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Declaring that the Mineral Rights in Certain Lands Acquired by the United States in Connection with the Garrison Dam and Reservoir Project are Held in Trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for Other Purposes.

United States Congress

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DECLARING THAT THE MINERAL RIGHTS IN CERTAIN LANDS ACQUIRED BY THE UNITED STATES IN CONNECTION WITH THE GARRISON DAM AND RESERVOIR PROJECT ARE HELD IN TRUST FOR THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, AND FOR OTHER PURPOSES

SEPTEMBER 18 (legislative day, SEPTEMBER 17), 1984.—Ordered to be printed

Mr. ANDREWS, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2480]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2480) to declare that the mineral rights in certain lands acquired by the United States in connection with the Garrison Dam and Reservoir project are held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

1. On page 5, line 13, after the word "lands," insert "within the exterior boundaries of the reservation."

2. On page 5, line 24, after the word "counterclaim," add a new section:

> SEC. 8. To the extent that there are net proceeds from the development of any mineral interests described in Section 2(a) of this Act, in excess of $300,000, the Three Affiliated Tribes of the Fort Berthold reservation shall reimburse the United States fixed sum of $300,000 from such proceeds. This reimbursement shall be deemed full reimbursement for any and all payments from the United States that the Three Affiliated Tribes received for the mineral estate, or any portion thereof, described in Section 2(a) of this Act.

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PURPOSE

The purpose of S. 2480 is to declare that the United States holds mineral rights in approximately 154,000 acres of land in trust for the Three Affiliated Tribes of the Fort Berthold Reservation. These lands were acquired by the Department of the Army, Corps of Engineers from members of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota for construction of the Garrison Dam and Reservoir project under the authority of the Flood Control Act of 1944.

BACKGROUND AND NEED

History of acquisition

In 1947, Congress authorized the Corps of Engineers to negotiate a contract with the Three Affiliated Tribes to provide cash compensation for the land to be taken for the Garrison project, and appropriated $5.1 million for that purpose. In the face of on-going construction, the tribes did negotiate a contract with the Corps providing compensation of $5.1 million and additional sums as required. The proposed contract would also have reserved numerous rights to the tribes, including reservation of mineral rights in lands to be acquired. Congress did not accept or ratify the negotiated contract, but instead simply increased the monetary figure to $12.5 million and made no mention of the contract. The $12.5 million was offered in exchange for "all right, title and interest" in the 154,000 acres (approximately $81 per acre) and covered all expenses involved in the taking, including costs of relocation and full satisfaction of all claims arising out of the Act. The total paid for mineral rights is claimed to be only $68,000. (*See*, Schedule of Appraisal for Garrison Taking.

Immediately following authorization of the Garrison Dam project, the Corps began the process of land acquisition, beginning with lands nearest the dam site, south of the reservation, and continuing upstream through and beyond the reservation. In 1951, midway through the land acquisition process and after the tribes had agreed to accept the $12.5 million settlement, major oil discoveries were made in the Williston Basin, a geologic area covering the eastern half of Montana, most of North Dakota, and the southwestern part of South Dakota. The largest of the 1951 oil finds was in Beaver Lodge, North Dakota, not far from the Fort Berthold Reservation.

Change in mineral acquisition policy

Subsurface interests suddenly became valuable and costs of condemnation rose commensurately. At this point, the Corps determined that it did not need ownership of subusrface minerals to operate the project. Henceforth, the Corps declined to purchase subsurface minerals if the owner objected or the price demanded was too high. This policy change was formalized in a Joint Policy Statement of the Department of the Interior and the Department of Defense on October 12, 1953, and later modified in 1962, and now provides for acquisition only of flowage easements except where necessary for Project purposes.

From 1954 to 1962, the United States acquired reservation lands from five other Missouri River Tribe for projects authorized by the Flood Control Act of 1944: Lower Brule Sioux, Crow Creek Sioux, Standing Rock Sioux, Cheyenne River Sioux, and Yankton Sioux. With respect to each of these Tribes, the per acre value paid was comparable to or exceeded that paid the Three Affiliated Tribes or their members. However, the mineral rights of these Tribes or their members were either reserved or restored.

In 1957, the House of Representatives' Committee on Government Operations held comprehensive hearings on the Army-Interior Reservoir Land Acquisition Policy, including the 1953 Joint Policy under which the Corps of Engineers first began to acquire flowage easements rather than fee simple title. In its report, the Committee stated:

> The application of the joint (1953) policy to projects where land acquisition was only partially completed has resulted in gross discrimination between owners whose lands the Corps had already acquired and owners of other lands where the purchase or condemnation proceedings had not yet been completed. (H. Rept. 85–1185, 1st Sess., p. 4).

Again, the Committee stated:

> Among the deplorable features of the joint policy have been the inequities resulting from its application at projects where the Corps' land-acquisition program had been only partially completed. Since the Corps does not have general authority to reconvey lands to former owners, application of the policy at such projects has meant that those whose lands were acquired in fee under the old policy no longer have any interest, whereas adjoining landowners, where purchase or condemnation proceedings had not then yet been completed, were allowed to retain fee title subject only to the flowage easement. (*Id.*, p. 32).

The Corps of Engineers has repeatedly taken the position that exploitation of oil and gas is not necessarily incompatible with project operations. In a letter to Senator Clinton Anderson. Chairman of the Senate Committee on Interior and Insular Affairs, dated May 10, 1962, this position was stated by General Elvis J. Stahr, Secretary of the Army. A similar position was taken by the Corps in legislation before this Committee in the 97th Congress providing for acquisition of a subordination of mineral rights of the Osage Tribe in the Skiatook Dam Reservoir in Oklahoma. (Hearing on S. 1370, dated November 23, 1981; Testimony of William J. Cronin, Chief, Legislative Services Office, Department of the Army).

Current mineral activity

The Fort Berthold Reservation has been the site of considerable exploration, and some development, of oil and gas, over the past years. Virtually, all of the Reservation part of Lake Sakakawea is under lease, and in the Lake and along its shorelines within the Reservation private companies recently have conducted about 500 miles of seismic exploration. The accumulated data appear to reveal the

presence of some oil and gas, but there has not yet been any drilling in the Reservation part of the lake. On the remainder of the Reservation, outside the taking area, there are about 24 exploratory wells which have been drilled within the past four years, seven of which have been brought into production. Three of these wells have since been abandoned.

LEGISLATIVE HISTORY

S. 2480 was introduced by Senator Andrews, for himself, and Senator Burdick, on March 27, 1984, and was referred to the Select Committee on Indian Affairs for consideration. A hearing was held by the Committee on June 21, 1984. There is no companion bill in the House of Representatives. The Select Committee on Indian Affairs held a business meeting on September 11, 1984, at which time, by unanimous vote of a quorum present, it ordered the bill reported favorably, with amendments.

AMENDMENTS

The Select Committee on Indian Affairs, at its business meeting on September 11, 1984, ordered S. 2480 reported with amendments. These amendments are set forth in full at the beginning of this report. Their purposes are explained in the Section-by-Section Analysis that follows.

SECTION-BY-SECTION ANALYSIS

Section 1. Sets forth the title to this Act.

Section 2. Provides that the mineral estate in the land located within the reservation boundaries of the Fort Berthold Indian Reservation acquired by the United States for the Garrison Dam and Reservoir project, with the exception of the lands commonly known as the Homestead District, described with specificity in this section, shall be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Indian Reservation.

Section 3. Provides that any development, exploration, production, or extraction of minerals with respect to the mineral estate conveyed by this Act, shall be conducted in accordance with regulations that the Secretary of the Army shall prescribe either to protect the Garrison Dam and Reservoir or to carry out the purposes of such dam and reservoir.

Section 4. This provision provides that any rights, interests or claims held by anyone other than the United States prior to the enactment of this Act shall not be terminated by this Act. Further, any lease, license or permit or contract pertaining to the mineral estate transferred by this Act may be renewed or extended only if the party of interest had a right to renew or extend prior to the enactment of this Act, such party exercises such right, and the governing body of the Three Affiliated Tribes of the Fort Berthold Reservation approves of such renewal or extension. Further, all royalties, rentals and other payments with respect to any mineral interest conveyed by this Act, accruing to the United States after the enactment of this Act shall be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Indian Reservation.

Section 5. Amends a 1962 Act (P.L. 87–695), pertaining to grazing rights on the Fort Berthold Reservation, to provide that the grazing rights of the Three Affiliated Tribes shall be extended to all portions of the reservation, whether or not previously Indian-owned, except for that portion of the reservation known as the Homestead District, as described with specificity in Section 2 of the Act.

Section 6. Provides that the Secretary of the Army and the Department of the Interior may enter into agreements transferring Indian trust land to the Garrison Dam and Reservoir project in exchange for lands held by the Secretary of the Army within the reservation boundaries that are no longer needed for the Garrison Dam and Reservoir project. Agreements transferring tribal lands would require the approval of the governing body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; and, that agreements transferring individual trust lands would require the approval of the individuals holding a majority of the beneficial interest in such land. It is further provided that the Secretary of the Army may transfer to the Secretary of the Department of the Interior lands within the reservation boundaries no longer needed for the Garrison Dam and Reservoir project to be held by the United States in trust for the Three Affiliated Tribes of the Fort Berthold Indian Reservation.

Section 7. Provides that the restoration of the mineral estate in this Act shall not be considered a gratuitous offset or counterclaim against any award made to the Three Affiliated Tribes of the Fort Berthold Indian Reservation in any claim against the United States.

Section 8. Provides that the Three Affiliated Tribes shall reimburse the United States a fixed sum of $300,000 from the future proceeds of the mineral estate provided that such proceeds exceed $300,000. The amount of reimbursement reflects a Committee finding of the value of all payments received by the Three Affiliated Tribes whether at the time of the taking or in subsequent claims judgments, plus simple interest of five (5) percent.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, at its business meeting on September 11, 1984, by a unanimous vote, a quorum being present, recommended that the Senate pass S. 2480, as amended.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 2480, as amended, as provided by the Congressional Budget Office is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 14, 1984.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2480, the Fort Berthold Reservation Mineral Restoration Act, as amended and ordered reported by the Senate Select Committee on Indian Affairs, September 11, 1984.

We expect that no additional cost to the federal government, or to state or local governments, would be incurred as the result of enactment of this legislation. S. 2840 declares that the United States holds mineral rights in approximately 154,000 acres of land in trust for the Three Affiliated Tribes of the Fort Berthold Reservation. To the extent that there are any net profits in excess of $300,000 from the development of these mineral rights, the tribes shall pay the United States $300,000 and retain any remaining profits. The government is current receiving no income from these mineral rights, and none is projected in the next few years.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES BLUM
(For Rudolph G. Penner).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate require 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. 2480 will have no impact on regulatory or paperwork estimates.

EXECUTIVE COMMUNICATIONS

The Select Committee on Indian Affairs received the following statement from the Department of Justice:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, August 2, 1984.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on S. 2480, a bill, "To declare that the mineral rights in certain lands acquired by the United States in connection with the Garrison Dam and Reservoir project are held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation, and for other purposes." The Department of Justice opposes enactment of this legislation.

S. 2480 provides that all mineral interests in certain lands located within the taking areas of the Garrison Dam and Reservoir project are to be held in trust for the Three Affiliated Tribes of the Fort Berthold Reservation with the exception of the lands listed in Section 2(b) of the bill. These mineral interests have been compensated for by legislation authorizing the Garrison Dam and Reservoir project and have also been the subject of extensive litigation against the United States. This litigation terminated with the beneficiaries of this legislation receiving compensation for their claims. Set forth below is a summary of these events.

I. PREVIOUS LEGISLATION AND LITIGATION

The Act of October 29, 1949, 63 Stat. 1026, authorized payment for the value of minerals underlying the lands within the taking area of the Garrison Dam and Reservoir. Pursuant to this Act, compensation was paid to the Three Affiliated Tribes.

Subsequently, a "general accounting" case was filed in the Indian Claims Commission under the Indian Claims Commission Act, 25 U.S.C. 70 *et. seq. Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, *Docket No.* 350–G. A "general accounting" case typically involves claims that the government mismanaged tribal funds and natural resources. The Three Affiliated Tribes of the Fort Berthold Reservation contended that the Act of June 1, 1910, 36 Stat. 455, the Act of August 1, 1910, 38 Stat. 681, and the Joint Resolution of April 3, 1912, 37 Stat. 681, imposed upon defendant a duty to reserve to their ownership all coal deposits which might underlie: (1) the homestead lands sold pursuant to the 1910 Act; (2) lands allotted pursuant to the Act of March 1, 1907, 34 Stat. 1015, 1042 and the 1910 Act; and (3) school lands granted to the State of North Dakota pursuant to the 1910 Act; and that defendant breached this duty. Plaintiff also alleged that the government mismanaged its range lands and its tribal funds.

During the course of the litigation, the defendant United States was served with the report of plaintiff's mineral expert which asserted that coal deposits underlying 500,943 acres of land were lost to the plaintiff. Of this total 204,604 acres were homestead land; 266,857 acres were allotted land; and 29,482 acres were school land. Of this total the report states that 76,222 acres were within the taking area of the Garrison Dam and Reservoir. Furthermore, of this 76,222 acres, the report states that 29,511 acres were originally "homestead" land and 46,711 acres were originally "allotted" land.

Plaintiff contended it was entitled under "the fair and honorable dealings" clause of the Indian Claims Commission Act to have all Reservoir valued as of June 30, 1979 (*i.e.*, a "modern" date). The 76,222 acres *within* the taking area of the Garrison Dam and Reservoir, plaintiff argued, should be valued as of March 5, 1950 (*i.e.*, the date when the Three Affiliated Tribes accepted the provisions of the Act of October 29, 1949, 63 Stat. 1026, which set forth the conditions for vesting of title to the taking area in the United States). The rationale for using this date was that if ownership of the coal deposits underlying the 76,222 acres had been reserved to the plaintiff, ownership would have been retained until March 5, 1950. The total taking area of the Garrison Dam and Reservoir was approximately 155,000 acres. Plaintiff's claim of failure to reserve ownership of coal deposits was, by definition, applicable to 76,222 acres at an absolute maximum. The claim did not apply to the remaining acreage within the taking area (*i.e.*, the remainder of the 155,000 acres).

In 1980, the parties negotiated a settlement covering all claims in the litigation. Moreover, during settlement negotiations plaintiffs offered to drop any claim with respect to coal deposits underlying lands which were allotted pursuant to the 1907 Act. A total of 50,157 acres was allotted under the 1907 Act. Of this 50,157 acres, 10,909 acres were within the taking area of the Garrison Dam and Reservoir, according

to plaintiff's mineral expert. The parties agreed that all coal whose ownership had not been reserved to the plaintiff (*i.e.*, all coal deposits underlying the homestead, allotted and school lands at issue) should be valued at $6.41 per acre for settlement purposes.

On May 29, 1981, a final judgment in the amount of $10,250,000 was entered in Docket No. 350–G by the Court of Claims pursuant to the settlement. Notably, the stipulation for entry of final judgment stated that "entry of final judgment in the above amount [$10,250,000] shall finally dispose of all claims and demands which were asserted or could have been asserted by plaintiff against defendant under the provisions of the Indian Claims Commission Act."

II. S. 2480

If S. 2480 were to be enacted, all mineral rights within the taking area of the Garrison Dam and Reservoir (except for the lands listed in Section 2(b) would be held in trust for the Three Affiliated Tribes. It is our understanding that the principal mineral underlying the taking area is lignite. The excepted lands listed in Section 2(b) of S. 2480 were homestead lands. As noted in the Claims Court litigation, plaintiff claimed damages for loss of lignite underlying 76,222 acres within the taking area of the Garrison Dam and Reservoir. Of this 76,222 acres, 29,511 acres were (according to the report of plaintiff's mineral expert) homestead land. Accordingly, S. 2480 would not operate so as to secure the mineral rights in this 29,511 acres to the Three Affiliated Tribes. The remaining 46,711 acres within the taking acres were "allotted" land. It appears that only about 80 acres of this 46,711 acres is excluded from the operation of S. 2480. Accordingly, the bill would operate so as to secure the mineral rights in 46,631 of the 46,711 acres to the Three Affiliated Tribes.

The Department's serious reservations and opposition to this legislation emanate from the original payment made by the United States under the Act of October 29, 1949, 63 Stat. 1026, and the extensive litigation and subsequent settlement and payment by the United States for the mineral rights in question. To permit continuous efforts to seek redress upon claims which have been litigated in the courts, and for which the United States has paid compensation, is contrary to sound policy. Sound reason counsels that the ability to seek redress should at some point terminate, most appropriately when the party seeking redress has accepted a payment of this claim. The expenditures of substantial resources by the United States in conducting the litigation and paying the settled claims should result in the claims being put to rest. Otherwise, the procedure which Congress has established to assert claims of this nature is redundant. The expenditures by the government are, after all, revenues raised through taxes. Not only is it necessary to adhere to this sound policy of present law, but enactment of S. 2480 would be fundamentally unfair to others who accept settlements and do not continue to seek additional avenues of redress.

Moreover, the Indian Claims Commission Act certainly did not contemplate that an Indian tribe which had received an award for loss of certain property would subsequently be entitled to have Congress restore ownership of the very same property to the tribe in total disregard of the prior judgment on behalf of the tribe to compensate it for loss of this property. This operative effect of the settlement should

not be ignored. At a minimum, fairness to the government requires that there be reimbursement to the government of money paid in the litigation for the coal deposits underlying 46,631 of the 46,711 acres of allotted lands within the taking area, with a calculation of appropriate interest. Pursuant to the settlement the plaintiff was, in effect, paid for all 46,711 acres of coal because the $10,250,000 judgment was in payment for all claims which were asserted or could have been asserted. In addition, repayment with interest should be required to the government of the amount paid to the Three Affiliated Tribes for mineral values within the taking area pursuant to the Act of October 29, 1949, 63 Stat. 1026.

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

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

COMMITTEE COMMENT

Amendment number 2 adopted at mark-up on September 11, 1984, constituting Section 8 of the Act responds to the Justice Department concerns, and should eliminate the objection. Testimony at the Committee's hearing from the Department of the Interior indicated that but for the concern expressed by the Department of Justice, it supported the legislation.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of the rule XXVI of the Standing Rules of the Senate, the Committee states as follows: It is the opinion of the Committee that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

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