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PROVIDING FOR 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

SEPTEMBER 25 (legislative day SEPTEMBER 17), 2008.—Ordered to be printed

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

REPORT

[To accompany S. 160]

The Committee on Indian Affairs, to which was referred the bill, S. 160, 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, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

PURPOSE

S. 160 would amend the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act to increase from $39.3 million to $129,822,085 the aggregate amount to be deposited into the Lower Brule Sioux Tribe Infrastructure Development Trust Fund by the Secretary of the Treasury to provide compensation to the Lower Brule Tribe of South Dakota for damage to tribal land caused by Pick-Sloan projects along the Missouri River.

S. 160 would also amend the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996 to increase from $27.5 million to $69,222,084 the aggregate amount to be deposited into the Crow Creek Sioux Tribe Infrastructure Development Trust Fund by the Secretary to provide compensation to the Crow Creek Sioux Tribe of South Dakota for damage to tribal land caused by Pick-Sloan projects along the Missouri River.

BACKGROUND

The Lower Brule Sioux Tribe and the Crow Creek Sioux Tribe were impacted by the Fort Randall Dam and the Big Bend Dam, two significant dam construction projects located on the Missouri

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River. Construction of the Fort Randall Project began in 1946 and of the Big Bend Project in 1960, and both projects resulted in the inundation of several thousands of acres of land on the reservations of these two Indian tribes.

Although Congress attempted to mitigate the impacts of these two projects on the two reservations and the Indian people who were living on them by enacting, in 1962, the Big Bend Recovery Act (P.L. 87–735), the insufficiency of the Government's mitigation efforts pursuant to that Act eventually led to the enactment of the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996 (P.L. 104–223) and, one year later, the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act (P.L. 105–132).

P.L. 104–223 and P.L. 105–132 each created an infrastructure development trust fund for the respective tribe, the principal balance of which would be derived from a percentage of receipts deposited into the United States Treasury from the Pick-Sloan Missouri River basin power program, and each act authorized payments to the tribe of interest earned on the principal balance of the fund for use on specified projects and activities. The principal amount authorized to be deposited into the Crow Creek Sioux Tribe fund was $27,500,000, and the principal amount authorized to be deposited into the Lower Brule Sioux Tribe fund was $39,300,000.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 states that this Act may be cited as the "Lower Brule and Crow Creek Tribal Compensation Act."

Section 2. Findings

Section 2 states the findings of Congress that: (1) the Pick-Sloan Missouri River Basin Program (authorized by section 9 of the Act of December 22, 1944 (commonly known as the "Flood Control Act of 1944") (58 Stat. 891)), was approved to promote the general economic development of the United States; (2) the Fort Randall and Big Bend dam and reservoir projects in South Dakota are major components of the Pick-Sloan Missouri River Basin Program and they contribute to the economy of the United States; (3) the Fort Randall and Big Bend dams inundated the fertile bottom land of the Lower Brule and Crow Creek Sioux Tribes, which greatly damaged the economy and cultural resources of the Tribes; (4) Congress has provided compensation to several Indian tribes that border the Missouri River and suffered injury as a result of 1 or more Pick-Sloan Projects; (5) the compensation provided to those Indian tribes has not been consistent; (6) Missouri River Indian tribes that suffered injury as a result of 1 or more Pick-Sloan Projects should be adequately compensated for those injuries, and that compensation should be consistent among the Tribes; and (7) the Lower Brule Sioux Tribe and the Crow Creek Sioux Tribe are entitled to receive additional compensation for injuries described in paragraph (6).

Section 3. Lower Brule Sioux Tribe

Section 3 amends the amount of compensation in the trust fund amount created by current law for the Lower Brule Sioux Tribe to $129,822,085.

Section 4. Crow Creek Sioux Tribe

Section 4 amends the amount of compensation in the trust fund amount created by current law for the Crow Creek Sioux Tribe to $69,822,084.

Section 5. Treatment as final compensation

Section 5(a) provides that this act is final and full compensation to the Lower Brule Sioux Tribe and the Crow Creek Sioux Tribe for damages caused by construction of the Fort Randall Dam and the Big Bend Dam under the Pick-Sloan Missouri River Basin Program.

Section 5(b) releases the United States of any further claim for compensation that the Lower Brule Sioux Tribe or Crow Creek Sioux Tribe may have for compensation as a result of the Pick-Sloan Missouri River Basin Program.

Section 5(c) defines the term "non-Missouri River Basin Program Indian tribe" and declares that this act will not serve as a precedent for any non-Missouri River Basin Program Indian tribe with respect to any potential claim of such tribe against the United States.

LEGISLATIVE HISTORY

S. 160 was introduced by Senator Thune on January 4, 2007, Senator Johnson became a cosponsor on May 14, 2007, and it was referred to the Committee on Indian Affairs. On June 19, 2008, S. 160 was approved by the Committee by voice vote and ordered reported favorably.

In the 109th Congress, similar legislation, S. 374, was introduced on February 14, 2005, by Senators Thune and Johnson and was referred to the Committee on Indian Affairs. On June 29, 2005, S. 374 was approved by the Committee by voice vote and ordered favorably reported. Shortly thereafter, a representative of the United States Government Accountability Office (GAO) expressed concern regarding language in the Findings section of the bill (section 2(7)) stating that a methodology determined appropriate by the General Accounting Office entitled the two tribes to additional compensation.

Accordingly, Chairman McCain requested the GAO assess whether the approach used in developing the amount of additional compensation in S. 374 followed the approach used in previous GAO reports for analyzing additional compensation for other tribes located along the Missouri River. In May 2006, the GAO issued the report requested by Chairman McCain. See GAO–06–517, Analysis of the Crow Creek Sioux and Lower Brule Sioux Tribes Additional Compensation Claims.

On June 14, 2006, the Committee held a hearing during which the GAO provided testimony on the report, and the tribes and their consultant provided their views. Briefly, the GAO testified that its research for the report indicated that the tribes' consultant devi-

ated in certain respects from the approach used in the previous GAO reports addressing additional compensation for other Indian tribes impacted by flood control/power projects on the Missouri River and concluded that the GAO's approach does not support the additional compensation amounts contained in S. 374. The tribes' consultant testified that his approach deviated in part to account for the inferior negotiating position of the tribes. He also testified that his original calculations did contain an error and provided new estimates for compensation based on his approach.

Based on the testimony provided, Senators Thune and Johnson prepared a substitute amendment which lowered the compensation for the Lower Brule Sioux Tribe from $186,822,140 to $129,822,085, and the compensation for the Crow Creek Sioux Tribe from $105,917,853 to $69,222,084. The substitute amendment also added a provision clearly stating that the compensation provided in this bill is the full and final compensation for the Lower Brule Sioux Tribe and Crow Creek Sioux Tribe for claims related to the Pick-Sloan projects which impacted their reservations.

On August 2, 2006, the Committee, in an open business meeting, considered S. 374. By a voice vote, the Committee ordered the bill reported favorably, with an amendment in the nature of a substitute, to the full Senate.

Similar legislation was also introduced in the 108th Congress, S. 1530, the Tribal Parity Act, was introduced by Senator Daschle on July 31, 2003, and referred to the Committee on Indian Affairs. Senator Johnson joined as a cosponsor on February 12, 2004. The Committee held a hearing on the bill on June 15, 2004, and at a business meeting held on July 14, 2004, approved the bill as amended. On November 19, 2004, S. 1530 passed the Senate with amendments by Unanimous Consent.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On June 19, 2008, the Committee, in an open business session, considered S. 160. By a voice vote, the Committee ordered the bill reported to the full Senate with a recommendation that the bill do pass.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate for S. 160, as provided by the Congressional Budget Office, is set forth below:

S. 160—Lower Brule and Crow Creek Tribal Compensation Act

Summary: S. 160 would increase the size of two existing tribal trust funds established by the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act and the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996. The Congress created those funds as compensation for damages to the tribes caused by the Pick-Sloan Missouri River Basin project; this bill would constitute a final settlement of claims by the two tribes against the United States. CBO estimates that enacting S. 160 would increase direct spending by $169 million over the 2009–2018 period. Enacting the bill would not affect revenues.

S. 160 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 160 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal years, in millions of dollars—										
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2009–2018
CHANGES IN DIRECT SPENDING											
Transfers to Lower Brule Fund:											
Estimated Budget Authority	0	130	0	0	0	0	0	0	0	0	130
Estimated Outlays	0	130	0	0	0	0	0	0	0	0	130
Transfers to Crow Creek Fund:											
Estimated Budget Authority	69	0	0	0	0	0	0	0	0	0	69
Estimated Outlays	69	0	0	0	0	0	0	0	0	0	69
Interest on Lower Brule Fund:											
Estimated Budget Authority	−2	−2	−2	−2	−2	−2	−2	−2	−2	−2	−20
Estimated Outlays	−2	−2	−2	−2	−2	−2	−2	−2	−2	−2	−20
Interest on Crow Creek Fund:											
Estimated Budget Authority	−1	−1	−1	−1	−1	−1	−1	−1	−1	−1	−10
Estimated Outlays	−1	−1	−1	−1	−1	−1	−1	−1	−1	−1	−10
Total Changes:											
Estimated Budget Authority	66	127	−3	−3	−3	−3	−3	−3	−3	−3	169
Estimated Outlays	66	127	−3	−3	−3	−3	−3	−3	−3	−3	169

Basis of estimate: CBO estimates that enacting this legislation would result in a net increase in direct spending of $169 million over the 2009–2018 period. By increasing the maximum funding level of two tribal trust funds and establishing a final settlement of certain tribal claims against the federal government, CBO estimates that enacting S. 160 would increase direct spending by $199 million over the 2009–2018 period. Partially offsetting those costs, the bill also would reduce direct spending for interest payments made to the tribes by $30 million over the 2009–2018 period. For this estimate, CBO assumes that the bill will be enacted near the beginning of fiscal year 2009 and that additional transfers to the trust funds would begin in that year.

Trust fund activity under current law

In 1996 and 1997, the Congress enacted legislation creating the Crow Creek Sioux Tribe Infrastructure Development Trust Fund (Crow Creek Fund) and the Lower Brule Sioux Tribe Infrastructure Development Trust Fund (Lower Brule Fund). Both acts authorized the Secretary of the Treasury to transfer 25 percent of gross revenues from electricity sales made by the Western Area Power Administration (WAPA), the agency that manages the Pick-Sloan

project, to each fund. Such transfers were made annually until the funds reached the maximum balances—$39 million for Lower Brule Fund and $28 million for the Crow Creek Fund—set forth in law. Consistent with the treatment of similar tribal trust funds, both funds are classified as accounts on the federal budget because all claims against the federal government for related damages have not been extinguished. Thus, transfers to the funds made to date have been considered intragovernmental and have had no net effect on the federal budget.

Current law also directs the Secretary to transfer any interest earned by the Crow Creek Fund and the Lower Brule Fund into separate accounts for the benefit of the tribes. Payments from the interest accounts may only occur after the trust fund has reached its maximum funding level. Because both trust funds are currently at their maximum levels, CBO estimates that such payments will total $20 million for the Lower Brule Fund and $10 million for the Crow Creek Fund over the 2009–2018 period.

Trust fund activity under S. 160

S. 160 would increase the maximum size of the Lower Brule Fund to $130 million and that of the Crow Creek Fund to $69 million. As under current law, each fund would receive deposits equal to 25 percent of proceeds from the Pick-Sloan project from the previous year. Annual deposits would continue until the total balance of the trust fund reaches the new maximum level. According to information from WAPA, gross revenues from its sale of electricity from the Pick-Sloan project will be $356 million in 2008 and average approximately $426 million per year thereafter. Based on those projections, CBO estimates that the Crow Creek Fund and the Lower Brule Fund would reach their new maximum levels in 2009 and 2010, respectively.

Upon full funding of their trust funds, S. 160 would extinguish future claims against the federal government by the two tribes. Consistent with the treatment of similar tribal funds, outlays would be recorded on the budget in the year that all funds are provided to the tribe and all claims against the government are released. As a result, CBO estimates that enacting S. 160 would increase direct spending by $69 million in 2009 for the Crow Creek Fund and by $130 million in 2010 for the Lower Brule Fund. Subsequent use of those funds would have no further impact on the federal budget as tribal trust funds managed in a fiduciary capacity by the federal government are treated as nonfederal funds.

In addition, any future interest earnings and payments would not be considered part of the federal budget after those funds are transferred. (Additionally, because under the bill the Lower Brule Fund would be below its maximum funding level in 2009, no interest payments would be made to the tribe in that year.) As such, CBO estimates that enacting S. 160 would reduce direct spending for interest payments to the tribes by $30 million ($20 million for the Lower Brule Fund and $10 million for the Crow Creek Fund) over the 2009–2018 period.

Intergovernmental and private-sector impact: S. 160 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

The payments authorized by this bill would benefit the Lower Brule Sioux and Crow Creek Sioux tribes.

Estimate prepared by: Federal Costs: Leigh Angres; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: MarDestinee Perez.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that the regulatory and paperwork impacts of S. 160 will be *de minims*.

EXECUTIVE COMMUICATIONS

The views of the Administration on S. 160 as introduced are set forth in the Statement of George Skibine, Deputy Assistant Secretary for Policy and Economic Development—Indian Affairs, United States Department of the Interior, dated June 18, 2008, and are set forth below:

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240
JUN 18 2008

The Honorable Byron L. Dorgan
Chairman, Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The following sets forth the views of the Administration on S. 160, the "Lower Brule and Crow Creek Tribal Compensation Act." The Administration does not support this bill.

S. 160, if enacted, would increase the compensation for the Lower Brule and Crow Creek Tribes for their loss of lands and cultural resources as a result of the Pick-Sloan Project. The intent of the legislation is to put the compensation provided to the Lower Brule and Crow Creek tribes (Tribes) on par with the compensation provided to similarly situated tribes in the region that received compensation for losses resulting from the Pick-Sloan water project along the Missouri River. The Lower Brule and Crow Creek Tribes received compensation for these losses under legislation enacted in 1996 and 1997. Without further analysis, it is not clear why the compensation already provided should not be considered adequate. GAO testimony on S. 374 , a similar bill from the 109th Congress, stated that the legislation would "catapult the Crow Creek Sioux and Lower Brule Sioux tribes ahead of the other tribes and set a precedent for the other tribes to seek a third round of compensation."

The original statutes providing compensation for these two Tribes were the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act (Public Law 105-132), and the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act (Public Law 104-223). Pursuant to these bills, two funds, the Crow Creek Fund and the Lower Brule Fund, were created in the U.S. Treasury. The interest from these funds is used to compensate the Crow Creek and Lower Brule Sioux tribes for damages to their reservations and economies as a result of water infrastructure development. The original authorized sizes for the Lower Brule Fund and the Crow Creek Fund were $39,300,000 and $27,500,000, respectively. Enactment of S. 160 would increase the maximum size of each fund, with additional deposits to be derived from the sale of electric power from the Pick-Sloan Missouri Basin program. If this bill is enacted, the size of the Lower Brule Fund and the Crow Creek Fund would be increased to $129,822,085 and $69,222,084, respectively.

When the Congressional Budget Office (CBO) scored a similar bill, S. 374, in 2006, it estimated that there would be an increase in direct spending of $169 million over a ten year period if the bill had been enacted. This direct spending would result from the

increase in the size of the funds provided for under this legislation and also the likely reclassification of the funds from budgetary to non-budgetary because the bill would extinguish any future claims by the Tribes against the federal government related to the Pick-Sloan Missouri River Basin Program upon full funding of the trust funds.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

George T. Skibine
Deputy Assistant Secretary for Policy and
Economic Development – Indian Affairs

cc: Honorable Lisa Murkowski
Vice Chairman

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 S. 160, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new language to be added in italic, existing law to which no change is proposed is shown in roman):

PUBLIC LAW 105–132; 111 STAT. 2565

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SEC. 4. ESTABLISHMENT OF LOWER BRULE SIOUX TRIBE INFRASTRUCTURE DEVELOPMENT TRUST FUND.

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(b) FUNDING.—Beginning with fiscal year 1998, and for each fiscal year thereafter, until such time as the aggregate of the amounts deposited in the Fund is equal to $129,822,085 [$39,300,000], the Secretary of the Treasury shall deposit into the Fund an amount equal to 25 percent of the receipts from the deposits to the Treasury of the United States for the preceding fiscal year from the Program.

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PUBLIC LAW 104–223; 110 STAT. 3027

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SEC. 4. ESTABLISHMENT OF CROW CREEK SIOUX TRIBE INFRASTRUCTURE DEVELOPMENT TRUST FUND.

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(b) FUNDING.—Beginning with fiscal year 1997, and for each fiscal year thereafter, until such time as the aggregate of the amounts deposited in the Fund is equal to $69,222,084 [$27,500,000], the Secretary of the Treasury shall deposit into the Fund an amount equal to 25 percent of the receipts from the deposits to the Treasury of the United States for the preceding fiscal year from the Program.

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