

**TESTIMONY**

**ON S. 374**

**TRIBAL PARITY ACT:**

**TO PROVIDE COMPENSATION TO THE LOWER BRULE  
AND CROW CREEK SIOUX TRIBES OF SOUTH DAKOTA  
FOR DAMAGE TO TRIBAL LAND CAUSED BY PICK-  
SLOAN PROJECTS ALONG THE MISSOURI RIVER**

**BEFORE THE**

**COMMITTEE ON INDIAN AFFAIRS**

**UNITED STATES SENATE**

**JUNE 14, 2006**

**SUBMITTED BY**

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Mr. Chairman and members of the Committee, I am grateful to have the opportunity to provide testimony today in regard to Senate Bill S. 374, the Tribal Parity Act. With your permission, Mr. Chairman, I would like to provide my written statement for the hearing record and then summarize my findings.

My name is Michael Lawson and I am a historical consultant with Morgan Angel & Associates, a public policy consulting firm here in Washington. In 2003, I authored a report entitled *Parity Compensation for Losses from Missouri River Pick-Sloan Dam Projects*. This report provided the factual basis for Senate Bill S. 1530, the initial version of the Tribal Parity Act introduced in the 108th Congress.

Senators Thune and Johnson of South Dakota reintroduced this legislation in the first session of the 109th Congress. Subsequently, Senator John McCain, the Chairman of this Committee, requested the General Accountability Office to assess whether my report followed the approach recommended by GAO in two prior reports involving additional compensation to tribes impacted by the Pick-Sloan dams on the Missouri River.

In 1991, the GAO advised Congress to consider an approach based on a range of compensation in regard to legislation for the Three Affiliated Tribes and Standing Rock Sioux Tribe of North Dakota. In 1998, it suggested the same approach for legislative compensation for the Cheyenne River Sioux Tribe of South Dakota. The approach the GAO recommended in both cases was to compensate the Tribes based on the difference between the amount the Tribes requested for their damages and the amount that Congress eventually provided to them in initial settlements. In order to establish the current value of the differences, the GAO suggested a range of two multipliers. The high range

calculated the value based on the annual interest rate on AAA corporate bonds. The low range established current value based on the annual inflation rate.

The GAO report to Senator McCain issued on May 19, 2006 was highly critical of my study. It concluded, among other things, that my report did not follow the previous GAO approach because it did not base the difference on the Tribes' "final asking price" or "last best offer." I did not use the Tribes' final asking prices as the basis of difference in part because the GAO previous two reports did not clarify that its references to tribal prices "at the time of the taking" was to be understood as meaning the "final asking price." In its most recent report, the GAO admits that it did not use the phrase "final asking price" in its two prior reports.

I also did not use the Tribes' final asking prices because I do not believe that these so-called "last best offers" provide a fair standard on which to base additional compensation. It is my view that settlements based on final asking prices award the Tribes not for the fair market value of their losses but rather for the ability of their tribal leaders to negotiate. The Cheyenne River Sioux Tribe, for example, has received the greatest amount of additional compensation (\$290,722,958) in large part because their negotiators back in 1954 held firm to a higher asking price. This created a greater amount of difference between what was asked for and what was received, and it is this difference that is the basis of the GAO's approach.

Placed in a difficult position, the Lower Brule and Crow Creek tribal negotiating committees used a different negotiating strategy. They had never before been required to negotiate values that involved such large sums of moneys or confront issues that would have such a huge impact on their communities and daily lives. They were provided with

only limited professional assistance. Yet, at every turn, they were pitted against government lawyers, accountants, appraisers and others whose goal was to negotiate the lowest price possible. They were also largely at the mercy of their local Congressional delegation, which did not then view Native Americans as a significant portion of their constituencies.

As I pointed out in my April 27, 2006 response to the GAO's draft report, I also did not use the final tribal asking prices as a starting point because my historical research indicated that those final tribal offers were made under conditions of extreme duress. The historical record makes it clear that Tribal representatives were continually pressured to resign themselves to the Government's "take it or leave it" posture.

Congress in 1952 stipulated by law that negotiations with the Tribes would not be allowed to interfere with the scheduled construction of the dam projects. Thus, the Tribes were not in a position to hold firm to an asking price or walk out of negotiations if they were dissatisfied. Their lands were going to be flooded, and their tribal members relocated whether or not they agreed to settlement terms.

By the time of the Tribes' "final offers" in March 1958, which the GAO uses as a starting point for analysis, the damages from the Fort Randall project had already been incurred. The Army had closed the floodgates of the dam in 1952 and had proceeded to condemn tribal lands illegally without Congressional authorization. The Fort Randall Dam had been completed and dedicated nineteen months earlier. This was obviously not a negotiating situation in which the parties had equal standing. In essence, the Tribes had no bargaining power.

The GOA report was also critical that I used only the high range of their approach, based on the annual interest yield of AAA corporate bonds and did not project the low range based on the annual inflation rate. I did not use the annual inflation rate as a range of compensation because Congress has established no precedent for basing additional compensation on that rate. In the three cases where Congress has applied the GAO approach (Three Affiliated Tribes, Standing Rock Sioux, and Cheyenne River Sioux), it has always awarded compensation at a rate that was higher than the annual inflation rate.

I also did not use the annual inflation rate as a lower range of compensation because present values calculated at that rate are less than the amounts the Tribe's have already received. Zero may represent the lower end of a range, but it does not constitute compensation because it has no value. Faced with a high range of value that Congress has already applied to similarly situated tribes and a low range that it has not applied and which, in this case, has no value, I did not think it unreasonable to not include the lower range.

The GAO report stated that my calculations of the total amounts requested in the current bill incorrectly adjusted for the additional compensation received by the Crow Creek Sioux Tribe in 1996 and by the Lower Brule Sioux Tribe in 1997. I acknowledged these miscalculations in my April 27, 2006 response to the GAO's draft report and have adjusted the amounts accordingly. As a result, the amount for the Lower Brule Sioux Tribe in Section 3 of Senate Bill S. 374 should be **\$169,122,085** instead of **\$186,822,140**.

The amount for the Crow Creek Sioux Tribe in Section 4 of the bill should be **\$96,722,084** rather than **\$105,917,853**.

These new amounts reflect both my adjustment in the calculations and the current (2006) value of the differences.

The table below outlines how these amounts were determined.

**TABLE 1: Compensation Based on Present Bill Adjusted to Reflect Accurate Interest Rate Calculation**

	<b>Crow Creek</b>	<b>Lower Brule</b>
<b>Fort Randall Costs and Expenses Difference</b>	\$709,208.61	\$1,170,667.00
<b>Fort Randall Difference in 1996-1997 Dollars</b>	\$13,368,444.64	\$23,688,898.72
<b>Big Bend Costs and Expenses and Rehabilitation Difference</b>	\$3,360,403.50	\$5,550,233.00
<b>Big Bend Difference in 1996-1997 Dollars</b>	\$53,392,328.20	\$94,588,086.19
<b>Total Difference in 1996-1997 Dollars</b>	\$66,760,772.84	\$118,276,984.90
<b>Minus Amount Provided by Congress, 1996/1997</b>	- \$27,500,000.00	- \$39,300,000.00
<b>Difference Remaining in 1996-1997</b>	\$39,260,772.84	\$78,976,984.90
<b>Difference Remaining in 2006 Dollars**</b>	<b>\$69,222,084</b>	<b>\$129,822,085</b>

\*Difference in 1996-1997 Dollars and 2006 Dollars is calculated by adding to the principal difference the annual average rate of interest earned on investments in AAA corporate bonds during the time period. The new totals for S. 374 represent the amounts of difference in 1996-1997 dollars plus the differences in 2006 dollars. For example, the difference remaining in 2006 dollars for Crow Creek (\$69,222,084), when added to the total difference in 1996-1997 dollars (\$66,760,773), equals \$135,982,857. \*\*Rounded to nearest dollar.

It is my view that the tribal asking prices I used in my report to determine the amount of differences more accurately reflect what the Tribe's considered to be the fair market value of their losses than do their final asking prices or last best offers. For

example, the tribal negotiating committees developed the tribal asking prices I used for Fort Randall damages over an eighteen-month period. Their estimates of damages were based on U.S. Department of Agriculture land values, U.S. District Court land settlements, and other data on the value of similar bottomlands and natural resources. Similarly, the tribal asking prices I used for Big Bend damages were based on estimates developed by a highly qualified and experienced appraiser familiar with local land and resource values.

The tribal prices I used in my report also fall within the mid-range of the Tribe's total requests. While they do not consistently represent the tribe's final asking prices, neither do they represent the totality of the highest prices the Tribes requested during the long course of their negotiations.

I concluded in my 2003 report that additional compensation for the Lower Brule and Crow Creek Sioux Tribes was appropriate and necessary if the United States was ever to provide equity to the Missouri River tribes impacted by the Pick-Sloan dams. The members of these tribes sacrificed much so that many other citizens of the Northern Plains might enjoy the benefits of increased electrical power, flood control, and recreational opportunities provided by the Pick-Sloan projects.

As a result, it is my view that Senate Bill S. 374 offers a fair and reasonable approach to providing additional compensation to these two Tribes. The amounts requested in this bill also fall within the mid-range of possible alternative approaches.

In my April 27, 2006 response to the GAO's draft report on this bill, I outlined three alternative approaches for providing additional compensation. I have included these three alternatives in the attached table (Table 2), as well as two others that are based

on the GAO's recommended alternative ranges. One uses the Tribe's final asking price as the basis of difference and calculates the current value using the annual average corporate bond interest rate. The other uses the tribal asking prices that serve as the basis of the current bill and calculates the present value using the average annual inflation rate.

The spectrum of these alternative approaches ranges from \$0 to in excess of \$432 million. In comparison, the adjusted amounts requested in Senate Bill S. 374 fall significantly below the mid-point of this range.

For the reasons I have stated, I urge the Committee to support Senate Bill S. 374 as amended by the adjusted calculations. In my considered opinion, this legislation represents a fair and final compensation package. It also provides a just conclusion to an extremely difficult chapter in the history of the relationship between the United States and the Crow Creek and Lower Brule Sioux Tribes.

This concludes my remarks. I would be happy to answer any questions you may have.



**Table 2: Alternatives for Additional Compensation**

	<b>I. Based on Current Bill Differences Calculated at Annual Inflation Rate</b>	<b>II. GAO Suggested High Range Based on Tribes' Final Asking Price</b>	<b>III. Based on Parity with Cheyenne River Sioux Settlement of 2002</b>	<b>IV. Based on Current Bill Adjusted to Reflect Corrected Calculation</b>	<b>V. Based on Parity with Santee Sioux of Nebraska Settlement of 2000</b>	<b>VI. Based on Tribes' Highest Asking Prices</b>
<b>LOWER BRULE SIOUX TRIBE</b>	\$0	\$2,556,758	\$20,690,688	\$129,822,085	\$138,368,976	\$432,547,830
<b>CROW CREEK SIOUX TRIBE</b>	\$0	\$0	\$11,572,974	\$69,222,084	\$93,893,940	\$70,685,862

**Box I.** Calculations of the amount of difference in the current bill using the low range of the GAO approach, based on the average annual inflation rate, indicate that no additional compensation would be due to either the Lower Brule or Crow Creek Sioux Tribes. The value of the amount of difference in the current bill for the Lower Brule Sioux Tribe calculated at the annual inflation rate is \$35,913,851 in 1997 dollars (\$6,451,456.91 for FR plus \$29,462,394.45 for BB). This total is \$3,386,149 less than the \$39.3 million the Tribe received in 1997. The value of the amount of difference in the current bill for the Crow Creek Sioux Tribe calculated at the annual inflation rate is \$21,257,556 in 1997 dollars (\$3,820,522.75 for FR and \$17,437,034.19 for BB). This is \$6,242,444 less than the \$27.5 million the Tribe received in 1997. Calculation of the GAO's final tribal asking price differences at the annual rate of inflation would also indicate that no additional compensation is due the Tribes.

**Box II.** Calculations of the GAO's "Final Asking Price" criteria at the high end of its range (based on the average annual yield on AAA corporate bonds) indicate that the Lower Brule Sioux Tribe is still entitled to a limited amount of additional compensation. The value of the GAO's difference in 1997 was \$40,855,398. The amount of additional compensation provided by Congress to the Lower Brule Sioux Tribe in 1997 was \$39,300,000. The difference between these two amounts is \$1,555,398. If the average annual interest rate on AAA corporate bonds is added to the amount of difference, its value in 2006 dollars is \$2,556,757.67.

**Box III.** As an alternative for equitable additional compensation, the Lower Brule and Crow Creek Sioux Tribes could be granted parity with the compensation on a per-acre basis provided to the Cheyenne River Sioux Tribe. Congress has established the precedent for providing additional compensation to the Missouri River Tribes on a per-acre basis in the trust funds it established for the Crow Creek Sioux Tribe in 1996, the Lower Brule Sioux Tribe in 1997, and the Yankton Sioux Tribe and Santee Sioux Tribe of Nebraska in 2002. Thus, it has provided additional compensation on a per-acre basis to more Missouri River tribes (four) than it has applied the GAO approach (three tribes). The per-acre value of the total compensation received by the Cheyenne River Sioux Tribe is \$2.886 (\$301,366,972 divided by 104,420 acres). The difference between the overall compensation provided to the Crow Creek Sioux Tribe and that provided to the Cheyenne River Sioux Tribe is \$742 per acre. Multiplying this difference by the number of acres lost by the Crow Creek Sioux (15,597) results in the total listed in Box 3 for Crow Creek. The difference between the overall compensation provided to the Lower Brule Sioux Tribe and that provided to the

Cheyenne River Sioux Tribe is \$928 per acre. Multiplying this difference by the number of acres lost by the Lower Brule Sioux (22,296) results in a total listed in Box 3 for Lower Brule.

**Box IV.** This is the amount of additional compensation calculated in Table 1.

**Box V.** As an alternative to parity with the Cheyenne River Sioux settlement, the Crow Creek and Lower Brule Sioux Tribes could be granted parity with the Santee Sioux settlement of 2002. The Santee Sioux Tribe of Nebraska received the highest amount of total compensation on a per-acre basis (\$8,164 per acre) (\$4,841,010 divided by 593 acres). As noted above, Congress has provided additional compensation on a per-acre basis to more Missouri River tribes (four) than it has applied the GAO approach (three tribes). The difference between the overall compensation provided to the Crow Creek Sioux Tribe and that provided to the Santee Sioux Tribe is \$6,020 per acre. Multiplying this difference by the number of acres lost by the Crow Creek Sioux (15,597) results in a total listed in Box 5 for Crow Creek. The difference between the overall compensation provided to the Lower Brule Sioux Tribe and that provided to the Santee Sioux Tribe is \$6,206 per acre. Multiplying this difference by the number of acres lost by the Lower Brule Sioux (22,296) results in a total listed in Box 5 for Lower Brule.

**Box VI.** A sixth alternative for the Crow Creek and Lower Brule Sioux Tribes would be to base additional compensation on the difference between the highest amounts asked for by the Tribes for direct and indirect damages from the Fort Randall and Big Bend projects, negotiating expenses, and rehabilitation and the actual amounts provided to the Tribes by Congress in 1958, 1962, and 1996-97. The amounts listed in Box VI indicate the current value of differences based on the Tribes' highest asking prices.