

**Mr. Grant Stafne, Councilman**  
**Assiniboine and Sioux Tribes of the Fort Peck Reservation**  
**Testimony for the Senate Committee on Indian Affairs**  
**Hearing on “The GAO Report on Indian Energy Development: Poor Management by BIA**  
**Has Hindered Development on Indian Lands”**  
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**I. Introduction**

My name is Grant Stafne, and I am a member of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. Tribal Chairman AT Stafne and my fellow Tribal Executive Board members send their best wishes and thanks to Chairman Barrasso, Vice Chairman Tester, and the Committee for holding this important oversight hearing on the GAO’s report on the effects of BIA’s management on development on Indian Lands, *GAO-15-502, Indian Energy Development: Poor Management by BIA has Hindered Energy Development on Indian Lands* (“Report”).

The Fort Peck Reservation consists of over two thousand square miles of land in northeastern Montana. The Assiniboine and Sioux Tribes and individual Indians own about one million acres of land. Over 6,700 Tribal members and non-member Indians live on the Reservation, along with over 3,200 non-Indians. We have been developing oil and gas reserves on our Reservation since the early 1950s.

**II. The Opportunities and Challenges of Energy Development on the Fort Peck Reservation**

The Fort Peck Reservation lies within the western part of the Williston Basin, which includes many oil producing formations, including what is commonly known as the Bakken formation and the Three Forks formation. Since the 1950s, a major part of the Tribes’ economy has been based on oil and gas development. In the 1950s, the Tribes began to lease substantial amounts of Tribal mineral lands to non-Indian companies for oil and gas development. In the oil boom of the 1970s and early 1980s, we asserted much greater control over this process, insisting on increased royalty rates for new Tribal leases, and entering into service contracts where the Tribes hired a private company to explore and develop Tribal oil and gas for our own benefit. We also imposed a Tribal severance tax on energy development. During the early 1980s, Tribal revenues from oil and gas lease rents and royalties came to over \$8 million in some years. Over the last two decades, oil and gas development on the Fort Peck Reservation has tapered off significantly.

However, the development of horizontal drilling techniques allows for better access to known oil and gas reservoirs in the Bakken and Three Forks formations on our Reservation. These reserves were previously inaccessible due to the low porosity and low permeability of the Bakken and Three Forks rock formations containing the oil and gas, which made it difficult to extract the product using conventional vertical drilling techniques. The oil and gas is essentially

trapped in the dense rock formation and cannot be extracted merely by drilling downward. Instead, the oil and gas must be released through horizontal drilling and a process called hydraulic fracture stimulation or more commonly “fracking.” An April 2008 U.S. Geological Survey Report determined that horizontal drilling and fracturing techniques could provide access to 3 to 4.3 billion barrels of recoverable oil in the Bakken formation alone. In 2011, Continental Resources Inc., a petroleum liquids producer in the U.S., declared that the “Bakken play in the Williston Basin could become the world’s largest discovery in the last 30-40 years.” Continental estimates the Bakken and Three Forks collectively hold 24 billion barrels of potentially recoverable crude oil equivalent: 20 billion in oil and 4 billion in natural gas. While much of the recent Bakken play has focused on reserves in North Dakota, it is now moving back to Montana and to the Fort Peck Reservation in particular.

Even though the recent drop in the price of oil presents an additional obstacle to development of our oil and gas resources, the Fort Peck Tribes sees this technological advance as an opportunity for our Tribal government – working in close collaboration with our Federal trustee – to use the bounty of our natural resources to create jobs and spur sustainable economic development to erase the persistently high rates of unemployment and poverty on our Reservation. Despite our best efforts over the past decades to develop our natural resources in an economically and environmentally sustainable manner, the difficulty of tapping these reserves, along with the challenges of dealing with multiple jurisdictions, have made it difficult for our Tribal government to make a significant dent in the unemployment and poverty that still plague our Reservation. We can and must do better, but this will only happen if our Federal trustee works with us to avoid the mistakes of the past. Unfortunately many of the factors identified in the recent GAO report on Indian Energy Development have had direct impacts on the pace of development of the oil and gas resources on our Reservation.

For example, the Report identifies the nature of “checkerboard” and fractionated land interests as a serious problem. *See, e.g.*, Report at 28. Like most reservations in Montana, our Reservation was opened to homesteaders a century ago, with trust and fee lands interspersed in a “checkerboard” ownership pattern. Consequently, the development of lands and resources within our Reservation is subject to oversight from many federal, state and tribal agencies and laws. If done properly and with respect for tribal sovereignty, federal government oversight and regulation should not unduly impede energy development or infringe on the proper exercise of Tribal governmental authority on our Reservation. Unfortunately, our experience has taught us that federal involvement is not always helpful, particularly in the field of energy development.

Federal and state agencies often do not coordinate well with one another or with tribal agencies. And as the Report identifies, this leads to long delays in the approval of required paperwork and in the implementation of tribally-beneficial energy development policies. While there are many excellent, highly-motivated officials in the Department of the Interior (DOI) and the Department of Energy (DOE) working to provide useful technical assistance to tribes, too often this technical expertise does not make it down to the BIA Regional Offices and Agencies on the reservations. BIA Regional and Agency staff often do not have adequate technical expertise in the complex field of energy development, and they do not always appreciate that

“time is of the essence” when it comes to energy development. Our experience lines up with the Report’s findings on the need for more – and better trained and resourced – staff to work on Indian energy issues.

The Fort Peck Agency’s long delays in processing mineral leases and other critical energy development paperwork often frustrate our energy development plans and serve only to push oil, gas, and other types of energy and mineral development off the Reservation. In fact, BIA approval of oil and gas leases can take so long that Indian probate cases have been known to open and close before any BIA action is ever taken. Time is money to energy producers. Federal inaction can often be as bad as wrong action, and we have found instances where the BIA has simply failed to carry out its trust responsibility by waiting months, even years, to act on mineral leases, appraisals, requests for drilling permits, and other documents requiring prompt action.

Just as time is money to energy producers, money is money to energy producers. If the costs of “on-reservation” energy production is much higher than the cost of “off-reservation” energy production, energy producers will naturally locate where it is less expensive to operate. We have already seen this pattern in the Williston Basin and do not want to see it continue. Federal permit fees and other energy development costs should not be vastly higher on tribal lands than they are on state lands. By and large, the market should decide these costs and fees, not federal bureaucrats.

The United States must do a better job of honoring its trust obligation to all tribal nations in the field of natural resource development. As discussed in the recommendation section below, DOI and DOE policymakers should work together to place knowledgeable oil and gas development experts at every BIA Agency where tribes are actively working to develop oil production in the Bakken and Three Forks formations. These locally-based experts could help the BIA Agency staff improve their turn-around time for required approval of a wide-range of energy-related documents. These experts should also be qualified to aid tribal leaders and BIA officials in planning for (and identifying funding resources for) the critical transportation infrastructure needed to support energy development in a safe manner. We have witnessed the damage created on the Fort Berthold Reservation to the Tribal road systems when oil production truck traffic increased rapidly with no corresponding increase in the transportation infrastructure needed to support it. Roads were destroyed and lives were lost in preventable traffic accidents.

Congress and the Administration have important roles to play in helping all tribes gain the benefits of sound and sustainable development of the Bakken and Three Forks formations. Congressional support for reservation-based transportation infrastructure, road maintenance and traffic safety program funding are critical to the safe and efficient development of the Bakken and Three Forks oil fields. Energy development activities also need to be coordinated with law enforcement officials, employee training center directors, environmental protection officials, school superintendent, and housing program directors so that the great crush of new people and economic activity on the Reservation does not overwhelm the Tribes’ limited governmental

resources in these areas. Fort Peck Tribal members must also be adequately trained and equipped for jobs in the oil and gas industry.

Greater federal funding assistance and technical support for the Tribal law enforcement, housing, environmental, career training, and educational programs will help us ensure that the many positives that come from sound energy development are not overshadowed by the negative consequences of traffic congestion, traffic safety concerns, and environmental damage.

Our Tribal government is entrusted with protecting our homelands for the next seven generations. We have a duty to our ancestors to ensure that the land they fought to preserve for us is maintained in a culturally and environmentally sound manner to sustain our people for generations to come. Thus, as we consider the positive job creation and economic development potential of Bakken energy development or other major projects such as the Keystone XL Pipeline, we have a corresponding duty to ensure that these projects are carefully planned and studied to ensure that they do not put our sacred sites at risk or otherwise imperil the sacred trust we have to preserve our homelands for future generations.

### **III. Recommendations for Improving Reservation-Based Energy Development**

This hearing is timely and important. The Tribes believe the specific recommendations set out below will help ensure that tribal nations – indeed the entire Nation – will be in a better position to capitalize on the great economic and job creation opportunity presented by the Bakken and Three Forks oil plays. These recommendations will also help tribal nations become engines of economic growth in the broader field of energy development – including renewable energy development – for the benefit of all.

#### **A. Improve BIA’s Administration of Energy Development**

The GAO Report identified the BIA’s review and response times and the cost of permitting as hindering energy development. Report at 21, 27. We agree. However, in addition to the length of time it takes for the BIA Agency to act on leases, permits and other paperwork, a great area of concern is the deficiencies within the BIA’s Realty Division. Specifically, there is not a certified realty appraiser at the Fort Peck Agency. Consequently, the BIA’s assessed values for rights-of-way and well-pad sites are sometimes 300 percent what they should be. For example, the Fort Peck Energy Company (“FPEC”), which the Tribes’ former energy development arm, paid \$15,000 each for two well-pad sites. This price may be consistent with the amounts now paid in North Dakota, where major development activities are already ongoing, but it is inconsistent with normal appraising practices in a place where oil has not yet been located in paying quantities. FPEC paid this fee under protest because it did not have the luxury of time to dispute the BIA’s actions. Available drilling rigs are in high demand and difficult to get so FPEC had to secure the well-pad sites even though it strongly disagreed with the BIA Agency assessment. This is but one example of our Federal trustee charging a tribally-owned corporation an improper assessment due to a lack of oil development expertise and appraisal experience.

We have encountered the same difficulty in securing rights-of-way (“ROW”) for oil exploration activities. We are aware of one company that has cancelled its plans to develop two wells on the Fort Peck Reservation because the BIA Agency staff insisted on a ROW fee in excess of \$28,000, which is far more than would be paid off-reservation. While it is of course important that allottees and our Tribal trust lands receive fair compensation for ROW usage, it is equally important that appraisals are not so unfair or arbitrary that they discourage legitimate oil exploration activities. In the Tribes’ view, these fees were arbitrary and were based on the unreasonable judgment of BIA personnel who are not trained appraisers. This lack of technical expertise discourages energy development on the Fort Peck Reservation because potential developers fear they will be subjected to arbitrary fees and costs they do not encounter off the Reservation.

Private business interests have often complained to our Tribal Executive Board that they do not like to deal with BIA Agency staff that too often seems uninterested in working with private companies in a fair, timely, and efficient manner. More must be done to enhance the technical capacity and expertise of Fort Peck Agency staff in the areas of energy development, land use, and ROW appraisals.

Senior DOI and DOE officials should work together to place highly-motivated, well-trained technical staff at the Fort Peck Agency and all other BIA Agencies located on Indian reservations within the active Bakken and Three Forks formation oil plays. These teams would be similar to the “one-stop” technical assistance team established on the Fort Berthold Agency and should include not only trained oil and gas lease specialists, but also a ROW specialist, a trained appraiser, and a geologist with oil and gas development experience. More than any other single recommendation, we believe this action will help seize this once-in-a-lifetime economic development opportunity for the Fort Peck Tribes, for other Tribes in the region, and for our Nation as a whole.

#### B. Reduce Oil and Gas Fees

Although this hearing is concentrated on BIA, it is important to note that another disincentive to drilling on Indian allottee and tribal trust lands is the \$6,500 that the BLM charges for a permit application to drill on federal land, including Indian and tribal trust lands. In FY 2010, Congress increased this fee from \$4,000 to \$6,500. In theory, this fee is intended to cover the BLM’s cost of processing the drilling permit application. However, the fee is highly disproportionate to the \$75 that the State of Montana charges to process the same kind of permit on State fee land, which is analogous to the differential fee problem identified in the report. *See* Report at 27. We see no good reason for the BLM fee to be so high on Indian and tribal trust lands and doubt Congress even considered the potential negative impact on oil and gas development in Indian Country when it made this change in the law. Economic development in Indian country should not be used to off-set the federal deficit.

### C. Ensure that lease bid deposits are placed in interest-bearing trust accounts

The Tribes also seek congressional support for legislation – or at a minimum renewed pressure for administrative action – to ensure that bid deposits for oil and gas lease sales on Indian and tribal trust lands are once again held in interest-bearing accounts. Historically, bid deposits were held in interest-bearing trust accounts and, upon Secretarial approval of the lease or contract, both the principal and interest were paid to the tribal and individual Indian landowners. However, DOI policy changed several years ago despite our strong protests. Now, the DOI holds bid deposits and other advance payments made by successful bidders in non-interest-bearing federal accounts until the lease or contract is approved by the Secretary.

As noted above, it can unfortunately take months and sometimes even years for a successful bidder to secure BIA approval of a mineral lease. Consequently, these bid deposits sit idle in federal accounts without earning interest for the beneficial land-owner, whether a tribe or an Indian allottee. By the time the funds are finally paid to tribes and individual Indian landowners, the value of the bid deposit has been eroded by inflation.

In the Tribes' view, the DOI's current practice is illegal and contrary to the federal trust responsibility. Our Tribal leadership has discussed this matter with senior BIA and DOI Office of Trust Fund Management officials, but they have responded by stating that they do not believe they have the statutory authority to place these funds at interest. At the same time, these officials agreed that bid deposit funds should start earning interest once the successful bidder is selected, and that tribes and individual Indians should not bear the costs of the time that it takes for the BIA to review and approve leases.

Although the Tribes believe DOI has sufficient legal authority and a clear trust obligation to place bid deposit funds at interest now, legislation mandating it would solve the problem once and for all and avoid future litigation over DOI's improper handling of these funds.

### D. Eliminate Dual Taxation

As the Report identifies, the problem of dual taxation is a serious hindrance to oil and gas development on Indian lands. Report at 29-30. The Fort Peck Tribes were one of the first Tribes in the country to institute a severance tax on oil and gas development on our Reservation. However, the 1989 U.S. Supreme Court decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S.163 (1989), allows States to tax certain activities by non-Indian companies on Indian and tribal trust lands. When *Cotton* applies to allow States to impose taxes in addition to tribal taxes, economic activity on tribal lands is discouraged. Tribal and State taxes are owed for energy development activities in Indian Country where only State taxes must be paid for energy development elsewhere. This double taxation creates a serious disincentive to energy and mineral development on Tribal lands and is inconsistent with well-established federal policies designed to promote Tribal economic development and self-sufficiency.

Our Tribal government has long urged Congress to overturn the poorly decided *Cotton* decision and to bar State taxation of commercial activities on Indian and tribal trust lands, but Congress has repeatedly failed to act. Therefore, the only way we could avoid the disadvantage *Cotton* creates was either to forego our right to tax energy development on Reservation lands altogether or seek to enter into an innovative tax sharing agreement with State of Montana.

As an example of our Tribes' leadership in this area, we reached an historic tax-collection and tax-sharing agreement with the State of Montana on March 25, 2008. While we are pleased with this agreement and believe it presents a model for other tribes to follow, we also continue to believe it is a poor substitute for congressional action. Simply put, the *Cotton* ruling was wrongly decided. We ask Congress once again to pass legislation returning full taxing authority to tribal governments for commercial activities on Indian and tribal trust lands.

E. Eliminate barriers to wind energy and other renewable energy projects

The Fort Peck Tribes believe further development of wind energy is an important part of America's energy independence. Montana is one of the five windiest states in the union and the Fort Peck Reservation in northeast Montana presents one of the greatest opportunities for wind energy development in the entire State. With the support of the DOE and other federal agencies, the Fort Peck Tribes spent many years researching and quantifying our wind energy resources, and we know that the potential energy that can be derived from wind power is considerable. With proper support from the Federal government and better connections to transmission lines on the national energy grid, we could attract reputable business interests to partner with us to develop commercially viable and sustainable wind energy projects on the Fort Peck Reservation.

Unfortunately, we and many others in Montana who wish to develop our wind energy resources are severely hampered by ever-changing national energy policies and by a lack of inexpensive and accessible transmission line capacity. Tribal wind energy projects cannot get off the ground if there is no commercially viable way to get our abundant wind power to energy consumers. Many of the transmission lines in Montana were built and are maintained by the Western States Power Authority (WAPA), a federal agency. In 2005, Congress directed the Secretaries of the Army and the Interior to conduct the Wind and Hydropower Feasibility Study (WHFS), which was completed in 2009, to determine the feasibility of blending wind generation with hydropower on the Missouri River, and to evaluate tribal wind generation. While the WHFS concluded that a 350MW Tribal Wind Demonstration Project was not feasible, it recommended studying facilities under 300MW and indicated that WAPA believed economic risk could be mitigated through the development of a 50MW facility, if authorized and funded prior to 2015. Unfortunately, neither WAPA nor Congress has undertaken the development of a Tribal Wind Demonstration Project. Congress should now take action to authorize and fund a Tribal Wind Demonstration Project at Fort Peck and throughout Indian country generally, as its next step in obtaining American energy independence.

F. Develop environmentally and culturally sustainable energy projects

Finally, related to our interest in wind energy development is our foundational belief that all economic development projects must be undertaken in ways that protect and enhance our Tribal homelands, sacred sites, and cultural resources. We fully support job-creation initiatives and economic development opportunities that allow us to develop our natural resources and improve the quality of life for our Tribal members. However, all of our development efforts must be balanced with our sacred commitment to preserve our Tribal homelands and to protect the spiritual and cultural heritage which our ancestors suffered so much to preserve for future generations. The people residing on our Reservation need clean land, water, and air in order to live and work in a healthy environment. In addition, ranching and farming are vital industries on the Fort Peck Reservation, so they too must be able to coexist and thrive alongside energy development. Otherwise, we have simply promoted one important Tribal industry at the expense of others, which would make no sense, economic or otherwise.

As a Tribal government, we endeavor to support only those initiatives that are done in a manner that is backed by sound science and that minimizes potential adverse impacts to our Tribal lands and resources. Moreover, while we have suggested improved technical capacity and responsiveness within the federal government, as well as a reduction in certain fees that we believe should be decided by market conditions, we do not suggest the elimination of federal oversight over any projects that have an impact on Indian trust resources and sovereign tribal governments. We ask that the Committee continue to provide oversight regarding Federal agencies' administration of programs that impact energy development on Indian reservations to help ensure that Tribes and our Federal trustees can work together to further Tribal priorities and both improve and protect our communities.

We thank the Committee for allowing us to submit testimony on this critical issue and look forward to working with Congress and the Administration to make real progress toward energy independence in Indian Country.