MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Mark N. Fox
Office of the Chairman

COMMENTS OF THE MANDAN, HIDATSA AND ARIKARA NATION
LICENSED INDIAN TRADER REGULATIONS
25 C.F.R. PART 140
AUGUST 30, 2017

INTRODUCTION

The Mandan, Hidatsa and Arikara Nation (MHA Nation) appreciates this additional opportunity to provide comments on the Department of the Interior's effort to modernize the Licensed Indian Trader regulations at 25 C.F.R. Part 140. The MHA Nation provided comments dated April 10, 2017 in response to Interior's February 8, 2017, Advanced Notice of Proposed Rulemaking and incorporates those comments by reference here.

As we stated in those comments, the regulations at 25 C.F.R. Part 140 must be updated to reflect federal laws and policies promoting tribal self-determination and self-governance. Revisions and updates to these regulations are long overdue. For too long, Indian tribes have been forced to engage in economic development with one hand tied behind their back because of inequitable and uncertain federal policies and judicial decisions affecting Indian trade. The MHA Nation strongly supports updating the Licensed Indian Trader regulations at 25 C.F.R. Part 140 consistent with Interior's recent work to update its leasing and right-of-way regulations.

State interference in energy and economic development on our Fort Berthold Indian Reservation demonstrates the need for trade and tax policies to catch up with federal self-determination laws and policies. In particular, updates to the Indian Trader regulations should address state dual taxation of energy and economic activities on reservation lands. In short, state dual taxation limits economic growth on and around Indian reservations and prevents Indian tribes from exercising full self-determination over their lands and resources. Without changes to these policies, tribes will continue to be heavily reliant on federal budgets for tribal programs.

In response to your letter dated July 28, 2017, our comments below provide additional information and economic data regarding lost taxes, revenues and economic opportunity because of the failure of the federal government to prevent state interference in economic activities on our lands. The MHA Nation and our Fort Berthold Indian Reservation is in the middle of one of the most active oil and gas play in the United States. While the MHA Nation, individual Indian allottees and non-Indian landowners within our Reservation have benefited from this economic activity, more than half of the tax revenues from these activities went to the State of North Dakota. The loss of these revenues prevents the MHA Nation from keeping up with road repairs and improvements, law enforcement, housing, health care, elder care, environmental management and more.

In addition, the loss of these tax revenues prevents the MHA Nation from investing in our future. Without these revenues, the MHA Nation is not able to invest in infrastructure that would bring long-term benefits and economic development to the Reservation including gas gathering facilities, a gas fired power plant, an oil refinery, and economic development zones. Without these revenues our communities and resources suffer the impacts of energy development and get few of the benefits. Indian tribes need the same tools that every other government uses - tax revenues, loan guarantees and bonding authority - to build infrastructure and promote economic growth within their jurisdictions.

Development in the Bakken Formation is expected to last another 35 more years. Oil and gas development at this level will provide income, tax revenues and energy resources that will grow our Reservation, State and National economies. Currently, production on the Fort Berthold Indian Reservation represents about 18% of all the production in North Dakota and about 2% of all the production in the United States. Maintaining and expanding this development opportunity requires a stable business environment and ensuring that the MHA Nation will be able to retain the tax revenues needed to sustain this growth. The MHA Nation and all tribes need trade, commerce and tax policies that support modern and successful federal self-determination policies. Updates to the Licensed Indian Trader regulations can provide the stable policies needed to support expanding energy development on our Reservation.

FEDERAL LAW PREVENTS STATE INTERFERENCE IN TRADE

The federal government long ago established its broad and exclusive authority to regulate trade with Indian tribes. The United States Constitution provides: "The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several Sates, and with the Indian Tribes; …." U.S. Constitution Art. I, Sec. 8, Cl. 3. Under this authority, Congress enacted the "Indian Trader Statutes" and provided the Commissioner of Indian Affairs with "the sole power and authority … to make such rules and regulations" for trade with Indians. 25 U.S.C. § 261.

Interior's regulation of trade with Indian tribes, as delegated by Congress, simply has not kept up with modern federal policies supporting tribal self-determination and tribal economies. In the absence of action by Interior to define the terms for trade with Indian tribes under modern circumstances, courts and state governments have filled the void and taken their own actions that undermine the Constitution and the law passed by Congress. This update is long overdue.

TREATIES REQUIRE PROTECTION FROM STATE INTERFERENCE IN TRADE

The MHA Nation and its component tribes entered into treaties with the United States that reflect the federal government's exclusive authority to regulate trade with Indian tribes. These treaty provisions establish a bilateral trade relationship between the United States and the MHA Nation to the exclusion of state and local governments. These treaties also protect the

MHA Nation from depredations, which includes official depredations as well as attacks, plundering, robbery and looting, by non-Indians.

In 1825, the Mandan, Hidatsa and Arikara Tribes each separately entered into treaties with the United States that specifically set out the federal government's exclusive role in regulating trade with them. For example, the Mandan treaty provides:

> All trade and intercourse with the Mandan tribe shall be transacted at such place or places as may be designated and pointed out by the President of the United States, through his agents; and none but American citizens, duly authorized by the United States, shall be admitted to trade or hold intercourse with said tribe of Indians.
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> …
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> [And,] the United States agree to admit and license traders to hold intercourse with said tribe, under mild and equitable regulations; …."

TREATY WITH THE MANDAN TRIBE, 7 Stat., 264, Art. 4 and 5 (July 30, 1825). Treaties with the Hidatsa and Arikara Tribes included identical provisions to the one above.

Similarly, in the 1851 Treaty of Fort Laramie, the MHA Nation reserved the Fort Berthold Indian Reservation and its lands, waters and resources for the benefit of the MHA Nation and its members. In addition, the treaty prohibits non-Indians from taking the MHA Nation's resources for their own benefit. The treaty states:

> In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

TREATY OF FORT LARAMIE, 11 Stat. 749, Art. 3 (Sept. 17, 1851). To fulfill these treaty provisions and ensure that the MHA Nation fully benefits from the lands and resources it reserved, the Licensed Indian Trader regulations must be updated to prevent state interference in Indian trade.

LOSS OF TAX REVENUES PREVENTS DEVELOPMENT OF RESERVATION INFRASTRUCTURE

As oil and gas development began to grow in the Bakken Formation on the Fort Berthold Indian Reservation, the MHA Nation reluctantly entered into a tax agreement with the State of North Dakota to prevent state dual taxation of tribal resources and the loss of this development opportunity. In the years before the tax agreement was signed, development surrounded the Reservation just over the border. Only after the MHA Nation agreed to give up more than half of the tax revenues from oil and gas development on our Reservation, and avoid threats of state dual taxation, did significant production begin on the Reservation.

Near the beginning of development on the Reservation, in the last half of 2008, almost $5 million was collected in tax revenues from the Reservation, including both Indian and non-Indian lands. Under the tax agreement with the State, 69% of these revenues, about $3.5 million, were distributed to the State, and 31% of the revenues, about $1.5 million, were distributed to the MHA Nation. Thus, while population, employment, truck traffic, law enforcement and regulatory needs began dramatically increasing on the Reservation, the MHA Nation was already behind and more than two-thirds of the taxes collected left the Reservation for State coffers. Few of these millions in tax revenues ever return to the Reservation.

Five years later in 2013, about $400 million was collected in tax revenues from the Reservation. Under the tax agreement, 54% of the revenues, about $215 million, were distributed to the State, and 46% of the revenues, about $182 million, were distributed to the MHA Nation.

Over the five-year period from 2008 to 2013, about $838 million was collected in tax revenues from the Reservation. Under the tax agreement, 58% of the revenues, about $486 million, were distributed to the State, and 42% of the revenues, about $351 million, were distributed to the MHA Nation.

Over the entire eight-year period from 2008 to 2016, about $2.276 billion was collected in tax revenues from the Reservation. Under the tax agreement, more than half of these revenues, about 51%, were distributed to the State. The MHA Nation received less than half, about 49%, of the tax revenues from oil and gas development on its Reservation. Thus, not only was the MHA Nation not able to keep 100% of the tax revenues from within its jurisdiction, the MHA Nation received less than half of these tax revenues.

In addition, a variety of other issues related to the tax agreement and the regulatory environment diminished the benefits the MHA Nation is able to realize from its resources. First, because development on Indian trust lands was slower to get underway than development on non-Indian trust lands, in the early years of the tax agreement the formula for dividing tax revenues benefited the State more than the MHA Nation. In other words, when oil and gas prices were at their highest, development on Indian trust lands lagged behind other areas, and so did the tax revenues flowing to the MHA Nation. This resulted in the MHA Nation not having adequate budgets early on to address the rapid increases in energy and economic activity on the Reservation.

Second, production on Indian lands only increased as development in the Bakken matured and oil and gas prices leveled off and even began to decline. Production on Indian lands was delayed during the time it took to get the tax agreement into place, staff up and train federal agencies to permit oil and gas development on Indian lands, and for limited drilling rigs and equipment to move from activities on non-Indian lands to Indian lands. Thus, the MHA Nation's share of tax revenues under the agreement was beginning to increase just as oil and gas prices began to fall. Because of delays in the taxing and regulatory environment, the MHA Nation was not able to capture the market at its highest.

Third, with declining oil and gas prices in recent years, the State acted unilaterally to lower the overall tax rate. As a result, even with production on Indian lands well underway, the taxes earned from each oil and gas well are declining. The MHA Nation estimates that the State's unilateral action to lower the tax rate will cost the MHA Nation about $700 million over the next 20 years.

While North Dakota maintains a rainy day Legacy Fund from oil and gas tax revenues with a balance around $4 billion in 2017, the MHA Nation estimates that its budget shortfall for the past 10 years was more than $1.95 billion. For the next 10 years, we estimate that we will need about $3.6 billion to develop our governing infrastructure, maintain physical infrastructure and keep up with growth on the Reservation.

In the area of housing the MHA Nation has an immediate need of $270 million for housing and $160 million for housing related infrastructure. Over the next 10 years, we anticipate needing $1.17 billion for housing growth and replacement, and $234 million for housing related infrastructure.

This new development will also require about $76 million in rural water infrastructure to provide municipal, residential and industrial water supplies. We also need to expand our solid waste facilities. Over the next 10 years we anticipate needing $150 million for solid waste facilities expansion.

We currently need about $215 million to cover road construction needs and anticipate needing $1.185 billion over the next 10 years to maintain Reservation roads. Roads maintenance and upgrades are needed to provide safe communities and to support commercial and energy activities. Recent estimates for new road construction to meet industrial standards are about $4.5 million a half mile. In addition, over the next 10 years we anticipate needing $365 million for transportation improvements and safety.

To take care of our increasing populations we also need to expand our existing health care clinic. We currently need $70 million to expand our clinic.

With increased populations we also have increased need for law enforcement. We currently estimate needing about $10 million to meet existing law enforcement needs, $10 million for our Drug Enforcement Agency, and $75 million for social services and public safety. In 2016, our law enforcement personnel handled almost 14,000 calls. Each year the demand on our law enforcement officers continues to increase. From 2015 to 2016:

- arrests rose from 30 to 103;
- methamphetamine seizures rose from 220 grams to 1037 grams;
- illegal use of prescription pill cases rose from 14 to 870;
- missing children reports rose from 0 to 16; and,
- missing person reports rose from 0 to 5.

Fortunately, on March 31, 2017, we were able to complete a new Public Safety and Judicial Center on a budget of $17.2 million. The Center provides space for law enforcement, communication, a 911 call center and tribal courts. To operate the Center we will need an annual budget of $9.5 million.

To address the increase in drug related crimes and social problems we are developing a Drug Treatment Facility. We expect to complete the Facility in May 2018 on a budget of $24.8 million. The Facility will provide residential treatment. To operate the Facility we will need an annual budget of $5.25 million. Over the next 10 years we anticipate needing $240 million for drug enforcement.

To provide for our elders we are also developing an Assisted Living Facility. Completion is expected in April 2018 on a budget of $8.5 million. To operate the Facility we will need an annual budget of $2.4 million.

Finally, it is important to note that increased energy development also brings a need for increased human capital within tribal government. While the federal government asks tribes to take on more oversight and responsibilities for trust resources, federal proposals lack the funds tribal governments need to hire and train staff. Eliminating state dual taxation would be one way to help ensure that tribal governments have the funds needed to take on these responsibilities. To provide regulatory staff and resources to oversee oil and gas development on our Reservation under current laws we need $20 million immediately and anticipate needing $234 million over the next 10 years to staff and support regulatory offices.

Many of these physical and governmental infrastructure needs could have been completed with the more than $1 billion taken by the State from oil and gas tax revenues on the Reservation from 2008 to 2016. Without these tax revenues, the MHA Nation is increasingly dependent on federal programs and agencies. We are also not able to invest in economic development that would provide long-term opportunities and growth on our Reservation.

LOSS OF TAX REVENUES PREVENTS DEVELOPMENT OF TRIBAL ECONOMIES

Due to a lack of tax revenues the MHA Nation has not been able to invest in and support our Reservation economy in the same manner as other governments support their economies. The MHA Nation has a number of plans for economic expansion, but those plans stay on the drawing board. With projects like a natural gas power plant, an oil refinery, an irrigation project and expansion of our tribal owned energy company Missouri River Resources (MRR), the MHA Nation is seeking to development value added opportunities that increase the benefit of each dollar of economic activity on the Reservation.

Natural Gas Gathering, Processing and Power Plant

Currently, a significant portion of the natural gas being developed on the Reservation is flared, i.e., wasted, due to a lack of infrastructure to capture, gather and distribute or use that gas. From 2008 to 2017 about 98 million MCF of natural gas has been flared on the Reservation.

This gas has a market value of about $563 million that could have benefited energy companies, the MHA Nation, individual Indian allottees and non-Indians within the Reservation. In addition, approximately $101 million in royalties and about $62 million in tax revenues could have been earned from this gas.

The MHA Nation has plans to capture, develop and market its natural gas resources. The MHA Nation has done economic and feasibility studies for a gas gathering facility, a gas processing plant and a gas fired power plant. These facilities would be developed through our energy company Missouri River Resources. We estimate about $130 million is needed to develop the gas processing plant and $110 million is needed for the gas gathering system.

Oil Refinery

About 10 years ago, the MHA Nation began planning to construct the first oil refinery on Indian lands and one of the first refineries to be built in the United States in decades. This $400 million project remains on the drawing board. An oil refinery would increase the value of oil resources developed on our Reservation. We could be refining jet fuel to sell to nearby Minot Air Force Base. If we had been able to develop this refinery, from 2018 to 2025, we estimate that the MHA Nation would have earned about $368 million in net income.

Irrigation

The MHA Nation has plans for a $150 million irrigation facility to replace our farmlands flooded by the construction of the Garrison Dam and Reservoir. In 1948, the federal government flooded in excess of 155,000 acres of our Reservation, including our prime agricultural lands. Before the flood, MHA had a prosperous agriculturally based economy. That economy was ruined when the bottomlands were taken. The federal government promised to provide irrigation when those lands were taken and we have petitioned Congress to appropriate the necessary funds. While a significant portion of this irrigation project remains a federal responsibility, with tax revenues from our oil and gas development, the MHA Nation could begin the process of recovering our agricultural economy.

Expansion of Missouri River Resources

We have plans for the expansion of our tribally owned energy company, Missouri River Resources (MRR), but MRR is under-capitalized. While we have leases for a number of wells, MRR does not have the resources needed to drill these wells and increase production. In addition to the tax revenues that have been taken by the State, additional funding is needed for federal loan guarantees and Tribal Economic Development (TED) Bonds to increase the investment capital available in Indian County. The rules governing TED Bonds also need to be clarified so that Indian tribes can use bonding authority in the same manner as ever other state and local government.

Expansion of Reservation Economic Development

Finally, because we are not able to support increased business opportunities and shopping centers on the Reservation the vast majority of our tribal members' income is spent off the Reservation. In the past year, we distributed $47 million of our earnings from oil and gas resources to our members. The vast majority of this money, and the sales tax revenues it generates, benefits towns and cities off the Reservation, including Bismarck, Minot and Watford City, North Dakota.

Benefits from Trust Resources Flow Off-Reservation

About 30 miles west of the Reservation infrastructure and economic development in Watford City, a small rural town, far outpaces economic development opportunities on the Reservation. Similar to the needs of the MHA Nation, in 2013, Watford City estimated that it needed about $300 million for basic infrastructure, a new hospital, and a new elementary school. Using the tools available to local governments, Watford City was able to move forward on many of these projects. In 2013 twenty new housing developments were being built in Watford City that will serve more than 7,000 people. Watford City also recently completed a new day care center, a shopping center with a 40,000-foot supermarket, subsidized housing for public employees who can't afford the inflated rents, and is in the process of building a bypass for the truck traffic.

In addition, the State supports infrastructure in Watford City and other cities around the State through distributions of oil and gas tax revenues—which includes tax revenues collected from the development of Indian trust resources on our Fort Berthold Indian Reservation. In 2016, the State distributed about $11 million to Watford City as an oil and gas hub city. This is just one of many hub cities across the state. With this funding and the tools provided to local governments, Watford City is able to build on its existing infrastructure and support community growth and economic development. For example, recently, Watford City utilized loans from the State run bank and issued bonds to build a $94 million event center and a $50 expansion of its schools. Watford City is also investing $1 million toward a $4.5 million dollar golf course.

Even income directly derived from the MHA Nation's trust resources benefits Watford City and other cities in the form of sales taxes. As noted above, last year the MHA Nation distributed $47 million of our earnings from oil and gas resources to tribal members. Without many stores on the Reservation our members travel to towns like Watford City, Minot and Bismarck to buy groceries, clothes, cars and major appliances. From 2013 to 2017, Watford City collected about $16.7 million in sales taxes. Of course, residents of Watford City whose population is also growing pay some portion of these taxes, but without economic development zones on the Reservation, Watford City gets the benefit of income from the MHA Nation's trust resources that are distributed to our members.

CONCLUSION

Updates to the Licensing Indian Trader regulations should focus on the issue of dual taxation. Nothing deprives the MHA Nation and other tribes of the resources we need to promote tribal energy and economic development, self-sufficiency, and self-determination than the state dual taxation of our resources and businesses. Without a clear federal statement, based on existing authority within the Constitution, Treaties and federal law, tribal economies will be subject to ongoing attacks by state interests and undermined by regulatory uncertainty. The MHA Nation appreciates Interior's effort to update the Licensed Indian Trader regulations and looks forward to further tribal consultation on this important issue.