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PROVIDING CERTAIN BENEFITS OF THE PICK-SLOAN MISSOURI RIVER BASIN PROGRAM TO THE LOWER BRULE SIOUX TRIBE, AND FOR OTHER PURPOSES

NOVEMBER 8, 1997.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 156]

The Committee on Indian Affairs, to which was referred the bill (S. 156) to provide certain benefits of the Pick-Sloan Missouri River Basin Program to the Lower Brule Sioux Tribe, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 156 to provide certain benefits to the Lower Brule Sioux Tribe which were authorized in Public Law 87–735 to provide for the mitigation of the effects of the Fort Randall and Big Bend Dam projects on the tribe's reservation, but which the United States failed to provide in whole or in part.

BACKGROUND

The Lower Brule Sioux Tribe ("the Tribe") resides on a 230,000 acre reservation in central South Dakota. The Missouri River overlies the reservation's eastern boundary, and its rich bottomlands provided the Tribe for generations with food, water, wood for shelter and fuel, forage for cattle and wildlife, and plants used for medicinal purposes. Construction of the Fort Randall and Big Bend Dams, authorized by the Flood Control Act of 1944, resulted in the inundation of over 22,000 acres of these bottomland resources and

the permanent loss of the subsistence economy based on those resources.

The Fort Randall Dam, which the U.S. Army Corps of Engineers ("the Corps") began constructing in 1946, flooded 7,997 acres of bottomland, over half of which was sheltered pastureland. Thirty-five families, constituting 16 percent of the resident tribal membership, were relocated against their wishes. Although the town of Lower Brule, the population center of the Lower Brule Reservation, was saved, the Tribe was greatly affected by the flooding of the community of Fort Thompson, on the Crow Creek Reservation directly across the Missouri River from Lower Brule. The Bureau of Indian Affairs (BIA) agency headquarters at Fort Thompson, which served both tribes, and its subagency in the town of Lower Brule, were combined and relocated off the reservations in Pierre, South Dakota, 60 miles from Lower Brule. Similarly, the Indian Health Service (IHS) hospital at Fort Thompson was moved off the reservation to Chamberlain, South Dakota, 30 miles from Lower Brule, creating great hardship on the Tribe, whose transportation facilities were severely limited.

The Big Bend Dam, which the Corps began constructing in 1960, resulted in the flooding of another 14,299 acres on the Lower Brule Reservation, the relocation of the town of Lower Brule, and the displacement of 62 families—approximately 53 percent of the resident tribal population. The government's handling of the Fort Randall relocations was not well-thought out, as families on both the Crow Creek and the Lower Brule reservations were relocated on lands within the projected area of the Big Bend Dam. As a result, the affected families were subsequently forced to relocate a second time.

In 1962, the Congress enacted the Big Bend Recovery Act (Public Law 87–735), which provided for the purchase of land for the Big Bend Dam two years after construction began. This Act acknowledged the adverse impacts of the Fort Randall and Big Bend projects on the Lower Brule people, and directed the Corps to replace lost infrastructure, tribal and Federal government facilities, schools, hospitals, a community center, roads and utilities. However, as a result of subsequent funding decisions by the Corps and a lack of coordination between the Corps and the BIA, these directives either were carried out inadequately, or not at all.

The benefits that S. 156 would provide to the Tribe are similar to those provided for in the Three Affiliated Tribes and the Standing Rock Sioux Tribe Equitable Compensation Act of 1992, Public Law 102–575. That Act established a $149,200,000 trust fund for the Three Affiliated Tribes of the Fort Berthold Reservation and a $90,600,000 trust fund for the Standing Rock Sioux Tribe. The trust funds were funded with receipts of deposits from the Missouri River Basin Pick-Sloan program. The amount of compensation was based on recommendations provided after an extensive study by a joint Federal-tribal advisory committee, known as the Garrison Unit joint Tribal Advisory Committee,which analyzed the impacts of the United States government's taking of more than 200,000 acres of tribal lands for the Garrison Dam and Reservoir as part of the Missouri River Basin Pick-Sloan program.

The provisions of S. 156 are also similar tithe Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996, Public

Law 104–223. This Act established a $27,500,000 trust fund, also funded with receipts form deposits from the Pick-Sloan program, for the Crow Creek Sioux Tribe, which suffered the loss of more than 15,000 acres that were inundated by the Fort Randall and Big Bend dams. In the case of the Crow Creek Sioux Tribe, as with the Three Affiliated Tribes and the Standing Rock Sioux Tribe, the Congress found that the compensation payments and mitigation funds that were expended on their behalf were significantly less than the value of the actual damages suffered by the tribes and the actual cost of replacing the lost facilities that the Untied States had promised the tribes.

S. 156 establishes a Lower Brule Tribe Infrastructure Development Trust Fund in the U.S. Treasury in which will be deposited, on an annual basis beginning in fiscal year 1998, an amount equal to 25 percent of the receipts of the deposits to the Treasury for the preceding fiscal year made by the integrated programs of the Missouri River Basin Pick-Sloan program, administered by the Western Area Power Administration (WAPA), until the aggregate of the amounts deposited is equal to $39,300,000. The Secretary of the Treasury is authorized and directed to invest these amounts in interest-bearing obligations of the Untied States or in obligations guaranteed as to both principal and interest by the United States.

Once the aggregate amount has been deposited in the Fund, the Secretary of the Treasury is authorized to transfer any interest which has accrued on the amounts deposited in the Fund into a separate account, and to transfer any funds in that account to the Secretary of the Interior for purposes authorized in S. 156, without fiscal year limitation on the availability of such funds. In turn, the Secretary of the Interior is authorized to make payments to the Tribe. The Tribe can use the fund only for carrying out projects and programs pursuant to a plan for socioeconomic recovery and cultural preservation. No part of these payments may be distributed to any member of the Tribe on a per capita basis.

The plan is to be developed by the Tribe, in consultation with the Secretary of the Interior and the Secretary of Health and Human Services, no later than two years after the enactment of S. 156. The plan must include the following programs and components: (1) an educational facility to be located on the Tribe's reservation. (2) a comprehensive inpatient and outpatient health care facility to provide essential services that the Secretary of Health and Human Services determines are needed and which are unavailable through existing facilities of the IHS on the Lower Brule Reservation; (3) the construction, operation, and maintenance of a municipal, rural and industrial water system for the reservation; (4) recreational facilities suitable for high-density recreation at Lake Sharpe at Big Bend Dam and at other locations on the reservation; and (5) other projects and programs for the educational, social welfare, economic development, and cultural preservation of the Tribe as the Tribe considers to be appropriate. The Committee's hearing record includes a detailed history, developed by Historical Research Associates, Inc.,[1] of the impacts of the Fort Randall and Big Bend dams

[1] An Analysis of the Impact of Pick-Sloan Dam Projects on the Lower Brule Sioux Tribe, by Michael L. Lawson, Ph.D., 1996.

on the Lower Brule Sioux people, the legal battles over the Corps' efforts to take Indian lands by eminent domain for Missouri River dam construction, and the efforts by the Lower Brule Sioux and other Sioux Tribes affected by the dams first to stop construction, and failing that, to obtain compensation for damages and relocation costs. A synopsis of that history is set forth below.

SYNOPSIS OF HISTORICAL BACKGROUND

The Pick-Sloan Project, a compromise of the separate water resource programs developed by Colonel A. Pick of the Corps of Engineers and William G. Sloan of the Bureau of Reclamation, concerned the development of flood control measures to protect the lower Missouri Basin ("Pick-Plan") and the construction of irrigation facilities to the upper Missouri Basin ("Sloan Plan"), and was developed in response to the urgent demand for federal action that followed the devastating Missouri River floods of 1942 and 1943.

Officially labelled the Missouri River Basin Development Program, the Pick-Sloan Plan was gradually expanded to include the construction of 150 multiple-purpose reservoir projects. In addition to flood control, these dams were designed to provide the benefits of hydroelectric power, navigation, recreation, and improved water supplies. The backbone of the Pick-Sloan Plan was provided by the six massive dams constructed by the Corps on the main stem of the Missouri River, two of which (Fort Peck and Oahe) rank among the largest earthen dams in the world. Together, these six projects inundated over 550 square miles of Indian land and displaced more than 900 Indian families.

Many of the problems encountered by the affected tribes and their tribal members came as a result of the United States government's failure to provide an adequate administrative structure for the Pick-Sloan Plan. In response to the apparently overwhelming opposition to the creation of a Missouri Valley Authority, the Truman Administration placed the program under the rather loose-knit coordination of the Missouri Basin Inter-Agency Committee (MBIAC), a non-statutory body.

The MBIAC took a piecemeal approach to Missouri Basin problems and was preoccupied with engineering methods that did not allow for adequate consideration of such important human factors as the condemnation of farms and ranches and the relocation of Indian families. The Corps had little in its training or background that prepared it to deal knowledgeably with Native Americans, and the Federal agency usually charged with that responsibility, the BIA, was hampered during this period by a severely-reduced budget and the threat of being abolished altogether by those in Congress who supported the termination of the government's trust responsibility for Indian lands and resources.

While a more centralized administrative structure, such as that proposed for the Missouri Valley Authority, might have received an annual block appropriation for all of its activities and functions, the numerous agencies involved with Pick-Sloan had to deal with several separate committees in Congress for funding of their particular part of the overall program. This meant that the Corps often received generous amounts for dam construction during years when the Sioux tribes were not able to receive appropriations for their

necessary relocation or compensation for their losses. Because of this lack of coordination, tribal members were denied most of the important benefits offered by Pick-Sloan and the efforts at reconstruction fell far short of their needs.

The Sioux Tribes knew little of the Pick-Sloan Plan until long after it had been approved. Although existing treaty rights provided that land could not be taken without their consent, none of the tribes were consulted prior to the program's enactment. The BIA was fully informed, yet made no objections to the plan while it was being debated in Congress in 1944. The BIA did not inform the tribes of the damages they would suffer until 1947. The Corps, assuming it could acquire the Indian land it needed through Federal powers of eminent domain, began construction on its dams, including those actually on reservation property, before opening formal negotiations with the tribal leaders.

In 1947, the BIA made its first effort to represent tribal interests within the MBIAC. To assess fully the damages to Indian land resulting from Pick-Sloan, the BIA organized the Missouri River Basin Investigations Project (MRBI) within the structure of its regional office at Billings, Montana. Initially this agency was given the task of conducting both extensive reservation surveys and appraisals to estimate replacement costs as well as social and economic damages resulting from inundation. Later, the MRBI was assigned the task of helping the tribes gain equitable settlements and to assist relocation and reconstruction activities.

By the time the first MRBI staff members reached the field, the Corps had spent approximately $28 million on the preliminary construction of three of its main-stem projects, including the Fort Randall Dam. A significant portion of the reservoir to be developed behind Fort Randall Dam, Lake Francis Case, would flood the land and resources of the Lower Brule Reservation. Initial MRBI findings were not published until 1949, by which time the Corps had spent an additional $37.5 million on construction. Yet, it was not until these early MRBI appraisals were made available that the Lower Brule Sioux learned the full effect of Pick-Sloan on their reservation.

Construction of the Fort Randall Dam began in May of 1946. This project was located downstream of the Lower Brule Indian Reservation, 100 miles southeast of Lower Brule and just above the Nebraska line in south-central South Dakota. When it was completed in 1949, Fort Randall provided a water storage capacity of 5.7 million acre-feet and a maximum hydroelectric power output of 320,000 kilowatts. The reservoir behind the dam extended over 107 miles. Fort Randall was built with compacted earth fill, as were other Corps projects on the Missouri River. Like the Garrison and Oahe dams, it featured a relatively high-head dam (160 feet) and a chute-type spillway designed to release excessive flows. Although in 1944 the Corps estimated this project would cost $75 million, it ultimately cost more than $200 million.

The Fort Randall Dam flooded 22,091 acres of Sioux land and dislocated 136 Indian families. The flooding of 7,997 acres of the Lower Brule Reservation caused the dislocation of 35 Indian families or approximately 16 percent of the resident population. Nearly one-half of the lost acreage was sheltered pastureland. The Tribal

Livestock Enterprise, the reservation's primary industry, suffered a serious blow.

The complete inundation of Fort Thompson, the largest community on the Crow Creek Reservation immediately across the Missouri from Lower Brule, adversely affected the Lower Brule Tribe. The BIA agency headquarters at Fort Thompson, which served both the Crow Creek and Lower Brule tribes, and its subagency in the town of Lower Brule were combined and relocated off the reservations in Pierre, South Dakota, 60 miles from the town of Lower Brule. Likewise, the Public Health Service hospital at Fort Thompson was moved in Chamberlain, South Dakota, 30 miles from the town of Lower Brule. With the closing of the Indian boarding school at Fort Thompson, students from Lower Brule and Crow Creek were also compelled to leave the reservations to attend high school. The off-reservation facilities were now located over 80 miles from remote parts of the reservations. Tribal offices remained on Indian land but with the removal of BIA facilities it was no longer possible for the Lower Brule Sioux to take care of their BIA, public-health, and tribal business needs on the same day at the same location. For a people whose transportation facilities were severely limited, this situation created an immense hardship.

While the Lower Brule Sioux were sustaining major damages from the Fort Randall project, the Corps began work on the Big Bend Dam in September, 1959. This project was located near the new townsite of Fort Thompson on land belonging to the Lower Brule and Crow Creek tribes. The smallest of the Corps' main-stem structures, Big Bend Dam was developed primarily for hydroelectric power production. Taking advantage of the long bend in the river for which it was named, engineers built a dam that produced 468,000 kilowatts and was just ninety-five feet high.

The Big Bend project took an additional 21,026 acres of Sioux land. Of the tribes affected, the Lower Brule suffered the most damage. The flooding of 14,299 acres required the relocation of the entire community of Lower Brule to a new site one mile west of its former location. Sixty-two Indian families, comprising 53 percent of the tribal population, were displaced. Most of the timber and pastureland not already destroyed by the Fort Randall Reservoir and nearly one-half of the remaining farms and ranches were inundated. Because the Corps wanted to change the original site of the Big Bend project and waited until 1957 to select a final alternative site, families on both the Lower Brule and the Crow Creek reservations were relocated on lands within what became the taking area for Big Bend Reservoir. These tribal members were thus required to undergo the trauma of yet another move.

Because their families and most important resources were concentrated near the Missouri River, resettlement devastated affected members of the Lower Brule Sioux Tribe. The natural advantages of their former homes could not be replaced on the marginal reservation lands that remained after inundation. The shaded bottomlands had provided an environment with plenty of wood, game, water, and natural food sources. Livestock grazed on abundant grasses and took shelter under the trees. The barren upland regions to which the Lower Brule people were forced to move were

less hospitable, more rigorous, and presented far greater challenges to their survival.

The bottomlands were critically important to the way of life of the Lower Brule people. Trees along the river had provided them with their primary source of fuel and lumber. The wooded areas also provided protection from the ravages of winter blizzards and the scorching summer heat. The gathering and selling of wood helped supplement their small cash income. The flooding of the forestlands destroyed 90 percent of timber on their reservation.

The wooded bottomlands also served as a shelter and feeding ground for many kinds of wildlife. Deer, beaver, rabbits, and raccoons were abundant year-round, and numerous pheasants and other game birds wintered there each year. The hunting and trapping of this game provided the Lower Brule Sioux with an important source of food, income, and recreation. The gathering and preserving of wild fruits and vegetables was a traditional part of the culture of the Lower Brule Sioux. Traditionally, they were also used for ceremonial and medicinal purposes. Wild fruit, including chokecherries, buffalo berries, gooseberries, and currants were readily available for picking. Destruction of this environment by the Pick-Sloan dams reduced the wild game and plant supply on the reservation by 75 percent.

The loss of the bottomland grazing areas seriously set back the livestock industry on the Lower Brule Reservation. Ranching had become the primary economic activity on the reservation in the years prior to Pick-Sloan. The Tribal Livestock Enterprise maintained ranches in four locations with a total of up to 700 head of cattle. However, the progress made in establishing a tribal cattle enterprise was greatly hindered by the reservoir projects. A substantial portion of the Indian ranchers were forced either to liquidate their assets altogether or to establish smaller operations on the inferior reservation land that remained.

The upland regions also presented a stiff challenge for Indian homeowners. The nature of the soil and terrain made irrigation impractical, if not impossible, while the Pick-Sloan project flooded the most potentially irrigable lands. The Fort Randall and Big Bend projects, for example, destroyed the possibility of implementing plans proposed jointly by the BIA and the Bureau of Reclamation for sizable irrigation projects on the Lower Brule Reservation.

INITIAL EFFORTS TO ACHIEVE SETTLEMENT OF TRIBAL CLAIMS

Realizing they were powerless to stop the dams, Sioux tribal leaders were determined, nevertheless, to negotiate for payments and benefits which would allow them to fully utilize their remaining resources. In light of congressional debate over the termination of Federal trust responsibilities, they also sought compensation that might permit them to make progress toward self-sufficiency, a goal established previously by the administration of BIA Commissioner John Collier between 1933 and 1945. Thus, tribal negotiators reasoned that a generous settlement might include the development of new programs and facilities for health, education, housing, community growth, and employment. They also hoped for such direct benefits from the dam projects as low-cost electrical power, irrigation, and improved water supplies.

Recognizing its obligation to ensure that the Sioux tribes affected by Pick-Sloan received just compensation, Congress in 1950 authorized the Corps and the BIA to negotiate separate settlement contracts with representatives of the Standing Rock and Cheyenne River Sioux Tribes. In addition to providing payment for all damages, these agencies were directed to cover the costs of relocating tribal members so that their economic, social, and religious life would be reestablished and protected. Each of the agencies was required to prepare a detailed analysis of damages, and in the event that they could reach a satisfactory agreement in the field, the Congress was to legislate a final settlement.

The Tribe petitioned in 1951 for prompt enactment of similar settlement procedures for their negotiations, but Congress did not act on their request until 1954. In the meantime the tribes were not idle. Meetings were held on the reservations to discuss contract terms, negotiating committees were appointed, and contracts for legal counsel were finally approved. Damage appraisals were prepared by both the Corps and the BIA; MRBI staff members conducted socioeconomic surveys; tribal lands were inspected by Indian Commissioner Dillon S. Meyer; and a contract for legal counsel was finally approved by the BIA. The Lower Brule Sioux retained Marcellus Q. Sharpe, a former governor of South Dakota, as their attorney. As chairman of the Missouri River States Committee, he had been a leading advocate of the Corps' main-stem Missouri River projects during the 1944 congressional debate on the Pick-Sloan Plan.

In 1951, the BIA announced that because of the Fort Randall project it planned to move its facilities at Fort Thompson, which served both the Crow Creek and Lower Brule Tribes, to the non-Indian community of Chamberlain, South Dakota. It also proclaimed that all schools on the reservations would be closed and students would be transferred to nearby public institutions. Hospital facilities at Fort Thompson had already been moved to Chamberlain the previous year.

The Tribe vehemently opposed those decisions, which it viewed as an initial step toward termination of Federal trust services. Tribal leaders protested that the relocation plan would create undue hardship. While Chamberlain was much closer to Lower Brule than Pierre, there was a strong feeling that the citizens of Chamberlain were prejudiced toward tribal members. In a petition to D'Arcy McNickle of the BIA's Tribal Affairs office, they asked that the decision be reconsidered.

In a letter to Herbert Wounded Knee, Crow Creek Tribal Chairman, Commissioner Meyer denied that an official decision had been made concerning the Fort Thompson facilities. He assured the tribal leader that the BIA had no intention of either ignoring tribal desires or depriving tribal members of their rights, but in executive conference with other BIA administrators on February 1, 1952, the Commissioner reaffirmed the earlier decisions. On July 21, 1952, the gates of Fort Randall Dam were closed, and by the end of the year portions of the Lower Brule Reservation were under water. Still the Tribe awaited the initiation of settlement talks. Negotiations were finally opened at Fort Thompson on March 9, 1953.

The Corps offered the Lower Brule negotiators $233,756 for their land and improvements. This settlement was based on an appraisal made by the Corps Real Estate Division. BIA officials offered $270,611, an amount reached by MRBI appraisers. When Attorney Marcellus Q. Sharpe asked Corps officials if they would accept the higher MRBI figures, they refused. The Corps then threatened to take the land by condemnation if an agreement could not be reached quickly. Several other meetings were held during the next few months, but all failed to bring the parties closer to settlement.

Army attorneys began preparing condemnation suits for the taking of the Lower Brule land without waiting for further developments. They claimed that the rising pool level of the Fort Randall reservoir and the long delay of Congress in establishing settlement guidelines left them no alternative. The Tribe was assured that 90 percent of the appraised value of tribal property would be made immediately available to it through the Federal Court, and that this legal action would in no way affect the eventual settlement from Congress. On June 1, 1953, a tentative agreement between the Corps and the tribe's attorney was reached which included the Tribe's right to use the land free of charge until a final settlement could be reached and the retention of all mineral rights within the reservoir area.

On August 4, 1953, the Corps filed suit in the United States District Court of South Dakota in an attempt to obtain title to lands on the Lower Brule and Crow Creek reservations. The action went unchallenged, the Court passed favorably on the condemnation request, and the Corps again succeeded in circumventing its legal obligations to the Indians. Despite previous agreements, an amount equal to the Corps' land appraisal rather than that of the BIA was deposited with the Court, but this money was never distributed to the tribes. The United States Attorney's office failed to file a declaration of taking, which would have given the Corps full title to the land, before Congress passed a law establishing legal guidelines for the Fort Randall negotiations in July, 1954. This act required Federal representatives to open new talks with the tribes. When these negotiations failed to bring about an agreement by 1955, the Justice Department permitted the Corps to proceed with its original condemnation suits.

THE FORT RANDALL SETTLEMENT

By 1954, construction of the Fort Randall Dam was 84 percent complete, all non-Indian land needed for the project had been acquired, and the pool level of the reservoir was rising rapidly, while Indian property owners still awaited Congressional action. Finally, legislation providing a settlement for the Yankton Sioux and establishing contract guidelines for the Lower Brule and Crow Creek Tribes was approved on July 6, 1954.

Negotiation guidelines established for the Lower Brule Sioux were similar to those provided for the Cheyenne River and Standing Rock tribes in 1950, with some important exceptions. The growing urgency of the situation caused Congress to shorten time limits for further talks; BIA and Corps representatives were given only a year to obtain a contract agreement. Despite treaty provisions and precedents established in earlier settlements with the Fort

Berthold and Cheyenne River Tribes, tribal ratification requirements were lowered from three-fourth of the adult tribal members to a simple majority. The Interior Department had recommended this action in order to expedite approval. In addition, the retention of tribal mineral rights was limited to gas and oil.

New talks with the Lower Brule Sioux Tribe were begun in the autumn of 1954 but ended again in deadlock. The BIA raised its offer for a property settlement to allow for the increase in land values since 1951, the year of the last MRBI appraisal. The Corps refused to offer any more than the amount it had previously deposited with the federal court in its condemnation suits of 1953. Although the Tribe was increasingly pressured by the impending flood, it was determined to hold out for better terms. Lower Brule negotiators, for example, demanded a property settlement of $508,493, which was 82 percent higher than the best Bureau of Indian Affairs offer. In the meantime tribal leaders were compelled by circumstances to make plans for the evacuation of their lands.

Lower Brule families within the Fort Randall taking area faced the prospect of having their homes inundated during the spring runoff of 1955, yet they still had no money with which to move. Condemnation funds deposited with the court were not available because the Justice Department had not yet filed a "declaration of taking" on the land, and the chances for a timely Congressional settlement appeared increasingly dim. Because it was anticipated that favorable agreements could not be reached with BIA and Corps representatives, Senator Francis Case and Congressman E.Y. Berry of South Dakota were asked to introduce settlement legislation for the tribes in the Eighty-third Congress. These bills, which asked for $6,348,316 for the Lower Brule Sioux Tribe, were not given consideration. As a result, the Tribe expected that it would have to use its own meager funds to help families relocate. During the fall of 1954 tribal leaders began planning for this eventuality.

Following a breakdown of negotiations in November, 1954, both the Corps and the BIA requested the Justice Department to carry out the condemnation suits filed in 1953. The Corps wanted clear title to the land, and the BIA wanted some money dispersed to tribal members before they were forced to move. Consequently, an official declaration of taking was filed on January 20, 1955. The Court allowed the Corps to take the Indian land it needed—the legality of the suite was not questioned. The Corps later claimed that its action was legal because the settlement guidelines, established by Congress the previous year, had stipulated that negotiations would not be allowed to interfere with the scheduled construction of the Fort Randall project. The Corps, however, had filed suit before the legislation was passed, and nothing in the act itself specifically authorized the Corps to exercise the right of eminent domain.

On March 22, 1955, Indian landowners on the Lower Brule Reservation received $270,611 as partial payment for their property. BIA assistance was requested in the distribution and expenditure of these funds, and a tribal committee was formed to plan relocation activities.

The Lower Brule Sioux Tribe, like the Standing Rock Sioux, was compelled for three more years to pursue a legislative settlement.

New legislation incorporating tribal demands was introduced in the 84th and 85th Congresses; but despite the obvious urgency of the settlements, the Congress did not act, and in the meantime, the Fort Randall project was officially dedicated on August 11, 1956.

White legislation was being considered in the Congress, in January of 1958, an injunctive action was filed on behalf of the Standing Rock Sioux Tribe in Federal district court to halt further construction of the Oahe Dam project until an adequate settlement was negotiated with the Tribe, arguing that the Corps did not have the legal authority to condemn Standing Rock property, citing the Sioux Treaty of 1868, which provided that land could be taken from the tribe only upon payment of just compensation and the consent of three-fourths of its adult membership. The action also sought to establish that even though the Supreme Court had determined that the Congress had the right of eminent domain over Indian land as long as just compensation was provided in accordance with the Fifth Amendment, the court had also ruled in at least two cases that this power rested only with the Congress and could not be extended to other Federal agencies without express authorization.

The presiding Judge, George T. Mickelson, a former governor of South Dakota, decided on March 10, 1958, to uphold the tribe's motion to dismiss the Army's condemnation suit. In doing so, he ruled that the Congress had not authorized the Corps to take Indian lands by any legislative act, including the Flood Control Act of 1944. "It is clear to this Court," he observed, "that Congress has never provided the requisite authority to the Secretary of the Army to condemn this tribal land. Such action is wholly repugnant to the entire history of Congressional and judicial treatment of the Indians."

Six months later, settlement legislation for the Lower Brule Sioux, the Crow Creek Sioux, and Standing Rock Sioux Tribes was enacted into law. The Lower Brule Sioux received $976,523 for their property, including their interest in the riverbed and all damages caused by the Fort Randall project. Unlike the Standing Rock Sioux, the Lower Brule Tribe was denied rehabilitation money and the right to regain ownership of any former property found unnecessary for the project.

Although no limit was placed on moving costs, the Tribe was required to pay all relocation expenses out of its settlement funds. The Standing Rock and Cheyenne River legislation had provided that such costs would be charged to the Corps' project budget. In addition, the Lower Brule Sioux did not receive protection for livestock hazards as the Cheyenne River Tribe had or the right to ratify the final agreement, nor were they permitted the same degree of autonomy over control and distribution of settlement funds, relocation of tribal members, or consolidation of their land.

Of all the Sioux tribes, only the Lower Brule and Crow Creek suffered the hardship of having to move two years before receiving a settlement, and they alone were denied funds for rehabilitating their reservations, although their poverty was relatively greater. They were also the only tribes that would face the same ordeal again.

THE BIG BEND SETTLEMENT

Even as tribal negotiators were in Washington seeking compensation for Fort Randall damages, Corps crews were surveying Lower Brule land for the Big Bend project. Construction of this dam was scheduled to begin in September 1960, thereby making it necessary for the Tribe to negotiate a settlement by that time if it hoped to avoid losing more land without adequate compensation. The Corps, however, worked ahead of schedule and ground-breaking ceremonies for the project took place on May 30, 1960.

Legislation for the Crow Creek and Lower Brule Sioux Tribes was introduced in Congress on March 2, 1960, just three months before the ground-breaking ceremonies for Big Bend Dam. A week later, the Corps again filed suit in Federal district court to condemn the 867 acres of Indian land needed for the actual project site, despite the earlier decision handed down by the same court in regard to the Standing Rock suit in 1958. Congress had still not specifically delegated its powers of eminent domain to the Army, yet the Corps was allowed to take title to the reservation land.

In 1962, fourteen years after construction began on Fort Randall Dam and two years after construction began on Big Bend Dam, the Congress enacted the Big Bend Recovery Act, Public Law 87–734, which directed the Corps "to protect, replace, relocate or reconstruct any existing essential governmental and agency facilities on the Lower Brule reservation, including schools, hospitals, Public Health Service and Bureau of Indian Affairs offices, facilities, service buildings, and employees' quarters, roads, bridges, and incidental matters or facilities in connection therewith". The Act also directed the Corps to construct "a townsite for the new town of Lower Brule, including substitute and replacement streets, utilities, including water, sewerage, and electricity, taking into account * * * the reasonable future growth of the new town".

The Lower Brule Sioux Tribe was granted $825,000 for direct damages (including the loss of the riverbed and gravel), $400,715 for indirect damages, and $1,968,750 for rehabilitation, for a total of $3,194,465. Moving expenses were limited to $247,325 and negotiating expenses to $75,000. Requests for shoreline boundary markers, fire protection, and unrestricted grazing, hunting, and fishing rights were denied. The Tribe received the same salvage and shoreline rights provided in all previous Pick-Sloan tribal settlements, subject to Federal regulation, but with the additional right to lease shoreline grazing areas to non-Indians if the tribe chose. No provision was given for special tribal funds to be developed from these revenues as the Tribe had hoped, and the Corps was given the authority to regulate the location, size, and nature of all land so used.

RECONSTRUCTION

With the passage of the Big Bend Recovery Act, the Federal government acquired the last tribal lands needed for the Pick-Sloan main-stem projects. Over the span of fourteen years and at a cost of over $34 million, the United States had obtained title to approximately 204,124 acres of Sioux property, more Indian land than was taken for any other public works project in the United States. None of the tribes considered their compensation adequate. As long and

arduous as the process of negotiating final settlement was, it was only the first stage of the Pick-Sloan ordeal for the tribes affected. Once compensation was received, and benefits and provisions were outlined in law, or even earlier in the case of the Fort Randall takings, plans had to be implemented for the relocation of tribal members and their property, the reconstruction and restoration of reservation facilities and services, and the rehabilitation of entire Indian communities.

For the Sioux Tribes, the period of reconstruction was the most difficult phase of the Pick-Sloan experience. The Sioux Tribes affected by Pick-Sloan often experienced as much difficulty in obtaining their funds as the government did in distributing them. The Lower Brule Sioux had a particularly difficult time in relocation families from the Fort Randall reservoir area. Because the tribe only received money from the Corps' condemnation settlement at the time they were forced to move, its relocation program had to be tailored to fit the funds available rather to meet the goal of full reestablishment as contemplated by the Congress. Aimed at immediate results rather than comprehensive rehabilitation, the Corps' efforts did not provide for such crucial items as development of satisfactory water supplies, construction of sufficient housing, or reestablishment of lost sources of income.

Although the Fort Randall project has been announced a full decade earlier, neither the Corps nor the BIA was prepared to implement an efficient relocation program when the time came for the Indians to move. Though it was clearly their responsibility to do so, neither agency had bothered to survey the reservations for new homesites or to investigate the actual cost of building materials. They failed to keep tribal members fully informed about the relocation plans affecting them. Kept in uncertainty until the last possible moment, the Tribe was compelled to proceed in haste when the time came to evacuate its lands.

Tribal families were crowded into temporary quarters until houses could be relocated and restored. In the chaos that followed, many were assigned to the wrong tracts of land and eventually had to move a second time. Shacks that should have qualified only for destruction had to be moved and repaired simply because there was not enough money for new housing.

Despite the Congressional mandate to mitigate the impacts of the dam projects, subsequent funding requests for the Corps and the BIA to carry out these directives were insufficient for that purpose. Some educational and health facilities serving the Lower Brule Tribe were either not replaced or restored adequately or not restored at all. The new water system was not adequate to accommodate "reasonable future growth". Replacement houses were neither well built nor sufficiently insulated. Whether due to underestimating the costs of mitigation or other reasons, the school, hospital, townsite and other infrastructure replacement guaranteed to the Tribe in the 1962 Act were not provided as promised. In short, the Federal government failed at every turn in making the Tribe whole.

LEGISLATIVE HISTORY

Senator Daschle introduced S. 156 for himself and Senator Johnson on January 21, 1997. Although initially referred to the Committee on Energy and Natural Resources, the bill was subsequently discharged from the Committee on Energy and Natural Resources and rereferred to the Committee on Indian Affairs on May 21, 1997. The Committee held a hearing on S. 156 on October 20, 1997.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On October 23, 1997, the Committee on Indian Affairs, in an open business session, considered S. 156 and ordered it reported with a technical amendment, with a recommendation that the bill, as amended, be passed.

SECTION-BY-SECTION ANALYSIS

Section 1. This section states the short title of the Act as the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act.

Section 2. This section sets forth the findings of the Congress.

Section 2(1) states that the Congress approved the Pick-Sloan Missouri basin program by passing the Flood Control Act of 1944 to promote the general economic development of the United States, to provide for irrigation above Sioux City, Iowa, to protect urban and rural areas from devastating floods of the Missouri River, and for other purposes.

Section 2(2) expresses the finding of the Congress that the Fort Randall and Big Bend projects are major components of the Pick-Sloan program, and contribute to the national economy by generating a substantial amount of hydropower and impounding a substantial quantity of water.

Section 2(3) expresses the finding of the Congress that the Fort Randall and Big Bend projects overlie the eastern boundary of the Lower Brule Sioux Reservation, having inundated the fertile, wooded bottom lands of the tribe along the Missouri River that constituted the most productive agricultural and pastoral lands of the Lower Brule Sioux Tribe and the homeland of the members of the Tribe.

Section 2(4) states the finding of the Congress that Public Law 85–923 authorized the acquisition of 7,997 acres of Indian land on the Lower Brule Sioux Indian Reservation for the Fort Randall project and Public Law 87–734 authorized the acquisition of 14,299 acres of Indian land on the Lower Brule Sioux Indian Reservation for the Big Bend project.

Section 2(5) sets forth the finding of the Congress that Public Law 87–734 provided for the mitigation of the effects of the Fort Randall and Big Bend projects on the Lower Brule Indian Reservation, by directing the Secretary of the Army to:

(A) replace, relocate, or reconstruct any existing essential governmental and agency facilities on the reservation, including schools, hospitals, offices of the Public Health Service and the Bureau of Indian Affairs, service buildings, and employee quarters, as well as roads, bridges, and incidental matters or facilities in connection with those facilities;

(B) provide for a townsite adequate for 50 homes, including streets and utilities (including water, sewage, and electricity), taking into account the reasonable future growth of the townsite; and

(C) provide for a community center containing space and facilities for community gatherings, tribal offices, tribal council chamber, offices of the Bureau of Indian Affairs, offices and quarters of the Public Health Service, and a combination gymnasium and auditorium.

Section 2(6) states that the requirements under Public Law 87–734 with respect to the mitigation of the effects of the Fort Randall and Big Bend projects on the Lower Brule Indian Reservation have not been fulfilled.

Section 2(7) expresses the finding of the Congress that although the national economy has benefited from the Fort Randall and Big Bend projects, the economy on the Lower Brule Indian Reservation remains underdeveloped, in part as a consequence of the failure of the United States to fulfill its obligations under Public Law 85–916 and Public Law 87–735.

Section 2(8) contains the finding of the Congress that the economic and social development and cultural preservation of the Lower Brule Sioux Tribe will be enhanced by increased tribal participation in the benefits of the Fort Randall and Big Bend components of the Pick-Sloan program.

Section 2(9) expresses the finding of the Congress that the Lower Brule Sioux Tribe is entitled to additional benefits of the Pick-Sloan Missouri River Basin program.

Section 3 provides definitions of five terms used in S. 156.

Section 3(1) defines the term "Fund" to mean the Lower Brule Sioux Tribe Infrastructure Development Trust Fund established under section 4(a) of the bill.

Section 3(2) defines the term "plan" to mean the plan for socioeconomic recovery and cultural preservation prepared under section 5 of the bill.

Section 3(3) defines the term "Program" to mean the power program of the Pick-Sloan Missouri River Basin program, administered by the Western Area Power Administration.

Section 3(4) defines the term "Secretary" to mean the Secretary of the Interior.

Section 3(5) defines the term "Tribe" to mean the Lower Brule Sioux Tribe of Indians, a band of the Great Sioux Nation recognized by the United States of America.

Section 4 of S. 156 provides for the establishment of the "Lower Brule Sioux Tribe Infrastructure Development Trust Fund".

Subsection 4(a) establishes in the U.S. Treasury a fund to be known as the "Lower Brule Sioux Tribe Infrastructure Development Trust Fund".

Subsection 4(b) requires the Secretary of the Treasury to deposit into the Trust Fund 25 percent of the receipts from the deposits to the Treasury from the Pick-Sloan program until such deposits total $39,300,000.

Subsection 4(c) requires the Secretary of the Treasury to invest the money in the Trust Fund only in interest-bearing obligations

of the United States or in obligations guaranteed as to both principal and interest by the United States.

Subsection (d) requires the Secretary of the Treasury, beginning with the fiscal year immediately following the fiscal year during which the Trust Fund is fully funded, to transfer any interest earned on the Trust Fund into a separate account which shall be available, without fiscal year limitation, to the Secretary of the Interior. The Secretary of the Interior may only withdraw funds from the account to make payments to the tribe, which can only use the funds to carry out projects and programs pursuant to the plan prepared under section 5. No per capita payments may be made to any tribal member.

Subsection (e) bars the Secretary of the Treasury from making any withdrawals from the Trust Fund except to make payments to the Secretary of the Interior to make payments to the tribe.

Section 5. Section 5 of the bill provides for the development of a plan for socioeconomic recovery and cultural preservation.

Subsection (a) requires the Tribe, within two years of enactment of the bill, to prepare a plan for use of the funds to be paid to the Tribe by the Secretary of the Interior. In developing the plan, the Tribe must consult with the Secretary of the Interior and the Secretary of Health and Human Services. The plan shall identify the costs and benefits of each of its components.

Subsection (b) requires the plan to include (1) an educational facility; (2) a comprehensive inpatient and outpatient health care facility to provide essential services unavailable through existing facilities of the Indian Health Service on the reservation; (3) the construction, operation and maintenance of a municipal, rural and industrial water system; (4) recreational facilities suitable for high-density recreation at Lake Sharpe at Big Bend Dam and at other locations on the reservation; and, (5) other projects and programs for the educational, social welfare, economic development, and cultural preservation of the Tribe as the Tribe considers appropriate.

Section 6 of S. 156 authorizes the appropriation of such sums as may be necessary to carry out the provisions of the bill, including funds for administrative expenses associated with the Trust Fund established under section 4.

Section 7 of S. 156 addresses the effect of payments to the Lower Brule Sioux Tribe.

Subsection (a) provides that no payment to the Tribe pursuant to this Act shall result in the reduction or denial of any service or program to which, pursuant to Federal law, the Tribe is otherwise entitled because of its status as a Federally recognized Indian tribe, or to which any individual tribal member is entitled because of that individual's status as a member of the Tribe.

Subsection (b) provides that no payment made under this Act shall affect Pick-Sloan Missouri River basin power rates, and that nothing in this Act may be construed as diminishing or affecting any right of the Tribe that is not otherwise addressed in this Act, or any treaty obligation of the United States.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 156, as amended, as calculated by the Congressional Budget Office, is set forth below:

S. 156—Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act

Summary: S. 156 would provide compensation to the Lower Brule Sioux Tribe for the taking of reservation lands to build the Fort Randall and Big Bend dam projects. The bill would set up an economic recovery fund for the tribe and make interest from the fund available to the tribe for education, social welfare, and economic development programs.

CBO estimates that enacting S. 156 would create new direct spending authority of $1.2 million in fiscal year 1999, 2.5 million in 2000, and $2.6 million for each of fiscal years 2001 and 2002. We estimate that resulting outlays would total about $5.6 million over the 1999–2002 period. Because S. 156 would affect direct spending, pay-as-you-go procedures would apply. In addition, S. 156 would authorize the appropriation of such sums as may be necessary to carry out this act, including funds necessary to cover the administrative expenses of the economic recovery fund. Based on information from the Bureau of Indian Affairs (BIA), CBO estimates that any increase in discretionary spending would be negligible. S. 156 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA).

Estimated cost to the Federal Government: The costs of this legislation fall within budget function 450 (community and regional development). The estimated budgetary impact of S. 156 is shown in the following table.

	By fiscal year, in millions of dollars				
	1998	1999	2000	2001	2002
CHANGES IN DIRECT SPENDING					
Estimated budget authority	0	1	2	3	3
Estimated outlays	0	(1)	1	2	3

[1] Less than $500,000.

Basis of estimate: S. 156 would establish an economic recovery fund for the Lower Brule Sioux Tribe. Beginning with fiscal year 1998, the bill would direct the Secretary of the Treasury to deposit up to 25 percent of the receipts in the preceding fiscal year from the Pick-Sloan Missouri River basin program into the Lower Brule Sioux Tribe Infrastructure Development Trust Fund in the United States Treasury. Once $39.3 million is deposited, no further principal deposits would be made. The bill would direct that the fund's principal be invested in interest-bearing Treasury securities and that the fund's interest earnings be transferred to a separate account and be made available to the tribe—without fiscal year limitation or the need for further appropriation—beginning in the fiscal year after the fund is capitalized.

Direct spending

Based on information from the Western Area Power Administration—which markets electricity produced from the Pick-Sloan Missouri River basin—CBO estimates that receipts from the Pick-Sloan project for fiscal year 1997 totaled about $260 million. Therefore, CBO expects that the fund would be fully capitalized in fiscal

year 1998 with a deposit of $39.3 million. the deposit to the trust fund would be an intragovernmental transfer and there would be no net outlays associated with it.

S. 156 would make the interest on the amounts in the economic recovery fund available to the Lower Brule Sioux Tribe for education, social welfare, and economic development. For the purpose of this estimate, CBO assumes that S. 156 will be enacted in the first quarter of calendar year 1998 and that the $39.3 million deposit into the fund will be made by March 31, 1998; thus, the deposits would earn interest for one-half of fiscal year 1998 and interest earnings would first become available for spending in fiscal year 1999. We assume that the principal balance in the fund would earn interest at an annual rate of about 6.2 percent, which is CBO's baseline projection of the interest rate on 10-year Treasury securities. Under S. 156, interest earned on the $39.3 million principal would be transferred to a separate Treasury account and then made available for spending by the Lower Brule Sioux Tribe. Unspent interest in that amount also would earn interest, but at a lower (short-term) rate. We assume that balances in the account would accrue interest at a rate of about 5 percent.

As a result, CBO estimates that interest earnings of $1.2 million would be made available to the tribe in fiscal year 1999 and interest earnings of between $2.5 million and $2.6 million would be made available for each of fiscal years 2000 through 2002. Estimated outlays of this interest are based on historical spending rates for programs with similar goals and activities as those stated in this bill.

Spending subject to appropriation

S. 156 would authorize to be appropriated such funds as may be necessary to carry out the legislation. CBO estimates that any increase in discretionary spending would be negligible. The Office of Trust Fund Management within the Department of the Interior would be responsible for the creation and maintenance of the trust fund created by S. 156. According to BIA, it is unlikely that the Office of Trust Fund Management would have to hire any additional employees to manage the new fund.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act of 1985 specifies pay-as-you-go procedures for legislation affecting direct spending or receipts. For purposes of enforcing pay-as-you-go procedures, only the effects in the budget year and the succeeding four years are counted. CBO estimates that enacting S. 156 would have no effect on direct spending in 1998, but would result in direct spending of less than $500,000 in 1999, and gradually increasing amounts in succeeding years, as indicated in the following table.

SUMMARY OF EFFECTS ON DIRECT SPENDING AND RECEIPTS

	By fiscal year, in millions of dollars									
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Changes in outlays	0	0	1	2	3	3	3	3	3	3
Changes in receipts	Not applicable									

Estimated impact on State, local, and tribal governments: S. 156 contains no intergovernmental mandates as defined in UMRA. As a condition of receiving payments from the federal government, section 5 of the bill would require the Lower Brule Sioux Tribe to prepare a plan for use of those payments and would specify a number of elements to included in the plan. Based on information provided by the tribe, CBO estimates that the cost of complying with this requirement would be minimal. The annual payments received from the federal government would be used by the tribe to carry out projects included in the plan.

S. 156 would impose no other costs on state, local, or tribal governments.

Estimated impact on the private sector: The bill would impose no new private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Kristen Layman; Impact on State, Local, and Tribal Governments: Marjorie Miller.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the provisions of the bill.

The Committee believes that the enactment of S. 156 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee received the following testimony from the U.S. Department of the Interior setting forth the position of the Administration of S. 156. Issues addressed in this testimony were resolved prior to the markup of S. 156.

STATEMENT OF TERRY VIRDEN, DIRECTOR, OFFICE OF TRUST RESPONSIBILITIES U.S. DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to present the Department of the Interior's views on S. 156, "the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act of 1997." I wish to thank Senator Daschle for introducing the bill which addresses longstanding problems regarding development in the Missouri River Basin and its impacts on Indian tribes residing in the region. If enacted, this bill would provide the Lower Brule Sioux Tribe with much deserved benefits from the Missouri River Basin Pick-Sloan Program.

S. 156 is a continuation of the United States efforts to correct inequities resulting from a regional Federal development project which affected several Tribes, many of which did not receive any appreciable benefits from that development. We view this as a companion to Public Law 104–223, the "Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996," which was also sponsored by Senator Daschle and addressed many of these same issues for the Crow Creek Sioux Tribe.

The Pick-Sloan Missouri River Basin Program, or Pick-Sloan, is a major Federal program that provides for economic development, irrigation, and flood control in the Missouri River Basin. Two of the primary components of Pick-Sloan are the Fort Randall and Big Bend projects. While these two projects have resulted in economic benefits for the United States in general, and more specifically for the Missouri River Basin, they have had a devastating impact on the Lower Brule Sioux Tribe, its culture, and its economy.

Fifty years ago the Big Bend and Fort Randall Dams flooded over 22,000 acres of tribal homelands. As a result, over 70 percent of the Tribe's residents were forced to relocate from historical cultural homelands and fertile river lands. These lands were taken and permanently sacrificed to provide for the general welfare of the United States.

S.156 provides the Lower Brule Sioux Tribe to be a major beneficiary of the Pick-Sloan, for which they sacrificed so much, and to share in the economic development it has provided over the past fifty years.

While this legislation is not the final chapter in addressing compensation for the sacrifices of all tribes the region, it is an important step toward providing much needed resources for the Lower Brule Sioux Tribe.

The Administration could support S. 156 if amended. As currently drafted, the bill would be subject to pay-as-you-go requirements of the Omnibus Budget and Reconciliation Act of 1990, as amended and its costs would need to be offset. In addition, S. 156 would need to be amended to conform to Federal financial management principles that disallow the payment of interest on appropriation.

This concludes my testimony. We would be happy to work with the Committee staff to develop amendments. I will be happy to respond to any questions you may have. Thank you.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill are required to be set out in the accompanying Committee report. The Committee states that enactment of S. 156 will not result in any changes in existing law.

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