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Reimbursement of the Fort Berthold Indians of North Dakota

United States Congress

US House of Representatives

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REIMBURSEMENT OF THE FORT BERTHOLD INDIANS OF NORTH DAKOTA

JUNE 4, 1940.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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

REPORT

[To accompany S. 414]

The Committee on Indian Affairs, to whom was referred the bill (S. 414) for the relief of the Indians of the Fort Berthold Reservation in North Dakota, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

The amendment is as follows:

On page 2, line 4, strike the figures "10" and insert in lieu thereof the figure "5".

A similar bill (H. R. 795) was introduced in the House and referred to your committee. The letters of the Secretary of the Interior, the Comptroller General of the United States, and the Attorney General of the United States, submitting their reports on this proposed legislation, are as follows:

DEPARTMENT OF THE INTERIOR,
Washington, April 4, 1939.

Hon. WILL ROGERS,
Chairman, Committee on Indian Affairs,
House of Representatives.

MY DEAR MR. CHAIRMAN: Further reference is made to your request for a report on H. R. 795, for the relief of the Indians of the Fort Berthold Reservation in North Dakota.

The act of February 11, 1920 (41 Stat. L. 404), conferred jurisdiction upon the Court of Claims to hear, determine, and adjudicate the claims of the Fort Berthold Indians, a confederated tribe consisting of the Arickaree, Gros Ventre, and Mandan Tribes, parties to the treaty of September 17, 1851 (11 Stat. L. 749), commonly referred to as the Fort Laramie Treaty.

The Court of Claims (71 Ct. Cls. 308) awarded a judgment in the amount of $4,923,093.47 from which gratuities aggregating $2,753,924.89 were offset, leaving a net judgment of $2,169,168.58. Included in the offsets was an amount of $400,000 claimed by the Indians to have been appropriated pursuant to the pro-

visions of an unratified treaty of July 27, 1866 (2 Kappler 1052), and erroneously allowed as a gratuity offset by the court. This bill, if enacted, will authorize the payment to the Fort Berthold Indians of the amount claimed to have been erroneously allowed as a gratuity offset.

Article V of the Fort Laramie Treaty of 1851 established the reservation boundaries of the various groups who were parties to the treaty. The territory set aside for the Gros Ventre, Mandan, and Arickaree Tribes, or Nations, was described as "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." The area involved was approximately 13,000,000 acres. The last paragraph of the same article, however, provides that—

"It is, however, understood that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands, * * *."

The Court of Claims established the following facts:

	Acres
Original area of reservation	13, 000, 000. 00
Area subsequently withdrawn from reservation	11, 424, 512. 76
Area of delimited reservation	1, 575, 487. 24
Subsequent additions, Executive orders of 1870, 1880, 1892	1, 578, 325. 83
Recognized area of reservation (net)	3, 153, 813. 07
Area for which Indians had not been compensated	9, 846, 186. 93
Original area of reservation	13, 000, 000. 00

The court thereupon awarded a judgment for compensation for 9,846,186.93 acres at 50 cents an acre, or $4,923,093.47, the exact amount of the gross judgment.

The attorneys for the Indian claimants did not inject into the suit a claim for compensation for an area not described in the fifth article of the Fort Laramie Treaty, but lying north and east of the Missouri River and more particularly described in the addenda to an unratified treaty of 1866, and hereafter quoted. This question was brought into the case only after the defendant had pleaded as a gratuity offset the $400,000 the Indians believed they had received for the cession of the land in question. The Indians base their claim to this area upon the last paragraph of article V of the 1851 treaty whereby they did not "abandon or prejudice any rights or claims they may have to other lands."

The treaty of July 27, 1866, as to the Arickarees, granted to the United States the right "to lay out and construct roads, highways, and telegraphs through their country," and article VII stipulated a consideration of $10,000 a year for 20 years "after the ratification of this treaty by the President and Senate of the United States."

The addenda to this document purport to convey to the United States all of the right and title held by the Indians in and to a certain tract of land on the northeast side of the Missouri River, more particularly described as—

"Beginning on the Missouri River at the mouth of the Snake River, about 30 miles below Fort Berthold; thence up Snake River and in a northeast direction 25 miles; thence southwardly parallel to the Missouri River to a point opposite and 25 miles east of old Fort Clarke; thence west to a point on the Missouri River opposite to old Fort Clarke; thence up the Missouri River to the place of beginning."

In consideration of this proposed cession article II of the addenda stipulates that "In addition to the payments by the United States of annuities there named to the Arickarees, there shall be paid $5,000 to the Gros Ventres and $5,000 to the Mandans, annually, in goods, at the discretion of the President."

The tract of land in the proposed cession has been estimated to be approximately 40 by 25 miles, embracing an area of approximately 640,000 acres, and Royce's Land Cessions indicate that at least one Mandan village was at one time located thereon.

The treaty of 1866 was negotiated by a treaty commission appointed by the President. A full report of the work of the Commission is found in the report of the Commissioner of Indian Affairs, for the year 1866, beginning on page 168. In explaining its work in part, the Commission reports (p. 172) that—

"We obtained from the Indians—the Arickarees, Mandans, Gros Ventres, Assiniboines, and Crows—not only a right-of-way through their possessions, but

also cessions of lands at such points as seemed to us especially necessary for settlement and cultivation. The cession from the Arickarees, Mandans, and Gros Ventres, who inhabit the country about Fort Berthold, cedes the country on the east side of the Missouri, from old Fort Clarke to Snake Creek or River, being about 40 miles long and 25 miles wide * * *.

"There is a good showing of coal on this land, the quality of which seems very uncertain, but if at all capable of being made available as fuel, will be of great value to commerce in a country where wood is extremely scarce. * * * The soil, coal or lignite, and timber, united with the exorbitant prices paid for everything in that region, will probably invite settlements on this natural junction of commercial lines, so as to accommodate them, and ultimately advance the development of the northwest prairies."

An examination of treaties with other tribes, and of claims asserted by other tribes against the United States fails to disclose that the area embraced in the 1866 treaty was relinquished or specifically claimed by any other group. The records of the General Land Office show that the area was disposed of as public domain. It follows, therefore, that the United States proceeded to avail itself of the benefits it received from the treaty, notwithstanding the fact that the treaty was never ratified.

Following the negotiation of the treaty Congress appropriated, over a period of 20 years, a sum aggregating approximately $1,349,000, a vastly larger amount than specified in the treaty. Claim is not here made for this larger appropriation, but only for the $400,000 charged as a gratuity offset and representing 20 annual installments of $20,000 each in fulfillment of the stipulations of the unratified treaty.

The act of May 15, 1886 (24 Stat. L. 44), authorized the Secretary of the Interior to negotiate with the various bands or tribes of Indians at Fort Berthold for a reduction of their reservation or for removal therefrom to other reservations. The negotiations so authorized resulted in an agreement dated December 14, 1886, and ratified by Congress on March 3, 1891 (26 Stat. L. 1032). It will be noted that this agreement followed immediately upon the expiration of the 20-year period established by the unratified treaty of 1866. The new agreement was not effective until the passage of the 1891 act. In the intervening years, however, Congress continued to appropriate funds for the benefit of the Fort Berthold Indians. Appropriations were made subsequent to 1891 in complete liquidation of the obligations assumed by the United States in the agreement of December 14, 1886.

The Indians find no fault with the judgment of the Court of Claims, except as to the $400,000 claimed to have been erroneously allowed as an offset. To summarize:

(*a*) The Indians, by the 1851 treaty, protected their claim to other land not specifically described in the treaty.

(*b*) The Indians, in good faith, and after negotiations with treaty commissioners appointed by the President, attempted to convey to the United States, by the treaty of 1866, complete title to a tract of land about 40 miles long and 25 miles wide.

(*c*) For unknown reasons, the 1866 treaty was never submitted for ratification.

(*d*) In their suit, the Indians did not assert a claim for the land north and east of the Missouri River, because no legal or equitable questions were involved, and further because of the belief that the treaty obligation had been recognized by the United States and that they had received compensation from the United States through annual appropriations over a period of years, not only for the amount of the treaty stipulation, but in excess thereof.

(*e*) The Indians contend that when the Court of Claims permitted the $400,000 to be pleaded as a gratuity offset, they were, in effect, denied compensation for property claimed by them, subsequently ceded to the United States, and later disposed of by the United States as public domain.

Because of the failure to ratify the treaty of 1866, the Fort Berthold Indians have no legal claim. They do have a strong moral claim, however, and in my opinion the enactment of H. R. 795 would be just and proper.

The Acting Director of the Bureau of the Budget has advised that the proposed legislation would not be in accord with the program of the President.

Sincerely yours,

HAROLD L. ICKES,
Secretary of the Interior.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, March 29, 1939.

Hon. WILL ROGERS,
Chairman, Committee on Indian Affairs, House of Representatives.

MY DEAR MR. CHAIRMAN: There was acknowledged March 4, 1939, receipt of your letter of March 2, requesting report on H. R. 795, Seventy-sixth Congress, entitled "A bill for the relief of the Indians of the Fort Berthold Reservation, North Dakota," a copy of which was inclosed with your letter. The bill appears to be similar to S. 414, passed by the Senate February 22, 1939, accompanied by Senate Report No. 78, as well as similar to S. 3243, Seventy-fourth Congress, which failed of enactment into law.

Under date of June 19, 1936, this office reported unfavorably on S. 3243, and it is noted such report was not printed as a part of Senate Report No. 78. It would appear unnecessary to repeat the statements contained in the report of June 19, 1936, a copy of which is enclosed for your information, and there is nothing in this Office at this time which would authorize or justify any modification of the conclusion therein reached—that the claim set forth in the bill for payment of $400,000 to the Fort Berthold Indians of North Dakota does not represent an obligation of the United States.

Sincerely yours,

R. N. ELLIOTT,
Acting Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 19, 1936.

Hon. ELMER THOMAS,
Chairman, Committee on Indian Affairs,
United States Senate.

MY DEAR MR. CHAIRMAN: Further reference is made to your letter of May 9, 1936, acknowledged May 12, 1936, transmitting with request for a report thereon a copy of S. 3243, Seventy-fourth Congress, first session, entitled "A bill for the relief of the Indians of the Fort Berthold Reservation, North Dakota."

The bill S. 3243 provides as follows:

"Whereas the United States and the Indians of the Fort Berthold Reservation, State of North Dakota, composed of the Arickarees, Gros Ventres, and Mandans, entered into a treaty on July 27, 1866, by which the United States stipulated and agreed to pay said Indians the sum of $20,000 annually for a period of 20 years, in consideration that said Indians 'grant and convey to the United States the right-of-way to lay out and construct roads, highways, and telegraphs through their country, and to use their efforts to prevent them from annoyance or interruption by their own or other tribes of Indians,' their country having been described by mutually acknowledged lawful boundaries in the Treaty of Fort Laramie dated September 17, 1851; and

"Whereas the United States and said Indians in good faith carried out the aforesaid provisions of said treaty of 1866 notwithstanding the Senate failed to ratify said treaty, the United States, with the consent and cooperation of said Indians, receiving and enjoying the full benefits it sought in entering into said treaty, while said Indians have been denied the consideration mutually agreed upon for the grant and conveyance of such rights and privileges accruing to the United States under said treaty: Now, therefore

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized and directed to pay to the Fort Berthold Indians of North Dakota, out of any money in the Treasury not otherwise appropriated, the sum of $400,000 in full and final settlement of all claims and demands of said Indians against the United States growing out of the stipulations of the treaty of July 27, 1866 (Indian Laws and Treaties, vol. 2, p. 1052)."

It is for pointing out that the facts with respect to the unratified agreement of July 27, 1866, are not as stated in the bill. The preamble to the bill recites in substance that the United States agreed to pay to the Indians of the Fort Berthold Reservation, composed of the Arickarees, Gros Ventres, and Mandans, the sum of $20,000 annually, for a period of 20 years, in consideration that said Indians "grant and convey to the United States the right to lay out and construct roads and telegraphs through their country, and to use their efforts to prevent them from annoyance or interruption by their own or other tribes of Indians,"

their country having been described by mutually acknowledged lawful boundaries in the Treaty of Fort Laramie, dated September 17, 1851.

The agreement of July 27, 1866, was originally negotiated solely with the Arickaree Tribe of Indians, and it was provided therein that that tribe of Indians would grant and convey to the United States the right to lay out and construct roads, highways, and telegraphs through their country, and that the said Indians would use their efforts to prevent them from annoyance or interruption by their own or other tribes of Indians, all for a consideration of $10,000, to be paid annually for 20 years. In the addenda to the said treaty or unratified agreement, it was stated that the Gros Ventre and Mandan Tribes of Indians concurred in and became parties and participants in and to all the stipulations of the treaty, and that for the further consideration of $5,000, to be paid to the Gros Ventres, and $5,000, to be paid to the Mandans annually in addition to the $10,000, to be paid annually to the Arickarees, the said three tribes of Indians agreed to convey to the United States all their right and title to certain lands situated on the northeast side of the Missouri River as described in the said addenda. It is apparent from the foregoing that the bill does not state all of the facts involved in the said claim. In other words, the preamble to the bill is not a complete and correct statement of the facts.

Under the agreement of July 27, 1866, the Indians of the Fort Berthold Reservation agreed to do two principal things, namely, to grant and convey to the United States the right-of-way to lay out and construct roads, highways, and telegraphs through their country, and to cede to the United States the aforesaid territory northeast of the Missouri River. These Indians, the Arickarees, Gros Ventres, and Mandans, with certain other tribes, were parties to the Treaty of Fort Laramie of September 17, 1851 (11 Stat. 749). In that treaty the lands claimed by the various tribes were delimited and with respect to the lands claimed by the Indians of the Fort Berthold Reservation, article 5 of the said treaty provided, insofar as the same is here material, as follows:

"The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

* * * * * * *

"The territory of the Gros Ventre, Mandan, and Arickaree Nations, commencing at the mouth of the 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."

For the consideration moving from the Indian tribes to the United States under the treaty of September 17, 1851, the United States agreed to pay to the tribes annually for 15 years the sum of $50,000, or a total of $750,000. All of the amount stipulated in the treaty was appropriated for and paid to the Indians. The last appropriation in satisfaction of this treaty obligation was carried in the act of March 3, 1865 (13 Stat. 550). Thereafter, nothing was due from the United States to these tribes of the Fort Berthold Reservation. While these Indians in the agreement of 1866 granted to the United States the right "to lay out and construct roads, highways, and telegraphs through their country," it is desired to invite attention to article 2 of the treaty of Fort Laramie of 1851, as follows:

"The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories."

Nothing was said in the quoted article of the Fort Laramie treaty about "telegraphs," but it would appear that the right to establish military posts would necessarily carry with it the right to do everything essential to make such posts effective, including the laying out and constructing of telegraphs. It is thus clear that under the unratified treaty the United States got nothing which it had not already secured and paid for under the treaty of 1851.

The other consideration was the attempted cession to the United States of all land northeast of the Missouri River. In this connection, attention is invited to the above-quoted article 5 of the Treaty of Fort Laramie, in which these Indians recognized and acknowledged the boundaries of their territory to be as therein described, and no claim was then made as to the ownership of land northeast of the Missouri River. There is of record evidence that after 1837 none of these Indians occupied the country covered by the cession in this unratified treaty. On the contrary this country was not only claimed by, but was occupied by, other bands or tribes of Indians. In this connection, it may be said that the Supreme Court has repeatedly held that the Indians' claim of right of occupancy of lands

is dependent upon actual and not constructive possession. (*Mitchel* v. *United States*, 9 Pet. 711; *Williams* v. *Chicago*, 242 U. S. 434; and *Choctaw Nation* v. *The United States*, 34 Ct. Cls. 17). It is to be noted that the treaty was never ratified, and it is not apparent what benefit the United States would have received had the treaty been ratified by the Senate. It is to be noted, also, that these Indians had an opportunity to have their claims considered by the Court of Claims under the Special Jurisdictional Act approved February 11, 1920 (41 Stat. 404), conferring jurisdiction upon the Court of Claims to determine the amount, if any, due these tribes from the United States under any treaties, agreements, or laws of Congress.

During the period from the time when payments under the treaty of Fort Laramie ceased until the time the payments under the agreement of December 14, 1886, commenced, that is, from 1867 to 1891, there were expended by the United States for the benefit of these Indians out of appropriations made directly for their support, sums in excess of $1,000,000, and the amounts so expended were included in the total offsets allowed by the Court of Claims against the judgment recovered by these Indians in that court (71 Ct. Cls. 308).

The first appropriation subsequent to the treaty of 1866 was that carried in the act of March 3, 1867 (14 Stat. 493), and is, in part, as follows:

"Arickarees, Gros Ventres, and Mandams: For first of payments *to be made during the pleasure of Congress*, to be expended in such goods, provisions, and other articles as the President may from time to time determine, * * * and also for pay of head chief, soldier chiefs, second chiefs, and Pierre Gavreau for his services to the Arickarees, forty thousand dollars." [Italics supplied.]

The legislative history would appear to indicate that originally this appropriation was intended as a "first installment of annuity" under the treaty of July 17, 1866, "not yet ratified," but after considerable debate the language as it appears in the act of 1867 was finally adopted; it being apparently the intent that the funds appropriated would be in lieu of the obligations under a treaty which had not been ratified. The subsequent appropriations appear to be on the same basis. See in particular the appropriation acts of July 27, 1868 (15 Stat. 199), and April 10, 1869 (16 Stat. 14).

It would appear clear from the foregoing that if the appropriations in question had been intended to be in satisfaction of a treaty obligation, the phrase "to be made during the pleasure of Congress" would not have been used, and the amount appropriated would have been the amount agreed upon, namely, $20,000, instead of twice that amount for the first 3 years and in varying amounts thereafter. At the same time the fact that these several amounts were appropriated apparently in lieu of the obligations provided for in the unratified treaty, and in sums greatly in excess of said obligations, would appear to indicate that if any obligation was imposed upon the Government by the unratified treaty of 1866 said obligation has been fully discharged.

In view of all the facts in this case, this Office is unable to recommend favorable action on the bill.

Sincerely yours,

J. R. McCarl,
Comptroller General of the United States.

Office of the Attorney General,
Washington, D. C., April 19, 1939.

Hon. Will Rogers,
Chairman, Committee on Indian Affairs,
House of Representatives, Washington, D. C.

My Dear Mr. Chairman: This acknowledges your letter of March 2 requesting my views relative to the bill (H. R. 795) for the relief of the Indians of the Fort Berthold Reservation in North Dakota.

This bill proposes to authorize the appropriation of $400,000 to be paid by the Secretary of the Interior to the Fort Berthold Indians of North Dakota, in full and final settlement of all claims and demands of those Indians against the United States growing out of the stipulations of the treaty of July 27, 1866 (2 Kappler, 1052). By the terms of this treaty, which was never ratified by the Senate, the Fort Berthold Indians agreed to keep the peace with the white people and with other Indians; granted and conveyed to the United States "the right-of-way to lay out and construct roads, highways, and telegraphs through their country"; and ceded to the United States a small tract of land. In return the Government agreed to pay to these Indians the sum of $20,000 annually for a period of 20

years. Although the treaty was not ratified, the sum of $400,000, as provided therein, was in due time appropriated and paid to the Indians. In the case entitled *Fort Berthold Indians* v. *United States* (71 C. Cls. 308), instituted pursuant to the Jurisdictional Act of February 11, 1920 (41 Stat. 404), the Government set up as an off-set and the Court of Claims allowed credit for the $400,000 so appropriated. The alleged impropriety of this set-off constitutes the basis of the claim to be discharged by the proposed appropriation.

The claim of the Fort Berthold Indians to this $400,000 is, because of the fact that the 1866 treaty was not ratified, without legal foundation. (See S. Rept. No. 771 and H. Rept. No. 1199, 75th Cong., 1st sess.) It would also appear that the United States is under no obligation to these Indians, legally or otherwise, for, even if the treaty had been ratified, nothing passed from the Indians to the United States. By the terms of the Fort Laramie Treaty of September 17, 1851 (2 Kappler, 524), the Fort Berthold Indians were already obligated to keep the peace and to allow the United States to establish roads and military and other posts through their territories; and these Indians apparently had no right whatever to the tract of land purported to have been ceded by the 1866 treaty. This tract was located on the east side of the Missouri River, and from and after the year 1837 none of the Fort Berthold Indians occupied lands east of that river. All of the country on both the north and east sides of the Missouri River was claimed and occupied by the Yankton and Yanktonai Sioux (Report, Commissioner of Indian Affairs, 1858, pp. 358, 615; idem., 1836, p. 34; Report, Secretary of War, 1858, p. 663; Explorations in the Dakota Country, by Lt. G. K. Warren of the Topographical Engineers, 1855, S. Ex. Doc. 76, 34th Cong., 1st sess., p. 16). In view of the fact that in the unratified treaty of 1868 the Indians neither promised nor gave up anything to the United States, it is believed that they have no valid claim to the $400,000 there promised and that this amount was properly charged as a set-off in the *Fort Berthold case.*

For the foregoing reasons I am unable to recommend the enactment of this bill.

Sincerely yours,

FRANK MURPHY,
Attorney General.

The following is taken from Senate Report No. 78, Seventy-sixth Congress, first session:

This bill was drafted by the Department of the Interior in order to do justice to the Fort Berthold Indians. It passed the Senate in the last Congress, and was favorably reported to the House.

The object of this legislation is to carry into effect an obligation solemnly assumed by the United States in its dealings with the Fort Berthold Indians, composed of the Arickarees, Gros Ventres, and Mandans, who have at all times maintained peace and friendship with the Government and who were the allies of the United States during the Sioux Wars (Report Commissioner on Indian Affairs, 1873, pp. 158–159). This obligation arises out of a treaty negotiated with these Indians on July 27, 1866 (Kappler's Laws and Treaties, vol. 2, 1052) which was not ratified but the provisions of which were carried into effect by both parties to it. Under this treaty the said Indians ceded to the United States the right to establish roads, highways, telegraph lines, military posts, and depot stations upon lands used by the said Indians as hunting grounds and upon lands reserved to them by the Fort Laramie Treaty of September 17, 1851 (Kappler's Laws and Treaties, vol. 4, 1065). The United States agreed to pay the said Indians, as a consideration for ceding such rights and privileges upon and over their lands, the sum of $20,000 per year for a period of 20 years. The said Indians permitted their lands to be used as agreed and the United States appropriated and paid the said Indians in due time the said $400,000, so that the United States received what it bargained to buy and the said Indians in return received the amount agreed upon for such rights and privileges. The said Indians from every standpoint of fairness and equity were entitled to receive the said money in return for what the United States received from them. While the 1866 treaty was not formally ratified, its terms were in effect approved by the Department in submitting estimates under said treaty (Report Commissioner on Indian Affairs for 1868, p. 336), and by Congress in making appropriations called for under its provisions, and the United States accepted the benefits conferred by the terms and conditions of the treaty so negotiated. In other words, the contract was ratified by the conduct of the parties thereto.

The minutes of the council meeting, held at the instance of the United States by the treaty commissioners with the Fort Berthold Indians on their reservation July 23, 1866, at which the said unratified treaty of 1866 was negotiated, contains the following expressions of purpose and confidence which renders this obligation doubly binding upon the United States in dealing with these ignorant and unlettered Indians:

"General CURTIS. The Great Father performs what he promises. Men have no right to make promises to you of which he knows nothing. We are the first commissioners ever sent to you by the Great Father. At Laramie (in 1851) he made promises and has performed them.

"Bushing Bear replied: 'We are very glad to see you here as the Great Father's chief. We will talk and be friendly, and we will keep our promises with our Great Father.' (Indian Office Treaty Box, 'Councils with Indians', p. 31)."

The Fort Berthold Indians and the United States commissioners treating with them were acting upon the good faith of the United States for the carrying into effect of the promises made. The promises were carried into effect and the transaction should, from every standpoint of fair dealing, have been regarded as settled and completed. Yet, long after the said annuities were paid and long after the benefits of the agreement with the Indians had been received and enjoyed by the United States, the issue was again raised under the suit instituted by the said Indians against the United States under the act approved February 11, 1920 (41 Stat. 404). The Government, after briefs had been filed, set up the said sum of $400,000 as an offset or counterclaim against the said Indians in the Court of Claims, and the offset or counterclaim was allowed on the theory that the said treaty of 1866 had not been ratified by the Senate and therefore not law.

The Secretary of the Interior in his report on S. 3243, Seventy-fourth Congress, stated:

"In considering the offsets allowed by the Court of Claims in the suit above mentioned the court did not take into consideration the provisions of the treaty of 1866 or allow the Indians anything for the loss of their lands, at least a part of which were occupied by the United States subsequent to the treaty, but allowed the United States, as offsets, the entire $400,000 which was stipulated by the 1866 treaty as consideration for the land. * * *

"The United States received all the benefits it expected to receive under the unratified treaty of 1866, and the Indians, notwithstanding their faithful observance of the treaty stipulations and the loss of a valuable tract of land which was appropriated by the Government to its own uses, have received nothing. * * *

"The claim * * * has no legal standing. There is, nevertheless, a moral obligation on the part of the Government which has not been fulfilled, and in my opinion the legislation will do justice to this group of Indians."

In the opinion of your committee, the said appropriations under the said unratified treaty of 1866 were made and paid for value received; and while the Court of Claims, from a strictly legal viewpoint when the issue was raised, had no alternative but to allow the amount as an offset or counterclaim, nevertheless from every moral, fair, and equitable standpoint the said Indians were entitled to the said money under a consummated contract with the United States. This is especially true in a transaction by the Government with its Indian wards, and it is the judgment of your committee that the sum of $400,000, deducted from the amount awarded by the Court of Claims to the said Indians, should now be reimbursed them and such a sum appropriated to carry out the obligation of the United States.

The Government in the case of white persons, dealing more nearly on an equality, recognizes moral obligations to its citizens, as shown by acts passed in the Seventy-fourth Congress with respect to the Home Owners' Loan Corporation and in contracts made under the A. A. A. In the latter the farmers had no legal claims against the United States which could be enforced, but the Government had made an agreement with them to pay them certain sums if they would do certain things. The Congress recognized the moral obligation to pay them and authorized appropriations for that purpose, and such appropriations were approved by the administration. The claims of the Fort Berthold Indians to the sum of $400,000, fully earned by them under a consummated agreement, have a stronger moral claim to an appropriation of this sum to reimburse them for the sum deducted by the Court of Claims from the amount found due them.

In *Daniels* v. *Tierney* (102 U. S. 415) the Supreme Court held:

"Syllabus: 3. Where a party has availed himself of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its constitutionality as a defense."

In the body of the opinion the Supreme Court said:

"It is well settled as a general proposition, subject to certain exceptions not necessary to be noted here, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its constitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect (*Ferguson* v. *Landram*, 5 Bush. 230; *Vanhook* v. *Whitlock*, 26 Wend. 43; *People* v. *Murray*, 5 Hill. 468; *Burlington* v. *Gilbert*, 31 Iowa 356; *R. R. Co.* v. *Stewart*, 39 Iowa 267).

"In the first case cited, an injunction was applied for to prevent the collection of a tax authorized by an act of the legislature passed during the late Civil War, to enable the people of the county to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked: 'Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?'

"In *United States* v. *Hodson*, supra, this court said: 'When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.'

"Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

In *The Ute Indians* v. *the United States* (45 Ct. Cl. 441) the Court of Claims said:

"Syllabus: Where Indians had no title to lands occupied by them as hunting grounds, which the court can recognize as valid, yet if they honestly claimed title the relinquishing of it to a party who wished to purchase would be a good consideration."

Opinion (pp. 445–446):

"By the treaty of 1868 (15 Stat. 619) the reservation in question was set apart for the plaintiffs, and by the third article of the treaty the plaintiffs relinquished 'all claims and rights in and to any portion of the United States or Territories except' such reservation. Even if we may admit that they had no valid title to any lands, yet they claimed some title and honestly claimed it, and the yielding of such a claim to a party who wishes to purchase it, is a good consideration.

"In the case of *Sykes* v. *Chadwick* (19 Wall. 141) the Supreme Court, in discussing the sufficiency of consideration, said:

" 'If any release is deemed requisite to confirm the title of lands with which one has been connected, though by a proper construction of the law he has no interest in them whatever, still such release will be a good consideration for a promise or for the payment of money.'

"Congress from time to time made appropriations of money to the plaintiffs which in terms were made in pursuance of the treaties of 1863 and 1868 (13 Stat. 560; 17 id. 457). After such treaty stipulations with the plaintiffs and after such recognition of their validity for more than 40 years, we do not think that the defendants can successfully set up the claim that these payments were made without adequate consideration. Certainly no such claim would ever be made against any people other than Indians. We do not think, therefore, the plaintiffs are properly chargeable with any payments made to them under and pursuant to the treaties of 1863 and 1868."

The Court of Claims, in *Moore* v. *The United States* (32 Ct. Cls. 593), held that an unratified treaty, if carried out by the parties thereto, is binding.

A suggestion has been made that part of the land ceded under the 1866 treaty was not owned by the Fort Berthold Indians under the treaty of 1851. The evidence shows that said lands were occupied by the Fort Berthold Indians in 1866 upon which were located as shown, by maps, several villages of the Indians, and under the fifth article of the treaty of 1851 the Indians retained their rights to other lands claimed by them not described in the 1851 treaty.

On this point the Court of Claims in the case of *Fort Berthold Indians* v. *The United States* (71 Ct. Cls. 308, 332), stated:

" It is true the treaty abounds in other considerations for its execution, but the one involved here, i. e., distinct reservations, is not only specific in its terms, obligating the parties to irrevocable observance of the limits of lands set forth, but *reserves in express words the claims of the Indians to other lands.*"

There is no question that under article 5 of the treaty of 1851 other lands not described in the 1851 treaty, claimed by the Fort Berthold Indians and such

claim recognized by the treaty commissioners of 1866, were not included, in the reservation created by the treaty of 1851, which 1851 reservation lands were exclusively dealt with by the Court of Claims in its decision, supra.

The only reference to the 1866 treaty made by the Court of Claims in its decision reported in Seventy-one Court of Claims, appears on pages 317 and 335, as follows:

"Under date of July 12, 1866, a treaty was negotiated with the plaintiff Indians, but never ratified by Congress, by the terms of which the plaintiffs stipulated to grant defendant the right to lay out and construct roads, highways, and telegraphs through "their country" and to cede to the defendant certain lands situated on the northeast side of the Missouri River. In consideration of the foregoing, the provisions contemplated a payment by the defendant of $20,000 annually for 20 years to the plaintiff tribes"

Page 335:

"In July 1866 a treaty was negotiated with the plaintiffs. This treaty ceded certain described lands to the defendant. The plaintiffs signed it, but it failed of ratification by Congress."

The fact is, that the provisions of the treaty of 1866 having been carried out by the conduct of the parties thereto and considered a closed transaction by both the Indians and the United States, were not brought into the case by the Fort Berthold Indians, but in the accounting rendered by the General Accounting Office the $400,000 paid said Indians under the treaty of 1866 was for the first time advanced as a set-off by the attorneys for the United States.

The report of the Secretary of the Interior, dated May 25, 1937, is as follows:

THE SECRETARY OF THE INTERIOR,
Washington, May 25, 1937.

Hon. ELMER THOMAS,
Chairman, Committee on Indian Affairs,
United States Senate.

MY DEAR MR. CHAIRMAN: Further reference is made to your request for a report on S. 642, for the relief of the Indians of the Fort Berthold Reservation in North Dakota.

The act of February 11, 1920 (41 Stat. L. 404), conferred jurisdiction upon the Court of Claims to hear, determine, and adjudicate the claims of the Fort Berthold Indians, a confederated tribe consisting of the Arickaree, Gros Ventre, and Mandan Tribes, parties to the treaty of September 17, 1851 (11 Stat. L. 749), commonly referred to as the Fort Laramie Treaty.

The Court of Claims (71 Ct. Cls. 308) awarded a judgment in the amount of $4,923,093.47 from which gratuities aggregating $2,753,924.89 were offset, leaving a net judgment of $2,169,168.58. Included in the offsets was an amount of $400,000 claimed by the Indians to have been appropriated pursuant to the provisions of an unratified treaty of July 27, 1866 (2 Kappler 1052), and erroneously allowed as a gratuity offset by the court. This bill, if enacted, will authorize the payment to the Fort Berthold Indians of the amount claimed to have been erroneously allowed as a gratuity offset.

Article V of the Fort Laramie Treaty of 1851 established the reservation boundaries of the various groups who were parties to the treaty. The territory set aside for the Gros Ventre, Mandan, and Arickaree Tribes, or Nations, was described as—

"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."

The area involved was approximately 13,000,000 acres. The last paragraph of the same article, however, provides that—

"It is, however, understood that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands, * * *."

The Court of Claims established the following facts—

Original area of reservation	13, 000, 000. 00
Area subsequently withdrawn from reservation	11, 424, 512. 76
Area of delimited area of reservation	1, 575, 487. 24
Subsequent additions, Executive orders of 1870, 1880, 1892	1, 578, 325. 83

Recognized area of reservation (net)	3, 153, 813. 07
Area for which Indians had not been compensated	9, 846, 186. 93
Original area of reservation	13, 000, 000. 00

The court thereupon awarded a judgment for compensation for 9,846,186.93 acres at 50 cents an acre, or $4,923,093.47, the exact amount of the gross judgment.

The attorneys for the Indian claimants did not inject into the suit a claim for compensation for an area not described in the fifth article of the Fort Laramie treaty, but lying north and east of the Missouri River and more particularly described in an addenda to an unratified treaty of 1866, and hereafter quoted. This question was brought into the case only after the defendant had pleaded as a gratuity offset the $400,000 the Indians believed they had received for the cession of the land in question. The Indians base their claim to this area upon the last paragraph of article V of the 1851 treaty whereby they did not "abandon or prejudice any rights or claims they may have to other lands."

The treaty of July 27, 1866, as to the Arickarees, granted to the United States the right "to lay out and construct roads, highways, and telegraphs through their country", and article VII stipulated a consideration of $10,000 a year for 20 years "after the ratification of this treaty by the President and Senate of the United States."

The addenda to this document purports to convey to the United States all of the right and title held by the Indians in and to a certain tract of land on the northeast side of the Missouri River, more particularly described as—

"Beginning on the Missouri River at the mouth of the Snake River, about 30 miles below Fort Berthold; thence up Snake River and in a northeast direction 25 miles; thence southwardly parallel to the Missouri River to a point opposite and 25 miles east of old Fort Clarke; thence west to a point on the Missouri River opposite to the old Fort Clarke; thence up the Missouri River to the place of beginning."

In consideration of this proposed cession article II of the addenda stipulates that—

"In addition to the payments by the United States of annuities there named to the Arickarees, there shall be paid $5,000 to the Gros Ventres, and $5,000 to the Mandans, annually, in goods, at the discretion of the President."

The tract of land in the proposed cession has been estimated to be approximately 40 by 25 miles, embracing an area of approximately 640,000 acres, and Royce's Land Cessions indicates that at least one Mandan village was at one time located thereon. For the information of the committee there is enclosed a photostat copy of a map found in Royce's Land Cessions.

The treaty of 1866 was negotiated by a treaty commission appointed by the President. A full report of the work of the commission is found in the report of the Commissioner of Indian Affairs, for the year 1866, beginning on page 168. In explaining its work in part, the Commission reports (p. 172) that—

"We obtained from the Indians—the Arickarees, Mandans, Gros Ventres, Assiniboins, and Crows—not only a right-of-way through their possessions, but also cessions of lands at such points as seemed to us especially necessary for settlement and cultivation. The cession from the Arickarees, Mandans, and Gros Ventres, who inhabit the country about Fort Berthold, ceded the country on the east side of the Missouri, from old Fort Clarke to Snake Creek or River, being about 40 miles long and 25 miles wide * * *.

"There is a good showing of coal on this land, the quality of which seems very uncertain, but if at all capable of being made available as fuel, will be of great value to commerce in a country where wood is extremely scarce. * * * The soil, coal or lignite, and timber, united with the exorbitant prices paid for everything in that region, will probably invite settlements on this natural junction of commercial lines, so as to accommodate them, and ultimately advance the development of the northwest prairies."

An examination of treaties with other tribes, and of claims asserted by other tribes against the United States fails to disclose that the area embraced in the 1866 treaty was relinquished or specifically claimed by any other group. The records of the General Land Office show that the area was disposed of as public domain. It follows, therefore, that the United States proceeded to avail itself of the benefits it received from the treaty, notwithstanding the fact that the treaty was never ratified.

Following the negotiation of the treaty Congress appropriated, over a period of 20 years, a sum aggregating approximately $1,349,000, a vastly larger amount

than specified in the treaty. Claim is not here made for this larger appropriation, but only for the $400,000 charged as a gratuity offset and representing 20 annual installments of $20,000 each in fulfillment of the stipulations of the unratified treaty.

The act of May 15, 1886 (24 Stat. L. 44) authorized the Secretary of the Interior to negotiate with the various bands or tribes of Indians at Fort Berthold for a reduction of their reservation or for removal therefrom to other reservations. The negotiations so authorized resulted in an agreement dated December 14, 1886, and ratified by Congress on March 3, 1891 (26 Stat. L. 1032). It will be noted that this agreement followed immediately upon the expiration of the 20-year period established by the unratified treaty of 1866. The new agreement was not effective until the passage of the 1891 act. In the intervening years, however, Congress continued to appropriate funds for the benefit of the Fort Berthold Indians. Appropriations were made subsequent to 1891 in complete liquidation of the obligations assumed by the United States in the agreement of December 14, 1886.

The Indians find no fault with the judgment of the Court of Claims, except as to the $400,000 claimed to have been erroneously allowed as an offset. To summarize:

(*a*) The Indians, by the 1851 treaty, protected their claim to other land not specifically described in the treaty.

(*b*) The Indians, in good faith, and after negotiations with treaty commissioners appointed by the President, attempted to convey to the United States, by the treaty of 1866, complete title to a tract of land about 40 miles long and 25 miles wide.

(*c*) For unknown reasons, the 1866 treaty was never submitted for ratification.

(*d*) In their suit, the Indians did not assert a claim for the land north and east of the Missouri River, because no legal or equitable questions were involved, and further because of the belief that the treaty obligation had been recognized by the United States and that they had received compensation from the United States through annual appropriations over a period of years, not only for the amount of the treaty stipulation but in excess thereof.

(*e*) The Indians contend that when the Court of Claims permitted the $400,000 to be pleaded as a gratuity offset, they were in effect denied compensation for property claimed by them, subsequently ceded to the United States, and later disposed of by the United States as public domain.

Because of the failure to ratify the treaty of 1866, the Fort Berthold Indians have no legal claim.

The Acting Director of the Bureau of the Budget has advised, however, that the proposed legislation would not be in accord with the program of the President.

Sincerely yours,

CHARLES WEST,
Acting Secretary of the Interior.

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