

TESTIMONY ON S. 1905

"THE CHEYENNE RIVER SIOUX TRIBAL
EQUITABLE COMPENSATION ACT"

BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

JULY 8, 1998

SUBMITTED BY
GREGG BOURLAND, CHAIRMAN
CHEYENNE RIVER SIOUX TRIBE

Hau, Cante Waste Yuha Napeciyuzapelo!! Wanbli Awanyankapi Miyelo!! Hello, I greet you with an open heart and a handshake, my name is Eagles Watch Over Him, my English name is Gregg J. Bourland. I am the Chairman of the Cheyenne River Sioux Tribe.

Mr. Chairman and members of the Committee. Thank you for the opportunity to testify before you today. I would also like to thank the two distinguished Senators from South Dakota for testifying today in support of S. 1905. The Indian and Alaska Native people are fortunate to have an Indian Affairs Committee in the Senate that has been such a strong advocate for us over the years. Similarly, the Indian people of South Dakota are fortunate to have two Senators who have been both good friends and great advocates for my Tribe and all of the other tribes in the State.

This is an emotional day for the members of the Cheyenne River Sioux Tribe. We have been waiting for this day for 44 years, for the day when Congress corrects the wrong that was done to our people in 1954. That is the year in which Congress enacted unconscionable legislation that severely underpaid the Tribe for the taking of 104,000 acres of our best land so the Army Corps of Engineers could build the Oahe Dam and Reservoir.

Today is also a day when Congress has the privilege of honoring a promise made to our people 44 years ago by the venerated Senator from South Dakota, the honorable Karl Mundt. Within days after Congress acted on the unconscionable compensation legislation in 1954, Senator Mundt wrote to the Tribe's chairman to acknowledge that the compensation was far less than it should have been. He then told the Tribe that if it accepted the bill for the time being and agreed not to lobby for a presidential veto, Senator Mundt would see that justice was done in a future Congress, stating, "We will do our best to finish the job." Unfortunately, Senator Mundt did not live to see this day, but in his memory, Congress now has the legislation in front of it that will enable it to "finish the job."

Compensation to tribes for the underpayment of tribal lands taken for the Pick-Sloan project is not a new issue for this Committee. Five tribes were harmed by the Missouri River

Basin Projects and Congress has already enacted legislation providing corrective compensation to four of them. Cheyenne River is the last, which in many ways is appropriate, since we were also the ones who probably suffered the greatest harm. The taking of those lands destroyed our way of life that was built around the bountiful bottom lands of the Missouri River and pushed us into the inhospitable barren uplands of the Dakota plains. It undermined our economy, our culture, and our family lives. It is appropriate that we now considering legislation that will provide us with funds that we will use to achieve economic self-sufficiency, because the taking of our lands 44 years ago set us back severely at a time when we were well on our way to such self-sufficiency.

THE GAO FORMULA USED TO CALCULATE THE COMPENSATION TO THE TRIBE

Let me begin by focusing on the most eye-catching portion of our legislation, the price tag. The bill provides the Tribe with a permanent fund of \$290,722,958; to be paid out of the profits that the Western Area Power Administration earns from the Missouri River Basin Program, at a rate of 10% of those profits each year until the entire amount is paid. I would like to emphasize that the \$290,722,958 compensation amount provided for in the bill is not the Tribe's number nor is it an arbitrary number. Rather, it is the number provided by the General Accounting Office (GAO), pursuant to a request from Congress, and is based on the same formula GAO and Congress had developed when Congress was first considering the Missouri River Basin tribal settlement legislation.

To provide a brief history on this, in 1990, Congress asked GAO to review an analysis prepared by the Fort Berthold Tribe regarding the amount of corrective compensation that tribe should receive in order to make it whole for the lands taken in 1952 for the Garrison Dam. GAO found numerous problems with the tribe's analysis and proposed an alternative approach that would provide consistency in determining compensation as Congress enacted legislation for each of the five tribes that had been unconscionably treated in the development of Pick-Sloan. GAO recommended that Congress use a two-part formula to determine the appropriate amount of compensation to provide each tribe. The first part of the formula would calculate the difference between the amount of compensation the tribes had formally requested from Congress when this issue arose in the 1950's and the amount they had actually received pursuant to the legislation adopted by Congress in the 1950's. This provides the base number. GAO's recommended second step was to compound this number using two different rates -- the corporate interest rate and the cost of living rate. Congress would then decide which compound rate it wanted to use and would award the tribe the base number compounded by the rate Congress chose.

GAO argued that this approach would provide consistency among the five tribes seeking corrective compensation and would allow the parties to work with objective known numbers, rather than getting enmeshed in trying to conduct evaluations of how much the land was really worth 40 years ago. Congress agreed with GAO and adopted this formula. When compensating Fort Berthold in 1992, Congress chose the corporate interest rate, pursuant to which it provided Fort Berthold with \$149 million in corrective compensation. (if the Fort Berthold bill were before Congress today, the amount of compensation that Tribe would receive under this formula would

be about \$300 million, since at the corporate bond rate, an investment would have doubled between 1990 and 1998.)

In preparation for the introduction of S. 1905, GAO applied this same formula to Cheyenne River's situation, and using the same corporate bond rate as was used for Fort Berthold, came up with the \$290,722,958 amount that is contained in S. 1905. The Tribe's economist, using standard appraisal methodology, came up with a higher amount. (His appraisal is an attachment to my testimony.) However, we recognize that use of the established GAO formula for the Cheyenne River Sioux Tribe legislation provides continuity and certainty. As GAO points out (at the footnote on page 25 of its 1998 report applying its formula to Cheyenne River settlement), because "the damage to each reservation was unique," it would be inappropriate to try to fashion a new formula on an ad hoc basis, using some simplistic indices, such as the number of acres each Tribe lost. For example, Fort Berthold lost 150,000 acres, Cheyenne River lost 104,000 and Standing Rock lost 56,000. But Standing Rock received virtually the same amount of compensation in the 1950's legislation as Cheyenne River did, for half the land. In addition, Cheyenne River lost critical bottomland. Cheyenne River and Fort Berthold both had major communities on their reservation flooded, such that a significant portion of the population had to relocate, while this was not true for Standing Rock. Because of the difficulties involved in trying to weigh all of these variables, the only way to insure consistency among the different settlements is to use the GAO approach.

WHY THE TRIBE IS ENTITLED TO THIS COMPENSATION

The next issue I would like to address is why should Cheyenne River receive this corrective compensation. The answer is in three parts:

1. 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. To provide just one example, during the winter of 1996-97 alone, our tribal members lost 30,000 head of livestock that they would not have lost if we still had the bottomlands that were taken for Pick-Sloan.
2. The Tribe has received no benefits from the Oahe Dam and Reservoir or the other components of Pick-Sloan. While they were built to make life better for many citizens, it was done in a way that completely excluded the Tribe and its members.
3. The 1954 legislation unconscionably undercompensated the Tribe and its members for the land that was taken. Even though the land that was taken from us was much more economically valuable than the land taken from non-Indians, the non-Indians received more than twice as much per acre as did the Indians.

Each of these three issues is discussed in greater detail below.

1. **The Project Severely Damaged the Economy of the Tribe and Caused Enormous**

Dislocation and Suffering for the Cheyenne River Sioux People

- The severe economic, cultural and social dislocations the Cheyenne River Sioux Tribe suffered as a result of the taking of 104,942 acres of their lands for the Oahe Project are spelled out in great detail in historian Michael Lawson's book about the effect of the Pick Sloan Plan on Indian tribes, "Dammed Indians". Below is a brief summary of some of the more extreme impacts:
- Over 30% of the tribal population, 1 81 families, lost their homes and were forced to relocate.
- Four reservation communities were flooded and had to be relocated, including the tribal and BIA headquarters town of Cheyenne Agency. Lawson concluded that this relocation "caused chaos and heartache for all tribal members." (P. 51)
- The reservation lost 80% of its bottom lands, which were the key to the Tribe's agricultural economy, its source of wood and game, relief from the cold and snow in the Winter and the 100 plus degree temperatures in the Summer, and the heart of the reservation cultural and social life because it offered shaded wooded areas with wild fruit, places to picnic, and access to the River for recreation. Effectively, the Tribe was relocated from bountiful forestlands to the barren, harsh, semiarid upland regions, which are far less hospitable to agricultural activities and in which the residents are continually battling the elements just to survive. The rest of the Missouri Valley residents improved their economic situation and the quality of their lives as a result of the Project. The Tribe not only failed to receive any of these benefits, but their economy and the quality of their lives were severely diminished by the flooding of their best lands.
- The most severe economic impact of the loss of the bottomlands was on our cattle industry. The Tribe lost 80% of its bottomlands, which constituted 90,000 of the 104,000 acres taken from them. This in turn reduced the value of an additional 800,000 acres of grazing land, impacting 75% of the tribal ranchers. Range units that include bottomlands can be [eased for twice as much as units that just offer the upper tier barren grazing areas. The problem for the ranchers caused by the loss of the bottomlands is summed up in the following quote. "But no person could come to me and get me to put any kind of price on cutting that ranch in two and selling just the bottom land, and leaving me with the breaks and upland, because I would only have a part-year operation. I would be able to run some cattle there and maybe graze them in the summer when I could water them in dams. But I would not have any place to take them in the winter. I would not have any feed, any place to put up hay, or the natural shelter or water for winter." This quote is not by a tribal member, but by the late Senator Case of South Dakota, who was a rancher and provided this testimony at the 1 954 Senate Hearing on the original Settlement Bill.

The truth of his statement was starkly demonstrated during the record setting winter snowstorms of 1996-97. Cheyenne River Sioux Tribal members lost 30,000 head of livestock, including 25,000 head of cattle. The reason was that the cattle had no shelter and no grass they could get to during the storms. Two thirds of cattle that perished were in the grazing units that had been connected to

bottomlands prior to the construction of the Dam. If the bottomlands had been available, the vast majority of those cattle would have survived. At a cost of \$600 a head, the Tribal members suffered over \$15 million in losses just in that one winter. While other winters have not been as severe, our tribal members lose, on the average, about five hundred cattle every normal winter because of the lack of shelter, at a cost to the members of \$300,000 a year. This cost will go on forever. Under the 1954 settlement agreement, the BIA was supposed to build pole shelters in the uplands for the cattle. They built only a small fraction of those that had been promised; though it probably has not made much of a difference because the shelters are of minimal benefit.

Senator Case stated that he would not sell bottomlands at any price when the effect would be to leave only uplands. Yet not only were their bottom lands taken from the Tribe against its will, the Army Corps of Engineers and Congress did not include a penny in the 1954 settlement legislation to compensate the Tribe for the severe impact the loss of the bottom lands had on the value of the 800,000 upland acres and the Tribe's overall ranching operation.

- The Tribe lost 90% of its timber. In addition to providing for a small amount of commercial timbering, this provided tribal members with logs for houses, posts for fences, poles for corrals and other structures, and firewood for their houses. As a result, the tribal members now have to purchase wood for these purposes and will continue to have to do so forever.
- The bottomlands provided good water for people and for livestock. Now that the tribal members are relegated to the barren uplands, water is scarce and what water can be found is of poor and brackish quality.
- The tribal members lost the place they went to hunt, to pick wild fruit, to carry out their ceremonies, and to engage in recreational activities. In effect, it destroyed the portion of their land that was most valuable and most important to their lives and culture, leaving them to try to carve out a new life in open wind-swept prairies that offer none of these amenities of life.

2. Cheyenne River Sioux Tribal Members Have Received None of the Benefits that the Dam and Reservoir Brought to all of the Other Residents of the Missouri River Basin

Congress approved the Pick-Sloan Plan because it promised to bring five significant benefits to the residents of the Missouri River Basin. Many of the residents have had their economic situation and the quality of their lives improved as a result of these benefits. However, the Tribe and its members have not receive a single one of these benefits:

1. Low cost hydropower -- The project brought low-cost hydropower to the area. Many of the communities in South Dakota received allocations, which they have been able to turn into sources of revenue for their governmental activities. The Tribe asked for such an allocation during the original settlement negotiations but was turned down. Nor did it even receive low-cost power for its own use. To the contrary, in the midst of all of this low-cost hydropower, the cost of electricity on the Cheyenne River Sioux Reservation has been among the highest in the entire country, burdening already impoverished tribal membership and serving as a barrier to economic development. (We will finally be receiving a small amount of the power

same time in the next decade.)

2. Flood Control -- None of the flood control aspects of the project benefit the Tribe, since it had never suffered flooding problems from the Missouri River.
3. Navigation -- The Tribe receives no benefits from the increased navigation the Project provided on the River.
4. Recreation -- Rather than providing increased recreational opportunities for the Tribe, the Project decreased them because it took away access to the River from tribal lands.
5. Irrigation -- No water from the Project is used to irrigate any land of that Tribe or its members.

3. The Tribe was Grossly Under Compensated for the Land that was Taken From It

The Army Corps of Engineers actually took possession of the Tribe's land and began construction five years before Congress enacted legislation taking the land from the Tribe. The Corps' action was clearly illegal since only Congress has the authority to take tribal land. But by this de facto taking, the Corps created enormous pressure for legislation to legitimize their illegal action. This pressure, coupled with the Corps goal of minimizing costs in order to show a positive cost-benefit ratio, resulted in what even neutral parties acknowledge was severe under compensation to the Tribe. The Tribe was not a willing seller of its land. The amount of compensation authorized by the Congress was 60% lower than the amount the Tribe requested, Yet, compensation in such cases is generally based on what a willing buyer would pay to a willing seller.

One rough measure of the under-compensation is that non-Indians, who did not lose any communities to the reservoir, received an average of \$49.22 per acre for their agricultural land, while the Tribe, which had its headquarters town and three other communities flooded and its entire way of life undercut, received only \$21.49 per acre. Another measure is the comparison with the Standing Rock settlement. As pointed out by historian Michael Lawson; 'The Standing Rock Sioux received more money than the Cheyenne River Sioux for indirect damages and rehabilitation, even though the latter tribe lost nearly twice as much land and underwent a much more drastic relocation.... The difference between the two settlements...reflected most clearly the federal government's arbitrariness in arriving at an agreement with the two tribes.' (Dammed Indians' p. 122)

When the final bill was reported out of Congress in 1954, the Tribe was shocked. The amount of compensation it provided was based on incorrect assumptions that the Tribe was never given an opportunity to address, such as the failure to consider the impact of the loss of the bottom lands on the value of the 800,00 acres of upper tier lands. When the Tribe learned of the minimal amount of compensation the bill provided, it began a campaign to persuade President Eisenhower to veto the bill. They were dissuaded from doing so by the late Senator Karl Mundt, who, speaking on behalf of the South Dakota Congressional Delegation, acknowledged that the settlement was less than it should have been, but promised to remedy the problem in the next session of Congress. 'If, the Tribe would accept the bill as it is now before the President, they

would have the assurance that the South Dakota Congressional Delegation would cooperate fully to see that the necessary amendments to the law are introduced and acted upon during the next Congress.... You may be sure that we will all do our level best to finish the job." (Letter from Karl E. Mundt to Tribal Chairman Frank Ducheneaux, August 30, 1954.) No such amendments were ever acted upon. Congress now has the opportunity to keep Senator Mundt's commitment to the Tribe, by enacting the proposed legislation.

THE PROCEDURES IN THE BILL FOR THE MANAGEMENT AND EXPENDITURE OF THE COMPENSATION FUNDS PROVIDED TO THE TRIBE REFLECT CONGRESS' SELF-DETERMINATION AND SELF-GOVERNANCE POLICIES

As is the case for the other Missouri River Basin settlement acts, S. 1905 permits the Tribe to spend the interest from the \$290,722, 958, but not the principal, which becomes a permanent fund in the Treasury. However, there are several provisions of the bill that differ from the earlier legislation. I would like to share with you why we think these provisions are improvements over the earlier legislation.

First, the bill (at section 3(3) AND 4(b)(1)) provides that the funds are to be placed in the omnibus, consolidated Treasury Fund that is used by the Office of Trust Fund Management (OTFM) for all tribal trust funds. Within that fund, it is credited to the account of the Cheyenne River Sioux Tribal Recovery Account, a dual cash account that automatically separates principal from interest. The previous settlement legislation had convoluted arrangements under which the settlement money was placed in a completely new Fund that the legislation instructed to be established in the Treasury. Then the Secretary of the Treasury had to separate out the interest and transfer it to OTFM, which had to open a new account so it could disburse the interest. These additional steps were cumbersome, created unnecessary work for Treasury and OTFM, and made it more difficult for the tribes to draw down their money.

I am a member of the Advisory Board to the Special Trustee for Indian Trust Funds and thus spend a great deal of time with OTFM officials. I have been told by OTFM that the approach set out in S. 1905 enables OTFM to manage the monies in the same way it manages all tribal trust funds. It also will make it much easier for the Tribe to draw down its money as interest accumulates. (As an aside, as a member of the Advisory Board, I have been impressed by the improvements at OTFM and feel very comfortable having OTFM managing our funds.)

Secondly, I have been told by the other tribes that have already received their corrective compensation that the Treasury Department has unjustifiably delayed, for many months, transferring the tribes' share of WAPA's profits to the tribes' accounts each year. This causes the tribes to lose interest money they properly should have been earning. At the same time, Treasury benefits from the income earned as a result of the delayed transfer. It is a clear violation of trust law for the Treasury Department, acting as a trustee for the tribes, to make money at the expense of the tribe when carrying out its fiduciary duties. S. 1905 therefore provides that if the funds are not transferred into the Tribe's account within 60 days after the end of the fiscal year, Treasury is required to pay interest to the Tribe, beginning on the 61st day, at Treasury's overnight rate.

Third, like the previous settlement acts, S. 1905 requires the Tribe to develop a plan describing how it will use the interest from the Fund. The monies may only be used for economic development, infrastructure development and/or educational, health, recreational and social welfare purposes. It also provides that none of those monies may be used to make per capita payments.

However, unlike these other acts, S. 1905 does not require the BIA to approve the Tribe's plan or its withdrawals of money from the Fund. At a time when the Self-determination Act and the Self-Governance Act authorize tribes to manage Federal dollars without BIA control, there is no justification for requiring BIA approval on how a Tribe spends its own money. BIA approval is a paternalistic concept that has outlived whatever usefulness it may have had. The Tribal Council is responsible to the members of the Tribe, not to the BIA. S. 1905 contains provisions that insure the members are aware of activities involving the use of funds provided by this bill. For example, section 4(f) requires the Tribal Council to make a copy of the plan available to the members before the plan becomes final. It also requires the Tribe's auditors, when conducting our annual audit, to opine on whether the Tribe has spent the monies it has withdrawn from the Fund in a manner that is consistent with requirements of the plan. The audit is a public document available to all tribal members.

CONCLUSION

In conclusion, I would once again like to thank the members of this Committee for considering S. 1905 today. It is a bill that is consistent with the earlier settlements involving Pick-Sloan, it reflects the principles of self-determination, and it will enable the Tribe to move towards the economic self-sufficiency that was setback so severely by the heavy hand of Pick-Sloan almost 45 years ago. I would also like to once again thank the Senators from South Dakota, Senator Daschle and Senator Johnson, for all of the hard work they and their staffs devoted to getting this legislation before the Congress. I look forward to joining with you later this year in celebrating the passage of this bill.