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**Excerpts from the US Congressional Record Regarding
Amendments Proposed by US Senator Joseph C. O'Mohoney
Related to the Taking of Land From the Three Affiliated Tribes of
the Fort Berthold Reservation for the Garrison Dam Project,
December 15, 1945**

US Congress

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CONGRESSIONAL RECORD—SENATE

The next amendment was, under the subhead "Flood control," on page 56, line 24, after the numerals "1946", to strike out "\$81,759,000" and insert "\$84,259,000"; and in line 25, after the word "expended", to strike out "Provided, That no part of this appropriation shall be available for constructing the Garrison (North Dakota) Reservoir beyond dimensions which would provide for a higher pool elevation than 1,830 feet or for constructing dikes or levees which would provide for a higher pool elevation than 1,830 feet for operating such dam" and insert "Provided, That no part of the appropriation for the Garrison Reservoir herein contained may be expended for actual construction of the dam itself until suitable land found by the Secretary of the Interior to be equal in quality and sufficient in area to compensate the Three Affiliated Tribes shall be offered to the said tribes in exchange for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam."

Mr. BYRD. Mr. President, I should like to ask the Senator from Tennessee to read a list of those projects.

Mr. McKELLAR. There are quite a number of them. Would the Senator be satisfied to have them placed in the RECORD, or would the Senator rather have them read?

Mr. BYRD. It would be very interesting to have them read to the Senate.

Mr. McKELLAR. There is a page or more of them, and I shall put them in

the RECORD, if the Senator does not object.

At this point, Mr. President, I ask unanimous consent to place in the RECORD a list of the several projects, as set forth on pages 11232 and 11233 of the CONGRESSIONAL RECORD of November 27, 1945.

There being no objection, the list was ordered to be printed in the RECORD, as follows:

Data on flood-control reservoirs, including power-generating facilities

The supplemental estimates include 56 reservoir projects, of which the following 13 reservoirs include power-generating facilities:

Project	Total estimated Federal cost of project	Initial power installation (kilowatts)	Estimated cost of power features
Buggs Island Reservoir, Va. and N. C.	\$30,960,000	85,500	\$5,660,000
Clark Hill Reservoir, Ga. and S. C.	35,300,000	160,000	11,005,000
Allatoona Reservoir, Ga.	17,400,000	66,000	3,220,000
Narrows Reservoir, Ark.	6,470,000	17,000	1,253,000
Blakely Mountain Reservoir, Ark.	11,080,000	42,000	2,647,000
Norfolk Reservoir, Ark.	27,500,000	70,000	4,676,000
Bull Shoals Reservoir, Ark.	47,000,000	126,000	6,171,000
Denison Reservoir, Tex. and Okla.	59,315,000	70,000	8,094,000
Fort Gibson Reservoir, Okla.	21,435,000	45,000	6,914,000
Garrison Reservoir, N. Dak.	130,000,000	80,000	5,900,000
Wolf Creek Reservoir, Ky.	52,000,000	135,000	9,522,000
Dale Hollow Reservoir, Tenn. and Ky.	22,739,000	36,000	5,075,000
Center Hill Reservoir, Tenn.	25,400,000	90,000	6,200,000

NOTE.—Based on power market studies made by the Federal Power Commission there is need for power at all of these projects.

Mr. GURNEY. Mr. President, I wish to say that contained in the \$84,000,000 appropriation is an item of \$2,000,000 which is appropriated for the purpose of actually starting construction of the first

of the large Missouri River dams authorized in the Flood Control Act of 1944. The money will not be used for the pouring of concrete, but to get ready to pour concrete. This appropriation is not the first one. The first one was, of course, for engineering services; and other appropriations to the Bureau of Reclamation have been made for the dam known as the Garrison Dam, in North Dakota, and for some of the dams in my own State of South Dakota. Those appropriations have been used for preliminary engineering services, on the part both of the Army engineers and the Bureau of Reclamation. So this \$2,000,000 appropriation will provide for the commencement of construction.

We have had much information on the floor of the Senate and in committee about the total cost of these worth-while flood-control-irrigation dams. I am sure that with this start of construction at the Garrison Dam there will be a subsequent request by the Army engineers for a larger amount of funds in the regular appropriation bill which will come before the Congress next spring. I agree with the Senator from Arkansas when he says that these projects are worth while. They certainly are worth the money which Uncle Sam spends on them; and we who live in the Dakotas and, I am sure, the people in other States along the Missouri River deeply appreciate the support which the Congress has given by passing the authorization measures. We express our thanks now for making a beginning by providing funds in accordance with the requests which have come from the Army engineers and the Bureau of Reclamation at this time.

The PRESIDING OFFICER. The question is on agreeing to the amendment on page 56, in line 24.

The amendment was agreed to.

Mr. YOUNG. Mr. President, I should like to add a word to what has been said by the able Senator from South Dakota. This project in North Dakota—the Garrison dam and resultant irrigation—will not merely provide jobs during the period following the war, especially jobs for servicemen, but it will stabilize the entire agriculture of North Dakota. That section of the United States is subject to periodical droughts which have occurred throughout our history. In 1934 there was an extremely serious drought which forced our people to sell most of their livestock. If at that time we had had an irrigation project similar to the one provided for by the item which has been under discussion here, our people could have produced enough forage to enable them to keep their herds, and thus it would not have been necessary for so many of our people to go on relief. Shortly after the 1934 drought, 53 percent of the people of North Dakota were on relief. Following that time, during the

war we were able to pay off most of the feed and seed loans, at 5-percent interest while ranking first of all States in reaching our E-bond quotas in four bond drives, and we produced more than a billion bushels of small grain and potatoes and nearly 10,000,000 head of livestock. Once again we were able to stabilize our

agricultural operations. That extreme variation would not have occurred at all if we had had available irrigation facilities similar to the ones which the appropriation under discussion provides, and would also provide for the generation of vast amounts of cheap electricity so sorely needed by the farmers of North Dakota.

Mr. O'MAHONEY. Mr. President, in connection with the Garrison Reservoir I ask unanimous consent to have printed in the RECORD at this point pages 301 to 308, both inclusive, and pages 336 to 338, both inclusive, from the hearings upon this item which is intended for the protection of the Three Affiliated Tribes on the Fort Berthold Reservation.

There being no objection, the matter referred to was ordered to be printed in the RECORD, as follows:

TESTIMONY BEFORE SENATE INDIAN AFFAIRS COMMITTEE ON POSITION OF INDIANS ON GARRISON RESERVOIR PROJECT

Senator O'MAHONEY. Mr. Chairman, may I make a brief statement supplementing what I said a little while ago?

Senator McKELLAR. Certainly, Senator.

Senator O'MAHONEY. I have here a brief statement of what occurred before the Committee on Indian Affairs. It appears from the testimony of Mr. Martin T. Cross, a member of the Gros Ventre Tribe, and chairman of the Tribal Business Council of the Three Affiliated Tribes, which are the Arikara, Mandan, and Gros Ventre Tribes.

Mr. Cross testified that there are in this reservation approximately 600,000 acres of

land, of which 221,000 acres would be flooded by the Garrison Dam.

In response to a question which I addressed to Mr. Cross with respect to where the Indians lived, he told me that they have about 500 homes on the reservation, and that of those 500 homes 437 would be inundated.

The chairman of this committee remembers very well the state of mind of the people in a historic town in Tennessee, when a dam was to be constructed by the Tennessee Valley Authority, which would have flooded out an area in which they lived and a cemetery in which they buried their dead. The Senator from Tennessee and the people from this town yielded finally only on the persuasion that the construction of that dam was essential to the prosecution of the war.

Senator McKELLAR. That is the only thing in the world that brought it about.

Senator O'MAHONEY. The feeling of the people in this town was akin to the feeling that is expressed by these Indians.

Now, Mr. Chairman, Mr. Martin Fox declared in that hearing—and I am quoting Mr. Fox:

"Years ago, back in 1851, the United States commissioned a number of men to come up and meet us at Fort Laramie, Wyo. We had representatives there and we drew up obligations and agreements and declarations between the United States Government and ourselves. Those agreements and declarations and treaties are still binding with us."

"If there is anything that needs to be amended or needs to be modified in those agreements, it is the people themselves—the soldiers—who should remedy this, if anything comes up. Violations of the treaty have been made, not by this group of men, but by the War Department, and I wonder if the War Department," and I am quoting, General Wheeler.

General WHEELER. All right.

Senator O'MAHONEY. All right.

"I wonder if the War Department is not a little touched in the head."

That is what the Indian said.

He said further:

"All the original declarations and treaties were made between the military personnel and the Indians. I maintain that they are still binding, and I am opposed to this plan."

STUDY OF STATUS OF INDIAN-TREATY OBLIGATIONS

The chairman of the committee then called upon the Assistant Solicitor of the Department of the Interior, who was there representing the Bureau of Indian Affairs, to submit a memorandum to the committee on the status of the treaty obligations; not having had the opportunity to examine the treaty, the members of the committee felt that it would be well to have a summary of that kind.

I do not intend to make this summary a part of the record, Mr. Chairman, but let me say briefly that it tells this story. That treaties were made with those Indians as far back as 1825, in which the United States recognized this general area as the country of the Indians. To quote the Acting Solicitor:

"Treaties made with the tribes in 1825 referred to the lands which they occupied as 'their country.'"

It was also provided that the Indians agreed to "give safe conduct to all persons who may be legally authorized by the United States to pass through their country."

Now, the boundaries of what was thus referred to as "their country" embraced lands concerning which we are talking about today. It was a large territory which involved millions of acres of land—about 10,000,000 acres, all told.

There were Executive orders, and I find that these Executive orders were not the product of the New Deal, but this language on these orders was employed many years before, in reference to the Indians.

And by an Executive order dated August 8, 1868, one dated April 12, 1870, and one dated July 13, 1880—

Senator OVERTON. That was all under Republican administrations?

Senator O'MAHONEY. I think so.

SUIT BY INDIANS OF NORTH DAKOTA AGAINST THE FEDERAL GOVERNMENT

The interpretation of the order was strict. The lands given to the Indians were diminished by some 9,846,186.93 acres of land.

Senator GURNEY. That is when the Indians of North Dakota filed a suit against the Government.

Senator O'MAHONEY. Yes; the Indians filed a suit, and Congress authorized them to do it, in the Court of Claims, on the theory that they had been damaged by the taking away of their land, and the Court of Claims held that the Indians were entitled to get back the value of the 9,846,186.93 acres of land.

Senator OVERTON. Why did not the Court of Claims allow them to take back their land?

JUDGMENT RENDERED BY COURT OF CLAIMS

Senator O'MAHONEY, Senator OVERTON, I do not know, but it may be that they did not want to take it away from the South Dakotans. The Court of Claims rendered a judgment that the Indians were entitled to recover the value of this land, to the extent of \$4,923,093.47. How they figured that 47 cents I do not know.

Now, in 1891 this question arose again, and again the question of the title of the Indians to these lands was recognized when a treaty was negotiated between the United States and the Three Affiliated Tribes, providing for the cession to the Federal Government of certain lands not needed by the Indians, and for which the Government was to pay the Indians \$800,000.

PROTECTION OF CERTAIN NONCEDED LANDS OF FORT BERTHOLD RESERVATION

Now, when the result of this treaty was promulgated—and it was promulgated by President Benjamin Harrison—he said this:

"I particularly notify all persons to observe that a certain portion of the said Fort Berthold Reservation not ceded," and that includes the 274,000 acres which would be flooded by the Garrison Dam "not ceded and relinquished by said agreement, is reserved for allotment to, and also as a reservation for, the said tribe of Indians; and all persons are, therefore, hereby warned not to go upon any of the lands so reserved, for any purpose or with any intent whatsoever, as no settlement or other right can be secured upon said lands, and all persons found unlawfully thereon will be dealt with as trespassers and intruders."

TREATY OF FORT LARAMIE WITH THE INDIANS

Now, in that famous treaty of Fort Laramie, when the Indians agreed to give the right of passage across their country, they authorized the United States to "establish roads, military and other posts"—and I am now quoting, Mr. Chairman, "to establish roads, military and other posts, within their respective territories."

That treaty, Mr. Chairman, has been in force, and it was a right that was granted by the Indians to the Federal Government.

EFFECT OF CONSTRUCTION OF GARRISON DAM ON INDIAN LANDS

That, Mr. Chairman, in brief, is the story which was told by the Indians to the Committee on Indian Affairs about the treaty made at the Fort Laramie Reservation.

It seems to me to be clear that when we appropriate this money to build this dam we will be taking the land of these Indians, and be subjected to another lawsuit, even if we insist upon disregarding the wishes of the Indians not to be compelled to leave their homes. There would be a very interesting legal question here involving just what the Indians could do to protect their rights.

They may sue the Chief of Engineers, General Wheeler, or the Secretary of War, to enjoin them from building the dam; or they might wait until condemnation proceedings are instituted—and the Indians deny that under the treaty we have any right to condemn—and then, after condemnation proceedings are begun, they might seek to defend that in the courts.

I think it is my duty, as chairman of the Committee on Indian Affairs, to lay before this committee the very serious question of the alleged invasion of the rights of the Indians by the construction of this dam.

Senator LANGER. And it will flood their lands.

LANDS TO WHICH INDIANS WOULD BE MOVED

Senator O'MAHONEY. Oh, yes; they will have to leave their homes, and they say that the lands constitute the best portion of the reservation; and they will be driven to lands which are not as good grazing lands, and they say that they could not go into any other part of the State of North Dakota which would be as good.

Mr. Chairman, Senator LANGER, who was present at the hearings, calls my attention to a colloquy which took place between myself and Mr. Bateman, a member of the tribal business council, Fort Berthold Indian Reservation. These questions were asked by Senator LANGER of Mr. Bateman:

"Senator LANGER. How many acres of this stuff will you have to have that they are trying to give you, to make a living?"

"Mr. BATEMAN. Well, for my part they would have to give me the whole piece to make a living."

"Senator LANGER. In other words, it is rough land?"

"Mr. BATEMAN. It is rough land."

"Senator LANGER. Buttes on it?"

"Mr. BATEMAN. Yes, sir."

"Senator LANGER. Ravines?"

"Mr. BATEMAN. Ravines."

"Senator LANGER. It is not fit for agricultural purposes at all, is it?"

"Mr. BATEMAN. No, sir."

"Senator LANGER. It would have to be used entirely for grazing?"

"Mr. BATEMAN. Grazing, mostly."

"Senator LANGER. And the land you have now, you have very fine farms?"

"Mr. BATEMAN. Yes, sir."

"Senator LANGER. You have places that are level for miles and miles; is not that true?"

"Mr. BATEMAN. Yes, sir. Grain will grow in dry seasons."

"Senator LANGER. You have subsoil many feet deep of fine chocolate-colored loam?"

"Mr. BATEMAN. Yes, sir."

Senator OVERTON. Mr. Chairman, I want to ask a question.

Senator MCKELLAR. Very well.

Senator OVERTON. Are you opposed to the appropriation?

Senator O'MAHONEY. Not necessarily. This hearing I referred to was held on October 9.

Senator OVERTON. Of what year?

Senator O'MAHONEY. Of 1945.

The counsel for the Bureau of Indian Affairs was not prepared to give us at that time the information with reference to the Indian treaties, and I asked him for this memorandum and I was under the impression that the memorandum was not yet received, but after coming to the hearing room this afternoon I telephoned to the Bureau of Indian Affairs, and I found that it had been submitted. The Committee on Indian Affairs, because of other pressing matters, like hearings before the Committee on Finance, and the Petroleum Committee, has not yet given attention to this matter. I do not want to speak for the committee, but I think the committee does owe an obligation to the Indians to consider this matter and to make a recommendation. I shall endeavor to do that before this matter now before us is taken up.

In the meantime, let me insert in the record here the memorandum submitted by Mr. Cohen, the Acting Solicitor of the Department of the Interior, appearing on pages 20-23 of the hearings held on October 9, 1945.

Senator OVERTON. That may be done.

That record reveals that whenever the Government wanted any of the lands, they took it?

Senator O'MAHONEY. Yes.

Senator OVERTON. And compensated them for it?

Mr. O'MAHONEY. The Indians are the wards of the Government of the United States. They are the beneficiaries of a treaty. The United States today stands before the world urging justice to all people. It seems to me it cannot support a moral position upon that issue unless it deals justly with its own wards, the Indians of the United States.

Mr. YOUNG. I am in entire accord with the thinking of the Senator from Wyoming.

The PRESIDING OFFICER. The next amendment of the committee will be stated.

12297

Senator O'MAHONEY. That is a conclusion but not my statement of fact.
Senator OVERTON. Thank you, Senator.
(The memorandum referred to is as follows:)

"MEMORANDUM SUBMITTED BY FELIX S. COHEN, ACTING SOLICITOR, DEPARTMENT OF THE INTERIOR

"In response to the request of your committee, I am submitting this memorandum supplementing my statement of October 9 and dealing specifically with: (1) The character of the title of land held by the Three Affiliated Tribes of the Fort Berthold Reservation; and (2) the legal means available to the Indians for the possible protection of such land.

"1. THE INDIAN TITLE

"The Three Affiliated Tribes of the Fort Berthold Reservation, comprising the Arikara, Mandan, and Gros Ventre (the last named are also variously referred to as Hidatsa, Minnetaree, or Balantse-Etoa), occupy an area in which they have lived at least since the time of the earliest white contacts with them (Handbook of American Indians, Bureau of American Ethnology, Bull. 30, pt. 1, p. 548). Treaties made with the Three Tribes in 1825 referred to the lands which they occupied as 'their country' and provided that they would 'give safe conduct to all persons who may be legally authorized by the United States to pass through their country.'¹ The boundaries of what was thus referred to as 'their country' were first set forth in the Treaty of Fort Laramie, September 17, 1851 (2 Kappler 594). Article 5 of that treaty provides, in part:

"The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the headwaters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning."

"By this treaty the signatory tribes recognized 'the right of the United States Government to establish roads, military and other posts, within their respective territories.' No other easement or interest was granted to the Federal Government by this treaty.

"Subsequently, by Executive orders dated August 18, 1868, April 12, 1870, and July 13, 1890 (Kappler, vol. 1, p. 683), the territory of these Indians, as originally set out in the Fort Laramie Treaty, was diminished. The land thus taken from the Indians was used in part for governmental purposes and the remainder was disposed of to railroads and individual settlers. This diminution effected unilaterally was later held by the Court of Claims to have been a violation of the possessory rights of these Indians, and on the basis of this decision a judgment was awarded to these Indians in 1930. The Indians were held to be entitled to recover the value of the 9,846,186.93 acres of land taken from them as of the time of the taking, which amounted, at 50 cents per acre, to \$4,923,093.47, less offsets for past Federal expenditures amounting to

¹ Treaty of July 18, 1825, with Ricara Tribe (7 Stat. 259, art. 5); treaty of July 30, 1825, with Balantse-Etoa or Minnetaree Tribe (7 Stat. 261, art. 5); treaty of July 30, 1825, with the Mandan Tribe (7 Stat. 264, art. 5).

\$2,753,924.89, leaving a net judgment in favor of the Indians of \$2,169,168.58.

"The Court of Claims found that the Indians had never given their consent to the action taken under the authority of the Executive orders of 1870 and 1880 and noted their objection when the facts became known to them' (at p. 327). Taking of lands from the Indians, the Court of Claims found, was a violation of the treaty. The treaty of 1851, the court found, provided that—

"The territory of the Indians was to be delimited in accord with their claims and protection assured them within its bounds. * * * Beyond doubt, the Indians so understood the treaty, and the Congress legislated in accord with its amended terms to which the Indians agreed * * *. The Indians' rights are not to be prejudiced by technical construction or words of doubtful import' (at p. 333).

"Because of a delay in submitting to the tribes a minor amendment to the treaty inserted by the Senate, the Fort Laramie treaty was not proclaimed or published in the usual course. Government officials thereafter assumed that no valid treaty existed, and it was in this belief that various portions of the Indian domain were disposed of without Indian consent. The Court of Claims found that the treaty, having been formally ratified, was valid and binding and that the taking of lands without Indian consent subsequent to this treaty was a violation of its terms, justifying the Indian suit.

"In 1891 further recognition was given to the title of the Indians to the lands here in question when an agreement was negotiated between the United States and the Three Affiliated Tribes providing for the cession to the Federal Government of certain lands not needed by the Indians, for which the Federal Government paid \$800,000, and guaranteeing Indian possession of the lands not so ceded. The agreement provides: 'That the residue of lands within said diminished reservation, after all allotments have been made as provided in article 3 of this agreement, shall be held by the said tribe of Indians as a reservation.'² The significance of this guaranty is elaborated in the Presidential proclamation which followed the ratification of this agreement. That proclamation declared:

"I furthermore notify all persons to particularly observe that a certain portion of the Fort Berthold Reservation not ceded and relinquished by said agreement, is reserved for allotment to, and also as a reservation for, the said tribes of Indians; and all persons are, therefore, hereby warned not to go upon any of the lands so reserved, for any purpose or with any intent whatsoever, as no settlement or other right can be secured upon said lands, and all persons found unlawfully thereon will be dealt with as trespassers and intruders; * * * (27 Stat. 979).

"Other agreements and statutes made with the Three Affiliated Tribes of the Fort Berthold Reservation are consistent with the foregoing provisions and guaranties."

"In recent years the possessory rights of the Three Affiliated Tribes in their remaining tribal lands have been recognized and guaranteed in a constitution and charter issued under the act of June 18, 1934 (48 Stat. 984), and ratified by vote of the Indians concerned.

"The constitution of the Three Affiliated Tribes, following the language of the governing statute, authorizes the tribal business council—

"(e) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets which may be authorized or executed by any au-

thorized official or agency of the Government, provided that no tribal lands shall ever be sold or encumbered, or leased for a period exceeding 5 years, except that mineral lands may be leased by the tribal business council for such longer periods as may be provided by law.

"This solemn pledge that the United States will not again, without Indian consent, deprive these Indians of any interest in their remaining lands, is further amplified in section 5 of the corporate charter ratified on April 24, 1937.

"The history of our Federal negotiations with these Indians indicates that at all times the guaranties and protections which these Indians asked from the Federal Government and which were granted to them from time to time in consideration of valuable cessions of territory, were not merely guaranties against private trespass, but were preeminently guaranties against any future taking of Indian land for governmental purposes. The spirit in which these guaranties were asked and given is that expressed over a century ago by Attorney General Wirt who, on the question of whether surveying parties might be sent over Indian soil without Indian consent, declared:

"So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. Of the admission of this principle, the treaty above referred to furnishes a proof. The United States stood in need of a road through the lands of the Senecas from Fort Schlosser to Lake Erie; yet, inasmuch as they had no authority to enter upon the lands of the Senecas, even for the purpose of passing through them, without their consent, their right-of-way became the subject of compact. Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States; their title is original, sovereign, and exclusive. We treat with them as separate sovereignties; and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory, without their consent, than we have to enter upon the territory of a foreign prince' (1 Op. Atty. Gen. 465, 466-467).

"This statement of Federal law and policy has been often repeated but has not been improved upon."

"Since, however, treaty obligations may be violated by act of Congress,³ the possessory rights of these Indians depend upon whether Congress, in appropriating funds for the construction of the Garrison Dam, or otherwise legislating thereon, will continue to respect the treaty obligations of the United States.

"2. FORMS OF LEGAL PROTECTION

"Assuming that an attempt is made to condemn or otherwise interfere with Indian possession of tribal land in connection with the construction of the proposed Garrison Dam, the Indians desire to know in what way they can challenge the legality of the proposed action. Inasmuch as the whole Garrison Dam project is still in the blueprint stage and apparently no moneys have as yet been appropriated which could be used for the building of the dam or for the condemnation of these Indian lands, it would be premature to discuss the authority of the War Department to condemn these lands or to flood them without condemnation. Assuming, however, that the Indians concerned are satisfied that no legal authority exists for the taking of these lands in derogation of treaty

² Act of Mar. 3, 1891 (26 Stat. 989, 1035).

³ See unratified agreement of July 27, 1866 (Kappler, vol. 2, p. 1052); act of June 1, 1910 (36 Stat. 455).

⁴ See Cohen, Handbook of Federal Indian Law, pp. 309, 393.

⁵ Cherokee Tobacco (11 Wall. 616 (1870)); Chinese Exclusion Case (130 U. S. 581, 600).

rights, two methods would appear to be available to the tribe for the presentation of such objections. In the first place, the tribe might bring suit to enjoin the Secretary of War from the commission of the acts in question. In the second place, the tribe might await the institution of condemnation proceedings and in those proceedings challenge the legality of the proposed condemnation.

"The legal capacity of the tribe thus to defend its rights is recognized in article VI, section 5 (e) of the tribal constitution and in section 5 (l) of the tribal charter. Its right to employ counsel for such purposes is recognized in article VI, section 3 (a) of the tribal constitution. Under these provisions of its constitution and charter, the tribe has the same right that any American citizen has to challenge construction activities carried on or threatened by the War Department or any other department of the Federal Government, where it appears that such activities are not properly authorized by act of Congress or are in derogation of rights established under Federal law. The propriety of such action, for example, is sustained in *Ryan v. Chicago, B. & Q. R. Co.* (59 F. (2d) 137 (C. C. A. 7, 1932)), in which an injunction was issued against the Secretary of War and his subordinates and attorneys to prevent construction of a dam, and condemnation proceedings in support of such construction, where the contemplated dam was in excess of the legislative authority granted by Congress. The court held that such a suit was not a suit against the Federal Government but merely a suit against Federal officials to prevent action in excess of their statutory authority. In that case Congress, after the issuance of the injunction, enacted supplementary legislation specifically authorizing the dam against which the injunction had issued. The case, however, is square authority for the proposition that suit will lie against the Secretary of War to prevent construction activities not clearly authorized by act of Congress. As the court said in that case:

"The least that can be said is that there is great doubt and uncertainty as to the extent of the authorization of Congress relative to the Alma Dam. The damage which will necessarily result to appellee under plan 2 is so enormous that no uncertainty should be permitted to exist as to appellee's right to compensation" (p. 143).

"Again, in the case of *Barr et al v. Rhodes* (35 F. Supp. 223 (D. C. W. D.; Ky.)), the court declared:

"The rule seems to be that the courts will not interfere with matters entrusted by Congress to the discretion of the heads of executive departments of the Government, but that they will enjoin acts which are beyond the scope of statutory authority or jurisdiction of executive officers. As was said in *Goldtra v. Weeks*, supra (271 U. S. 536; 46 S. Ct. 616; 70 L. Ed. 1074) "by reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government" (p. 225).

"In the case of *St. Louis & F. R. Co. v. City of Tulsa* (213 Fed. 87 (D. C. E. D., Okla.)), a somewhat similar question was discussed in connection with a suit against a municipality to enjoin condemnation proceedings. It was there held that an injunction was a proper remedy to prevent the municipality from interfering, through condemnation proceedings, with rights which it had already granted to a railroad. The court quoted with approval from *Elliott on Roads and Streets* (2d ed.):

"Section 219. * * * The intent of the legislature to destroy the rights granted by former statutes must unequivocally appear. A grant of authority to appropriate land seized under former statutes, or previously seized for public use, cannot ordinarily be inferred from a mere general grant. The

general rule is that if the two uses are not inconsistent, and both may stand together without material impairment of the first, authority for the second use may be implied from a general grant; but, if they cannot coexist without material impairment of the first, authority to take for the second cannot be implied from a mere general grant of authority to condemn" (p. 93).

"It is clear that the remedy of injunction, which, as the foregoing cases indicate, is available to a non-Indian citizen to prevent unlawful interference with his property, is equally available to the Three Affiliated Tribes of the Fort Belknap Reservation."

"FELIX S. COHEN,
Associate Solicitor."

EFFECT OF GARRISON DAM ON INDIANS

Senator O'MAHONEY. What do you think about the Indians?

Representative LEMKE. The land that is to be taken away from the Fort Berthold Indians is land where their bread basket is.

Senator O'MAHONEY. The bread basket of the Indians?

Representative LEMKE. Yes, sir. It is the river bottom cultivated land. I am not satisfied with the lands that the War Department is attempting to give to the Indians.

Senator McKELLAR. You cannot have the dam and keep the Indians there.

Representative LEMKE. No. But I am not satisfied with the land the Army has offered to the Indians. I do not think that upland hills is fair compensation, or anywhere near it. I am willing to help the Indians find land that will compensate them.

Senator McKELLAR. Surely there are local courts out there that will give the Indians what they are entitled to.

Representative LEMKE. In my experience as a legal practitioner I have found this—

Senator McKELLAR. When I was practicing law I was the trial lawyer of my firm, and I tried a good many condemnation cases. I hardly recall one when the persons were not amply compensated, not in a case that I ever tried, and sometimes they got more than they were entitled to.

Senator O'MAHONEY. The difficulty here as affecting the Indians is this, that the possibility of compensation does not exist, for compensation in money means nothing to them. What they want are homes.

Senator McKELLAR. But it seems to me the progress of the country rather requires that this dam shall be built, and I think the Indians should be compensated in the fullest measure, because, so to speak, we treat them as the wards of the Nation, and we ought to be generous with them.

PROPOSAL TO COMPENSATE INDIANS NOT ADEQUATE

Senator O'MAHONEY. Congressman LEMKE, you were about to say that in your opinion the proposal made by the War Department to compensate the Indians is not adequate compensation.

Representative LEMKE. No. If I am correctly informed by the Bureau of Indian Affairs, they are trying to push them up in the Killdeer Mountains. But there is land in North Dakota that is productive, and land that probably could be irrigated, and I will try to see that the Indians are given.

Senator O'MAHONEY. Do you think the members of the Committee on Indian Affairs could rely upon any vague promises of that kind as to compensation?

Representative LEMKE. No. I think they might have a fight over it, as you always find when you deal with departments of the Government.

* *Cherokee Nation v. Hitchcock* (187 U. S. 294); *Lane v. Pueblo of Santa Rosa* (249 U. S. 110); and see Cohen, Handbook of Federal Indian Law, pp. 283-285.

Senator McKELLAR. Again referring to my personal history—which I ought not to refer to, but sometimes I have to—when I was a trial lawyer for about 17 or 18 years, I learned to know men pretty well by looking at them. I do not believe that the present head of the Bureau of Engineers, General Wheeler, is the kind of man who would see the Indians imposed upon. That is just the way I feel about it.

Senator O'MAHONEY. If that were true, I think the Indians would probably rest very easily, but that is not the case. General Wheeler, able though he is—and I am glad as a member of the Military Affairs Committee to have voted for his confirmation—but he cannot create land to which these Indians are to be moved.

Senator McKELLAR. But he can see that they are treated fairly and justly.

Senator O'MAHONEY. There is evidence before the Committee on Indian Affairs that the land which is offered in the Killdeer Mountains is not comparable land, and this is now confirmed by Congressman LEMKE.

Representative LEMKE. In dry years there is very little grass on those hillsides. Now it looks nice, and I have no intention of criticizing the War Department, but if they had gone there 3 or 4 years ago they would have found no grass there. It just makes a difference when you see it.

I repeat, and I will agree with the chairman, that the Indians, I believe, will have to give way, because after all, even the city of Williston will have to give way if subsequent events show that it is for the best interest of my State and the Nation.

TIME ELEMENT IN COMPENSATING INDIANS FOR LOST LAND

Senator O'MAHONEY. If you recommend to this committee that it report to the Senate a bill which compels the Indians to go away, do you also desire to say to those Indians that for their compensation they must depend, not upon this committee, not upon the Congress, but upon the future action of some court? Maybe 20 or 25 years may pass before those Indians are compensated for the lands taken away from them by Executive order.

Representative LEMKE. I agree with you absolutely on that. Something should be done before the Indians are moved, that they should get full compensation. Let me give you an illustration: I handled a case at Elwood, Ill. There they took a farm 150 years old and before a Chicago jury I secured \$22,000 more than the Government offered.

Senator O'MAHONEY. If you did that before a Chicago jury you ought to be able to do something with a Senate committee.

Representative LEMKE. Then at Omaha, when we had the Frazier-Lemke cases—Senator O'MAHONEY. Who was that Lemke whose name is mentioned there?

Representative LEMKE. Myself. When we had the Frazier-Lemke cases, then these so-called expert civil-service appraisers came and testified that a home, though used 20 years, is as good as it was when built. But when we had the Omaha condemnation cases these same fellows appeared and testified that a home depreciated 5 percent each year, and at the end of 20 years it was worth very little.

Remember that if you go up against the Federal Government you have all the powerful machinery arrayed against you. I will say this in justification of the Army, that General O'Brien, who was in charge, said, "If I had known you before, we would not have had all these lawsuits." But as to these Indians, with all the power of the Federal Government, there is no way by which they can collect what is due them unless Congress gives them assistance.

SUGGESTED AMENDMENT TO PROTECT INDIANS

Senator O'MAHONEY. Do you recommend that we throw these Indians off the land and trust to luck?

Representative LEMKE. This project has been started, and the Army engineers have made surveys.

Senator O'MAHONEY. It is in the blueprint stage, but the Indians are on the land.

Representative LEMKE. I still feel that before the Indians are removed, we should compensate them and justify our action. They have counsel now, and I think counsel will attempt to get some settlement agreeable to both sides.

Senator O'MAHONEY. Would you see any objection to a limitation being placed on this appropriation which would provide that the Indians should not be driven off the land until there is a settlement?

Representative LEMKE. I have no objection to that. That is a limitation on their using it, but they can go ahead with their plans and preparation and construction. I am perfectly in accord with the idea that the Indians of all people have gotten a very bad deal all through the history of the United States of America.

Senator McKELLAR. Any other questions?

Mr. LANGER. Mr. President—

Mr. O'MAHONEY. I yield to the Senator from North Dakota.

Mr. LANGER. I wish to ask a question, if I may. Was the amendment drawn with the consent and advice and approval of the attorney for the three affiliated tribes?

Mr. O'MAHONEY. I did not have opportunity to consult the attorney for the tribes, but I did consult the Department of the Interior and the Office of Indian Affairs, and I had the assistance of the Office of Indian Affairs in the preparation of the amendment.

Mr. LANGER. I call the attention of the distinguished Senator from Wyoming to line 13, page 57. May I have his interpretation as to what will happen if it should develop that the land offered in exchange that is selected by the Department of the Interior should be unsatisfactory to the Indian tribe?

Mr. O'MAHONEY. If it should be unsatisfactory to the Indian tribe, the question, I think, would then be open for further consideration, because the engineers report as filed in the House contains the provision that the total appropriation shall be sufficient to provide for compensation for the Indians or for moving the Indians.

We also have in this appropriation bill an item of \$78,000,000 which will permit the Department of the Interior, through the Office of Indian Affairs, to make a survey of that entire area for the purpose of finding lands of the same quality and suitable for exchange.

Mr. LANGER. I am very much gratified by the explanation, because I know that the distinguished Senator, chairman of the Committee on Indian Affairs, has time and time again seen to it that the Indians were protected. I am very happy to know his interpretation of the item.

Mr. O'MAHONEY. I am grateful to the Senator.

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. GURNEY. In view of the point made by the Senator from Wyoming and the Senator from North Dakota, I believe it would be well if we could have in the RECORD at this point the pertinent paragraph in House Document 475, which document is the basic background for the whole Missouri River authoriza-

tion. Therefore, I ask unanimous consent that paragraph 12 of House Document 475 appear in the RECORD at this point.

The PRESIDING OFFICER. Is there objection?

There being no objection, the paragraph was ordered to be printed in the RECORD, as follows:

12. The proposed reservoirs will inundate Indian lands at several points. The estimates submitted on the over-all cost of the projects include funds to cover the cost of taking such lands and buildings, including relocation of burial grounds. It is to be understood, therefore, that approval of this plan includes authority for the Indians through their tribal councils, with the approval of the Secretary of the Interior, to convey and relinquish such property to the United States, and authority for the Secretary of War to enter into appropriate agreements with the Secretary of the Interior and the Indian tribes concerned for the payment of the fair value of the property taken, or for the contribution of a sum approximating such value toward locating or constructing or toward relocating or reconstructing buildings, works, facilities, or water projects in the vicinity of the Missouri River or its tributaries.

Mr. O'MAHONEY. I am very glad the Senator has made that request, and I am glad the matter is to appear in the RECORD.

Mr. President, I should like to add that immediately following this insertion, there should be inserted in the RECORD a letter addressed to me by Mr. Felix S. Cohen, Acting Solicitor of the Department of the Interior, dealing with the same subject.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D. C., December 14, 1945.
HON. JOSEPH C. O'MAHONEY,
United States Senate.

MY DEAR SENATOR O'MAHONEY: With reference to your telephonic inquiry concerning the meaning and effect of the comments made in paragraph 12 of the letter of the Chief of Engineers, United States Army, dated December 31, 1943 (H. Doc. No. 475, 78th Cong., 2d sess., p. 4), concerning arrangements to be made where Indian lands are inundated by proposed reservoirs, there are two observations that I should like to submit:

1. As a legal matter I should think it very doubtful whether a statement by the Chief of Engineers of the United States Army in a letter to the chairman of the House Committee on Flood Control would be considered a limitation upon any powers of condemnation which may be vested in the War Department by prior legislation, such as the act of March 3, 1901 (31 Stat. 1058, 1084; 25 U. S. C., sec. 357), authorizing the condemnation of Indian allotments with cash payment of damages.

2. Even if the statement in question should be construed as having the force of law, it purports in terms not to limit any legal authority heretofore vested in Federal agencies to carry out condemnation, but rather to spell out authority to handle land transactions with Indians on a basis of agreement and subject to the approval of the Secretary of the Interior. I do not doubt that such a method of procedure is highly desirable. Unfortunately, the language of the statement in question, while purporting to authorize future action on such a basis, does not in terms limit action to any such basis. It thus fails to accord to the Indians any

assurance that they will be consulted with regard to the disposition of their lands.

I trust that the foregoing observations appropriately answer your inquiry. Because of the pressure of time these observations have not been submitted to the scrutiny of the Interior Department and they are therefore to be considered merely as the expressions of my own opinion.

Sincerely yours,

FELIX S. COHEN,
Acting Solicitor.

Mr. YOUNG. Mr. President, I should like to address a question to the Senator from Wyoming.

Mr. O'MAHONEY. I yield.

Mr. YOUNG. I should like to ask the distinguished Senator what effect the amendment he had made just a moment ago would have on the disposition of the Indian problem.

Mr. O'MAHONEY. It would have the effect of compelling an immediate study of this problem, so that the Indians would not be removed from that land until an opportunity had been granted to make certain that they were being properly treated.

Mr. YOUNG. I think the distinguished Senator from Wyoming has been very fair with the Indians. Probably this is the first time in 300 years they have gotten such a deal. I think they are in a better situation than are the whites. The whites will have their lands condemned and payment received, and then will have to go and find homes elsewhere. I have no objection to the amendment.

In the Senator's opinion, how long will it take to settle these affairs? How long will construction of the dam be held up?

Mr. O'MAHONEY. I doubt very much whether construction of the dam will have to be held up at all, provided the War Department and the Interior Department undertake, as it is the desire of those who are the sponsors of the amendment, the immediate solution of the problem.

I pointed out in the committee that although a treaty was made with the Indians at Fort Laramie in the middle of the last century, almost a hundred years ago, recognizing the Indians' title to these lands, and although later, in the administration of President Benjamin Harrison, some eight or nine million acres of land were taken by Executive order, the Indians were not compensated for that taking until 20 or 30 years had passed, until they had been authorized by Congress to prosecute a claim in the Court of Claims. That injustice is obviated by this amendment. The responsibility is really placed upon those who desire to construct this dam to deal justly with the Indians, and do it now.

Mr. YOUNG. I certainly am in accord with the Senator's thinking, though I had hoped this might be accomplished in some other way. We have interested in the solution of our affairs out there, and in the construction of these dams, the Bureau of Reclamation, the Army Engineers, the Department of Agriculture, and the Federal Power Commission, and now there is being added the Interior Department. I think that places more importance upon the interagency committee there, composed of these Fed-

eral departments, together with the governors.

FIRST DEFICIENCY APPROPRIATION ACT,
1946—CONFERENCE REPORT

Mr. MCKELLAR. Mr. President, I submit a conference report on the First Deficiency Appropriation Act, 1946, for which I ask immediate consideration.

Mr. O'MAHONEY. Mr. President, may I ask the Senator if this is the conference report on the appropriation bill?

Mr. MCKELLAR. It is.

Mr. O'MAHONEY. May I ask the Senator whether the amendment which the committee recommended with respect to the protection of the rights of the Indians was agreed to in the report?

Mr. MCKELLAR. It was agreed to by the House, and it had been agreed to by the Senate conferees. We must first adopt the conference report. The committee has instructed me to move two amendments, one of which is to strike out "one thousand eight hundred and thirty" where it occurs twice. The motions will be made after the conference report is agreed to.

Mr. O'MAHONEY. I understand the Senator to say that the Senate committee amendment protecting the rights of the three Affiliated Tribes remains in the bill.

Mr. MCKELLAR. The Senator is correct. It remains in the bill.

The PRESIDING OFFICER. Is there objection to the present consideration of the conference report?

Mr. O'MAHONEY. Mr. President, reserving the right to object, I wish to pursue a little further the question with respect to the Indian amendment. I understand from the clerk of the committee that the amendment is in disagreement.

Mr. MCKELLAR. The amendment is in disagreement, but the language concerning the Indians is not in disagreement, except as the whole amendment is in disagreement.

Mr. O'MAHONEY. As I understand, the disagreement affects only the height of the dam.

Mr. MCKELLAR. Yes.

Mr. RUSSELL. It is purely a technical disagreement, so far as the Indian amendment is concerned.

The PRESIDING OFFICER. Is there objection to the present consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The report was agreed to.

The PRESIDING OFFICER (Mr. HUFFMAN in the chair) laid before the Senate a message from the House of Representatives announcing its action on certain amendments of the Senate to House bill 4805, which was read as follows:

IN THE HOUSE OF REPRESENTATIVES, U. S.,

December 19, 1945.

Resolved, That the House recede from its disagreement to the amendments of the Senate numbered 18, 35, 42, 48, 54, and 88 to the bill (H. R. 4805) making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1946, and for prior fiscal years, to provide supplemental appropriations for the fiscal year ending June 30, 1946, and for other purposes, and concur therein.

That the House recede from its disagreement to the amendment of the Senate numbered 59, to said bill, and concur therein with an amendment as follows: In lieu of the amount of \$15,000,000 named in said amendment insert "\$7,500,000";

That the House recede from its disagreement to the amendment of the Senate numbered 103, to said bill, and concur therein with an amendment as follows: In lieu of the matter stricken out and inserted by said amendment insert: "*Provided*, That no part of this appropriation shall be available or used to maintain or operate the Garrison (N. Dak.) Reservoir at a higher maximum pool elevation than 1,830 feet, or for constructing dikes or levees which would be required by a higher pool elevation than 1,830 feet for operating such dam, unless an operation at a higher level should be authorized hereafter by law; *Provided further*, That no part of the appropriation for the Garrison Reservoir herein contained may be expended for actual construction of the dam itself until suitable land found by the Secretary of the Interior to be equal in quality and sufficient in area to compensate the Three Affiliated Tribes shall be offered to the said tribes in exchange for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam."

Mr. MCKELLAR. Mr. President, I move that the Senate agree to the amendment of the House to the amendment of the Senate numbered 59.

The motion was agreed to.

FIRST DEFICIENCY APPROPRIATION ACT,
1946

The PRESIDING OFFICER (Mr. ELLENDER in the chair) laid before the Senate a message from the House of Representatives announcing its action on a certain amendment of the Senate to

House bill 4805, which was read as follows:

IN THE HOUSE OF REPRESENTATIVES, U. S.,
December 20, 1946.
Resolved, That the House disagree to the amendment of the Senate to the amendment of the House to the amendment of the Senate No. 103 to the bill (H. R. 4805) making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1946, and for prior fiscal years, to provide supplemental appropriations for the fiscal year ending June 30, 1946, and for other purposes.

Mr. MCKELLAR. Mr. President, I move that the Senate recede from its amendment to the amendment of the House to the amendment of the Senate numbered 103.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Tennessee.

Mr. WHITE. Mr. President, will the Senator indicate what the amendment is?

Mr. MCKELLAR. Yes. As the Senator knows, there has been a prolonged fight regarding a dam in the northern part of North Dakota, and the conferees on the part of the House and those on the part of the Senate have now held two conferences regarding it.

The question is whether the dam should be constructed at a height of 1,830 feet or 1,850 feet. The House insists upon 1,830 feet and the Senate insists upon 1,850 feet.

The conferees have tried to arrive at an agreement and have not been able to do so. Yesterday the Senate agreed to an amendment which was sent to the House and there disagreed to. My motion is that the Senate recede from its amendment to the amendment of the House to Senate amendment 103. We hope that when the conferees again meet an agreement may be reached. If the motion to which I have referred is agreed to I shall then move that the Senate disagree to the amendment of the House to the amendment of the Senate numbered 103, ask for a further conference, and that the Chair appoint conferees on the part of the Senate.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Tennessee.

Mr. O'MAHONEY. Mr. President, I was on the telephone when the Senator from Tennessee took the floor.

Mr. MCKELLAR. Yes.

Mr. O'MAHONEY. May I ask the Senator to state what is the status of the Senate amendment affecting the rights of the Indians of the Three Affiliated Tribes?

Mr. MCKELLAR. That matter is included in the amendment relating to the height of the dam.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Tennessee that the Senate recede from its amendment to the amendment of the House to Senate amendment 103.

The motion was agreed to.

Mr. MCKELLAR. I now move that the Senate disagree to the amendment of the House to the amendment of the Senate No. 103, request a further conference with the House thereon, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. MCKELLAR, Mr. GLASS, Mr. HAYDEN, Mr. TYDINGS, Mr. RUSSELL, Mr. MCCARRAN, Mr. BROOKS, Mr. BRIDGES, Mr. GURNEY, and Mr. BALL conferees on the part of the Senate at the further conference.

X X X X

Mr. O'MAHONEY. The only amendment in disagreement, I take it, is the one relating to the height of the dam.

Mr. MCKELLAR. Yes. If that matter could be settled there would be no difficulty with reference to the subject about which the Senator has spoken. But in order to reach an agreement it will be necessary for the Senate to recede from its amendment to the amendment of the House to Senate amendment 103. Then the entire matter can be taken up again, and when that is done, we hope to do better than we were able to do before.

I may say that the situation is a very difficult one. So far as I know, there has been no opposition to the Senator's amendment. I do not think any opposition will be encountered. The controversy relates to the height of the dam, whether it should be 1,830 feet or 1,850 feet.

Mr. O'MAHONEY. And the pending motion of the Senator is to enable the conferees on the part of the Senate to return to a conference with conferees on the part of the House, and reach some kind of an agreement relative to the height of the dam.

Mr. MCKELLAR. Yes.

Mr. O'MAHONEY. I thank the Senator.

X X X X

FIRST DEFICIENCY APPROPRIATION ACT,
1946—CONFERENCE REPORT

Mr. MCKELLAR submitted the following report:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the amendment of the Senate numbered 103 to the bill (H. R. 4805) making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1946, and for prior fiscal years, to provide supplemental appropriations for the fiscal year ending June 30, 1946, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

Amendment numbered 103: That the Senate recede from its disagreement to the amendment of the House to the amendment of the Senate numbered 103, and agree to the House amendment with an amendment, as follows:

In lieu of the matter inserted by said House amendment, insert the following: "Provided, That no part of the funds herein appropriated shall be available for the actual construction of the Garrison Reservoir Dam, North Dakota, ~~until~~ *Provided further*, That no part of the appropriation for the Garrison Reservoir herein contained may be expended for actual construction of the dam itself until suitable land found by the Secretary of the Interior to be equal in quality and sufficient in area to compensate the Three Affiliated Tribes shall be offered to the said tribes in exchange for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam"; and the House agree to the same.

KENNETH MCKELLAR,
CARL HAYDEN,
RICHARD B. RUSSELL,
PAT MCCARRAN,
C. WAYLAND BROOKS,
CHAS GURNEY,
JOSEPH H. BALL,

Managers on the Part of the Senate.

CLARENCE CANNON,
LOUIS LUDLOW,
LOUIS C. RABAUT,
JOHN TABER,
R. B. WIGGLESWORTH,
ALBERT J. ENGEL,

Managers on the Part of the House.

X X X X

Amendment numbered 103: That the Senate recede from its disagreement to the amendment of the House to the amendment of the Senate numbered 103, and agree to the House amendment with an amendment, as follows: In lieu of the matter inserted by said House amendment, insert the following: "Provided, That no part of the funds herein appropriated shall be available for the actual construction of the Garrison Reservoir Dam, North Dakota, itself: *Provided further*, That no part of the appropriation for the Garrison Reservoir herein contained may be expended for actual construction of the dam itself until suitable land found by the Secretary of the Interior to be equal in quality and sufficient in area to compensate the Three Affiliated Tribes shall be offered to the said tribes in exchange for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam"; and the House agree to the same.

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Managers on the Part of the House.

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PAT McCARRAN,
C. WAYLAND BROOKS,
CHAN GURNEY,
JOSEPH H. BALL,

Managers on the Part of the Senate.

Mr. GURNEY. Mr. President, I now send forward another amendment, relating to the Garrison Reservoir in North Dakota.

The PRESIDING OFFICER. The clerk will state the amendment.

The CHIEF CLERK. It is proposed on page 9, after line 22, to insert the following:

Garrison (N. Dak.) Reservoir: For acquisition of the lands and rights therein within the taking line of Garrison Reservoir which lands lie within the area now established as the Fort Berthold Indian Reservation, N. Dak., including all elements of value above or below the surface thereof and including all improvements, severance damages and re-establishment and relocation costs the sum of \$5,105,625, which said sum is included in the total allocated under this act for the said Garrison Reservoir and which shall be deposited in the Treasury of the United States to the credit of the Three Affiliated Tribes of Fort Berthold Reservation, to be

subject to withdrawal and disbursement as herein provided. This amount is made available subject to the following conditions subsequent and in the event the said conditions are not complied with then this amount shall lapse and be thereby null and void. Said conditions subsequent are:

That a contract between the United States and the said Three Affiliated Tribes shall be negotiated and approved by a majority of the adult members of said tribes and enacted into law by the Congress, providing for the conveyance of said lands and interests and the use and distribution of said fund and that disbursements from said fund shall be made forthwith in accordance with said approved contract and act of Congress.

That said contract shall be submitted to the Congress on or before the 1st day of June 1948: *Provided, however,* That, notwithstanding said contract or the provisions of this act, the said Three Affiliated Tribes may bring suit in the Court of Claims as provided in section 24 of the act of August 13, 1946, on account of additional damages, if any, alleged to have been sustained by said tribes by reason of the taking of the said lands and rights in the said Fort Berthold Indian Reservation on account of any treaty obligation of the Government, any intangible cost of reestablishment or relocation or any other basis of claim cognizable under said act of August 13, 1946, and for which the said tribes are not compensated by the said \$5,105,625.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mr. LUCAS. Mr. President, I regret to talk about the amendment, but I confess it was difficult for me to understand the reading of the amendment. The clerk read it rather fast. I wish the Senator would briefly explain to me why all these Indians must be considered at this time, and why this amount of money must be provided at this time. I do not quite get the purport of it.

Mr. GURNEY. In the first place, the amount of money provided in the bill is \$5,105,000. This is to pay the Indians for the land that will be inundated when the water comes up to the level behind Garrison Dam. It also pays for moving the Indians away from that land to other land, and for resettlement, the buildings, and what not, that are presently under the taking line, when the reservoir is filled. Of course, the provisions in the bill are such that the \$5,000,000 goes into the Treasury, so that it will be held in trust until the three tribes of Indians in the Fort Berthold Reservation agree to the settlement.

Mr. LUCAS. Mr. President, will the Senator yield?

Mr. GURNEY. I yield.

Mr. LUCAS. If it is impossible to get the Indians to agree, then as I understand it, there will be no money spent?

Mr. GURNEY. That is correct.

Mr. LUCAS. Who is responsible for pressing for this amendment, if it is not known where the Indians stand on it?

Mr. GURNEY. During the hearings, the Indians appeared before the committee with legal counsel and at that time presented their story. The subcommittee suggested that the Army engineers and the Indians get together, after the hearing which we accorded them, to see if they could not agree on the language that would be satisfactory to both parties. Of course, the Army engineers could not in any way try to get together with the Indians on anything intangible, such as the loss of property rights, moving away from their homes, and things of that sort; so the \$5,000,000 is merely an agreement made between the Army engineers and the Indians, through their legal representative, on the tangibles, land, buildings, things that can be seen.

Mr. LUCAS. How many Indians are involved in the transaction?

Mr. GURNEY. Two thousand and seventeen.

Mr. LUCAS. And what is the extent of the land that is expected to be inundated?

Mr. GURNEY. One hundred and fifty-nine thousand acres.

Mr. LUCAS. Did legal representatives for the Indians appear before the committee and ask for the money? I mean, did they request the Appropriations Committee to approve legislation of this kind?

Mr. GURNEY. As I said, the Indians with their legal representatives and the Army engineers have agreed to this amount of money for the tangibles. They are not in agreement on the intangibles, so the amendment gives congressional authorization for the Indians to take that part of the claim to the Court of Claims.

Mr. O'MAHONEY. Mr. President, would the Senator yield to me for a brief statement?

Mr. GURNEY. I yield to the Senator from Wyoming.

Mr. O'MAHONEY. Mr. President, when the appropriation bill dealing with this matter was before the Senate a year ago, the Senate adopted an amendment which I had proposed in committee, to provide that before the dam itself should be built, the Army engineers should offer to the Indians in compensation for the land which was to be taken, land equal in area and comparable in value to that which was being taken. It provided that the decision as to whether or not the land to be offered was compensatory should be made by the Secretary of the Interior. An amendment was worked out at one of the sessions of the committee between the Chief of Engineers, General Wheeler, and myself. The Army engineers, acting in compliance with that amendment, made a survey of the general area in which the Indians live and in which the dam is to be built, and

selected certain lands now belonging to other persons which the Army engineers proposed should be condemned by the Federal Government, and, having been condemned, should be given to the Indians in exchange for the lands that were to be taken away.

The Interior Department felt that the offer was not adequate and did not comply with the provisions of the law; so that when the measure came before the Congress at this session, the problem still remained unsolved. It is a problem, I will say to the Senator from Illinois, because of the fact that these three Indian tribes, known as the three affiliated tribes, who occupy the Fort Berthold Indian Reservation, once before had an experience with the Federal Government, in which they lost some 4,000,000 acres of land. The Federal Government took that great area from these same Indians, about 75 years ago, to give some of it to the railroads, in order that railroad transportation might be provided in this area, to set aside some of it for settlement by white settlers, and so forth. The land was taken, but the Indians were not compensated for more than 50 years. Long after the Indians who were deprived of this 4,000,000 acres had suffered that loss, the Congress of the United States gave them authority to sue in the Court of Claims. They recovered a judgment, the payment of which was authorized by Congress. That was their experience about 50 years ago. I point out, I will say to the Senator from Illinois, that most of the land was taken from the Indians by Executive order, issued, I think, during the administration of Benjamin Harrison. I allude to that fact in order to demonstrate that the Executive order was not an invention of recent years.

In any event, however, when the bill came up for consideration this year, the problem remained unsolved. During the hearings to which the Senator from South Dakota has referred, when counsel for the Indians was making his representations to the committee, in the presence of the Army engineers and of a delegation from the Fort Berthold Indian Reservation, he said, in answer to a question that was propounded by one of the members of the committee, that the Indians and the Army engineers had never had an opportunity to try to come to an agreement themselves. Thereupon it was suggested by the subcommittee that the Army engineers and the Indians, through their counsel and their three representatives who were then in Washington, should go into conference the next day to see whether or not it would be possible to come to an understanding.

The amendment which was presented by the committee, except for the last proviso, was written by the attorney for the Indians. It was agreeable to the Army engineers and agreeable to the members of the committee. The amendment provided that the sum of approximately \$5,165,000 should be set aside to compensate the Indians for certain tangible losses. The Indians said that \$5,000,000 would not compensate them, that it would not pay for the loss of treaty rights. Thereupon it was sug-

gested that an additional proviso should be added giving the Indians the right to sue in the Court of Claims for any other damages, if there are such, which they may suffer by reason of the taking of this land. The \$5,000,000 figure was reached by the Army engineers by way of the appraisal of the land that was proposed to be substituted for the land to be taken.

I may say that the land which is to be taken, which will be flooded, covers about 159,000 acres. It consists of one-third of the diminished reservation of these Indians. It contains their so-called bottom lands, the lands in which most of them live. The Indians naturally dislike to be deprived of their homes. It may be doubted, and seriously doubted, whether there is any other solution if the dam is to be built. The Indians proposed at one time to the Army engineers that instead of building the Garrison Dam, three other small dams should be constructed. The judgment of the Army engineers expressed to the committee was that these other dam sites and the structures that could be built there, would not serve the purposes of flood control. It was suggested by the Governor of North Dakota when he came to Washington and appeared before the House committee, that the compensation should be made by way of cash.

The provision contained in the bill is not self-enforcing. The bill provides that before it shall become absolutely effective the Indians at a meeting on their own reservation shall decide whether or not to accept it. If the Indians do not accept it, then the case remains substantially as it is now.

Mr. LUCAS. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. LUCAS. I wish to ask the Senator, who is pushing the project, besides the Indians and the Army engineers?

Mr. O'MAHONEY. The Indians are not pushing the project, if the Senator refers to the Garrison Dam.

Mr. LUCAS. I am referring to the Garrison Dam which is going to require the taking of the number of acres the Senator referred to.

Mr. O'MAHONEY. The Garrison Dam is being pushed in the first instance by the Army engineers, who tell the committee and tell Congress that that is the site at which the dam can be most efficiently constructed, most efficiently to control the flood waters of the river.

Mr. LUCAS. What territory does the river affect? Does it run through North Dakota and South Dakota?

Mr. O'MAHONEY. It affects the territory down the Missouri and the Mississippi Rivers.

Mr. LUCAS. It is part of the flood-control program.

Mr. O'MAHONEY. It is. It is a beneficial part of the flood-control program.

Mr. LUCAS. The situation is a very interesting one. I wish to say that I had some experience with the Army engineers previous to the war when they took over for flood-control purposes certain lands which were adjacent to a river. The experience I had with them was an unpleasant one so far as the payment of the actual fair cash value of the land

was concerned. Many a farmer protested, and protested in vain. During the war the Army engineers changed their policy, as I understand, entirely. At the beginning of the war, when the Army engineers and other Army officials began taking property in my section of the country for military purposes, immediately there arose some fear in the minds of the landowners, by reason of the previous experience with the Army engineers with respect to fair and equitable treatment. They had some hesitancy in dealing with the Army engineers because they feared they were not going to receive what the land was worth. But during the war they did receive what the land was worth. I certainly hope they do not revert to the policy of taking land that was in effect before the war, so far as

flood control is concerned, and the erection of dams and other structures necessary to harness the waters of the West, the South, or any other section of America.

Mr. President, I want to speak out rather boldly. I hope the Army engineers who are going to do this work, behind which the Congress of the United States will stand, do not take a niggardly position with respect to the value of the lands which are owned by the people who are finally going to be obliged to give them up for flood-control purposes.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. TYDINGS. As I understand, the \$5,000,000 may be insufficient or it may be sufficient, but it is to be used exclusively for the real-estate ventures of the project, and the amount does not embrace aboriginal, incorporeal hereditaments.

Mr. O'MAHONEY. It embraces other factors of damage besides the actual real estate. It embraces the cost of certain buildings and the like. I shall not use the mixture of aboriginal and Blackstonian metaphors, which the Senator from Maryland used, but I shall say it does not involve the violation of treaty rights. If treaty rights have been violated, then under the proviso which has been added to the bill the Indians are given the positive jurisdiction to raise the question in the Court of Claims as provided under the Indian Claims Commission.

Mr. TYDINGS. Mr. President, will the Senator yield for one observation?

Mr. O'MAHONEY. Yes.

Mr. TYDINGS. I hope when the overall figure is written, however, that the aboriginal, incorporeal hereditaments will be duly compensated for so far as the Indians surrendering the land are concerned.

Mr. YOUNG. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. YOUNG. Under the amendment sponsored by the able Senator from Wyoming [Mr. O'MAHONEY], last year, the Army engineers were given the right to condemn land and secure lieu lands for the Indians; that is correct, is it not?

Mr. O'MAHONEY. That is correct.

Mr. YOUNG. And under the present amendment they would not have that right?

Mr. O'MAHONEY. The Senator is correct.

Mr. YOUNG. I personally believe that the amendment sponsored by the Senator from Wyoming was a very fair one and a good one for the Indians, but it did not result in a solution of the problem. In fact, it even raised another problem, that of the white people of North Dakota whose lands would be acquired for the Indians. The cash settlement, I believe, is the only way out, and I believe the Indians themselves will eventually agree that it is the best solution. I hope the treatment of the Indians will be generous.

Mr. LUCAS. I hope so. I simply raised the question, because, as I said before, I had had a somewhat unpleasant

experience with the Army engineers respecting the value they had placed in their appraisals on certain lands in my section of the country. I may have more to say on that subject as time goes on.

Mr. O'MAHONEY. Mr. President, it should be said that the figure contained in the bill, \$5,105,625, was a figure which was reached by the Army engineers and the Indians who were here with their counsel, as adequate compensation for the physical, tangible damage occasioned by the taking of the land.

The additional damage which the Indians claim is governed by the concluding proviso, which gives tribes the authority to bring suit in the Court of Claims "on account of additional damages, if any, alleged to have been sustained by said tribes by reason of the taking of the said lands and rights in the said Fort Berthold Indian Reservation on account of any treaty obligation of the Government, any intangible cost of reestablishment or relocation or any other basis of claim cognizable under said act of August 13, 1946, and for which the said tribes are not compensated by the said \$5,105,625."

So the whole question can be reviewed by the Court of Claims on the basis of any failure of compensation in this sum.

Mr. LANGER. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. LANGER. I ask the Senator if he does not know that this land was not appraised by North Dakota people.

Mr. O'MAHONEY. I did not know that.

Mr. LANGER. Even the abstracts were examined by people from without the State of North Dakota.

Mr. O'MAHONEY. I was not advised of the procedure taken by the Army engineers in making the appraisal. The committee did not go into that question when we were advised by the representative of the Indians that this figure was satisfactory for the items which were mentioned.

Mr. LANGER. I know from my association with the distinguished Senator on the Indian Affairs Committee last year that the Senator knows that this is the very best land in that locality. It is nearly all bottom land.

Mr. O'MAHONEY. The land which is to be taken?

Mr. LANGER. The land which is to be taken.

Mr. O'MAHONEY. That is my understanding.

Mr. LANGER. Does the Senator know that the land of some of the farmers whose land was to be taken for this purpose was condemned, and that the farmers insisted upon a jury trial? The jury found that that land, which is not as good as this land, was worth \$36 an acre, while the Indians are receiving only \$31.

Mr. O'MAHONEY. I was not aware of that.

Mr. LANGER. I wanted to get that fact in the record. I am sure that my distinguished colleague [Mr. Young] does too.

Even though this amount is accepted by the Indians, they are accepting it with a pistol at their heads. They know that the Garrison Dam is to be built. They know that their property is to be taken. I serve notice now that even though they accept this amount with a pistol at their heads, some of us in North Dakota are going to insist that they get a sum adequate to compensate them for the value of the property which is taken.

Mr. O'MAHONEY. Let me say that it was for the purpose of removing the pistol that the Senator from Wyoming offered the concluding proviso, which authorizes the Indians to take this matter to the Court of Claims.

Mr. LANGER. That is correct. I wish to say further that 2 years ago it was the distinguished Senator from Wyoming who insisted on that proviso being placed in the bill, that the Indians might be properly compensated for the property which was taken. I may add that my colleague the distinguished junior Senator from North Dakota [Mr. Young] has spent many hours trying to settle the question in a manner satisfactory both to the Government and to the Indians. We have had conference after conference on it, and have done the very best we could under the circumstances.

Mr. O'MAHONEY. I have welcomed the sympathetic cooperation of both Senators from North Dakota. In the Committee on Indian Affairs last year the senior Senator from North Dakota, who was a member of the committee, cooperated very diligently in the hearings upon this question. I am very happy to see that there is so much concern to see that the Indians shall be properly treated. It must be remembered, however, that we have carefully written into this amendment the proviso that the settlement must be accepted by the Indians, and that a contract must be signed. If the Indians are not satisfied, if the compensation is not sufficient—although it is \$31.91 an acre—or if the amount allocated for any of the other causes of damage is not satisfactory, then it will be for the Indians to say so when the tribe meets to discuss the contract.

We have provided a specific sum which apparently is adequate in the minds of the Indians who were here, for the tangible damages which have been inflicted. Over and above that, we have given the Indians the right and the authority to go into the Court of Claims and assert any additional claims.

Mr. LUCAS. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. LUCAS. May I inquire of the able Senator whether or not the evidence discloses what will happen to the Indians once they are removed from the reservation on which they live at the present time?

Mr. O'MAHONEY. Of course they will not be removed from the entire reservation. The 159,000 acres which will be taken constitutes possible one-third of the total reservation.

Mr. LUCAS. Is the remaining part of the reservation productive land?

Mr. O'MAHONEY. No; it is principally grazing land. The land to be taken is the better land.

Mr. LUCAS. That is what I understood. It seems to me that if we are continually to take the better land for flood-control purposes, sooner or later we shall have to consider the ultimate effect of it. I am for flood control; but when we look at the little picture which has been so vividly portrayed by the Senator from Wyoming, and realize that this group of Indians—2,000 or more—who have been living in this fertile valley all these years and using the valley for farming purposes, are now compelled to move back into the hills, so to speak, and take their chances with grazing or some other form of activity, I submit that it is a serious question as to whether or not the land should be taken.

Mr. O'MAHONEY. It was pointed out in the hearing that the construction of the reservoir will result in the creation on the reservation, as it were, of a great, new lake which will provide fishing as well as water for livestock. Some advantages are likely to flow from the construction of the reservoir.

Mr. LUCAS. The Indians cannot live solely on fish.

Mr. YOUNG. Mr. President, will the Senator yield?

Mr. O'MAHONEY. I yield.

Mr. YOUNG. Let me say to the Senator from Illinois that the Indians will not lose all of their good lands. As the Senator from Wyoming has pointed out, they will lose only about a third of their lands. I think it will be possible to acquire other lands and put together good units.

I should like to add further that as a result of the efforts of the senior Senator from North Dakota [Mr. Langer] and the Senator from Wyoming, the Indians have obtained a much better settlement than they otherwise would have. I believe it is one of the outstanding settlements ever received by any Indians.

Mr. O'MAHONEY. I am glad to have the Senator say that, because I am cognizant of the fact that if it had not been for the amendment written into the bill last year the Indians would probably have found themselves in exactly the same position in which they were 75 years ago, when a large part of their original lands were taken and they had to wait half a century for any compensation.

Mr. YOUNG. In the meantime, no harm has been done by delaying the construction of the dam. They can proceed in any orderly manner.

Mr. O'MAHONEY. And there may be no possibility during the next year, under the appropriations provided in this bill, that any substantial part of that dam can be constructed. Certainly the land will not be flooded for at least 5 years.

Mr. LUCAS. Mr. President, I regret that I have taken so much time upon this amendment, but it interested me, and I am glad to get the story.

Mr. O'MAHONEY. I am glad the Senator has asked the question, because I think it is a very good thing to have in the Record.

Mr. LANGER. Mr. President, I want to thank the distinguished Senator from Illinois for the interest he has taken in

some of my constituents. They are very fine, brave people, and their sons enlisted in the war and did a good job.

I want to call the attention of the Senator from Wyoming to this fact. I am familiar with every acre of that land. The units consist of two kinds of land. They have land upon which they raise a little crop and where they keep their cattle, and they have upland. They make a little hay on the upland. When we take the good land it detracts from the value of the upland, as the Senator can very well see. So the amount of \$31.91 is entirely inadequate, because it lessens the value of the upland.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from North Dakota [Mr. Gurney].

O'MAHONEY AMENDMENT No. 1

Which is a provision in the Supplemental Appropriations Act for the fiscal year ending June 30, 1946 (Act of Dec. 28, 1945, 59 Stat 654)

; That no part of the appropriation for the Garrison Reservoir herein contained may be expended for actual construction of the dam itself until suitable land found by the Secretary of the Interior to be equal in quality and sufficient in area to compensate the Three Affiliated Tribes shall be offered to the said tribes in exchange for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam.

O'MAHONEY AMENDMENT No. 2

Which is a provision in the War Department Civil Functions Act making appropriations for the fiscal year ending June 30, 1948 (Act of July 31, 1947, 61 Stat. 690)

That, notwithstanding said contract or the provisions of this Act, the said Three Affiliated Tribes may bring suit in the Court of Claims as provided in section 24 of the Act of August 13, 1946, on account of additional damages, if any, alleged to have been sustained by said tribes by reason of the taking of the said lands and rights in the said Fort Berthold Indian Reservation on account of any treaty obligation of the Government or any intangible cost of reestablishment or relocation, for which the said tribes are not compensated by the said \$5,105,625.