



4-2008

## Effects Report: Potential Transfer of Garrison Project Lands Within the Fort Berthold Reservation Boundaries Pursuant to the Fort Berthold Mineral Restoration Act

United States Army Corps of Engineers, Omaha District, Nebraska

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### Recommended Citation

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# **EFFECTS REPORT**

## **Potential Transfer of Garrison Project Lands Within the Fort Berthold Reservation Boundaries**

Pursuant to the Fort Berthold Mineral Restoration Act

**Containing the Following Sections:**

**INTRODUCTION**

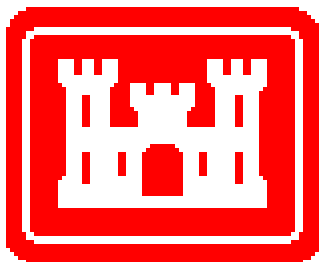
**AUTHORITY**

**CRITERIA**

**PROPOSED DETERMINATION**

**DETERMINATION**

**CONCLUSION**



**U.S. ARMY  
CORPS OF ENGINEERS  
OMAHA DISTRICT, NEBRASKA**

**April 2008**

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**Potential Transfer of Garrison Project Lands**

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In a letter dated May 25, 2004, then Chairman Tex Hall of the Three Affiliated Tribes (TAT) requested that the Department of the Army (DA) administratively transfer Garrison Project lands along Lake Sakakawea, within the Fort Berthold Reservation, that were above the maximum flood control pool elevation 1854 m.s.l. and not needed by the Corps for the Project. In his letter to Mr. John Paul Woodley, Assistant Secretary of the Army (Civil Works) (ASA(CW)), Chairman Hall said the Army had the authority to transfer<sup>1</sup> the lands under the Fort Berthold Mineral Restoration Act (FBMRA). This act authorizes the Secretaries of the Army and Interior to enter into agreements under which lands within the exterior boundaries of the Reservation acquired by the United States for the construction, maintenance, or operation of the Garrison Project, but no longer needed for those purposes, could be declared held in trust for the benefit of the TAT.

By letter dated September 3, 2004, the ASA (CW) directed the Corps to examine land use designations in the Garrison Project Master Plan, with the ultimate objective of the examination to be a transfer of the maximum amount of land above the maximum flood control pool elevation. Any land identified would be transferred to the Department of Interior (DOI), Bureau of Indian Affairs (BIA), to be held in trust for the TAT.

### **1.1. Three Phase Process.**

After receiving this request from the ASA(CW), the Corps approached this project using a three phase process that would maximize public, state, tribal and Federal involvement in this effort. The three phase approach would include input by interested public, state, tribal and Federal parties through individual and public meetings.

#### **1.1.1. Determination of Authority.**

Phase 1 is Determination of Authority. This phases assesses whether the Corps has the authority to enter into an agreement with DOI to declare lands no longer needed for construction, maintenance, and operation of the Garrison Project to be held in trust for the benefit of the Three Affiliated Tribes.

#### **1.1.2. Development.**

Phase 2 is Development. This phase establishes the criteria for assessing lands available for transfer. Two products will be completed during this phase of the project. First, the Corps produced an Effects Report, which states the Army's criteria for making a determination of lands no longer needed for the construction, maintenance or operation of the Garrison Project, the Army's ultimate determination and acts as a repository for all the information used to make the previously mentioned determination. The second product is a memorandum of agreement between the Secretaries of the

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<sup>1</sup> The FBMRA authorizes the Secretaries of the Army and Interior to enter into agreements declaring land within the Fort Berthold Reservation no longer needed for Garrison project construction, maintenance or operation to be held by the United States in trust for the benefit of the TAT. As such, the Corps must identify lands no longer needed for the project and the Secretaries of the Army and Interior must enter into an agreement or agreements declaring that those lands will be held in trust by the United States for the TAT. In addition, in order to ultimately implement this authority, the Army will have to transfer administrative jurisdiction and real property accountability of any affected land from the Army to the Department of Interior. Although the FBMRA involves numerous actions, including the ultimate transfer of administrative jurisdiction, the current efforts by the Corps are being referred to as a "transfer" of lands, particularly by the public. Accordingly, the term "transfer" as used in this document is a shorthand for all the actions and authorities contained in the FBMRA.

Army and Interior. The FBMRA provides that the Secretary of the Army and the Secretary of the Interior may enter into agreements declaring that land no longer needed for project purposes is to be held in trust for the benefit of the TAT. Therefore a memorandum of agreement will be completed and signed between the two Secretaries.

### **1.1.3. Implementation.**

Phase 3 is Implementation. During this phase three products will be produced. First, the Corps will complete an Environmental Baseline Survey which would be used to complete an Environmental Condition of Property Statement. The second product is the Letter of Transfer, the mechanism where the administrative accountability and responsibility for those lands offered to DOI would be transferred by DA to DOI. The Letter of Transfer includes all appropriate documentation, which generally includes descriptions of the lands to be transferred, maps depicting the transfer area, a Title Report, acquisition information (estate, method of acquisition, title abstracts, etc.) and copies of the third party interests. The final product is a determination by the DOI. Upon an offering of lands no longer needed for the Project, the DOI would determine if lands offered by the DA should be declared to be held in trust by the United States for the benefit of the TAT. In making this determination the DOI would require and/or consider a written land-into-trust application by the TAT and a supporting duly-authorized Tribal resolution, the TAT's proposed use of the land, the ability of the DOI to discharge the additional responsibilities resulting from the acquisition of the land in trust status, the DA Effects Report and any additional information the DOI considers necessary to enable it to reach a decision.

### **1.2. Format.**

This report has five sections in addition to this INTRODUCTION section. The AUTHORITY section concentrates on relevant events concerning acquisition, construction, and subsequent operation of Garrison Project lands and ultimately how the FBMRA fits among these events. The CRITERIA section describes the process by which criteria were developed to identify lands that are no longer needed for operation of the Garrison Project. The next section discusses the PROPOSED DETERMINATION, where the Corps gathered initial feedback from the public, utilized the criteria and made a proposed determination. Following that section is the DETERMINATION section. In this section the process used to make the ultimate determination will be shared. Finally a CONCLUSION section summarizes the previous information and provides the recommended agreement that will guide the third phase of the project, which is implementation.



The Corps reviewed relevant information concerning the request of the TAT. The main issue that needed to be addressed is whether FBMRA provided the authority to enter into agreements to transfer the lands included in the TAT request.

### **2.1 Fort Berthold Mineral Restoration Act.**

In 1947, in advance of the construction of the Garrison Dam, Congress authorized the Corps of Engineers to negotiate a contract with the TAT to provide cash for land. The contract was negotiated for land and reserved numerous non-monetary rights to the Tribes, including mineral rights. In 1949 Congress did not accept or ratify the contract, but instead increased the purchase amount with no reserved non-monetary rights. The Act was passed taking 154,000 acres from TAT, but omitted from the law all non-monetary benefits.

From 1954 to 1962, the Corps acquired reservation lands from five other Missouri River Tribes for other main stem projects and allowed these Tribes to reserve mineral rights. Legislation was introduced in the 81st and 82nd Congresses to restore mineral rights to the TAT, but Congress was not successful in passing that legislation. In 1984, Congress succeeded in restoring the mineral rights of the TAT with the passage of the FBMRA (P.L. 98-602). Section 206 (b) provides,

“The Secretary of the Army and the Secretary of the Interior may enter into agreements under which any land within the exterior boundaries of the reservation acquired by the United States for the construction, maintenance, or operation of the Garrison Dam and Reservoir Project that is no longer needed for such purposes, is declared to be held by the United States in trust for the benefit of the Three Affiliated Tribes of the Fort Berthold Reservation.”

### **2.2 Army General Counsel Opinion.**

The Army General Counsel reviewed the Fort Berthold Mineral Restoration Act (P.L. 98-602, Title II, Section 206(b)) and offer an opinion on whether this law could be used for this request by the Three Affiliated Tribes. Counsel determined that the law is clear on its face in terms of providing legal authority for the Army and the Department of the Interior to enter into agreements under which lands no longer needed for the construction, operation, and maintenance of the Garrison Dam and will be declared to be held in trust for the Three Affiliated Tribes and administratively transferred to the Department of the Interior. The Army General Counsel's memorandum is provided in Appendix L.

### **2.3 Authority**

The FBMRA authorizes and provided legal authority to the Secretaries of the Army and Interior to enter into agreements under which certain lands acquired by the United States for the construction, maintenance, or operation of the Garrison Project, but no longer needed for those purposes, could be declared held in trust for the TAT and administratively transferred to DOI. With respect to the conditions of such a transfer, the Corps identified the following statutory requirements that need to occur in order to comply with the provisions of FBMRA. They are:

- a) An agreement to hold lands in trust for the benefit of the TAT is only between the Secretaries of the Army and Interior,
- b) The agreement will be limited to lands the Army determines are no longer needed for construction, operation, and maintenance of the Garrison Project,
- c) The agreement is further limited to apply only to lands within the Fort Berthold Reservation, and
- d) The DOI would have to determine that it was appropriate under its regulations to accept the lands as trust lands.

A requirement of the FBMRA is that the DA must determine if it has lands that are no longer needed for construction, maintenance, or operation of the Garrison Project. It is estimated that approximately 36,000 acres, currently acquired and managed by the Corps lie within the exterior boundaries of the Fort Berthold Reservation. Of the 36,000 acres approximately 66 percent (24,000 acres) are designated as vegetative management areas, 29 percent (10,200 acres) are wildlife management areas, and 5 percent (1,800 acres) are recreation areas in the recently updated Garrison Master Plan, dated December 2007 (Figure 2.1).

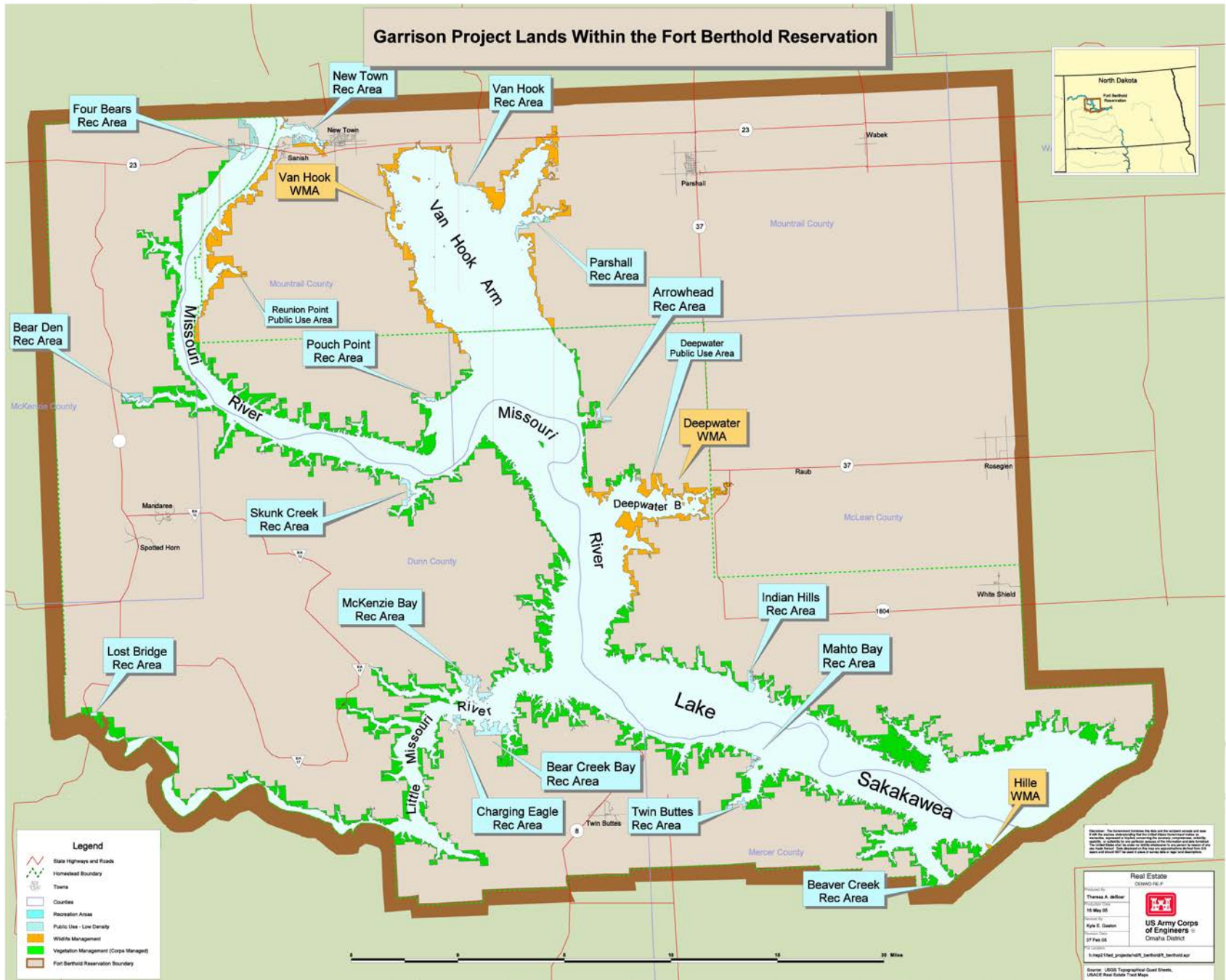


Figure 2.1. Master Plan (December 2007) designation of land uses.

Since the FBMRA provides for the administrative transfer of lands no longer needed for the construction, operation and maintenance of the Garrison Project it was important that the Corps develop criteria that would be used for making a determination of lands no longer needed. Therefore the Corps completed research and then developed criteria for use in this determination.

### **3.1 The Flood Control Act of 1944.**

The Flood Control Act of 1944 authorized the development of water control projects within the Missouri River Basin. The subsequent Definite Project Report specifically details the proposed purposes of the Garrison Dam Project. The following is a short background on relevant events concerning authorization and construction of the Garrison Project and ultimately how the FBMRA relates to it.

The Garrison Project was authorized by the Flood Control Act (FCA) of 1944, Section 9 that states the following:

“(a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.”

House Document (HD) 475 includes the Army/Corps plan for flood control on the Missouri River. Senate Document (SD) 191 includes the Interior/Bureau of Reclamation plan for the river. SD 247 involved representatives of both agencies meeting and reconciling the plans into one recommended plan. The Garrison Project was in the Corps plan, but not in the Interior plan. Upon reconciliation, SD 247 included Garrison (as per HD 475), the high version of Oahe [I am not sure what high version is – maybe high water version?], Fort Randall, Big Bend (not included in HD 475, but included in SD 191), and Gavins Point.

HD 475 contemplated the construction of five additional multiple-purpose reservoirs on the main stem of the Missouri River. In HD 475, the Missouri River Division Engineers Report, dated August 10, 1943, signed by Colonel Lewis A. Pick, paragraph 45 states in pertinent part: “In addition to providing flood control benefits on the Missouri and Mississippi Rivers, the comprehensive plan would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.”

SD 247 included the following language regarding the Garrison Project: “The Garrison Dam, Reservoir, and power plant, was included in the coordinated plan as it provides a large volume of useful storage capacity for flood control, navigation, irrigation, and permits the utilization of

approximately 160 feet of head for the development of hydroelectric power in an area capable of absorbing the potential output and which, otherwise, has no prospective source of abundant low-cost power. A large reservoir at the Garrison site, situated immediately below the Yellowstone River with its large silt contribution, will prolong materially the life of downstream reservoirs.”

The FCAs of 1936, 1938, and 1941 all provided authority for flood control projects on the Missouri River or its tributaries. The FCA of 1944 modified the approved general comprehensive plan (FCA 1938) to include the 5 main stem dams and reservoirs on the Missouri River from Garrison to Sioux City. In addition, Ft. Peck was designated to operate as a part of the main stem system and the Garrison Diversion was authorized.

### **3.2 Definite Project Report**

In January of 1946, the Omaha District, Corps of Engineers submitted a Definite Project Report for the Garrison Reservoir Project. In the syllabus, it states: “The Garrison Reservoir Project is proposed as one of a system of multiple-purpose reservoirs on the Missouri River for flood control, irrigation, navigation, power, and other beneficial purposes.”

Later on in the Definite Project Report, paragraph 24 reads as follows:

- “24. Purpose of the Project. The objectives to be achieved by the plan of improvements are as follows:
- (a) To provide flood control along the Missouri River.
  - (b) To provide for irrigation.
  - (c) To improve navigation on the Missouri River and the Mississippi River.
  - (d) To produce hydroelectric power.
  - (e) To provide for diversion to the Devil’s Lake and the James River Basin regions.
  - (f) To maintain assured minimum low water flow on the lower Missouri River in the interest of sanitation.
  - (g) To provide facilities for recreation and for wildlife preservation.”

Based upon a review of authorization for the Garrison Project, flood control, irrigation, navigation, and power dominate the discussion of project purposes. It is clear that there were other beneficial purposes that were included in the planning for and authorization of the main stem projects. Recreation and wildlife were frequently mentioned as purposes in the House and Senate Documents that were approved in Section 9 of the Flood Control Act of 1944. In a letter to the Chairman, Committee on Flood Control, House of Representatives dated December 31, 1943, the Chief of Engineers discussed the benefits of the projects that were being proposed in the plan. The Division Engineer’s report contemplated that the uses of the authorized and existing multiple-purpose reservoirs would be progressively broadened and reapportioned as additional water was stored in the dams being proposed in the expanded plan. He went on to state as follows: “When completed, the basin plan will be operated for maximum multiple-purpose use. Thus preference can be given to the functions which contribute most significantly to the welfare and livelihood of the people of various parts of the basin, and at the same time adequate steps can be taken to meet new economic situations that may arise in the future.”

### **3.3 Project Purpose Criteria**

Based upon a review of the statutory authority for the Garrison Project and the Congressional reports on which the statute was based, the project purposes of flood control, irrigation, navigation, and power can be maintained by operating the project within a portion of the project's historical boundaries. Our review indicates that the lands necessary to continue in this manner are at elevation 1854 m.s.l. and lower. Sufficient lands above elevation 1854 m.s.l. should be retained in their current status so the Corps can assure that the project purposes of recreation and wildlife would continue to be implemented.

In order to make an informed determination the Corps committed to gathering public input, prior to making a determination if there were lands no longer needed for the construction, maintenance and operation of the Garrison project. The Corps held public meetings to share information and gather public feedback and then completed the Draft Effects Report.

#### **4.1 Public Comment Period (May-June 2005)**

Omaha District Commander, Colonel Jeffery Bedey stated that the Corps would conduct a transparent process, and would gather public input prior to any decisions being made. Therefore the Corps decided to inform the public of the request that had been made, the current status of the request, the process that was being followed, and how the public would be involved. An initial set of public meetings were held May 24-26, 2005 to accomplish the public information sharing goals.

Three public meetings were advertised and held May 24-26, 2005, in Bismarck, Dickinson, and Williston, North Dakota. The meetings consisted of an open house format from 4 to 6 pm, and a public comment format from 6 to 8 pm. During the open house, the public could meet one-on-one with Corps officials to ask questions. During the public comment session, a brief presentation was made by the Corps project manager, then Tribal leaders, government officials, and the public could speak formally in front of the group and have their comments recorded by a court reporter (see Appendix B – 2005 Public Meeting Transcripts). People could also voice their opinions by filling out comment forms, writing letters, and emailing the Corps (see Appendix C – 2005 Public Meeting Comments) by the end of the public comment period, which ended on June 3, 2005.

The 2005 public meetings were well attended, with an estimated two hundred people at Bismarck, one hundred at Dickinson, and eighty at Williston. During the formal comment session, twenty-seven people testified at Bismarck, seventeen people testified at Dickinson, and nineteen people testified at Williston. At all three meetings, twenty-seven people turned in comment forms and one hundred sixty-three people signed up to be on the mailing list. During the entire comment period, sixty-one people sent emails, twenty-four people mailed letters or turned them in at the meetings, seventeen people faxed comment forms, letters or petitions, and six people mailed comment forms. One person called the Garrison office to give their comments. After the end of the comment period, seven comment forms, five letters, one fax, and one email were received. These late comments are included in Appendix D of the report, but will not be addressed in the text.

To organize the comments received during the 2005 public comment period, a spreadsheet was created using Microsoft Excel (Appendix E). The spreadsheet had columns for the commenter's name, if available, organization (e.g., North Dakota Wildlife Federation, TAT, Public, etc.), organization type (e.g., Federal, State, County, University, Private, Nonprofit, or Public), hometown and state of the commenter, comment format (e.g., comment form, transcript from public meeting, email, etc.), date comment was received by the Corps, comment category (e.g., Leases, Access, etc.), clarifiers for comment category, and a summary of the comment. Every letter, fax, or comment form was scanned and saved in a computer file.

After review of the comments it was clear that there were fifteen categories of public concern. Each comment was assigned to one of the fifteen categories in order to simplify response and incorporation into the Draft Effects Report: Access, Compensation, Corps Management, Historical Trauma of Dam, Investment, Jurisdictional Confusion, Leases, Legal, Master Plan, Ownership,

Project Purpose, Revenue, Transfer Process, Tribal Management, or Other. Most of the main categories had a clarifying category in the next column. For example, a comment could fit under the Access category and have a clarifier of Cabin owners, Fees, or Public Access.

A general summary of the 2005 comments, in each major category, is included in Appendix E. A table for the 2005 comment period was prepared with questions on each category topic and associated responses. The tables are included in Appendix F.

## **4.2 Draft Effects Report**

Early in the determination process the Corps decided that it would be important to have a document that would convey all the information gathered during the process as well as the justification for any final determination that would be made. The Draft Effects Report is the culmination of the information gathering and decision making process.

After the public meetings, the Corps began development of a Draft Effects Report. The document explained the authority of the Corps under the FBMRA, described the process used to identify lands no longer needed for construction, maintenance, or operation of the Garrison Project, proposed a determination, and addressed and responded to public concerns and comments received during the 2005 public comment process. The report was released to the public in early June 2006 and was available for review until August 22, 2006. Public review meetings were held on June 26-30, 2006 to provide a forum to receive oral comments, transcribe those comments, and include them, if appropriate, in the final Effects Report.

## **4.3 Proposed Determination of Lands No Longer Needed**

After the project purpose criteria were identified, four alternatives were formulated for consideration and review. In addition to the TAT request (all lands above 1854 m.s.l.), three other alternatives were considered for identifying lands no longer needed for operation, maintenance, or construction: 1) no project lands available, on the basis that all lands are still needed to operate the project; 2) all lands above elevation 1854 m.s.l. available, except lands being used for recreation; and 3) all lands above elevation 1854 m.s.l. available, except lands being used for recreation and wildlife management.

Based on the conclusion of flood control, irrigation, navigation, hydropower, recreation and wildlife management as project purposes and a review of the alternatives articulated above, the Corps proposed in the Draft Effects Report that the following lands could be considered as no longer needed for the construction, maintenance, or operation of the Garrison Project and could be offered to the DOI:

- Lands above the maximum (exclusive) flood control pool, which at Garrison Dam/Lake Sakakawea is elevation 1854 m.s.l., excluding lands currently being used for the purpose of low and high-density recreation and wildlife management.<sup>2</sup>

It is estimated that above 1854 m.s.l. there are approximately 36,000 acres, within the exterior boundaries of the Fort Berthold Reservation, managed by the Corps. Of the 36,000 acres

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<sup>2</sup> All lands considered would be conditioned with the Corps retaining the right to erode, slough, and/or flood. Existing public access routes to the lake would not be closed or diminished as a result of this transfer.



approximately 66 percent (24,000 acres) are currently used as vegetative management areas, 29 percent (10,200 acres) are wildlife management areas, and 5 percent (1,800 acres) are recreation areas (Figure 2.1). The lands within the Fort Berthold Reservation boundaries at or below the maximum flood control pool and those lands above 1854 m.s.l. that are currently being used for recreation and wildlife purposes would be retained by the Corps. By retaining these lands it would allow the Corps to continue to operate the Garrison Project according to the congressionally authorized project purposes.<sup>3</sup>

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<sup>3</sup> It is anticipated that there may be some additional lands that may be retained based on special conditions. It is anticipated that these would be minimal in acreage and impact on the overall proposed change in land status.

During the summer of 2006 the Corps completed and published the Draft Effects Report, completed an extended comment period and conducted six public meetings. This information was reviewed, taken into consideration and a determination was made on whether there were any lands no longer needed for the construction, maintenance and operation of the Garrison Project.

### **5.1 Public Comment Period (June-August 2006)**

The Corps held six public meetings June 26-30, 2006 in Bismarck, Dickinson, Hazen, Williston, New Town, and Minot, North Dakota to give all interested parties an opportunity to comment on the Draft Effects Report. In Bismarck, Hazen, Williston, New Town, and Minot, the meetings consisted of an open house format from 5 to 6 pm, during which the public could view maps and displays and meet with Corps officials. During the second half of each meeting, from 6 to 8 pm, public comments were formally recorded during a traditional comment session. In Dickinson, the open house was from 10 to 11am and the formal comment period was from 11 am to 1 pm. During the public comment session, a brief presentation was made by the Corps project manager, then Tribal leaders, government officials, and the public could speak formally in front of the group and have their comments recorded by a court reporter (see Appendix G – 2006 Public Meeting Transcripts). People could also voice their opinions by filling out comment forms, writing letters, and emailing the Corps (see Appendix H – 2006 Public Meeting Comments) by the end of the public comment period, which ended on August 22, 2006.

An estimated 45 people were present at Bismarck, 26 at Dickinson, 29 at Hazen, 32 at Williston, 65 at New Town, and 29 at Minot. During the formal comment session, 14 people testified at Bismarck, 6 people testified at Dickinson, 7 people testified at Hazen, 10 people testified at Williston, 18 people testified at New Town, and 10 people testified at Minot. At all six meetings, 7 people turned in comment forms and 9 people submitted written statements. During the comment period, 42 submitted their comments by e-mail, 14 people mailed letters, 4 people mailed in comment forms, and one person faxed in their comments. It was noted that fewer people attended the 2006 meetings on the Draft Effects Report than the 2005 meetings, which provided the public with initial information about the proposed transfer.

To organize the comments received during the 2006 public comment period, a spreadsheet was created using Microsoft Excel (Appendix I). The spreadsheet has columns for the commenter's name, if available, organization (e.g., North Dakota Wildlife Federation, TAT, Public, etc.), organization type (e.g., Federal, State, County, University, Private, Nonprofit, or Public), hometown and state of the commenter, comment format (e.g., comment form, transcript from public meeting, email, etc.), date comment was received by the Corps, comment category (e.g., Leases, Access, etc.), clarifiers for comment category, and a summary of the comment. Every letter, fax, or comment form was scanned and saved in a computer file.

Each comment was assigned to one of the following fifteen main categories in order to simplify response and incorporation: Access, Compensation, Corps Management, Historical Trauma of Dam, Investment, Jurisdictional Confusion, Leases, Legal, Master Plan, Ownership, Project Purpose, Revenue, Transfer Process, Tribal Management, or Other. Most of the main categories had a clarifying category in the next column. For example, a comment could fit under the Access category and have a clarifier of Cabin owners, Fees, or Public Access.

A general summary of the 2006 comments, in each major category, is included in Appendix I. A table for the 2006 comment period was prepared with questions on each category topic and associated responses. The table is included in Appendix J. In addition a narrative comparison of the 2005 comments to the 2006 comments is included in Appendix K.

## **5.2 Comment Consideration**

In making a determination the Corps took the public comments under consideration. It was apparent that of the 15 previously mentioned comment topics, four major themes remained unresolved in the mind of the public. The four major concerns were the legality of the FBMRA, the equitability of the action, access to the lake and future management of the lands.

### **5.2.1 Legality of the Transfer**

Concerning the legality of the FBMRA one commenter summarized the concern by saying, *"I do not believe the Corps has the authority to transfer 24,000 acres of land under the "Fort Berthold Reservation Mineral Restoration Act" as it asserts. The Mineral Restoration Act is just that - a restoration of mineral rights to the Fort Berthold Reservation and not a mechanism to transfer thousands of acres of land."* The Army has determined that the plain language of Section 206(b) of the FBMRA (P.L. 98-602) provides the authority for the Secretary of the Army to enter into agreements with the Secretary of the Interior under which lands no longer needed for the construction, operation, and maintenance of the Garrison Dam and Reservoir Project may be declared to be held in trust for the Three Affiliated Tribes (TAT) and administratively transferred to Interior. The Army General Counsel opinion is included in Appendix L. This concern has been addressed.

### **5.2.2 Equitability of the Transfer**

The second area of concern was that the land transfer must be done equitably. Again a commenter stated this concern by saying that *"...any land transfer must be done equitably. That is, the land must be transferred to the person it was taken from. This is not only a matter of fundamental fairness, it is one of the Corps' "guiding principles" when transferring land."* In the Draft Effects Report the Corps responded by stating that the Army does not have the legal authority from Congress to transfer lands to private parties from whom land was also taken for the Garrison Dam and Reservoir Project. The FBMRA only provides the authority to transfer any land no longer needed to the DOI to be held in trust for the Three Affiliated Tribes. We again spent a significant amount of time researching this topic and decided that while there is still approximately 24,000 acres of vegetative management land no longer needed, we did have the ability to decide when the land would be offered to DOI. To positively address this concern the Corps decided to offer the land to DOI in phases. Those lands that were originally acquired from the Three Affiliated Tribes, approximately 21,000 acres, would be offered first, and the approximately 3,000 acres (i.e., the lands acquired from parties other than the Three Affiliated Tribes) would be offered to DOI after the conclusion of the 111<sup>th</sup> Congress. This would allow Congress time to determine if it would want to direct the Corps differently concerning the remaining 3,000 acres. Therefore we have addressed this concern.

### **5.2.3 Access to the Lake**

Access remained a concern of the public after their review of the Draft Effects Report. One commenter stated this concern by saying, “...*this transfer creates great uncertainty. By creating a ring of non-public land around Lake Sakakawea, you raise questions of public access to leased land and to Corps land, in general, that have not been answered and may have no clear answer. You have certainly not made any provision to guarantee perpetual, free public access to all the public lands of Lake Sakakawea.*” In the Draft Effects Report we thought it was clear that the authorized access points to the lake are through the recreation sites that surround Lake Sakakawea. In the proposed determination we stated that all recreation sites would be retained by the Corps rather than being transferred. All other land currently has restrictions placed on access due to land use, cultural resource and/or threatened and endangered species requirements. Therefore the public should not be accessing the lake through those areas. In addition there is already non-public (reservation) land around Lake Sakakawea, so this administrative transfer would not change that situation. However, it would move the reservation land closer to the lake. But as stated previously the access to the lake would be the same as is currently in place. Furthermore, all of the approximately 24,000 acres being offered for administrative transfer to the DOI are currently managed under PL 87-695, the Grazing Law. Under this law the TAT is “...permitted to graze stock...on such former Indian land as the Secretary of the Army determines is not devoted to other beneficial uses, and to lease such land for grazing purposes to members or non-members of the tribes on such terms and conditions as the Secretary of the Interior may prescribe.” Since this land is subject to PL 87-695 and much of the land is already leased to the TAT for grazing purposes, management of the land would not change. Therefore we have addressed this concern.

### **5.2.4 Future Management of the Lands**

Management of the lands was the final concern that appeared to be on the minds of the public. There were several different facets to management which included access fees, future development, funding, and jurisdiction.

#### **5.2.4.1 Access Fees**

Concerning access fees one comment summarized, “...*the transfer takes away 24,000 acres of public land that is now used for hunting or other recreation and makes it either inaccessible or accessible only by payment of an additional tribal conservation fee...*” In the proposed determination the Corps states that all lands currently designated as recreation or wildlife management are being retained and would continue to be managed by the Corps. Therefore no fee would be charged on those lands. As stated previously the public should not be accessing the lake via areas other than authorized access points; to do so would be a violation of current Corps policy. In addition the lands that are being considered for transfer are currently used for grazing purposes, so in general it is not appropriate to use that land for hunting or other recreation purposes. Based on this information fees for access to the lake would not change from the current situation, should a transfer of the approximately 24,000 acres be completed.

#### **5.2.4.2 Future Development**

A comment that was received summarized the concern about future development by saying “...the transfer permanently hurts any future development or expansion of recreation or wildlife opportunities. By exempting existing recreation and wildlife management areas from the transfer, the Corps acknowledges that these are within the scope of the project. But by giving away all other land, it effectively stops the further development of the project for these very same purposes.” After researching this concern the conclusion was that this proposed administrative transfer of lands would not effect the development or expansion of recreation or wildlife areas because the lands to be administratively transferred do not fall under either of those project purposes. In coming to this conclusion two things were considered. First, the “General Plan for Use of Project Lands and Waters for Wildlife Conservation and Management, at Garrison Dam-Lake Sakakawea, North Dakota” signed by the Commissioner of the North Dakota Game and Fish Department on April 7, 1982, required the Corps to set aside 71,000 acres for “...the conservation and management of resident and other wildlife.” Of the 71,000 acres that have been set aside for wildlife management, only 42,000 acres are currently being managed by the North Dakota Game and Fish Department. It is clear that there is room for expansion within the existing acres that have been set aside for that purpose. Secondly, with regard to recreation, since the completion of the 1978 Garrison Master Plan and the recent Final Garrison Master Plan (December 2007) there has been no increase in lands designated for low or high density recreation. Either way, it is always possible to designate lands outside of the Fort Berthold reservation for recreation and/or wildlife purposes, should it become needed in the future.

#### **5.2.4.3 Funding**

In general, funding concerns were covered by these two comments which stated, “...management of the transferred lands can affect the rest of the reservoir. And yet, no provision is made for funding of what is now a Corps obligation and responsibility.” and another that stated, “It will make it difficult for counties to determine the amount of acres for which the Corps makes payments in lieu of taxes.” The TAT understands that there would be no funding provided as part of this administrative transfer, as does the DOI, who would be responsible, along with the TAT, for accomplishing management activities previously accomplished by the Corps. A positive impact of any transfer would be the ability of the Corps to potentially fund projects that were previously deferred due to the lack of funding. In addition, the administrative transfer would not affect the Corps ability to determine the lands on which it pays payment in lieu of taxes (PILT), because as part of the process the Corps would provide to the DOI maps and descriptions of the land being administratively transferred, which in turn requires the Corps to evaluate the title information on lands that it would be retaining. This should make more accurate the acreage for which the Corps would pay PILT, rather than make it more uncertain.

#### **5.2.4.4 Jurisdiction**

Concerning jurisdiction it was stated that the “...land you propose to transfer has not been adequately described. No one will know when they have crossed the boundary defined as “land above 1854, m.s.l. This will make it difficult to determine what government has civil or criminal jurisdiction...” Currently there are no physical markings on the land to denote Corps versus Tribal lands and the appropriate jurisdiction. The administrative transfer of the lands would not

change this situation. So a case could be made that it currently is difficult to determine civil and criminal jurisdiction. However all parties currently work together to ensure that civil and criminal jurisdiction are properly implemented. That same commitment would be in place should an administrative transfer occur.

In each case concerning management, whether it be access fees, future development, funding or jurisdiction, there is a positive resolution to the concern.

### **5.3 Determination of Lands No Longer Needed**

Based on the conclusion that flood control, irrigation, navigation, hydropower, recreation and wildlife management are project purposes, another review of the alternatives, and the positive resolution of the public concerns, the Corps determines that the following lands are no longer needed for the construction, maintenance, or operation of the Garrison Project:

- Lands above the maximum (exclusive) flood control pool, which at Garrison Dam/Lake Sakakawea is elevation 1854 m.s.l., excluding lands currently being used for the purpose of low and high-density recreation and wildlife management.<sup>4</sup>

It is estimated that above 1854 m.s.l. there are approximately 36,000 acres, within the exterior boundaries of the Fort Berthold Reservation, managed by the Corps. Of the 36,000 acres approximately 66 percent (24,000 acres) are currently used as vegetative management areas, 29 percent (10,200 acres) are wildlife management areas, and 5 percent (1,800 acres) are recreation areas. The lands within the Fort Berthold Reservation boundaries at or below the maximum flood control pool and those lands above 1854 m.s.l. that are currently being used for recreation and wildlife purposes would be retained by the Corps. By retaining these lands it would allow the Corps to continue to operate the Garrison Project according to the congressionally authorized project purposes<sup>5</sup>. Therefore applying this determination results in approximately 24,000 acres becoming eligible for offer for administrative transfer (Figure 5.1).

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<sup>4</sup> All lands considered would be conditioned with the Corps retaining the right to erode, slough, and/or flood. Existing public access routes to the lake would not be closed or diminished as a result of this transfer.

<sup>5</sup> It is anticipated that there may be some additional lands that may be retained based on special conditions. It is anticipated that these would be minimal in acreage and impact on the overall proposed change in land status.



Figure 5.1. Determination of lands no longer needed for the Construction, Maintenance and Operation of the Garrison Project.

On September 3, 2004, the ASA (CW) directed the Corps to examine land use designations in the Garrison Project Master Plan, with the ultimate objective of the examination to be a transfer of the maximum amount of land above the maximum flood control pool elevation. Any land identified would be offered for transfer to the Department of Interior (DOI), Bureau of Indian Affairs (BIA), to be held in trust for the TAT. After receiving this request from the ASA(CW), the Corps approached this request in three phases. The phases would maximize public, state, tribal and Federal involvement in this effort. The three-phase approach would include input by interested public, state, tribal and Federal parties through individual and public meetings.

Based on the conclusion that flood control, irrigation, navigation, hydropower, recreation and wildlife management are project purposes, a re-review of the alternatives, and the positive resolution of the public concerns, the Corps has determined that the following lands are no longer needed for the construction, maintenance, or operation of the Garrison Project:

- Lands above the maximum (exclusive) flood control pool, which at Garrison Dam/Lake Sakakawea is elevation 1854 m.s.l., excluding lands currently being used for the purpose of low and high-density recreation and wildlife management.

This determination results in approximately 24,000 acres are eligible for offer for administrative transfer (Figure 5.1).







**Appendix C**  
**2005 PUBLIC MEETING COMMENTS**  
Received During the Comment Period

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**Appendix D**  
**2005 PUBLIC MEETING COMMENTS**  
Received After the Comment Period

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**Appendix E**

**2005 PUBLIC COMMENT SUMMARY SPREADSHEET**

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**Appendix I**  
**2006 PUBLIC COMMENT SUMMARY SPREADSHEET**

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**Appendix K**  
**2005/2006 PUBLIC COMMENT COMPARISON**

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