bill, S. 1796. By an amendment to the title the Committees have properly included the Blackfeet Tribe with the Gros Ventre in S. 1795 and the Assiniboine claim is separately treated in S. 1796.

LEGISLATIVE HISTORY

96TH CONGRESS

S. 1795 was introduced by Senator Melcher on September 21, 1979. The bill was jointly referred to the Judiciary Committee and to the Select Committee on Indian Affairs on October 30, 1979. The Select Committee held a hearing on the measure on December 4, 1979. The Department of Justice testified in opposition to the bill. The Department of the Interior, though invited to testify, deferred to the views of the Justice Department.

95TH CONGRESS

S. 3609, authorizing the claim of the Blackfeet and Gros Ventre Tribes, was introduced by Senator Abourezk and referred to the Judiciary Committee. No action was taken.

COMMITTEE RECOMMENDATIONS AND TABULATIONS OF VOTES

The Select Committee on Indian Affairs, in open business session on April 30, 1980, with a quorum present, recommends by a vote of two in favor and one opposed that the Senate pass S. 1795, as amended.

The Committee on the Judiciary, in open business session on June 24, 1980, with a quorum present, recommends by unanimous vote that the Senate pass S. 1795, as amended.

COMMITTEE AMENDMENTS

The Committees recommend an amendment in the nature of a substitute.

SECTION-BY-SECTION ANALYSIS

Section 1. Confers jurisdiction on the Court of Claims, notwithstanding any federal statute or any legal defenses such as laches, res judicata, collateral estoppel or statutes of limitations, to render judgment on any Fifth Amendment claim by the Blackfeet and Gros Ventre Tribes for over 12 million acres of land for which the Court of Claims awarded 50¢ per acre in 1935. The 50¢ per acre is binding and may not be relitigated.

Section 2. Provides that the Court shall enter an award computed on the basis of established judicial precedent. The intent is to refer to the formula used in *Uintah Etc. Indians v. United States*, 139 Ct. Cl. 1 (1957). Interest, as the measure of just compensation, is to be calculated at five percent (5%) per year and no offsets or gratuities subsequent to the date of the accounting in the prior case may be deducted from any award made under this Act.

Section 3. Applies the Indian Claims Commission Act provisions covering attorney fees.

Section 4. Applies the Indian Claims Commission Act provisions regarding expert witnesses.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office advises that no additional cost to the government would be incurred as a direct result of enactment of S. 1795. The likelihood of a successful claim against the government cannot be assessed at this time.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., December 4, 1979.

Hon. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to your request of November 8, 1979, the Congressional Budget Office has reviewed S. 1796, a bill to authorize the Assiniboine Tribe and the Blackfeet Tribe to file in the Court of Claims any claims against the United States for damages for delay in payment for lands claimed to be taken in violation of the United States Constitution, and for other purposes, as referred jointly to the Senate Committee on the Judiciary and the Senate Select Committee on Indian Affairs on October 30, 1979.

Based on this review, it appears that no additional cost to the government would be incurred as a direct result of the enactment of this bill. Should the tribes in question make a successful claim, the government would be liable for any awards. However, no estimate can be made at the present time of the probability of success or the likely magnitude of such a claim.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committees believe that S. 1795 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The pertinent communications received by the Committees from the Department of the Interior and the Department of Justice setting forth agency recommendations relating to S. 1795 follow:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., December 4, 1979.

HON. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 341, S. 1795, and S. 1796, bills to authorize, respectively, the Three Affiliated Tribes of the Fort Berthold Reservation, the Gros Ventre Tribe, and the Assiniboine Tribe and Blackfeet Tribe to file in the Court of Claims any claims against the United States for damages for delay in payment for land claimed to be taken in violation of the United States Constitution.

We defer to the views of the Department of Justice as to the advisability of the bills' enactment.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

RICK C. LAVIS,
Acting Assistant Secretary.

DEPARTMENT OF JUSTICE,
Washington, D.C., June 4, 1980.

HON. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: You have requested the views of the Department of Justice concerning S. 341, S. 1795 and S. 1796, as revised.

The bills would permit the Three Affiliated Tribes of the Fort Berthold Reservation, the Gros Ventre Tribes and the Blackfeet Tribe, respectively, to file claims against the United States for damages for delay in payment for lands claimed to be taken in violation of the Constitution and for other purposes.

The revisions made bring the proposed treatment of the tribes into close approximation to that afforded the Sioux Tribe by the Act of March 13, 1978, Pub. L. 95-243, 92 Stat. 153 and provides a considerably narrower range of relief. In large part the revised bills answer the technical questions raised by the Department of Justice.

It remains unclear whether the United States is to receive credit, in reduction of any judgment which might be entered pursuant to these three bills, for the amount, if any, appropriated to pay the judgment in the "prior cases." If no such credit is allowed the United States will pay twice for the land itself.

It is suggested to clarify this point that each of the three bills be amended by adding at the end of Section 2 the following:

Provided, however, that the United States shall be entitled to an offset, against any judgment entered under authority of this Act, of the sum of money, if any, awarded as a judgment in the prior case.

The proposed amendment should eliminate any questions about double payment.

It should be emphasized, however, that the Department of Justice continues to oppose piecemeal erosion of the statutory policy prohibiting further consideration of pre-1946 claims, until a study is performed to evaluate the viability of the statute of limitations on pre-1946 claims.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ALAN A. PARKER,
Assistant Attorney General

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committees note that no changes in existing law are made by S. 1795 as amended.

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