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SENATE

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PROVIDING FOR CERTAIN BENEFITS OF THE MISSOURI RIVER BASIN PICK-SLOAN PROJECT FOR THE CROW CREEK SIOUX TRIBE, AND FOR OTHER PURPOSES

SEPTEMBER 9, 1996.—Ordered to be printed

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

REPORT

[To accompany S. 1264]

The Committee on Indian Affairs, to which was referred the bill (S. 1264) to provide for certain benefits of the Missouri Basic Pick-Sloan project to the Crow Creek Sioux Tribe, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1264 is to provide certain benefits to the Crow Creek 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 Crow Creek Sioux Tribe resides on a 258,361 acre reservation in central South Dakota. The Missouri River overlies the reservation's western boundary, and its rich bottomlands for generations provided the tribe with food, water, wood for shelter and fuel, forage for cattle and wildlife, and plants used for medicinal purposes. Construction of Fort Randall and Big Bend Dams, authorized by the Flood Control Act of 1944, resulted in the inundation of over 15,000 acres of these bottomland resources and the permanent loss of the subsistence economy based on those resources.

Fort Randall Dam, which the Army Corps of Engineers began constructing in 1946, flooded 9,154 acres of bottomland, over one-third of which was forested. It flooded Fort Thompson, the reservation's largest community, forcing eighty-four families, constituting 34 percent of the tribal membership, to be relocated. It caused the Bureau of Indian Affairs (BIA) to relocate its agency headquarters from that site to Pierre, South Dakota, fifty miles from the reservation, and the Indian Health Service (IHS) to move its hospital at Fort Thompson twenty miles south to Chamberlain, South Dakota. These facilities were now located over ninety miles from remote parts of the reservation, creating great hardship on the Crow Creek Sioux, whose transportation facilities were severely limited.

The Big Bend Dam, which the Corps of Engineers began constructing in 1960, resulted in the flooding of another 6,179 acres and the relocation of twenty-seven additional families. These Damages affected 5 percent of the reservation's land base and 11 percent of its population. Approximately one-fourth of the tribe's remaining farms and ranches were also flooded. The government's handling of the Fort Randall relocations was apparently not well-thought out, because families on both the Crow Creek and the Lower Brule reservations were relocated on lands within the projected area of the Big Bend Dam, and as a result, these families were subsequently forced to undergo the trauma of yet another move.

The Committee's hearing record includes a detailed history, developed by the Historical Research Associates, Inc., of the legal battles over the Corps of Engineers' efforts to take Indian lands for Missouri River Dam construction by eminent domain, and the efforts by the Crow Creek 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.

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

S. 1264 AND SUBSTITUTE AMENDMENT

The benefits that S. 1264 would provide the Crow Creek Sioux Tribe are similar to those provided for in the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992. That Act established trust funds for the tribes of the Fort Berthold and Standing Rock Reservations and funded them with receipts of deposits from the Missouri River Basin Pick-Sloan program to compensate the tribes for the inundation of their lands. The amount of compensation was based on the recommendations of an extensive study by a joint Federal-tribal advisory committee,

known as the Garrison Unit Joint Tribal Advisory Committee, of the impacts of the government's taking of over 300,000 acres of tribal lands for Garrison Dam and Reservoir and Oahe Dam and Reservoir as part of the Missouri River Basin Pick-Sloan program.

The substitute amendment to S. 1264 establishes a Crow Creek Sioux Tribe Infrastructure Development Trust Fund in the U.S. Treasury in which will be deposited, on an annual basis beginning in fiscal year 1997, 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, until the aggregate of the amounts deposited is equal to \$27,500,000. The Secretary of the Treasury is authorized and directed to invest these amounts in interest-bearing obligations of the United 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 established by the Secretary in the Treasury, and thereafter, to transfer any funds in that account to the Secretary of the Interior for purposes authorized in S. 1264, without fiscal year limitation on the availability of such funds. In turn, the Interior Secretary is authorized to make payments to the tribe, but the payments can only be used by the tribe for carrying out projects and programs pursuant to a plan for socioeconomic recovery and cultural preservation, and no payments may be distributed to any member of the tribe on a per capita basis.

The plan is to be developed by the Bureau of Indian Affairs, the Indian Health Service and the Crow Creek Sioux Tribe, is subject to the approval of the Crow Creek Tribal Council, and must be submitted to the Congress no later than two years following the enactment of S. 1264. 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 out-patient health care facility to provide essential services that are needed and which are unavailable through existing facilities of the Indian Health Service on the Crow Creek 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 (5) other projects and programs for the educational, social welfare, economic development, and cultural preservation of the tribe as the Interior Secretary considers appropriate.

SYNOPSIS OF HISTORICAL BACKGROUND¹

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

¹Synopsis of historical background is drawn from a report of the Historical Research Associates, Inc. prepared for the Crow Creek Sioux Tribe by Michael L. Lawson, Ph.D., on August 18, 1995, entitled "An Analysis of the Impact of the Pick-Sloan Plan on the Crow Creek Sioux Tribe and of the Need for Federal Legislation to Address These Impacts."

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 of Engineers on the main stem of the Missouri River; two of which (Fort Peck and Oahe) rank among the largest earth 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 Federal 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 nonstatutory body.

The Inter-Agency Committee 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 families. The Army Corps of Engineers had little in their training or backgrounds that prepared them to deal knowledgeably with Native Americans, and the Federal agency usually charged with that responsibility, the Bureau of Indian Affairs (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 responsibilities 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 Army often received generous amounts for dam construction during years when the Sioux tribes were not able to receive appropriations for their necessary relocation nor compensation for their losses. Because of this lack of coordination, tribal members were systematically denied most of the important benefits offered by Pick-Sloan and their 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 Bureau of Indian Affairs was fully informed, yet made no objections to the plan while it was being debated in Congress in 1944. The Bureau of Indian Affairs did not inform the tribes of the damages

they would suffer until 1947. The Corps of Engineers was so confident that it could acquire the Indian land it needed through Federal powers of eminent domain that it began construction on its dams, including those actually on reservation property, even before opening formal negotiations with the tribal leaders. The legislation establishing the Pick-Loan Plan did not address the Indians' reserved water rights under the Winters Doctrine.

In 1947, the Bureau of Indian Affairs made its first effort to represent tribal interests within the Missouri Basin Inter-Agency Committee. 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 also assigned to help tribes gain equitable settlements and to assist relocation and reconstruction activities.

By the time the first MRBI staff members reached the field, the Corps of Engineers had spent approximately \$28 million on the preliminary constructions 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, like Francis Case, would flood Crow Creek reservation land and communities. 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 Crow Creek 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 Crow Creek Indian Reservation, 100 miles southeast of Crow Creek and just above the Nebraska line in south-central South Dakota. When it was completed in 1969, 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 stretched over 107 miles. Fort Randall was built with compacted earth fill, as were other army projects on the Missouri. Like Garrison and Oahe dams, it featured a relatively high-head dam (160 feet) and a chute-type spillway designed to release excessive flows. Although the Corps of Engineers estimated this project would cost \$75 million in 1944, it ultimately cost more than \$200 million.

The Fort Randall Dam flooded 22,091 acres of Sioux land and dislocated 136 Indian families. Of the tribes affected, the Crow Creek Sioux were the hardest hit. Its tribal members lost 9,514 acres of precious bottomland, over one-third of which was forested. Eighty-four families, representing approximately 34 percent of the reservation population, were forced to evacuate their riverside homes and to accept land ill-suited for houses, ranches, or farms. For Thompson, the reservation's largest community, was completely inundated. The BIA agency headquarters there, which also served the Lower Brule Sioux, was moved fifty miles from the reservation to Pierre, the capital city of South Dakota. The Indian Health Service hospital was moved twenty miles south to Cham-

berlain. These facilities were now located over ninety miles from remote parts of the reservations. Because tribal offices remained on Indian land, it was no longer possible for the Crow Creek 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 Crow Creek Sioux were sustaining major damages from the Fort Randall project, the Corps of Engineers 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 Crow Creek and Lower Brule Tribes. The smallest of the Army's main-stem structures, Big Bend was developed primarily for hydroelectric power production. Taking advantage of the long bend in the river for which it 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. Crow Creek tribal members lost 6,417 acres to the dam project and were forced to move twenty-seven families. These damages affected 5 percent of the reservation's land base and 11 percent of its population. Approximately one-fourth of the tribe's remaining farms and ranches were also flooded. The government's handling of the Fort Randall relocations was apparently not well-thought out, because families on both the Crow Creek and the Lower Brule Reservations were relocated on lands within the projected area of the Big Bend Dam, and as a result, these families were subsequently forced 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 Crow Creek 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 Crow Creek 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 Crow Creek 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 the vast majority of timber on their reservation.

The gathering and preserving of wild fruits and vegetables was a traditional part of the culture of the Crow Creek Sioux. Traditionally, they were also used for ceremonial and medicinal purposes. The loss of these and other plants greatly reduced the Crow Creek's natural food supply.

The wooded bottomlands also served as a shelter and feeding ground for many kinds of wildlife. Deer, beaver, rabbits, and rac-

coons were abundant year-round, and numerous pheasants and other game birds wintered there each year. The hunting and trapping of this game provided the Crow Creek Sioux with an important source of food, income, and recreation. 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 crippled the livestock industry on Crow Creek. Ranching had become the primary economic activity on the reservation in the years prior to Pick-Sloan. A substantial number of 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 Crow Creek 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 the 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 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.

The Crow Creek Sioux Tribe was hampered in its initial efforts to obtain legal counsel, because the Indian Commissioner, Dillon S. Meyer, refused to grant his necessary approval of a tribal contract with first one, and then a second attorney proposed by the tribe. The American Civil Liberties Union provided funds for lawyers to serve as unofficial tribal representatives in preliminary negotiations that began in 1952, but eventually, the tribe felt compelled to find an attorney who met Commissioner Meyer's approval, settling on M.Q. Sharpe, a local lawyer previously engaged by the Lower Brule Sioux and the former governor of South Dakota. As chairman of the Missouri River States Committee, Sharpe had been a leading advocate of the Army's main-stem Missouri River projects during the 1944 congressional debate on the Pick-Sloan Plan.

Recognizing its obligation to ensure that the Sioux tribes affected by Pick-Sloan received just compensation, in 1950, the Congress authorized the Corps of Engineers 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 can be reestablished and protected." Each of the agencies was required to prepare a detailed analysis of damages, and in the event that they could not reach a satisfactory agreement in the field, the Congress was to legislate a final settlement.

The Crow Creek Tribe petitioned in 1951 for prompt enactment of similar settlement procedures for their negotiations, but Congress did not act 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 Army and the BIA; MRBI staff members conducted socioeconomic surveys; and tribal lands were inspected by Commissioner Meyer.

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, especially since they felt strongly 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 Bureau of Indian Affairs 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 Crow Creek Reservation were under water, while the tribe still awaited the initiation of settlement talks. Negotiations were finally opened at Fort Thompson on March 9, 1953.

The Corps of Engineers offered the Crow Creek negotiators \$375,613 for their land and improvements. This settlement was based on an appraisal made by the Corps' Real Estate Division, BIA officials offered \$399,313, an amount reached by MRBI appraisers. When tribal attorney 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 Crow Creek 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 courts, and that this legal action would in no way affect the eventual settlement from Congress. On June 1, 1953, a tentative agreement between the Army 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 Army filed suit in the United States District Court of South Dakota in an attempt to obtain title to lands on the Crow Creek and Lower Brule reservations. The action went unchallenged, the Court passed favorably on the condemnation request, and the Corps of Engineers again succeeded in circumventing its legal obligations to the Indians. Despite previous agreements, an amount equal to the Army's 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 District Attorney's office failed to file a declaration of taking, which would have given the Army full title to the land, before the Congress finally 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 Army 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. Legislation providing a settlement for the Yankton Sioux and establishing contract guidelines for the Crow Creek and Lower Brule Tribes was approved on June 6, 1954.

Negotiation guidelines established for the Crow Creek 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 the Congress to shorten time limits for further talks; BIA and Army 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-fourths of the adult tribal members to a simple majority. The Interior Department had recommended this action in order to expedite approval. The retention of tribal mineral rights was limited to gas and oil.

New talks with the Crow Creek Sioux Tribe were rekindled 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

of Engineers refused to offer any more than the amount it had previously deposited with the Federal court in its condemnation suits of 1953. Although the tribes were increasingly pressured by the impending flood, they were determined to hold out for better terms. In the meantime tribal leaders were compelled by circumstances to make plans for the evacuation of their lands.

Crow Creek 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 Army representatives, Senator Francis Case and Congressman E.Y. Berry of South Dakota were asked to introduce settlement legislation for the tribes in the 83d Congress. These bills, which proposed \$5,686,036 for the Crow Creek Sioux Tribe, were not considered by the Congress. 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 the breakdown of negotiations in November 1954, both the Army and BIA requested that the Justice Department carry out the condemnation suits filed in 1953. The Corps of Engineers wanted clear title to the land, and the Bureau of Indian Affairs wanted some money dispersed to tribal members before they were forced to move. As a result, an official declaration of taking was filed on January 20, 1955. The court allowed the Army to take the Indian land it needed—the legality of the suit was not questioned. The Corps of Engineers later claimed that its action was legal because the settlement guidelines, established by the Congress in the previous year, had stipulated that negotiations would not be allowed to interfere with the scheduled construction of the Fort Randall project. The Army, however, had filed suit before the legislation was enacted, and the Act did not authorize the Corps of Engineers to exercise the rights of eminent domain.

On March 22, 1955, Indian landowners on Crow Creek Reservation received \$399,313 from the Court as partial payment for their property. The Army had been required to deposit an additional \$23,700 in order to bring payments up to the MRBI appraisal figures. BIA assistance was requested in the distribution and expenditure of these funds, and a tribal committee was formed to plan relocation activities.

The Crow Creek 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, 99 percent complete according to Army reports, was officially dedicated on August 11, 1956.

While 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 of Engineers did not have the legal authority to condemn Standing Rock property, citing the Sioux treaty of 1868, which was reaffirmed by acts of Congress in 1877 and 1889. The acts proclaimed 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 Crow Creek Sioux, the Lower Brule and Standing Rock Sioux Tribes, was enacted into law. The Crow Creek Sioux finally received \$1,395,812 for their property, including their interest in the riverbed and all damages caused by the Fort Randall project. Unlike the Standing Rock Sioux, the 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 settlement funds. The Standing Rock and Cheyenne River legislation had provided that such costs would be charged to the Corps of Engineers' project budget. In addition, the Crow Creek 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 Crow Creek and Lower Brule had suffered the hardship of having to move two years before receiving a settlement, and they alone had been 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, Army crews were out surveying Crow Creek 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 of Engineers, however, worked ahead of schedule and ground-breaking ceremonies for the project took place on May 30.

Legislation for the Crow Creek and Lower Brule Tribes was not introduced in Congress until March 2, 1960. A week later, the Corps of Engineers 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 the Standing Rock suit in 1958. Congress had still not specifically delegated its powers of eminent domain to the Army, yet the Corps of Engineers was allowed to take title to the reservation land.

The tribe received a final settlement on October 3, 1962. The Crow Creek Sioux Tribe was granted \$355,000 for its direct damages (including the loss of the riverbed and gravel), \$209,302 for indirect damages, and \$3,802,500 for rehabilitation: a total of \$4,366,802. Moving expenses were limited to \$77,550 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 of Engineers was given the authority to regulate the location, size, and nature of all lands so used.

Reconstruction

With the passage of the Big Bend settlements in 1962, 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 represents only the first stage of the Pick-Sloan ordeal for the tribes affected. Once compensation was received, and benefits and provisions were outlined by 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 Crow Creek Sioux had a particularly difficult time in relocating families from the Fort Randall reservoir area. Because the tribe only received money from the Army's condemnation settlement at the time they were forced to move, its relocation program had to be tailored to fit the funds available rather than the goal of full reestablishment as contemplated by the Congress. Aimed at immediate results rather than comprehensive rehabilitation, its pro-

grams failed to provide for such crucial items as development of satisfactory water supplies, construction of sufficient housing, or re-establishment of lost sources of income.

Although the Fort Randall project had been announced a full decade earlier, neither the Army nor the Bureau of Indian Affairs 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.

The relocation of government facilities generated controversy over the selection of a new agency site. In most cases involving the other tribes affected by Pick-Sloan, the nearest suitable upland area was designated as the new relocation site. But crucial BIA facilities serving the Crow Creek Sioux were moved completely off the reservation. Tribal facilities and individual residences were relocated from the Fort Thompson townsite to the nearest convenient upland locations.

Although the Congress carefully prescribed both the quantity and quality of replacement structures for the new Fort Thompson townsite in the Big Bend Settlement Act, the BIA and the Corps of Engineers failed to fulfill the intent of the statute. In some cases, the tribe did not get its facilities replaced or restored adequately or at all. The Corps of Engineers built a new elementary school, which soon proved to be inadequate and of poor construction, but the high school was never replaced. The hospital at Fort Thompson was never replaced and the Indian Health Service did not bring a facility back to the reservation until 1980. Homes were not insulated sufficiently to endure the rigors of harsh Dakota winters and water lines for the new homes were placed on the roofs, and subsequently burst.

LEGISLATIVE HISTORY

Senator Daschle introduced S. 1264 on September 20, 1995. The bill was referred to the Committee on Indian Affairs, and the Committee held a hearing on S. 1264 on April 25, 1996.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On July 18, 1996, the Committee on Indian Affairs, in an open business session, considered S. 1264 and ordered it reported with an amendment in the nature of a substitute, with a recommendation that the bill, as amended, be passed.

SECTION-BY-SECTION ANALYSIS

Section 1. This section sets forth the short title of the Act, which is to be cited as the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996.

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

Section (a)(1) expresses the findings of the Congress 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 about Sioux City, Iowa, to protect urban and rural areas from devastating floods of the Missouri River, and for other purposes.

Section (a)(2) expressed 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 (a)(3) expresses the finding of the Congress that the Fort Randall and Big Bend project overlies the western boundary of the Crow Creek Indian 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 Crow Creek Sioux Tribe and the homeland of the members of the tribe.

Section (a)(4) sets forth the finding of the Congress the Public Law 85-916 authorized the acquisition of 9,418 acres of Indian land on the Crow Creek Indian Reservation for the Fort Randall project and Public Law 87-735 authorized the acquisition of 6,179 acres of Indian land on Crow Creek for the Big Bend project.

Section (a)(5) sets forth the finding of the Congress that Public Law 87-735 provided for the mitigation of the effects of the Fort Randall and Big Bend projects on the Crow Creek 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 such 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 (a)(6) contains the finding of the Congress that the requirements of Public Law 87-735, with respect to the mitigation of the effects of the Fort Randall and Big Bend projects on the Crow Creek Sioux Indian Reservation have not been fulfilled.

Section (a)(7) expresses the finding of the Congress that although the national economy has benefitted from the Fort Randall and Big Bend projects, the economy on the Crow Creek Sioux Indian Reservation remains underdeveloped, in part as a result of the failure

of the United States to fulfill its obligations under Public Law 85-916 and Public Law 87-735.

Section (a)(8) contains the finding of the Congress that the economic and social development and cultural preservation of the Crow Creek 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 (a)(9) expresses the finding of the Congress that the Crow Creek Sioux Tribe is entitled to additional benefits of the Pick-Sloan Missouri River basin program.

Section 3. Section 3 of S. 1264 sets forth the definition of terms used in the bill.

Section (3)(1) provides that the term "fund" as used in the bill, is intended to mean the Crow Creek Sioux Tribe Infrastructure Development Fund which would be established under the authority contained in section 4(a) of the bill.

Section (3)(2) provides that the term "plan" as used in the bill, is intended to mean the plan for socioeconomic recovery and cultural preservation prepared under the authority of section 5 of the bill.

Section (3)(3) provides that the term "program" is intended to refer to the power program of the Pick-Sloan Missouri River basin program that is administered by the Western Area Power Administration.

Section (3)(4) provides that the term "Secretary" is intended to refer to the Secretary of the U.S. Department of the Interior.

Section (3)(5) provides that the term "tribe" as used in the bill, means the Crow Creek Sioux Tribe of Indians, a band of the Great Sioux Nation recognized by the United States.

Section 4. Section 4 of S. 1264 provides for the establishment of the Crow Creek Sioux Tribe Infrastructure Development Fund.

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

Subsection (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 power program of the Pick-Sloan Missouri River basin program until deposits equal \$27,500,000.

Subsection (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 in the fiscal year immediately following the fiscal year in which the Trust Fund is fully funded, to transfer any interest earned on 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 authority 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 Department of Interior and the Secretary of the Department 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 IHS on the reservation; (3) the construction, operation and maintenance of a municipal, rural and industrial water system; (4) 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. Section 6 of S. 1264 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. Section 7 of S. 1264 addresses the effect of payments to the Crow Creek 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. 1264, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 9, 1996.

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1264, the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996.

Enacting S. 1264 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, *Director*).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 1264.
2. Bill title: Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996.
3. Bill status: As ordered reported by the Senate Committee on Indian Affairs on July 24, 1996.
4. Bill purpose: S. 1264 would provide for compensation to the Crow Creek Sioux Tribe for the taking of tribal lands for the site of the Fort Randall and Big Bend Dam projects. The bill would establish an economic recovery fund for the tribe and make interest earned by the fund available to the tribe for education, health, maintenance of water systems, and other purposes.
5. Estimated cost to the Federal Government: CBO estimates that enacting S. 1264 would create new direct spending authority of about \$1.4 million each year, beginning in fiscal year 1998. We estimate that the resulting outlays would total about \$4 million over the 1997–2002 period, as shown in the following table.

[By fiscal years, in millions of dollars]

	1997	1998	1999	2000	2001	2002
CHANGES IN DIRECT SPENDING						
Estimated budget authority	0	1.5	1.4	1.4	1.4	1.4
Estimated outlays	0	0.2	0.5	0.8	1.1	1.3

The costs of this bill fall within budget function 450.

6. Basis of estimate: S. 1264 would establish a Crow Creek Sioux Tribe Infrastructure Development Trust Fund, into which would be deposited an amount equal to 25 percent of the previous year's receipts from the power program of the Pick-Sloan Missouri River basin program, with a cap of no more than \$27.5 million. Since the power program's receipts for fiscal year 1996 are estimated to be greater than \$200 million, CBO expects that the fund would be fully capitalized in fiscal year 1997. This transfer would be intragovernmental and there would be no outlays associated with such principal deposits.

The bill would direct that the principal be invested in interest-bearing Treasury obligations. The interest would be transferred to another account, which the tribe would be able to use for various purposes. S. 1264 states that the interest would be made available to the Secretary of the Interior to the tribe the year after the Infrastructure Development Trust Fund is fully funded. Assuming a transfer to the fund early in fiscal year 1997, CBO estimates that interest earnings of about \$1.4 million would be made available to the tribe in fiscal year 1998 and in each subsequent year. These amounts would be available for spending without appropriations

action. Estimated outlays of this interest by the tribe are based on historical spending rates for programs with similar goals and activities as those stated in the bill.

7. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. CBO estimates that enacting S. 1264 would affect direct spending in the form of payments to the Crow Creek Sioux Tribe from the tribe's Infrastructure Development Trust Fund. Such payments would begin in fiscal year 1998, but we estimate that outlays would total less than \$500,000 in that year. The following table summarizes the estimated pay-as-you-go impact of this bill.

[By fiscal years, in millions of dollars]

	1996	1997	1998
Change in outlays	0	0	0
Change in receipts	(¹)	(¹)	(¹)

¹ Not applicable.

8. Estimated impact on State, local, and tribal governments: S. 1264 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

Section 5 of the bill would require the Crow Creek Sioux Tribe to prepare a plan for using payments from the federal government authorized by section 4 as a condition of receiving those payments and would specify a number of elements to be included in the plan. Based on information provided by the tribe, CBO estimates that the cost of complying with this requirement would be about \$500,000 over two years. The bill would not authorize any funds for preparing the plan, but the annual payments received from the federal government would be used by the tribe to carry out projects included in the plan.

S. 1264 would impose no other costs on state, local, or tribal governments.

9. Estimated impact on the private sector: This bill would impose no new private-sector mandates as defined in Public Law 104-4.

10. Previous CBO estimate: None.

11. Estimate prepared by: Federal Cost Estimate: Rachel Robertson. Impact on State, Local, and Tribal Governments: Marjorie Miller. Impact on the Private Sector: Amy Downs.

12. Estimate approved by: Paul N. Van de Water, 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. 1264 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee received the following report from the U.S. Department of the Interior setting forth the position of the Administration on S. 1264, as introduced. Issues identified in the Interior Department's report to the Committee have been addressed in the amendment in the nature of a substitute to S. 1264.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, July 17, 1996.

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: I am pleased to transmit our report on the Department of the Interior's views in support of S. 1264, a bill to provide for certain benefits of the Missouri River basin Pick-Sloan project to the Crow Creek Sioux Tribe. This report addresses the issues raised during the Department's testimony at the joint hearing before your Committee and the House Subcommittee on Native Americans and Insular Affairs on April 25, 1996.

We believe the Crow Creek Sioux Infrastructure Development Act of 1995 is an appropriate vehicle through which the Tribe can realize the benefits promised them by the Big Bend Act of 1962, which required the replacement of infrastructure lost as a consequence of dam construction. Moreover, the bill is consistent with the language and intent of the Missouri River Pick-Sloan Program, which was authorized as part of the Flood Control Act of 1944 to provide benefits of the Missouri River irrigation and power development. We find that the language of and responsibilities described in these key acts are consistent with the federal government's trust responsibilities and other federal law. There is precedent for the bill's approach in the 1992 enactment of the Three Affiliated Tribes and Standing Rock Sioux Equitable Compensation program (106 Stat. 4731), which we strongly supported, and the associated General Accounting office documentation of the impacts of dam construction on the tribes of the Missouri River basin.

It is within the context of our support for this bill that we now offer proposed amendments that will strengthen its implementation and address the issues identified during the Joint hearing on April 25. The proposed amendments discussed herein will correct certain definitions and program language; provide for the remedy of potential appropriations problems; authorized the Tribe to prepare the Plan, and provide for the costs for the operation and maintenance of the new school facility.

Program language and definitions

Certain minor definition and language changes will clarify the bill, specifically in sections 3 and 4. Section 3(3) should be revised to read: "The term 'program' means the power program of the Pick-Sloan Missouri Basin Program (Eastern Division), as administered by the Western Area Power Administration. In Section 4(b), language should be added after the word "Fund" on line 13 to reflect that these funds are nonreimbursable and nonreturnable. This sug-

gested language is consistent with the language used in the Three Affiliated and Standing Rock Sioux legislation.

Remedy of potential appropriations problems

In the Administration's testimony before the Committees in April, a concern was raised referencing potential PAYGO problems with the interest payment to the tribe generated from the corpus of the \$27.5 million trust fund established under the legislation. It is our understanding that the capitalization of the Fund can be achieved in two years, and does not pose any PAYGO concerns for the Administration.

However, the Office of Management and Budget notes that Pay-As-You-Go procedures would apply, because the bill makes the interest on the trust fund available for expenditure. This would be scored as an increase in outlays of \$1.5 million per year, and could contribute to a sequester if it is not fully offset. This proposal should be considered in conjunction with all other proposals that are subject to the PAYGO requirement.

Given the Administration's support for the bill, however, we have identified a number of options through which to remedy the potential PAYGO problem, and offer them for your consideration. First, we believe it is possible to find an offset for the \$1.5 million interest, perhaps by searching for smaller offsets which amount in total to \$1.5 million from different areas of the budget. As a second option, we believe it would be possible to permit the tribe to draw upon the interest after some time period (for example, seven years), as in the Three Affiliated model. In order to provide the tribe with planning funds while interest on the Fund accumulates, we would recommend that a portion of the annual interest generated on the Fund (for example \$250,000) be available annually to the tribe.

Any of these options could be implemented by amending Section 4(b) and (d)(2). We would support any or a combination of the options described above.

Plan development

As stated during the hearing, we suggested that the tribe rather than the Secretary develop the infrastructure plan. Given that the Administration strongly supports the concept of and programs for self governance of American Indians, we recommend that the Crow Creek Sioux Tribe bear the primary responsibility for planning tribal development. While we expect the tribe to coordinate closely with the Secretaries of Interior and Health and Human Services, we believe the tribe is fully capable of planning its own infrastructure development. This can be achieved by amending Sections 5(a), 5(b) and 6 to provide for the tribe's primary responsibility.

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

Thank you for the opportunity to submit this report in support of S. 1264. Should you have further questions, please contact me.

Sincerely,

MICHAEL J. ANDERSON

(For Ada E. Deer, Assistant Secretary—Indian Affairs).

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. 1264 will not result in any changes in existing law.

