

**Crow Nation Testimony for the
Subcommittee on Indian and Alaska Native Affairs
Legislative Hearing on H.R. 1548, Native American Energy Act
April 26, 2013**

I. Introduction

The Crow Nation is a sovereign government located in southeastern Montana. The Crow Nation occupies a reservation of approximately 2.2 million acres, with abundant natural resources including coal, oil, natural gas, and bentonite. We also are actively working to develop hydropower and wind power projects utilizing renewable energy resources within our reservation. The Crow Nation is uniquely positioned to contribute to the energy independence of our country.

We are encouraged to see the Subcommittee working to address many of the issues that impact energy opportunities in Indian Country. Eliminating obstacles to energy project development in Indian Country, along with providing incentives to secure and expand Indian energy projects, will build additional national capacity to create more jobs in the national economy. We must work together to address the barriers that currently limit project development in order to fully realize the potential for energy development that exists in Indian Country, and for the nation.

We believe that H.R. 1548 makes significant strides toward eliminating many of the regulatory hurdles that have hindered energy project development in Indian Country. Based on our experiences working with industry partners in the coal, oil, and natural gas extraction industries, we will also suggest additional provisions that would further promote these objectives, and would expand the impact of the Native American Energy Act in addressing longstanding disparities in energy project development.

II. Comments on Section 3 – Appraisals

Despite holding substantial natural resources, the Crow Nation has encountered numerous problems in developing energy projects on the Crow Reservation. The Crow Nation and our energy development partners have experienced, and continue to experience, systematic problems in creating energy development and creating new jobs associated with that development.

BIA records for surface and mineral ownership are often erroneous, missing, and out of date. These problems cause significant delay in preparation of environmental documents and land records necessary for project evaluation and development. The BIA lacks the staffing

necessary to provide accurate information on Reservation surface and mineral ownership, and to resolve additional questions that arise. This makes our projects less competitive with off-reservation development. Many companies view this, in addition to other problems, as another prohibitive cost of doing business on the Crow Reservation.

The Crow Nation has worked closely with BIA staff to facilitate its energy development projects. In most cases, BIA staff have worked to be as responsive as staffing shortages and regulatory requirements would allow. However, despite our best efforts, BIA staff shortages and OST appraisal requirements have resulted in a much more difficult and time-consuming process in developing a large energy project on the Crow Reservation than would be the case off-reservation. The delays and added costs have hindered the development of energy projects of all scales in the past, and have been a major source of frustration for project developers as well as for the Crow Nation and its citizens.

The Crow Nation believes that the provisions of H.R. 1548, especially Section 3, address these obstacles and provide alternate methods for compliance with the requirements in federal laws and regulations governing Indian lands. These provisions will assist Indian Nations in realizing the goal of efficient energy project development.

III. Comments on Section 6 – BLM Oil and Gas Fees

The current version of H.R. 1548 includes language prohibiting collection of any fee by the Secretary of Interior, through the Bureau of Land Management, for any application for a permit to drill on Indian land, for conducting any oil or gas inspection activity on Indian land, or on any oil or gas lease for nonproducing acreage on Indian land. These provisions address a longstanding concern of the Crow Nation.

Beginning with the FY 2008 Appropriations Act for the Department of Interior, Congress required the Bureau of Land Management to charge a \$4,000 fee to process every Application for Permit to Drill (“APD”) on the federal and Indian lands on which it supervises oil and gas development activity. The APD Fee has since been increased by subsequent appropriations legislation to \$6,500 for each new well. The Crow Nation has continually protested the application of this fee to tribal lands, and has sought relief in numerous ways.

This \$6,500 fee compares to drilling permit fees of less than \$100 off the Reservation in the State of Montana. Obviously, this creates a disincentive to explore for oil and gas on Indian lands compared to off-reservation State and fee lands. As indicated above, it has been a major factor in the suspension of additional natural gas field exploration and development on the Crow Reservation by our partner, Ursa Major, who also holds leases outside the Reservation. The APD fee is a particular burden for the type of shallow (less than 1500’ deep), low-producing gas wells being drilled by Ursa Major. The cost of completing these types of wells is less than

\$150,000 each, so the APD Fee substantially increases and also comprises a large portion of the capital investment necessary to bring additional wells into production.

The APD Fee also discourages efficient development and slows exploration efforts. For exploratory “wildcat” drilling where success is speculative, the developer can only afford to get permits for a couple of wells at a time, see if they hit gas, and if so, file APDs for another couple of wells, and repeat the cycle. Without the high APD Fee, the developer would be able to obtain many permits and immediately drill additional wells if the first ones are successful. Considering the lead time for issuance of the drilling permits (60-90 days), the APD fee causes delays of up to a year in developing a handful of new wildcat wells, in addition to adding tens of thousands of dollars of non-productive costs that limit the Crow Nation’s ability to charge taxes and collect royalties on future production.

We are extremely encouraged to see this issue addressed by the provisions in Section 6 of H.R. 1548. The APD fee is a hindrance to the Crow Nation’s goal of developing its oil and gas resource. The language eliminating the collection of APD fees on Indian lands will eliminate the disparity that currently exists between drilling on Crow lands and drilling on adjacent State fee lands. This provision will enable expanded and more efficient oil and gas development on the Crow Reservation. It also conforms to our longstanding belief that Indian Nations should not be penalized for nor damaged by the federal government’s exercise of its trust responsibility over Indian lands and resources.

IV. Additional Areas to Consider for H.R. 1548 - Need to provide certainty in tax incentives

There are several current federal tax incentives for economic development in Indian Country, including an accelerated depreciation provision, an Indian wage tax credit, and for energy in particular, the Indian Coal Production Tax Credit. However, the accelerated depreciation provision and wage tax credit both have substantial limitations that severely limit their usefulness for major Tribal energy development projects.

More importantly, all of these tax incentives are set to expire at the end of this year, and in the past they have been extended only one year at a time. For major Tribal energy projects, such as a coal mine or a power generation project with 6-10 year development lead times, the inability to rely on the continued availability of these incentives means that they cannot be factored into the economic evaluations that are necessary for investment decisions. Permanent extensions and appropriate modifications to these existing tax incentives will facilitate job creation and economic development, particularly in energy development, on the Crow Reservation and for all of Indian Country.

A. Indian Coal Production Tax Credit

The Crow Nation has leased 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 expressly developed to supply Powder River Basin coal to Midwestern utilities and has produced over 180 million tons of coal to date. WRI annually pays substantial production taxes and coal royalties to the Crow Nation, exceeding \$20 million in 2010 when the Mine was operating at full capacity. This Absaloka Mine coal revenue represents as much as two-thirds of the Crow Nation’s non-federal budget. Additionally, WRI employs a 70% tribal workforce, with an average annual salary of over \$66,000, and a total annual employment expense of approximately \$18.6 million. The Absaloka Mine is the largest private employer of Crow Tribal members on the Crow Reservation, where the unemployment rate exceeds 47% according to the Bureau of Indian Affairs statistics.

The importance of the Absaloka Mine to the economy of the Crow Reservation cannot be overstated. Without question, the Absaloka Mine is critical to the Crow Nation’s financial independence now, over the past 39 years, and well into the future. A major unplanned outage at the Mine’s largest power plant customer during 2011-2012, which resulted in a 50% reduction in Tribal coal revenues, has driven home the importance of the Absaloka Mine, as well as the need to diversify the Crow Nation’s coal and other energy projects and revenues.

Several factors have contributed to the longevity of the Absaloka Mine and the partnership between the Crow Nation and WRI, but a critical element in keeping the Absaloka Mine in operation has been the Indian Coal Production Tax Credit (“ICPTC”). The Absaloka Mine has struggled financially to compete with larger Powder River coal mines, while also complying with the additional regulatory burdens involved with Indian energy development.

Just last month, the Crow Tribal Legislature approved and Chairman Old Coyote executed an agreement with WRI to expand its mining operations with a lease of an estimated 145 million tons of Rosebud McKay coal resources located adjacent to the Absaloka Mine. This additional lease will provide the Tribe will long-term increasing revenues and employment, and sustain the operation of the Absaloka Mine past 2020. The existence of the ICPTC helped to level the additional regulatory burden of mining on tribal lands, and provide a long-term stable source of revenue to the Tribal government.

In addition, earlier this year, the Crow Tribal Legislature approved and Chairman Old Coyote executed an agreement with Cloud Peak Energy to explore with options to lease and develop an estimated 1.4 billion tons of Crow coal in the southeastern part of the Reservation. The agreement will provide additional much needed revenue to the Tribe as well as employment opportunities for tribal members, and will help diversify the Tribal revenue sources. The existence of the ICPTC contributed to making this deal work. However, in order to support the

large investment required for this new mining area, the continued existence of the ICPTC will be a very important element in Cloud Peak's future decisions on exercising its options and developing this additional Crow coal.

Both of these leases must be approved by the Department of Interior.

The 2005 Energy Policy Act provided the ICPTC beginning in tax year 2006, based upon the number of tons of Indian coal produced and sold to an unrelated party. "Indian coal" is coal produced from reserves owned by an Indian Tribe, or held in trust by the United States for the benefit of an Indian Tribe, as of June 14, 2005. The tax credit is calculated by totaling the number of tons of Indian coal produced and sold, then multiplying that number by \$1.50 (for calendar years 2006 through 2010). For tax years between 2010 and December 31, 2012, the total number is multiplied by \$2.00 (plus an inflation adjustment).

The ICPTC has worked to keep the Absaloka mine competitive and open, as well as to expand the Crow Nation's ability to attract additional outside investment and create jobs and wealth. The tax credit remains critical to the current operation of the existing Absaloka Mine and provides sufficient incentive to help us attract additional investment for future energy projects, as demonstrated by the 2 new lease agreements this year. In order to protect existing operations and encourage growth, the ICPTC should be made permanent, should apply to new Indian coal production facilities, should be allowed to be used against alternative minimum tax, and the requirement that the coal be sold to an unrelated person should be deleted to allow and encourage facilities owned, in whole or in part, by Indian Nations to participate and benefit from the credit.

The continued operation of the Absaloka mine has been significantly facilitated by the tax benefits made possible by the ICPTC. Without the ICPTC, the Absaloka Mine would have ceased to operate, thereby ending a substantial revenue source for the Crow Nation. Continuance of the ICPTC is critical to the long-term future of the Absaloka Mine, and to diversification of the Crow Nation's revenue through development of additional coal reserves by Cloud Peak Energy. The Crow Nation seeks to ensure the continued economic viability of its coal resource developments, as the revenue and jobs that it brings to the Nation are an overriding imperative for the Nation and its citizens.

B. Alternative Fuel Excise Tax Credit

Several coal-to-liquids ("CTL") projects have been announced in the United States. However, all of these projects are struggling due to the high financial commitment needed to plan and implement these projects in an uncertain economic and energy policy environment. The Crow Tribe's Many Stars CTL Project is not immune to these challenges. Among other

potential actions that the federal government could take to encourage the development of new technology in this area, the extension of the Alternative Fuel Excise Tax Credit is critical.

The current Alternative Fuel Excise Tax Credit provides for a 50-cent per gallon credit. We would propose to extend the expiration of the tax credit for a definitive time period, rather than year-to-year extensions as has been done recently. Since it could take roughly 6-10 years for this project to be fully planned, implemented, and operational, investors raise the concern that the incentives will expire before the plant starts operation. We would address this concern by providing the tax credit for a period of 10 years following start-up.

C. Accelerated Depreciation Allowance

Included in the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. 103-66, 107 Stat. 558-63, codified at 26 U.S.C. 168(j), 38(b), and 45(A), are two Indian reservation-based Federal tax incentives designed to increase investment and employment on Indian lands. The theory behind these incentives was that they would act in tandem to encourage *private sector* investment and economic activity on Indian lands across the United States. Neither incentive is available for gaming-related infrastructure or activities. The incentives – an accelerated depreciation allowance for “qualified property” placed in service on an Indian reservation and an Indian employment credit to employers that hire “qualified employees” – expired on December 31, 2003, and have been included in the short-term “extenders packages” of expiring incentives since that time.

Energy projects require significant equipment and physical infrastructure, and involve the hiring of large numbers of employees. Crow is not alone in holding vast untapped natural resources; for several Indian nations, estimates of proven and undeveloped energy resources on Indian lands suggest that revenues to tribal owners would exceed tens of billions in current dollars. As the energy development market improves and the federal programs enacted in the 2005 pro-development energy law, the *Indian Tribal Energy Development and Self Determination Act* (Pub. L. 109-58), energy related activity on Indian lands will increase substantially in the years ahead.

Unfortunately, one-year or two-year extensions of the accelerated-depreciation provision do not provide an incentive for investment of new capital in Indian country for significant energy projects. Development of major projects generally takes a decade or longer. Investors need certainty that the benefit will be available when the project initiates operations in order to factor that benefit into their projected economic models, as well as investment decisions. A permanent extension would address this problem, making the incentive attractive to investors in long-term energy projects on Indian lands.

As currently written, the depreciation allowance could be interpreted to exclude certain types of energy –related infrastructure related to energy resource production, generation, transportation, transmission, distribution and even carbon sequestration activities. We recommend that language be inserted to statutorily clarify that this type of physical infrastructure expressly qualifies for the accelerated depreciation provision. In proposing this clarification, it is not our objective to eliminate non-energy activities that might benefit from the depreciation allowance. Indeed, if adopted, the language we propose would not discourage other forms of economic development in Indian country.

By providing clarifying language and this permanent extension, the accelerated depreciation provision will finally accomplish its purpose – enhancing the ability of Indian nations to attract energy industry partners to develop long-term projects utilizing the available Indian resources.

D. Indian Employment Wage Credit

The 1993 Act also included an “Indian employment wage credit” with a cap not to exceed twenty percent (20%) of the excess of qualified wages and health insurance costs that an employer pays or incurs. “Qualified employees” are defined as enrolled members of an Indian tribe or the spouse of an enrolled member of an Indian tribe, where substantially all of the services performed during the period of employment are performed within an Indian reservation, and the principal residence of such employee while performing such services is on or near the reservation in which the services are to be performed. *See* 26 U.S.C. 45(c)(1)(A)-(C). The employee will not be treated as a “qualified employee” if the total amount of annual employee compensation exceeds \$35,000. As written, the wage tax credit is completely ineffective and does not attract private-sector investment in energy projects within Indian country. The provision is too complicated and private entities conclude that the cost and effort of calculating the credit outweighs any benefit that it may provide. We therefore propose that the wage and health credit be revised along the lines of the much-heralded Work Opportunity Tax Credit, which is less complicated and more likely to be used by the business community. We propose retaining the prohibition contained in the existing wage and health credit against terminating and rehiring an employee and propose to alter the definition of the term “Indian Reservation” to capture legitimate opportunities for employing tribal members who live on their reservations, even though the actual business activity may be off-reservation. This amendment would allow the Indian Employment Wage Credit to more effectively fulfill the purpose for which it was originally enacted.

VI. Conclusion

It is critical that Congress act to protect Indian nations' sovereignty over their natural resources and secure Indian nations as the primary governing entity over their own homelands. This will have numerous benefits for the local communities as well as the federal government.

The Crow Nation aspires to develop its vast natural resources not only for itself, but to assist the United States realize a new goal – achieving energy independence, securing a domestic supply of energy, and reducing dependence on foreign oil. These goals are consistent with the provisions in H.R. 1548, and can be furthered by the additional provisions we suggest adding to the Bill.

Thank you for the opportunity to provide these comments, share our experiences, and suggest additional measures to encourage energy development in Indian Country.