

**STATEMENT OF LLEVANDO “COWBOY” FISHER  
PRESIDENT, NORTHERN CHEYENNE TRIBE**

**Before the  
HOUSE COMMITTEE ON NATURAL RESOURCES  
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS  
On  
H.R. 4350, THE NORHTERN CHEYENNE LANDS ACT**

**May 7, 2014**

Chairman Young and Committee Members, I am Llevando Fisher, President of the Northern Cheyenne Tribe of Montana. Some people call me “Cowboy.” I was elected as President by vote of our Tribal membership and my term expires in November 2016. Prior to that, I was elected by the people to serve as President in 1992 and to multiple terms on our Tribal governing body, the 11-person Northern Cheyenne Tribal Council. I am pleased to be here today to testify on behalf of the Northern Cheyenne Tribe in strong support of H.R. 4350, the Northern Cheyenne Lands Act. Today, I am accompanied by Tribal Councilmembers Eloise Snow and Tracy Robinson and Tribal Administrator William Walksalong. I want to thank Rep. Daines for introducing H.R. 4530 and thank the Committee for holding this hearing.

If H.R. 4350 is enacted, several long-standing paramount issues for the Northern Cheyenne will finally be resolved and the Tribe’s ability to control its land, mineral resources, and trust funds will be greatly enhanced. This will improve the Tribe’s ability to self-govern and control its own destiny and will provide sorely needed economic development opportunities. I want to stress that the Northern Cheyenne Lands Act is a Tribal bill. The bill has three key elements.

**Summary of the H.R. 4350**

First, H.R. 4530 directs the Secretary of the Interior to take certain fee lands owned by the Tribe into trust. As authorized by Section 4, certain land that the Tribe has acquired in fee over the years with its very limited resources would be transferred into trust status. Most of the land is on-Reservation, with two of the parcels adjacent to other land near the Reservation already held in Trust for the Tribe. The remaining land is located very close to our most precious sacred site, Bear Butte in South Dakota. By transferring those lands into trust status, the Tribe would strengthen the permanency of its land holdings, eliminate jurisdictional ambiguities, increase economic development opportunities, and protect an important sacred site. On the lands in Montana, the Tribe would attempt to engage in economic development, such as a convenience store and truck stop, and build

facilities for important social programs. For the sacred lands in South Dakota, trust status will ensure their protection from commercial development.

Second, Section 5 of the bill directs the Secretary to accept eight subsurface sections owned by Great Northern Properties (GNP) and located within the Reservation into trust for the Tribe. The Secretary is directed to transfer sections of federal coal to GNP as compensation for the on-Reservation tracts. Our Reservation will finally be made whole by rectifying an error made by the United States over a century ago. Congress directed the acquisition of land to expand the Reservation and the federal agent charged with this responsibility failed to acquire 5,000 subsurface acres of prime coal on our Reservation. Those subsurface acres would be transferred to the Tribe by the private company that currently owns them, GNP. This would fulfill commitments made to the Tribe in 2002 by the Montana Congressional delegation, other federal officials, and the State of Montana when the Tribe dismissed a lawsuit against the United States. GNP would receive coal from the United States and the Tribe would be granted a 40% interest in any revenue GNP receives from that coal if it is ever developed. This would be a badly needed revenue stream which would help mitigate the many impacts of the mineral development that has encircled our Reservation and our people for many years.

Third, the Secretary is directed to transfer to the Tribe a trust fund that was created for the Tribe and is currently held by the United States Office of Special Trustee (OST). As authorized by Section 6, a fund that originated from the Northern Cheyenne Reserved Water Rights Settlement Act of 1992 would be transferred to the Tribe's permanent fund and held in perpetuity to fund important basic services such as educational programs, home energy bills, elderly needs and burials, all of which often go unfunded due to lack of resources. The fund is currently held for the Tribe's benefit as the "Northern Cheyenne Trust Fund" by OST and its earnings are credited to the Tribe.

Attached to my written statement is a document that summarizes the Northern Cheyenne Tribe's dramatic struggles over the past 40 years with coal-related development, which provides perspective on why the enactment of the Northern Cheyenne Lands Act is just and appropriate. I also attached copies of a letter signed by each member of the State of Montana's Board of Land Commissioners (consisting of the State's five top elected officials), a resolution of the Montana-Wyoming Tribal Leader's Council, and a resolution of the National Congress of American Indians, each supporting H.R. 4350 and urging its passage. Finally, I have included two maps - - one showing how our Reservation has been encircled by coal-related development projects, and another showing our Reservation, its communities and the network of on-Reservation roads serving those off-Reservation projects. As discussed in greater detail herein, these projects force extensive unmitigated impacts onto our Reservation and people, while the Tribe and its members are excluded from the compensating benefits (impact funding, employment, and commercial opportunity) of such development. I request that all these documents be included in the hearing record.

## **Preserving and Protecting Tribal Land is of Paramount Importance to the Northern Cheyenne.**

We Northern Cheyenne cherish our land. To us, our land is everything. It has provided for our families for centuries. After we were forcibly relocated to the Oklahoma Territory in 1878 as retribution for our resistance to non-Indian domination and our participation in the Battle of the Little Bighorn (the Custer Battle), we (uniquely among all other tribes so relocated) trekked back to our historic homeland in Montana. This journey came at great cost to the Tribe - - death, imprisonment and other deprivations - - as we were hounded along the way by thousands of hostile U.S. military soldiers and settlers. We eventually made it back to Montana to reclaim our homeland and the Northern Cheyenne Reservation was later formally established by Presidential Executive Order in 1884.

Today, the Northern Cheyenne Reservation is bordered on the west by the much larger Crow Indian Reservation and on the east by the Tongue River. Our Reservation is truly the homeland of the Northern Cheyenne. The Reservation population is approximately 90% Northern Cheyenne. Non-Indian presence on the Reservation is minimal. A majority of our approximately 10,000 Tribal members reside on the Reservation. Traditional Cheyenne values and culture still thrive on the Reservation and the Cheyenne language is still spoken. The Reservation remains culturally distinct from the surrounding land and communities.

Of its 447,000 acres, over 95% of the Reservation surface is owned, controlled and used by the Tribe and its members. The primary land uses are cattle grazing, some timber harvesting, and ceremonial and subsistence use. Non-Indian use of Reservation lands is minimal. Despite the Tribe's success in controlling much of the Reservation, there are a few areas where the Tribe strongly desires to shore up control and ownership, and those areas are addressed in the Northern Cheyenne Lands Act.

Despite extremely limited resources, the Tribe has continued to prioritize land acquisition within the Reservation and purchased approximately 1600 acres of land it now owns in fee. Section 4 of H.R. 4350 authorizes the Secretary of the Interior to transfer that fee land into trust status. Much of that land is located in areas that could be commercially developed in our population center of Lame Deer. By transferring the Reservation lands into trust, the Tribe's jurisdiction to regulate those lands would never be questioned and Tribal beneficial ownership of that land would be essentially permanent for future generations because it is more difficult to convey trust land than fee land.

The legislation also authorizes the Secretary of the Interior to take into trust 635 acres adjacent to the Bear Butte State Park in South Dakota which the Tribe purchased. Bear Butte is on the National Register of Historic Places and a National Historic Landmark. Bear Butte is considered by many Native Americans, including members of the Northern

Cheyenne Tribe, as a sacred place. Bear Butte is our Mount Sinai. It is where our prophet Sweet Medicine received the Sacred Arrows. The Sacred Arrows remain protected by our traditional leaders to this day. These lands also serve as a base for tribal pilgrimages. By placing the lands in trust, the United States would be furthering the Tribal goal of protecting Bear Butte from commercial development that is inconsistent with its spiritual importance.

**The Tribe's Ownership of the Reservation Mineral Estate is Plagued  
by a Century-Old Federal Error.**

The entire Reservation mineral estate - - except for the eight sections that are the subject of Section 5 of H.R. 4350 - - is owned by the Tribe as a single entity. Because of the paramount importance to us of our land, we have a sacred duty to pursue ownership of the eight sections. Securing ownership of those eight sections has been a priority of the Northern Cheyenne for decades, including when I served as Tribal President 20 years ago, and H.R. 4350 will finally accomplish that goal.

The eight sections of subsurface are also of great commercial value. The coal is very high quality and relatively easy to mine economically. Several decades ago, those subsurface rights were leased to Peabody Coal Company for valuable consideration by the then-owner, Burlington Northern Railroad. Although those leases are no longer in force, we don't want to repeat that experience again. But, without ownership of that subsurface, we at best have limited power over, and would suffer impacts and gain scant benefits from, the development of the coal.

We have been continuously deprived of ownership of the eight subsurface sections since 1900 because of a federal error. In 1900, because of hostilities and violence between Northern Cheyenne, non-Indian settlers and illegal squatters on or adjacent to the Tribe's 1884 Reservation, Congress directed Indian Inspector James McLaughlin to purchase the legal and illegal non-Indian interests on and near the Reservation so that the Reservation could be enlarged eastward to the middle of Tongue River. Inspector McLaughlin proceeded to do so, paying the legal and illegal settlers between \$1500 and \$2000 per claim. In contrast, Inspector McLaughlin paid only \$25 per family to Northern Cheyennes then living on federal land previously allocated to them east of the Tongue River. The Reservation was then expanded eastward to mid-channel of the Tongue River by Presidential Executive Order in 1900.

In performing his duties, Inspector McLaughlin made a critical error. Although he purchased all lands within the Reservation (as expanded) then owned by Northern Pacific Railway, Inspector McLaughlin missed eight sections of subsurface owned by the Railway. For 114 years, the United States has failed to remedy this error by not acquiring this valuable mineral estate for the Tribe. Approximately 20 years ago, Great Northern Properties purchased the entire inventory of railroad subsurface in Montana, including the

eight sections within the Northern Cheyenne Reservation. If the Northern Cheyenne Lands Act is passed, the Tribe would waive all claims related to this error.

### **A Tribal Initiative to Rectify the Federal Error Which Could Result in Much-Needed Tribal Income from Off-Reservation Mineral Development**

The Tribe, on its own initiative, approached GNP with a proposal to resolve by agreement the 114-year old federal error which deprived the Tribe of ownership of the eight sections of Reservation subsurface now owned by GNP. The beginning of this process is documented in a 1993 letter from the Tribe's mineral consultant to the Tribe's attorney reflecting a conversation with GNP's President, who was receptive to the idea, which I request be submitted into the record. The Tribe successfully negotiated and drafted a written agreement with GNP committing GNP to deed its eight sections of Reservation subsurface to the Tribe if GNP receives off-Reservation federal coal reserves in Montana as compensation for the transfer. An updated version of that agreement is near completion. With the willing cooperation of GNP and the Tribe, the United States is now in a position to remedy an ongoing federal mistake that greatly impacts the Northern Cheyenne Tribe. The Northern Cheyenne have waited many decades for this opportunity.

The Tribe - GNP agreement also provides that the Tribe will receive 40% of the net revenue from the off-Reservation coal that is subbituminous and 24% of the net revenue from the off-Reservation coal that is lignite. The federal coal tracts, which have been identified for the transfer and are depicted in maps referenced in H.R. 4350, consist of tracts in the vicinity of the Bull Mountains and East Fork mine areas. Despite their relative proximity to those mine areas, current development plans are such that the coal in this sections would not be mined for at least 10 to 15 years. The Tribe's royalty interest in the Bull Mountains and East Fork tracts would provide desperately-needed revenue to the impoverished Northern Cheyenne Tribe. Those Tribal royalty interests would, if the tracts were ever mined, yield the only source of funding available to the Tribe to deal with the impacts of the mining of those tracts near the Reservation. All of these tracts contain subbituminous coal and the Tribe would therefore hold a 40% interest in the royalties derived from the future development.

The royalty revenue would help redress continued economic imbalances and burdens imposed on the Tribe by off-Reservation coal development. The Northern Cheyenne Reservation lies in the heart of Montana's Powder River coal region. As shown in the attached maps, the Reservation is surrounded on all sides by major existing and proposed coal-related projects and includes a network of roads used by these off-Reservation projects to travel through the reservation and the region. This pattern of development produces major influxes of newcomers to the area and leads to undesirable socio-economic effects on the Tribe, including on-Reservation crime, traffic and accidents. Because our Tribal government lacks adequate legal authority and resources to deal with these non-Indian incursions, there are heightened tensions between Tribal members and

non-Indian visitors.

Public services and facilities on the Reservation have long been grossly inadequate, both in absolute terms and in marked contrast to off-Reservation communities. The surrounding development increases pressures on those public services and facilities. Severe deficits have been documented in Reservation housing, water and sewer, solid waste, education, health care, law enforcement, fire protection, and transportation. Those deficits increase as on-and off- Reservation populations increase with development.

With no tax base and minimal on-Reservation economic development, the Tribe thoroughly lacks the financial resources to address these socio-economic impacts and respond to the increased demands caused by the off-reservation coal development. In contrast, the surrounding development produces tremendous public revenues (lease bonuses, rents and royalties, state production taxes, real and personal property taxes, and other exactions) for the United States, the State of Montana and the counties and municipalities that adjoin the Reservation. The Tribe is privy to none of these public revenues. We suffer the impacts of development but receive no revenues that would allow us to minimize the ills inflicted by this development.

Also, while the Northern Cheyenne suffer chronic unemployment rates averaging over 60%, very few Northern Cheyenne are employed in these off-Reservation projects. Indeed, Reservation unemployment rates have not improved during the course of the development of coal mines and power plants in the vicinity of the Reservation. Historically, Native Americans' employment in Montana's Powder River Basin mines has averaged approximately 3.5% of the total labor force, absent any special hiring-agreement mandates. State law does not authorize the holders of State mining leases to offer any employment preferences to local Native Americans. The bottom line is that average per-capita income on the Northern Cheyenne Reservation is a minor fraction of that in surrounding communities, and the Tribal unemployment rate is many multiples of the off-Reservation rate.

In summary, because of the very weak economic ties between the Reservation and surrounding off-Reservation communities, the Northern Cheyenne have not shared in the economic gains from regional coal development. The Reservation does not benefit significantly in terms of jobs, construction contracts, general business activity, or increases in Tribal governmental revenues from the regional increase in economic activity generated by additional off-Reservation coal development. Thus, the Northern Cheyenne suffer an array of major adverse impacts from the off-Reservation (largely federally-sponsored or facilitated) coal-related development and enjoy few, if any, of the compensating benefits enjoyed by the United States, the State and surrounding communities and residents. However, the Tribe may be able to share in those compensating benefits someday via a revenue sharing agreement that will only be possible if the Northern Cheyenne Lands Act becomes law.

## **The Tribe Settled its Claims Over the Otter Creek Coal Transfer in Exchange for Promises to Support the Goals Contained in H.R. 4350.**

The Congressionally-directed transfer of the massive federal Otter Creek Coal Tracts to the State of Montana in 2002 perpetuates and exacerbates the existing economic and social inequities between the Reservation and surrounding communities. The Otter Creek Tracts comprise about 8,000 acres of coal lands along both sides of Otter Creek south of Ashland, Montana, and just east of the Northern Cheyenne Reservation. The Tracts are estimated to contain 533 million tons of recoverable coal reserves checkerboarded with more than 700 million tons of private and other State coal. The result is the single largest block of currently available, developable coal reserves in Montana. Those resources have now been entirely leased to a wholly-owned subsidiary of Arch Coal, Inc., the Nation's second largest coal mining company, and Arch is aggressively proceeding toward development. The surface rights to the Otter Creek Tracts are held by private landowners, the State of Montana and the Bureau of Land Management. Otter Creek is a tributary to the Tongue River, which forms the eastern boundary of the Northern Cheyenne Reservation.

The Tribe, in extensive correspondence and meetings with all major interests, strongly and repeatedly expressed opposition to the proposed transfer of the Otter Creek tracts by the Secretary of the Interior to the State without accompanying measures to mitigate the enormous negative economic and social impacts that development of the Otter Creek tracts would have on the Reservation. The Tribe filed a lawsuit in Federal District Court in Washington, D.C. to enjoin the Secretary's transfer of the Otter Creek Tracts to the State.

In an effort to achieve a settlement of its claims, the Tribe met with members of Congress, the Governor, the other top elected officials of the State, the Secretary of the Interior, BLM, BIA, industry and other interested parties. As a result, the Montana State Land Board agreed to support the enactment of Federal legislation providing impact funding to the Tribe, directing the transfer of the GNP-owned subsurface tracts within the Reservation to the United States and compensating GNP with a transfer of federal coal, and providing the Tribe with an economic interest in the development of the coal received by GNP. In return for the foregoing State commitments, the Tribe agreed to, and did, dismiss with prejudice its federal lawsuit. Features of that settlement are in the Northern Cheyenne Lands Act; namely, the provisions related to clearing title to the 5,000 subsurface acres currently held by GNP and the accompanying revenue sharing opportunity for the Tribe in revenue generated from the tracts to be transferred to GNP.

In negotiating its Otter Creek settlement with all parties from beginning to end, the Tribe worked closely and with the encouragement of the Montana Congressional delegation and BLM's Montana State Office. The understanding reached was that federal impact

funding of \$10 million per year for seven years would be sought through legislation, structured in a way to assure that that financial resource would be a permanent resource, available to the Tribe to fund on-Reservation public services, facilities and other governmental matters, as new development projects proceeded within 25 miles of the Reservation. In fact, \$70 million of impact funding was included in a 2004 iteration of the bill.

The Tribe, in good faith, relied on all of these commitments in consummating the Otter Creek settlement and dismissing its litigation against the Otter Creek transfer. However, the impact funding has not been included in H.R. 4350 in light of the current difficulties in securing any direct funding from Congress. Someday, we hope to secure such funding. As things currently stand, therefore, the proceeds of the proposed Tribal 40% interest in the GNP royalties stands as the only potential source of impact funding available to the Tribe to cope with the accrued and future impacts of surrounding coal-related development, including the massive development envisioned for the Otter Creek tracts.

In addition to foregoing tens of millions of dollars of impact funding, the Tribe has addressed several concerns raised in prior versions of the bill. First, the location of the federal tracts GNP would receive is in proximity to existing mines. Prior iterations of the bill included tracts in pristine and highly controversial areas, such as the Otter Creek area. Second, in contrast to other tracts in prior bills, the tracts GNP would receive are not within any mine plan or scheduled for development. Currently, the tracts would not be developed for at least 10-15 years. It is entirely possible the tracts are never mined given current coal market conditions. Third, the concerns of the owners of the surface lands over the federal minerals are addressed. The bill includes a provision retaining the federal right of surface owners to control whether mining occurs below their lands even after the federal tracts are transferred to GNP. Prior iterations of the bill did not include this element either.

### **The Tribe is Entitled to Manage its Own Water Rights Trust Fund.**

The final section of the bill, Section 6, concerns a \$5 million trust fund account, referred to as the “Northern Cheyenne Trust Fund,” which is currently held on behalf of the Tribe by the OST. The earnings are applied for the benefit of the Northern Cheyenne Tribe. The principal amount in the Fund originated from the 1991 Water Rights Compact between the United States, State of Montana, and the Tribe.

These same parties reached a settlement agreement in 1999 which states that the principal of the Fund shall remain in perpetuity, that the earnings of the Fund are to be paid to the Tribe, and that the Tribe may transfer the Fund from federal to private management. OST has paid the earnings from the Fund to the Tribe, including over the last few years. However, in 2008, OST took a position inconsistent with the settlement agreement:

because the appropriation could only be used for purposes expressly authorized by Congress, the principal account balance must remain under federal control. The Tribe strongly disagrees and believes that it is entitled to transfer the funds to private management, as originally agreed upon by the parties. This issue would be resolved if Congress directed OST to transfer the funds to the Tribe's permanent fund for private management.

The Tribe's Permanent Fund plan states that the principal must be held in perpetuity and only a certain percentage of the earnings may be used each year, specifically: 5% of the average quarterly market value of the Permanent Fund during the immediately preceding four fiscal years. The earnings can be used for a limited number of uses: law enforcement, education, youth or elderly programs, burial, public services, culture, land acquisition, natural resources, economic development, Reservation district allocations, and governmental services. By directing the Secretary to transfer the fund to the Tribe's Permanent Fund, the funds would be held in perpetuity and the earnings would be used for these vital services.

The Permanent Fund is a very secure vehicle for these funds. The Permanent Fund plan cannot change without a vote of the Tribe's membership and the membership has repeatedly shown that it is reluctant to make any changes to this fund. The fund has grown by several millions of dollars in its almost two decades of existence.

The United States has failed to manage the Northern Cheyenne Trust Fund in compliance with its fiduciary responsibilities, resulting in a very low rate of return. This gives rise to claims against the United States for trust fund mismanagement. Such claims would be waived by the Tribe under H.R. 4350.

### **Conclusion**

The Tribe has pursued passage of H.R. 4350 with integrity and honor. H.R. 4350, if enacted, would achieve the following constructive results:

- (1) Consolidate the Tribe's land base and the Tribe's ability to self-govern.
- (2) Enhance the Tribe's opportunity for economic development on the Reservation.
- (3) Protect the area around Bear Butte, which is sacred to the Northern Cheyenne and other tribes.
- (4) Remediate the federal government's 114-year error which has deprived the Tribe of ownership of eight sections of Reservation subsurface. As H.R. 4350 provides, in return for the mineral conveyances provided for in the bill, the Tribe

would release any and all claims it may have against the United States for that error.

- (5) Prevent GNP (or anyone else) from developing the eight sections without Tribal consent or benefit, irrespective of the long-standing Tribal concerns about Reservation coal development.
- (6) Provide a potential revenue stream to the Tribe to help the Tribe cope with the accrued and future impacts of adjoining off-Reservation coal-related development.
- (7) Address the long-standing injustices suffered by the Tribe from federally-sponsored and facilitated coal-related development in areas near the Reservation, while the Tribe's trustee financially benefits from such development.
- (8) Secure the Northern Cheyenne Trust Fund to be held in perpetuity to fund vital Tribal programs for the youth, elderly and other underprivileged Tribal members. The Tribe would release the United States from liability related to management of the Fund.
- (9) Reward the Tribe for its self-generated, steadfast and honorable effort to resolve these matters by agreement rather than litigation.

Again, Chairman Young and Committee Members, I want to thank you for your consideration of H.R. 4350, the Northern Cheyenne Lands Act. Enactment of this bill will help address many wrongs that have been done to the Northern Cheyenne by the United States over the centuries. The Tribe did not create the situation we now find ourselves in. We implore Congress and the Administration to do the right thing and enable the Northern Cheyenne to control their own lands and trust funds, and therefore control their own destiny.

# BOARD OF LAND COMMISSIONERS



STEVE BULLOCK, GOVERNOR

1625 ELEVENTH AVENUE

## STATE OF MONTANA

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HELENA, MONTANA 59620-1601

April 21, 2014

Honorable Jon Tester, Senator  
United States Senate  
706 Hart Senate Office Building  
Washington, D.C. 20510

Honorable John E. Walsh, Senator  
United States Senate  
2 Russell Courtyard  
Washington, D.C. 20510

Honorable Steve Daines, Representative  
United States House of Representatives  
206 Cannon House Office Building  
Washington, D.C. 20515

### Re: Proposed "Northern Cheyenne Lands Act"

Dear Senator Tester, Senator Walsh, and Representative Daines:

At the request of the Northern Cheyenne Tribe, we, as individual members of the Montana Board of Land Commissioners affirm our support for the enactment of legislation to rectify a claimed error which deprived the Tribe of ownership of 8 ½ sections of Reservation subsurface rights. We hereby request that the Montana Congressional delegation move forward to enact legislation. The passage of this legislation is very important in that it will correct a longstanding error when the Northern Cheyenne Reservation was expanded 114 years ago and will provide important land consolidation and economic opportunities to the Tribe, which are greatly needed. This legislation is long overdue and we request its swift enactment.

Sincerely,

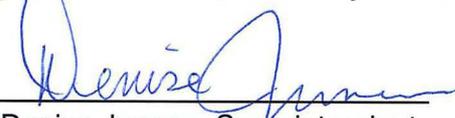
Montana's Board of Land Commissioners:

By   
Steve Bullock, Governor

By   
Tim Fox, Attorney General

By   
Linda McCulloch, Secretary of State

By   
Monica Lindén, Commissioner  
of Securities and Insurance

By   
Denise Juneau, Superintendent  
of Public Instruction



## Montana & Wyoming Tribal Leaders Council

175 North 27<sup>th</sup> Street, Suite 1003, Billings, MT 59101 Ph: (406) 252-2550 Fax (406) 254-6355  
Website <http://www.mtwytlc.org> Email: [CherylB@mtwytlc.com](mailto:CherylB@mtwytlc.com)

Resolution# 13March2014-02

**A RESOLUTION TO SUPPORT LEGISLATION TO REMEDY INJUSTICES BY PROVIDING THE NORTHERN CHEYENNE TRIBE OWNERSHIP OF SUBSURFACE RIGHTS WITHIN ITS RESERVATION AND CONTROL OVER THE NORTHERN CHEYENNE TRUST FUND, AND FOR THE TRANSFER OF TRIBALLY-OWNED FEE LANDS TO THE UNITED STATES TO BE HELD IN TRUST FOR THE TRIBE.**

**WHEREAS**, the Montana-Wyoming Tribal Leaders Council (Tribal Leaders Council) has been created for the purpose of providing a unified voice for Tribal governments and a collective organization to address issues of concern to member Tribes and their peoples; and

**WHEREAS**, duly elected Tribal Chairs, Presidents and Council Members of the Tribal Governments make up the membership of the Montana-Wyoming Tribal Leaders Council and as such are fully authorized to represent their respective Tribes; and

**WHEREAS**, by acting in unison to direct the formation of national, regional and local policy elected Tribal Leaders succeed in providing leadership on all issues that may affect the Tribes and reservation communities; and

**WHEREAS**, the Tribal Leaders Council strives to advance and to safeguard the sovereign authority and cultural integrity of each member Tribe; and

**WHEREAS**, the Northern Cheyenne Tribe has depended on its lands and land-based resources to support its way of life since time immemorial and has made supreme and historic sacrifices to repossess and maintain its homeland, including its Reservation in Montana; and

**WHEREAS**, the Tribe and its members are currently the beneficial owners of over 90% of the surface lands on the Northern Cheyenne Reservation and all but approximately 5,000 subsurface acres of the Reservation; and

**WHEREAS**, the Tribe currently suffers from tremendous social and economic challenges, including a lack of employment opportunities on the Reservation, which could be improved by Congressional legislation aimed at strengthening its control over its land base, natural resources and trust funds; and

**WHEREAS**, over 100 years ago, to resolve hostilities that had broken out between the Northern Cheyenne and non-Indian interests legally (and illegally) then located on or near the Northern Cheyenne Reservation, Congress directed that a federal agent be sent to the Northern Cheyenne Reservation to investigate and recommend an appropriate solution to those hostilities, and that agent's investigation resulted in a recommendation to Congress that the best solution would be to buy-out all non-Indian interests on or near the Reservation to facilitate extending the eastern boundary of the Northern Cheyenne Reservation to mid-channel of the Tongue River; and

**WHEREAS**, in executing that Congressional directive, the federal agent failed to purchase 8 sections of subsurface (coal and iron ore) under approximately 5,000 acres within the expansion area, which subsurface was then owned by Northern Pacific Railway and is now owned by Great Northern Properties; and

**WHEREAS**, in 2002, the Tribe agreed by settlement to dismiss its lawsuit against the United States, which alleged that the United States failed to protect the Reservation from the impacts of coal development, in return for several promises, including assistance in securing Tribal ownership of the aforementioned subsurface rights (as well as mitigation funding to address the impacts of coal development in areas adjacent to the Reservation); and

**WHEREAS**, to increase Tribal ownership and control of Reservation surface lands, the Tribe has purchased approximately 1000 acres of lands within its Reservation that were taken out of trust ownership status for various reasons; and

**WHEREAS**, the Tribe has purchased approximately 635 acres of land near Bear Butte, South Dakota, which the Tribe considers sacred ground for its members, as well as for members of other Tribes; and

**WHEREAS**, funds from the 1992 Northern Cheyenne Water Rights Settlement Act are currently managed as the "Northern Cheyenne Trust Fund" by the Office of Special Trustee; and

**WHEREAS**, in 1999, the United States, State of Montana, and the Tribe resolved a dispute by settlement agreement that the Tribe is entitled to the earnings

of that Fund and to transfer the Fund to the Northern Cheyenne Permanent Fund, but since then the Office of Special Trustee has refused to transfer the Fund and the Fund has not been prudently invested and managed by the Special Trustee; and

**WHEREAS**, to strengthen the Northern Cheyenne Tribe's land base and economic opportunities and resolve the above-described injustices which have deprived the Tribe of the subsurface rights and adequate returns from the Northern Cheyenne Trust Fund, the Tribe seeks Congressional legislation which would:

Transfer title from Great Northern Properties (GNP) to the Northern Cheyenne Tribe of the 8 sections (approximately 5,000 acres) of Reservation subsurface owned by GNP;

In return, convey to GNP subsurface rights in federal subsurface tracts within the state of Montana containing approximately equal amounts of federal minerals;

Facilitate the Tribe's acquisition from GNP of royalty interest in royalties paid to GNP in the event revenue is someday generated from the leasing of those tracts;

Transfer title to approximately 1600 acres of Tribally-owned fee land to the United States to be held in trust for the benefit of the Tribe;

Clarify, consistent with the Tribe's 1999 settlement with the United States and State of Montana, that the "Northern Cheyenne Trust Fund" managed by the Office of Special Trustee may be transferred to the Northern Cheyenne Tribe Permanent Fund; and

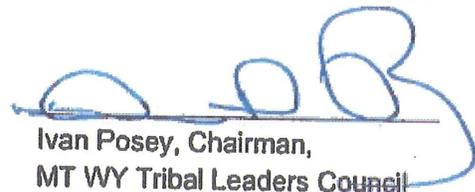
**WHEREAS**, the Tribal Leaders Council has previously strongly and fully supported earlier iterations of the proposed legislation (e.g., S. 647 and H.R. 1158) and urged for it to be passed by Congress as promptly as possible; and

**NOW THEREFORE BE IT RESOLVED**, that the Tribal Leaders Council does hereby urge the United States Congress and the Obama Administration to enact the legislation described above, or similar legislation, as promptly as possible; and;

**NOW BE IT FURTHER RESOLVED**, that this resolution shall be the policy of Tribal Leaders Council until it is withdrawn or modified by subsequent resolution.

#### CERTIFICATION

We, the undersigned, as the Chair and the Secretary of the Montana Wyoming Tribal Leaders Council, do hereby certify that the foregoing Resolution was duly presented and approved, at a specially convened Board Meeting of the Montana Wyoming Tribal Leaders Council, which was held on the 13<sup>th</sup> of March, 2013 in Billings, Montana with a full quorum present.

  
Ivan Posey, Chairman,  
MT WY Tribal Leaders Council

  
Gerald Gray, Secretary  
MT WY Tribal Leaders Council



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #TUL-13-014

### EXECUTIVE COMMITTEE

PRESIDENT  
**Brian Cladoosby**  
*Swinomish Tribe*

FIRST VICE-PRESIDENT  
**Michael Finley**  
*Colville Tribes*

RECORDING SECRETARY  
**Robert Shepherd**  
*Sisseton Wahpeton*

TREASURER  
**Dennis Welsh, Jr.**  
*Colorado River Indian Tribes*

### REGIONAL VICE-PRESIDENTS

ALASKA  
**Jerry Isaac**  
*Native Village of Tanacross*

EASTERN OKLAHOMA  
**S. Joe Crittenden**  
*Cherokee Nation*

GREAT PLAINS  
**Leander McDonald**  
*Spirit Lake Nation*

MIDWEST  
**Aaron Payment**  
*Sault Ste. Marie Band of Chippewa*

NORTHEAST  
**Randy Noka**  
*Narragansett Tribe*

NORTHWEST  
**Fawn Sharp**  
*Quinault Indian Nation*

PACIFIC  
**Rosemary Morillo**  
*Soboba Band of Luiseno Indians*

ROCKY MOUNTAIN  
**Ivan Posey**  
*Shoshone Tribe*

SOUTHEAST  
**Ron Richardson**  
*Haliwa-Saponi Indian Tribe*

SOUTHERN PLAINS  
**Steven Smith**  
*Kiowa Tribe*

SOUTHWEST  
**Manuel Heart**  
*Ute Mountain Tribe*

WESTERN  
**Arlan Melendez**  
*Reno Sparks Indian Colony*

EXECUTIVE DIRECTOR  
**Jacqueline Johnson Pata**  
*Tlingit*

**NCAI HEADQUARTERS**  
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Washington, DC 20005  
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**TITLE: Support Legislation to Remedy Injustices by Providing the Northern Cheyenne Tribe Ownership of Subsurface Rights within Its Reservation and Control over the Northern Cheyenne Trust Fund, and for the Transfer of Tribally-Owned Fee Lands to the United States to be Held in Trust for the Tribe**

**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, the Northern Cheyenne Tribe has depended on its lands and land-based resources to support its way of life since time immemorial and has made supreme and historic sacrifices to repossess and maintain its homeland, including its Reservation in Montana; and

**WHEREAS**, the Tribe and its members are currently the beneficial owners of over 90% of the surface lands on the Northern Cheyenne Reservation and all but approximately 5,000 subsurface acres of the Reservation; and

**WHEREAS**, the Tribe currently suffers from tremendous social and economic challenges, including a lack of employment opportunities on the Reservation, which could be improved by Congressional legislation aimed at strengthening its control over its land base, natural resources and trust funds; and

**WHEREAS**, over 100 years ago, to resolve hostilities that had broken out between the Northern Cheyenne and non-Indian interests legally (and illegally) then located on or near the Northern Cheyenne Reservation, Congress directed that a federal agent be sent to the Northern Cheyenne Reservation to investigate and recommend an appropriate solution to those hostilities, and that agent's investigation resulted in a recommendation to Congress that the best solution would be to buy-out all non-Indian interests on or near the Reservation to facilitate extending the eastern boundary of the Northern Cheyenne Reservation to mid-channel of the Tongue River; and

**WHEREAS**, in executing that Congressional directive, the federal agent failed to purchase 8 sections of subsurface (coal and iron ore) under approximately 5,000 acres within the expansion area, which subsurface was then owned by Northern Pacific Railway and is now owned by Great Northern Properties; and

**WHEREAS**, in 2002, the Tribe agreed by settlement to dismiss its lawsuit against the United States, which alleged that the United States failed to protect the Reservation from the impacts of coal development, in return for several promises, including assistance in securing Tribal ownership of the aforementioned subsurface rights (as well as mitigation funding to address the impacts of coal development in areas adjacent to the Reservation); and

**WHEREAS**, to increase Tribal ownership and control of Reservation surface lands, the Tribe has purchased approximately 1000 acres of lands within its Reservation that were taken out of trust ownership status for various reasons; and

**WHEREAS**, the Tribe has purchased approximately 635 acres of land near Bear Butte, South Dakota, which the Tribe considers sacred ground for its members, as well as for members of other tribes; and

**WHEREAS**, funds from the 1992 Northern Cheyenne Water Rights Settlement Act are currently managed as the “Northern Cheyenne Trust Fund” by the Office of Special Trustee; and

**WHEREAS**, in 1999, the United States, State of Montana, and the Tribe resolved a dispute by settlement agreement that the Tribe is entitled to the earnings of that Fund and to transfer the Fund to the Northern Cheyenne Permanent Fund, but since then the Office of Special Trustee has refused to transfer the Fund and the Fund has not been prudently invested and managed by the Special Trustee; and

**WHEREAS**, to strengthen the Northern Cheyenne Tribe’s land base and economic opportunities and resolve the above-described injustices which have deprived the Tribe of the subsurface rights and adequate returns from the Northern Cheyenne Trust Fund, the Tribe seeks Congressional legislation which would:

- transfer title from Great Northern Properties (GNP) to the Northern Cheyenne Tribe of the 8 sections (approximately 5000 acres) of Reservation subsurface owned by GNP;
- in return, convey to GNP subsurface rights in federal subsurface tracts within the state of Montana containing approximately equal amounts of federal minerals;
- facilitate the Tribe’s acquisition from GNP of a royalty interest in royalties paid to GNP in the event revenue is someday generated from the leasing of those tracts;
- transfer title to approximately 1600 acres of Tribally-owned fee land to the United States to be held in trust for the benefit of the Tribe;

- clarify, consistent with the Tribe’s 1999 settlement with the United States and State of Montana, that the “Northern Cheyenne Trust Fund” managed by the Office of Special Trustee may be transferred to the Northern Cheyenne Tribe Permanent Fund; and

**WHEREAS**, the NCAI has previously strongly and fully supported earlier iterations of the proposed legislation (e.g., S. 647 and H.R. 1158) and urged for it be passed by Congress as promptly as possible.

**NOW THEREFORE BE IT RESOLVED**, that the NCAI does hereby urge the United States Congress and the Obama Administration to enact the legislation described above, or similar legislation, as promptly as possible; and

**BE IT FURTHER RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

**CERTIFICATION**

The foregoing resolution was adopted by the General Assembly at the 2013 Annual Session of the National Congress of American Indians, held at the Cox Business Center from October 13 - 18, 2013 in Tulsa, Oklahoma with a quorum present.

  
\_\_\_\_\_  
President

**ATTEST:**

  
\_\_\_\_\_  
Recording Secretary



## STAGG ENGINEERING SERVICES, INC.

May 6, 1993

RECEIVED  
MAY 10 1993

ZIONTZ, CHESTNUT, VARNELL,  
BERLEY & SLONIM

Steven H. Chestnut, Esq.  
Ziontz, Chestnut, Varnell,  
Berley & Slonim  
Suite 1230  
Fourth and Blanchard Building  
2101 Fourth Avenue  
Seattle, Washington 98121

Re: Proposed Swap of Lands  
Great Northern Properties  
Rosebud County, Montana  
Job No. E396-126-102

Dear Steve:

As you requested I spoke with Nick Carter, president of Great Northern Properties, concerning a possible interest in exchanging property it owns within the perimeter of the Northern Cheyenne's reservation. He indicated a serious interest in this concept and asked me to relay this interest to you.

Nick will be in Montana during the period June 1 - 4 and would be willing to meet with you and/or other representatives of the Tribe to discuss this issue further. Nick can be reached as follows:

Nick Carter  
President  
Great Northern Properties  
P.O. Box 2827  
Huntington, West Virginia 25727-2827  
(304) 522-5755

I am confirming my forwarding of this information to you by sending Nick a copy of this letter.

If I can be of additional assistance in this matter please let me know.

Steven H. Chestnut, Esq.  
May 6, 1993  
Page Two

Sincerely yours,

STAGG ENGINEERING SERVICES, INC.



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Alan K. Stagg  
President

AKS:

pc: Nick Carter

# Northern Cheyenne Lands Act

## Historical Perspective

May 7, 2014

**Struggle for the Reservation.** The Northern Cheyenne cherish their land. To them, their Reservation is everything. It has provided for the Northern Cheyenne for centuries. Northern Cheyenne bands made their way back to the Tribe's original lands in Southeast Montana after the notorious massacres at Sand Creek and Washita. Later, they were forcibly relocated to the Oklahoma Territory in 1878 as retribution for their resistance to White domination and their participation in the Battle of the Little Bighorn (the Custer Battle), and then (uniquely among all other tribes relocated to the Oklahoma Indian Territory) fought their way back to their historic homeland in Montana. The journey came at great cost to the Tribe - - death, imprisonment and other deprivations - - hounded along the way by thousands of hostile military and settlers. The Northern Cheyenne eventually made it back to Montana to reclaim their homeland.

**1884 Reservation.** In 1884, by Executive Order, President Arthur established a 371,200 acre reservation for the Northern Cheyenne Tribe extending westward from the eastern border of the Crow reservation to 10 miles east of the Tongue River in Montana.<sup>1</sup> The Reservation included non-Indian settlers within its boundaries. A number of Tribal members living east and west of the Tongue River were not encompassed within the Reservation. Violent conflicts arose between Tribal members and early white settlers. Pending resolution of the situation, the Secretary of the Interior withdrew additional lands in 1886, including lands between the Reservation's eastern boundary and the Tongue

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<sup>1</sup> Exec. Order of Nov. 26, 1884.

River, as well as land to the east of the Tongue River.<sup>2</sup> These withdrawals further heightened the hostilities.

**1900 Expansion of Reservation.** In 1898, Congress directed the Secretary to investigate and report on the situation and, specifically, to determine whether it was feasible to relocate the Northern Cheyenne to the adjacent Crow Reservation.<sup>3</sup> In November, 1898, U.S. Indian Inspector James McLaughlin reported to Congress that the Tribe was unwilling to move to the Crow Reservation and the Crows were unwilling to receive them. McLaughlin recommended that “if the reservation were cleared of white settlers, who occupied much of the best land on the reservation, and if a sufficient amount of other desirable land could be added to the reservation, many of the difficulties of the Northern Cheyenne could be eliminated.”<sup>4</sup> He also reported on his negotiations with the white settlers (legal and illegal) for the acquisition of their lands within the expanded limits of the Reservation so as to entice those Northern Cheyenne living east of the Tongue River to relocate to the expansion area.<sup>5</sup>

In a second report issued in February 1900, McLaughlin recounted his negotiations with the Northern Pacific Railway Company for the purchase of the railway holdings within the expansion area. The Railway held checkerboard sections of public lands (surface and subsurface) under prior Acts of Congress<sup>6</sup> intended to induce westward Railway expansion. In early 1900, McLaughlin reported that he had reached purchase agreements with the

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<sup>2</sup> See Brief for the Northern Cheyenne Tribe as Amicus Curiae Supporting Defendants-Appellees, *Fidelity Exploration & Production Co. v. U.S.*, 506 F.3d 1182 (9th Cir. 2007).

<sup>3</sup> *Id.* at 4. See also Opinions of the Solicitor of the Department of the Interior, M-34758, *Validity of Patents Issued to Northern Cheyenne Indians* (September 5, 1947).

<sup>4</sup> *Id.* at 1469.

<sup>5</sup> *Id.* See also James McLaughlin, *My Friend the Indian* 302 (Houghton Mifflin Co. 1910). In his biographical novel, McLaughlin noted that in implementing the expanded Reservation he “found it necessary not only to buy out ranchers and individual settlers on a small scale, but actually to buy up the town of Hutton, Montana, which had been located on the reservation lands, through the incorrectness of a map of the portion of Custer County.”

<sup>6</sup> Northern Pacific Land Grant Act, July 2, 1864 (13 Stat. 365); Joint Resolution 67, May 31, 1870 (16 Stat. 378).

Railway and persons who had purchased surface land from the Railway within the expansion area.<sup>7</sup>

On March 19, 1900, President McKinley by Executive Order expanded the Reservation as McLaughlin had recommended. The boundaries of the Northern Cheyenne Reservation now ran from the Crow Reservation on the West to the middle of the Tongue River on the East.<sup>8</sup> On May 31, 1900, Congress appropriated the funds necessary to pay for lands purchased by McLaughlin, including those of the Railway and its successors. The Secretary then revoked 1886 withdrawal orders covering the public lands east of the Tongue River.<sup>9</sup>

**GNP's 5,000 Acres of Subsurface.** The Railway had previously sold some of its surface lands within the Reservation expansion area to others, while retaining ownership of about 5,000 acres of the underlying subsurface. In purchasing from the railway, McLaughlin unfortunately neglected to acquire that underlying Railway subsurface. In 1992 (92 years later), Great Northern Properties ("GNP") purchased those subsurface lands from a subsidiary of the Railway. This split estate (between Tribal surface ownership and third party subsurface ownership), subsists 112 years after Congressional direction to purchase the private in-holdings within the expanded Reservation in trust for the Tribe. These 5,000 acres are the only subsurface within the Reservation not owned by the Tribe.

**Tribal Homeland.** Today, the Northern Cheyenne Reservation is bordered on the west by the 4-5 times larger Crow Indian Reservation and on the east by the Tongue River. The Northern Cheyenne Reservation is truly the homeland of the Northern Cheyenne. The Reservation population is a 90% Northern Cheyenne. Non-Indian presence on the Reservation is minimal. A majority of the Tribe's almost 10,000 Tribal members reside on the Reservation. Traditional Cheyenne values and culture still thrive on the Reservation

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<sup>7</sup> Opinions of the Solicitor of the Department of the Interior, M-34758 at 1469.

<sup>8</sup> Exec. Order of March 19, 1900.

<sup>9</sup> Opinions of the Solicitor of the Department of the Interior, M-34758 at 1469.

and the Cheyenne language is still spoken. The Reservation remains culturally distinct from the surrounding land and communities.

Significantly, the Northern Cheyenne Reservation was the last Reservation to be allotted by Congress. Because of that very late Allotment Act, the Tribe's reverence for the Reservation, and a long-standing Tribal buy-back program, almost all of the Reservation surface is held in trust for the Tribe as an entity and its members. Furthermore, the Reservation surface is overwhelmingly controlled and used by the Tribe and its members. The primary land uses are cattle grazing, timber harvesting (entirely suspended for years due to adverse market conditions), farming, and ceremonial and subsistence use. The entire Reservation mineral estate - - except for the 5,000 acres that are the subject of the Northern Cheyenne Lands Act - - is owned by the Tribe as a single entity. Because of the paramount importance to them of the Reservation, the Northern Cheyenne feel a sacred duty to pursue ownership of the 5,000 acres of Reservation subsurface held by GNP.

**GNP Leases 5,000 Acres to Peabody.** In 1965, the coal industry began to express interest in the Northern Cheyenne Reservation. Encouraged by BIA and USGS (and without benefit of any independent expertise), in an effort to alleviate its abject poverty the Tribe authorized BIA and USGS to prepare documents necessary to conduct a public lease sale of its coal reserves.<sup>10</sup> In three successive coal sales (1966, 1968 and 1971), the vast bulk of the Reservation was carved up by a collection of the Nation's leading energy companies and speculators, all on unconscionable terms. During this episode, the Railway separately and independently leased its 5,000 acres of Reservation subsurface to Peabody Coal Company.

**Cancellation of Reservation Coal Transactions.** Realizing that it had lost control over about 70% of the Reservation, in 1973 the Tribe submitted a 600-page petition to the Secretary of the Interior seeking cancellation of the permits and leases encumbering the

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<sup>10</sup> See Hearings before the U.S. Senate Select Committee on Indian Affairs on S. 2126 – A Bill Relating to Certain Leases Involving the Secretary of the interior and the Northern Cheyenne Indian Reservation, 90th Cong. 32-39 [“S. 2126 Hearing”] (testimony of Allen Rowland, President of the Northern Cheyenne Tribal Council).

Reservation. The Tribe argued: (1) the royalty rate of 17.5 cents per ton (reduced to 15 cents if the coal, as most companies intended, was processed on the Reservation) was unconscionable; (2) the 25,000-30,000 lease options granted by the BIA-approved exploration permits grossly exceeded the 2,500 acre limitation specified in federal regulations; (3) the United States performed no prior environmental analyses before approving the coal transactions; (4) the documents contained no significant environmental protection or restoration provisions; and (5) the BIA leasing process was otherwise littered with regulatory and statutory violations.

The Secretary responded to the Tribe's petition by suspending all further coal development under the transactions, recognizing that the United States had effectively turned over the Reservation to the coal industry and speculators. To restore the balance of power to the Tribe, and in the hope that the transactions would be renegotiated, the Secretary declined to cancel the permits and leases outright, but assured the Tribe that "the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require [the Tribe's] joint agreement and support prior to any further approval by [the Secretary]."<sup>11</sup> In the ensuing years, the Tribe remained so traumatized and deeply offended by what had been done, that it rejected all overtures of the involved coal companies and speculators to renegotiate the transactions.

**Congressional Solution.** In approximately 1978, the Tribe approached the coal companies with a proposal to seek federal legislative action which would facilitate the companies' voluntary relinquishment of their claims on the Reservation. Recognizing that their development prospects on the Reservation were nil, the companies joined with the Tribe in a cooperative effort to seek legislation. At the request of the Tribe and the companies, in 1979, S. 2126 entitled "A Bill Relating to Certain Leases Involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation" was introduced. The final bill incorporated the concepts of noncompetitive leases and "bidding rights" as compensation for expenditures on the Reservation. S. 2126 as enacted authorized the

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<sup>11</sup> See Report from the Committee on Interior and Insular Affairs on S. 2126 (September 23, 1980).

Secretary to negotiate with the Tribe and each affected party for a “cancellation agreement” under which the permit or lease would be cancelled in exchange for either (a) a much smaller noncompetitive lease for federal coal adjacent to an existing mining unit that was unlikely to be mined separately, or (b) a certificate of bidding rights.<sup>12</sup> The final bill also established the value of the bidding rights at a level equal to the amount of the permit holder’s or lessee’s actual cash investment plus interest.

S. 2126 was enacted on October 9, 1980.<sup>13</sup> Over the next year, separate cancellation agreements among the Department of the Interior, the companies, and the Tribe were entered into, except as to the tracts secured by the speculators, whose claims on the Reservation were therefore cancelled by Congressional fiat as provided in the Act.<sup>14</sup> The speculators then sued the United States for a Fifth Amendment “taking” in the U.S. Court of Claims.<sup>15</sup> That suit was essentially unsuccessful. The Court gave token judgment by ordering reimbursement by the United States of the very minimal bonuses they had paid for the permits.<sup>16</sup>

**Class I Air.** In the late 1970’s, utilities owning the Colstrip power plants about 15 miles north of the Reservation sought to greatly expand the size of that project. The Tribe was very concerned about the likely adverse effects on Reservation air quality and the pattern of exclusion of Northern Cheyenne from employment in the power plants, notwithstanding appalling unemployment rates on the Reservation (the area’s largest local community). To address these issues, the Tribe took the bold and unprecedented step of reclassifying the air quality standard above its Reservation to Class I - - the most pristine

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<sup>12</sup> A Bill Relating to Certain Leases Involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation, Pub. L. No. 96-401, 94 Stat. 1707 (1980).

<sup>13</sup> *Id.* at § 4.

<sup>14</sup> The speculators offered to pay the Tribe an initial payment and an overriding royalty on the federal coal (located in the Tongue River Valley) they sought, if the Tribe would sign the necessary cancellation agreement. The Northern Cheyenne Tribal Council rejected that offer.

<sup>15</sup> *NRG Co. v. U.S.*, 24 Cl. Ct. 51 (1991).

<sup>16</sup> *NRG Co. v. U.S. (“NGR II”)*, 30 Fed. Cl. 460 (1994).

standard under federal law.<sup>17</sup> The Tribe was the first governmental entity of any kind in the Country to do so. EPA granted the reclassification and litigation challenging it was unsuccessful.<sup>18</sup> The end result was an agreement between the Northern Cheyenne Tribe and the power plant owners providing for the adoption of enhanced air quality control technology for the plant expansion, employment and other commercial opportunities for the Northern Cheyenne, and funding for Tribal government.

**Powder River Coal Sale.** In 1982, Secretary of the Interior James Watt authorized the largest federal coal lease sale in history. The Powder River Basin Sale included tracts to the north, east and south of the Reservation, as well as tracts in Wyoming. The Montana tracts included so-called tracts for an existing mine in Colstrip 15 miles to the north, tracts for the Decker mines 25 miles to the south, and tracts for new mines to be established to the east in the Tongue River Valley.

The Tribe made extensive efforts to resolve its concerns with this enormous coal lease sale without litigation. Those efforts were spurned by the Secretary and industry and, on the eve of the Powder River Basin lease sale, the Tribe filed suit against the Secretary asking that any leases issued in the forthcoming sale be voided on the ground that the leasing process essentially ignored or minimized the very adverse effects on the Northern Cheyenne. The Tribe's claims were filed under the federal coal leasing statutes and regulations, the federal trust responsibility, and NEPA. The Tribe based its claims on exclusion of the Tribe from impact funding, the physical and socio-economic on-Reservation impacts such development would engender, and the historic pattern of exclusion of Northern Cheyenne from employment opportunities at existing off-Reservation coal-related projects.

In federal District Court, the Tribe won a sweeping victory on all counts. All leases, including those authorizing new production tracts in the Tongue River Valley, were

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<sup>17</sup> Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration, 42 Fed.Reg. 40695 (August 11, 1977).

<sup>18</sup> *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981).

voided.<sup>19</sup> The United States and the involved companies appealed only the remedial provisions of the District Court decision.<sup>20</sup> Ultimately, the new production tract leases in the Tongue River Valley were terminated and the Tribe negotiated a mitigation agreement with the Colstrip mine (which had initially received tracts in the 1982 sale) that provided, among other items, jobs for Tribal members and some Tribal impact funding.

**Termination of Montco Project.** In the 1980s, federal mining permits were issued for the proposed Montco Mine project in the Tongue River Valley, adjacent to the Reservation. While the Tribe had concerns about the project from its inception, a lack of resources prevented the Tribe from taking legal action to challenge it, although the Northern Plains Resource Council (“NRPC”) and others tried unsuccessfully to block the project. In the 1990s when the Montco Project was applying for yet another renewal of its mining permit (after several prior renewals), the Tribe finally decided to legally challenge the project.

The Tribe was successful in administrative proceedings. Montco appealed to the District Court, which reversed the administrative decision. The Tribe then appealed to the Montana Supreme Court. Although NRPC was a party to the proceedings, the Tribe took the lead in preparing the pleadings, writing the briefs, and arguing the case. In a case of first impression, the Montana Supreme Court agreed with the Tribe’s position and denied further renewal of the Montco permit.<sup>21</sup> Since then, there have been no efforts to resuscitate the Montco Project.

**Otter Creek.** In 1989, Crown Butte Mines proposed a precious metals mine – the New World Mine – on private and U.S. Forest Service lands located approximately 3 miles from the border of Yellowstone National Park. During the federal environmental review process for the New World Mine, several issues arose about the impact of mining on the

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<sup>19</sup> *Northern Cheyenne Tribe v. Hodel*, 12 Ind.L.Rep. 3065 (D. Mont. 1985).

<sup>20</sup> *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988).

<sup>21</sup> *Montco v. Simonich*, 285 Mont. 280, 947 P.2d 1047 (1997).

surrounding area, including the Clark's Fork of the Yellowstone River, and the permitting process for the mine became extremely controversial.

With this controversy and the increasing likelihood that the New World Mine would never receive the necessary federal permits, negotiations began between Crown Butte Mines, local environmental groups and the Council on Environmental Quality as to how to buy-out the valid existing rights held by Crown Butte Mines. In August 1996, President Bill Clinton announced an agreement between the United States and Crown Butte Mines which, among other items, committed the United States to pay \$65 million for patented and unpatented mining claims held by Crown Butte Mines.

In April 1997, the United States proposed to fund this \$65 million payment with either a diversion of federal royalties from currently producing coal, oil, and gas operations in Montana or an exchange of other federal assets. To identify appropriate revenue streams, Montana Governor Marc Racicot commenced the Montana Initiative to identify federal coal and timber lands in Montana.<sup>22</sup> Ultimately, for various reasons, none of the revenue streams or exchange property identified by the State of Montana or the United States was workable as payment to Crown Butte Mines.

However, the Fiscal Year 1998 Balanced Budget Agreement entered into by Congressional leadership and President Clinton included \$300 million for "high priority land acquisitions."<sup>23</sup> This total included \$65 million for the purchase by the United States of Crown Butte Mines' interests in patented and unpatented mining claims.<sup>24</sup> Despite their inclusion in the Balanced Budget Agreement, the Republican Congress did not wholeheartedly endorse the "high priority land acquisitions" identified by President Clinton. The Senate Appropriations Committee included money for "high priority land acquisitions" in the Fiscal Year 1998 Appropriations Bill for the Department of the Interior

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<sup>22</sup> Hearing before the Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, New World Mine Proposed Buyout, H.Rpt. 105-40 (May 20, 1997); CRS Report for Congress, New World Gold Mine and Yellowstone National Park, No. 96-669 ENR (August 27, 1996).

<sup>23</sup> The Balanced Budget Act of 1997, Pub. L. No. 105-33 (Aug. 5, 1997).

<sup>24</sup> It also included \$250 million for the Headwaters Forest acquisition in northern California.

provided that separate legislation was enacted authorizing the acquisition while the House Appropriations Committee did not include any funding for the acquisitions.

In the fall of 1997, negotiations began in earnest between the White House and Congressional Republicans on the Fiscal Year 1998 Appropriations Bill for the Department of the Interior. Congress eventually decided to fund and authorize the Administration's "high priority land acquisitions" including \$65 million for the New World Mine property. The authorization for the New World Mine acquisition included a number of terms and conditions insisted upon by the respective authorizing Committees in the House and Senate.<sup>25</sup> It also included two items of particular importance to the State of Montana: (1) \$12 million for the maintenance and rehabilitation of the Beartooth Highway through Wyoming into Montana and (2) \$10 million in federal mineral rights to the State of Montana.

As to the transfer of the federal mineral rights to the State of Montana, the Act authorized that the Secretary of the Interior to convey to the state "without consideration":

- \$10,000,000 in mutually agreeable federal mineral rights in the State; or
- all federal mineral rights in Otter Creek tracts 1, 2, and 3

Over the next four years, the State and the federal government failed to identify mutually agreeable federal mineral rights to convey to the State.<sup>26</sup> Thus, the Secretary was obliged to convey the Otter Creek tracts 1, 2 and 3 to the State.

**Otter Creek Settlement.** Throughout this time, the Northern Cheyenne Tribe repeatedly expressed concerns to the State of Montana and the Department of the Interior about transferring the Otter Creek tracts to the State of Montana. The Otter Creek tracts

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<sup>25</sup> An Act Making Appropriations for the Department of the Interior and Related Agencies for the fiscal year ending September 30, 1998 and for other purposes, Pub. L. No. 105-83 (Nov. 20, 1997).

<sup>26</sup> The Montana Mineral Exchange: H.R. 2107, Section 503 of the Department of Interior & Related Agencies Appropriations Act, 1998, Briefing & Information Packet (January 1999).

are approximately 3-4 miles from the Tongue River, the eastern boundary of the Northern Cheyenne Reservation. The Tribe was worried that transfer of the property from federal to state ownership would adversely impact the Reservation if the tracts were developed, since the Tribe would lose federal trust protections and the environmental protection requirements of the federal coal leasing program would no longer apply. The Tribe met on numerous occasions with the Montana Congressional delegation, representatives of the Department of the Interior, the Governor, other State officials, and Great Northern Properties (“GNP”), to work out a settlement.

In January 2002, Montana Governor Martz formally requested that the Secretary of the Interior Norton transfer the Otter Creek tracts 1, 2 and 3 to the State. The Tribe met with Secretary Norton, to present its concerns and request time to negotiate a multi-party settlement. Shortly after that meeting, the Tribe was advised that the Secretary would withhold action on the transfer pending such settlement discussions. The Department then “withheld action of the transfer of any federal mineral rights to the State of Montana in order to support the discussions between the State of Montana and the Northern Cheyenne Tribe.”<sup>27</sup>

On the eve of a public hearing before the State Land Board to consider and consummate an Otter Creek Settlement Agreement negotiated by the Tribe and the State, the Tribe learned that, notwithstanding the Secretary’s stand-still assurance, the Otter Creek transfer would go forward virtually immediately. Within two business days, the Tribe filed suit against the Secretary in federal District Court in Washington, D.C. to enjoin the transfer.<sup>28</sup> The Tribe’s settlement discussions with Governor Martz, the Montana State Board of Land Commissioners, the Montana Congressional delegation and Great Northern Properties (the owner of the private coal checkerboard in Otter Creek) to resolve its litigation and objections to the Otter Creek transfer were ultimately successful.

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<sup>27</sup> Draft Environmental Assessment for Compliance with Section 503 of the Department of the Interior and Related Agencies Appropriation Act of 1998, Public Law 105-83 at pp. 17 – 19 (Feb. 4, 2002). It is unclear if a final EA was ever issued for the transfer of the Otter Creek Tracts.

<sup>28</sup> *Northern Cheyenne Tribe v. Norton*, Docket # 1:02-cv-00146-TPJ (D.D.C. 2002). The Tribe’s complaint was filed on January 25, 2002.

Under the settlement, the Land Board and the Congressional delegation agreed to support the enactment of federal legislation which would provide impact funding to the Tribe and resolve the Tribe's claims against the United States arising from the Otter Creek transfer and the 1900 failure to acquire 5,000 acres of subsurface rights within the Reservation. The State Land Board agreed to require any lessee of the Otter Creek tracts, in close consultation with the Tribe, to fashion Operating Plans which would provide employment and commercial opportunity to the Northern Cheyenne, enhance environmental protection for the Reservation, require project workforce and truckers to meet conduct codes while on the Reservation, and protect Tribal historic, cultural and religious interests and values in the Tongue River Valley. The Land Board also agreed to support efforts to improve off-Reservation roads to lessen resulting traffic loads on the Reservation, new cooperative law enforcement arrangements, and Congressional enactment of federal legislation to facilitate federal impact funding to the Tribe. In exchange, the Tribe agreed to dismiss, with prejudice, its judicial challenge to the Otter Creek transfer.

The Settlement Agreement was signed by the President of the Northern Cheyenne Tribe, Governor Martz, Montana Secretary of State Brown, and Montana Director of Natural Resources and Conservation Clinch in February 2002.<sup>29</sup> The Bureau of Land Management issued the State of Montana a patent for the Otter Creek tracts on April 10, 2002.<sup>30</sup>

**Legislative Follow-Up on Otter Creek Settlement.** Consistent with the terms of the Otter Creek Settlement, in 2004, Senator Burns introduced the Montana Mineral Conveyance Act.<sup>31</sup> The 2004 Montana Mineral Conveyance Act was cosponsored by Senators Baucus and Campbell. As introduced, the bill conveyed to the United States the Northern Cheyenne Reservation tracts owned by Great Northern Properties for other coal reserves owned by the United States in Montana. The Northern Cheyenne Tribe agreed to

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<sup>29</sup> Settlement Agreement by the Montana State Board of Land Commissioners and Northern Cheyenne Tribe (Feb. 19, 2002).

<sup>30</sup> State of Montana, Office of the Governor, Executive Order No. 12-02, Executive Order Certifying Transfer of Title to Federal Property Interests (May 28, 2002).

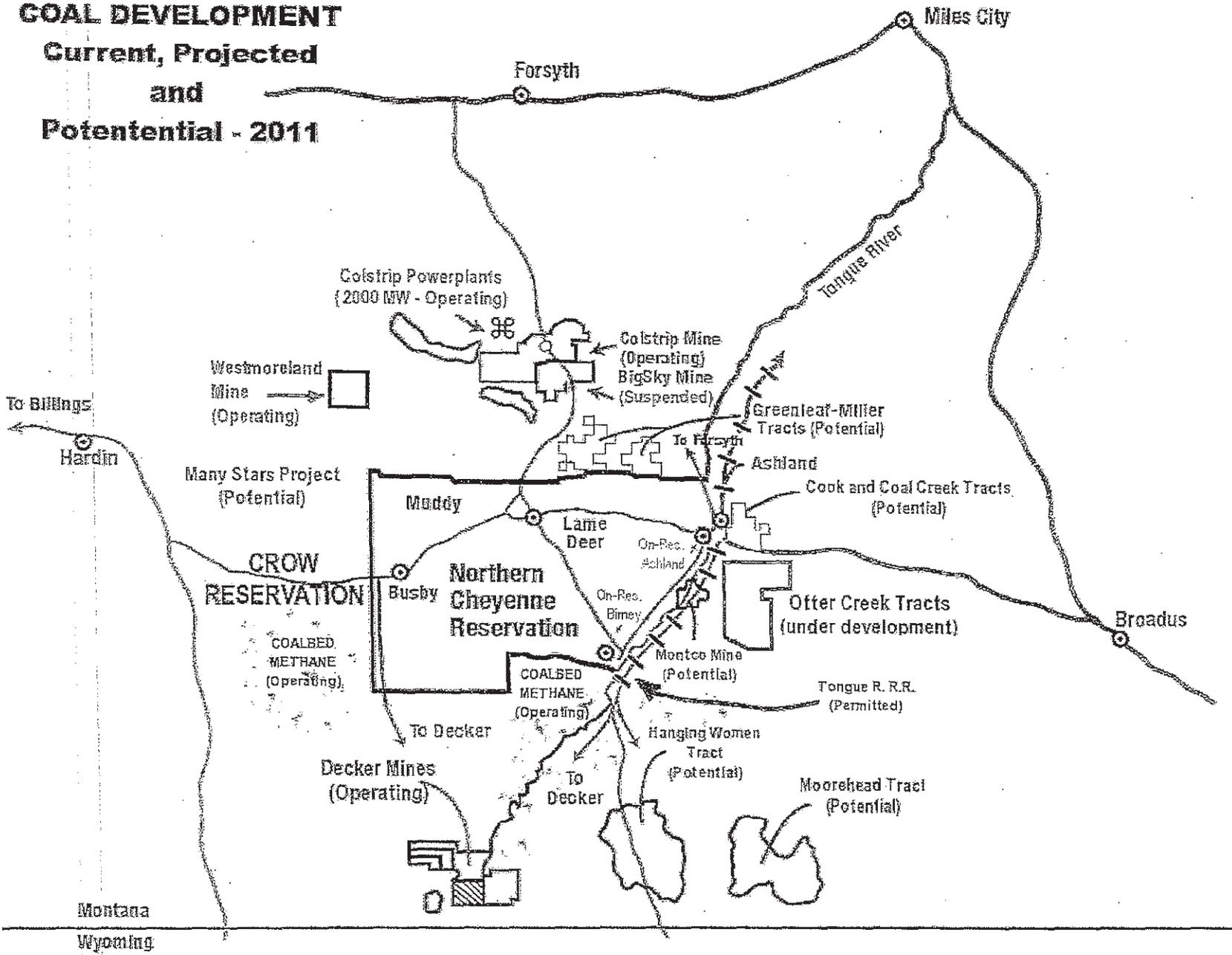
<sup>31</sup> S. 2225, 108th Cong., 2d Sess. (2004).

waive its breach of trust claims against the United States. The legislation also authorized a \$70 million impact assistance fund for the benefit of the Northern Cheyenne Tribe. No hearings were held on the 2004 Montana Mineral Conveyance Act.

H.R. 1158 was introduced in 2011, as was a similar bill in the Senate, S. 647. Another iteration of the bill was introduced in the Senate as S. 2110. In contrast to the predecessor 2004 Bill and the negotiated Otter Creek Settlement, neither H.R. 1158 nor the Senate bills provided the promised \$70 million in federal impact funding to the Tribe. This provision was removed in light of federal budget realities and to increase the likelihood of enactment. H.R. 1158 was reported favorably by unanimous consent out of the House Indian and Alaska Native Affairs with a recommendation that it would pass. No hearing was held in the Senate.

# COAL DEVELOPMENT

## Current, Projected and Potential - 2011



**Reservation  
Communities  
and Roads - 2011**

