

**United States House Committee on Natural Resources
Subcommittee on Energy and Mineral Resources
Oversight Hearing on: "Mining in America:
Powder River Basin Coal Mining the Benefits and Challenges"
July 9, 2013**

Testimony of Crow Nation Chairman Darrin Old Coyote

I. Introduction

Good morning. On behalf of the Crow Nation, I want to thank Chairman Lamborn and the members of the House Subcommittee on Energy and Mineral Resources for holding this Oversight Hearing on Powder River Coal Mining. My name is Darrin Old Coyote and I am the Chairman of the Crow Nation. I appreciate this invitation to provide testimony from the Crow Nation's perspective on coal development, an area central to my administration and a topic that has unlimited potential to improve the ongoing substandard socioeconomic conditions of the Crow people and the surrounding communities in southeastern Montana (the northern portion of the Powder River Basin).

I have served as an elected official of the Crow Nation for 8.5 years. More recently, in November 2012, I was elected as Chairman of the Crow Nation. Over the past 7 months, with the help of our coal partners and the Crow Nation Legislative Branch, we have taken several meaningful steps toward the successful development of our coal resources and look forward to completing, in the next few years, projects that will positively transform my community. My purpose today is to provide a brief history of the Crow Nation's resources, to summarize my administration's efforts to develop Crow coal in the northern Powder River Basin, and to share the benefits and challenges of Crow coal development.

II. Brief Overview of Crow Reservation, Land Issues and Resources

A. Brief History of Land and Development Challenges

The Crow Nation is a sovereign government located in southeastern Montana. The Crow Nation has three formal treaties with the federal government, concluding with the Fort Laramie Treaty of May 7, 1868. The Crow Reservation originally encompassed most of Wyoming (including the Powder River Basin) and southeastern Montana, totaling 38.5 million acres. Through a series of treaties, agreements and unilateral federal laws over a 70 year span, Crow territory was reduced by 92% to its current 2.2 million acre area.

In addition to substantial land loss, the remaining tribal land base within the exterior boundary of the Crow Reservation was carved up by the 1920 Crow Allotment Act. In 1919, prior to the Allotment Act, there were 2,453 allotments (individual Crow ownership), consisting of 482,584 acres. By 1935, there were 5,507 Crow allotments, consisting of 2,054,055 acres (218,136 acres

were alienated by 1935). The Big Horn and Pryor Mountains were not allotted and still remain reserved for the Crow Nation and its citizens.

Because of allotment and federal probate of Indian property (with many Indians dying without wills), the phenomenon of fractionated land ownership arose - where several (sometimes hundreds of) owners might have varying interests in a single parcel. By 1928, the *Meriam Report* declared the federal allotment policy to be one of the most disastrous federal policies of all time. During discussions leading up to the *Indian Reorganization Act* of 1934, one congressman explained the fractionating effects of allotment in this fashion:

“It is in the case of the inherited allotments, however, that the administrative costs become incredible.... On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping.” 78 Cong.Rec. 11728 (1934), cited in *Hodel v. Irving*, 481 U.S. 704 (U.S.S.D. 1987).

The Crow land base has been decimated by fractionated ownership of various allotments. The Department of the Interior estimates that over 10% of all fractionated lands within Indian country are actually within the Crow Reservation (with numerous parcels of allotted lands that have more than 10 owners and sometimes more than 100 owners). By meaningfully addressing the fractionation issue at Crow through implementation of the *Cobell Settlement* (enacted by Congress and signed by the President in December 2010), we can hopefully make more of the Crow homeland productive for both residential and energy development purposes.

In sum, the loss of the Crow land base, allotment, and fractionation have collectively resulted in checkerboard ownership of reservation lands, giving rise to overlapping governmental authority in Indian country (federal, state, tribal and local). Sometimes, the land issues become cost prohibitive for some project developers. As discussed later, tax incentives are critical and need to be provided in order to level the playing field for Indian energy projects.

B. Present Land, Population, and Education

The statistical land ownership resulting from the above described legal history is approximately: 45% Crow allotments; 20% Crow Nation trust and fee land; and 35% non-Indian fee land (basically 2/3 of surface land is owned by the Crow Nation and individual Crows). However, overall, the pattern of surface ownership generally is “checkerboard” with interspersed Crow Nation trust and fee lands, Crow allotments and non-Indian fee lands. At times, the checkerboard nature of the surface ownership creates challenges, summarized later, for developing the subsurface minerals (almost all of which is owned by the Crow Nation).

Today, there are about 13,000 enrolled citizens of the Crow Nation, with approximately 9,000 of those residing within the exterior boundaries of the Reservation. Our goal is to invite more of

our citizens to return home to live and resume tribal relations, but we must be able to offer homes, jobs, and a place to find their dreams. Our current unemployment rate is 47%. The Crow Nation has always emphasized higher education and we currently have more than 400 annual applications for higher education assistance. Because of federal funding limitations and internal budget constraints, however, we can only partially fund 90 students each year.

In addition to providing financial support for education, we have a separately chartered tribal college (Little Bighorn College, "LBHC") that started operations in 1981. LBHC has had over 350 graduates. LBHC graduates are employed on and around the Crow Reservation in a variety of positions including teachers' aids, computer technicians, office managers and administrative assistants. At least sixty have completed bachelor's degrees and are pursuing professions in education, social work, human services, science, nursing, technology, accounting and business. As we move forward in developing our coal resources, LBHC can help to provide our citizens with training in fields for new job opportunities.

C. Coal, Past and Present

The Crow Nation has very substantial undeveloped coal resources. In fact, today, the Crow Indian Reservation contains 2 million acres in subsurface mineral rights, including an estimated 9 billion tons of coal. The Crow Nation has developed a limited amount of its resource, by leasing a portion of its coal reserves for 39 continuous years to Westmoreland Resources, Inc. ("WRI"). WRI owns and operates the Absaloka Mine, a 15,000-acre single pit surface coal mine complex near Hardin, Montana, on the northern border of the Crow Reservation.

The Absaloka Mine was developed to supply Powder River Basin coal to Midwestern utilities and it has produced over 180 million tons of coal since 1974. From the Mine's 5-7 million tons per year of coal production, it provides production taxes and royalties to the Crow Nation – exceeding \$20 million in 2010 when the Mine was operating at full capacity. The revenue generated from the Mine represents as much as two-thirds of the Crow Nation's non-federal budget.

Furthermore, WRI employs a 70% tribal workforce, with an average annual salary of over \$66,000, and a total employment expense of approximately \$18.6 million dollars. The Absaloka Mine is the largest private employer within the Crow Reservation. The importance of the Mine to the economy of the Crow Reservation cannot be overstated. Without question, it is a critical source of jobs, financial support and domestically produced energy. WRI has been the Crow Nation's most significant private partner over the past 39 years.

A recent example demonstrates the importance of the Absaloka Mine to the Crow people. A major unplanned outage at the Mine's largest power plant customer over the past 2 years resulted in a 50% reduction in tribal coal revenue and numerous employment layoffs. We expect the outage to cease soon, with a commensurate return this fall of the tribe's basic government operating revenue. This recent outage reinforced the need for the Crow Nation to pursue multiple coal projects to diversify our revenue base.

III. My Administration's Vision on Energy Development: Potential Benefits

Given our vast mineral resources, the Crow Nation can, and should, be self-sufficient. My goal is clear. My administration desires to develop our mineral resources in an economically sound, environmentally responsible manner that is consistent with Crow culture and beliefs. More than anything, I desire to improve the Crow people's quality of life, create a future with good-paying jobs and employment benefits within the Crow Reservation, and provide hope and prosperity for the next seven generations of Crow citizens.

My larger vision is to become America's energy partner and help reduce America's dependence on foreign oil. Over the next 40 years, the World Energy Council predicts that the world will need to double today's level of energy supply to meet increased demand. Primary energy sources, such as coal, oil and gas, have a finite life and therefore we must have an all-of-the-above energy development strategy to meet America's needs as well as global demand.

My administration stands ready to meet the global energy challenge, but the future both near and long term, must have coal in its equation. With President Obama's recent speech on climate change, we are mindful of the increased efforts, policy and otherwise, to restrict coal as a domestic fossil fuel source to generate electricity (with domestic coal produced electricity being reduced from approximately 50% to 40% in less than a decade). Our coal partners and our coal economist consistently remind us of the difficult environment for domestic coal production.

Despite the challenging environment, the Crow Nation has intensified its efforts to develop its coal resources to diversify its revenue streams. With respect to the Absaloka Mine, the Crow Tribal Legislature approved and I executed an agreement with WRI in March 2013 to expand its mining operations with a lease of an estimated 145 million tons of Rosebud McKay coal resources located adjacent to the Mine. This new lease will provide the Crow Nation with long-term revenues and employment and sustain the operations of the Mine past 2020. Even though this lease is pending before the BIA, we expect approval in the near future.

Similarly, in June, the BIA approved another tribally-approved agreement with Cloud Peak Energy ("CPE") to explore, with options to lease, and develop an estimated 1.4 billion tons of Crow coal in the southeastern corner of the Crow Reservation. This long term agreement will also provide much need revenue to the Crow Nation, increase employment opportunities for Crow and Montana citizens, and diversify tribal revenue sources. However, the CPE project – named Big Metal (www.bigmetalcoal.com), is dependent on coal exports through the Northwest.

As such, I have directed my administration to look to coal exports as an alternative, given the increased coal demand in China, India and other countries. Over the past 6 months, I have sent three Crow delegations to the Northwest to meet and work with other tribal nations, investigate proposed coal export projects, and then to analyze and follow-up on these recent diplomatic discussions and fact-finding trips about possible relationships involving Crow coal, transportation and export terminal partners. During the last two trips, which I attended, I invited present and potential project partners as well as tribal leaders from Northwest tribal nations to visit my homeland to see first-hand Crow coal development and listen to their concerns.

Last month, I hosted a Crow Nation Coal Summit to answer questions about coal transportation issues (coal dust and train traffic), jobs (viewing Crow citizens at the Absaloka Mine), reclamation and the potential for future export development. We worked with our coal partners to provide mine tours of Spring Creek and Absaloka, to provide coal transportation information from Burlington Northern Santa Fe Railway Company representatives, and to have coal export terminal questions answered by representatives from SSA Marine (the project developers of the proposed Gateway Pacific Terminal coal export facility).

We have been made aware of local concerns regarding coal export projects expressed by citizens in the Northwest. That is the reason I brought industry, tribal nations and local citizens together to inform, educate, and work with each other to address any substantive issues. I will continue to work with everyone and respect tribal treaty rights and local concerns. However, I strongly feel that non-governmental organizations cannot and should not tell me to leave Crow coal in the ground; I was elected to provide basic services and jobs to my citizens and I will steadfastly and responsibly pursue Crow coal development to achieve my vision for the Crow people.

Finally, with a substantial Crow coal resource, I would like to continue the late Chairman Venne's vision to have the Crow Nation, with a project partner, build the first coal-to-liquids ("CTL") plant in North America with capture and storage of carbon. In fact, in 2008, the Crow Nation and our partner signed a project agreement to develop Many Stars, a planned coal-to-liquids project that sought to produce up to 50,000 barrels or more per day of ultra-clean jet and diesel fuel. The vision was to contract with the U.S. Air Force to supply clean diesel fuel that would meaningfully reduce carbon emissions throughout the world, reduce America's dependence on foreign oil, and provide a safe and secure domestic fuel supply to our national defense.

Unfortunately, the economic recession hit and an uncertain national energy policy made it difficult for the proposed project to proceed. We remain hopeful that the Administration can and will support clean coal, that technology advancements can create a smaller scale project, and that we will have a new development partner to take the risk with the Crow Nation. Needless to say, I am pursuing an all-of-the-above energy development strategy (hydropower, wind, coal export and CTL) but I will need some help in order to effectuate my energy vision.

IV. Challenges and The Need to Level the Playing Field

A. Challenges

Despite the fact that the Crow Nation has a substantial coal resource and even though we have a clear coal development vision, numerous practical problems consistently arise with each proposed project. The lease approval and development process is burdensome, slow, and complicated. Federal regulatory requirements for appraisals, surface access approvals and environmental assessments to conduct exploration within the Reservation often times create significant delays. Further, incomplete land records (in some cases BIA records for surface and mineral ownership are erroneous, missing and out of date), inadequate BIA staffing (e.g., the

BIA area office in Billings, Montana, has one primary individual to work on environmental issues for eight tribal nations), and surface land fractionation (described above) create multiple examples of uncertainty that discourage investment and prevent project development.

It is extremely difficult to compete with off-reservation development because of these problems. Many companies view these additional regulatory and practical burdens as cost prohibitive, even with the best efforts of particular BIA employees and the Crow Nation. Based on our experience in working with current and prospective coal partners, we strongly recommend a two-prong approach to leveling the playing field for energy development in Crow country: (i) eliminate regulatory obstacles (we provided written support for H.R. 1548, Native American Energy Act); and (ii) permanently extend existing tax incentives to offset the extra development burdens.

B. Leveling the Playing Field

In general, two existing federal tax incentives encourage investment and development in Indian country but their utility is diminished by their short term nature. Accelerated depreciation and the Indian employment tax credit are two examples of such incentives (the latter needs some modifications to enhance its effectiveness). These incentives, originally enacted in the 1993 Budget Reconciliation Act, have been extended year-to-year in the tax extenders package and, as such, generally are not relied upon by potential investors with large Indian energy projects because of the extended length of time (often 5-10 years for large coal projects) that development takes before the energy commodity is produced. The Crow Nation supports the permanent extension of these tax incentives, with modifications, but another more specific tax incentive is the most important for Crow coal development.

The Indian coal production tax credit ("ICPTC"), originally enacted in the 2005 Energy Policy Act, kept the Absaloka Mine open and competitive since 2006. This credit neutralized the threat of a potential mine closure and also continued WRI's ability to provide critical employment and revenue for essential Crow governmental functions. Like the aforementioned tax incentives, it is set to expire on December 31, 2013, and has also been part of the tax extenders package.

In order to overcome all of the additional regulatory costs and land transaction issues described above, the Crow Nation seeks a permanent extension of ICPTC, with a few modifications. We would like for the ICPTC to be used against the alternative minimum tax, to extend the placed in service date to include the aforementioned projects, and to eliminate the unrelated person requirement in the original credit (to allow for a CTL project in the future). With these tax incentives made permanent, the Crow Nation can compete with others on a level playing field.

V. Conclusion

Today, the Crow Nation desires to develop its vast coal resources not only for itself, but for our energy partners, the surrounding communities and for the United States. By developing Crow coal via domestic markets, export terminals and coal conversion, we firmly believe we can help ourselves while simultaneously meeting national energy goals -- achieving energy independence, securing a domestic supply of valuable energy, and reducing the country's dependence on foreign

oil. My administration has been very busy in working to develop our coal resources and to remove obstacles to successful development.

I simply desire for the Crow Nation to become self-sufficient by developing its own coal resources and to provide basic services for the health, hopes and future of the Crow people. With help from you - our historic treaty ally – in leveling the energy development playing field, we can achieve my vision and both benefit immensely.

Mr. Chairman and Committee members, thank you again for the opportunity to testify on Powder River Basin Coal Development before you today. I would be happy to answer any questions.