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110TH CONGRESS
2d Session

SENATE

REPORT
110-462

A BILL TO REPEAL SECTION 10(f) OF PUBLIC LAW 93-531, COMMONLY KNOWN AS THE “BENNETT FREEZE”

SEPTEMBER 15, 2008.—Ordered to be printed

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

R E P O R T

[To accompany S. 531]

The Committee on Indian Affairs, to which was referred the bill (S. 531), to repeal section 10(f) of Public Law 93-531, commonly known as the “Bennett Freeze,” having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 531 is to repeal section 10(f), commonly known as the “Bennett Freeze,” of Public Law 93-531, the Navajo-Hopi Land Settlement Act of 1974. Public Law 93-531 was originally enacted to settle rights and interests between the Navajo Nation and the Hopi Tribe regarding disputed land between the two tribes. Section 10(f) was added to Public Law 93-531 in 1980 (see, Public Law 96-305) to prohibit any development on the lands that are in dispute between the Navajo Nation and Hopi Tribe. S. 531 will revoke the restriction on development, commonly known as the “Bennett Freeze.”

BACKGROUND AND HISTORY

Public Law 93-531, the Navajo-Hopi Land Settlement Act of 1974, was enacted to settle disputes over lands that have existed between the Navajo Nation and the Hopi Indian tribe for over a century. The disputes arose from an Executive Order signed in 1882 that set aside approximately 2.5 million acres of land in northern Arizona for the Hopi Tribe and “such other Indians as the Secretary [of the Interior] may see fit to settle thereon,” and a 1934

Act of Congress setting aside lands for the Navajo Nation. Since the Executive Order in 1882, members of the Hopi Tribe and Navajo Nation have disputed the right to occupy certain lands set aside by the 1882 Executive Order. In order to resolve these disputes, Congress passed the Navajo-Hopi Land Settlement Act in 1974 (Public Law 93-531), which authorized litigation between the two tribes to determine each tribe's respective rights to the lands in question.

In 1962, in the case of *Healing v. Jones*, the Federal District Court ruled that both the Hopi Tribe and the Navajo Nation had joint rights to use the lands in dispute. The Court held that the Department of the Interior had settled Navajos on lands of the 1882 Hopi Reservation through implication, indirection and neglect. Thus, the Court found that both tribes had rights to certain lands within the 1882 Hopi Reservation. The lands comprising this area became known as the "joint use area."

Joint use of the land, however, failed between the two tribes. The relations between the tribes became so tense over the access to sacred religious sites and development on the lands that the Commissioner of the Bureau of Indian Affairs at this time, Robert Bennett, implemented a freeze on any development on the disputed land in 1966. This was termed the "Bennett Freeze" after Commissioner Robert Bennett. The freeze forbade any development on the lands at issue in litigation, including the building of houses, improvement to property, public work projects, power and water lines, publican agency improvements, and associated rights of way.

In 1974, Congress passed the Navajo-Hopi Land Settlement Act. This law established a three member Navajo-Hopi Indian Relocation Commission to manage the relocation of members of the Navajo Nation who were living on the lands set aside for the Hopi Tribe and members of the Hopi Tribe who were living on lands set aside for the Navajo Nation. The 1974 law contemplated that the relocation activities would be fulfilled by 1986, and the cost of providing relocation benefits to approximately 6,000 Navajos eligible for relocation was estimated to be about \$40 million. However, the total cost has exceeded \$500 million.

In 1980, Congress amended the 1974 Navajo-Hopi Land Settlement Act to codify the Bennett Freeze. The goal of the amendment was to not allow any development on the disputed lands with the consent of both tribes. However, the result has been that the Native Americans living in the Bennett Freeze region reside in conditions that have not changed since 1966, and need to be improved. Only three percent of the families affected by the Bennett Freeze have electricity, and only ten percent have running water.

In 2005, the Navajo and Hopi tribes entered into an intergovernmental agreement that resolved all outstanding issues regarding the land in dispute. The intergovernmental agreement clarifies the boundaries of the Navajo and Hopi reservations in Arizona and guarantees access to protected religious sites of both tribes. The agreement also puts an end to the ban on development on the disputed lands. The agreement was approved by the Secretary of the Interior in November 2006. Therefore, there is no additional need for the Bennett Freeze. Both the Navajo and Hopi tribes support this legislation to repeal section 10(f) of Public Law 93-531, the

Bennett Freeze. Further, the Department of the Interior supports this bill.

LEGISLATIVE HISTORY

S. 531 was introduced in the Senate by Senator John McCain (R-Ariz.) on February 8, 2007. At a business meeting of the Committee, held on June 19, 2008, the Committee on Indian Affairs ordered S. 531 to be reported favorably without an amendment.

SECTION-BY-SECTION ANALYSIS

Section 1 is the only section of S. 531. Section 1 repeals section 10(f) of Public Law 93-531 (25 U.S.C. 640d-9(f)).

COMMITTEE RECOMMENDATION

The Committee on Indian Affairs held an open business meeting to consider S. 531, and other matters, on June 19, 2008. During the business meeting, the Committee voted, by a voice vote of a quorum present, to report S. 531 favorably to the full Senate, without amendment.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 531 as calculated by the Congressional Budget Office is set forth below:

S. 531—A bill to repeal section 10(f) of Public Law 93-531, commonly known as the “Bennett Freeze”

S. 531 would repeal a provision of law, known as the Bennett Freeze, that imposed a ban on construction on certain lands occupied by the Navajo Nation and the Hopi Tribe in Arizona. CBO estimates that implementing S. 531 would have no significant impact on the federal budget. Enacting S. 531 would not affect direct spending or revenues.

S. 531 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

In 1966, the Commissioner of the Bureau of Indian Affairs placed a construction ban on certain lands in northern Arizona due to a longstanding ownership dispute between the Navajo Nation and the Hopi Tribe. The freeze, which prohibited any additional housing development and restricted repairs on existing dwellings, was codified into law in 1980 and limited construction until litigation between the tribes was resolved. In 2006, the Secretary of the Interior and the tribes signed an agreement resolving the land dispute. Enacting S. 531 would be the final requirement to repeal the Bennett Freeze.

The tribes would likely seek funding from the Bureau of Indian Affairs and Department of Housing and Urban Development for housing construction; those resources are subject to the availability of appropriated funds, and S. 531 would not authorize funding for those activities. Therefore, CBO estimates that implementing the bill, by itself, would have no significant impact on the federal budget.

The CBO staff contact for this estimate is Leigh Angres. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 531 will have a minimal, if any, impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The only executive communication received by the Committee from the Executive Branch was oral and written testimony provided by Mr. Jerry Gidner, Director for the Bureau of Indian Affairs at the Department of the Interior to the Committee on Indian Affairs on May 15, 2008. In his testimony Mr. Gidner testified that the Department supports S. 531 and noted that on November 3, 2006, Secretary of the Interior, Dirk Kempthorne, Navajo Nation President Joe Shirley, Jr. and Hopi Vice Chairman Todd Honyaoma signed a historic Navajo-Hopi Intergovernmental Compact, resolving a 40-year-old conflict over tribal land in north-eastern Arizona. Mr. Gidner's full testimony is available in the Committee records for the hearing.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 531, as reported, are shown as follows: existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman. Enactment of S. 531 would make the following changes to existing law:

Public Law 93-531

AN ACT Relating to the conflicting rights of the Navajo and Hopi tribes of Arizona.

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(e) TRIBAL JURISDICTION OVER PARTITIONED LANDS.—

(1) Lands partitioned pursuant to this subchapter, whether or not the partition order is subject to appeal, shall be subject to the jurisdiction of the tribe to whom partitioned and the laws of such tribe shall apply to such partitioned lands under the following schedule:

(A) Effective ninety days after July 8, 1980, all conservation practices, including grazing control and range restoration activities, shall be coordinated and executed with the concurrence of the tribe to whom the particular lands in question have been partitioned, and all such grazing and range restoration matters on the Navajo Reservation lands shall be administered by the Bureau of Indian Affairs Navajo Area Office and on the Hopi Reservation lands by the Bureau of Indian Affairs Phoenix Area Office, under applicable laws and regulations.

(B) Notwithstanding any provision of law to the contrary, each tribe shall have such jurisdiction and authority over any lands partitioned to it and all persons located thereon, not in conflict with the laws and regulations referred to in paragraph (A) above, to the same extent as is applicable to those other portions of its reservation. Such jurisdiction and authority over partitioned lands shall become effective April 18, 1981.

The provisions of this subsection shall be subject to the responsibility of the Secretary to protect the rights and property of life tenants and persons awaiting relocation as provided in subsections (c) and (d) of this section.

[(f) DEVELOPMENT OF LANDS IN LITIGATION, EXCEPTION.—

[(1) Any development of lands in litigation pursuant to section 640d-7 of this title and further defined as "that portion of the Navajo Reservation lying west of the Executive Order Reservation of 1882 and bounded on the north and south by westerly extensions, to the reservation line, of the northern and southern boundaries of said Executive Order Reservation," shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. "Development" as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

[(2) Each Indian tribe which receives a written request for the consent of the Indian tribe to a particular improvement, construction, or other development on the lands to which paragraph (1) applies shall respond in writing to such request by no later than the date that is 30 days after the date on which the Indian tribe receives the request. If the Indian tribe refuses to consent to the improvement, construction, or other development, the response shall include the reasons why consent is being refused.

[(3)(A) Paragraph (1) shall not apply to any improvement, construction, or other development if—

[(i) such improvement, construction, or development does not involve new housing construction, and

[(ii) after the Navajo tribe or Hopi Tribe has refused to consent to such improvement, construction, or development (or after the close of the 30-day period described in paragraph (2), if the Indian tribe does not respond within such period in writing to a written request for such consent), the Secretary of the Interior determines that such improvement, construction, or development is necessary for the health or safety of the Navajo Tribe, the Hopi Tribe, or any individual who is a member of either tribe.

[(B) If a written request for a determination described in subparagraph (A)(ii) is submitted to the Secretary of the Interior after the Navajo Tribe or Hopi Tribe has refused to consent to any improvement, construction, or development (or after the close of the 30-day period described in paragraph (2), if the Indian tribe does not respond within such period in writ-

ing to a written request for such consent), the Secretary shall, by no later than the date that is 45 days after the date on which such request is submitted to the Secretary, determine whether such improvement, construction, or development is necessary for the health or safety of the Navajo Tribe, the Hopi Tribe, or any individual who is a member of either Tribe.

[(C) Any development that is undertaken pursuant to this section shall be without prejudice to the rights of the parties in the civil action pending before the United States District Court for the District of Arizona commenced pursuant to section 640d-7 of this title, as amended.]

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