

FORT BERTHOLD RESERVATION OIL DEVELOPMENT UNDER 2007 SENATE BILL NO. 2419 AND SUBSEQUENT STATE-TRIBAL AGREEMENTS

Despite unprecedented growth in oil exploration and production near the boundaries of the Fort Berthold Reservation, in the 20 years preceding the July 1, 2008, agreement between the Governor and the Three Affiliated Tribes of the Fort Berthold Reservation, only one oil well was completed within the boundaries of the Fort Berthold Reservation. The reason for the lack of oil industry activity within the reservation was the reluctance of oil companies to invest because of the uncertain status of state and tribal regulatory and taxation authority. The situation that existed was perceived as detrimental to the state, the Three Affiliated Tribes, and the oil industry.

Introduction of 2007 Senate Bill No. 2419 was intended to remove the barriers preventing oil and gas development on the Fort Berthold Reservation. Because the state and the Three Affiliated Tribes each had valid claims of authority, it was perceived to be in the best interest of all concerned that a cooperative agreement be entered to establish certainty in regulation and taxation of oil and gas exploration and development within the Fort Berthold Reservation. The bill was the result of joint efforts of representatives of the Governor's office, the Three Affiliated Tribes, and the Legislative Assembly. The concept of the bill was to provide the Governor authority to enter an agreement with the Three Affiliated Tribes within parameters established by the legislation.

From the effective date of the agreement on July 1, 2008, to the beginning of February 2010, 160 new wells were completed within the Fort Berthold Reservation, including 40 new wells on trust lands. At the beginning of February 2010, new wells on trust lands were producing approximately 6,200 barrels of oil per day and 19 drilling rigs were operating within the Fort Berthold Reservation, including 9 drilling on trust lands.

ALLOCATION TO POLITICAL SUBDIVISIONS

As introduced and as passed by the Senate, 2007 Senate Bill No. 2419 did not make reference to allocation to political subdivisions of tax revenue from production within the Fort Berthold Reservation. The House of Representatives extensively revised the bill with a hodgehouse amendment to provide that all taxes from fee land within the reservation would be retained by the state and allocated as provided by law and that a separate allocation would apply for production from trust land. Revenue from the 5 percent gross production tax from wells on trust lands was to be allocated among political subdivisions in the amounts provided by statute and, after the cost of state

administration and regulation of oil and gas was transferred to the state general fund, all remaining revenue was to be divided in equal amounts between the state and the tribe.

A conference committee amendment was adopted on April 21, 2007. The conference committee amendment was a hodgehouse amendment that provided that taxes from production on trust lands would be evenly divided between the tribe and the state and production from nontrust lands would be allocated 20 percent to the tribe and 80 percent to the state. The provision regarding allocation of revenue as contained in the conference committee amendment and currently codified as North Dakota Century Code Section 57-51.2-02(5) reads as follows:

5. The allocation of revenue from oil and gas production taxes on the Fort Berthold Reservation must be as follows:
 - a. Production attributable to trust lands. All revenues and exemptions from all oil and gas gross production and oil extraction taxes attributable to production from trust lands on the Fort Berthold Reservation must be evenly divided between the tribe and the state.
 - b. All other production. The tribe must receive twenty percent of the total oil and gas gross production taxes collected from all production attributable to nontrust lands on the Fort Berthold Reservation in lieu of the application of the Three Affiliated Tribes' fees and taxes related to production on such lands. The state must receive the remainder.
 - c. The state's share of the revenue as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 and 57-51.1. (emphasis added)

The conference committee minutes indicate that at least some of the members of the conference committee believed the conference committee amendment contained a "hold harmless" provision for political subdivision allocations. However, the amendment adopted by the conference committee and approved by the Legislative Assembly clearly states that political subdivision allocations come from the state's share of revenue.

The amendment prepared by the Legislative Council staff for the conference committee was based on a drafted amendment delivered for preparation as a conference committee amendment. The amendment prepared by the Legislative Council staff contains exactly what was contained in the amendment as delivered.

Tribal Fees and Taxes

Under the provisions of 2007 Senate Bill No. 2419 which are now codified in Section 57-51.2-02, it is provided in subsection 7:

The Three Affiliated Tribes must agree not to impose a tribal tax or any fee on future production of oil and gas on the Fort Berthold Reservation during the term of the agreement.

Under the agreement entered between the Governor and the Three Affiliated Tribes in 2008 and the agreement as renewed in 2010, the tribe is allowed to impose one-time fees totaling \$100,000 per well relating to the siting of the well and use of the land. The Governor interprets these fees as being not based on oil production and therefore in compliance

with the statutory limitation on tribal taxes and fees. The agreement describes the taxes and fees imposed by the tribe as a "one-time \$60,000 Tribal Employment Rights Office ("TERO") fee on wells on Trust Land and a one-time Tribal Application Fee of \$40,000 on wells on Trust Land."

The state has no information on the fee revenue collected by the tribe but the fee applies to wells with a trust interest of greater than 50 percent and there are 62 wells in that category. At \$100,000 in fees for each qualifying well, the total fee receipts to the tribe would be \$6.2 million.

PRODUCTION AND REVENUE STATISTICS

A spreadsheet prepared by the Tax Department showing oil and gas tax collections from production within the Fort Berthold Reservation and approximate distributions of those revenues is attached as an [appendix](#).

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