

United States Senate Committee on Indian Affairs
Oversight Hearing on
"Identifying Indian Affairs Priorities for the Trump Administration"
March 8, 2017

Testimony of Crow Nation Chairman Alvin Not Afraid, Jr.

I. Introduction

Good morning. On behalf of the Crow Nation, I want to thank Chairman Hoeven, Vice-Chairman Udall, Senators Daines and Tester, and the other distinguished members of the Senate Committee on Indian Affairs for holding this Oversight Hearing on Identifying Indian Affairs Priorities for the Trump Administration. My name is Alvin Not Afraid, Jr., and I am the Chairman of the Crow Nation. After serving 4 years as Tribal Secretary, I was elected Chairman last year and took office in December, 2016. I appreciate this invitation to provide testimony on economic priorities from the Crow Nation's perspective.

For many years, coal has been the mainstay of the Crow Reservation economy. However, various Federal regulatory initiatives during the previous administration in Washington, D.C. have taken a serious toll on the Western coal industry, and especially on the production of Crow and other Indian coal. My administration is aggressively pursuing other economic development projects, including renewable energy, to diversify and reduce our dependence on coal revenues, but those will take time – probably many years – to make major contributions to our efforts to achieve economic self-sufficiency. One such tourism opportunity we can initiate immediately relates to a historic document, “The Grizzly: A Treaty of Cooperation, Cultural Revitalization and Restoration.” The Crow Nation was instrumental in this treaty, which to date has been signed by 123 Tribal Nations, and provides a blueprint for the Crow and other tribal nations in this sphere, with the promise of cultural, economic and environmental revitalization.

Today, my testimony will focus on changes in Federal policies that will bring some much-needed near-term relief for Crow coal, while we transition to new clean-coal technologies, renewables, and other types of Tribal business enterprises. First, I’d like to give you some background on the Crow Nation and our Reservation lands, and our coal resources and development priorities.

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

A. Brief History of Land and Development Challenges

The Crow Nation is a sovereign government located in southeastern Montana. The Crow Nation has three formal treaties with the federal government, concluding with the Fort Laramie Treaty

of May 7, 1868. The Crow Reservation originally encompassed most of Wyoming and southeastern Montana, totaling 38.5 million acres. Through a series of treaties, agreements and unilateral federal laws over a 70-year span, Crow territory was reduced by 94% to its current 2.2 million acre area.

In addition to substantial land loss, the remaining tribal land base within the exterior boundary of the Crow Reservation was carved up by the Allotment Acts. By 1935, there were 5,507 Crow allotments, consisting of 2,054,055 acres. The Big Horn and Pryor Mountains were not allotted and still remain reserved for the Crow Nation and its citizens.

The Crow land base has been further decimated by fractionated ownership of various allotments. The Department of the Interior (“DOI”) estimated that over 10% of all fractionated lands within Indian country are actually within the Crow Reservation (with many parcels of allotted lands that have more than 100 owners).

During 2014 - 2015, the Crow Nation partnered with DOI and meaningfully addressed the fractionation issue through implementation of the *Cobell* Settlement. The Crow Land Buy-Back Program resulted in more than \$130 million paid out to Crow landowners, with more than 240,000 equivalent acres purchased for the Crow Nation.

Despite the success of the Crow LBBP, the overall loss of the Crow land base and allotment have resulted in checkerboard ownership of reservation lands, giving rise to overlapping governmental authority (federal, state, tribal and local). Sometimes, the land issues become cost prohibitive for project developers. As discussed later, tax incentives and other measures are critical in order to level the playing field for Indian energy projects.

B. Present Land, Population, and Education

Today, there are 14,000 enrolled citizens of the Crow Nation, with more than 9,000 of those residing within the exterior boundaries of the Reservation. Our Tribal membership consists of many young people – fully 58% of our members are under 30 years old. This demographic only reinforces the need to take a long-term view of the Reservation economy.

Our goal is to invite more of our citizens to return home to live and resume tribal relations, but we must be able to offer homes, jobs, and a place to find their dreams. Our current unemployment rate is between 25% and 47%, depending on whose statistics you use.

The Crow Nation has always emphasized higher education and we currently have more than 400 annual applications for higher education assistance. Because of federal funding limitations and internal budget constraints, however, we can only partially fund 90 students each year. In

addition to providing financial support for education, we have a separately chartered tribal college (Little Bighorn College, “LBHC”) that started operations in 1981. Among the hundreds of LBHC graduates, many are employed on and around the Crow Reservation in a variety of positions including teachers' aides, computer technicians, office managers and administrative assistants.

C. Crow Coal – Past, Present and Future

1. The Absaloka Mine

The Crow Nation has very substantial undeveloped coal resources, estimated at 9 billion tons. The Crow Nation has developed a limited amount of its resource, by leasing a portion of its coal reserves for the past 40 years to Westmoreland Resources, Inc. (“WRI”). WRI owns and operates the Absaloka Mine (“Mine”), supplying Powder River Basin coal to Midwestern utilities, and it has produced 200 million tons of coal since 1974. From the Mine’s 5-7 million tons per year of coal production, it provides production taxes and royalties to the Crow Nation – exceeding \$20 million in 2010 when the Mine was operating at full capacity. **The revenue generated from the Mine has represented as much as two-thirds of the Crow Nation’s non-federal budget.**

Furthermore, WRI employs a 70% tribal workforce, with an average annual salary of over \$66,000, and is the largest private employer within the Crow Reservation. The importance of the Mine to the economy of the Crow Reservation cannot be overstated. Without question, it is a critical source of jobs, financial support and domestically-produced energy. WRI has been the Crow Nation’s most significant private partner over the past 40 years. During 2012-2013, the Tribe and WRI finalized a new lease agreement to extend the life of the Absaloka Mine for two more decades.

However, as my Administration begins its efforts to bring prosperity to the Crow people, the future of the Absaloka Mine has never been more uncertain. Production at the Absaloka Mine has fallen to only 3 million tons per year, and will stay at that level for at least the next 2 years. This is despite the previous Tribal administration agreeing to a reduction in our coal severance tax rates, which further compounds the loss in Tribal revenues.

In the past, Tribal royalties and coal severance tax revenues from the Mine totaled well over \$20 million per year, but it is now projected that we will receive **less than one-half those amounts for the next few years.** This large reduction in coal revenues has had a drastic effect on the Tribal Government workforce, including major layoffs and furloughs, and greatly reduced the levels of essential government and emergency services that we are able to provide for our membership.

2. The Big Metal Project

The Crow Nation has worked for many years to expand development of our vast coal resources. In 2013, the BIA approved our agreement with Cloud Peak Energy (“CPE”) to explore, with options to lease and develop an estimated 1.4 billion tons of Crow coal in the southeastern corner of the Crow Reservation. This long-term project, named “Big Metal” from a Crow legend, will also provide much needed revenue to the Crow Nation, increase employment opportunities for Crow and Montana citizens, and diversify Tribal revenue sources.

Cloud Peak Energy (CPE) has demonstrated their commitment to both safety and the environment, and we appreciate their leadership as one of this country’s largest coal producers. In addition, CPE has been a good partner with the Crow Nation, providing college scholarships to dozens of Crow students and supporting those in need. All of this has occurred while CPE has worked with the Tribe to complete exploratory drilling, secure surface rights, assess cultural resources that will need to be protected, and begin environmental base line work for the permitting process, all of which has been ongoing since 2014.

However, the Big Metal project faces the same challenges as the Absaloka Mine, with domestic coal markets steadily contracting due to Federal coal policies that have had a disproportionate impact on Tribal coal development. In addition, full development of the Big Metal project is largely dependent on coal exports to the Pacific Rim through ports in the Northwest, but efforts to expand coal export capacity through those ports have been consistently stymied by environmental challenges aimed at killing coal.

3. The Clean Coal Future

Finally, the Crow Nation has long recognized that the long-term benefits of our very large coal resource will depend on new clean coal technologies that address concerns with climate change. I would like to continue to build the first coal-to-liquids (“CTL”) plant in North America with full carbon capture and utilization.

In 2008, the Crow Nation and our partner signed a project agreement to develop the Many Stars project, a coal-to-liquids project that would produce up to 50,000 barrels or more per day of ultra-clean jet and diesel fuel. The Crow Nation sought to contract with the U.S. Air Force and other local industries to supply clean fuel that would meaningfully reduce carbon emissions throughout the world, reduce America’s dependence on foreign oil, and provide a safe and secure domestic fuel supply to our national defense.

Unfortunately, with the recession and financial crisis that hit in 2009, it became impossible to obtain the large investment needed for this type of cutting-edge project. Since then, there has been no concerted Federal policy to encourage the development of clean coal technology, carbon capture and sequestration, or other technologies and incentives that could save many good coal jobs throughout the country.

III. Crow Nation Coal Policy Priorities

There are a number of changes in Federal policies and incentives that the Congress and the Trump Administration should take to provide both near- and long-term benefits for the continued, responsible development and production of Crow coal, while we diversify our Reservation economy to achieve economic self-sufficiency.

A. The OSMRE Stream Protection Rule

First, I want to thank the Congress and President Trump for enacting the joint resolution under the Congressional Review Act disapproving the Office of Surface Mining's misguided Stream Protection Rule.

The proposed new regulations published by OSM in 2015 were originally intended to address some practices in the Eastern coal mines, but included onerous and unnecessary new requirements for Powder River Basin mines as well. The proposed new Rule was developed without input from the West, and based on my discussions, neither the Federal or State regulators would have been able to implement it.

The Rule was also developed without meaningful consultation with the Crow Tribe, as required by Federal law, on the 2,000 pages of materials that accompanied the proposed rule. Unlike mines regulated by State authorities under SMCRA, the Rule would have had an immediate effect on the Absaloka mine which OSM regulates directly on Crow Reservation. It would have reduced the Mine's coal reserves, and further reduced sales of Crow coal at a time when the Tribe is already suffering from diminished coal production and prices.

We are greatly encouraged by this early and timely action to prevent devastating impacts on the mining of Crow coal. As further explained below, the mining of Crow coal is already subject to one of the most extensive regulatory programs in any industry under the Surface Mining Control and Reclamation Act (SMCRA), which the Crow Tribe has been working to assume authority to administer on our own lands.

B. EPA's Clean Power Plan

EPA's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," otherwise known as the "Clean Power Plan," was initially proposed in 2014 and required States to reduce carbon dioxide emissions from existing coal-fired power plants. Although it would have a major impact on the markets for Crow coal, it was developed without any consultation with the Crow Tribe, as required by Executive Order 13175. The Crow Nation and the Montana Attorney General sent joint comments to the EPA in December 2014, to express grave concern about the negative impact on the Crow Nation. Nevertheless, EPA finalized the proposed rule in 2015 without further Tribal consultation or consideration of these impacts.

The Clean Power Plan has already had a serious negative effect on Crow coal and the Crow Reservation economy. The great majority of Crow coal from the Absaloka Mine has been supplied to the Sherburne County Generating Station ("Sherco") near Minneapolis. However, as a result of Minnesota's efforts to comply with the Clean Power Plan, Units 1 and 2 at Sherco will be shut down soon. For Unit 3, which was designed for Crow coal, and is the largest, most modern and cleanest unit, the longer term future remains uncertain.

The Clean Power Plan must be rolled back to prevent further adverse impacts on Crow coal customers, especially on the newest and cleanest generating units that still have many years of productive life.

C. Indian Coal Production Tax Credit – Leveling the Playing Field

In addition to the EPA's Clean Power Plan, numerous practical problems consistently arise with each proposed Indian coal project. The lease approval and development process is burdensome, slow, and complicated. Federal regulatory requirements for appraisals, surface access approvals and environmental assessments to conduct exploration within the Reservation often create significant delays. Further, incomplete land records, inadequate BIA staffing, and surface land fractionation (described above) create uncertainty that discourages investment and significantly impedes project development. It is extremely difficult to compete with off-reservation development because of these problems, even with the best efforts of particular BIA employees and the Crow Nation.

The Indian coal production tax credit ("ICPTC"), originally enacted in the 2005 Energy Policy Act, has kept the Absaloka Mine open and competitive since 2006. This \$2+ per ton tax credit is intended to "level the playing field" for Indian coal (currently Crow, Navajo and Hopi), by offsetting some of the additional regulatory hurdles we face. This credit neutralized the threat of

a potential mine closure and continued the Absaloka Mine's ability to provide critical employment and revenue for essential Crow governmental functions. Under our agreements with Westmoreland, it has also yielded several millions of dollars in direct benefits to the Crow Nation, funds that are sorely needed now.

However, since 2013, the ICPTC has been extended on a year-to-year bases as part of the tax extender package, and that has diminished its effectiveness by not providing certainty to support major long-term investments necessary for coal development. Worse still, it expired at the end of 2016.

In order to overcome all of the additional regulatory burdens and land transaction issues described above, the Crow Nation seeks a permanent extension of ICPTC. With this tax incentive made permanent, the Crow Nation would have the opportunity to compete with others on a level playing field. It will help sustain the Absaloka Mine, produce additional Tribal revenue, and encourage new coal development like CPE's Big Metal project.

As mentioned above, the development of new coal utilization technologies will be very important to ensure the long-term economic viability of the Crow Nation's large coal resources. In addition to permanently extending the ICPTC, the Congress and the Trump Administration should focus on providing other tax incentives and direct support for clean coal technologies and carbon capture and sequestration. These measures will allow us to resurrect the Many Stars coal-to-liquids project in a modified form to produce ultra-clean fuels while addressing the criticisms of climate change advocates.

D. Access to International Markets

With the contraction of coal demand for utilities in the United States, the best hope for maintaining and expanding Crow coal production is the export market, primarily to modern new coal plants in Japan and South Korea. For example, major development of Cloud Peak Energy's Big Metal project on the Crow Reservation depends primarily on being able to export our coal, and an expanded marine export facility on the West Coal is essential infrastructure to support that effort. It also is important to note that Powder River Basin coal from Crow mines is lower in sulfur dioxide and nitrogen oxide, which is better for the environment than the coal that is currently mined in Asian countries.

The Army Corps of Engineers recently denied permits for the Gateway Pacific Terminal, which would have provided the closest and most efficient way to ship Crow coal overseas. Also,

protests to expanded rail shipments of coal from mines to the ports have been used to impede the environmental permitting process for new coal ports.

The last proposed new coal export terminal is the Millennium Bulk Terminals project in Longview, Washington. The Crow Tribe trusts that the Congress and the new Administration will ensure that the Army Corps and other Federal agencies do not unnecessarily delay or deny the needed permitting for this important project and others that may be developed in the future.

E. Tribal Primacy Under SMCRA

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), created the U.S. Department of Interior's Office of Surface Mining and Reclamation Enforcement (OSMRE), and a comprehensive nationwide regulatory program for surface coal mining. The Act authorizes States to assume primary enforcement responsibility with OSMRE's approval and oversight, which has been done in most coal states including Montana.

The 2006 amendments to SMCRA authorized Tribes to also assume primary responsibility for its administration on Reservation lands. The Crow Tribe has been working diligently with OSM for several years to complete the requirements for undertaking this complex regulatory program. In 2009, the Crow Legislature enacted the Crow Coal Mining and Reclamation Act, which has undergone an extensive, detailed informal review by OSM. Trained Tribal personnel of the Crow Coal Regulatory Office (CCRO) currently participate in all inspections of the Absaloka Mine. In the future, we foresee undertaking full responsibility for new coal mine permitting with the time and funding to build capacity for this highly technical function.

As a sovereign nation, the Crow Tribe has the right to regulate our own lands and resources. What remains of the Crow Reservation will be our Nation's homeland for all time, and we have a continuing vital interest in protecting our people, land, air, water, wildlife and cultural resources from any negative effects of mining our valuable coal resources.

We trust that Secretary Zinke and the Congress will continue to support the Crow Nation's efforts to assume SMCRA Primacy, with the necessary funding, OSM staffing, and flexibility to accomplish this important task. For our part, I am taking measures to re-invigorate and prioritize the Tribe's work to satisfy the requirements for assuming Primacy, and look forward to working with OSMRE and the other DOI agencies toward a timely completion.

For the Crow Nation at this pivotal time, the importance of SMCRA Primacy extends beyond just coal mining. We also have substantial resources of Gravel, Limestone, and Bentonite that are economically viable, and will help diversify the Reservation economy.

SMCRA Primacy is a stepping stone toward the extension of Tribal sovereignty to regulating development activities for these other minerals as well. When we have developed and demonstrated our capability to regulate surface coal mining under the most stringent requirements of SMCRA and Tribal law, the Tribe will most certainly be in a position to assume responsibility from the Bureau of Indian Affairs (BIA) and the Bureau of Land Management (BLM) for protecting the Reservation environment during development of these other Tribal mineral resources.

We also look forward to working with the Committee and the Secretary to adopt legislation and policies as necessary to facilitate the Crow Nation's regulation of other mineral development on our Reservation homeland.

F. Abandoned Mine Lands Reclamation Fund

For many years, the Absaloka coal mine paid a 35 cent-per-ton Reclamation Fee to the Federal government for the Abandoned Mine Lands fund. That Fee, currently 28 cents-per-ton, amounts to a Federal tax on Crow-owned coal, reducing the amounts of royalties and taxes that the Crow Nation could otherwise collect.

One of the other changes made by the 2006 SMCRA amendments was to authorize the return of a portion of the AML fund to the certified States and Tribes who have completed reclamation of most of their old abandoned mines. For the Crow Nation, this has meant several millions of dollars in funding, not only for old mine reclamation efforts but also for new infrastructure and community development projects.

However, there have recently been recurring efforts to divert certified States' and Tribes' shares of the AML fund to pay for Eastern coal miners' retirement benefits. While we understand concerns with the cutbacks in other funding, it is not fair or appropriate for Crow coal to subsidize those benefits, especially when we have so many immediate and pressing needs ourselves.

The Crow Nation hopes that the Congress and the new Administration will support the continued return of the AML funds to the certified Tribes and States from whom the Reclamation Fee is collected.

IV. Economic Diversification

It is important to recognize that tribal nations which presently have energy operations providing the principal source of revenue in their economies need to diversify for future growth and economic stability. A so-called “energy tribe” is not precluded from environmental stewardship, either within parameters that would be considered contemporary, or within the context of traditional values; quite the contrary – as one that is perceived to be an “energy tribe,” the Crow Nation seeks to stabilize and improve its commercial potential with coal with a view to that revenue source being able to support diversity and expansion of our economic portfolio. Green initiatives, with eco-tourism at the forefront, can provide for future economic stability. A nation cannot enjoy that stability by solely relying upon one economic driving force. Diversity within our economic portfolio is an expression of self-determination and sovereignty.

To that end, I would like to introduce this historic document, “The Grizzly: A Treaty of Cooperation, Cultural Revitalization and Restoration.” To date, 123 Tribal Nations have signed this document, which to the best of my knowledge, makes it the most signed treaty in history. This treaty does not just relate to the proposed delisting and trophy hunting of the grizzly bear - a being we consider sacred and integral to our cultures – to the Crow the grizzly is our relative, our Elder Brother – this treaty speaks to the consequences of this action if it proceeds as it has to date, and the issues that Tribal Nations stand upon, which remain at the heart of the federal-Indian trust responsibility: Tribal sovereignty, treaty rights, consultation mandates, spiritual and religious freedoms, and sacred site protections – each of which is on the verge of suffering irreparable harm if this process continues as it is presently constituted.

In addition to the 123 Tribal Nations that have signed this treaty - led by the Crow and Northern Cheyenne, approximately 50 tribes issued declarations and resolutions opposing the delisting of the grizzly bear and requesting that formal, government-to-government consultation be undertaken, and that Acts, Executive Orders, and Secretarial Orders pertinent to this issue be honored – which they have not been – a conclusion supported by the UN Special Rapporteur on the Rights of Indigenous Peoples. We have serious concerns about the science being presented, and worry that ultimately this process will result in ostensibly zoo populations in two national parks, Yellowstone and Glacier.

The Crow Nation was among the first to formally oppose the delisting of the grizzly bear as it is presently constituted; several nations, the Navajo, Osage, Oglala Sioux, and Piikani Blackfoot among them, have formally requested that a moratorium be instituted so that all of the impacted Tribal Nations can be consulted, and so that we can contribute our ideas, our plans, and our alternatives. Those alternatives will provide for cultural, economic and environmental revitalization to tribal communities, and enable economic diversification. In November 2015,

former Hopi Tribe Chairman, Ben Nuvamsa, led a tribal delegation that met with the previous administration's Director of the US Fish and Wildlife Service and the Deputy Secretary of Interior. Despite impressions given to the contrary, there was no further engagement on tribes' plans and initiatives. With Secretary Zinke now in office, we hope for a reset, and I would ask the Secretary to consider instituting the previously requested moratorium so that we can reach the most positive, mutually beneficial conclusion and honor the federal-Indian trust responsibility. Tribal Nations want to be partners, not litigants.

There are Tribal Nations with biologically suitable habitat in the grizzly's historic range who propose having this sacred being reintroduced to their sovereign lands. Instead of trophy hunting them, transplant the hunting quota from Greater Yellowstone and from the Crown of the Continent, to these tribal lands. This reintroduction can provide for economic and vocational opportunity where it is most desperately needed – on our reservations - where unemployment can run from 70 to 90%. This alternative provides for educational, training, and vocational opportunities in preparing tribal members in the fields of science and biology to undertake our own management programs. Crucially, this initiative will also provide for eco-tourism opportunities; from training and employing guides, to reservation infrastructure potential through the hospitality industry, which will allow for outside, business investment to be attracted. Each aspect will foster cultural revitalization and immersion, as all of these initiatives can be undertaken in a cultural context, which aids in the perpetuation of cultural.

Eco-tourism, which is already been successfully undertaken by First Nation in BC revolving around the grizzly, provides a pathway of understanding between Native and non-Native communities. The precedent exists for Threatened and Endangered Species to be reintroduced to sovereign tribal lands, including predators, which happened with the Mexican grey wolf on White Mountain Apache lands. Significantly, a tribal reintroduction program is the only way the grizzly bear will ever come close to being a recovered species. The delisting and trophy hunting of the grizzly as it is presently being undertaken threatens not only our culture and the federal-Indian trust responsibility, but has serious implications for economic growth and diversity.

V. Conclusion

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

By leveling the playing field for developing clean Crow coal for domestic markets, exports and coal conversion, we firmly believe we can help ourselves while simultaneously meeting national energy goals -- achieving energy independence, securing a domestic supply of valuable energy, and reducing the country's dependence on foreign oil.

Crow coal is not immune from an economic sunset. Our nation's coal is not an inexhaustible resource, and like any commodity, is subject to market vagaries. Growing and diversifying our economic portfolio will further secure and buffer our citizens from the inevitable market vulnerabilities.

Mr. Chairman and Committee members, thank you again for the opportunity to testify on these important subjects before you today. I would be happy to answer any questions.