



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Tex "Red Tipped Arrow" Hall
Office of the Chairman

Testimony of the Honorable Tex G. Hall Chairman, Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation

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Natural Resources Committee
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Oversight Hearing on Bureau of Land Management's Hydraulic Fracturing Rule's Impacts on Tribal Energy Development

Good morning Chairman Young, Ranking Member Boren and Members of the Subcommittee. My name is Tex Hall. I am the Chairman of the Mandan, Hidatsa and Arikara Nation (MHA Nation). I am honored to present this testimony on the BLM's proposed regulation of hydraulic fracturing.

I. Introduction

Every time I turn around the MHA Nation must overcome yet another barrier to Indian energy development. Today's barrier is the BLM's proposed regulation of hydraulic fracturing used in the development of oil and gas resources. The BLM proposes to require an additional review and approval loop in what the Subcommittee has already found to be an overburdened regulatory process for developing Indian energy resources.

Over the last four years, MHA Nation and the Reservation have been in the middle of the most active oil and gas play in the United States. The Fort Berthold Reservation is located in the heart of the Bakken Formation, which is the largest continuous oil accumulation in the lower 48 states. In 2008, the United States Geological Survey estimated that the Bakken Formation contains between 3 billion and 4.3 billion barrels of oil.

MHA Nation is actively promoting the development of our energy resources. This country has an energy problem and we want to be a part of the solution! Our resources provide us with a substantial opportunity to ensure that our members have good jobs, can heat their homes and provide for their families. Our resources also add to this Nation's domestic energy supplies. Our goal is to continue to develop our resources in a responsible manner that will maintain our homelands and provide long-term economic security for our Reservation communities.

Since energy development began on the Reservation we have struggled with the federal bureaucracy for every single oil and gas permit. We now have about 250 wells in production and the MHA Nation and Fort Berthold Allottees have earned about \$182 million in oil and gas royalties. In addition, we have 905 vendors providing services directly to the oil and gas industry. Each of those vendors employs between 4 and 24 people. Based on an average employment of 12 jobs per company, that is in excess of 10,000 jobs.

In 2012, we expect more wells to be drilled on the Reservation than were drilled in the first four years combined. In 2013, we expect another 300 wells to be drilled. This energy development will result in hundreds of millions in royalty payments and economic activity. The BLM's proposed regulations stand in the way of that energy and economic development and will limit energy and economic development on the Fort Berthold Reservation.

It is important to note at the outset, that the BLM developed its regulations, which will have a tremendous impact on the development of Indian energy resources, without anything close to meaningful tribal consultation. This violates the Department's four month old "Policy on Consultation with Indian Tribes" (December 2011). What BLM has done to date, does not even come close to the "strong, meaningful role for tribal governments at all stages of federal decision-making on Indian policy" that the Department of the Interior promised when it announced its new tribal consultation policy. Press Release, Department of the Interior, "Secretary Salazar Kicks Off White House Tribal Nations Conference at Department of the Interior" (Dec. 2, 2011).

My testimony examines BLM's failure to comply with the Department's tribal consultation policy and sets out the requirements for consultation. In addition, I will discuss some of the problems with the proposed regulations and the impact the proposed regulations will have on energy development on the Fort Berthold Reservation.

II. BLM Must Withdraw the Proposed Regulation Until Meaningful Tribal Consultation has Occurred

The Bureau of Land Management (BLM) is developing a regulation for hydraulic fracturing activities that will have significant impacts the oil and gas resources being development on the Fort Berthold Reservation. Our industry partners report that BLM's proposed regulations may add so much delay, uncertainty and cost to the oil and gas permitting process that they may be forced to pull their drilling rigs off the Reservation. These rigs would likely end up developing oil and gas resources just over the Reservation boundary on state and private lands.

Since BLM has not fulfilled the Department's and the Administration's requirements for consultation with Indian tribes, BLM must withdraw the draft hydraulic fracturing regulations from the Office of Management and Budget (OMB) or should exclude the application of these regulations to any permits on Indian lands until proper and meaningful consultation with tribes can occur. In addition, the Department's Tribal Governance Officer (TGO), the Assistant Secretary for Indian Affairs and BLM should work with tribes to develop an appropriate

consultation protocol and timeline for the development of any regulations that may be needed for this issue.

Tribal consultation requirements are not just a formality. Tribal consultation is based on the long-standing government-to-government treaty relationship between Indian tribes and the federal government. This relationship requires consultation with tribal governments when federal actions will affect Indian resources. The purpose of consultation is to allow the two governments to engage in collaborative decision-making, promote tribal self-determination, and avoid costly mistakes. Tribal consultation is also an exercise of the federal government's trust responsibility to Indian tribes.

The Department of the Interior's Policy on Consultation with Indian Tribes (Tribal Consultation Policy) requires that the BLM structure a consultation process to allow "timely input" from tribes and which will enable BLM to work with tribes as "collaborative partners." Tribal Consultation Policy § VII.E.2. The policy states that, "[c]onsultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." *Id.* § II.

Because of the severe impacts the proposed regulation will have on the MHA Nation's and other tribe's resources, BLM is required to follow the "Stages of Consultation" set out in the Department's Tribal Consultation Policy in the development of any hydraulic fracturing regulations. These stages include an "Initial Planning Stage," a "Proposal Development Stage," and an "Implementation of Final Federal Action Stage."

As described in detail below, BLM has only begun to meet the requirements of the Initial Planning Stage even though BLM already submitted its draft regulations for review by OMB—generally the last step before publication in the Federal Register. BLM's tribal consultation actions to date consist of four January 2012 Regional Tribal Consultation meetings and a few follow up meetings with individual tribes. This is not what the Department's tribal consultation policy requires. This is just the beginning of tribal consultation. At this stage, BLM should not have draft regulations pending at OMB.

In addition, I believe that BLM must take proactive steps to correct its failure to comply with the Department's Tribal Consultation Policy and its federal trust obligations. This is particularly needed because BLM has already provided the draft hydraulic fracturing regulations to OMB. BLM's actions to date have given me and other tribes the impression that tribal input is not desired or only minimally needed even though there is strong evidence that the proposed regulations will cost the MHA Nation and the surrounding community a sizable number of jobs and money.

I ask that the Department enlist its TGO to monitor BLM's actions as it develops an appropriate consultation protocol and restarts tribal consultation. Throughout the consultation process, the Department's policy directs the TGO to facilitate government-to-government consultation, to implement a reporting system to ensure that consultation efforts are documented

and reported to the Secretary, and to fulfill other TGO obligations under the Department's policy. Tribal Consultation Policy § VII.B.1(a)-(g).

In this case, the resulting consultation protocol should clarify that BLM is prepared to: (1) withdraw the draft regulations from OMB or excluded permits on Indian lands from the proposed regulations, (2) work with tribes to develop a consultation timeline, (3) engage tribes in the Initial Planning Stage and the other two stages of consultation, and (4) generally set out the steps that BLM will follow to comply with the Department's Tribal Consultation Policy and other consultation requirements.

A. Initial Planning Stage

During the Initial Planning Stage, BLM is directed to involve tribes "as early as possible" and provide enough information to enable tribes to fully engage and assist in the development of regulations that will affect tribal resources. Tribal Consultation Policy § VII.E.1. This early stage should be informative as BLM identifies and describes the issue it believes needs regulation and it must also include a meaningful dialogue in which BLM considers tribal views on the issue, the need for regulation and, most importantly, alternatives for addressing the issue. Based on my review of BLM's actions to date, BLM has only begun to comply with the requirements of the Initial Planning Stage of the Department's Tribal Consultation Policy.

As an initial matter, the April and November 2011 Regional Public Forums in Bismarck, North Dakota, Little Rock, Arkansas, Denver, Colorado, and Washington, D.C. were not part of the tribal consultation process—as BLM asserted in meetings with tribes. These meetings were advertised to the general public, were not directed to tribal leaders, and were purely informational. These are not tribal consultation sessions on a government-to-government basis, do not provide opportunities for tribes to discuss their concerns and propose solutions, and should not be represented by BLM as part of the tribal consultation process.

The January 2012 Regional Tribal Consultations in Tulsa, Oklahoma, Billings, Montana, Salt Lake City, Utah; and Farmington, New Mexico could be considered a beginning to tribal consultation, but on their own, they do not fulfill the Department's Tribal Consultation Policy. These meetings were purely informational. The BLM made no attempt at these meetings to involve tribes in determining the scope of the issue, offer tribes an opportunity to participate in drafting the regulations, or engage tribes in a discussion of alternatives to federal regulation.

BLM's failure to involve tribes early in the regulation development process violates basic tribal consultation principles. For example, Executive Order No. 13175 requires that agencies, "consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes." Exec. Order No. 13175 § 3(c)(3) (Nov. 9, 2000). BLM never consulted with tribes on the need for hydraulic fracturing regulations, on the staffing and other steps which would be required to implement those regulations on Indian lands, or on preservation of tribes' authority to regulate the issue themselves. By not involving tribes, BLM has developed a

regulation that is likely to limit energy development on the Fort Berthold Reservation and cost us needed governmental revenues.

Based on these actions and according to the Department's own Tribal Consultation Policy, BLM is still in the Initial Planning Stage of tribal consultation. Consequently, BLM's draft regulations needs to be withdrawn from OMB or permits on Indian lands should be excluded from the regulation until BLM has complied with the policy. Allowing the draft regulation to be published in the Federal Register before initial consultation stages are completed would violate the Administration's and the Department's tribal consultation policies and leave tribes and the federal government with a costly new set of federal requirements that they are unprepared to implement.

B. Proposal Development Stage

Without fully initiating or completing the Initial Planning Stage, BLM is attempting to skip ahead and quickly complete the Proposal Development Stage with little to no tribal involvement. Contrary to BLM's actions, the Department's Tribal Consultation Policy requires BLM to work with tribes at the beginning of the Proposal Development Stage to establish a timeline for the consultation process. The Tribal Consultation Policy also requires BLM to work with tribes as "collaborative partners." This collaboration is critical because tribes are already facing regulatory requirements that the federal government is not capable of implementing in a timely manner.

First, at the start of the Proposal Development Stage, BLM is required to work with tribes to develop an appropriate schedule for the consultation. This is necessary in order to allow tribal officials and staff the time to analyze the issues and prepare meaningful ideas. The Tribal Consultation Policy specifically states that:

The Bureau or Office shall develop a process . . . that maximizes the opportunity for timely input by Indian Tribes and is consistent with both Tribal and Bureau or Office schedules. The Bureau or Office will solicit the views of affected Indian Tribes regarding the process timeline to consult on a Departmental Action with Tribal Implications. The Bureau or Office should work with Indian Tribes to structure a process, to the extent feasible, that considers specific Indian Tribal structures, traditional needs, and schedules of the Indian Tribes. The Bureau or Office should make all reasonable efforts to comply with the expressed views of the affected Indian Tribes regarding the process timeline at this Stage, taking into account the level of impact, the scope, and the complexity of the issues involved in the Departmental Action with Tribal Implications, along with the other factors driving the schedule. The process will be open and transparent. . . .

Tribal Consultation Policy § VII.E.2. BLM has not developed the required consultation process or timeline with tribes.

Hydraulic fracturing and the potential impact of the proposed regulations on tribal resources, Indian energy and economic development are significant—especially in areas of high demand for oil and gas resources like the Fort Berthold Reservation. A regulation of this magnitude requires a more extensive timeline and process to fully engage tribes in the development of draft regulations. To comply with the Department’s Tribal Consultation Policy during the Proposal Development Stage, BLM needs to develop a consultation timeline with tribes that takes into account the level of impact, the scope, and the complexity of the issues involved. To date, this has not happened.

Second, the Proposal Development Stage requires that BLM work with tribes as collaborative partners. While the January 2012 Regional Tribal Consultations included disclosure of the Department’s proposed action, BLM did not involve the MHA Nation or other tribes as collaborative partners or engage tribes in a meaningful dialogue about the substance of the regulations. These meetings were merely informational.

For example, BLM arrived at two of the four meetings with draft regulations already completed. Given our government-to-government relationship, and our first-hand knowledge of the industry, BLM should not present tribes with completed regulations at this stage, rather BLM should work with tribes to develop the regulations from the ground up. We know what works on our Reservations, BLM does not. BLM also did not engage tribes in a meaningful dialogue about the substance of the regulations. Of course, this would have been difficult as tribes were not provided an opportunity to review the regulations ahead of the meeting.

Moreover, soon after the January 2012 Regional Tribal Consultations, BLM submitted its draft regulation to OMB for review. OMB review is typically the last step before publication of a draft regulation in the Federal Register. BLM’s actions foreclosed meaningful consultation and did not provide any opportunity for collaboration with tribes on how to accomplish federal goals in the most efficient and cost effective manner.

After extensive efforts to contact BLM, the MHA Nation and a few tribes met with BLM in Washington, D.C. on March 26, 2012, to discuss the lack of tribal consultation and finally provide some feedback to BLM on the draft regulations. This meeting represented the first time that BLM and tribes were prepared to have a dialogue on the draft regulations. Unfortunately, because of BLM’s actions to date, the majority of the meeting was spent discussing the lack of tribal consultation. Towards the end of the meeting, there was a little time for tribes to provide some comments on the details of the draft regulations, but there was no substantive exchange of information, no development of the required consultation timeline, and no discussion of ideas and concerns about the practical problems that these regulations present.

The Department’s Tribal Consultation Policy also requires that tribal consultation be conducted with Departmental officials who are knowledgeable about the matters at hand, are authorized to speak for the Department, and can exercise delegated authority in the disposition and implementation of an agency action. Tribal Consultation Policy § II. In contrast, BLM officials who attended the March 26th meeting made clear throughout the meeting that they could only listen to tribal suggestions, could not provide any responses during the meeting, and would

need to discuss any responses with their superiors. Similarly, BLM's suggestion that tribes meet with their local Field Offices for consultation does not comply with the Department's Tribal Consultation Policy since BLM has made no indication that the local Field Offices are authorized to speak for the Department or exercise delegated authority. BLM "Dear Tribal Leader" letter (Dec. 9, 2011).

Finally, it is not the responsibility of the MHA Nation or other tribes to seek out meetings to discuss the contents of a draft regulation. The BLM is required to comply, with the Department's Tribal Consultation Policy on its own initiative when proposing to develop regulations that will affect tribal resources.

C. Implementation of Final Federal Action Stage

The Department's Tribal Consultation Policy includes a third stage regarding a post-consultation review process. While this third stage is not mandatory, its inclusion in the Department's Tribal Consultation Policy suggests that these efforts are encouraged, support the federal trust responsibility, and would result in more effective Departmental actions and regulations. If BLM eventually decides that a hydraulic fracturing regulation that includes Indian lands is needed, BLM should include an Implementation of Final Federal Action Stage in its consultation process.

Given the complexity of hydraulic fracturing, the fact that multiple agencies are already involved in the on-reservation drilling permit approval process, the magnitude of potential impacts to tribes and the need for adequate BLM staff to oversee any regulatory process, post-consultation review and training is likely to be needed. As you know, BLM already lacks the staff necessary to implement its current regulatory scheme in a timely manner, and these new regulations will simply add to that backlog, unless proper planning, with full tribal involvement, is undertaken

D. Summary

BLM skipped most of the Initial Planning Stage of the Department's Tribal Consultation Policy and is not complying with the requirements of the Proposal Development Stage. Consequently, BLM must withdraw the draft hydraulic fracturing regulations from OMB or should exclude the application of these regulations to any permits on Indian lands until proper and meaningful consultation with tribes can occur. Also, the Department's TGO, the Assistant Secretary for Indian Affairs and BLM should work with tribes to develop an appropriate consultation protocol and timeline for consultation on the development of any hydraulic fracturing regulation. This is a basic level of consultation and it is needed here to avoid impacts on the Reservation economy.

In sum, BLM must restart its consultation process to properly engage tribes. If BLM does not take these steps, BLM's proposed regulations on hydraulic fracturing would be developed in violation of the Department's four-month old Tribal Consultation Policy. This policy was developed, in part, to ensure early planning, involvement of tribes, and avoidance of

negative impacts. BLM's consultation to date is nothing like the meaningful role in federal decision-making promised to tribes when the consultation policy was announced.

III. Problems with the Proposed Regulation and Impacts on Energy Development

After many years of economic hardship, the MHA Nation and its members are finally seeing improved economic conditions due to the oil and gas development on the Reservation. BLM's proposed regulation of hydraulic fracturing activities would disproportionately impact the MHA Nation and its members due to our reliance on oil and gas development for economic growth and sustainability.

Time is of the essence. I ask that the Subcommittee and Congress take any actions that are available to prevent BLM from implementing its proposed regulations in order to save domestic energy production and desperately needed jobs and economic opportunity in Indian Country. I have already testified before the House Committee on Appropriations' Subcommittee on Interior, Environment and Related Agencies that Congress should prohibit federal dollars from being used to implement the proposed hydraulic fracturing regulations until a number of prerequisites are met. These prerequisites are:

- As described above, the BLM needs to follow the Department's own tribal consultation policy;
- The Environmental Protection Agency (EPA) must complete its study on hydraulic fracturing that the full House Appropriations Committee requested in its FY 2010 budget report and Indian tribes must be given an opportunity to review and respond to EPA's study;
- BLM needs to develop a staffing and implementation plan to ensure that its review and approval of hydraulic fracturing plans will not add to the already unreasonable delays that tribes face in trying to get oil and gas permits approved on Indian lands;
- BLM should be required to request and receive the funding necessary to fill staff positions, and to complete the hiring and training of those individuals, before it is allowed to implement these types of new regulations;
- BLM should be required to demonstrate that it has an adequate process in place to ensure that there is no duplication of existing requirements for on-reservation permits to drill; and,
- BLM should develop an implementation plan that will phase in hydraulic fracturing requirements over time, as the federal agencies and the oil and gas industry working on our reservations become familiar with these new demands.

These are common sense requirements for the development of any federal regulation. Rather than follow this logical procedure, BLM officials have stated that they developed the

proposed regulations in response to “public outcry.” I ask that the federal government, and the MHA Nation’s federal trustee, follow a more deliberative and substantive process, like the one outlined above, in developing regulations that will have economic consequences on the MHA Nation. In the remainder of my testimony, I will highlight a variety of problems with the BLM’s proposed hydraulic fracturing regulations.

First, I can find no authority for the BLM to regulate activities on Indian lands, including hydraulic fracturing. Although the BLM has jurisdiction to regulate activities on “public lands,” Indian lands are not public lands. Indian reservation lands are set aside and reserved for the exclusive use and benefit of Indian tribes. Neither the Federal Land Policy and Management Act of 1976 nor the Department of the Interior’s Departmental Manual provide BLM with direct or delegated authority over Indian lands.

If the BLM has somehow assumed authority over Indian lands, the BLM may not, consistent with the trust responsibility, apply public interest standards to Indian lands. In contrast to oil and gas development on public lands, royalties and taxes from oil and gas production on tribal and allotted lands on the Reservation are a significant source of revenue for our tribal government and income for allottees on the Reservation. Adding additional burdens for the development of oil and gas on the Reservation could chill production and force operators to shift investment away from our Reservation to state and private lands where the regulatory burden is less onerous. The Tribe requests that the Subcommittee and Congress pass legislation that would prevent Indian lands from being swept into laws and policies for public lands.

Second, I am not aware of any incidents on tribal lands, or for that matter public lands, that would precipitate federal regulation. While federal regulation of shallow gas wells in Wyoming and Pennsylvania may be justified to protect ground water, I see no such justification for deep horizontal wells like those that are drilled on the Fort Berthold Reservation. The wells drilled on our Reservation and the hydraulic fracturing activities take place far below the water table. Without proof that these rules are necessary to protect against an identified threat to the environment, deep well fracing on the Reservation should be exempt from the additional regulatory burdens that the proposed BLM regulations would impose.

Of course, I am also greatly concerned about the environmental health of the Fort Berthold Reservation. The MHA Nation cannot just pick up and move to another reservation if our lands or waters are spoiled. This is my home and I work every day to ensure that we maintain our natural resources for many generations to come. All I ask is that any regulation be based on sound science, as opposed to public outcry, and developed consistent with the federal trust responsibility as opposed to public interest standards.

Third, the BLM already lacks the staff to keep up with existing permitting requirements, let alone a new and complicated one. It already takes 5 to 20 times longer to get an oil and gas permit on Indian lands. On the Fort Berthold Reservation, we just got done clearing the backlog of Communitization Agreements when we lost the Director of our BLM Field Office. Now, Communitization Agreements are starting to pile up again while the BLM is proposing to create additional work for its short-staffed offices.

Fourth, oil and gas operators seeking permits for oil and gas activities on Indian lands already undergo an extensive environmental review process. BLM has not explained what its proposed hydraulic fracturing regulations will add to this process. The process is already lengthy, time consuming and costly. These delays and costs are one of the primary reasons why oil and gas developers look just over the Reservation boundary for cheaper and quicker development opportunities on private lands. We need to remove road blocks to Indian energy development, not increase them.

Fifth, as noted above, federal studies of hydraulic fracturing activities are still ongoing. The EPA and other federal agencies are currently conducting scientific studies on hydraulic fracturing. BLM's proposed regulations are premature in advance of the EPA study, and BLM has offered no justification for proceeding with this new regulation without the benefit of these studies.

Sixth, economic impacts on the MHA Nation will be significant. The MHA Nation has been using revenues from oil and gas development to successfully reduce its governmental debt and provide the physical and governmental infrastructure to support economic development. If the BLM's new hydraulic fracturing regulations create a disincentive for companies to develop energy on the Reservation, the MHA Nation would suffer a disproportionately greater impact than others.

For example, based on an 18% tribal royalty rate, a single oil and gas well provides our tribal government with more that \$2 million per year in revenues to fund government functions. Multiply this by 100 or 200 wells producing tribally owned minerals and the numbers are staggering. While we do not have this many wells producing from tribally owned minerals yet, these kinds of numbers are not far off. The MHA Nation will not receive these revenues if companies are forced to pull drilling rigs off the Reservation for cheaper and more certain development opportunities on state and private lands.

IV. Conclusion

I want to thank Chairman Young, Ranking Member Boren and the members of the Subcommittee for the opportunity to testify on the BLM's proposed hydraulic fracturing regulations. Unlike the public lands that are clearly within BLM's authority to regulate, the application of the regulations to Indian lands will have a direct effect on the MHA Nation's revenues, our ability to invest in the future, and the services we are able to provide our members and future generations. The MHA Nation stands ready to work with the Subcommittee and the BLM to find an appropriate resolution.

At the appropriate time, I would be happy to answer any questions you may have. Thank you.