

STATE-TRIBAL OIL AND GAS REVENUE SHARING COMPACTS

This memorandum describes the authority for revenue sharing compacts between the State of North Dakota and a tribal government, analyzes potential inconsistencies between fee language referenced in North Dakota Century Code Section 57-51.2-02(7) and an oil and gas gross production and extraction tax revenue sharing compact signed by the Governor and the Chairman of the Three Affiliated Tribes on February 28, 2019, and describes the treatment of compact language deemed to be inconsistent with statutory provisions.

The authority for the Governor to enter an oil and gas revenue sharing compact with a tribal government is derived from statute. As such, each Legislative Assembly has the power to amend the statutory provisions that control the manner in which the Governor may exercise that authority. The Legislative Assembly may provide the Governor broad authority to negotiate the terms of an agreement or may specifically define the terms that must be included in an agreement entered by the Governor. A revenue sharing agreement is created through the use of a compact, rather than through statutory provisions, because state laws have been held inapplicable within the boundaries of a reservation (*Worcester v. Georgia*, 31 U.S. 515 (1832)).

The most recent oil and gas revenue sharing compact was entered between the Governor and the Chairman of the Three Affiliated Tribes on February 28, 2019. However, the agreement does not become effective until Senate Bill No. 2312, containing the terms in the bill as it existed on February 28, 2019, is filed with the Secretary of State. A question has arisen regarding whether a provision in the compact conflicts with a provision in Section 57-51.2-02(7). Section 8 of Article IV of the compact provides:

The Tribe agrees not to impose any additional taxes or fees during the term of this Compact, not present at the time of entry of this Compact, on any present or future oil and gas exploration or production activity or interest within the exterior boundaries of the Fort Berthold Reservation, except for the one-time \$100,000.00 drilling fee and tribal application fee assessed on wells on Trust Lands to offset the costs of oil and gas regulation and impacts. For the purposes of this subsection, a well is determined to be on Trust Land if the majority of the Spacing Unit is comprised of Trust Lands. In the exercise of its pre-existing authority to impose taxes of a general nature, the Tribe agrees that no such taxes will be imposed that target or disproportionately impact the oil and gas industry. By way of illustration, the impact of a generally applicable commercial vehicle registration fee is not disproportionate if the generally applicable tax applies equally to vehicles of the same weight or other classification regardless of the type of commercial activity in which the vehicles are used.

Section 57-51.2-02 outlines the requirements of any agreement entered pursuant to Chapter 57-51.2, including the following requirement contained in subsection 7:

The tribal governing body must agree not to impose a tribal tax or any fee on future exploration and production of oil and gas on the reservation and on trust properties outside reservation boundaries during the term of the agreement.

Statutory provisions pertaining to the interpretation of contracts may be applied when evaluating whether the provisions in Section 8 of Article IV of the compact conflict with the provisions in Section 57-51.2-02(7). Section 9-07-03 provides a contract must be interpreted to give effect to the "mutual intention of the parties as it existed at the time of contracting." In this instance, both parties were aware of the statutory requirements in Chapter 57-51.2 at the time the agreement was signed. This fact is apparent given the language used in Section 8 of Article IV of the compact. It appears the parties went to great lengths to distinguish the \$100,000 fee imposed pursuant to the compact from the imposition of "a tribal tax or any fee on future exploration and production of oil and gas" prohibited under Section 57-51.2-02(7). Though the fee is referenced as a "drilling fee and tribal application fee" it also is described further as a tax of general nature used to offset the costs of oil and gas regulation and impacts, which could be distinguished from a fee on "exploration and production of oil and gas."

Similar fees have been imposed under prior revenue sharing compacts entered between the Governor and the Chairman of the Three Affiliated Tribes. The first compact entered in 2008 contained provisions allowing for "a one-time \$60,000 Tribal Employment Rights Office fee on wells on Trust Land and a one-time Tribal Application Fee of \$40,000." The 2013 compact also allowed for a "one-time \$100,000 fee that includes the Tribal Employment Rights Office ("TERO") fee and tribal application fee." Though the name of the fee in the 2013 compact differs from the name of the fee in the 2019 compact, the described purpose for which the fee is imposed is identical in both compacts as a fee to "offset the costs of oil and gas regulation and impacts."

If the fee language in the compact is challenged and ultimately determined by the United States District Court for the District of North Dakota, or a subsequent federal appellate court, to be in violation of the provisions contained in Section 57-51.2-02(7), only the offending provision would be deemed void by the court. All other provisions contained in the compact would remain in full force and effect.