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## Fort Berthold Dam Site v. The Garrison Dam Site Statement of Fact and Law, 1947

Ralph H. Case

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Garrison  
Dam

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BEFORE THE  
CONGRESS AND THE PEOPLE OF THE  
UNITED STATES.

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FORT BERTHOLD DAM SITE

v.

THE GARRISON DAM SITE.

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STATEMENT OF FACT AND LAW.

Presented By

THE INDIAN PEOPLE OF FORT BERTHOLD  
RESERVATION, NORTH DAKOTA.

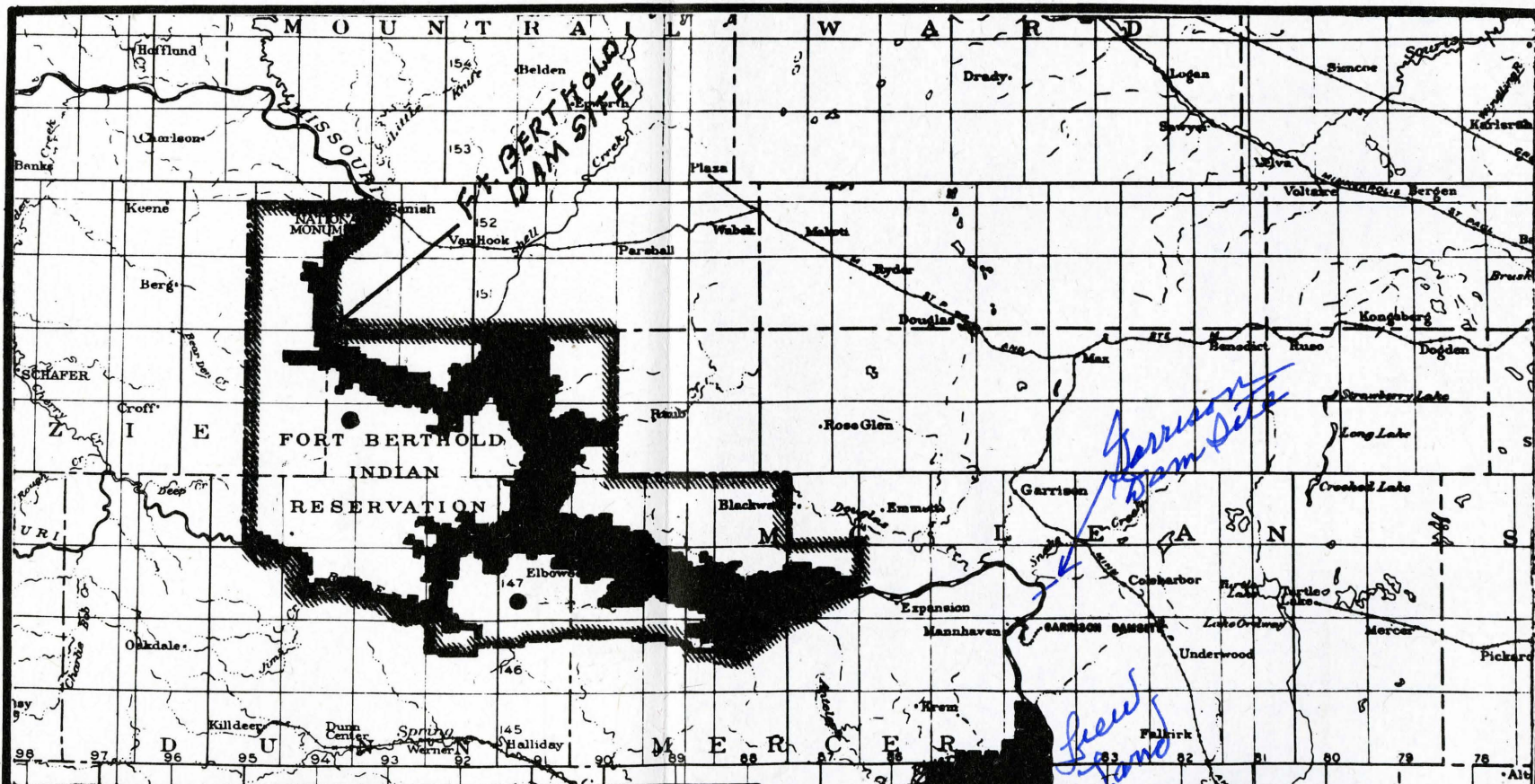
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The Three Affiliated Tribes of  
Fort Berthold Reservation,  
North Dakota.

*By order of the Tribal Council.*

RALPH H. CASE  
*General Counsel.*

J. B. SMITH  
*Official Delegate*  
Fort Berthold Reservation  
North Dakota.

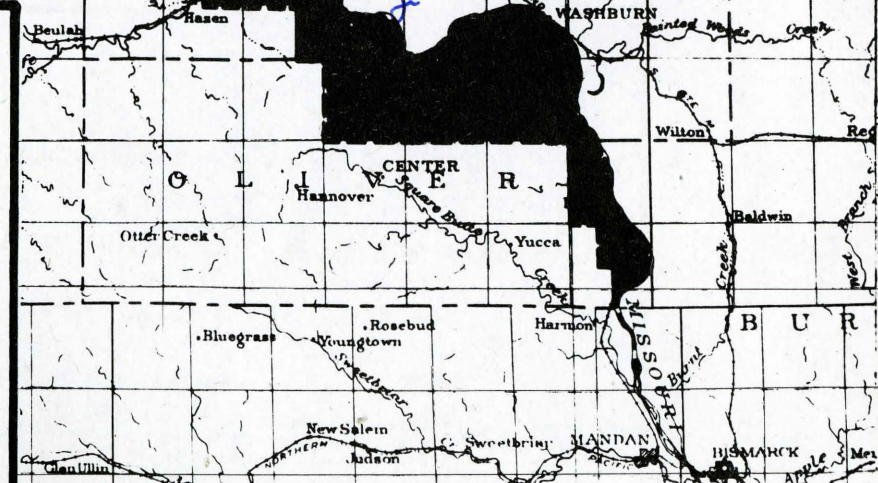


DEPARTMENT OF THE INTERIOR  
OFFICE OF INDIAN AFFAIRS

FORT BERTHOLD INDIAN RESERVATION & VICINITY  
NORTH DAKOTA

GARRISON RESERVOIR TAKING OF INDIAN LANDS  
AND  
PROPOSED LIEU LAND AREA

- Garrison Reservoir Taking
- Lieu Lands Offered.
- Lieu Land offered includes 14,570 acres embraced in scattered tracts within the indicated segments of the residual Reservation.



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CONGRESS AND THE PEOPLE OF THE  
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**STATEMENT OF FACT AND LAW.**

Presented By

**THE INDIAN PEOPLE OF FORT BERTHOLD  
RESERVATION, NORTH DAKOTA.**

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The Congress in December, 1944, authorized the construction of five great dams across the main stem of the Missouri River in North Dakota and South Dakota. This statement relates to the dam in North Dakota known as the Garrison Dam. This dam and the others in South Dakota are part of the great plan to develop and control the waters of the Missouri River basin.

The Garrison Dam is the giant of all dams ever proposed for construction. It is to be four and one-quarter miles long of rolled earth, 200 feet from river bed to crest, will impound twenty-three million acre feet of water and will cost for construction and consequential damages as much as the cost of the Panama Canal. A great lake will be formed behind this giant dam, which will destroy the homes, the land and the economy of the Indians of the Fort Berthold Reservation.

The map attached to this statement presents many vital features of the situation. The map, used here by permission of the Interior Department, shows the area which will

be inundated on Fort Berthold Reservation. The great lake with its long arms not only covers all the fertile land on the Reservation, but cuts the remainder into five isolated tracts.

The consequences to the Fort Berthold Indians; to the people of North Dakota and to the United States are so great and so grave that the attention of the Congress and the attention of all the people of the United States should be given to the situation and to this statement.

### **IMPENDING LOSSES.**

If the Garrison Dam is constructed all of the fertile bottom land and all of the first bench lands on the Fort Berthold Reservation will be inundated.

One hundred and fifty-seven thousand acres of Indian lands will be lost forever.

Three hundred and fifty-seven families, comprising fifteen hundred and forty-four persons will necessarily be moved to a new location elsewhere in North Dakota.

Sixty-three families; i.e., four hundred fifty-six persons will be abandoned in five isolated segments of what is now the Fort Berthold Reservation.

The community organization of these Tribes will be destroyed. Their treaties with the United States will be violated. The State of North Dakota will suffer an irreparable damage and the United States will expend a vast sum without securing any substantial benefit to the people of the Missouri River Valley.

The Indians of Fort Berthold Indian Reservation are cattle men and depend upon their cattle business for their living. At this time nineteen thousand head of cattle and four thousand horses are on the range land in Fort Berthold Reservation. The four hundred twenty families of Fort Berthold Reservation now have an average income of not less than one thousand dollars annually, practically all of which comes from their cattle industry. This entire industry will be lost by the construction of Garrison Dam and the inundation of Indian lands caused thereby.

### **THE ALTERNATE OFFER OF THE FORT BERTHOLD DAM SITE.**

After the Fort Berthold Indians learned, late in 1945, of the proposed taking of their lands by the Garrison Lake, they employed legal and engineering counsel to assist them. These Indians are not obstructionists. They would welcome the impounding of the Missouri River to provide irrigation and electric power. They do not wish to disturb the overall plan for the development of the Missouri River Basin. However, they are anxious to avoid their own destruction and as citizens of North Dakota and the Nation they made an offer of an alternate plan and location for a great dam. The proposed Fort Berthold Dam will eliminate the need for the Garrison Dam, will provide for all needed power and irrigation and will operate reasonably as a safeguard against floods, if any, occasioned by the Upper Missouri River.

To this end the Tribal Council of the Three Tribes at Fort Berthold Reservation on May 27, 1946, made a formal offer to the United States of a gift of a dam site in the northerly portion of their own Reservation. The Fort Berthold Dam site as suggested is to be on the north line of Township 150 North. If located exactly on that line three-quarters of that site is within the Fort Berthold Reservation. If located slightly to the south of the line indicated, all of the dam site is within the Fort Berthold Reservation.

The Tribal Council offered to give, without cost, all of the Fort Berthold dam site within their control to the United States. In addition they offered to take care of their own allottees above the Fort Berthold Dam site by reallocoting or relocating these allottees on Tribal Lands below the Fort Berthold Dam site.

The suggested Fort Berthold Dam is proposed to maintain a water level of eighteen hundred thirty feet above mean sea level. That is the height proposed for the Garrison Dam, now provided by law. 1830' M.S.L. will not

change the level of the water in Williston, North Dakota. It will be exactly the same as proposed for Garrison Dam. The Fort Berthold Dam will be one and one-quarter miles long and its cost will be less than one-third of the cost of construction of Garrison Dam. The saving in construction cost alone to the United States will be not less than *two hundred million dollars*. In addition the Fort Berthold Dam will provide irrigation for all bottom lands down stream, not only in the Fort Berthold Reservation, but on all the lands along the Missouri River southward as far as Bismarek, North Dakota.

The Fort Berthold Dam, together with the four great dams in South Dakota, will provide adequate flood control of the Missouri River. There never has been a flood of any consequence on the lower Missouri, nor on the Mississippi, occasioned by flood waters of the Upper Missouri.

So far as navigation on the Lower Missouri and Mississippi Rivers is involved here, the Garrison Dam with all of its water storage behind it will not be of any material aid to navigation. The theory is that water may be released at Garrison Dam in the low water period of each year. Our Engineers state that the amount of water which can be released at Garrison Dam will increase the level of the Mississippi River at Memphis not more than one-half of one inch. It is incredible that the white and Indian people of North Dakota are asked to give up so much for so small an advantage, to the people of the Lower River Valley.

The Fort Berthold Dam will provide electric power far in excess of the present or prospective needs of the area which might be served under modern power transmission conditions. No action has been taken upon this alternate plan for the construction of the Fort Berthold Dam.

### **CONGRESS PROHIBITS USE OF MONEY FOR CONSTRUCTION OF GARRISON DAM.**

By Section 6 of the Act of May 2, 1946, the Congress prohibited the use of any funds for the construction of Garrison Dam itself until the Secretary of War should offer to

the Fort Berthold Indians, through the Secretary of the Interior, lands comparable in quality and sufficient in area to compensate the Fort Berthold Indians for the losses they would sustain if Garrison Dam is constructed. The War and Interior Departments thereafter made independent studies and came to independent conclusions in regard to the situation created by Section 6 of the Act of May 2, 1946.

### **THE WAR DEPARTMENT OFFER OF LIEU LANDS.**

Late in 1946 the War Department made a formal offer to the Secretary of Interior of approximately ~~157,000~~ <sup>145,000</sup> acres of land below the proposed Garrison Dam in Mercer and Oliver Counties, North Dakota. (See map attached.) This offer was practically an acre for acre exchange. The offer included all of the bottom land along the west side of the Missouri River and its tributary, the Knife River.

Hearings were accorded to the Fort Berthold Indians on December 16th and 23rd, 1946. At these hearings the testimony showed that fertile bottom lands in the lieu land offered by War Department were less than one-fifth in area compared to similar lands within the Fort Berthold Reservation. Further it was proved that the value per acre of the bottom lands in the lieu land area was not more than one-third of the value of similar lands within Fort Berthold Reservation. This was further established by the soil survey maps of North Dakota made by the Department of Agriculture at an earlier date.

It was also established that the cattle industry on which the Indians of Fort Berthold depend would be absolutely destroyed by removal of the Indians to the lieu land area. The Summer range land for cattle on Fort Berthold Reservation would remain in their possession, but that land would be divided (see map) into five isolated segments.

It would require the driving of cattle twice a year, not less than two hundred miles, over highways, through populated country to transfer the tribal herd from the Summer range to the lieu land area for Winter feed and shelter.



Such a requirement is an impossibility. It was also shown that the upland in the lieu land area (see map) is not grazing land as the bulk of the upland is under cultivation and the native grasses have been destroyed.

In all it appeared that the offer made by War Department was not more than one-twentieth part of compensation to the Fort Berthold Indians.

### **INTERIOR DEPARTMENT DECLINES WAR DEPARTMENT OFFER.**

On December 27th, 1946, the Secretary of the Interior declined the offer made by the War Department. The Act of May 2, 1946, (Section 6), required the Secretaries of War and Interior to report on the situation on or before January 1st, 1947. That report necessarily was a disagreement. The legal effect of this disagreement is that no money can be expended for construction of Garrison Dam itself. It has been stated in the public prints that the War Department intends to make a new offer based upon its original offer, but including more land. The effect of the first offer and the effect of the increased offer appears in this statement in a subsequent paragraph. The letter declining the War Department offer is as follows:

#### **THE SECRETARY OF THE INTERIOR**

Washington

December 27, 1946

My dear Mr. Secretary:

The Fort Berthold Indian Reservation Selection and Offer of Lieu Lands, transmitted by you under date of November 21, 1946, has been carefully studied by this Department during the past month. It is the opinion of the Department that the offer as it now stands does not provide lands "comparable in quality and sufficient in area to compensate" the Indians for the lands to be inundated in the Reservoir area. I must, therefore, withhold my approval of the offer at this time.

There are transmitted herewith for your information and study recommendations made to me by the Acting Commissioner of Indian Affairs on December 27, 1946, and a report by the Indian Service Missouri River Basin Investigations Unit headed by Mr. Allan G. Harper. The Acting Commissioner's memorandum and the Harper report both recommend rejection of the offer as it now stands, although suggesting modifications which might result in an agreement satisfactory to all concerned.

In addition to the analyses made by the Indian Office, this Department has arranged two opportunities for hearings of the Fort Berthold Indian delegation (three tribal members) and their counsel, Mr. Ralph Case. At these hearings the delegates and their counsel strongly indicated their disapproval of the original offer of the War Department and the counterproposals of the Harper report. The delegation and its counsel contend that the requirements of the statute have not been met in the lieu lands offer, and that deficiencies in comparability and sufficiency have not been overcome in the countersuggestions of the Harper report.

If, as I assume may be the case, your Department is unable to submit an alternative and acceptable offer within the few days that remain of the current calendar year, I can only suggest that our efforts to reach an agreement should be continued. I am advised by counsel in an opinion of which a copy is enclosed, that no termination of authority or forfeiture of appropriations will be effected by a failure to reach an agreement during the current year and that negotiations may, in that event, continue beyond the January 1 date. You may be assured of the complete cooperation of this Department in the search for a satisfactory lieu land agreement.

Sincerely yours,

(Sgd) J. A. KRUG,  
*Secretary of the Interior.*

HON. ROBERT F. PATTERSON,  
*Secretary of War.*

Enclosure 348.

## **LOSSES SUSTAINED BY CONSTRUCTION OF GARRISON DAM.**

The actual losses that will be sustained by the State of North Dakota, by the United States and by the Indians of Fort Berthold Reservation are now set out in that order.

### **LOSSES TO NORTH DAKOTA.**

If Garrison Dam is built it will be necessary to move three hundred and fifty-seven families, comprising fifteen hundred forty-four persons from Fort Berthold Reservation and obviously it will be necessary to relocate them on some other area of land. The offer of lieu lands made by the War Department (see map) will take out of the control of Oliver and Mercer Counties, North Dakota, all of the Missouri River bottom land and five towns within the Counties. The lieu land area would become in law and in effect an Indian Reservation. No taxes will be paid on these lands after they are transferred to Indian ownership.

Town property and improvements would become worthless. The tax base of the two Counties would be almost totally destroyed. The people of these and adjoining Counties now declare that they will not submit to the taking of their land for the purpose of giving them to the Fort Berthold Indians. Should the indicated War Department procedure be followed and additional lands be added in Oliver, Mercer, McLean, Burleigh and adjoining Counties, the threat of disaster to all of those Counties in North Dakota is greatly increased.

There is a legal situation here that should have the attention of Congress, it is as follows: Under the sovereign right of Eminent Domain private property can be taken for public use. The present proposal is to take the private property of citizens of the Missouri River Counties of North Dakota for the purpose of making a trade with the Fort Berthold Indians. The lands so traded will be in the private ownership of the Indians. There is not a trace of

public use to be found in the privately owned Indian lands. If the property of one citizen can be taken from him for the purpose of giving it to another citizen then there is no such thing as private property in the United States. The people of the valley counties in North Dakota can successfully resist the invasion of their constitutional rights. Such a taking of private property is not within the right of Eminent Domain.

### **LOSSES TO THE UNITED STATES.**

The losses in money to the United States are great, the moral losses to the United States are far greater. The United States can avoid the present dilemma by accepting the generous offer of the Fort Berthold Indians, by building the Fort Berthold Dam in place of the Garrison Dam.

Two hundred million dollars can be saved by the United States in construction and removal costs. ("Removal costs" mean removal of the Indians to another location.) In addition, the United States would lose all of its investment in agency plant, and facilities, schools, hospitals roads and other improvements. These if reestablished elsewhere in North Dakota would cost at least fifty percent more than their estimated present cost or a total of fifteen million dollars.

Highways and bridges will be lost in the inundated area and must be re-established elsewhere, but on this there is no possibility of making an estimate. The cost, however, would be very substantial.

If the Garrison Dam is built it will flood approximately thirty miles of the Sault Ste. Marie Railroad right-of-way, railroad stations, tracks and other railroad facilities. What the cost will be to relocate the railroad other facilities has not even been estimated. Certainly it will be very substantial in amount.

The greater loss to the United States is in the loss of its honor as a Nation. The United States is Trustee for each and every allottee on Fort Berthold Reservation, and is the guarantor of the Tribal title to every foot of tribal lands.

The present proposal is that, in the last resort, the United States may condemn, under the right of Eminent Domain, the individual and tribal property of these Indians. It is an axiom of the law that no man can sue himself. The United States cannot maintain as plaintiff an action against itself as defendant and trustee. It can, however, if it chooses to violate its trust, issue patents in fee (in disregard of its own statute) to these Indians, and then it might maintain an action in condemnation.

To pursue such a course would be a gross breach of trust. The United States would fall to the level of the late dictators of Europe. This Congress and any subsequent Congress should understand and avoid the infamy of such a procedure.

### **THE REMEDY.**

For a situation so complicated as the one presented by this statement, there should be and there must be a remedy.

The people of Fort Berthold ask that the Congress and the people of the United States carefully consider the following:

I. Eliminate the Garrison Dam from the Missouri River Development Program. Minor construction work on approaches and shore work will represent a loss which is small in comparison with the savings here indicated.

II. Locate the Fort Berthold Dam on the site indicated or nearby. Accept the generous offer of the Fort Berthold Indians, which alone will effect a saving vastly greater than the small loss occasioned by the elimination of the Garrison Dam.

III. Protect the City of Williston, North Dakota, by maintaining the Fort Berthold Dam level at 1830' M.S.L.

IV. Defer construction of the Fort Berthold Dam until a further study is made and particularly until the labor and material market has returned to normal and thus avoid in-

excusable competition in this present time of shortage of labor and materials.

V. Provide for irrigation of northeastern North Dakota from the Fort Peck Dam in Montana. This is in accord with recommendations of the Bureau of Reclamation.

VI. Provide for irrigation and power for all the valley area below the Fort Berthold Dam. This will bring greater prosperity and security to the Fort Berthold Indians and to all the valley counties below the Fort Berthold Dam.

VII. Save the honor of the United States. Save the cost of another Panama Canal. Save the State of North Dakota from great loss. Save the Fort Berthold Indian Tribes from extinction.

Respectfully submitted for

THE THREE AFFILIATED TRIBES OF  
FORT BERTHOLD RESERVATION, NORTH DAKOTA,

By order of the Tribal Council.

RALPH H. CASE,  
*General Counsel.*

J. B. Smith  
Official Delegate  
Fort Berthold Reservation  
North Dakota.



