

AGREEMENT CONCERNING STATE SEVERANCE AND GROSS PROCEEDS TAXES AND THE RELEASE OF CLAIMS IN *CROW TRIBE OF INDIANS v. STATE OF MONTANA, ET AL.*, Cause No. CV-78-110, BLG-JDS (D. Mont.), AND RELATED APPEALS, PURSUANT TO MONTANA CODE ANNOTATED §§ 85-20-901 – 905

**THIS AGREEMENT**, dated October \_\_\_\_, 2016, is entered into among the **CROW TRIBE OF INDIANS**, a federally recognized Indian Tribe whose address is P.O. Box 159, Crow Agency, Montana 59022 (the "Tribe"); the **STATE OF MONTANA**, including its Department of Revenue, and Yellowstone, Big Horn, and Treasure Counties ("Montana"), whose addresses are: Office of the Governor, State Capitol, P.O. Box 200801, Helena, Montana 59620-0801; Yellowstone County, 217 North 27<sup>th</sup> Street, Billings, Montana 59101; Big Horn County, P.O. Box 908, Hardin, Montana 59034; Treasure County, 307 Rapelje Avenue, Hysham, Montana 59038; and the **UNITED STATES OF AMERICA**, by and through us DOJ, whose address is 9<sup>th</sup> + Pennsylvania NE (the "United States").  
Washington, DC 20004

**WHEREAS**, the Crow Indian Reservation (as defined herein) and the Ceded Strip (as defined herein) are underlain by large deposits of Tribal Coal (as defined herein), and income derived from the production and sale of such Tribal Coal is critical to Tribal economic development and self-government; and

**WHEREAS**, the issue of whether Montana has the right and power to apply its Severance Tax and Gross Proceeds Tax (both as defined herein) to Tribal Coal was the subject of extensive litigation beginning in the U.S. District Court for the District of Montana in 1978, Cause No. CV-78-110-BLG-JDS; and

**WHEREAS**, in that litigation, the Federal courts determined that Montana's Severance and Gross Proceeds Taxes in existence at that time did not apply to the Tribal Coal at issue, because under the facts of the litigation these taxes were preempted by Federal law and policies and interfered with Tribal self-government, and further held that Tribal Coal in the Ceded Strip is "a component of the reservation land itself." *Crow Tribe v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988); citing *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981). As a result of those determinations, all Severance and Gross Proceeds Taxes that Montana had paid into the U.S. District Court's registry pursuant to orders of such court were paid to the United States in trust for the benefit of the Tribe, and Montana has not subsequently collected Severance or Gross Proceeds Taxes on Tribal Coal; and

**WHEREAS**, further litigation ensued in Cause No. CV-78-110-BLG-JDS on the issue of whether the Tribe was to receive payment of Severance and Gross Proceeds Taxes that Montana had collected on Tribal Coal prior to the U.S. District Court's orders to pay such taxes into the court registry (*i.e.*, before February 1983 in the case of Severance Tax and before November 1987 in the case of the Gross Proceeds Tax). See *Montana v. Crow Tribe*, 523 U.S. 696, 705-708 (1998). On remand from the U.S. Supreme Court, the U.S. District Court held that the Tribe was not entitled to receive any pre-registry taxes. See Order dated February 16, 1999. The Tribe appealed to the U.S. Court of Appeals for the Ninth Circuit, and that appeal remains pending (Nos. 99-35400, 99-35401 and 99-35410); and

**WHEREAS**, the Tribe's appeal on pre-escrow taxes collected by Montana remains pending in the Ninth Circuit; and

**WHEREAS**, as part of the consideration for the Tribe's agreement in the 1999 Crow Tribe-Montana Water Rights Compact (the "Compact") to protect certain water rights recognized under State law and to release all claims asserted in Cause No. CV-78-110-BLG-JDS and related appeals, Montana agreed that future Severance and Gross Proceeds Taxes that it may collect on Tribal Coal will be paid to the Tribe, Mont. Code Ann. § 85-20-902(4); and

**WHEREAS**, in addition to the payment of future Severance and Gross Proceeds Taxes that may be collected on Tribal Coal after this agreement is in effect, the Compact provides that Montana shall contribute the sum of fifteen million dollars (\$15,000,000.00) paid into an escrow account for the benefit of the Tribe as the remainder of its cost-share obligation for the Compact, Mont. Code Ann. § 85-20-901 (Article VI, Section A of the Compact), and payment of such funds to the Tribe is contingent, among other things, on the Tribe and the United States having furnished releases of all claims asserted in Cause No. CV-78-110-BLG-JDS and any pending appeal, Mont. Code Ann. § 85-20-904(1)(d); and

**WHEREAS**, Montana is authorized by Mont. Code Ann. §§ 85-20-902-905 to enter into this agreement with the Tribe and the United States; and

**WHEREAS**, the Chairman of the Crow Tribe is authorized to enter into this agreement on behalf of the Crow Tribe pursuant to the affirmative vote of the Crow Tribal General Council on March 19, 2011 approving the Compact, and the Constitution and Bylaws of the Crow Tribe; and

**WHEREAS**, the United States approved the Compact in the Crow Tribe Water Rights Settlement Act of 2010, Pub. L. 111-291 (Title IV), and the Crow Tribal General Council approved the Compact by vote on March 19, 2011; and

**WHEREAS**, the United States is authorized to enter into this agreement pursuant to the Settlement Act of 2010, Pub. L. 111-291 (Title IV), and 28 U.S.C. §§ 516 and 517; and

**NOW, THEREFORE**, in consideration of the mutual covenants and promises herein and in the Water Compact, the parties agree as follows:

1. Definitions. As used in this Agreement:

"Ceded Strip" means the area covered by Article II of the Act of April 27, 1904 (33 Stat. 352), as depicted on the map attached to the Compact as Appendix 5;

"Compact" means the Crow Tribe-Montana Water Compact set forth in Mont. Code Ann. § 85-20-901 and its appendices;

"Crow Tribe of Indians v. State of Montana, et al., Cause No. CV-78-110-BLG-JDS and any pending appeal" (or any version of that phrase) means all legal claims or actions arising out of the facts as asserted in Cause No. CV-78-110-BLG-JDS and subsequent appeals;

"Gross Proceeds Tax" means the coal production tax levied by Montana pursuant to Mont. Code Ann. §§ 15-23-701, *et seq.*;

"Montana" as used in this Agreement means all of the following entities together: the State of Montana (as herein defined), the Montana Department of Revenue, and Yellowstone, Big Horn and Treasure Counties.

"Reservation" means the Crow Indian Reservation consisting of the area as presently reserved for the Crow Tribe pursuant to the following Treaty and laws: Article 2 of the Fort Laramie Treaty of May 7, 1868 (15 Stat. 649); the Act of April 11, 1882 (22 Stat. 42); the Act of March 3, 1891 (26 Stat. 989); the Act of April 27, 1904 (33 Stat. 352); the Act of August 31, 1937 (50 Stat. 884); and the Act of November 2, 1994 (108 Stat. 4636), as depicted on the map attached to the Compact as Appendix 4;

"Severance Tax" means the coal production tax levied by Montana pursuant to Mont. Code Ann. §§ 15-35-101, *et seq.*;

"State of Montana" as used in this Agreement means the executive branch of the state government of Montana under the authority of the governor;

"Tribe" means the Crow Tribe of Indians, a federally recognized Indian Tribe whose address is P.O. Box 159, Crow Agency, Montana 59022; and

"Tribal Coal" means coal that the United States holds in trust for the benefit of the Crow Tribe which is located on the Reservation or the Ceded Strip.

## 2. Future Severance and Gross Proceeds Taxes Collected by Montana

- (a) The Parties agree that this Agreement concerns only the Severance Tax and the Gross Proceeds Taxes.
- (b) In the event that Montana levies and collects any Severance and Gross Proceeds Taxes on Tribal Coal after this Agreement is in effect, Montana agrees that it shall promptly transmit such tax collections directly to the Tribe in accordance with the following provisions:
  - (i) All payments shall be made by Montana within thirty (30) days after receipt by Montana, by electronic funds transfer or any other method as directed in writing by the Chairman of the Tribe;
  - (ii) Payment shall be made only to the Tribe;

(iii) In the case of a producer's under- or over-payment of any Severance and Gross Proceeds Taxes collected by Montana and paid to the Tribe, future payments to the Tribe shall be adjusted by the same amount(s) received from or credited or refunded by Montana to the producer. In the event there are no state taxes to offset an overpayment by a producer, the Tribe shall refund the appropriate tax amount to the producer;

(c) Nothing in this Agreement shall be construed to mean the Tribe has surrendered, suspended, contracted away, or limited in any way its power to tax;

(d) Nothing in this Agreement shall be construed to mean Montana has surrendered, suspended, or contracted away its power to tax;

(e) This Agreement applies only to the Crow Tribe and the Severance and Gross Proceeds Taxes defined herein. This Agreement does not apply to other tribes or types of tax.

### 3. Release of Claims.

As of the date this Agreement takes effect, the Tribe and the United States hereby release and discharge Montana from any and all claims, including but not limited to claims for costs and attorney fees, asserted in *Crow Tribe of Indians v. State of Montana, et al.*, Cause No. CV-78-110-BLG-JDS and any pending appeal.

### 4. Effective Date and Implementation of this Agreement.

(a) This Agreement shall become effective upon its execution by all parties ("Effective Date").

(b) Within one (1) business day after the Effective Date, the parties to *Crow Tribe of Indians v. State of Montana, et al.*, Cause No. CV-78-110-BLG-JDS shall file a "Joint Motion for Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1(a)," and a "Joint Motion for Expedited Ruling on Pending Motions" in the U.S. District Court for the District of Montana, seeking an indicative ruling that the district court will enter an order incorporating this Agreement and retaining jurisdiction. Within one (1) business day of the granting of that motion, the parties shall file a "Joint Motion for Limited Remand Pursuant to Rule 12.1(b)" with regard to the appeals pending in the U.S. Court of Appeals for the Ninth Circuit, Nos. 99-35400, 99-35401 and 99-35410. Within one (1) business day of the entry of an order granting the "Joint Motion for Limited Remand Pursuant to Rule 12.1(b)," the parties shall file in the U.S. District Court for the District of Montana a "Joint Motion for Dismissal of the Action and Enforcement of this Agreement," together with a proposed order incorporating this Agreement and retaining jurisdiction.

(c) This Agreement shall be entered as or incorporated into the dismissal order and judgment in the Action by the U.S. District Court for the District of Montana and shall be enforceable in such Court. If there is a dispute over compliance with any term or provision of this Agreement, and the parties have not resolved the dispute within sixty (60) days after notice by a disputing party, either party may file a motion requesting that the Court enforce the relevant term(s) or provision(s) of this Agreement.

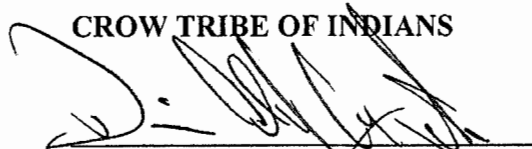
(d) Upon the Agreement's execution by all parties, the condition specified in Section A.2 of Article VI of the Compact and Mont. Code Ann. § 85-20-904(1)(d) for payment to the Tribe of the settlement funds held in escrow shall be deemed satisfied and the Attorney General shall within one (1) business day provide notice to the escrow agent that all conditions have been met for the release of the funds in escrow.

5. Miscellaneous Provisions.

Except to the extent that the parties have agreed to the continuing jurisdiction of the District Court for the enforcement of this Agreement, nothing in this Agreement shall be construed as any waiver whatsoever of the Tribe's or the United States', or Montana's sovereign immunity from suit.

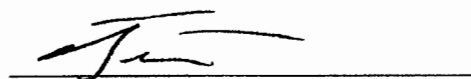
**IN WITNESS WHEREOF**, the parties have executed this Agreement on the dates set forth next to their signatures below.

**CROW TRIBE OF INDIANS**

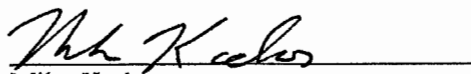
  
\_\_\_\_\_  
Darrin Old Coyote  
Chairman, Executive Branch

Date: 10-20-16

**STATE OF MONTANA**

  
\_\_\_\_\_  
Steve Bullock  
Governor

Date: Oct. 20, 2016

  
\_\_\_\_\_  
Mike Kadas  
Director, Department of Revenue

Date: 10.16.19

My signature below certifies that all releases, pleading and proposed orders with regard to *Crow Tribe of Indians v. State of Montana, et al.*, Cause No. CV-78-110-BLG-JDS and any pending appeals, have been furnished to me and are in acceptable form when executed by all parties. This Agreement is legally sufficient and is approved pursuant to the terms of the Compact, and Mont. Code Ann. § 18-11-105 and § 85-20-904 (1)(d):

A handwritten signature in black ink, appearing to read 'T. Fox', written over a horizontal line.

Tim Fox  
Attorney General

Date: 20 October 2016

UNITED STATES OF AMERICA

Ann Hirsch

Date: 11/17/2016

YELLOW STONE COUNTY

John D. [Signature]

Date: 10/25/16

BIG HORN COUNTY

[Signature]

Date: 10-24-2016

TREASURE COUNTY

Mark Mueh

Date: 11-1-16