

CROW TRIBE OF MONTANA

Testimony for

United States House Committee on Ways and Means,

Subcommittee on Select Revenue Measures

**HEARING on
"Certain Expiring Tax Provisions"**

April 26, 2012

Introduction

Thank you for the opportunity to share the views and concerns of the Crow Nation on Federal tax policy, specifically on certain expiring tax provisions. Given that the Crow Nation's resources are primarily energy-based, our comments today focused on certain expiring tax provisions that directly impact Indian energy development.

The Crow Nation is a federally-recognized sovereign Tribal 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, limestone and bentonite. We also are also actively working to develop hydropower and wind power projects utilizing renewable energy resources within our reservation. As such, the Crow Nation is uniquely positioned to contribute to the energy independence of our country.

We believe that existing tax provisions serve to help counter the impact of the many regulatory obstacles facing energy development in Indian Country. We invite this Subcommittee to consider how tax policy can help level the playing field for energy development in Indian Country and help realize the economic value of such resources not only to the Tribes that own them, but to surrounding local communities and the nation as a whole.

Continuing to provide tax incentives to create energy jobs in Indian Country will help overcome other obstacles to energy project development, and will build additional national capacity to create even more jobs in the national economy. This is an opportunity that cannot be missed.

While we strongly support permanent extensions of these tax provisions to support longer range infrastructure projects, we urge Congress to extend the expiring provisions temporarily until broader consensus emerges for a longer-term tax package. In any given year, the trio of tax provisions discussed below provides critical benefits to tribal energy projects and tribal governments.

Energy Opportunities and Obstacles

Coal

There is an estimated, some believe conservatively so, 9 billion tons of coal held by the Crow Nation. The Absaloka mine outside of Hardin, Montana produces 6 million tons of coal annually; over 175 millions of tons since 1974. The mine annually pays taxes and royalties to the Crow Nation totaling \$19 million, which is 60% of our non-Federal budget. The mine provides skilled jobs that pay \$16 million; again critical in our economy which struggles with nearly 50% unemployment. As a source of jobs, critical financial support, and US produced energy, it is absolutely critical that it remain open and competitive.

A recent outage at Absaloka's largest coal customer's power plant will hurt jobs and revenues in 2012, and emphasizes the need for multiple energy projects to diversify our revenue sources.

To that end, we have been developing Many Stars, a planned Coal-to-Liquids (CTL) plant. The original plans called for a state of the art clean coal facility capable of producing up to 50,000 barrels or more of liquid products per day ultimately – liquid fuel capable of replacing oil for ultra-clean jet and diesel fuel, which translates to a significant reduction in the need for importing foreign oil, and in turn contributes to national security. It was anticipated that Many Stars, as designed, would create many jobs – up to 2,000 construction jobs and a range of 250 to 900 production jobs dependent on through-put. And with full carbon capture and sequestration, Many Stars seems to be the best way to monetize the Tribe's vast coal resources in the long run while not contributing to the climate change problem.

But uncertainty about national energy policy has made it difficult to attract investment for this cutting edge project. Regulatory uncertainty combined with expiring tax provisions makes future planning quite difficult. Fortunately, technology improvements are making a smaller scale facility possible. We are currently working to bring in a new developer and starting on a smaller scale (8,000 barrels per day), which is now more feasible due to technology improvements

In addition to the Absaloka Mine and the Many Stars CTL project, there is good potential for additional development of very low-sulfur coal on the Reservation that is dependent on rail access to the west coast. This option is burdened by some cost disadvantage and additional BIA regulatory hurdles, as compared to nearby Federal coal.

Oil and Gas

Recent exploration has found natural gas reserves worth developing, but activity has been halted by the markets and the Bureau of Land Management's Application for Permit to Drill (APD) fees of \$6500 per well. Off-reservation permit fees compare at less than \$100. Limited oil exploration and development is occurring near the western edge of the Reservation.

Wind

Several years-worth of wind data indicates a steady and reliable Class 5/6 wind resource in several areas of the Reservation located in direct proximity to existing transmission lines. Because the wind resource areas encompass lands held in a variety of ownership patterns, including tribal trust, individual tribal member allotments (many of which are highly fractionated), and non-Indian fee lands, developing this resource has proved to be a challenge.

Hydropower

The recent Crow Water Rights Settlement Act of 2010 grants the Nation exclusive rights to develop and market hydropower from the Yellowtail Afterbay Dam. Preliminary planning is underway. To date, the plan is to build a small, low-head hydropower facility with an estimated capacity of 10 Megawatts to supply the local rural cooperatives that provide electric power to the Reservation.

Leveling the Playing Field for Indian Energy Projects

Regulatory obstacles

The lease approval and development process is burdensome, slow, and complicated. Regulatory requirements for appraisals and surface access approvals to conduct exploration on Indian trust lands, along with slow environmental assessments, create delays and uncertainties significant enough to make our projects non-competitive. These types of burdens and other limitations in the federal Indian law tend to discourage investments in, and ultimately development of our projects.

Incomplete land records, inadequate BIA staffing, and surface land fractionation add more burdens to energy projects on Reservation lands, in the form of extensive land work, mineral rights research, and hundreds of surface landowner consents.

Effective Federal tax incentives are essential to help offset some of these extra burdens.

Federal Tax Incentives

While the existing federal tax incentives work to encourage investment and development on Indian energy projects and to provide critical support to ongoing tribal energy projects, their usefulness is limited by the length of their applicability. For example, the tax incentives that have worked to keep the Absaloka mine open and competitive since 2006 are due to expire next year and so cannot be counted upon by investors considering support of mine expansions and other new long-lead-time projects and investments that will take 5 – 10 years to begin producing.

That said, we strongly recommend that the Indian Coal Production Tax Credit, the accelerated depreciation provision, and the Indian Wage Tax Credit be included in the extenders package

Congress considers this year. We also strongly support the Indian Coal Production Tax Credit and the accelerated depreciation provision being made permanent, along with some additional modifications. We recommend that the Indian Wage Tax Credit be refashioned to mirror the very successful Work Opportunity Tax Credit, which will be a much more effective tool to encourage employment on reservations. A detailed explanation of each of these three tax provisions with our recommended changes is attached.

Extension of Wind Energy Production Tax Credit is also essential to development of Tribal wind resources and ability for the Tribe to make direct use of the credit will provide options for ownership and control.

Finally, we recommend extending the expiration date of the current 50-cents per gallon alternative fuel excise tax credit for a period of 10 years following start-up for those coal-to-liquids (CTL) projects starting construction prior to 2020.

Conclusion

Given our vast mineral resources, the Crow Nation can, and should, be self-sufficient. We seek to develop our mineral resources in an economically sound, environmentally responsible and safe manner that is consistent with Crow culture and beliefs.

The Crow people are tired of saying that we are resource rich and cash poor. We respectfully request your assistance in setting the foundation to make our vision a reality.

We have been working to develop our energy resources and to remove obstacles to successful development. We hope to build a near-term future when our own resources, in our own hands, provide for the health, hopes and future of our people.

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 has been an ally of the United States all through its history. Today, the Crow Nation desires to develop its vast natural resources not only for itself, but to once again help the United States with a new goal -- achieving energy independence, securing a domestic supply of valuable energy, and reducing its dependence on foreign oil.

However, our vision can only become a reality with Congress' assistance. Mr. Chairman and Subcommittee members, thank you again for the opportunity to provide testimony on how federal tax policy and incentives can help level the playing field for Indian Energy development.

ATTACHMENT

Explanation of Proposed Indian Tax-Incentive Amendments

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), provided for 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 who hire “qualified employees” -- expired on December 31, 2003, and have been included in the short-term “extenders packages” of expiring tax incentives since that time.

The Indian Coal Production Tax Credit was enacted in the Energy Tax Incentives Act of 2005 and serves to inoculate tribes that chose to mine their coal resources from the many vagaries of the markets, thereby allowing some stability in productive use of tribal resources for the benefit of these tribal governments and their members.

Permanent extensions of these tax provisions are sought in order to attract long term investment. Although short-term extensions do not provide the kind of certainty to investors when it comes to long-term business planning, the extenders serve to support the current operations for tribal energy tribes.

Indian Coal Production Tax Credit

The Indian Coal Production Tax Credit is very important to the Crow Tribe. The Energy Tax Incentives Act of 2005 provided a business tax credit starting 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, and from facilities that were placed in service before January 1, 2009. The tax credit is calculated by multiplying the number of tons of Indian coal produced and sold by \$1.50 for calendar years 2006 through 2010; and by \$2.00 for calendar years beginning after 2010. Both dollar amounts will be adjusted for inflation each year. The credit does not apply for sales occurring after December 31, 2012. The purpose of this tax credit was to neutralize the impact of price differentials created by SO₂ emissions allowances thereby allowing Indian coal to remain competitive.

The Tribe seeks a permanent extension to the Indian Coal Production Tax Credit, and to allow the credit to be used against alternative minimum tax (AMT) for the full period of the credit, to extend the "placed in service" date (from "by January 1, 2009" to "by January 1, 2025"), and to delete the requirement that the coal be sold to an unrelated person (to allow mine-mouth coal conversion facilities to participate as well as facilities owned by Tribes).

As the original Indian coal production tax credit served to minimize the threat to the Crow Tribe's ability to continue to mine coal at the Absaloka Mine, and thereby continue providing employment and funding critical governmental functions, these amendments to extend the ICPTC now sought by the Crow Tribe will continue to accomplish those critical objects while allowing the Tribe further develop its very large low-sulfur coal resources in Montana.

Accelerated Depreciation Allowance

In general, "qualified Indian reservation property" is defined as property 1) used by the Federal taxpayer in the conduct of a trade or business within an Indian reservation, 2) is not used or located outside the reservation on a regular basis, and 3) is not acquired by the taxpayer from a person who is related to the taxpayer. Certain property ("qualified infrastructure property") *may* be eligible for the accelerated depreciation allowance even if located *outside* an Indian reservation if it connects with qualified infrastructure property located within the reservation. Specific examples included in section 168 are "roads, power lines, water systems, railroad spurs, and communications facilities." *See* 26 U.S.C. 168(j)(4)(C).

Depreciation schedules for qualified property are as follows:

3-year property	2 years
5-year property	3 years
7-year property	4 years
10-year property	6 years
15-year property	9 years
20-year property	12 years
Nonresidential real property	22 years

Because renewable and non-renewable energy activities require significant equipment and physical infrastructure and involve the hiring of large numbers of employees, the Congress has repeatedly recognized that the 1993 incentives are ideally geared to energy development on

Indian lands. Conservative estimates of proven and undeveloped energy reserves on Indian lands suggest that revenues to tribal owners would be in the billions.

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 clarify congressional intent that this type of physical infrastructure does indeed qualify for the accelerated depreciation provision. In proposing this clarification, it is not our objective to eliminate those non-energy activities that might benefit from the depreciation allowance. Indeed, if adopted, the language we propose would continue to encourage other forms of economic activity on Indian lands.

The current definition of “Indian Reservation” also could be interpreted to exclude facilities such as the Absaloka Mine and future coal development to support coal-conversion facilities. The language we propose would clarify the definition of “Indian Reservation” to include facilities that utilize Tribal or Indian trust minerals that are located outside the Reservation surface boundaries, such as Crow coal in the “ceded strip” immediately north of the Reservation boundary, where the coal itself is held in trust by the United States and considered to be part of the Reservation.

By providing this clarifying language and making the provision permanent, this accelerated depreciation provision will enhance the Crow Tribe’s ability to work with the energy industry to develop long-term energy projects using the Tribe’s resources to advance our people.

Indian Employment Wage Credit

The 1993 Act also included an “Indian employment wage credit” in an amount not to exceed 20 percent 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, substantially all of the services performed during the period of employment are performed within an Indian reservation, and the principal place of abode 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 compensation to that employee exceeds \$35,000 annually.

Our experience in attempting to use this credit to attract private-sector investment in energy projects on our reservation is that it is so complicated and unfamiliar that most private entities

conclude that the cost and effort of calculating the credit outweighs any benefit 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 to retain 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 not be on-reservation. This amendment would allow the Indian Employment Wage Credit to more effectively fulfill the purpose for which it was originally enacted.