April 15, 2015

Recommendations to the Senate Finance Committee
Cloud Peak Energy, Gillette, Wyoming

LEVELING THE PLAYING FIELD – INDIAN COAL PRODUCTION TAX CREDIT

The Indian Coal Production Tax Credit provides a crucial means to level the playing field for future development of the vast Tribal coal resources that are subject to more regulatory requirements than comparable development on private, state, or federal lands, as well as to protect the economic viability of existing Tribal coal mining projects that provide much-needed jobs and whose royalties and taxes provide a major source of non-Federal funding for coal-producing Tribes. This tax credit must be permanently reauthorized with some important revisions to ensure that Indian Tribes can pursue economic development and self-determination.

A recent economic study by Harvard Professor Joseph Kalt of the Crow Indian Tribe, which possesses significant but under-developed coal assets, found that the Indian Coal Production Tax Credit was essential for helping to alleviate poverty for the Tribe's people. The study found:

"[T]he U.S. Census estimates that in 2006---2010 the annual per capita income of American Indians on the Crow Reservation ($11,987) was less than half that of the U.S. as a whole ($27,334). The median household income for Crows ($38,560) was markedly lower than that reported for U.S. households ($51,914), and the Crow family poverty rate (24%) was more than double that of the U.S. population as a whole (10%). The poverty rate for Crow children (39%) was also twice that of children throughout the U.S. (19%)."[1]

As Crow Nation Chairman Darrin Old Coyote testified before a United States Senate Committee on Indian Affairs Oversight Field Hearing on April 8, 2015, "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."

Cloud Peak Energy supports the Crow Tribe's request to permanently extend the Indian Coal Production Tax Credit in order to provide the Tribe an opportunity to reach their goals of self-sufficiency.

Current Law

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. (*See* 26 USC Section 45 (c)(9).) Eligible facilities must have been placed in service by January 1, 2009. (*See* 26 USC Section 45

[1] Professor Joseph P. Kalt, The Mining of Crow Nation Coal: Economic Impact on the Crow Reservation, Big Horn County, and Montana, The Harvard Project on American Indian Economic Development, February 4, 2014 (hereinafter, "2014 Kalt Report")

(d) (10).) 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. This credit was allowed to be used against alternative minimum tax (AMT) for four years. The credit did not apply for sales occurring after December 31, 2012. (*See* 26 USC Section 45(e)(10).) Section 406 of the American Taxpayer Relief Act of 2012 extended this tax credit through the end of 2013. The credit expired on December 31, 2013, was renewed and expired again in December 2014.

Proposal

A permanent extension of the Indian Coal Production Tax Credit is sought to provide stability and attract energy investors. Striking the expiration date and the "placed in service" date will achieve this goal. In addition, modifications to existing law are needed to allow the credit to be used against alternative minimum tax (AMT) for the full period of the credit and to delete the requirement that the coal be sold to an unrelated person, in order to allow mine-mouth coal conversion facilities to participate as well as facilities owned by Tribes. This proposal has been incorporated into H.R. 1522, as introduced in the House. A companion bill is expected to be introduced in the Senate in the near future.

Reason for the Change

The Indian Coal Production Tax Credit serves to counter-balance the additional costs and time required to permit and lease Indian coal, to buffer the impacts caused by the general vagaries of the coal markets, and to encourage private investment in Indian energy, jobs, and wealth. The credit leverages Tribal coal revenues and employment that are worth several times the cost of the credit. All of these benefits contribute to funding critical tribal governmental functions and securing the self-sufficiency and self-determination of the coal-producing Tribes. A permanent extension to the Indian Coal Production Tax Credit is needed to ensure these multiple benefits for the future. A permanent extension will provide the certainty investors need for effective long-term business planning, which is, of course, critical for large energy development projects.

How does the Indian Coal Production Tax Credit impact the economy?

In January 2013, Cloud Peak Energy, one of the largest U.S. coal producers, and the Crow Tribe of Indians signed option and exploration agreements covering an estimated 1.4 billion tons of in-place coal in the southeastern corner of the Crow Reservation. This agreement received approval from the Bureau of Indian Affairs in June 2013.

As of June 2014, Cloud Peak Energy paid a total of $5.25 million in option payments to the Tribe and will make additional annual payments during the remainder of the initial five-year option period that could bring total option payments during the initial period to $10 million. Upon any future exercise and required regulatory approval of a coal mineral lease or leases, and development of mining, Big Metal Coal Co. LLC will provide preferential hiring, training and promotion to qualified Crow Tribal members and Indians living on or near the Crow Indian Reservation and will make lease signing bonus, production tax, and royalty payments to the

Tribe. Cloud Peak Energy has also been providing $75,000 per year for post-secondary education scholarships for eligible Tribal members.

A permanent extension of the ICPTC – including application to AMT – will be important in our future decision to exercise these lease options and develop this Tribal coal, which would more than double the Tribe's royalty and tax revenue, along with related bonus payments and college scholarship funding. We also understand an extension of the ICPTC would support Westmoreland Coal Company's large additional investment for developing the new Tract I area, and maintaining this critical source of Tribal revenue and employment. [A1]

The economic study of the Crow Tribe found:

"[W]e can see the economic importance of Crow coal and the ICPTC to the State of Montana as a whole. Not surprisingly, the largest impacts are in the mining sector: The annual economic contribution of the Absaloka Mine is approximately 16% to the sector's output and employment, while the comparable figures for [Cloud Peak Energy's] Big Metal Project are 34%---35%. Combined, the two mines add approximately a percentage point to the overall Montana GRP and substantially increase the State and federal tax collections in Montana, as compared to a scenario with a shuttered Absaloka Mine. The overall potential total of taxes and royalties for the Crow Nation, Big Horn County, and the State of Montana from Crow coal produced from the Absaloka Mine and the Big Metal Project is approximately $3.8 billion over 25 years."[2]

<u>The Indian Coal Production Tax Credit makes the tax code fairer.</u>

As discussed above, the ICPTC serves to counterbalance the additional regulatory burdens that come with permitting a mine on a federal Indian reservation. By allowing Indian Tribes to compete more effectively with other holders of coal resources, the tax code allows the Tribes to compete fairly in the coal market.

<u>The Indian Coal Production Tax Credit effectively supports other important Federal policy objectives such as Native American self-determination.</u>

By allowing Indian coal to compete with coal resources on private, state, or federal land, the ICPTC supports the development of Indian-owned resources, thereby supporting tribal economic growth, employment and self-sufficiency. As we continue to develop our natural resources, we grow the basis of support for all of the Tribe's economic development, which as you well know, is critical to create a stable environment to best serve our people.

<u>Summary of the "Playing Field" – Regulatory Burden</u>

Coal mine permitting is generally regulated by the Federal Surface Mining Control and Reclamation Act (SMCRA) administered by the Office of Surface Mining Reclamation and Enforcement (OSM), and approved State (and Tribal) plans for implementing the Act. SMCRA is one of the most complex and comprehensive regulatory schemes in any industry.

[2] 2014 Kalt Report

Below is a summary and comparison of regulatory agencies involved in developing Private, Federal and Tribal coal in Montana, including administration of SMCRA and additional requirements for Tribal lands:

Mine Location	Agency	Examples of Agency Functions
Off-Reservation Private Coal & Surface	Montana Dept. of Environmental Quality (**MDEQ**)	All mine and exploration permitting
Off Reservation Federal Coal/Private Surface	**MDEQ** _____ Bureau of Land Management (**BLM**)	All mine permitting _____ Exploration permitting
Tribal Coal	**OSM**	Most mine permitting
	Bureau of Indian Affairs (**BIA**)[3]	Exploration program approval Trust Land surface access appraisals and consent approvals[4] Rights of Way appraisals and consent approvals Lease approval for mining
	BLM	Exploration plan approval
	U.S. EPA	Water discharge/NPDES permits
	Crow Tribe	Training and workforce development Cultural resources protection
	MDEQ	Absaloka Mine "Ceded Area" permitting (with OSM concurrence) Off-Reservation infrastructure/impacts for mines near the Reservation border

[3] Each federal agency approval must comply with NEPA (CatEx, EA or EIS)

[4] For Cloud Peak Energy's Big Metal project, surface access agreements for initial exploration involve 39 tracts of allotted trust land with a total of 560 individual Indian owners.

Draft bill to permanently extend the Indian Coal Production Tax Credit:

MCG15201 S.L.C.

114TH CONGRESS,1ST SESSION

S.

To amend the Internal Revenue Code of 1986 to extend and improve the Indian coal production tax credit.

IN THE SENATE OF THE UNITED STATES

Mr. DAINES introduced the following bill; which was read twice and referred to the Committee on

A BILL

To amend the Internal Revenue Code of 1986 to extend and improve the Indian coal production tax credit.

Be it enacted by the Senate and House of Representa tives of the United States of America in Congress assembled,

SECTION 1. EXTENSION AND IMPROVEMENT OF INDIAN COAL PRODUCTION TAX CREDIT.

(a) REPEAL OF LIMITATION BASED ON DATE FACILITY IS PLACED IN SERVICE.—Section 45(d) of the Internal Revenue Code of 1986 is amended to read as follows:

''(10) INDIAN COAL PRODUCTION FACILITY.—The term 'Indian coal production facility' means a facility that produces Indian coal.''.

(b) REPEAL OF LIMITATION ON PERIOD DURING WHICH COAL MUST BE PRODUCED AND SOLD; TREATMENT OF SALES TO RELATED PARTIES.—Section 45(e)(10)(A) of the Internal Revenue Code of 1986 is amended by striking ''per ton of Indian coal—'' and all that follows and inserting the following: ''per ton of Indian coal—

''(i) produced by the taxpayer at an

Indian coal production facility, and
‘‘(ii) sold (either directly by the tax
payer or after sale or transfer to one or
more related persons) to an unrelated per
son.”.

(c) REPEAL OF LIMITATION ON TREATMENT AS A SPECIFIED CREDIT.—

(1) IN GENERAL.—Section 38(c)(4)(B) of the Internal Revenue Code of 1986 is amended by redesignating clauses (iv) through (ix) as clauses (v) through (x), respectively, and by inserting after clause (iii) the following new clause:
‘‘(iv) the credit determined under section 45 to the extent that such credit is attributable to section 45(e)(10) (relating to Indian coal production facilities),’’.

(2) CONFORMING AMENDMENT.—Section 45(e)(10) of such Code is amended by striking subparagraph (D).

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to coal produced and sold after the date of the enactment of this Act, in taxable years ending after such date.