PAYMENT FOR IMPROVEMENTS, RED ROCK RESERVOIR, IOWA

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC WORKS UNITED STATES SENATE

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 931

A BILL TO AUTHORIZE THE SECRETARY OF THE ARMY TO PAY FAIR VALUE FOR IMPROVEMENTS LOCATED ON THE RAILROAD RIGHTS-OF-WAY OWNED BY BONA FIDE LESSEES OR PERMITTEES

JULY 30, 1963

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TUESDAY, JULY 30, 1963

U.S. SENATE,
COMMITTEE ON PUBLIC WORKS,
SUBCOMMITTEE ON FLOOD CONTROL—RIVERS AND HARBORS,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 4200, New Senate Office Building, Senator Stephen M. Young, of Ohio, presiding.

Present: Senators Young of Ohio, Inouye, Miller, Jordan, and Pearson.

Senator YOUNG. The subcommittee will come to order. We are ready to proceed, Senator Hickenlooper.

(S. 931 and the letter of the Bureau of the Budget dated June 17, 1963, and the letter of the Department of the Army dated June 21, 1963, follow:)

[S. 931, 88th Cong., 1st sess.]

A BILL To authorize the Secretary of the Army to pay fair value for improvements located on the railroad rights-of-way owned by bona fide lessees or permittees

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Army be authorized and directed to pay to any bona fide lessee or permittee owning improvements, which are or which were situated on a railroad right-of-way, the fair value of any such improvements, which have been or will be rendered inoperative or be otherwise adversely affected by the construction of the Red Rock Reservoir project on the Des Moines River, Iowa, as determined by the Secretary, or by the United States District Court for the District of Iowa on which is conferred jurisdiction for this purpose; and that the Secretary of the Army be authorized to provide the funds necessary to carry out the provisions of this section from any moneys appropriated for the construction of the Red Rock Reservoir project.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., June 17, 1963.

HON. PAT MCNAMARA,
Chairman, Committee on Public Works,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your requests of January 15, 1963, and March 1, 1963, for the views of the Bureau of the Budget on S. 128 and S. 931, bills to authorize the Secretary of the Army to pay fair value for improvements located on railroad rights-of-way owned by bona fide lessees or permittees.

The bills, whose purpose is stated in their titles, would apply to certain properties affected by construction of the Milford Dam and Reservoir project, Kansas, and the Red Rock Reservoir project, Iowa.

As a result of additional information obtained since providing comments last year on S. 3114 and S. 2048 of the 87th Congress, bills identical to S. 128 and S. 931, we understand that circumstances similar to those existing at Milford

Reservoir and Red Rock Reservoir, with respect to lessees who have constructed improvements on lands being acquired for project purposes, have occurred frequently at Corps of Engineers projects throughout the country. In these cases the individuals involved have not been compensated, except by special legislation.

In its reports to your committee the Department of the Army notes that the Committee on Public Works of the House of Representatives has established a Select Subcommittee on Real Property Acquisition to carry out a broad review of matters related to real property acquisition under Federal programs. This select subcommittee will prepare a report making whatever recommendations, including legislative proposals, it considers appropriate. The Department of the Army recommends that uniform acquisition procedures be established through enactment of general legislation and that action on S. 128 and S. 931 be deferred pending the comprehensive study and recommendations of the select subcommittee. We understand that this report will be completed in approximately 1 year.

The Bureau of the Budget concurs in the views of the Department of the Army in its reports on S. 128 and S. 931.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

DEPARTMENT OF THE ARMY,
Washington, D.C., June 21, 1963.

Hon. PAT MCNAMARA,
Chairman, Committee on Public Works,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army with respect to S. 931, 88th Congress, a bill to authorize the Secretary of the Army to pay fair value for improvements located on the railroad rights-of-way owned by bona fide lessees or permittees.

The Department of the Army is opposed to the enactment of this bill, the purpose of which is stated in its title.

The Chief of Engineers, under the supervision of the Secretary of the Army, is constructing the Red Rock Reservoir on the Des Moines River, Iowa, in accordance with the comprehensive plan for the Upper Mississippi River Basin approved in the Flood Control Act of June 28, 1938 (52 Stat. 1215), as amended. In this connection it will be necessary to relocate portions of the facilities operated by three railroad companies, the Chicago, Rock Island & Pacific Railway Co., the Chicago, Burlington & Quincy Railroad Co., and the Wabash Railroad Co.

An investigation indicates that improvements have been constructed by at least three lessees on the rights-of-way of the Wabash Railroad Co. which will be affected by the construction of the Red Rock Reservoir project and who will be required to remove their improvements. The lessees are a grain elevator company, a propane gas fuel company, and a lumber company. Structures have been erected by each of these lessees under leases with the railroad company providing for termination upon 30 days' notice by either party, coupled with the requirement that upon termination the lessee must, at his own expense, remove all improvements from the premises. These are considered to be month-to-month tenancies, and the lessees to be "tenants at will."

In the acquisition of property by the Federal Government, the essential guidelines concerning entitlement to payment have been established as a result of court interpretation of the guarantee of just compensation contained in the fifth amendment to the Constitution of the United States. Under these determinations it has been held that "tenants at will," or licensees under revocable licenses, do not possess a compensable property interest. In connection with similar situations previously encountered by this Department at other projects, the Comptroller General pointed out that the Government could and should terminate the leases upon succeeding to the rights of the railroad companies. (See Comptroller General Decisions B–95443, Aug. 4, 1950, and B–104527, Aug. 15, 1951.) Because of the limited rights of occupancy the removal of the tenant-owned improvements on the railroad's rights-of-way at Red Rock Reservoir are among the counsequential damages for which no compensation is required.

The Department of the Army is aware that "just compensation" determined in accordance with case law established by the courts, does not always fully compensate owners and tenants for all of their losses. However, these consequences are found in all governmental acquisitions and are not peculiar to the Red Rock project or to any single group of projects.

It is likewise well established that unless there is a "taking," the Government is not liable. Here the property rights of the lessees involved in this bill are not being taken by the Government. The obligation of the lessees to remove their structures was created by a previous voluntary agreement between the parties; the Government here is merely succeeding to the rights of the railroad company pursuant to these leases. Had the railroad company disposed of its land by sale to a private party, there can be no question but that the purchaser could compel the lessees to remove their structures without incurring any obligation to compensate the lessees for the loss thereof. Thus there appears no legal or equitable basis for compensating these lessees merely by reason that the purchaser is the United States.

The Department of the Army is cognizant of the fact that Congress has previously enacted similar legislation on several other reservoir projects. While this Department is concerned with hardship suffered by any individual or group, it is also interested in equal treatment of everyone. It is therefore considered more desirable to establish, to the extent possible, uniformity of acquisition procedures by enactment of general legislation. For this reason the Department of the Army is generally opposed to any further piecemeal legislation concerning special payments for property interests collaterally affected by Federal projects.

In recognition of this general problem, the Committee on Public Works of the House of Representatives on August 24, 1961, established the Select Subcommittee on Real Property Acquisition to conduct a comprehensive study of the laws, procedures, and practices pertaining to the acquisition and evaluation of real property acquired for Federal and federally assisted programs. Presumably, one of the aspects which it will review will be the need to make payment for special losses incurred which are presently considered noncompensable under existing statutes. Accordingly, it is the recommendation of the Department of the Army that action on S. 931 be deferred pending the comprehensive study and recommendations by the Select Subcommittee on Real Property Acquisition.

The full fiscal effect of enactment of this bill cannot be readily ascertained. However, preliminary investigations as to the aforementioned three lessees indicate the value of such improvements to approximate $125,000.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely yours,

CYRUS R. VANCE,
Secretary of the Army.

STATEMENT OF HON. BOURKE B. HICKENLOOPER, U.S. SENATOR FROM THE STATE OF IOWA

Senator HICKENLOOPER. Thank you, Mr. Chairman and members of the committee. I appreciate the courtesy of the committee and the chairman. I have two meetings at the same time, one of the Atomic Energy Committee and the other the Foreign Relations Committee, and I am trying to cover both of them because of matters that are before them.

I am appearing, Mr. Chairman and gentlemen of the committee, primarily in behalf of S. 931, introduced by my colleague, Senator Miller, and myself in connection with compensation for certain elevator buildings and others in the grain business, erected on this land, as well as lumber buildings and other allied businesses which are on the right-of-way of the Wabash Railroad in the Des Moines River Valley in an area which will be taken over as a result of the Red Rock Dam, where this area will be flooded.

The Government is coming in by condemnation proceedings and taking over the property of the Wabash Railroad. Of course, all of its rights in connection with the property, in such condemnation proceedings, I assume that the Wabash will be adequately compensated for the property which is being taken. The right-of-way will have to be moved and so on because of the flooding caused by Red Rock Dam.

There are certain private properties consisting of grain elevators and allied buildings, certain lumberyard buildings, and others, along the right-of-way at a comparatively few locations which my colleague will discuss with you at much greater length. The locations, I understand, are leased from the Wabash Railroad. There is a provision in the lease that the railroad company can cancel the lease, I think on 30 days' notice. I believe that either party can. That has been a standard provision in railroad leases out there for many, many years.

I think the almost unbroken fact is that the railroads never cancel these leases on these properties but retain the right to cancel. There may be some cancellations that have occurred in the past, but it is practically never done, so that, in effect, the people who put their money in these properties, in building these buildings, these lumberyards and grain storage facilities, et cetera, have what amounts to almost a perpetual lease on that property so long as the railroad operates as a railroad in that area.

In many cases, though, the railroads have been abandoned and, of course, the leases have been terminated and the businesses have been closed out.

However in this particular case the Government engineers argue that inasmuch as they are being placed in the position of the railroad by the condemnation that is taking over all of the railroad property, that they should accede to the right of the railroad to cancel these leases on 30 days' notice without any compensation, which would be the right of the railroad—I mean, we would have to acknowledge that right on the part of the railroad. They say that in acceding to the right of the railroad they accede also to the right of a cancellation on 30 days' notice without compensation. And the Corps of Engineers refuses compensation.

I believe it is the position, at least it is our position—and I believe there is precedent which Senator Miller can discuss a little later with you—it is our position that this is not the ordinary exercising of a right of termination of a lease because the railroad which has that right to terminate is not voluntarily terminating its location nor its operation at that point.

I was about to say that it was the victim—although I do not mean to make that kind of a connotation, but the railroad situation is the result of the eminent domain condemnation power of the Federal Government for the public use of that land, and the railroad has nothing to say about it. The Government comes in there and condemns this and then collaterally, if you please, or flowing from this right acquired a right to cancel the lease which originally was set up to serve not only the railroad and its traffic, but to serve the community as an outlet for its grain and for the storage of lumber and all of the rest of the things that went into this lease.

We contend there is substantially a different principle involved here than merely the railroad exercising a right which it retained at the time it signed the lease. In other words, the right of the railroad was retained for a totally different purpose than the right that is now being exercised.

Anyway, there is a precedent for this in similar cases. I believe that in Kansas there were some examples and some in other States. I think that my colleague has a list of these.

The basis of this bill is that in connection with this condemnation, because these people are being involuntarily thrown out and the railroad has nothing to do with it whatsoever—only that the Government as a successor to the railroads is arbitrarily doing it, and this presents a difficulty.

This bill provides that the Corps of Army Engineers shall be required to make a fair value compensation for the taking of these buildings and the destruction of the leasehold which amounts to the taking of the buildings, because, in fact, if they move these buildings, it would cost them at least as much as they are worth, if not more. There is no value in really moving them.

And on this project, this particular project, the Army Corps of Engineers should compensate for the fair value that is involved here. That, in a nutshell, is probably the burden of the argument on this bill, roughly put.

Senator Miller has a lot of documentation here which he can present to you, but we do ask you to consider the basic equities in this matter, the purposes for which this lease was made, the terms underlying the right to cancel which the railroad had, the arbitrary superimposition of the Government into the position of the railroad, not by voluntary action of the railroad but by the eminent domain provisions of law, and that it is not the railroad exercising its right, but the Government, for no purpose, setting in under its power, which does deprive these people of their property. And I am quite sure that this committee will arrive at a conclusion based upon its examination which will be fair and equitable, and whatever that decision may be, I am sure that it will be welcomed and fair and equitable, and I thank the committee.

Senator YOUNG. We thank you very much, Senator Hickenlooper, for a convincing statement which you have just made.

Are there any questions?

Senator PEARSON. I have some, but I am sure that Senator Miller can answer them.

Senator YOUNG. We will save the questions for your colleague. You have other committee assignments to attend, I understand.

Senator HICKENLOOPER. I am sure that Senator Miller can answer them more satisfactorily and lucidly than I may be able to, and I will be happy to put myself in his hands. We do join in urging your earnest consideration.

Senator YOUNG. We will be glad to hear from you now, Senator Miller.

22-220—63——2

STATEMENT OF HON. JACK MILLER, U.S. SENATOR FROM THE STATE OF IOWA

Senator MILLER. Mr. Chairman and members of the subcommittee, I, too, appreciate the courtesy of the subcommittee in arranging for a hearing on S. 931, introduced by Senator Hickenlooper and myself. This is the companion bill to identical bills H.R. 4841 by Congressman Kyl, of Iowa, and H.R. 1136 by Congressman Neal Smith, of Iowa. H.R. 1136 has been favorably reported out by the House Public Works Committee.

The purpose of this legislation is to avoid the hardship which will otherwise arise to a relatively few property owners as a result of the construction of the Red Rock Reservoir project on the Des Moines River.

The construction of this project is proceeding on schedule under current appropriations authority by Congress.

These property owners own property on railroad rights-of-way under leases or permits with the railroad. Because such leases or permits are terminable on 30 days' notice by the railroad, the Corps of Army Engineers does not believe it has authority to pay damages for the taking of the lessees' or permittees' property. The bill would authorize the Secretary of the Army to pay fair value for the taking of said property on the theory that had it not been for the unforeseen action by the Federal Government, these property owners would not have been placed in the unfortunate position in which they now find themselves.

The only properties affected by this situation which have been brought to my attention are a grain elevator business owned by the Farmers Grain Co., Inc., at Runnells, Iowa, which is located on the present right-of-way of the Wabash Railroad; a lumberyard owned by McKlveen Lumber Co., also located on the same right-of-way; and some foundations for propane gas tanks and a scale pit for the Vanderzyl Bros. Fuel Co., and some gaslines owned by the Iowa Power & Light Co.

It is probable that the gaslines are covered by section 701(c)–1, title 33, United States Code Annotated, a special provision providing compensation for the relocation of utility lines affected by projects such as Red Rock Dam.

There are two points which I would particularly stress in connection with the subcommittee's consideration of this legislation:

The first is that the Wabash Railroad has stated that for all practical purposes, leases such as the ones involved here continue in effect indefinitely; that except for the Red Rock Dam project, it can be stated without reservation that so long as the property would be used for the purposes related to railroad business, the lease would continue in effect.

The second is that on the strength of this arrangement, the Federal Small Business Administration made a loan to the Farmers Grain Co., Inc., in the amount of $250,000, secured in part by a mortgage on the property at Runnells. I ask consent that a letter dated July 8, 1963, from the Wabash Railroad, signed by D. E. Brummitt, be made a part of the record.

Senator YOUNG. Without objection, that will be made a part of the record at this point.

(The letter from the Wabash Railroad dated July 8, 1963, follows:)

WABASH RAILROAD CO.,
St. Louis, Mo., July 8, 1963.

File: L. Runnels, Farmers Grain Co., Inc.

Mr. JOHN R. MACKAMAN,
Dickinson, Throckmorton, Parker, Mannheimer & Raife,
Fleming Building, Des Moines, Iowa.

DEAR MR. MACKAMAN: Mr. Duesenberg of our law department has referred to me for reply your letter of June 26, 1963, addressed to him.

The subject to which this reply is directed pertains to the provision in the Wabash lease of property at Runnells, Iowa, to the Farmers Grain Co., Inc., providing for the termination of said lease upon 30 days' notice by either party. The date of the Farmers Grain Co. lease is March 1, 1954.

It is absolutely correct that almost all of the Wabash leases, for purposes similar to that in question, contain a 30-day termination clause. It is essential, from the point of view of Wabash, that the land which this railroad obtains for industrial purposes be utilized in a manner productive of railroad business. For this reason, and in order to assure the proper employment of land owned by this company, these short notice termination clauses universally appear in our land leases.

The right in the clause, however, is seldom exercised by Wabash where the lessee remains a railroad shipper. For all practical purposes, the leases continue in effect indefinitely. The lease with Farmers Grain Co. is a typical example. That lease is originally for a term of 1 year and thereafter from year to year. Since its inception, it has continued without interruption to the present time. Except for the Red Rock project, it can be, without reservation, stated that so long as the property would be used for the purposes related to railroad business the lease would continue in effect.

Yours very truly,

D. E. BRUMMITT.

Senator MILLER. I also ask that a copy of the lease arrangement between Farmers Grain Co., Inc., and the Wabash Railroad be received as an exhibit for the record.

Senator YOUNG. Without objection, that may be done.

(The copy of the contract for lease of land follows:)

CONTRACT FOR LEASE OF LAND

This agreement, made and entered into this 1st day of March A.D. 1954, by and between Wabash Railroad Company, party of the first part (hereinafter called the Lessor), and Farmers Grain Co., Inc., of Carlisle, in the State of Iowa, party of the second part (hereinafter called the Lessee),

WITNESSETH, That the said Lessor, for and in consideration of the covenants, agreements and undertakings of the Lessee, hereinafter contained, and the sum of Twelve and no/100 ($12.00) per annum in advance to be paid the Lessor, hereby grants unto said Lessee, subject to the conditions herein contained, the right to occupy and use for the purpose of maintaining corn cribs, elevator, scales, and office, the following described premises at Runnells in the County of Polk and State of Iowa, having an area of 13,400 square feet, more or less:

Parcel A: Beginning at the point of intersection of the Lessor's northerly right-of-way line and the east line of Brown Street produced; thence easterly along said right-of-way line 140 feet; thence southerly at right angles 40 feet; thence westerly and parallel to said right-of-way line 145 feet to east line of Brown Street produced; thence northerly 40.5 feet along east line of Brown Street produced to point of beginning; also

Parcel B: Beginning at a point 250 feet easterly from east line of Brown Street produced, measured along center line of house track, and 8.5 feet southerly at right angles therefrom; thence easterly and parallel to said house track

110 feet; thence southerly at right angles 70 feet; thence westerly at right angles 110 feet; thence northerly at right angles 70 feet to point of beginning.

The above described parcels of land are shown in green lines on the print dated April 1, 1954, attached hereto and hereby made a part of this agreement.

It is understood and agreed that the Lessee has succeeded to all rights, title, and interest of Donald C. Wise, to property located on the above-described leased premises.

Unless sooner terminated as herein otherwise provided, this lease shall continue in effect for the term of one year from the date first above written and shall continue in effect thereafter, subject to termination, after the expiration of said term of one year, thirty days after either party hereto shall have given to the other party written notice of its intention to terminate the same.

And the Lessee, for himself, his heirs, incoming partners, and sublessees, with or without notice of the terms of this lease and each of them, undertakes, covenants and agrees with the Lessor as follows:

First: (a) To pay as increased rent six percent per annum on all special taxes and assessments which may be assessed against said leased premises, (b) To pay all general taxes and/or assessments which may be levied or assessed locally against the leased premises and levied or assessed against buldings and structures of the party of the second part on the leased premises.

Second: In the conduct of said business on or about said premises as hereinbefore described, to comply at all times with such rules and regulations as the Lessor may from time to time prescribe in relation to such business.

Third: To assume all risks of loss, injury or damage of any kind or nature whatsoever, to any buildings, or other structures or appurtenances thereto, together with all property, real, personal, or mixed, belonging to said Lessee, his heirs, incoming partners, sublessees, or others, which may be now or hereafter placed or be in said buildings, etc., or any of them, upon said leased premises, land adjoining or adjacent thereto, and all risks of injury or death of himself and any person or persons (including his employes) while on or about said leased premises, in service of or at the instance, license, or invitation of said Lessee or his employes, or otherwise, whether arising from fire or other agency, directly or indirectly, from the use of said leased premises, or the construction, existence, operation, or maintenance of said buildings, or other structures or appurtenances, as the case may be, upon or under, or the removal thereof from, said leased premises, or otherwise; whether the same be caused by the negligence of the Lessor, or any of his employes, agents, or servants, or otherwise; and to save and keep harmless the Lessor from all claims and suits growing out of any such loss, damage, injury, or death.

Fourth: Not to create or permit to be created or to exist upon said leased premises any nuisance, public or private, during the continuance of this lease, and to save and keep harmless the Lessor from any suit or claim growing out of any such nuisance thereon.

Fifth: Not to erect or maintain, or suffer to be erected or maintained on said leased premises, any building, structure or obstruction so near the main, side or switch tracks of the Lessor as to endanger the safety of its employes, agents, or servants or increase the hazard of their employment, or inconvenience them in the discharge of their duties and not permit said premises to become or remain dangerous in any respect to said employes, agents, or servants, or to other persons; and to save and keep harmless the Lessor from all claims growing out of any default herein.

Sixth: To secure at its own cost and expense, any and all permits or approvals, required by the State, County, City, or other properly constituted authority, to construct, maintain, or operate the buildings, structures, or plant on the leased premises, and to save and keep harmless the Lessor from all suits, costs, and expenses arising from any default in the requirements of this paragraph.

Seventh: To waive all right to question the validity of this lease, or any of the terms or provisions hereof or the right or power of the Lessor to execute and enforce the same; and to waive all right to claim damages in the event the Lessee be ejected from, or be required to surrender possession of, the leased premises by reason of the failure of title of the Lessor or for other cause.

Eighth: Not to sublet said premises, in whole or in part, nor to assign or transfer this lease, in whole or in part, without a supplemental agreement being executed by the parties hereto and the sublessee; the Lessor having the right to refuse such subleasing at its option.

Ninth: Not to use, or permit the said leased premises to be used, for any purpose other than that embraced in the terms of this agreement.

Tenth: It is further mutually agreed between the parties hereto, that in case said buildings, structures, or works shall at any time during the continuance of this lease be destroyed in whole or in part by fire or otherwise, this lease shall not by reason thereof determine but the Lessee shall have thirty days thereafter in which to rebuild the same; but in case said property so destroyed shall not be rebuilt in all respects equal to that destroyed, and within the time aforesaid, this lease may be determined at the option of the Lessor.

Eleventh: It is further mutually agreed between the parties hereto that the Lessor shall have the right to determine this lease at any time subsequent to the effective date hereof upon thirty days' written notice, and in such event the Lessee shall, within thirty days after the date of notice of such determination, remove said buildings, structures, works, and all other property of the Lessee, and all wreckage and debris from said premises and surrender possession thereof to the Lessor in the same condition as when received. Acceptance of rent in advance by the Lessor shall not act as a waiver of the right to terminate this agreement, or of any other right of the Lessor hereunder.

Except as otherwise provided in Article Thirteenth hereof, the Lessor agrees to recognize the buildings and structures placed upon said leased premises by said Lessee as the property of the Lessee, and to permit said Lessee to remove the same at any time during the continuance of this lease, and at the expiration of this lease the Lessee shall, within thirty days, remove the said buildings, structures, and property, and all wreckage and debris from the premises, such to be at the expense of the Lessee; and, until such removal, the agreements contained in the Third, Fourth, and Fifth Articles shall remain in full force and effect.

If the Lessee shall fail or refuse to remove said buildings, structures, works, or property and all wreckage and debris from said premises, as and within the time herein required, then the Lessor may make said removals at the expense of the Lessee.

Twelfth: It is further mutually agreed that the Lessor may at any time enter upon said leased premises to construct, extend, or repair any side or switch track, or to perform any duty required of it by any governmental authority, or to make any use of said premises not inconsistent with the use herein granted to the Lessee.

Thirteenth: If default be made in the payment of the rent above reserved, or any part thereof, or in any of the covenants or agreements herein contained, to be kept by the Lessee, it shall be lawful for the Lessor or the legal representatives of said Lessor at any time thereafter, at the election of said Lessor or the legal representatives thereof, without notice or demand of rent, to declare said term ended and to re-enter said demised premises or any part thereof, either with or without process of law, and the said Lessee, or any person or persons occupying the same, to expel, remove and put out, using such force as may be necessary so to do, and the said premises again to re-possess and enjoy as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants; and said Lessee further convenants and agrees that said Lessor, or the representatives or assigns of said Lessor, shall have at all times the right to distrain for rent due, and shall have a valid and first lien upon all property of said Lessee, whether exempt by law or not, as security for the payment of the rent herein reserved.

It is further agreed by the parties hereto, that after the service of notice or the commencement of a suit, or after final judgment for possession of said premises, the Lessor may receive and collect any rent due and the payment of said rent shall not waive or affect said notice, said suit or said judgment.

Fourteenth: If the electric service, telegraph, telephone, or signal wires, poles, or appurtenances, or conduits, water, gas, or drain pipes, or other railroad facilities, of the Lessor, are or that may be in the future located on, over, under, or across the above-described leased premises, the Lessor reserves the right to enter upon the leased premises for the purpose of installing, maintaining, operating, relocating, or removing said railroad facilities, and the Lessee agrees not to interfere with or obstruct their installation, relocation, maintenance, operation, or removal, and will save the Lessor free from all costs and expenses for injury or damage to said railroad facilities arising from any act of the Lessee, its agents or servants.

Fifteenth: This lease, and each and all the provisions herein contained, shall inure to the benefit of and be binding upon the parties hereto, incoming parties and sublessees of the Lessee and the successors and assigns of the parties hereto.

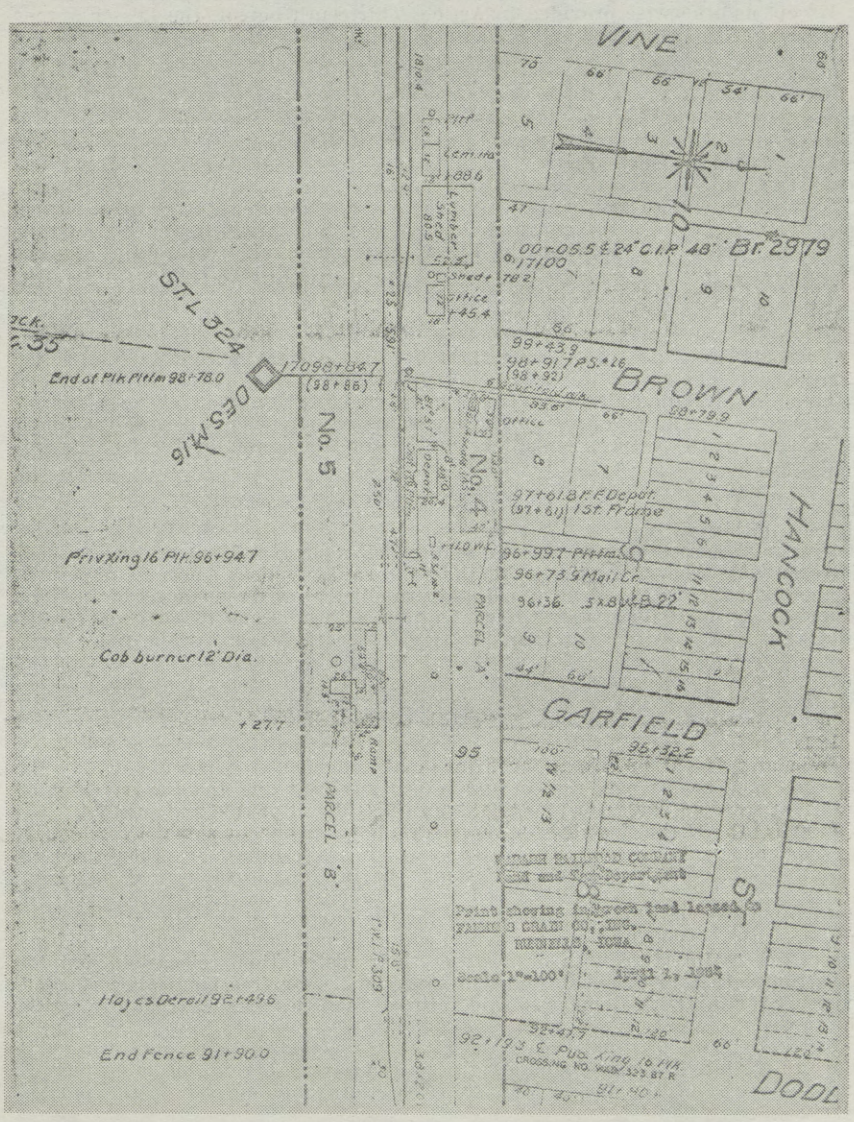
Sixteenth: The personal pronouns used herein as referring to the Lessee shall be understood so to refer whether said Lessee be a natural person, a co-partnership or a corporation.

Seventeenth: If, under the laws of the United States or any state in which these premises are located, any public body or tribunal now has, or during the term of this lease shall have, the right to require the termination of this lease, then this lease may be terminated by such body or tribunal in accordance with law.

WABASH RAILROAD COMPANY,
By D. E. BRUMMITT,
Land and Tax Commissioner.
FARMERS GRAIN CO., INC.,
By GLENN MILELAIN,
Secretary and Treasurer.

Approved:

P. A. ZIEHKLE,
Division Freight Agent.



Senator MILLER. Finally, Mr. Chairman, I should point out that there is ample precedent for legislation of this type. Section 211, Public Law 86–645, permits compensation of persons owning improvements situated in railroad rights-of-way affected by the Tuttle Creek Reservoir project on the Blue River in Kansas.

Our bill is substantially identical to this.

In connection with the buildings and other structures involved in the Farmers Grain Co., Inc., I have a schedule which sets forth the items, dates of acquisition, and costs, and I ask consent that this schedule be made a part of the record at this point in my remarks.

Senator YOUNG. Without objection, that may be done.

(The document follows:)

FARMERS GRAIN CO., INC.—BUILDINGS AND OTHER STRUCTURES INVOLVED

The following is a schedule of the buildings and other structures which are permanently attached to the real estate and cannot be moved or the moving of which would be very costly:

Item	Date acquired	Cost
Elevator building	1954	$3,500.00
Feed storage building	1954	3,500.00
Office building	1954	2,500.00
New approach	1954	778.23
Scale	1954	1,500.00
Steel grain storage tanks	1954	10,460.82
Mill room addition	1955	729.93
J. B. hammermill and motor	1955	850.00
Keeley vertical mixer	1955	1,629.52
Butler storage building	1957	20,550.30
Total		50,998.80

Since real estate values have not appreciably increased or decreased in this area since 1954 and since these buildings have been well maintained, it is estimated that their current value is approximately $50,000. An appraisal of the property would, of course, be necessary to establish a reliable valuation figure.

Senator MILLER. Mr. Chairman, Congressman Kyl and Congressman Smith are not able to be present. However, Mr. Duane Curtis, administrative assistant to Congressman Kyl, has requested that I ask consent of the committee to include in the record a memorandum by Congressman Kyl, and I make this request, that it be included in the record at this point.

Senator YOUNG. That memorandum will be included in the record at this point.

(The memorandum of Hon. John Kyl follows:)

MEMORANDUM OF HON. JOHN KYL, REPRESENTATIVE FROM IOWA

I can agree with the Defense Department that there should be general law governing situations of this kind. However, it is apparent that general legislation would come too late to bring justice to the cases under consideration.

The lease arrangements involved in these instances are the usual type written on printed forms. The railroad solicits these agreements. This is the only means a business has for getting facilities on the railroad sidings. There is an accompanying "gentlemen's agreement" which says in effect, "this arrangement shall continue as long as the lessee does business with the railroad and acts in good faith."

The letter introduced into the record by Senator Miller indicates that if this Federal project had not been built, the lease arrangement would have continued unimpaired with no date noted for termination.

The Small Business Administration, an agency of the Federal Government, supported the permanency of such leases by loaning the Farmer's Grain Elevator a quarter of a million dollars.

I cannot argue with the legal fact that the Government has purchased the lease arrangements with acquisition of the railroad property. What we seek is a matter of equity. There is specific precedent in actions taken in Kansas, and in South Dakota.

The Federal Government has also demonstrated precedent when the Congress determined that if grazing permits (which are not permanent) are revoked so the land may be used for defense purposes, the leaseholder has a compensable interest. This is the same kind of equity we seek in regard to the Red Rock project.

We sincerely appreciate the courtesy and consideration of the Senate in this matter.

JOHN KYL.

Senator MILLER. Mr. Bert Bandstra, administrative assistant to Congressman Neal Smith, is here, and I believe that he would like to make a brief statement to the committee.

Senator YOUNG. If he has a statement in writing that will be made a part of the record.

Senator MILLER. He does not have a prepared statement.

Senator YOUNG. Have you completed your formal statement?

Senator MILLER. I have, except for the introduction of one further witness, and I would like to ask Mr. Bandstra if he has a brief statement to make to the committee.

Senator YOUNG. I am not going to hear him now, until we finish with your testimony.

Senator MILLER. Very well.

Senator YOUNG. If he has a written statement, I will be very happy to have that introduced into the record.

Senator MILLER. May I say that I have completed my testimony. My only function now would be to introduce Mr. Bandstra and then to introduce the one witness who has come all the way from Iowa.

Senator YOUNG. Who is the witness?

Senator MILLER. It is Mr. McKlveen, who is here to speak in behalf of the McKlveen Lumber Co., the Farmers Grain Co., Inc., and the Vanderzyl Bros. Fuel Co., of Pella, Iowa.

Senator YOUNG. The Chair would prefer to hear Mr. McKlveen after the conclusion of your testimony.

Senator MILLER. I have no further testimony, Mr. Chairman. I would be very happy to try to answer any questions that the subcommittee members may wish to ask.

Senator YOUNG. I am confident that you can answer any questions that we have to ask.

I am sure you have seen the report from the Bureau of the Budget and from the Department of the Army. The Secretary of the Army and the Bureau of the Budget are opposed to the enactment of this legislation, recommending that uniform acquisition procedures be established, and that action on S. 931 be deferred pending the completion of the comprehensive study and recommendations of the Select Subcommittee on Real Property Acquisition of the Committee on Public Works of the House of Representatives. I think that we would like to have your comment on that.

The statement goes on to say that the situation occurs very frequently in Corps of Engineers' projects all over the country and is not peculiar to the Red Rock project.

In the letter of the Bureau of the Budget it states:

In these cases, the individuals involved have not beeen compensated, except by special legislation.

It does not seem to the chairman that the claim is seriously made here that they should not be compensated. It is just the procedure that they are objecting to. They prefer to step aside hoping that general legislation will be enacted, which may not be enacted at this session of the Congress. I would like to have your comments on these statements.

Senator MILLER. May I say, Mr. Chairman, that I thoroughly agree with the observations you have just made. I would also say that we believe that general legislation on this matter probably is long overdue.

However, I am sure that the subcommittee recognizes that legislation of this import could take months, and maybe even go into the next session of Congress, before it could be acted upon favorably. In the meantime these people are placed in jeopardy by imminent action, so that they might lose everything. And even if the bill later on was passed, we would not know about its retroactive application.

I believe, Mr. Chairman, that the same arguments have been made previously in legislation such as this, particularly in connection with the public law that I cited to the subcommittee, Public Law 86–645.

Senator YOUNG. Undoubtedly, they have been made every time a bill of this kind has been introduced.

Senator MILLER. Yes. From the standpoint of equity and justice, I believe that it would be most unfortunate to delay consideration on this measure merely in the hope and the expectation and perhaps the advocacy of general legislation which might be a long way off in the future.

So I would hope that the subcommittee would give favorable consideration to this general legislation, but would not see fit to delay equity in this case for that reason.

Senator YOUNG. Senator Miller, I have one further question. As I understand it, the total amount involved in this matter is approximately $125,000, is that correct?

Senator MILLER. I would estimate, Mr. Chairman, that it would be under that. I think that we would be quite safe in stating that that would be the maximum ceiling.

The item that I put in the record pertaining to the Farmers Grain Co., Inc., runs in the neighborhood of $50,000. I believe that Mr. McKlveen will testify with regard to the figures regarding his lumber company.

The propane gas tank company's problem is something that I am not familiar with, except that I do understand that the tanks are movable and that the damages that would need to be compensated relate to the substructures underlying the tanks and the scale pit which probably would not be very great.

Senator YOUNG. Do you have any questions, Senator?

Senator PEARSON. You introduced the lease or a copy thereof, as I recall. Is there any provision in the lease pertaining to compensation or action on the part of a governmental unit?

As an attorney I think, as well as yourself, that we both have participated in the drafting of many leases, and the standard

provision relates to that, as I recall it. And I wondered if there was anything in this particular lease along that line?

Senator MILLER. If you would bear with me, I would try to find it.

Senator PEARSON. You can furnish that later on.

Senator MILLER. I cannot answer that question, because I have not reviewed the lease. It consists of three pages of fairly fine print, but I have asked that it be made an exhibit of the record.

Senator PEARSON. But I would further inquire as to whether or not there is any precendent for legislation such as this, other than Senator Carlson's bill which had not been directed to my attention prior to this morning.

Is there any legislation that has been passed by the Congress on this particular subject?

Senator MILLER. Senator, the reason I cited this public law is because it is comparatively recent. I thought it would be one that would be the freshest within the recollection of the committee.

I understand that there may be others, but we did not research this out, feeling that this one item pertaining to the Blue River in Kansas was very comparable to the factual situation that is present in this case.

There may be others. We tried to find one that was of recent date and was on practically all fours with the case we have.

Senator PEARSON. This bill provides for the payment on the basis of "the fair value of any such improvements," and as I recall condemnation actions, as condemnation actions and so forth, I know that in Kansas—and I have seen this, perhaps very much the same way in Iowa—that generally speaking, the measure of the damages would be the value before the taking as compared with the value after the taking. This does not compensate the value of the lease or the interest held, but the value of the improvements, is that right?

Senator MILLER. That is correct.

Senator PEARSON. Your bill is the same, I see. It is the fair value of such improvements, the same as Senator Carlson's bill.

Senator MILLER. Yes. We tried to prepare this bill so that it would not cause the subcommittee an undue amount of research or analysis, going outside the precedent that had been set in the bill to which you refer.

Senator PEARSON. I have nothing further.

Senator YOUNG. Senator Inouye?

Senator INOUYE. Senator, is it your contention that although technically and legally there is a right to terminate on 30 days' notice, that it is the prevailing custom, practice and tradition in the relationship of the lessor-lessee that in actuality the lease is a long-term one?

Senator MILLER. That is correct, and it has been so interpreted as a practical matter by a great many businesses. I invited the attention of the subcommittee to the interpretation along this line by the Federal Small Business Administration.

Senator INOUYE. When was this deal made?

Senator MILLER. When?

Senator INOUYE. Yes.

Senator MILLER. I do not have the date, but I am advised that it was several years ago, and that a good portion of the loan is still

outstanding. It was in the amount of $250,000. However, other properties than the ones involved in this particular condemnation were also put up as equity.

The point that I wish to make, however, is that the Small Business Administration saw fit to accept a mortgage on the property here as a partial equity of the loan. I would be very doubtful that the Small Business Administration would have done so had it not recognized a long practice out in my State of the railroads using these leases on an indefinite, almost an interminable basis, and I believe that the next witness will have a point in this connection, to show the committee how this practice has actually affected his own particular property.

Senator INOUYE. Am I correct that at the time of the Small Business Administration loan, that there was this 30-day terminaton clause contained within the lease?

Senator MILLER. Yes, sir.

Senator INOUYE. And your contention is that the Small Business Administration also recognizes custom and tradition prevailing in your area?

Senator MILLER. Yes, sir.

Senator INOUYE. And your contention is that the Small Business Administration also recognizes custom and tradition prevailing in your area?

Senator MILLER. Yes, sir.

Senator INOUYE. I have no further questions.

Senator YOUNG. Senator Jordan, have you any questions?

Senator JORDAN of North Carolina. I want to apologize for being late. I will, of course, read the testimony.

Senator YOUNG. Are there any further questions? Is there anything further that you wish to state?

Senator MILLER. No; I have nothing further, Mr. Chairman.

I would like now to present Mr. McKlveen.

Senator YOUNG. We will now hear from Mr. McKlveen.

Senator PEARSON. I was going to say to the Senator that he has described a situation that might seem unusual to some of us, but I want to say this, as a personal reference, that the Pearson family has been in the grain business in Kansas for about 75 years, running country elevators on railroad lines, and I know that these leases go on year after year after year with the same termminology that the Senator from Iowa has just described. It does not seem a very sensible arrangement, and one would wonder why the 30-day termination clause, but it is a fact and it occurs, and I know that the Senator has described the situation that is a common practice. It does seem quite unusual.

I wanted to make that observation.

Senator MILLER. I appreciate Senator Pearson's making this observation. Those of us who are lawyers, I am sure, would recognize this. I am quite confident that the chairman himself, in view of his long practice in the State of Ohio, has come across similar arrangements in Ohio. It is my understanding that this is a general application. I thought that I should only speak from my experience in my own home State.

Senator YOUNG. At this point in the record, the Chair would like to have unanimous consent to insert this statement on S. 931, instead of reading it.

(The statement entitled "S. 931" follows:)

S. 931

(To authorize the Secretary of the Army to pay fair value for improvements located on the railroad rights-of-way owned by bona fide lessees or permittees)

The purpose of S. 931 is to authorize the Secretary of the Army to pay to any bona fide lessee or permittee owning improvements, which are or which were situated on a railroad right-of-way, which have been or will be rendered inoperative or be otherwise adversely affected by the construction of the Red Rock Reservoir project on the Des Moines River, Iowa, the fair value of any such improvements as determined by the Secretary, or by the U.S. District Court for the District of Iowa on which jurisdiction for this purpose is conferred, such payment to be made from funds appropriated for the construction of the Red Rock Reservoir project.

The Red Rock Reservoir is under construction by the Corps of Engineers on the Des Moines River, Iowa. The dam will be located approximately 143 miles above the mouth of the Des Moines River, which empties into the Mississippi River 361 miles above the mouth of the Ohio River. The drainage area above the damsite is 12,250 square miles. The Iowa capital city of Des Moines is located about 60 miles upstream from the damsite.

The dam will consist of a rolled earthfill embankment with a gravity-type concrete spillway with crest gates, having a total length of about 6,260 feet and a maximum height of 95 feet above the valley floor. The reservoir will have an area of about 68,000 acres, and a storage capacity of 1,890,000 acre-feet, of which 1,840,000 acre-feet will be allotted to flood-control purposes, and 50,000 acre-feet for conservation purposes. The operation of the reservoir will result in materially reduced flood heights on the Des Moines River below the dam, and will also provide substantial supplementary benefits by reducing Mississippi River floods.

The comprehensive plan for flood control and other purposes in the upper Mississippi River Basin was authorized by the Flood Control Act of June 28, 1938 (52 Stat. 1215). The Flood Control Act of December 22, 1944, included the Red Rock Dam on the Des Moines River in the plan, substantially as recommended in House Document No. 651, 78th Congress. The estimated cost of the Red Rock Dam and Reservoir is $78,100,000. It is scheduled for completion about 1967.

In connection with construction of the Red Rock Reservoir, it will be necessary to relocate portions of the facilities operated by three railroad companies, the Chicago, Rock Island & Pacific Railway Co., the Chicago, Burlington & Quincy Railroad Co., and the Wabash Railroad Co. There are at least three lessees on the rights-of-way of the Wabash Railroad Co. which will be affected by the construction of the Red Rock Reservoir project and who will be required to remove their improvements. The lessees are a grain elevator company, a propane gas fuel company, and a lumber company.

Structures have been erected by each of these lessees under leases with the railroad company providing for termination upon 30 days' notice by either party, coupled with the requirement that upon termination the lessee must, at his own expense, remove all improvements from the premises. Thus, these are considered to be month-to-month tenancies, and the lessees to be "tenants at will."

In the acquisition of property by the Federal Government, guidelines on payments have been established by court interpretation of just compensation, which holds that licensees under revocable licenses do not possess a compensable property interest, and the removal of tenant-owned improvements is one of the consequential damages for which no compensation is required. It is recognized that owners and tenants are not always fully compensated for all of their losses when their property is acquired by the Federal Government.

This situation occurs frequently at Corps of Engineer projects all over the country, and is not peculiar to the Red Rock project. In such cases the individuals involved have not been compensated for their property, except by special legislation.

The Secretary of the Army and the Bureau of the Budget are opposed to enactment of this legislation, recommending that uniform acquisition pro-

cedures be established through general legislation, and that action on S. 931 be deferred pending completion of the comprehensive study and recommendations of the Select Subcommittee on Real Property Acquisition of the Committee on Public Works of the House of Representatives.

NOTE.—Prepared by the staff of the Committee on Public Works.

Senator YOUNG. Will you proceed, Mr. McKlveen.

STATEMENT OF JOSEPH L. McKLVEEN, McKLVEEN LUMBER CO., RUNNELLS, IOWA

Mr. McKLVEEN. Mr. Chairman and members of the committee, my name is Joseph L. McKlveen. I live in Prairie City, Iowa.

My appearance before this committee is on behalf of the McKlveen Lumber Co., Runnells, Iowa, of which I am partner and general manager; also on behalf of the Farmers Grain Co., of Runnells, Iowa, and the Vanderzyl Bros. Fuel Co., of Pella, Iowa.

I ask that my written statement, which is now in your hands, be entered into the record, and I will summarize it orally.

Senator YOUNG. The Chair observes that it is a five-page statement, and without objection, that is so ordered and it will be embodied in the record at this point, and the witness may proceed to testify in addition.

(The prepared statement of Joseph L. McKlveen follows:)

STATEMENT OF JOSEPH McKLVEEN BEFORE THE SUBCOMMITTEE ON BUILDINGS AND GROUNDS OF THE COMMITTEE ON PUBLIC WORKS, U.S. SENATE, JULY 30, 1963

My name is Joseph L. McKlveen. My appearance before this committee is on behalf of the McKlveen Lumber Co., Runnells, Iowa, of which I am partner and general manager, also on behalf of the Farmers Grain Co., of Runnells, Iowa, and the Vanderzyl Bros. Fuel Co., of Pella, Iowa. Each of the above-named business firms have buildings and improvements located on land on the present right-of-way of the Wabash Railroad in the flood area of the Red Rock Dam in Iowa. I ask that my written statement now in your hands be entered into the record, and I will summarize orally.

I am here in support of Senate bill 931 and respectfully request your favorable consideration of this bill as introduced by Senators Jack Miller and B. B. Hickenlooper from my home State, Iowa.

The buildings and improvements of the McKlveen Lumber Co. in Runnells, Iowa, are located on land leased from the railroad under a standard printed lease form containing the usual 30-day cancellation clause which is included in all or substantially all railroad leases. The Department of Army has taken the position that we, or the other two firms mentioned above, cannot be compensated for the destruction or removal of our buildings, because upon condemnation of the railroad property, the Government will succeed to the rights of the Wabash Railroad under the lease and enforce the cancellation clause without compensation to us. This is the reason that legislation is needed to create a right to compensate for the property which will be taken.

The lease between the McKlveen Lumber Co. and the Wabash Railroad states:

"It is further mutually agreed between the parties hereto that the lessor shall have the right to terminate this lease at any time subsequent to the effective date hereof upon 30 days' written notice, and in such event the lessee shall, within 30 days after the date of notice of such termination, remove said buildings, structures, works, and all other property of the lessee, and all wreckage and debris from said premises and surrender possession thereof to the lessor in the same condition as when received. Acceptance of rent in advance by the lessor shall not act as a waiver of the right to terminate this agreement, or of any right of the lessor hereunder."

We call your attention to the fact that our lumber company purchased the buildings and improvements at Runnels, Iowa, from the Warfield Lumber Co. in 1950 and took over the lease which they held at that time. It is also pointed out to you that the Warfield Lumber Co., our predecessors, had held this lease with the Wabash for approximately 40 to 50 years prior to the date of our acquisition.

It has been explained to us by the Wabash Railroad Co. that the right of the railroad to terminate a lease upon 30 days' notice is seldom exercised where the lessee remains a railroad shipper. They tell us for all practical purposes the lease continues in effect indefinitely. That fact can be verified in our own case at Runnells as well as at our Prairie City location where we have held a similar lease with the Rock Island Railroad since 1906. The lease is for a term of 1 year and thereafter from year to year. Since its inception, it has continued without interruption to the present time. As stated in a letter from the Wabash Railroad Co., dated July 8, 1963, we quote:

"Except for the Red Rock project, it can be, without reservation, stated that so long as the property would be used for the purposes related to railroad business, the lease would continue in effect."

Now, concerning the property affected, so far as the McKlveen Lumber Co. at Runnells, Iowa, is concerned, we list as follows the buildings which would be taken by the Red Rock project:

(1) An office and display room, size 18 by 62 feet.
(2) A lumber and building material storage building, size 52 by 80 feet.
(3) A lumber storage building, size 16 by 48 feet.
(4) A warehouse, size 18 by 59 feet.

We feel that a fair value of these buildings would be $25,000, and this figure most certainly would not include damages experienced by us involved in the cost of moving our merchandise nor loss of business during the moving process. We have been advised by the owners of the Farmers Grain Co. that they estimate the current value of their buildings at approximately $50,000.

I would like especially to call your attention to a precedent for this legislation. Section 211 of Public Law 36–645 was enacted by Congress to permit compensation of persons owning improvements situated on railroad right-of-way affected by the Tuttle Creek Reservoir project on the Blue River in Kansas. The current proposed legislation is, in substance, identical.

It would be impossible to move our Runnels buildings intact due to their size and the type of construction. The value of any salvage obtained from dismantling the buildings would be more than offset by the cost of tearing them down.

As you know, H.R. 1136, a bill identical to S. 931 was passed recently by the House Subcommittee on Public Works. I am sure this favorable action was taken only after careful study and consideration.

In view of the testimony which I have presented to you, I respectfully submit that the McKlveen Lumber Co., Farmers Grain Co., and Vanderzyl Bros. Fuel Co., by any standard of justice and fair play, are entitled to be compensated for whatever loss they will sustain to their permanent improvements by reason of the construction of the Red Rock Dam.

I thank you, gentlemen, sincerely for your courteous attention and for giving me the opportunity to present our problem to you. I trust that you will see fit to give favorable consideration to Senate bill 931 which would authorize the Secretary of the Army to pay fair value for improvements located on the railroad rights-of-way owned by bona fide lessees or permittees. If any of you have any questions which I might be able to answer for you, please feel free to state them.

Mr. McKLVEEN. Thank you very much.

I am here in support of S. 931 and respectfully request your favorable consideration of this bill as introduced by Senators Jack Miller and Bourke B. Hickenlooper, of my home State of Iowa.

The buildings and improvements of the McKlveen Lumber Co., Runnells, Iowa, are located on land leased from the Wabash Railroad Co. under a standard printed lease containing the usual 30-day cancellation clause which is included in all or substantially all of the railroad leases.

The Department of the Army has taken the position that the firms mentioned above cannot be compensated for the destruction of or the removal of the buildings which they have on this leased ground. The Government will succeed to the rights of the railroad under the lease and enforce the cancellation clause without compensation to us. This is the reason that legislation is needed to create a right to compensate for the property that will be taken from them.

Senator YOUNG. It will be unnecessary for the witness to read the provisions of the lease. It is the standard provision. The members of the subcommittee have your statement in its entirety, anyway.

Mr. MCKLVEEN. I will refrain from reading the provisions of the lease.

I would like especially to call to your attention the fact that our lumber company purchased the buildings and the improvements at Runnells, Iowa, from the Warfield Lumber Co. back in 1950, at which time we took over the lease which they had with the Wabash Railroad.

I would like also to point out to you that the Warfield Lumber Co., our predecessor, had held this lease for approximately 40 or 50 years prior to the time of our acquisition of this property.

It has been explained to us by the Wabash Railroad that the right of the railroad to terminate a lease upon 30 days' notice is seldom exercised, where the lessee remains a railroad shipper. And they tell us that for all practical purposes the lease continues in effect indefinitely.

That fact can be verified by our own case at Runnells, where the lease has been in effect 50 to 60 years; and also at Prairie City, Iowa, where we operate a lumber company and have held a lease from the Rock Island Railroad since 1906. The lease is for a term of 1 year and thereafter on a year-to-year basis since its inception; since the lease was written back in 1906 at Prairie City it has continued without interruption to the present time.

I would like briefly to quote from a letter received from the Wabash Railroad which states:

> Except for the Red Rock project, it can be without reservation stated that so long as the property would be used for the purposes related to railroad business, the lease would continue in effect.

Now concerning the property affected, so far as the McKlveen Lumber Co. is concerned, I would like to list for you as follows the buildings and the equipment which would be taken by the Red Rock project.

Senator YOUNG. Are these the buildings listed on page 4 of your statement?

Mr. MCKLVEEN. That is correct. There are four parcels: The office and display room, size 18 by 62 feet; a lumber and building materials storage building, size 52 by 80 feet; a lumber storage building, size 16 by 48 feet; and a warehouse, size 18 by 59 feet.

We feel that the fair value for these buildings would be $25,000, and I would like to point out that this figure would not compensate us for damages experienced by the cost of moving our merchandise, nor the loss of business which we would experience during the process of moving.

We have been advised by the owners of the Farmers Grain Co., Inc., that they estimate the current value of their buildings to be approximately $50,000.

The Vanderzyl Bros. Fuel Co. at Cordova, Iowa, has a plant located on railroad property, and I do not have the figures which would let me state accurately as to the damages that they would suffer.

I would like especially to call your attention again to a precedent for this legislation, that is section 211 of Public Law 86–645, which was enacted by Congress to permit compensation of persons owning improvements situated on the railroad right-of-way affected by the Tuttle Creek Reservoir project on the Blue River in Kansas.

The proposed legislation is in substance identical.

Awhile ago Senator Miller was questioned relative to any other legislation which was similar to this, and I was told by a representative of the Corps of Engineers sitting beside me here that there are five other cases similar to this, and they can answer your questions regarding that.

It would be impossible for us to move our buildings at Runnells, Iowa, because of their size and the type of construction. And the value of the salvage that would be obtained from dismantling them would be more than offset by the cost of tearing them down.

As you Senators probably are aware, H.R. 1136, a bill identical to S. 931, was passed recently by the House Committee on Public Works, and I am sure this favorable action was taken only after careful study and consideration.

In view of the testimony which I have presented to you this morning, I respectfully submit that the McKlveen Lumber Co., of Runnells, Iowa, the Farmers Grain Co., Inc., of Runnells, Iowa, and the Vanderzyl Bros. Fuel Co., of Pella, Iowa, by any standard of justice and fairplay are entitled to be compensated for whatever loss they will sustain through the improvement by reason of the construction of the Red Rock Dam.

I want to thank you Senators this morning sincerely for your courteous attention and for giving me the opportunity to come before you and to present our problem. I trust that you will see fit to give favorable consideration to S. 931 which would authorize the Secretary of the Army to pay fair value for the improvements located on the railroad right-of-way owned by bona fide lessees or permittees.

If any of you have any questions which I might be able to answer for you, I would be glad to have you state them.

Senator YOUNG. Senator Pearson, have you any questions?

Senator PEARSON. No; I think not. I am just puzzled now about the procedure for determining the fair value of such improvements. Could you refer us to some general condemnation law, a Federal statute?

Mr. MCKLVEEN. I am sorry that I cannot answer that.

Senator PEARSON. I was looking at this act that you cited, Public Law 86–645. It does not make any reference back to any other procedure or condemnation law, either.

Mr. MCKLVEEN. I would assume that the same procedure would apply that applied in cases where the buildings are not on leased ground; that the Corps of Engineers would have their appraisers come in and arrive at a fair and equitable value. This is just an assumption on my part. And I think that the Corps of Engineers probably have the procedure worked out for that.

Senator PEARSON. I have no further questions.

Senator YOUNG. Do you have any questions, Senator Inouye?

Senator INOUYE. Mr. McKlveen, I note from your testimony that your lumber company purchased the buildings and the improvements at Runnells, Iowa, from the Warfield Lumber Co. in 1950 and took over the lease which they had held at that time?

Mr. MCKLVEEN. Yes.

Senator INOUYEE. In 1950 was the Red Rock Reservoir being discussed?

Mr. MCKLVEEN. Not to my knowledge, sir.

Senator INOUYE. So at the time that you negotiated this arrangement, you had no knowledge that the Red Rock Reservoir would be built?

Mr. MCKLVEEN. None whatever.

Senator INOUYE. You took over the lease on the assumption that it was the custom and the practice and the tradition that would be followed as heretofore?

Mr. MCKLVEEN. We did.

Senator INOUYE. I have no further questions.

Senator YOUNG. Have you any questions, Senator Jordan?

Senator JORDAN of North Carolina. No; I do not. This is a most interesting subject. It is a very unusual thing, it seems to me. It looks like to me if they can compensate the railroad, that they ought to compensate for anything else that they destroy, unless there is some reason for not doing so. I also know that it is a fact that on these railroad leases they have that. They have the 30-day cancellation clause in them. Why they do, I do not know. We have it on a side track which runs about one-half mile to some of our property. That very same thing is in that lease.

Senator YOUNG. Do you have any further questions?

Senator INOUYE. I am informed by the staff that the Red Rock River Reservoir was authorized in 1944. Your company had no knowledge of this?

Mr. MCKLVEEN. I really did not, myself; no.

Senator INOUYE. I have no further questions.

Senator YOUNG. Have you any further comments?

Senator JORDAN of North Carolina. No.

Senator YOUNG. Senator Miller, have you any statements from any Members of the House of Representatives, from your State? If so, you could file them with the subcommittee not later than sometime tomorrow.

Senator MILLER. Yes, sir.

Senator YOUNG. And then if you have any additional material or statements, could you place them in the record not later than sometime tomorrow?

Senator MILLER. Yes, indeed.

Senator YOUNG. The Chair asks that because the Chair has in mind not to delay in calling the subcommittee into executive session to act on this.

Senator INOUYE. May I suggest something?

Senator YOUNG. Yes.

Senator INOUYE. May I suggest to the Senator that a contract also be included in the evidence, if it is available? I think it is rather important to the case.

Senator MILLER. Well, I would be more than happy to do so, but I am afraid that it might take a telephone call to Iowa to try to obtain it, so I would have to ask your indulgence for a little longer time than tomorrow to get that in for the record. But I would be more than pleased to place a copy of this in the record of the subcommittee as soon as I possibly can get it.

Senator YOUNG. That is certainly equally agreeable. Why not fix the time, the balance of this week for that, and the subcommittee will consider this sometime next week.

Senator MILLER. That will be fine.

(The contract with the Small Business Administration referred to is in the files of the committee.)

Senator YOUNG. In fact, the chairman will endeavor to talk with you personally to make sure that you have all of the information you wish to have included in the record. I assure you that any representative from your State who desires to be heard by the subcommittee, that we could arrange for that out of courtesy to him—that could be done just before we sit down in executive session.

Senator MILLER. I appreciate that, Mr. Chairman.

The only other thing that I think of is that there might be a statement by Congressman Neal Smith, whose bill, as I pointed out, is now on the House Calendar, but he is, I understand, out of the city because of illness, and I am quite sure that a statement from his office can be filed with the subcommittee by tomorrow.

(The statement referred to is as follows:)

STATEMENT OF CONGRESSMAN NEAL SMITH, FIFTH IOWA DISTRICT

Mr. Chairman, I appreciate this opportunity to submit this statement for the record in support of S. 931 introduced by Senators Miller and Hickenlooper.

The law provides that in connection with the acquisition of real estate, whether by purchase or condemnation, the Government shall pay the fair market value for any real estate acquired.

Normally, of course, buildings attached permanently to the real estate are fixtures and are considered a part of the real estate. Most of the buildings and improvements involved here are not movable. The problem arises in this instance due to the unusual ownership of the fee title interest in this particular real estate.

The railroad has only a right-of-way (easement) over the real estate, but—by virtue of the lease—has no interest in the buildings.

Section 473.1 of the Code of Iowa provides:

"Such part of a railway right-of-way as is wholly abandoned for railway purposes by the relocation of the line of railway, shall revert to the persons who, at the time of the abandonment, are owners of the tract from which such abandoned right-of-way was taken."

The Wabash Railroad Co. now has an application for abandonment of this line pending before the Iowa Interstate Commerce Commission, which, under the circumstances, will no doubt be approved.

Since the buildings are substantial and are, in fact, not movable, without this legislation one of two inequitable results would follow:

(1) The present owner of the tract from which the right-of-way was taken would be unjustly enriched if the buildings were not removed; or

(2) The owners of the buildings could demolish the buildings and realize only a salvage value.

The simple solution which would avoid these inequities is to authorize the Corps of Engineers to purchase the buildings at their fair market value from the owners of the buildings and recoup a portion of the purchase price by selling the buildings for their salvage value, which is the usual and normal procedure where the fee title ownership is not divided.

Although the leases involved were entered into voluntarily, from the standpoint of the lessee there is no real basis for negotiation on the 30-day cancella-

tion clause. Since the Wabash Railroad is the only railroad running through Runnells, Iowa, the railroad in effect has a monopoly on rail transportation with the result that the lessee can either sign the standard railroad lease with the 30-day cancellation clause or forgo the necessity of having his facilities located on the railroad siding.

Furthermore, in view of the provisions of section 473.1 of the Iowa Code, the railroad would insist on a short-term cancellation clause in order to eliminate any question regarding a partial abandonment of the right-of-way for railway purposes.

As a result, a custom has been established throughout the country—depending somewhat upon local law—by which leases of this type are actually considered perpetual in nature, particularly in view of the business which accrues to the railroad as a result of having businesses established on their right-of-way.

The opposition of the Department of the Army is based on the need for general legislation covering this and similar situations. However, time is of the essence and general legislation covering these situations does not appear imminent. It is doubtful that general legislation would apply retroactively and the owners of the buildings must make plans now for the construction of new facilities along the relocated railroad right-of-way.

There is ample precedent for this legislation. Section 211 of Public Law 86–645 which was enacted 3 years ago by Congress is identical to the present bill except only for the proper names. There have been a number of other instances in which substantially the same objective was accomplished by somewhat different language.

S. 931 is identical to H.R. 4841 introduced by Congressman Kyl and to H.R. 1136 introduced by myself. H.R. 1136 was favorably reported by the House Public Works Committee on July 18 of this year.

In view of the foregoing and other testimony and the exhibits entered in the record, I would very much appreciate and urge the favorable consideration of S. 931 by this committee.

Senator YOUNG. If not, we can arrange that. I think I have expressed the views of the members here, that you have given us a very full and complete bit of information on this bill in a most persuasive manner. We will be glad to give this bill thorough consideration.

I think that we appreciate very much the fact that the witness, Mr. McKlveen, came from Iowa to inform us exactly of the situation. It is helpful to us to have testimony like that.

Is there anything further?

Senator MILLER. No.

Senator YOUNG. Our next witness is Mr. Loney W. Hart, from the Office of the Chief of Engineers, Department of the Army, whom we will want to hear from now.

Have you a prepared statement?

Mr. HART. Yes; I have. I believe you have copies of it.

Senator YOUNG. We have a copy of it. This prepared statement will be received and made a part of the record.

(The prepared statement of Mr. Loney W. Hart follows:)

STATEMENT BY LONEY W. HART, OFFICE, CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY

Mr. Chairman and members of the committee: I am Loney W. Hart, Chief of the Real Estate Legislative Services Office, Chief of Engineers, Department of the Army. With me is Mr. M. S. Gurnee, Chief, Operations Division, Office Chief of Engineers. I have been designated to present the views of the Department of the Army in this matter and have a brief prepared statement which I would like to present to the committee.

The purpose of the bill is to authorize and direct the Secretary of the Army to pay to any bona fide lessee or permittee owning improvements, which are or which were situated on a railroad right-of-way, the fair value of

such improvements, which have been or will be rendered inoperative or be otherwise adversely affected by the construction of the Red Rock Reservoir project on the Des Moines River, Iowa.

The views of the Department of the Army on this bill were furnished the chairman of this committee by letter from the Secretary of the Army dated June 21, 1963. As stated therein, this Department is opposed to the enactment of this legislation.

The facts involved herein may be briefly stated. In connection with the construction of the Red Rock Reservoir project, it is necessary to relocate portions of facilities operated by three railroad companies, one of which is the Wabash Railroad Co. Improvements have been constructed on the right-of-way of this railroad company by three lessees who will be required to remove improvements. While no actual appraisal has been made, a preliminary estimate indicates the fair value of these improvements approximate $125,000. The lessees are a grain elevator company, a propane gas fuel company, and a lumber company. Structures have been erected by each of these lessees under leases with the railroad company providing for termination upon 30 days' notice by either party, coupled with the requirement that upon termination the lessee must, at his own expense, remove all improvements from the premises. These are considered to be month-to-month tenacies, and the lessees to be "tenants at will."

Under various decisions of the courts in condemnation proceedings, it has been held that "tenants at will," or licensees under revocable licenses, do not possess a compensable property interest. In connection with similar situations, the Comptroller General has also ruled that any loss suffered by tenants under this type of right is in the nature of consequential damages. As a result, this Department is without authority to reimburse the lessees in this instance.

As indicated in the departmental report, "just compensation" determined in accordance with case law established by the courts does not always fully compensate owners and tenants for all their losses. Cognizance is also taken of the fact that Congress has previously enacted legislation similar to this bill on several other reservoirs.

In this particular matter, while the Department of the Army is sympathetic to any hardships these lessees may suffer, it is also concerned with equal treatment of everyone. The situation in this case is not peculiar to the Red Rock project or to any single group; these consequences may be found in all governmental acquisitions. Therefore, it would appear more desirable to establish, to the extent possible, uniformity of acquisition procedures by enactment of general legislation.

In this connection, it may be pointed out, that the Select Subcommittee on Real Property Acquisition of the House Committee on Public Works in its comprehensive studies of just compensation in real property acquisitions, has under consideration this problem of reimbursement for limited estates. It may be anticipated that this subcommittee will make a specific recommendation on this feature.

Accordingly, the Department of the Army is generally opposed to any further piecemeal legislation concerning special payments, and recommends that action on this bill, S. 931, be deferred pending recommendations by the Select Subcommittee on Real Property Acquisition, or the enactment of general legislation.

The Bureau of the Budget has concurred in the views of this Department.

This concludes my statement, Mr. Chairman, and we shall be happy to answer any questions you may have on this bill.

Senator YOUNG. You may proceed.

STATEMENT OF LONEY W. HART, CHIEF, REAL ESTATE LEGISLATIVE SERVICES, OFFICE OF THE CHIEF OF ENGINEERS; ACCOMPANIED BY MARK S. GURNEE, CHIEF, OPERATIONS DIVISION; AND C. C. CASEY, CHIEF OF PLANNING AND PURCHASE SECTION, REAL ESTATE DIVISION, CORPS OF ENGINEERS

Mr. HART. Mr. Chairman and members of the committee, I am Loney W. Hart of the Office of Chief of Engineers, and I am accompanied by Mr. Mark S. Gurnee and Mr. C. C. Casey of the Office of Chief of Engineers.

Senator YOUNG. We will be glad to hear the testimony that you have to offer. We will certainly read your statement, so you may add anything to your statement that you wish, and then maybe there will be some questions.

Mr. HART. If you wish, I can dispense with the statement as already stated. I might only state this, that it follows substantially the information which the Secretary of the Army has furnished to this committee.

Senator YOUNG. The letter of the Secretary of the Army has already been placed in the record.

Mr. HART. That is correct. That was the letter from the Secretary of the Army dated June 21, 1963. I believe you read from it before.

Senator YOUNG. It was made a part of the record.

Do you wish to add to your testimony?

Mr. HART. No, sir. I would be glad to answer any questions that the committee may have in relation to this that would conserve the time of the committee.

Senator YOUNG. Are you opposed to the enactment of this bill?

Mr. HART. The position of the Army is, sir, that we oppose piecemeal legislation in this respect and feel that general legislation might be more beneficial, by reason of the facts as stated in our letter, that this is not an unusual situation; it occurs quite frequently and we would like to see some general legislation so that we can treat everyone equal and not be faced with private bills for private relief or going into court arguing about damages.

Senator YOUNG. It would seem to appear that is the proper procedure, but is any legislative proposal, to your knowledge, of a general character, as you have mentioned, pending in the House of Representatives at this time?

Mr. HART. No, sir; there is not. The Select Subcommittee on Real Property has been accumulating background information on various types of damages, of which this is one.

It might be of interest to know that this week this subcommittee of the House is holding hearings in Tennessee—this entire week—in accordance with their studies, and they expect to have a report to submit to the Congress in the spring of next year.

Senator YOUNG. Perhaps the newly elected Congress, following the 1964 election, might then have some general legislation on that?

Mr. HART. Conceivably so; yes, sir.

Senator YOUNG. And probably not before then?

Mr. HART. No, sir; it would not be.

Senator YOUNG. Are there any questions, Senator Pearson?

Senator PEARSON. Could you tell me whether or not you know whether the Chief Engineer or the Department of the Army objected to this section 211 which is part of the Tuttle Creek enactment?

Mr. HART. Yes, sir, we did; and our basis of objection was the same as it is here today. I do happen to have a record of the House hearings on that, the only difference being at that time the Department of the Army was urging the formation of a commission for the study of just compensation in order to have general legislation of some kind. We suggested that such commission be formed and that items of this nature be studied and recommendations made. The only difference is, since that time there has been such a subcommittee formed that is making that study. That is the only difference, really, in our position.

In the Tuttle Creek bill there were, I believe, between 11 and 14 lessees in a similar situation.

Senator PEARSON. One of the other witnesses made reference to the fact that there were several other pending pieces of legislation or situations subject to legislation, and he cited the fact that there were five such circumstances; is that correct?

Mr. HART. Not exactly as you have stated it. I believe he meant that there were five previous bills that had been enacted that were somewhat similar. I do have those. They stretch back to 1952. In that year there were two private laws passed to take care of specific cases. One was the Pacific Fruit Express Co., and——

Senator PEARSON. Was the language the same in those special bills as in this bill here?

Mr. HART. No, sir; not directly. The Tuttle Creek is identical to this. That was the last law of this nature. The other two were a little bit different, although the principle was the same.

Then we have one on the Missouri River, Public Law 84–987, relating to Gavins Point, Fort Randall, and Oahe Dams, where we covered payments of lessees and permittees or those having limited rights on all three reservoirs.

The language again was somewhat similar, not identical, but the principle was the same.

Last year we had, in connection with the acquisition of Indian lands at Big Bend Dam and Reservoir, where they did not have a railroad right-of-way, but an analogous situation where the lessee or really a permittee came under the Bureau of Indian Affairs, and they had the same situation of a lease cancelable upon 30 days' notice with an obligation to remove the improvements and restore the property.

Senator PEARSON. In those cases, did the bill provide for the payment in value of the lease or the payment in value of the improvement?

Mr. HART. The improvements—just the improvements, sir.

Senator PEARSON. It bothers lawyers, and no doubt it bothers members of your legal department as to compensation generally, and I think my colleagues would agree at least that the compensation is for the value of the interest held, but it is a very difficult situation when you get into grain elevator situations along railroad lines, that I am familiar with and that Senator Miller has described.

I have no further questions.

Senator YOUNG. Do you have any questions, Senator Inouye?

Senator INOUYE. Would you agree with the argument proposed by the proponents of this bill that although the facts indicate that there is a technical and legal right to terminate the lease with 30 days' notice, that there is in this area the prevailing practice and the tradition that such clauses are ignored, that the lease in actuality is a long-term lease?

Mr. HART. Yes, sir. We would agree with the fact that there is a custom of the trade. We recognize that. And that is one of the difficulties of the equities here, and perhaps that is why we think that general legislation is the answer, because under your determination by the courts in connection with the condemnation proceeding, the lessee as opposed to such would have no compensable interest.

In other words, technically, of course, as Senator Pearson has pointed out, we are obligated in taking any property to pay the value of what we take and an unexpired leasehold should be paid for.

Technically, we would pay for that, but what is the value of an unexpired leasehold where there is a 30-day cancellation clause with a mandatory obligation to remove the improvements at the lessee's expense? That was the difficulty.

Actually I am not arguing the equity here, the merits, but to answer your question from a purely hypothetical standpoint, if the custom of the trade was sufficient to warrant or to create a firm interest in real estate, then they would not conceivably be before this committee asking for relief. They could get it in the courts. However, courts have held to the contrary; there is no compensable interest. Here we are not taking anything.

The legal position would be that this is not a taking from the lessee. Actually there has been no condemnation filed against the railroads here. It is by an agreement. We have worked out a relocation agreement for the relocation of the railroad. Therefore we step into the shoes, under this agreement, of the railroad company.

Back in 1952, the reason for these two private bills resulted from the fact that we ourselves questioned this, and so we wrote to the Comptroller General of the United States and said, "Here are the facts. We think perhaps they should be paid, but can we pay them?"

The Comptroller General on two separate occasions came back and said, "You know, they have no compensable interest. The United

States steps into the shoes of the railroad and terminates the lease."

That was the beginning of your bills for private relief.

Senator INOUYE. From what you have stated, am I correct to gather that the equities in this case are on the side of the proponents?

Mr. HART. I would have to speak personally on that. The Department of the Army has expressed a position here in this case that we are taking nothing. We are not obligated to pay. So we would only say this, that if Congress considers that this is a meritorious situation, then we would prefer general legislation.

I think we would have to leave it to your good judgment as to the equities.

Senator INOUYE. I have nothing further.

Senator YOUNG. Are there any further questions?

Senator PEARSON. One more question in the field of general legislation:

Do you have an opinion as to whether the language of that general legislation should be for the interest acquired, or whether it should be for the compensation, the fair compensation of the improvements?

Mr. HART. I think it would go more to the improvements, and I am speaking personally, off the cuff, so to speak, sir, that the courts have already set down proper determinations for the interests acquired. When you are taking something, you have to pay for what you take.

The question here is that technically we are not taking it, so it would probably go to the improvements as well as any other interest they have. It would have to be that way, sir.

Senator PEARSON. I appreciate that your answer is pretty much off the top of your head. In response to that, I might say that I am not so sure that I would favor general legislation for the fair payment of improvements thereon. I might say that general legislation already exists for the payment of interest held, the leasehold, but an argument might very well be made in certain types of cases where you need special legislation.

So the committee can look at the equities involved each time and determine whether or not they are justified. And I would think that the introduction of about five bills, or the existence of about five cases, would not create an undue burden on the Department of the Army or the Engineering Corps.

Senator INOUYE. I would like to make a cogent observation. I wish to concur with what Senator Pearson has said. I have great doubt about general legislation. I think that in matters of this nature it may be wise, although it would take a longer time for the committee to treat each case separately on its separate merits, but I would think that it would be most difficult to draft and enact general legislation that would cover all cases.

I would prefer to handle these cases separately.

Senator YOUNG. If we were to pass general legislation, that no doubt would result in a greater payment of money, of the taxpayers' money, to compensate a lot of claims that might not have been presented in special bills. Is that not true, that it might result in that?

Mr. HART. That could be so.

Senator YOUNG. Are there any further questions or any further testimony that you have to submit?

Mr. HART. No, sir.

Senator YOUNG. We thank you very much.

Mr. Gurnee, do you wish to file a statement with us or to add anything to what has been said?

Mr. GURNEE. No, sir.

Senator YOUNG. If not, that concludes the hearing, and the subcommittee will stand in recess, subject to the call of the Chair.

(Whereupon, at 11:10 a.m., the subcommittee recessed, to reconvene subject to the call of the Chair.)

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