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## Letter from John Provinse to Senator Langer Regarding a Memorandum about the Garrison Dam-Fort Berthold Settlement, April 15, 1949

John Provinse

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*Garrison Dam*  
IN REPLY REFER TO:

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS  
WASHINGTON 25, D. C.

*2*

Hon. William Langer,  
United States Senate.

APR 15 1949.

My dear Senator Langer:

Enclosed for your advance information is a copy of a memorandum on the Fort Berthold-Garrison Dam settlement. This memorandum will be made a part of our official report on the bill which is now being cleared through the Secretary's office.

We have been informed that hearings on the bill will be started before the House subcommittee on April 29.

Sincerely yours,

*John H. Provinse,*  
John H. Provinse,  
Assistant Commissioner.

Attachment.

Memorandum of Information on S.J. Resolution 11 and H.J. Resolution 33, providing for the ratification by Congress of a contract for the purchase of certain Indian lands by the United States from the Three Affiliated Tribes of Fort Berthold Reservation, North Dakota, and for other related purposes.

#### A. INTRODUCTION

This Joint Resolution undertakes to provide a complete and final settlement with the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, in consideration of the taking of their lands for the Garrison Project. Efforts to effect settlement have been prosecuted since 1946 and have been the subject of wide public interest. The Joint Resolution now before Congress contains two distinct elements: (1) the text of an executed contract between the Tribes and the United States for \$5,105,625 which has already been appropriated and (2) supplementary sections principally providing appropriation authorizations for \$3,000,000 to establish a "Land Readjustment Fund," for \$6,500,000 as extra compensation, and for the reservation of 20,000 kw. of Garrison electric power for consumption within the residual Fort Berthold Reservation.

#### B. BACKGROUND OF JOINT RESOLUTION IN EIGHTIETH CONGRESS.

The War Department's Civil Appropriation Act, 1948 (Public Law 296, Eightieth Congress, approved July 31, 1947) appropriated \$5,105,625 for the acquisition of the lands and rights of the Three Affiliated Tribes within the taking line of the Garrison Reservoir within the Fort Berthold Reservation, including all elements of value above or below the surface thereof and including all improvements, individual tract severance damages, and re-establishment and relocation costs. The appropriation was made available, however, on condition that a contract between the United States and the Tribes should be negotiated and approved by a majority of the adult members of the Tribes. It was specified that the contract should provide for the conveyance of the lands and interests to be taken and to set out the use, distribution, and disbursement of the appropriation, and to be submitted for the approval of the Congress on or before June 1, 1948. Finally the act provided that, notwithstanding the said contract, the Tribes were authorized to 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 the 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 re-establishment or relocation, for which the said tribes are not compensated by the said \$5,105,625."

Section 1 of the Joint Resolution incorporates the contract which was entered into by the Tribes on May 20, 1948 in accordance with the provision of the War Department's Civil Appropriation Act, 1948, for all elements of value above and below the surface of the land taking. Sections 2 to 10 contain a series of supplementary clarifications, considerations, and appropriation authorizations proposed as final payments in lieu of a future suit in the Court

of Claims as authorized in the said War Department Appropriation Act. Section 11 authorizes appropriations to carry out the Joint Resolution.

The conditions specified by Public Law 296 in regard to the negotiation and approval of the contract were fully met. The contract was freely negotiated by the Tribal Business Council with the Chief of Engineers and his deputies in Washington, D. C., in January and February, 1948. The Council was assisted by the tribal attorney, Mr. Ralph H. Case, of Washington, D. C. The Acting Commissioner of Indian Affairs and his deputies participated in the negotiations. The draft contract was subsequently submitted by the Tribal Business Council to the members of the Tribes at a series of community meetings at which its terms were explained and discussed. Individual signatures to the contract were taken by the Council, totaling 625, or 65.1 percent of the total population of adult members of 960. A certificate attesting to these facts executed by Mr. Mark Mahto, Secretary of the Tribal Business Council, and by Mr. Ben Feifel, Superintendent of the Fort Berthold Agency, is appended to the contract. The Tribal Business Council witnessed its approval of the contract in Washington on May 20, 1948 in the presence of the Secretary of the Interior who concurred in its terms. The Chief of Engineers, U. S. Army, acting for the United States, had (prior to May 20, 1948) formally affixed his signature, and after that date, but before June 1, 1948, submitted the contract to the Congress for ratification. The contract, as required by Public Law 296, sets out the use, distribution, and disbursement of the appropriation of \$5,105,625. Thus compliance with all the conditions specified by the Congress in Public Law 296 has been effected.

In the course of the contract negotiations, the Tribal Business Council laid claim to financial and other considerations, not encompassed by the authority granted by Public Law 296. These additional claims are incorporated in the Joint Resolution and represent the full scope of the settlement to which the Indians believe they are entitled. The enactment of these sections would constitute a "complete and final settlement of all rights, interests, and claims whatsoever" of the Three Affiliated Tribes (Section 9) and would negate the right to bring future suit in the Court of Claims, as authorized by Public Law 296.

The Sub-Committee on Indian Affairs of the Committee on Interior and Insular Affairs, U. S. Senate, conducted a public hearing on S.J. Resolution 224 on June 5, 1948. Counsel of the Three Affiliated Tribes and representatives of the Corps of Engineers and of the Bureau of Indian Affairs were present and testified. This Joint Resolution, like that now pending in the present session of Congress, contained the text of the executed contract together with supplementary appropriation authorizations. The hearing, which was presided over by Senator Arthur V. Watkins, Chairman of the Sub-Committee, emphasized the desirability of making one, final settlement with the Three Affiliated Tribes and not leaving any unsatisfied claim open for future controversy. Senator Watkins thoroughly opposed settlement of the issue by an additional bill, stating that "I want to settle it in this one." The Joint Resolution was not acted on prior to adjournment, but the discussion at the June 5 hearing stimulated subsequent study by the Tribal Business Council. The Joint Resolution now under consideration represents the matured claims of the Council, developed with the cooperation of the North Dakota Congressional delegation, the tribal attorney and the Indian Bureau.

## C. SALIENT FACTS ON THE TAKING OF FORT BERTHOLD LANDS.

### I. Physical Effects.

In authorizing the construction of the Garrison Project, the United States is withdrawing 80 miles of the Missouri River Valley in the Fort Berthold Reservation, incorporating 155,000 acres. This leaves a residual reservation of 430,000 acres for the present enrolled population of 2,215. This withdrawal is the latest in a series of forced takings from the original reservation of 12,500,000 acres set aside for the Mandan, Gros Ventre and Arikara in 1851. It is a blow that has caused naturally great emotional reaction and anxiety. The land which the reservoir takes is the best land of the reservation. It is the heart of the reservation, fertile, partially timbered, accessible to a shallow watertable and the river, and possessing outcrops of lignite. It is the choice area for dwelling and conducting cattle operations. The Taking Area, in fact, consists of the majority of land on which the Indians live and make their living.

The reservoir as it fills up will not only flood the main valley but also flow into the valleys of the Little Missouri, Shell and Lucky Mound Creeks, severing the residual reservation into five water-bound segments. This will effectively isolate the residents of each segment, cutting all direct transportation and communication, except by water in the summer months. The segmentation of the physical organization of the reservation forces radical changes in the entire economic, social and administrative structure.

### II. Economic Effects.

The Indians have a cattle herd of 6,839 head which they have increased from 3,141 since 1938. These, they graze on a strip of 240,000 acres along and adjacent to the bottomlands which are to be flooded. This low and timbered area protected from the winds affords excellent winter pasture. The loss of the majority of this range will force the Indians to graze their cattle yearlong on the upland plains which afford few protected areas and enforce a much greater amount of expense of feeding. The whole cattle industry must be reorganized to be adjusted to the separate ranges on the five residual segments.

The reduction of the reservation area will drastically reduce the carrying capacity of the reservation and upset the balance of winter and summer ranges that exists at present. Although the residual reservation will carry the presently owned cattle of the Fort Berthold Indians and allow theoretically an increase of seventy-seven per cent, it has not been estimated to what degree this expansion will be limited by lack of practical winter grazing areas. One hundred fifty families could operate theoretical cattle herds of adequate size for self-support on the residual reservation, which would take care of sixty-five per cent of the reservation. Little opportunity would be left for livestock production by any of the remainder of the population or future increase.

The timber in the bottomlands, provides the houselogs, fence posts and especially the firewood for the Indian population. This inestimable asset will be destroyed by the reservoir. Although there will be compensation for the

loss of this resource, there will be little or no lumber and wood supply on the reservation in the future. Many outcroppings of lignite are now utilized for home consumption and for some sale. Whereas there probably exists a potential lignite resource under the residual reservation, its accessibility is not the same as it is in the Taking Area. Similarly the underground water sources, easily accessible in the bottomlands, are buried at greater depths and unavailable except at great expense in location and drilling.

The timber and brush covered lands along the rivers and creeks, being withdrawn for the reservoir, are the habitat of deer and other game and the source of many wild foods upon which the Indians have depended for generations. They form an essential part of the food supply of many families and supplement the small cash incomes derived from cattle and seasonal wage work. This very important asset will be lost as the game is driven to other protected areas, and the fruit-bearing bushes cleared before flooding.

An integral part of the disastrous effect upon the economy is the effect of the withdrawal of these reservation lands upon land ownership, land use, and particularly the land resources of individual families. The land of the Taking Area within the reservation is not owned or divided into individual farms or parts of farms as is the rural area outside the reservation. Land on the reservation is owned as allotments by individuals, by heirs who own only interests in allotments and by the Tribes. The land is not used as individual tracts. Much of it is pooled in common community ranges; much of it is idle. Individuals do not farm extensively the allotments they own, but only small plots. Many people live on land on which they have only an undivided interest. Others live on land only by courtesy of relatives, following Indian custom. The greater part of the land is owned by old people who were alive when bottomlands became the first part of the reservation to be allotted. When the land is withdrawn, it will not be a matter of individuals selling their farms or losing their leases and moving to other farms as among the whites, but a problem of a group whose land ownership and use is confusedly and inextricably entwined by Indian custom and the complications of inheritance imposed by Federal regulations. The majority of the payments will go to older Indians who will have little interest in reinvesting in other lands. Heirs will receive little with which to reestablish themselves as they are now living. Many will be forced to remove from the lands where they are now living and receive no payments.

The removal will result in a complex relocation program for the entire group and its complete economic and social rehabilitation. It is anticipated that a large number of the relocated families will require support during the period of rehabilitation. In order to accomplish a sound and permanent rehabilitation, any household planning to ranch or farm must be provided with an adequate amount of land. This will require the consolidation of the allotments and scattered interests in inherited allotments into units which can be operated economically and efficiently. Due to the limited amount of land and the topography of the reservation, grazing ranges will have to be established for joint use.

The total economic effect of the withdrawal of the reservation bottomlands for the Garrison Project will be to force the Indians from a partial and traditional subsistence economy based on their natural resources to an almost

complete cash economy, entailing far greater daily work and expense. The difficulties of this readjustment will be realized only when the Indians come face to face with their new condition. The second over-all effect will be to force the Indians to reorganize the ownership and use of their land holdings in the five residual segments. Funds must be made available either in their compensation or by appropriations to meet these inescapable requirements for temporary support and land consolidation.

### III. Social Effects.

The withdrawal of reservation lands required for the Garrison Reservoir forces the break-up of all or part of the nine communities on the reservation. This disruption will have the disorganizing and anxiety-producing effects that a sudden and forced break-up of any long-standing and well integrated group produces. Some communities may be able to move as groups from the flood area to new sites on the residual segments, but most of them will be torn apart by households going to their residual or newly consolidated land holdings. Taking people from neighborhoods where strong social relationships and cooperation have been established to settle in new groups where none of the relationships and cooperation has been developed, will deeply undermine their sense of security. The extent of such social disorganization that may occur can be estimated from the fact that 289 households of the reservation total of 357, living in nine communities, will have to re-establish themselves. Due to the fact that the reservoir will divide many household land units, although not directly affect the homes located on them, some 300 or more households may ultimately have to move.

at least 240 of the 289 households have stated in a house-to-house survey that they plan to remain on the reservation. They will have to move to higher areas, more exposed to the severe winter climate of North Dakota. The fertile soil and natural resources to which they have accommodated themselves on the bottomlands, will not be at hand. This change will have a poor social and psychological as well as economic effect. These social changes will also have their influence upon the rapidity and success of the economic rehabilitation of the people. Social rehabilitation will, in fact, become as much a problem to meet as will economic rehabilitation.

The Fort Berthold Indians comprise three tribes, Mandan, Gros Ventre, and Arikara. These tribes have lost much significance as separate social units of the reservation. The segmentation of the reservation may serve to strengthen tribal ties by isolating members, especially the Arikara, on separate segments. However, this isolation will also serve to separate the Indians from the far more important political unification of the Three Affiliated Tribes which they have organized under a Constitution and By-Laws authorized by the Indian Reorganization Act of 1934. This organization provides a Tribal Business Council which directs the political affairs of the people, manages the tribal property and funds, and through a Charter, promotes the individual and group agricultural enterprises of the people. The loosening of this organization by the physical separation, and the inability of the Council to communicate and meet freely will undoubtedly create a serious handicap to the economic and social development which the Three Affiliated Tribes have manifested in the last twelve years. These Indians form a social, cultural, and racial group within their region of the state and in the State of North Dakota. They will maintain organizations and separateness on this basis whether or not it is

recognized in formal organization. The setback that will occur to the functions of their present organization by the physical breaking up of the reservation by withdrawing the land areas which unify, will be serious and cannot be underestimated.

These Indians still retain the most important symbols of their native religion, and some of the religious organizations and keepers associated with them. The native religion has been decreasing in significance and active participation in ceremonies is relatively slight. However, the people as a whole have not abandoned their belief in this religion, the meaning of the sacred shrines and heirlooms, or, especially the belief in the supernatural powers of this sacred equipment. The removal of shrines, changes of location of the equipment and the break-up of organizations and clans imposed by the removal of the Indians, will have a significant effect upon the Indians' morale, because of the sacred power these hold. Shrines will have to be replaced. There are also several monuments associated with tribal history and structures on the reservation all located in the Taking Area and requiring re-erection.

The taking area contains eighteen official cemeteries with over 1600 graves, including the Scout Cemetery, a National Monument, and four tribal monuments. Uncounted family cemeteries and graves also lie within the taking area. These graves must all be disinterred and reburied in re-established cemeteries in the residual areas.

#### IV. Effects on Administration.

The Fort Berthold Agency with its offices, employees quarters, boarding school classrooms and dormitories, hospital and maintenance shops at Elbowoods will be completely wiped out by the Garrison Reservoir. Seven community day schools and two farm agent's stations also lie in the reservoir site. The loss of the administrative plant will disrupt the administrative, educational, health, agricultural extension services. They cannot be replaced as they now exist in the future divided reservation, constituting a loss to the Indians' present way of life. The complete abolishing of the administrative plant creates an opportunity for re-establishment of a modern and efficient administration, but this cannot function as effectively under the decentralized situation created by the division of the reservation into five separate parts with which direct travel and communication is lost.

Every segment in which a number of Indians reside will become in part an administrative entity. Contact with any central agency will be maintained only by long and circuitous travel. Direct contact by the central officers of the reservation with the people themselves, highly essential to their administration and social and economic development, will be greatly reduced.

One effect of the division of the land and people and decentralization of administration, forced by the withdrawal of land from the heart of the reservation, will be to thrust the people into closer relationships with the neighboring off-reservation population and state and county offices. This will have the salutary effect of stimulating Indian assimilation and participation in state affairs. This may happen over long-term closer association, but there are official and unofficial social barriers which the Indians must overcome. People of different races and social backgrounds living in close proximity are usually charged with greater racial prejudices than if they were



separated by some distance and had few personal relationships. Already the Indians and Indian Bureau have experienced definite opposition from local non-Indians and local government departments to Indian participation. Governmental groups and taxpayers fear that acceptance of Indians into social and public institutions will be accompanied by the obligation of the costs, which Indians do not pay if such costs are paid for by land taxes. Even though such costs can be paid by means of Federal contracts, this opposition still functions against the full or large transfer of Indian administration to state and county departments. Some administration must be carried on at least for the relocation and transitional period following the withdrawal of the reservoir site, and this administration will be handicapped by physical effects of the withdrawal.

#### V. Summary.

The salient facts of the withdrawal of land through the middle of reservation are:

1. That the reservation will be divided physically into five segments, which imposes severe hardships and disorganization upon individuals and families and upon the economic, social and administrative organization of the Fort Berthold Indians.
2. That the loss of 155,000 acres of their best land creates a severe economic loss in natural resources which cannot be replaced and which imposes limitations on economic development.
3. That the withdrawal of lands and dividing of the reservation create severance or an additional loss by reducing the value of the residual reservation.
4. That at least 289 of the 357 households of the reservation will have to remove, imposing not only the economic and social re-establishment of individual families, but their re-organization in economic enterprises, social groupings and communities.
5. That the religious life and organization will suffer impairment and that over 1600 graves in eighteen cemeteries, the shrines, and monuments of the Tribe will require complete removal.
6. That the political and economic organizations which have instigated much recent social and economic development toward tribal and individual self-sufficiency, will be greatly impaired and curtailed in effectiveness.
7. That the facilities of the Federal administration will be entirely wiped out, requiring replacement and reorganization.
8. That the pre-eminent effect will be that the withdrawal of land from the reservation imposes losses that affect the Indians as a social group, which are over and above the losses that they will suffer as individuals or by families, by the very fact that the Indians compose an economic, social, political, administrative

and even religious group within the area and state where they live. These losses such as the present land ownership and use pattern forcing a consolidation of lands in order that the people can become rehabilitated economically, or as the community or villages and community life, are not compensated for by payments on an individual or tribal basis for material wealth that they are to lose. The taking of 155,000 acres of land has created the taking of many other and more valuable things from the Indians. It is to replace these, as far as possible, in order that life may be reorganized and continued that additional compensation must be requested of the Congress.

#### D. SUMMARY OF PROVISIONS CONTAINED IN CONTRACT EXECUTED MAY 20, 1948.

##### I. General Summary.

The contract of May 20, 1948 is based on the appropriation of \$5,105,625 contained in Public Law 296 and provides for three classes of expenditure to be determined by special procedures, namely, (1) for payment of tribal and allotted lands as appraised, (2) for payment of cost of removing the Indians from the reservoir taking area, and (3) for payment of removing cemeteries. If these three costs, when determined, are less than \$5,105,625, the Indians are to retain the unexpended balance as tribal funds: if these three costs, when determined, exceed \$5,105,625, the United States is committed to appropriating the deficit.

The Commissioner of Indian Affairs is made responsible for (1) making the necessary appraisals, (2) preparing a plan for removing the Indians, (3) preparing a plan for removing the cemeteries, and (4) preparing a plan for the use of the shore-line of Garrison Reservoir within the reservation. If and when the appraisals and these respective plans are approved by the Army Chief of Engineers, the Commissioner is made responsible for the administrative execution thereof. If the Indians reject the appraisals placed on any or all of their lands, their right to seek judicial determination thereof in Federal Court is reserved to them.

Proceeds reserved by the Tribes for tribal lands are to be held in trust but may be expended to acquire lieu lands or other tribal property. Proceeds received by individual members of the Tribes are to be deposited in individual Indian money accounts at the Agency and expenditures therefrom are to be made by the Superintendent under special regulations of the Secretary of the Interior.

The Indians may salvage standing timber free of charge until October 1, 1950 and their improvements until October 1, 1952. Their interest in any sub-surface values discovered in the future is reserved. The contract, when ratified, constitutes a conveyance of the fee titles to the United States. By a special provision the Indians reserve the right to seek additional compensation through petitioning Congress or filing suit in the Court of Claims. The Indians' hunting and trapping rights within the Garrison taking area are reserved, but they consent to having the fishing regulations established for Garrison Reservoir apply to them.

## II. Detailed Analysis.

1. Reservation of right to claim additional compensation: By Article I the Three Affiliated Tribes reserve the right to pursue further their claims against the United States by petitioning Congress for additional compensation or by filing suit in the Court of Claims under Public Law 296, or both. This article must be read in conjunction with Section 9 of the Joint Resolution (page 74) which provides that in consideration of the conditions, requirements, and appropriations set out in the resolution, "complete and final settlement of all rights, interests, and claims whatsoever" of the Three Affiliated Tribes will be satisfied. Adoption by Congress of the Joint Resolution as submitted would nullify that portion of Public Law 296 under which the Tribes were authorized to bring suit in the Court of Claims.

The decision of the Tribes to seek full settlement of all their claims at this time is expedient. The far-reaching effects of the taking of their lands and homes for the Garrison Reservoir are to be experienced in the immediate future. The need for assistance is immediate. A judicial determination of their claims would involve unpredictable delay. There might be a question of whether the real needs of the Tribes, directly caused by the taking of their lands, could be made the legal basis of an award. A far more satisfactory and equitable course in dealing with these Tribes is to make a complete settlement prior to, rather than after, consequences of the Garrison taking are inflicted.

2. Description of Taking: Part A of Article II describes the Taking Line of the Garrison Reservoir within the Fort Berthold Reservation, embracing an area of 175,716.44 acres, from which are excepted certain patented lands totaling 20,804.83 acres, the total net taking of Indian lands being stated to be 154,911.61 acres.

By Part B of the article certain isolated Indian tracts, totaling 543.89 acres, located in the "ceded" portion of the reservation, are described and included in the taking. By Part C certain Indian-owned townsites in Van Hook and Sanish, North Dakota, are described and included in the taking. By Part D certain "Public Reserves" in townsites of Sanish and Van Hook, North Dakota, believed at the time of preparing the contract to be colored with Indian interest, are described and included in the taking. By Part E certain patented lands in the Taking area, totaling 2,881.33 acres, in which coal rights are reserved to the Tribes, are described and included in the taking.

The Indian land taking is thus described by a process of delineating the Taking Line and by excepting from the Taking Area thus established the patented, or non-trust, lands located

therein. The statistical reflection of this process, as stated in the contract, indicates that a total of 154,911.61 acres of Indian tribal and allotted land is in the Taking Area. The determination of the acreage contained in the contract is based on aerial flights of the Army in 1940 and includes 9,439.88 acres of river accretion formed since the original G.L.O. survey which measured the Taking Area as 166,276.56 acres. Since 1940, however, additional changes have taken place which, according to calculations of the Bureau of Indian Affairs, will reduce the taking of Indian lands, exclusive of the lands itemized in Part C of the contract schedule, to 152,432.32 acres. No amendment of the contract is recommended, as it is impossible to make any final determination of acreage because of the constantly shifting shore line of the Missouri River.

3. Distribution of fund of \$5,105,625 and limitations on the use thereof: By article III, the appropriated fund of \$5,105,625 is made subject to disbursement by the Commissioner of Indian Affairs for three purposes: (a) payment for tribal and allotted lands and values above and below the surface, (b) costs of relocating and re-establishing Indians who live in the Taking Area, and (c) costs of relocating and re-establishing Indian cemeteries, tribal monuments, and shrines in the Taking Area (Section 1). The cost of relocating government-owned structures is excluded from payment out of the appropriated fund (Section 2). No expense of any government agency in carrying out the contract is chargeable to the appropriated fund (Section 3). If the three enumerated kinds of disbursement, when determined, total less than \$5,105,625, the Tribes are to retain the unexpended balance as tribal funds (Section 4). No part of the appropriated fund may be used to pay for the lands and improvements belonging to any church, mission, missionary society or to any person not a member of the Tribes (Section 5). The decision of Congress to recognize that the mere payment of the fair market value of Indian lands for public projects is insufficient and that the costs of removal are properly a charge against the United States represents a welcome change of policy in dealing with situations of this kind. In previous Indian land takings for public purposes, failure to provide funds for removal costs has caused acute distress and contributed to serious retrogression of Indian economic progress. It seems also proper that the costs of relocating government-owned buildings, roads, etc., should not be charged to the appropriation of \$5,105,625 which specifically appropriated the said sum to the Three Affiliated Tribes and made no mention of the costs of relocating government-owned structures. By the same reasoning it is proper to exclude payment for governmental expenses incurred in carrying out the contract. The provision by which the Tribes retain any unexpended balance remaining in the appropriation after the three enumerated purposes are satisfied, is less justified when considered in connection with Sections 2 to 10 of the Joint Resolution. Yet the section is wholly consistent with Public Law 296.

Tentative estimates indicate that the total of the three costs authorized by the contract will at least equal and probably exceed the appropriated amount.

4. Appraisal of tribal and allotted lands: By Article IV responsibility for appraising the Indians' lands is imposed on the Commissioner of Indian Affairs, but the schedule thereof must be transmitted to the Chief of Engineers for his approval (Sections 1 and 2). The appraisal must be based on the fair market value of the lands and improvements, including the elements of value relating to individual tract severance damages, standing timber, and mineral rights. On approval by the Chief of Engineers the appraisal schedule must be presented to the Tribal Business Council in its entirety and such portion of said schedule to the individual allottees and heirs for their approval as relates to their respective interests. Within ninety days after such transmittal the Council and any individual allottee or heir may present to the Commissioner their objections, if any, for consideration (Section 2). If any part of the appraisal is finally rejected, the Department of the Army is obliged to bring suit in the U. S. District Court of North Dakota (Section 3), and in any such proceeding the Commissioner of Indian Affairs is required to supply the Indian litigants with legal counsel, if so requested (Section 4).

During the course of the contract negotiations the Acting Commissioner of Indian Affairs personally dissented from the proposal to make the Commissioner responsible for the preparation of the appraisal schedule, because he felt that this duty more properly reposed in the taking Agency. He concurred in Section 1 of Article IV only on the urgent request of the Tribal Business Council and upon the request of the Corps of Engineers. It would be more equitable for the lands and improvements to be appraised on a replacement value basis because of the present inflation of materials prices and because of the difficulty of acquiring substitute lands at "market values." However, the principle of replacement cost is not accepted in eminent domain proceedings and the Corps of Engineers would not accede to its use as a basis for appraising the Indians' holdings in the Garrison Taking Area. It is believed that the constitutional rights of the Indians are fairly protected in reserving to them the right to reject the appraisals placed on their lands and to seek judicial determination thereof. It also seems appropriate that counsel should be supplied for such Indians who exercise this privilege.

5. Removal of Indians from Taking Area: By Article V the Commissioner of Indian Affairs is required to prepare a plan for the removal, relocation, and re-establishment of the Indians, together with cost estimates thereof, including therein (but not restricted to) the cost of transporting the Indians to their new locations, the cost of transporting the Indians' household goods, farming equipment, livestock, and other property, the cost of developing domestic and livestock water supplies on the residual reservation, and the cost of dismantling, transporting, and re-erecting salvageable buildings and

improvements. On approval of the plan by the Chief of Engineers, the Commissioner is designated to carry it out (Section 1). It is also provided that the Chief of Engineers will prepare a schedule for clearing the Garrison Reservoir right-of-way and that the said schedule shall be jointly reviewed by him and the Commissioner of Indian Affairs annually to consider changes proposed by either party. Responsibility, however, for determining changes in the clearance schedule is reposed exclusively in the Chief of Engineers. It is stipulated that the clearance schedule will provide for systematic clearing of the right-of-way by succession of segments (Section 2).

Implementation of this article should be completed by the Spring of 1950 so that removals might begin in the summer of that year, be continued in the summer of 1951, and be completed in 1952. The Indians' personal, family, community, and tribal plans must be ascertained at the earliest possible date after approval of the contract. Surveys of the land and water resources of the residual segments, together with the selection of homesites, must be undertaken. The land consolidation program must also be instituted simultaneously. Preliminary, though necessarily tentative, studies are already under way by the Missouri River Basin Investigation Staff of the Indian Bureau.

6. Relocation of cemeteries, monuments, and shrines: By Article VI the Commissioner of Indian Affairs is designated to prepare a plan for relocating and re-establishing Indian burial graves, tribal monuments, shrines, and other facilities with cost estimates, to transmit the same to the Chief of Engineers, and, upon approval by him, to carry it out (Section 1). It is provided that new sites for the re-establishment of these facilities shall be acquired out of the proceeds from the taking of present sites in the Taking Area and that titles to new sites shall be of like character as exist for the sites which are to be taken for Garrison Reservoir (Section 2). Insofar as practicable the removal plan is to be carried out by and through the interested churches, heirs, allottees, Council, or keepers of a particular shrine. The removal plan must provide for the employment of Indians and for tribal and religious services. In the event there is no party interested in a particular removal, the Commissioner is authorized to assume any necessary responsibility (Section 3).

There are 18 separate cemeteries containing over 1,600 graves and an undetermined number of scattered family burying grounds in the Taking Area. All the cemeteries are denominational, except one. Of the 16 cemeteries, 7 are located on allotted lands, 6 on lands deeded to churches, one on a National Monument, one on a Tribal Reserve, and one on land deeded to the U. S. for this purpose. The Tribes as such have a direct interest in the "Scout Cemetery" located on a National Monument, four tribal monuments, and one tribal flour mill. An estimate of the cost of carrying out the provisions of this article cannot be made without a detailed survey and will depend on various factors: the time necessary to locate, identify, and disinter the remains; the kind and quality of reinterment

casket; the difficulty and time required to open new graves; the distance between old and new sites; and the removal and re-establishment of head markers and other grave stones. The overall administrative cost (not deductible from the fund of \$5,105,625) could be considerable. At the hearings of the Senate Subcommittee on Appropriations on the 1948 Civil Functions Act, General R. A. Wheeler stated that the Corps of Engineers had estimated the cost at \$255,000.

7. Use of proceeds from taking of tribal lands: By Article VII proceeds from tribal lands and interests under the contract are to be held in trust by the U. S. and may be used to acquire land or other tribal property, or for such other purposes as may be determined by the Council with the approval of the Commissioner of Indian Affairs. Lands so acquired are to be held "as other tribal lands" and are to be "non-taxable and inalienable until otherwise provided by Congress, notwithstanding any other restrictions on the purchase of land under any other law."

Under this article responsibility for determining the disposition of tribal proceeds is vested in the Tribal Business Council; the power of the Commissioner of Indian Affairs is limited to vetoing council decisions. This is a desirable step in the direction of transferring responsibility to the Indians.

The second sentence of Article VII, beginning on line 10, page 60 provides that all lands acquired by the Tribes with contract proceeds "shall be inalienable and non-taxable until otherwise provided by Congress". The intent of this language is to insure that tribal lands so acquired shall be held as other tribal lands, but by strict interpretation of the specific language, especially in the use of the term "inalienable," it is probable that some doubt would exist as to the power of the tribes to effect exchanges of such lands without special Congressional sanction. The same criticism lies also against similar limiting language in Article VIII, Section 3. It is recommended that this technical defect in Articles VII and VIII be corrected by adding the following section to the Joint Resolution:

Section 12. Articles VII and VIII of the contract incorporated as Section 1 of this Joint Resolution shall not operate, nor be held to restrict or prohibit sales or exchanges of lands or interests in lands between the said tribes as incorporated and the members thereof as is now or may be provided by law.

The final clause of Article VII, "notwithstanding any other restrictions on the purchase of land under any other law," beginning on line 13 of page 60, is intended to free the tribes from any statutory limitation on the purchase of lands which has been, or may in the future be, enacted, prohibiting the purchase of lands which would become non-taxable. It is believed that the Congress should approve this guarantee to the Fort Berthold Indians because of the special circumstances arising out of the taking of their existing tribal lands for the Garrison project.

8. Use of proceeds from taxing of allotted lands: Under Article VIII proceeds received by individual Indians under the terms of the contract are to be deposited in their "Individual Indian Money" accounts (Section 1). Expenditures from such I.I.M. accounts are to be made by the Superintendent of the Fort Berthold Reservation under regulations to be promulgated by the Secretary of the Interior or by his duly authorized representative. Under such regulations the Superintendent may disburse individual proceeds directly to non-resident members of the Tribes and to such other members who do not require supervision. The individual proceeds may be disbursed for purchase of new lands, homes, or other property (Section 2). Lands acquired with such proceeds are to be taken in the name of the United States in trust for individual Indians and shall be "non-alienable and non taxable until otherwise provided by Congress" (Section 3).

Article VIII provides a substantial degree of decentralized administration in the disbursement of individual proceeds. This is desirable and in line with Departmental policy. Under the terms of the Article a considerable number of beneficiaries will receive their proceeds immediately and in cash.

The limitation on the status of lands acquired with the proceeds as to their "inalienability" should be corrected by the Joint Resolution. It is intended that such lands should be held as other allotted lands, but under Section 3, such lands could not be exchanged and disposed of under the general allotment laws without authority of Congress. A suggested section in the Joint Resolution to cure this defect is included in the foregoing item 7.

9. Conveyance of Indian titles to the United States: Under Article IX approval of the contract by the Council and by a majority of the adult members of the tribes and its enactment into law, constitutes a relinquishment and conveyance to the United States of all lands, rights, and interests by the Tribes as to tribal lands and by allottees and heirs as to allotted lands, vesting title thereto in the United States.

Approval of the Council and of a majority of the adult members of the tribes has been formally given in accordance with the procedure and conditions stipulated in Public Law 296. (See above under "B")

The omnibus transfer of titles, as provided in Article IX, will obviate the necessity of much paper work in the Bureau of Indian Affairs and the Corps of Engineers. Appropriate entries will have to be made, however, on the records of the Indian Bureau and of the Bureau of Land Management.

10. Rights of Indians to use of Garrison Reservoir shoreline: Under Article X the Commissioner of Indian Affairs is required, within two years from the date of the contract, to present to the Chief of Engineers for his approval a plan for the grazing of livestock between the Taking Line and the actual water line of Garrison Reservoir, based on the fullest development of the residual reservation for livestock. Areas so reserved under the Plan may not be



reduced or changed except with the consent of the Commissioner and approval of the Council. The Council may promulgate Rules and Regulations for the utilization of the reserved areas (Section 1). The Chief of Engineers may advise the Commissioner to eliminate any feature from the plan which would interfere with the operation of the Garrison Project. The right of the Three Affiliated Tribes to such designated areas is made prior to their use for park, recreational, or wild life conservation purposes under other statutes (Section 2). The Council commits itself to cooperate with North Dakota in the conservation, development, and utilization of the wild life resources of the Taking Area, but the Tribes reserve their hunting and trapping rights therein established by treaty and to issue licenses therefor under tribal regulations. The right to fish in Garrison Reservoir is to be governed by Rules and Regulations of the Chief of Engineers, but the Tribes and the members thereof do not have to pay any license fee therefor (Section 3). The Tribes reserve the right for their members (under terms and conditions determined by the Council and in accordance with plans approved by the Chief of Engineers) to establish boat harbors, wharfs, and recreational areas in the Taking Area, provided such privileges are not made available to non-members except in accordance with regulations and schedules of rates approved by the Tribes with the concurrence or approval of the Chief of Engineers.

The reservation of shore line grazing rights to the Fort Berthold Indians is eminently justified. The Tribes are to be deprived of their river bottom lands and access to the Missouri River and its tributaries for the watering of livestock. It is reasonable to insure their access to Garrison Reservoir as a substitute, especially in view of the fact that the Indians' economy is so largely based on the raising of livestock. It is also reasonable that the Indians' economic needs should have preference in the use of the Taking Area. However the Article, as written, allows latitude for adjusting the Indians' economic interest with recreational, park, and conservation interests, in the drafting of the plan to be prepared by the Commissioner of Indian Affairs.

The Indians retain their treaty hunting and trapping rights as presently established but tacitly surrender their treaty fishing rights in Garrison Reservoir. The latter concession is proper and in the interest of protecting any program which may be established for stocking the reservoir. The other privileges extended to the Tribes and their members as to building boat docks, etc., recognizes the fact that such facilities will be necessary because of the segmentation of the residual reservation.

11. Salvage of improvements, timber, etc: Under Article XI the tribes and members thereof may salvage their improvements from the Taking Area at least until October 1, 1952, subject to the condition that the District Engineer, Garrison District, shall serve notice of his intent to begin clearing operations at least three months prior thereto. No deduction from the appraisal of improvements is to be made (Section 1). They may also salvage timber, sand, and gravel until at least October 1, 1950, similarly without any deduction from the appraisal thereof, and with a similar condition as to the

giving of three months clearance notice (Section 2). They may salvage lights until the date fixed for impounding the water of Garrison Reservoir (Section 3). The District Engineer is required to give six months notice of the impoundment date, and no damage for loss of life or property due to such impoundment may be claimed on or after the date so specified, but the said date is not to be earlier than October 1, 1952.

The salvage privileges established by Article XI are generous. When the final dates were fixed in the contract negotiations, it was believed that ratification would take place in the 80th Congress. If ratified by June 1, 1949, only 17 months will be available in which to take advantage of the privilege of salvaging the standing timber, embracing only one winter season. It is believed that insufficient time will thus be allowed in which to undertake effective and economic salvage operations.

12. Discovery of Future Sub-Surface Values in Taking Area: Under Article XII, if in the future, sub-surface values are discovered in the Taking Area, the Tribes shall be entitled to a royalty of one-eighth of the money received for oil and gas extracted, with said royalties deposited to tribal funds or paid to allottees or heirs as their interests now appear.

A technical defect in Article XII is corrected by Section 10, of the contract, beginning in line 21 of page 7<sup>4</sup> of the Joint Resolution, namely, the application of the article to all minerals, not merely oil and gas.

13. Payment of possible deficit under contract: Under Article XIII it is provided that the contract is entered into on the understanding that the cost of carrying out its terms should be met by appropriations for the Garrison Project. If \$5,105,625 is insufficient, such additional sum or sums as may be necessary will be made from appropriations for Garrison Reservoir.

The contract is based on the theory that the appropriation of \$5,105,625 is sufficient to pay for the appraised value of the tribal and allotted lands and improvements to be taken for the Garrison Reservoir and for the costs of relocating and re-establishing the Indians themselves, as well as for the relocating and re-establishing of Indian cemeteries, monuments, and shrines. It is provided, however, that if these costs, when determined in accordance with the terms of the contract, shall prove to be less than \$5,105,625 the Tribes will retain the unexpended balance on tribal funds (Article III, Section 4). On the other hand, if these costs, when determined, shall prove to be in excess of \$5,105,625, such additional sum or sums as may be necessary will be made available from appropriations for the construction of Garrison Reservoir (Article XIII). The inclusion of this formula is justified because the estimate of \$5,105,625 was unilaterally determined by the taking

agency, the Corps of Engineers, without the concurrence or acceptance of the Indians; because the said estimate was based on gross appraisals; and because the value of lands has markedly risen since 1946, the date of the Corps' appraisal survey.

14. Miscellaneous: article XIV is the standard contract provision and Article XV stipulates that the contract shall not become effective until it has been ratified by a majority of the adult members of the tribes, by the Council of the tribes, and by the Congress.

E. ADDITIONAL COMPENSATION AND OTHER CONSIDERATIONS SUPPLEMENTARY TO THE CONTRACT OF MAY 20, 1948 CONTAINED IN JOINT RESOLUTION

I. Land Readjustment Fund (Sections 2 & 3)

Sections 2 and 3 of the Joint Resolution both deal with the establishment and operation of a "Land Readjustment Fund."

Section 2 authorizes an appropriation of \$3,000,000 to establish a Land Readjustment Fund for use in consolidating the land holdings of the Three affiliated Tribes and in purchasing land for needy members thereof. The fund is to be administered by the Commissioner of Indian Affairs and its operation terminated at the end of ten years. Any unexpended balance in the Fund at the end of the 10-year period is to be returned to the Treasury and any land which has not been deeded to members shall be held by the U. S. in trust for the Tribes and shall be non-taxable and non-alienable until otherwise provided by Congress. Section 3 elaborates the purposes and operations of the Fund: It is to be operated to consolidate the allotted lands into economic use units. Allotted, inherited and unrestricted lands, as well as interests in lands and improvements, may be acquired by purchase or exchange by the Fund which can, through sale or exchange, dispose of such lands to individual Indians. Proceeds derived from the Garrison land taking may be used by individual members of the Tribes to acquire lands purchased or otherwise acquired by the Fund. To care for needy members, the Fund may take lands in tribal ownership for assignment to such persons.

The establishment of a mechanism to bring about land ownership consolidation on the residual Fort Berthold Reservation is a sine qua non of a successful removal of the Indians from the Garrison Taking Area.

Allotment of the Fort Berthold Reservation began in 1895. Ninety percent of the allotments made in that year, numbering 949, were selected on the bottom lands adjacent to the Missouri River. Between 1910-1915, 765 more allotments were made in intermingled locations with the first schedule of 1895. The third period of allotment fell between 1910 and 1912. Finally, between 1923-1929, 556 allotments were made in the southeastern part of the reservation (generally uplands).

This application of allotment to the Fort Berthold Reservation has created the following conditions: (1) Approximately 50 percent of the allotted lands are in heirship status, but 75 percent of the bottom lands (largely allotted in 1895) are in that status. These are precisely those lands which lie within the Garrison right-of-way. Most individual Indians today have interests within two and sometimes three of the four allotment groups, and most families have interests in all four. (3) Although allotted throughout the

entire area of the reservation, family groups have, through one means or another, located their homes on the bottom lands--i.e. within the Garrison right-of-way. (4) Through scatteration and fractionization of the individual holdings, it has been difficult for the Indians to use their lands themselves, and hence the fact of 340,000 acres being leased or permitted to non-Indians. (5) In spite of the pattern of allotment, the Indians have succeeded in building their economy on a strip of 241,000 acres on both sides of the river. (From this strip, Garrison will take out the heart--155,000 acres). (6) For each acre of allotted land owned in the Garrison right-of-way, the Fort Berthold Indians own 3 acres on other parts of the reservation. (7) No individual, or even family, will have sufficient compensation for lands taken in the right-of-way to acquire a new farm or ranch unit, unless the value of the lands owned outside of the right-of-way can be realized, or unless land holdings can be consolidated. (8) Removed Indians will not be able to establish satisfactory farms or ranch units on the residual reservation unless an extensive reservation-wide program of exchange and reconsolidation is undertaken.

The only practical approach to this problem is the creation of a "Land Readjustment Fund" which would be operated for the following purposes: (1) To purchase lands in the residual reservation from Indians who want to relocate outside of the reservation. By adding together compensation derived from sale of land in the reservoir right-of-way to the proceeds derived from the sale to the Fund of land in the residual reservation, an Indian family would have more adequate means of buying a new farm or ranch, and/or going into some other economic enterprise. (2) To purchase lands in the residual reservation either from Indians or white patentees in order to block up consolidated, family-size, economic units for farm or ranch purposes. (3) To acquire tribal lands for assignment to landless Indians who must remove from the right-of-way. (4) To sell or exchange acquired lands to Indians or whites.

Over the entire period of its operation, the appropriation for the Land Readjustment Fund would suffer diminishment on account of (1) the acquisition of lands which could not be disposed of to individuals, and hence retained in tribal ownership, (2) purchases of tribal land for needy members of the tribes, and (3) the costs of operating the Fund.

The appropriation of \$3,000,000 would be about adequate to establish a Land Readjustment Fund for the necessary purposes described above. For the most part this sum would be used to acquire various categories of land within the reservation boundaries as a stock from which sales and exchanges could be carried on, creating economic farm and ranch units under newly issued trust patents. The fund could also be used to acquire low grade allotted lands which can be effectively utilized only in large blocks as community pastures. An estimate of expenditures from the fund is as follows:

- |   |             |
|---|-------------|
| (1) Purchase of improved patented lands in the residual segments of the future reservation: 41,130 acres at \$25.00 per acre.....               | \$1,103,425 |
| (2) Purchase of trust allotments and heirship interests from non-resident Indians: 36,123 acres at \$15.00 per acre.....                        | 541,920     |
| (3) Purchase of trust allotments and heirship interests from Indians who move away-from the reservation: 53,600 acres at \$15.00 per acre ..... | 804,000     |

Total brought forward \$2,449,345

- (4) Purchase of trust allotments and heirship interests which are uneconomical in individual ownership; lands to be used as community pastures: 50,000 acres at \$10.00 per acre.....\$ 500,000
- (5) Administration: Expert field and clerical personnel expense to effect land acquisitions, consolidations, appraisals, records and clearance of work, for 10 years..... 150,000
- Total.....\$3,099,345

## II. Supplementary Appropriation of \$6,500,000 (Section 4)

Section 4 authorizes an appropriation of \$6,500,000 to the Three Affiliated Tribes to compensate them:

- a. For all breaches of the Treaty of September 17, 1851;
- b. For the abrogation of Section 5 (e) of Article VI of the Constitution and By-Laws of the Tribes adopted in accordance with the Indian Reorganization Act of 1934;
- c. For disruption of their economic, social, religious, and community life;
- d. For reducing them to the condition of "displaced persons";
- e. For the destruction of their basic industry (livestock);
- f. For the intangible costs of relocation and re-establishment of a sound economic base for the future of the Tribes and adjustment to new fields of endeavor.

The section rests on the proposition that none of these damages and/or needs is compensated for by the appropriation of \$5,105,625. The appropriation of \$6,500,000 is to be credited to the Three Affiliated Tribes, to draw 4 percent interest, and to be available for expenditure by the Council with the approval of the Commissioner of Indian Affairs.

Section 4 generally describes three kinds of justification for the payment of the additional compensatory appropriation of \$6,500,000, namely (1) compensation for tangible losses of property not covered by the contract appropriation of \$5,105,625, and (2) compensation to defray the costs of meeting social needs arising out of the Garrison land taking, and (3) compensation for intangible damages.

1. Compensation for tangible losses of property not covered by the contract appropriation of \$5,105,625: Section 1 of Article IV of the Contract of May 20, 1948 provides that the Indians' lands and improvements shall be appraised at the "fair market value." In

following the customary interpretation of this language, it is certain that tangible values will be taken but not be compensated. At least three such kinds of compensation due the Tribes may be conservatively estimated, as follows:

- (a) Compensation for the loss of the future supply value and supplemental value of standing timber, not covered by contract appraisal: Under Article IV, Section 1 of the contract, the Fort Berthold Indians are to receive the appraised value of standing timber on a fair market value basis. Payment on this basis does not represent the real tangible value for its future supply utilization, as well as for its continued use year after year for house logs, fuel, and fence posts. The economic function of the timber stand in the life of the tribes makes it far more valuable for these uses than is represented by its fair market value. With the taking of the bottomlands, the timber stand will be irretrievably lost. The timber within the Taking Area furnishes the proper environment for recreational areas for the Indians, for wildlife habitat and for many fruits, such as June berries, wild plums, and grapes, choke cherries and buffalo berries. The timber also moderates the local climate and furnishes protection to the Indians and their livestock.

The Fort Berthold Indians are entitled to participate in the stumpage values which would be almost sure to increase as the supply of local timber decreases. It will be necessary in the future to secure timber products from a distance with much higher transportation charges. The Indians have a right to anticipate these future supply values which are inevitable. The taking of their land deprives them of the opportunity to realize the benefits of future increased values.

In addition to the increase in the value of the merchantable timber the natural reproduction, which will produce merchantable material in a few years, has a substantial value comparable to the capitalization of the cost of a forest plantation. The Indian Service authorizes a valuation of \$3.00 to \$4.00 per acre for young hardwood growth. This valuation might be reduced on the Fort Berthold Reservation since some of the larger young growth suitable for fence posts will be included in the appraisal of the fair market value of the standing timber.

These future supply and supplemental values are estimated as follows:

20,000 acres timber @ \$2.00 per acre, future supply value.....	40,000
20,000 acres young growth @ \$2.00 per acre.....	40,000
20,000 acres recreation value @ 2.00 per acre..	40,000

Total brought forward..\$120,000

35,000 acres timber and brush @\$2.00 per acre,  
wildlife habitat value..... 70,000

35,000 acres timber and brush @\$2.00 per acre,  
wildfruit value..... 70,000

35,000 acres timber and brush @ \$2.00 per acre,  
protection value..... 70,000

Total..... \$330,000

(b) Compensation for the factor of irrigability of certain lands in the Taking Area, not covered by the contract appraisal: The appraisal of lands, to be undertaken under Article IV of the contract will not include any claim for compensation on account of potential irrigability of certain lands within the Taking Area. However in 1942 the U. S. Bureau of Reclamation made a survey of irrigable potentials of the Fort Berthold Reservation (Report on Missouri River Investigations - North Dakota - South Dakota. Missouri-Souris Project and Potential Units, Investigations Report No. 66). This report and subsequent surveys of the Bureau of Indian Affairs substantiated the fact that the following acreage is suitable for irrigation and meets all the necessary requirements:

Shell Creek Unit	-	4,500	acres
Independence Unit	-	4,130	"
Fort Berthold Unit	-	9,400	"
Old Agency Unit	-	6,510	"
Total	.....	24,540	"

Questions of soil adaptability, water rights, topography, and feasibility have been determined and conclusions are that irrigation of these lands, to be taken from the Fort Berthold Indians for Garrison Reservoir, is practical. It is estimated that the irrigable potential increases the value of these 24,540 acres by \$10.00 per acre. This would result in an amount of \$245,400.

(c) Compensation for the severance of the Fort Berthold Reservation into five residual segments through the taking of the reservation's bottom lands: Although damages for the severance of individual tracts of land are provided in Article IV, Section 1 of the contract, no compensation is provided therein for the severance of the reservation as a whole. It must be remembered that the original Fort Berthold Reservation contained 12½ million acres and that it was successively reduced to its present boundaries by a series of statutes and executive orders. The Garrison Reservoir will take the best of the lands remaining in the ownership of the Tribes--the heart of the reservation. The bottom lands to

be taken represent a complex of valuable characteristics-- shelter for homes and livestock, easily developed water, winter pasture, plentiful wild fruit supply, and game in abundance. Taken in conjunction with the upland range, an almost perfect balance of lands exists in the present reservation. The lands remaining on the reservation will have a definite diminished value. But no account is taken of this fact in the settlement provided by the contract. An estimate of this uncompensated loss is as follows:

Value of reservation before Taking:	
583,283 acres at average price of	
\$25.00 per acre.....	\$14,582,075
Value of remainder after Taking:	
437,024 acres at average price of	
\$18.00 per acre.....	7,866,432
Total Damage.....	\$ 6,715,643
Minus estimated appraised value.	4,000,000
Total severance damage.....	\$ 2,715,643

The per acre values used in the above calculation are based on current land sales in the area.

2. Compensation for meeting the costs of social needs arising from the social and economic disruption of the life of the tribes by Garrison Reservoir: The contract of May 20, 1948 provides for the payment of the Indians' costs in removing from the Garrison right-of-way, for costs of developing water supplies and fencing on the residual reservation, and for costs of removing cemeteries. It does not provide funds to enable the Indians to re-establish their shattered economy. Nor does it deal with the problem of those Indians who are to leave the reservation or with the basic fact that, on their diminished land resource, a substantial portion of the tribes must seek to leave the reservation in the future. When viewed from this perspective on the total effect of the Garrison Project on the Fort Berthold Indians, there is sound justification for extending substantial aid to them by providing additional compensation for economic and educational programs. Those Indians who remain on the residual reservation and who wish either to remain in, or get into, the livestock business will have insufficient funds to do so, even after their land bases have been re-established through the Land Readjustment Fund, as provided by Sections 2 and 3 of the Joint Resolution. Around 90 percent of those who expect to remain on the reservation fall in this category (200 families). The 49 families who wish to leave the over-crowded residual reservation should be encouraged to do so, but without financial assistance, it is doubtful that very many of them will be able to take this step. Finally, it is very important to note that the compensation to be derived from the taking of the allotted lands will generally go to the older members of the tribes, or that it will be distributed widely in small amounts to heirs. This result will naturally follow from the fact that the Taking Area closely blankets the first and oldest



schedule of allotments made in 1895. No conformity between compensation and need can be expected. Yet 300 families will have to move and get re-established economically. From this analysis it is possible to describe two categories of economic need: financial assistance to establish the Fort Berthold people in the livestock business on the residual reservation and financial assistance to assist members of the reservation to leave the reservation to engage in small business or to acquire homes in relation to definite employment opportunities. The establishment of an "Economic Recovery Fund" would facilitate the attainment of these purposes. An estimate follows:

The reduction of the Fort Berthold Reservation through the taking of the best part for the Garrison Reservoir means that within a relatively short time the residual reservation segments will be brought completely into use, with insufficient resources left for the resident population to make a living. A trend to diminish the reservation population, should be given impetus, and the only practicable way to achieve this would be giving the younger generation a considerably expended opportunity for technical, professional, and vocational training.

An expression of these social and economic needs is as follows:

(a) Assistance to 175 families (or one-half of the expected reservation population) by agricultural and livestock loans, averaging \$12,000 per family, based on the Indian Bureau's experience in administering the I.R.A. Revolving Credit Fund .....	\$2,100,000
(b) Assistance to 50 families by small business and/or real estate loans, averaging \$15,000 .....	750,000
(c) For assistance to an average of twenty young men and women annually averaging \$1,500 per year, for 10 years	<u>300,000</u>
<b>Total</b>	<b>\$3,150,000</b>

3. Indemnity in consideration of violating the Treaty of 1851 and the Tribal Constitution: The Fort Berthold Reservation was established in 1851 by the Treaty of Fort Laramie. The three confederated tribes (Mandan, Arikara, and Gros Ventre) point with pride to the fact that they have always faithfully observed the terms of their treaty. At the same time, the United States has repeatedly violated the treaty by reducing the Fort Berthold Reservation from its original area of 12½ million acres to its present area of 643,000 acres. It must be admitted that the land taking for the Garrison Project constitutes another treaty violation. It must also be admitted that this land taking, when considered in terms of the upheaval it will work, leaves the Tribes virtually without an integral land base, as guaranteed by the Treaty of 1851.

The Three Affiliated Tribes are a distinct element in the general population, having Indian ancestry and tribal association derived from a common historical origin. The Treaty of 1851 recognized their right of occupancy to the territory delimited therein. In 1936-37 the United States recognized the Tribes as a political and social entity when it

granted them a federal Constitution and Charter of Incorporation. These documents reaffirmed their right to veto any disposition of their remaining tribal estate, all of which is now to be taken for the Garrison Project.

The Tribes have not challenged the right of the United States to exercise its sovereign power of eminent domain by its action in violating the Treaty of 1851 for public purposes. They have, however, appealed to the Congress to recognize an obligation to recompense them on account of the deliberate withdrawal of the United States from the solemn promises of 1851. They take the position that it is not equitable to force them into a claims suit, that it is within the power and competence of the Congress to fix a compensatory payment, and that the Congress is morally obligated to do so.

No effort is made here to equate this claim in dollars. The amount stipulated in Section 3 of the Joint Resolution is \$6,500,000 for all outstanding claims. The total of the specific claims set forth in the two preceding paragraphs is \$6,440,400. The conclusion must follow that the amount requested is well within reason and should commend itself to Congress for favorable action.

### III. Reservation of Block of Electric Power at Garrison Dam (Section 5)

Section 5 sets aside a block of at least 20,000 kilowatts of Garrison electric power, when developed at Garrison Dam to be delivered at one or more points on the Fort Berthold Reservation or, as it may be extended, at a rate not to exceed 2 mills per kilowatt hour, for uses on the reservation for the benefit of tribal and other enterprises, and for individual members of the Tribes. Any of the reserved power not used may be used by the United States.

It would be desirable to extend the benefits of electrification to the Fort Berthold Reservation. The Tribes are being required to make extensive sacrifices in public interest, and it would be only equitable that provision should be made to give the Tribes a share of the general benefit to be derived from the Garrison Project.

It is highly questionable, however, that the Indians be given a preferred status in regard to rates, as such preferential treatment is contrary to one of the most important tenets of the country's public power policy. The Department ought not, therefore, to approve the provision in Section 5 which stipulates that the Tribes will be delivered electric power at the rate of 2 mills. At the same time the Department ought to approve the principle of reserving a block of power for use within the Fort Berthold Reservation and should recommend that the Congress authorize the appropriation of sufficient funds to construct, when feasible, an adequate distribution system. It is recommended that Section 5 be revised to read as follows:

"Sec. 5. When electric power is available from the Garrison Dam, there is hereby reserved and set aside a block of power of 20,000 kilowatts

for sale and distribution by the Three Affiliated Tribes for use of such power on the residual Fort Berthold Reservation as it may be extended. This block of power shall be delivered at such point or points on the reservation and at such voltage as may be determined by the Secretary of the Interior. Payment shall be made for the power actually used at the lowest wholesale rate or rates applicable to the same class of service made available to other customers receiving electric power from the Garrison Dam power plant. The transmission and distribution system necessary for the delivery of such block of power to the customers of the said Three Affiliated Tribes shall be constructed from time to time as needed by the said tribes, with funds made available therefor by the United States without cost to the said Tribes, and there is hereby authorized to be appropriated from time to time such sums as may be required for the construction of the said distribution system to make available to the customers of the said Three Affiliated Tribes the block of power herein reserved to them. The rates for the sale of the power by the Three Affiliated Tribes shall be subject to approval by the Secretary of the Interior. Until such time as the said Three Affiliated Tribes shall require all of the electric power reserved to them, any amount in excess of that actually required by the said Three Affiliated Tribes shall be available to the Secretary of the Interior for sale or disposition off the Fort Berthold reservation as extended."

#### IV. Provision for Investigation of Irrigation Possibilities on the Residual Fort Berthold Reservation (Section 6)

Section 6 provides for an investigation of the feasibility of providing irrigation within the residual Fort Berthold Reservation and for the construction of necessary irrigation works upon a finding of feasibility. This provision extends to any lands acquired in the future by the Tribes or by their members. If constructed, the irrigation works must be operated on a basis not less favorable than to non-Indian lands and the costs thereof shall be subject to the terms and other laws applicable to Indian lands.

This section insures the construction of irrigation works on feasibly irrigable lands of the Fort Berthold Reservation. It is no greater consideration than is given to all reservations where irrigable lands exist, but authority for such works is not always obtainable. This order for irrigation construction has justification in that the Fort Berthold Indians are losing valuable irrigable lands in the taking, and would have had approximately 25,000 acres of irrigated land had an original Bureau of Reclamation program for irrigating the valley of the Missouri been carried out. There is further justification in that it may be shown in the future that the Fort Berthold Indians require irrigated lands for producing an assured supply of feed for their livestock and food for themselves.

Investigations, as far as they have been carried out at present, reveal that irrigation of any area of the residual segments is probably infeasible. To reach suitable lands, water must be lifted about 200 feet from the normal level of the reservoir. With electric power at even 2 mills per kilowatt hour, the cost of putting water on land with this pumping requirement would be approximately from six to seven dollars per acre. For Indians, unused to irrigation, or for non-intensive irrigated farming,

this cost would be prohibitive. The report on tentative investigations of irrigable lands, by the Missouri River Basin Investigations, states:

"Examination of the topographic maps prepared by the Corps of Engineers and the reconnaissance survey maps of the U.S.B.R. discloses no potential irrigable areas within the residual reservation which can be feasibly irrigated by the pumping of water from the Garrison Reservoir.

"First impressions might indicate that the area lying within southeast Mountrail County located within the peninsula formed by the Missouri River on the west and south and Shell Creek Valley on the east could be supplied with water by pumping from Garrison pool to the top of the divide which roughly parallels the Missouri River and the relatively short distance to the east of it.

"The low points along the top of the ridge are at an elevation of approximately 2200 feet MSL. The operating level of the Garrison pool will be at elevation 1830 feet MSL. At the nearest point the 1830 contour is approximately  $1\frac{1}{2}$  miles from the nearest saddle in the ridge. This means that any installation to pump water to the top of this ridge would require  $1\frac{1}{2}$  miles of pipeline operating under a maximum static head of about 370 feet.

"Since the maximum static head of approximately 150 feet is considered to be the outside limit at which irrigation pumping can be considered with all other conditions (power rates, quality of the land, climatic conditions, etc.) extremely favorable, it seems obvious that the proposal to irrigate any of the area lying on this peninsula is not feasible."

The greatest possibility of these Indians having irrigated lands will be in some bottomland which they may acquire. There is the possibility of purchasing or exchanging dry farm land east of the river for land south of the reservation in the future for the livestock program and settlement. If the land were acquired in the neighboring valley of the Knife River, it would probably be subject to irrigation from the proposed Knife River Reservoir.

Enactment of Section 5 ought not to be opposed, but it is not possible to be sanguine that any substantial benefit will accrue therefrom to the Fort Berthold Indians.

#### V. Payment of Interest on Fund of \$5,105,625 (Section 7)

Section 7 provides for the payment of 4 percent interest on the fund of \$5,105,625, appropriated by Public Law 296, from July 31, 1947, the approval date of the said statute. The interest is to be credited to the Tribes. Both the fund and the interest are to be non-taxable.

Inasmuch as there is no contract and no conveyance of property until ratification of the contract by the Congress, the payment of interest

from the date of the approval of the appropriation act appears to be questionable. Payment of interest from the date on which the contract comes into force is justifiable and should be paid. It is recommended therefore that Section 7 be amended by striking out "July 31, 1947" and inserting "May 20, 1948." This date is that on which the Indians and the United States executed the contract in accordance with Public Law 296. It is reasonable to apply the doctrine of nunc pro tunc, once the contract comes into effect through Congressional ratification.

The last sentence of Section 7 which reads, "The said funds shall be and remain non-taxable" has the effect of relieving the compensation received under the contract by the Tribes and the members thereof from the imposition of the capital gains income tax. In view of the special circumstances underlying the receipt of income derived from the Garrison taking which is at present tax free, and in view of the fact that the taking is involuntary and fraught with such serious consequences to the Three Affiliated Tribes, and further in view of the fact that the replacement value of the property to be taken is not recognized in the appraisal thereof, and finally because the Fort Berthold Indians will require all the compensation received to buy new homes and lands, this provision in Section 7 should be endorsed.

#### VI. Protection of Settlement Proceeds from Collection of Debts (Section 8)

Section 8 has the following effect: It bars the collection of debts of the Tribes and their members out of any funds received under the Joint Resolution, including the contract, except debts due the United States and the Tribes. It cancels all debts of the Tribes and their members incurred in connection with the Farm Security Administration, Farm Home Administration, and Seed and Feed loan programs.

It should be noted that, except for the three specifically named kinds of debts, Section 8 does not cancel the debts of the Tribes and their members; it operates only to make debts non-collectable from proceeds derived under the Joint Resolution. In operation the section will undoubtedly result in some permanent defalcation of debts. However it is believed that the section should be approved because the proceeds received from the Garrison taking should be protected from the collection of debts which would militate against the successful removal and rehabilitation of the Tribes. "Farm Home Administration" should read "Farmers Home Administration" and "Seed and Feed Loans" should read "Farm Credit Administration."

#### VII. Stipulation of Final Settlement (Section 9)

Section 9 stipulates that the Joint Resolution containing the executed contract and the supplementary sections shall be in "complete and final settlement of all rights, interests, and claims of the Tribes against the United States on account of the construction of the Garrison Project."

The effect of Section 9 is to cancel the Tribes' right to bring suit in the Court of Claims under the authorization contained in Public Law 296. As pointed out elsewhere in this memorandum, the proposal to make a complete and final settlement as set forth in the Joint Resolution is highly desirable; it is not necessary therefore to discuss it further at this point.

### VIII. Correction of Article XII of Contract (Section 10)

Section 10 corrects Article XII of the contract by making it apply also to any minerals found in the future in the Taking Area, not merely gas and oil.

The correction provided in Section 10 is desirable.

### IX. Authorization of Appropriations to carry out Joint Resolution

Section 11 authorizes appropriations necessary to carry out the conditions, provisions, and requirements of the Joint Resolution.

By Section 3 of Article III of the Fort Berthold Contract, no portion of the appropriation of \$5,105,625 may be expended by any government agency for any cost or expense incurred by it in carrying out its terms. Inasmuch as the contract imposes many responsibilities on this Department, Section 11 is indispensable to an effective execution of the contract.

A careful analysis of the contract indicates that an appropriation of at least \$500,000 should be authorized for expenditure by the Department over the next few years. Funds appropriated to the Bureau of Indian Affairs for Missouri River Basin Investigations and Surveys are not sufficient to cover these costs and moreover could not be used for several of the purposes. Responsibilities of this Department under the contract are as follows:

1. Appraisal of the Indian lands and improvements located in the Garrison Taking Area.
2. Appraisal of lands and improvements to be acquired with proceeds to be received under the contract.
3. The preparation of detailed plans and estimates of cost for the removal of the Indians from the Taking Area; the investigation of the lands and water resources of the residual Fort Berthold Reservation; and the supervision of the Indians' removal and relocation.
4. The preparation of detailed plans and estimates of costs for the removal and relocation of Indian cemeteries, monuments, and shrines from the Taking Area, and the supervision thereof.
5. The investigation of grazing areas below the Taking Line and the preparation of recommendations to the Chief of Engineers as to areas to be reserved for Indian use.
6. The planning and supervision of salvage operations, including the cutting and disposal of standing timber located in the Taking Area.
7. The legal representation of Indians who exercise their option to reject appraisals of their lands as prepared by the Commissioner of Indian Affairs.

8. The augmenting of the Indian Bureau staff at the Fort Berthold Agency, necessitated by the need for additional personnel to make cash disbursements to individual Indians, and to lend assistance to the Indians in planning the reconstitution of their farming and livestock activities, in supplying them with advice in readjusting their home economics, and in safeguarding health and welfare during the period of their removal.
9. The repair and/or renovation of government quarters on the Fort Berthold Reservation for the accommodation of additional personnel required for the planning and supervision of the Indians' removal; and the purchase of necessary automotive equipment.

Expenses imposed on the Department through the enactment of Sections 2 to 10 of the Joint Resolution are summarized as follows:

Sections 2 and 3: Administration costs to come out of appropriation of \$3,000,000.

Section 4: Incalculable. Depends on the uses to which the appropriation is put and the extent to which the Council will impose responsibilities on the Department in administering said uses.

Section 5: None.

Section 6: \$10,000.

Sections 7, 8, 9, and 10: None.