Calendar No. 708

105TH CONGRESS, *2d Session* | SENATE | REPORT 105–379

THE MISSISSIPPI SIOUX TRIBES JUDGMENT FUND DISTRIBUTION ACT OF 1998

OCTOBER 7 (legislative day, OCTOBER 2), 1998.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 391]

The Committee on Indian Affairs, to which was referred the bill (S. 391) the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 391, as amended, is to modify the disposition of funds allocated under chapter II of Public Law 90–352 (82 Stat. 239) to the Sisseton and Wahpeton Tribes of Sioux Indians to pay a judgment awarded by the Indian Claims Commission in dockets numbered 142 and 359, including interest, that, as of the date of enactment of this Act, have not been distributed.

BACKGROUND

In 1862, as a result of encroachment by non-Indian settlers and repeated treaty violations, the Sioux Indians participated in an uprising known as the "Minnesota Outbreak" of 1862. As a result, the United States in a military action forced the dispersal of the aboriginal Upper Sioux Bands. A majority of these persons became members of three modern-day tribes: the Devils Lake, now the Spirit Lake Sioux Tribe of North Dakota, the Sisseton-Wahpeton Sioux Tribe of South Dakota, and the Assiniboine and Sioux Tribes of the Ft. Peck Reservation in Montana. Other members of the aboriginal Upper Sioux Bands joined tribes on other reservations,

some fled to Canada, and in some cases some of the dispersed Sioux never tried to qualify for membership in any tribe and have not been residents of any reservation.

In 1967 pursuant to the authority of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §§ 70, *et seq.,* the Indian Claims Commission approved a settlement between two tribes that prosecuted the case, the Spirit Lake Tribe and the Sisseton and Wahpeton Sioux Tribe, and the defendant, the United States. The settlement added the Sisseton and Wahpeton Indians of the Fort Peck Indian Reservation with the following caveat: "nothing in this stipulation shall be construed as agreement by the [other two tribes] as to whether the Sisseton and Wahpeton Indians of the Fort Peck Reservation are or are not, entitled to share in any award . . . that question shall be left for final determination by the Secretary of Interior and Congress." [1]

The stipulated judgment against the United States concerned nearly 30 million acres of tribal lands in Minnesota, Iowa, and South Dakota taken by the U.S. in violation of certain treaty commitments made to the Sisseton and Wahpeton Bands or Tribes of Sioux Indians in the Treaty of Prairie du Chien (July 15, 1830) and the Treaty of Traverse des Sioux (July 23, 1851).[2] In 1968, the Congress appropriated $5,874,039.50 to satisfy the judgment and deposited the money in a U.S. Treasury account. Act of June 19, 1968 (82 Stat. 239).

Although the Spirit Lake, Sisseton and Wahpeton, and Fort Peck tribes were nearly destitute at this time, a distribution of these funds did not occur during the 91st Congress because an agreement could not be reached on the allocation of the appropriated fund. During the 92nd Congress, a formula was developed to distribute the funds. The two tribes that prosecuted the case in the Court of Claims and the Assiniboine and Sioux Tribes of the Fort Peck Reservation were recognized as ethno-historically and politically representative of the aggrieved aboriginal bands, and were therefore entitled to the award. In addition, based on historical events, the forced dispersal of the aboriginal Upper Sioux Bands, the Department also recommended the inclusion of Sisseton-Wahpeton lineal descendants (hereinafter "lineal descendants") who were not enrolled members of these successor tribes.[3]

The 92nd Congress enacted Public Law 92–555 (Act of October 25, 1972; 86 Stat. 1168) which provided for an apportionment of the funds between the three tribes and the Lineal Descendants. The 1972 Act provided for distribution of the award on the following basis:

Tribe or group:

	Percentage of Award
Devils Lake Sioux Tribe of N.D.	21.6892
Sisseton-Wahpeton Sioux of S.D.	42.9730

[1] *Sisseton and Wahpeton Bands or Tribes, et al.* v. *United States,* 18 Ind. Cl. Comm. 477 (July 25, 1967).

[2] *Id.*

[3] In reporting the legislation, the Senate Committee on Interior and Insular Affairs agreed with the Interior Department stating, "While it is clear that these successor tribes exist and are representative of the aggrieved aboriginal bands, historical evidence confirms that there are additional descendants who are not enrolled with these successor tribes, but are entitled to share in the proceeds of the award." (S. Rept. 92–144, p.2).

	Percentage of Award
Assiniboine and Sioux of Ft. Peck	10.3153
Lineal Descendants	25.0225

The Spirit Lake Sioux Tribe, the Sisseton-Wahpeton Sioux Tribe and the Assiniboine-Sioux Tribes of Fort Peck have each received the full distribution of their respective shares. However, the lineal descendants' share of the funds has remained undistributed since enactment of the Act. The Department of the Interior indicates that the lineal descendants' share was originally $1,469,831.50. With accrued interest, the current account is valued at $15.2 million. In 1979, the Department sent 1,935 lineal descendants letters acknowledging their eligibility to participate in the award. Presently the Department has certified 1,988 lineal descendants as eligible to share in the award.

LITIGATION

THE TRIBES

In 1987, the Tribes filed suite in Federal district court challenging the validity of the portions of the 1972 Act that provided for the distribution of a portion of the judgment fund to the lineal descendants. The district court ruled that the six-year statute of limitations in 28 U.S.C. section 2401(a) applied to the tribes' claims and because the claims were not filed until fifteen years after enactment of the 1972 Act, they were barred by the statute of limitations.[4]

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the tribes' lawsuit, but noted that the "tribe's substantive claims appear to have some merit."[5] The court pointed out that the tribes have known since 1972 that 25% of the fund would be distributed to lineal descendants. Thus, their cause of action against this allocation could have been brought at that time. Several of the arguments raised by the tribes could not be resolved through a challenge to the 1972 Act. The court indicated that the tribes could return to federal court to assert that none of the individuals on the Secretarial roll have a Sisseton-Wahpeton Sioux lineal ancestor or that the number of lineal descendants was so "exceptionally small" that it rendered the distribution plan irrational.

Although the tribes returned to federal court and asserted these claims, the nature of the 1972 Act and the posture of the subsequent lawsuit left the tribes' core claim unlitigated. Since the tribes litigated the underlying Court of Claims lawsuit solely "for and on behalf of its members and all other descendants of the original bands of Sisseton and Wahpeton Sioux,"[6] it would seem to follow that funds would be distributed to either members of the three tribes with Sisseton or Wahpeton ancestors or non-members with the same ancestry. The court pointed out, however, that the 1972 Act reserved one-fourth of the proceeds to the lineal descendants. Thus, the court ruled that the tribes had no standing to challenge

[4] *Sisseton-Wahpeton Sioux Tribe* v. *United States*, 686 F.Supp. 831 (D. Mont. 1988) (*Sisseton I*).

[5] *Sisseton-Wahpeton Sioux Tribe* v. *United States*, 895 F.2d 588 (9th Cir., 1990) (*Sisseton II*).

[6] *The Sisseton-Wahpeton Sioux Bands et al.* v. *United States,* 10 Ind. Cl. Comm. 137 (January 12, 1962).

the presence of non-lineal ancestors on the Secretarial role, "no matter how many nonmembers are identified."[7] The tribes were not allowed to argue that nonmembers were receiving judgment funds rightfully belonging to their members. Instead, the tribes were limited to arguing that the distribution of 25% of the fund to the lineal descendants was so out of proportion to the actual number of lineal descendants that the distribution scheme was irrational.

The gravamen of the subsequent litigation is that Congress irrationally allocated one-fourth of a judgment fund to far fewer than one-fourth of the total class of combined number of people with Sisseton and Wahpeton ancestry. No one appears to question that Congress was unaware of the number of lineal descendants in 1972. Nevertheless, Congress allocated the judgment fund with 75% going to the tribes and their members and 25% going to inviduals with Sisseton and Wahpeton ancestry who were not enrolled with the tribes. Essentially, the tribes sought to prove that because the United States was unaware of the number of lineal descendants, it granted a windfall to a few individuals.

The United States did not dispute the tribal claim that only 3.3% of the individuals on the Secretarial roll could trace their ancestry to a member of the Sisseton and Wahpeton Sioux tribe (65 out of 1,965 individuals). Nonetheless, the court did not disturb this allocation because the court construed the applicable legislative history as allowing the inclusion of individuals who may or may not be able to trace their ancestry to a member of the aboriginal tribe. Although the court asserts that 1972 Act is "clear on its face," a close reading reveals that the court is not talking about the inclusion of non-members. Instead, what is clear is "that the Act unambiguously leaves the standard of proof of the Secretary's discretion[.]" The court found nothing on the face of the act to require an applicant to demonstrate descent from Sisseton or Wahpeton ancestor who was alive before 1862. Thus, the court concluded that the Secretary could allow individuals to become enrolled by showing that they or an ancestor were on rolls dating from 1909 to 1979. (It is also worth mentioning that there is every indication that the Secretary would have been upheld if he had required proof of a lineal ancestor alive before 1862. Evidence was certainly available to support this interpretation.[8])

There is arguable support with the legislative history of the 1972 Act for the proposition that less than perfect rolls might play some part in the process set in motion by the Act.[9] Even accepting that

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[7] *Sisseton-Wahpeton Sioux Tribe* v. *United States*, 90 F.3d 351, 355 (9th Cir., 1996) *(Sisseton III),* citing *Sisseton II* at 594.

[8] Because the court was concerned with whether Congress intended for the Secretary to determine the standard of proof for lineal descendants, it did not concern itself with *Congress*' intent with respect to the qualifications of lineal descendants. The Committee's review of the legislative history of the 1972 Act reveals ample evidence that Congress assumed that the Secretary would require a more exacting standard. For example, a letter dated May 12, 1971, from the Assistant Secretary of the Interior to the Chairman of the Senate Committee on Interior and Insular Affairs on S. 1462 (92nd Congress) expressed the Department of the Interior's agreement with the provisions in the bill requiring that "the individual, to participate, must be able to trace lineal descent from members of the aboriginal bands."

[9] The record is somewhat mixed on this point. The strongest evidence is the use of the 1909 McLaughlin Annuity roll to determine the inter-tribal and member versus nonmember allocations in the 1972 Act. Since this was a roll of reservation residents, and not a tribal membership roll, it seems to indicate a Congressional willingness to base its calculations upon rolls that may have included non-lineal descendants. As the Committee reports accompanying the 1972 Act

the Secretary was given wide latitude to employ such rolls and agreeing that Congress did not intend for every lineal descendant to identify a lineal ancestor, one is still left with the core tribal issue: whether the number of *actual* lineal descendants was so small that the decision to allocate one-fourth of the judgment fund to this group was irrational.

The court found it unnecessary to address this question because it found that Congress and/or the Secretary acting with or without congressionally sanctioned deference could adopt a standard for enrolling lineal descendants which might result in "unqualified" enrollees.[10] Based on this conclusion, the court simply ruled, after employing an inclusive approach, that the allocation of one-fourth of the judgment fund to 1969 enrollees was not irrational.

As a matter of statutory interpretation, judicial deference to Congress, in the area of Indian affairs, and administrative law, it is difficult to find fault with the court's ruling. Nevertheless, the tribes have petitioned Congress questioning whether it is appropriate for the rationality of the 1972 allocation to be analyzed in light of what appears to be an overly-generous standard for inclusion on the Secretarial roll.[11] Furthermore, the tribes assert that the court's approach adds insult to what they already perceive as a serious injury. From their point of view, the allocation of a sizeable part of the judgment to non-members of the successor tribes was troubling. In *Sisseton II,* this allocation is upheld because the number of questionable enrollees inflates the Secretarial roll to a large enough number to make the allocation rational.

In addition, the tribes have questioned whether the Secretary's use of an inclusive standard is in fact an attempt to comply with a perceived legislative directive, or was adopted as a way of accomplishing one of a number of an administratively burdensome responsibilities with limited resources.

In 1996, the Tribes filed a new constitutional challenge to the 1972 Act based on a 1995 Supreme Court decision, claiming that by retroactively reopening and revising the Indian Claims Commission judgment awarded to the tribes, the Act exceeded the authority of the Congress in violation of the separation of powers doctrine. Once again, the district court dismissed the case, ruling that the tribes should have brought this claim as part of their original suit in 1987. An appeal is presently pending.

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make abundantly clear, however, Congress agreed to utilize the formula based upon this roll to avoid further conflict over the allocation. As discussed in the preceding footnote and the following footnote, much better evidence is available that bears directly on Congress' intent with respect to the qualifications for lineal descendants.

[10] The 1972 Act directed the Secretary to prepare a list of persons "whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary." (citing 25 U.S.C. §§ 1300d–3(b) and 1300d–4(a)). The phrase "on any rolls acceptable to the Secretary" certainly grants latitude to the Department of Interior. But phrases from the Committee Report indicate how this discretion was to be employed: "[The lineal descendants] will receive their proportionate share of the funds on proof of lineal descendancy with the aboriginal band." S. Rep. 92–144, at p.3.

[11] At the end of its ruling, the United States Court of Appeals for the Ninth Circuit states: "It is time for this litigation to end." *Sisseton III* at 356. This statement was in response to the tribes' attempt to amend their complaint to add additional claims, which the court found to be redundant. Obviously this should not be construed to inhibit Congressional consideration of the tribes' claims and concerns. Similarly, the fact that the 8th Circuit correctly applied the presumption that "all funds held by the United States for Indian tribes are held in trust," does not limit Congress' authority with respect to these funds. *See, Loudner* v. *United States,* 108 F.3d 896, 900 (1996), citing cases.

THE LINEAL DESCENDANTS

In March of 1997, in an action brought by several of the lineal descendants, the 8th Circuit Court of Appeals, in a reversal of the holding of the district court, ruled that the lineal descendants' claim was not time barred, that the notice given by the Federal government of the eligibility for receiving funds from the judgment was insufficient and that the five month deadline to apply for a share in the judgment fund was arbitrary, unreasonably short, and therefore invalid, *Loudner* v. *United States,* 108 F.3d 896 (8th Cir., 1997). This ruling could significantly enlarge the class of lineal descendants eligible to share in the distribution of the judgment fund because the decision requires the Bureau of Indian Affairs (BIA) to reopen the enrollment application process for the lineal descendants.

PRIOR LEGISLATION

In 1986, the Senate Select Committee on Indian Affairs favorably reported a bill (S. 2118) eliminating any lineal descendancy distribution and directing that the undistributed funds be distributed to the three tribes. However, the Senate failed to vote on the measure. In 1992, the Congress passed legislation (S. 2342) amending the 1972 Act to permit the tribes to litigate those causes of action that the district court and the Ninth Circuit held were barred by 28 U.S.C. section 2401(a) as well as any other claims asserting that the 1992 Act was unconstitutional or invalid on other grounds. This legislation also authorized the Attorney General to settle any action that might be brought by the tribes challenging the constitutionality of the 1972 Act. However, President Bush vetoed this legislation (Presidential Message 102–251) citing, among other things, "the long-standing policy of the executive branch * * * against ad hoc statute of limitations waivers and similar special relief bills" and the desirability of avoiding additional litigation with the three Tribes on the issues barred by the statute of limitations.

Following the veto in 1992, the Congress passed legislation amending the 1972 Act to authorize the Attorney General "to negotiate and settle any action that may be or has been brought to contest the constitutionality or validity under law of the distribution to all other Sisseton and Wahpeton Sioux provided for in section 202 of this Act." (25 U.S.C. § 1300d–10, Section 17 of Public Law 102–497). Since then, however, the Department of Justice has refused to negotiate on the grounds that, in the absence of legislation directly amending and altering the lineal descendancy distribution plan set forth in section 202 of Public Law 92–555, it has no authority to settle with the tribes on terms that differ from the distribution established in that section of the 1972 Act.

LEGISLATIVE HISTORY

S. 391 was introduced in the Senate on March 4, 1997 by Senator Dorgan, for himself and for Senators Conrad, Johnson, Daschle, Baucus, and Burns, and was referred to the Committee on Indian Affairs. On March 6, 1997, an identical measure, H.R. 976, was introduced by Congressman Rick Hill, in the House of Representatives and referred to the Committee on Resources.

The Resources Committee of the House of Representatives held a hearing on H.R. 976 on June 24, 1997. On July 3, 1997, the Committee ordered the bill favorably reported. It was reported to the House on September 3, 1998, and brought up under suspension of the rules and passed on September 8, 1997. On September 9, H.R. 976 was received in the Senate and referred to the Committee on Indian Affairs. On October 21, 1997, the Committee held a legislative hearing on H.R. 976. On November 4, 1997, the Committee favorably reported an amendment in the nature of a substitute to H.R. 976.

Following upon the concerns expressed by the Administration to H.R. 976, as reported by the Committee, a legislative hearing was held by the Committee on S. 391, on July 8, 1998. On July 29, 1998, S. 319 was ordered to be reported favorably with an amendment in the nature of a substitute.

THE NEED FOR LEGISLATION

Evidence adduced at the Committee's hearings strongly indicates that the 1972 Act overestimated the number of individuals who are, in fact, lineal descendants of a member of the Sisseton and AWahpeton Sioux Indian tribe, but who are not enrolled with one of the three successor Indian tribes. In addition, testimony called into a question whether the process employed by the Secretary to determine eligibility to qualify as a lineal descendants is consistent with objectives of the 1972 Act. In addition, the Committee agrees with the principle that the tribe itself should generally be provided with a capital fund to replace the lost trust assets, especially a tribal land-base. Taken together, the Committee does not believe these factors should defeat the long-held expectations of the 1998 individuals on the Secretarial lineal descendancy roll. These factors justify amendments to the 1972 Act to a clarify the enrollment process and to ensure that the number of people enrolled as lineal descendants does not result in a per capita windfall of judgment funds being allocated to individuals, when those resources are needed to supply needed capital to assist reservation economies.

SUMMARY OF THE PROVISIONS

As introduced, S. 391 and its House companion, H.R. 976, sought to resolve the competing claims of the tribes and the lineal descendants by awarding the lineal descendants the amount of principal originally awarded to them in 1972 ($1,469,831.50 out of the total judgment fund of $5,874,039.50), with the accumulated interest (approximately $13.5 million) going to the three tribes for among other uses, economic development purposes.

As reported by the Committee, S. 391 addresses concerns raised by the tribes, the lineal descendants, and the Departments of Justice and Interior. The Committee continues to be concerned about the length of time this matter has gone unresolved. From 1972 to 1987, a period of fifteen years, there was no legal impediment to the distribution of all funds. Nevertheless, one-fourth of the fund was undistributed.

In enacting this bill, the Committee has taken several steps to ensure that the bill will be considered a final resolution of this

matter. For example, on November 4, 1997, the Committee approved a version of H.R. 976 redistributing 42.5% of the remaining fund and preserving 57.5% of the fund for the presently certified lineal descendants. This figure was chosen to equalize the per capita distribution between lineal descendants who are also members of the three tribes and those that are not. There is every indication that Congress could reallocate these funds in this manner, even though the certification of any additional lineal descendants, which may occur as a result of the 8th Circuit's ruling in *Loudner,* would reduce the amount distributed to these individuals.[12] Indeed, the litigation brought by the tribes to challenge the 1972 Act confirms Congress' authority to make such distributions, even where "the possibility of unequal distribution per capita [is] obvious." *Sisseton III*, at 355.

Percentages allocated.—Out of equitable considerations for the certified lineal descendants and an abundance of caution to address this matter with finality, the amendment in the nature of a substitute to S. 391 reduces the share allocated to the three tribes from 42.5%, as reported by the Committee on November 4, 1997 (as an amendment to H.R. 976) to 28.3995%. This will allow an additional 600 individuals to be certified without any reduction to the individuals already listed on the Secretarial roll, on a per capita basis. Because it is difficult to predict the number of applicants who will ultimately be enrolled, the bill also addresses the possibility that the new enrollees may number less than 600. If that is the case, the tribal share will increase proportionately. The bill provides a process for the reduction of the percentage allocated for the enrollment of additional lineal descendants if there are less than 600 enrolled.[13]

In addition, the bill will hold harmless the 1988 enrolled individuals with respect to the modified eligibility criteria.

In order to ensure that the fund does not languish if a challenge is brought against the bill, section 8(e) provides the Secretary with directives should a final judgment be rendered which would make provisions of the bill inoperable. In addition, the one year statute of limitations is established to ensure that this matter does not continue without resolution. Although the Department of Justice representatives have expressed concern with respect to both of these provisions in certain fact situations, it has not indicated that they are necessarily problematical. After several formal hearings, numerous informal meetings with Interior and Justice Department employees, and a thorough review of the 27-year record of this mat-

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[12] *See, e.g., Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649 (1976) and *United States* v. *Jim,* 409 U.S. 80 (1972).

[13] The formula established by section 8(b) was derived in the following manner. The allocation of 71.6005% of the remaining judgment fund reserved for lineal descendants will *result in per capita parity* between the amount of the judgment fund divided between the lineal descendants and the tribal members with Sisseton and Wahpeton ancestors, but only if an additional 600 non-member lineal ancestors are certified by the Secretary. If less than 600 applicants are certified, the lineal descendants will receive a higher *per capita* distribution than the members of the three tribes, assuming that a full *per capita* distribution had occurred. One of the primary objectives of this bill is to eliminate such a result. Thus, the formula for adjusting the allocation takes the number of enrolled individuals, 1988 and adds 600 to get 2,588. By dividing 2,588 into the percentage that results in per capita parity, 71.6005%, the per person percentage results. In other words, .0277 multiplied by 2,588 lineal descendants results in the percentage allocated for lineal descendants, 71.6%. Thus, for each person less than 600 certified as a lineal descendant, the percentage allocated to this class should be reduced by .0277.

ter, it is the Committee's view that these provisions are much more likely to assist in bringing this matter to fruition. Obviously if a final decision is rendered by a court upholding the provisions of the bill, including the allocations, the Committee expects that the Secretary will immediately distribute the tribal shares as directed in section 4 and, if applicable, section 7. The Secretary will distribute funds to lineal descendants under the appropriate separate process provided in section 7.

Inter-tribal allocation.—A related issue of concern to the Committee is the intertribal distribution scheme. Even while the Interior Department opposed any reallocation of the remaining judgment fund to the tribes, it assiduously challenged the allocation proposed by the tribes. Such inter-tribal judgment fund allocations have proven to be quite troublesome in a number of instances and the allocation under the 1972 Act was no exception. The 1971 Committee Report indicated that the tribes "arrived at the [formula] after a long period of considerable confusion, attempts to reconcile their differences, and the discarding of a variety of rolls and enrollment and apportionment approaches." S. Rep 92–144, p. 6. (June 4, 1971). As the Committee explained in 1971, the diversity of membership criteria among the tribes during the twentieth century makes it difficult to rely on contemporary tribal enrollment numbers as a means of allocating these funds. Although imperfect, the reliance on the 1909 McLaughlin Annuity roll was endorsed by Congress in 1972. The roll determined how many individuals resided on each of the three reservations, or elsewhere or on other reservations in 1909.

While the Committee welcomes the Interior Department's views and guidance on such allocations, the fact remains that a number of competing (and equally equitable) alternatives could be proposed. As one member of the Supreme Court observed:

> "We must acknowledge that there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong. One could regard the distribution as a windfall for whichever beneficiaries are now favored. In light of the difficulty in determining appropriate standards for the selection of those who are to receive the benefits, I cannot say that the distribution directed by the Congress is unreasonable and constitutionally impermissible. Congress must have a large measure of flexibility in allocating Indian awards[.]" [14]

Proof of ancestry.—As noted, the bill does not require the Interior Department to revisit the list of persons already certified as lineal descendants prior to January 1, 1998. The Committee is concerned with the Department of the Interior's approach to enrollment. As the Ninth Circuit noted, the dispersal of the aboriginal tribe presents a difficulty in identifying those who are entitled to enrollment. Although the Committee does not take issue with the 9th Circuit's finding that the 1972 Act left considerable discretion to the Secretary, there are competing explanations for why the 1972 Act sought to be inclusive with respect to the rolls and other mate-

[14] *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 91 (1997) (Blackmun, J. and Chief Justice concurring).

rials that may be employed to prove ancestry. The Secretary appears to believe that Congress sought to be inclusive to ensure inclusion of all lineal descendants, even at the cost of enrolling a number of individuals who are not, in fact, descendants of a member of the aboriginal tribe. An alternative interpretation is that inclusiveness with respect to rolls was intended to allow individuals to prove their ancestry using any document (*i.e.* roll) that would allow them to trace their ancestry to a source indicating that they have a lineal ancestor who was a member of the Sisseton and Wahpeton Sioux tribe. The approach finally incorporated into the bill seeks to eliminate ambiguity, by indicating which rolls the Secretary may use.

Tribal intervention.—At the hearing held on July 8, 1998, the Department of the Interior testified that it could not support S. 391 unless section 9(d) (*Affirmative Defenses Waived*) was removed. The Committee requested that Interior and the tribes reach agreement on this issue. In a letter to the Committee, counsel for the tribes subsequently informed the Committee that the tribes would agree to the removal of section 9(d) to give effect to the agreement between Interior and the tribes. In doing so, the Committee does not intend its action to have any legal ramifications or to effect the determination of any issue in litigation.

The Committee has included provisions ensuring that the tribes may participate in any litigation concerning this Act. This provision is consistent with the federal policy of encouraging tribal self-determination. As the Supreme Court explained in 1983, "Indian[] [tribes] are entitled "to take their place as independent qualified members of the modern body politic." [citing cases] Accordingly, [tribal] participation in litigation critical to their welfare should not be discouraged." [15]

SECTION-BY-SECTION ANALYSIS OF S. 391 AS REPORTED BY THE COMMITTEE

Section 1. Short title.—Section 1 cites the short title of the bill as the "Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998."

Section 2. Definitions.—Section 2 defines the terms "covered Indian tribe", "fund account", "Secretary", and "tribal governing body" for purposes of this Act.

Section 3.—Distribution to, and use of certain funds by, the Sisseton and Wahpeton Tribes of Sioux Indians.—Section 3 provides that any funds made available by appropriations under chapter II of Public Law 90–352 to the Sisseton and Wahpeton Tribes of Sioux Indians to pay a judgment in favor of the tribes in Indian Claims Commission dockets 142 and 359, including interest, after payment of attorney fees and other expenses, that, as of the date of enactment of this Act, have not been distributed, shall be distributed and used in accordance with this Act.

Section 4. Distribution of funds to Tribes.—Section 4 allocates 28.3995% of the remaining judgment funds to the governing bodies of the three Tribes and provides the percentages that are to be apportioned to the governing bodies of the three Tribes. Section 4 also

[15] *Arizona* v. *California,* 460 U.S. 605, 614 (1983).

provides that for purposes of making distributions of funds pursuant to this Act, the Sisseton and Wahpeton Sioux Council of the Assiniboine and Sioux Tribes shall act as the governing body of the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

Section 5. Use of distributed funds.—Subsection (a) of section 5 prohibits the three tribes from making any per capita payments to tribal members from the funds received under this Act. Subsection (b) provides that the funds received under this Act may only be used for making investments or expenditures reasonably related to tribal economic and resource development and the development of educational, welfare and other programs beneficial to tribal members. Allowance is also made for the Tribes to pay attorneys fees out of the proceeds allocated to them by the Act. Subsections (c) and (d) reference the American Indian Trust Fund Management Reform Act of 1994 with regard to management of the tribal funds.

Section 6. Effect of payments to covered Indian Tribes on benefits.—Section 6 provides that for purposes of receiving federal benefits and services, payments received by any of the three tribes or by any individual under this Act shall not be treated as income or resources or be a basis for reducing or denying any federal service or program.

Section 7. Distribution of funds to lineal descendants.—Section 7 requires that the Secretary shall distribute 71.6005% of the remaining judgment funds to the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe. This section supersedes that section of Public Law 92–555 which provided for distribution to the lineal descendants. Subsection (b) provides that if there are than 2,588 lineal descendants certified, the Secretary shall reduce the distribution proportionately and distribute the difference to the tribes. Subsection (c) provides that for any person applying for enrollment as a lineal descendant after January 1, 1998, the Secretary shall certify that the applicant can trace ancestry to a specific Sisseton or Wahpeton Mississippi Sioux lineal ancestor who was a member of the Sisseton and Wahpton Mississippi Sioux Tribe. Subsection (d) provides conforming amendments to the 1972 Act.

Section 8. Jurisdiction; Procedure.—Section 8(a) authorizes the covered tribes to intervene in any action brought by the lineal descendants to challenge the validity or constitutionality of this Act. Subsection (b) limits federal courts with jurisdiction to hear such a claim to district courts for North and South Dakota or, the District of Columbia, or the Court of Federal Claims, if appropriate. (This provision is not intended and should not be construed to affect the jurisdiction of the United States Court of Federal Claims.) Subsection (c) requires the Secretary to provide notice of such an action to the covered tribes. Subsection (d) establishes a one year statute of limitations on asserting any of the claims identified in section 8(a). Subsections (e) and (f) provide that if the lineal descendants succeed in asserting one of the claims identified in 8(a), the Secretary shall allocate the remaining judgment funds, including the 28.3995% reserved for the covered tribes to the lineal descents. Conversely, if the covered tribes are successful, in challenging the allocation of judgment funds to the lineal descendants in

1972, the 71.6005% reserved for the lineal descendants will go the covered tribes.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On July 29, 1998, the Committee on Indian Affairs, in an open business session considered an amendment in the nature of a substitute to S. 391. The bill, as amended was ordered reported with a recommendation that the bill, as amended, do pass.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 391, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 10, 1998.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 391, the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Hadley (for federal costs), and Leo Lex (for the impact on state, local, and tribal government).

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 391—Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998

Summary: S. 391 would direct the Secretary of the Interior of Distribute previously appropriated funds, plus accrued interest, to certain tribal governing bodies and individuals as payment of a judgment in favor of the Mississippi Sioux tribes. Various legal challenges make it unlikely that the funds would be disbursed within the next several years under current law. If S. 391 is enacted and not challenged in court, this bill would result in payments being made in the near term that otherwise would be made at some point in the future. If S. 391 is enacted and challenged in court, the expected near-term payments would probably be delayed by one to-several years. The bill also requires the establishment of trust funds for the tribal distributions and prescribes purposes for which those funds could be spent. Finally, S. 391 would increase the requirement for establishing lineal descent. However, CBO estimates that the additional costs of the Bureau of Indian Affairs (BIA) for reviewing claims of lineal descent would be less than $500,000 in any year, and would be subject to appropriation.

CBO estimates that enacting S. 391 would affect direct spending over the 1999–2008 period, but would probably result in no net cost

to the federal government over that period. We estimate that direct spending would increase by a total of about $17 million in fiscal year 2000. This spending would be more than offset by savings of future payments that would otherwise be made in absence of S. 391, but we cannot estimate the precise amount or timing of such payments. Because S. 391 would affect direct spending, pay-as-you-go procedures would apply.

S. 391 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) that would affect tribal governments. CBO estimates that complying with this mandate would entail no net costs. Further, this bill would confer substantial benefits on tribal governments. S. 391 would impose no new private-sector mandates as defined in UMRA.

Estimated Cost to the Federal Government: For the purposes of this estimate, CBO assumes the bill will be enacted near the start of fiscal year 1999. CBO estimates that enacting S. 391 would have no significant impact on discretionary spending and no net cost in terms of direct spending over the 1999–2008 period. The near-term budgetary effects are shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

[By fiscal year, in millions of dollars]

	1999	2000	2001	2002	2003
CHANGES IN DIRECT SPENDING					
Estimated budget authority	0	17	[1]	[1]	[1]
Estimated outlays	0	17	[1]	[1]	[1]

[1] The legislation would trigger direct spending of about $17 million in fiscal year 2000, but these costs would be offset by savings in subsequent years from payment that would otherwise be made in the absence of S. 391. CBO cannot predict the precise amount or timing of payments that would be required is S. 391 is not enacted.

S. 391 would impose a one-year statute of limitations on legal actions to challenge the constitutionality of the bill. If there are no claims during the year, then the Secretary of the Interior would disburse the $1.47 million that was appropriated in 1968 for the judgment in favor of the Sisseton and Wahpeton Tribe of Sioux Indians and the internet and the interest that has accrued on the initial appropriations. S. 391 would impose a more stringent requirement for proving tribal ancestry by lineal descent and would thereby increase the staff time necessary for BIA to review claims of lineal descent. However, CBO estimates that the additional costs associated with reviewing claims of lineal descent would be less than $500,000 in any year from appropriated funds.

This bill would require that 28.4 percent of the settlement finds be distributed to the governing bodies of the Spirit Lake Sioux Tribe of North Dakota, the Sisseton and Wahpeton Sioux Tribe of South Dakota, and the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana, one year after enactment of this bill. Up to 71.6 percent of the settlement funds would be distributed to the lineal descendants of the Sisseton and Wahpeton Tribe of Sioux Indians. Under S. 391, CBO expects that the Secretary would disburse the total of about $17 million in fiscal year 2000. This estimate assumes that interest would continue to accrue until the final distribution.

The direct spending in 200 would be offset by a reduction in outlays of at least the same amount at some point in the future. Based on information provided by BIA and the Department of Justice, CBO expects that the two court cases currently delaying the payments would not be resolved until sometime after fiscal year 1999. Through we have no basis for knowing when the court cases will be resolved, we expect that the resulting payments would equal the amount that would be paid under this legislation plus accrued interest.

Pay-as-you-go considerations: The Balance Budget and Emergency Deficit Control Act specifies pay-as-you-go procedures for legislation affecting direct spending or receipts. CBO estimates that enacting S.391 would increase direct spending by about $17 million in fiscal year 2000, which would be more than offset by savings subsequent years from payments that would otherwise the made in the absence of S.391.

[By fiscal year, in millions of dollars]

	998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Changes in outlays	.....	.....	17	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Changes in receipts ...	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	

[1] The legislation would trigger direct spending of about $17 million in fiscal year 2000, but these outlays would be offset by savings in subsequent years from payments that would otherwise be made in the absence of S.391. CBO cannot predict the precise amount or timing of payments that would be required if S.391 is not enacted.

[2] Not applicable.

Estimated impact on State, local, and tribal governments: S.391 contains and intergovernmental mandate as defined in UMRA, but CBO estimates that complying with this mandate would entail not net costs. The bill would place requirements upon the affected tribes specifying how judgment funds must be used. Funds would be allocated to the tribes in special trust fund accounts. They could not be used to make per capita payments to tribal members, but rather would be used for tribal programs. Because these requirements are placed on funds awarded as a judgment, and not as a condition of federal assistance, they would be mandates ad defined by UMRA. However, any costs would be more than offset by the funds provided by the bill.

The most significant impact of this bill on tribal governments would be the benefit conferred by the bill's proposed distribution of judgment funds. Under current law, the Mississippi Sioux Tribes would receive no additional funds under these judgments. The funds due to the tribes under the distribution plan originally approved by the Congress shave already been paid. The remaining funds were to be paid to lineal descendants of the Sisseton and Wahpeton Tribes. Under the earlier plan, these individuals were to have received about $1.47 million. Those funds have not yet been paid because of ongoing litigation and, with accrued interest, currently amount to about $15.2 million. This bill establish a revised distribution plan under which the descendants would receive up to 71.6 percent of the funds and the tribes would receive the remainder.

The bill specifies that if its provisions are contested, the prevailing party will be entitled to 100 percent of the remaining funds. CBO cannot predict the likelihood or outcome of such a suit.

Estimated impact on the private sector: S.391 would impose no now private-sector mandates as defined in UMRA.

Previous CBO estimates: On August 22, 1997, CBO transmitted an estimate of H.R. 976, the Mississippi Sioux Tribes Judgment Fund Distribution Act of 1997, as ordered reported by the House Committee on Resources on July 16, 1997. For H.R. 976, CBO assumed the bill would be enacted prior to October 1, 1997; therefore, CBO estimated that the accrued interest that would be disbursed under the bill would be less than the total under S. 391. In addition, H.R. 976 provided that the principal would be distributed to the lineal descendants of the Sissetion and Wahpeton Tribe of Sioux Indians and that, one year latter, the interest would be distributed to the governing bodies of the Spirit Lake Sioux Tribe of North Dakota, the Sessetion and Wahpeton Sioux Tribe of South Dakota, and the Assiniboine and Sioux Tribes of the fort Peck Reservation in Montana.

Estimates prepared by: Federal cost: Mark Hadley, Impact on State, local, and tribal government: Leo Lex.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director Budget Analysis

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 391 will have minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee received two letters each from the Department of the Interior and the Department of Justice, which are reprinted below, providing the views of the Administration on S. 391.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
August 20, 1998.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In response to your request dated June 17, 1998, this letter provides the views of the Department of Justice on S. 391, the "Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998", as reported out of the Senate Indian Affairs Committee on July 29, 1998.

The sponsors of S. 391 have stated that their intent is to correct a perceived lack of parity between fund allocations to three successor Tribes to the Mississippi Sioux and their lineal descendants, and to end the long running litigation that has ensued over the 1972 Judgment Distribution Act (Pub. L. 92–555, Oct. 25, 1972, 25 U.S.C. 1300d to 1300d–9), that established those allocations. See

143 CONG. REC. S1925 (March 4, 1997) (statement of Senator Dorgan). We have analyzed the bill with these goals in mind and focus our comments on litigation-related concerns raised by the jurisdictional provisions contained in Section 8.

As outlined in our letter of February 6, 1998, the Department has successfully defended against two prior challenges to the 1972 Judgment Distribution Act by the Sisseton and Wahpeton Sioux Tribe, the Spirit Lake Sioux Tribe (formerly the Devils Lake Sioux Tribe), and the Assiniboine and Sioux Tribes of the Fort Peck Reservation. A challenge by individuals claiming that they are eligible lineal descendants that did not receive proper notice of the Interior Department's process for identifying lineal descendants resulted in an order requiring the Secretary to reinitiate the process for completing a final roll of eligible lineal descendants. *Loudner* v. *United States,* 905 F. Supp. 747 (D.S.D. 1995), *rev'd,* 108 F.3d 896 (8th Cir. 1997). There is, in addition, another constitutional challenge by the Tribes pending in the D.C. Circuit. *Sisseton-Wahpeton Sioux Tribe, et al.* v. *United States,* 686 F. Supp. 831 (D.D.C. 1997), *appeal pending,* (D.C. Cir.).

Section 8 of S. 391 purports to establish a process to handle challenges to the bill by lineal descendants. The Department has a number of concerns with section 8. First, the section does not provide a clear set of jurisdictional instructions for litigants and courts. Subsection (3) of section 8 provides that "[i]f appropriate, the United States Court of Federal Claims shall have jurisdiction over an action referred to in subsection (a)." This provision is ambiguous and could result in confusion and unnecessary litigation. In addition to redrafting subsection (b)(3), we would suggest that the Committee consider changing the heading of 8(b) from "Jurisdiction" to "Venue," and including the United States district court for the district of Montana in the subsection (b)(1) list of appropriate venues. The latter suggestion is made because the Assiniboine and Sioux Tribes of the Fort Peck Reservation are located in Montana, lineal descendants are likely to be located there, and the Tribes' first suit challenging the constitutionality and legality of the 1972 Judgment Distribution Act was adjudicated in that district.

Second, subsection (b)(2) appears aimed at avoiding inconsistent judgments by consolidating lineal challenges in one district court. Its language, however, ensures only that a district court will retain exclusive jurisdiction over the first section 8(a) action filed. If the goal is to consolidate all actions in the first district court to exercise jurisdiction, we suggest changing the heading from "Exclusive Jurisdiction" to "Consolidation of Actions," and clarifying that all subsequently filed actions shall be consolidated in the first district court to exercise jurisdiction over a section 8(a) action.

Third, the bill's 365-day statute of repose for constitutional claims by lineal descendants, set forth in section 8(d), could raise serious constitutional concerns. That provision would bar any claim referred to in section 8(a)—that is, to any action by a lineal descendant "to challenge the constitutionality or validity of distributions under this Act to any covered Indian tribe"—filed more than 365 days after enactment of S. 391. The provision is apparently intended to serve as a statute of repose that would set a specific cutoff for the filing of constitutional challenges by lineal descendants,

rather than as statute of limitations, which would presumptively be subject to equitable tolling principles. *See Lauf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U.S. 350, 363 (1991) (three-year statute of repose on actions for securities fraud not subject to equitable tolling).

As applied to any lineal descendants who first learned of their potential eligibility to share in the Mississippi Sioux fund as a result of the additional notice required by the Eighth Circuit's decision in *Loudner* v. *United States,* 108 F.3d 896 (1997), this provision may be subject to constitutional challenge. Section 8(d) would not, on its face, erect an absolute bar to constitutional challenges by newly notified lineal descendants. However, it could require those individuals to apprehend S. 391's threat to their interests and to file suit raising any constitutional objections to that threat very soon after learning of their potential stake in the fund that S. 391 would reallocate. (Indeed, depending on the timing and structure of the notice and application process that Interior provides to potential lineal descendants pursuant to the Eighth Circuit's decision, it is possible that the 365-day deadline would pass before some lineals learned of their stake in the fund.) The Supreme Court has stated that "[a] serious constitutional question * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe,* 486 U.S. 592, 603 (1988) (internal quotation marks omitted).

In addition, the Court has indicated that illusory remedies for constitutional claims can themselves be unconstitutional, holding that due process forbids a state from reconfiguring its remedial scheme for constitutional challenges to state taxes "unfairly, in *midcourse*" in a manner that deprives taxpayers of any effective remedy. *Reich* v. *Collins,* 513 U.S. 106, 110 (1994) (emphasis in the original). In view of this authority, we believe that the limitations provisions of section 8(d) could be subject to challenge for failure to afford newly notified lineal descendants a meaningful opportunity to challenge the constitutionality of S. 391's revision of the allocations scheme provided by the 1972 Distribution Act.

Fourth, the "Special Rule" outlined in section 8(e), is, in our view, ill-conceived, unworkable, and likely to result in significant confusion. The rule directs "all or nothing" relief in the event of either a successful lineal challenge (8(e)(1)), or a successful tribal counterclaim (8(e)(2)). Such relief does not account for the possibility that either a lineal descendant (or descendants), or a covered Tribe (or Tribes), could prevail on lesser claims that would not warrant the relief dictated by the section. For example, a lineal descendant might sue to challenge only one of the Tribes getting an additional allocation, or, conceivably, a Tribe might challenge the propriety of fund allocations to only a subset of lineal descendants. It is also imaginable that an action could result in both lineal descendants and the Tribes winning in part. Given the universe of potential future claims, section 8(e) is likely to be an untenable set of instructions for a court to apply. We therefore recommend deleting section 8(e) from the bill.

Finally, if the goal of S. 391 is to bring closure to this matter, Congress might consider a more decisive approach to pending and future tribal challenges to the distribution of the Mississippi Sioux

Fund. In our view, the Tribe's challenges have been finally resolved by the litigation outlined above. If the intent of Congress is to end further litigation over the Mississippi Sioux Fund by reallocating a portion of the Fund designated for lineal descendants to the successor Tribes, Congress should consider language that would explicitly provide that, if the Tribes elect to accept additional fund distributions under the bill, they may no longer pursue claims arising out of the distribution of the fund. Absent such a release of claims, the bill's restrictions on litigation disincentives work only against the lineal descendants, leaving the Tribes free to pursue their pending suit in the D.C. Circuit and to initiate new suits outside the constraints of section 8(a), notwithstanding the fact that two previous tribal suits on this issue have resulted in denials of certiorari by the United States Supreme Court.

We understand that the Interior Department separately will address issues surrounding the bill's methodology for calculating a reallocation of the undistributed portion of the fund, as well as the proposed change in standards applicable to the Secretary's court-ordered obligation to reopen the process for identification of eligible lineal descendants.

Thank you for the consideration of our views. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

L. ANTHONY SUTIN,
Acting Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 6, 1998.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Department appreciates the opportunity to comment on the amendment in the nature of a substitute to H.R. 976, the "Mississippi Sioux Tribes Judgment Fund Distribution Act of 1997," that was reported out of your Committee on November 4, 1997. While we defer to the Interior Department's articulation of the Administration's policy-based objections to the Committee's substitute bill, we write separately to explicate more fully the legal implications of the substitute. As we outline below, Section 8(a) and Section 9 contain ambiguities and conflicts with existing law that could result in yet more litigation over the 1972 Congressional formula for allocating the Indian Claims Commission's (ICC) award in ICC Dockets 142 and 359.[1] See Pub. L. 92–

[1] The Sisseton and Wahpeton Sioux Tribe, the Spirit Lake Sioux Tribe (formerly the Devils Lake Sioux Tribe), and the Assiniboine and Sioux Tribes of the Fort Peck Reservation have brought the following suits challenging the Congressional distribution formula set forth in 25 U.S.C. 1300d, *et seq.* The first action, *Sisseton-Wahpeton Sioux Tribe, et al.* v. *United States,* 686 F. Supp. 831 (D. Mont. 1988), *aff'd* 895 F.2d 588 (9th Cir.), *cert. denied,* 498 U.S. 824 (1990), challenged its constitutionality. The second suit, *Sisseton-Wahpeton Sioux Tribe, et al.* v. *United States,* (unpublished amendment memorandum and order dated Sept. 28, 1994, D. Mont.), *aff'd*, 90 F.3d 351 (9th Cir.), *cert. denied,* 117 S. Ct. 516 (1996), challenged the Interior Department's

555, Oct. 25, 1972, codified at 25 U.S.C. 1300d–1300d–9 ("The 1972 Judgment Distribution Act").

As indicated by the Interior Department's letter of November 14, 1997, Section 8(a) of the substitute bill presents serious practical and legal problems. The Section creates two requirements with respect to the timing of fund distributions to those lineal descendants eligible to receive monies from the undistributed portion of the ICC award. Specifically, the first two lines of Section 8(a) require that fund distribution to the lineal descendants occur within 180 days of the enactment of the substitute bill. The third through fifth lines of Section 8(a), however, require that fund distribution occur "in the manner prescribed in section 202(c) of Public Law 92–555 (25 U.S.C. 1300d–4(c))." Section 202(c) expressly states that the funds allocated to the lineal descendants shall be distributed to the "persons *enrolled on the roll prepared by the Secretary* pursuant to Section 201(b) of this title." Thus, Section 8(a) requires distribution to occur within 180 days of enactment but simultaneously requires distribution to occur after the Secretary has completed the roll of lineal descendants. As a practical matter, the Secretary will not be able to meet both requirements.

The Secretary's process of finalizing the roll of lineal descendants is presently controlled by the Eighth Circuit's decision in *Loudner* v. *United States,* 108 F.3d 896 (8th Cir. 1997), *rev'g*, 905 F.Supp. 747 (D.S.D. 1995). Under *Loudner*, the Secretary is required to undertake a new more comprehensive process to notify potential lineal descendants that they may apply to the Secretary for a determination of their eligibility to receive monies from the remaining funds. Thus, the Secretary must reopen the application process for lineal descendants, provide adequate notice of the application process, provide an adequate application period and identify the eligible lineal descendants from the pool of applicants. We understand from the Department of the Interior that the agency will not be able to accomplish these court-ordered tasks within the 180-day time frame set forth in the substitute bill.

To maintain internal consistency between the substitute bill and the existing statutory requirements of the 1972 Judgment Distribution Act, and to permit the Department of the Interior to fulfill the Eighth Circuit's mandate in *Loudner*, any Congressional adjustment of the 1972 distribution scheme must account for the fact that the Secretary has not completed the roll required by Section 201(b) of Public Law 92–555.

We have additional concerns about the jurisdictional provisions contained in Section 9 of the substitute bill. The Section would give exclusive original jurisdiction to the U.S. District Court for the District of Columbia to hear challenges to "the constitutionally or validity under law of the distributions authorized under this Act," with a special 180 day statute of limitations.

Our first observation is that it is not clear how this Section is intended to operate in relation to the Tucker Act, 28 U.S.C.

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implementation of the statute. The most recent action, *Sisseton-Wahpeton Sioux Tribe, et al.* v. *United States,* 686 F. Supp. 831 (D.D.C. 1997), *appeal pending,* (D.C. Cir.) again challenges the constitutionality of the statute. In addition to the Tribes' suits, individuals claiming that they are eligible lineal descendants that did not receive proper notice of the Interior Department's process for identifying lineal descendants, sued the Secretary in *Loudner* v. *United States,* 905 F. Supp. 747 (D.S.D. 1995), *rev'd*, 108 F.3d 896 (8th Cir. 1997).

1491(a)(1), the "Little Tucker Act," 28 U.S.C. 1346(a)(2), and the "Indian Tucker Act," 28 U.S.C. 1505. These statutes require that claims against the United States arising under the Constitution or other federal laws be brought exclusively in the *U.S. Court of Federal Claims* if the claim is $10,000 or more in amount, or, alternatively, in the district courts, if under $10,000. The various provisions of the Tucker Act permit claims to be brought within six years of accrual. Further, Tucker Act remedies are generally restricted to monetary relief.

Although it is not clear whether Section 9 is intended to preempt the Tucker Act, the Section is written broadly enough to include monetary, equitable and declaratory relief. Thus, the Section could be interpreted to eliminate Tucker Act remedies for challenges to the judgment distribution scheme of the substitute bill, and to bar such challenges after six months as opposed to six years. We are concerned that without Congressional clarification, the resolution of these jurisdictional ambiguities could embroil the courts and the parties in further litigation.

Our second observation about Section 9 is that it ambiguously authorizes challenges to "this Act." If "this Act" were read to include challenges to the original 1972 Judgment Distribution Act as well as the provisions of the substitute that amends it, then the three successor Tribes to the Sisseton and Wahpeton Mississippi Sioux could relitigate their heretofore unsuccessful efforts to challenge the constitutionality of the distribution formula set out in the original 1972 Act. The functional effect of this reading would be to waive the statute of limitations that three federal court determinations, left undisturbed by the Supreme Court, have held to bar such tribal litigation. A clarification that Section 9 is only intended to permit challenges to the amendatory provisions of the substitute bill would avoid confusion on this point.

In sum, assuming that Congress's goal is to bring an end to the longstanding litigation over the 1972 Judgment Distribution Act, we recommend further refinement of the Committee's substitute bill.

Thank you for your consideration of our views. The Office of Management and Budget has advised this Department that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, July 29, 1998.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for allowing us the opportunity to review your proposed amendment to S. 391, a bill to provide for the disposition of certain funds appropriated to pay judgments in favor of the Mississippi Sioux Indians, and for other purposes.

We cannot support this measure as written, and offer the following suggestions to amend to legislation.

We have reexamined the proposed reallocation of the remaining funds currently held in trust for the Mississippi Sioux lineal descendants and recommend that the proposed cap of 600 new enrollees be removed from section 4 of S. 391. It is the Department's position that S. 391 should be amended to provide that any reallocation of the remaining Mississippi Sioux judgment funds should be held in abeyance until the lineal descendants' enrollment process is complete. There is a strong possibility that parity between the tribes' and lineal descendants' fund allocations will be achieved as a result of the reopening of the enrollment process that is required under the *Loudner* decision. The Bureau of Indian Affairs has prepared additional tables showing that a full pro rata distribution will occur between the tribes and the lineal descendants when and if there are 1,969 new enrollees.

As stated earlier in our testimony given on July 8, we fully expect at least 10,000 new applications will be filed with the Bureau of Indian Affairs as a result of the *Loudner* decision. We estimate that the number of new enrollees may exceed 1,000. Currently, we have 2,200 new applications on file at the Aberdeen Area Office that were filed by individuals associated with the *Loudner* case. We expect the number of new applications will double by this fall after the Bureau conducts public information meetings at each of the Sioux reservations for the purpose of notifying the public of the reopening of the enrollment application period.

If the Committee does not accept our recommendation and decides to reallocate the funds prior to the completion of the enrollment process, we recommend that the cap provided for in section 4 be raised to 1,000. Raising the cap to 1,000 new enrollees would increase the lineal descendants' share of the current fund to 80.4396 percent, rather than the proposed 71.6005 percent.

If the cap is raised to 1,000 new enrollees, the percentages on page 3, line 24; and page 9, line 7 would be changed from 71.6005 to 80.4396 percent. On page 9, line 15, the number of enrollees would be changed from 2,588 to 2,988.

The calculations called for under subsection 7(b) are difficult to understand and perform. To alleviate this situation, we suggest that the calculations used to make the adjustment in the event that the number of enrollees is less that 2,988 be revised in simpler terms. It will take several more years to complete the new enrollment process and the remaining funds in section 3 will no longer be viewed as a portion of a fund. Instead, it will have again become the "remaining fund."

Section 7 should be rewritten by deleting everything after the word "shall" on page 9, line 15, through page 10, line 3. The following should be inserted after the word "shall" on page 9, line 15:

> reduce the remaining funds described in subsection (a) on a pro rata basis.
>
> (A) the reduction shall be calculated by,
>
> (i) multiplying the remaining funds in subsection (a) by .033467 percent
>
> (ii) multiplying the product obtained in (i) by the difference between 2,988 and the number of lineal de-

scendants on the final roll of lineal descendants, but not to exceed 1,000.

(2) DISTRIBUTION.—If the remaining funds described under subsection (a) are reduced under subsection (b), an amount equal to the reduction shall be reallocated to the covered Indian tribes in the same proportion as specified in section 4(a)(2).

We also have some concerns about subsection 7(c) Verification of Ancestry. We believe that the eligibility criteria used to qualify the first 1,988 lineal descendants should not differ from the eligibility criteria used to qualify the new enrollees. Changing the eligibility criteria in midstream creates two classes of lineal descendant enrollees. The early records on file concerning the Sisseton or Wahpeton Mississippi Sioux Indians consist of annuity rolls, census rolls, allotment records and probate records. We do not have any official tribal membership rolls that date back to the 1800's, or tribal organic documents that set out the tribal enrollment criteria. If enacted, we believe that the Verification of Ancestry provision as set forth in 7(c) will result in further litigation to settle differences the government, the covered Indian tribes, and the lineal descendants will have in interpreting it.

We would also direct your attention to Section 4(d) which we suggest be amended to read as follows:

(d) TRIBAL TRUST FUND ACCOUNTS.—The Secretary of the Treasury, at the request of the Secretary of the Interior, acting through the Office of Trust Funds Management within the Department of the Interior, shall establish such accounts as are necessary, in the Fund account, to provide for the distribution of funds under subsection (a)(2).

We are also concerned with the language in Section 5(d)(2) EXEMPTION. As written, funds distributed to covered tribes may be managed and invested pursuant to the American Indian Trust Fund Management Reform Act, 25 U.S.C. § 4001 et seq. However, the language currently written within this section exempts tribes wishing to withdraw their funds for outside management from submitting a management plan for Secretarial approval. Such exemption from development of a management plan which is subject to Secretarial review and approval would circumvent the protections Congress evisioned when enacting the American Indian Trust Fund Management Reform Act of 1994. There would be no way of ensuring that tribal management of the funds will reasonably take into consideration all appropriate factors, including consideration of whether the individuals or institutions that will manage these funds have the requisite capability and experience, and of whether such management will protect the funds against substantial loss. Congress envisioned that a tribal management plan would have to satisfy these concerns, as well as those reflected in 25 CFR Part 1200, before dissolution of the trust responsibility will respect to withdrawn funds.

Section 4(a)(2)(B) references a specific contract, whereas Section 5(b)(6) references the above section and lists two contracts. We fell that this inconsistency need to be addressed.

We also ask that all references to the Office of Trust Funds Management include the word "Funds," rather than "Fund".

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

Sincerely,

KEVIN GOVER,
Assistant Secretary—Indian Affairs.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC October 31, 1997.

Senator BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
Washington, DC.

DEAR SENATOR CAMPBELL: This letter is response to inquiries and from your office regarding the current distribution plan for the Mississippi Judgment fund which is currently before the Senate and is intended to advise you as to issues currently under consideration at the Department of the Interior. It is our understanding that several members of the Senate support H.R. 976 in its current state, while others are seeking alternative approaches to resolution of the distribution problems.

As you aware, from our testimony, the Department opposes H.R. 976 in its current form. H.R. 976 as currently written eliminates the entire pool of interest earned on the principle set aside in 1968 for distribution to non-tribally enrolled lineal descendants of the Mississippi Sioux. In enacting the 1972 Distribution Plan, Congress made specific findings which clearly articulate reasons for distribution to lineal descendants. The Congressional findings are supported by an opinion of the Indian Claims Commission, dated January 12, 1962, 10 Ind. Cl. Comm. 137. 180. In this opinion, the Commission held the following:

> There are two petitioning Indian communities, to wit, the Sisseton and Wahpeton Tribe of Sioux Indians of the Sisseton Reservation in South Dakota, and the Sisseton and Wahpeton Tribe of Sioux Indians of the Forth Totten Reservation in North Dakota, whose membership comprises descendants of the original members of the Sisseton and Wahpeton bands of Mississippi Sioux as they existed during the times pertinent to the claims asserted in Docket 142. As such the petitioning communities are entitled to bring and maintain the claims in Docket 142 under the provisions of the Indian Claims Commission Act, for and on behalf of its members *and all other descendants of the original bands of Sisseton and Wahpeton Sioux similarly situated.* (Italics supplies).

Congress has not found those findings to be in error.

The portion of funs set aside for lineal descendant distribution from the original fund was 25.0225 percent of the entire appropriation. This percentage was derived from the Department of Interior's estimation of the pool of possible beneficiaries. With the pas-

sage of 25 years, the size of the beneficiary pool is becoming clearer, and 1,988 individuals have already been determined to be eligible beneficiaries of the fund. The Department is currently in litigation regarding new potential applicants and, as a result of the Eighth Circuit Court of Appeals decision in *Loudner* v. *United States,* we will be required to re-open the enrollment process. There are approximately 600 individuals who are claiming descendancy a this time and 432 of those individuals have joined to file a Motion for Class Certification in the District Court.

Since the set aside was intended to be fairly proportionate to all descendants of the Mississippi Sioux Tribe, a readjustment of the original apportionment scheme would be rational in light of our current knowledge of already determined beneficiaries and estimate of potential beneficiaries under *Loudner.* Since *Loudner* is not expected to be resolved until new notice procedures have been written and published in the Federal Register and implemented by this Department, a final formula for reallocation at this time would be speculative. The Department does not agree that it would be rational to implement a reapportionment at the completion of the application review. We are committed to completing the enrollment within two years and disposing of current litigation in *Loudner.* However, the Department concurs that distribution has been withheld for an excessive amount of time and should be expedited. To address this issue we offer the following discussion concepts:

1. An immediate distribution to the tribes of 28.3995 percent of the principal and interest income from the funds currently held to pay the judgment for the Mississippi Sioux lineal descendants. The tribal shares could be allocated in percentages based upon the actual tribal enrollment figures. Using those figures, it would give Sisseton-Wahpeton 14.3854 percent, Spirit Lake 5.2382 percent, and Ft. Peck 8.7759 percent of the funds currently held in trust.

2. The establishment of an escrow account for 600 new enrollee lineal descendants. The escrow amount would be 16.5998 percent of the funds currently held to pay the judgment. If the number of new enrollees is less than 600, the excess funds could be reallocated to the tribes using the same percentage figures described under No. 1.

3. The remaining funds, or 55.0007 percent of the funds held to pay the judgment would remain available for distribution to the lineal descendants.

4. Once the enrollment process is complete, a proportionate share of the funds for the new enrollees would be placed back into the main pool of funds prior to calculating the individual per capita shares.

Under this approach the lineal descendants' share of the total funds originally appropriated would be capped at 17.9162 percent. The tribal share of the funds would increase from the original 75 percent share to 82.0838 percent of the total fund. Once the enrollment process necessitated by *Loudner* is complete, the tribal share would increase if the new enrollees number less than 600.

I have enclosed a table which reflects the estimated number of eligible non-tribally enrolled lineal descendants in comparison with tribally enrolled descendants who have already received fund distribution and the appropriate apportionment of those numbers.

The Committee should be aware that only a small number of potential new lineal descendants and none of the already-identified 1988 lineal descendants are represented by counsel in these discussions. Accordingly, there can be no assurance of support from the unrepresented individuals for any allocation scheme.

The Department thanks you for your continued interest in this matter.

Sincerely,

MICHAEL J. ANDERSON,
Deputy Assistant Secretary—Indian Affairs.

BUREAU OF INDIAN AFFAIRS—MISSISSIPPI SIOUX JUDGMENT FUNDS

[Calculations used to arrive at proposed percentages for distribution of current fund held in trust]

	Enrollment	Tribal/descendants enrollment	Tribal/descendants percentages	Proportionate share of principal fund ($5,874,039.50)	Proposed Tribal share (current principal fund less new proportionate share)	Group percentages based on enrollment	Group shares based on enrollment	Proportionate share of funds currently held in trust (percentage)	Proposed percentage distribution of current fund
Sisseton-Wahpeton	6,006	.....	.....	.....	.....	50.6536	211,440.82	14.3854	.....
Spirit Lake	2,187	.....	.....	.....	.....	18.4448	76,993.19	5.2382	.....
Ft. Peck	3,664	.....	.....	.....	.....	30.9016	128,990.87	8.7759	.....
	11,857	11,857	82.0838	4,821,632.84	.....	100.0000	417,424.87	28.3995	28.3995
Lineal Descendants	1,988	.....	.....	.....	1,469,831.53	76.8161	808,417.48	55.0007	.....
Potential New Enrollees	600	2,588	17,9162	1,052,406.65	(1,052,406.66)	23.1839	243,989.18	16.5998	71.6005
	2,588	14,445	100.0000	5,874,039.50	417,424.87	100.0000	1,052,406.66	71.6005	100.0000

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law (existing law proposed to be omitted is enclosed in black brackets, new matter printed in italic).

Title 25, Section 1300d–4(a).

(a) Basis of apportionment

After deducting the amount authorized in section 1300d of this title, the funds derived from the judgment awarded in Indian claims Commission docket numbered 142 and the one-half remaining from the amount awarded in docket numbered 359, plus accrued interest *other than funds otherwise distributed to the Sisseton and Wahpeton Tribes of Sioux Indians in accordance with the Mississippi Sioux Tribes Judgement Fund Distribution Act of 1998,* shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll, as follows:

Tribe or group:	*Percentage*
Devils Lake Sioux of North Dakota	21.6892
Sisseton-Wahpeton Sioux of South Dakota	42.9730
Assiniboine and Sioux Tribe of the Fort Peck Reservation, Montana	10.3153
[All other Sisseton and Wahpeton Sioux	25.0225]

Title 25, Section 1300d–3(b).

(b) [The] *Subject to the Mississippi Sioux Tribes Judgement Fund Distribution Act of 1998, the* Secretary of the Interior shall prepare a roll of lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe who were born or prior to and are living on October 25, 1972, whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary, and who are not members of any of the organized groups listed in subsection (a) of this section. Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota. The Secretary's determination on all applications for enrollment shall be final.

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