

Gas, Roads, and Glory: North Dakota and MHA Nation's Struggle Over Flaring Regulation

Erica Beacom

Repository Citation

Erica Beacom, *Gas, Roads, and Glory: North Dakota and MHA Nation's Struggle Over Flaring Regulation*, 40 Wm. & Mary Envtl. L. & Pol'y Rev. 235 (2015), <https://scholarship.law.wm.edu/wmelpr/vol40/iss1/7>

GAS, ROADS, AND GLORY: NORTH DAKOTA AND MHA NATION'S STRUGGLE OVER FLARING REGULATION

ERICA BEACOM*

INTRODUCTION

A. *North Dakota's Unimaginable Oil Boom in the 21st Century*

*The westward march of American industry was written in the quarters of plowed earth . . . it was visible even on the far horizon, at the edge of a fretted but still bracing emptiness, in the shape of giant windmills and the silhouette of a coal gasification plant. Each and all were contemporary manifestations of an economic imperative that dates back to the triumph of the treaty breakers who usurped the Native Americans and commodified their land.*¹

North Dakota's intricate history with the oil boom and bust cycle first started in the 1960s when oil was first discovered in the state.² The cycle continued to evolve in the 1970s when inflation of oil prices drove the market.³ During the 1970s, oil production peaked at 4.6 million barrels.⁴ After twenty-five years, production was halved and then eventually petered out with the result accumulating in the known fact that no new drilling wells were placed in the region after 1999.⁵

With technological advancements and the advent of horizontal drilling, North Dakota's bust cycle ended in 2007 with the rediscovery of

* J.D. Candidate, William & Mary Law School, 2016; B.A. Anthropology and History, St. Cloud State University, 2012. The author would like to thank her family, friends, professional mentors, and the wonderful staff of the *William & Mary Law School Environmental Law and Policy Review* for their invaluable contributions and insight to this Note. A special thank you to my father, who inspired the entirety of my Note and guided me through the principles of energy exploration and state regulation.

¹ Chip Brown, *North Dakota Went Boom*, N.Y. TIMES MAG., 3 Feb. 3, 2013, at MM22, available at <http://www.nytimes.com/2013/02/03/magazine/north-dakota-went-boom.html?r=0> [<http://perma.cc/8SF2-A39X>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

the difficult to reach, but ever present, Bakken region.⁶ At that time North Dakota was only ranked ninth in oil production within the United States.⁷ Recent reports have estimated crude oil production output in the Bakken region around one million barrels of oil per day.⁸ With the impressive jump in production coupled with advanced technology,⁹ North Dakota's piece of the Bakken region accounts for around ten percent of the United States' oil production.¹⁰ North Dakota's current oil boom has raised the state's rank to second in oil production within the country, inferior only to the state of Texas.¹¹

B. Environmental Concerns with Oil Production and Flaring

The Bakken region¹² is unique in its formation. None of the rocks capable of oil production are visible on the surface, resulting in a geological formation that has been compared to the structure of an "Oreo cookie."¹³ To access the difficult formations, horizontal drilling¹⁴ was employed and the region now boasts the longest horizontal wells in the world.¹⁵ But even with advancement of precision horizontal drilling, ninety-five percent

⁶ *Id.*

⁷ Brown, *supra* note 1.

⁸ *Bakken oil production forecast to top 1 million barrels per day next month*, U.S. ENERGY INFO. ADMIN. (Nov. 15, 2013, 1:50 PM), <http://www.eia.gov/todayinenergy/detail.cfm?id=13811> [<http://perma.cc/H4SZ-KEGM>] [hereinafter Bakken oil production forecast].

⁹ Thomas W. Fredericks, *Freeing Indian Energy Development from the Grips of Cotton: Advancing Energy Independence for Tribal Nations*, FREDERICKS, PEEBLES, & MORGAN LLP (2013), http://www.ndnlaw.com/newsdocuments/FPM_Tom_Fredericks_Article_Federal_Lawyer.pdf [<http://perma.cc/QSE8-UHAF>] (explaining that the boom is due to relaxed federal policy, rising oil and gas prices, and innovations in extraction and production—oil shale development and hydraulic fracturing for natural gas).

¹⁰ Bakken oil production forecast, *supra* note 8.

¹¹ *Id.*

¹² See *Unconventional Oil & Gas: Bakken Shale*, OIL & GAS FIN. JOURNAL, <http://www.ogfj.com/unconventional/bakken-shale.html> [<http://perma.cc/PGB6-NZR4>] (last visited Oct. 26, 2015) (describing the Bakken Shale region as an oil play shared by both Canada and the United States and located primarily in North Dakota and Montana).

¹³ Brown, *supra* note 1.

¹⁴ Jeff Brady, *Focus on Fracking Diverts Attention From Horizontal Drilling*, NAT'L PUB. RADIO (Jan. 27, 2013, 5:52 AM), <http://www.npr.org/2013/01/27/170015508/focus-on-fracking-diverts-attention-from-horizontal-drilling> [<http://perma.cc/E82J-92U6>] (explaining that horizontal drilling is the exact opposite of vertical drilling (i.e., drilling straight down to the pocket of gas or oil) by the fact that horizontal drilling extends down then turns the drill bit and extends the well horizontally to access the shale).

¹⁵ Brown, *supra* note 1.

of the oil within the Bakken would remain inaccessible without the practice of hydraulic fracking.¹⁶ In addition to the known environmental threats hydraulic fracking creates,¹⁷ North Dakota now faces major issues in the corporation-driven natural gas flaring (“flaring”) practices currently employed in the Bakken region.¹⁸

In academia, flaring has been defined as the practice of burning off natural gas.¹⁹ Specifically, “[f]laring is the controlled burning of natural gas and a common practice in oil/gas exploration.”²⁰ In the context of oil production, “gas bubbles up” with the oil and, instead of capturing the gas, oil companies treat the gas as waste and burn it.²¹ In 2011, the Energy Information Administration reported that North Dakota’s oil producers flared around 1.4 billion cubic meters of natural gas.²² This high rate of flaring roughly equates to thirty-two percent of the total amount of gas produced in North Dakota and the reported figures for 2012 have only increased.²³

The practice of flaring includes the negative consequences of: killing surrounding vegetation; noise nuisance; and the insertion of soot, toxic chemicals, and smoke into the atmosphere.²⁴ In North Dakota, the biggest threat from flaring practices are the fumes of pure methane that are escaping unnoticed directly into the atmosphere.²⁵ To understand the profound danger of escaped methane seeping into the atmosphere, a brief review of carbon dioxide (“CO₂”) and climate change must be examined. In sum, CO₂ emissions have been linked as one of the main drivers of

¹⁶ *Id.*

¹⁷ See Joe Hoffman, *Potential Health and Environmental Effects of Hydrofracking in the Williston Basin, Montana*, GEOLOGY AND HUMAN HEALTH, http://serc.carleton.edu/NAGTWorkshops/health/case_studies/hydrofracking_w.html [<http://perma.cc/8BY5-8KLJ>] (last modified June 26, 2014) (describing risk and concerns of fracking as contamination of groundwater, methane pollution, air pollution, exposure to toxic chemicals, and blowouts due to gas explosions).

¹⁸ Jeff Tollefson, *Oil boom raises burning issues*, 495 NATURE 290, 291 (2013).

¹⁹ GUSTAF OLSSON, WATER AND ENERGY: THREATS AND OPPORTUNITIES 153 (2012).

²⁰ *Understanding the Basics of Gas Flaring*, OHIO ENVTL. PROT. AGENCY (Nov. 2014), <http://www.epa.ohio.gov/Portals/27/oil%20and%20gas/Basics%20of%20Gas%20Flaring.pdf> [<http://perma.cc/AX9A-6G8H>].

²¹ OLSSON, *supra* note 19, at 153.

²² *Id.*

²³ *Id.*

²⁴ Amy Sinden, *An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria*, in *Adjudicating CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* 173, 176 (William C.G. Burns & Hari M. Osofsky eds., 2009).

²⁵ Tollefson, *supra* note 18, at 291.

climate change in the world²⁶ as it has preceded the advent of increased temperatures, rising sea levels, and the melting of the polar ice caps.²⁷ The damage caused by CO₂ increased emissions is well-documented,²⁸ the research highlights the imminent danger that the world faces with natural gas flaring, which contains methane boasting a warming power twenty-five times higher than that of CO₂.²⁹

At the moment scientists are unsure about the exact amount of methane escaping into the atmosphere due to the Bakken region's oil production practices.³⁰ However, it is known that in a best-case scenario—where all methane is combusted—the natural gas flares will have added nearly four million tons of CO₂ emissions over the course of the year in 2012.³¹ To create an accurate impression of the amount of emissions produced by flaring, a 2009 article reported that 278 million metric tons of emitted gases are the equivalent of 50 million passenger car emissions.³² The emissions in the Bakken region consists of 4 million tons and, as one atmospheric scientist states, compares to “running a medium-sized coal-fired power plant in the prairie.”³³

C. *Mandan, Hidatsa, and Arikara Tribe and the Bakken Region*

The Mandan, Hidatsa, and Arikara are known as the “Three Affiliated Tribes” or the MHA Nation of North Dakota.³⁴ MHA is federally

²⁶ IPCC, 2013: *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1, 13 (T.F. Stocker et al. eds., 2013) available at http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf [<http://perma.cc/RLD5-5F6N>].

²⁷ *Id.* at 3.

²⁸ See generally IPCC, *supra* note 26; The Royal Soc'y and U.S. Nat'l Acad. of Sci., *Climate Change: Evidence and Causes*, 1 (2014), available at <http://nas-sites.org/americasclimatechoices/events/a-discussion-on-climate-change-evidence-and-causes/> [<http://perma.cc/5W6C-C4TE>]; U.S. GLOBAL CHANGE RESEARCH PROGRAM, OVERVIEW: CLIMATE CHANGE IMPACTS IN THE UNITED STATES, in U.S. NATIONAL CLIMATE ASSESSMENT, 2–19 (2014) (on file with author).

²⁹ Tollefson, *supra* note 18, at 291.

³⁰ *Id.*

³¹ *Id.*

³² Christopher D. Elvidge et al., *A Fifteen Year Record of Global Natural Gas Flaring Derived from Satellite Data*, 2 ENERGIES 595, 619 (2009), available at <http://www.mdpi.com/1996-1073/2/3/595> [<http://perma.cc/J7B8-UXXD>].

³³ Tollefson, *supra* note 18, at 291.

³⁴ *MHA History*, MHA NATION, <http://www.mhanation.com/main2/history.html> [<http://perma.cc/8YNS-PLKL>] (last visited Oct. 26, 2015).

recognized³⁵ with an established, sovereign land base on Fort Berthold Indian Reservation.³⁶ Fort Berthold exists within parts of six North Dakota counties in the west-central part of the state.³⁷ The total area of the reservation is roughly 1530 square miles, and approximately eleven percent of the land is covered by water³⁸ due to the construction of the Garrison Dam brought on by the Pick-Sloan Project.³⁹ In 2009, due to negotiations between the Tribe, the United States, and the state of North Dakota, Fort Berthold was opened to oil exploration and production.⁴⁰ Fort Berthold's 930,000 acres rests upon the highly lucrative Bakken region, which currently hosts drilling rigs, active wells, and a large number of nearly completed wells posed to produce almost 250,000 barrels of oil a day.⁴¹ More than \$500 million have been generated by fracking leases and oil royalties that benefit the entire MHA Nation.⁴² Current rough estimates of future production forecast almost an additional \$1 million per month, payable to the MHA Nation.⁴³

³⁵ Andrew Schill, *Obstacles to Oil and Gas Development on the Fort Berthold Indian Reservation*, ABADIE SCHILL (July 4, 2012) (on file with author); see also Treaty of Fort Laramie with Sioux, et al., 1851 (Sept. 17, 1851), available at http://indianlaw.mt.gov/content/multi/treaties/1851_fort_laramie.pdf [<http://perma.cc/8MCE-E3LQ>].

³⁶ *Laws and Treaties: The 1851 Treaty at Fort Laramie, The History and Culture of the Mandan, Hidatsa, and Sahnish*, NORTH DAKOTA STUDIES, http://www.ndstudies.org/resources/IndianStudies/threeaffiliated/historical_laws.html [<http://perma.cc/XT9T-29YL>] (last visited Oct. 26, 2015).

³⁷ N.D. INDIAN AFFAIRS COMM'N, FACTS AND PROFILES: INDIANS IN NORTH DAKOTA, 8 (1999), available at http://www.nd.gov/indianaffairs/image/cache/NDIAC_Facts_and_Profiles.pdf [<http://perma.cc/JC8N-MXKN>].

³⁸ U.S. Dep't of Energy, *Fort Berthold Reservation*, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY 1, https://www1.eere.energy.gov/tribalenergy/guide/pdfs/fort_berthold.pdf [<https://perma.cc/J8HL-NLUH>] (last visited Oct. 26, 2015).

³⁹ *Id.*; *The History and Culture of the Mandan, Hidatsa, and Sahnish, Tribal Historical Overview—1900s—Garrison Dam*, NORTH DAKOTA STUDIES, http://www.ndstudies.org/resources/IndianStudies/threeaffiliated/historical_1900s_garrison.html [<http://perma.cc/D89J-W9ZM>] (last visited Oct. 26, 2015).

⁴⁰ James MacPherson, *North Dakota Oil Tax Agreement Nets \$40 Million Monthly for State, Fort Berthold Reservation*, MHA NATION (Dec. 9, 2013) http://www.mhanation.com/main2/Home_News/Home_News_2013/News_2013_12_December/news_2013_december_09_north_dakota_oil_tax_agreement_nets_40_million_monthly_for_state_fort_berthold_reservation.html [<http://perma.cc/7WH5-68FZ>].

⁴¹ Bakken oil production forecast, *supra* note 8; U.S. Dep't of Energy, *supra* note 38.

⁴² Curt Brown, *While North Dakota embraces the oil boom, tribal members ask environmental questions*, STAR TRIBUNE (Feb. 25, 2014, 8:24 AM), <http://www.startribune.com/n-d-tribal-members-question-oil-boom-s-effects-on-sacred-land/233854981/> [<http://perma.cc/8U6E-S9ET>].

⁴³ *Id.*

Due to the reservation's new status in the oil production sphere and the Tribe's ongoing commitment to preserving the land for future generations, the current corporations flaring practices have come to the forefront of Tribal concern.⁴⁴ MHA Nation has formulated and approved tribal flaring regulations,⁴⁵ through Tribal legislature, to mitigate the negative effects of flaring.⁴⁶ With Tribal Council approval the promulgated regulations can be imposed on all oil companies operating on MHA trust land.⁴⁷

Because flaring rates have garnered much attention on both the national and international scales,⁴⁸ the timely and efficient approval of tribal flaring regulations should have been considered prudent. But both the state of North Dakota and the Tribe took up the gauntlet in defending the land from the excessive flaring practices, which lead to conflicting flaring regulations.⁴⁹ The conflicts between the two sets of flaring regulations have raised the age-old question of state sovereignty versus tribal sovereignty.⁵⁰ Sovereignty questions in turn have resulted in a \$1 billion industry questioning whether investment into tribe-controlled land and resources is worth the cost of implementing the newly minted, stringent flaring regulations imposed by both the Tribal and State governments.⁵¹

⁴⁴ Mike Kopp, *MHA Nation Oil and Gas Expo addresses environmental and infrastructure plans*, BAKKEN.COM (Apr. 10, 2014), <http://bakken.com/news/id/136792/mha-nation-oil-gas-expo-addresses-environmental-infrastructure-plans/> [<http://perma.cc/U88C-EEAG>]; Vincent Schilling, *Tex Hall Vying for Fourth Term as Three Affiliated Tribes Chairman*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 9, 2014), <http://indiancountrytodaymedia-network.com/2014/09/09/tex-hall-vying-fourth-term-three-affiliated-tribes-chairman-156786> [<http://perma.cc/82XP-4M6Y>].

⁴⁵ Resolution of the Governing Body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, Res. No. 13-070-VJB (N.D. 2013), *available at* http://www.mhanation.com/main2/elected_officials/elected_officials_resolutions/resolutions_2013/May%2009,%202013%20Meeting.pdf [<http://perma.cc/6PH6-4W89>].

⁴⁶ *Id.*

⁴⁷ See Indian Reorganization Act 25 U.S.C.A. §§ 461–79 (June 18, 1934), *available at* <http://www.untahbasintah.org/papers/indianreorganizationact.pdf> [<http://perma.cc/7RDQ-VGJF>].

⁴⁸ See Sinden, *supra* note 24; OLSSON, *supra* note 19, at 153; Kopp, *supra* note 44.

⁴⁹ See generally Resolution No. 13-070-VJB, *supra* note 45; Notice to Lessees and Operator of Onshore Federal and Indian Oil and Gas Leases (NTL-4A), Dep't of Interior (Jan. 1, 1980); N.D. ADMIN. CODE 43-02-03-44-45 (2000), 43-02-03-60.1-.3 (2014), 4602-03-88.1 (2014), *available at* <https://www.dmr.nd.gov/oilgas/rules/rulebook.pdf> [<https://perma.cc/5VD2-MRFK>].

⁵⁰ See generally FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIANS TRIBES, AND THE CONSTITUTION* (2009); DEBORAH A. ROSEN, *AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880* (2007).

⁵¹ James Macpherson, *ND regulators adopt natural gas flaring rules*, YAHOO FIN. (July 2,

D. *Roadmap*

This Note argues that the best practice for both economic gain and respect for tribal sovereignty would be to allow the MHA Nation to protect, implement, and regulate their own resources and land without the state of North Dakota's interference and repetitive flaring regulations. Part I presents and dissects the background law concerning tribal sovereignty, state sovereignty, the United States and tribal relationship, oil and mineral leases, the Department of Interior's role in leasing contracts, and ultimately case law surrounding the fiduciary relationship between the United States and Native American tribes. Part II will lay out the legal dimensions of the Tribe's arguments for absolute control over flaring regulations on Fort Berthold reservation. Part II also addresses the issue of royalties and attests to the fact that if continued unchecked, North Dakota will follow the historical cycle of exploiting tribal resources at the expense of Native American welfare. Part III establishes protocol for the best resolution of the quagmire at the center of the war for control of oil production and flaring practices on Fort Berthold reservation. The Conclusion aims to balance Native American rights and state sovereignty in the hope of providing clear industrial regulations to further oil exploration and production for the benefit of all MHA tribal members.

I. GREAT PLAINS' POWER: BACKGROUND OF STATE AND TRIBAL SOVEREIGNTY

A. *Bakken Region: Location, Production, Future*

The Bakken shale region extends over the United States border into Canada and is located in the Williston Basin,⁵² which boasts twenty different oil-producing geological formations.⁵³ The northern limit of the Bakken region ends somewhere in the Canadian provinces of Saskatchewan and Manitoba.⁵⁴ The Bakken region of the United States ranges from east to west through both Montana and North Dakota.⁵⁵ The southern

2014, 1:21 PM), <http://finance.yahoo.com/news/nd-regulators-adopt-natural-gas-215512814.html> [<http://perma.cc/K8G4-RRHK>].

⁵² See *Unconventional Oil & Gas: Bakken Shale*, *supra* note 12.

⁵³ Brown, *supra* note 1.

⁵⁴ *Unconventional Oil & Gas: Bakken Shale*, *supra* note 12.

⁵⁵ *Id.*

boundary is estimated to end past the central point of both Montana and North Dakota.⁵⁶

The Bakken region is estimated to produce ninety-one percent of North Dakota's total oil production.⁵⁷ The great productivity of the Bakken is surprising due to the fact that the Bakken rocks, which produce crude oil, are not visible on the surface of the state.⁵⁸ Instead the Bakken rocks lie almost two miles underground and consist of three layers commonly analogized as an "Oreo cookie."⁵⁹ Knowledge pertinent to the productivity rates of the Bakken region was established in the 1950s.⁶⁰ The problem was that Bakken oil was considered to be "tight,"⁶¹ a term that refers to the porous nature of rocks. Specifically in the Bakken region the rocks are neither porous nor permeable, which results in a lock on oil because none of the material flows on its own.⁶²

Even with these hurdles oil production in North Dakota managed a small boom during the 1960s with vertical wells, but this method of production included finding a naturally occurring fracture in the earth.⁶³ Natural fractures turned out to be a rare breed in North Dakota, and those that were found keyed into thin formations.⁶⁴ However, in the late 1980s with the advent of horizontal drilling, the Bakken region started to become a viable production option again.⁶⁵ Horizontal drilling in North Dakota consists of drilling down tens of thousands of feet and then maneuvering sideways into the Middle Bakken sandstone.⁶⁶

But horizontal drilling was not enough to rehabilitate North Dakota back to a viable oil production "boom" cycle.⁶⁷ The necessary factor came with the introduction of the new practice of blasting gallons of pressurized water into the ground to release the tight formations within

⁵⁶ *Id.*

⁵⁷ Brown, *supra* note 1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Brown, *supra* note 1.

⁶⁴ See generally Stephen D. Sturm & Ernest Gomez, *Role of Natural Fracturing in Production from the Bakken Formation, Williston Basin, North Dakota*, SEARCH AND DISCOVERY (Aug. 28, 2009), <http://www.searchanddiscovery.com/documents/2009/50199sturm/> [<http://perma.cc/K95D-QDKY>]; Brown, *supra* note 1, at 6.

⁶⁵ Brown, *supra* note 1.

⁶⁶ *Id.*

⁶⁷ *Id.*

the Bakken shale.⁶⁸ Commonly known as ‘hydraulic fracturing’ or ‘fracking’ the method consists of sending “pressurized water full of sand and various chemicals . . . down the well to crack open hairline channels.”⁶⁹ Without fracking, ninety-five percent of the Bakken region would be inaccessible for oil production purposes.⁷⁰

The Bakken boom officially started for North Dakota in 2007 and was driven forward purely by technological refinements such as horizontal drilling and the advent of fracking practices as a whole.⁷¹ In 2007, North Dakota ranked ninth in the United States’ oil producing states.⁷² In 2013 the state was reported to have moved in to second place, behind only Texas in crude oil production.⁷³ The U.S. Energy Information Administration also reported that in 2013 Bakken oil accounted for about ten percent or higher of total United States oil production.⁷⁴

Estimates of exactly how much viable oil lies within the Bakken region are unknown.⁷⁵ Productivity figures are continuously rehashed and increased on a daily basis.⁷⁶ In 1974, it was reported that there may have been ten billion barrels of oil in the ground.⁷⁷ In 2000, the region was estimated to hold almost 503 billion barrels of oil.⁷⁸ Recent figures in 2013 report that there may be as much as 169 billion barrels of oil in the Bakken region.⁷⁹ Experts, critics, and proponents of the oil production in Bakken region only agree on one point: productivity numbers remain continuously in flux.⁸⁰ If North Dakota’s domestic ranking as second in oil productivity holds, then the future productivity of the Bakken region

⁶⁸ *Id.*

⁶⁹ Brown, *supra* note 1; See *The Process of Hydraulic Fracturing*, EPA, <http://www2.epa.gov/hydraulicfracturing/process-hydraulic-fracturing> [<http://perma.cc/42WS-XB88>] (last updated Aug. 11, 2014).

⁷⁰ Brown, *supra* note 1.

⁷¹ *Id.*

⁷² Bakken oil production forecast, *supra* note 8.

⁷³ *Id.*

⁷⁴ *Id.* See also Brown, *supra* note 1 (forecasting the percent of North Dakota’s contribution to U.S. oil production at eleven percent).

⁷⁵ Brown, *supra* note 1.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Bakken oil production forecast, *supra* note 8.

⁸⁰ Sari Horwitz, *Dark Side of the Boom: North Dakota’s oil rush brings cash and promise to reservation, along with drug fueled crime*, WASH. POST (Sept. 28, 2014), <http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/> [<http://perma.cc/6BHY-PZAY>].

will catapult to the top of North Dakota's economic diversification and will remain there for at least one generation.⁸¹

B. Tribal Sovereignty: Mandan, Hidatsa, and Arikara, the Three Affiliated Tribes

MHA Nation's reservation lies in the heart of the Bakken Shale production.⁸² The land was created and reserved for the MHA Nation in 1851 by the Fort Laramie Treaty,⁸³ which set aside twelve million acres of protected lands for the Three Affiliated Tribes.⁸⁴ By 1947 the United States government implemented the Garrison Dam project⁸⁵ and created Lake Sakakawea.⁸⁶ The dam project swallowed four hundred and seventy-nine square miles of Fort Berthold Reservation.⁸⁷ The consequences were severe for the Tribe as at least eight Indian communities lay completely submerged, along with the majority of the farming and ranching economy that sustained the MHA Nation.⁸⁸ Currently, Fort Berthold reservation registers approximately 422,750 acres spread through six counties.⁸⁹ Because the entirety of reservation land lies within the Bakken Shale formation, the majority of the MHA Nation has been eager to jump-start the reservation's self-sufficiency movement with an influx of oil production capital.⁹⁰

⁸¹ Brown, *supra* note 1.

⁸² Horwitz, *supra* note 80.

⁸³ U.S. DEPT OF INTERIOR, NATIVE AMERICAN TREATIES AND BROKEN PROMISES: 1851 TO 1877 89 (2014), available at <http://www.nps.gov/wica/historyculture/upload/-7e-5-Chapter-Five-Treaties-and-Broken-Promises-Pp-84-132.pdf> [<http://perma.cc/SLU9-94XN>]. See generally Charles D. Bernholz & Brian L. Pytlik Zillig, *The Treaty of Fort Laramie with Sioux, etc., 1851: Revisiting the document found in Kappler's Indian Affairs: Law and Treaties*, UNIV. NEB., LINCOLN, <http://treatyoffortlaramie1851.unl.edu> [<http://perma.cc/BRF6-JHQU>] (last visited Oct. 26, 2015) (explaining the background, Indian policy, and reserved land system negotiated in the Fort Laramie Treaty of 1851).

⁸⁴ Horwitz, *supra* note 80.

⁸⁵ See generally *History & Federal Legislation: The Pick-Sloan Missouri Basin Program*, GARRISON DIVERSION CONSERVANCY DIST., http://www.garrisondiv.org/about_us/history_federal_legislation/ [<http://perma.cc/J6JF-7HGS>] (last visited Oct. 26, 2015).

⁸⁶ Horwitz, *supra* note 80.

⁸⁷ *Id.*

⁸⁸ *Id.*; Bob Reha, *Water Wars: The lost towns of Lake Sakakawea*, MINN. PUB. RADIO (July 2, 2003), http://news.minnesota.publicradio.org/features/2003/07/02_rehab_river_history/ [<http://perma.cc/EZU6-NB75>].

⁸⁹ N.D. INDIAN AFFAIRS COMM'N, *supra* note 37.

⁹⁰ Horwitz, *supra* note 80; Brown, *supra* note 1.

Tribal land, sovereignty, and resource control all fall into a shifting area of law that is continuously negotiated through interpretation of the United States Constitution, Chief Justice Marshall's nation-to-nation policy, and subsequent statutes passed by Congress.⁹¹ Upon the advent of the United States Constitution, relations between the tribes and the European settlers were sustained in a shaky coexistence that would eventually devolve into destruction and forcible removal for growth of colonist civilization.⁹² In that established cultural norm, the Founding Fathers set the United States Constitution to mention and regulate tribes and tribal relations in a mere three sections.⁹³

The first mention of tribes within the United States Constitution resides in the Fourteenth Amendment, Section Two, stating that “[r]epresentatives . . . shall be apportioned among the several states according to their respective numbers . . . excluding Indians not taxed”⁹⁴ The second mention appears in Article I, Section Eight, stating that “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁹⁵ The third mention would later appear in the Fourteenth Amendment, added to correct apportionment of representatives, but still held Indian status in a separate capacity.⁹⁶ For each brief mention of Indians within the United States Constitution, it becomes clear that the federal government, Founding Fathers, and general European population held tribes as separate entities from the newly developed United States of America.⁹⁷

With this foundation set in the United States Constitution, the next cycle of tribal relations and United States citizenry fell to Chief Justice Marshall. The Supreme Court, with Chief Justice Marshall writing for the majority, was tasked with the responsibility to delineate the roles, responsibilities, and rights of tribes.⁹⁸ These three cases are known as

⁹¹ POMMERSHEIM, *supra* note 50, at 4–7.

⁹² *Id.*

⁹³ Charles F. Wilkinson, *Indian Tribes and the American Constitution*, in AMERICAN INDIANS, TIMES, AND THE LAW: HISTORICAL RIGHTS AT THE BAR OF THE SUPREME COURT 117, 119 (1987), available at <http://users.humboldt.edu/erick/econ323/topics/wilkinson.pdf> [<http://perma.cc/H5MG-P564>].

⁹⁴ U.S. CONST. art. 1, § 2, cl. 3.

⁹⁵ U.S. CONST. art. I, § 8, cl. 3.

⁹⁶ U.S. CONST. amend. XIV, § 2.

⁹⁷ Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future Of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 191–92 (2001).

⁹⁸ *Id.* at 192.

the “Marshall trilogy” and are the bedrock for understanding the tribal–United States relationship.⁹⁹ Marshall grounded all of his arguments in the fact that treaty relationships had been a part of the British negotiations with tribes.¹⁰⁰ In his rationale, treaty making was a duty that the United States of America inherited after the American Revolution and it included all past treaty rights, actions, and obligations.¹⁰¹ This understanding of the treaty relationship conceptualized Marshall’s idea that Indian tribes and their respective territories were “domestic, dependent nations.”¹⁰² The basic effect of this definition was to separate the idea of a foreign nation (and therefore nation sovereignty) from the assumption of complete foreign nation power. Chief Justice Marshall achieved this by expressly stating that tribes, as “domestic dependent nations,” were under the sole protection of the United States by treaty making, and by accepting United States “protection” tribal sovereignty was to be severely limited.¹⁰³

Adding to the distinction was the fact that Indian tribes were pre-constitutional entities.¹⁰⁴ “Pre-constitutional” is defined as existence before the formation of the United States, and maintaining continuous individual authority over tribal territory from an earlier point than the newly formed, colonial government.¹⁰⁵ The modern federal-tribe rules of regulation, negotiation, and contracts all harken back to Marshall’s basic understanding of the nation-to-nation policy, and the effects (positive and negative) of this understanding have carried through to every aspect of Indian regulation.¹⁰⁶

The first natural consequence of Marshall’s policy is that states are forbidden from applying state law in Indian territory.¹⁰⁷ Because tribes were placed on the federal level in negotiations and interactions, the state-tribe relationship is non-existent except where the tribe or federal government expressly consent.¹⁰⁸ The second consequence is that tribal sovereignty and tribal territory are irrevocably linked.¹⁰⁹ In Marshall’s sovereign formula tribes must demonstrate their precolonial existence,

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Coffey & Tsosie, *supra* note 97.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 192.

¹⁰⁶ *Id.*

¹⁰⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1, 15–21 (1831).

¹⁰⁸ Coffey & Tsosie, *supra* note 97, at 192.

¹⁰⁹ *Id.*

which in that time period meant overt control within a set territorial boundary.¹¹⁰ Without a land base that tribes could claim as their own, the federal government could not reconcile their status as an autonomous cultural group with their identity as a sovereign nation.¹¹¹ Marshall's last legacy in Indian policy is his creation of the "domestic, dependent nations" status.¹¹² This designation has been widely litigated as state governments, tribes, and the federal government each attempt to delineate the exact sovereign status that this facially clear, but overall ambiguous title, conveys.¹¹³

Because states were cut out early in the tribe-federal government relationship a lot of scrutiny and effort has gone into shaping tribal sovereignty through federal authority.¹¹⁴ In the eighteenth century tribal sovereignty was shaped in its entirety by Marshall's policy.¹¹⁵ Simplistically, Marshall attempted to create autonomous tribal governments caveated or preempted only by federal government authority.¹¹⁶ As Marshall's policy played out the Court saw an influx of cases to determine the extent of control over tribes.¹¹⁷ First impression resulted in a broad policy, tribes were held not to be bound by the Constitution or by federal law unless Congress explicitly brought or listed the tribes in the proposed legislation.¹¹⁸

In the nineteenth century the broad policy started to narrow with land demands and violent incidents between tribes and settlers growing.¹¹⁹ Indian policy shifted from autonomous tribes to the view that tribes were "heathens" and in need of a good "parental role model."¹²⁰ This started the negative, paternalistic side of Indian-federal policy cycle with the tribes slotted as wards of the nation involved with the federal government through a fiduciary relationship.¹²¹

¹¹⁰ *Id.* at 192–93.

¹¹¹ *Id.*

¹¹² *Id.* at 192.

¹¹³ *Cherokee Nation*, 30 U.S. at 17–18, 20.

¹¹⁴ Coffey & Tsosie, *supra* note 97, at 192.

¹¹⁵ *Id.*

¹¹⁶ Coffey & Tsosie, *supra* note 97, at 191–92.

¹¹⁷ MELODY KAPILIALOHA MACKENZIE ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03(4)(a) (Nell Jessup Newson et. al. eds., 2012 ed.) [hereinafter Cohen's Handbook].

¹¹⁸ Coffey & Tsosie, *supra* note 97, at 193.

¹¹⁹ Alexandra Lutz, *The Indian Wars: Struggle Between Native Americans and Settlers*, STUDY.COM, <http://study.com/academy/lesson/the-indian-wars-struggle-between-native-americans-and-settlers.html> [<http://perma.cc/RMZ9-3C35>] (last visited Oct. 26, 2015).

¹²⁰ Coffey & Tsosie, *supra* note 97, at 192.

¹²¹ Andrew Boxer, *Native Americans and the Federal Government*, HISTORY REVIEW (2009), <http://www.historytoday.com/andrew-boxer/native-americans-and-federal-government>

The paternalistic era of policy applied itself in a variety of ways. The biggest fall out was the Supreme Court removing itself out of regulation and review of legislation implemented against the tribes.¹²² This left tribes floundering under the Allotment Act passed by Congress, which opened up tribal land to white settlement—essentially destroying the homogeneity and safety of tribal sovereignty on reserved land.¹²³ But the Court and the Federal government have since relaid the foundation of inherent tribal sovereignty by resurrecting the concept of domestic, dependent nation status.¹²⁴

One of the carried-over principles from the paternalistic policy era was the idea that prevention of tribal control over non-native persons residing within trust land of tribes was a necessary rule.¹²⁵ The fear being that, if allowed, tribes would drag non-natives into an alien legal system rigged to be inherently against non-native status.¹²⁶ This fear culminated in the *Montana v. United States* case that held that tribes were free to regulate trust lands and land of tribal members but could not extend tribal regulations to non-natives.¹²⁷ The test applied in the case stated, “[regulation of non natives] bears no clear relationship to tribal self-government or internal relations.”¹²⁸ Simply stated, if the tribes want to effectuate their power (tribal sovereignty) they must show that it is consistent with their “domestic, dependent nation” status and is expressly authorized by Congress.¹²⁹

1. The Indian Reorganization Act

MHA Nation established its tribal government in the aftermath of the 1934 Indian Reorganization Act.¹³⁰ The Indian Reorganization Act was created with a multiprong plan of attack in developing Indian self-sufficiency but with the maintenance of the United States’ firm paternalistic

[<http://perma.cc/CZ9E-DFZG>]; Reid Peyton Chambers, *Enforcing the Trust Responsibility: Presentation to the Secretarial Commission on Indian Trust Administration and Reform* (Apr. 29, 2012), <http://www.doi.gov/cobell/commission/upload/5-1-Enforcing-the-Federal-Trust-Responsibility-RPC-4-29-13.PDF> [<https://perma.cc/9MCN-9DYT>].

¹²² Coffey & Tsosie, *supra* note 97, at 193.

¹²³ *Id.*

¹²⁴ Bureau of Indian Affairs (“BIA”), U.S. DEP’T OF THE INTERIOR, <http://www.bia.gov/WhoWeAre/BIA/> [<http://perma.cc/RYS7-DGUY>] (last updated Sept. 22, 2015, 5:45 PM).

¹²⁵ See Cohen’s Handbook, *supra* note 117, at § 7.02(1)(a).

¹²⁶ Coffey & Tsosie, *supra* note 97, at 193.

¹²⁷ *Montana v. United States*, 450 U.S. 544, 564–65 (1981).

¹²⁸ *Id.* at 564.

¹²⁹ *Id.* at 564–65.

¹³⁰ N.D. INDIAN AFFAIRS COMM’N, *supra* note 37, at 5.

attitude in future Indian policies.¹³¹ The first issue that the Act dealt with was the federal government's preoccupation with selling land out from underneath tribes.¹³² A firm moratorium was applied to sale of land, the only exception being that the Secretary of the Interior can partake in voluntary exchange of lands if the standards of equality in the agreement are beneficial for the tribe and Indian land as a whole.¹³³ The second issue the Act addresses is the attempt to develop Indian lands and resources by establishing infrastructure necessary to build tribal businesses and to create sufficient educational systems on reservations.¹³⁴

But the most important part of the Indian Reorganization Act is Section Sixteen, which established the right to organize tribal members residing on reservations to effectuate common welfare.¹³⁵ The section explicitly lays out the right to create a constitution and bylaws that could be ratified by a majority vote of the adult members of the tribe.¹³⁶ The Act also explicitly stated that powers will vest with tribes once voters pass the constitution and bylaws.¹³⁷ Tribes will have the rights and powers to: employ legal counsel, prevent sale, disposition, lease, or encumbrance on tribal lands without the consent of the tribe, and the power to negotiate with Federal, State, and local governments.¹³⁸

These powers and rights are taken a step further with Section Seventeen of the Act, which establishes an opportunity for a tribe to obtain a charter of incorporation upon petition of one-third of adult tribal members to the Secretary of Interior.¹³⁹ If approved, the adult members of the tribe must ratify the charter of incorporation by a majority vote.¹⁴⁰ If ratified by the tribe a charter of incorporation will convey to the tribe the power to:

[P]urchase, take by gift, or bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers

¹³¹ See Indian Reorganization Act, at ch. 576.

¹³² Boxer, *supra* note 121.

¹³³ Indian Reorganization Act, ch. 576, §§ 2–4.

¹³⁴ *Id.* at ch. 576, § 1.

¹³⁵ *Id.* at ch. 576, § 16.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Indian Reorganization Act, at ch. 576 § 17.

¹⁴⁰ *Id.*

as may be incidental to the conduct of corporate business not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation.¹⁴¹

2. Application of Indian Reorganization Act for the MHA

The MHA Nation ratified their constitution on May 15, 1936.¹⁴² The Secretary of the Interior approved the document on June 29, 1936, and henceforth it has been one of the main pillars of Tribal authority on Fort Berthold reservation.¹⁴³ Under Section Three, MHA Nation's constitution explicitly states that they hold the power to levy taxes and license fees on non-members conducting business on the reservation and are only limited in their power to regulate by federal law governing trade of tribes.¹⁴⁴ Section Five reserves the power to manage all economic affairs and enterprises of the MHA Nation through the Tribal Business Council, which is the head governing body of MHA Nation.¹⁴⁵ Section Five also reserves the right to negotiate with Federal, State, and local governments to the Tribal Business Council in the best interest of the Tribe.¹⁴⁶ The Tribal Business Council also reserved the right to approve or veto sales, leases, or encumbrances of MHA trust lands.¹⁴⁷ The Council also holds responsibility to protect and preserve property, wildlife, and natural resources of the Tribe, which, paired with their reservation of power for management of all Tribal lands through assignments or leases, seems to spell out firm control over interests and resources found within Fort Berthold reservation.¹⁴⁸

The second piece of MHA Nation control over their trust land and resources comes from their charter of incorporation mentioned in the Indian Reorganization Act.¹⁴⁹ The Secretary of the Interior approved and

¹⁴¹ Indian Reorganization Act, ch. 576, § 17.

¹⁴² Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation (approved June 29, 1936), *available at* <http://lib.fortbertholdcc.edu/FortBerthold/TATconst.asp> [<http://perma.cc/D75X-5CRU>].

¹⁴³ Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, *supra* note 142; *see also* Resolution No. 13-070-VJB, *supra* note 45.

¹⁴⁴ Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, *supra* note 142, at § 3.

¹⁴⁵ *Id.* at § 5(a).

¹⁴⁶ *Id.* at § 5(d).

¹⁴⁷ *Id.* at § 5(e).

¹⁴⁸ *Id.* at § 5(I)–(J).

¹⁴⁹ *See* Resolution No.13-070-VJB, *supra* note 45.

sent the charter for ratification of the Tribe on April 1, 1937.¹⁵⁰ MHA Nation hosted the referendum and ratified on April 24, 1937.¹⁵¹ The charter's purpose focuses on laying the foundation for economic development of the MHA Nation.¹⁵² In line with the paternalistic tradition, the only restrictions placed on the Tribe in their bid for economic development are found in the Constitution or laws of the United States.¹⁵³ The Tribe explicitly reserves the authority to purchase, hold, manage, operate, or dispose of real or personal property except in certain situations.¹⁵⁴ One of the restricted situations that this broad power does not effect is the sale or mortgage of land or interest in land by the Tribe.¹⁵⁵ This includes water rights, oil, gas, and other mineral rights found in the trust lands of MHA Nation.¹⁵⁶ Simply put, the Tribe may not sell or mortgage land or natural resources (including oil and gas) found within their trust lands.¹⁵⁷ But the Charter does leave room for the Tribe to manage and operate real and personal property.¹⁵⁸ The reservation of power regarding sale or mortgage reflects the federal government's traditional belief that all tribes are wards of the government and must be subject to strict scrutiny in economic transactions—implicating debts and profits.¹⁵⁹

3. MHA Charter of Incorporation Applied to Bakken Shale Production

One of the most important limitations placed on the MHA Nation under their charter of incorporation is the policy that neither the Tribe, nor anyone acting on behalf of the Tribe, can take part in action that will destroy or injure natural resources of the Fort Berthold Reservation.¹⁶⁰ The charter demands that any leases, permits, or contracts, regardless

¹⁵⁰ Corporate Charter of the Three Affiliated Tribes of the Fort Berthold Reservation North Dakota, *Preamble* (Apr. 24, 1937), available at <http://lib.fortbertholdcc.edu/FortBerthold/TATcorp.asp> [<http://perma.cc/WLP7-P8KR>].

¹⁵¹ *Id.*

¹⁵² *Id.* at *Corporate Existence and Purposes*.

¹⁵³ *Id.* at *Corporate Powers* § 5.

¹⁵⁴ *Id.* at *Corporate Powers* § 5(b).

¹⁵⁵ *Id.* at *Corporate Powers* § 5(b)(1).

¹⁵⁶ Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, *supra* note 142, at § 5(b)(1).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Boxer, *supra* note 121.

¹⁶⁰ Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, *supra* note 142, at *Powers* § 5(b)(4).

of whether they were approved by the Secretary of the Interior, have to conform to the federal regulations governing matters between tribes and the federal government.¹⁶¹ If they do not conform, they are immediately rendered inapplicable and are revoked by the discretion of the Secretary of the Interior.¹⁶² The charter then specifically highlights the issues of contracts and agreements that must be aligned with the charter.¹⁶³ Any corporation, including the state of North Dakota, that engages in leases or contracts with the Tribe must abide by the regulations found within the charter.¹⁶⁴

4. Tax Agreement with North Dakota for Oil Exploration

Prior to the 2008 Tax Agreement minimal drilling was occurring on Fort Berthold Reservation.¹⁶⁵ To be exact, a well had not been drilled on reservation lands for twenty-seven years.¹⁶⁶ Factors that contributed to this lack of development were cited as: complex tribal rules, uncertainty of tax standards and rates, and unpredictable regulatory structure.¹⁶⁷ Industry wariness was reported to stem from the belief that a tribal tax on top of a state tax would make drilling and production too costly to justify investment.¹⁶⁸ But with the 2008 Tax Agreement, between the state of North Dakota and MHA Nation, that uncertainty was to melt away and lead to an increase in development.¹⁶⁹ After the agreement, horizontal wells on Fort Berthold increased from a singular well to over one thousand wells.¹⁷⁰ With the increase in development Fort Berthold reservation now accounts for a “huge portion” of the state’s oil production.¹⁷¹

The MHA Nation and the state of North Dakota signed the oil and gas tax agreement on June 10, 2008, which established a single taxation

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at § 5(f).

¹⁶⁵ Amy Dalrymple, *New Oil Tax Agreement for Three Affiliated Tribes in the Works*, MHA NATION (Apr. 5, 2013 12:00 AM), http://mhanation.com/main2/Home_News/Home_News_2013/News_2013_04_April/news_2013_april05_new_oil_tax_agreement_for_tat_in_the_works.html [<http://perma.cc/RBL6-7VUH>].

¹⁶⁶ *Id.*

¹⁶⁷ MacPherson, *supra* note 40; Dalrymple, *supra* note 165.

¹⁶⁸ Dalrymple, *supra* note 165.

¹⁶⁹ MacPherson, *supra* note 40.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

system for oil and gas production on Fort Berthold Reservation.¹⁷² In this Agreement the taxation system was described as a streamlined version of both Tribal and State tax systems.¹⁷³ The 2008 Agreement designated the state of North Dakota as the solo administrator of the streamlined taxation system.¹⁷⁴ The Agreement also specifically stated that by employing a single taxation system the Tribe in no capacity relinquished their respective tax jurisdiction.¹⁷⁵ The obvious goal of the document is to circumvent the biggest hurdle of reservation economic development—the possibility of double taxation on oil and gas production.

The 2008 Tax Agreement had specific reporting guidelines for the taxation of oil and gas sales and purchases from wells within the reservation.¹⁷⁶ The distinction of importance that effects how much revenue the Tribe will receive is the qualification of the land in use.¹⁷⁷ This distinction is established by the definition of Trust Land¹⁷⁸ versus Non-Trust Land.¹⁷⁹ Simply put, Non-Trust Land is viewed as the private land¹⁸⁰ on Fort Berthold reservation.¹⁸¹

Within the bounds of the 2008 Tax Agreement, Trust Land taxation and revenue sharing on a well was computed in four forms: oil taxation, gas taxation, oil and gas tax exemptions, and oil and gas revenue sharing.¹⁸² Oil and gas revenue sharing was split evenly, with fifty percent of gross production and oil extraction taxes collected and paid to the Tribe.¹⁸³

¹⁷² Letter from Cory Fong, Comm'r, State of North Dakota Office of State Tax Commission, to Producers, Purchasers, and Processors of Oil Production in North Dakota (July 11, 2008) [hereinafter Fong Letter], *available at* <https://www.nd.gov/tax/oilgas/threetribe/pubs/tatagreementnotice.pdf?20150129104446> [<https://perma.cc/M4NV-KUR2>].

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2.

¹⁷⁸ Trust Land is defined as “all mineral acres in a producing spacing unit held in trust by the United States of America (“USA”) for the Tribes or an individual tribal member.”

¹⁷⁹ Non-Trust Land is defined “as all other mineral acres in a producing unit not classified as Trust Lands.” Fong Letter, *supra* note 172.

¹⁸⁰ *History of Allotment*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/allotment> [<https://perma.cc/CL5H-C9RV>] (last visited Oct. 26, 2015) (explaining private land on reservations is a product of the General Allotment Act of 1887, (commonly known as the Dawes Act) that created a system where members of a tribe selected 40–160 acres of land for their personal use, and, if the reservation held more land than needed for individual allotment to tribal members, the federal government was allowed to negotiate purchase of the excess land and then sell it to non-Indian settlers).

¹⁸¹ MacPherson, *supra* note 40.

¹⁸² Fong Letter, *supra* note 172.

¹⁸³ *Id.* at 2.

On Non-Trust Land the same four categories of taxation and revenue applied.¹⁸⁴ The difference occurred in the oil and gas revenue sharing percentages. Instead of being evenly split as the Trust Lands were, Non-Trust Land tax rates were allocated at a twenty percent rate of the gross production taxes to the Tribe.¹⁸⁵ The State collected eighty percent of the gross production and, in addition, collected one hundred percent of the oil extraction taxes collected from the Non-Trust Lands.¹⁸⁶ This skewed taxation rate payable on Non-Trust Lands for the state also included a provision that, in five years, the 80:20 ratio of gross production taxes would become 100 percent allocated taxes paid solely to the State.¹⁸⁷

Under the 2008 Tax Agreement, the 2013 revenue shares of the Tribe would have been \$131.8 million with the State figure listed at \$176.8 million.¹⁸⁸ But in 2010, MHA Nation, led by Chairman Levings, indicated to the North Dakota legislature that the Tribe would break the existing tax agreement if the terms were not renegotiated.¹⁸⁹ MHA Nation proposed a new agreement that would eliminate the 2008 Tax Agreement in favor of an equal division of the extraction and production taxes on Non-Trust Land.¹⁹⁰ With the renegotiated terms, the North Dakota Tax Department estimated that the Tribe would receive an additional \$81 million in the 2013–15 period.¹⁹¹ The State was estimated to gain \$6 million in the same period, but alleged that the State would lose \$76 million in the 2015–17 period.¹⁹²

Surprisingly, the North Dakota legislature—and major oil companies that operate on a reservation—all supported an equalization of tax revenue split between the State and Tribe.¹⁹³ The main issue at stake was the wish of the legislators to condition the extra tax revenue.¹⁹⁴ Legislators wanted to require MHA government to funnel the money exclusively to reservation infrastructure concerns.¹⁹⁵ The legislators' request was met with significant resistance; the MHA asserting tribal sovereignty and

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Dalrymple, *supra* note 165.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Dalrymple, *supra* note 165.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

both sides calling for accountability and transparency of all spending of tax-generated funds.¹⁹⁶

On January 13, 2010, Marcus D. Levings, Chairman of the Three Affiliated Tribes, and John Hoeven, Governor of the State of North Dakota, signed the 2010 Oil and Gas Tax Agreement (“2010 Tax Agreement”).¹⁹⁷ The 2010 tax agreement explicitly stated that it superseded all oil and gas agreements promulgated prior to its enactment (i.e., superceded the 2008 Tax Agreement).¹⁹⁸ The 2010 Tax Agreement duration was listed as indefinite unless formally cancelled by one of the parties.¹⁹⁹ It also did not address the Non-Trust Land inequitable taxation standard, and in fact listed the same terms as seen in the 2008 Tax Agreement.²⁰⁰ Specifically, the term that established that the State would continue to receive eighty percent of the taxation of Non-Trust Lands with the Tribe collecting only twenty percent remains intact.²⁰¹ The only clear, substantial difference is that the State vacated the clause that dropped the Tribe completely from tax revenue generated by Non-Trust Land.²⁰²

The 2010 Tax Agreement lends insight to the flaring regulation dispute in several of its provisions. Part B of the agreement specifically lists “[S]overeign [I]mmunity” as an ideal to be protected.²⁰³ The provision goes on to express that if litigation does occur that the agreement itself cannot be used in any way, other than to enforce its terms.²⁰⁴ Part C acknowledges the Tribal right of jurisdiction over imposition of production and extraction taxes on oil and gas activities on reservation.²⁰⁵ But, in the same paragraph, Part C expressly grants and acknowledges State asserted jurisdiction subject to inherent limitations on a reservation to tax oil and gas activities on the reservation.²⁰⁶ If businesses were hoping to have a clear explanation on authority and jurisdiction within the reservation, they will not find it in the 2010 Tax Agreement.

¹⁹⁶ *Id.*

¹⁹⁷ *Oil and Gas Tax Agreement Between the Three Affiliated Tribes and State of North Dakota*, Three Affiliated Tribes-State of ND, Jan. 13, 2010 [hereinafter 2010 Tax Agreement], available at <https://www.nd.gov/tax/oilgas/threatribes/pubs/oilgastaxagreement.pdf?20150129110954> [<https://perma.cc/MM56-DLLY>].

¹⁹⁸ *Id.* at 7.

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* at 5.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 2010 Tax Agreement, *supra* note 197, at 1.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 2.

²⁰⁶ *Id.*

Unclear jurisdictional limits set the stage for Tribal allegations of encroachment by the State upon tribal sovereignty and the power of the MHA Nation to self regulate their land, economic development, and people within the borders of the Fort Berthold Reservation. Section D, clause 9 of the 2010 Tax Agreement levies the first significant limitation on Tribal authority. It states that the tribes agree not to impose additional taxes and fees on any oil and gas exploration or production activity or interest within the Reservation.²⁰⁷ Section E, clause 4 sheds even more light on the inherent tension between state and MHA authority as it once again attempts to regulate the Tribe through a moratorium on imposition of additional tribal taxes or fees on future production of oil and gas on the reservation for the term of the agreement.²⁰⁸ Because the term of the 2010 Tax Agreement is indefinite, terminated by only one of the parties seeking to break it, this clause essentially binds the Tribe to the 2010 standard forever.²⁰⁹

The third limitation comes under Section H, clause 3(c), which states that future wells drilled and completed during the life of the 2010 Tax Agreement will be under State law and regulations for purposes of oil and gas production.²¹⁰ The clause continues, stating that any Tribal laws and regulations drafted will be in conjunction only with state and federal agencies.²¹¹ To add injury to insult, it goes a step further and binds Tribal authority by insisting that law and regulation drafted by the Tribes during the term of the 2010 Tax Agreement will not be applicable to wells currently covered by the document.²¹²

In effect, the 2010 Tax Agreement serves as a power-stripping document. The agreement completely strips the Tribe of power to regulate or tax and gives no recourse for future problems or change in circumstances by the very fact that the duration of the agreement has been labeled as indefinite. Proponents of the 2010 Tax Agreement will state that the recourse available is to all out break the 2010 Tax Agreement. They will point to the termination clause of the agreement that specifically grants the power of either party to terminate without cause or

²⁰⁷ *Id.* at 4 (explaining that the only allowable additional Tribal fees and taxes come from Tribal Employment Rights Office ("TERO") fee on wells on Trust Land and the one time Tribal Application fee on wells on Trust Land).

²⁰⁸ *Id.*

²⁰⁹ 2010 Tax Agreement, *supra* note 197, at 6.

²¹⁰ *Id.* at 7.

²¹¹ *Id.*

²¹² *Id.* (stating that no regulation promulgated by the Tribe will have effect on wells drilled or completed during the 2010 Tax Agreement).

liability.²¹³ On its face this would seem like a broad power of redress, but in fact it stands as a threat.

This threat is further elaborated by the fact that termination cannot be achieved without a good faith effort to resolve the differences leading to the Notice of Termination.²¹⁴ This means that, even if MHA Nation could or would want to leave the 2010 Tax Agreement, they would first have to participate in rounds of mediation or arbitration. Assuming that each round would last a significant amount of time, the Tribe is stalled out from implementing the needed change *and* loses out on the additional negotiated income. Because of the agreement, MHA Nation is left in a unique place. MHA Nation has transformed reservation quality of life from abject poverty to quality living with a future that reflects stability and prosperity. Without the 2010 Tax Agreement and the revenue it generates, companies would remain wary of contracting with the Tribal Business Council on economic development issues.²¹⁵ North Dakota therefore holds significant leverage over the Tribe that results in a skewed tax agreement riddled with limitations on Tribal authority that are extremely suspect under federal and Tribal law.

With the limited recourse options available to amending the 2010 Tax Agreement, Chairman Tex Hall and the then-current Tribal Business Council lobbied the Tribal and State Relations Committee in an attempt to increase the tax revenue proceeds from Trust Lands.²¹⁶ A letter was sent to the Chairman and Vice Chairman of the Committee on June 25, 2012. The main motivation of the Tribe was listed as the need for increased revenue from the Non-Trust Lands to increase government services and to furnish a mitigation fund for the extreme infrastructure problems plaguing the reservation.²¹⁷ In a clever turn of negotiation, instead of insisting that the state of North Dakota equalize the Non-Trust Land tax revenue to a 50:50 split, Chairman Hall calls for a 80:20 division in favor of the Tribe of tax revenue generated by Trust Lands.²¹⁸ In an extreme characterization, the letter states that under the current 2010 Tax Agreement

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Dalrymple, *supra* note 165.

²¹⁶ MacPherson, *supra* note 40.

²¹⁷ Letter from Tex “Red Tipped Arrow” Hall, Chairman, TAT—Mandan Hidatsa & Arikara Nation, to David O’Connell and Donald Schaible, Chairman and Vice-Chairman of Tribal and State Relations Committee (June 25, 2012) (on file with author) [hereinafter Letter from Tex Hall].

²¹⁸ *Id.*

the state reaps a \$2 billion budget surplus while the MHA Nation “scrapes by.”²¹⁹ MHA Nation claims that their roads, natural resources, and the safety of reservation residents are at stake and suffering due to the unequal treatment of tax revenue funds.²²⁰ Hall sets the stage for the current flaring regulation battle with a pointed statement, “When the Tax Agreement was negotiated, no one could foresee the impact the oil and gas development would have on our roads, our police, and our social services. It is unprecedented.”²²¹

From the initial 2008 Tax Agreement that opened the reservation to development, two-thirds of the tax revenue from the oil and gas production has gone to the state.²²² The one-third given to the Tribe cannot sustain the damage to the infrastructure and is effectively crippling oil and gas industry on the reservation.²²³ According to current projections, it will take \$1.5 million per mile to rebuild the roads to an effective grade in order to withstand the grueling weight and amount of traffic generated by the oil companies.²²⁴ The letter concludes that a more equitable share of the tax revenue is the only option to support current and future energy development.²²⁵ It also states that the residents of the reservation deserve a higher quality of life than that which has been decimated due to the economic development unequal profit scheme.²²⁶

The battles over the 2010 Tax Agreement lay the foundation for the ongoing debate surrounding the flaring regulations of the Fort Berthold reservation. The situation of being routinely denied negotiations over the 2010 Tax Agreement terms pertaining to the tax revenue shares of both Trust and Non-Trust Land on the reservation could be hypothesized as the starting point for the Tribe seeking other possible revenue streams. This search could have created the endeavor to harness the large rates of flared natural gas from oil production in an attempt to improve residents’ quality of life and generate needed revenue to repair the MHA Nation infrastructure.

²¹⁹ Surplus and scrape characterized by amounts reflecting the 2012 figures. May 31, 2012 figures: State received \$178 million. The MHA Nation received \$100 million under the 2010 tax agreement; *see* Letter from Tex Hall, *supra* note 217.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Letter from Tex Hall, *supra* note 217.

²²⁶ *Id.*

5. Production and Flaring Concerns

Recently, Fort Berthold was reported as flaring 48% of the natural gas produced in tandem with the oil production.²²⁷ MHA Nation links the high rate of flaring to the lack of adequate pipelines and other infrastructure.²²⁸ Overall the state of North Dakota reports flaring of natural gas production at a lesser percentage of thirty-six percent.²²⁹ In the latest gas figures, oil companies are reporting a drop in oil production that has allowed for flaring regulations to be implemented and met.²³⁰ The North Dakota Industrial Commission reported that the benchmarks set by the state requires a flaring cap of twenty-six percent for all natural gas production by October 1, 2015.²³¹ The benchmarks then drop significantly: twenty-three percent by January 1, 2016, and fifteen percent within two years, ultimately culminating in 2020 at a low ten percent.²³² The state of North Dakota incentivizes the oil companies to meet these percentages by threatening penalties such as curtailment of production.²³³ Currently, North Dakota reported flaring figures are twenty-four percent, a significant drop from the reported rate of sixty-four percent in 2011.²³⁴

Unfortunately, even with the reported improved percentages, the entire practice of flaring on Indian land remains unaddressed.²³⁵ North Dakota's figures may have dropped, but there has been little reporting of flaring reduction on Trust Land.²³⁶ With such high percentages being reported of flared gas, the most recent being forty-eight percent, the environmental concerns and alternative methods, such as capturing flared gas in a bid for economic viability options, has come to the forefront of the MHA Nation's collective concern.

²²⁷ Amy Dalrymple, *Tribe aims to cut high rate of flaring in half*, OIL PATCH DISPATCH (Apr. 25, 2014), <http://oilpatchdispatch.areavoices.com/tag/fort-berthold/> [<http://perma.cc/9TAA-RZPJ>].

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Brian Scheid, *Falling oil price, rig counts helping operators meet N. Dakota gas flaring rules*, PLATTS MCGRAW HILL FINANCIAL (Feb. 17, 2015, 3:25 PM), <http://www.platts.com/latest-news/natural-gas/washington/falling-oil-price-rig-counts-helping-operators-21995007> [<http://perma.cc/A5DG-HRUK>].

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Talli Nauman, *Oil flares lighting up North Dakota tribe's skies*, NATIVE SUN NEWS (Feb. 9, 2015), available at <http://www.Indianz.com/news/2015/016385.asp> [<http://perma.cc/HD8M-8EJQ>].

²³⁶ *Id.*

6. Flaring Regulation by the State of North Dakota

The state of North Dakota—through the North Dakota Industrial Commission—formed and passed a policy for flaring reduction within the state.²³⁷ The first objective was to limit the number of wells currently flaring natural gas by implementing a new permit requirement.²³⁸ The new permit requirement consisted of a gas capture plan (“GCP”).²³⁹ GCPs are detailed plans containing how much natural gas a company believes they will be producing from a well, along with the method it chooses to deliver natural gas to a processor, and the exact location where the natural gas will be processed.²⁴⁰

The next step was to implement milestones for reduction of flared gas in volume,²⁴¹ by the number of wells flaring, and the duration of flaring.²⁴² The basic outline of the regulation stated that companies would have sixty days to engage in maximum efficient rate of oil production.²⁴³ If the company is not in compliance with regulation their cap reduces to 200 barrels for sixty days.²⁴⁴ If the company remains noncompliant, the cap drops to 150 barrels for sixty days.²⁴⁵ As soon as the company complies with the regulation—by connecting wells to gas-gathering equipment—and proves its capability to move the captured gas to a processing facility, the caps immediately disappear and companies return to production at maximum efficient rate.²⁴⁶

In sum, North Dakota’s flaring regulation consists of a requirement for gas capture plans for any increase in production or for applications to drill after June 1, 2014.²⁴⁷ The State plans to track the regulations through semi-annual meetings with companies engaged in oil production

²³⁷ N.D. INDUS. COMM’N, 11:30 A.M. PRESENTATION OF THE DEPARTMENT OF MINERAL RESOURCES REVIEW OF NORTH DAKOTA PETROLEUM COUNCIL FLARING TASK FORCE REPORT AND CONSIDERATION OF IMPLEMENTATION STEPS 2014, *available at* https://www.dmr.nd.gov/oilgas/presentations/NDIC030314_100.pdf [<https://perma.cc/KP8N-4LV5>].

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Press Release, Indus. Comm’n of N.D., *NDIC adopts an additional flaring reduction policy* (July 1, 2014) [hereinafter Press Release Indus. Comm’n N.D.], *available at* <http://www.nd.gov/ndic/ic-press/DMR-Flaring140701.pdf> [<http://perma.cc/H6LP-LQFY>].

²⁴¹ *Id.* at 54.

²⁴² N.D. INDUS. COMM’N, *supra* note 237.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

to gauge effects and correct deficiencies.²⁴⁸ The State also plans to apply IT resources to create an easy access reporting system consisting of an Internet report form.²⁴⁹ North Dakota further has a provision to track and report on flaring, on and off Fort Berthold, compared to the goals set by the Commission.²⁵⁰

7. Flaring Regulation by the MHA Nation

North Dakota's flaring regulations have been touted as an innovative system designed to tackle the issues of flaring—which are so prevalent in the state—by threat of production curtailment.²⁵¹ Comparatively, MHA Nation's flaring regulation is designed as a policy that highlights the needs of MHA tribal members and narrows the scope of flaring regulations to administer solutions to the ongoing issues within reservation boundaries.²⁵²

a. Interplay Between Tribal Law and Federal Oversight

Because tribes and the federal government are set in a complex relationship of “domestic, dependent nations” any action carried out by a tribe falls under a federal approval scheme. Part of oil production, and for the majority of economic development in general, is the federal oversight system enabled through a multistep process.²⁵³ For the majority of trust land issues, which implicate the fiduciary relationship held by the federal government, the system consists of individualized Secretarial approval and a permitting system that contracts between all three parties (tribe, corporate entity, federal government).²⁵⁴ Indian lands that are currently engaged in natural resource production contribute five percent of domestic output in oil production flowing from Indian country.²⁵⁵

²⁴⁸ N.D. INDUS. COMM'N, *supra* note 237.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Press Release Indus. Comm'n of N.D., *supra* note 240.

²⁵² See Resolution No. 13-070-VJB, *supra* note 45.

²⁵³ To Amend the Tribal Energy Development and Self-Determination Act of 2005, S. 209, 114th Cong. (2015) available at <http://www.gpo.gov/fdsys/pkg/BILLS-114s209is/pdf/BILLS-114s209is.pdf> [<http://perma.cc/WH6W-MDWR>].

²⁵⁴ See generally *id.*; Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–458(d)(d)(d)(2) (2012).

²⁵⁵ Cohen's Handbook, *supra* note 117, at § 17.03.

In 2011 alone the Department of Interior authorized 4,843 mineral leases on 2.7 million acres of Indian land.²⁵⁶

Economic development is a serious prerogative for both the MHA Nation and the federal government, and when centered on minerals and production of natural resources there is a long legislative history of tried and discarded policy.²⁵⁷ In 1891, the Indian Mineral Development Act defined mineral resources as "oil, gas, uranium, coal, geothermal, or other energy or nonenergy [sic] mineral resources."²⁵⁸ For a mineral resource to be under the control of a tribe or tribal member there must be a finding that either: (a) the land was reserved for Indian tribes and therefore the tribes hold the beneficial ownership of both soil and mineral interests; or, (b) the United States failed to make an express reservation of interest in minerals.²⁵⁹ This finding also comes with the caveat that any doubt of ownership of the mineral resource should be resolved in favor of the tribe.²⁶⁰

The Indian Mineral Development Act was eventually amended in 1924 and 1927 with detrimental effects to tribal self determination, mainly though a provision that allowed states to tax oil and gas production on all tribal lands.²⁶¹ The Secretary of Interior was enabled to pay the state tax from the royalties of tribes.²⁶² The 1938 enactment of the Indian Mineral Leasing Act solidified the state tax provision but required tribal consent and approval of the Secretary of Interior for any mineral lease.²⁶³ It also included an exception under the right of Indian Reorganization Act ("IRA") tribes to lease lands for mining in accordance with their IRA charters or constitutions.²⁶⁴

In 1982, Congress enacted the Indian Mineral Development Act ("IMDA").²⁶⁵ IMDA was targeted to further self determination policy and attempted to create financial profit from Indian mineral resources for the benefit of tribes.²⁶⁶ The entire idea behind IMDA was to facilitate tribal

²⁵⁶ *Id.*

²⁵⁷ *See, e.g., infra* notes 258, 261, 263.

²⁵⁸ 25 U.S.C. § 2102(a).

²⁵⁹ *See* United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938).

²⁶⁰ *Id.*

²⁶¹ 25 U.S.C. § 398.

²⁶² *Id.*

²⁶³ *Id.* § 396(a)-(g).

²⁶⁴ *See* Cohen's Handbook, *supra* note 117, at ch.1 §§ 1.05, 4.04(3)(a).

²⁶⁵ *See* 25 U.S.C. §§ 2101-2108; *see also* *Quantum Exploration, Inc. v. Clark*, 78 F.2d 1457 (9th Cir. 1986) (referencing the IMDA and the reasons for its enactment).

²⁶⁶ S. Rep. No. 97-472, at 2 (1982).

control over mineral agreements in their entirety, from negotiation of an operating agreement to setting exploration terms.²⁶⁷ IMDA still required the Secretary of Interior (“SOI”) to review mineral agreements under the standard of “in the best interest of the Indian tribe.”²⁶⁸ But the SOI was allowed to look at factors such as potential economic return, potential environmental and cultural effects, and provisions in the agreement pertaining to resolution of disputes between parties.²⁶⁹

In addition to IMDA, Congress passed the Indian Tribal Energy Development and Self Determination Act (“ITEDSA”) in 1992.²⁷⁰ ITEDSA was the answer to addressing mineral development in an era of climate change issues and a new national focus on non renewable resources.²⁷¹ With the advent of the renewable energy mindset Congress took the initiative to grant tribes another avenue in economic development through the process of energy development. The purpose of ITEDSA was stated as the promotion of tribal economic self-sufficiency and increase of control over the future of Indian land.²⁷² Tribes can form a tribal energy resource agreement (“TERA”) with the Department of Interior under ITEDSA.²⁷³ With a TERA a tribe can enter into “leases and other business agreements for energy resource development and grant rights-of-way for pipelines . . . *without* secretarial approval of the specific lease, agreement or right-of-way.”²⁷⁴

b. Trust Liability of Federal Government with Tribes

In *United States v. Mitchell (Mitchell II)* the Supreme Court held that the federal government had fiduciary obligations to tribes in their capacity as resource owners, “where the Federal Government takes on or has control or supervision over tribal monies or properties.”²⁷⁵ Tribes

²⁶⁷ Cohen’s Handbook, *supra* note 117.

²⁶⁸ 25 U.S.C. § 2103(b).

²⁶⁹ *Id.*

²⁷⁰ *Id.* §§ 3501–3506.

²⁷¹ Cohen’s Handbook, *supra* note 117.

²⁷² H.R. Rep. No. 102-474 pt. 8, at 93 (1992).

²⁷³ 25 U.S.C. § 3504(e).

²⁷⁴ *Id.* § 3504(a)–(b). *But cf. Indian Tribal Energy Development and Self Determination Act Amendments of 2011: Hearings on S. 1684 Before Senate Committee on Indian Affairs*, (2012) available at <http://www.indian.senate.gov/sites/default/files/upload/files/Tex-Hall-testimony041912.pdf> [<http://perma.cc/HG6Z-X3M4>] (stating that no tribes had used the TERA program from the testimony of Tex G. Hall).

²⁷⁵ *United States v. Mitchell*, 463 U.S. 206, 224 (1983).

must show that statutory language that created a trust or federal control over the resource,²⁷⁶ or a source of law that makes specific duties for the government either implicit or explicit, and that the tribe in fact suffered an injury by the breach of duty and requires an award of damages.²⁷⁷ Also, neither the government nor the Secretary of Interior has a duty to maximize tribal returns.²⁷⁸

Where there has been subsequent erosion of findings of fiduciary duties in coal leasing, the federal courts still find obligations for the SOI in the oil and gas lease context.²⁷⁹ Mainly, the SOI must determine if the lease is in the “best interest of the Indian”²⁸⁰ and to monitor the performance of the party the tribe has contracted with.²⁸¹ On top of that, the SOI is charged with a trust duty to find an oil and gas royalty accounting method that “best protect[s] the royalty interest of the [tribe].”²⁸² The SOI has the duty to look at all factors when considering whether a lease is in the tribe’s best interest, which includes economic factors but also demands a weighing of “all relevant factors.”²⁸³ All of the SOI’s duties and obligations are under the requirement of “act[ing] in accordance with the trust responsibility” and “in good faith and in the best interests of the Indian tribes.”²⁸⁴

c. NTL-4A, The Enforcement of Fiduciary Duties in Flaring

In the vein of fiduciary duties due to tribes, the Department of the Interior through the Bureau of Land Management promulgated the NTL-4A.²⁸⁵ The NTL-4A or Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases directly deals with oil production subject to royalties.²⁸⁶ The standards of when royalty’s status applies depend on two factors: (1) produced and sold on a lease basis for benefit

²⁷⁶ *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474–75 (2003).

²⁷⁷ *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

²⁷⁸ *Id.* at 510–14.

²⁷⁹ *Id.* at 505.

²⁸⁰ *Id.*

²⁸¹ *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1565 (10th Cir. 1984) (Seymore, J., dissenting).

²⁸² *Id.* at 1566.

²⁸³ *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992).

²⁸⁴ 25 U.S.C. § 3504(e)(6)(2012).

²⁸⁵ Resolution No. 13-070-VJB, *supra* note 45; Notice to Lessees and Operator of Onshore Federal and Indian Oil and Gas Leases (NTL-4A), Dep’t of Interior (Jan. 1, 1980).

²⁸⁶ *Id.*

of a lease approved by agreement, and (2) the Supervisor determines an avoidable loss on a lease.²⁸⁷ NTL-4A is the controlling federal doctrine on flaring regulations within Indian land.²⁸⁸ Royalty status applies unless:

(1) is used on the same lease, same communities tract, or same unitized participating area for beneficial purposes, (2) is vented or flared with the Supervisor's prior authorization or approval during drilling, completing or producing operations, (3) is vented or flared pursuant to the rules, regulations, or order of the appropriate State regulatory agency when said rules, regulations, or orders have been ratified or accepted by the Supervisor, or (4) the Supervisor determines it to have been an otherwise unavoidable loss.²⁸⁹

When royalty status applies the Indian lessor receives a portion computed on the basis of the full value of the gas wasted or the portion that is attributable to the lease.²⁹⁰

The second factor of the finding of applicable royalties, "avoidably lost" is defined as:

[W]hen the Supervisor determines that such loss occurred as result of (1) negligence on the part of the lessee or operator, or (2) the failure of the lessee or operator to take all reasonable measures to prevent and/or to control the loss, or (3) the failure of the lessee or operator to comply fully with applicable lease terms and regulations . . . or (4) any combination of the foregoing.²⁹¹

Section III of the notice also has a provision for authorized venting and flaring of gas. The four categories are narrow, defined as emergencies, well purging and evaluation tests, initial production tests, and routine or special well tests.²⁹² The Notice then goes further and clearly defines that "Oil Well Gas" may not be flared outside of those four exceptions

²⁸⁷ NTL-4A, *supra* note 285, at 1–2.

²⁸⁸ *Id.* at 1.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 2.

²⁹¹ *Id.* at Sec. II "Definitions."

²⁹² *Id.* at 3.

unless approved by the Supervisor.²⁹³ Justifications for exception approval hinges on a showing that the cost of marketing or beneficial use of the gas would not be economically justified and if it were required, that it would result in an abandonment of the oil reserves and therefore a loss.²⁹⁴ Another justification could be an action plan that would eliminate flaring of gas within one year of application.²⁹⁵

d. MHA Nation's Flaring Regulations

MHA Nation's flaring regulations derive their power from the facilitating documents of the Indian Reorganization Act, namely MHA's constitution that authorizes the Tribal Business Council to promulgate and pass legislation on behalf of the tribal members.²⁹⁶ MHA's flaring regulation preamble painstakingly states that the Tribal Business Council is creating their own flaring regulation because of the Bureau of Land Management's ("BLM") failure to enforce NTL-4A²⁹⁷ that covers flaring of gas on Indian land.²⁹⁸ Finding a failure on the part of the BLM, the Tribe then found it to be in its "best interest" to regulate flared gas on the reservation.²⁹⁹ The Tribal Business Council specifically listed two reasons for the flaring regulation: (a) the lack of enforcement by the BLM, and (b) flaring is "wasteful and contributes to air pollution."³⁰⁰

The first regulation that the Tribe levies against the oil companies is that gas produced in tangent with crude oil can be flared for one year.³⁰¹ After a year has passed from the first production date, the company must regulate their flaring by capping the well completely, connecting to a gas gathering line, or by equipping their production units with electrical generators that use seventy-five percent of the gas from the well.³⁰² If the well continues to operate outside the MHA regulation then the producer must pay royalties to the Tribe computed at the value of the flared gas added to the federal gross production tax on flared gas.³⁰³ The

²⁹³ NTL-4A, *supra* note 285, at 3.

²⁹⁴ *Id.* at 4.

²⁹⁵ *Id.*

²⁹⁶ *E.g.*, Resolution No. 13-070-VJB, *supra* note 45.

²⁹⁷ *Id.* at 1, 3.

²⁹⁸ NTL-4A, *supra* note 285.

²⁹⁹ *See* Resolution No. 13-070-VJB, *supra* note 45, at 1, 3.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1.

³⁰² *Id.*

³⁰³ *Id.* at 1-2.

MHA Nation itself will survey for violations and if an operator is found to be in violation the Tribal Business Council will determine the value of the flared gas for payment royalties.³⁰⁴

MHA Nation does provide a flaring exemption provision. The producer must show through an application to MHA Nation Energy Department that connection to a well is “economically infeasible” at present time of application or in the near future.³⁰⁵ Another flaring exemption states that if the cost of connection to a gathering line is greater than what the producer will derive from the sale of the gas (minus taxes and royalties) then the producer shall be exempted.³⁰⁶ The resolution also states that the royalties and taxes taken from this regulation will be used exclusively for the “maintenance, repair, and construction of tribal roads within the exterior boundaries of the Reservation.”³⁰⁷

8. Regulation Conclusions

In sum, both North Dakota and MHA Nation have promulgated and attempted to implement their individual flaring regulations on the oil producers within Fort Berthold Reservation. The state of North Dakota has proven themselves as diligent investors in the development of oil production, to increase the state’s economic productivity.³⁰⁸ However, North Dakota has also proven that when the opportunity arises that creates financial gain in favor of the state only that they will seize the opportunity and refuse to negotiate with the Tribe, regardless of demonstrated need and ownership of the MHA Nation.³⁰⁹ This can be seen in the fact that when negotiating over both tax agreements the state of North Dakota continued to adhere to a mismatched benefit ratio in regards to the Non-Trust Land revenues.³¹⁰ Tribal lands and oil production should be 50:50 regardless of Trust or Non-Trust Land designation because the oil production is generated in the boundaries of Fort Berthold and is therefore taxing the reservation’s infrastructure, people, and services.

³⁰⁴ *Id.*

³⁰⁵ Resolution No. 13-070-VJB, *supra* note 45, at 2.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 3.

³⁰⁸ See Ryan Honeywell, *North Dakota’s Oil Boom is a Blessing and a Curse*, GOVERNING (Aug. 2011), <http://www.governing.com/topics/energy-env/north-dakotas-oil-boom-blessing-curse.html> [<http://perma.cc/TA5R-44AB>].

³⁰⁹ See 2010 Tax Agreement, *supra* note 197.

³¹⁰ *Id.* at 2.

The state reaps a disproportionate amount of benefits from MHA Nation oil production on the reservation.³¹¹ As a state leader in oil production domestically, North Dakota legislature should be aware that infrastructure needs, such as roads and government services, are a major concern in these economic development projects. MHA Nation has a federally protected right to govern themselves through the Indian Reorganization Act, and the state cannot infringe upon this right.³¹² The terms of both 2008 and 2010 Tax Agreements are skewed in North Dakota's favor, resulting in lost revenue generated by the reservation but never reaped for the benefit of its tribal members. This disconnect of the state demonstrates that North Dakota cannot be, and will never be, in the best position to promulgate rules on flaring regulation within the reservation boundary.

While MHA Nation's flaring regulations are ambitious and clearly established to serve the needs of the reservation, they too have legal and implementation problems. The fiduciary relationship between the Federal Government and the Tribe demands flaring regulation by federal policy through the present rule of the Bureau of Land Management presented in NTL-4A.³¹³

II. RESOLVING THE POWER TO REGULATE

A. *Is North Dakota's Flaring Regulations Applicable to Fort Berthold?*

The state of North Dakota cannot regulate natural gas flaring on Fort Berthold Reservation because there is a long history of leaving tribes and tribal members outside state jurisdiction due to tribal sovereignty established by Chief Justice Marshall.³¹⁴ State law is generally not applicable to Indian affairs within the territory of the tribe.³¹⁵ The only way that a state can have jurisdiction is by consent of Congress and the *Worcester v. Georgia* case has been the established precedent regarding express Congressional consent. The *Worcester* case determined that the

³¹¹ *Id.*

³¹² See *supra* Part II.

³¹³ See generally Brandon Evans, *Bakken Oil, gas producers decry new federal regulations*, GAS DAILY, 3 (Oct. 20, 2015) (explaining that Bureau of Land Management released proposed rules addressing calculations of royalties that require federal drilling permits and new venting and flaring regulations for fracking on federal and Indian land) (on file with author).

³¹⁴ See *Rice v. Olson*, 324 U.S. 786, 789 (1945).

³¹⁵ *Worcester v. Georgia*, 31 U.S. 515, 562–63 (1832).

Constitution gave broad authority over Indian issues solely to the federal government, and that treaties between tribes generally reserved tribal self-governance within the territory of the contracting tribe.³¹⁶ Chief Justice Marshall also made it clear that the acts and interest of states would inherently be against that of the federal government and Indian tribes.³¹⁷ Therefore states would interfere on an unacceptable level with the federal agenda.³¹⁸ The Supreme Court has consistently held to the fact that the key holdings of *Worcester* have remained intact and therefore create precedent which cannot be overturned unless by an act of Congress.³¹⁹

B. Is MHA Nation's Flaring Regulation Applicable to Fort Berthold Reservation?

Even though MHA Nation passed their resolution under the power derived from the MHA constitution, which is empowered through the Indian Reorganization Act (federal law), the regulation cannot be implemented against companies on the reservation under the current federal policy of regulation and tribal self determination. The main problem is that tribal regulation cannot overtake the already applicable BLM flaring regulation found in NTL-A4.³²⁰ Tribes may be “domestic, dependent nations” and retain inherent sovereignty, but when treaties came into play between the tribes and the federal government, tribes sacrificed part of their sovereignty in return for a permanent contractual relationship with the United States. Basically, tribal sovereignty is “subject always to the paramount authority of the United States.”³²¹ The Supremacy Clause of the Constitution bars any other entity from creating law that attempts to circumvent federal law as the reigning authority in the United States.³²²

Unfortunately, because of the power of the Supremacy Clause, the MHA Nation belief that BLM is not enforcing the NTL-4A and therefore is afforded the right to create flaring standards does not in fact grant the

³¹⁶ *Worcester*, 31 U.S. at 556, 560–61.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *William v. Lee*, 358 U.S. 217, 219 (1959). *See also* *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764–65 (1985) (stating that states are barred from taxing tribal royalties from mineral leases on trust land).

³²⁰ *See* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

³²¹ *Talton v. Mayes*, 163 U.S. 376, 380 (1896).

³²² U.S. Const. art. VI, cl. 2.

Tribe express power to promulgate flaring regulations without the federal government.³²³ There is no legal precedent, act, regulation, or rule to bolster the Tribe's independent creation of regulation against the applicable federal regulation already in place.

Instead, the best way to enforce application of the NTL-4A provisions would be to instigate legal action against the Bureau of Land Management, and therefore the Secretary of Interior, for a breach of mandatory duty. Specifically, the Tribe should allege that SOI breached their duty in the fact that when approving the oil and gas leases they failed to take into consideration the "factors" outside of economic benefit.³²⁴ As proof of the outside factors that fall into the category of environmental and cultural resource damage the Tribe should put forth evidence of: the deterioration of the roads; increase in crime; and at the very heart of this entire issue, the fact that natural gas flaring at such high rates is destroying the environment of the Fort Berthold Reservation.³²⁵

To be entirely transparent, the additional problem with the MHA regulation is that there are several clauses with the MHA Nation resolution that are directly against, or in breach of, federal law already regulating the issue.³²⁶ Namely that MHA Nation is attempting to force oil producers to pay taxes that the Tribe will set independently of any present regulation, rules, or federal acts. Also, the provision that Tribal determination would be final with no redress or appeal policy in place could equate to a potential Due Process claim. To add to the issue, the Tribe also attempted to add on an additional tax through requiring oil producers to foot the bill on the federal tax on processed natural gas.

MHA Nation has overstepped their inherent Tribal authority and the their self promulgated flaring regulation cannot be sustained or implemented against the oil producers on the reservation.

C. *Tribal Sovereignty and Policy of Self Determination:
How Should MHA Nation Assert Authority over the Issue
of Natural Gas Flaring on the Fort Berthold Reservation?*

Currently the overall policy goal of Congress, the Executive, and at times the judiciary is self-determination in every aspect of tribal

³²³ *Id.*

³²⁴ *Cheyenne-Arapaho*, 966 F.2d at 589.

³²⁵ See Tollefson, *supra* note 18; see also Phil Davies, *Homeland of Opportunity*, Fed. Reserve Bank Minneapolis (Oct. 6, 2014), <https://www.minneapolisfed.org/publications/fedgazette/homeland-of-opportunity> [<https://perma.cc/V4Y8-D3KX>].

³²⁶ NTL-4A, *supra* note 285.

sovereignty for all tribes within the United States.³²⁷ With that in mind, and with the knowledge that the purpose of ITEDSA was stated as the promotion of tribal economic self-sufficiency with the additional purpose of increasing tribal control over the future of Indian lands, MHA Nation should seek to enforce their authority using the broad policy arguments within ITEDSA.³²⁸

ITEDSA creates a clear path for MHA Nation to exercise authority over their economic development through TERAs. A TERA grants MHA the power to enter into leases and other business agreements for energy resource development and to grant rights-of-way for pipelines without secretarial approval of the specific lease, agreement, or right-of-way.³²⁹ Without the need for Secretarial approval MHA Nation could lay the infrastructure for gas capture, which would force oil producers into adhering to the NTL-4A provisions. Specifically, MHA could create gas-gathering pipelines, build a processing plant, curb the extreme flaring on reservation, and basically reap all the benefits that they were trying to create through the tribal flaring regulations without the necessary oversight that comes with the current federal government–tribal relationship rules and duties.

CONCLUSION

The regulation of natural gas flaring on Fort Berthold Reservation is an ongoing issue for state, federal, and tribal authorities. Natural gas flaring in itself can directly effect the climate change scale as scientists believe that four million tons of CO₂ emissions was added to the atmosphere over the year of 2012. Flaring regulation of the Bakken Shale production must be implemented against the oil producers in the region. But the state of North Dakota cannot apply its state regulation to Fort Berthold reservation due to historical precedent set by Chief Justice Marshall, and because of the tribal-federal relationship over property, taxation, and economic development has existed firmly outside state jurisdiction. In addition to the lack of state jurisdiction, there is an abundance of negative history that highlights the fact that States lack the control and relevant knowledge of tribal authority to carry out the best procedures and policies that benefit both the tribes and states in equal measures. On

³²⁷ See generally 25 U.S.C. § 3502(a)(1).

³²⁸ See Indian Tribal Energy Development and Self-Determination Act, 25 U.S.C. §§ 3501–3506.

³²⁹ See *id.*

the other side, MHA Nation's flaring regulation cannot be upheld or applied in its current form. The MHA Nation regulation bases its entire power on the idea that the Secretary of Interior, via the Department of Interior, via the Bureau of Land Management failed to enforce the provisions of NTL-4A. But a breach of duty does not create the power to independently create and apply Tribal regulation within the reservation boundaries.

The goal of the MHA regulations are clear: they intend to capture, use, and profit from their currently wasted natural resources. The Tribal Business Council clearly states in their resolution for flaring practices that any money or royalties derived from the policy will automatically feed back into the management and development of the road system within the reservation. Clearly, the goal of the Tribe is worthy in its effect of fixing the detrimental infrastructure effects that the Tribe currently suffers from through capturing a Tribal natural resource and mitigating the negative effects of flared gas.

With the goal of improving the conditions of the reservation and mitigating flared gas effects to facilitate oil production and improve the Tribal health and safety, MHA Nation should promulgate a TERA under the ITEDSA Act. With an affirmative TERA in place the Tribe will be allowed to create the mechanism and production facilities necessary to capture the flared gas and therefore enforce royalty payments or use the flared gas under NTL-4A. In this vein MHA Nation would be in complete compliance with federal regulation while achieving their set goals of improving infrastructure, mitigating negative environmental effects, and creating benefits for all Tribal members. With the use of the TERA the Tribe can bide their time and control their economic development until a period where tribes will be charged by the federal government to take complete control of tribal goals, economic development, and general welfare decisions.

In conclusion, North Dakota flaring regulations will not be applicable to Fort Berthold Reservation, leaving MHA Nation's proposed goals the opportunity to become aligned with current federal law, which will produce a tribally based regulation standard through the use of current federal law and programs applicable to the situation at hand under the limited scope of tribal self determination currently promoted.