

STATEMENT OF

ANDREW GREY, SR., CHAIRMAN
SISSETON-WAHPETON SIOUX TRIBE

MYRA PEARSON, CHAIRWOMAN
SPIRIT LAKE TRIBE

MARVIN YOUPEE, CHAIRMAN
FORT PECK SISSETON-WAHPETON SIOUX COUNCIL

ON S. 391

A BILL
TO PROVIDE FOR THE DISPOSITION OF CERTAIN FUNDS
APPROPRIATED TO PAY JUDGMENT IN FAVOR OF THE
MISSISSIPPI SIOUX INDIANS, AND FOR OTHER PURPOSES

DELIVERED BEFORE A HEARING OF THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

JULY 8, 1998

Mr. Chairman and members of the Committee, I am Andrew Grey, Sr . , Chairman of the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Indian Reservation, North Dakota and South Dakota. I am presenting this testimony on behalf of my Tribe and on behalf of Myra Pearson, Chairwoman of the Spirit Lake Tribe (formerly known as the Devils Lake Sioux Tribe) of the Ft. Totten Indian Reservation, North Dakota, and Marvin Youpee, Chairman of the Ft. Peck Sisseton-Wahpeton Sioux Council of the Ft. Peck Indian Reservation, Montana.

As you know, all three Tribes strongly supported enactment of S. 391 and H.R. 976 as introduced. The position of the Tribes on these measures is stated in our testimony and statement presented on H.R. 976 before this Committee on October 21, 1997. The Tribes' legal counsel, Bertram E. Hirsch, further amplified our position in a written statement presented to this Committee on October 29, 1997. We would like to incorporate these statements by reference and request that they be included in the official record pertaining to S. 391. For the reasons provided in these statements, the Tribes currently continue to believe that the fairest adjustment of the 1972 Act's distribution allocation is reflected in these measures as introduced. In passing H.R. 976, the House agreed.

However, at the close of the this Committee's October 21, 1997 hearing, Vice-Chairman Inouye, while noting that the allocation to lineal descendants in the 1972 Act was "arbitrary," stated that because of the potential for a veto he would not recommend that the Committee pass H.R. 976 without amendments addressing the concerns expressed by the Department of the Interior and other

parties. On November 4, 1997, the Committee approved amendments to H.R. 976 at a mark up session and then voted to approve the measure. The amendments revised the allocation to lineal descendants provided in the 1972 Act to provide these lineal descendants with a substantially larger allocation than the one authorized by H.R. 976 as passed by the House.

The Department of the Interior, in letters to the Committee dated October 31, 1997 and November 14, 1997, indicated its opposition to the re-allocation approved by the Committee on November 4. In these letters, the Department also stated the reallocation formula and related provisions that it could support. In a February 6, 1998 letter to the Committee, the Department of Justice essentially endorsed the Department of the Interior's position.

In a February 12, 1998 letter to the Committee and in a March 2, 1998 letter to Kevin Gover, Assistant Secretary of the Interior - Indian Affairs, Bertram E. Hirsch, legal counsel for the Tribes, provided the Tribes' response to the Department of the Interior proposal. Copies of these letters are attached to this Statement. These letters continue to accurately represent the Tribes' position on the Department's proposal. Essentially, the Tribes, because of the political *force majeure* aligned against their position, are compelled to either accept substantially less than what they believe they have a legal right to or be left with no change to the 1972 Act. Because of the Tribes' immediate need for funds and the obvious political impossibility at this time of securing more, the Tribes' have decided to accept the re-allocation proposed by the Department of the Interior and reserve for another day any action or activity that may appropriately assist them in further redressing the injustice perpetrated by the 1972 Act.

Virtually every feature of the Department of the Interior's proposal is included in Senator Dorgan's proposed amendment in the nature of a substitute to S. 391. For the reasons stated in this Statement and the attachments, it is this proposed amendment that the Tribes are prepared to accept.

In addition to the amendments proposed by the Department of the Interior, Senator Dorgan's amendment also includes amendments proposed by the Tribes. For example, section 6 expands the uses for which the Tribes can expend the distributed funds. These expanded uses are consistent with the original uses stated in S. 391 and would assist the Tribes in carrying out the original uses.

Section 8(c), also proposed by the Tribes, would require the Secretary to consult with the Tribes in verifying the lineal descendancy of persons applying for enrollment on the roll of lineal descendants after January 1, 1998. As the Committee knows, the Tribes have long expressed concern that most of the "lineal descendants" approved by the Department of the Interior do not have a Sisseton or Wahpeton lineal ancestor. The Tribes' concerns are explained in more detail in the attached letters. The proposed consultation provision is consistent with the national policy of tribal self-determination and would help to assure that only Sisseton or Wahpeton lineal descendants participate in any distribution while not upsetting any determinations of lineal descendancy made previous to the Loudner litigation. In an April 22, 1998 meeting, Michael Anderson, Deputy Assistant Secretary Indian Affairs informed Mr. Hirsch that the Department could accept a provision requiring tribal consultation as part of the lineal descendancy verification process. Mr. Anderson noted that tribal consultation has been a part of the verification process involved in judgment fund distributions affecting other tribes.

Section 9 was also proposed by the Tribes. The Tribes consider this section as providing an extremely important basis for not completely opposing the Department of the Interior's re-allocation proposal. As the Committee knows, the Tribes have been unable to litigate their claims that the distribution to lineal descendants authorized in the 1972 Act is unconstitutional - a violation of due process and separation of powers and a taking without just compensation. The Tribes have been barred from having a federal court consider the merits of these claims primarily because of statute of limitations and res judicata defenses successfully interposed by the Government. If the lineal descendants bring suit to challenge the constitutionality of S. 391's distribution to the Tribes, Section 9 would allow a federal court to reach the merits of the Tribes' claims without regard to these defenses. By allowing the Tribes' claims to be considered on the merits in such a suit, the lineal descendants risk losing all of the distribution provided for them if they were to bring such a suit. This creates a disincentive for bringing suit and may result in S. 391, if enacted, bringing a close to this judgment fund distribution matter. In addition, allowing the Tribes to achieve consideration of the merits of their claims is only fair in the context of a claim by lineal descendants that the distribution to the Tribes is unconstitutional. Under such circumstances, a federal court should be able to determine who is rightfully entitled, as a matter of constitutional law, to the judgment awarded to the Tribes in 1967.

Lastly, I understand that there may be concern that enactment of Senator Dorgan's amendment could result in costs to the United States. This is not the case. The funds at issue were appropriated in 1968. Senator Dorgan's proposed amendment authorizes the distribution of these funds and, by assuring that no funds can be distributed until after final judgment in a lawsuit, if any, brought pursuant to Section 9 of the amendment, protects against the possibility that additional appropriations could be necessary to satisfy a post-distribution judgment. If the amendment is not sufficiently clear on this point, the Tribes would be pleased to work with the Committee to assure the necessary clarity.

Thank you.