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State-Tribal Relations Committee

61st Montana Legislature

TO: State-Tribal Relations Committee Members
FROM: Jeremy Gersovitz, Staff Attorney
RE: State-tribal oil and natural gas production tax agreements
DATE: July 19, 2010

Members of the committee:

I have been asked to report on the oil and natural gas production tax agreements between the various tribes and the State of Montana. This assignment grew out of comments made by members of the Blackfeet Tribal Business Council during its joint meeting with the State-Tribal Relations Committee on July 7, 2010. Council members had voiced displeasure over potentially splitting the oil and gas tax production tax on a 50/50 basis with the State instead of by a 65/35 division. It should be noted that given that these are ongoing, sensitive negotiations, detailed or insider information is difficult to come by.

BACKGROUND

There is currently only one oil and natural gas production tax agreement in place. It was signed between the Fort Peck Tribes and the State of Montana on March 25, 2008, and runs until June 30, 2017.

The State is in the process of negotiating oil and gas revenue sharing agreements with the Crow and Blackfeet tribes. There is no specific time line in place as side boards for the negotiations. The last face to face meeting with the Crow Tribe was in January of 2009. That has been followed by telephone conversations on the matter. Currently, the Crow Tribe has the State's proposal in front of it.

Rocky Boy's and Fort Belknap have also expressed interest in negotiating such an agreement but apparently have not actively pursued formal talks with the State since their initial discussions in 2006/2007.

The Blackfeet Tribe had an agreement with the State in the 1990s but it was ultimately terminated by the Tribe. The last negotiating session with the Blackfeet Tribe occurred in December of 2009. The State's team included Department of Revenue Director Dan Bucks, DOR attorney Charlena Toro, DOR Division Administrator, Business and Income Taxes, Gene Walborn, Budget Director, Office of Budget and Program Planning, David Ewer, Acting Director, Governor's Office of Indian Affairs, Lesa Evers, and then Governor's American Indian Nations Council attorney Andrew Huff. At that time, the State formally proposed the 50/50 split referenced above; the tribe has yet to formally respond in writing.

While no longer in force, the last Amended Oil and Natural Gas Tax Revenue Sharing

Agreement between the Blackfeet Tribe and the State of Montana, signed February 4, 2000, provides some background which is instructive for comparative and informational purposes and thus is set out in detail below.

TAX COLLECTION

Under the terms of the Fort Peck Agreement, the State collects the taxes and then remits the Tribe's share to it (Sec. VII, P. 4); under the terms of the defunct Blackfeet Tribe Agreement, the Tribal Business Council collected the taxes and then remitted to the State and local governments their share of it (Sec. 4, P. 3).

TAX SHARING

Under the terms of the Fort Peck Agreement, the amount of oil and gas production tax monies is split equally. (Sec. VIII, P.5). The agreement concerns new oil and gas production only and is not concerned with the taxation of existing oil and gas production (Sec. II.B, P.2). Under the terms of the defunct Blackfeet Tribe Agreement, a much more complex formula was employed. The Tribe received the State general fund share of the State share of production taxes for wells drilled on the Reservation. The State received the production taxes which fund the Resource Indemnity Trust and Ground Water Assessment Tax and the Board of Oil and Gas Conservation. The local governments and all school funding sources continued to receive their share of production taxes for wells completed before January 1, 1996, but gave their share of production taxes to the Tribe for the first three years of production on all wells completed after January 1, 1996. After the first three years of production, the Tribe and local governments shared the revenue which originally went to the local government until, at the conclusion of nine years of production, the local government received 99% of the production taxes it received prior to January 1, 1996, and the Tribe received 1% of the amount which went to the local government prior to the Agreement. The 1% share was intended to function as an administrative fee to help compensate the Tribe for collecting the tax. The Tribe and the local governments shared the production taxes for years four, five and six based on a 45/55 split between the local government and the Tribe. In years seven, eight and nine, the split was 70/30 between the local government and the Tribe. (Sec. 5, Pp. 4-5).

LENGTH OF AGREEMENT

Under the terms of the Fort Peck Agreement, it runs from March 25, 2008, until June 30, 2017. (sec. IX, P.5). Renewal was to be for a term of ten years. (Sec. XX, P. 11). Under the terms of the Blackfeet Tribe Agreement, it ran for a period of 18 months. (Sec. 15, P.10). No specific renewal term was set out. Subsequent amendments extended the agreement.

STATUTORY OVERVIEW

The State's authority to enter into the agreement arises from the State-Tribal Cooperative Agreement Act, § 18-11-101, MCA, which provides in pertinent part:

(2) It is the intent of the legislature that this part be used to promote cooperation between the state or a public agency and a sovereign tribal government in mutually beneficial activities

and services.

(3) It is the goal of the legislature to prevent the possibility of dual taxation by governments while promoting state, local, and tribal economic development.

Dual taxation, it should be noted, is permitted by a number of U.S. Supreme Court cases, most notably Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989).

Also especially relevant is §18-11-103, MCA, which sets out:

Authorization to enter agreement -- general contents. (1) Any one or more public agencies may enter into an agreement with any one or more tribal governments to:

(a) perform any administrative service, activity, or undertaking that a public agency or a tribal government entering into the contract is authorized by law to perform; and

(b) assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public agency and a tribal government and to share or refund the revenue from the assessment and collection.

(2) The agreement must be authorized and approved by the governing body of each party to the agreement. If a state agency is a party to an agreement, the governor or the governor's designee is the governing body.

(3) The agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.

(4) (a) Prior to entering into an agreement on taxation with a tribal government, a public agency shall provide public notice and hold a public meeting on the reservation whose government is a party to the proposed agreement for the purpose of receiving comments from and providing written and other information to interested persons with respect to the proposed agreement.

(b) At least 14 days but not more than 30 days prior to the date scheduled for the public meeting, a notice of the proposed agreement and public meeting must be published in a newspaper of general circulation in the county or counties in which the reservation is located.

(c) At the time the notice of the meeting is published, a synopsis of the proposed agreement must be made available to interested persons.

(Emphasis supplied.)

According to § 18-11-112, MCA, except for administrative expenses, revenue collected by a public agency under a state-tribal agreement must be deposited in separate special revenue accounts and must be disbursed as provided for in the agreement. The money deposited in a state administrative expenses account and in a state special revenue account is statutorily appropriated, as provided in § 17-7-502, to the department or public agency that is a party to a state-tribal cooperative agreement under § 18-11-103, for the purpose of paying administrative expenses or paying to a tribe its portion of the tax or fee.

The 13 page agreement with the Fort Peck Tribe concerns only new oil and natural gas production, defined as "any production from oil or natural gas wells that a producer commenced drilling on or after the effective date " of the document, on reservation lands over which both the State and Tribes have the authority to tax. The State is to collect the tax and distribute 50% of it on a quarterly basis to the tribe. To date, there has been no tax collected by the state. This is especially unfortunate given that the tribe reportedly has tremendous oil reserves--in the neighborhood of 100 million barrels--and is desperately in need of employment opportunities for its members.

Figures provided by the Department of Revenue for calendar year 2009 reveal that for oil and gas statewide the State collected almost 173 million dollars; it had approximately 93 million dollars of that amount left after it finished disbursing some 80 million dollars to the counties who in turn disbursed to various school and county accounts.

EXAMPLE

(Provided by Dan Dodds, Senior Economist, DOR)

Revenue from the oil and gas production tax is distributed using the formulas in § 15-36-331 and §15-36-332, MCA.

First, a small fraction of revenue is allocated to the Board of Oil and Gas Conservation to fund its operations and to a fund for distribution to city and county governments. The remainder is split between the state and county governments and school districts. In Glacier County, 58.83% is distributed to the county, and the remainder goes to the state.

The county share is allocated, in fixed percentages, to the county-wide school funds, the school district where oil or gas was produced, and county government. Revenue from a well in a location with separate elementary and high school districts is allocated to them in proportion to their mill levies. The following table shows the percentage allocations for tax revenue from a well in the East Glacier Park school district.

Statutory Distribution of Revenue from Well in East Glacier Park School District

(Using 2009 School District Mill Levies)

Step 1		
	Board of Oil and Gas Conservation	0.09%
	Oil and Natural Gas Resource Account (Distributed to Counties based on production, 1/3 to county, 2/3 to incomrporated cities and towns)	0.08%
	Local Share	58.83%
	State Share	41.17%
Distribution of Local Share		
	Countywide Elementary Retirement	11.200%
	Countywide High School Retirement	4.870%
	Countywide Transportation	3.010%
	Glacier County	34.810%
	Browning High School District	12.797%
	East Glacier Park Elementary District	33.313%
Distribution of State Share		
	Coal Bed Methane Account	1.23%
	Natural Resource Projects Account	1.45%
	Natural Resource Operations Account	1.45%
	Orphan Share Account	2.99%
	University System	2.65%
	General Fund	90.23%

The revenue sharing agreement proposed by the Blackfeet Nation would allocate 65% of total tax revenue from new wells on the reservation to the tribe. The state has proposed that the tribe and the state each receive 50% of revenue after the share going to the Board of Oil and Gas Conservation and the Oil and Natural Gas Resource Account. In either case, the percentages in the preceding table would then apply to the share allocated to Montana. The following table shows the allocation of $1,000 of tax revenue from new wells in the East Glacier Park School District under current law and with the two proposed revenue sharing agreements.

Distribution of $1,000 of Revenue from Hypothetical New Wells on Blackfeet Reservation

	Montana Tax Only	Combined Montana / Blackfeet Tax 65% to Tribe	Combined Montana / Blackfeet Tax 50% to Tribe
Tax Revenue From New Wells	$1,000.00	$1,000.00	$1,000.00
Blackfeet Nation	$0.00	$650.00	$499.15
Board of Oil and Gas Conservation	$0.90	$0.32	$0.90
Oil and Natural Gas Resource Account	$0.80	$0.28	$0.80
Local Share			
Countywide Elementary Retirement	$65.78	$23.02	$32.89
Countywide High School Retirement	$28.60	$10.01	$14.30
Countywide Transportation	$17.68	$6.19	$8.84
Glacier County	$204.44	$71.55	$102.22
Browning High School District	$75.16	$26.30	$37.58
East Glacier Park Elementary District	$195.65	$68.48	$97.82
Local Total	$587.30	$205.55	$293.65
State Share			
Coal Bed Methane Account	$5.06	$1.77	$2.53
Natural Resource Projects Account	$5.96	$2.09	$2.98
Natural Resource Operations Account	$5.96	$2.09	$2.98
Orphan Share Account	$12.29	$4.30	$6.14
University System	$10.89	$3.81	$5.45
General Fund	$370.85	$129.80	$185.42
State Total	$411.00	$143.85	$205.50

I am happy to entertain any questions.

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