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FEATURED

County, state pushed to act on unpaid production taxes

By GREG JOHNSON NEWS RECORD MANAGING EDITOR gjohnson@gillette news record.net 14 min ago



Cloud Peak Energy’s Chapter 11 bankruptcy filing has Campbell County and Wyoming on edge about how much — if any — of an outstanding \$8.3 million tax bill will be paid. Because ad valorem taxes on mineral production are collected by counties on a schedule that sees companies paying 18 months after the fact, bankruptcies become a big financial problem. Based on Cloud Peak’s tax bill for 2017 taxes that it only paid half of, the county also could be on the hook for another \$17 million or more for 2018’s production taxes, which aren’t yet due.

News Record Illustration/Greg Johnson

Rereading a chapter from a favorite novel can often reveal details and insight that make the story more rewarding. For Campbell County, Chapter 11 of the Powder River Basin coal industry's nonfiction tale reads more like a recurring nightmare from a prolonged horror saga.

Cloud Peak Energy Corp.'s recent Chapter 11 bankruptcy filing has local and state officials worried about the future of the company's three PRB mines and the 1,200-some-odd people who work at them. They're also scrambling to get in line to salvage even a small fraction of the millions of dollars left owed to the people of Campbell County and Wyoming.

The company filed for bankruptcy May 10, which also was the deadline for paying \$8.3 million Cloud Peak owed Campbell County in ad valorem taxes for the last half of 2017 coal production. Without strong legal protections at the state or federal levels, it's anyone's guess as to how much — if any — of that money will ever be collected.

Because those tax collections are about 18 months behind the actual production of coal, the county also may not see any money for coal mined in all of 2018, which based on 2017's production could come to about \$17 million or more.

That's a potential \$25 million-plus the county may never collect, not counting tax on coal mined through the first six months of 2019.

It's a huge amount of money for any entity to have to write off, said Commissioner Mark Christensen. And unfortunately, Chapter 11 tells a story Campbell County has read before.

"We've seen this before and didn't do anything about it (at the state level) to rectify the potential for these bankruptcies," he said. "Whether we want to admit it or not, we did this to ourselves to a large degree. And at this point, there really is not much we can do.

"The reality is, we're in a spot where we have these bankruptcies where (money) isn't coming back."

Same old tune

Baseball Hall-of-Fame catcher Yogi Berra could have been talking about dealing with PRB coal company bankruptcies when he famously quipped, "It's like déjà vu, all over again."

When Alpha Natural Resources filed for Chapter 11 bankruptcy in 2015, the company left about \$19 million in unpaid ad valorem taxes owed to Campbell County. While Alpha spun off its two PRB mines — Eagle Butte and Belle Ayr — into another company and left Wyoming, the bankruptcy reorganization did not include paying any of that debt.

What followed were years of legal wrangling, negotiations and lawsuits that saw Campbell County hire an outside law firm to pursue the money. Eventually, Alpha paid some of the taxes it owed, then came to a settlement last spring to pay all but \$4 million of the balance. Add in the \$1 million it cost the county to force the settlement, about \$5 million was left on the table.

When coal giant's Peabody Energy and Arch Coal Inc. followed suit with their bankruptcy filings shortly after Alphas, they made a point of keeping up their ad valorem taxes, Christensen said.

Those vastly different experiences leaves the county unsure what to expect from Cloud Peak's bankruptcy.

"The best case? They pay up like they've always done and like (Arch and Peabody) did," Christensen said. "The worst case is they don't pay anything and we have to get in line."

That line is a long one, and because counties don't have any secured claims to the debt owed, they won't get anything until the company's secured debt holders are paid. The chance for there to be anything left for claims like the county's is negligible.

It's a problem not only for coal, but for other extraction industries in Wyoming, like oil and natural gas, said state Sen. Michael Von Flatern, R-Gillette.

Faced with possibly eating \$25 million or more in unpaid taxes from Cloud Peak Energy is a situation the county and state shouldn't be in, he said. That's because the Legislature came close to changing state law in 2014 to eliminate the 18-month gap between production and paying the tax.

And ironically, that change was killed at the urging of Cloud Peak Energy.

Changing the game

In 2014, a bill had been drafted that would have required mineral extraction companies to pay their ad valorem taxes monthly instead of on a biannual basis months removed from the actual production, Von Flatern said.

The state of Wyoming already collects severance taxes from companies based on monthly production, so making the county taxes on that same production due on the same schedule seems a logical fix. Instead, companies lobbied against the change, especially the coal companies.

Cloud Peak's objections were the loudest and most persistent, Von Flatern said.

"Why are you punishing us?" he recalled of the argument. "We were in their office in downtown Gillette, and that's the reasoning they gave, that you've never had problems with the coal mines and this law will hurt the coal mines the most."

The main point the coal companies object to is that making the transition to monthly payments will create an 18-month period when they'd be required to essentially make double payments. That's because while the new monthly schedule will be in effect, the taxes for the previous 18 months still haven't been collected.

While that argument worked in 2014 and the sponsor of the bill dropped it, Von Flatern said it's unlikely to work now. The state Joint Revenue Interim Committee is expected to draft another bill calling for a change to monthly production tax payments to counties to present in the next session.

Even if it passes, it's still years too late to save counties tens of millions of dollars and expensive legal battles, he said.

"Had that passed in 2014, this would be in effect now and (counties) would be collecting taxes on a monthly basis," Von Flatern said. "Now we're stuck with not getting that money from them because they can take 18 months before we can even get a file on them."

In the case of Cloud Peak, which owns the Cordero Rojo and Antelope mines in Campbell County, it would be the difference of instead of having nearly two years of unpaid taxes outstanding, the company would've only been a few months behind at most when it filed for bankruptcy.

Requiring monthly payments “is what we should do,” Von Flatern said. “Instead, they continue to be behind and even now, every day they work and they work and they’re getting farther and farther behind.”

While he understands the concern about making double payments and how that can be crippling to coal companies that are barely hanging on as it is, Christensen said the Campbell County Commission’s main responsibility is to its residents. Allowing companies to go under without paying what’s owed isn’t acceptable.

In the end, the coal companies won’t be paying any more than they owe and that some arrangement with the state can probably be hammered out to make up that 18-month gap difference over a period of two to five years, he said.

“It seems like it should be something so easy to fix and it’s annoying that it’s so damn hard to fix,” Christensen said.

A proposed overhaul

That’s a frustration shared by the Powder River Basin Resource Council, a Sheridan-based nonprofit dedicated to responsible management of Wyoming’s natural resources.

The group produced a comprehensive report in August that outlines not only the huge financial deficit the current ad valorem tax system has created for Wyoming and its counties, but a detailed plan of how the Legislature can address the problem.

Perhaps the most telling numbers in the report is that since the energy bust hit for both Wyoming oil and coal in 2016, the state today is owed less than \$3 million in severance taxes from the downturn. Because those taxes are collected monthly, 99.977% of those taxes were paid as owed even during a bust.

Counties, on the other hand, continue to see their unpaid ad valorem taxes go unpaid. As of the time of the report in August, 13 counties were carrying nearly \$55 million in delinquent production taxes. At \$32.7 million, Campbell County was owed the most by far. Carbon County was owed \$10.3 million and Sheridan \$7.5 million. The other 10 counties were all owed less than \$1 million each.

“The cumulative impact of these busts has been substantial, leaving counties across the state with significant deficits,” the report says. “Counties with active mineral extraction have been affected by loss of local jobs, loss of ongoing tax collection, and, in many cases, uncollectable taxes that were previously assessed.

“The deficits faced by counties are significant and, given current laws, are certain to grow. If left unchecked, these debts are likely to mount to crisis level.”

Along with standardizing ad valorem tax collections monthly with the state severance tax schedule, the Resource Council also proposes establishing perpetual liens on mineral company property to “ensure that outstanding tax debts are collectable at the time of sale or transfer of assets.”

In the case of a bankruptcy, having those liens would give counties a strong secured claim to those assets and give them a place near the the front of the line with other senior debt holders.

A bill in 2017 that attempted to establish those liens failed, but the Revenue Committee is taking the issue up again.

The strongest argument for giving counties superior liens on mineral companies is because the minerals belong to the people of Wyoming.

“Tax revenue collected by counties directly serves Wyoming citizens, while other liens represent private interests,” the report says. “Taxes generated from mineral production belong to the people of Wyoming, and all methods for ensuring their collection should be prioritized.”

Another proposal Von Flatern said he supports is establishing a pool of money for counties to use to help with legal fees associated with collecting all the production taxes they’re owed. While Campbell is fortunate to have the financial means to spend \$1 million to go after companies like Alpha Natural Resources, smaller counties don’t.

“While it is unfortunate that the county had to write off \$4 million (in its settlement with Alpha), Campbell County is fortunate to have been able to engage in bankruptcy proceedings at all,” the report said. “The county has money available to pursue unpaid taxes through litigation. It cannot be overstated, however, that many counties in Wyoming do not have the funds required to even enter into the bankruptcy process.”

It's something Lincoln County is facing now with the ongoing, and at times messy, Chapter 11 bankruptcy of Westmoreland Coal Co., an Englewood, Colorado-based company that owns the Kemmerer mine.

The Resource Council estimates the bankruptcy will leave Lincoln County with about \$11 million in production taxes it can't collect.

Where past attempts to update the tax collection regulations have failed, this next session may be different, Von Flatern said.

Cloud Peak Energy's bankruptcy and an ongoing effort to collect more than \$17 million in unpaid production taxes from Blackjewel LLC may be enough to finally push legislators over the edge, he said.

"The point is that somewhere along the line, because (minerals are) a valuable product, there has to be a tax issued," he said. "We need the Revenue Committee to bring forward a bill that will set the ad valorem taxes a couple years down the road to where we're collecting every 30 days. In that time, the counties can figure out their budgets."

If for some reason the Revenue Committee doesn't bring a bill that changes the ad valorem tax schedule, Von Flatern said he would.

As for the argument that adjusting and making some double payments is too burdensome on companies, he said they'll simply have to bite the bullet, but the state also will likely also consider plans for how to ease that transition.

"They'll have to do it if they want to keep operating," he said. "They'll argue that it will put them under. I'm not so sure about that. ... In the end, if you give away the candy store, eventually you find yourself very poor and very hungry."

Impact on education

While much of the attention about the unpaid taxes has been about how that impacts counties, it also has a significant impact on Wyoming as a whole, especially education funding.

Campbell is a passthrough county, which means a large percentage of mineral production taxes are passed on to the state, earmarked for education. It's a way to guarantee a minimum level of funding for schools around the state. To that end, about 75% of ad valorem mineral taxes collected go into the general education pool to fund districts across Wyoming.

In the case of Cloud Peak Energy, that's a potential for as much as \$18.75 million that may not be passed through.

For a state that's already facing a \$250 million education shortfall next fiscal year, the last thing lawmakers need is to make up even more, Von Flatern said.

It's also an argument the Powder River Basin Resource Council makes for a monthly collection schedule.

"Because so much of our school funding comes from mineral production taxes and severance taxes, bust cycles cause significant harm to Wyoming schools and weaken our entire state," the report says.

Because the state is obligated to fund education no matter what, these large mineral tax shortfall may show up as cuts in other areas of the state budget, Von Flatern said.

In the end, any legislative fix likely won't go into effect for at least a couple of years, which means counties will continue to be on the hook. And even the most benevolent, community-minded and historically generous company can leave a huge tax burden when it goes bankrupt, Christensen said.

That seems the case with Cloud Peak Energy, which Christensen said he believes has tried to do right by the county and its employees. But now that decisions are in the hands of the bankruptcy court, good intentions aren't a factor.

"It's like Carol's position has always been," he said, referring to Deputy County Attorney Carol Seeger. "You're the good guys until you're not."



Mineral Tax Delinquency Report

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Another outstanding bill

In the case of Blackjewel LLC, the company acquired the Belle Ayr and Eagle Butte mines from Contura Energy, which spun off from Alpha during its bankruptcy process. Since taking over operation of the mines, Blackjewel ran up a significant tab of unpaid taxes. The company reached an agreement with Campbell County earlier this year that put it on a payment plan that will have Blackjewel's unpaid 2017 taxes and 2018 current by April 30, 2020.

So far, Blackjewel has made \$5 million in payments in 10 weekly installments of \$500,000 each. The rest of the schedule is as follows:

June 28: \$1 million

July 31: \$2 million

Aug. 30: \$2 million

Sept. 30: \$2 million

Oct. 31: \$2 million

Nov. 29: \$2 million

Dec. 31: \$2 million

Jan. 31, 2020: \$2 million

Feb. 28: \$2 million

March 31: \$2 million

April 30: Balance of tax and interest due (based on 2018 production, about \$10 million, plus about \$3 million for interest on the delinquent tax). This would bring the company current for 2018 and 2019.

