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# IMPACT OF THE FLOOD CONTROL ACT OF 1944 ON INDIAN TRIBES ALONG THE MISSOURI RIVER

## HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

NOVEMBER 1, 2007

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# IMPACT OF THE FLOOD CONTROL ACT OF 1944 ON INDIAN TRIBES ALONG THE MISSOURI RIVER

**THURSDAY, NOVEMBER 1, 2007**

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Washington, D.C.*

The Committee met, pursuant to notice, at 9:35 a.m. in room 628, Senate Dirksen Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

## OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. The Committee will come to order. This is a hearing of the Indian Affairs Committee. We will receive testimony today on the history of the Flood Control Act of 1944 and how it continues to affect Indian tribes along the Missouri River.

The Flood Control Act authorized the Pick-Sloan plan, which was a plan to stop flooding along the Missouri River and increase irrigation and provide for navigation. A well-intentioned plan, but there were negative consequences to this plan, some significant, and those consequences are still being felt today. That plan authorized the building of five mainstem dams and reservoirs along the Missouri River, and we will show some charts and photographs momentarily.

The land was forcibly taken from a number of interests, especially from Indian tribes and individuals. In some cases, the Indians had little notice about being removed. Although the tribes were ultimately compensated for the lands, the lands were not voluntarily given up by the tribes. And in a number of cases, tribes were given payments in the form of what are called JTAC payments and others. In some cases this happened once, in some cases more than once. There have been pieces of legislation introduced to revisit it again.

My feeling was that we should take a look at the entire set of reservoirs and dams and the displacement of all of the tribes along the Missouri River as a result of the Pick-Sloan plan. We should try to make an evaluation of what has happened with respect to all of the tribes affected, and then make some judgment and proceed from there.

The loss of these lands have been devastating to the Indian communities. More than 900 Indian families were relocated, but the

fact is we have had entire communities inundated by water. My father, as a young man herded horses on the Indian reservation. He stayed in and lived in a city, or community, called Elbow Woods. Elbow Woods no longer exists. It has been under water for almost 50 years. The town, the hospital, it is all under water.

The reason I know Elbow Woods is because my father used to take me to Elbow Woods and say, here is where I herded horses; here is where I worked with the Indians and worked on the reservations. He was enormously proud of that portion of his life. So I know Elbow Woods. This is a picture of the community as the water began rising, and of course, the water inundated that community.

I tell you that only to say that entire tribal infrastructures and economies were destroyed. Their way of life changed dramatically from living on the river bottoms and eating fruit and berries and healthful foods on the river bottoms, to being relocated. And so there are a lot of consequences for that happening.

I am going to be joined at this hearing by my colleagues from South Dakota, Senator Johnson, who has introduced legislation affecting some South Dakota tribes, which is very important legislation, and my colleague, Senator Tester, from Montana, who has had similar interest with respect to Montana tribes.

I, of course, am very interested in the North Dakota interests of tribal governments. So this, I think, will be a hearing at which we will gather information, both during and after the hearing, to try to get a more global view of what has happened along the Missouri River with respect to tribal interests. In addition, we look at what kind of recompense was offered and received, and what needs to be done to be fair for all of these years to those whom land was taken.

I have just received a call that I have to go to Senator Reid's office for an important, but brief, meeting on a couple of appropriations bills. I have asked Senator Tester if he would chair the hearing in my absence, and I expect to be back in about 30 minutes. My apologies for that, but sometimes in this business meetings come up at the last moment.

Let me ask Senator Tester if you want to take the Chair here. You and Senator Johnson will want to make statements, and then introduce witnesses, and then I will return.

## STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. [Presiding.] That would be fine. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tester, thank you very much.

Senator TESTER. I think that Senator Dorgan has summarized the issue very, very well that we are going to be dealing with today. I appreciate his leadership on this Committee, and once again on issues that are critically important to Indian Country.

I think Senator Johnson has a statement, but he wants it to be put into the record. I think that what we will do now is just hear from Ms. Robin Nazzaro, Director of Natural Resources and Environment from the GAO.

[The prepared statement of Senator Johnson follows:]

PREPARED STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Thank you to Chairman Dorgan, Vice Chairwoman Murkowski, and the staff of the Indian Affairs Committee for holding this hearing. I would like to welcome the South Dakota tribal leaders, Chairman Jandreau, Chairman Cournoyer, President Steele, and Chairman His Horse Is Thunder. Chairman Thompson of Crow Creek and Chairman Brings Plenty of Cheyenne River could not be here but they are planning to submit written testimony. I also would like to welcome my colleague Senator Thune, thank you for joining us today.

The Flood Control Act of 1944 had a tremendous effect on my state. It has provided many benefits and numerous problems that are both still being felt today. Unfortunately, the South Dakota tribes have not fully shared the benefits, but were dealt an unfair share of the costs. The impacts of the dams and irrigation districts affected each tribe and each part of the state independently. I look forward to hearing the testimony on the continuing challenges each tribe faces individually due to this act.

Thank you.

Senator TESTER. Robin, if you want to start out and fire away, we can hear some history of what is going on and hopefully we will have some questions for you when you are done. Robin?

## STATEMENT OF ROBIN M. NAZZARO, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, GOVERNMENT ACCOUNTABILITY OFFICE; ACCOMPANIED BY JEFF MALCOLM, ASSISTANT DIRECTOR

Ms. NAZZARO. Thank you, Senator Tester. I am pleased to be here today to discuss the compensation provided to the seven tribes for lands taken by flood control projects on the Missouri River.

As was mentioned, the Federal Government constructed these dams that caused damage to seven reservations: Fort Berthold, Cheyenne River, Standing Rock, Lower Brule, Crow Creek, Yankton and Santee. As was noted, Congress authorized payments to these tribes as compensation for the damages, and then again later Congress responded by authorizing additional compensation through the establishment of development trust funds for tribes at each of the seven reservations.

However, as the Chairman noted earlier, lingering questions remain about whether the tribes have been adequately compensated for the damages and whether they have been treated consistently. Since 1991, we have issued three reports on additional compensation for tribes at five of the reservations: Fort Berthold, Cheyenne River, Standing Rock, Lower Brule and Crow Creek. My statement today is based on these reports and summarizes the damages and compensation authorized by the Congress.

The reservoirs created by the dams on the river permanently flooded over 350,000 acres of land on the reservations, ranging from over 150,000 acres flooded on the Fort Berthold Reservation to less than 600 acres on the Santee. In addition to the valuable river bottomland that was lost, the tribes also lost the natural resources such as timber, wildlife and native plants, and structural improvements such as homes and ranches on the land.

In addition to the direct damages, the tribes also suffered indirect or intangible damages for the loss of assets of unknown value, including spiritual ties to the lands, tribal claims to the homeland, and benefits derived from living along the river. The damage that each tribe sustained was unique, depending on the land that was

lost, the resources and structure on that land, and the overall impact to the community.

The tribes at the seven reservations originally received compensation for their damages between 1947 and 1962. The Three Affiliated Tribes of the Fort Berthold Reservation received $12.6 million. Cheyenne River Sioux Tribe received $10.6 million. Standing Rock Sioux Tribe received $12.3 million. The Lower Brule Sioux Tribe received $4.3 million. The Crow Creek Sioux Tribe received $5.9 million. The Yankton Sioux Tribe received $.2 million, and the Santee Sioux Tribe, $.059 million.

For the tribes at the five reservations that we have reported on in the past, the original compensation was based on detailed assessments by the U.S. Government and the tribes of the damages caused by the dams, and in some cases protracted settlement negotiations. They were ultimately unable to reach settlement agreements and Congress decided the compensation amounts. In each case, the original compensation provided was less than what the tribes had requested.

The tribes received additional compensation between 1992 and 2002. The Three Affiliated Tribes of the Fort Berthold Reservation received $149.2 million; the Cheyenne River Sioux Tribe, $290.7 million; the Standing Rock Sioux Tribe, $90.6 million; the Lower Brule Sioux Tribe received $39.3 million; the Crow Creek Sioux Tribe, $27.5 million; the Yankton Sioux Tribe, $23 million; and the Santee Sioux Tribe, $4.8 million.

During our prior reviews, we recognized the inherent difficulties with trying to perform a new economic analysis on the damages the tribes sustained over 50 years after the fact. We suggested that if Congress determined that additional compensation was warranted, it could determine the amount of compensation by calculating the difference between the tribes' final settlement proposal and the amount of compensation Congress originally authorized.

We used the inflation rate and an interest rate to adjust the difference to reflect a range of current values. Using the inflation rate for the lower end of the range and the interest rate for the higher end of the range. The three largest additional compensation amounts for Fort Berthold, Cheyenne River, and Standing Rock Reservations were all within the ranges we calculated.

Congress did not ask us to review the methodologies used to calculate the four small additional compensation amounts, which were all less than $40 million before enacting the bills. The Crow Creek Sioux and Lower Brule Sioux Tribes were authorized additional compensation commensurate on a per acre basis, with the additional compensation provided to the Standing Rock Sioux Tribe in 1992. Similarly, the additional compensation authorized in 2002 to the Yankton Sioux and the Santee Sioux Tribes was also partially based on a per acre calculation.

In closing, I would caution against looking solely at the acreage loss and the authorized compensation amounts to try and determine if the tribes were treated consistently. Such comparisons have led to perceived inequities between the tribes. Looking at just the total compensation amounts masks the outlying differences of each of the compensation bills.

This concludes my statement and I would be pleased to answer any questions you or Senator Johnson have at this time.

Thank you.

[The prepared statement of Ms. Nazzaro follows:]

United States Government Accountability Office

GAO

Testimony

Before the Committee on Indian Affairs, U.S. Senate

For Release on Delivery
Expected at 9:30 a.m. EDT
Thursday, November 1, 2007

# INDIAN ISSUES

## Damages and Compensation for Tribes at Seven Reservations Affected by Dams on the Missouri River

Statement of Robin M. Nazzaro, Director
Natural Resources and Environment

GAO-08-249T

November 1, 2007

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# Highlights

Highlights of GAO-08-249T, a testimony before the Committee on Indian Affairs, U.S. Senate

## INDIAN ISSUES

## Damages and Compensation for Tribes at Seven Reservations Affected by Dams on the Missouri River

### Why GAO Did This Study

From 1946 to 1966, the government constructed five dams as flood control projects on the Missouri River in North Dakota and South Dakota. The reservoirs created behind the dams flooded portions of seven Indian reservations—Fort Berthold, Cheyenne River, Standing Rock, Lower Brule, Crow Creek, Yankton, and Santee. The tribes at these seven reservations received compensation when the dams were built as well as additional compensation over the years that followed.

Since 1991, GAO has issued three reports on additional compensation claims for tribes at five reservations:

- 1991—Fort Berthold and Standing Rock (GAO/RCED-91-77);
- 1998—Cheyenne River (GAO/RCED-98-39); and
- 2006—Crow Creek and Lower Brule (GAO-06-517).

In these reports, GAO proposed that one recommended approach to providing additional compensation would be to calculate the difference between the tribe's final asking price and the amount that was appropriated by Congress and then adjust the difference using the inflation rate and an interest rate to reflect a range of current values.

This testimony is based on GAO's three prior reports, and summarizes the damages estimated by the Department of the Interior and the compensation authorized by Congress, for dams constructed on the Missouri River.

To view the full product, including the scope and methodology, click on GAO-08-249T. For more information, contact Robin M. Nazzaro at (202) 512-3841 or nazzaror@gao.gov.

### What GAO Found

The reservoirs created by the dams on the Missouri River permanently flooded over 350,000 acres of land on seven Indian reservations, ranging from over 150,000 acres flooded on the Fort Berthold reservation to less than 600 acres flooded on the Santee reservation. In addition to the valuable river bottom land that was lost, the tribes also lost any natural resources and structural improvements on the land. The natural resources lost included timber, wildlife, and native plants. The structural improvements lost included such things as homes and ranches. In some cases, entire towns were lost. In addition to the direct damages, Congress has recognized that the tribes also suffered indirect or intangible damages for the loss of assets of unknown value. These losses included spiritual ties to the lands (for example, cemeteries and tribal monuments); tribal claims to a homeland; and benefits derived from living along the Missouri River.

The tribes at the seven reservations that lost land due to the flood control projects on the Missouri River originally received compensation for their damages between 1947 and 1962, and they subsequently requested and received additional compensation between 1992 and 2002. For the tribes at the five reservations that we have reported on in the past, the original compensation was based on detailed assessments by the U.S. government and the tribes of the damages caused by the dams and, in some cases, protracted settlement negotiations. The U.S. government and the tribes were ultimately unable to reach settlement agreements, and Congress decided the compensation amounts. In each case, the original compensation authorized was less than what the tribes had requested, leading the tribes to request additional compensation. The three largest additional compensation amounts—Cheyenne River, $290.7 million in 2000; Fort Berthold, $149.2 million in 1992; and Standing Rock, $90.6 million in 1992—were all within the ranges calculated in GAO's 1991 and 1998 reports. Congress did not ask GAO to review the methodologies used to calculate the four smaller additional compensation amounts, all less than $40 million, before enacting the bills in 1996 (Crow Creek), 1997 (Lower Brule), and 2002 (Yankton and Santee). The Crow Creek Sioux and Lower Brule Sioux tribes were authorized additional compensation commensurate, on a per-acre basis, with the additional compensation provided to the Standing Rock Sioux tribe in 1992. Similarly, the additional compensation authorized in 2002 for the Yankton Sioux and Santee Sioux tribes was also partially based on a per-acre calculation.

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to discuss our work on reviewing the additional compensation claims by tribes at seven Indian reservations for lands taken by flood control projects on the Missouri River. As you know, between 1946 and 1966 five dams were constructed on the Missouri River—the Garrison Dam in North Dakota, and the Oahe, Fort Randall, Big Bend, and Gavins Point Dams in South Dakota—that damaged seven reservations. The reservoirs created behind the dams permanently flooded portions of the Fort Berthold, Cheyenne River, Standing Rock, Lower Brule, Crow Creek, Yankton, and Santee reservations. While the dams were being constructed, Congress enacted a number of laws that authorized payments to the tribes residing on the affected reservations as compensation for the damages caused by the dams. However, beginning in the 1980s, some of these tribes began requesting additional compensation. As part of their pursuit of additional compensation, the tribes generally hired consultants to develop economic analyses or perform other calculations to form the basis for their requests for additional compensation. In the 1990s and early 2000s, Congress responded to these requests for additional compensation by establishing development trust funds for the tribes at each of the seven reservations.[1]

However, today, more than 45 years after the last original compensation bill was enacted and almost 5 years after the last additional compensation bill was enacted, lingering questions remain about various aspects of the tribes' compensation. Most notably, questions have been raised about whether the tribes have been adequately compensated for the damages they sustained and whether they have been treated consistently. For example, two bills pending in the 110th Congress, H.R. 155 and S. 160, would provide the Crow Creek Sioux and Lower Brule Sioux tribes with a third round of compensation totaling an additional $132.2 million.[2] Specifically, the Crow Creek Sioux tribe would receive an additional $41.7 million over and above the $27.5 million in additional compensation

[1]Fort Berthold and Standing Rock, Pub. L. No. 102-575, title XXXV, 106 Stat. 4600, 4731 (1992); Crow Creek, Pub. L. No. 104-223, 110 Stat. 3026 (1996); Lower Brule, Pub. L. No. 105-132, 111 Stat. 2563 (1997); Cheyenne River, Pub. L. No. 106-511, title I, 114 Stat. 2365 (2000); and Yankton and Santee, Pub. L. No. 107-331, title II, 116 Stat. 2834, 2838 (2002).

[2]Bills were also introduced in the 108th and 109th Congresses that would have provided the Crow Creek Sioux and Lower Brule Sioux tribes with a third round of compensation. See S. 1530, 108th Cong. (2003); H.R. 4949, 108th Cong. (2004); H.R. 109, 109th Cong. (2005); and S. 374, 109th Cong. (2005).

authorized in 1996 (unadjusted for inflation) and the Lower Brule Sioux tribe would receive an additional $90.5 million over and above the $39.3 million in additional compensation authorized in 1997 (unadjusted for inflation). Also, pending in the 110th Congress is the Cheyenne River Sioux Tribe Equitable Compensation Amendments Act of 2007, H.R. 487.[3] This bill would make a number of amendments to the 2000 act that authorized additional compensation for the Cheyenne River Sioux tribe, including allowing individual tribal members to be eligible for payments and changing how the trust fund is capitalized and invested.

Since 1991, we have issued three reports on additional compensation claims for tribes at five reservations: (1) in May 1991 we reported on claims by the Three Affiliated Tribes of the Fort Berthold Reservation and the Standing Rock Sioux Tribe;[4] (2) in January 1998 we reported on the claim by the Cheyenne River Sioux Tribe;[5] and (3) in May 2006 we reported on the most recent additional compensation claims by the Crow Creek Sioux and Lower Brule Sioux tribes.[6] In each report, we raised questions about the approach and calculations used in developing the tribes' additional compensation claims, and, as an alternative we calculated a range of possible additional compensation for Congress to consider should it determine that additional compensation was warranted. In addition, we testified in April 1991 on our work related to our first report and more recently, we testified on June 14, 2006, on our May 2006 report.[7] Our testimony today is drawn from our three prior reports and summarizes the damages incurred, and the compensation received, for dams constructed on the Missouri River.

[3]Similar versions of this bill were introduced in the 109th Congress. See H.R. 3558, 109th Cong. (2005); and S. 1535, 109th Cong. (2005).

[4]GAO, *Indian Issues: Compensation Claims Analyses Overstate Economic Losses*, GAO/RCED-91-77 (Washington, D.C.: May 21, 1991).

[5]GAO, *Indian Issues: Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam*, GAO/RCED-98-39 (Washington, D.C.: Jan. 28, 1998).

[6]GAO, *Indian Issues: Analysis of the Crow Creek Sioux and Lower Brule Sioux Tribes' Additional Compensation Claims*, GAO-06-517 (Washington, D.C.: May 19, 2006).

[7]GAO, *Indian Issues: GAO's Assessment of Economic Analyses of Fort Berthold and Standing Rock Reservations' Compensation Claims*, GAO/T-RCED-91-30 (Washington, D.C.: Apr. 12, 1991); and *Indians' Additional Compensation Claims: Calculations for the Crow Creek Sioux and Lower Brule Sioux Tribes Differ from Approach Used in Prior GAO Reports*, GAO-06-849T (Washington, D.C.: June 14, 2006).

We compiled information from our three prior reports to prepare this testimony. In reviewing the additional compensation claims for the tribes at the five reservations covered by our prior reports, we met the tribes' consultants to discuss the damages caused by the dams and the analysis that was the basis for the tribes' additional compensation claims. We also reviewed other pertinent information regarding the economic condition of the tribes at the time the land was acquired, including reports prepared by the Department of the Interior. In addition, for our 1998 and 2006 reports, in order to ensure that we obtained and reviewed all relevant data, we conducted a literature search for congressional, agency, and tribal documents at the National Archives and the Department of the Interior's library. We used original documents to learn about the tribes' settlement negotiations process and to identify the appraised land prices and various proposed settlement amounts. As a result, we determined that the data were sufficiently reliable for purposes of this testimony. We also met with representatives of the Cheyenne River Sioux, the Crow Creek Sioux, and the Lower Brule Sioux tribes. Our three prior reports, on which this testimony is based, were prepared in accordance with generally accepted government auditing standards.

In summary,

- The reservoirs created by the dams on the Missouri River permanently flooded over 350,000 acres of land on seven Indian reservations. Two reservations lost more than 100,000 acres while the remaining five reservations each lost less than 56,000 acres. In addition to the valuable river bottom land that was lost, the tribes also lost any natural resources and structural improvements on the land. The natural resources lost included timber, wildlife, and native plants and berries. For example, the Crow Creek reservation lost 94 percent of its timberland and the Fort Berthold reservation lost 100 percent of its irrigable land. The structural improvements lost included such things as homes and ranches. In some cases, entire towns were lost. In addition to the direct damages, Congress has recognized that the tribes also suffered indirect or intangible damages for the loss of assets of unknown value. These losses included spiritual ties to the lands (for example, cemeteries and tribal monuments); tribal claims to a homeland; and benefits derived from living along the Missouri River.

- The tribes at the seven reservations that lost land due to the flood control projects on the Missouri River originally received compensation for their damages between 1947 and 1962 and they subsequently requested and received additional compensation between

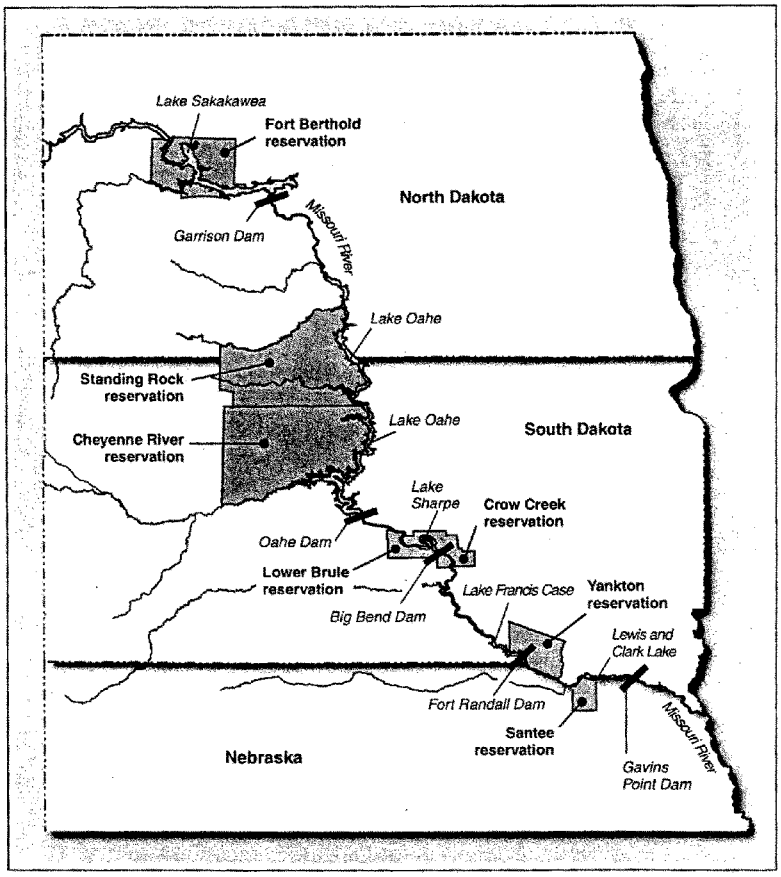
1992 and 2002. For the tribes at the five reservations that we have reported on in the past, the original compensation was based on detailed assessments by the U.S. government and the tribes of the damages caused by the dams and, in some cases, protracted settlement negotiations. For example, the settlement negotiations for the Crow Creek Sioux and Lower Brule Sioux tribes involved two dams and stretched over about 9 years, from 1953 through the enactment of their settlement legislation for the Big Bend Dam in 1962. The U.S. government and the tribes were ultimately unable to reach settlement agreements and Congress decided the compensation amounts. In each case, the original compensation provided was less than what the tribes had requested, leading the tribes to request additional compensation. The three largest additional compensation amounts—Cheyenne River, $290.7 million in 2000; Fort Berthold, $149.2 million in 1992; and Standing Rock, $90.6 million in 1992—were all within the ranges we calculated in our 1991 and 1998 reports. Congress did not ask us to review the methodologies used to calculate the four smaller additional compensation amounts, all less than $40 million, before enacting the bills in 1996 (Crow Creek), 1997 (Lower Brule), and 2002 (Yankton and Santee). The Crow Creek Sioux and Lower Brule Sioux tribes were authorized additional compensation commensurate, on a per-acre basis, with the additional compensation provided to the Standing Rock Sioux tribe in 1992. Similarly, the additional compensation authorized in 2002 for the Yankton Sioux and Santee Sioux tribes was also partially based on per-acre calculation. In addition to the per-acre calculation, an adjustment was made for these two tribes to provide an amount for severance damages and rehabilitation that was not included in their original compensation.

## Background

The Flood Control Act of 1944 established a comprehensive plan for flood control and other purposes, such as hydroelectric power production, in the Missouri River Basin.[8] The Pick-Sloan Plan—a joint water development program designed by the U.S. Army Corps of Engineers and the Department of the Interior's Bureau of Reclamation—included the construction of five dams on the Missouri River, including the Garrison Dam in North Dakota, and the Oahe, Fort Randall, Big Bend, and Gavins Point Dams in South Dakota (see fig. 1). The dams were constructed during a 20-year period from 1946 to 1966.

[8]Pub. L. No. 78-534, 59 Stat. 887 (1944).

**Figure 1: Dams and Reservations on the Missouri River**




Sources: The National Atlas of the United States of America® and Map Resources.

For tribes at five of the seven reservations, Congress asked us to review the additional compensation proposals developed by tribal consultants. Our reviews for tribes at three reservations—Fort Berthold, Standing Rock, and Cheyenne River—were conducted before Congress authorized their additional compensation. In 1991, we reported on the additional compensation claims for the Three Affiliated Tribes of the Fort Berthold Reservation and the Standing Rock Sioux tribe, and, in 1998, we reported

on the additional compensation claims for the Cheyenne River Sioux tribe.[9]

More recently, we reviewed the additional compensation claims for the Crow Creek Sioux and Lower Brule Sioux tribes. The Crow Creek Sioux and Lower Brule Sioux tribes were affected by the Fort Randall and Big Bend dams. The tribes received their original compensation for the damages caused by these two dams in 1958 and 1962.[10] However, the tribes did not consider their original compensation to be sufficient, and they sought additional compensation to address the effects of both dams. As a result, in 1996 and 1997, Congress authorized additional compensation for the Crow Creek Sioux and the Lower Brule Sioux tribes, respectively.[11] In 2003, the Crow Creek Sioux and Lower Brule Sioux tribes hired a consultant to determine if they were due additional compensation based on the method we proposed in our 1991 and 1998 reports. As a result of the consultant's analysis, the two tribes are currently seeking a third round of compensation. In our 2006 report we assessed whether the tribes' consultant followed the approach in our prior reports in calculating the compensation for Congress to consider in determining whether additional compensation was warranted for the Crow Creek Sioux and Lower Brule Sioux tribes.[12]

## Damages Caused to the Tribes at Seven Reservations as a Result of Dams on the Missouri River

The reservoirs created by the dams on the Missouri River permanently flooded over 350,000 acres of land on seven reservations, ranging from over 150,000 acres flooded on the Fort Berthold Reservation to less than 600 acres flooded on the Santee Reservation (see table 1). In addition to the valuable river bottom land that was lost, the tribes lost any natural resources and structural improvements on the land. The natural resources lost included timber, wildlife, and native plants and berries. The structural improvements lost included such things as homes and ranches. In some cases, entire towns were lost.

[9]GAO/RCED-91-77 and GAO/RCED-98-39.

[10]Fort Randall Dam: Crow Creek, Pub. L. No. 85-916, 72 Stat. 1766 (1958); and Lower Brule, Pub. L. No. 85-923, 72 Stat. 1773 (1958). Big Bend Dam: Crow Creek, Pub. L. No. 87-735, 76 Stat. 704 (1962); and Lower Brule, Pub. L. No. 87-734, 76 Stat. 698 (1962).

[11]Crow Creek, Pub. L. No. 104-223, 110 Stat. 3026 (1996); and Lower Brule, Pub. L. No. 105-132, 111 Stat. 2563 (1997).

[12]GAO-06-517.

**Table 1: Acreage Flooded on Seven Reservations by Dams on the Missouri River**

| Reservation | Dam | Acreage flooded |
|---|---|---|
| Fort Berthold | Garrison | 152,360 |
| Cheyenne River | Oahe | 104,420 |
| Standing Rock | Oahe | 55,994 |
| Lower Brule | Fort Randall and Big Bend | 22,296 |
| Crow Creek | Fort Randall and Big Bend | 15,597 |
| Yankton | Fort Randall | 2,851 |
| Santee | Gavins Point | 593 |
| **Total** | **5 dams** | **354,111** |

Source: GAO analysis of the additional compensation acts.

The damage that each tribe sustained was unique depending, on the land that was lost, the resources and structures on the land, and the overall impact on the community. For example, the Department of the Interior estimated at one point that 78 percent of the families living on the Fort Berthold reservation, or 289 families, lived in the area that was going to be flooded, a number that was generally two to three times higher than on the other reservations. On the Crow Creek and Lower Brule reservations, the Fort Randall Dam displaced 119 families, and the Big Bend Dam displaced 89 families. In some cases the same families were displaced by both dams. The Crow Creek reservation lost 94 percent of its timberland and the Fort Berthold reservation lost 100 percent of its irrigable land.

In addition to the direct damages, Congress has recognized that the tribes also suffered indirect or intangible damages for the loss of assets of unknown value. These losses included spiritual ties to the lands (for example, cemeteries and tribal monuments); tribal claims to a homeland; and benefits derived from living along the Missouri River.

## Compensation Provided to the Tribes on the Missouri River for the Damages Caused by the Dams

The tribes at the seven reservations that lost land due to the flood control projects on the Missouri River originally received compensation for their damages between 1947 and 1962, and they subsequently requested and received additional compensation between 1992 and 2002 (see table 2). For the tribes at the five reservations that we have reported on in the past, the original compensation was based on detailed assessments by the U.S. government and the tribes of the damages caused by the dams and, in some cases, protracted settlement negotiations over how much the tribes should be compensated for their losses. The settlement negotiations for

the Cheyenne River Sioux tribe lasted about 4 years from the date settlement negotiations were authorized to the date the settlement legislation was enacted. The settlement negotiations for the Crow Creek Sioux and Lower Brule Sioux tribes involved two dams and stretched over about 9 years, from 1953 through the enactment of their settlement legislation for the Big Bend Dam in 1962. The results of the settlement negotiations were that the U.S. government and the tribes were unable to reach an agreement. As a result, the settlements were left for Congress to decide. For each of the tribes at the five reservations that we have reported on in the past, the original compensation provided was less than what the tribes' believed their lands were worth.

**Table 2: Compensation Authorized by Congress for Tribes on the Missouri River**

Current year dollars in millions

| Tribe | Acreage lost | Year original payment enacted | Original payment authorized | Year additional compensation enacted | Additional compensation authorized |
|---|---|---|---|---|---|
| Three Affiliated Tribes of the Fort Berthold Reservation | 152,360 | 1947 and 1949 | $12.6 | 1992 | $149.2 |
| Cheyenne River Sioux | 104,420 | 1954 | 10.6 | 2000 | 290.7 |
| Standing Rock Sioux | 55,994 | 1958 | 12.3 | 1992 | 90.6 |
| Lower Brule Sioux | 22,296 | 1958 and 1962 | 4.3 | 1997 | 39.3 |
| Crow Creek Sioux | 15,597 | 1958 and 1962 | 5.9 | 1996 | 27.5 |
| Yankton Sioux | 2,851 | 1952 and 1954 | 0.2 | 2002 | 23.0 |
| Santee Sioux | 593 | 1958 | 0.05 | 2002 | 4.8 |

Source: GAO analysis of the compensation acts.

Note: The dollar amounts in this table are generally from different years and they should not be added together or compared without first making adjustments for changes in the purchasing power of money over time.

During our prior reviews, we have recognized the problems with the original settlement negotiations, namely that the tribes may have been at a disadvantage during the negotiations and that they were not willing sellers of their land. We also recognized the inherit difficulties with trying to perform new economic analyses on the damages the tribes sustained 50 years after the fact. In our 1991 and 1998 reports, for the tribes at three reservations, we found the economic analyses used to justify their additional compensation claims to be unreliable, and we suggested that the Congress not rely on them as a basis for providing the tribes with additional compensation. Instead, we suggested that if Congress determined that additional compensation was warranted, it could determine the amount of compensation by calculating the difference

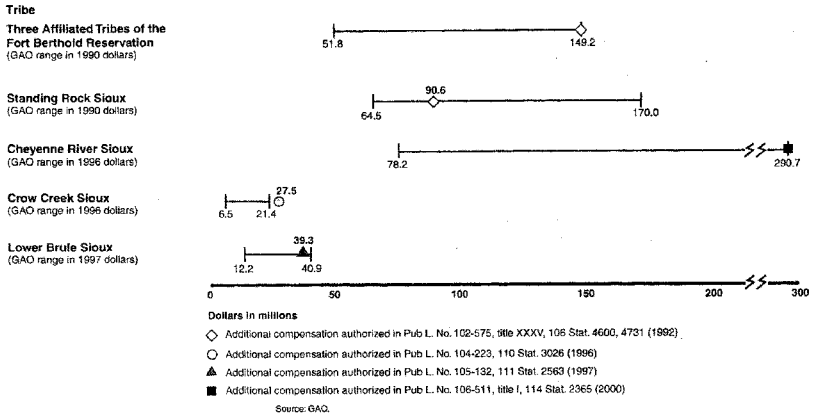
between the tribe's final settlement proposal (referred to in our 2006 report as the tribe's "final asking price") and the amount of compensation Congress originally authorized the tribes. We used the inflation rate and an interest rate to adjust the difference to reflect a range of current values, using the inflation rate for the lower end of the range and the interest rate for the higher end. Using this approach, we calculated how much additional compensation it would take today to make up for the difference between the tribes' final asking prices and the original compensation provided. The three largest additional compensation payments—Cheyenne River, $290.7 million in 2000; Fort Berthold, $149.2 million in 1992; and Standing Rock, $90.6 million in 1992—were all within the ranges we calculated.

The four smaller additional compensation payments were calculated using a different approach. We were not asked by Congress to review the additional compensation claims for the Crow Creek Sioux and Lower Brule Sioux tribes in the 1990s when they received their additional compensation. The Crow Creek Sioux and Lower Brule Sioux tribes did not base their additional compensation claims in the 1990s, on an economic analysis as the tribes did for the three other reservations that we reviewed. Rather, the Crow Creek Sioux and Lower Brule Sioux tribes' consultant asserted that since the tribes suffered the same type of damages as the Standing Rock Sioux tribe, they should be provided with additional compensation commensurate, on a per-acre basis, with the additional compensation provided to the Standing Rock Sioux tribe in 1992.[13] In our 2006 report, where we reviewed the additional compensation claims by the Crow Creek Sioux and Lower Brule Sioux tribes, we found that the additional compensation provided to the Crow Creek Sioux tribe in 1996 was slightly above the range we calculated and the additional compensation provided to the Lower Brule Sioux tribe in 1997 was within the range we calculated. The additional compensation dollar ranges we

[13]We proposed in our 1991 report that Congress consider a range of additional compensation of $64.5 million to $170 million for the Standing Rock Sioux tribe. In 1992, Congress authorized payment to the tribe of $90.6 million. According to the Crow Creek Sioux tribe's consultant, the additional compensation for the Crow Creek Sioux tribe was calculated by adding an adjustment factor to the Standing Rock per-acre amount of $1,618—to take into account that a greater percentage of the Crow Creek Sioux Reservation was taken—and then multiplying this figure ($1,763.16) by 15,597 acres. Using this formula, the Congress authorized an additional compensation payment to the Crow Creek Sioux tribe of $27.5 million in 1996. Similarly, using the same $1,763.16 per-acre figure (multiplied by 22,296 acres), the Congress authorized an additional compensation payment to the Lower Brule Sioux tribe of $39.3 million in 1997.

calculated for the tribes at five reservations covered in our three prior reports are summarized in figure 2. (The dollar amounts in figure 2 are generally from different years and they should not be added together or compared without first making adjustments for changes in the purchasing power of money over time.)

**Figure 2: GAO's Estimated Range of Additional Compensation Versus the Additional Compensation Authorized for Five Tribes Since 1992**




Source: GAO.

The additional compensation authorized in 2002 for the Yankton Sioux and Santee Sioux tribes was also partially based on a per-acre calculation. Congress followed a two-part calculation in authorizing additional compensation for the Yankton Sioux and Santee Sioux tribes. The first part involved taking the additional compensation provided to the Lower Brule Sioux Tribe in 1997, on a per-acre basis ($1,763), and multiplying that times the acreage the Yankton Sioux and Santee Sioux tribes lost (Yankton Sioux, $1,763 × 2,851.4 acres = $5.027 million; Santee Sioux, $1,763 × 593.1 acres = $1.046 million). The second part of the calculation involved multiplying the results of the first part by 4.58 to add an amount

for severance damages and rehabilitation (Yankton Sioux, $5.027 million × 4.58 = $23.02 million; Santee Sioux, $1.046 million × 4.58 = $4.79 million).[14] We have not performed any reviews of the additional compensation claims for the Yankton Sioux and Santee Sioux tribes.

Rehabilitation funds had been provided to tribes on four of the seven reservations as part of their original compensation in the 1950s and 1960s (see table 3). While rehabilitation was a significant component of the original compensation package for four tribes, we believe it should be considered separately from the comparison for damages because rehabilitation was not directly related to the damage caused by the dams. Funding for rehabilitation, which gained support in the late-1940s, was meant to improve the tribes' social and economic development and prepare some of the tribes for the termination of federal supervision.[15] From the late-1940s through the early-1960s, Congress considered several bills that would have provided individual tribes with rehabilitation funding. For example, between 1949 and 1950, the House passed seven bills for tribes totaling more than $47 million in authorizations for rehabilitation funding, and considered other bills, one of which would have provided $50 million to several Sioux tribes, including Crow Creek and Lower Brule. Owing to opposition from tribal groups, the termination policy began to lose support with Congress in the late 1950s, and rehabilitation funding for individual tribes during this time was most often authorized by Congress in association with compensation bills for dam projects on the Missouri River. However, the granting of rehabilitation funding for these tribes was inconsistent. Some tribes did not receive rehabilitation funding along with compensation for damages, while others did.

[14]See S. Rep. No. 107–214 at 4 (2002). The $23.0 million and $4.8 million in additional compensation authorized in 2002 for the Yankton Sioux and Santee Sioux tribes, respectively, is significantly less than the $34.3 million and $8.1 million originally proposed as additional compensation for these two tribes in 1999. See H.R. 2671, 106th Cong. (1999); and S. 1148, 106th Cong. (1999). For an explanation of how these higher dollar amounts were calculated see S. Rep. No. 106–367 at 7–8 (2000).

[15]The policy of termination, which was initiated in the 1940s and ended in the early 1960s, was aimed at ending the U.S. government's special relationship with Indian tribes, with an ultimate goal of subjecting Indians to state and federal laws on exactly the same terms as other citizens.

**Table 3: Rehabilitation Payments Authorized by Congress for Tribes on the Missouri River**

Current year dollars in millions

| Tribe | Year original payment enacted | Original payment authorized | Rehabilitation payment authorized | Percentage |
|---|---|---|---|---|
| Three Affiliated Tribes of the Fort Berthold Reservation | 1947 and 1949 | $12.6 | $0 | 0% |
| Cheyenne River Sioux | 1954 | 10.6 | 5.2[a] | 49 |
| Standing Rock Sioux | 1958 | 12.3 | 7.0[a] | 57 |
| Lower Brule Sioux | 1958 and 1962 | 4.3 | 1.9 | 45 |
| Crow Creek Sioux | 1958 and 1962 | 5.9 | 3.8 | 64 |
| Yankton Sioux | 1952 and 1954 | 0.2 | 0 | 0 |
| Santee Sioux | 1958 | 0.05 | 0 | 0 |

Source: GAO analysis of the compensation acts.

[a]These amounts include relocation and reestablishment funds authorized for the tribes. For example, the Cheyenne River Sioux tribe was authorized $416,626 for relocating and reestablishing tribal members living in the area that was flooded.

In closing, I would caution against looking solely at the acreage lost and the authorized compensation amounts to try and determine if the tribes were treated consistently. Such comparisons have led to perceived inequities between the tribes. For example, questions could be asked such as, Why was the original compensation for the Standing Rock Sioux tribe almost as much at the original compensation for the Three Affiliated Tribes of the Fort Berthold Reservation when the Fort Berthold reservation lost three times as much land? or Why was the additional compensation provided to the Yankton Sioux tribe almost as much as the additional compensation provided to the Crow Creek Sioux tribe when the Crow Creek reservation lost more than five times as much land? The type of land lost, the resources on the land, the structures on the land, the settlement negotiations, the compensation bills, and the dates when compensation was provided, has varied by tribe. Looking at just the total compensation amounts masks the underlying differences in each of the compensation bills.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

Contact and Acknowledgments

For further information, please contact Robin M. Nazzaro on (202) 512-3841 or nazzaror@gao.gov. Individuals making key contributions to this testimony and our 2006 additional compensation report are Greg Carroll, Tim Guinane, Susanna Kuebler, Jeffery D. Malcolm, and Carol Herrnstadt Shulman.

Senator TESTER. Thank you, Robin. I appreciate your testimony. I do have a few questions here.

You provide some more background information as it relates to the original compensation amounts to the tribes and how they were developed. The original compensation was from the 1950s and the 1960s, and your testimony stated that the original compensation to the tribes was based on detailed assessment by the U.S. Government and the tribes of the damages caused by the dams and, in some cases, protracted settlement negotiations. Could you describe some of the factors and information that was utilized to determine the level of damage caused to the tribes during those original settlement negotiations?

Ms. NAZZARO. Yes. The Corps of Engineers did an initial assessment of the direct damages of the flooding. The Department of Interior then did an assessment of indirect damages. These included pretty extensive inventories of not only the lands, but the resources on those lands. For example, how many trees were on the lands; what kind of trees; livestock, if you will.

I have seen records of actually counting how many chickens were there; what kind of agricultural pursuits had been in the area; what kind of resources would be available, even into the future. Say they decided to pursue logging with the trees that were on the lands.

There was some attempt made to try to determine not only the value of the resources then, but also how these resources could have been used in the future.

Senator TESTER. Did the indirect damages include things like you are talking about, like spiritual ties and those kind of things?

Ms. NAZZARO. That was indirect costs, correct? Or damages, yes.

Senator TESTER. I am assuming, other than trees and livestock and homes and churches and hospitals, that also the value of the land was also included as a baseline.

Ms. NAZZARO. That was the Corps of Engineers' assessment. Yes, the Corps of Engineers did the direct assessment of damages.

Senator TESTER. Who did the indirect?

Ms. NAZZARO. The Corps of Engineers.

Senator TESTER. Did both indirect and direct?

Ms. NAZZARO. No, indirect came from the Department of Interior. Yes.

Senator TESTER. Can I ask why? Why was it done that way? Do you know why the Army Corps just didn't do them both?

Ms. NAZZARO. I wouldn't think that they would have that expertise to be able to assess the indirect damages.

If I could bring my expert on this whole issue, who knows the history of the tribes very well, Jeff Malcolm?

Senator TESTER. I certainly don't have a problem with that.

Jeff?

Mr. MALCOLM. Jeff Malcolm. I am an Assistant Director with GAO's Natural Resources and Environment team.

The Corps of Engineers felt that in the original legislation that authorized compensation for the dams, that they were only authorized to pay for the direct damages directly caused by the dams. They didn't believe they were authorized to pay for other intangibles or indirect damages.

Senator TESTER. I got you. Okay.

GAO has taken a position that it would be difficult to perform new economic analysis on the damage to the tribes sustained 50 or 60 years ago. Instead, GAO recommended that Congress look to a tribe's final asking price during the original negotiations and use that to determine whether a tribe should be entitled to additional compensation.

Can you further describe why we can't just use the information we have to perform a new economic analysis on the damages faced by the tribes when their lands were originally taken? Does that make sense to you?

Ms. NAZZARO. Well, I think a big part is the time that has lapsed. A lot of these people are no longer alive. The lands are no longer there to visually inspect them, so you are still relying on historical records, which may or may not be accurate. So it would be very difficult. That gets to our point about the difficulty 50 years after the fact to go in and make an assessment.

Senator TESTER. Okay. If the GAO was asked, would they be able to develop methodologies for calculating damages based on factors other than tribes' final asking price?

Ms. NAZZARO. I think we would want to stand behind the methodology we used before. We really felt that the tribes' final asking price was the most complete and realistic estimate at the time, and that is why we used that estimate. I know there have been questions raised as to why we used that price.

Senator TESTER. Yes.

Ms. NAZZARO. But as over time, as the negotiations went on, data became more enriched, if you will, and so we feel that it is better data to use the more recent, or the final asking price, rather than to go back to any other ones. As you reach through a negotiation, you both start at kind of opposite ends.

Senator TESTER. And work toward the middle.

Ms. NAZZARO. Doing the worst case, you know, how much are you going to pay, and I think you come closer together. So we felt that final asking price was probably the best number to use.

Senator TESTER. Okay. The GAO has recognized that there were problems with the original settlement negotiations, namely that the tribes may have been at a disadvantage during the negotiations with the Federal Government. What are some of the reasons why the tribes may have been at a disadvantage during these negotiations?

Ms. NAZZARO. Well, in one case that I am particularly familiar with is the fact the Government was actually constructing the dams at this time. We have heard that they felt pressured, that this was kind of a one shot deal, either come to the table and put forth your estimate, or you may not have an opportunity again.

Jeff might have another perspective.

Senator TESTER. But did this happen in most of the cases, that the dams were being built and negotiations were going on after the dam had been in progress?

Mr. MALCOLM. I would say in most of the cases that is what happened. Again, there were varying degrees of how long the construction had been ongoing while the negotiations were ongoing. But yes, in some cases the dams had been closed and the water had started rising. Certainly, as we refer to in our statement, there were protracted negotiations. So the negotiations spanned over many years. During that time, some people were being relocated without really having compensation.

Senator TESTER. So what you are saying is the dams weren't just starting construction. They were done with construction.

Mr. MALCOLM. Done is a relative term as you look at the dams. Basically, they report the time the dams were closed, which is when they actually walled off the water for the last time. After the dams were closed, the construction was continuing to go on for a number of years after that. They continued to fill in the dams and do various parts of the construction.

Senator TESTER. Okay. In your testimony, Robin, you stated that four of the seven tribes received rehabilitation funds as a part of their original settlements, but that GAO believes that rehabilitation should be considered separately from any comparison for damages because rehabilitation was not directly related to the damage caused by the dams.

Can you address what rehabilitation funds were meant to address originally?

Ms. NAZZARO. Rehabilitation was not a factor in the Fort Berthold situation. It didn't happen until later, more in the 1958 time frame, when they were negotiating with Standing Rock that the whole concept of rehabilitation came back in.

The idea here was to improve the economic and social status of the tribes. It had a lot to do with just the history of the tribes and how the Federal Government interacted with the tribes. This was really a preparation for termination of Federal supervision of the tribes, and was in the form of business loans, education loans, things like that to actually improve the overall welfare of the tribes at the time. It wasn't really linked to the flooding of the Missouri River.

Senator TESTER. Okay. All right. Okay. Thank you.

We have been joined by Senator Murkowski and Senator Thune. We welcome them to the Committee. If you folks have any opening statements, we could certainly take them at this point in time.

## STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman.

I don't have much of an opening statement. I just do want to acknowledge, recognizing the history of the Pick-Sloan program and the impact of the very sudden relocation of entire Native communities. We recognize how complex, how far-reaching this really is.

The Pick-Sloan program also illustrates that if the community relocation is unavoidable that the true costs of relocation should be

very carefully evaluated in advance of the relocation, and that the process of the relocation should be very carefully planned.

We have some situations in Alaska, perhaps not much unlike what we have seen here. We have several communities, in fact a whole handful of communities, that are looking to relocate as a consequence of what we are seeing with rising sea levels due to climate change, erosion on the coast. We are looking at their capacity to adequately cover the losses that are sustained by relocating these tribal communities.

So I am pleased that we are able to have this hearing this morning to look specifically to the Pick-Sloan, but also about how we can perhaps better anticipate as we move forward in matters such as this.

Thank you, Mr. Chairman.

Senator TESTER. Senator Thune, did you have any opening statement?

**STATEMENT OF HON. JOHN THUNE,**
**U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman.

I just want to tell you I appreciate very much, since I am not on the Committee, the opportunity to be able to be here today along with my colleague, Senator Johnson from South Dakota, be able to welcome the Chairmen and Presidents of our tribes in South Dakota, to look at the impacts of Pick-Sloan. There are lots of positive things that have happened in our State, and yours as well, Mr. Chairman, as a result of Pick-Sloan, but there are also a lot of consequences and impacts that have perhaps not been as positive with regard to the lands adjacent to and the impacts they have had on the tribes.

So we are going to hear from some of those tribal leaders today and I am very glad to be able to welcome them here, and look forward to the insights and the testimony they will be able to provide about how this project has affected their specific reservations and what fair compensation could do to improve them.

So I want to thank you again for holding the hearing, for inviting me, and I look forward to working with my colleagues on both sides of the aisle to address and bring some resolution to these issues, which are very long-standing and in need of some closure.

So thank you, Mr. Chairman.

Senator TESTER. Thank you, Senator Thune.

Senator Johnson, did you have any questions for the witness?

Senator JOHNSON. Yes.

I understand the GAO numbers are all based on final asking price. While that may be a good benchmark when parties to negotiations are on equal footing, I believe that they can not be strictly applied to every historical injustice. Did the GAO's analysis examine the conditions under which the parties arrived at their final asking price?

Mr. MALCOLM. We looked at the historical record. Again, just to say for the record, certainly we worked closely with our economists at GAO. The final asking price issue is not something that is written in stone. We did look for any information to indicate why that would have been, or if that would have been an unreasonable num-

ber to use. So we looked at all of the tribal offers that were made over a period of years to try to determine if the final asking price was inconsistent with or totally out of line with other offers that had been made over time.

What we determined based on that analysis was that it was a reasonable offer. It was consistent with generally the other offers that had been made over time. One of our issues that we had was again looking at the offers that were made as a proposal. The proposal had many different components. As you know, in a negotiation, you might be willing to give up something in category A if you get more in category B.

So there are tradeoffs and decisions that are made between those, so we think it is kind of important to consistently use one offer, as opposed to taking components out of various offers that were made over different years. So that was also one of the issues we raised in our report.

Ms. NAZZARO. And those proposals didn't always decrease over time. In fact, actually in one case it was actually the highest proposal that the tribes came back with, and that was the one that was used in our economic analysis.

Senator JOHNSON. It seems the tribes must of been at a disadvantage in the original negotiations. Are they not also at a disadvantage in this GAO formula?

Mr. MALCOLM. The basis of the formula, again, is simply recognizing the difficulties with redoing a completely new economic analysis. As Robin mentioned, you don't have the people to interview today in every case to really determine how they valued items 50 years ago. I mean, something might be much more valuable to someone today than it was to a different person 50 years ago when they were actually there. So not having those people to do that type of analysis is difficult.

So basically, our approach was simply to say, make the assumption that you gave essentially 100 percent of what they asked for at the time. So 50 years ago, they were willing to settle for X amount, and we saw that as their final asking price. So our assumption is, let's say if they had come to the table as they did 50 years ago, put a proposal across the table, and said, we are willing to accept $12 million for this land. The Government would have said, we will take that offer; let's sign this on the dotted line.

That didn't happen. The Government and the tribe did not reach an agreement. They were at a stalemate. So what we are saying is, okay, let's say you had accepted that offer that they made 50 years ago. So we calculated how much did they ask for then; what did Congress actually provide. So we are basically looking at trying to make them whole, if you will, in accepting the final offer that was issued at the time.

Senator JOHNSON. Are you saying the agreements were at the end subjective in nature?

Mr. MALCOLM. Excuse me?

Ms. NAZZARO. If he is asking that the final offers were subjective, the final negotiations, there never was an agreement between the Government and the tribes. Congress ultimately made the decision on that original compensation and it was less than the tribes wanted. So that is why we went back and said let's look at the dif-

ference, then, between what the tribes wanted and what Congress gave them, and use that as the basis, that difference.

And then we applied an interest rate and a bond rate to give you a range of what we thought would have been fair had we stuck with what the tribes actually were asking for back then. It did seem like it was more arbitrary as to what Congress decided to give them than what the tribes, because that was based on their personal knowledge. So we felt it was fairer to go back to what the tribes actually were asking for.

Senator JOHNSON. No further questions.

Senator TESTER. Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman.

I just have one question. In your testimony, you had mentioned that in addition to the direct damages, that Congress had also recognized that the tribes had suffered damages due to social and cultural losses. The question for you this morning is whether or not those social costs have been contemplated in GAO's calculation of additional compensation for the seven Indian tribes? If so, how do you calculate for that? How do you provide for that accounting?

Ms. NAZZARO. It was factored in the final asking price. The tribes had included all those various components: direct costs, indirect costs, and in some cases rehabilitation costs. The only one that did not include rehabilitation was for the Affiliated Tribes associated with the Fort Berthold Reservation.

Senator MURKOWSKI. So you are saying that the tribes had proposed that number as compensation?

Ms. NAZZARO. That was part of the component of the discussions. That is where Jeff was mentioning that there was a tradeoff, that sometimes they would say, well, we will take more for the direct, and then we will cut back on the indirect, that there was a balancing. But all those components were on the table at the time of the original negotiations for compensation. So that was a part of that number that, if you will, the tribes proposed at the end.

Senator MURKOWSKI. As you are looking to additional compensation, are the culture and the social costs still factored in, or have you basically concluded that that was done once and so there is no more?

Mr. MALCOLM. It still is factored in, Senator Murkowski. Again, as Robin described, we looked at all the different components of how much the tribe itself had asked for those indirect damages at the time. We looked at again the compensation bill that Congress enacted, and again in every case they got less than what they had requested. So we did have a factor for the indirect damages that we then brought forward to current values to see how the amount that they were not paid, how much would that be worth today, i.e. how much would it take to make them whole based on what they asked for 50 years ago.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Senator TESTER. Senator Thune?

Okay. I want to thank you very much for your testimony and your answering of the questions. Thank you very much.

Mr. MALCOLM. Thank you.

Ms. NAZZARO. Thank you.

Senator TESTER. Our next panel consists of the Honorable Ron His Horse Is Thunder, Chairman of the Standing Rock Sioux Tribe from Fort Yates, North Dakota; the Honorable Michael B. Jandreau—and excuse me if I have pronounced it wrong—Chairman of the Lower Brule Sioux Tribe of Lower Brule, South Dakota; the Honorable Marcus Wells, Jr., Chairman of the Three Affiliated Tribes of Mandan, Hidatsa, and Arikara Nation, New Town, North Dakota; the Honorable Roger Trudell, Chairman of the Santee Sioux Nation in Nebraska; the Honorable Robert Cournoyer, Chairman, Yankton Sioux Tribe in South Dakota; and the Honorable John Yellow Bird Steele, President of the Oglala Sioux Tribe in South Dakota.

We will start out with Ron His Horse Is Thunder. You can start with your testimony and we will go down the list. Thank you for being here.

We will keep the testimony. If you can make it as concise, keep it to five minutes, it would be very much appreciated.

We are joined by the other good Senator from North Dakota, Senator Conrad. Do you have any statement before we get started with this panel? We are just starting now.

## STATEMENT OF HON. KENT CONRAD, U.S. SENATOR FROM NORTH DAKOTA

Senator CONRAD. If I could just for a moment, Mr. Chairman, especially welcome Ron His Horse Is Thunder, a very dear friend and somebody who has a real vision and a commitment to improving the future of his people. I am delighted that he is here.

I welcome all the witnesses, Marcus Wells as well. I didn't notice that you were here as well. Good to have you here. Marcus is a relatively new tribal Chairman, but somebody who has jumped in with both feet to try to improve the future of his people as well.

So we are delighted to have these two distinguished witnesses from North Dakota and all the witnesses on this panel.

Thank you, Mr. Chairman.

Senator TESTER. Thank you, Senator.

We will try to keep the comments to five minutes. I appreciate it very much if you would. There are six of you here and we do have limited time today by the time we get through the questions.

So Ron, you go ahead and fire away.

## STATEMENT OF RON HIS HORSE IS THUNDER, CHAIRMAN, STANDING ROCK SIOUX TRIBE

Mr. HIS HORSE IS THUNDER. Mr. Chairman, honorable members of the Committee, thank you for allowing me the opportunity to speak today. I have written remarks, but I am not going to read them off to you. I will condense them down into some oral testimony here.

I particularly find interesting the GAO's method of accounting for losses that tribes incurred more than 50 years ago. Of course, we all, and the street term, if you will, for accountants is bean counters. It is really interesting as they start talking about how they appraised our land originally, et cetera, and the difference between their appraisal and the tribe's appraisal, and basically call

it an asking price, what we originally asked for. I don't know if our tribe ever came up with an original asking price. Maybe they did.

They seemed to say that there is a difference between what was given us by Congress then and the asking price. So I would be interested in knowing what our asking price originally was and what was the difference in terms of percentages that was the original asking price and what was in fact given us.

Standing Rock did lose about 56,000 acres of land and we were originally given about $12 million in compensation for that loss. Now, I have talked to a number of the elders who were alive back then, and I have seen some of the records of the price that they were given for their land. Every time you talk to them, it brings up much sadness in their hearts.

They were given about $31 an acre for their land back then, is what they were given. There was no negotiation with them. It was just, you take this, and that is it. I find it real interesting that they didn't understand that there was in fact a negotiation process. They didn't understand the fact that they could have appealed it, that they could have gotten a lawyer and appealed the process, and maybe even gotten more compensation.

They didn't understand that. Most of them didn't speak English very well. The Bureau of Indian Affairs was giving them an appraisal notice saying $31 an acre and this is how many acres you are going to lose, and this is how much we are going to give you for it. And even though many of them said no, they refused to sign, they were still forced to take $31 per acre, again not understanding that they had a right to get an attorney and to challenge it.

Now, non-Indians, many of them, did challenge it and got up towards $60 an acre, more than almost twice the value of what Indian land was paid at. So there is a huge discrepancy in the amount that Indians got for land and non-Indians got for their land, it being the exact same land.

Standing Rock in its 55,000 acres that was lost, although we didn't lose the most amount of acres. I think that Fort Berthold lost more acres than we did. Standing Rock did lose the most timbered land. Out of all the tribes, we lost more timber acreage than any of them.

As GAO says, you can't really use one appraisal rate and apply it to another tribe because the types of land lost were different. But the timberland was highly valuable to us in that it is where most of our game resided. It is where we acquired most of our food from.

I purposely used the word bean counter when I started this because when we start talking about food, that is something that wasn't truly accounted for. There is a little field mouse, if you will, that lives among the trees, and it collects beans. It will run from tree to tree or plant to plant and collect little beans, and store them for the wintertime. They dry. They create huge mounds of the stuff.

We used to use that as food. We would go find these little mounds, these huge mounds, if you will, where these beans were stored and we would trade with those little field mice. We would leave corn or we would leave tobacco, and we would take half of their beans that they stored for the winter, and that was part of our food supply. That is something the GAO, those bean counters

will never understand in terms of beans. They never will. That was our food supply, and of course the grapes and the berries and everything else that is associated with the forest. That will never be accounted for, and can't be accounted for.

Now, they talk about the difference in asking price. Again, I don't think our tribe ever really had an official asking price, but maybe it did. We did receive additional compensation at the Standing Rock Sioux Tribe. We got in the 1990s an additional $90.5 million. But we asked actually for more. We didn't receive that higher amount, and when they start talking about negotiations, the negotiations change from tribe to tribe. If you came in later after Standing Rock and Three Affiliated came in, we were the first, if you came in after that, the way of appraising your land and what you lost changed, and actually got more. I mean, the evaluation go more.

So if you were to give us what the tribes got after we came in, the negotiation process gets better and better. We in fact believe that our true loss in 2004 dollars was $611 million. We have a study that we would like to leave that accounts for that difference. So truly what Standing Rock believes it lost, even if you take out the $90.6 million that was paid to us in the 1990s, is truly an additional loss of $611 million that we believe is there.

Also, there is surplus land that the Corps of Engineers when it took, it took a long square boundary line along the river. There is what is deemed excess Corps land. We know on our reservation there are 19,000 acres that is Corps land that could be given back to the tribe. We have asked for it. They have given us back only 365 acres thus far and we would like to see all that 19,000 acres returned to us.

I can't actually see the clock, sir.

Senator TESTER. Actually, the clock hasn't been running for a while, but you are about out of time. So wrap it up, please.

Mr. HIS HORSE IS THUNDER. So in the end, I really feel for our tribal members, and there are still some alive today who were the original landowners who only got paid $30 an acre and were forced to move from the best land we had up to the top on the prairies. Originally, there was, and I have heard it said by the GAO, some replacement lands that were available, rehab lands they refer to them as, available to these landowners who originally lost land.

Well, those rehab lands, those rehab dollars, we call them section five dollars on our reservation. Section five dollars, of all the people who lost land on the river bottom, only one person ever got section five land ever. Section five land was administered by the Bureau of Indian Affairs, and you want to know who got section five land? Bureau of Indian Affairs employees who did not lose land on our reservation, and did get replacement land even though they didn't lose any land. Only one person who ever lost land on the river bottoms, one person, ever got replacement lands.

Thank you.

[The prepared statement of Mr. His Horse Is Thunder follows:]

IMPACT OF FLOOD CONTROL ACT OF 1944 ON INDIAN TRIBES
ALONG THE MISSOURI RIVER

TESTIMONY OF THE STANDING ROCK SIOUX TRIBE
RON HIS HORSE IS THUNDER, CHAIRMAN

November 1, 2007

The Standing Rock Sioux Tribe welcomes the opportunity to present testimony at this most important hearing of the Senate Indian Affairs Committee on the impact of the 1944 Flood Control Act on Indian tribes along the Missouri River. The act and the Pick Sloan Missouri River Basin Project (Project) were intended to provide employment for soldiers returning from World War II and to develop the economy of the Northern Great Plains and downstream navigation states. Irrigation and hydropower development would be the hallmarks of the Project in the states of Montana, North Dakota and South Dakota, and the 9 foot navigation channel would be the hallmark of the Project in Nebraska, Iowa, Missouri and Kansas. Irrigation projects, tributary storage and the use of hydropower for irrigation pumping were identified purposes of the Project on the Indian reservations.

The plans for development on the Indian reservations were largely unfulfilled, although the Congress is commended for the 1986 Garrison Diversion Unit Reformulation Act and the 2000 Dakota Water Resources Act provisions that provided for 2,380 acres of irrigation on Standing Rock Indian Reservation (now under development) and the ongoing development of water supply for municipal, rural and industrial purposes across the reservation.

The principal impact of the Project was the devastating inundation of our ancestral lands along the Missouri River with the creation of Lake Oahe, the largest of the mainstem Missouri River reservoirs. The Corps of Engineers took 56,000 acres of land on the Standing Rock Indian Reservation for project purposes and continues to maintain 19,000 acres of lands surplus to project needs. The Equitable Compensation Act, resulting from recommendations of the Joint Tribal Advisory Committee established by the Garrison Diversion Unit Reformulation Act, partially offset the damages of taking the Tribe's lands. A $90.6 million fund was established that assists the Tribe through the generation of annual returns that may be invested in the economic development of the Tribe. The compensation was less than the value of the land to the United States for hydropower purposes, which was determined based on 1990 conditions as follows:

COMPUTATIONS OF VALUE OF TAKING AREAS BASED ON HYDRPOWER

| Indian Reservation Downstream Order | Reservoir | Acres Taken | Maximum Operating Pool Acres | Percent Taking | 50% Net Power Value | 1990 Annual Megawatt Hours x 1,000 | Net Electrical Power Benefit (mills/kwh) | Net Annual Value | 4% Discount Net Present Value |
|---|---|---|---|---|---|---|---|---|---|
| Fort Berthold | Garrison | 154,912 | 380,000 | 40.8% | 20.4% | 2,318.3 | 32.44 | 15,328,342 | $ 383,208,543 |
| Standing Rock | Oahe | 55,994 | 374,000 | 13.2% | 6.6% | 2,647.5 | 32.44 | 5,648,931 | 141,223,266 |
| Cheyenne River | Oahe | 99,548 | 374,000 | 26.6% | 13.3% | 2,647.5 | 32.44 | 11,429,335 | 285,733,386 |
| Lower Brule | Big Bend | 14,958 | 61,000 | 24.5% | 12.3% | 995.5 | 32.44 | 3,959,215 | 98,980,363 |
| Lower Brule | Fort Randall | 7,997 | 102,000 | 7.8% | 3.9% | 1,701.6 | 32.44 | 2,163,757 | 54,093,924 |
| Crow Creek | Big Bend | 6,416 | 61,000 | 10.5% | 5.3% | 995.5 | 32.44 | 1,698,243 | 42,456,077 |
| Crow Creek | Fort Randall | 9,149 | 102,000 | 9.0% | 4.5% | 1,701.6 | 32.44 | 2,475,455 | 61,886,371 |
| Santee | Gavins Point | 593 | 31,000 | 1.9% | 1.0% | 686.9 | 32.44 | 213,113 | 5,327,833 |
| | | 349,567 | 1,485,000 | 23.5% | | | | $ 42,916,391 | $ 1,072,909,763 |

The formula was based on principles established by the former Federal Power Commission for determining the value of tribal lands used by private utilities for hydropower purposes.

The foregoing provides a brief historical perspective. Our current problem is the considerable damage to our drinking water and irrigation intakes on the Standing Rock Indian Reservation by the operation of Lake Oahe by the Corps of Engineers primarily for downstream navigation. The Review and Update of the Master Manual, completed by the Corps of Engineers a few short years ago is obsolete and based on a false hydrology that does not recognize the impacts of climate change and the absence of significant economic value from the release of vast quantities of water for navigation in the lower Missouri River.

The Standing Rock Sioux Tribe has taken the initiative to find a remedy for the inequities of the current operating procedures. We have joined with the states of North Dakota, South Dakota and Montana to develop legislation that will better balance the economies of the upper and lower basins. One of the guiding principles in our work with the upper basin states is recognition that, while irrigation was the predominant national thrust in 1944, the national need at present is alternative, renewable energy. Pick Sloan should be re-oriented toward the contemporary national need. We are also seeking sensibility in the operation of the Missouri River reservoirs with climate change. The Standing Rock Sioux Tribe feels that navigation in the lower Missouri River is uneconomic and that the Missouri River reservoirs have the potential to enhance navigation flows of the Mississippi River over short time frames on the order of weeks rather than months. New planning is needed to accommodate climate change and to define the best use of more limited releases for navigation.

An adverse impact of the 1944 Flood Control Act that goes unnoticed is the failure of the United States, whether the Secretary of the Interior or the Secretary of the Army, to plan for, preserve and protect our valuable rights to the use of water in the Missouri River.

The Corps of Engineers makes the following statement describing how the Corps fails to recognize or consider Indian water rights in its Master Water Control Manual for the future operation of the Missouri River, thereby committing Missouri River water to operational priorities and creating an insurmountable burden for the future exercise of the rights to the use of water by the Standing Rock Sioux Tribe as reserved from time immemorial:

> *The Missouri River basin Indian tribes are currently in various stages of quantifying their potential future uses of Mainstem System water. It is recognized that these Indian tribes may be entitled to certain reserve or aboriginal Indian water rights in streams running through and along reservations. Currently, such reserved or aboriginal rights of tribal reservations have not been quantified in an appropriate legal forum or by compact with three exceptions.... The Study considered only existing consumptive uses and depletions; therefore, no potential tribal water rights were considered. Future modifications to system operation, in accordance with pertinent legal requirements, will be considered as tribal water rights are quantified in accordance with applicable law and actually put to use. Thus, while existing depletions are being considered, the Study process does not prejudice any reserved or aboriginal Indian water rights of the Missouri River basin Tribes.* (PDEIS 3-64)

The Secretary of Interior's former Working Group on the Endangered Species Act and Indian Water Rights, published recommendations for consideration of Indian water rights in Section 7 Consultation, in national guidance for undertakings such as the Master Manual, as follows, but this guidance has not been followed:

> *The environmental baseline used in ESA Section 7 consultations on agency actions affecting riparian ecosystems should include for those consultations the full quantum of: (a) adjudicated (decreed) Indian water rights; (b) Indian water rights settlement act; and (c) Indian water rights otherwise partially or fully quantified by an act of Congress... Biological opinions on proposed or*

*existing water projects that may affect the future exercise of senior water rights, including unadjudicated Indian water rights, should include a statement that project proponents assume the risk that the future development of senior water rights may result in a physical or legal shortage of water. Such shortage may be due to the operation of the priority system or the ESA. This statement should also clarify that the FWS can request reinitiation of consultation on junior water projects when an agency requests consultation on federal actions that may affect senior Indian water rights.*

The Standing Rock Sioux Tribe claims rights to irrigate not less than 303,650 arable acres with an annual diversion duty of 4 acre feet per acre, to supply municipalities, commercial and industrial purposes and rural homes with water for not less than 30,000 future persons having an annual water requirement of 10,000 acre feet annually and to supply 50,000 head of livestock of every kind on the ranges having an annual water requirement of 1,500 acre feet annually, all subject to change. This is a considerable reserved water right that is weakened by the failure of the agencies of the United States to acknowledge any water right. This failure forces future courts to undo investments, undertakings, mortgages and economies that build on the basis of the Master Manual conclusions as the Tribe develops its water rights, which becomes highly prejudicial to the Tribe.

The Standing Rock Sioux Tribe initiated an effort in the 1985 marketing plan of the Western Area Power Administration (Western) to obtain an allocation of Pick Sloan hydropower, but we were denied on the basis that the Tribe was not a utility. When the 2000 marketing plan was announced by Western, we requested a congressional hearing chaired by Congressman George Miller, and direction was given to Western to allocate Missouri River hydropower to the Tribes. The concept was subsequently extended to the Colorado River Basin. The Tribes were enthusiastic that low cost federal hydropower would be available. Power has now been allocated from Western, and the Tribes receive a "credit" to reflect the difference between energy costs from the Basin Electric and Western. The problem is that the credit has been systematically diminished by Western rate increases that will total over 35% in 2008 relative to 2005 rates. The concept of the credit needs reevaluation.

The balance of our remarks are dedicated to the effort of the Standing Rock Sioux Tribe with the upper basin states. In addition to the description of that effort, draft legislation is attached that further defines the concepts of an Upper Missouri River Development Fund and changes in the operation of the Missouri River reservoirs. These concepts are preliminary and are being refined in cooperation with the states. The States and the Tribe have agreed to work together but have not agreed on the concepts to be advanced. Proposals to implement a Western rate increase are not supported by the Governors of the states or the Tribe but have been explored as an alternative funding mechanism.

1) Upper Missouri River Development Fund

The following relates to the establishment by Congress of a development fund in the upper Missouri River basin (upper basin tribes, North Dakota, South Dakota and Montana) to mitigate the impact of releases from mainstem Missouri River dams for downstream navigation and other purposes. The overriding context of the fund is the continuing damage to the Upper Basin of releases from the mainstem Missouri River reservoirs for downstream navigation. The fund is a logical *sequitur* in response to operation of the Missouri River by the Corps of Engineers with an obsolete Master Plan. Climate change with potentially reduced, long-term streamflows, not addressed in the Master Plan, and continue support for navigation releases with limited economic value argue for a development fund to mitigate damages and balance equities.

The U.S. Supreme Court did not accept the petition for *certiorari* from the upper basin states to resolve the relative priority of navigation and upper basin purposes of the Missouri River Basin Pick

Sloan Project, and the Corps of Engineers is operating the Missouri River mainstem reservoirs in the upper basin states for navigation in the downstream states with minimal economic value as a primary purpose. Other purposes important to the Upper Missouri Basin States and Tribes are secondary.

The development fund would assist in resolving inequities in the allocation of water between the upper and lower basins and is intended to further nonrenewable energy development in the northern Great Plains, consistent with national energy policy, and finance authorized (but underfunded) and future water projects.

In addition to the development fund, draft provisions call for a re-examination of the operation of the Missouri River mainstem reservoirs and the establishment of minimum storage levels that reflect current hydrology based on climate change. The operation of the reservoirs is based by the Corps of Engineers on the hydrology from 1898 through 1997, but climate change has made the historic streamflow records obsolete. The historic streamflow records are not a sound basis for decision-making on reservoir operations.

a) Pick Sloan provisions were intended to create equitable development of the Missouri River, balancing navigation with other appropriate and economic uses of water, which the development fund will help resolve

The 1944 Flood Control Act (58 stat 665) adopted Senate Report 247 and the Joint Engineering Report for the Missouri River. The report recommended the construction of the mainstream dams:

> "*... to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses... provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.... to facilitate the consideration of projects on the basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.*"

The development fund is intended to address, among other things, the impact in the upstream states of downstream navigation releases that adversely impact upstream states and Indian reservations.

b) Sources of Deposit to Upper Missouri Development Fund

The development fund would rely on two separate or complimentary contributions: (a) the Reclamation Fund established by the 1902 Reclamation Act and (b) revenues collected by the Western Area Power Administration (Western) from hydropower sales at the mainstem dams at a rate to be decided (say 2 mills per kilowatt hour).

(1) Reclamation Fund as Source of Deposit

The Reclamation Fund is described as follows:

> The Reclamation Fund was established by the Reclamation Act of 1902 (32 Stat. 388). It is a restricted, unavailable receipt fund into which a substantial portion of Reclamation's revenues (mostly repayment of capital investment costs, associated interest, and O&M reimbursements from water and power users) and receipts from other Federal agencies (primarily revenues from certain Federal mineral royalties and hydropower transmission) are deposited. No expenditures are made directly from the Reclamation Fund; however, funds are transferred from the Reclamation Fund into Reclamation's appropriated expenditure funds or to other Federal agencies pursuant to congressional appropriation acts to invest and reinvest in the reclamation of arid lands in the Western United States.
> *(US Bureau of Reclamation Annual Report 2006)*

The amount in the Reclamation Fund is increasing according to the Bureau of Reclamation, and the balance at the end of FY 2007 is estimated at $7.2 billion: *(US Bureau of Reclamation, Slide Show, Sacramento, California, November 2006.*

The Reclamation Fund is the principle source of appropriations for water and related resource projects of the Bureau of Reclamation: *(US Bureau of Reclamation, Presentation by Bob Wolff, Sacramento, California, November 2006)*

> The Reclamation Fund was established by The Reclamation Act of 1902 (43 U.S.C. 391) and is derived from repayments and other revenues from water resource development; certain receipts from sales, leases, and rentals of Federal lands in the 17 Western States. Receipts deposited in the Reclamation Fund are made available by Congress through annual appropriation acts. Receipts and balances that are not appropriated remain in the Reclamation Fund as unappropriated receipts. Beginning in Fiscal Year 1984, the annual appropriation acts for Reclamation have provided, "That of the total appropriated, the amount of program activities which can be financed by the Reclamation Fund shall be derived from that fund."

Projects receiving appropriations from the General Fund, rather than the Reclamation Fund, in the Water and Related Resources construction account include the Central Arizona Project, Animas La Plata Project, Colorado River Salinity Control Project, Columbia and Snake River Salmon Recovery and a portion of the Mni Wiconi Project. *(US Bureau of Reclamation, Slide Show, Sacramento, California, November 2006).*

The "Northwestern New Mexico Rural Water Projects Act" (S.1171, current Congress, current session) proposes that the Secretary of the Treasury shall deposit in a "Reclamation Water Settlements Fund" for the project amounts that would otherwise have been deposited in the Reclamation Fund at a rate of $100 million annually, if available. Amounts deposited by the Secretary of the Treasury in the "Settlements Fund" shall be available without further appropriation. This latter provision seems to avoid the issue of an increase in the Reclamation budget and competition with other projects for appropriations. Funds to be deposited in the Reclamation Fund are diverted and deposited in the Settlements Fund. and

16 (b) DEPOSITS TO FUND.—

17 (1) IN GENERAL.—For each of fiscal years
18 2018 through 2028, the Secretary of the Treasury
19 shall deposit in the Fund, if available, $100,000,000
20 of the revenues that would otherwise be deposited
21 for the fiscal year in the fund established by the
22 first section of the Act of June 17, 1902 (32 Stat.
23 388, chapter 1093). Rec1

1 (2) AVAILABILITY OF AMOUNTS.—Amounts de-
2 posited in the Fund under paragraph (1) shall be
3 made available pursuant to this section—
4 (A) without further appropriation; and
5 (B) in addition to amounts appropriated
6 pursuant to any authorization contained in any
7 other provision of law.

S. 1171, described above, clearly raises issues with regard to equity among the other 16 states outside New Mexico with regard to the magnitude of diversions from the Reclamation Fund. Nevertheless, New Mexico has taken necessarysteps for authorization of the project and use of the Reclamation Fund before the end of the current session of Congress. Both the House (HR 1970) version and Senate version of the bill have been introduced and the Energy and Natural Resource Committee (Senate) and Water and Power Subcommittee (House) have held hearings.

The share of the Reclamation Fund created by the Pick Sloan Project (primarily hydropower revenues) could be determined and could become an equitable basis for the Reclamation Fund as a source of financing the Upper Missouri River Basin Fund. Clearly, recent significant deposits to the Reclamation Fund have been from offshore drilling, which apparently cannot be used by some states, except Texas and California. The deposits are generally available to the 17 Western states. After equity has been achieved, the New Mexico model seems to provide a mechanism for making funds available for deposit without appropriation and without competition for appropriations within the congressional budget ceiling for Reclamation.

(2) Power Marketing Administration (Western) Revenues as Source of Deposit

The Central Arizona Project serves as an example of a project built from a river basin development fund (Lower Colorado River Development Fund), which relied on a Western rate contribution of 4.5 mills per kilowatt hour from users in Arizona and 2.5 mills per kilowatt hour from users in California (see below).

(2) any Federal revenues from the Boulder Canyon and Parker-Davis projects which, after completion of repayment requirements of the said Boulder Canyon and Parker-Davis projects, are surplus, as determined by the Secretary, to the operation, maintenance, and replacement requirements of those projects: Provided, however, That for the Boulder Canyon project commencing June 1, 1987, and for the Parker-Davis project commencing June 1, 2005, and until the end of the repayment period for the Central Arizona project described in section 1521(a) of this title, the Secretary of Energy shall provide for surplus revenues by including the equivalent of 4 1/2 mills per kilowatthour in the rates charged to purchasers in Arizona for application to the purposes specified in subsection (f) of this section and by including the equivalent 2 1/2 mills per kilowatthour in the rates charged to purchasers in California and Nevada for application to the purposes of subsection (g) of this section as amended and supplemented: Provided further, That after the repayment period for said Central Arizona project, the equivalent of 2 1/2 mills per kilowatthour shall be included by the Secretary of Energy in the rates charged to purchasers in Arizona, California, and Nevada to provide revenues for application to the purposes of said subsection (g) of this section: Provided, however, That the Secretary is authorized and

*(25 USC 1543)*

The Western contributions to the fund were supplemented with Congressional appropriations. Several billion dollars from the two sources have been used in developing the Central Arizona Project since the fund was authorized in 1968. The fund in the Colorado River Basin will be exhausted by year 2050. About $250 million in the fund will generate interest over the next 30 years to finance up to $340 million in projects. Future expenditures will focus on water projects on Indian reservations in Arizona.

The Lower Colorado River Basin Fund receives funding from multiple sources for specific purposes as provided under P.L. 90-537 and amended by P.L. 108-451. Funding sources include appropriations, Federal revenues from the Central Arizona Project, Federal revenues from the Boulder Canyon and Parker-Davis Projects, the Western Area Power Administration, Federal revenues from the Northwest-Pacific Southwest intertie in the States of Nevada and Arizona, and revenues earned from investing in Treasury securities. Funding sources may be retained and are available without further appropriation. The fund provides for irrigation development and management activities within the Lower Colorado River Basin including operation, maintenance, replacements, and emergency expenditures for facilities of the Colorado River Storage Project and participating projects.

*(US Bureau of Reclamation Annual Report 2006, Note 16)*

The Upper Colorado River Basin Development fund is less specific with respect to amounts of rate increases, but the Secretary of Interior is authorized to adjust electrical rates of the Western Area Power Administration upward for the limited purposes of salinity control, fish and wildlife and on-farm measures as summarized below.

(c) Costs payable from Upper Colorado River Basin Fund
Costs of construction, operation, maintenance, and replacement of each unit or separable feature thereof authorized by section 1592(a) of this title, costs of construction, operation, and maintenance of measures to replace incidental fish and wildlife values foregone, and costs of implementation of the on-farm measures authorized by section 1592(c) of this title allocated for repayment by the upper basin under subsection (a)(2) of this section shall be paid in accordance with section 620d(d)(5) of this title from the Upper Colorado River Basin Fund within the limit of the funds made available under subsection (e) of this section.
(d) Omitted
(e) Upward adjustment of rates for electrical energy
The Secretary is authorized to make upward adjustments in rates

*(25 USC 1595)*

The Northwest Power Act also provides rate increases within the Bonneville Power Administration (BPA) for fish and wildlife (salmon recovery) efforts.

> Notwithstanding any other provision of this section, rates established by the Administrator, under this section shall recover costs for protection, mitigation and enhancement of fish and wildlife, whether under the Pacific Northwest Electric Power Planning and Conservation Act or any other Act, not to exceed such amounts the Administrator forecasts will be expended during the fiscal year 2002-2006 rate period, while preserving the Administrator's ability to establish appropriate reserves and maintain a high Treasury payment probability for the subsequent rate period.
>
> *(16 USC 839e)*

c) Impact of Western Rate Increase

Figure 1 and Table 1 present the history and proposed rates of the Western Area Power Administration for the Eastern Division of Pick Sloan. The projection for FY 2007 in 2003 was a rate of 17.86 mills per kilowatt hour compared with the actual rate for FY 2007 of 19.83 mills per kilowatt hour or 2 mills per kilowatt hour higher than projected four years earlier. The 2003 projection for FY 2008 was 18.38 mills per kilowatt hour, and the proposed rate for FY 2008 is 24.78 mills per kilowatt hour or 6.4 mills higher than projected five years earlier. The customer base is capable of absorbing the significant increases attributed to drought but likely due, in part, to continuing climate change.

**FIGURE 1**

**HISTORY OF WESTERN RATES**

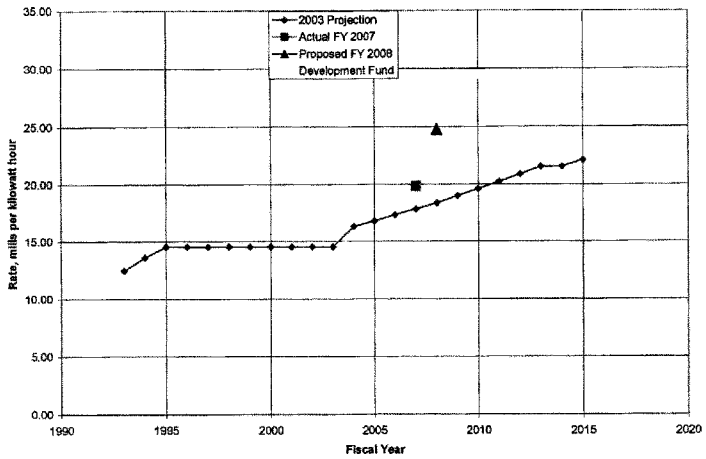



**TABLE 1**

HISTORIC, CURRENT AND PROPOSED RATES
WESTERN AREA POWER ADMINISTRATION
EASTERN DIVISION OF PICK SLOAN

| Fiscal Year | 2003 Projected Composite Rate | Current Composite Rate | Proposed Composite Rate | Development Fund Rate |
|---|---|---|---|---|
| 1993 | 12.47 | | | |
| 1994 | 13.62 | | | |
| 1995 | 14.54 | | | |
| 1996 | 14.54 | | | |
| 1997 | 14.54 | | | |
| 1998 | 14.54 | | | |
| 1999 | 14.54 | | | |
| 2000 | 14.54 | | | |
| 2001 | 14.54 | | | |
| 2002 | 14.54 | | | |
| 2003 | 14.54 | | | |
| 2004 | 16.53 | | | |
| 2005 | 16.80 | | | |
| 2006 | 17.33 | | | |
| 2007 | 17.86 | 19.83 | | |
| 2008 | 18.38 | | 24.78 | |
| 2009 | 19.00 | | | |
| 2010 | 19.60 | | | 29.50 |
| 2011 | 20.22 | | | |
| 2012 | 20.86 | | | |
| 2013 | 21.53 | | | |
| 2014 | 21.53 | | | |
| 2015 | 22.11 | | | |

Table 2 shows the recent and proposed Western rate increases and a rate increase of 4.72 mills per kilowatt hour ($0.00472 /kwh) necessary to generate deposits to a development fund with a present value of about $1 billion. Since 2003 Western has raised rates by 36% and proposes an

TABLE 2
INCREASES IN WESTERN POWER RATES
TO FINANCE DEVELOPMENT FUND

| Project | Western Increases 2003 | 2007 Current | 2008 Proposed | Proposed Development Fund |
|---|---|---|---|---|
| Rate, mills/kwh | $0.01454 | $0.01983 | $0.02478 | $0.02950 |
| Rate Increase, mills/kwh | -- | $0.00529 | $0.00495 | $0.00472 |
| % Increase | -- | 36.38% | 24.96% | 19.05% |
| Annual Revenue Increase | | | | |
| Western Rate | -- | -- | $53,200,000 | -- |
| Develoment Fund | -- | -- | -- | $50,648,000 |
| Present Value, 40 years, 4% | -- | -- | -- | $1,002,464,412 |
| Sources of Revenue | | | | |
| Montana | | | | |
| Canyon Ferry | $5,927,436 | $8,083,979 | $10,105,924 | $13,835,500 |
| Fort Peck | 15,696,962 | 21,407,893 | 26,762,382 | 36,639,000 |
| Yellowtail | 6,963,789 | 9,497,382 | 11,872,844 | 16,254,500 |
| Subtotal | $28,588,188 | $38,989,254 | $48,741,151 | 66,729,000 |
| North Dakota | | | | |
| Garrison | 33,416,078 | 45,573,647 | 56,972,415 | 77,998,000 |
| South Dakota | | | | |
| Oahe | 42,705,343 | 58,242,569 | 72,810,057 | 99,680,500 |
| Big Bend | 15,507,386 | 21,149,344 | 26,439,165 | 36,196,500 |
| Fort Randall | 25,238,997 | 34,421,548 | 43,030,981 | 58,911,500 |
| Gavins Point | 10,502,557 | 14,323,639 | 17,906,232 | 24,514,500 |
| Subtotal | $93,954,282 | $128,137,099 | $160,186,434 | $219,303,000 |
| Annual Eastern Division Revenue | $155,958,548 | $212,700,000 | $265,900,000 | $316,548,000 |
| Impact on Consumer Receiving Western Power | | | | |
| % From Western | 30.00% | 30.00% | 30.00% | 30.00% |
| Alternative Energy Cost | $0.04000 | $0.04000 | $0.04000 | $0.04000 |
| Composite Energy Cost | $0.03236 | $0.03395 | $0.03543 | $0.03685 |
| Transmission/Dist Cost, $/kwh | $0.04000 | $0.04000 | $0.04000 | $0.04000 |
| Monthly Power Rate, $/kwh | $0.07236 | $0.07395 | $0.07543 | $0.07685 |
| Percent Consumer Increase | -- | 2.19% | 2.01% | 1.88% |
| Average Monthly Residential kwh | 1,000 | 1,000 | 1,000 | 1,000 |
| Average Monthly | | | | |
| Total | 72.36 | 73.95 | 75.43 | 76.85 |
| Increase | -- | 1.59 | 1.49 | 1.42 |
| Annual Cost | | | | |
| Total | 868.34 | 887.39 | 905.21 | 922.20 |
| Increase | -- | 19.04 | 17.82 | 16.99 |

additional 25% rate increase in 2008. The development fund proposal would add an additional 19% and increase Western revenues by $50,648,000. In 2003, annual revenues average to $156 million. The rate increase through FY 2007 increased revenues to $213 million. The proposed rate increase in FY 2008 would increase revenues to $266 million, and the development fund would increase revenues to $316

million. With or without the development fund, Western has significantly increased rates and revenues (Table 2).

Table 2 is based on a typical Western customer that receives 30% of power needs from federal hydropower marketed by Western. It was assumed that alternative power would be available to this customer at a cost of 4¢ per kilowatt hour ($0.0400 /kwh). It was also assumed that transmission and distribution costs (powerline costs separate from energy) would have a typical cost of 4¢ per kilowatt hour. Finally, it was assumed that average monthly residential power use is 1000 kWh.

Throughout Western's customer base in the Eastern Division of Pick Sloan, customers may receive anywhere from 10% to 100% of their total energy needs from Western (some municipalities and Tribes are at the upper end of the range). Transmission and distribution costs may range from 3 ¢ to 5 ¢ per kilowatt hour. Monthly residential power use may typically range from 500 to 1,500 kilowatt hours with some users falling outside the range, particularly in more expensive homes.

Continuing with the example and the assumptions, the monthly residential electrical bill in 2003 would average $72.36 and would increase to $75.43 with the rate increases proposed by Western through 2008. Monthly electrical bills would increase to $76.85 with the proposal for the development fund. Annual costs would increase from 2003 at $868.34 to $922.20 with the Western rate increases and the development fund. The development fund would add $16.99 to the annual electrical bill relative to Western increases through 2008.

Similar analyses (to Table 2) were conducted for Western customers with shares of federal hydropower at 50%, 75% and 100% as presented in Table 3 and Figure 2. Western Customers with 100% Western power would see increases in annual costs from $654.48 in FY 2003 to $777.36 in 2008, an increase of $122.88. The development fund would increase annual costs to $834, an addition of $56.64. The $213.86 advantage of customers with 100% Western allocation over customers with 30% allocation in FY 2003 would fall to $88.20 annually with all rate increases through the development fund.

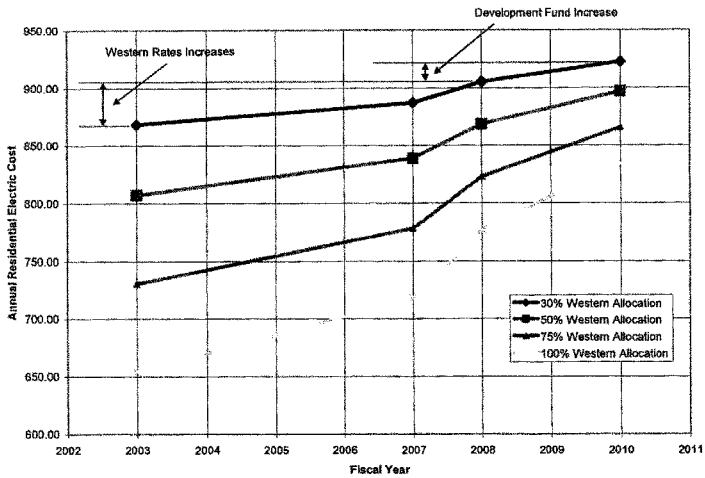
With the development fund, consumer rates would increase to $0.07685 per kilowatt hour for the customer with 30% Western allocation and to $0.06950 per kilowatt hour for the customer with 100% Western allocation. Compare these values with regional costs given in Table 3 from the Energy Information Administration for 2007. Retail rates in Montana, for example, averaged $0.0939 per kilowatt hour, the Rocky Mountain region averaged $0.0974 per kilowatt hour, and the Pacific region, including Bonneville, averaged $0.12280 per kilowatt hour. Western customers would continue to hold advantage of at least 1.5 ¢ to 2 ¢ per kilowatt hour.

**TABLE 3**
SUMMARY OF IMPACTS OF WESTERN RATE INCREASES
AND PROPOSED DEVELPOMENT FUND INCREASE

| | | 2003 | 2007 | 2008 | Development Fund |
|---|---|---|---|---|---|
| Western Rate per kwh | | $0.01454 | $0.01983 | $0.02478 | $0.02950 |
| Rate Change per kwh | | -- | $0.00529 | $0.00495 | $0.00472 |
| % Increase | | -- | 36.38% | 24.96% | 19.05% |
| Annual Revenue | | $155,958,548 | $212,700,000 | $265,900,000 | $316,548,000 |
| Annual Increase | | -- | $56,741,452 | $53,200,000 | $50,648,000 |
| Present Value, 40 years, 4% | | | | | $1,002,464,000 |
| | % Western Allocation | | | | |
| Impact on Consumer | | | | | |
| Monthly Consumption, kwh | | 1,000 | 1,000 | 1,000 | 1,000 |
| Assumed Trans/Dist Rate | | $0.04000 | $0.04000 | $0.04000 | $0.04000 |
| Assumed Non-WAPA Rate | | $0.04000 | $0.04000 | $0.04000 | $0.04000 |
| Consumer Rate per kwh | | | | | |
| | 30% | $0.07236 | $0.07395 | $0.07543 | $0.07685 |
| | 50% | 0.06727 | 0.06992 | 0.07239 | 0.07475 |
| | 75% | 0.06091 | 0.06487 | 0.06859 | 0.07213 |
| | 100% | 0.05454 | 0.05983 | 0.06478 | 0.06950 |
| State Average Retail Rate, 2007, EIA | | | | | |
| Montana | | -- | $0.09390 | -- | -- |
| North Dakota | | -- | 0.08370 | -- | -- |
| South Dakota | | -- | 0.08700 | -- | -- |
| Minnesota | | -- | 0.09720 | -- | -- |
| West North Central | | | 0.09200 | -- | -- |
| Mountain | | -- | 0.09740 | -- | -- |
| Pacific | | -- | 0.12280 | -- | -- |
| Annual Increase | | | | | |
| | 30% | -- | $19.04 | $17.82 | $16.99 |
| | 50% | -- | 31.74 | 29.70 | 28.32 |
| | 75% | -- | 47.61 | 44.55 | 42.48 |
| | 100% | -- | 63.48 | 59.40 | 56.64 |
| Monthly Bill | | | | | |
| | 30% | $72.36 | $73.95 | $75.43 | $76.85 |
| | 50% | 67.27 | 69.92 | 72.39 | 74.75 |
| | 75% | 60.91 | 64.87 | 68.59 | 72.13 |
| | 100% | 54.54 | 59.83 | 64.78 | 69.50 |
| Monthly Increase | | | | | |
| | 30% | -- | 1.59 | 1.49 | 1.42 |
| | 50% | -- | 2.65 | 2.48 | 2.36 |
| | 75% | -- | 3.97 | 3.71 | 3.54 |
| | 100% | -- | 5.29 | 4.95 | 4.72 |
| % Increase | | | | | |
| | 30% | -- | 2.19% | 2.01% | 1.88% |
| | 50% | -- | 3.93% | 3.54% | 3.26% |
| | 75% | -- | 6.51% | 5.72% | 5.16% |
| | 100% | -- | 9.70% | 8.27% | 7.29% |

**FIGURE 2**

**IMPACT ON CONSUMER**




d) Projects Benefiting

The classes of projects benefiting from the development fund include, among others, the following:

- Re-construction of upper basin intakes for municipal, rural, industrial and irrigation purposes with provisions for permanency given recent and historic low reservoir levels;
- Advance funding for currently authorized rural water projects not receiving adequate appropriations for timely completion;
- Rural water projects not authorized;
- New irrigation of woody biomass crops suitable for ethanol production;
- Regional electrical transmission improvements to transport new wind energy;
- Regional wind energy projects with distribution to improved transmission grid;
- Other renewable and non-renewable energy projects.

With reduction of downstream flows for navigation on the Missouri River, additional purposes of the development fund outside the Upper Basin, might include structures on the lower Missouri River to maintain river stage at levels necessary for municipal, power plant and other intakes. The current Master

Plan of the Corps of Engineers relies on maintaining river flows at levels necessary to maintain intake capacity, but the same purpose could be accomplished by structures to regulate river stage.

(1) Intake Reconstruction

Examples of intakes needing rehabilitation and improvements for permanent operation include MRI intakes at Fort Yates and Wakpala and irrigation intakes at Cannonball, Fort Yates and on the Grand River arm. A complete inventory of intakes affected by historic low reservoir levels is needed in Montana, North Dakota and South Dakota.

(2) Advance Funding for Authorized Rural Water Projects

Authorized rural water projects and Montana, North Dakota and South Dakota are not receiving sufficient funds to complete the projects on schedules approved by the Secretary of Interior or the authorizing legislation. The development fund, whether financed by Western rate increases or the Reclamation Fund (without the need for appropriation), may be used to supplement appropriations and build projects in a more timely manner.

Table 4 summarizes the status of authorized rural water projects in Montana, North Dakota and South Dakota. At the end of fiscal year 2007, six projects, funded through appropriations to the Bureau of Reclamation, had spent $478.85 million and needed $1.01 billion to complete. With five-year extensions in the authorized completion dates, the projects will collectively average about 20 years to complete or at least double the time expected. Low levels of appropriations and inflation are extending the completion dates.

The President's budget for FY 2008 was $64.22 million, project capability was $191.11 million, and $116.4 million is needed annually to complete the projects with a five-year extension in the respective construction schedules (not counting North Central, which is unknown). The development fund could be used to advance construction funds to complete these rural water projects in a more timely manner.

**TABLE 4**

SUMMARY OF RURAL WATER PROGRAM STATUS

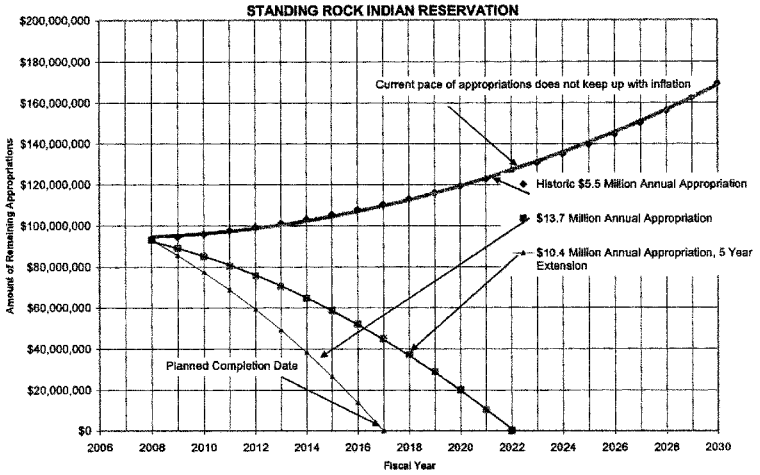
| | | FY 2008, Million $, Federal Share | | | | | Year of Completion | | | Ave. Approps Needed, Mill $ (Inflation Adjusted, 7.58%) | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Project | Date Authorized | Total Funds Spent | Total Funds to Complete | % Complete | President's Budget | Project Capability | Plan or Statutory | Current Pace | 5-Year Extension | Plan or Statutory | 5-Year Extension |
| Garrison | 2000 | $71.20 | $344.94 | 17.11% | $15.17 | $46.68 | 2,017 | Inflation Controlled | 2,022 | $54.94 | $41.55 |
| Standing Rock | 2000 | 17.80 | 86.23 | 17.11% | 5.06 | 11.67 | 2,017 | Inflation Controlled | 2,022 | 13.74 | 10.39 |
| Lewis and Clark | 2000 | -- | -- | -- | 15.00 | 35.00 | -- | -- | -- | | |
| Mni Wiconi | 1994 | 326.53 | 119.18 | 73.26% | 29.00 | 30.91 | 2,008 | 2,018 | 2,013 | Not Workable | 33.41 |
| Perkins County | -- | -- | -- | -- | 0.00 | -- | -- | -- | -- | | |
| Fort Peck/Dry Prairie | 2000 | 48.32 | 210.66 | 18.66% | 0.00 | 36.85 | 2,013 | Inflation Controlled | 2,018 | 52.32 | 31.06 |
| North Central | 2002 | 15.00 | 251.54 | 5.63% | 0.00 | 30.00 | -- | Inflation Controlled | -- | | |
| Total | | $478.85 | $1,012.55 | 32.11% | $64.22 | $191.11 | | | | $121.00 | $116.41 |

Figure 3 is an illustrative example of the impact of the current rate of appropriations on a component of the Garrison Project on the Standing Rock Indian Reservation. The entire Garrison Project is affected similarly. Inflation is outpacing the current rate of appropriations ($5.5 million annually), and

the project cannot be completed without increased funding. If annual appropriations were increased to $10.4 million, the project could be completed in 2022, or 22 years after the authorization of the Dakotas Water Resources Act. If annual appropriations were increased to $13.7 million, the project could be finished on the scheduled completion date. Similar analysis can be shown for all rural projects in the three state area. The Mni Wiconi project is furthest along at 73% completion, and a finish in FY 2013 is realistic.

**FIGURE 3**

**IMPACT OF APPROPRIATION LEVEL ON CONSTRUCTION COMPLETION WITH CONTINUATION OF 7.88% ANNUAL INDEXING TREND STANDING ROCK INDIAN RESERVATION**




(3) Rural Water Projects Not Authorized

Additional water projects are being proposed in the three state area. These include Central Montana, Dry Redwater (Montana), Red River Valley (North Dakota) and Fall River (South Dakota) among others. Investment in these projects may fall in the range of $1 billion to $1.5 billion. The development fund might be used to supplement appropriations for this future class of projects.

(4) New Irrigation for Ethanol and Woody Biomass Methanol

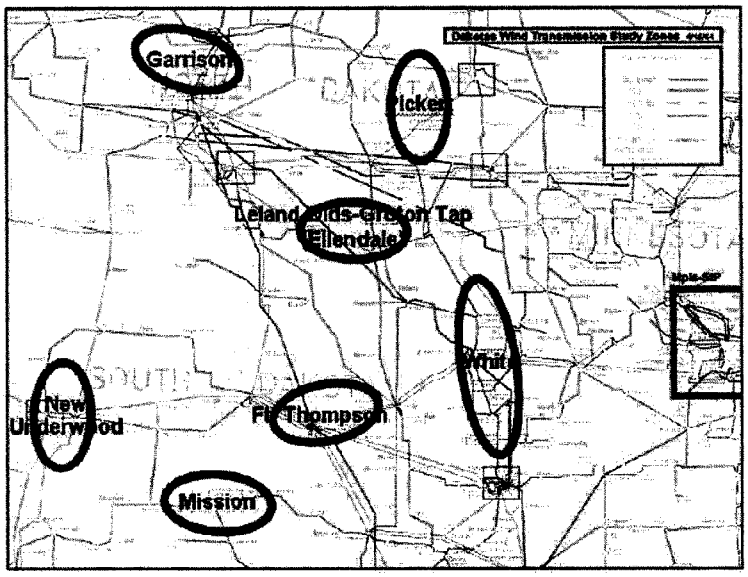
Irrigation of corn, poplar or sawgrass along the Missouri River in the three state area may supply product for future ethanol projects. Irrigation development for a single plant might require development of 10,000 acres of irrigation at an investment of $1 billion. These values are illustrative and not based upon analysis.

(5) Regional Electrical Transmission Improvements and New Wind Energy

Western has examined wind generation projects in the areas shown on Figure 4.[1] Alternative costs for transmission range from $119 million to $430 million.[2] The Western investigations are limited and do not include other potential projects in Montana, North Dakota and South Dakota.

Each project or group of projects of 500 MW potential would require an investment of approximately $.5 billion for installation of generation equipment.

**FIGURE 4**
Seven Wind Sites Considered in the Western/ABB Study




[1] ABB Inc., Electric Systems Consulting, Revised October 19, 2005, *Dakotas Wind Transmission Study, Study Summary*, REPORT NO. 2005-10977-4 R1, Western Area Power Administration, Billings, Montana.
[2] Table 2-6, ABB Inc., Electric Systems Consulting, July 26, 2002, *Montana-Dakotas Regional Study, East Side (MAPP) Studies, Phase 1*, Report No. 2002-10215-2.R02a, Western Area Power Administration, Billings, Montana.

**ATTACHMENT A**

**DRAFT PROPOSAL**

**109th CONGRESS**
*2nd Session*
**S._____**

**IN THE SENATE OF THE UNITED STATES**

**August____, 2008**

**A BILL**

*To mitigate damages in the Upper Missouri River Basin, develop future generation and transmission capacity in the Eastern Division of the Pick Sloan Missouri River Basin Program and for other purposes.*

**SEC 1. FINDINGS AND PURPOSES**

(a) The Congress of the United States finds that:

(1) the 1944 Flood Control Act (58 Stat 665) adopted Senate Report 247 and the joint engineering report for the operation of the Missouri River, which report provided, among other things, that Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point Dams and reservoirs were recommended to'... *more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses... provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods'*;

(2) the 1994 Flood Control Act was conceived *'...to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.'*

(3) 1944 Flood Control Act established the duty of the Secretary of Defense to prescribe discretionary regulations for the use of storage allocated to navigation, which duty is addressed by (a) the March 2004 Missouri River Master Manual Review and Update (hereinafter 2004 Master Manual) by the Corps of Engineers and (b) annual operating plans consistent with the framework of the 2004 Master Manual for the operation of the Missouri River mainstem dams for specific purposes, including:

i. navigation,

ii. hydropower,

iii. water supply,

iv. recreation,

v. threatened and endangered species, among other purposes;

(4) the operation of the mainstem dams in accordance with the Master Manual during prolonged drought periods does not balance the benefits of navigation with other economic uses of the waters of the Missouri River and creates hardships in the Upper Missouri River Basin impacting the States of Montana, North Dakota and South Dakota and impacting the Fort Peck, Fort Berthold, Standing Rock, Cheyenne River, Lower Brule, Yankton and Crow Creek Indian Reservations by:

i. lowering of water levels in reservoirs behind Fort Peck, Sakakawea, Oahe, Big Bend and Fort Randall Dams in;

ii. filling of portions of the reservoirs with artificially created sediment with unknown contaminants concentration,

iii. destruction of domestic water supply intakes,

iv. destruction of irrigation intakes,

v. damage to fisheries, including loss of reservoir retention time,

vi. damage to riparian habitat,

vi. loss of irrigated crop revenues,

vii. loss of the water-based recreation revenues and

viii. loss of multiplier effects in the economy, among other things;

(5) An Upper Missouri River Basin Development Fund will:

i. more equitably balance the benefits of navigation with appropriate and economic use of the waters by Upper Missouri River Basin users.

ii. assist the United States in its goal to recover $454 million for that part of the dam costs allocated to irrigation and authorized by the 1944 Flood Control Act;

iii. permit the recovery of damages along the Missouri River and reservoirs authorized by the 1944 Flood Control Act during prolonged periods of drought;

iv. develop future renewable and nonrenewable generation and transmission projects in North Dakota and the Standing Rock Indian

Reservation, consistent with federal objectives, for export of electricity to the Midwest and Rocky Mountain regions.

(b) The purposes of this act are to:

(1) mitigate and compensate for the adverse impacts in Montana, North Dakota and South Dakota and on the Fort Peck, Fort Berthold, Standing Rock, Cheyenne River, Lower Brule, Yanton and Crow Creek Indian Reservations caused by the operation of the Missouri River mainstem dams in accordance with the 2004 Master Manual;

(2) create a fund with deposits from (a) hydropower revenues produced in the Eastern Division of Pick Sloan and (b) appropriations necessary to enable the United States to recover costs of the Missouri River mainstem dams allocated to irrigation,

(3) enable Montana, North Dakota and South Dakota and the Fort Peck, Fort Berthold, Standing Rock, Spirit Lake, Cheyenne River, Lower Brule, Rosebud, Pine Ridge, Crow Creek and Yankton Indian Reservations, to invest in future renewable and non-renewable energy projects in the aforesaid States and on the aforesaid Indian Reservations for the benefit of the region and the nation.

**SEC 3. DEVELOPMENT FUND**

There is hereby established a separate fund in the Treasury of the United States to be known as the Upper Missouri Basin Development Fund (hereafter called the "development fund") which shall remain available until expended as hereinafter provided.

(a) Deposits -- There are authorized to be deposited in the development fund:

(1) any federal revenues from the hydropower operations of the Eastern Division of Pick Sloan which, after completion of repayment requirements of Missouri River Basin Projects, are surplus, as determined by the Secretary of Energy, to the operation, maintenance, and replacement of those projects shall be credited to the development fund beginning January 1, 2006;

(2) the increase in the firm wholesale hydropower rate determined by the Western Area Power Administration necessary to recover not more than $454 million in costs of the Missouri River mainstem dams allocated to irrigation in the Upper Missouri River Basin and not recovered by irrigation due to lack of development and de-authorization of irrigation projects in the Upper Missouri River Basin and the Eastern Division of Pick Sloan;

(3) two (2) mills per kilowatt hour from firm wholesale hydropower revenues collected by the Western Area Power Administration in the Eastern Division Pick Sloan shall be deposited in the development fund beginning January 1, 2006;

(4) For each of fiscal years 2009 through 2018, the Secretary of the Treasury shall deposit in the fund $100,000, 000 from the fund established by the first section of the Reclamation Act, (Act of June 17, 1902, (32 Stat 388, Chapter 1093).

(5) The Secretaries of Army and Interior shall report to Congress annually their joint findings of the difference between benefits to downstream navigation and damages to resources and facilities at the six mainstem Missouri River reservoirs attributable to release of water for navigation, and the difference shall be deposited in the development fund from authorized appropriations specified in Sec. 7;

i. the Secretary of the Army is authorized and directed to provide an annual report to Congress on the tonnage and economic value of navigation using the Missouri River at Kansas City and Omaha;

ii. the Secretary of the Army is authorized and directed to provide an annual report to Congress on the tonnage and economic value of navigation using the Mississippi River when releases from the Missouri River mainstem dams are necessary to maintain navigation on the Mississippi River;

iii. the Secretary of the Interior is authorized and directed to provide an annual report to Congress on the economic loss of recreation, water supply, fishery and riparian habitat caused by the lowering of water levels in the six mainstem dams of the Missouri River by release of water for navigation on the Missouri and Mississippi Rivers, such economic loss to be counted as Upper Missouri Basin damages;

(6) Deposits shall not to exceed $3 billion.

(b) Withdrawals — There are authorized to be withdrawn amounts from the development fund, in order of priority, necessary to:

(1) mitigate damages from erosion and siltation to intake facilities for domestic, irrigation and other purposes along the Missouri River and the shoreline of the six Missouri River mainstem reservoirs from Fort Peck Lake to Gavin's Point Dam in site-specific instances;

(2) mitigate damages to cultural and historic resources;

(3) mitigate other damages;

(4) develop renewable and non-renewable energy resources to be marketed in the Eastern Division of Pick Sloan according to the priorities established in Sec 4; provided, however, that all amounts withdrawn from the development fund shall be matched by a 25% non-federal share for projects developed in the States of Montana, North

Dakota and South Dakota and shall be matched by 10% non-federal share for projects developed on the Indian Reservations listed in Sec 1. (b) (3) (ii); and provided, however, that not less than 50% of withdrawals from the fund shall be for projects within the States of Montana, North Dakota and South Dakota and not less than 50% all of withdrawals from the fund shall be for projects within the Indian Reservations listed in Sec 1. (b) (3);

(5) develop renewable and non-renewable energy resources to be marketed outside the Eastern Division of Pick Sloan according to the principles established in the foregoing Sec 3. (b) (4);

(6) supplement appropriations for development of authorized rural water projects in Montana, North Dakota and South Dakota within the authorized construction schedule; provided, however, that appropriations shall continue to the limit of the authorized construction amount after construction is completed, and supplemental funding withdrawn from the development fund shall be restored

**SEC 4. ENERGY INVESTIGATION AND PROJECT PRIORITY**

(a) Not later than three years following the date of enactment, the Secretary of Energy is authorized and directed, through cooperative agreements with three States separately and the Indian Reservations listed in Sec 1. (b) (3) separately, to complete a plan for renewable and non-renewable energy development in the Upper Missouri River Basin and to:

(1) provide a priority list for the development and marketing of energy in the three States outside the Indian Reservations listed in Sec 1. (b) (3) based on projects determined feasible with identification of net benefits to the three States, the Region and the Nation;

(2) provide a priority list for the development and marketing of energy on the Indian Reservations listed in Sec 1. (b) (3) based on projects determined feasible with identification of net benefits to the Indian Reservations, the Region and the Nation;

(3) develop cooperative agreements between the Secretary and the Indian Reservations listed in Sec 1. (b) (3) containing provisions, rules and regulations for Indian Tribes through the Indian Self-Determination Act, as amended, (PL 93-638).

(b) The Secretary of Energy is authorized and directed, through cooperative agreements, to implement feasible renewable and nonrenewable power projects in Montana, North Dakota and South Dakota and within Indian Reservations listed in Sec 1. (b) (3) through grants from the development fund based on the provisions in Sec 3 (b) (4) and (5) ;

(c) The Secretary is authorized and directed, through cooperative agreements, to permit Montana, North Dakota and South Dakota and Indian Reservations listed in Sec 1. (b) (3) Reservations to implement feasible hydropower upgrades at Fort Peck, Garrison, Oahe, Big Band, Fort Randall, Gavin's Point and federal tributary dams through grants from the development fund based on the provisions in Sec 3 (b) (4) and (5) and based upon a mutually agreeable plan between the States and Tribes on the sharing of costs and revenues;

(d) Title to all facilities and property financed from the development fund for the Indian Tribes shall be held in trust by the United States on behalf of the Tribe.

**SEC 6. WATER RIGHTS.**

(a) IN GENERAL.—This Act does not—

(1) preempt or modify any Federal or State law or interstate compact concerning water rights, water quality or disposal;

(2) confer on any non-Federal entity the authority to exercise any Federal right to the water of any stream or to any ground water resource;

(3) affect any right of the affected Tribes to water, located within or outside the external boundaries of the respective Indian Reservation, based on a treaty, compact, executive order, agreement, Act of Congress, aboriginal title, the decision in Winters v. United States, 207 U.S. 564 (1908) (commonly known as the ''Winters Doctrine''), or other law; or

(4) validate or invalidate any assertion of the existence, nonexistence, or extinguishment of any water right held or Indian water compact entered into by the affected Tribes or individual Indian under Federal or State law.

**SEC 7 – APPROPRIATIONS**

(a) There are authorized to be appropriated amounts equal to the sum of the economic losses and navigation benefits determined according to the provisions of Sec 3 (b) (3) by the Secretaries of Interior and Army to the States of Montana, North Dakota and South Dakota and the Indian Reservations listed in Sec 1. (a) (4), such amounts to be deposited in the development fund.

AT LARGE

Jesse "Jay" Taken Alive

Margaret M. Gates

Charles W. Murphy

Dave Archambault II

Joseph McNeil Jr.

Jesse McLaughlin

DISTRICTS

Robert Cordova
*Cannonball District*

Henry Harrison
*Long Soldier District*

Joe Strongheart Sr.
*Wakpala District*

Frank White Bull
*Kenel District*

Joe White Mountain Sr.
*Bear Soldier District*

Milton Brown Otter
*Rock Creek District*

Frank Jamerson Jr.
*Running Antelope District*

Richard D. Bird Jr.
*Porcupine District*

Ron His Horse Is Thunder
*Chairman*

Avis Little Eagle
*Vice Chairwoman*

Geraldine Agard
*Secretary*

November 8, 2007

The Honorable Byron L. Dorgan
United States Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington D.C. 20510

Re: Supplemental Statement for the Record – Hearing on Impacts of 1944 Flood Control Act on Indian Tribes

Dear Chairman Dorgan:

Thank you again for conducting a very important oversight hearing, on the impacts of the 1944 Flood Control Act and the Missouri River Basin Pick-Sloan program on Indian Tribes. Please accept this as a supplemental statement to my testimony on November 1, 2007.

I write to emphasize the impacts of the Pick-Sloan program on the Standing Rock Sioux Tribe, with respect to the project lands on the Standing Rock Reservation. The forced acquisition of land from our Tribe for the site of Oahe Reservoir came with a commitment by the Corps of Engineers to return any land that was acquired, but which was not needed for flood control. That promise remains unfulfilled. Legislative action may be necessary in this regard.

I respectfully submit that the Committee on Indian Affairs should develop legislation to remedy the longstanding problems caused by the retention and mismanagement by the Corps, of the Pick-Sloan project lands on the Standing Rock Indian Reservation. The Oahe Act of September 2, 1958 authorized the Corps to acquire 55,992.83 acres of land from the Tribe, for Lake Oahe. (72 Stat. 1762). Section 1(b) specifically authorizes an administrative transfer of lands by the Secretary of the Army to the Standing Rock Sioux Tribe and Tribal members. This section states,

BLDG. 1 NORTH STANDING ROCK AVE • P.O. BOX D • FORT YATES, NORTH DAKOTA 58538
PHONE: 701-854-7201 or 701-854-8500 • FAX 701-854-7299

> Upon a determination by the Secretary of the Army, filed among the appropriate land records of the Department of the Interior within two years from the date of enactment of this Act, that any of the lands described in this Act are not required for Oahe project purposes, title to such land shall be revested in the former owner.

Over 19,000 acres of land were taken from our Tribe, but were never inundated and are not used for flood control or other Pick-Sloan project purposes. Nevertheless, the Corps of Engineers has never carried out this section of the law. Instead, the Corps, administratively, defines "Oahe Project purposes" very broadly, so as to justify the continued retention of the land. The Corps of Engineers has designated scores of tracts of taken land far above the operating pool of the reservoir as wildlife mitigation lands, a so-called "project purpose." It is undisputed that the Corps has done very little or no mitigation work on these lands. They lay fallow, or are used for grazing livestock by former landowners as permitted under section 10 of the taking act.

These riparian lands are very valuable wildlife habitat. The Corps conducts little or no wildlife enhancement activities on these lands. The Standing Rock Sioux Tribe Department of Fish and Wildlife provides food plots and wildlife management. However, the retention by the Corps of title to these lands complicates the efforts by the Tribe for wildlife enhancement.

Similarly, the water level fluctuations of Oahe Reservoir caused by the release of water for navigation and other non-Indian water uses downstream, erode and destroy Native American cultural resources on this land. The Corps of Engineers has failed to cooperate with the Standing Rock Sioux Tribe Historic Preservation Office for the mitigation of adverse impacts to these cultural sites.

The transfer of these lands to the Tribe will enable us to better protect the cultural sites, which the Corps has a responsibility to protect, but fails to do so. The affected historic properties include cemeteries – which the Corps had a responsibility to relocate in 1958, but failed to do so. Consequently, human remains of Standing Rock Sioux origin are unearthed, and require mitigation and repatriation under the Native American Graves Protection and Repatriation Act (NAGPRA). 25 U.S.C. §3002.

The efforts of the Corps of Engineers to assist with protection of these sites and repatriation of unearthed human remains have been erratic. In fact, Corps officials have obstructed Tribal repatriation efforts, and have been uncooperative with mitigation.

An example of this is the unearthing of historic properties at Demery Island. The Corps' proposed mitigation would have violated NAGPRA, by causing additional harm

to adjacent lands, and possibly intentional unearthing of additional cultural objects. When the Tribe expressed concern with this to Corps, all mitigation efforts were halted, and the legal protections required by law were not afforded.

Brigadier General Gregg Martin wrote to me about this, in a letter dated May 11, 2007. He stated,

> *The comments concerning Demery Island were not intended to be disrespectful.... It was explained that the recovery program would require the removal of existing vegetation, which your THPO did not support..... therefore the Corps did not pursue any further action.*

*See* Letter of Brigadier General Gregg F. Martin to SRST Chairman Ron His Horse is Thunder, May 11, 2007, attached hereto.

The Tribe thus has an admission by the Corps of Engineers that it failed to establish a mitigation plan for an impacted historic property in cooperation and consultation with our Tribe, as required by the National Historic Preservation Act and NAGPRA. As General Martin admitted, The Corps "did not pursue any... action." Clearly, neither our Tribe nor Congress can rely on the Corps to properly manage wildlife or cultural resources on the Pick-Sloan project lands on the Standing Rock Reservation. This land should be restored to our Tribe.

The Congressional General Accounting Office (GAO) has recommended that the Corps of Engineers liberalize its policies of disposing of real property. *General Accounting Office* (1984). The GAO report suggested that the Corps is not in compliance with the applicable requirements for disposing of surplus properties, because of its restrictive manner in considering of lands available for excessing. That clearly applies to the Corps' treatment of the project lands at Standing Rock.

The Department of the Interior Joint Tribal Advisory Committee (JTAC) studied the Corps project lands at Standing Rock and Fort Berthold. In its Final Report, the committee stated, "there are lands adjacent to the reservoir that were taken that could be returned to the Tribe." *Final Report of the Garrison Unit Joint Tribal Advisory Committee* (May 23, 1986), p. 18. With respect to the designation of uses of tracts of land by the Corps, the report stated, "the identification of the lands, the determination of their present status and the prediction of future use should be the subject of negotiations between the Department of the Interior, on behalf of the tribes, and the COE." *Id.* at pp. 18-19.

We had hoped that this issue would be resolved by enactment of the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992. (106 Stat. 4731). Section 3509 of the act outlined land transfer procedures involving rights of first refusal for sale to the Tribe to former landowners, and transfer to the Tribe. (106 Stat. 4737). The act contained strict time frames for the transfer of title from the Army to BIA, and for the offers of sale and transfers.

When the Corps failed to comply, an amendment was added to an appropriations bill repealing the land transfer. Section 407 of the Emergency Supplemental Appropriations Act of February 12, 1994, reads in relevant part,

> Sections 3508 and 3509 of the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act are repealed effective October 30, 1992, *Provided, That the U.S. Army Corps of Engineers should proceed with the Secretary of the Interior to designate excess lands and transfer them pursuant to Public Law 99-599.*

108 Stat. 41 (emphasis added).

The Corps of Engineers has failed to carry out this provision in good faith. As stated above, there are over 19,000 acres of Pick-Sloan project lands within the exterior boundaries of the Standing Rock Reservation. The Corps has purported to implement the land transfer language in the 1994 Supplemental Appropriations Ac t by transferring 386 acres. The issue remains unresolved, because of the failure by the Corps of Engineers to effectuate a meaningful land transfer, through its administrative process.

Ultimately, the Corps of Engineers simply refuses to work with the Tribe on this issue in a cooperative manner. General Martin wrote, "In the absence of special legislation, the Corps does not have the authority to administratively transfer project lands directly to the Standing Rock Sioux Tribe." *See* Attachment. He stated this, even though Congress addressed this issue in the 1958 Oahe Act, 1992 Equitable Compensation Act and 1994 Emergency Supplemental Appropriations Act. It is clear to our Tribe that the Corps of Engineers refuses to exercise the discretion granted under existing legislative authority to do justice to our Tribe and transfer this land.

A final legislative solution is needed. I respectfully request that the Committee on Indian Affairs develop legislation directing the Corps of Engineers to transfer all Pick-Sloan project lands above the maximum operating pool of the Oahe Reservoir to the Standing Rock Sioux Tribe.

I submit for the record legislative language that was developed by the office of the Assistant Secretary of the Army for Civil Works, for this purpose. This language was drafted by the Corps, after the enactment of Title VI of the Water Resources Development Act of 1999, which transferred comparable lands in South Dakota. It addresses the land issue in a comprehensive manner, addressing the concerns of the Three Affiliated Tribes, Crow Creek Sioux Tribe, and others.

The Standing Rock Sioux Tribe has attempted to work with the Corps since the release of the JTAC Final Report in 1986, to restore these lands to the Tribe. The status quo has resulted in mismanagement of valuable wildlife lands, and destruction of cultural resources of Standing Rock Sioux origin. The Tribe can manage these lands better than the Corps. As stated above, General Martin admitted in his letter to me dated May 11, 2007 that the Corps is violating the NHPA and NAGPRA at the valuable Demery Island site.

Our Tribe was promised that any surplus taken lands would be returned, when Congress passed the Oahe Act of 1958. The Corps of Engineers has demonstrated that it is unwilling to address with issue in a meaningful and cooperative manner. The restoration of this land to our Tribe should be part of any comprehensive legislation addressing the impacts of the 1944 Flood Control Act on the Indian Tribes of the Missouri River Basin.

Thank you very much for your consideration of our concerns on these matters of extreme importance to the Standing Rock Sioux Tribe.

Sincerely,

Ron His Horse Is Thunder, Chairman
Standing Rock Sioux Tribe

cc: Tribal Council
Administration
Water Resources
File

The CHAIRMAN. [Presiding.] Let me next call on Chairman Jandreau.

Let me thank Senator Tester for Chairing. I had to depart momentarily for an important appropriations meeting with the Leader.

Chairman Jandreau, thank you very much for being here. You may proceed.

## STATEMENT OF MICHAEL B. JANDREAU, CHAIRMAN, LOWER BRULE SIOUX TRIBE

Mr. JANDREAU. Thank you. Thank you, Senator Dorgan, Senator Johnson, Senator Conrad, Senator Tester, Senator Murkowski and Senator Thune, for allowing me to come today to make a presentation in relationship to these losses that have occurred.

Lower Brule and Crow Creek are in a little bit different situation at this point. Chairman Thompson could not be with me today. However, I have submitted a statement for the record on behalf of Chairman Thompson and myself.

First of all, Senate bill 160, which affects the Lower Brule and Crow Creek, has been changed to meet the concerns that have been reflected in the last hearing. First of all, we modified it in several ways. One was to reduce the amount of money that we were asking for by $57 million, from $186 million to $129 million. Second, a new section five made it clear that Lower Brule and Crow Creek legislation would declare this as full and final compensation for the Missouri River claim in relationship to the dams. And thirdly, we asked that this not impact any other tribe outside of the Missouri River.

I listened today with great interest in all of the comments that were made by GAO. The idea of final asking price is unrealistic. When GAO did the study, they came to our reservation. They talked to elders, elders who were alive at the time of the taking. They listened to them tell how incomplete the taking of these lands made them and their ability to survive.

They told the folks that were there from GAO that they believed that adequate compensation had never been made. In fact, when we testified before this Committee in 1992, I believe it was, the first time, we submitted testimony from our elders that reflected that the monies that we received at that time were not full compensation for what they believed the losses were.

While we encourage and support our fellow tribesmen in having their needs dealt with, we ask that if that is not possible in this session of Congress, that this Committee would recommend moving forward with our bill. If a bill during this Congress can be done comprehensively, we understand that and are willing to work with Congress, with our fellow tribesmen, to be a part of that.

However, if ours moves forward before that, we agree that we will not ask for any additional compensation than that that is Senate bill 160.

Thank you very much.

[The joint prepared statement of Mr. Jandreau and Mr. Thompson follows:]

PREPARED STATEMENT OF MICHAEL B. JANDREAU, CHAIRMAN, LOWER BRULE SIOUX TRIBE AND LESTER THOMPSON, CHAIRMAN, CROW CREEK SIOUX TRIBE

Chairman Dorgan, Senator Johnson, Members of the Committee, I am Chairman Mike Jandreau of the Lower Brule Sioux Tribe. With me is Chairman Lester Thompson of the Crow Creek Sioux Tribe. Allow us to also recognize Senator Thune, who has introduced The Lower Brule and Crow Creek Compensation Act, S.160, with Senator Johnson.

First, Mr. Chairman, we appreciate that this hearing is on the larger question of compensation for all Tribes on the Missouri River (the River) that lost land as a result of the Pick-Sloan Missouri River Program. We support full and fair compensation for all Tribes on the River, not just our two Tribes.

At the same time, however, we believe we are in a unique position. Our legislation was reported by the Committee in the 108th Congress and the 109th Congress. The legislation passed the Senate *three times* in the 108th Congress. After the bill was reported in the 109th Congress, Chairman McCain asked the GAO for a report on the legislation. A mathematical error was discovered and the legislation before you was then modified in several ways:

- First, the amount of compensation was reduced. For Lower Brule the amount in the bill was reduced from $186 million to $129 million, or $57 million. The Crow Creek amount was reduced by $36 million, from $105 million to $69 million.

- Second, a new Section 5 was added making it clear that as to Lower Brule and Crow Creek this legislation would be full and final compensation, even if additional legislation were enacted for all other Missouri River Tribes; and, last,
- Section 5 also makes it clear that S. 160 would not be a precedent beyond the Missouri River Basin Program.

Mr. Chairman, the Flood Control Act of 1944 may have been good for the United States, but it has been devastating for River Tribes. I ask that our testimony of June 15, 2004 and June 24, 2006 be made a part of this hearing record.*

In partial compensation for the damage caused by Pick-Sloan, the Congress did enact two Infrastructure Development Trust Funds for Lower Brule and for Crow Creek. We have used these funds to the best advantage of our Tribes. Meetings were held with our elders and other Tribal members to establish priorities and many critical projects have been undertaken. But we have only scratched the surface of what needs to be done to bring Tribal life and our Tribal economies into the mainstream of American life.

It is very painful to read *The World is Flat* and to read that the United States is outsourcing jobs to China and India when many American Indian reservations have an unemployment rate over 80 percent and a third world standard of living. When exactly is the United States going to establish a comprehensive plan for the Reservations here in the United States?

The Lower Brule and Crow Creek Compensation Act would enable our two Tribes to move forward with health care, justice programs, education, transportation, broadband, and our many other needs. Let us stress, however, we also support moving forward with legislation for all other River Tribes when they are ready to do so.

*Our main point today is that it is not fair or right to hold our bill up until all other River Tribes are ready. Each year that passes we are losing millions of dollars in interest that our people need for critical services. We have done our studies, created our internal plans, and are ready to move forward. We are prepared therefore to accept S. 160 as full and final compensation.*

Finally, let us stress that we are not seeking a hand out based on our human needs. This legislation is intended to provide compensation for the loss of our land and the costs suffered by our two Tribes. The Army Corps of Engineers has estimated that the Pick-Sloan project's overall contribution to the U.S. economy is over $1.2 billion per year. Tribal compensation must been seen in that context. The United States took our best land and our water (under the Winters doctrine) to produce electricity. They then sell the electricity and instead of sharing the revenue with the Tribes, they charge us for the electricity.

This is fundamentally wrong! Further, we are not talking about injustices that were committed against the Indian people in the 1860's. We are talking about this year, 2007. It is time to correct the record and enact legislation that compensates all Tribes that have lost their land. It is time to fairly compensate River Tribes for their loss and their contribution to the American economy. We urge the Committee to look at the cost of the legislation in the context of history and the revenue the is generated each year by Pick-Sloan.

We urge the Committee to bring S. 160 to the floor of the United States Senate. Thank you.

The CHAIRMAN. Chairman Jandreau, thank you very much.

Next, we will hear from the Honorable Marcus Wells, Jr, the Chairman of the Three Affiliated Mandan, Hidatsa and Arikara Nation Tribes in New Town, North Dakota.

Chairman Wells, thank you very much.

## STATEMENT OF MARCUS WELLS, JR., CHAIRMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

Mr. WELLS. Good morning. My name is Marcus Dominic Wells, Jr. [Greeting in native tongue.]

I would like to thank the Committee and the Chairman for inviting me to testify today.

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*The information referred to is printed in the appendix.

Over 50 years ago, our lands were flooded to construct the Garrison Dam and its reservoir. These lands were our prime bottom lands, home to over 90 percent of our tribal members. These lands provided us with fertile soil for agriculture. These lands were where our tribal ancestors lived and prospered. We were self-sufficient.

In all, we lost 156,000 acres of our best and most fertile lands. Our tribal families were forced to move up to the dry, windy highlands of the reservation, which our people had previously used for grazing of our animals. Now, our people must live there.

The result was not by our own choosing. Our tribe was pressured and steam-rolled into signing away our prime bottom lands in the 1940s. In May of 1948, Tribal Chairman George Gillette traveled here to Washington, D.C. to sign the final agreement with the Department of Interior. A photograph of that event shows Chairman Gillette weeping as Interior Department officials sign away the tribe's lands to make way for Garrison Dam's giant reservoir, Lake Sakakawea. Chairman Gillette said, "Right now, the future does not look too good for us."

I keep that photograph above my desk as a reminder of why I and my fellow Council members work so hard to ensure that the United States Government fulfills its long-delayed promises and commitments to make our people whole once again.

Chairman Gillette was right. The flooding of our bottomlands destroyed our prosperous agriculture base and segregated the reservation to six isolated segments. We have struggled to be self-sufficient again as our communities became separate from one another. Driving from one part of the reservation to another can take three hours or more, making it very difficult and costly to provide basic governmental services such as law enforcement, health care, education, and transportation services.

The payment from the Federal Government to the tribe was far too little to compensate for the loss of our bottomlands. Our depth of our people's suffering, and the fragmentation of our unified tribal government services. Three decades later, the Federal Government admitted as much. Secretary of the Interior Donald Hodel signed a charter in 1985 creating the Garrison Unit Joint Tribal Advisory Committee, or JTAC. The JTAC's final report of 1986 stated very clearly that our tribe had been forced to accept a highly inequitable payment for the flooding of our lands, resulting in catastrophic social and economic damage. The JTAC report found that the resources we had lost was valued in the range of $170 million and $343 million.

In addition to further financial restitution, the JTAC report recommended that the Federal Government undertake several measures to compensate the tribe for its sustained losses. These steps included completion of a reservation-wide drinking water system, construction of two major irrigation projects, financial assistance for reservation farms, development of recreational shoreline opportunities on Lake Sakakawea, preferential rights for Garrison power, and replacement and refurbishment of critical infrastructure lost due to the flooding, such as our health care facility, bridge, school dormitories, tribal roads and housing. These recommendations were intended to make the tribe whole once again.

These projects have not been fulfilled in accordance with the Federal Government's promise. It has been over 50 years since the flooding of our lands and we have still not been made whole. Each year, the tribe subsidizes the Government's trust responsibilities by millions of dollars, to name a few: $600,000 toward law enforcement; $500,000 to Indian Health Service; $600,000 to the roads; $1 million toward the housing program.

The tribe's drinking water system is far from complete. In fact, 90 percent of our tribal households still have no running water. Over 300 families truck in water for use in the home, making life on the reservation expensive and inconvenient. Other families use well water laden with heavy salts and minerals. I have seen parents washing their babies in brown well water that reeks of heavy and unhealthy minerals such as manganese, coal, iron, and lime.

Our horses and other livestock also drink from the same brown water. More than 50 years after the flooding of our land, too many of our family homes do not have access to a safe, clean water supply.

The Garrison Reformulation Act of 1986 and the Dakota Water Resources Act of 2000 were meant to speed the completion of our drinking water system, but annual funding has been too little to make substantial progress. There are only a handful of elders left who remember the time before the flooding of our lands. They deserve to see clean, safe drinking water running into their homes in their own lifetimes.

Contrary to the Federal Government's promises and the express terms of the Dakota Water Resources Act, our tribal members living in New Town and Parshall are paying extremely high water bills and live under the threat that their water will be turned off due to the falling water levels in the Missouri River. Our tribe has prepared detailed water purchase agreements to share the benefits of the Dakota Water Resources Act not only with our people, but with all people, Indian and non-Indian, living on the Fort Berthold Reservation, whether living in towns or in rural areas.

Although the Dakota Water Resources Act expressly states that the water project is to provide municipal as well as rural water benefits, the Bureau of Reclamation has so far not agreed that appropriations under the Act can be used to help provide water benefits to residents in New Town and Parshall. We need this Committee's help to change this unwise and unfair policy.

We also had to bring a lawsuit against the Bureau of Reclamation to gain recognition that the tribe's successful financing of a small portion of the water project through low-interest USDA loans could be repaid with the Dakota Water Resources Act appropriations. To help us more promptly complete this vital municipal, rural and industrial water project, I ask for the Committee's support and Congress's prompt passage of Senate bill 2200, the Tribal Water Resources Innovative Financing Act, which was introduced by Senator Conrad and cosponsored by Senators Johnson and Tester.

Since our lands were first taken from the tribe for the Pick-Sloan Project over a half century ago, the tribe has also attempted to recover lands that are in excess of those needed for the project. The Three Affiliated Tribes and Standing Rock Sioux Equitable Com-

pensation Act provided for the return of project lands located at or above elevation 1,860 feet mean sea level to the tribe and other former landowners, but those provisions were repealed in 1994. The new law provided that the U.S. Army Corps of Engineers should proceed with the Secretary of the Interior to designate excess lands and transfer them. The Corps has been studying the potential transfer of the lands since 1994, but to date the tribe has not received any of the lands.

The tribe seeks the immediate return of these lands that are at or above the maximum flood pool elevation, and we have advised the Corps that we will agree to reasonable and necessary easements for lake access for project purposes. There is no question that the Corps has the legal authority to transfer these lands immediately to the tribe under the Fort Berthold Mineral Restoration Act. The Corps agrees that this provision provides legal authority for the Corps to transfer the excess lands to the Secretary of the Interior for the benefit of the tribe, but we are still waiting for it to be done.

The tribe and the Corps share a mutual interest in stewardship over these land along the lakeshore, but in my view, the tribe has a greater interest and ability to manage these lands. I firmly believe that the tribe would be a better steward of the lands than the Corps. We are already managing the contiguous tribal lands. Return of the lands would assist the tribe in developing tourism, recreation, and economic development opportunities. It is long overdue.

I also remind the Committee of the JTAC promise to replace the hospital that was flooded due to the Pick-Sloan Project. We have been working diligently with Chairman Dorgan and our North Dakota congressional delegation to fulfill this promise, but we still have a ways to go. I ask for the support of this Committee to finally bring the dream of caring, competent, and accessible health care to the Fort Berthold Reservation.

Finally, individual tribal landowners did not receive adequate compensation for their losses caused by the Pick-Sloan Project. For example, the Federal Government agreed to move some houses up to dry land before the flood, but many of these homes were simply moved atop dry bluffs in the middle of nowhere. These homes were not livable and have long since been abandoned. Many tribal members had to abandon the reservation because they could no longer survive in the land of their ancestors. Fundamental fairness demands that all individual tribal members who were cast out of their homes receive just compensation for their losses.

Again, I thank the Committee for the opportunity to speak and look forward to answering any questions you may have. I will be submitting my more detailed written testimony shortly.

Thank you.

[The prepared statement of Mr. Wells follows:]

**SUPPLEMENTAL WRITTEN TESTIMONY OF CHAIRMAN MARCUS WELLS, JR. FOR THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION TO THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE**

**November 15, 2007**

**Restitution for the Flooding of Tribal Lands Pursuant to the Flood Control Act of 1944**

My name is Marcus Wells, Jr., and I am the elected Tribal Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation. I would like to thank Chairman Dorgan and the Members of this Committee for the opportunity to supplement the oral testimony I provided at the hearing held on November 1, 2007. I would also like to thank this Committee for its commitment to reexamine the historic wrongs done to the Three Affiliated Tribes, to our Tribal members and to all Tribes harmed by passage of the Flood Control Act of 1944 and the development of the Pick –Sloan and Garrison Diversion project. I appreciate Chairman Dorgan and Senator Conrad's strong statements of support at the November 1 hearing for the principle that our Tribe and our Tribal membership must be fully compensated for the terrible flooding and other harms that resulted from this project.

Like them, I strongly believe that prior compensation legislation has not fully and justly compensated our Tribe and our Tribal membership for the catastrophic losses we suffered over fifty years ago. I pledge to work with this Committee and our North Dakota Congressional delegation to develop appropriate legislation to complete - once

and for all time - the important and honorable task of fulfilling the United States government's long-delayed promises to our people.

The Flooding of Our Tribal Bottomlands

The Three Affiliated Tribes of the Fort Berthold Reservation are comprised of three sovereign Tribes, each with its own noble history and culture. The Mandan, Hidatsa, and Arikara tribal nations occupied the areas of the Missouri, Heart, James, Cannonball, Mouse, Powder, and Yellowstone Rivers and their tributaries for centuries before the arrival of European-Americans. The bottomlands of these rivers have been central to our cultural, religious and social identity for thousands of years. Our ancestors each held a deep respect for these rivers and relied on their waters as a mainstay of our life on the Great Plains.

The Mandan, Hidatsa, and Arikara Tribes were formally united through the Fort Laramie Treaty of 1851 with the United States. The Fort Laramie Treaty set aside over 12 million acres for the unified Tribes. Over a thirty-five year period following the signing of the Fort Laramie Treaty, subsequent unlawful takings by settlers and Presidential orders sanctioning these unlawful takings, reduced the Tribe's land by degrees to less than one million acres. The Treaty of December 14, 1886 established the current exterior boundaries of the Fort Berthold Reservation with only 986,000 acres. Thereafter, the Homestead Act of 1910 opened our Reservation lands to non-Indian settlement, resulting in further encroachment and loss of our Treaty lands.

However, despite these repeated takings of our lands and the expropriation of our natural resources, the Three Affiliated Tribes succeeded in prospering economically and

socially until well into the first half of the twentieth century – primarily based on the productive use of the rich bottomlands of the Missouri River. Our remaining lands were rich in natural resources and were used by Tribal members for ranching and farming. Our bottomlands provided timber used for log homes, fence posts, and shelter for stock. They also provided natural food sources and wildlife habitats. In short, these bottomlands provided our Tribe with the resources and environment to create and maintain self-sufficient economies, political structures, and community relationships. Our Tribal members were well-known as the farmers, merchants, and bankers of the Northern Plains. The Hidatsa members were also known as the "people of the willows." Even the non-Indian settlers who homesteaded within the Fort Berthold Reservation relied on the Tribe for many of the raw materials of life – such as fresh produce, timber, and other mercantile goods.

Our Tribe's successful economy and thriving cultural lifestyle were damaged nearly beyond repair when, as a result of the Flood Control Act of 1944, the Federal government took another large piece of the Tribe's already severely diminished lands. The Federal government took the heart of our homeland, approximately 156,000 acres of prime Missouri River bottomlands on which most of our people lived and worked. These prime Tribal lands – representing approximately ninety-four percent (94%) of the Tribe's agricultural lands, eighty-four percent (84%) of the road network, the hospital, the schools, and the homes of more than 400 Tribal families – were to be flooded to allow for the development of the Garrison Diversion project. The Tribe bore the lion's share of destruction from flooding for the Garrison Diversion project, with well over one-fourth of the total acreage flooded in North Dakota (550,000 acres) falling within the Reservation's

boundaries. These rich lands had assured the Tribe's self-sufficiency for generations through ranching and agriculture. With the flooding, farms and ranches in the bottomlands were liquidated.

The Federal government unilaterally took these bottomlands without first consulting with or obtaining the permission of our Tribal members or our Tribe's governing body, the Tribal Business Council. In fact, it is my understanding that the U.S. Army Corps of Engineers began to develop the Garrison Diversion project as early as 1945, three years before the Federal government even attempted to negotiate a settlement with the Tribe and our Tribal membership. Our Tribal leaders and members never voluntarily agreed to accept the devastation to the Tribal economy, culture, towns, and homes caused by the flooding of prime Tribal bottomlands for the Garrison Diversion project. Instead, our Tribal leaders and members protested these unlawful takings in every manner available. Nonetheless, Congress and the Executive branch ignored Tribal protests, passed legislation supporting the project, and permitted the Corps of Engineers to continue its work as if it already owned the land outright.

Of course, the Federal government did not own our land outright, but instead held it in trust for the benefit of the Tribe and our members. The unceasing work of the Corps of Engineers, despite strong Tribal protests, caused many people in our Tribal communities to believe that the loss of the Tribe's most productive Reservation lands was inevitable. Tribal Chairman George Gillette was forced to sign an agreement with the Department of the Interior to sell 156,035 acres of Tribal land in 1948 for approximately $12.6 million. This amount represented only $80 per acre and was far below the "power value" of these lands – much less the incalculable value of these lands to our Tribe's

culture and history. Chairman Gillette wept at the signing of the agreement in Washington, D.C. and said, "Right now the future does not look too good for us."

As Chairman Gillette accurately predicted, the Garrison Diversion project created far-reaching cultural, economic, and health problems for our Tribal members. Construction on the $294 million Garrison Dam began in 1947, and closure of the embankment occurred in April 1953. The Corps of Engineers completed the final earthwork in the fall of 1954, flooding the Missouri River bottomlands and eventually forcing almost all of the Tribe's people to relocate to the barren highlands, where our members had previously grazed livestock. Tribal unemployment soared to as high as seventy percent (70%) as our Tribe's agriculture-based economy was destroyed. Construction of the Garrison Dam forced more than eighty percent (80%) of the Tribes' membership – 339 families – to relocate to higher ground. Some of our Tribal members were forced by these circumstances to move off the Reservation all together.

Following the flooding, Tribal communities and families became divided by the vast expanse of Lake Sakakawea, which was created by the filling of water behind Garrison Dam. The Lake severed our Reservation lands into remote sections not easily accessible to one another, hampering community, government and economic development. These remote sections were connected with only one bridge at Four Bears. Our Tribe has since struggled to be self-sufficient as our communities became separated from one another. Driving from one part of the Reservation to another can take four or more hours by car, making it very difficult and costly to provide basic governmental services such as law enforcement, health care, education and transportation services.

These flooded bottomlands lands had been central to Tribal life and had also provided ample access to good, clean water. During the time of Garrison Dam construction, the Federal government repeatedly promised Tribal leaders that our people would receive new homes, schools, hospitals, roads, and other necessary infrastructure to help rebuild Tribal society and economy after the flooding of traditional Tribal communities in the bottomlands. In particular, the United States government made repeated promises to our Tribe to provide a safe and plentiful domestic water supply. Most of these promises were never fulfilled, and we were never fully compensated for the taking of our lands and communities. Our Tribal members have never shared in the huge benefits which the Dam's operations have provided to the Federal government or to the many people and communities located far from our Reservation.

Compensation for the Loss of Our Bottomlands

The payment we received from the Federal government was far too little to compensate for the loss of our bottomlands, for the depth of our people's suffering, and for the fragmentation of our unified Tribal government services. Three decades after the Garrison Dam was built, the Federal government admitted as much. Secretary of the Interior Donald Hodel signed a charter in 1985 creating the Garrison Unit Joint Tribal Advisory Committee, or JTAC. The JTAC's Final Report of May 23, 1986 determined that our Tribal leaders had had no choice but to accept the paltry financial terms offered by the Federal government for the flooding of our Missouri River bottomlands, and that Congress had offered the inadequate sum of $12.6 million on a "take-it-or-leave-it" basis. The JTAC Report calculated that because the bottomlands were so rich in natural

resources, and because our Tribe was economically self-sufficient before the flooding of the bottomlands, the resource base we lost was valued between $170 million and $411.8 million in 1986 dollars.

The JTAC Report concluded that our Tribe was entitled to the substitute or replacement value of these tens of thousands of acres of lost bottomlands which had formed the economic base of our Reservation. The Report further stated that "Congress recognized . . . that only the principle of substitute, or replacement, valuation, by way of the replication of the resources base of the Tribes both as to area and quality, would adequately compensate the Tribes and make them whole." This was so because Congress also "recognized that the bottomlands of the reservation represented the only income producing resource base that was sufficient to make the reservation a successful enterprise." However, the Report stated that the War Department had "proved unable to comply with the statutory requirements imposed" to compensate our Tribe.

The JTAC Report found that due to the hardships endured by our Tribe after the flooding, Tribal schools were inadequate, our Tribal health care system was failing, and people living on the Reservation experienced levels of fatal and debilitating health conditions that far exceeded normal levels in the United States. In addition to further financial restitution, the JTAC report recommended that the Federal government undertake several measures to compensate the Tribe for its sustained losses. These steps included completion of a Reservation-wide drinking water system, construction of two major irrigation projects, financial assistance for Reservation farms, development of recreational shoreline opportunities on Lake Sakakawea, preferential rights for Garrison power, and replacement and refurbishment of critical infrastructure lost due to the

flooding – such as our health care facility, bridge, school dormitories, Tribal roads, and housing facilities. These recommendations were intended to make the Tribe whole again. But again, these projects have not been fulfilled in accordance with the Federal government's promise. It has been over 50 years since the flooding of our lands, and we still have not been made whole.

From the JTAC funds we did receive, the Tribe earns a relatively low rate of interest - roughly $4 million per year. By resolution, our Tribal Business Council has dedicated this money for Tribal education, social welfare, economic development, and other Tribal programs. While that has been our intention, the financial reality is that we have been forced by growing funding shortfalls to use our annual JTAC earnings to subsidize the Federal government's own trust responsibility to provide services to our people by millions of dollars. For example, the Tribe puts $600,000 of its own funds per year toward the law enforcement program; $500,000 per year toward the Indian Health Service programs; $600,000 per year toward the Indian Reservation Roads Program; and $1 million per year toward the Housing Program.

Our JTAC earnings were intended to bring advances to our Tribe and our Tribal members far beyond the standard level of Federal trust services, but these earning have essentially been hijacked by the Federal appropriations process to cover the Federal government's own costs to deliver Federal trust services to our people. In effect, the Federal government has diverted our JTAC compensation funds to pay itself back for the cost of delivering Federal trust programs on our Reservation. Yet these Federal trust programs were themselves intended to provide compensation for the far earlier taking of our lands and our unfettered sovereign rights through the Treaty of Fort Laramie and the

massive taking of our lands in the late 1800s and early 1900s. It is patently unfair and unworthy of a great Nation like the United States to force our Tribe to use our JTAC compensation fund to cover the deficiencies in annual Federal appropriations.

If Congress passes new legislation to compensate our Tribe more fully for our $411.8 million loss in 1986 dollars, we will put these additional funds to work to improve our Reservation infrastructure. We cannot return to the economic self-sufficiency that we enjoyed before the flooding of our Reservation without a safe, reliable transportation network, accessible schools, a fully functional health system and Reservation-wide water, irrigation and sewer systems. This Committee's effort to develop fair and comprehensive Pick-Sloan compensation legislation would help put us on the path toward true economic self-sufficiency and greater Tribal self-determination.

I now turn to some of the specific Tribal-Federal projects, program and initiatives that - when completed – will help to make our Tribe and our people whole for the losses we suffered.

Bringing Safe, Clean Drinking Water to the Reservation

As described above, the JTAC Report recommended, among other things, that the construction of a safe, complete drinking water system would be essential for the Nation to revitalize economic growth on the Reservation, and that the Secretary of the Interior should seek authorization and proceed immediately with the construction of such a system. The JTAC report emphasized that the Tribe had been promised the completion of its rural water distribution projects and that the United States needed to fulfill this promise. However, the Tribe's drinking water system is far from complete. Despite

passage of the Garrison Reformulation Act in 1986, Pub. L. 99-294, and the Dakota Water Resources Act in 2000, Pub. L. 106-554, over ninety percent of our Reservation homes still are not hooked up to the Fort Berthold Rural Water Supply System, which is designed to provide safe and clean drinking water on the Reservation and adjacent areas. For individual Tribal families or other Reservation residents, digging an artesian well is often not feasible, and the water drawn from such wells is undrinkable due to over-saturation with alkaline minerals such as sodium and magnesium.

Many Reservation families must still clean dishes and bathe themselves and their small children in brown well water that reeks of heavy minerals such as manganese, coal, iron and lime. These unhealthy minerals also exacerbate the dangerously high level of diabetes on the Reservation. As a result, many families in the Reservation's rural communities still haul in or truck in potable water to their homes, making life on the Reservation expensive and inconvenient. In all, more than 300 Tribal families still have to truck fresh water into their homes, businesses, farms and ranches to meet domestic water needs for drinking, cooking, washing dishes, bathing, and watering livestock. Ironically, even the family of the Tribe's director of construction for the Fort Berthold Rural Water office does not yet have direct access to a safe, clean water supply.

The Garrison Reformulation Act of 1986 and the Dakota Water Resources Act of 2000 were meant to speed up the completion of our drinking water system for all municipal, rural and industrial water users within the exterior boundaries of the Fort Berthold Reservation and adjacent areas, but annual Federal funding appropriated under these laws has been far too little to make any substantial progress on this important project. There are only a handful of elders left who remember the time before the

flooding of our lands. They deserve to see clean, safe drinking water running into their homes during their own lifetimes.

The lack of clean, accessible drinking water has forced some Tribal members to abandon their homes in rural areas on the Reservation. The need to haul clean water, even in harsh winter conditions, is constant, making rural life on the Reservation difficult or impossible elders and for families with young children. However, simply moving to a town within our Reservation, such as New Town or Parshall, does not solve the drinking water problem. While residents in these towns may have access to tap water unlike many rural Reservation residents, they must also pay exorbitant utility bills, and many face the threat of water outages due to historically low water levels in the Missouri River.

Contrary to the Federal government's promises and the express terms of the Dakota Water Resources Act, Tribal members and non-Tribal residents living in New Town often pay hundreds of dollars a month for drinking water because they must pay a surcharge to cover New Town's financing of its upgraded water treatment plant. Tribal members and non-Tribal residents living in Parshall also live under the constant threat that their water will be turned off due to the blockage of the water intake system serving the town as a result of sediment buildup and falling water levels in the Missouri River. For a people who have given up so much to provide needed flood control, water and power benefits to so many others in this country, the current state of affairs is intolerable and demands prompt Congressional action.

To address the water needs of both rural and municipal Reservation residents, our Tribal staff have developed detailed and carefully drafted water purchase agreements to share the benefits of the Dakota Water Resources Act fairly with Tribal members and

non-Tribal residents living on the Reservation. Although the Dakota Water Resources Act expressly states that the water project is to provide municipal as well as rural water benefits, the Bureau of Reclamation so far has not agreed that appropriations under the Act can be used to help provide water benefits to residents of New Town, Parshall and other Reservation communities. I believe the Bureau of Reclamation is ignoring Congress' plain words and intent in passing the Dakota Water Resources Act and ask for this Committee's help to change this unwise and unfair policy.

In addition, the Tribe had to bring a lawsuit against the Bureau of Reclamation to gain recognition that the Tribe's successful financing of a small portion of the water system construction project through low-interest USDA loans could be repaid with DWRA appropriations. To help us more promptly complete this vital municipal, rural and industrial water project, we request the Committee's support for – and Congress' prompt passage of – Senate bill S. 2200, the Tribal Water Resources Innovative Financing Act, which was introduced by Senator Conrad and cosponsored by Senators Johnson and Tester. This bill will affirm that tribes can finance drinking water construction projects in today's dollars, bringing these important projects to completion much sooner and more cost effectively than could occur with traditional pay-as-you-go funding methods.

As noted above, Lake Sakakawea creates a physical barrier that substantially increases the cost of developing the Fort Berthold Rural Water Supply System. Because of this natural water barrier, we must construct new water treatment plants, pipelines and intake facilities for the isolated portions of our Reservation. We must also make use of the existing water treatment plant in New Town to supply water to rural residents in the

Northeast Segment of the Reservation. As shown in the enclosed PowerPoint presentation developed by our Tribal engineers and Tribal Rural Water office, we are ready, willing and able to substantially expand water service on our Reservation.

Unfortunately, the small trickle of annual Federal appropriations, often less than $1 million per year, is hardly enough to keep up with construction cost inflation. The lack of Congressional appropriations has been tying our hands and delaying these critical water supply projects. What little money that has come to us under the Dakota Water Resources Act must often be diverted to emergency water intake projects due to the dangerous drought conditions in North Dakota. I therefore call on the Members of this Committee and Congress to help us substantially increase the meager Dakota Water Resource Act appropriations in FY 2008 and in future fiscal years until this project is completed.

Water Quantification

As this Committee knows well, our Tribe possesses a priority water right to the Missouri River under the legal principles first articulated by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908). For many years, our Tribal leaders have been concerned about quantifying this prior water right for a variety of reasons. While some of these concerns still remain, our Tribe is also gravely concerned about the potential infringement of our water rights due to the changing climate, the current water management of the U.S. Army Corps of Engineers, and the potential for the diversion of our water rights to supply the Red River Valley project.

In order to protect our water resources for the benefit of our Tribal members and non-Tribal residents of the Fort Berthold Reservation, our Tribe is now prepared to work toward quantifying our priority water right. I look forward to working with this Committee and with our North Dakota Congressional delegation to ensure that a full and fair quantification of our priority water right can be successfully accomplished without the need for expensive and protracted litigation.

Recovery of Excess Lands

Since our lands were first taken for the Pick-Sloan and Garrison Diversion project over a half century ago, our Tribe has also attempted to recover lands that are in excess of those needed for the Project. The Three Affiliated Tribes and Standing Rock Sioux Equitable Compensation Act, Pub. L. No. 102-575 (Oct. 30, 1992), provided for the return of Project lands located at or above elevation 1,860 feet mean sea level to the Tribe and other former land-owners, but those provisions were repealed in 1994 by Section 407 of Pub. L. No. 103-211. The new law provided that "the U.S. Army Corps of Engineers should proceed with the Secretary of the Interior to designate excess lands and transfer them." The Corps has been studying the potential transfer of the lands since 1994, but to date the Tribe has not received any of the lands.

The Tribe seeks the immediate return of those lands that are at or above the maximum flood pool elevation, and we have advised the Corps that we will agree to reasonable and necessary easements for Lake access for Project purposes. There is no question that the Corps has the legal authority to transfer these lands immediately to the Tribe under the Fort Berthold Mineral Restoration Act, Pub. L. No. 98-602, which 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.

The Corps agrees that this provision provides legal authority for the Corps to transfer the excess lands to the Secretary of the Interior for the benefit of the Tribe, but we are still waiting for it to be done

The Tribe and the Corps share a mutual interest in, and stewardship over, these lands along the lakeshore, but in my view, the Tribe has a greater interest and ability to manage these lands. I firmly believe that the Tribe would be a better steward of these lands than the Corps. We are already managing the contiguous tribal lands. The return of the lands would assist the Tribe in developing tourism, recreation, and economic development opportunities. It is long overdue.

Congressional Support for a New Hospital to Serve the Fort Berthold Reservation

As noted in the JTAC Report, the closure of the Garrison Dam flooded and destroyed the federal Indian hospital serving the Fort Berthold Reservation. To induce our Tribal members to leave their homes and property, Federal government officials promised to quickly replace the destroyed hospital. Despite repeated Congressional and Executive Branch assurances – going back over fifty years – that reiterated the Federal government's solemn commitment to replace the destroyed hospital, we are still years away from realizing the fulfillment of this promise. With that said, I want to commend

the recent work of Chairman Dorgan and our entire Congressional delegation to help ensure that this promise is finally kept.

As I understand it, current language in the Senate's FY 2008 Energy and Water appropriation legislation would provide $3 million to the U.S. Army Corp of Engineers for the design of the proposed Elbowoods Memorial Health Center. This is a good start. However, this bill must still be passed by the full Congress and signed by President Bush to become law. I am concerned that our hospital funding may be delayed or held hostage due to the current veto threats and political maneuvering surrounding the FY 2008 appropriations process. I am confident that Chairman Dorgan, who also chairs this Senate Energy and Water Appropriations Subcommittee, will do everything in his power to ensure that our surviving Tribal elders realize their life-long dream and witness the fulfillment of the Federal government's promise to replace the Elbowoods Hospital. After 57 years, it is well past time for our Tribal members to have access to a comprehensive, high quality health care delivery system.

Living so long without this replacement hospital, our Reservation residents have been forced to make do with an inadequate health clinic that is available only from 9 a.m. to 5 p.m. Monday through Friday. The lack of round-the-clock health care has led to many premature deaths and the unnecessary suffering for our people. Our current healthcare crisis is directly attributable to the flooding of our Reservation and to the United States government's failure to keep its promise in a timely fashion.

This is not the first time our Tribal leaders have brought the hospital replacement issue to this Committee's attention. In 1991, the Senate Committee on Indian Affairs issued a report noting that, at that time, over 40 years had passed since the Federal

government's promise was first made and over five years had then passed since the Joint Tribal Advisory Commission had issued its final report, but still the urgently needed health facility had not been built. This Committee stated in its 1991 report that "every effort should be made by the Administration and the Congress to provide additional federal funding through annual appropriations for" the health care facility. Again at an August 30, 2001 hearing, this Committee re- emphasized that this solemn promise by the United States had not been kept and stated that a great Nation must keep its word.

I ask all the Members of this Committee to help Chairman Dorgan ensure that this Congress and this Committee finally act to hold this great Nation to its promise. When the FY 2008 appropriations finally become law, we plan to use these funds to design our new health care facility to address the health problems that are killing the Mandan, Hidatsa and Arikara tribal members at rates far beyond the national average.

The facility will have an expanded kidney dialysis unit, since diabetes on the Reservation is twelve times greater than the national average and is our leading cause of death. It will also have a cancer-screening unit because the Reservation has a cancer rate seven times greater than the national average and cancer is our second leading cause of death. We are currently pursuing other funding sources to help us construct the kidney dialysis unit and cancer screening center. We also plan to have the capacity to test persons with heart problems because heart disease is our third leading cause of death. We also have developed a disease management system - in the form of an internet-based health information technology resource center - with the cooperation of the Georgetown University Medical Center and with Senator Conrad's strong support. This new center, when fully developed, will allow our medical staff to monitor diabetes patients in their

homes and will provide the staff with information on the best practices available on diabetes and cancer treatment and prevention, particularly with regard to the diet and lifestyle of our patients.

Now is the time to act because the Indian tribes in our region suffer the greatest disease burden of all the tribes in the twelve Indian Health Service areas in the Nation. Many Tribal members are geographically isolated and economically disadvantaged, which leads to greater health care complications. One of the most alarming health care disparities for Tribal members living in the Aberdeen and Billings IHS areas is the high incidence of chronic diseases such as cancer, diabetes, and heart disease, all of which substantially increase our annual health care costs. This replacement "round-the clock" healthcare facility will help us tackle these chronic problems and bring our annual health care costs down. I therefore ask for the continued support of this Committee to finally bring the dream of caring, competent and accessible health care to the Fort Berthold Reservation.

Adequate Compensation to Individual Tribal Members

Finally, I wish to remind this Committee that individual Tribal landowners have never received adequate compensation for their losses caused by Pick-Sloan and Garrison Diversion project. For example, the Federal government agreed to move some houses up to the dry land before the flood, but many of these homes were simply moved atop dry bluffs in the middle of nowhere. These homes were not livable and have been long since abandoned. Many Tribal members had to abandon the Reservation altogether because they could no longer survive in the land of their ancestors. Fundamental fairness

demands that all individual Tribal members who were cast out of their homes receive full, fair and just compensation for their losses.

I thank the Committee for the opportunity to provide this supplemental written testimony and look forward to our work together on this important legislation.

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Attachment 1 to the supplemental written testimony of Chairman Marcus Wells, Jr. for the Three Affiliated Tribes of the Fort Berthold Reservation

# Fort Berthold Rural Water

## Project Positioning Opportunities

**Oct. 2007**

BARTLETT & WEST
ENGINEERS

# The Issue.....

- The State of ND is aggressively pursuing support for the Red River Valley Water Supply Project (RR Project).
- Funding for the RR Project would be by both State and Federal authorizations
- Water for the RR Project would be from Lake Sakakawea
- To obtain Federal funds, Congressional Delegation is seeking unified North Dakota support.

# The Red River Project ... at a glance ...

- Purpose of RR Project .... To provide water to eastern ND to offset water shortages in event of a drought; RR Project sized to meet year 2050 needs.
- RR Project would divert approx. 120,000 acre feet of water per year at rate of 122 cfs
- RR Project expected to cost in excess of $700M of which 1/3 is expected to be Federal dollars
- With necessary support, construction could possibly begin in 2009 with a 4-5 year completion date

# RR Project Hurdles ....

- Construction of the RR Project is not currently federally authorized .... Needs federal authorization to be able to take water out of the Missouri River to eastern ND
- RR Project needs Federal authorization to convert a $200m loan into a $200M grant
- RR Project has opponents ...
  - Canada oppose due to water quality concerns
  - Environmental groups, and other down stream States oppose due to transfer of water
  - Various tribal governments oppose the RR Project (including TAT)

# Summary of TAT concerns ....

- RR Project seeks the use of Missouri River water without properly addressing the TAT water rights.
- RR Project might be adding an additional burden on the already limited appropriated for the construction funding level.
- RR Project will cause a diversion and increased competition for limited Federal funds which the TAT needs to complete the FBRW System.
- Many of the Tribal Elders which endured the pain and transition on the TAT sacrifice of Garrison Dam, are becoming few in numbers.

# With this Problem An Opportunity Exists ....

- The State of North Dakota and Congressional sponsors of the RR Project desperately need a unified State-wide support.
- They are desperately seeking Tribal support for the RR Project, in order to obtain Federal authorization and appropriations.
- The State sponsors have approached TAT and requested support on the RR Project.
- The TAT can utilize tribal influence within Indian Country to assist the State of North Dakota, if the State is willing to provide adequate funding to complete the FBRW Project.

# With State and Congressional support ... much is possible....

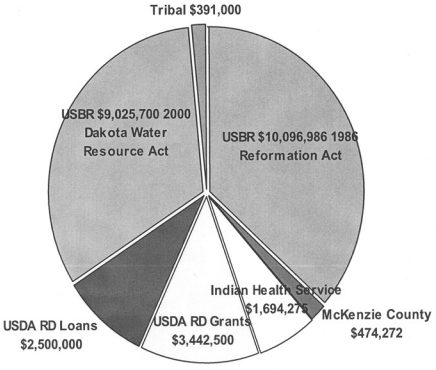
- The Dakota Water Resource Act of 2000 documents the federal obligation to provide federal funds and involvement in assisting TAT construct facilities to provide water to all residents of the Fort Berthold Indian Reservation.
- The USBR has accepted and concurred with an Engineering Report which documents water infrastructure needs of near $100M for the FBRW System.
- Federal appropriations under the DWRA have been insufficient to allow FBRW to make any meaningful progress with the FBRW Project---- progress made to date has generally been by use of funds from other programs.

# Possible resolution ....

- Resolve the Fort Berthold Rural Water Construction Program
  - *Develop a MOU with the Stake holders of DWRA to establish an advantageous division of the annual appropriations.*
  - *Establish division for of appropriations to benefit TAT to complete the rural water project in a timely fashion.*
  - *Tie the funding and construction of the RR Valley Project to the funding and construction of the FBRW Project.*
  - *Get the State of North Dakota and RR Project to accept a low percentage of the construction appropriations!*

# Funding to Date ....

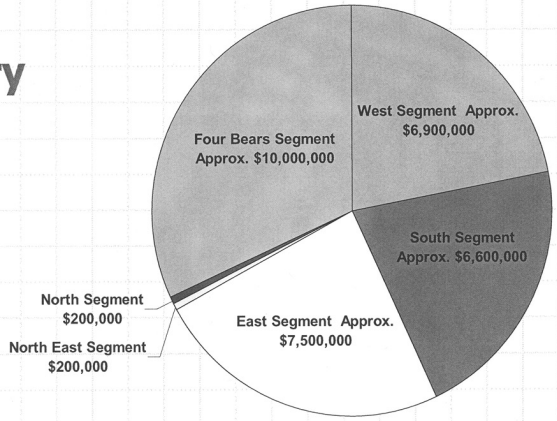
**Our Primary Funding Sources .... Total at $27,625,443**



# Progress to Date ....

**Our Primary Work To Date ...**

**Total of 21 RR Projects**




# If money were available ...

- FBRW has an approved Engineering Report which shows an ability to construct the FBRW System in a 10 year time frame. Report was issued in 2005.
- In the next 2 years--with adequate funding--FBRW could pursue a water development Project in each of the Reservation Segments

# In the Four Bears Segment ....

- ***Work to date ...***
  - ***Contract 2003(B)*** *at $1.5M... **distribution Project** funded by USDA; service to approx. 55 users*
  - ***Contract 2003(C )*** *at $.6M ... **elevated tank** Project funded by USDA; storage for all Segment users*
  - ***Dragswolf Reservoir*** *at $.9M ... **ground reservoir** Project funded by I.H.S.; storage for all Seg. Users*
  - ***Contract 2005(B)*** *at $1.3M ... **new intake** into Lake*
- ***Next Phase of Projects ...***
  - ***Four Bears Phase 1 WTP Expansion*** *at $2.7M ... **critically needed** to allow service to existing and future users; plant is currently running at maximum capacity.*

# In the North Segment ....

- ***Work to date ...***
  - ***No infrastructure built to date---*** *need to develop a water source*
  - ***Ongoing negotiations with New Town*** *for water appears to be stalled.*
- ***Next Phase of Projects ...***
  - ***North Segment Intake and WTP*** *at $6.5M .... Needed to provide for a **water source for both North and NE** segments.*
  - ***North Area 1 Distribution*** *Project at $4.5M ... would **provide service to 80 users** and extend a line into the NE Segment*

# In the North East Segment ....

- ***Work to date ...***
  - ***No infrastructure built to date***--- *need to develop a water source*
  - *Ongoing negotiations with New Town for water appears to be stalled.* ***Negotiations may be possible with Parshall.***
- ***Next Phase of Projects ...***
  - ***North East Segment Area 1 Distribution*** *Project at $3M ..... would provide* ***service to 40-50 users.***
  - *Above Project is* ***dependent upon a water source*** *— envisions using water from a FBRW constructed WTP in North Seg.*

# In the West Segment ....

- ***Work to date ...***
  - ***Contract 2003(E)*** *at $.2M...* ***distribution Project*** *funded by USDA; service to approx. 27 users within Mandaree*
  - ***Contract 2004(I)*** *at $.6M ...* ***raw water line*** *from intake to WTP; benefit to all users of the Segment*
  - ***Contract 2004(J)*** *at $.7M ...* ***new intake facility*** *due to low Lake levels; benefit to all users of the Segment.*
- ***Next Phase of Projects ...***
  - ***West Segment Distribution*** *and Tank for Area 1 at $2.5M .... Would provide* ***service to 30 users.***
  - ***West Segment Phase 1 WTP Expansion*** *at $2.7M ....* ***critically needed to allow service*** *to existing and future users; plant will be at maximum capacity after Project above.*

# In the East Segment ....

- ***Work to date ...***
  - ***Contract 2003(A)*** *at $1.0M... **distribution Project** funded by USDA; service to approx. 75 users*
  - ***Contract 2006(A )*** *at $1.3 ... **new intake** into Lake due to low Lake levels; benefit to all users of Segment.*
- ***Next Phase of Projects ...***
  - ***East Segment Area 2 Distribution*** *at $3.0M ... will provide **service to 50-60** users*
  - ***East Segment Phase 1 WTP Expansion*** *at $2.7M ... **critically needed** to allow service to existing and future users; plant will be at maximum capacity after Project above.*

# In the South Segment ....

- ***Work to date ...***
  - ***Contract 2006(C )*** *at $1.3M ... **new intake** into Lake with benefits to all users of the Segment*
- ***Next Phase of Projects ...***
  - ***South Segment Water Supply Line*** *at $1.3M ... new supply line from intake to WTP to tanks; benefits for all users of Segment*
  - ***South Segment Tanks at $.8M*** *.... Replacement of existing fiberglass tanks; benefits for all users of Segment*
  - ***South Segment Phase 1 WTP Expansion*** *at $2.7M ... **critically needed** to allow service to existing and future users; plant is currently at maximum capacity.*

# Summary of FBRW Projects for near term ...

- *West Segment ..... Area 2 Distribution Project*
- *West Segment ..... Phase 1 WTP Expansion*
- *South Segment ..... Water Supply Line*
- *South Segment ..... Reservoir Replacement Project*
- *South Segment ..... Phase 1 WTP Expansion*
- *Four Bears Segment ..... Phase 1 WTP Expansion*
- *North Segment ..... Intake and WTP Project*
- *North Segment ..... Area 1 Distribution Project*
- *North East Segment ..... Area 1 Distribution Project*
- *East Segment ..... Phase 1 WTP Expansion*
- *East Segment ..... Area 2 Distribution Project*

# Conclusions and Recommendations ...

- *TAT to meet with affected tribes of the RR Project and form a joint position paper.*
- *As possible, TAT to present such position to USBR at NRWA Meeting in Albuquerque in Nov.*
- *TAT to host a meeting of State sponsors of the RR Project, including other affected tribes, and present position paper*
- *TAT to schedule and meet with Congressional Delegation to present position paper.*

The CHAIRMAN. Chairman Wells, thank you very much for your testimony.

Next, we will hear from the Honorable Roger Trudell, the Chairman of the Santee Sioux Nation in Nebraska.

Chairman Trudell?

**STATEMENT OF ROGER TRUDELL, CHAIRMAN, SANTEE SIOUX NATION**

Mr. TRUDELL. Good morning, Chairman Dorgan and members of the Committee, and our two neighboring Senators, Senator Johnson and Senator Thune. It is always a pleasure to be wherever you are at, and Senator Murkowski, Senator Conrad.

I am going to limit mine because I did submit a couple page testimony, and just briefly say that our lands were taken through the condemnation process. There was no negotiation process involved in it at all. The lands that were taken were probably our richest lands because they were the bottomlands.

Some of the things I tried to point out in what I was presenting was if you just looked at it as a dollar value for an acre of land, probably the compensation was just. But if you don't take into consideration the long-term effects of the dam and what it has on our community, our reservation, you know, we are running into repairs that we can't meet because we have no resources to meet them. Because the dam and the lake are there, we have a lot of hunters that come in. We are a major flyway for geese and ducks and bats and mosquitoes and whatever else.

Nobody takes responsibility for the roads. The State has maintenance on the road into the reservation. They maintain it to a certain point, but once it ends at the village limits, then the village of Santee itself, which is 99.9 percent tribal, and has no tax base, and we have to stand the cost of repairing roads and other issues related to the hunters and stuff that are coming in.

Off those hunters, we have no income or anything. I think the Government are the only people who are able to sell waterfowl permits because it is Corps land, and the Corps has an agreement with the State of Nebraska, then they have to have a State of Nebraska hunting permit, and they don't have to have a tribal hunting permit. So we are not able to capture any dollars off of those people to do the repairs that need to be done on our roads.

And then one of the other things is that we are losing additional lands because of the Gavins Point Dam and Lewis and Clark Lake by I call it siltation, and somebody says it is actually sedimentation, I guess. The sedimentation is creating the rising water table along other lands through the creeks and stream beds. Those things I would like maybe to have somehow considered and the loss of potential income that we would have had if we still had control and access to the lands of the river, even down to the hunting rights of our people, because the State demands a hunting license from our tribal members, although it was formerly our land and it is basically Federal land if it was taken for the Corps of Engineers in the dam.

So the rights of our people are also being limited by what has taken place over the last 50 some years, with the creation of the Gavins Point Dam and Lewis and Clark Lake.

I am going to end my testimony at this point for the sake of time. Thank you.

[The prepared statement of Mr. Trudell follows:]

# Santee Sioux Nation

COUNCIL HEADQUARTERS / MUSEUM

Chairman: Roger Trudell
Vice Chairman: David Henry
Treasurer: Robert Campbell
Secretary: Wyatt Thomas

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October 29, 2007

Testimony on compensation for lands taken for the construction of Gavins Point Dam and Lewis and Clark Lake

Presented to The Honorable Senator Byron Dorgan, Chairman, and Members of the Senate Committee on Indian Affairs.

Presented by:

Roger Trudell, Chairman
Santee Sioux Nation

Thank you Honorable Chairman and Members of the Committee for giving the Santee Sioux Nation the opportunity to provide testimony on the justness or the lack thereof for compensation on lands taken for the construction of Gavins Point Dam and Lewis and Clark Lake.

First, let me inform the Honorable Chairman and members of this committee the Santee Sioux Nation is grateful for what compensations have been provided. I realize a formula was developed based on a number of factors to arrive at the sum of four million plus dollars to be held essentially in escrow for the Santee Sioux Nation generating interest for use by the Santee Sioux Nation based on a spending plan developed through public meetings and with the approval of the Bureau of Indian Affairs.

Due to the fact that we lack resources to avail ourselves of legal and economic expertise to show in dollars past lost revenues or the inability to show generation of revenues due to the loss of access to the river. I will do my best to provide what information I can.

For the last fifty years former Santee Sioux Nation property has been a Mecca for the river sports man. Waterfowl hunters and sports fishermen annually come to our community and reservation to practice their sports. Over the last fifty years permits and licenses have generated zero income for the Santee Sioux Nation. Yet the Santee Sioux Nation must stand the repairs to our main thorough fare due to the wear and tear created by those very sportsmen who are paying other entities to enjoy their sport. Most recently we have had to leave the street in disrepair because we lack the resources to make repairs.

Should the Tribe have had control of the river and the primary access points there would have been the potential to develop the tourist trade not only with the hunters and fishermen, but with the recreational river users. That factor was not part of the formula. One could only project and estimate what the potential income to the Tribe could have been. Unfortunately not being an economist, I can not make that projection.

A greater factor that was not considered in the formula is the advanced siltation of the Lewis and Clark Lake which is devastating to our existing land base. The siltation is creating a rising water table and eroding tribal lands along the creek and stream beds. The potential loss of revenues from those lands is not considered. The potential damage by the existing water table to individual wells and community wells will be costly. Individual wells are currently five thousand dollars or greater to get to untainted water. The municipal system purification process will have to be upgraded at a tremendous cost. Again, we lack the resources to provide these upgrades. A reservation wide drinking water system feasibility study was granted but under funded leaving the study somewhat in limbo.

Honorable Chairman, the compensation for the land taken may be just but the lack of compensation from lost revenues, ongoing repairs, and the further loss of lands need to be considered. The potential damage to our water system and individual wells need to be considered. Without consideration of these factors then I would state that compensation awarded is not just.

We request an additional period of time to provide supporting documentation.

Thank you for you consideration.

Respectfully submitted,

Roger Trudell, Chairman
Santee Sioux Nation.

The CHAIRMAN. Chairman Trudell, thank you very much for your testimony. We appreciate your traveling to this hearing.

Next, the Honorable Robert Cournoyer, the Chairman of the Yankton Sioux Tribe in Marty, South Dakota.

Mr. Chairman, you may proceed.

**STATEMENT OF ROBERT W. COURNOYER, CHAIRMAN, YANKTON SIOUX TRIBE**

Mr. COURNOYER. Good morning, Mr. Chairman and members of the Indian Affairs Committee.

I serve as the elected Chairman of the Yankton Sioux Tribe. Our tribal lands are located in southeastern South Dakota and the Missouri River borders our southern boundary. On behalf of the Yankton Sioux Tribal membership, I would like to express my appreciation to you and the Committee members for inviting me to testify today and for taking up consideration of the impact of the Flood Control Act of 1944 on Indian tribes along the Missouri River.

Our reservation was established by the Treaty of 1858, which provided our people with 430,405 acres of land along the Missouri River. As time passed, our reservation was diminished by the Act of August 15, 1894, which opened up our reservation to non-Indian settlement. By the 1950s when the Fort Randall Dam project was constructed, only 44,938 acres of Indian land remained in Federal trust status.

In 1944, the United States Congress enacted the Flood Control Act which authorized the construction of five dams along the Missouri River known as the Pick-Sloan Project. The primary purpose of the dams and reservoirs was flood control downstream. Other stated purposes were navigation, hydropower generation, providing water supplies, and recreation.

The impact of the Pick-Sloan Program was devastating to all the Missouri River tribes, including the Yankton Sioux Tribe. The Fort Randall Dam and reservoir inundated a large portion of the Yankton Sioux Indian Reservation bottomlands and rich productive agricultural lands. The Fort Randall project flooded 2,851 acres of Indian trust land within the reservation and required the relocation and resettlement of at least 20 families which was approximately eight percent of the resident tribal population. Over the

past 50 years, the tribe has lost an additional 408 acres to stream bank erosion.

The Missouri River bottomlands provided a traditional way of life for the Yankton Sioux, and now it is virtually lost. The bottomlands provided an abundance of game and plants for traditional food, plants for ceremonial and medicinal purposes, and plenty of trees for lumber and fuel. In addition to the loss of the bottomlands, the tribe lost acres and acres of productive agricultural land.

Inundation of the community of White Swan. The waters of the Missouri River completely inundated the traditional and self-sustaining community of White Swan, one of the tribe's major settlement areas. The White Swan families raised various livestock which took shelter in the timbered bottomlands or outbuildings. The White Swan families sold surplus milk and eggs in the towns of Lake Andes and Wagner. The money received was generally used to purchase needed stapes that were not cultivated from the rich soil in and around the community of White Swan.

The community was very close-knit and the families helped each other in many ways. While it was the practice of the United States to relocate flooded Indian communities flooded by the Pick-Sloan program to higher ground, the community of White Swan was never relocated or reestablished elsewhere. The White Swan families were simply dispersed elsewhere and the community was never replaced.

Condemnation proceedings. Neither the Flood Control Act of 1944 or any subsequent acts of Congress specifically authorized the United States Army Corps of Engineers or the Bureau of Reclamation to condemn Sioux tribal lands for the Pick-Sloan project. Unfortunately, the condemnation of the Yankton Sioux tribal lands was not challenged for a host of reasons.

The condemnation proceedings in the U.S. District Court resulted in settlements that did not provide adequate compensation to the Yankton Sioux Tribe. The tribe did not receive compensation for direct damages, but rather a compensation for the appraised value of their property. The condemnation proceedings did not take into account the large proportion of productive agricultural land.

Further, the settlement did not account for the inflation of property values between the time of the taking and the time of settlement, which was several years later. The average settlement payment on other Indian reservations whose land was taken by the act of Congress was approximately $16,000 per family according to the research documents, while the Yankton Sioux Tribe received $5,605 per family as a settlement for the land taken by the United States.

The Yankton Sioux Development Trust Fund. We recognize your efforts to compensate the Yankton Sioux Tribe in the 107th Congress. The Yankton Sioux Tribe Development Trust Fund was signed into Public Law 107–331 in December, 2002. The language sets up a trust fund for $23,023,743 in compensation for the tribal lands lost due to the Flood Control Act of 1944. These funds are not available until 2013. We would appreciate the Committee examining the possibility of these funds being made available prior to 2013.

In conclusion, many of our tribal elders who experienced firsthand the taking of tribal lands and the removal have passed on. It has been long enough for a just and equitable resolution to the devastating impacts of the Pick-Sloan Act on our tribe.

Thank you for your time in considering this important matter.

A couple of things I wanted to add, too, is currently we are in court with the Corps of Engineers on the takings areas of the White Swan and the North Point. Basically, what had happened there is that there was some discovery of remains and they were doing construction, because at the time they were turning these lands over to the State of South Dakota for recreational purposes. If it weren't for Title VI, the Wildlife Habitat Restoration Act, those lands rightfully should have come to the Yankton Sioux Tribe. Currently, we are asking that approximately 1,000 acres of that land be restored to the tribe.

Traditionally before the Corps took over and returned the land to the State of South Dakota, we had access to the river above the dam and below the dam in those Corps areas. Now, we are restricted from having access to those lands. Title VI was created, because a lot of the white landowners came and protested to not only the Governor and to their representatives in Congress, which said that if that land was given back all along the river, to the Tribes the taking areas, that it would block the white farmers, landowners, hunters, etc., from having access to the river. We believe that not to be true, and that is what they have done to us, in fact, is that by turning the land over to the State of South Dakota, that it blocked the Tribe and Tribal membership access to the river above the dam and below the dam in the Corps areas.

So we are asking currently that approximately 1,000 acres be restored back to the Tribe the taking areas.

Thank you for your time.

[The prepared statement of Mr. Cournoyer follows:]

PREPARED STATEMENT OF ROBERT W. COURNOYER, CHAIRMAN, YANKTON SIOUX TRIBE

Mr. Chairman and Members of the Indian Affairs Committee, my name is Robert Cournoyer, and I serve as the elected tribal Chairman of the Yankton Sioux Tribe. Our Tribal lands are located in southeastern South Dakota and the Missouri River borders our southern boundary. On behalf of the Yankton Sioux tribal membership, I would like to express my appreciation to you and the committee Members for inviting me to testify today and for taking up consideration of the impact of the Flood Control Act of 1944 on Indian Tribes along the Missouri River.

**Background**

Our reservation was established by the Treaty of 1858, which provided our people with 430,405 acres of land along the Missouri River. As time passed, our reservation was diminished by the Act of August 15, 1894, which opened up our reservation to non Indian settlement. By the 1950s, when the Fort Randall dam was constructed, only 44,938 acres of Indian land remained in federal trust status.

In 1944, the United States Congress enacted the Flood Control Act which authorized the construction of five dams along the Missouri River known as the Pick-Sloan Program. The primary purpose of the dams and reservoirs was flood control downstream. Other stated purposes were navigation, hydropower generation, providing water supplies, and recreation.

The impact of the Pick-Sloan program was devastating to all the Missouri River tribes including the Yankton Sioux Tribe. The Fort Randall dam and reservoir inundated a large portion of the Yankton Sioux reservations bottom lands and rich productive agricultural lands. The Fort Randall project flooded 2,851 acres of Indian trust land within the Yankton Sioux reservation and required the relocation and re-

settlement of at least 20 families which was approximately 8 percent of the resident tribal population. Over the past fifty years, the tribe has lost an additional 408 acres to stream bank erosion.

The Missouri River bottom lands provided a traditional way of life for the Yankton Sioux that is now virtually lost. The bottom lands provided an abundance of game and plants for traditional food, plants for ceremonial and medicinal purposes, and plenty of trees for lumber and fuel. In addition to the loss of the bottom lands, the tribe lost acres and acres of productive agricultural land.

**Inundation of the Community of White Swan**

The waters of the Missouri River completely inundated the traditional and self-sustaining community of White Swan, one of the tribe's major settlement areas. The White Swan families raised various livestock which took shelter in the timbered bottom lands or out buildings. The White Swan families sold surplus milk and eggs in the towns of Lake Andes or Wagner. The money received was generally used to purchase needed staples that were not cultivated from the rich soil in and around the community of White Swan. The community was very close knit and the families helped each other in many ways.

While it was the practice of the United States to relocate flooded Indian communities flooded by the Pick-Sloan program to higher ground, the community of White Swan was not relocated or reestablished elsewhere. The White Swan families were simply dispersed elsewhere and the community was never replaced.

**Condemnation Proceedings**

Neither the Flood Control Act of 1944 nor any subsequent acts of congress specifically authorized the U.S. Army Corps of Engineers or the Bureau of Reclamation to condemn Sioux tribal land for Pick-Sloan projects. Unfortunately, the condemnation of Yankton Sioux tribal land was not challenged for a host of reasons.

The condemnation proceedings in U.S. District Court resulted in settlements that did not provide adequate compensation to the Yankton Sioux Tribe. The tribe did not receive compensation for direct damages but rather a compensation for the appraised value of their property. The condemnation proceedings did not take into account the large proportion of productive agricultural land. Further, the settlement did not account for the inflation of property values between the time of taking and the time of settlement which was several years later. The average settlement payment on other Indian reservations whose land was taken by acts of Congress was approximately $16,680 per family according to research documents, while the Yankton Sioux Tribe received $5,605 per family as a settlement for the land taken by the United States.

**Yankton Sioux Tribe Development Trust Fund**

We recognize your effort in compensating the Yankton Sioux Tribe in the 107th Congress. The Yankton Sioux Tribe Development Trust Fund was signed into Public Law 107–331 December, 2002. The language sets up a trust for $23,023,743 in compensation for the Tribal lands lost in the Flood Control Act of 1944. These funds are not available until 2013. We would appreciate the Committee examining a possibility of these funds being made available prior to 2013.

**Conclusion**

Many of our tribal elders who experienced first hand the taking of tribal land and the removal have passed on. It has been long enough for a just and equitable resolution to the devastating impacts of the Pick-Sloan program on our tribe. Thank you for your time and consideration to this important matter. We appreciate Chairman Dorgan and the rest of the Committee's attention to the large scope of the issues affecting the Pick-Sloan program.

The CHAIRMAN. You are asking the Corps of Engineers at this point, right?

Mr. COURNOYER. Yes, we have a lawsuit with them currently.

The CHAIRMAN. Chairman Cournoyer, thank you very much.

Finally, we will hear from Chairman John Yellow Bird Steele, the President of the Oglala Sioux Tribe in South Dakota.

Mr. Steele, you may proceed.

**STATEMENT OF JOHN YELLOW BIRD STEELE, PRESIDENT, OGLALA SIOUX TRIBE**

Mr. STEELE. Thank you very much, Senator Dorgan.

I would like to thank the members of this Committee for allowing me to testify at this hearing. I would say that my heart feels very happy to see Senator Johnson there representing the Oglala Sioux Tribe. And I thank Senator John Thune for his attendance and representing also the Oglala Sioux Tribe.

I think that this is a very important hearing, Senators, and I thank you for holding this hearing. We talk about a comprehensive bill addressing the impacts of the 1944 Flood Control Act and the Pick-Sloan program, but I don't think it is as comprehensive as you call it, because it does not include the Oglala Sioux Tribe. We have been impacted.

I would like to say that the impact the Oglala Sioux Tribe feels from the 1944 Flood Control Act and the Pick-Sloan program, it requires reference to our treaties and the tribal land claims that we have filed in the Indian Land Claims Commission. I did not hear the GAO make reference to these. They only addressed those tribes that are physically situated along the Missouri River. The Oglala Sioux Tribe is a river tribe. I make reference and say just because we are adjacent to the Black Hills physically, that these other tribes are not Black Hills tribes. Why do we have to be physically located there to feel the physical impacts of the Pick-Sloan Act?

We are, and I would like to give a little testimony. I gave written testimony here. I would like to in my oral testimony explain a little on that. But I will say that just a little over 100 years ago, the Wounded Knee massacre, the Sand Creek massacre, the United States Government physically fought our people. Our mothers, our grandmothers, our daughters were there fighting the United States Government for a way of life that was being destroyed.

Today, this life is called third world conditions, the most impoverished—words, words, words. You physically live the life in the middle of these United States. And we are talking about some compensation for taking and not justly compensating rights. I thank you for that. That is the way we should treat one another, I do believe.

But we are still wary, Senators. Trusting is very hard when our lands we consider from our points of view to have been stolen, not justly compensated for. I am sorry.

I got a telephone call last night from a Mr. Sam Waddell, a tribal member of the Yankton Sioux Tribe, saying the Army Corps of Engineers just got orders from up above to quantify the tribe's rights on the river. Who is the Army Corps of Engineers to quantify this? And this leaves in my mind some fears, some apprehensions that this hearing might also lead to some settlement of water rights. It is a fear because, as I say, of the way we have been treated in the past, the way we live today.

But I will say my time is getting very short, Senators, so I am going to have to wrap it up here, that the 1944 Flood Control Act has impacted us because the Corps of Engineers operates the Missouri River main stem and the Bureau of Reclamation operates the tributaries. This is all associated with the 1944 Flood Control Act. Right now, the Angostura Dam on the Cheyenne River tributary

immediately upstream from the Pine Ridge Reservation has devastatingly impacted Pine Ridge.

Representative Herseth Sandlin has introduced H.R. 833 to establish a trust fund for the Oglala Sioux Tribe and restore water flow to the Cheyenne River. Senator Johnson will be introducing that bill on behalf of the Oglala Sioux Tribe. We thank him for that.

In conclusion, I would like to say, Senators, that Congress should develop and enact comprehensive reform of the Pick- Sloan program. The tribes upstream need drinking water. It is affecting the intakes of the water systems of tribes. The stabilization of reservoir levels, and protection of historic properties are very important to us.

I would also like to say that anything dealing with any settlement of water rights requires that we settle our outstanding land claims with the United States Government. So let's sit down, Senators, and let's talk about these in a fair, just way. Let us again, if need be, like the old treaties were established, talk about these what we might consider to be hard subjects and come to some sort of a settlement or agreement.

Today, us people sitting here testifying before you are the same people that were shedding their blood just a little over 100 years ago. This is a different kind of a war, but we are tomorrow's ancestors and we have a responsibility to see that our peoples are able to live a little better than we are right now in our dealing with yourselves.

I would like to thank you for this hearing. I really appreciate it, and I thank you for allowing me at the last minute to give testimony. I think that this hearing is very timely, and I look forward to working with this Committee on just a little bit of what I have said. I had to put this testimony together very quickly just from yesterday, and so we will refine it and resubmit it to you, Senators.

Thank you very much.

[The prepared statement of Mr. Steele follows:]

PREPARED STATEMENT OF JOHN YELLOW BIRD STEELE, PRESIDENT, OGLALA SIOUX TRIBE

Mr. Chairman and members of the Committee on Indian Affairs, my name is John Yellow Bird Steele. I serve as President of the Oglala Sioux Tribe.

Let me begin by thanking you for holding this important hearing. The Missouri River Basin Pick-Sloan Program has had significant adverse impacts on land, water and cultural resources of the Oglala Sioux Tribe and Great Sioux Nation. The costs of the Pick-Sloan program have disproportionately fallen on the Tribes, while the benefits are enjoyed in predominantly non-Indian communities, with little spillover benefits on the Indian Reservations.

The impact of the 1944 Flood Control Act and Pick-Sloan program on our Tribe requires reference to our treaties, and the tribal land claims filed in the Indian Claims Commission. Our reserved water rights to the Missouri River and its tributaries, and to the cultural resources along the banks of the Missouri River, have their source in our Treaties.

**Tribal Treaties**

The Oglala Sioux and other Tribes of the upper Missouri River basin are treaty Tribes. As such, we are entitled to special consideration with respect to the impacts of federal public works projects, on our land and resources.

The 1868 Ft. Laramie Treaty (11 Stat. 749) recognized title to the Teton and Yankton Sioux to 60 million acres of territory west of the Missouri River in the States of South Dakota and North Dakota.

The 1868 Treaty (15 Stat. 635) carved a 26 million acre reservation out of our 1851 Treaty territory for the Sioux bands. This reservation, called the "Great Sioux Reservation" included all of western South Dakota west of the low water mark of the east bank of the Missouri River. Thus, the 1868 Treaty recognized an undivided ownership interest in the entire bed of the Missouri River in the Oglala Sioux Tribe from the North Dakota boarder to the Nebraska border.

The United States maintains that it acquired the western portion of the Great Sioux Reservation known as the "Black Hills" under the Act of February 28, 1877 (19 Stat. 254) even though its confiscation of this area violated Article 12 of the 1868 Treaty which provided that no part of the reservation could be ceded to the United States without three-fourths consent of the adult male Sioux Indians occupying or interested in the Great Sioux Reservation.

The United States also maintains that it acquired an additional 9 million acres of the Great Sioux Reservation under the Act of March 2, 1889 (25 Stat. 888). The Act also established five smaller Sioux reservations from the remainder of the Great Sioux Reservation including the Pine Ridge Indian Reservation.

Thus, the Pine Ridge Indian Reservation is the current home of the Oglala Sioux Tribe, although the Tribe has claimed unextinguished rights to our treaty lands including the Missouri River.

**Indian Claims Commssion**

I believe that a discussion of the Indian Claims Commission Act proceedings is also necessary because I don't believe the Oglala Sioux Tribe can quantify its water rights in the Missouri River without first settling its outstanding land claims with the United States.

The Oglala Sioux Tribe filed a land claim in the Indian Claims Commission in 1950. This case was designed as "Docket 74." The case was divided into two cases in 1960, Docket 74–A and 74–B. Docket 74–A involves a claim for 34 million acres of 1851 treaty land located outside of the Great Sioux Reservation. It also involved an aboriginal title claim that included the east bank of the Missouri River in South Dakota from Pierre, S.D. northward into North Dakota.

There were two acts of fraud perpetuated by the Government upon the Sioux tribes regarding Docket 74–A lands. The first Act was when some federal official inserted "relinquishment language" in Article 2 of the 1868 Treaty. The ICC acknowledged that the Sioux bands would not have signed the 1868 Treaty, which ended the Powder River War of 1866–1867, had they known they were giving up any land. Nevertheless, the ICC ruled that Article 2 constituted a voluntary cession of 1851 treaty territory.

The second was when the U.S. Claims Court rammed a $44 million final money judgment down the Sioux tribes' throats in Docket 74–A based on a stipulated settlement agreement that the claims lawyers signed behind the backs of the Sioux tribes. The claims attorneys also stipulated away $3.7 million as an offset to the U.S. without the consent of the Sioux tribes.

The Oglala Sioux Tribe filed a motion for relief from judgment, which was denied by the Claims Court. The U.S. Court of Appeals for the Federal Circuit affirmed, but Judge Newman wrote the following in her dissenting opinion which exposes the collusion between the tribes' claims attorneys, government attorneys and the federal courts:

> The entry of judgment is surely not a routine "evidentiary stipulation" such as is encountered in day to day trial management: not only because the stipulation disposes of some 3.7 million dollars in moneys previously adjudged to be due the Sioux Indians; but because counsel for both sides knew that since at least 1979 tribes representing the majority of Sioux Indians had given instructions contrary to the settlement. The record contains two resolutions of the Oglala Sioux Tribal Council informing counsel that it no longer sought money damages, but wanted to pursue legal and legislative strategies to gain return of ancestral lands. These resolutions also directed counsel to have the Oglala Sioux Tribe dismissed from this litigation.
>
> A lawyer cannot be authorized by a court to make a settlement and bind the client contrary to the client's wishes. Nor can either the court or the United States ignore the tribes' several attempts to discontinue Mr. Lazarus' representation. The court does not discuss the asserted violation of 25 U.S.C. 81.
>
> In light of this extended history, the Claims Court's acceptance of the Stipulation of Facts and the grant of the Joint Motion to Enter Judgment is incongruous; and its denial of appellants' motion for relief (from judgment) under Rule 60(b) is in plain error, *in light of the undisputed assertion that they were given no prior notice of the settlement.* [Emphasis Supplied].

*See Oglala Sioux Tribe and Rosebud Sioux Tribe v. United States,* 862 F.2d 275 (Fed. Cir. 1988).

We can never accept the award for Docket 74–A under these circumstances, for to do so would be tantamount to closing our eyes and affirming these two acts of fraud perpetuated upon our Tribe by the Federal Government. And I don't see how we can quantify our water rights to the Missouri River without reaching an agreement with Congress to resolve our Docket 74–A land claim.

Docket 74–B was a claim for the Black Hills Claim. The ICC awarded $17.1 million, plus $85 million in simple interest, for the 7.3 million acres of Black Hills lands that was confiscated by the United States in the Act of February 28, 1877 (19 Stat. 254).

On appeal, the Court of Claims dismissed the ICC award on the basis that it had already ruled on the Black Hills Claim in a 1942 case. The Teton Sioux Tribes (except for the Oglala Sioux Tribe) and other 1868 Treaty signatory tribes got Congress to pass a new Court of Claims special jurisdictional act in 1978 that allowed for *de novo* consideration of the claim. The claim was refiled under the Act as Docket 148–78, and the Court of Claims which affirmed the ICC award in 1979 based on the record made in the ICC.

The Supreme Court affirmed the ICC award on June 30, 1980 on the basis that the confiscation of the Black Hills violated the Just Compensation Clause of the U.S. Constitution.

However, the Oglala Sioux Tribe did not renew its contract with its claims attorney Arthur Lazarus, Jr. when it expired by its own terms in 1975. It also never authorized its former claims attorney to refile the claim under the 1978 act and did not regard itself as a party to the 1979 Court of Claims decision and the U.S. Supreme Court decision. It therefore filed a quiet title and trespass damages action in U.S. District Court for the District of South Dakota in 1980, after the Supreme Court made its ruling.

The U.S. Court of Appeals for the Eighth Circuit, however, ruled that the tribe could not sue in the Article III courts of the United States because the Indian Claims Commission, which could only award money damages for the tribe's treaty lands, was the tribe's exclusive remedy and that the tribe was a party to the 1980 Supreme Court case.

Docket 74–B, like Docket 74–A, needs to be settled in a fair and honorable manner by negotiation and the implementation of any negotiated settlement through Congressional legislation

**The 1944 Flood Control Act**

The U.S. Army Corps of Engineers was placed in charge of constructing six dams on the main stem of the Missouri River under the Missouri River Pick-Sloan Program that was authorized by the 1944 Flood Control Act (58 Stat. 887). The Corps acquired approximately two million acres for the dams, and areas flooded by the lakes created by the dams. Three lakes, Lake Oahe, Lake Sharpe, Lake Francis Case are located within our treaty territory.

It is common knowledge that a substantial amount of land taken by the Federal Government for the main stem dams was located on Indian reservations that bordered the Missouri River.

The Oglala Sioux Tribe was impacted by the 1944 Flood Control Act because it has unextinguished rights to the river bed of the Missouri River, and to treaty lands located in its 1851 and 1868 Treaty areas, as well as the aboriginal title lands located east of the Missouri River that were taken by the Government for the main stem dams and reservoirs under the Missouri River Pick-Sloan Program. It also has cultural resources along the Missouri River that were impacted by the Act. The Corps never acquired the Oglala Sioux Tribe's interests in these properties when it attempted to extinguish Indian title for the dams and reservoirs.

**The White River and Cheyenne River Pick-Sloan Projects**

The Flood Control Act authorized two dams on the Pine Ridge Reservation at Slim Buttes and Rockyford for irrigation, recreation and flood control. The projects were never constructed, however. This failure has resulted in the Tribe not being able to develop its irrigation potential that would have created economic opportunities for the tribe and its members.

**The Oglala Sioux Rural Water Supply System**

The western portion of the Pine Ridge Reservation in White Clay District (now Oglala District) was suffering from lack of good potable water in the 1980s. The Tribe took the initiative to join the West River and Lyman Jones rural water projects in developing and getting Congress to pass the Mni Wiconi Act (P.L. 100–

516) in 1988. The Act authorized the construction of a Core pipeline and related facilities from the Missouri River at Ft. Pierre to the Pine Ridge Indian Reservation, as well as a reservation delivery system. The Core pipeline is 95 percent completed and the reservation delivery system is 40 percent completed. The core pipeline and reservation delivery system is held in trust by the United States for the Oglala Sioux Tribe.

There are now three inter-connecters to the OSRWSS, the West River/Lyman Jones Rural Water System, the Lower Brule Rural Water System, and the Rosebud Rural Water System.

This OSRWSS is a good project that allows the Tribe to reap some of the benefits that it has been denied over the years from its lands along the Missouri River, and from the Missouri River itself. It also allows us to improve the health and general welfare of our tribal members and plan for future water shortages that may be caused by global warming.

We want to thank Congress for the annual appropriations that has allowed the OSRWSS and other systems to be constructed, and we look forward to the day when the Mni Wiconi Project is completed.

**Missouri River Land Transfer Issues Under WRDA**

The Oglala Sioux Tribe presently has a civil action pending in the United States District Court for the District of Columbia challenging the transfer of title to Corps' lands and recreational areas along the Missouri River to the State of South Dakota under Title VI of the Water Resources Development Act of 1999, as amended by Title VI of the Water Resources Development Act of 2000. *See Oglala Sioux Tribe v. U.S. Army Corps of Engineers, et al.* (Case No.1:01CV02679 (GK)). This case is a reservation boundary dispute that seeks to uphold the 1868 Treaty and protect historic properties and cultural resources on the lands and recreational areas.

**There is a Need for Comprehensive Reform of the Pick-Sloan Program**

Comprehensive reform is needed to ensure that the Indian Tribes share more equitably in the water supply and hydropower benefits of the Pick-Sloan program. Reforms should address at least four areas. First, the water management by the Corps of Engineers on the Missouri River main stem, and the Bureau of Reclamation on the tributaries to the Missouri, must be revised to ensure adequate water supplies for the Tribes. Second, reforms should include the authorization to use hydropower revenue generated by the Pick-Sloan program, to fund development projects on Indian Reservations in the Missouri River basin. Third, Congress should address the claims of individual Indian Tribes that are directly impacted by a dam project under the Pick-Sloan program. Fourth, the historic preservation laws need to be strengthened to ensure that cultural resources along the Missouri River are protected from erosion and destruction.

*1. The Water Management by the Corps of Engineers and Bureau of Reclamation Must be Revised*

The Corps of Engineers operates the dams on the Missouri River pursuant to the Missouri River Master Water Control Manual. The Master Manual, as revised by the Corps of Engineers in 2004, provides for steady seasonal flows from Gavins Point Dam for downstream navigation. Daily releases are significant, with 35,000 cfs designated as full navigation service for an eight month navigation season. In addition, the Corps of Engineers designates water releases for the spring rise for habitat restoration, and for hydropower generation, at the various times of the year.

In its Missouri River operations, the Corps of Engineers gives no consideration to Tribal water supply needs. This is the case even though the Oglala Sioux Tribes operates the water treatment and intake facilities on the Missouri River for the Mni Wiconi Project, which serves the West River Lyman Jones Water District, Lower Brule Sioux, Rosebud Sioux and Oglala Sioux Tribes. The Indian Reservations along the Missouri River, such as the Standing Rock Sioux and Cheyenne River Sioux Tribes, have suffered diminished drinking water supplies. The reservoir levels in the upper Missouri basin diminished substantially, as a result of the continuing navigation flows, during the current period of severe drought.

The Corps of Engineers violates our Treaties and our rights under the Winters Doctrine, by managing water flows in a manner that causes diminished water supplies in the upper Missouri River basin. The water releases for downstream navigation and habitat restoration directly impact the water supplies that are needed by the Oglala Sioux and our fellow Indian Tribes on the upper Missouri River.

Yet the Corps of Engineers manages the Missouri River water flows in a manner that allocates water flows for non-Indian uses in the lower Missouri River. The Master Manual must be revised, to decrease navigation flows and stabilize water supplies on the upper Missouri River, to fulfill the rights of the Tribes.

The water supplies and rights of our Tribe should not be jeopardized by the regional disputes between the upper and lower Missouri basin. The Congress should take action requiring the Corps to maintain stable reservoir levels on the upper Missouri River, for Tribal consumptive and instream water needs.

The Bureau of Reclamation operates the tributary dams for irrigation and recreation. One such project, the USBR Angostura Unit, impounds water flows of the Cheyenne River immediately upstream from the Pine Ridge Reservation. The USBR completely blocks off Cheyenne River water flows, in order to provide water service of 48,000 acre-feet per year for irrigation of 12,218 acres at the Angostura Irrigation District.

The Bureau of Reclamation released the *Final Environmental Impact Statement, Angostura Unit, Contract Negotiation and Water Management,* in August, 2002. Reclamation confirmed the incidence of fish with lesions and problems with water quality and riparian vegetation on the Pine Ridge Reservation, downstream from Angostura.

The water management by the Bureau of Reclamation of the Cheyenne River at Angostura provides for the diversion of waters subject to the water claims of the Oglala Sioux Tribe for the Angostura Irrigation District. Water flows have diminished and the environment on the Pine Ridge Reservation has been degraded as a direct result of the USBR water management.

As is described below, Representative Herseth-Sandlin has introduced H.R. 883, to establish a trust fund for the Oglala Sioux Tribe and restores certain water flows in Cheyenne River. This legislation addresses the problems caused by water management by the Bureau of Reclamation on the Cheyenne River.

*2. The Congress Should Authorize the Use of Pick-Sloan Hydropower Revenues for Development Projects on Indian Lands*

The comprehensive reform of the Pick-Sloan program should include the authorization for the use of hydropower generated by the Pick-Sloan program, to fund development projects on Indian Reservations in the Missouri River basin. Hydroelectric revenues of the Western Area Power Administration are collected for debt service of the multi-purpose functions of the Pick-Sloan program. The re-designation of these funds for Tribal development projects would constitute a cost effective manner of addressing the historic inequities of the Pick-Sloan program.

The waters of the Missouri River produce a hydroelectricity system estimated by the Corps of Engineers as contributing approximately $800 million to the national economy each year. The economy on the Pine Ridge and other Indian reservations in the upper Missouri River Basin remain generally impoverished, however.

The population of the Pine Ridge Reservation is approximately 47,000, making the Oglala Sioux one of the largest Tribes in the United States. (Bureau of Indian Affairs, *Indian Labor Force Report,* 2003). The 2003 unemployment rate was estimated by the Bureau of Indian Affairs at 87 percent. *Id.* The 2000 Census indicates that per capita income in Shannon County, the Reservation's largest county, was $6,286. This compares with the per capita income nationwide of $21,587. Median household income on the Reservation in 2001 was $20,916, less than one-half the national average of $41,994.

The revenue produced by the sale of the hydroelectricity in the Pick-Sloan program should be authorized for the use by the Tribes of development on our Reservations. This will address the historical inequities of in the allocation of the costs and benefits of the Pick-Sloan program, and address the far-reaching infrastructure and economic development needs of the Indian Tribes in the upper Missouri River basin.

*3. There Must Be Redress for Indian Tribes Under Pick-Sloan*

Throughout the upper Missouri River basin, individual components of the Pick-Sloan program have adversely affected the lands, waters and economic resources of Indian Tribes. Many Tribes retain claims that have not been addressed, for the taking of land, relocation of communities, destruction of infrastructure, diminished water supplies, and degraded environment, from the construction and on-going operation of the Pick-Sloan program.

For example, the Oglala Sioux Tribe has suffered from diminished water flows, riparian vegetation, wildlife and degraded water quality, due to the impoundment of water and irrigation at the USBR Angostura Unit. The Bureau of Reclamation impounds 133,000 acre-feet of water at Angostura Reservoir, completely disrupting natural water flows in the Cheyenne River on the Pine Ridge Reservation.

The harm suffered by the Tribe is documented in the *Final Environmental Impact Statement, Angostura Unit, Contract Negotiation and Water Management.* Accordingly, Rep. Herseth-Sandlin has introduced H.R. 883. This legislation establishes a trust fund for the Oglala Sioux Tribe in the amount of $90.5 million, and restores

water flows in Cheyenne River through efficiency improvements at the Angostura Irrigation District. It will provide resources for the Tribe to address the environmental impacts of the Angostura Unit, and for much needed economic development on the Pine ridge Reservation.

This legislation is long overdue. The Congress should enact H.R. 883, and should address the claims of all Tribes which suffered adverse impacts from the Pick-Sloan program.

*4. Enhanced Protection for Cultural Resources is Needed*

No agency of the Federal Government has destroyed more cultural resources or desecrated more Native American human remains than the Army Corps of Engineers, in its Missouri River operations. Yet in its operations of the Missouri River dams, the Corps of Engineers has failed to implement a mitigation or other compliance plan as required under the National Historic Preservation Act. (16 U.S.C. § 470a *et seq.*)

The National Historic Preservation Act requires the Corps of Engineers to evaluate the impact of its "undertakings" on historic properties along the Missouri River. (NHPA § 106, 16 U.S.C. § 470f). The federal courts have determined that wave action caused by water releases at the Missouri River dams are "undertakings" requiring compliance with the NHPA. (*Yankton Sioux Tribe v. Army Corps of Engineers,* 83 F. Supp. 2d 1047 (D.S.D. 2000)).

A Corps of Engineers Programmatic Agreement with the Advisory Council on Historic Preservation, outlining the agreed-upon procedures for compliance with section 106 of the NHPA, when wave action of the Missouri River impacts cultural sites at the water's edge. However, on July 17, 2000, the Advisory Council terminated the agreement, informing the Corps:

> The Omaha District's handling of this matter evidences a serious lack of understanding of Federal historic preservation laws and regulations, a lack of commitment to fulfill historic preservation legal responsibilities, and an unwillingness to seek and consider the views and recommendations of State officials, tribal governments, and the Council . . ..
>
> The PA was intended to allow the Corps greater flexibility in how it met its obligations under Section 106 while fostering better long-term planning for and stewardship of historic properties . . . (T)he Omaha District has disregarded commitments it made in the PA and the resulting (negative) consequences it has had for irreplaceable resources under its care. The Council is forced to conclude that the Corps is unable, or unwilling to carry out the terms of the PA.
>
> (Letter of Carolyn Buford Slater, Chairperson, Advisory Council on Historic Preservation, to Secretary of the Army, dated July 17, 2000).

The Corps of Engineers has failed in its responsibility of stewardship for sacred Native American cultural resources along the Missouri River. The Corps disregarded its commitments under the Programmatic Agreement, which was consequently terminated by the Advisory Council. The Missouri River Master Manual contains no provisions for the protection of the identified cultural sites in the future, or mitigation of damage that is caused by wave action.

Native American human remains are entitled to special protection under the Native American Graves Protection and Repatriation Act. (NAGPRA) (25 U.S.C. § 3001 *et seq.*). Yet the Corps has completely disregarded its obligation to avoid disturbance of existing grave sites, and to properly repatriate human remains upon inadvertent unearthings due to wave action of the Missouri River.

These legal requirements are extremely important to our Tribe. Under NAGPRA, Indian Tribes enjoy presumptive rights of ownership and repatriation of human remains and cultural objects that are unearthed within its aboriginal territory, as adjudicated by the Indian Claims Commission. (25 U.S.C. § 3002). As stated above, the Oglala Sioux Tribe retains treaty and aboriginal claims throughout an extensive area, including the bed of the Missouri River and the lands adjacent to the Missouri. Consequently, our Tribe enjoys rights of ownership and repatriation under NAGPRA on lands along the Missouri River.

The wave action caused by COE water releases for hydropower generation and downstream navigation causes erosion, as well as the destruction of cultural resources of Lakota and Arikira origin along the Missouri River. This violates the NHPA and NAGPRA. Yet the Corps of Engineers continues these actions, and is now finalizing long-term plans which fail to address them.

The failure of the Corps of Engineers to comply with the National Historic Preservation Act and Native American Graves Protection and Repatriation Act directly and adversely impacts cultural resources and human remains of Lakota origin along the Missouri River. The current Programmatic Agreement of the Corps of Engineers

provides no plan to put an end to this destruction caused by wave action from COE water releases for navigation.

**Conclusion**

In conclusion, no quantification of water rights should occur until all tribal land claims are resolved. Moreover, the Congress should develop and enact comprehensive reform of the Pick-Sloan program. The stabilization of reservoir levels and enhanced protection of historic properties must be an important part of the reforms. The need to respect the rights of the Oglala Sioux and other Indian Tribes is intensified by the climate change we are experiencing, which further stresses the water resources of the Missouri River basin.

This hearing is thus very timely. I look forward to working with the Committee on Indian Affairs to develop comprehensive reform of the Missouri River Pick-Sloan program, to respect and implement the Treaty rights of the Oglala Sioux Tribe.

The CHAIRMAN. Mr. Chairman, thank you very much. We appreciate your being here. You have presented to this Committee previously, and we appreciate your advice.

Let me call on the Vice Chair, Senator Murkowski.

Senator MURKOWSKI. Mr. Chairman, I don't have any questions this morning, but I do want to thank all those that have traveled from your communities to represent your constituents to testify before this Committee on an issue that is clearly of great import to you all.

Again, I thank you.

The CHAIRMAN. Thank you very much.

Because I was detained, I had to leave briefly, I will ask the others to ask questions, and I will ask questions at the end. I do want to just say this, however, before calling next on Senator Johnson. The issue of compensation is one that we need to study with respect to the entire Pick-Sloan plan and the reservations that were injured as a result. I have gathered together the information about compensation. We have had several different areas of compensation, some in 1947, some in 1958, some in 1962, some in 1992, using different approaches.

The fact is, I called this hearing because we continually hear tribes ask questions about why they have not been adequately compensated. They want to present information to point out the difficulties they now face and the lack of compensation. I would prefer that we address this not in five different areas, but that we address this with respect to the Pick-Sloan plan and all of those who have been disadvantaged. Let us evaluate the compensation up and down the river on that plan in a way that makes sense to all of us.

So that is why we held the hearing of this type, because we can't ignore this, nor should we give priority depending on who has the loudest voice and says, I demand these issues be addressed.

All of you have described conditions that really demand the issues be addressed. Ron His Horse Is Thunder, the Chairman of the Standing Rock Sioux Tribe, in his testimony describes something that many of us have seen down there: water conditions, the inadequate water supply, inadequate device in that reservoir in the river, and what is now I guess, a stream, that provides water for the tribe. This is a tribe that has experienced having no water for a lengthy period of time, running out of water, and having no water come out of that reservoir.

So we understand that water is necessary for a decent life and we understand what it means in Standing Rock to lose your access to potable water. It is devastating. So there are a lot of issues that all of you face, and I appreciate your testimony.

I will ask questions at the end, but let me call on my colleagues as a matter of courtesy.

Senator Johnson?

Senator JOHNSON. Mr. Jandreau, how many times has this reform legislation passed the Committee?

Mr. JANDREAU. Our particular bill passed the Committee three times and went to the Floor of the Senate, but it has never become law.

Senator JOHNSON. Are you ready and willing to proceed with this legislation at this time?

Mr. JANDREAU. Yes.

Senator JOHNSON. Are you reluctant to have compensation held up at this time?

Mr. JANDREAU. Yes, I am.

Senator JOHNSON. Mr. Chairman, the Crow Creek and Lower Brule Tribe are ready and willing to go. They have proceeded to present legislation at this time and it is unfair to hold them up having been passed out of the Committee three times.

Mr. His Horse is Thunder, what would you do if you were to have the range of compensation? How would it be prioritized?

Mr. HIS HORSE IS THUNDER. Thank you, Senator, for the question. I have been asked by a lot of the elders who—let me put it this way. Standing Rock has received one compensation package for $90.6 million. It was for the tribe's economic loss and the money is to be spent for development of the economy on the reservation.

The element that is missing that I am asked by my relatives, my elders to bring today is this. It is that some of the compensation be used to make whole those people who originally lost land. Over half the land that was taken on our reservation was lost by individuals themselves.

Senator JOHNSON. Are there diminishing numbers of those people?

Mr. HIS HORSE IS THUNDER. Absolutely, Senator. Today, I know of 18 who are currently alive. This past year, we lost three of the people who were original landowners at the time of the taking. So the numbers are very much diminishing.

Senator JOHNSON. Mr. Wells, how would you use the money?

Mr. WELLS. Senator, what we have been doing, what we have done so far as been to use the interest, which is approximately $6 million a year. It has been directed toward Federal programs, contracts and grants as shortfalls as the contracts go from Bureau of Indian Affairs, Indian Health Service, BOR.

The next priority would be projects, infrastructure, water, sewer, building—anything that needed to be upgraded from the time of the flood. And then what is remaining is just enough to help the elders organization, the Boys and Girls Club.

So out of the $6 million, it comes back down to basically just meeting the Federal shortfalls for projects and programs and contracts and infrastructure.

Senator JOHNSON. Mixed up with the money that the tribes are owed originally.

Mr. WELLS. Well, $350 million would have been probably the better number to get us whole. But what happened is it just basically made up the shortfall of the Federal trust responsibility, Senator.

Senator JOHNSON. Mr. Trudell, how would you use the money?

Mr. TRUDELL. Senator Johnson, thank you for the question. We would probably, you know, because we receive no income off the income that goes into the river from waterfowl sales or hunting licenses to the States, and there is no development. On our front, the development is all east of us.

So we would probably look at, although we have to stand the repairs of all these things that take place, we would probably have to use additional income to repair our main thoroughfare through the community where the heavy traffic is, and then we would have to probably look at replacing individual wells which run anywhere from $5,000 to $8,000 because of the sedimentation problem that is creating a rising water table on our other lands.

Most of the wells are shallow wells at the present time, and so we will have to go to a much deeper well to get to pure water, nontainted water. So those average anywhere from over $5,000 to $10,000, I think they told me the other day, but probably on the average about $8,000 a well.

We are in the process of trying to develop a reservation-wide water system which was partially funded by Congress, but underfunded, so that study hasn't been completed yet. That is in the hands of the Bureau of Reclamation. So water development is going to be one of our primary. And then I don't know how we would ever look at compensation for lands that are currently being lost because of the sedimentation problem.

Thank you.

Senator JOHNSON. Mr. Cournoyer, how would you use the money?

Mr. COURNOYER. I think our plan is like some of the other Chairmen stated, and Presidents, is that we would upgrade our infrastructure, our community water systems, roads, because we all know that the Federal Government that whatever they don't fulfill, we have to try to put whatever resources we have towards assisting Federal programs.

And not only that, too, what I would look at and strongly recommend is that we put some of that money towards education, finishing, completing our school, but not only that, enhance our community college and look at providing a little money for scholarships so that people can go to school and get that education, because once you get an education, you get that degree, you are creating economic self-sufficiency, or you are sustaining something that they can do all kinds of things to you, once you get that degree, they can't take that away from you. So you are creating your own economic stability.

But not only that, too, looking at industry, bringing jobs into the reservation because nobody is knocking at most of our reservation doors and saying, I have X amount of jobs, so I think we have to create economic development for ourselves, and if we can do that, I think that we can go out and do anything.

Senator JOHNSON. President Steele, welcome to the Committee. You had the unique position, and recognized that you have the Angostura Project, which is a Pick-Sloan project. Apart from that, you have a legitimate claim to being a river tribe. How would you use the money as compensation for the project? How would use the money?

Mr. STEELE. Like the other tribal Presidents, Senator, I would have to address the basic infrastructure that the Federal Government—I call it inherent Federal neglect, whereby every Federal department had nothing to do with this very large land base in the middle of the United States. They said that was Bureau of Indian Affairs and Indian Health Service responsibility through most of the 1900s.

They stuck monies in technical assistance into the surrounding municipalities and counties and built their infrastructure. Well-intended Bureau of Indian Affairs people patterned the roads on a very large land base, Pine Ridge, directing that dollar directly off-reservation as soon as it hits it.

I need to re-pattern and rebuild those roads. He told me, your people need to go shop. You need north-south roads, very well intended. But I can't turn that God darn dollar over even once because of the very patterning of the roads, basic economics 101. How is development to happen on Pine Ridge?

I, like the rest of these Chairmen, have to address the basic infrastructure, the tangible and the intangible. We just adopted the Uniform Commercial Code and set up the filing system with the State of South Dakota.

But I have unfunded mandates by the Federal Government on solid waste. With a large land base, the disposal according to EPA standards, the operational costs are outstanding, Senator. It is difficult.

Thank you.

The CHAIRMAN. Thank you very much.

Senator Thune?

Senator THUNE. Thank you, Mr. Chairman.

I do appreciate the testimony. I know it was a very insightful hearing from each of our tribal leaders about the challenges that they face day to day, providing a better life for the people that they serve there, and what some of these past projects and Federal actions have done to impair their ability to do that. So I appreciate very much all of you being here today and sharing your testimony.

I would echo what my colleague from South Dakota, Senator Johnson, said, Mr. Chairman, in that I share your view that there is value in seeing these things in a context that allows for a comprehensive type approach to it. But absent that happening, we do have Senate bill 160, which has cleared this Committee and the Senate previously. There were issues that were raised at the hearing we had in the last session on this that have been tightened up in the legislation, and it is queued up and ready to go. So I hope we can figure out a way in the context of a broader bill, or if not, some way to bust that legislation loose.

I would like to ask a question of Chairman Jandreau with regard to that. There have been some comments and concerns, as I said previously, in the past at a hearing we had on this about there

being no end in sight for Pick-Sloan Project compensation. In this particular bill, the Lower Brule and Crow Creek Tribe Compensation Act, if it was passed, the bill makes clear now that these payments would be treated as full and final compensation.

I guess I would like to get your reaction and thoughts about the tribe's view of the finality of this particular bill.

Mr. JANDREAU. That is a very correct statement, Senator. After the last hearing and the reaction of some of the Senators' concerns, we went home and we did talk to our respective tribal councils. We did receive from them the authority to state that this would be final compensation on the Missouri River claim.

We were also asked how this would affect pay-go. You know, currently our land and our water rights still continue to provide $1.2 billion a year to the Federal Government. While it probably cannot be looked at exactly as a place to extract pay-go, we feel that in our unique circumstance that it is the appropriate place to extract that.

So we have agreed to, regardless of whether the settlement for the other tribes is higher or not, that we have agreed that what we have asked for in S. 160 will be our final request for Crow Creek and Lower Brule.

Thank you.

Senator THUNE. Thank you.

All of the compensation plans that are currently being considered involve the creation of or the payment to a trust fund. I guess I would just open this to whoever would like to comment on it. It kind of ties back to the question that Senator Johnson asked earlier, but could you sort of explain to the Committee what sort of projects and economic development the tribes might use these trust funds that would be created for?

Mr. Trudell?

Mr. TRUDELL. Yes, sir.

Thank you, Senator.

I call it money that is not money, because it is just a pencil entry and interest, and it is not available to us until I think 2013, so we can't do anything with it right now. That is one of the primary problems is we have ongoing damage taking place all the time with no way to repair that damage. Without earlier access to those funds, then our streets and stuff and other things are continue to deteriorate.

We have to take a plan before the people. We had to have hearings before our tribal membership on the development of a plan, and we did that. We submitted that plan for approval by the Department of Interior. The Bureau of Indian Affairs had to approve that plan, which I don't understand. And then at a later point, we decided to leave our money that is not money with the Treasury because they are probably going to be around longer than the Bureau of Indian Affairs, but we still need to have access to that interest at an earlier date to take care of some of the needs that we currently have.

Thank you.

Mr. HIS HORSE IS THUNDER. Mr. Senator, could I respond to that just real briefly?

The Standing Rock Sioux Tribe and its $90.6 million receives about $4 million a year of thereabouts, depending on how the interest rate fluctuates, but of the $4 million a year that we currently receive, we provide about $500,000 a year in scholarships for our students to go on to college.

We also use at least a good chunk of that $500,000 or thereabouts per year to purchase land that either tribal members or non-Indians within our reservation boundaries have for sale. As we know, the fractionalization of tribal lands is a huge problem. We have set money aside to buy land back from either tribal members, again, or non-Indians, trying to do away with checkerboarding on the reservation.

We have also put a huge chunk of change into road development. We have taken actually a loan out by a bank and used our JTAC money as collateral and pay back through JTAC for about $28 million to develop our roads on the reservation. We probably have now some of the better roads of most of the reservations in North and South Dakota because we have done that.

We have set money aside for entrepreneurs. I think we put $600,000 in there just this year alone so that for equity investment, we call it. They can get 15 percent of a business package paid for by the tribe. They would have to go get the rest of the money from a bank that would ensure that they had a good business proposal developed, otherwise the bank is not going to give them the remaining 85 percent of the dollars that they need to start businesses. So we put money into entrepreneurial development.

We put money into home ownership that we will pay up to 25 percent of the costs, up to $100,000, for a house for our tribal members who can't. Housing is at a premium, and they can't normally go get a bank loan for a house, usually you want 20 percent down. So we will pay that 20 percent down for the tribal member, provided that they live in that house for at least a minimum of 10 years.

So we are putting it into economic development and home ownership, land purchase, scholarships, et cetera.

Mr. WELLS. Senator, as I alluded earlier, I am Marcus Wells, Jr., Chairman, Three Affiliated Tribes of Mandan, Hidatsa and Arikara, but I alluded earlier to the $149.2 million that is in the principal amount. Basically, we have done step one which is to take care of the Federal shortfalls, trust responsibilities, and infrastructure, but we have a lot more infrastructure to take care of, and no doubt are basically our priorities.

Our priorities would be the water, health care, homes, just social impacts that we have had to endure. Employment I think is probably—economic development, and somewhere down the line, we feel after we get the infrastructure needs taken care of, then we can progress further, and that is the approach that we have taken. Just get us the basics—water, homes, and the health care—and then we will work on economic development as a spinoff of that. But right now, those are our priorities, to know that elders and our young couples who are having newborns are being inundated by health care bills that are not being paid for by the Federal Government. As long as the trust and treaty responsibilities are there, our elders are the ones. A former Chairman of our tribe, Arby Little

Soldier, is still getting inundated by legal bills, and he is here with me in prayer to make sure that I continue that voice forward to Senator Conrad and Senator Dorgan and yourself, Senator Thune.

Thank you.

Senator THUNE. Mr. Chairman, I appreciate again your indulgence in allowing me to join the panel today. I was a cosponsor of your amendment last week on the Floor to add more law enforcement personnel on our reservations. That is an issue, in discussing with the leaders of our tribes in South Dakota, talking in Standing Rock, 2.2 million acres and seven full-time law enforcement personnel, and a lot of times long distances to get to a situation. This creates all kinds of problems, and security is a big issue as well. So I appreciate your efforts on that, and I am glad to join in that.

But as all of us are aware, because we have traveled out there, we have some very serious needs in our communities on the reservations. The various legislative solutions that have been proposed, and some of which are in the works right now, I think would do a lot to help these leaders address those needs.

So I appreciate again the chance to join the panel today and I thank our leaders for their testimony and look forward to working with them.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Thune, thank you very much.

In response to your comment and the comment by Senator Johnson, this hearing is not called for the purpose of delaying anything, but to the extent that we move forward on these issues. I would hope that we would have some finality, number one, and number two, that we have a methodology that is fair, acceptable and one that is explainable. We have different interests up and down the river. It is long past the time this Federal Government made things right. The question is how do we do that. I would hope that we will have some methodology and some finality that all of us can feel is the right approach. So, that is the purpose of the hearing.

Senator Conrad?

Senator CONRAD. Thank you, Mr. Chairman.

As the principal sponsor of the original JTAC legislation that led to a settlement of $90.6 million for Standing Rock and $140.2 million for Three Affiliated Tribes, I perhaps have a special perspective on this because it took me years to get the legislation passed. It was the first bill that passed. It became the model for all of the other compensation bills that passed later.

I think there is one fact that I really want to draw to the attention of my colleagues and to the record. There was a very significant difference between the GAO estimates and the estimates of the original JTAC Committee on what would represent just compensation. Let me just give you on the upper end of the ranges the difference.

On the upper end for Standing Rock, the GAO said equitable compensation would be $170 million. The JTAC report prepared by former Secretary Hodel in the Reagan Administration said for Standing Rock, the top end of the range should be $349 million, twice as much as the GAO report. So the range of the two reports for Standing Rock was $170 million to $349 million. They received $90.6 million. Okay?

On Three Affiliated Tribes, the GAO said top end of the range, $149.2 million. The JTAC Commission under Secretary Hodel in the Reagan Administration estimated $411.8 million. They received $149.2 million.

I make this point because I think it is critically important to understand there was a dramatic difference between the estimates of the General Accounting Office that used one methodology, and the JTAC Commission under Secretary Hodel that used a different methodology.

I personally always believed that the more appropriate methodology was that done by Secretary Hodel. Why do I believe that? Because the GAO approach, which is certainly a defensible approach, but I think misses the point. They looked at land values, what land was worth at the time. They increased that with an inflationary index, and then said this would be a buyout amount on the open market. What is wrong with that approach? It completely misses, to me, the point that a way of life was done enormous damage. This wasn't just a matter of the value of land. This was not only the value of land, it was also the value of infrastructure, in the case of Three Affiliated Tribes, a hospital, bridge, school. They have never been compensated for. We did get the bridge. In fairness, we have to say we got the bridge. But we have not gotten a hospital. The school has never been compensated for.

In the case of Standing Rock, the $90.6 million, all of these were a matter of negotiation. Let's be frank. I was the negotiator so I know. I know how this worked. I never believed that those numbers were a fair resolution, but it was the first settlement legislation. It was something that had never been done before, and it was very, very hard to convince colleagues to do it. We had to adopt a very creative way to deal with the budget process. That is why the money is not available immediately. It is available outside the five year budget window because it was the only way we could get the legislation passed under the budget rules that pertained at the time.

So Mr. Chairman, first of all, I salute you for having this hearing. You are doing exactly the right thing. There ought to be a consistency in approach for all of these settlements. It shouldn't be somebody comes later, therefore they get more. It should be based on a formula that everybody understands and is defensible both to taxpayers and to those who are receiving the funds in compensation for what was taken. And let there be no doubt, an enormous amount was taken.

In the case of Three Affiliated Tribes, the vast majority of tribal members were forced to relocate, and they went from the rich bottomlands that supported a very rich way of life, and I don't mean rich just in material terms. I mean rich in every term.

Standing Rock was similarly devastated. I mean, that is just the truth of the matter. And to just say, well, it is a calculation of how much the land was worth, no. That isn't the real calculation because what was devastated here was a way of life—and economic way of life, a series of social institutions that were done enormous damage. So I think any fair minded person would have to go back and say that the JTAC calculations come much closer to some kind of fair and equitable compensation than does the other calculations

that were made by the General Accounting Office. I don't fault the General Accounting Office. They have a perfectly good rationale for the way they approached this. I just think it misses the larger reality.

So with that, I would say to the witnesses, we thank you very much for being here. The issue of how the money would be used is going to be critically important. I have been down this road before. I know how this issue will arise with my colleagues. This has been very difficult with respect to the previous JTAC settlements. I think all of us know that.

I think to the extent that you can say, as Ron you have said and Marcus you have said, that the money would be used for infrastructure and for education and for entrepreneurial development, and of course there are tremendous needs in health care, needs in housing. Those are all legitimate claims, making up for the shortfall in terms of what the Federal Government provides.

I will end there because I have taken more of the Committee's time than I should, and I apologize, Mr. Chairman, for that, but I did want to just lay out these issues, having experienced this over many years, and having been deeply involved in the original negotiations. I never thought at the time, never believed in my heart, that these final numbers we were able to negotiate represented fair and equitable compensation. I believed it was the best we could get at the time.

The CHAIRMAN. Senator Conrad, thank you very much, and thank you for your leadership. In 1992, I was in the U.S. House and Senator Conrad invited the leadership here to get started and to finish the negotiations and move legislation. I was proud to advance that legislation, as well in the House. But without Senator Conrad's leadership, we would not have had the 1992 settlements that existed. He has indicated, and I agree, that that was what was achievable at the time, but much has happened since then.

I go back to the—I guess we don't have the photograph here of George Gillette—but the photograph of George Gillette at the signing, and he says, "With a few scratches of the pen, we will sell the best part of our reservation. We will sell the best part of our reservation."

Well, the other point I would make is that when we have the chart up that shows the Missouri River basin, that is not the only issue here. That Missouri River basin had to bear the costs, but the benefits went way down to the rest of the Country. It went down to the Mississippi, all the way to the Gulf, and we had flood control. We had opportunities to store water so that when there was less water on the middle Mississippi for barging, that that water was available.

So a lot of other folks got the benefits from this, and we bear the costs of a flood that comes and stays. To some it is a flood. To others it is a complete inundation of their homeland, of their town, of their hospital, of any range of things that represented a good life for them.

So while this hearing and your testimony focuses on the Pick-Sloan plan, which essentially is going from Montana down to Gavins Point and the mainstem dams that were built, that project was not just about geography. The substantial benefits from that

project flowed well beyond, down to the rest of the center part of this Country.

Now, the question is, were the costs that were imposed on the Indian reservations properly compensated? The answer, quite clearly, is no. The more difficult question is how does one properly compensate? What is the methodology by which we begin to address this issue?

As Senator Conrad has said, this is a circumstance where, and I believe Chairman Steele you indicated as well, we have people living in third world conditions. Chairman Wells, you talked about the number of people hauling water and the percentage of the people in your tribe that don't have running water. We have people that are horribly disadvantaged, living a lifestyle that is gripped with desperate poverty. Well, the fact is at least a portion of these people were affected by land that was taken and not properly compensated.

Now, some of the things we have described exist on reservations in many parts of the Country, so this is not all attributable to this issue. But the proper compensation for land that was taken as a part of the Pick-Sloan plan would certainly begin to alleviate some of these issues.

I make one final point. The people of my State and South Dakota and the other States on that map, and especially the tribes, did not get on a train or a car and come to Washington, D.C. to say, can you put together a water plan for us that will take our lands? Nobody went to Washington to beg for the Pick-Sloan plan from our region of the Country because we were going to be net losers. And so they came to us. Washington came to the tribes and the States and said, here is what we would like to do. We understand there are some burdens for you as a result of it, and here is what we plan to do for you.

Well, much of it has never occurred. While we have made some progress, I mentioned earlier the years 1947, 1958, 1962, 1992, there have been various types of settlements with various tribes using different methods. But it has never been properly addressed, which is why I felt when we started talking about this, that we would call all of the affected parties in and talk through this to see if we can't reach some finality about what would be fair to tribal governments that have been cheated in a number of ways by the Federal Government over many, many years. I think that term cheated exists as well with respect to how they were compensated when they were seeing the taking of their lands for the Pick-Sloan plan.

So many of you have traveled a long distance to come here today. You don't come because you like to travel, especially these days. Traveling is not easy, but you have provided a very compelling story to this Committee about life on your reservations, and the consequences of the taking of land.

Let me ask a couple of questions before we have to conclude. All of you have water rights, or virtually all of you I believe have water rights from the Missouri River. I think nearly all of you have said those water rights have never been quantified.

Chairman His Horse Is Thunder would you talk about that for a moment? I believe all of you have said about the same thing, but why don't you proceed.

Mr. HIS HORSE IS THUNDER. We haven't quantified our water rights in the past, Senator. We have not. We have a figure which we believe would be an adequate appropriation for our tribe. Today, we figure that at 1.5 million acre feet I believe is where we are at. That would allow us to, and we figured it out, to irrigate so many acres of land, as well as serve an additional population of 30,000 members for future growth and development, as well as our MR&I programs to pump water across the whole reservation.

We figure it would be about 1.5 million acre feet. We have not thrown that figure out officially yet, but that is where we would look at if we were going to settle. In the past we and many others have truly been fearful of appropriations because w did not want to, if you will, limit the ability of future generations to a particular quantity of water should that water not be enough.

And so we figure about 1.5 million would adequately take care of future generations.

The CHAIRMAN. Mr. Chairman, I was on your reservation when you ran out of water—was it three years ago, now?

Mr. HIS HORSE IS THUNDER. It would be four years ago this Thanksgiving.

The CHAIRMAN. Four years ago Thanksgiving, and you were out of water for how many days? Eight to ten days?

Mr. HIS HORSE IS THUNDER. I believe we were out for five days, sir.

The CHAIRMAN. Five days. I salute the employees of the Bureau of Reclamation working over Thanksgiving weekend, which, as you know, is very difficult conditions to try to get something done temporarily to get the water supply working again. But I recall the discussions we had about the cost of fixing it by getting an intake out there that would fix this permanently for you.

The issue was that there is not enough money. It seems to me, to find out 40 or 50 years later that a Federal agency says it is too much money to have a permanent intake for you, we don't have the funds, is irrehensible.

Somebody ought to have the funds to provide a solution to issues caused by this entire plan. I assume you would agree that you didn't run out of water before the Pick-Sloan plan, did you? I mean, you had access to the river at that point. I assume you find it frustrating and probably it makes you angry that you face these problems of the need for a permanent intake. But people say, there is no money. But they have a responsibility to give you permanency with respect to taking water out of that reservoir.

Mr. HIS HORSE IS THUNDER. We do find it quite frustrating. The temporary solution that we incurred four years ago cost about $5 million, and that is just a temporary solution. Of that, I believe the tribe still hasn't been reimbursed for about $1.5 million of those dollars. So a permanent solution would definitely be something we think is just to us. But the temporary fix itself presents a whole bunch of problems besides the cost of $5 million, that right now, with the drought we are having, that we are with a temporary so-

lution and taking a look at that water intake being inundated with silt as well.

And then if we do get rain like we really want, and snow pack in the mountains next year and we get a lot of water, that if that the water rises above eight feet where it is right now, it will, believe it or not, actually blood that intake, and make it unworkable, and then we will be back to no water again.

Right now, the reservoir is down about 28 feet, and so we all want it to go back up, but if it comes up just eight feet, we are back to no water again on our reservation.

The CHAIRMAN. Well, I want to continue to work with you on that. It is another one of those effects of this set of issues that needs to be resolved.

Chairman Wells, your reservation gave up the largest quantity of land. Is it 152,000 acres that were lost? What percent was that of your reservation?

Mr. WELLS. Of the one million acres, I imagine it would be 15 percent.

The CHAIRMAN. So it is 15 percent. At that point, it was one million acres total?

Mr. WELLS. Yes, sir.

The CHAIRMAN. And you had a settlement in 1992, did you not?

Mr. WELLS. The $149.2 million. We certainly appreciate all of the work that was done by Senator Conrad, Mr. Chairman, and yourself, and Congressman Pomeroy. We have used the money conservatively. We have used it for infrastructure. We have used it for supplementing the Federal shortfalls, as I said in my testimony. I don't think we have ever really got to do any services for the tribal programs. We have done the four areas—economic development, social welfare, and education, and in others, but we have never been able to really open that up other than one year. I believe that was in fiscal year 1999 and 2000, maybe two years. But then we found out that it just made the shortfall of the Federal trust responsibility.

So of the $411 million that Senator Conrad spoke of earlier, I would certainly see us getting into the conditions that Chairman Jandreau just spoke of. I think we would be close, because of the housing and the water and health care issues. I just had a grandmother in the tribal office and she has three of her children living in her home, in a HUD home. They have children. And she looked up at that picture of former Chairman Gillette and she was explaining the history to her daughter. She said, "And our Chairman now is going up to Washington, D.C. to see if he can get some more justification for us, to get you a house." And that is her very simple words to her daughter in front of me. I was smiling, and I said, "How did you know that?" And she said, "Well, they told me you were heading to D.C. That is why I had to come and get you before you left."

So those are real stories. It is every day, the roads. I had friends of my wife come up to her and say, can you talk to your husband and see if he can get some gravel on our roads, Alvina, the first lady, I guess you would call her. That is how I initiated a joint relationship for housing. We both went in and got a screener and a crusher and we are putting gravel on the roads, home roads and

rural roads, because of the shortfalls of the BIA. They have no money for gravel.

So those are the real things that we are doing, Mr. Chairman.

The CHAIRMAN. Chairman Wells, thank you very much for coming.

All of you have a common cause as Chairmen and leaders of your tribe. Let me just say, I appreciate your leadership. Leadership is about opportunity and responsibility: the opportunity to provide leadership, to move in the right direction, seek the right solutions. But obligation, I mean, leadership is not easy. Good leadership requires a lot of time, effort, energy, and controversy from time to time.

So I want to thank you for your leadership. I have asked all of you to come in to give us a larger perspective of what has happened to the tribes with respect to the Pick-Sloan plan. I think you have done that today. To our neighbors in South Dakota, as I said, we have common purpose. It seems to me, tribal governments should take a look at what happened and what now, in the year 2007, and beyond should be done to make sure we have some final recompense that is fair to the first Americans, who were injured as a result of the taking of land, a substantial amount of lands in the 1940s.

So I do have to close the hearing, but I want to thank all of you, all six of you, for traveling to Washington, D.C. at considerable time for you and providing this information. The Committee intends to work with you. You heard testimony. You heard commitment from my colleagues today. We intend to work with you to try to find ways to reach some solutions on these issues.

Thank you very much for being here, and this hearing is adjourned.

[Whereupon, at 11:38 a.m., the Committee was adjourned.]

# A P P E N D I X

PREPARED STATEMENT OF JOSEPH BRINGS PLENTY, CHAIRMAN, CHEYENNE RIVER SIOUX TRIBE

I want to thank the Senate Committee on Indian Affairs and Chairman Dorgan for the opportunity to provide you with written testimony on the losses suffered by the Cheyenne River Sioux Tribe resulting from the construction of the Oahe Dam in 1954. My name is Joseph Brings Plenty and I am the Chairman of the Cheyenne River Sioux Tribe.

The Cheyenne River Sioux Tribe has provided this Committee and the United States Congress with repeated testimony about the direct losses in land, infrastructure and improvements upon land as well as indirect damages in loss of timber, wildlife, wildlife products, and destruction of the agricultural economy with the loss of 104,420 acres of land within the Reservation. That history is found in hearing transcripts from numerous prior hearings and Government Accounting Office studies. [1]

Those older and wiser than I have recounted for you what happened when the Oahe Dam was constructed. One account states that, "by the end of the decade, the Tribe would be facing the forced removal of 200 Indian families from four river settlements and their surrounding bottomlands; would be forced to give up its valuable riparian cottonwood forest plant, and wildlife habitat bordering the Missouri; see the ruination of its cattle raising industry; suffer the loss forever of bottomland hunting and fishing for indigenous species found there, permanently lose the use of bottomland plant products for cultural and spiritual purposes an finally, see its homes destroyed along with churches, schools, and its tribal social life. It would see the residue of their remaining lands fall to a value only a 'small fraction of their present value.' The above was not an account of the government's taking put forward by the Tribe but the government's own account from House Report 2484 (83rd Congress) on the project's probable impact on the Cheyenne River Sioux." [2]

This taking was accomplished by threats and force. By the time the United States had come to the Tribe to discuss taking of the land, the Oahe Dam was already under construction, making it clear that the lands would be flooded. The United States Army Corps of Engineers stated to the Tribe on the open public record, "Neither your Constitution nor your treaty rights can stop the taking of your lands according to law under the right of eminent domain. The United States is a sovereign power and if the Tribe could stop the taking of the land then it would be the supreme power even over the United States government and this cannot be." [3]

It was this attitude of might makes right which resulted in the destruction of lives, resources, and the entire economy here at Cheyenne River. To date, the Tribe has not received one cent of additional compensation since 1954. Congress has enacted legislation in the Cheyenne River Equitable Compensation Act of 2000 establishing a Trust Fund of $290,722,958.00 which will be deposited on October 1, 2011, and the interest from which will become available on that date, but until then, Cheyenne River's economy and society continue to suffer the effects of the destruction from the Oahe Dam unabated. This continues today even though the United States sees the benefit of 1.2 billion dollars in hydroelectric production from these dams every year, Missouri farmers see and have seen since 1954 billions of dollars

[1] Examples: (1) S. Hrg. 106–200, Cheyenne River Sioux Equitable Compensation Act, Senate Committee on Indian Affairs Hearing on S. 964 (August 3, 1999); (2) Pub. L. 83–776, 68 Stat. 1191 et. Seq. (1954); (3) S. Hrg. 109–572, Tribal Parity Act, and the Cheyenne River Sioux Tribe Equitable Compensation Amendments Act (June 14, 2006); (4) Analysis of Economic Loss Resulting From Lands Taken from the Cheyenne River Sioux Tribe for the Oahe Dam, Robert McGlaughlin Company, (Solen, ND July 1994); and (5) GAO/RCED 98–39: Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam (August 1998).

[2] Government Accounting Office Report 98–39 "Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam, GAO/RCED 98–39 (1998), Appendix IV, Statement of Robert McGlaughlin.

[3] Id.

in gains from their crops due to flood control on their bottomlands which once lay unprotected from storms that wiped out crops every season, and the economies of all Missouri River states including South Dakota thrives from tourism in hunting and fishing along the Missouri River.

While the Nation prospers and South Dakota prospers, Cheyenne River watches our people die young from depths of poverty unseen anywhere else in the United States; from the theft of our hospital and Indian Health Service's refusal to fund the staffing so we have more than two doctors for 16,000 people because it was the Corps of Engineers that built the hospital in Eagle Butte in 1956 to replace the one they flooded and not the Indian Health Service; from drinking water contaminated with over a billion tons of mining tailings flowing from the Black Hills that pile up at the mouth of the Cheyenne River instead of continuing to flow downstream because the Oahe Dam backs that water up and drops those tailings right where our only water intake sits. This is all attributable to the construction of the Dam. And none of it is included in any calculation of damages done to date.

Cheyenne River has repeatedly sought remedies for the environmental contamination compounded by the Oahe Dam to no avail. Title VI of the Water Resources Development Act of 2000 includes authorization to the Corps of Engineers to address this environmental devastation but has the Corps even begun to study the problems let alone seek funding to remedy these problems? No. And no amount of discussion has changed this. The Tribe and seven federal agencies with the help of the South Dakota delegation provided almost 20 million dollars in funds to move that water intake over the past 2 years at our own expense. But not before our rates of cancer, autoimmune disorders, and deaths from unheard of diseases are out of control. We have seven cases of pancreatic cancer—there are only 32,000 cases in the entire United States. Now, we have authorization in the 2007 Water Resources Development Act for another $65 million dollars to build a mainline from that intake to Eagle Butte—where the United States relocated the tribal headquarters—over 65 miles from the River. If we had not been forced to relocate to a non-Indian town for political reasons with the flooding and were instead allowed to stay near the River, the Tribe would not be in this position of needing this level of funding just to have a permanent supply of clean drinking water. The United States government did this. Until this main line is built, Cheyenne River will not see one new home or business because there is no water pressure. Our families will continue to live two to four families per household. After the main line is built, the system needs an upgrade to all the water lines to reach the families who were scatters over an area the size of Connecticut by forced relocation from the flooding. The Banner study already submitted to this Committee demonstrates that the total cost in 2004 was estimated at $389 million. This makes the Equitable Compensation Act Fund for Cheyenne River pale in comparison.

Meanwhile, our people die from the health disorders caused by that contaminated silt stacking up at our border on our Cheyenne River all because the dam was built. And Indian Health Service, the Corps of Engineers, and the Environmental Protection Agency continue to tell the Tribe they have no programs or funds to do anything about it—it's up to Congress. And still Cheyenne River waits, and prays for a better time to come where there are not at least two funerals a week.

While we wait, our population is growing exponentially. Half of the population at Cheyenne River is under the age of twenty-one years old. And the Tribe still has not one cent in funds to address rebuilding from the flooding. With this population explosion there is less to go around per person. The poverty created by the destruction of our river bottoms is like a whirlpool. The original losses keep spiraling and expanding exponentially as time goes on and the longer time goes on without any funding to rebuild, the larger the costs are to actually restore the tribal economy to the same level as its counterparts in South Dakota.

The Tribe has testified before this Committee at length about how prepared Cheyenne River is to implement its long term strategic plan for poverty reduction—a plan developed in partnership with the Northwest Area Foundation and being implemented with $10 million in funding from that Foundation and the Tribe. Yet, this plan cannot be fully implemented fully until it starts receiving interest income from the Cheyenne River Equitable Compensation Act of 2000. Until October 2011, all we can do is proceed as best we can with the limited funds we can gather. We have a sixty bed nursing home under construction right now, and struggle to secure the funds to complete construction and operate with operations slated to start in 2008. But we are prepared for when the Tribe actually begins to receive funds to move forward.

All studies on the losses at Cheyenne River assume the Tribe's original requests in 1954 that were not funded and add a generic economic inflation rate over time. These economic inflation rates do not calculate the exponential growth of the tribal

population or the cost of that infrastructure that was destroyed and never replaced. In order to place the Tribe on equal footing with all others, the Congress would have to account for the cost of replacement of the water system, the cost of a new hospital built by Indian Health Service so they would actually staff it, the cost in human health harms and lives lost from contamination of our water supply. These are just a few of the costs not calculated into any Government Accounting Office study to date.

Even worse, the Corps of Engineers received funding to relocate graves and still today, as the water rises and falls, bones are exposed from graves that were supposed to be moved. The Missouri River Basin is home to over 15,000 known historic sites—this has been documented and written about in numerous publications. And yet, funds to protect these national treasures which are irreplaceable and are a national treasure—not just to the Lakota Nations and our brother and sister Nations—but of the United States for all our children, are negligible. No calculation of damages for any Tribes to date accounts for what it costs to protect these national treasures, or for what it would cost to properly relocate those burial sites the Corps of Engineers failed to relocate in their haste to see he dams become operational for the benefit of Missouri farmers, navigators, and the hydroelectric power industry.

When money and power become the basis for destroying the lives of our own United States citizens, and the goal of the government offices requested to look at the value of the damages becomes to limit what it will cost to "compensate for original losses", no justice will prevail. When I buy insurance and my house is destroyed, I receive what it costs to replace that home. This is the principal behind determining "just" compensation—what will it take to make the person whole again? Not just what could I sell it for on the open market. This is important here—the United States in the reports listed in footnote 1 of this statement itself has stated that no one would have been a willing seller of this land and these assets because the stolen was the heart and sole of an entire civilization. It would be akin to trying to compensate Palestinians or Israelites for the loss of Jerusalem and thinking that money would make the Nation whole.

The United States needs to sit down and take a good look at what it will cost to restore basic infrastructure that the rest of the United States has but we have never had. While the rest of the United States has enough of an economy to look at infrastructure development and economic growth, Cheyenne River spends the majority of its government funds on heating assistance for tribal members, food for its members, shelter for its members, and health care for its members. With an unemployment rate of over 80 percent this year, what else is the government to do? Until the basic infrastructure of clean drinking water, housing, roads, and economic engines for growth in the tourism and agriculture industries are restored, there is little room for change.

As this Tribe has testified to this Committee before, our greatest resource is our tribal membership whose skills, talents, determination and perseverance are the very reason Cheyenne River continues to achieve gains. And this will remain no matter what the Congress does as a result of this hearing.

But I hope, as I must, that I live to see the Cheyenne River Equitable Compensation Act of 2000 funds actually received by the Tribe and I hope I see the day that our gravesites are all protected and no more relatives will be found on the shores of the Missouri River, and I hope I see the day when all of our people have clean drinking water and adequate health care. And I hope that this Committee, if it chooses to look further into what compensation is "just," will acknowledge that the Tribes on this River know best how to achieve that economic self-sufficiency that was once the birth right of the Nations. And that justice will be served when that birth right to be economically self-sufficient is restored to our Nations.

Thank you again for this opportunity to provide you with my thoughts. I welcome any questions you may have regarding this testimony.

PREPARED STATEMENT OF ARCHIE FOOL BEAR, BOARD MEMBER, STANDING ROCK SIOUX TRIBE AND UPPER MISSOURI RIVER INTERTRIBAL ALLOTTEES ASSOCIATION

As a Board Member of the Upper Missouri River InterTribal Allottee's Association, I would like to present this statement on behalf of the four thousand plus members that comprise this association. The Upper Missouri River Intertribal Allottees Association (hereinafter "UMRIAA" or "Association") is a 501 (c) (3) nonprofit entity serving eight reservations in North and South Dakota along the upper Missouri River basin. Native Americans from Fort Berthold, Standing Rock, Cheyenne River, Crow Creek, Lower Brule, Rosebud, Yankton, Santee and Fort Peck reservations have organized the UMRIAA for the purpose of assisting the allottees in their quest to correct the grave injustices perpetuated upon them and their families by the taking of their river homelands by the Pick Sloan Plan of the United States Government. Allottees and their heirs from these Tribes representing organizations such as the Sakakawea Landowners Association of Fort Berthold Reservation, the Oahe Landowners Association of the Standing Rock Sioux Tribe and the Oahe Landowners Association of the Cheyenne River Sioux Reseration have asked UMRIAA to help them pursue just compensation and social impact claims for the taking of their lands in violation of the Fifth Amendment of the United States Constitution during the 1940s, 50s and 60s that resulted in social and economic ruin of our once prosperous peoples.

This taking not only created a loss of land, but in most cases a loss of livelihood. This created a much larger dependent population where a majority self-sufficient population once stood. In addition, study of historical trauma indicates that many of the social ills that befall reservation communities come from suffering this type of great loss. This taking is a flagrant example of the injustice perpetuated on Native people. This specific group of Native people has endured forced removal and relocation to their respective reservations. Once there, they worked within their circumstances to establish themselves in the river-bottom and were successful. With the flood acts, again these people experienced forced removal and destruction of their lands, homes, and livelihoods. At Fort Berthold, the flooding took the homes of 85% of the people since many allottees invited their extended families to live on their allottement in the fertile river bottom. It was the best land of the reservation because their was good soil, good shelter and good

water available there. Many, if not most of the social ills that plague these tribes today are a direct result of the impact and losses of those who suffered this historical trauma.

From 1992 through 2002, the United States Congress enacted several Equitable Compensation Acts. In each of these acts the Federal Government admitted that the original compensation for the taking of the lands was inadequate, but it nelgected to make provisions to directly compensate individual allottee landowners or their heirs notwithstanding the known fact that a majority of the Indian lands taken for the Pick Sloan Plan were allotted lands. It has become evident to the Missouri River Basin Tribes and their respective members -- including the individual landowners and heirs (hereafter simply "individual landowners") whose allotted lands were taken -- that the Equitable Acts have not served to sufficiently correct the injustice of the United States' takings. None of the Equitable Acts contain an express provision allowing for the direct payment of just compensation to individual landowners who lost their lands, despite the fact that the majority of the lands included in calculating the additional compensation appropriated under the Acts were individually owned allotments.

For their part, many of the Tribes also believe that the United States has inadequately compensated them for the economic losses suffered. The methodology used by the United States to calculate the additional compensation for the Standing Rock Sioux Tribe and the Three Affiliated Tribes in particular has no logical basis and was devised as a simple means to resolve what is ultimately a more complex but surmountable challenge.

Both the Tribes and their members also believe that the United States has utterly failed to compensate them for the more intangible types of damages known as "external damages" or externalities. These types of damages encompass the historically unique injuries suffered by Indian peoples collectively, e.g., the long-lasting psychic trauma and other socio-cultural effects resulting from the uprooting of cohesive traditional tribal societies. The use of the "fair market value" standard to evaluate "just compensation" under the Fifth Amendment invariably fails to consider external damages and the real loss that the Indian people have suffered from the flooding of their lands.

During the past several years, the Tribes and individual landowners have sometimes been at odds with each other regarding the specific issue of what is due to the individual landowners. However, both sides have begun to realize that working together will be a more effective way to resolve their dilemmas. Yet without an amendment to the Cheyenne River Equitable Compensation Act, both the Tribe and the individual landowners will be prohibited from reaching any potential compromise on this issue.

The thrust of the landowner's claims is based upon Fifth Amendment principles. The Fifth Amendment of the United States Constitution mandates that if lands owned by an individual are taken for a public purpose, the individual owning the property at the time of the taking is entitled to compensation.[1] "The person entitled to compensation for a taking of property by the Government is the owner of the property at the time of the

[1] See also United States v. Miller, 317 U.S. 369, 373 (1942)(all emphases added unless otherwise noted).

taking."[2] "When the governmental action constitutes actual physical occupation of the property, compensation for such a physical takeover is never denied."[3]

These basic Fifth Amendment principles have previously been applied to federal takings of Indian lands. Early in this nation's history, tribal governments could be compensated for lands "held by the Indians in common" if necessary for the public interest.[4] However, even in situations where tribes were compensated for "communal lands," payment of just compensation was due to the individual Indian for his individual lands and payment to the tribe was deemed inadequate.[5] When Indian lands were allotted under the General Allotment Act of 1887 (also known as the Dawes Act and repealed in 1934), its provisions made clear that the entire beneficial interest in the allotment was held by the individual allottee or his heirs.[6]

Federal courts have long recognized that "vested property rights of individual Indians are 'secured and enforced to the same extent and in the same way' as the equivalent rights of other citizens."[7] The United States Supreme Court has twice relied on the Fifth Amendment to strike down federal takings of individually owned Indian lands under the Indian Land Consolidation Act ("ILCA").[8] In Babbitt v. Youpee, the Supreme Court found the ILCA unconstitutional because it allowed the taking of Indian lands without payment of just compensation to individual landowners or their heirs.[9] Under ILCA's Section 207, Congress had mandated that certain fractionated lands escheat to the tribal government but fatally made no "provision for the payment of compensation to those who held such interests."[10] The version of ILCA struck down in Youpee marked Congress' second failed attempt at making such consolidation of lands constitutional.[11] In finding ILCA unconstitutional, the Supreme Court noted that although the consolidation of Indian lands is a worthy goal, such a goal could not be achieved at the expense of the individual landowners' rights. More recently, the United States District Court for the District of South Dakota has relied on Youpee's and Hodel's reasoning to strike down section 5 of the Sisseton-Wahpeton Sioux Act, which permitted small interests in allotted land to escheat to the United States as trustee for the benefit of

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[2] Lacey v. United States, 595 F.2d 614, 619, 219 Ct. Cl. 551 (1979)(citations omitted).
[3] Dumarce v. Norton, 2003 DSD 9, 2003 U.S. Dist. LEXIS 14789 (D.S.D. 2003), citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S 419, 426 n.5, quoting Michelman, Property, Utility, and Frankness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1184 (1967) (original emphasis).
[4] See e.g., Act of April 25, 1896, "*An Act to Grant to Railroad Companies in Indian Territory Additional Powers to Secure Depot Grounds*," 29 Stat. 109 (1896).
[5] Id. See also Murray v. United States, 817 F.2d 1580 (Fed. Cir. 1987), aff'd, 864 F.2d 148 (Fed. Cir. 1988).
[6] See 25 U.S.C. § 348, as amended by Act of November 7, 2000 (" . . .in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs. . . [.]")
[7] Irving v. Clark, 758 F.2d 1260, 1262 (8th Cir. 1985), quoting Choate v. Trapp, 224 U.S. 665, 677 (1912) and cited by Lebeau v. United States, 171 F. Supp.2d 1009, 1016 (D.S.D. 2001)
[8] 25 U.S.C. § 2202 et seq.
[9] 519 U.S. 234, 237 (1997)
[10] Youpee, 519 U.S. at 239.
[11] See Hodel v. Irving, 481 U.S. 704 (1987).

the Tribe.[12] The reasoning used in this line of cases is that such legislation cannot override the requirements of the Fifth Amendment.[13]

The Standing Rock Sioux and Three Affiliated Tribes individual landowners owned the majority of the lands taken by the United States in the 1950s to build the Oahe and Garrison Dams. For Standing Rock, approximately 46,000 acres (or 82%) of the total 55,994 acres taken by the United States were individually owned. In the case of the Three Affiliated Tribes, approximately 90% of the total 156,035 acres taken by the United States was individually owned. The CRST individual landowners owned approximately 46,316 acres (or 44%) of the total 104,420 acres taken by the United States.

In enacting the Equitable Acts, Congress acknowledged that the compensation provided by the United States in earlier statutes did not satisfy the Fifth Amendment's "just compensation" requirements because the earlier amounts were grossly inadequate. The awarding of additional compensation is mandated.[14] The number of acres referenced in each of the Equitable Acts – which were meant to provide additional mandated compensation – clearly includes the individual landowners' acreage taken in the 1950s.

However, notwithstanding the fact that the amount of compensation included in the Equitable Acts is purportedly compensation for all of the lands taken, not just tribally-owned lands, Congress ultimately failed to expressly provide for the making of direct payments to the individual landowners or their heirs through the Equitable Acts. As this committee is undoubtedly aware, Congress set up trust funds in the name of the Tribes, with the interest to be disbursed through tribal plans submitted separately by the Tribes and approved by the Secretary of Interior.

In passing the Equitable Acts, Congress essentially followed the same line of thinking followed in passing the ill-fated ILCA. That is, in acting for the benefit of the Missouri River Basin Tribes in general, Congress seems to believe that it has also sufficiently compensated the individual landowners because they will somehow benefit, either directly or indirectly, from the tribal programs funded under the tribal plans. However, the creation of the trust funds for the benefit of the Tribes fails to provide just compensation to the individual landowners or their heirs as is required by the Fifth Amendment.

In addition to receiving inadequate compensation for their lands, individual landowners of the Missouri River Basin Tribes suffered serious damage to their social, cultural, and psychological well being as a result of the takings. The lands lost were not only economically valuable, but essential to the continued cultural and psychological welfare of individuals and families.

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[12] See Dumarce supra.
[13] Youpee, 519 U.S. at 242.
[14] See e.g., Phelps v. United States, 274 U.S. 341 (1926)(although compensation was provided under federal legislation for the requisitioned use of private property during World War I, property owners had a right to additional monies if the federal government did not pay "just compensation" in the first instance.)

> These greater losses were due to the direct trauma of forced removal and relocation from homes, from familiar lands, and from the break-ups of (Tiospayes) families, friends, allies, and neighbors. There were losses of resources and opportunities for the continuation and development of local area-specific traditional and ceremonial sites with associated cultural, spiritual, social activities (not to mention traditional burial sites). These losses of opportunities for agriculture and economic development along with the greatest loss of all, a family's home and spiritual connection to this land which is now flooded and underwater. [15]

Congress has authorized compensation for this type of damage in the taking that occurred as a result of Pick-Sloan. The plain language of the Enabling Acts for the Missouri River Basin Tribes, in conjunction with the legislative history and intent of the later Equitable Acts, supports a finding by this Committee to authorize compensation for intangible injuries to the individual landowners. The individual landowners should therefore receive compensation for external/negative damages, insofar as they encompass injuries due to emotional and cultural loss and trauma.

Section 2(b) of the 1950 Cheyenne River and Standing Rock Sioux Tribe Enabling Act ("CRST and SRST Enabling Act"), which authorized the negotiation and ratification of settlement contracts for acquisition of lands to be used for the Oahe Dam and Reservoir, provides for the payment of:

> (1) just compensation for lands and improvements and interests therein, conveyed pursuant to subsection (a);
> (2) costs of relocating and reestablishing the tribe and the members of each tribe who reside upon such lands so that their economic, social, religious, and community life can be reestablished and protected: Provided, That such costs of relocating and reestablishing the tribe and the members of each tribe who reside upon such lands shall not result in double compensation for lands and properties to the tribe and members of each tribe... [16]

The 1950 CRST and SRST Enabling Acts directed the additional consideration of losses for "economic, religious, and community life" in the calculation of "just compensation." In fact, the two tribes were (ostensibly) paid only for the "fair market value" of their lands, when Congress authorized the inclusion of other factors in the analysis.

The Act setting forth the terms and conditions of the compensation provided to the Three Affiliated Tribes and individual allottees provides almost $5.2 million as

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[15] Statement of Francis (Punchee) R. Charging Cloud, October 23, 2002. Without compensation for this type of harm inflicted upon the Tribes and landowners for the purpose of providing cheap power to non-Indian communities, justice cannot be served.

[16] Pub. L. 870, H.R. 5372, 81st Cong., 2nd Sess., Sec. 2(b).

> (a) Payment for tribal and allotted Indian lands and improvements, including heirship interests, and values above and below the surface, within the Taking Area;
> (b) Costs of relocating and reestablishing the members of the tribes who reside within the Taking Area; and
> (c) Costs of relocating and reestablishing Indian cemeteries, tribal monuments, and shrines within the Taking Area.[17]

In addition to the $5.2 million, in Section 12(2) of the Resolution, Congress designated another $7.5 million, to satisfy:

> all other rights, claims, demands and judgments of said tribes, individual allottees or heirs thereof, of any nature whatsoever existing on the date of enactment of this Act, whether of tangible or intangible nature and whether or not cognizable in law or equity in connection with the taking of said land and the construction of said Garrison Dam project.

In other words, Congress appropriated $7.5 million to settle claims of an intangible nature that are not necessarily cognizable in law or equity. This language sets forth explicit Congressional authorization, and actual payment for damages encompassing cultural and psychological harm to individual landowners from the Fort Berthold Reservation.

Review of the later Equitable Acts acknowledging the United States' failure to justly compensate the tribes for their lands should be viewed in light of the original Enabling statutes. The TAT and SRST Equitable Act sets aside trust monies for Tribes for use under tribal plans for "educational, social welfare, economic development and other programs." The TAT and SRST Equitable Act does not explicitly refer to psychic or emotional injuries as a basis for the additional compensation provided. However, Section 3503(a) of the Act does indicate that "in recognition of the findings, conclusions, and recommendations of the Secretary's Joint Tribal Advisory Committee, Congress finds that [both tribes] should be adequately compensated for the taking of [their lands]." In turn, the JTAC Report (May 23, 1986) for the TAT and SRST Equitable Act, upon which Congress relied, did note that some of the psychological and emotional effects of the implementation of the Pick-Sloan Missouri Program were common to both tribes, including:

> The quality of life enjoyed by the tribes on the river bottomlands has not been replicated in the areas to which they were removed. The dramatic rise in the incidence of stress-related maladies and illnesses following removal of

[17] Pub. L. No. 81-437, 63 Stat. 1026, October 29, 1949.

> the Indians is circumstantial evidence that there is a casual relationship between these effects and the removal.[18]

Congress did hear testimony in support of the TAT and SRST Equitable Act that mentioned social and cultural losses.[19] In hearings for the TAT and SRST Equitable Act, Senator Kent Conrad (D- N.D.) noted that the tribal "way of life was literally wiped out.[20]

Similarly, the Cheyenne River Sioux Equitable Compensation Act, Pub. L. 106-511, also does not mention compensation for emotional or psychological damages. However, the previous Report of this Committee recognized that the "loss of access to traditional hunting, gathering, and ceremonial grounds [due to flood inundation] was permanent" and that the Cheyenne River Sioux Tribe "incurred major adverse impacts to its way of life, its economy and culture."[21] Gregg Bourland, Tribal Chairman of the Cheyenne River Sioux Tribe, also testified as follows:

> The taking of our land for the Oahe Dam and Reservoir devastated our lives. It displaced over 30% of our families and it permanently changed for the worse the way we live, the way we earn our living, the way we recreate, the way we practice our culture, the world we see when we wake up each morning.[22]

Compensation based on a "subjective" valuing of emotional harm and cultural loss is not unprecedented. The Civil Liberties Act of 1988, "Restitution for World War II internment of Japanese-Americans and Aleuts," was enacted in acknowledgement of and apology for "the fundamental injustice" of the relocation of and internment of Japanese Americans and Aleutian Islanders during World War II.[23] Another purpose of the Act was to:

> (5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations <u>in equity and at law</u>, for-
>
> > (A) injustices suffered and unreasonable hardships endured while these Aleut residents were under United States control during WWII;

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[18] TAT and SRST JTAC Report at 2.

[19] <u>See</u> Testimony of Charles W. Murphy, SRST Chairman, before the Select Committee on Indian Affairs on S. 168 (April 12, 1991) ("we not only lost our best lands and most valuable resources, we also lost our subsistence way of life.")

[20] Hearings on S. 168 Before the Comm. On Indian Affairs, 102nd Cong. 14 (1991).

[21] S. Rep. No. 106-217 at 2 (1999).In the Senate Report on the Yankton Sioux and Santee Sioux Equitable Act, the Committee on Indian Affairs indicated that it "recognize[d] that any attempt to measure the tangible and intangible values associated with the loss of tribal life and tradition along a free flowing river in monetary terms is necessarily subjective." S. Rep. No. 107-214 (2002).

[22] Testimony of Gregg Bourland, CRST Chairman, before the Committee on Indian Affairs on S.1905 (July 8, 1998).

[23] Pub. L. 100-383, 102 Stat. 903.

> (B) personal property taken or destroyed by United States forces during WWII;
> (C) community property, including community church property, taken or destroyed by United States forces during WWII: and
> (D) traditional village lands on Attu Island not rehabilitated after WWII for Aleut occupation or other productive use.

The Act provided, in part, for a $20,000 payment to each surviving individual of Japanese ancestry who was interred in camps during World War II, a $50 million education fund, a $5 million trust fund for Aleuts, and $12,000 to each Aleut relocated during the war. The legislative history of the Act, found in the Congressional Record, details some of the reasoning behind its passage. Congressman Miller of California noted that "beyond the material loss was the psychological damage of having been suddenly uprooted and labeled a potential traitor."[24] Other Representatives commented that "the stigma of internment weighed heavily on the hearts and souls of these Americans, and the specter of disloyalty attached to anyone in the camps," and "the prime purpose [behind passage of the Civil Liberties Act] is . . . to make crystal clear to Americans now and in the future that there is no disloyalty that attaches to [those incarcerated]," and "adequate amends can never be made to the internees for their losses and suffering, however . . . this legislation . . . is an important recognition of the injustices committed against loyal citizens." Id. It is clear that Congress intended payments to individuals to compensate them not only for loss of property, but for emotional trauma as well. Although this compensation did not purport to arise in the context for a Fifth Amendment taking, it does support the proposition that Congress is willing to recognize the type of "nontraditional" harm experienced by the landowners.

In sum, there is support for the recovery of external damages by the Missouri Basin Tribes and this recovery should also be given to the individual landowners. The 1950 CRST and SRST Enabling Act made specific mention that the government was to reestablish and protect "economic, social and community life." Members of the Three Affiliated Tribes were provided $7.5 million in their Enabling Act for claims of an intangible nature. Later Equitable Acts acknowledged that the compensation was inadequate. Evidence found in the Congressional record of the later Equitable Acts requires that just compensation be calculated to include damages for loss of culture, psychological injury, and emotional distress. Congress can authorize compensation for non-traditional damages in legislation. Although not categorized as "consequential damages," since they were expressly acknowledged in the Enabling Acts, individual landowners should be compensated for these damages through the amount determined to be "just" compensation for the taking of lands for the Missouri River Dam projects as set forth in the Report of Robert McLaughlin

[24] 100th Cong. 2nd Sess., 134 Cong. Rec. H. 6307 (August 4, 1988).

It is the Upper Missouri River Intertribal Allottees Association's position that the individual landowners at Crow Creek and Lower Brule were not properly compensated and we therefore request that any additional compensation provided to the Tribe in S.374 be fairly apportioned between the Tribe and the landowners to directly compensate these individual landowners for their losses. We also request that this Committee include a provision in the Cheyenne River Equitable Compensation Amendments Act that directly compensates the individual landowners for their losses, as opposed to only authorizing the Tribe to provide compensation to the individual landowners as the Tribe determines proper.

Thank you for your consideration in this very important matter. We have included additional documentation which further outlines the historical impact the Flood Control Act has had on the Allottees.

Respectfully Submitted,

/s/ Archie Fool Bear

Archie Fool Bear
Standing Rock Sioux Tribal Board Member,
Upper Missouri River InterTribal Allottees Association

**Attachments**

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TOM W. ECHOHAWK
(1952-1982)

**MEMORANDUM**

**To: Upper Missouri River Intertribal Allottees Association**

**From: Fredericks, Pelcyger & Hester, LLC**

**Re: History of the Pick Sloan Project**

**Date: March 1, 2006**

## Introduction

This memorandum discusses the history of the Pick Sloan Project and how this project resulted in the patent destruction of indigenous land, identity, family life, and culture for the Upper Missouri River Intertribal Allottee member tribes. This memorandum focuses on how allottees of one member tribe, the Cheyenne River Sioux Tribe, were adversely affected by the Pick Sloan Project. While the experience at Cheyenne River is typical of the experience shared by allottees of all member tribes, further research should be done documenting the extent of the harm suffered by the allottees on the other reservations pursuant to the flooding of their lands. It is essential that we undertake a rigorous, legalistic examination of the historical circumstances

surrounding the effect of the flooding on each individual reservation in order to better establish the common elements shared by all allottee members to show how those common experiences justify a comprehensive resolution for the shared claims arising in this case. A final resolution of these claims will only be achieved through promoting an accurate understanding and acknowledgement of the history surrounding the implantation of the Pick Sloan Project and by demonstrating how the Pick Sloan Project has come to materially alter the political, social, and cultural landscape of all the member tribes today.

**History of the Pick Sloan Project**

The Missouri River Intertribal Allottee Association member tribes all lost a considerable parcel of their richest lands pursuant to a grandiose plan to build a series of dams on the Missouri River that was implemented by the Army Corps of Engineers. The origins of this large-scale dam project came about following a series of floods on the Missouri river in the early 1940's.[1] A particularly severe flood in early 1943 drew the attention of the Corps of Engineers who decided a flood management plan would need to be adopted immediately in order to protect the communities and farmsteads adjacent to the river.[2] The Corps plan was to develop six dams that would in turn create a series of reservoirs along the river.[3] The reservoirs would flood the most arable bottomlands along the river and forever alter the existing geographic makeup of the northern plains. However, the plan supposedly would provide long-term benefits to the region through

[1] *See* David H. Getches, *Grassroots Versus Water logging*, 4 Great Plains Nat. Resources J. 1 (1999).
[2] *See id.* at 3.
[3] *See id.*

serving the dual purpose of controlling flooding on the Missouri as well as improving commercial navigation on the lower Missouri.[4]

While the Corps of Engineers was busy selling its flood control plan to Congress, the Bureau of Reclamation was in the process of developing its own designs for the Missouri river, the thrust of its plan not being flood control or navigation but rather irrigation.[5] The Bureau had previously built a number of small irrigation projects along the Missouri in the late 1930's.[6] It soon became evident that the projects would be unable to pay back the federal investment in that any repayment was contingent upon the irrigators being able to maintain a profit, and the Bureau therefore focused on assisting the irrigators so that they could pay back the federal investment.[7] In the Bureau of Reclamation's opinion, the solution rested in the construction of additional hydropower dams that would be able to generate enough revenue to pay for the costs of their construction and subsidize the existing irrigation projects at the same time.[8]

With both the Bureau of Reclamation and the Corps of Engineers lobbying for the acceptance of their plans in Congress, a great debate ensued as to which proposal had the most merit. After a long drawn out battle by both agencies, Congress chose to adopt both plans despite the fact that the provisions of the two projects were redundant in many areas. Moreover, Congress ignored the fact that implementing both projects would have severe economic and environmental ramifications in that both plans would require tremendous amounts of revenue to implement and would come to change the ecosystem

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[4] *See id.*
[5] *See id.*
[6] *See id.*
[7] *See id.*
[8] *See id.*

of the northern plains region permanently.[9] The final version of the project, which allowed the Corps to proceed with its plan first, was passed by Congress in the Flood Control Act of 1946, commonly referred to as the Pick Sloan plan for the Bureau of Reclamation and Corps of Engineer planners who had created their respective projects.[10] The Pick Sloan plan became operational a few years later, with the newly constructed dams flooding close to 1,500,000 acres of land on 620 miles of the Missouri river, creating four vast reservoirs known as Lewis and Clark Lake, Lake Francis Case, Lake Sharpe, and Lake Oahe.[11]

**Impact of the Pick Sloan Project**

The detrimental effects associated with the construction of the dams were disproportionably felt by the Association Member Tribes of the region, especially by the Sioux Tribes, where over 350,000 acres of 18 U.S.C. §1151(a) reservation lands were flooded, which comprised 23 percent of the total acres that were inundated by the project.[12] The disproportional impact on reservation lands was intentional, as the Corps of Engineers carefully calculated the construction sites of the dams so that the inundated lands would primarily fall upon Indian reservations.[13] Given the fact that the Pick-Sloan project caused more extensive damage to Indian country than any other public works project to date, it has been referred to as "the single most destructive act ever perpetuated

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[9] *See id.*
[10] *See id.*
[11] *See* Peter Capossela, *Indian Reserved Water Rights on the Missouri Basin*, 6 Great Plains Nat. Resources J. 131, 152 (2002).
[12] *See id.*
[13] *See* ROBERT MCLAUGHLIN COMPANY, ANALYSIS OF ECONOMIC LOSS RESULTING FROM LANDS TAKEN FROM THE CHEYENNE RIVER SIOUX TRIBE FOR THE OAHE DAM, 6 (1994).

on any tribe by the United States."[14] The land that was flooded on most reservations was the most arable and productive land left in Indian Country. It contained the densest collection of trees on the Great Plains, which to the tribes was the most valuable remaining resource at the time, in that this timber was used as fuel in providing their main source of heat during the harsh Dakota winters.[15] In addition, the largest communities, as well as many agency headquarters of the tribes in the region were located near the river on land that was flooded by the Act. The flooding of these lands therefore required the relocation of entire seats of government, completely changing the demographics of the area, and disrupting the functional effectiveness of the governmental agencies on the reservation for years to come.[16] The repercussions of the Flood Control Act therefore affected the member tribes on a number of significant levels that went beyond simply divesting them of their ancestral homelands. The Act forever altered the makeup and form of the reservation political and economical systems, which in turn impaired the very lifeblood of the tribe's existence as a people.

On the Cheyenne River Sioux Reservation, the reservation land to be used for the Pick Sloan project was acquired under the Cheyenne River Act of 1954.[17] The act's passage came at a time of extreme economic hardship for the tribe, and their economic misfortune was undoubtedly used as a bargaining tool in the negotiation process. In order to relinquish title to any reservation lands, three quarters of the tribe's adult

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[14] *See* MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK SLOAN ACT AND THE MISSOURI RIVER SIOUX (1982).
[15] *See id.* at 153.
[16] *See e.g.* South Dakota v. Bourland, 508 U.S. 679, (1993) Determining that the tribe had effectively given up jurisdiction to control non-Indian fishing on the reservoir and hunting on lands adjacent to the flooded area.
[17] *See* CHEYENNE RIVER ACT OF 1954, CH. 1260, 68 Stat. at 1191.

members had to agree to the cession pursuant to the 1868 Fort Laramie Treaty requirements.

As part of the Missouri River Basin Plan, Congress needed to secure the agreement of the tribes involved. The Member Tribes were never informed of the Pick Sloan Plan until several months after it had been approved by Congress, and none of the tribes affected by the project had been consulted prior to its enactment. The hubris of the Corps of Engineers was illustrated by the fact that it did not even consult with tribes at the onset of the project, and had begun construction of the dams on reservation property before negotiation proceedings with the tribes had even been initiated.

The Tribes eventually agreed to allow the U.S. to implement the project, after the Corps had lobbied to convince them of the project's potential benefits that would result from irrigated water and cheaper electrical rates from the dams' hydroelectric turbines, representations that were never fulfilled to this day.[18] Negotiations with the government dragged on for 14 years, during which time the five Sioux reservations that were affected by the project each negotiated separately for a settlement, realizing that efforts to stop construction of the dams themselves would likely be futile. The final settlements were therefore not uniform in their application amongst the individual tribes, and in the end, Cheyenne River lost the most land and received the least compensation of all the Sioux Tribes.

The floodwaters of Lake Oahe took 104,000 acres of the Cheyenne River Sioux Tribe's bottomlands (80 percent of the Tribe's fertile land) and required the forced resettlement of nearly 30 percent of the reservation population, including four highly

[18] None of the proposed irrigation projects were completed on Indian lands and tribal members have seen only a marginal reduction in its electric rates as a result of the project.

populated communities and the tribal headquarters at the Old Agency.[19] The flooding inundated not only the most productive farms, but also the best ranchland, 90 percent of the reservation timberland, and 75 percent of the wild game and plant supply. In its place, the flooding created a huge reservoir, Lake Oahe, which is used today as a recreation area by a predominantly non-Indian public.

Although Cheyenne River was paid $10,644,014 for the flooded land on the reservation, this amounted to less than $19.00 per acre, far below the average market value for such fertile and productive lands at the time.[20] This settlement was distributed amongst the Tribe and the individual allottees that held land assignments adjacent to the river. Frequent disputes arose between the Tribe and these landowners as to the amount of compensation that was owed for the condemnation of their individual land holdings, as a certain percentage of the settlement was intended to be used for tribal development projects along the river. As part of the initial settlement, neither the individual landowners nor the Tribe itself was fully compensated for the lands adjacent to the flooded waters. This strip of land on both sides of the Missouri River, commonly referred to as the "taken area," was instead held by the Corps of Engineers, who had acquired regulatory control of this land pursuant to the Flood Control Act.

The Flood Control Act was typical of other legislation that was passed during this time, the express purpose of which was to augment the policy of termination through the further dispossession of Indian lands. The termination era policies that were instituted during the Eisenhower administration had served to undermine much of the positive aspects of the Former Interior Commissioner Collier's New Deal, and the invective that

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[19] *See* Chad W. Swenson, *South Dakota v. Bourland: Drowning Cheyenne River Sioux Tribal Sovereignty in a Flood of Broken Promises*, 39 S.D. L. Rev. 181, 192-93 (1994).
[20] *See id.* at 193.

was advanced through the termination policies became paramount to an all out attack on tribalism. More importantly, these policies served to reinforce the assumed stewardship of the United States government in its control over Indian tribes, and demonstrated how the Secretary of the Interior has the power to act as a divisive figure in all issues pertaining to life on the reservation. Fortunately, the policies of this era were never carried to fruition, and were formally repudiated in the 1960's with the implementation of the new U.S. Indian policy, Self-Determination.

**History and Impact of the Pick Sloan Dam Project**

The Missouri River Intertribal Allottee Association member tribes all lost a considerable parcel of their richest lands pursuant to the Pick Sloan Dam-Flood Control Project, which consisted of a series of dams on the Missouri River. The origins of this large-scale dam project came about following a series of floods on the Missouri river in the early 1940's.[1] A particularly severe flood in early 1943 drew the attention of the Corps of Engineers who decided a flood management plan would need to be adopted immediately in order to protect the communities and farmsteads adjacent to the river.[2] The Corps plan was to develop six dams that would in turn create a series of reservoirs along the river.[3] The plan supposedly would provide long-term benefits to the region through serving the dual purpose of controlling flooding on the Missouri as well as improving commercial navigation on the lower Missouri.[4]

As part of the Missouri River Basin Plan, Congress needed to secure the agreement of the tribes involved. The Member Tribes were never informed of the Pick Sloan Plan until several months after it had been approved by Congress, and none of the tribes affected by the project had even been consulted prior to its enactment. The Tribes eventually agreed to allow the U.S. to implement the project, after the Corps had lobbied to convince them of the project's potential benefits that would result from irrigated water and cheaper electrical rates from the dams' hydroelectric turbines, promises that have never fulfilled to this day.[5]

In implementing the Pick Sloan Project, Congress ignored the severe environmental ramifications that would result for the Tribes, in that the project would come to have a devastating impact in destroying the ecosystem of the northern plains region.[6] After the Pick Sloan plan was implemented, the newly constructed dams flooded close to 1,500,000 acres of land on 620 miles of the Missouri river, creating four vast reservoirs known as Lewis and Clark Lake, Lake Francis Case, Lake Sharpe, and Lake Oahe.[7] The detrimental effects associated with the construction of the dams were disproportionably felt by the Upper Missouri River Allottee Association Member Tribes of the region, especially by the Sioux Tribes of North And South Dakota, where over 350,000 acres of 18 U.S.C. §1151(a) reservation lands were flooded, which comprised 23 percent of the total acres that were inundated by the entire Pick Sloan project.[8] The disproportional impact on reservation lands was intentional, as the Corps of Engineers had carefully calculated the construction sites of the dams so that the inundated lands would primarily fall upon Indian reservations.[9]

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[1] *See* David H. Getches, *Grassroots Versus Water logging*, 4 Great Plains Nat. Resources J. 1 (1999).
[2] *See id.* at 3.
[3] *See id.*
[4] *See id.*
[5] None of the proposed irrigation projects were completed on Indian lands and tribal members have seen only a marginal reduction in their electric rates as a result of the project, despite the fact that the Pick Sloan project generates over $120 million each year in power revenues for the nation.
[6] *See id.*
[7] *See* Peter Capossela, *Indian Reserved Water Rights on the Missouri Basin*, 6 Great Plains Nat. Resources J. 131, 152 (2002).
[8] *See id.*
[9] *See* ROBERT MCLAUGHLIN COMPANY, ANALYSIS OF ECONOMIC LOSS RESULTING FROM LANDS TAKEN FROM THE CHEYENNE RIVER SIOUX TRIBE FOR THE OAHE DAM, 6 (1994).

Given the fact that the Pick-Sloan project caused more extensive damage to Indian country than any other public works project to date, it has been referred to as "the single most destructive act ever perpetuated on any tribe by the United States."[10] The land that was flooded on most reservations was the most arable and productive land left in Indian Country. It contained the densest collection of trees on the Great Plains, which to the tribes was the most valuable remaining resource at the time, in that this timber was used as fuel in providing their main source of heat during the harsh Dakota winters.[11] In addition, the largest communities, as well as many government headquarters of the tribes in the region were located near the river on land that was flooded by the Act. The flooding of these lands therefore required the relocation of entire seats of government, completely changing the demographic makeup of the reservation areas, and disrupting the effectiveness of the tribal and federal governments to provide services on the reservation for years to come.[12] The lands lost were not only economically valuable, but essential to the continued cultural and psychological welfare of individuals and families.

> These greater losses were due to the direct trauma of forced removal and relocation from homes, from familiar lands, and from the break-ups of (Tiospayes) families, friends, allies, and neighbors. There were losses of resources and opportunities for the continuation and development of local area-specific traditional and ceremonial sites with associated cultural, spiritual, social activities (not to mention traditional burial sites). These losses of opportunities for agriculture and economic development along with the greatest loss of all, a family's home and spiritual connection to this land which is now flooded and underwater. [13]

The repercussions of the Flood Control Act affected the member tribes on a number of significant levels that went beyond simply divesting them of their ancestral homelands. The Act forever altered the Tribal political and economic systems, which in turn impaired the very lifeblood of the tribe's existence as a people. In addition to receiving inadequate compensation for their lands, individual landowners of the Missouri River Basin Tribes suffered serious damage to their social, cultural, and psychological well being as a result of the takings. These impacts are still felt today, where rampant alcoholism, 80% unemployment and social dysfunction continue to plague the lives and well-being of these tribal members. Many of these areas today remain the poorest in the nation, with a median average yearly income of only $6,000. As a direct result of the Pick Sloan project, Tribal members have become refugees in their own land, and are forced to live in third world conditions that make every day survival an increasingly difficult challenge to meet.

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[10] *See* MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK SLOAN ACT AND THE MISSOURI RIVER SIOUX (1982).

[11] *See id.* at 153.

[12] *See e.g.* South Dakota v. Bourland, 508 U.S. 679, (1993) Determining that the tribe had effectively given up jurisdiction to control non-Indian fishing on the reservoir and hunting on lands adjacent to the flooded area.

[13] Statement of Francis (Punchee) R. Charging Cloud, October 23, 2002.

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TOM W. ECHOHAWK
(1952-1982)

**MEMORANDUM**

**To:** Upper Missouri River Intertribal Allottees Association

**From:** Fredericks, Pelcyger & Hester, LLC

**Date:** August 29, 2006

**Re:** **Damages**

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Based on recent legislation pending before the 109th Congress and the recent discussions to include these claims with the settlement negotiations regarding the Cobell case, the UMRIAA has requested that we provide the following assessment of the damages owed to various tribes and allottees affected by the Pick-Sloan Program during the 1950's based on a method for calculating damages adopted and applied by the United States Congress under the Cheyenne River Sioux Tribal Equitable Compensation Act. As the Cheyenne River Sioux Tribe received just compensation, their claims are excluded from this analysis.

## I. Background

The Pick-Sloan Program resulted in the taking of hundreds of thousands of acres of tribal and allotted lands located along the Missouri River Basin within the following eight Indian reservations: the Fort Berthold Indian Reservation, Cheyenne River Sioux Indian Reservation, Standing Rock Sioux Indian Reservation, Crow Creek Indian Reservation, Lower Brule Indian Reservation, Yankton Sioux Reservation, Santee Sioux Reservation and the Rosebud Sioux Indian Reservation. Most of the lands were irreplaceable fertile river bottomlands that had been occupied for hundreds of years by the tribes and allottees living along the river. The taking of these lands led to the displacement of hundreds of families and ultimately caused devastating losses to the social, spiritual and cultural vitality of these eight tribes. The Garrison Dam had such devastating effects at Fort Berthold that at the time of the taking of their lands only 6% of the tribal members were on some for of public assistance. In 1990, that number had increased to over 90%.

During the 1950's, the Cheyenne River Sioux lost a total of 104,420 acres of tribal and allotted lands. In 1954, the Cheyenne River Sioux was compensated according to three categories: Category I – Land, Severance, Improvements and Timber: $2,250,000; Category II – Indirect Damages: $3,134,014; and Category III – Tribal Rehabilitation Program: $5,160,000 for a total of $10,544,014. See Pub. L. No. 83-776 (Sept. 3, 1954). The Cheyenne River Sioux Tribal Council passed a resolution stating that the tribe had not received adequate compensation for damages resulting from the Oahe Dam. See Cheyenne River Sioux Tribe, Tribal Resolution No. 69-93-CR (1993). In 1993, the Cheyenne River Sioux retained the services of the Robert McLaughlin Company ("RMC") to conduct an analysis of the economic loss resulting from the lands taken from the tribe for the Oahe Dam.

The RMC used two approaches to estimate the economic losses of the Cheyenne River Sioux. See The Robert McLaughlin Company, Analysis of Economic Loss Resulting From the Cheyenne River Sioux Tribe for the Oahe Dam, 137-138 (July 1994). Under a primary approach, the RMC recalculated the value of the tribe's losses for lost timber, wildlife, wild products and agricultural production and estimated that the total value of these losses, as of January 1, 1955, was $19.4 million. Id. After subtracting the $5.4 million authorized as damage compensation by Congress in the 1954 Enabling Act, the RMC applied the annual prime rate to adjust the unpaid damages of $14 million to the overall value in 1996, arriving at a total claim for additional compensation of $300.7 million. Id. Under a secondary approach, the RMC used the GAO method applied in the calculation of damages for the Three Affiliated Tribes and the Standing Rock Sioux Tribe. Id. Based on what the Cheyenne River Sioux requested in 1954 ($23,530,303), the RMC deducted the amount appropriated by Congress ($10,544,014) and applied the nominal prime rate to bring this amount forward to the 1996 value of $279.1 million. Id. The RMC determined that the Cheyenne River Sioux Tribe was entitled to additional compensation between $279.1 million and $300.7 million.

In 2000, Congress enacted the Cheyenne River Sioux Tribal Equitable Compensation Act and provided $290,722,958 in additional compensation for the Cheyenne River Sioux Tribe for the taking of tribal and allotted lands to implement the Pick-Sloan Program. See Cheyenne River Sioux Tribe Equitable Compensation Act, Pub. L. No., 106-511 (2000). Congress openly adopted and applied a methodology for calculating damages attributable to the taking of tribal and allotted lands to implement the Pick-Sloan Program. The Cheyenne River Sioux Tribe received additional compensation for their lands, which took into consideration external damages for loss of natural resources and social damages that were not considered in other Equitable Acts. In fact, other tribes affected by the Pick-Sloan Program either received no compensation or compensation that was vastly disproportionate to what experts and even the congressionally mandated JTACs recommended.

## II. Damages

As discussed thoroughly in the accompanying memorandum discussing the claims of the allottees and/or their heirs and the petition submitted to the Secretary of the Interior, the following damages are based on the method applied in the Cheyenne River Sioux Tribal Equitable Compensation Act.

**a. Three Affiliated Tribes**

The Three Affiliated Tribes sustained losses totaling 156,035 acres in tribal and allotted lands as a result of the Garrison Dam. Approximately 140,400 acres (or 90%) of land was allotted to individual members of the Three Affiliated Tribes. Applying the method adopted by Congress, the Three Affiliated Tribes should have been compensated at the rate determined by the RMC at $411.8 million in 1992 and out of that amount the individual landowners should have received $370.6 million for their losses. The Three Affiliated Tribes are currently in the process of retaining the services of the RMC to determine these damages in 2006 dollars to include in its own parity legislation.

| | Expert (Cummings) Report | JTAC Recommendation | 1992 Equitable Act | **Individual Landowners** |
|---|---|---|---|---|
| **Total Damages** | $170 million - $178.4 million | $178.4 million - **$411.8 million (1992 Dollars)**-- the $411.8 million is the amount recommended by RMC | $149.2 million | $149,200,000 x 90% =$134,280,000 (portion of 1992 Equitable Act) OR $411,800,000 x 90% = **$370,620,000 (1992 Dollars)** |

**b. Standing Rock Sioux Tribe**

The Standing Rock Sioux Tribe sustained losses totaling 55,994 acres in tribal and allotted lands as a result of the Oahe Dam. Approximately 46,000 acres (or 82%) of land was allotted to individual members of the Standing Rock Sioux Tribe. The RMC recently completed an assessment of damages based on the method applied and adopted by Congress. According to the RMC, the Standing Rock Sioux Tribe is entitled to additional compensation totaling $611.1 million in 2004 dollars. The individual landowners would then be entitled to an 82% portion of that amount totaling $501.1 million in 2004 dollars in addition to $72.3 million (or 82% of the $90.6 million awarded in 1992). The Standing Rock Sioux would also need to determine those figures in 2006 dollars to include in its own parity legislation.

| | Expert (McLaughlin) Report | JTAC Recommendation | 1992 Equitable Act | Individual Landowners |
|---|---|---|---|---|
| **Total Damages** | $342.9 million | $181.2 million - $342.9 million (1992 Dollars) OR **$611,072,601** (2004 Dollars after deducting $90.6 million paid in 1993) | $90.6 million | $90,600,000 x 82% =$72,292,000 (portion of 1992 Equitable Act) **PLUS** $611,072,601 x 82% =$501,079,533 (2004 Dollars) **for a TOTAL of: $573,371,533 (2004 dollars)** |

**c. Crow Creek Sioux and Lower Brule Sioux**

The Crow Creek Sioux Tribe sustained losses totaling 15,597 acres in tribal and allotted lands as a result of the Fort Randall and Big Bend Dams. Approximately 5,303 acres (or 34%) were allotted lands. The Lower Brule Sioux Tribe sustained losses totaling 22,296 acres in tribal and allotted lands as a result of the Fort Randall and Big Bend Dams. Approximately 21,627 acres (or 97%) were allotted lands. The Crow Creek and the Lower Brule Sioux Tribes retained the services of Dr. Michael Lawson to determine the additional compensation for each tribe based on the method for calculating damages applied in the case of the Cheyenne River Sioux. Dr. Lawson determined that the Crow Creek Tribe was entitled to an additional $69.2 million for the taking of their lands and that the Lower Brule Tribe was entitled to $129.8 million.

| | 1997 Trust Fund Act | 2006 Parity Act (Dr. Lawson Report) | Individual Landowners |
|---|---|---|---|
| **Total Damages for Crow Creek** | $27.5 million | **$69.2 million (2006 dollars)** | $69,200,000 x 34% **=$23,528,000 (2006 dollars)** |
| **Total Damages for Lower Brule** | $39.3 million | **$129.8 million (2006 dollars)** | $129,800,000 x 97% **=$125,906,000 (2006 dollars)** |

**d. Yankton Sioux Tribe**

The Yankton Sioux Tribe sustained losses totaling 2,851 acres taken at White Swan. Approximately 542 acres (or 19%) were allotted lands. Only $121,210 was paid at the time of the initial taking ($42/acre), less than half the appraised value of comparable lands on other Sioux reservations. A total of $106,500 was allocated in damages for tribal members, but was not distributed to all families relocated from their allotted lands. The Tribe recovered a total of $23 million under the Trust Fund Act. Additional research is needed to assess the additional compensation owed to the allottees of the Yankton Sioux Tribe.

**e. Santee Sioux Tribe**

The Santee Sioux Tribe sustained losses of 593 acres. The Tribe was paid $52,000 at the time of the taking ($87.67/acre) and received a total of $4.8 million under the Trust Fund Act. Additional research is needed to assess the additional compensation owed to the allottees of the Santee Sioux Tribe.

**f. Rosebud Sioux Tribe**

There were no tribal lands taken from the Rosebud Sioux Tribe. However, a total of 1,231 acres of allotted lands were taken for the Pick-Sloan Program. Additional research is needed to assess the additional compensation owed to the allottees of the Rosebud Sioux.

## III. Conclusion

There is a considerable amount of additional compensation that the various tribes and individual allottees affected by the Pick-Sloan Program are rightfully entitled to based on the method for calculating just compensation adopted and applied by Congress under the Cheyenne River Sioux Tribe Equitable Compensation Act of 2000. Additionally, based on the significant number of acres held by the allottees, any attempt to compensate the tribes for their losses must also provide additional compensation for the allottees and/or their heirs impacted by the taking of their lands.

Although the Enabling Acts provided for individual payments to allottees commensurate with their ownership interests, the Equitable Acts failed to provide additional compensation directly for the allottees. Rather the additional compensation provided under the Equitable Acts are paid directly to the various tribes according to Tribal Plans developed by the tribes and approved by the Secretary of the Interior. Therefore, any effort to compensate the tribes for the taking of lands under the Pick-Sloan Program must also provide direct payment for the allottees and/or their heirs commensurate with their ownership rights.

# NOTICE OF CLAIMS AND PETITION FOR COMPENSATION TO THE SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR

# IN THE MATTER OF THE UPPER MISSOURI RIVER INTERTRIBAL ALLOTTEES ASSOCIATION TO JUST COMPENSATION

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## SUMMARY OF PETITION

This Petition sets forth the Claims of individual Indian Allottees and/or their heirs resulting from allotted lands taken by the United States for the Pick-Sloan Missouri River Basin Program ("Pick-Sloan Program") initially authorized by Congress under the Flood Control Act of 1944, Pub. L. No. 78-534, 78 Cong. Ch. 665, 58 Stat. 887 (Dec. 2, 1944), and requests that the Secretary of the Department of Interior provide compensation to the Allottees and/or their heirs pursuant to the Equitable Acts.[1] The Equitable Acts provided additional compensation to several Missouri River Basin Tribes and their Allottees for the taking of tribal and allotted lands on eight Indian reservations for the Pick-Sloan Program. Specifically, this Petition requests the Secretary to compensate the Allottees and/or their heirs by requiring that the Tribal Plans authorized in the Equitable Acts include compensation for the Allottees and/or their heirs as a matter of right. These Claims, if left unresolved, may subject the United States to a lengthy and complicated class action lawsuit for money damages.

## I. INTRODUCTION

The Allottees and/or their heirs affected by the Pick-Sloan Program have joined together to form the Upper Missouri River Intertribal Allottees Association ("UMRIAA") to research, study and investigate the taking of individually-owned lands under the Flood Control Act of 1944 and to educate and inform the Allottees and the affected communities of all available legal and equitable rights and remedies concerning land loss claims, just compensation and social or other damages. The attached Resolution passed by the members of the UMRIAA and the UMRIAA Board of Directors authorizes the filing of this Petition. The key facts and factors that support the Claims in this Petition are as follows:

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[1]The Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Pub. L. No. 102-575, 106 Stat. 4731 (1992); The Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act, Pub. L. No. 104-223, 110 Stat. 3026 (1996); The Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act, Pub. L. No. 105-132, 111 Stat. 2563 (1997); The Cheyenne River Sioux Tribe Equitable Compensation Act, Pub. L. No. 106-511, 114 Stat. 2365 (2000); and The Yankton Sioux Tribe and Santeee Sioux Tribe Equitable Compensation Act, Pub. L. No. 107-331, 116 Stat. 2834 (2002) [hereinafter "Equitable Acts"].

A. In 1938, Congress passed an Act authorizing the taking of "all lands, easements and rights-of-way" for the purpose of developing dam and reservoir projects, or channel improvements or channel rectification projects for flood control.[2]
B. In 1944, Congress passed the Flood Control Act, authorizing the construction of thousands of dams and levies across the United States to develop water resources. The intended beneficial uses of these water resources included flood control, aid to navigation, irrigation, supplemental water supply, power generation, municipal and industrial water supplies, stream-pollution abatement, sediment control, preservation and enhancement of fish and wildlife, and creation of recreational opportunities.
C. Over 23 percent of the lands taken under the Flood Control Act of 1944 were Indian lands, within the boundaries of the following eight Indian reservations located along the Missouri River Basin: Fort Berthold Indian Reservation, Cheyenne River Sioux Indian Reservation, Standing Rock Sioux Indian Reservation, Crow Creek Indian Reservation, Lower Brule Indian Reservation, Yankton Sioux Reservation, Santee Sioux Reservation and the Rosebud Sioux Indian Reservation. The project was known as the Pick-Sloan Missouri River Basin Program ("Pick-Sloan Program").
D. Congress passed a series of Enabling Acts[3] for each of the eight Indian reservations along the Missouri River Basin authorizing the taking of tribal and allotted lands for the Pick-Sloan Program. As will be discussed in Part II of this Petition, the Joint Tribal Advisory Committees ("JTACs") formed by Congress to assess the losses incurred by the Tribes and Allottees concluded that the Tribes and Allottees had not been adequately compensated by the federal government "for the unique circumstances and values" taken from them under the various Enabling Acts. Therefore, the JTACs recommended additional compensation be paid to the Tribes and Allottees.
E. At the time of the takings, a majority of the Indian lands taken were held in individual ownership by Allottees and/or their heirs as a result of the General Allotment Act of 1887.[4]
F. The Tribes and Allottees of these lands suffered great and terrible financial, social, spiritual, and cultural losses as a result of the Pick-Sloan Program, which led to the eventual physical destruction of their way of life.

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[2] Act of June 23, 1938, 52 Stat. 1218 (June 23, 1938).
[3] The Three Affiliated Tribes Enabling Act, Pub. L. No. 81-437, 63 Stat. 1026 (Oct. 29, 1949)(authorized taking of lands located on the Fort Berthold Reservation); The Cheyenne River Sioux Tribe and Standing Rock Sioux Tribe Enabling Act, Pub. L. No. 81-870, 64 Stat. 1093 (Sept. 30, 1950)(authorized taking of lands located on the Cheyenne River Sioux Reservation); The Standing Rock Sioux Tribe Enabling Act, Pub. L. No. 85-915, 72 Stat. 1762 (Sept. 2, 1958)(authorized taking of lands located on the Standing Rock Sioux Reservation); The Big Bend Recovery Act, Pub. L. No. 87-735, [ Stat. ] (1962)(authorized taking of lands located on the Lower Brule and Crow Creek Sioux Reservations) [hereinafter "Enabling Acts"]; See Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, S.R. 434, 107th Cong., § 2(a)(6) & (7) (2002)(lands condemned on the Santee Sioux and Yankton Sioux Reservations were not given an opportunity to receive compensation for direct damages from the Pick-Sloan Program).
[4] The General Allotment Act, 24 Stat. 388, ch. 119, 25 U.S.C.A. §§ 331 et seq. as amended (Feb. 8, 1887).

G. Through a series of Equitable Acts,[5] the United States Congress admitted that it failed to pay just compensation for the tribal and allotted lands taken under the various tribal Enabling Acts.[6]

H. To remedy these inequities and comply with the Fifth Amendment to the United States Constitution, Congress authorized the allocation of additional funds to compensate the Tribes and Allottees for the taking of reservation lands and provided for the deposit of such funds in various Recovery Funds in the name of the Three Affiliated Tribes, the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Lower Brule Tribe, the Crow Creek Tribe, the Yankton Sioux Tribe, and the Santee Sioux Tribe ("Tribes").

I. Given the congressional acknowledgement of the inequity of the original payments made for reservation lands, the Equitable Acts also provided additional compensation for the taking of allotted lands owned by the Allottees, owners of a majority of the land taken, who were also undercompensated and suffered greatly as a result of the loss of their lands. In some cases, up to 90 percent of the lands lost were allotments owned by Allottees. Congress included the acreage owned by the Allottees in its calculations to determine the compensation to be included in the Equitable Acts.

J. In accordance with the principles of Fifth Amendment takings law and the federal government's trust responsibility to the Allottees, the intent behind the Equitable Acts was to ensure that just compensation was paid to the Tribes and the Allottees for the lands taken for the Pick-Sloan Program.

K. The horrific and unjustifiable actions of the federal government taken to implement the Pick-Sloan Program are commonly known and well documented by the Allottees, the Tribes, and various historians, and constitute a blight on the United States' already poor record on the treatment of Indians.

L. Pursuant to the various Equitable Acts, the Secretary of the Interior is vested with the authority to approve the Tribal Plans, which outline how the interest income generated from the Recovery Funds set aside under the Equitable Acts will be expended. Therefore, the Allottees who lost their lands, as well as their heirs who would have inherited such lands, request that the Secretary of the Interior address these claims and require that the Tribal Plans approved by the Secretary include compensation for the Allottees and/or their heirs to provide the basic necessities of life, including clean, safe, modern housing, healthcare, economic opportunities, and social and cultural rejuvenation. In short, the Allottees and/or their heirs deserve no less than just compensation in an amount comparable to what they lost under the Pick-Sloan Program as provided under the Equitable Acts.

M. The proposed inclusion of the Allottees in the tribal spending plans will settle the outstanding Claims of the Allottees and/or their heirs, which stem from the effects of the Pick-Sloan Program and fulfill the overall purpose of the Enabling Acts and the Equitable Acts.

## II. BACKGROUND

### A. Allotment

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[5] See, *supra* fn. 1.
[6] See, *supra* fn. 3.

Prior to the colonization of North America, Native Americans controlled vast areas of land within what is now the United States. With the arrival of Europeans, the Indian population was decimated by disease and warfare. Many tribes signed treaties in which they ceded millions of acres of land in exchange for small parcels of land within defined boundaries known as "reservations."

> The theme of Indian policy for the remainder of the nineteenth and first quarter of the twentieth century was "civilization and assimilation." At the heart of this policy was legislation providing for the acquisition of Indian lands and resources. The theory of assimilation justified the legislation as beneficial to Indians. Proponents of assimilation policies argued that if Indians adopted the habits of civilized life they would need less land and the "surplus" would be available for white settlers. The taking of Indian lands was justified as necessary for the moral improvement of native people and the progress of civilization.

See Felix Cohen, Cohen's Handbook of Federal Indian Law, 77 (2005 ed., LexisNexis, 2005).

In 1887, Congress enacted the General Allotment Act ("Dawes Act") "the vehicle through which Congress systematically allotted lands on most Indian reservations." See David H. Getches, Charles F. Wilkinson and Robert A. Williams, Jr., Cases and Materials on Federal Indian Law, 165-166 (4th ed., West Group, 1998). Under the Dawes Act, tribal lands were divided up and allotted to individual Indians ("Allottees").

> Land speculators and frontier settlers saw allotment as a sure-fire scheme to open up Indian lands for more productive use and ultimate transfer to non-Indian owners. In 1887, when the Dawes Act provided for allotting tribal lands to individual Indians, the American Indian's heritage in land totaled 138 million acres. Less than 50 years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands.

See Felix Cohen, Cohen's Handbook of Federal Indian Law, 77-78 (2005 ed., LexisNexis, 2005). Allotment created individual Indian ownership rights in lands that were formerly held as tribal lands creating a "checkerboard" pattern of ownership on many Indian reservations that are controlled today by tribes, individual tribal members and non-Indians.

**B. Flooding of Lands**

Although the members of the UMRIAA are members of different tribes, they all share a common experience. As a result of the Dawes Act, each of the reservations affected by the Pick-Sloan Program were allotted prior to 1944. Tribal members with lands located along the Missouri River Basin owned between 60 to 180 acres of land each. The Flood Control Act of 1944 authorized the flooding of thousands of acres of land to construct five main-stem dams. This federal project was known as the Pick-Sloan Missouri River Basin Program ("Pick-Sloan Program"). Under a series of Enabling Acts, the United States was authorized to enter into contracts with the Three Affiliated Tribes, the

Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Lower Brule Tribe, the Crow Creek Tribe, the Yankton Sioux Tribe, and the Santee Sioux Tribe ("Tribes") for the purchase of tribal and allotted lands located along the Missouri River Basin. In many cases, project construction had already begun as the United States negotiated with Tribes regarding the compensation due for the lands taken.

The majority of the lands taken under the Enabling Acts were owned by Allottees. For example, Allottees owned as much as 90 percent of the lands taken by the United States to build the Oahe and Garrison Dams. At Fort Berthold, 140,400 acres (or 90 percent) of the total 156,035 acres of lands taken were owned by Allottees of the Three Affiliated Tribes. On the Standing Rock Sioux Tribe's reservation, approximately 46,000 acres (or 82 percent) of the total 55,994 acres taken were owned by Allottees. On the Cheyenne River Sioux Reservation, Allottees owned approximately 46,316 acres (or 44 percent) of the total 104,420 acres taken. *See generally* Michael L. Lawson, *Dammed Indians: The Pick Sloan Plan and the Missouri River Sioux,* University of Oklahoma Press (1982).

Most of the lands were irreplaceable fertile river bottomlands that had been occupied for hundreds of years by the Tribes and Allottees living along the river. At Fort Berthold, 325 families, or around 80 percent of the tribal population, were uprooted from their traditional homes to make way for the Garrison Dam. At Lower Brule, 97 percent of the tribal population lost their lands because of the Fort Randall and Big Bend Dams. At Crow Creek, 34 percent of the population was displaced and at Yankton 19 percent of the population lost their homes. At Cheyenne River, 180 families, or 30 percent of the population lost their homes and at Standing Rock, 170 families, or 25 percent of the population were displaced. No tribal lands were taken at Rosebud, all 1,231 acres were individually owned. *See* Michael Lawson, Dammed Indians 45-67 (1982).

Under protest and extreme duress, the Tribes and Allottees eventually agreed to the sale of their lands for amounts far below fair market value. To best illustrate how the contracts for the taking of lands from the Tribes and Allottees was initiated, we must examine the process that was followed to acquire tribal and allotted lands from the Three Affiliated Tribes on the Fort Berthold Reservation. On May 2, 1946, the United States Congress ratified the War Department Civil Appropriations Act to make appropriations for the fiscal year ending June 30, 1947, for civil functions administered by the War Department. See Act of Cong., Pub. L. No. 79-374 (May 2, 1946). Specifically, the Act provided for the construction and maintenance of certain public works on rivers and harbors for flood control and for other purposes, in accordance with the provisions of the Flood Control Act approved June 22, 1936. Under Section 6 of the Act, no part of the appropriations were set aside for the actual construction of the Garrison Reservoir dam itself, until the Secretary of War selected and offered, through the Secretary of the Interior, land which the Secretary of the Interior approved as comparable in quality and sufficient in area to compensate the Tribes. The selection and offer of such lands by the Secretary of War was to be consummated before January 1, 1947, after which time actual construction of the dam itself would proceed. Section 6 also provided for the transfer of funds appropriated for the construction of the Garrison Reservoir dam to the Secretary of the Interior to acquire title to comparable lands.

On July 31, 1947, Congress enacted the Flood Control Act of 1947, to make appropriations for civil functions administered by the War Department for the fiscal year ending June 30, 1948. See Act of Cong., Pub. L. No. 80-296 (July 31, 1947). The Flood Control Act provided for the construction and maintenance of certain public works on rivers and harbors for flood control and for other purposes. The Act provided for the acquisition of the lands and rights located within the area of the Fort Berthold Reservation for the Garrison Reservoir. Approximately $5,105,625 was allocated under this Act for the Garrison Reservoir and deposited in the Treasury of the United States to the credit of the Tribes. The funds were to be used in accordance with the terms of a contract negotiated between the Tribes and the United States, approved by a majority of the adult members and enacted into law by Congress. The Act further placed a time limit on submitting the contract to Congress on or before the first day of June 1948. The Act reserved the rights of the Tribes to bring suit in the Court of Claims on account of additional damages, if any, or any intangible cost of reestablishment or relocation, for which the Tribes are not compensated by the fund of $5,105,625.

The Tribes, allottees and heirs of such Tribes, entered into a contract with the United States on May 20, 1948, for the taking of approximately 155,000 acres of land located on the Fort Berthold Reservation. The contract was negotiated between the Tribes and the Bureau of Indian Affairs. Under Article I, the Tribes reserved all rights and privileges to pursue their claims against the United States in the Court of Claims or by petitioning Congress for additional relief legislation or both. Article II outlined the lands to be taken or acquired by the United States. Article III set out the purposes for which the fund of $5,105,625 was to be appropriated. The amount was to cover payment for tribal and allotted Indian lands and improvements, including heirship interests and values above and below the surface, to be taken for the Garrison Project. The fund was also to be used to cover the costs of relocating and re-establishing the members of the Tribes who resided within the taking area of the Garrison Project and for relocating and re-establishing Indian cemeteries, tribal monuments, and shrines within the taking area. Any unexpended balance of the fund was to remain in the U.S. Treasury to the credit of the Tribes.

Under Article IV, the Commissioner of Indian Affairs, Department of Interior ("Commissioner") was instructed to prepare an appraisal schedule of the lands within the taking area to determine the fair market value of the land and improvements. The appraisal schedule was to be submitted to the Chief of Engineers, Army Corps of Engineers ("Chief of Engineers") for approval. Upon approval, the Commissioner was to transmit the appraisal schedule to the Tribal Council and such portions to individual Indians for their approval. The Tribal Council and individual Indians were given ninety (90) days to present any objections to the Commissioner. The right to reject appraisals was reserved to the Tribes, allottees and heirs of the allottees.

Article V vested the Commissioner with the administrative responsibility to remove, relocate and re-establish the members of the Tribes. Under Article VI, the Commissioner was required to prepare a plan, together with cost estimates for the relocation and re-establishment of tribal monuments, shrines and other tribal facilities, and for the disinterment and reinterment of all bodies within the taking area designated by the Council, allottees, heirs of the allottees and churches. Article VII provided that the

amount due to the Tribes for tribal lands and interests under the terms and conditions of the contract would be held in trust by the United States for the Tribes and could be used to acquire such other lands or other tribal property, or for such other purposes, as would be determined by the Tribal Council with the approval of the Commissioner. All lands acquired under such terms were to be held in trust for the benefit of the Tribes as other tribal lands and inalienable and non-taxable until otherwise provided by Congress.

Under Article VIII, the amounts determined to be due to the individual allottees and other individual Indians were to be deposited to such individual Indians in their Individual Indian Money Accounts and made available for expenditures under the terms of the contract. Under regulations of the Secretary of the Interior, the Superintendent of the Fort Berthold Reservation was granted the authority to authorize the disbursement of funds deposited in the Individual Indian Money Accounts of non-resident members of the Tribes and of such other members who, in his opinion, did not require supervision over such funds. Expenditures could be made from the accounts of individual Indians whenever necessary and desirable for the purchase of new lands, homes, or other property for such Indians. Title to the new lands acquired with the proceeds deposited to the credit of the allottees or heirs were to be taken in the name of the United States in trust for the individual Indians, and inalienable and non-taxable until otherwise provided by Congress.

Article IX provided that upon approval of the contract by the Tribal Council and by a majority of the adult members of the Tribes and its enactment into law, the contract would be held to be a relinquishment and conveyance to the government of all lands, rights and interests within the taking area by the Tribes as to tribal lands and by the allottees and heirs as to allotted lands, and no further relinquishment or instrument of conveyance would be required to extinguish the Indians' interest in and to such lands. Article XI stated that the contract could not become effective until ratified by a majority of the adult members of the Tribes, by the Tribal Council of the Tribes and enacted into law by Congress. The Tribal Business Council and 625 adult members of the Tribes, representative of a majority of 960 adult members formally approved this contract on May 20, 1948.

However, following the partial ratification of the contract entered into between the Tribes and the United States on May 20, 1948, and the approval by the Tribal Business Council and a majority of the adult members of such Tribes, the contract was transferred to the U.S. Army Corps of Engineers. The bill was rewritten by the Committee on Interior and Insular Affairs to suit the needs of the Corps. The terms of the bill were changed to eliminate the rights and interests of the Tribes. The administration was also placed in the hands of the Corps of Engineers. The bill was formally adopted by Congress as the Three Affiliated Tribes Enabling Act, Pub. L. No. 81-437 on October 29, 1949 ("TAT Enabling Act"). Under the TAT Enabling Act, the Tribes were given six (6) months from the date of enactment to accept the provisions of the TAT Enabling Act by an affirmative vote of a majority of the adult members. Upon approval, all title, right and interest of the Tribes, allottees and heirs of allottees in and to the lands would transfer to the United States and the sums of the fund would be provided to the Tribes.

Vital parts of the contract negotiated between the Tribes and the United States were intentionally excluded from TAT Enabling Act. Specifically, Sections 2 through 5 of Article III, restricting the use of the $5,105,625 fund were excluded, the provisions of Article V and Article VI outlining the administrative duties of the Commissioner of Indian Affairs to remove, relocate and re-establish the Tribes, its members, tribal monuments, shrines, private burials, cemeteries, and other tribal facilities was left out, Article X provisions dealing with rights to grazing, hunting, trapping, fishing and the right of the Tribes to regulate such activities was excluded, and Article XIII dealing with subsurface values and the Tribes reserved rights to 1/8 of the royalties generated from oil and gas was excluded. Based on the facts surrounding the ratification of the TAT Enabling Act and the restrictions provided under the War Department Civil Appropriations Act of 1947 and the Flood Control Act of 1947, the Tribes, allottees and heirs were dealt a grave injustice as a result of the takings which occurred as a result of the Pick-Sloan Program.

### C. Congress' Attempt to Compensate

After years of petitioning Congress, the injustices suffered by the Tribes and Allottees were finally investigated by various congressionally authorized committees known as Joint Tribal Advisory Committees ("JTACs"). On May 10, 1985, the Secretary of the Interior signed a Charter creating the Garrison Unit Joint Tribal Advisory Committee to examine the economic and developmental needs of the Fort Berthold and Standing Rock Sioux Reservations, including the need for additional financial compensation for the lands taken by the federal government to implement the Pick-Sloan Program. During its evaluation of the additional compensation, JTAC requested that the Tribes estimate the economic losses they sustained as a result of the federal government taking their land.

Each reservation hired an economic consultant to determine the dollar value of these economic losses. The Three Affiliated Tribes retained Dr. Ronald G. Cummings, a Professor in the Department of Economics at the University of New Mexico at the time. Dr. Cummings based the estimated loss on the income the Three Affiliated Tribes could have earned annually from the reservation bottomlands taken from them. See Ronald G. Cummings, Just Compensation for Lands Taken from the Three Affiliated Tribes of the Fort Berthold Reservation for the Garrison Dam (Resource Management Associates, Nov. 1984). Dr. Cummings estimated that the Three Affiliated Tribes sustained losses between $170 million and $178.4 million and proposed that they receive additional compensation in an amount between $170 million and $180 million. The Standing Rock Sioux Tribe retained the Robert McLaughlin Company ("RMC") of Solen, North Dakota to determine the economic loss incurred by the Standing Rock Sioux Tribe. The RMC based the estimate of loss on the total loss of assets such as land, buildings and resources owned by the Standing Rock Sioux Tribe. See Robert McLaughlin Company, Analysis of Economic Loss Resulting from Lands Taken from the Standing Rock Sioux Tribe for the Oahe Dam (1986). In addition, the RMC included the economic losses sustained by Indian consumers as a result of higher prices for resource products that were no longer available. The RMC calculated a total loss of $342.9 million for the Standing Rock Sioux and recommended that amount in additional compensation.

As the different analytical approaches used by the consultants produced substantially different estimates of loss, JTAC calculated an economic loss for each reservation using both approaches. See United States Department of the Interior, Bureau of Indian Affairs, Final Report of the Garrison Unit Joint Tribal Advisory Committee, Billings, Montana (May 23, 1986). JTAC's calculation of the loss at Fort Berthold using the RMC approach was $411.8 million, as compared to the $178.4 million estimate made by Dr. Cummings. JTAC's calculation of the Standing Rock loss, using Dr. Cummings's approach, was $181.2 million, as compared to the $342.9 million estimate made by the RMC. On the basis of these analyses, JTAC concluded that the Tribes had not been adequately compensated by the federal government for the "unique circumstances and values" taken from them and recommended additional compensation of between $178.4 million and $411.8 million for Fort Berthold, and between $181.2 million and $342.9 million for Standing Rock. Id.

In 1990, the Select Committee on Indian Affairs for the United States Senate referred the JTAC Report to the U.S. General Accounting Office ("GAO") and requested an assessment of the adequacy of the economic analyses applied in the JTAC Report. On May 21, 1991, the GAO released its findings to the Senate Select Committee and determined that the analyses performed by the Fort Berthold and Standing Rock consultants overstated the economic losses sustained when their lands were taken and should not be relied on by Congress. See Report to the Chairman, Select Committee on Indian Affairs, U.S. Senate from United States General Accounting Office, INDIAN ISSUES: Compensation Claims Analyses Overstate Economic Losses, GAO/RCED-91-77 at p. 2 (May 1991). Rather, the GAO recommended that Congress should provide additional compensation to the Tribes by using the difference between the compensation the Tribes believed was warranted at the time of the taking and the compensation that was appropriated by Congress provided that adjustments are made to reflect current value.

In 1992, Congress passed the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, appropriating $149.2 million in additional funds to the Three Affiliated Tribes and $90.6 million in additional funds to the Standing Rock Sioux Tribe. Pub. L. No. 102-575, 106 Stat. 4731 (1992). The amount appropriated to both Tribes was not just compensation, but was based on the recommendations of the GAO. Congress blatantly disregarded the recommendations of the JTAC Report and provided additional compensation for the Three Affiliated Tribes based on the difference between the amount of compensation the Tribe believed was warranted at the time the land was taken in 1949 ($21,981,000) and the amount of compensation that was appropriated by Congress ($12,605,625). The difference was $9,375,375, which was adjusted to the 1990 rate using the corporate bond rate to reach a dollar range of additional compensation for Fort Berthold of $51,803,940 to $149,243,557. The difference in the two appraisals was approximately $97,439,617. See Report to the Chairman, Select Committee on Indian Affairs, U.S. Senate from United States General Accounting Office, INDIAN ISSUES: Compensation Claims Analyses Overstate Economic Losses, GAO/RCED-91-77 at p. 6 (May 1991). Under the Equitable Act, the Three Affiliated Tribes received $149.2 million in additional compensation for the lands taken for the Garrison Dam.

In the case of the Standing Rock Sioux, Congress provided additional compensation based on the difference between the amount of compensation the Tribe believed was warranted at the time the land was taken in 1958 ($26,370,663) and the amount of compensation that was appropriated by Congress ($12,211,553). The difference was $14,159,110, which was adjusted to the 1990 rate using the corporate bond rate to reach a dollar range of additional compensation for Standing Rock of $64,460,876 to $170,031,297. Id. Note that Standing Rock's consultant recommended $342.9 million in additional compensation, yet the Tribe ultimately received $90.6 million. This represents a political solution for a problem which is already governed by Fifth Amendment principles: just compensation requires that a property owner be placed in the same pecuniary position as if the property had not been taken. *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller*, 317 U.S. 369, 373 (1943).

Congress appropriated the GAO recommended compensation to the Tribes for the taking of their lands and placed such funds in Recovery Funds in the name of the Tribes. See The Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Pub. L. No. 102-575, § 3504(a) and (b) (1992). The Secretary of the Interior was vested with the authority to deposit the interest accruing on deposits made to these Recovery Funds in a separate account in the Treasury of the United States and to make payments to the Tribes "for use for educational, social welfare, economic development, and other programs." Id. at §3504(a)(4) and (b)(3). Despite the purpose of the Equitable Acts and the Secretary's authority to approve the spending plans for the Tribes, the interest distributed from the Recovery Funds have been paid directly to the tribal governments to spend in accordance with their respective Tribal Plans notwithstanding the loss and hardship of the Allottees and/or their heirs. To this date, the individual Allottees whose lands were taken for the Pick-Sloan Program have never received the just compensation they are entitled to under the Equitable Acts.

Based on these facts, the UMRIAA has taken the position that the Allottees and/or their heirs are entitled to just compensation for the loss of their individual lands as a matter of law and to the extent that the Secretary has allocated the funds provided under the Equitable Acts directly to the tribal governments, such Acts are in violation of the Fifth Amendment of the United States Constitution and are therefore unconstitutional. Although the Allottees could move to declare the Equitable Acts unconstitutional, the Allottees do not feel such action is necessary. It is evident to the Allottees and/or their heirs that the Equitable Acts have not served to sufficiently correct the injustices of the United States' actions. Until the Secretary of the Interior takes an active role in this matter in accordance with the Equitable Acts to ensure that proper compensation is paid to the Allottees and/or their, the Equitable Acts will continue to violate the principles of the Fifth Amendment.

## III. PURPOSE OF THIS PETITION

The purposes of this Petition are to set forth (a) the facts underlying the taking of tribal and allotted lands owned by the Tribes and Allottees along the Missouri River Basin pursuant to the Pick-Sloan Program, (b) the devastating impact that the taking of these lands had upon the Allottees; and (c) the Claims of the Allottees and/or their heirs to just

compensation under the Equitable Acts to put the Allottees and/or their heirs in a pecuniary position as if the use of their property had not been taken.

It is the position of the Allottees and/or their heirs that the Secretary of the Interior has the authority to resolve these Claims fairly and expeditiously by requiring that the Tribal Plans, which set forth the expenditure of the interest income provided under the Equitable Acts, include compensation for the Allottees and/or their heirs. Failure to provide the just compensation owed to the Allottees and/or their heirs would violate the Fifth Amendment and render the Equitable Acts unconstitutional.

## IV. THE CLAIMS

### A. Basic Fifth Amendment Principles

The Fifth Amendment of the United States Constitution mandates that if lands owned by an individual are taken for a public purpose, the individual owning the property at the time of the taking is entitled to compensation. See also United States v. Miller, 317 U.S. 369, 373 (1942)(all emphases added unless otherwise noted). "The person entitled to compensation for a taking of property by the Government is the owner of the property at the time of the taking." Lacey v. United States, 595 F.2d 614, 619, 219 Ct. Cl. 551 (1979)(citations omitted). "When the governmental action constitutes actual physical occupation of the property, compensation for such a physical takeover is never denied." Dumarce v. Norton, 2003 DSD 9, 2003 U.S. Dist. LEXIS 14789 (D.S.D. 2003), citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S 419, 426 n.5, quoting Michelman, Property, Utility, and Frankness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1184 (1967) (original emphasis).

These basic Fifth Amendment principles have previously been applied to federal takings of Indian lands. Early in this nation's history, tribal governments could be compensated for lands "held by the Indians in common" if necessary for the public interest. See e.g., Act of April 25, 1896, "*An Act to Grant to Railroad Companies in Indian Territory Additional Powers to Secure Depot Grounds*," 29 Stat. 109 (1896). However, even in situations where tribes were compensated for "communal lands," payment of just compensation was due to the individual Indian for his individual lands and payment to the tribe was deemed inadequate. Id. See also Murray v. United States, 817 F.2d 1580 (Fed. Cir. 1987), aff'd, 864 F.2d 148 (Fed. Cir. 1988). When Indian lands were allotted under the General Allotment Act of 1887, its provisions stated that the entire beneficial interest in the allotment was held by the individual allottee or his heirs. See 25 U.S.C. § 348, as amended by Act of November 7, 2000 (" . . .in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs. . . [.]") An allottee ordinarily acquires by virtue of allotment full possessory rights with respect to the improvements and the timber upon his allotment as well as the minerals beneath it. See Felix S. Cohen, Handbook of Federal Indian Law, 220-221 (1st ed. reprint, Five Rings Press, 1986).

Federal courts have long recognized that "vested property rights of individual Indians are 'secured and enforced to the same extent and in the same way' as the equivalent rights of other citizens." Irving v. Clark, 758 F.2d 1260, 1262 (8th Cir. 1985), quoting Choate v.

Trapp, 224 U.S. 665, 677 (1912) and cited by Lebeau v. United States, 171 F. Supp.2d 1009, 1016 (D.S.D. 2001). The United States Supreme Court has twice relied on the Fifth Amendment to strike down federal takings of individually owned Indian lands under the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2202 et seq. In Babbitt v. Youpee, 519 U.S. 234, 237 (1997), the Supreme Court found the ILCA unconstitutional because it allowed the taking of Indian lands without payment of just compensation to individual landowners or their heirs. Under ILCA's Section 207, Congress mandated that certain fractionated lands escheat to the tribal government but fatally made no "provision for the payment of compensation to those who held such interests." Youpee, 519 U.S. at 239. The version of ILCA struck down in Youpee marked Congress' second failed attempt at making such consolidation of lands constitutional. See Hodel v. Irving, 481 U.S. 704 (1987). In finding ILCA unconstitutional, the Supreme Court noted that although the consolidation of Indian lands is a worthy goal, such a goal could not be achieved at the expense of the individual landowners' rights. Youpee, 519 U.S. at 242.

More recently, the United States District Court for the District of South Dakota relied on Youpee's and Hodel's reasoning to strike down section 5 of the Sisseton-Wahpeton Sioux Act, which permitted small interests in allotted land to escheat to the United States as trustee for the benefit of the Tribe. See Dumarce supra. Congress cannot override the requirements of the Fifth Amendment. Youpee, 519 U.S. at 242. Therefore, the Allottees and their heirs are entitled to just compensation for the taking of their lands under the Enabling Acts as provided for in the Equitable Acts. Failure to provide such compensation to the Allottees and/or their heirs would render the Equitable Acts unconstitutional in the same respect as the ILCA is rendered unconstitutional by the Supreme Court in Youpee and Hodel.

### B. The Equitable Acts Provided Additional Compensation for Allottees

Individual landowners owned the majority of the lands taken by the United States to build the Oahe and Garrison Dams. At the Standing Rock Sioux Indian Reservation, approximately 46,000 acres (or 82 percent) of the total 55,994 acres taken by the United States were individually owned. In the case of the Three Affiliated Tribes, approximately 90 percent of the total 156,035 acres taken by the United States was individually owned. At Cheyenne River, approximately 46,316 acres (or 44 percent) of the total 104,420 acres taken by the United States were individually owned.

In enacting the Equitable Acts, Congress acknowledged that the compensation provided by the United States in earlier statutes did not satisfy the Fifth Amendment's "just compensation" requirements because the earlier amounts were grossly inadequate. The awarding of additional compensation is mandated. The Supreme Court in Phelps ruled:

> Moreover, it has long been established that, where pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the Government as well as with common justice, the owner's claim is one arising out of

> implied contract. . . Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value . . .at the time of the taking paid contemporaneously with the taking. As such payment has not been made, [petitioner] is entitled to the additional amount claimed.

Phelps v. United States, 274 U.S. 341, 343-44 (1926)(although compensation was provided under federal legislation for the requisitioned use of private property during World War I, property owners had a right to additional monies if the federal government did not pay "just compensation" in the first instance). The number of acres referenced in each of the Equitable Acts – which were meant to provide additional mandated compensation – clearly included the individual landowners' acreage taken in the 1950s & 1960s.

As both the Tribes and individual landowners know, Congress set up Recovery Funds in the name of the Tribes, with the interest to be disbursed through Tribal Plans submitted separately by the Tribes and approved by the Secretary. Although the Equitable Acts prohibit the distribution of any compensation as *per capitas* to the tribal membership, the Allottees submit that the payments that would be made to the allottees would not be per capita payment but would be payments for just compensation as required by the 5th Amendment of the United States Constitution.

Although per capita payments were made in the initial disbursement of funds for loss of lands and related losses resulting from the dam and reservoir projects, no such payments are provided in the Equitable Acts. Section 3506 of the Equitable Act for Fort Berthold and Standing Rock states that "[n]o part of any moneys in any fund under this title shall be distributed to any member of the Three Affiliated Tribes or the Standing Rock Sioux Tribe on a per capita basis."

The canons of statutory construction require interpreting statutes to avoid unconstitutional results. See e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."); FTC v. American Tobacco Co., 264 U.S. 298, 307 (1924)(Supreme Court refuses to attribute to Congress "an intent to defy Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."); Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 463 (8th Cir. 1999)("We interpret statutes to avoid serious constitutional problems, so long as the statutory language is fairly susceptible to a constitutional construction.") Accordingly, choosing to interpret the Equitable Acts' "per capita" references to both refer to and prohibit the payment of just compensation to individual landowners produces an impermissible unconstitutional result. Furthermore, the Secretary has an obligation, if not a duty, to interpret the Equitable Acts in a manner that allows the Acts to be

constitutional. The Secretary can require the spending plans submitted by Tribes to include a plan to justly compensate the Allottees and/or their heirs.

Payments to individual Allottees and/or their heirs whose lands were included in assessing just compensation in the Equitable Acts, are not considered *per capita* payments under the plain meaning of the term. They would not be payments made to a Tribe's general population based on tribal membership, but would be made under an equitable distribution based on ownership of lands actually taken. It is unconscionable to infer that Congress intended to compensate the Tribes alone believing that the just compensation owed to the Allottees and/or their heirs would be fulfilled by the benefits received, either directly or indirectly, from tribal programs funded under the Tribal Plans approved by the Secretary. Based on the facts leading to the passage of the Equitable Acts, it is evident that Congress intended to provide just compensation for the Allottees and/or their heirs as required under the Fifth Amendment. The simple fact remains that should the *per capita* prohibition be applied to prevent such just compensation, the Equitable Acts will be rendered unconstitutional. Likewise, if the Secretary does not require the spending plans to include a program to justly compensate the Allottees, the Equitable Act will be susceptible to constitutional challenge.

### C. Secretary of Interior is Required to Compensate Allottees and/or their Heirs

With respect to the existence of a fiduciary relationship between the United States and the individual landowners, "[t]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." Dumarce v. Norton, 2003 DSD 9, 2003 U.S. Dist. LEXIS 14789 (D.S.D. 2003), quoting Lincoln v. Vigil, 508 U.S. 182, 194 (1993) quoting United States v. Cherokee Nation of Oklahoma, 480 U.S 700, 707 (1987). "That fiduciary duty 'extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation." Dumarce, 2003 DSD at *p27, citing Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997). See also Little Earth of United Tribes, Inc. v. HUD, 675 F. Supp. 497, 535 (D. Minn. 1987), amended, 691 F. Supp. 1215 (D. Minn. 1988), aff'd, 878 F.2d 236 (8th Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

Second, controlling precedent also establishes that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians." *Mitchell II*, 463 U.S. at 224–225. This relationship need not be expressly implied but, rather, it can be found where all the necessary elements of a common-law trust are present: a trustee, a beneficiary, and a trust corpus. Id. at 225. The *Mitchell II* Court held:

> where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties even though nothing is said expressly in the authorizing or underlying statute about a trust fund, or a trust or fiduciary relationship.

*Mitchell II*, 463 U.S. at 225, citing Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980).

In the present case, the Secretary has assumed substantial control over the distribution and use of trust funds established by the Equitable Acts. Trust funds are held in the United States Treasury Department and invested in government securities. The trust funds are not merely managed in trust, but actual distribution of the interest subject to an approval process that the Tribes must undergo as a precondition to receiving any distribution. For example, under the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, Sections 3504 (a)(2) and (b)(2) mandate that the Secretary shall make annual payments to both Tribes "for use for educational, social welfare, economic development, and other programs, subject to the approval of the Secretary." Sections 3504 (a)(4) and (b)(3) also provide that the Secretary shall not distribute any part of the principal of the funds. By taking such elaborate control over the use and distribution of the trust funds set aside as compensation for the loss of tribal and allotted lands, the government has created a fiduciary relationship between itself and the Tribes, as well as between itself and the Allottees whose lands are addressed in the Equitable Acts.

The Tribal Plans are necessary for the Tribes to outline how the funds will be used for education, social welfare, economic development, and other programs in accordance with the provisions of the Equitable Acts. Yet, none of the Tribal Plans approved by the Secretary have taken into account the equitable distribution of funds required to justly compensate the Allottees and/or their heirs for their losses from the United States' takings. By allowing the Tribes to use and distribute funds, derived in large part from the taking of allotted lands, the United States has breached its fiduciary obligation to the Allottees and the Secretary must require that the tribal spending plan include a plan to justly compensate the Allottees. For the Secretary to allow the Tribes to continue to spend all of the interest income would render the Equitable Acts unconstitutional.

## V. CONCLUSION

The members of UMRIAA have suffered admitted and indisputable wrongs at the hands of the United States. Their Claims, however, have far more than moral authority. As demonstrated herein, these Claims have substantial legal validity and would subject the United States to lengthy litigation in federal court if not addressed. The Allottees are likely to achieve substantial vindication by the courts. In lieu of this dispute, the Allottees and/or their heirs seek the assistance of the Secretary in resolving these Claims by ensuring that the Allottees and/or their heirs receive the just compensation they are entitled to under the Equitable Acts.

Respectfully Submitted,

THE MEMBERS OF THE UPPER MISSOURI RIVER INTERTRIBAL ALLOTTEES ASSOCIATION

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

RECEIVED

IN REPLY REFER TO:

OCT 16 2006

Thomas W. Fredericks, Esq.
Fredericks, Pelcyger & Hester, LLC
1900 Plaza Drive
Louisville, Colorado 80027

Dear Mr. Fredericks:

This responds to your letter to Secretary Kempthorne and Petition for Compensation by the Upper Missouri River Intertribal Allottees Association (UMRIAA) (both dated July 13, 2006). The request for compensation for allottees grows out of the Pick-Sloan program of dam and reservoir projects, which displaced affected allottees in the 1940's. You request that the Secretary approve and authorize compensation for the allottees as allowed in the Tribal Plans and authorized in the Equitable Acts.

The Solicitor's Office, Division of Indian Affairs, has been asked to review the Notice of Claim and Petition for Compensation and respond to your request. If you have any questions, do not hesitate to call Tom Bartman (202-208-4361) of this office.

Sincerely,

Carl J. Artman
Associate Solicitor
Division of Indian Affairs

Cc: Michael Olsen
Principal Deputy Assistant Secretary - Indian Affairs

ATTACHMENT B
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SRST JUDICIAL COMMITTEE

# *ECONOMIC LOSS ANALYSIS: STANDING ROCK SIOUX TRIBE JUST COMPENSATION PARITY WITH THE CHEYENNE RIVER SIOUX TRIBE'S ADDITIONAL COMPENSATION SETTLEMENT FOR TRIBAL AND INDIVIDUAL ECONOMIC RESOURCES TAKEN FOR THE OAHE DAM*

By

Robert W. McLaughlin
Robert McLaughlin Consulting

**September 2005**

SUBMITTED TO

**THE STANDING ROCK SIOUX TRIBE**

**Charles W. Murphy**
**Chairman**
**Standing Rock Sioux Tribe**
**Fort Yates, ND 58538**

ATTACHMENT 82
JAN - 9 2006
SRST JUDICIAL MINUTES

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**ECONOMIC LOSS ANALYSIS: STANDING ROCK SIOUX TRIBE JUST COMPENSATION PARITY WITH THE CHEYENNE RIVER SIOUX TRIBE'S ADDITIONAL COMPENSATION SETTLEMENT FOR TRIBAL AND INDIVIDUAL ECONOMIC RESOURCES TAKEN FOR THE OAHE DAM**

## *Part One*

### *Conditions Leading to the Analysis for Compensation Parity with the Cheyenne River Sioux Tribe Award*

*Preface.* The Standing Rock Sioux Tribe (the Tribe) seeks to gain compensation parity with the equitable compensation Congress provided the Cheyenne River Sioux Tribe (CRST) for the Oahe dam taking with Public Law No: 106-511, 114 Stat. 2385 (Nov. 13, 2000). The Tribe requested Robert McLaughlin Consulting (RMC) determine an adjusted compensation value for its economic losses resulting from their Oahe dam taking which would achieve parity with CRST losses from the same impoundment.

The Tribe, assuming this amount would result in a higher number, and not having been awarded additional compensation even near their 1998 compensation request numbers, would move to seek additional and final compensation from Congress for resource losses incurred because of the Oahe dam.

Following the above, the Tribe contracted with RMC to provide a parity analysis report compatible with the 1994 CRST Economic Loss Report (CRST Loss Report)[1] that would support a tribal request for parity compensation before Congress.

The following report is made-up of four parts. *Part One* discusses the background of the Tribe's continuing efforts in seeking economic recovery for resource losses. *Part Two* reviews several technical issues which need to be applied so that an equitable compensation framework can be achieved under just compensation. *Part Three* establishes technical criteria which need to be revised by the Tribe to align its parity request with the CRST Loss Report - these are: 1) the use of an appropriate capitalization rate and 2) a compatible and consistent valuation estimate for consumers' surplus values. *Part Four* presents RMC's parity analysis that matches the methodology and analysis utilized by RMC in calculating the Cheyenne River Sioux's resource losses resulting from the Oahe dam. Since, for practical purposes, these two tribal takings for the Oahe dam were considered by law and by the Government as one

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[1] Robert W. McLaughlin, ***Analysis of Economic Loss Resulting from Lands Taken from the Cheyenne River Sioux Tribe for the Oahe Dam.*** Solen, ND: Robert McLaughlin Company, July 1994.

ATTACHMENT B4

appraisal unit and in fact were in the same trade area with contiguous land areas, the parity analysis is conclusive.

*Background to Economic Loss Recovery and Parity*

The Tribe's pursuit to establish credible economic loss estimates for its highly productive bottomland resources along the Missouri river began in early 1986 when the Tribe asked the Robert McLaughlin Company (RMC) to provide a preliminary analysis for those losses for review by the Garrison Unit Joint Tribal Advisory Committee (the JTAC) established by the Secretary of the Interior, Donald P. Hodel, on May 10, 1985.

RMC completed a preliminary report, *Anaysis of Economic Loss Resulting from Lands Taken from the Standing Rock Sioux Tribe for the Oahe Dam* (1986 Loss Report)[2] in April 1986. Th e 1986 Loss Report was presented to the JTAC in May 1986. The 1986 Loss Report concluded there existed a substantial additional compensation due the Tribe for lands taken for the Oahe impoundment. Utilizing cost-benefit analysis criteria to establish economic loss, RMC calculated, as of 1986, the government owed the Tribe an additional $342.9 million in compensation.

Upon review of the 1986 Loss Report and a companion report for the Fort Berthold Reservation, the JTAC found that a range of additional compensation was due the Tribe from the Oahe taking. In the Executive Summary from their report: ***Final Report of the Garrison Unit Joint Tribal Advisory Committee*** (JTAC Final Report), May 23, 1986, they said:

> It is clear that the tribes clearly were not compensated in an amount derived from a methodology which accounted for the unique circumstances and values taken from the tribe. The Committee received testimony from two economic experts who utilized methodologies designed to account for those unique circumstances and values. Utilizing both formulas for the Standing Rock Reservation results in compensation due between $181.2 million and $349.9 million. The tribe can be fairly compensated only by determining the value of interests taken by using a formula such as that provided by the economic experts. ***The compensation, in any event, should not be less than the lower***

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[2] Robert McLaughlin Company. ***Analysis of Economic Loss Resulting from Lands Taken from the Standing Rock Sioux Tribe for the Oahe Dam.*** Solen, ND: Robert McLaughlin Company, April 1986.

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***amount determined by the formulas*** (emphasis added).[3]

For Standing Rock, the JTAC recommended range for additional compensation was between $181.2 million and $349.9 million representing different estimating calculations from the two economic reports by Cummings and McLaughlin respectively. The difference between the two numerical results indicates how differing applications of non-market pricing techniques can result in a range of valuations establishing values for resources foregone.[4]

Dr. Cummings report, ***Just Compensation for Lands Taken from the Three Affiliated Tribes of the Fort Berthold Reservation for the Garrison Dam*** (Cummings report), utilized an approach which found "fair market value" inappropriate when valuing tribal resource losses, turning instead to principles and standards of "social accounting" which accounted for a loss of the Tribe's resource economic base.[5]

In February 1988, Joseph P. Kalt, Professor of Political Economy, John F. Kennedy School of Government, Harvard University, reviewed the Cummings Report and the 1986 Loss Report, raising several points regarding the 1986 Loss Report's analysis. Professor Kalt stated that "the RMC approach is the more correct of the two". However, Kalt questioned some of RMC's calculations for loss.[6]

Following the Kalt critique, RMC revised its 1986 Loss Report. RMC, in its response to a review in May 1991 by the U.S. General Accounting Office[7] (GAO) of the RMC and Cummings reports, clarified: a) the discount rate employed in the 1986 Loss Report and b) a singular inappropriate damage calculation. These were the primary issues raised by the Kalt assessment. These adjustments resulted in a revised economic loss calculation of $272 million as of 1990.[8]

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[3] The Garrison Unit Joint Tribal Advisory Committee, ***Final Report of the Garrison Unit Joint Tribal Advisory Committee***, USDI, BIA, Billings, Montana, May 23, 1986.

[4] Note: Dr. Cummin's report provided several different calculations as "alternatives for just compensation" for the Fort Berthold loss, all of which differed considerably.

[5] Ronald G. Cummings, ***Just Compensation for Lands Taken from the Three Affiliated Tribes of the Fort Berthold Reservation for the Garrison Dam***, Resource Management Associates, Albuquerque, New Mexico, November 1984.

[6] Joseph P. Kalt and Harry Nelson, Memorandum to Charles Murphy, Council Members, Everett Iron Eyes, Re: the RMC Report, February 8, 1988.

[7] United States General Accounting Office, ***Indian Issues: Compensation Claims Analysis Overstate Economic Losses***, GAO/RCED-91-77, Washington, D.C., May 21, 1991.

[8] ***Indian Issues***, p.48, letter from RMC to GAO, March 6, 1991.

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In December 1997, RMC revised the original 1986 Loss Report to reflect the above change in loss calculations. In the revision preface, RMC stated: "The attached updated ELR (Economic Loss Report) reflects historically correct revisions made prior to the decision by Congress to establish a trust fund awarding Standing Rock additional financial compensation for the destruction of its lands for the Oahe project." The revised report used the 1990 $272 million as the economic loss prior to the passage of P.L. 102-575, establishing a funded endowment for the Tribe in the amount of $90.6 million.

ATTACHMENT B7

## Part Two

### Economic Principles for Establishing Non-market Resource Valuation Criteria

A brief overview of principles applied in establishing an economic loss valuation is the subject of this section. Values for certain goods lost from the impoundment were relatively easy to estimate. For example, goods derived from cattle or crop production had values established using contemporaneous market prices. Baseline prices for such goods were determined by finding current market prices for the good at the time of the taking. Other goods that tribal members utilized were classified as non-market goods and are much more difficult to value. Since many goods of the more traditional Indian economy at that time fell into this category, RMC viewed it as important to attempt to value these goods.

Basic principles employed to estimate such resource values are reviewed below.[9]

For purposes here, we referred to Indian non-market resource goods such as lost to the Oahe dam as ***traditional economic goods***. Some of the traditional economic goods under study with both the CRST and 1986 Loss Reports were wildlife, wild fruit, and medicinal plants. Traditional economic goods may be consumption or non-consumption goods. Most of the goods under study by the Loss Reports were traditionally consumed, making their value economically as well as culturally significant to tribal members.

These goods, for the most part, generally fell into a non-market goods category as their prices were and are not determined by marketplace activities. This makes the determination of their value to the Tribe and society a great deal more difficult to estimate. It is the purpose of this section to discuss how such consumption, non-market goods can be valued.

In a simplified, enterprise economy with a well established marketplace - prices are determined by the interactive relationship between informed willing sellers of a resource and informed willing buyers. Bids are made and negotiated and prices are settled upon.[10] Prices change as supply and demand for goods and services shift in this marketplace. Numerous factors cause supply and demand to shift such as input prices, consumer preferences and prices of substitute goods.

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[9] Adopted from an earlier RMC valuation report.

[10] Buyers or sellers will often consult with professional appraisers to improve their understanding of price and gain more perfect information, respectively, especially when assets marketed are significant.

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The process usually works well for private sector free enterprise[11], providing a reasonably fair and equitable means for exchange. In general, it is the basis for exchanges of goods and assets from flea markets and shopping malls to multi-billion dollar deals transacted in international goods and resources markets.

For the above market transactions, financial analysis - although it can become quite complex depending on assets and contracts involved - provides the basis for making decisions for valuation of resources. Where an asset or resource is to be employed for commercial or business purposes, its value is primarily determined by its capacity to contribute to income generation and net income in society. Assets or resources that contribute positively to final net income result in both productivity for society and commercial earnings for asset owners.

As such, marketplace prices underpin commercial transactions around the world. The evaluation of prices for resource assets would be relatively unclouded if all transactions were made-up of private-sector marketplace assets. However, this is not the situation with special classes of investment, i.e. a public investment in a large scale water development project that impacted unique classes of tribal goods and non-market resources.

If the investment project under evaluation were strictly a commercial project, financial analysis would be applied and adequate. However, since the investment under consideration, the Oahe dam, was a public investment that displaced unpriced, traditional economic resources; economic values based on derived prices[12] now are

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[11] In societies where markets and protected ownership exists for assets (exclusive and divisible goods) there are various categories of non-exclusive and non-divisible goods that are not marketed for individual ownership. These goods and resources are called non-rival or public goods (Randall 1987) and have been placed generally outside of the market pricing system. Such goods include air, water in streams and lakes, and categories of wildlife, fish and certain habitats.

[12] J. Price Gettinger, ***Economic Analysis of Agricultural Projects***, 2nd Ed., (World Bank, ED Institute, Johns Hopkins University Press, 1998). Gettinger defines one type of derived price as an efficiency price; "an economic value used in economic analysis that reflects the ***opportunity cost*** or value in use of a good or service used or produced by a project. It may be a market price or a shadow price. Efficiency prices are the values used in economic analysis when the objective is to maximize National Income. Hence, economic analysis done using efficiency prices is sometimes called *efficiency analysis*. When the objective of a project is something other than national income (... savings objectives), the efficiency price may be adjusted by an appropriate distribution weight." National Income objectives were, in part, the basis for the Oahe project investment.

Another resource economist, Randall, states that for goods that are not priced (non-market) such as environmental resources, the economic analyst must estimate the appropriate Hicksian compensating measure of value. For many goods, he says, "markets may provide considerable indirect information. The analyst's task is to extract and interpret this information, a task that often requires considerable insight and ingenuity."

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important. With economic analysis, prices reflect social and individual economic values. Such adjustments in prices have been termed "shadow", "accounting" and "efficiency" prices.[13]

Various methodologies have been developed over the years to address the valuation of costs and benefits under such circumstances.

Large scale infrastructure projects like large main-stream dams are not investments undertaken by the private sector. Such projects are too costly to finance privately with relatively low or negative financial rates of return. On the other hand, such projects may bring significant economic benefits to society through flood control, power generation, irrigation development, water development, and recreation benefits. Economic analysis can demonstrate such positive contributions to society. On the other hand, costs to society must also be estimated accurately for economic analysis to contribute to equitable and efficient decisions.

To derive benefits and costs so public decision makers could compare, fairly, returns to society, an evaluation technique was developed called ***cost-benefit analysis*** or CBA. It was applied, in its earliest format, by the U. S. Army Corps of Engineers (Army Corps), the Bureau of Reclamation (BOR) and other federal agencies to evaluate large public works projects including water projects.[14]

Since the 1986 Loss Report focused on impacts stemming from the construction of the Oahe Dam, the following comments will be in the context of this project. As with principles for private sector financial analysis, CBA requires its own principles and standards to adequately estimate benefits and costs.

The application of CBA focuses on the determination of social goods and social losses resulting from a public project's implementation. These categories are analogous to financial revenues, expenses, and profits found in private enterprise analysis. For CBA, the categories are social benefits and opportunity costs[15] and net benefits to

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[13] Gittinger states: "In the strictest sense, a shadow price is any price which is not a market price, but the term usually also carries the connotation that it is an estimate of the economic value of the good or service in question...." p. 243.

[14] Otto Exstein. ***Water-Resource Development - the Economics of Project Evaluation.*** Cambridge, MA: Harvard University Press, 1985, pp. 274-276.

[15] Gittinger defines ***OPPORTUNITY COST*** as: The benefit forgone by using a scarce resource for one purpose instead of for its next best alternative use. For example, suppose a farmer produces both wheat and corn but applies all his available fertilizer to his corn, he would reduce the value of his wheat production somewhat, but he might gain a higher value for increased corn production. The value of his wheat production forgone would be the opportunity cost of the fertilizer used for corn production. In this example, therefore, the opportunity cost is ***MARGINAL VALUE PRODUCT*** of the fertilizer in its next

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society at large.

Opportunity costs, in the Oahe Dam case, are those asset values foregone by a tribe when its resources were removed from the tribal resource base by the river's impoundment. Many of these assets were unpriced consumption goods, which had significant use value to tribal members at the time of the taking.

With tribal non-market goods, it has always been difficult to establish prices. This is so because price information in Indian country has been scarce. Many of the resource goods in question with the 1986 Loss Report studies were traditional consumptive final, non-market priced goods with no easy alternative use to establish price levels. Such conditions require the adoption of alternative criterion such as contingent valuation method (CVM) using "willingness to accept or pay" data to establish estimates.[16]

The Army Corps inadequately valued tribal resources at the time of the taking, including values for fish, wildlife, and medicinal plants and their respective habitat losses.[17] Although the final outcome may have been the same with adequate CBA, i.e., a completed dam, the Tribe would have been provided adequate just compensation for

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best alternative use. In a perfectly competitive market where there are many buyers and sellers, all of whom have perfect information, the ***MARKET PRICE*** will equal the marginal value product of an item and thus market price, opportunity cost, and marginal value product will all be equal. In any enterprise, net benefit, or profit, will be maximized when the use of an input is adjusted to the point where its marginal value product is equal to its opportunity cost. In project evaluation, for the financial analysis the opportunity cost of a purchased input is always its market price. In ***ECONOMIC ANALYSIS***, the opportunity cost of a purchased input is always either its marginal value product in its best non-project alternative use, if for ***INTERMEDIATE*** goods and services, or its ***VALUE IN USE*** (as measured by ***WILLINGNESS TO PAY***) if it is a ***FINAL*** good or service. Since price is equal to marginal value product in a perfectly competitive market, in economic analysis if an input is purchased in a reasonably competitive market the price is at least an initial estimate of the marginal value product of the input and, hence, of its opportunity cost. If, because of market imperfections or OTHER reasons, the market price of an input does not closely approximate the marginal value product in its next best alternative use, the marginal value product is estimated directly, and that estimate becomes the ***SHADOW PRICE*** of the item. The concept of opportunity cost is a cornerstone of ***PROJECT ANALYSIS*** and is the central concept underlying valuation of project inputs.

[16] ***Willingness to Pay*** is the amount consumers are prepared to pay for a final good or service or an estimate of the ***Value in Use*** (Gettinger). Willingness to Accept is what an owner is prepared to accept for the loss of the good.

[17] See: ***Analysis of Economic Loss***, 1986, 1997. RMC found the 1990 economic loss value owed the Tribe to be $271,502,000. Congress, in 1993, provided the Tribe with additional compensation in the amount of $90.6 million for its economic losses. The shortfall in compensation to the Tribe was approximately $183 million, in 1990 dollars, after the additional payment. Michael L. Lawson's ***Dammed Indians, the Pick-Sloan Plan and the Missouri River Sioux, 1944-1980***, thoroughly reviews the entire history of the U.S. takings of Indian homelands for the four main stem dams along the Missouri under the so called Pick-Sloan program.

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its economic losses incurred.

Like cases where project financial evaluation are marginal in the commercial world, there always exists the temptation, where political pressure is significant, to not identify all project costs completely. This is done, one supposes, to enhance prospects for project approval. When this occurs in private sector investment analysis, bad or fraudulent outcomes often result. For this reason, federal regulators like the Securities and Exchange Commission (SEC) and other regulatory or law enforcement agencies operate to protect the public from false claims and other financial violations. Unfortunately, with the Pick-Sloan water projects, underestimates of true costs and overestimates of project benefits were relatively easily disguised and overlooked. The public, and more importantly, affected parties like the Tribe, had to rely on the integrity of project analysts. In the Oahe case, it was the Army Corps. The Army Corps was mandated by law to accurately estimate values for project benefits and costs so project impacts would be correctly interpreted. This did not take place (McLaughlin, 1986).

If a public project is not evaluated correctly, the probable result will be a distortion in the economy caused by the improper analysis. Bad projects can be constructed with a secondary effect of removing scarce resources from society at costs greater than otherwise stated. If true costs are pervasively distorted for public projects, negative economic or societal impacts could result over time.

Other costs may also result from the implementation of a public project, such as harm to the natural or human environment or harmful indirect damages to individuals and communities (social costs). Damages to tribal cultural resources were also directly related to the Oahe project and thus far have never been adequately evaluated.[18]

The above brief description of CBA is intended to assist the reader, not familiar with CBA, understand in a general way principles utilized to estimate values for resource impacts incurred by the Tribe resulting from the Oahe project.[19] Additional information on CBA can be found in any library that contains resource economics literature. The Department of Agricultural Economics at North Dakota State University has developed a summary paper on the subject: Report No. 201, ***Guidelines for Economic Evaluation of Public Sector Water Resource Projects***, which can serve as a practical introduction to the application of CBA as it applies to water projects. The

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[18] Note: Although social costs were not addressed in the Loss Report studies, such impacts are major and should be appraised by the Standing Rock and Cheyenne River Sioux Tribes in the future.

[19] For a fundamental early text on cost-benefit analysis see: E.J. Mishan, ***Economics for Social Decisions, Elements of Cost-Benefit Analysis***, (New York: Praeger Publishers, 1973).

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report's authors are Randall S. Anderson, Jay A. Leitch, and Cliff R. Fegert.[20]

Central to CBA is the determination of public benefit compared to public cost. If a change in an economy has a positive net effect it is called a "Pareto-improvement". Such an economic change will produce a situation in society which results in a sum of social gains that is greater than the sum of social losses. To measure the gains or losses from a particular economic action, the analyst can estimate the increase or reduction in an economic condition and measure consumers' surplus resulting from a particular economic intervention.

The resource economist, Alan Randall, defines the main principle of CBA as a test for "potential Pareto-improvements." He states: "A potential Pareto-improvement (PPI) is a change that *could* make, *after compensation*, at least one person better off and no one worse off." "If there were sufficient gains to compensate all losers to the extent of their self-evaluated losses and still have some gains remaining, the change would be judged a PPI."[21]

When the Army Corps calculated economic benefit for the Oahe project, they estimated the potential future costs of flood damages to lower basin areas without the Dam. These costs became project benefits with the project in-place. The resulting benefit was an improvement in the economic condition of the lower basin states and its positive value was estimated in the CBA equation over a stream of years, the project's life.

To illustrate how consumers' surplus can result from a project, recreation benefits can be studied. The Oahe project created several major recreation areas, especially on the reservoir's East side under federal and state control.

Recreation is a benefit to those who previously had no or limited recreational opportunities before the project. As the result of the public's investment, these residents, over the stream of years of the project's life, will benefit by having access to substantially increased recreational opportunities.

Professor Jay A. Leitch gives the example of the value of public recreational opportunities where participants pay user fees for use of the facilities. However, this amount may reflect only a portion of what the beneficial users would actually be willing to pay for the recreation benefit. "The difference between what consumers must pay in the market and what they would be willing to pay is consumers' surplus. Thus, one

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[20] Randall S. Anderson, Jay A. Leitch, and Cliff R. Fegert, ***Guidelines for Economic Evaluation of Public Sector Water Resource Projects***, Agricultural Economics Report No. 201, Department of Agricultural Economics, North Dakota State University, Fargo, North Dakota, May 1985.

[21] Alan Randall, ***Resource Economics*** (New York: John Wiley & Sons, 1987), pp. 234 - 235.

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possible estimate of the total social benefit of the recreational opportunity is the value of the recreation user fee plus consumers' surplus."[22]

On the other hand, if a resource is entirely eliminated by the impoundment, a reduction in that good's consumers' surplus value has also taken place. The value of the good plus its consumers' surplus value will be the opportunity cost of the removal of the good which is then factored into the CBA calculation as a cost when no other market based price information is available.

The Oahe Dam was historically justified on this basis and not entirely on a direct revenue basis such as electrical power that would be sold to public or private consumers. As many government planners have agreed, CBA has proved a valuable method to estimate a project's overall value to society. It is accepted that projects with financial and social benefits beyond all financial and opportunity costs of a project can result in an overall social improvement.

If project opportunity costs or social costs are hidden, distorted, or otherwise not included, then a potential government action can also distort the CBA outcome, raising serious questions about the public policy validity of a decision to invest in a project. It is, especially for those who are potentially negatively impacted by a project, important to ascertain that benefits and costs are estimated as accurately and evenly as possible.

Economists have cautioned CBA practitioners that evaluation techniques must be consistent if an analysis is to satisfy the economic principles on which it is premised. Practitioners are required to estimate values accurately and completely on the benefit side as well as the cost side.[23] In the case of the Oahe Dam project, history has shown that the Army Corps, in particular, transgressed CBA principles in fundamental ways with regard to costs incurred.

Once costs have been established for resources foregone, in this instance the sacrifice of tribal economic or other private resources, then compensatory alternatives for such resources can be considered.

The sum of these economic costs reflects true costs of the project to society. In order to make a tribe whole for its resource losses, compensatory action is required.

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[22] op. cit, p. 21.

[23] CBA is not an exact science. Alan Randall suggests that practical CBA is "part economics, part accounting and part good old-fashioned detective work. All of the evidence is seldom available in a state readily adaptable to CBA, and often some crucial pieces of information are best known to the parties that have a direct interest in the outcome of the analysis." In Indian country, it is imperative that a tribe demand that all costs of public projects be estimated or accounted for as accurately as possible because the historical record shows that taken Indian resources were not correctly accounted for.

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Justification for adequate compensatory action is well established in economic welfare theory and law.

Why were legitimate project costs or requirements not included in the Army Corps' CBA calculations? The obvious answer is that the Army Corps required the Oahe project to be constructed to complete its Pick-Sloan Missouri River development plan. A reading of the historical record contemporaneous to the Missouri River dam building period clearly shows this.

It was a goal of the Army Corps to reduce project costs paid for acquiring real estate assets wherever possible. To rachet down acquisition costs, the Army Corps liberally applied underestimations of real project acquisition costs. The record indicates they were not effectively challenged on economic principles or economic justice grounds and they had little trouble getting their way in Congress although the tribes protested vigorously general injustice issues in writing and before Congress during the nineteen fifties.

Even with all of the Army Corps' efforts to maximize project benefits while dismissing project costs, the Oahe project had the narrowest of positive CBA margins of all the Pick-Sloan Missouri River dam projects.

Economist E. J. Mishan, London School of Economics, comments on the importance of consistency in estimating benefits and costs:

> A cost-benefit analysis is raised on a single criterion, that of a potential Pareto improvement, and this criterion is deemed to be related to a provision of some virtual constitution. Even if a political decision were made, say, to build a dam, a cost-benefit analysis of the dam revealing a net loss would be properly regarded as a valid criticism of the political decision - and the decision could be defended only by invoking other considerations, for example, equity or national defense. The determination of the value of a project, or of any part or effect of that project, by the political process is either (economically) arbitrary, or else, if it arises from any other consistent body of principles, is in conflict with the allocative criterion from which a cost-benefit calculation proceeds. To add figures derived on one principle to figures derived from some other principle produces a sum that carries no coherent interpretation.
>
> The economist, as well as the political decision-making body, should be aware of this. If the decision of the latter is to place the evaluation of the project in the hands of the economist, the economist must perforce base his calculations on a purely economic criterion. Returning some parts of it

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> to be evaluated by the political process - which in the first instance agreed to be guided by the purely economic evaluation - is to effect a deception and sacrifices meaning on the alter of quantification, in order to save face. If the unmeasurable effect is completely beyond his range of reasonable guesses, so that a decision cannot be reached by the economist on the basis of the measurable data and by reasonable guesswork, he serves the public better by confessing the truth: that, with the existing techniques and information, he is unable to discharge his task.[24]

With regard to establishing complete costs for the Oahe project, several issues are important. First, the Tribe was asked to give up its river homelands, including major impacts to four Indian communities and its traditional riparian forested economic base, found along the bottomlands of the Missouri River.[25] That the Tribe and its members did not want to give-up such precious resources and considered them irreplaceable is well known. They would be lost forever.

Because tribal members did not generally or easily participate in the mobile, marketplace economy of the United States at the time of the taking, they were, in fact, wedded to Standing Rock Sioux homelands. Because of these attachments, the riparian habitats destroyed now represent irreplaceable losses. Compensation or alternative lands replacement to mitigate such losses were by far a distant, second-best choice to not destroying these valuable resources in the first instance. To conspicuously under compensate the Tribe for these values has been recognized as a serious injustice.

Finally, above and beyond resource losses, the Tribe has suffered - over the past 40 years - additional negative social impacts resulting from the impoundment.[26] The harm done to the human environment at Standing Rock cannot be underestimated. The removal of Indian communities and home sites from the Tribe's forested bottomlands

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[24] Ibid., pp. 19-20.

[25] Note: North and South Dakota non-Indians sacrificed much less for the reservoir impoundments. Although incurring the loss of valuable Missouri bottom lands, they were not asked to have their communities and the greatest part of their economic base destroyed as the result of the construction of the Pick-Sloan water development projects.

[26] See: Daniel Hemmer, ***Options for Evaluating Social Costs Resulting from Lands Taken from the Standing Rock Sioux Tribe for the Oahe Dam Project***, Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard Project on American Indian Economic Development, Harvard University, April 1996. Report was written to assist the Tribe in decision making regarding the pursuit of social impact damages.

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has, no doubt, resulted in increased social pathological costs suffered by individuals since the time of the taking. Dependency and the loss of taking lands are linked. The pain and suffering resulting from the impoundment are of the magnitude that real social costs caused by the Pick-Sloan plan implementation may never be fully appraised.

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**Part Three**

***Establishing the Cheyenne River Sioux Tribe's Economic Loss from the Oahe Impoundment as a Parity Baseline for Missouri River Just Compensation***

In 1993 the Cheyenne River Sioux Tribe (CRST) asked RMC to develop an economic analysis of the CRST's loss due to the Oahe impoundment. The following report was issued in July 1994: an ***Analysis of Economic Loss Resulting from Lands Taken from the Cheyenne River Sioux Tribe for the Oahe Dam*** (CRST Loss Report).

The CRST provided RMC adequate time to complete a thorough analysis.[27] RMC applied a like analytical methodology to the CRST's analysis as was utilized in the 1986 Loss Report. However, the CRST analysis was able to develop improved estimations based on research of historical documentation. In addition, the consultant was able to include analysis reviews of report findings before the CRST committed to them.

The RMC report found that by 1996, additional compensation due the CRS Tribe would be $300.7 million. As before, Congress asked the GAO to review the RMC findings. This time, however, the GAO utilizing a different methodology, arrived at a very similar conclusion of the Tribe's economic losses resulting from the Oahe impoundment in their report: ***Indian Issues: Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam.***[28]

In Congress on April 2, 1998, Senator Tom Daschle introduced S. 1905, "a bill to provide for equitable compensation for the Cheyenne River Sioux Tribe." Senator Daschle told Congress:

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[27] It is noted that at the time of the Standing Rock report development, the Tribe was placed under an extreme time requirement and very limited funding to complete a preliminary report for presentation to the JTAC. RMC had one month to complete a report that would illustrate the many substantive problems inherent in the Government's analysis, which took over a decade, mobilizing several major federal departments in a significant Government undertaking with the full backing of the U.S. Congress. Nevertheless, Congress asked its very able Government Accounting Office to question the RMC report but were unable to discredit the fundamental fact that the Government had originally presented a flawed analysis that denied the Tribe its right, under the U.S. Constitution, to just compensation for substantial economic losses incurred directly as the result of the Oahe impoundment.

[28] United States General Accounting Office, ***Indian Issues: Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam***, GAO/RCED-98-39, Washington, D.C., January 1998.

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> The bill is based on an extensive analysis of the impact of the Pick-Sloan Dam Projects on the Cheyenne River Sioux Tribe, which was performed by the Robert McLaughlin Company. The McLaughlin report was reviewed by the General Accounting Office, which found that the losses suffered by the tribe justify the establishment of a $290 million trust fund, which is the amount called for in this legislation.
>
> It represents an important step in our continuing effort to fairly compensate the tribes of South Dakota for the sacrifices they made decades ago for the construction of the dams along the Missouri River and will further the goal of improving the lives of Native Americans living on those reservations.[29]

Based on the above report and GAO review, Congress raised the level of just compensation to a new, more equitable level for tribal economic losses caused by the Oahe impoundment with the bill.

Public Law No: 106-511, 114 Stat. 2365 (Nov. 13, 2000), the "Cheyenne River Sioux Tribe Equitable Compensation Act", approved additional just compensation legislation signed into law by the President. The Act approved $290.7 million to be set aside in a special fund as additional equitable compensation for the CRST. This amount was significantly greater, from a simple compensation to land comparison, than the Standing Rock Sioux Tribe's compensation approved years earlier.

Because RMC established improved estimates during the development of the CRST Loss Report, such estimates can now be significant to the Tribe in seeking to obtain full and equitable compensation under a parity premise. Applied estimates were emphasized in the RMC response to the GAO's "Indian Issues" report on the Cheyenne River economic loss. An interested reader is referred to the CRST Loss Report and the GAO's report GAO/RCED -98-39 for a reading of these issues.

Several of the issues from the CRST Loss Report will be significant to the Tribe in seeking parity with the CRST Loss Report and GAO findings. These issues are briefly reviewed below and some are from RMC's testimony before the Senate Committee on Indian Affairs on the CRST Equitable Compensation Act on July 8, 1998 and RMC's response to the GAO Report.

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[29] *Congressional Record - Senate*, 105th Congress, Second Session, April 2, 1998, Washington, D.C., Vol. 144, No. 41, S3120 - S3121.

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## 1. The Capitalization Rate

For the Tribe to achieve parity with the CRST Loss Report findings it is important the Tribe apply the same technical criteria in a revised analysis as applied with the CRST's 1994 analysis. The following discussion regarding the use of an acceptable rate for capitalization is from the CRST's analysis and the same principles will be applied to adjusting the Standing Rock analysis.

Well known to the Army Corps was the reality that the CRST Tribe would not give up its Missouri River bottomlands without political resistance and unless coerced to do so. After years of encroachment, the utility value of the Tribe's Missouri riparian forested bottomlands and its natural habitat used for economic, cultural, and religious purposes was mostly beyond any monetary value the Government could offer the Tribe in 1953.

To convince the CRST Tribe that they had no alternative but to accept the project on terms the government was offering, it started construction of the project before obtaining legal right from the CRST Tribe to do so, leaving no question in the minds of tribal leaders that their bottomlands would be destroyed. The Army Corps also made it clear to the CRST Tribe that their position was hopeless and they would be forced to give up their land if they refused to agree to conditions:

> Neither your Constitution nor your treaty rights can stop the taking of your lands according to law under the right of eminent domain (Statement of Army Corps Representative, CRST Tribal Council Minutes, October 8, 1947).

RMC knows of no tribe which has willingly sold land resources for any price except under threat of seizure or forced taking on the part of the United States.

To establish a proper capitalization rate for this analysis, RMC asked the Economics Resource Group, Inc. (ERG) Cambridge, Massachusetts, to provide input to RMC on the proper rate to be applied to foregone losses at Cheyenne River resulting from the taking as of January 1955. ERG's response was:

> We propose that RMC use a real rate of interest for capitalizing the costs of the taking. The structure of RMC's analysis yields annual losses from foregone hunting, food, and fuel gathering, and the like. Since these annual loss figures are expressed in 1955 dollars and implicitly presumed to extend in perpetuity, the appropriate interest rate to use is the real rate of interest. The annual loss values do not account for inflation and neither should the interest rate. A nominal interest rate, such as the FFR,

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implicitly contains an offset for inflation.[30] Operationally, this means that RMC can use a capitalization rate numerically similar to the one it used (FFR rate) yet with a better economic justification for doing so.

We found that the real riskless rate of interest from 1925 to 1991 was on the order of 0.54%. In the 1950s, 60s, and 70s, common belief was that the real interest rate was on the order of 1 to 2 percent. The low rate of interest is not appropriate for the RMC analysis, however, because it does not account for the risk characteristics of the values lost in the Oahe taking. The Tribe's lost resources (food, fuel, etc.) are characterized by price and supply volatility which is likely greater than the market average, regardless of whether the goods are traded in a traditional economy or in the mainstream economy. To be compensated for the added risk of investment in these commodities, investors demand higher returns, and thus, the rate of interest for discounting a stream of returns (harvests, cuttings, hunts, etc.) must be higher than the riskless rate as well.

Ideally, one would take a weighted average of the market rates and social time preferences for discounting (see Chapter 12 of Jenkins and Harberger).[31] Since the Tribe's lost resources are generally non-market goods, a social time preference for the Tribe may be more suitable than a market-based interest rate. However, the difficulties of choosing a rate which accurately captures Cheyenne River Sioux social time preferences in the mid-1950s preclude using this ideal measure. Employing a market rate such as the real prime rate or the yield on AAA bonds adjusted for inflation as a proxy might accomplish the same goal without jeopardizing the quality of the analysis. Ibottson Associates reports that the rate of inflation in 1955 was 0.37%[32] and DRI-McGraw Hill's on-line information service reports that the 1955 prime rate was 3.16%. Thus, the real prime rate ex post for 1955 was 2.79%.

Using the real prime rate to bring the adjustment of the 1955 losses to 1994 would be inappropriate because the calculation would not account for inflation nor would it reflect the best use to which the Tribe could have

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[30] Note: At one point RMC proposed utilizing the Federal Funds Rate, FFR, as the interest rate.

[31] Glenn P Jenkins and Arnold C. Harberger, ***Program on Investment Appraisal and Management, Manual: Cost-Benefit Analysis of Investment Decisions***, (Cambridge: Harvard Institute for International Development, 1992).

[32] Ibbotson Associates, ***Stocks, Bonds, Bills and Inflation: 1992 Yearbook, Market Results for 1926-1991***, (Chicago: Ibbotson Associates, 1992), p. 34.

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> put the payments, had they all been made in 1955. The nominal prime rate reflects the real rate of interest and the rate of inflation, and it is a conservative proxy for the available yield on the Tribe's investment of the funds that should have been awarded in the compensation. Furthermore, the volatility of the prices of the bulk of the lost commodities (fuel, food, and agricultural products) requires a higher rate, and thus, using the prime rate to bring the values of the uncompensated losses to the present could be characterized as being conservative.
>
> Normally in a cost-benefit analysis it is proper to use only one interest rate to convert dollars in different times. However, there may be cases in which it is legitimate to use two different rates. In the case where a financial award for damages that should have been made in the past is assessed in the present, it may be legitimate to use a nominal market rate of interest to bring forward the monetary compensation due in the past, even if it does not directly conform with risk characteristics of the losses. In this case, the Tribe's lands should have been converted into (more) dollars in 1955 which could then have been invested in securities or projects of diverse risk profiles including mutual funds in the stock market. The use of their compensation funds did not necessarily have to be the purchase of assets with identical risk characteristics to those which had been lost. Under the compensation fund interpretation, it would be appropriate to use market rates of return to bring the 1955 damages to the present. The prime rate is a reasonable but conservative measure of the return available for funds invested in 1955.[33]

Following ERG's recommendation, RMC applied the 1955 real prime rate of 2.79 percent to capitalize economic losses incurred by the Tribe in 1955 for each product/net product category. To bring the Tribe's shortfall in compensation forward to 1996 from 1955, the nominal prime rate was utilized each year since the taking.

To establish a like rate for the present parity analysis for Standing Rock's economic losses in 1958, RMC asked Jonathan Taylor, The Taylor Policy Group, Cambridge, Massachusetts to determine the rate. Mr. Taylor was one of the principal authors of the Economics Resource Group that determined the Cheyenne River Sioux Tribe's 1955 rate. Mr. Taylor's determination of the Standing Rock rate for 1958 is as follows:

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[33] Memorandum from The Economic Resource Group, Inc., to the Robert McLaughlin Company from Joseph P. Kalt, Kenneth Grant and Jonathan Taylor, ERG, on the subject of: "A Review of the Oahe Dam Economic Loss Report written by Robert McLaughlin Company for the Cheyenne River Sioux Tribe, June 6, 1994.

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**Capitalization Rate and Interest**

The *Economic Loss Analysis*[34] estimates resource values for losses associated with the impoundment of lands and natural resources upstream of the Oahe Dam, under the impounded waters of the Oahe Reservoir. The *Analysis* models the losses as annual flows of dollars from the time of the taking, running in perpetuity into the future. To convert the value of these flows over time into a present-day 1958 value, the *Economic Loss Analysis* divides the estimated annual flow by the prime rate in 1958 (3.83%) adjusted for inflation (1.7%) - the 1958 real prime rate (2.07%) (Federal Reserve Bank, 2005; Ibbotson Associates, 2005, p. 38). This capitalization rate is appropriate for a number of reasons.

Ideally, an analysis of this type would convert the estimates of the losses into certainty equivalents (probabilistically expected values) and then use the risk free real rate of interest to capitalize them. Over the period from 1925 to 2004, the inflation-adjusted return on US Treasury Bills (or real riskless rate of return) was 0.7% (Ibbotson Associates, 2005, p.31). In 1958 the annual return on US Treasury Bills was 1.54%, yet inflation was greater (1.765), giving T-bills a negative real rate of return (-0.22%) (Ibbotson Associates, 2005, p. 31, 38).

Notwithstanding the conceptual cleanliness of using the riskless rate, the necessary data to calculate certainty equivalents for the lost values do not exist. Data regarding the economic volatility of the resources - particularly the non-market resources - are unavailable, yet they are essential for a meaningful estimation of certainty equivalents.

Without certainty equivalents for the losses, the analysis is forced to turn to the discount rate to capture the risk component of the losses. As my colleagues and I mentioned in our memo to you about the losses of the Cheyenne River Sioux Tribe (CRST) losses, the

> lost resources (food, fuel, etc.) are characterized by price and supply volatility which is likely greater than the market average, regardless of whether the goods are traded in a traditional economy or in the main-stream economy (Kalt, Grant, & Taylor, 1994, p.3).

Yet, of course, there is no security or debt instrument whose risk profile

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[34] RMC's present parity analysis.

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matches that of the basket of lost resources. The analysis must turn to a proxy.

The prime rate is the "Rate posted by a majority of top 25...insured U.S. - chartered commercial banks" (Federal Reserve Bank, 2005). As such, it is a basket index that generally reflects supply and demand conditions in US debt capital markets. Since the Tribe and its members were not likely to be able to turn to equity markets to capitalize a stream of cash flows like these, the debt market is an appropriate benchmark. Would the Tribe itself and its members obtain terms exactly at the prime rate to effectuate a capitalization like the one in question? Perhaps not, but deviations from the prime rate due to regional, bank, and borrower idiosyncrasies are dwarfed by a further consideration: taxes.

When valuing costs and benefits over time within the framework of cost-benefit analysis (as the Army Corps of Engineers ostensibly was required to do in its analysis of the Missouri River Basin Initiative) the relevant discount rate should be the social discount rate for the population in question – that is, the weighted average of market rates of return and consumption rates of interest (See, e.g., Stokey & Zeckhauser, 1978, p. 171; Jenkins & Harberger, 1992, p. 12-50; US EPA, 2000, p. 39; Spackman, 2004, p. 468, 484).[35] Consumption rates of interest are after-tax interest rates; they are lower than the market rate. Say, for example, a citizen obtains a passbook rate of 5% but is taxed at a rate of 40%. The rate at which she would trade consumption today for consumption next year is 3%. Holding aside the complications of deriving weights for calculating the social discount rate, the exclusion of taxes implies that

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[35] References in Jonathan Taylor's Memorandum to RMC: 9-16-2005: Federal Reserve Bank. FRB: Federal Reserve statistical release H.15 - historical data (2005) [Web Page]. URL http://www.federalreserve.gov/release/h15/data.htm.; Ibbotson Associates. ***Stocks, Bonds, Bills and Inflation: 2005 Yearbook***. Chicago, IL: Ibbotson Associates, 2005.; G.P. Jenkins, & A Harberger. ***Program on Investment Apprisal and Management Manual: Cost Benefit Analysis of Investment Decisions***. Cambridge, Ma: Harvard Institute for International Development, 1992.; J. Kalt, K. Grant, & J. Taylor. Letter to Robert McLaughlin, June 1994. Cambridge, MA.; Robert W. McLaughlin. ***Economic Loss Analysis: Standing Rock Sioux Tribe Just Compensation Parity with the Cheyenne River Sioux Tribe's Additional Compensation Settlement for Tribal and Individual Economic Resources Taken for the Oahe Dam*** (draft). Solen, ND: Robert McLaughlin Consulting, August 2005.; M. Spackman. "Time Discounting and of the Cost of Capital in Government." Fiscal Studies, Vol. 25, No. 4, (December 2004), 467-518.; E. Stokey, & R. Zeckhauser. ***A Primer for Policy Analysis***. New York: W.W. Norton, 1978.; US EPA, ***Guidelines for Preparing Economic Analysis***. Washington, D.C.: U.S. Environmental Protection Agency, 2000.; US GAO, ***Indian Issues: Compensation Claims Analysis Overstate Economic Losses***, GAO/RCED-91-77, Washington, D.C., May 21, 1991.; and US GAO, ***Indian Issues: Cheyenne River Sioux Tribe's Additional Compensation Claim for the Oahe Dam***, GA/RCED-98-39, Washington, D.C., January 1998.

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using the prime rate makes the *Economic Loss Analysis* conservative when it comes to capitalization. The social discount rate is lower than the savings interest rate that a community faces because it must reflect consumers' lower, after-tax time tradeoffs in consumption. RMC's use of the real prime rate unadjusted for taxes makes the loss estimate conservative because dividing the annual loss estimates by a (lower) tax adjusted rate would raise the capitalized value.

The *Economic Loss Analysis* appropriately uses the *real* prime rate to capitalize the values (not the *nominal* prime rate) because the annual losses are calculated to extend at a constant level into the future; that is, they are denominated in 1958 dollars. If inflation were modeled in the loss projections from 1958 forward, it would be appropriate to discount using the nominal prime rate, but this is not the case. Conversely, when moving forward in time, that is, bringing 1958 capitalized losses forward to the present, it is appropriate to use the nominal prime rate as RMC did because inflation did occur in the intervening years. Using the nominal rate preserves the purchasing power of the 1958 losses in today's dollars.

Despite the numerical difference between the real prime rate and the nominal prime rate, using them in this fashion brings a necessary consistency to the analysis. The underlying rates used to bring losses from the projected future back to 1958 and from thence to the present are identical (after inflation), and they should be. Conceptually, the rate of interest here is the opportunity cost of capital, and that opportunity cost (however imperfectly measured or proxied) must be the same going backward in time as it is going forward in time.

RMC asked the Taylor Policy Group to comment on the GAO's review of RMC's capitalization and interest rate as applied in the CRST Loss Report. Taylor's comments are as follows:

**The General Accounting Office Review of RMC's Capitalization and Interest Rates**

The Government Accounting Office (GAO) criticized RMC's use of the 1955 real prime rate (2.79%) in capitalizing the Cheyenne River losses:

> A key question in evaluating the consultant's selection of a discount rate is whether it accurately reflects the discount rate that the tribe would have used in the 1950s. Historical documents indicate that the tribe and MRBI used a 4-

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> percent discount rate.[36] Moreover, the tribe requested that its settlement draw interest at 5 percent. This information suggests that the tribe's discount rate was higher than the prime rate assumed by the consultant (US GAO, 1998, p. 6).

But GAO's criticism misses the mark on several levels. The text cited above provides no analytical context that would shed light on how and why the tribe used 4%, how that rate was derived, or what justification was given for its use. According to the footnote in the GAO main report (quoted in full here as footnote 36), *MRBI* (not the tribe) used 4% in the manner a real interest rate would be applied, but the report is silent on the tribe's analytical use of it.

In response to RMC's Comments defending the use of the prime rate, GAO further elaborates (in Appendix IV) the points made above, observing that notes from a negotiation conference indicate that: i) the tribe was the first to introduce the 4% figure in 1952; ii) the tribe's seven-member negotiating team and attorney were present when it was introduced; and iii) the Chairman of the tribe and the tribe's attorney discussed and explained how the damages were estimated (US GAO, 1998, p. 50). But these details do not shed light on exactly whether and how 4% represents the tribe's opportunity cost of capital. In fairness to the writers of the GAO report, the analysis explaining the tribe's use of 4% may be lost to history. Regardless of the reason however, the GAO report does not provide sufficient analytical context to confirm or rebut the presumption that 4% represents the tribe's opportunity cost of capital. From the GAO's coverage of the issue it is not even possible to discern whether the tribe used the 4% rate as a real or nominal rate.

The GAO report also observes that the tribe requested that its settlement draw 5% interest – a rate higher than the nominal prime rate (3.16% in 1955, the year of analysis in the Cheyenne case). But this is not evidence of an actual discount rate: it is a position taken in a negotiation which may or may not reflect actual time preferences or opportunity costs. The GAO report has not offered compelling evidence that either the tribe's cost of borrowing or its time preference is inconsistent with the application of the real prime rate for capitalization. Indeed a prior GAO

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[36] The context in which the 4-percent discount rate is used indicates that it is real – that is, net of inflation. For example, to calculate the value of timber products foregone, MRBI capitalized the annual use value of timber products at 4 percent. Implicit in this calculation is an assumption that the annual use value is constant over time (i.e., real). To ensure that the capitalization calculation is consistent, the discount rate must also be real. (*Footnote here quoted from footnote 14 in the original.*)

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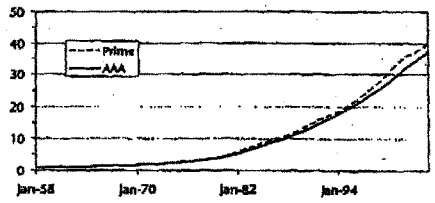
report (US GAO, 1991, p. 20-21) noted the difficulty of determining the tribe's time preference during the 1950s and suggested neither a quantitative nor a directional adjustment to the use of 2.5% for the Standing Rock Sioux (SRST) – a rate lower still than RMC used in its CRST analysis (2.79%).

Notwithstanding these complaints, the 1998 GAO report actually uses an interest rate to bring losses forward in time – the AAA corporate bond rate – that would seem to endorse the use of the prime rate, if for no other reason than because the bond rate and the prime rate are equivalent in practical terms over the time period relevant to the *Economic Loss Analysis*.[37] They do not move in lock-step, of course, as they represent different sectors of the debt capital market, yet the average yield on AAA bonds in 1958 was 3.79% and the prime rate was 3.83% (Federal Reserve Bank, 2005). More importantly for the practical purpose of the *Economic Loss Analysis*, over the period from January 1958 through December 2004 AAA bonds yielded an annual average return of 8.01% while the prime rate yielded 8.15%. As Figure 1 shows, a dollar of principal in January 1958 yields virtually the same amount of future value in 2004, despite compounding over nearly half a century.

Figure 1
One Dollar Compounded at the Prime Rate and at the AAA Corporate Bond Rate
1958-2004




(Federal Reserve Bank, 2005)

[37] In 1998 the GAO offered two estimates of compensation due. The upper estimate used the nominal corporate bond rate. The lower estimate compounded by inflation alone (US GAO, 1998, p. 3). However doing so is technically improper because the inflation-only approach does not account for the real time value of money or otherwise approximate the tribe's opportunity cost of foregone compensation.

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By its explicit use o AAA corporate bond yields, then, the GAO report endorses those rates as a proxy for the relevant opportunity cost of capital going forward from the 1958 loss. Consistency in the analysis would require using the same opportunity cost of capital to bring the forecasted annualized losses back to 1958 present value. And since the annual forecasts are in real dollars, that rate must be the nominal rate minus inflation (as acknowledged by the GAO report's quoted footnote above). As a matter of facts, the difference between the 1958 real prime rate (2.07%) and the 1958 real AAA corporate bond rate (2.03% = 3.79% - 1.76%) is a quibble: two hundredths of a point or only 2% of the perpetuity present value.

One could take the alternative approach and accept the GAO report's contention that 4% is the appropriate inflation-adjusted opportunity cost of capital in 1958 (per the MRBI's use of that figure). If so, consistency would require bringing the losses forward from 1958 to the present at a nominal rate consistent with a 4% real rate in 1958. That could mean a constant 4% plus inflation or something like a prime-plus two or AAA-bonds-plus-two, given the relative position of those real rates and 4%. In either case, the accumulation of interest on the unpaid damages would approximately make up for the heavier discounting of the real values. There's no free lunch to be had except through the erroneous application of inconsistent inflation-adjusted rates for moving values backward and forward in time.

The *Economic Loss Analysis* and the GAO report are virtually on the same page with respect to interest and should be regarding capitalization too, so long as the GAO maintains conceptual consistency between the two values. The aspersions that the GAO report casts against the real prime rate as a capitalization rate (via references to MRBI uses of real rates substantially in excess of it and to tribal negotiating stances) would violate this consistency. The GAO report cannot have it both ways: a high discount rate when *dividing* future values for present value (e.g., 4% real) and a lower rate when *multiplying* principal to get interest (e.g., corporate bonds at 3.79% nominal in 1958).[38] The GAO report has not offered any compelling evidence for an inconsistent approach between the capitalization rate and the interest rate (after proper inflation adjustment – that is, no evidence worthy of overturning the general principle that costs benefit analysis should use consistent rates going forward and backward in time.

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[38] Given that inflation was 1.76% in 1958, this is quite a substantial and aggressive inversion of the quantities that would actually be used.

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The 1998 GAO report's discussion of the discount rate needlessly clouded the issue. Unless they can introduce hard evidence that speaks to the relevant opportunity cost of capital, future critiques of the approaches of the *Economic Loss Analysis* should acknowledge the significant agreement between the approaches of the GAO report and RMC's prior and current analyses of interest due *and should only apply inflation adjustments to those rates for discounting*. To do otherwise is to mislead decision makers.

2. Compatible Valuation Estimates and Consumers' Surplus

Consistency with the CRST's Loss Report is again important regarding non-market goods. During the development of the CRST's Loss Report, RMC had sufficient time to be able to conduct research that put a floor under several estimates for values of non-market goods. Although lowering the resultant outcomes, these estimates are more difficult to reject as without basis. So the Tribe herein has adjusted its 1986 Loss Report estimates of consumers' surplus in line with the CRST's Loss Report.

The Oahe Dam was premised on economic analysis, more specifically cost-benefit analysis. It is RMC's position that the Army Corps misused principles and standards of analysis where applied to the Tribe i.e., by understating costs incurred by the Tribe by reason of the Oahe impoundment while, at the same time, overstating future project benefits. This is important because the margin between social benefits to social costs for the Oahe project was very narrow. If cost and benefits were portrayed accurately; theoretically, the project would not have passed the cost-benefit test.

Because the law governing the Oahe taking included indisputable language that the Tribe be made whole after suffering taking losses, social accounting principles are required to be employed for analysis purposes. The Army Corps, nevertheless, insisted that market valuation techniques be utilized in conflict with economic analysis principles and standards which they liberally used elsewhere to boost the benefit side of the cost-benefit calculation for the project.

On the Fort Berthold taking, Ronald Cummings[39] said "fair market" values offered the Tribe would have been only 10 percent of the value of the "income-generating potential" of the Fort Berthold taken lands in 1950 and, more importantly, would have been "totally insufficient to have allowed the Tribe to replace their taken lands by market purchases of contiguous farms below the dam site."

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[39] Resource economist and former Chairman of the Department of Economics, University of New Mexico.

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As with the Cheyenne River taking, the law provided that Fort Berthold should be made whole. Fair market valuation of the taking lands was not going to accomplish this. Cummings said:

> ... it was argued that the principles underlying the concept of "fair market value" are not those which are appropriate for assessing the value of the Tribes' loss: their loss of a fundamental part of a social economic base. For such losses, we have demonstrated principles long established in economic theory and long *used* by such agencies as the Bureau of Reclamation and the Corps of Engineers, viz., the principles/standards of social accounting. Had social accounting principles been used in assessing *surface* land values of the Tribes' taken lands in 1950, their loss would have been on the order of $47 million, rather than $3.7 million.[40]

Cummings argues, correctly, that social accounting principles were mandated for establishing values for foregone tribal resources. To correctly value the Tribe's resources lost to the impoundment at the time of the taking, the Army Corps would have had to establish an appropriate utility value of those resources to the Tribe. They refused to do this.

Economists have developed methods for deriving non-market estimates by applying contingent valuation methods (CVM) or the amount of compensation which would be required to be paid (willingness to accept or pay), that will restore the utility level to individual(s) who experience a decremental loss of a good.[41]

Following this, the government has established principles and standards to be used by federal agencies in formulating plans for the implementation of water projects. The willingness to accept - willingness to pay criteria can be applied when non-market estimates need to be established where CVM can be applied.

RMC utilized, conservatively, economic valuation techniques to established foregone values for Cheyenne River resources in 1954. A complete discussion of this valuation

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[40] Cummings, Ronald G., ***Just Compensation for Lands Taken from the Three Affiliated Tribes of the Fort Berthold reservation for Garrison Dam***, Resource management Associates, Albuquerque, New Mexico, November 1984, p. 20.

[41] A. Randall, ***Resource Economics***, (New York: John Wiley & Son, 1987). Note: Willingness to accept is generally an upper bound, while willingness to pay, a lower bound (J. Leitch).

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is found in the CRST Loss Report. Suffice to say here is that the resultant numerical outcome of the CRST Loss Report analysis by RMC was very close to GAO's alternative valuation outcome of January 1998.

Consumers' Surplus. As stated above, history has shown that in the Oahe taking the government overestimated many project benefits while underestimating project costs, in particular their costs for compensation for the taking of Indian economic resources. On the other hand, promised project benefits for irrigation and major recreational sites never materialized in Indian country after the dam was closed.

Exceptions to this is are production of hydropower – a highly profitable project benefit -- and to a lesser degree, downstream flood protection. It is noted that the Army Corps, the government's project developers, still maintains operating control over the profitable power production operations. Such revenue benefits, of course, are built, in large part, on the destruction of Indian country's valuable bottomlands.

In establishing just compensation for the loss of Indian lands to the project, cost-benefit criteria are utilized. The government has established principles and standards for federal agencies to be utilized for water related projects. Like criteria were in place during the development of the Oahe project and were utilized by the government's MRBI. As explained above, the time preference of the Tribe for its land resource base was very low. That is, the Tribe was not willing to sell its resource-based assets for even very high price bids and would purchase like non-trust assets at even negative rates of return (R. Cummings). Likewise, the compensation variation (CV) required as the sum of money which would make the Tribe, after the taking, no better or worse off than before, was clearly high. Why is this so?

The value of tribal homelands, especially the natural product and wildlife-rich riparian cottonwood habitat along the Missouri, represented the last natural habitats the Tribe could utilize for its traditional economic and cultural pursuits remaining after a century and one-half of constant encroachment on tribal homeland resources by the government.

The taking and its disruption of the tribe's economic, cultural, and religious systems caused extensive resentment, distrust, and the belief that once again the people were being unjustly exploited by the government for the benefit of non-Indians.

The Tribe's existing, resource-based, livelihood and cultural (in part recreational) pursuits would be destroyed. Given the limitations of economic opportunity at Cheyenne River and Standing Rock, once bottomland resources were destroyed, it would be unlikely that the economic benefits derived from these lands would be replaced with wage incomes. This has been borne out today as, even forty years after the impoundment, unemployment rates at Cheyenne River and Standing Rock hover

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around the seventy to eighty percent rate according to Bureau of Indian Affairs' (BIA) statistics.

Other social cost impacts, not calculated in economic losses, were incurred by the Tribe from the taking and are truly profound. Resultant reliance on USDA commodity foods -- rather than lean wild meats and healthful natural products -- which were laced with salt, sugar and fat, have no doubt led to the high incidence of disease -- like diabetes -- now seen in high rates among tribal members. The rise in the rates of alcoholism amongst tribal members, and early deaths, over the sense of loss and its resulting dislocations is always attributed to the Oahe taking by tribal members. The value of the destroyed natural habitat environment -- its amenity value -- can never be brought back. The grief and psychological disruption from the loss of community, social structures and religious places has been permanently damaging to tribal members.

Can the Government argue that there exists no consumers' surplus for the Tribe's wildlife, timber, and natural products before the taking? If consumers' surplus would be established by the values the Tribe placed on these products beyond estimates made by various federal agencies in the early fifties, then the value representing consumers' surplus for these products was clearly substantial.

Because prices were not established in any market for these products, the MRBI employed substitute price estimates to determine loss values, usually by comparison with what they considered the closest alternative non-traditional good. This was a limited method for attaching values to traditional Indian products, one which tends to seriously undervalue Indian products.

The utilization of forest products for housing, protective winter shelter for livestock, for outside summer shade, for winter fuelwood, and for religious ceremonies played a significant role in the traditional Indian economy. The harvesting of wild game provided a significant and wholesome food for the Sioux diet. The use of processed game skins, fur products, and other wildlife products played an important role in dress products utilized during traditional singing and dancing contests and for natural craft production. Other products were utilized for religious purposes. The processing of wild fruits was important to maintaining the Sioux diet. The use of other natural woodland products for medicinal purposes was fundamentally important to Sioux traditional culture and medicine.

The destruction of these irreplaceable and valuable products was not even recognized or valued by the Government as a loss. It is indisputable that these products carried a high consumers' surplus loss with their destruction because of the high value the Indian people placed on them. It is also indisputable the Tribe's *willingness to accept* monetary compensation in lieu of these traditional economic base resources and

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products was also very high.

Such economic pursuits by Sioux families have long been recognized by authorities familiar with traditional Indian economies. Mid-way through the twentieth century, such traditional economic behavior and activity was still significantly employed by the Cheyenne River and Standing Rock Sioux along the Missouri River. It was this traditional Indian economic activity that was almost entirely destroyed by the Oahe Dam.

MRBI valued Indian traditional products as the total value of the annual harvest. RMC similarly valued, with the consumers' surplus loss exception, the total annual product as the annual value, following the Government in this instance. MRBI reasoned that "most of the harvesting of these products is done by Indian labor using relatively inexpensive equipment. Much of the work of harvesting is performed by labor having little or no opportunity for other productive employment. Where harvesting costs are negligible the net value of harvested natural products approaches their gross value."[42]

Estimated consumers' surplus values were attached to all of the traditional natural product values which were, for all practical purposes, completely destroyed by the impoundment and where no alternative modern good could serve as a substitute.

In a willingness to pay study conducted to establish values for North Dakota hunting and fishing activities, consumers' surplus was found to be, conservatively, 40 percent of the total daily expenditure.[43] It is recognized that willingness to pay is an acceptable contingent valuation[44] method utilized to estimate non-market values. Furthermore, it is recognized as a more conservative valuation approach than willingness to accept, which is considered a higher boundary. Because of the lack of data available to estimate contemporaneous consumers' surplus losses for traditional products at Cheyenne River and Standing Rock, RMC has incorporated a 40 percent consumers' surplus loss valuation floor for all traditional Indian product categories - accepting the willingness to pay for hunting and fishing as the lower limit of consumers' surplus losses at Cheyenne River and now, herein, for Standing Rock.

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[42] MRBI, Report Number 138, p.13.

[43] Anderson, et.al., ***Guidelines***, p. 28. Another willingness to pay contingent valuation study reported on by Peter H. Pearse in ***Land Economics*** (2-68) evaluated the consumers' surplus of big game hunting in East Kootenay, British Columbia in 1964, and determined that the average consumers' surplus value for these hunters for the big game resource was 72 percent of their expenditure.

[44] Note: Contingent valuation studies value items that are not traded in markets and where individuals are asked to place values on non-market items contingent on a hypothetical market in which to trade them.

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To not estimate, conservatively, obvious minimal values for consumers' surplus losses would be, as E. J. Mishen has said, to stand cost-benefit theory on its head. If consumers' surplus does not exist in this instance, where irreplaceable, highly valued goods are completely removed from society, then it does not exist at all.

### 3. The Government's Use of MRBI Report Number 138

During the final late negotiations between Congress and the CRST Tribe in 1954, the Government relied heavily on its MRBI Report Number 138: "Damages to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota." This report has several serious shortcomings and is reviewed here because the government sometimes still refers to it as an authoritative report.

RMC in the CRST Loss Report had serious concerns about the Government's analysis to determine value as represented in MRBI Report 138: concerns of conflict-of-interest regarding timber assessments and the questionable application of cost-benefit principles on the part of the government between 1951 - 1954 to name two.

The authors of this report played fast and loose with valuation numbers. An example of this was reported in the CRST Loss Report document and is restated below.

MRBI calculated Cheyenne River's direct damages which amounted to, in their opinion, $2,053,117. Applying their Fort Berthold ratio of 1 to 3.42 to establish total indirect costs, they arrived at a total damage estimate for Cheyenne River of $7,021,660, line 38, Table 1 (MRBI Report). They then added all of their underestimated indirect damages (all the separate damages categories calculated in the report) for Cheyenne River and found, not surprisingly, they only came to $3,215,308.

The MRBI authors had found a valuation figure which even fell below the already discredited Fort Berthold settlement rate. How did MRBI resolve this problem? They simply increased the indirect damages category by $1,753,235, line 36, so that all indirect damages would add to $4,968,543 to satisfy their artificial ratio requirement. Looking at their explanatory footnote for this category, called "all other damages, mostly intangible", MRBI explained this value was derived because: "since a more satisfactory basis for computing intangible damages was not available, the amounts shown here were obtained by subtracting the sum of all other items from total damages."[45]

MRBI had essentially created $1,753,235 in indirect damage values out of thin air - an easy target for Congressional axe wielders - after struggling with damage values in

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[45] MRBI, Report Number 138, Table 1 w/notes, p. 24.

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terms of nickels and dimes in the report's main body. Unfortunately for the Tribe and true to form for the termination era, sharped-eyed Congressional budget cutters spotted this undocumented valuation adjustment and eliminated all of it and more from the Tribe's indirect damage requests, thus making the final Cheyenne River settlement substantially worse than the "discredited" Fort Berthold settlement by achieving a total damage to indirect damage settlement of 1 to 2.39.

The report went unusually far to discredit the Tribe's utility values for wildlife, plant, and land resources. It stated the value of game to the Indian people was less because they were more skillful hunters, used cheaper equipment, and needed no long distance travel for hunting. It valued wild game employing grocery store food alternatives, as replacement values, for the Tribe's lost wildlife resources. This argument was deficient and would not have been put forward except that the Government was at the height of its termination policy and was sure that such arguments would not even be defended against by knowing government officials. The pre-termination era MRBI Report 117 never mention such an argument.

The alternatives to make the Tribe whole here are not fat laden commodity canned or super market chickens, assuming the members had wage incomes sufficient to purchase such items, after the taking, but their real replacement values. The Government, recognizing it could not make the Tribe whole with like replacement lands or lieu lands (too expensive and politically not feasible), offered low cash settlements and drove down the Tribe's estimates wherever they could with its MRBI Report Number 138.

It is RMC's opinion that the Government's cost analysis for "indirect damages" in 1953-54 was built on a house-of-cards valuation technique that has finally fallen-in by the weight of historical truth.

**STATEMENT**

**OF**

**CHAIRMAN LESTER THOMPSON**

**BEFORE THE**

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**JUNE 14, 2006**

Mr. Chairman, Members of the Committee, thank you very much for the opportunity to testify on the Tribal Parity Act, S. 374. I am Lester Thompson, the Chairman of the Crow Creek Sioux Tribe. It is an honor for me to be here with Chairman Mike Jandreau. Chairman Jandreau is the most senior Chairman in our State and in the Great Sioux Nation. I am the most junior Chairman in the Sioux Nation, having been elected Chairman in April. I took office, along with a new Tribal Council, in May 2006.

I also would like to thank Senator Thune for introducing the Tribal Parity Act and Senator Johnson for cosponsoring. This legislation before you is of extraordinary importance to our Tribe. I am delighted that it is the subject of my first appearance before Congress.

The members of the Crow Creek Sioux Tribe were relocated after Little Crow's War in Minnesota. People were transported on barges from Minnesota stopping at Santee and then we moved on to Crow Creek. Many lives were lost along the way. We are members of the Isanti and Ihanktowan divisions of the Great Sioux Nation. We speak Dakota and Nakota dialects. We have three districts on the reservation, and are a Treaty tribe.

The Crow Creek Sioux Tribe consists of 225,000 acres located in Central South Dakota. Our Western boundary is the Missouri River. In 1944, when the Congress enacted the Flood Control Act and authorized implementation of the Missouri River Basin Pick-Sloan Plan for water control, two of the dams, Fort Randall and Big Bend, flooded over 16,000 acres of our best and most productive bottom land. It was also the very land where a majority of our people lived. The cost to Crow Creek in human terms, and economically, was astronomical.

We lost:

- Our hospital;
- Housing units;
- Tribal Buildings and other structures;
- Schools;
- Businesses;
- Roads;
- Acres of waterbed and timberland, and domestic and ranch water systems;
- Food sources, such as fishing, hunting, and subsistence farming; and
- Ceremonial grounds and traditional medicines.

Our way of life was altered irreparably. Before the dams, the lifestyle was simple. The people worked in a community garden. In the evenings, the people would gather to share that day's catch of fish and the food gathered. They would meet to visit, pray, sing, and dance where the Bureau officials could not observe. The children attended boarding school within walking distance of their homes and family. The way of life, the social interactions, the camaraderie and sense of being one people – one Tribe, was destroyed by the environmental changes and forced relocation. The hospital and school were never replaced. The traditional medicine that grew solely in the waterbed and the Ceremonial Grounds are irreplaceable.

When the relocation took place, some purchased homes with the $500 compensation received. Others received homes in low rent housing – a project constructed of fifty units in an area smaller than a city block.

The elders observed that this is when the change occurred. People started to watch each other, argue with each other, begrudge each other, and become disgruntled. With the loss our school, the next option was the Immaculate Conception Boarding School, 13 miles away. The students were no longer able to walk to their homes and families on a daily basis, and those teaching were not people who believed in the heritage, culture, and customs of the students. Abuses that occurred in Catholic Boarding Schools are well documented historically, and I will not expand, except to say that the loss of our school negatively impacted our people on a much larger scale. This impact on the social development of our people has rippled down through generations.

Our Reservation is in Buffalo County, South Dakota. Buffalo County is the POOREST COUNTY IN AMERICA, and also has the highest cancer rate in the Nation. Many Elders believe that the building of the dam and disturbing the earth and the water flow released death in the air.

Chairman Jandreau has spoken eloquently regarding the desire to join the global market and seeking economic parity with the rest of America. I strongly agree and support those goals. But at Crow Creek, we must first achieve parity with Chamberlain, South Dakota, just twenty-five miles away. A small town of just 3,000 people, Chamberlain's unemployment rate is approximately the state average – 5 percent, while the rate at Crow Creek is over 80 percent.

For us to move forward, we must improve our infrastructure and create an environment that is conducive to human and economic progress. The Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act enacted in 1996 (P.L. 104-223) awarded $27.5 million to the Crow Creek Sioux Tribe. Of the $27.5 million, the Tribe is allowed to utilize the interest. The Tribal Parity Act would greatly enhance the trust fund, thus

increasing our available monies and allowing us to leverage with the private sector. The first year of the trust fund, we received slightly over a million dollars. Due to fluctuating interest rates, the yield has now dwindled to slightly over $700,000, and is not a set or guaranteed yearly amount. We have utilized the interest to do a number of things to improve the situation of our people, including the following:

- Purchase a small school with a gymnasium in the Big Bend District – the furthest outlying district. We are able to provide Kindergarten through 6th grade education to students in that area, preventing the necessity of an hour-long bus ride each way to and from school;
- Construct a Community Building in the Crow Creek District, providing a place to gather for socializing, celebrations, and funerals;
- Construct a Community Building in the Fort Thompson District, utilized for community events, program presentations, wakes, weddings, dance, meetings, and as a polling place;
- Set a higher education program to assist students in college;
- Purchase land to increase the land base; and
- Improve damaged roads and upgrade our water plant.

These initiatives just begin to scratch the surface. The legislation we are discussing today, S.374, is intended to supplement our existing trust fund. As you know, it passed the Senate three times in the 108th Congress, both as a stand-alone bill and as an amendment. All three times the measure died in the House. The Tribal Parity Act was again reported by this Committee on June 29th, 2006, but has yet to come before the Senate for consideration.

The Army Corps of Engineers has estimated that the Pick-Sloan Project's overall contribution to the U.S. economy averages $1.27 billion annually. According to the Western Area Power Administration, the agency that administers the Pick-Sloan Project, receipts from the project in 2006 are likely to total $119 million and the same every year after. The $69 million dollar increase to the trust fund requested in S. 374 (as amended)

would bring the trust fund balance to $96 million – less than one year's receipts the government receives from the Pick-Sloan Project.

The expanded trust fund would enable the Crow Creek Sioux Tribe to make not just significant, but magnificent strides in growth and development. Economic development and environmental improvements would change the lives of our people, our children, and all future generations of Crow Creek Sioux. It would assist in putting Reservations on parallel ground, enabling us to compete economically, with Chamberlain and the rest of the United States, as opposed to remaining in our current state, operating below the standards of most Third World Countries.

The recent GAO report entitled "Analysis of the Crow Creek Sioux and Lower Brule Sioux Tribes' Additional Compensation Claims" criticizes the Tribes for not using "a final asking price." Mr. Chairman, there is not a Tribe or Tribal member that could possibly place a monetary value on the loss and detrimental impact the Pick-Sloan Project has had on our people. "Official" documents use terms such as "Lake Sharpe" or "Lake Francis Case" to identify the land overtaken by the Pick-Sloan Project. In the every-day language of the Tribal people, the land is called "taken area" or "taken land." **Because it was taken.** The land taken was the richest portion of our reservation. There were no offers or deals made to sell the land, and no assessment done to determine the value of the land. Even if there had been an assessment, the medicinal plants grown on the land and the Ceremonial Grounds hold a higher, non-monetary value. The devastation this has wrought still remains today for all to see.

The Crow Creek Sioux Tribe is consulting with experts such as Dr. Mike Lawson to estimate a monetary value, but his name or expertise is not mentioned in the GAO report. The compensation listed for Crow Creek Sioux Tribe in the Tribal Parity Act is not based on the highest asking price, or based on the price for the Santee Sioux, the Lower Brule Sioux, or any other Tribe. Each Tribe is unique, but what binds us together is our sovereignty. We are asking for the ability to maintain our sovereignty.

A Christian group visited the Crow Creek Sioux Tribe, stating that they had read about the poverty on the Reservations and the fact that Crow Creek is in the poorest county in the America. After visiting, the group called the situation a **National Shame.** As Chairman of the Crow Creek Sioux Tribe, I want to see the deplorable statistics change. I do not want our situation to remain a national shame. We are not asking for charity, for a handout, or even for your pity. We are not even asking for a helping hand. We are simply asking for fair and just compensation.

For the men, women, and children of the Crow Creek and Lower Brule Sioux Tribes, there is nothing more important right now than moving forward with the Tribal Parity Act. The new Tribal Council, including myself as Chairman, understands the challenges that lie ahead. Our reason for running for office and our daily motivation is to improve the situation and make a positive difference for the people of the Crow Creek Sioux Tribe. The Tribal Parity Act is an essential step in our efforts to reverse the downward trend and move forward. We urge the Committee to file the report and bring S. 374 to the Senate Floor for consideration as soon as possible.

Thank you for the opportunity to testify before your Committee, and I will be happy to answer any questions you might have.

**STATEMENT**

**OF**

**CHAIRMAN MICHAEL B. JANDREAU**

**BEFORE THE**

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**JUNE 14, 2006**

Mr. Chairman, Members of the Committee, thank you very much for the opportunity to testify on the Tribal Parity Act, S. 374. I am Michael Jandreau, the Chairman of the Lower Brule Sioux Tribe. I have been Chairman of the Tribe for twenty-seven years, and served on the Council for seven years before being elected Chairman.

The legislation before you this morning is of great importance to our tribe and our people. I would like to thank Senator Thune introducing the legislation, and Senator Johnson for cosponsoring. I am joined today by members of our Council, other tribal members, and our Counsel, Marshall Matz with the law firm of Olsson, Frank and Weeda.

The Lower Brule Sioux Tribe is a constituent band of the Great Sioux Nation and a signatory of the Fort Laramie Treaty of 1851 and the Fort Sully Treaty of 1865. The reservation is approximately 230,000 acres in central South Dakota. The Missouri River establishes the eastern boundary of the reservation. Historically, the Missouri's

bottomlands provided food, wood for shelter and fuel, forage for cattle and wildlife, and plants utilized for medical purposes.

In 1944, Congress enacted the Flood Control Act, which authorized implementation of the Missouri River Basin Pick-Sloan Plan for water development in the Missouri River Basin. Two of its main-stem dams, Fort Randall and Big Ben, flooded over 22,000 acres ---approximately 10% of the entire reservation and our best bottomland. In addition, it required the resettlement of nearly 70% of the resident population. For the Lower Brule Sioux Tribe, the human and economic costs have far outweighed any benefits from the Pick-Sloan project.

The Congress responded in 1997 with the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act, Public Law 105-132. This legislation has been of enormous benefit to our people. It established a Trust Fund of $39,300,000 for the benefit of the tribe. With this Fund, and using leverage, we invested over $27 million in our entire infrastructure. We have built:

- A new community center,
- A tribal administration building,
- A detention center with a courthouse and police department, and a
- Wildlife building.

We have also used the fund to improve tribal housing and employ 250-270 individuals (both youth and adults) in the summer months. In short, the trust fund is allowing us to improve our economy and the quality of life on the reservation in many ways.

The legislation before you today, S. 374, is intended to supplement our existing trust fund. It passed the Senate three times in the 108th Congress, once as an independent bill and twice as an amendment to other bills. All three died in the House. The Parity Act was again reported by this Committee on June 30, 2005, but has yet to come before the entire Senate for consideration.

Mr. Chairman, in all honesty, I am completely baffled by the recent GAO report entitled "Analysis of the Crow Creek Sioux and Lower Brule Sioux Tribes' Additional Compensation Claims". It is the most frustrating government document I have read in all of my years as Chairman.

Essentially, the GAO makes two criticisms of the Tribal Parity Act and the approach used by our consultant, Dr. Mike Lawson. First, the GAO criticizes us (and it is, in fact, the Tribes that the GAO is criticizing) for not using "the final asking price". Second, the GAO is indignant that Dr. Lawson suggests one level of compensation, and not a range. I would like to make several points in response:

1. The Congress never established the final asking price as the standard that must be used for determining what is fair compensation under the Flood Control Act. In a business transaction when two parties are negotiating with equal standing, I can

understand how the last asking price would indicate the true feelings of the parties. That is clearly not the case here. There was no "negotiation". Our land had been flooded and we were trying to do the best we could. The Congress should look at all of the facts when trying to evaluate the appropriate level of compensation and not be blinded by the last offer.

2. GAO criticizes Dr. Lawson for not providing a range of reasonable compensation levels based upon different policy assumptions, but then the GAO does the same thing and fails to give you, the Congress, a range of possibilities.
3. Beyond the numbers, there is a tone to the GAO report that is deeply disturbing. Dr. Mike Lawson is a nationally recognized expert on the Flood Control Act and the Tribes affected by that legislation. Yet, the GAO does not even mention his name anywhere in the document. Dr. Lawson is a consultant to two sovereign Indian tribes. The GAO has every right to disagree with him, or with me, or with anyone else. But I would hope they also recognize that a mechanical application of a standard formula may not apply in all cases. The tribes are not one size fits all.

Our best land was taken to benefit America. Our Tribe is not seeking charity; we are seeking justice and parity with other Missouri River tribes that have been adversely affected by the Flood Control Act. There has been no one, clear policy decision by the Congress on how to determine what is just and fair compensation for Missouri River tribes. The Tribal Parity Act is not based upon the "highest asking price". And we are not seeking Parity with the Santee Sioux, who has received the highest amount on a per

acre basis. We are seeking what Dr. Lawson, the recognized national expert, believes to be fair and owing from the United States to the people of Lower Brule. The Congress has the power and the obligation to make a fair policy decision. You are not bound by any one formula or test, as, I believe, the GAO would have you believe.

This legislation would, if enacted, add to our trust fund and allow us to aggressively attack the many human challenges we face on the reservation. Further, we could more adequately build our infrastructure to the point that it would be possible to attract a private sector economy.

As you know, sovereignty is key to tribal existence. But, in the long run, for sovereignty to survive, there must be some type of economic sovereignty as well. We must develop a private sector economy and jobs for our people. The legislation before you will allow us to do all of that. We will be able to improve education, health care, housing, transportation, the justice system, and so many other services.

As much as we need this legislation, let me stress that we are not asking for a handout. This legislation is intended to provide more complete compensation for the loss of our best land and other costs suffered by the Tribe. The Army Corps of Engineers has estimated that the Pick-Sloan project's overall contribution to the U.S. economy averages $1.27 billion per year. The Tribal Parity Act must be seen in that context.

The Lower Brule Sioux Tribe is making great progress. Our unemployment rate is the lowest of any reservation in South Dakota, but it is still much above the national average. My goal as Chairman is to see Lower Brule fully participate in the United States economy while maintaining our heritage and identity. It is very painful for me to read The World Is Flat by Thomas Friedman and realize that globalization is passing over Lower Brule and the Indian reservations of the United States. China and India, for example, are revolutionizing their economy while Indian reservations are essentially ignored.

The reservations are a part of the United States, but we are not a part of the US economy. Mr. Chairman, I am not here today to outline a comprehensive agenda for Lower Brule or for tribes, generally. I am here to say that the Tribal Parity Act is the essential next step to improving the quality of life at Lower Brule and it is completely justified. We urge you to finally file the Committee report and bring it to the floor of the Senate as soon as possible. It has been exactly two years since I first testified on the Parity Act. Our Tribe needs and deserves the benefits of the Tribal Parity Act, as adjusted to reflect a more accurate mathematical computation.

We urge the Committee to amend S. 374 to provide $129,822, 085 of additional compensation to Lower Brule and $69,222,085 of additional compensation for Crow Creek. These figures are far lower that our highest asking price and are lower than the amount provided to the Santee. It is, in short, fair and just compensation for the complete disruption to our reservation life and the taking of our best bottom lands. Thank you. I would be pleased to answer any questions.

**STATEMENT**

**OF**

**DUANE BIG EAGLE**

**BEFORE THE**

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**JUNE 15, 2004**

Mr. Chairman, Members of the Committee, I am Duane Big Eagle, Chairman of the Crow Creek Sioux Tribe. Thank you very much for the opportunity to testify in support of the Tribal Parity Act, S. 1530.

First, I would also like to thank Senator Daschle for the introduction of the legislation, and Senator Johnson for cosponsoring. The legislation before you this morning is of great importance to the Crow Creek Sioux Tribe. We support it and urge its favorable consideration by the Committee and the Congress.

The Crow Creek Sioux Tribe is, like Lower Brule, a constituent band of the Great Sioux Nation and a signatory of the Fort Laramie Treaty of 1851 and the Fort Sully Treaty of 1865. The Missouri River establishes our western boundary, directly across the river from Lower Brule. The Big Bend Dam connects our two reservations and its

construction effected our two reservations in a similar manner. It flooded our best bottomlands and required us to relocate our town; for us that is Fort Thompson.

In 1996, the Congress enacted Public Law 104-223 creating the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act. It established a Trust Fund of $27,500,000 for the benefit of the tribe. The legislation before you today, S. 1530, the Tribal Parity Act, would compliment that earlier law.

We are not seeking any advantage over any other tribe, just parity. The additional compensation called for in the Tribal Parity Act was computed by Dr. Lawson based on methodology used by the GAO for other tribes. The amount included in the legislation, was not computed by either the Crow Creek Sioux Tribe or the Lower Brule Sioux Tribe. It is the amount that Dr. Lawson has computed would bring us up to the standard used by the Congress for Cheyenne River.

Candidly, Mr. Chairman, our tribe needs ever dollar that is fairly owed to us. Our unemployment rate is too high, our health problems are a significant barrier to progress, and our education and infrastructure systems are in need on great improvement.

With the interest on the trust fund, we could much more effectively meet the challenges we face on the reservation, and these challenges can not be overstated. We are a small tribe with great human needs. The Tribal Parity Act is vital to the progress and future of the Crow Creek Sioux Tribe.

Mr. Chairman, we all know....painfully....the history of the reservations in the United States and the history of the Great Sioux Nation tribes, in particular. We are not near any major population center. We have a casino, as does Lower Brule, but that will never be a major source of income. For us to stand a chance, we must, at a minimum, be fairly compensated for the land that was taken by the Pick-Sloan. The $78 million in the Parity bill for Crow Creek, if added to our current trust fund, would give us a trust fund of $105 million. The interest on this trust fund would provide Crow Creek with the resources necessary to make a significant difference in the lives of our people and the lives of our children and grandchildren. It would, in short, give our Tribe a second chance. Thank you for your consideration. I would be pleased to answer any questions.

**STATEMENT**

**OF**

**MICHAEL B. JANDREAU**

**BEFORE THE**

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**JUNE 15, 2004**

Mr. Chairman, Members of the Committee, thank you very much for the opportunity to testify on the Tribal Parity Act, S. 1530. I am Michael Jandreau, the Chairman of the Lower Brule Sioux Tribe. I have been Chairman of the Tribe for twenty-five years.

The legislation before you this morning is of great importance to our tribe and our people. I would like to thank Senator Daschle for the introduction of the legislation, and Senator Johnson for cosponsoring. I am joined today by members of our Council, other tribal members, and our Counsel, Marshall Matz with the law firm of Olsson, Frank and Weeda.

The Lower Brule Sioux Tribe is a constituent band of the Great Sioux Nation and a signatory of the Fort Laramie Treaty of 1851 and the Fort Sully Treaty of 1865. The reservation is approximately 230,000 acres in central South Dakota. The Missouri River

establishes the eastern boundary of the reservation. Historically, the Missouri's bottomlands provided food, wood for shelter and fuel, forage for cattle and wildlife, and plants utilized for medical purposes. In 1804, Lewis and Clark traveled up the Missouri River, passing through our area during the month of September. Nothing has been the same since that time.

In 1944, Congress enacted the Flood Control Act, which authorized implementation of the Missouri River Basin Pick-Sloan Plan for water development in the Missouri River Basin. Two of its main-stem dams, Fort Randall and Big Ben, flooded over 22,000 acres ---approximately 10% of the entire reservation and our best bottomland. In addition, it required the resettlement of nearly 70% of the resident population. For the Lower Brule Sioux Tribe, the human and economic costs have far outweighed any benefits from the Pick-Sloan project.

The Congress, under the leadership of this Committee, and in response to legislation introduced by Senator Daschle, responded in 1997 with the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act, Public Law 105-132. This legislation has been of enormous benefit to our people. It established a Trust Fund of $39,300,000 for the benefit of the tribe. With this Fund, we have begun to revitalize our infrastructure. We built a new community center, tribal administration building, and wildlife building, among others. They are more than just buildings. It is allowing us to improve our economy and the quality of life on the reservation in many ways.

Legislation is now pending, S. 1530, the Tribal Parity Act, that would build upon the earlier law. As you have heard from Dr. Mike Lawson, the Tribal Parity Act is intended to do just that.....provide parity between the Missouri River Tribes. We are not seeking any advantage over any other tribe in the Great Sioux Nation, only equity and parity. The additional compensation called for in the Tribal Parity Act was computed by Dr. Lawson based on methodology used by the GAO for other tribes.

Our tribe is asking for this legislation because the United States should treat all tribes fairly and because of what it would mean for our people. It would, if enacted, add over $147 million to our trust fund. With the interest on the trust fund, we could attack the many human challenges we face on the reservation. Further, we could more adequately build our infrastructure to the point that it would be possible to attract a private sector economy.

As you know, sovereignty is key to tribal existence. But, in the long run, for sovereignty to survive, there must be economic sovereignty as well. We must develop a private sector economy. The legislation before you will allow us to do all of that. We will improve education, health care, housing, transportation, the justice system, and so many other services.

As much as we need this legislation, let me stress that we are not asking for a hand out or charity. This legislation is intended to provide more complete compensation for the loss of our best land and other costs suffered by the Tribe. The Army Corps of Engineers has

estimated that the Pick-Sloan project's overall contribution to the national economy averages $1.27 billion per year. S. 1530 should be seen in that context.

The Lower Brule Sioux Tribe is making great progress. Our unemployment rate is the lowest of any reservation in South Dakota, but it is still much above the national average. Our goal is to participate fully in the United States economy while maintaining our heritage and identity. We urge your support for S. 1530, the Tribal Parity Act. I would be pleased to answer any questions. Thank you very much.

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