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The Honorable Gina McCarthy Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Joint Comments of Montana Attorney General and the Crow Nation on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Docket ID No. EPA–HQ–OAR–2013–0602

Submitted electronically via regulations.gov

Dear Administrator McCarthy:

We are writing to express grave concern about the substantial negative impact that the EPA's Proposed Rule, dated June 18, 2014, and titled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," will have on the Crow Nation, its citizens and resources, and their collective future. In sum, both the Proposed Rule dated June 18, 2014, and the subsequent and separate proposed Clean Power Plan Rule for Indian country dated November 4, 2014, simply do not address the Crow Nation's concerns.

The lack of meaningful government-to-government consultation, as required by Executive Order 13175, in developing the aforementioned Proposed Rules is telling. Despite the minimal tribal outreach (and no direct contact with elected Crow Nation officials before the rule was proposed), significant substantive policy prescriptions are likely to cause serious setbacks to the Crow Nation, potentially over multiple generations. The longstanding trust responsibility between the federal government and the Crow Nation may be violated unless an exception and/or mitigation of the rule is provided to us.

The Proposed Rule is a major problem for the Crow Nation. However, before providing a summary of the issues that we have, we think it is important to provide the EPA a brief background of the Crow Nation, its history and natural resources, and impacts of the Rule on the Crow Nation. In sum, the Proposed Rule will likely have substantial negative impacts on the Crow Nation, potentially violate the longstanding trust responsibility between the federal government and the Crow Nation, and require substantive alternatives to the severe consequences that this Proposed Rule will have for the Crow Nation.

I. Brief Overview of Crow Reservation, History of Land and Resources, Impacts

A. Brief Overview

The Crow Nation is a sovereign government located in southeastern Montana. The Crow Nation has three formal treaties with the federal government, 1825 Friendship Treaty, 1851 Treaty of Fort Laramie (with several tribal nations), and concluding with the Fort Laramie Treaty of May 7, 1868. The Crow Reservation originally encompassed most of Wyoming (including the Powder River Basin) and southeastern Montana, totaling 38.5 million acres. Through a series of land cessions contained in the latter treaty, agreements and unilateral federal laws over a 70 year span, Crow territory was reduced by 92% to its current 2.2 million acre area.

Beyond the reduction in its homeland, the Crow land base has been decimated by fractionated ownership of land. The Department of the Interior estimates that over 10% of all fractionated lands within Indian country are actually within the Crow Reservation (with numerous parcels of allotted lands that have more than 10 owners and sometimes more than 100 owners). By meaningfully addressing the fractionation issue at Crow through implementation of the *Cobell* Settlement (enacted by Congress and signed by the President in December 2010), the Crow Nation was hopeful that this recent solution to a century long problem would help make more of the Crow homeland productive for both residential and energy development purposes.

B. Coal, Past and Present

The Crow Nation has very substantial undeveloped coal resources. In fact, today, the Crow Indian Reservation contains 2 million acres in subsurface mineral rights, including an estimated 9 billion tons of coal. The Crow Nation has developed a limited amount of its resource, by leasing a portion of its coal reserves for 40 continuous years to Westmoreland Resources, Inc. ("WRI"). WRI owns and operates the Mine (the Mine), a 15,000-acre single pit surface coal mine complex near Hardin, Montana, on the northern border of the Crow Reservation.

The Mine was developed to supply northern Powder River Basin coal to Midwestern utilities and it has produced over 180 million tons of coal since 1974. From the Mine's 3-7 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 represents as much as two-thirds of the Crow Nation's annual non-federal budget.**

Furthermore, WRI employs a 70% tribal workforce, with an average annual salary of over $66,000, and a total employment expense of approximately $18.6 million dollars. The Mine 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 in the past 50 years.

C. *Macro Impacts to the Crow Nation*

A recent example demonstrates the importance of the Mine to the Crow Nation. A major unplanned outage at the Mine's largest power plant customer over a 2-year period resulted in a 50% reduction in Tribal coal revenue and numerous tribal employment layoffs. As further explained below, the Proposed Rule will likely cause this same scenario on a permanent basis going forward. Crow coal has been a minor fraction of all domestically produced coal for the past 40 years, but yet the Crow Nation is more likely to suffer more severe, pervasive and irreversible impacts to its future than other affected States or Tribes.

Despite the loss of the Crow land base (including most of the Power River Basin), allotment, and fractionation that have collectively crippled resource development opportunities within the Crow Reservation over the past century, this Proposed Rule may effectively accomplish what so many failed federal Indian policies could not by substantially reducing the only non-federal source of revenue that has maintained the Crow Nation's current 47% unemployment rate, partially fund Crow elder programs and the higher education of our tribal youth, and minimally assisted with homes and jobs for the Crow Nation's 13,000 enrolled citizens.

II. Summary of Arguments

In addition to the concerns expressed in the comments submitted by the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming in the comments filed November 21, the Attorney General of the State of Montana and the Crow Nation bring to your attention the following serious problems with the proposed rulemaking for the citizens of the Crow Nation and Montana. In short, EPA did not consult with the Crow Nation, did not consider the economic impacts on the Crow Nation, and did not provide a less intrusive alternative to the severe effect on the Crow Nation of this Proposed Rule. In combination, EPA violated its trust responsibility to the Crow Nation and must provide a substantive alternative and/or mitigation of the Proposed Rule.

A. *The agency failed in its duties to consult with the Crow Nation and to consider the economic effects of the proposal on the Crow Nation.*

As mentioned above, the Crow Nation receives revenues equaling 66 percent of its annual operating budget from severance taxes paid for the mining of coal owned by the Crow nation at the Mine, near Hardin, Montana. Ninety percent of the coal mined from the Mine is sold to, and burned at, electrical generating units (EGU) in Minnesota. The Proposed Rule strongly encourages the State of Minnesota to demand retirement of the older units of the power plant to meet with carbon reduction goals set by the EPA

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The Proposed Rule also sets higher renewable standards for the State of Minnesota to meet by 2030, despite Minnesota law already requiring higher levels of renewable energy to be produced by 2020. Because the Proposed Rule will unfairly penalize Minnesota and other Midwest customers that currently buy and rely on production of Crow coal for its mix of energy

production and since the Minnesota EGU have already taken action to reduce carbon emissions, the likely result will be a substantial loss of that market for Crow coal.

That in turn will mean drastic hits to the Crow Nation's operating revenues, which will directly cause loss of services and employment on the Crow Reservation. Yet despite Executive Orders requiring federal agencies to consult substantively with Indian Tribes affected by agency proposals, and to consider the impact of proposals on economic growth and job creation, EPA utterly failed to do so with respect to the effect of this proposal on the Crow Nation.

Executive Order 13175 requires agencies to ensure meaningful and timely input by tribal officials in the development of regulatory policies that affect tribes. In this case, that simply didn't happen. Despite representations at Section III.A.5 of the Proposed Rules that "EPA conducted significant outreach to tribes", the actual extent of the agencies' effort was minimal, at best. Other than a letter purportedly sent to the Tribe (a form letter stating, "Dear Tribal Leader"), no one in the agency contacted the Crow Nation directly – government-to-government – as is required in the aforementioned Executive Order and Presidential Memo that implements EO 13175.

The lack of meaningful consultation is perplexing in light of the fact that the Crow Nation is one of only four Tribes nationwide which owns merchantable coal deposits, and is one of only three Tribes (out of 566 federally recognized tribes) for whom the mining of coal burned in electrical generating units impacted by the proposal is a hugely significant piece of the Tribal economy. Because the Crow Nation only produces coal with its longstanding development partner, the latter EPA Proposed Clean Power Plan for Indian country (those tribes with EGUs within their reservation boundaries) also does not apply.

In fact, the November 4, 2014, Clean Power Plan Rule simply provides an option for a tribe to develop its own Section 111(d) plan and, if they choose not to, then EPA would develop a federal plan necessary to achieve EPA's suggested carbon emission reductions in Indian country. As such and because the Crow Nation does not have an EGU on its reservation, the Clean Power Plan Rule is inapplicable to the Crow Nation. Therefore, both sets of EPA's Proposed Rules do not address the Crow Nation's significant interests impacted as a result of federal agency action.

Furthermore, Executive Order 13563 requires federal agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs and to tailor its regulations to impose the least burden on society consistent with regulatory objectives. It requires regulations be based on an open exchange of information and perspectives among State, local and tribal officials. Any open exchange with Crow tribal officials would have brought to light the impact of the proposal on the Crow Nation and would have highlighted the unfairly prejudicial impact of the proposal on the Minnesota customer for the Crow coal.

B. No Meaningful Alternative Exists for the Production of Crow Coal Today

Based on the Crow Nation's experience with the development of technology for efficient use of coal (including carbon capture), EPA's predicate assumptions regarding efficiency improvements at existing coal-fired electrical generation units are unfounded. In fact, with its

coal resource and water, the Crow Nation began negotiating in 2007 with a project partner to build the first coal-to-liquids ("CTL") plant in North America with capture and storage of carbon. In 2008, the Crow Nation and its partner signed a project agreement to develop Many Stars, a planned coal-to-liquids project that sought to produce up to 50,000 barrels or more per day of ultra-clean jet and diesel fuel.

The vision was to contract with the U.S. Air Force (and other local off-take agreements) to supply clean diesel fuel that would meaningfully reduce carbon emissions throughout the region, reduce America's dependence on foreign oil, and provide a safe and secure domestic fuel supply to our national defense. Two overriding factors prevented the deployment of the leading technology to reduce and/or capture carbon emission.

The U.S. economic recession occurred and an uncertain national energy policy to support carbon capture technology made it difficult for the proposed project to proceed. We remain hopeful that the Administration can and will support clean coal, that technology advancements can create a smaller scale project, and that the Crow Nation will have a new development partner to take the risk with it. The Crow Nation has continued its discussions with possible technology providers and developers in the carbon reduction industry and almost all of them say the same thing – the federal government has not provided meaningful support to develop carbon emission reduction technology.

III. Conclusion

Given its vast mineral resources, the Crow Nation can, and should, be self-sufficient. Our goal is clear. The Crow Nation desires to develop its resources in an economically sound, environmentally responsible manner that is consistent with Crow culture and beliefs. More than anything, the Crow administration desires 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. The Crow citizens are also citizens of the State of Montana, which shares the Crow administration's goals and desires for the Crow people.

It is possible that the Crow Nation could become America's energy partner and help reduce the country's dependence on foreign oil. Over the next 40 years, the World Energy Council predicts that the world will need to double today's level of energy supply to meet increased demand. As such, to meet the global energy challenge, the near and long term future must have coal in our national energy policy. Moreover, the federal government must provide meaningful resources, technical and financial, to develop carbon emission reduction technology to have a less costly alternative to traditional power plants use of domestic coal.

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