**Testimony in Support of North Dakota SB 2304**
**Background and Justification**
**Tax Reform**
**Within the Exterior Boundaries of the Fort Berthold Indian Reservation**

By
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## Background

The Oil and Gas Gross Production Tax Sharing Agreement is unconstitutional on both the State level and according to the Constitution of the Three Affiliated Tribes. The Three Affiliated Tribes and the State of North Dakota have been illegitimately collecting oil and gas gross production taxes on allotted lands within the reservation since the first agreement was signed.

In North Dakota, an oil and gas production tax is imposed instead of property taxes on oil and gas producing properties. Oil extraction tax is also levied on the extraction of oil from the earth. A 5% rate is applied to the gross value at the well of oil produced.

**The Enabling Act** which created North Dakota as a state, is an Act by the United States Congress on February 22, 1889, that makes a clear and unambiguous statement within Chapter 180, Statutes at Large 676, Section 4m in pertinent part, "*That the people inhabiting the proposed states do agree and declare that they forever disclaim all right and title… to all lands lying within said limits owned or held by any Indian or Indian tribes; and …, that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.*"

The express terms of the Enabling Act were incorporated into the **North Dakota State Constitution in Article XIII, Section 3,** in which North Dakota "accepted" the grants of land given to form the State, from the United States of America, "*under the conditions and limitations therein mentioned…*".

The **Dawes Act** of February 8, 1887 authorized the federal government to divide communal territory and allotted land plots to individual Indians to be owned in severalty; rather than by the entire Indian Tribe.

The **Dawes Act states in pertinent part of Section 5**: "*That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United*

*States does and will hold the land thus allotted…., in trust for the sole use and benefit of the Indian to whom such allotment shall have been made*".

**The Dawes Act** of February 8, 1887 which preceded the Enabling Act states in **Section 6** of the document, "*That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and* ***no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law****. Every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States* ***without in any such manner affecting the right of any such Indian to tribal or other property***".

That means an Allottee need not physically reside on the land or property of which they own, nor do they have to be a considered an "enrolled member" in regards to the Indian Reorganization Act, to enjoy the rights, privileges, protections and benefits of ownership.

An individual member of the Hidatsa Tribe, the Mandan Tribe, or the Arikara Tribe, and an "enrolled member" of the Three Affiliated Tribes created under the Indian Reorganization Act of 1934 are NOT the same thing, by legal, traditional or cultural definition.

**The Indian Reorganization Act of June 18, 1934** states in **Section 3**: "*The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States; Provided, however, that valid rights or claims or any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act*."

**Section 5 of the Indian Reorganization Act** states in part: "*Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or Individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation*."

Under the terms of the State/Tribal Oil and Tax Agreements: The MHA Nation Tribal Business Council (TBC) waived its own immunity from taxation by the State of North Dakota by entering in to the Agreement.

Allotted lands are tax exempt. Tribal lands and Allotted lands are two separate and distinct land ownership classifications according to tribal, state, and federal law.

Allottee lands are subject to the exemptions for oil and gas production and extraction taxes from trust lands under chapter 57-51 and 57-51.1.

The TBC has NO LEGAL AUTHORITY to speak on behalf of any individual beneficial allottee landowner(s) who own(s) the controlling interest in his, her or their own Allotment, unless an allottee's consent is given.

Allottees are subjected to taxation without representation or participation under current State/Tribal Oil and Gas Compacts.

**The Indian Civil Rights Act of 1968, 25 U.S.C. Chapter 15, Subchapter I, 1302 (a) (5) states:** "No Indian Tribe in exercising powers of self-government shall take any private property for a public use without just compensation."

The Fort Berthold Indian Reservation was created by Executive Order. Allotments were NOT. Individual Indian Allotments were created by Congress through the DAWES ACT.

According to federal statute, allottee landowners are on equal footing with the MHA Nation in regards to their own land holdings.

**The Indian Civil Rights Act of 1968** amended **Public Law 280** so states could no longer assume civil and criminal jurisdiction over Indian Country unless the affected tribes consented at special elections called for this purpose.

In other words, the TBC has the authority to negotiate the terms of a tax agreement, but only the people through referendum vote, have the authority to approve its enactment to be binding on the Tribal Lands.

Allottees with the controlling interest in their own allotment have the sole authority to consent to a tax agreement with the State on their own property. The TBC has no jurisdiction over allottee lands.

**Article VI – POWERS, Section 2 of the TAT Constitution states**: The exercise of powers granted by this Constitution is subject to any limitations imposed by the Statutes of the United States or by this Constitution and Bylaws.

**Article VI Section 3 of the Constitution of the Three Affiliated Tribes states**: "*The people of the Fort Berthold Reservation hereby grant to the Tribal Business Council of the Three Affiliated Tribes all necessary sovereign authority – legislative and judicial – for the purpose of exercising the jurisdiction granted by the people in Article 1 of this Constitution*".

**THE TRIBAL BUSINESS COUNCIL DOES NOT HOLD SOVEREIGN EXECUTIVE AUTHORITY UNDER THE CONSTITUTION OF THE THREE AFFILIATED TRIBES.**

**Article VI Section 5 of the Constitution of the Three Affiliated Tribes** further limits the Tribal Council's jurisdictional authority to tribal lands only. It also prohibits the TBC's jurisdictional authority over allotted lands. Examples of those sub-sections of Article VI, Section 5 include:

(h) To regulate the inheritance of real and personal property, other than the allotted lands, within the territory of their jurisdiction.

(i) To make arrangements and leases of Tribal lands, and otherwise manage Tribal lands, interests in Tribal lands, and property upon such lands, in conformity with Article IX of this Constitution.

**Article IX – LAND**, Section 1, of the Constitution states: *The Tribal Business Council shall have the authority to manage and lease or otherwise deal with tribal lands and resources in accordance with law and to prevent the sale, disposition, lease or encumbrance of tribal lands, interest in lands or other tribal assets*.

**Article IX, Section 2** defines Tribal lands, as: The **UNALLOTTED lands of the Fort Berthold Indian Reservation and all lands which may hereafter be acquired by the Three Affiliated Tribes or by the United States IN TRUST for the Three Affiliated Tribes, shall be held as Tribal lands and no part of such lands shall be sold or ceded, except as permitted by law and then only with the consent and approval of the Secretary of the Interior.**

**The Corporate Charter of the Three Affiliated Tribes states: Corporate Property**.

7. *No property rights of the Three Affiliated Tribes, as heretofore constituted, shall be in any way impaired by anything contained in this Charter, and the* ***tribal ownership of unallotted lands****, whether or not assigned to the use of any particular individuals, is hereby expressly recognized.* ***The individually owned property of members of the Tribe shall not be subject to any corporate debts or liabilities, without such owners' consent****. Any existing lawful debts of the Tribe shall continue in force, except as such debts may be satisfied or cancelled pursuant to law.*

That provision in the Charter clearly, unambiguously and expressly states that the property, including lands or activities thereupon, of the citizens of the Three Affiliated Tribes **CANNOT BE TAXED** by the Three Affiliated Tribes corporate or governing body unless an owner's consent is given to do so. Any tax is a **LIABILITY to the Allottee** to pay Tribal corporate/government debt.

The only tax that can be legally levied is that, which is pointed out in **Tribal Constitution Article 6, Section 5 (b)**. This tax is issued on a per capita basis and not based on property or income of any Tribal citizen.

The Jicarilla vs New Mexico decision is not applicable to Allotted Indian lands in the Dakotas which were created by Federal Law.

Only the United States Congress has plenary authority over allotted lands. Not the Tribal government, not the Executive Branch of the federal government, nor the State of North Dakota.

Individual Indian Allotments can exist outside the exterior boundaries of an Indian Reservation.

The Tribe does not have the authority to tax deeded or "fee" lands within the reservation boundaries unless certain conditions exist.

The State of North Dakota has tax authority over deeded lands or "fee lands" within the exterior boundaries of the reservation.

**The MHA Nation does not provide significant services to the oil and gas lessees or allotment beneficiaries and lacks legitimate regulatory authority and/or interest in the allotted lands which may justify their collection of any tax or tax benefit which rightfully belongs to the Individual Indian Allottee landowner.**

**Article VI- Powers** of the Tribal Constitution limit the TBC's regulatory authority to the following:

Section 5 (h) To **regulate** the inheritance of real and personal property, other than the allotted lands, within the territory of their jurisdiction.

Section 5 (j) To protect and preserve the property, wildlife, and natural resources of the Tribes; to **regulate** hunting and fishing on all lands within the jurisdiction of the Tribes, and to cultivate and preserve native arts, crafts, culture, ceremonies and traditions.

Section 5 (l) To adopt resolutions **regulating** the procedure of the Tribal Business Council and other Tribal agencies and Tribal officials of the Reservation.

Oil and Gas operators on the Fort Berthold Indian Reservation are being taxed twice under current agreements.

The operators just count it as "the cost of doing business" on the Reservation and penalize the mineral owners by passing on the costs to the beneficial Indian mineral allotment owners. Higher pass-through costs are a form of being taxed without actually being called a tax.

Currently the oil and gas gross production tax sharing agreement (the agreement) allows the State to collect and administer a tax on all lands within the exterior boundaries of the reservation, including allotted lands. It is **NOT a tribal tax**.

Allottees were not given notice nor due process in regards to any tax on their lands.

The State and the Tribal government (the Tribe) entered into the agreement to provide consistency and a stable business environment.

It is an agreement to avoid litigation over tax revenues.

The tax agreements are a great concept and should continue***, BUT the State and Tribe are receiving tax dollars they are not entitled to***. Immediate reform measures need to be taken to bring the law and/or agreements into lawfulness and constitutional compliance.

**Proposed Action**

FIX IT. As a matter of fact, the fix may already be written into the COMPACT AGREEMENT and State law.

Tax fees should continue to be levied by and paid to the State by the oil and gas operators to remain consistent and provide a stable business environment.

The State will collect and administer the proceeds of the taxes on allotted lands to the allottees.

The State will collect and administer the proceeds of the taxes collected on tribal lands to the Tribe.

The State will collect and administer the taxes due on deeded/fee lands.

Landowner refunds which were unconstitutionally and were errantly disbursed to the Tribal government and not the individual allottee beneficial landowners will be refunded to the

rightful beneficiary or beneficiaries. Refunds will be determined by each person's proportionate ownership stake within an existing or proposed spacing unit and the amount of taxes collected and disbursed or held.

Beneficial allottee landowners whose lands were illegally taxed are entitled to a full refund and/or tax benefit from the State and Tribe; in accordance with **Article V (5) of the COMPACT** which states: "***The Tax Commissioner, on behalf of the State, has the authority to offset future distributions to the Tribe to address situations in which refunds of taxes are made to a taxpayer.***"

Allottee ownership determinations can be made similar to those methods used by federal officials regarding Range Units on the reservation. Ownership records are readily available at the Bureau of Indian Affairs offices and are available with the click of a button.

Since tax fees collected on tax exempt lands cannot be considered a tax; Oil and gas operators will receive a 100% expense tax write-off as a result of payments made in lieu of taxes to the State regarding tax exempt lands.

The State, after collecting and administering taxes will issue payments to the affected allottees according to each one's proportionate ownership in the amount of the taxes collected.

In accordance with the DAWES ACT, ENABLING ACT, the North Dakota State Constitution and the federal government's trust responsibility to American Indians, the federal government, upon billing by the State, will issue payments to the State for services provided to the Tribe, Allottees and/or oil and gas operators; including compensation for regulatory enforcement and administrative processing fees. *The State already does this on other federally held, tax-exempt properties throughout the State of North Dakota*. It is not a new concept.