

BEFORE THE
CONGRESS AND THE PEOPLE OF THE UNITED STATES

FORT BERTHOLD DAM SITE v. THE GARRISON DAM SITE.
STATEMENT OF FACT AND LAW. AMENDED AND EXTENDED.

presented by

THE INDIAN PEOPLE OF FORT BERTHOLD RESERVATION, NORTH DAKOTA.

May 26, 1947

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 consequence 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 lost forever.

One hundred sixty-eight thousand six hundred twenty-seven acres of Indian lands will be lost forever.

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

Fifty-two 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 Mississippi 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 three hundred and fifty-seven families of Fort Berthold Reservation now have an average income of about one thousand dollars annually, a large part 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. ...

GARRISON DAM IS UNNECESSARY

The Indian people of Fort Berthold Reservation submit that they are the ones who will suffer the greatest damage by construction of Garrison Dam. They are also the ones who will suffer the greatest disaster if and when Garrison Dam fails. They feel, therefore, that the Congress should consider the following statement by Honorable H.W. Bashore, Commissioner of Reclamation. ...

“I am in hearty agreement with the proposal that modification of the plans for the reservoirs proposed in the report of the Board of Rivers and Harbors be an expressly reserved privilege. Our studies indicate that the corps may want to adjust its plans for the location and size of some of these reservoirs when the full facts are developed. The Bureau of Reclamation contemplates the recommendation of construction of a number of reservoirs upstream from the main-stem reservoirs that have been included in the report of the Board of Rivers and Harbors. Numbers of these will have flood-control functions, and they may have far-reaching effects on the storage capacity needed on the Missouri River in North Dakota and South Dakota. Full consideration of these matters may considerably alter the reservoirs as initially suggested. For example, through elimination of one of the main-stem reservoirs, if that should be found to be warranted, and the substitution of several reservoirs on tributaries to provide commensurate flood-control storage, it probably would be possible for the Bureau of Reclamation to make marked irrigation contributions that are not contemplated in the report as it was submitted for comment. Also, our studies indicate that diversions of water from the Fort Peck Reservoir and the Oahe site for use in North Dakota and South Dakota may be preferable to the proposal in the report that a diversion be made at Garrison Dam. Precisely the same ends would be served, many of them perhaps in higher degree and more profitably for everyone, I should not like to see the door closed now against consideration of any alternate means of replenishing Devils Lake, Diverting water into the James and Sheyenne Rivers, and providing for irrigation east of the Missouri River.”

H.W. Bashore, *Commissioner*,
Bureau of Reclamation
December 17, 1943.

The Congress, we urge, should take into consideration the difference of opinion and recommendation coming from ... the Bureau of Reclamation, Department of Interior. The foregoing quotation from the Commissioner of Reclamation, H.W. Bashore, is still the position taken by the Bureau of Reclamation. The Bureau of Reclamation has never recognized nor recommended the Garrison Dam. The Bureau of Reclamation submitted a report on the Missouri River Basin, which was presented in the U.S. Senate by Senator O'Mahoney of Wyoming. ... [T]he following is quoted therefrom:

“By the construction of these three reservoirs, (The Oahe Dam, Big Bend Dam and power plant, Fort Randall Dam and power plant), the river will be sufficiently regulated to control floods, develop all power possibilities, eliminate silt, create enormous recreational possibilities, permit the use of the Fort Peck Reservoir for irrigation, and allow for the development of all irrigable areas in the upper Missouri-Souris and Oage units.”

Albert M. Day, *Acting Director*
Bureau of Reclamation,
April 28, 1944”

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 relocating these allottees on Tribal Lands below the Fort Berthold Dam site. ...

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 Bismarck, North Dakota. ...

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 THE 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 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. ...

Late in 1946 the War Department made a formal offer to the Secretary of Interior of approximately 145,220 acres of land below the proposed Garrison Dam in Mercer and Oliver Counties, North Dakota. ... 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 lands offered by the 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 area was not more than one-third of the value of similar lands within the Fort Berthold Reservation. ...

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 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 is not grazing land as the bulk of the upland is under cultivation and the native grasses have been destroyed. ...

On December 27th, 1946, the Secretary of the Interior declined the offer made by the War Department. ...

LOSSES SUSTAINED BY THE CONSTRUCTION OF GARRISON DAM

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

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 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 Fort Berthold Indians. Should the indicated War Department procedure be followed and additional lands be added in Oliver, Mercer, McLean, Burleigh and adjoining 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. ...

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 Indian people of Fort Berthold Reservation of North Dakota, by construction of Garrison Dam, are in danger of losing their homes, their modes of life, their basic industry and further they stand in danger of losing all their property and their lives.

THE 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 inexcusable 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. Cass

General Counsel.