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Hearing on Indian Governments and the Tax Code
"Maximizing Tax Incentives for Economic Development"
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I. Introduction

Good Morning. I want to thank Chairman Baucus and the members of the Senate Committee on Finance for holding this hearing on Indian tax issues. My name is Donald Laverdure and I currently serve as Chief Legal Counsel and Senior Advisor for the Crow Nation Executive Branch. Prior to my current position, I was an Assistant Professor of Law and Founding Director of the Indigenous Law Program at Michigan State University College of Law. I also served two years as a William H. Hastie Fellow, Lecturer in Law and Executive Director of the Great Lakes Indian Law Center at the University of Wisconsin Law School.

During my legal career, academic and practice, my primary focus has been Indian tax issues, regardless of the forum – research and writing, speaking and teaching, and/or litigating and negotiating. As such, I have testified several times at local government levels, assisted and/or represented more than twenty Indian nations and organizations, and taught law classes and numerous seminars on Indian tax issues over the past nine years.

With this background in mind, my purpose today is to provide a full and accurate context to judge the federal legislative incentives presented before this committee. In this testimony, I provide the following sections: (i) public perception regarding Indians and taxes and a brief history of taxation in Indian country; (ii) background and summary of the federal legislation (including proposed amendments) before this committee; (iii) proposed energy projects to practically illustrate why these incentives are important and critical for economic development; and (iv) conclude that these legislative measures are a necessary first step to level the economic playing field for Indian nations and their economic partners.

II. Public Perception and History of Taxation in Indian Country

A. Public Perception

Today, many Americans believe that Indians do not pay taxes, that Indian nations are not legitimate governments, and that most Indians are wealthy because of casinos. Given public opinion, it is not surprising that ordinary citizens and interest groups, especially in states with successful tribal gaming facilities, pressure their elected officials, federal and local, to demand that Indians “pay their fair share.” Thus, many Americans argue that any special rights “given” to Indians from “old” treaties, primarily casinos and tax free status, are no longer valid.

Moreover, the public is taught that two sets of governments exist in America under the U.S. Constitution – federal and state. Therefore, like previous generations, the American public

confuses fact with perception based on: (i) confusion with respect to the legal and tax status of individual Indians; (ii) a fundamental misunderstanding of the pre-constitutional and independent sovereign status of Indian nations; and (iii) distorted information regarding the actual socioeconomic conditions in Indian country (basing perception on the minority of wealthy gaming tribes and incorrectly imputing their circumstances to many other tribes that remain impoverished). Consequently, generational misplaced public perception typically results in recycled federal policies impacting Indians – termination of Indian nations, assimilation of Indians into majority society, and taxation like every other American.

There is no doubt that public opinion impacts, and has previously formed the basis of, federal policies affecting Indians. In the past, with regard to property and natural resources such as land, water, and minerals, public opinion led to the devastating Federal Indian policies of removal, allotment, and termination – all of which resulted in non-Indian control of some form of tribal wealth in Indian country. Indeed, decisions concerning such wealth never included tribal leaders or tribal citizens. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (no recourse in any branch of the federal government when the federal government unilaterally took Indian homelands, even fabricating signatures to meet previously agreed upon treaty terms); Tee-Hit-Ton v. United States, 348 U.S. 272 (1955) (no compensation for federal taking of aboriginal lands); Removal Act of 1817 (removal of Indians in New York); Removal Act of 1830 (removal of Cherokees from Georgia); General Allotment Act of 1887 (breaking up tribal land base and opening up Indian land to settlers); Flood Control Act of 1944 (condemning tribal homelands for federal dam projects).

An examination of the relevant legal and political decisions, based on public perception, reveals that taxation in Indian country is an efficient mechanism that invariably changes the legal and political status of tribal governments and their citizens in order for non-Indians and American governments to unjustly capture newly discovered wealth from Indian country. Throughout American history, tribal governments and their citizens have shouldered immense burdens and responsibilities of other governments and their citizens, typically through takings and taxes of each new form of Indian wealth, while receiving minimal and often no benefits in return. Today, many Indian homelands are relatively small geographic areas comprising some of the most impoverished communities in the United States. Despite the poverty, **Indian wealth is potentially subject to four or five concurrent government taxes (federal, tribal, state, county and city)** – an unjust structure that I call "Indian tax law."

B. History of Indian Tax Law

1. Federal Commerce and Indian Nations

As the original inhabitants, Indian nations had established local economies and trade networks. Contact from Europeans had initiated an economic link between separate societies – an exchange of goods and services among Indian nations, colonies and European countries. Indian tribes' relationship with other governments, and their respective citizens, was therefore critical to international trade and diplomacy. Prior to ratification of the U.S. Constitution, colonies regulated trade with Indians.

Indian commerce, a significant trade venue and source of wealth, was a critical issue to the framers of the U.S. Constitution. Since the founding of the republic, every generation of Americans and their elected officials, local and national, has debated who regulates and therefore controls some form of wealth in Indian country, actual or potential. Even though Indian nations did not participate in the constitutional convention, two important provisions were adopted in the U.S. Constitution regarding Indians: (i) Congress has the power to regulate commerce with the Indian tribes; and (ii) representatives and direct taxes shall be apportioned among the several states "*excluding Indians not taxed*." U.S. Constitution Article I, Section 8, Clause 3 (commerce clause); Article I, Section 2, Clause 3 (proportional representation clause).

With exclusive commerce power, federal officials negotiated hundreds of treaties with Indian nations, seeking peace, friendship and exclusive trade. At least initially, the federal commerce power was used to control all non-Indian individuals that sought to do business in Indian country. Over the years, Congress enacted a series of Indian Trade & Intercourse Acts that imposed licensing and a series of other requirements for Indian traders by the federal government – which continues in substantial effect to this day. See Act of June 30, 1834, ch. 161, sec. 25, 4 stat. 729. Federal regulation began with non-Indians in Indian country and eventually transformed into plenary authority over all persons within Indian country.

Similarly, the various European nations, colonies and the federal government sought to regulate and generally profit from the underlying Indian land. The British Crown sought to maintain exclusive rights to purchase property from Indian nations and regulated such to minimize the impact of land speculators from buying and sometimes stealing Indian land. In *Johnson v. M'Intosh*, the U.S. Supreme Court held that discovery of the Indians gave England, and then the federal government, the right of first refusal to purchase Indian lands, creating a monopoly to purchase such territory. Johnson v. M'Intosh, 21 U.S. 543 (1823).

Indian nations ended up with a property right constituting something less than fee simple to their own homelands and the U.S. created a system of land tenure with minimal disruption to already well-established procedures. In fact, title to millions of acres of land had already been obtained. See Felix Cohen, Original Indian Title, Minnesota Law Review (1941). Even today, as a result of *Johnson v. M'Intosh* and subsequent federal court opinions, Indian nations' land cannot be sold without acquiescence of the federal government. 25 U.S.C. Section 177.

In contrast to federal powers in Indian country, the U.S. Supreme Court has ruled that state laws have no force within Indian territory except with the tribe's consent, or treaty conformity, or acts of Congress. Upon discovering gold in Cherokee territory, the State of Georgia had asserted unilateral control over individuals, resources, and property within Cherokee territory. However, the Supreme Court denied Georgia's power, stating that "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Despite *Worcester*, President Jackson removed the Cherokees from their homeland in Georgia on the trail of tears to Oklahoma territory.

These decisions regarding general federal and state power within Indian country are important because they have direct bearing on which government extracts revenue from wealth generation

in Indian country. Over time, federal and tribal circumstances changed and so did the federal-tribal relationship: (i) originally, there was a bilateral relationship between the Indian nations and federal government, through treaties and agreements (pre-constitution to 1871); (ii) implied federal control of Indians (1871 to 1934); and (iii) express federal pre-emption of state power in Indian affairs (1934 to present). The evolutionary nature of the federal-tribal relationship created anomalous federal and state taxation consequences – a path that initially precluded, then allowed for, federal, state and local taxation in Indian country. In 1876, the Commissioner of Indian Affairs stated, "whenever an Indian reservation has on it good land, or timber, or minerals the cupidity of the white man is excited, and a constant struggle is inaugurated to dispossess the Indian, in which the avarice and determination of the white men usually prevails."

2. Federal Taxes and Indian Nations

Unlike commerce, the governmental tax relationship among Indian nations, the federal government, and states was not addressed in the text of the U.S. Constitution. Similar to the federal-state intergovernmental tax immunity doctrine, Indian nations were not historically subject to federal taxation and the national government was not subject to local taxes. *See* McCulloch v. Maryland (1823) (holding that the federal government was immune from state tax); U.S. Attorney Gen. Op. 1824 (federally-licensed traders within Cherokee territory were immune from Cherokee taxes). In 1913, three important tax issues occurred, each of which still has ramifications for governmental taxation in America today.

First, direct federal taxes were ratified with the Sixteenth Amendment to the U.S. Constitution. Second, Congress provided an express statutory exclusion for state governments, but not tribal governments, from federal taxation. *See* 26 Internal Revenue Code Section 115 (excluding gross income derived from any public utility or a state exercising any essential government function). Third, with passage of the Sixteenth Amendment and IRC Section 115, the rationale for the intergovernmental tax immunity doctrine had been rendered obsolete, setting the stage for its erosion and eventual demise. *See* Helvering v. Gerhardt, 304 U.S. 405 (1938) (upholding federal taxes assessed on a state instrumentality); Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) (holding that state taxes applied to federal employees).

Despite the omission of Indian nations from the federal statutory exclusion, the Internal Revenue Service ("IRS") treated tribes like states, ruling that tribal governments were not subject to generally applicable federal taxes. *See* Rev. Rul. 67-284, 1967-2 C.B. 55; Rev. Rul. 81-295, 1981-2 C.B. 15. More recently, the IRS issued a multifaceted ruling with respect to federal taxation of tribally-owned businesses: (i) an unincorporated business entity, wholly-owned by a tribe is not taxable regardless of location of income earned; (ii) a wholly-owned tribal corporation under the 1934 Indian Reorganization Act ("IRA") Section 17 is not taxable regardless of location of income earned (because it is considered to be an instrumentality of the federal government); and (iii) a tribally-owned corporation formed under state law is taxable (federal and state) regardless of location of income earned. Rev. Rul. 94-16, 1994-1 C.B. 19.

Unfortunately, there is no guidance, statutory or administrative, regarding the tax consequences of tribal entities chartered under tribal law. Needless to say, outside investors and tribes themselves are subject to significant financial risk because of the uncertainty in today's emerging

era of tribal corporations / entities. In order to encourage much needed economic development and to further Indian self-determination in Indian country, Indian nations should not be subject to taxation when they form business entities under their own law and create economic development within their own territory (just like state and local governments).

In contrast to the IRS, the U.S. Supreme Court and the Ninth Circuit Court of Appeals ruled that Indian nations are subject to applicable federal taxes because tribes were not statutorily excluded by Congress from such provisions. *See* Chickasaw Nation v. U.S., 122 S. Ct. 528 (2001) (tribally-owned casino subject to federal wagering excise tax); Confederated Tribes of Warm Springs v. Kurtz, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (tribally-owned and operated sawmill subject to federal vehicle and fuel excise taxes); In Matter of Cabazon Indian Casino, 57 B.R. 398 (9th Cir. BAP 1986) (tribally-owned casino subject to federal unemployment and withholding taxes; by contrast, a tax credit is provided to states). State governments are not subject to the same federal excise taxes that are applied to Indian nations because they have a statutory exclusion from gross income under Section 115 of the Internal Revenue Code.

Congress has, however, partially spoken on the taxation of Indian nations when it enacted the Tribal Tax Status Act of 1982, treating tribes as states for *certain* federal tax purposes. 26 U.S.C. Section 7871(a). The legislation provides the following tax consequences: (i) deductions for charitable contributions, estate tax, gift tax, real estate tax; (ii) exemptions for certain excise taxes; (iii) an exclusion for interest on tribal government bonds and for benefits from accident and health plans; (iv) tax-exempt status for tribal colleges and universities; (v) tax on excess expenditures to influence legislation; and (vi) other tax benefits for employee annuities, discount obligations and private foundations. Importantly, the legislation provides that a tribal government must be performing an essential governmental function, like a state, to qualify for many of the aforementioned tax benefits.

The IRS has interpreted the provisions of the 1982 Tax Act narrowly, causing Indian nations to be subject to negative tax consequences that no other government in America must suffer. As a result, Indian nations are generally unable to issue tax-exempt bonds and are the subject of disproportionate IRS audits with casino financing transactions. More importantly, Indian nations cannot access capital from the investment market that is necessary to develop infrastructure for economic development. While on the other hand, state and local governments can and do regularly access the bond and financial markets for local economic development (e.g., municipal golf course).

Why are Indian nations subordinate to all other American governments with respect to these important tax issues that often constitute critical paths toward economic development? I do not know, but the Tribal Government Tax-Exempt Bond Parity Act of 2007 is a step in the right direction, presumably amending the 1982 Tribal Government Tax Status Act, and is related to a larger issue – governmental equality for Indian nations vis-à-vis all other governments in the United States. Fundamentally, one immediate solution in my mind is clear – **Congress, and this committee in particular, should set its priority for Indian tax policy by legislating tribes to be equal to states for all federal tax purposes**.

3. Federal Taxation of Individual Indians

Historical records shed little light on the constitutional phrase "Indians not taxed." For most of American history, individual Indians were legally determined to be tribal citizens and not federal or state citizens. *See, e.g.,* 7 U.S. Op. Atty. Gen. 746 (1856); Elk v. Wilkins, 112 U.S. 94 (1884). Even though Indians could not become federal citizens by general acts of Congress, the U.S. Attorney General concluded that Indians were subject to federal authority. During this time period, however, many Indians who maintained their tribal relations were not subject to local taxes. *See, e.g.,* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) (holding that local property taxes were not applicable to tribal Indians in Indian country).

The phrase "Indians not taxed" implied that some Indians were taxed, setting the stage for inconsistent court decisions. After the Civil War, in 1868, Congress ratified the Fourteenth Amendment to the U.S. Constitution and declared that all persons born or naturalized in the U.S. and subject to its jurisdiction, are citizens of the U.S. and of the State wherein they reside, but retained the phrase "Indians not taxed." U.S. Constitutional Amendment XIV. The earliest agency interpretation concluded that the federal income tax did not apply to Indians because internal revenue laws had not been extended to Indian country. 12 U.S. Op. Atty. Gen. 208, 210 (1867).

In 1870, however, the U.S. Supreme Court held that federal tobacco taxes applied to products manufactured and sold by individual Cherokees within Cherokee territory. The Cherokee Tobacco, 78 U.S. 617 (1870). The Cherokee Nation and the federal government had negotiated a treaty in 1866, providing for taxation of tobacco products sold outside of Indian country. Then in 1868, two years after the federal-tribal treaty, Congress passed an internal revenue act that imposed taxes on tobacco produced anywhere within the exterior boundaries of the United States. Despite express federal-tribal treaty language providing for taxes on sales *outside* of Indian country, the Supreme Court upheld the federal tobacco taxes on products manufactured and sold by Cherokees within Cherokee territory.

The U.S. Supreme Court, in *Cherokee Tobacco*, gave the following reasons for its decision: (i) Indian territory is part of the United States (despite removal and a promise that it would never be); (ii) outsiders would be lured by illicit gain; (iii) Indian treaties could be superseded by acts of Congress; and (iv) tax burdens were required from American citizens and were indispensable to meet public needs. At the same time, lower federal court decisions ruled inconsistently regarding the citizenship of American Indians under the Fourteenth Amendment. *See, e.g.,* U.S. v. Lucero, 1 N.M. 422 (1869) (holding that Pueblos were citizens); McKay v. Campbell, 16 Fed. Cas. No. 8840 (D.C. Ore. 1871) (ruling that child of tribal Indians was not a citizen); U.S. v. Cook, 25 Fed. Cas. 695 No. 14891 (C.C. 1879) (after dissolving tribal relations, Indian could become American citizen).

In 1884, in *Elk v. Wilkins*, the U.S. Supreme Court affirmed earlier interpretations of the "Indians not taxed" language in the Fourteenth Amendment, holding that such language barred American citizenship for Indians. 112 U.S. 94 (1884). The Court said the tribal citizens "owed immediate allegiance to their several tribes, and were not part of the people of the United States." Thus,

despite Cherokee Tobacco, the Court stated that "general acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them."

Justice Pound aptly described the anomaly of permitting federal taxation of noncitizen Indians: “they are nationals and without a nation.” Cuthbert W. Pound, National Without a Nation: The New York State Tribal Indians, 22 Colum. L. Rev. 97, 98 (1922). *Cherokee Tobacco* was the first U.S. Supreme Court decision affirming the federal tax power over individual Indians within Indian country. Despite the Court ignoring express federal-tribal treaty language to the contrary, *Cherokee Tobacco* is the accepted authority for all other federal taxes upon Indians within Indian country and its rationale is generally accepted and relied upon by federal courts today.

Eventually, the *first Americans* obtained the right to vote in the United States in 1924. 8 U.S.C. Section 1401(b). Prior to this federal statutory grant of citizenship, Congress had already extended federal laws, including taxation, over Indians in Indian country, thereby constituting “taxation without representation.” Similarly, the early agency interpretations and federal court decisions were quickly reversed in a series of court decisions, with the court holding that Indians were subject to federal tax laws unless Congress expressly exempted or excluded them. Choteau v. Burnet, 283 U.S. 691 (1931); Superintendent v. Commissioner, 295 U.S. 418 (1935).

C. Modern – Local Taxation in Indian Country

In exercising its authority in Indian affairs, the federal government divested Indian nations of their land base under a series of allotment acts – eventually leading to the creation of new states in the West. Even in areas where tribal governments retained a portion of their homelands, non-Indians were allowed to settle substantial parts of Indian country. These new demographics, which now included non-Indian settlers, would lead to new forms of state and local control over wealth generating activities in Indian country.

Prior to allotment, property owned by Indian nations and their citizens had been immune from local property taxes. The New York Indians, 72 U.S. (5 Wall.) 761 (1866) (holding tribal land to be immune from state property tax); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) (holding lands allotted to individual Indians were immune from state property tax). Nevertheless, Congress could authorize state tax authority over Indian lands, however, such authorization was to be "unmistakably clear" in any such federal legislation. In one case, for example, the U.S. Supreme Court held that Congress expressly authorized state real property taxes on Indian lands under Section 6 of the 1887 General Allotment Act. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

Section 6 of the 1887 General Allotment Act also provided that previously non-taxable Indian lands were subject to state tax after the federal government issued a fee patent title to an individual Indian owner. More recently, the U.S. Supreme Court held that any fee simple land owned by an Indian nation, even if it was reacquired and held within its historic homeland, was subject to local taxes. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (tribally-owned fee land subject to country property tax); City of Sherill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) (tribally-owned fee land subject to city property tax). Similarly, if land is owned outside of Indian country in fee simple, whether held by tribal

governments or their citizens, it is subject to local taxes unless Congress specifically prohibits such local tax. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (upholding validity of New Mexico's gross receipts tax on tribally operated ski resort on land lease from the federal government and located adjacent to the tribe's reservation).

Public perception that led to federal and then state conflict over Indian land, water, and minerals has more recently included demands to share other Indian wealth generating activities. *See, e.g.,* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (tribal Indians not subject state income tax only if living and working within their own homeland); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (non-Indian consumers subject to both state and tribal tobacco taxes); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (leading to federal regulation and state participation in wealth from tribal gaming); Atkinson Trading v. Shirley, 532 U.S. 645 (2001) (non-Indian not subject to tribal hotel occupancy tax); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (state motor fuels tax applies to patrons of tribal casino).

In the past thirty-five years, some Indian law scholars have noted that the U.S. Supreme Court has also accepted public opinion about what Indian rights "ought to be." David Getches, Conquering the Cultural Frontier: The New Subjectivism of the U.S. Supreme Court in Indian Law, 84 Cal. L. Rev. 1573 (1996). Indeed, the Court is pro-active in curtailing tribal sovereignty, contrary to its constitutional duty to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The Supreme Court has repeatedly upheld the power of state and local governments to tax activities, persons, and property in Indian country, while simultaneously diminishing tribal tax authority over similar objects of taxation.

With some notable exceptions, the Supreme Court has rarely recognized and/or protected tribal authority in Indian tax cases, even over their own tax base – persons, property, and entities in Indian country. The historical trend is clear – increased public revenue for the federal, state and local governments from wealth in Indian country at the expense of Indian nations. Because of all of the foregoing, Indian nations cannot, and more often contractually agree not to, assess and collect taxes from wealth generating activities in Indian country in order to attract much needed economic development. Federal tax incentives would definitely help shoulder the tribal burden.

III. Summary of Federal Legislative Indian Tax Incentives

A. Federal Tax Incentive Legislation

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 tax incentives since that time. Such extensions do not provide certainty to investors for long-term business planning and, as a result, the potential of the incentives is not realized.

1. Accelerated Depreciation Allowance

In general, “qualified Indian reservation property” is defined as property: (i) used by the federal taxpayer in the conduct of a trade or business within an Indian reservation; (ii) is not used or located outside the reservation on a regular basis; and (iii) 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 Committee on Finance has repeatedly recognized that the 1993 incentives are ideally geared to energy development on Indian lands. 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. With an attractive market and the enactment in 2005 of a 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 these kinds of 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 their investment decision. A permanent or 20-year extension would address this problem, thus 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 those 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 this clarifying language and this long-term 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 vast Indian resources available.

2. Indian Employment Wage Credit

The 1993 Act also included an “Indian employment wage credit” with a cap not to exceed 20 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 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 be off-reservation. This amendment would allow the Indian Employment Wage Credit to more effectively fulfill the purpose for which it was originally enacted.

3. Indian Coal Production Tax Credit

A third tax incentive is the Indian Coal Production Tax Credit, important to several Indian nations in the West, including the Crow Nation. The 2005 Energy Policy Act provided a business tax credit 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.

The origin of this production tax credit began with the goal of neutralizing the impact of price differentials created by sulfur (SO_2) emissions allowances, thereby keeping Indian coal competitive in the regional market. I believe the following actions should be taken regarding the tax credit: (i) extend the application of the tax credit (from 7 to 20 years); (ii) allow the credit to be used against alternative minimum tax (AMT) for the full period of the credit; (iii) extend the "placed in service" date (from "by January 1, 2009" to "by January 1, 2022"); and (iv) delete the requirement that the coal be sold to an unrelated person (to allow and encourage facilities owned, in whole or part, by Indian nations to participate).

One purpose of the Indian coal production tax credit was to minimize the economic threat to the ability of the Crow Nation's economic partner to continue to mine coal. The credit helped keep the mine in production and simultaneously provided revenue to fund critical governmental functions. These proposed amendments and extension of the credit would continue to support the responsible development of these available resources.

IV. Example of Current Projects -- Crow Tribe Coal-to-Liquids Project

A. Summary and Overview

The Crow Nation is currently engaged in advanced negotiations with a third party to plan and implement a very significant Coal-to-Liquids (CTL) project within the Crow Indian Reservation. This CTL project offers the best opportunity for the Crow Nation to monetize their currently stranded coal assets and is a critical economic necessity for the Nation. However, government support and incentives are needed to fully realize the economic viability of such a significant project. Incentives help mitigate the extremely high capital cost and project execution risk associated with this type of mega-project, even during a currently robust commodity market, due to historical uncertainties with such commodity markets.

With no commercial-sized CTL projects currently operating in North America, this particular project has the opportunity to demonstrate that large scale (multi-billion dollar) CTL projects can be developed and operated in a technically, environmentally, and socially responsible manner, as well as provide a critically needed key domestic energy source to the western United States. In sum, enabling this CTL project is absolutely critical to end decades of poverty and create the long term economic viability of the Crow Nation Tribe and simultaneously represents strategic national security interests by reducing America's dependence on foreign oil.

B. Background and Supporting Context

The total coal resources on the Crow Reservation is estimated to be 10 billion tons, which is about 3% of the total supply of coal in the United States. This CTL project will target coal-to-liquids conversion of roughly 2 billion tons of Crow coal, initially producing 50,000 barrels of liquid products per day and ultimately producing 125,000 barrels of liquid products per day. Crow coal can be converted to ultra-clean fuels, like synthetic jet fuel and diesel fuel at an estimated yield of 1 barrel of liquid product per ton of coal supply. Thus, when considered in traditional oil and gas terms, this project has the opportunity to responsibly develop and

monetize a 2 billion barrel oilfield – likely more significant than any single traditional oil and gas opportunity currently being pursued in North America.

By way of background, U.S. net imports equal 12 million barrels per day or 4.4 billion barrels a year. Consumption in the U.S. is 20.7 million barrels per day or 7.5 billion barrels a year. The U.S. has proven oil reserves of roughly 21 billion barrels. Thus, this CTL project has the ability to increase U.S. oil reserves by 10% -- a significant contribution to U.S. energy independence.

C. Economic Benefits for the Crow Tribe

A large integrated mine and CTL project will create 3,000 to 4,000 jobs during a four to five year construction period and an additional 700 to 900 permanent jobs upon the commencement of operations. The jobs created by this project would include high level positions, such as engineers and managers, as well as skilled trades (mechanics, electricians, welders). In addition, income generated by the project could serve to support the Tribe's severely underfunded education and health care programs and support the development of key infrastructure on the Crow Reservation to improve the lives of its citizens.

D. Project Overview

The total integrated cost of the proposed combined mine and CTL project is estimated to be $7-8 billion for the initial 50,000 barrels per day (bpd) facility. This cost includes capturing 95% and more of carbon emissions for permanent underground storage and/or use in enhanced oil recovery projects (EOR). While rising crude prices would seem to help the economics of a CTL plant, construction and engineering costs also continue to dramatically rise, thereby constantly challenging the economic viability of this type of mega-project – the first of its kind in the United States. These costs underscore the importance for incentives to enhance the economic viability of this world-class project.

There are advantages in building CTL plants adjacent to the coal resources that otherwise have limited marketability due to lower quality and/or high transportation costs. CTL plants are located all over the world and this technology is ready for deployment in the United States. CTL has been used since before WWII, and South Africa has been operating 150,000 bpd since the 1950s. In addition, the latest clean-coal technology has improved product yields and enables environmental safeguards not previously available in the beginning years of this industry.

E. Critical Need for Government Support

Several CTL projects have been announced in the U.S.; however, all of these projects are struggling due to the high financial commitment needed to plan and implement these projects. Banks are reticent to lend to "first of a kind" project, even though the technology has been proven commercially in other countries and in demonstration plants here in the United States. Based on the foregoing, the following key actions are crucial for the viability of the Crow CTL project:

- Grant the Department of Defense and other federal agencies the ability to enter into long-term, guaranteed fixed-price contracts that will underpin the commercial framework needed for these types of long-term CTL projects;

- Extend the expiration date of the current 50-cents per gallon fuel excise tax credit from September 2009. Since it could take roughly 10 years for these types of projects to become fully planned, implemented, and operational, an end-of-year 2020 might be a reasonable extension date;

- Support a twenty percent (20%) investment tax credit for each CTL plant placed in service before the same future date; and

- Support 100 percent (100%) expensing of investments in the year of capital outlay for any CTL plant in operation by the same future date.

The above four incentives, in addition to the Indian tax incentives before this committee, are considered by many to be the most critical incentives to enable the advancement of these critically needed CTL projects. However, there are many other incentives that can assist in enabling these critically needed projects. The following table lists the current federal government incentives that should be strongly considered for extension:

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC §§ 45(c)(9), 45(d)(10), 45(e)(10), 39	Renewable Electricity Production Credit/Indian Coal - General Business Credit	Coal-to-Liquid Plant and Coal Reserves	The credit is $1.50 per ton on the sale of Indian coal for calendar year 2006-2009 and $2.00 for calendar years beginning after 2009, linked to inflation. For 2007, the credit for Indian coal was $1.544 per ton of coal that was sold.	1/1/2013
Federal - IRC § 45A. This provision has expired; however, Congress is considering legislation that would extend the credit, retroactive from January 1, 2008.	Indian Employment Credit - General Business Credit	Coal-to-Liquid Plant, Coal Reserves and Marketing	Tax credit based on the increase in qualifying annual wages paid to enrolled Indian tribal members or their spouses from 1997 - 2004 as compared to a base year annual wage in 1993.	12/31/2007

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC § 168. This provision has expired; however, Congress should consider legislation that would extend the credit, retroactively	Accelerated Cost Recovery for property on Indian Reservation - Depreciation Deductions	Coal-to-Liquid Plant	Provides a shorter recovery period of approximately 40% for most non-residential depreciable property. The property must be placed in service prior to 12/31/2007 and used by the taxpayer predominantly in the active conduct of a trade or business within an Indian reservation, not used or located outside the Indian reservation on a regular basis, not acquired (directly or indirectly) by the taxpayer from a person who is related to the taxpayer and not property (or any portion thereof) placed in service for purposes of conducting or housing class I, II, or III gaming. Special rules for reservation infrastructure investment - shall not apply to qualified infrastructure property located outside of the Indian reservation if the purpose of such property is to connect with qualified infrastructure property located within the Indian reservation. Such term includes, but is not limited to, roads, power lines, water systems, railroad spurs, and communications facilities.	12/31/2007.
Federal - IRC §1396	Empowerment Zone Tax Credit - General Business Credit	Coal-to-Liquid Plant, Coal Reserves and Marketing	Taxpayers located in a Federal Empowerment Zone who hire qualified employees are eligible for a credit of up to 20% of the first $15,000 in employee wages for a maximum credit of $3,000 per qualifying employee for each year they remain employed by the taxpayer.	12/31/2009
Federal - IRC. §6426(d); §6427(e)(2); §34(a)(3)	Alternative Fuel Credit - Fuel Credit	Coal-to-Liquid Plant and Marketing	Credit available to a taxpayer who sells an alternative fuel to be used as a fuel in a motor vehicle or motorboat, or so used by the taxpayer. The term “alternative fuel” includes any liquid fuel derived from coal (including peat) through the Fischer-Tropsch process, and excludes ethanol, methanol, or biodiesel.	9/30/2009

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC §6426(e); §6427(e)(1); 34(a)(3)	Alternative Fuel Mixture Credit - Fuel Credit	Coal-to-Liquid Plant and Marketing	Credit available to a taxpayer who produces any alternative fuel mixture for sale or use in a trade or business. An alternative fuel mixture is a mixture of alternative fuel (as described above) and taxable fuel that contains at least 0.1 percent (by volume) of taxable fuel which is sold by the taxpayer producing such mixture to any person for use as fuel, or is used as a fuel by the taxpayer producing such mixture.	9/30/2009
Federal - IRC §4041(a)(1) and (2)	Alternative Fuel and Alternative Fuel Mixture (Enduser) Excise Tax	Coal-to-Liquid Plant	If the alternative fuel or alternative fuel mixture is not a taxable fuel, an excise tax nonetheless is levied when it is sold for use as a fuel in a diesel-powered highway vehicle, diesel-powered train, motor vehicle or motorboat.	No express expiration date
Federal - IRC. §4081(b)	Alternative Fuel Mixture (Blender) Excise Tax	Coal-to-Liquid Plant	If an alternative fuel mixture is a taxable fuel, it is subject to excise tax when removed, entered or sold by a blender. A taxable fuel has (i) at least four percent normal paraffin, or (ii) a distillation range of 125 degree F or less, a sulfur content of 10 ppm or less, and minimum color of +27 Saybolt.	No express expiration date
Federal - IRC §199	Deduction for Income Attributable to Domestic Production Activities - Federal Income Tax Deduction	Coal-to-Liquid Plant and Coal Reserves	The deduction is for a percentage of the lesser of (1) the taxpayer's "qualified production activities income" (QPAI) or (2) the taxpayer's taxable income for the tax year. The deduction will be limited for a taxable year to an amount equivalent to 50% of the W-2 wages paid by the taxpayer during the calendar year. QPAI is derived from, among other things, the following: any sale, exchange, or other disposition or any lease, rental, or license of qualifying production property that was manufactured, produced, grown, or extracted by the taxpayer in whole or in significant part within the U.S.	No express expiration date

Jurisdiction and Statutes	Incentive and Type	Applicable Entity	Program Description	Expiration Date
Federal - IRC §45D	New Markets Tax Credit - General Business Credit	Coal-to-Liquid Plant, Coal Reserves and Marketing	The credit is for a taxpayer who makes a qualified equity investment (in the form of stock or a partnership interest in a selected community development entity (CDE). The credit is available both to purchasers at original issue and to subsequent purchasers. A CDE is a corporation or partnership (1) the primary mission of which is serving or providing investment capital for low-income communities or low-income persons; (2) that maintains accountability to residents of low-income communities by their representation on any governing board or on any advisory board of the CDE; and (3) is certified by the Treasury Department as an eligible CDE. For an investment in a CDE to be a "qualified" equity investment, the CDE must designate it as such.	12/31/2008

V. Conclusion

As a practical matter, several levels of government exist that provide services to meet public needs in America today. Each level of government independently assesses, enforces, and collects taxes on various forms of private wealth to yield public revenue. Throughout the history of our republic, and especially in the last half century, government tax collections have yielded substantial public revenue, enhancing the presence and power of the federal, state, and local governments.

Federal, state, and local government taxes are largely accepted in modern America because of consensual governance and the provision of public services. Over time, public opinion about taxation has shifted from issues of sovereign legitimacy to proportional tax burden and public spending choices, with tax policy debates often occurring during national and local political campaigns. Thus, even though some Americans complain about taxes (some protesting), without mentioning the basic services that are provided by taxes, like roads, water, sewers, schools, etc., their opinions and actions are largely expressed at the ballot box, not through litigation.

In contrast to other governments in America, Indian nations are mired in tax litigation and adverse legislation, national and local, both focusing on the legitimacy of tribal governments.

Despite pre-existing all other governments and possibly being subject to four or five concurrent government taxes in Indian country, a majority of the American public and some elected officials continue to believe that Indians do not pay taxes. Instead of building legal and physical infrastructure, developing and sustaining local economies, and debating tribal tax policies, public opinion forces Indian nations to exhaust valuable resources litigating tax disputes against other governments and local non-Indian residents.

Existing Indian tax law is the primary obstacle to tribal self-determination and economic development in Indian country. Alexander Hamilton wrote in Federalist Paper No. 12, "a nation cannot long exist without revenue and destitute of this essential support, it must resign its independence." With federal tax authority firmly established and the expansion of state and local powers to tax almost all activities, persons, and property within Indian country, along with diminishing tribal tax authority, many Indian nations have been rendered powerless and dependent within their own homelands.

The path from dependent sovereign to governmental equality is, undoubtedly, a substantial challenge. However, under current conditions, Indian nations cannot achieve meaningful self-determination in Indian country because they are not the primary tax and governing authority – they lack public revenue to provide basic services, and they are unable to address substandard socioeconomic conditions. By enacting this legislation, Congress will have established its intent to begin reforming the unequal and unjust structure of existing Indian tax law.

Therefore, I strongly recommend that this committee carefully consider and permanently extend the existing and proposed federal Indian tax legislation. In light of the history of taxation in Indian country, the subject matter before this committee represents modest legislation to create some incentives for doing business in Indian country. With long-term certainty and predictability of tax incentives, I firmly believe that Indian nations can attract partners to invest in much needed economic development in Indian country.

This tax legislation, if enacted, could tip substantial pending investment decisions toward world–class energy development and those decisions by themselves would make a significant and positive change for tribal communities. After this legislation, it is my hope that future legislation will be introduced to treat tribes as states for all federal tax purposes and that tribes and states will move toward source-based government-to-government taxation agreements in lieu of existing Indian tax law. Thank you for your time and attention and I would be happy to answer any questions.