MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

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

Legislative Hearing on H.R. 1548, the Native American Energy Act
Subcommittee on Indian and Alaska Native Affairs
Natural Resources Committee
U.S. House of Representatives

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Chairman Young, Ranking Member Hanabusa and Members of the Subcommittee, my name is Tex Hall. I am the Chairman of the Mandan, Hidatsa and Arikara Nation (MHA Nation). I appreciate this opportunity to testify on H.R. 1548, the Native American Energy Act.

In the 112th Congress, Congressman Young introduced a similar bill, H.R. 3973. The MHA Nation provided written and verbal testimony on H.R. 3973 during a hearing held on February 15, 2012. I ask that the Committee reference the MHA Nation's prior testimony for our general views on Indian energy development and the barriers that tribes face in developing their resources. I also ask the Committee reference the MHA Nation's prior testimony for specific comments on provisions that H.R. 3973 has in common with the current bill, H.R. 1548. My testimony today focuses on issues raised during the hearing on H.R. 1548 and changes in H.R. 1548 compared to the prior bill.

For the past five years, our Reservation has been at the center of the most active oil and gas play in the United States—the Bakken Formation in North Dakota. The Bakken Formation is the largest continuous oil accumulation in the lower 48 states. Recently, the United States Geological Society (USGS) almost doubled its estimate for the amount of recoverable oil and gas in the Bakken Formation. The USGS now estimates that the Bakken Formation contains 7.4 billion barrels of recoverable oil.

In five short years, our region has become the second highest oil and gas producing area in the United States. We produce more oil than Alaska. Only Texas produces more. Currently, there are 30 drilling rigs, more than 15,000 semi-trucks operating on our Reservation and about 625 oil and gas wells in production. With all this activity on our Reservation, we need increased support for tribal authority—not federal or state authority.

Affirming Tribal Authority to Support Energy Development

The MHA Nation supports H.R. 1548 and many of its provisions for streamlining and improving federal permit processing. Indeed, the federal government's role in permit processing and upholding the trust responsibility on our Reservation is an important example of the treaty relationship between our governments. Because of our treaty and trust relationship, the federal government has a significant role on in energy development on our Reservation and Congress should support that role. Bills like H.R. 1548 would improve the federal government's role in energy permitting on our Reservation.

However, Congress must do more than simply improve the federal role in Indian energy development. The MHA Nation and tribes everywhere need Congress to take a number of actions to affirm tribal governmental authority. Congress must address a number of outdated laws, court opinions and policies that prevent tribes from fully exercising tribal authority and fully benefitting from Indian energy development. In this legal climate, the Subcommittee can pass all the federal streamlining in the world, but Indian energy development will remain stifled.

The most significant authority Indian tribes need to develop their energy and economic resources is exclusive taxing authority over their reservations. Tribes already have the authority to tax, but encroachments on tribal authority, jurisdiction and business activities by state and federal governments, have disabled the ability of tribes to use their taxing authority to support energy and economic development.

Along with H.R. 1548, the MHA Nation and tribes everywhere, need Congress to pass laws affirming the exclusive authority of Indian tribes to tax energy development on our reservations. Currently, outdated Supreme Court precedent allows states to place a double tax on energy development on tribal lands. These state taxes eliminate or reduce our ability to raise our own taxes and tribes remain ever more dependent upon the federal government.

On the MHA Nation's Fort Berthold Reservation, this double taxation forced the MHA Nation into an unfair oil and gas tax agreement with the State of North Dakota. Under the tax agreement, the State gets about 61% of the tax revenues from energy production on the Reservation, and the MHA Nation gets 39%. While oil and gas development on the Reservation has proceeded under the tax agreement, the MHA Nation is now subject to a 61% tax on its oil and gas resources. No one else in the United States is subject to a 61% tax rate. It is incredible that the federal government allows states to fill their coffers off the backs of impoverished Indian tribes while keeping tribes dependent upon shrinking federal budgets.

Since 2008, the State of North Dakota has taken a $314 million in tax windfall from the MHA Nation and over the next four years, the State's windfall will grow to $1 billion. The negative impact on the Reservation is not so hard to figure out. In 2011, the State collected more than $75 million in taxes from energy development on the Reservation, but spent less than $2 million of that amount on state roads on the Reservation and zero tax dollars on federal and tribal roads. In addition, none of the 2011 funds were used to mitigate impacts that oil and gas development has had on the MHA Nation, its members and our natural resources.

The State receives this windfall at the expense of the MHA Nation and tribal and federal infrastructure even though in just the past two years the State has collected almost $4 billion in tax revenues from all of the oil and gas development in the State. In fact, within a year or two of the tax agreement, the State's coffers were so full that the State created an investment account whose funds cannot be spent until 2017. While these funds sit around earning interest, federal and tribal infrastructure on our Reservation is such disrepair every day is a state of emergency. This affects our ability to maximize oil and gas development, but more importantly, our residents and tribal members must live in this state of emergency just getting to school or the grocery store.

The MHA Nation needs tax revenues to do the same work that every other government does. We need to maintain roads so that heavy equipment can reach drilling locations, but also so that our tribal members can safely get to school or work. We also need to provide increased law enforcement to protect tribal members and the growing population on our Reservation. We also need to develop tribal codes and employ tribal staff to regulate activities on the Reservation. For example, we developed a code to prevent dumping of hazardous waste, but we also need to hire staff to enforce the code.

Indian tribes need Congress to pass laws affirming tribal authority—not state or federal authority. During the hearing on H.R. 1548, it was suggested that energy permitting on Indian lands could be improved by utilizing state permitting processes. For example, in North Dakota the oil and gas permitting process typically takes a few weeks. On tribal lands, the Bureau of Indian Affairs (BIA) and all the other federal agencies involved in the bureaucratic permitting process can take year or more to permit a single oil and gas well.

While states may have efficient permitting processes for energy and economic development, state authority has no place on Indian lands. Suggesting that tribes should utilize state permitting processes and authority dismisses Indian tribal sovereignty, jurisdiction and authority. Permitting decisions on Indian lands cannot be made by state government employees according to state standards. If States were given permitting authority over Indian lands, even if it were voluntary for each tribe, it would increase state encroachment into tribal affairs and impact tribal governments across the Country.

To solve the problem with federal permitting delays, we do not need more state authority or more state encroachment on Indian reservations. We also do not need more federal regulation of our activities. Instead, we need Congress and the federal government to support tribal authority and remove the layers of federal regulation that burden our development opportunities. Congress has already passed self-determination laws and the federal government already supports a number of self-determination policies and programs. However, for tribes to fully realize the promise of self-determination laws, policies and programs, Congress must affirm the key authorities needed by tribal governments—including taxing authority.

The "Indian Tribal Energy Development and Self-Determination Act of 2005" is a perfect example of our need for Congress to affirm tribal authority. Enacted as a part of the

Energy Policy Act of 2005, this new law expanded the policy of self-determination to Indian energy resource development through "Tribal Energy Resource Agreements" or TERA's. Once a tribe has an approved TERA, that tribe is free to design its own permitting process and approve permits for energy development on its reservation without further review or approval by the Secretary of the Interior. Under this authority, tribes could manage and greatly improve and streamline the permitting processes on their reservations.

However, since its enactment in 2005, no tribe has applied for a TERA and taken advantage of its expansion of self-determination policies to energy development. One of the primary reasons tribes have not applied for a TERA and created their own permit approval processes is a lack of tax revenues to hire the staff needed to run a permitting office. Not to mention the tribal codes and regulations that would have to be drafted, or the office space and equipment needed.

During the hearing, Members of the Subcommittee asked the Interior witness about federal paternalism and the need to promote tribal self-determination and decision-making, but paternalism will not end and self-determination will not be achieved until Congress acts to affirm tribal taxing authority, sovereignty and regulatory jurisdiction over reservation lands. Without these basic authorities, tribes cannot fully realize the self-determination that Congress has already passed. Congress needs to untie the hands of tribal governments and affirm tribal authority.

Specific Comments on H.R. 1548, the Native American Energy Act

H.R. 1548 includes a number of provisions that the MHA Nation supports, but we ask the the Subcommittee greatly expand the bill to include the authorities discussed above. While much more is needed, the MHA Nation supports a number of provisions in the bill including changes to the appraisal process, standardizing lease numbers, limiting participants in the environmental review process to the affected area, and eliminating BLM oil and gas fees. I ask that the Subcommittee reference my prior testimony during the hearing on H.R. 3973 on February 15, 2012 for comments on the provisions these bills have in common.

H.R. 1548 also includes some changes from the prior bill. In particular, provisions to establish Indian Energy Development Offices have been removed from the bill and a provision to exclude Indian lands from the Bureau of Land Management's (BLM) proposed hydraulic fracturing regulations has been included in the bill. In the rest of my testimony, I provide specific comments on these changes.

First, the MHA Nation asks that Indian Energy Development Offices be included in the bill. Indian Energy Development Offices would provide a common sense solution to the overly bureaucratic federal permitting process. Until Congress affirms tribal authority and tribes begin running their own permitting processes, Indian Energy Development Offices would provide the streamlining and staffing needed to facilitate energy development on Indian lands.

Indian Energy Development Offices, or one-stop shops as former Senator Dorgan called them, would bring together everyone involved in energy permitting on Indian lands under the same roof. These offices would only be needed in areas of high permitting activity and would increase energy staffing and expertise within the BIA.

There is already a "virtual" one-stop shop on the Fort Berthold Reservation, but, as the name implies, the federal government has only partially committed to the success of this office. As a result, the MHA Nation has received some temporary and part-time support, but not the permanent solution we will need as we develop the largest continuous oil accumulation in the lower 48 states for decades to come. We need Congress to permanently authorize and fully fund one-stop shops in areas of high permitting demand on Indian lands.

In fact, these one-stop shops are already being provided for BLM lands while leaving tribal requests for this same kind of coordination behind. Section 365 of the Energy Policy Act of 2005 authorized BLM to establish 7 pilot offices and streamline federal permitting by co-locating staff from different federal agencies in these offices. And, just a few weeks ago, the Senate Energy and Natural Resources Committee voted out a bill that would expand these BLM pilot offices. In addition, the President's fiscal year 2014 budget also proposed reforms to revamp and improve these BLM one-stop-shops.

Congress should provide at least the same level of commitment for energy development on Indian lands as it does for federal lands. Energy development on Indian lands provides benefits far beyond what are obtained when similar resources are developed on federal lands. Developing Indian energy resources provides needed economic development, jobs, and infrastructure growth on Indian reservations. In the Great Plains and Rocky Mountain Regions, where many conventional energy resources are available for development on Indian reservations, the average unemployment rates are 77% and 67%, respectively as reported in the Bureau of Indian Affairs Labor Force Report of 2005. These regions encompass the States of Montana, Nebraska, North Dakota, South Dakota and Wyoming.

Second, the MHA Nation strongly supports H.R. 1548's new Section 11. Section 11 would prevent the BLM from applying its proposed hydraulic fracturing regulations to Indian lands. Section 11 is needed to prevent the BLM from exceeding its limited authority under the Federal Lands Policy and Management Act of 1976 (FLPMA).

In defining the "public lands" that BLM would manage under FLPMA, Congress specifically excluded Indian lands. Congress provided that,

> The term 'public lands' means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except– . . . lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702 (e) and (e)(2). In the proposed hydraulic fracturing regulations, BLM appears to believe that under the Indian Mineral Leasing Act of 1938 the Secretary of the Interior can delegate to BLM the authority to regulate oil and gas leases on Indian trust lands. This is incorrect. No amount of delegated authority, agency discretion or administrative convenience can override the specific direction of Congress in FLPMA.

Congress' limitation of BLM's authority makes perfect sense. Public lands and Indian lands are to be managed according to very different standards. Attempting to manage Indian lands according to public interest standards, including "multiple use" and national recreation and scenic values, violates the trust standards established for the management of Indian lands. Section 11 would ensure that BLM does not exceed its authority and apply its public interest standards to Indian lands.

In addition, Section 11 is needed to affirm tribal primacy to regulate hydraulic fracturing. Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, directs BLM to consult with Indian tribes on 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." Section 11 is consistent with this Executive Order and would prevent BLM regulation where the prerogatives and authority of Indian tribes should be preserved.

Finally, the MHA Nation asks that a number of other provisions to promote and increase tribal authority be included in H.R. 1548. There are a variety of sources already available to the Subcommittee where problems and legislative solutions have been identified, including:

- on July 18, 2011, in response to Congressman Young's request, the MHA Nation submitted 31 legislative proposals to address barriers to Indian energy; and,
- in our February 15, 2012, testimony on the prior version of the Native American Energy Act, H.R. 3973, the MHA Nation highlighted 20 of its legislative proposals.

In addition, attached to today's testimony are legislative proposals specifically aimed at increasing tribal authority.

The MHA Nation asks that the Subcommittee review these submissions and expand H.R. 1548 to affirm tribal authority. I want to thank Chairman Young, Ranking Member Hanabusa and the Members of the Subcommittee for your consideration of our testimony.

Testimony of Chairman Hall
Legislative Hearing on H.R. 1548 - Additional Materials for the Record:

Legislative Proposals to Increase Tribal Authority and
Support Indian Energy Development

1. **Indian lands are not public lands.** Despite clear statements from Congress that Indian lands are not public lands, the Department of the Interior does not consistently follow Congressional direction. For example, the Federal Land Policy and Management Act, Public Law 94-579, specifically states that the Bureau of Land Management (BLM) does not have authority on Indian lands. However, Interior routinely involves the BLM in regulating energy development on Indian lands. This has resulted in public lands standards being applied to Indian lands in violation of the federal government's trust responsibility.

   Proposed legislative solutions:

   - Legislation to clarify that Indian lands are not public lands. This would prohibit land managing agencies from regulating activities on Indian lands and ensure that Indian lands are managed for the exclusive use and benefit of Indian tribes.

   - In the alternative, legislation could allow Interior to delegate authority to the BLM to regulate activities on Indian lands, but require that BLM develop separate and specific regulations in consultation with Indian tribes according to timelines, requiring involvement of tribes and promotion of the federal trust responsibility for any regulations or permitting processes.

   - The National Environmental Policy Act (NEPA) is also applied to Indian lands through the same public lands reasoning. The application of NEPA to Indian lands diminishes the authority of Indian tribes by allowing anyone from across the Nation to comment on and influence activities on Indian lands. Legislation could: 1) exclude Indian lands from NEPA, 2) provide "treatment-as-a-state" authority for tribes take over the NEPA process, 3) provide for the ability of Indian tribes to "contract" under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, to obtain resources needed to implement "treatment-as-a-state" provisions, and 3) limit NEPA participants to the affected area or reservation boundary.

2. **Affirm exclusive tribal authority to tax activities on Indian lands.** Indian tribes need the same tax resources that other governments rely on to oversee energy development and provide infrastructure needed to support the energy industry. However, current federal case law allows states to tax activities on Indian lands without regard to the chilling effect such a burden puts on Reservation energy development. Legislation could require tribes to fairly reimburse states for any substantiated services that have a nexus to oil and gas production impacts on Indian lands.

   Proposed Legislative Text:

   (a) IN GENERAL.—Indian tribes have exclusive authority to levy or require all assessments, taxes, fees, or levies for energy activities on Indian lands.

(b) REIMBURSEMENT FOR SERVICES.—State and other local governments may enter into agreements with Indian tribes for reimbursement of services provided by the state or local government that are a directly related to the energy activities on Indian lands. Indian tribes, state and local governments are directed to negotiate in good faith in developing such agreements. Any agreement under this section may be reviewed for accuracy by the Secretary of the Interior.

(c) DEFINITIONS.—For the purposes of this section, the terms "Indian tribe" and "Indian land" have the meaning given the terms in section 2601 of the Energy Policy Act of 1992 (25 U.S.C. 3501).

3. **Confirm Tribal Jurisdiction Over Rights-of-Way.** Legislation is needed to clarify that tribes retain inherent sovereign authority and jurisdiction over any rights-of-way they have granted. Over the last 30 years, jurisdiction over rights-of-way has been treated differently by various federal courts. Each time an issue arises, another federal court undertakes a new examination. This leads to uncertainty in the law and a lack of dependability about the rules that apply on a right-of-way. This hinders development of energy resources because all parties need certainty in the law.

   Proposed Legislative Text: Notwithstanding any other provision of law, Indian tribes retain inherent sovereignty and jurisdiction over Indian and non-Indian activities on any rights-of-way across Indian land granted for any purpose.

4. **Contracting for Implementation of Clean Water Act, Clean Air Act, Safe Drinking Water Act and other Treatment-as-a-State Authorities.** Contracting under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, has been used successfully for decades to provide tribes with greater control over programs and decision-making in Indian Country. This authority and opportunity should be extended to "treatment-as-a-state" provisions under the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act and other authorities. This funding would increase the number of tribes who are able to develop the tribal codes and programs needed to implement these existing authorities. This funding would also provide tribes with fair compensation for taking over federal responsibilities.

5. **Permanently Repeal the "Essential Government Function" Test for Tribal Economic Development Bonds.** The American Recovery and Reinvestment Act of 2009 added new § 7871(f) to the IRS Code. In general, the purpose of new § 7871(f) was to give tribes greater flexibility to use tax-exempt bonds to finance economic development projects than is allowable under the existing standard of § 7871(c). The more restrictive standard under § 7871(c) generally limits the use by Indian tribal governments of tax-exempt bonds to the financing of certain activities that constitute essential governmental functions customarily performed by State and local governments with general taxing powers and certain manufacturing facilities. The more flexible standard under new § 7871(f) generally allows Indian tribal governments to use tax-exempt bonds to finance any economic development projects (excluding certain gaming facilities and projects located outside of Indian

reservations as provided in § 7871(f)(3)(B)) or other activities for which State or local governments could use tax-exempt bonds under § 103.

Section 7871(c) should be repealed and replaced with § 7871(f). Or, at a minimum, § 7871(f) should be permanently extended. Need a recurring annual allocation for TED Bonds. Any unused allocation should be reallocated on a yearly basis.

6. **Indian Energy Development Offices and Needed Staff.** The BIA lacks the staff and expertise to oversee energy development on Indian lands. In addition, Indian energy development is often subject to extensive review and approval by multiple agencies. The resulting bureaucratic delays are a disincentive to energy development on Indian lands. Indian Energy Development Offices should be created in each BIA regional and agency offices where there is a high level of energy activities. Offices should be staffed with energy experts and people familiar with the environmental impacts of energy projects. Tribes should be able to contract under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, to perform the functions of these offices.

Proposed Legislative Text:

Section 2602(a) of the Energy Policy Act of 1992 (25 U.S.C. 3502(a)) is amended—
(1) by redesignating paragraph (3) as paragraph (4);
(2) by inserting after paragraph (2) the following:
"(3) INDIAN ENERGY DEVELOPMENT OFFICES.—
"(A) ESTABLISHMENT.—To assist the Secretary in carrying out the Program, the Secretary shall establish within the Department of the Interior not less than 5 offices.
"(B) NAMING.—Each office established under subparagraph (A) shall be known as an 'Indian Energy Development Office'.
"(C) LOCATION.—The Secretary shall locate each Indian Energy Development Office—
"(i) within a regional or agency office of the Bureau of Indian Affairs; and
"(ii) to the maximum extent practicable, in an area in which there exists a high quantity of tribal energy development opportunities, as determined by the Secretary in consultation with Indian tribes.
"(D) DIRECTORS.—Each Indian Energy Development Office established under this paragraph shall be headed by a director.
"(E) DUTIES.—The director of each Indian Energy Development Office shall—
"(i) provide energy-related information and resources to Indian tribes and tribal members;
"(ii) coordinate meetings and outreach among Indian tribes, tribal members, energy companies, and relevant Federal, State, and tribal agencies;
"(iii) oversee, and ensure the timely processing of, Indian energy applications, permits, licenses, and other documents that are subject to development, review, or processing by—
"(I) the Bureau of Indian Affairs;
"(II) the Bureau of Land Management;
"(III) the National Park Service;
"(IV) the United States Fish and Wildlife Service;

"(V) the Bureau of Reclamation;
"(VI) the Minerals Management Service; or
"(VII) the Office of Special Trustee for American Indians of the Department of the Interior; and
"(iv) consult with Indian tribes that will be served by an Indian Energy Development Office to determine what services, information, facilities, or programs would best expedite the responsible development of energy resources."
"(F) STAFF.—Each Indian Energy Development Office established under this paragraph shall be adequately staffed to meet the demand for energy permitting in the region or agency where the office is established. Staff and functions of each Indian Energy Development Office may be contracting by the applicable tribe under the Indian Self-Determination and Education Assistance Act, Public Law 93-638.

7. **Roads & Infrastructure.** Tribal energy production is burdened by a lack of adequate roads, railroad lines, safe bridges and other infrastructure required to move equipment and extracted resources. Tribal roads, bridges, rail lines and other infrastructure were not designed to accommodate a large influx of new traffic by large trucks and heavy equipment. As a result, reservations with large scale energy production now find themselves with dilapidated roads and bridges, and seriously overburdened law enforcement which are endangering their communities as well as adding to the costs and delays of production.

   Proposed Legislative Text: Within nine months of enactment, the Departments of Interior and Transportation shall jointly develop and submit to Congress, a comprehensive plan for repairing, reconstructing and maintaining on-reservation roads, bridges and rail lines utilized by the oil, gas and coal industry. Such plan shall be developed in consultation with tribes engaged in large scale oil, gas and coal development. The completed plan shall ensure working on all major infrastructure is undertaken within 24 months of enactment of this Act and that a funded plan is in place to maintain that infrastructure once it is completed.

   This plan shall also make specific recommendations for the development of new roads, rail lines, pipelines and other infrastructure which would enhance oil and gas production on each reservation which houses significant oil, gas and coal reserves.

8. **Tribal Energy Development Capacity Building.** In addition to tax policies and regulatory burdens, a significant reason Indian enerrgy resources remain untapped is a need for additional energy development and oversight experience within tribal governments. Indian tribes want to take the lead in developing their resources, but for more than a century national energy policy has not treated tribes as mere lessors and not energy developers. The full support of the Department of Energy is needed to assist tribes in building the capacity to develop and oversee energy resources.

   Proposed Legislative Solution: The Department of Energy's program offices such as the Advanced Research Projects Agency - Energy, Electricity Delivery & Energy Reliability, Energy Efficiency & Renewable Energy, Fossil Energy should be required to set-aside a portion of their budgets to assist Indian tribes in assessing, developing, and regulating tribal energy resources. Technical assistance, assessments, and training programs should be developed in coordination with the Office of Indian Energy Policies and Programs.