

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
)
Goodnight Midstream Bakken)
, LLC)
)
Permit No. ND22349-11250)
)
)

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Mandan, Hidatsa and Arikara Nation (“MHA Nation” or “Petitioner”) submits this Petition for Review (the “Petition”) in regard to the Underground Injection Control Program Permit No. ND22349-11250 (the “Final Permit”), which was issued to Goodnight Midstream Bakken, LLC (“Goodnight Midstream” or “Permittee”) on February 15, 2019, by Region 8 of the United States Environmental Protection Agency (“EPA”). The Final Permit authorizes Goodnight Midstream to construct and operate a Commercial Class II saltwater disposal (“SWD”) well, known as Red Murphy SWD No. 1, in Dunn County, North Dakota. Petitioner contends that the Final Permit issued by EPA is based on clearly erroneous findings of fact and conclusions of law. Specifically, Petitioner challenges the following:

- (1) EPA should not have issued a Final Permit that violates the laws of the MHA Nation. MHA Nation law prohibits the operation of SWD wells within the boundaries of the Fort Berthold Indian Reservation. The EPA has a trust responsibility to protect tribal sovereignty and self-government, which requires the EPA to refrain from any

action that violates tribal law. The MHA Nation has its own authority to regulate waste disposal on its lands and EPA regulations direct that EPA exercise its permitting authority in direct coordination with the MHA Nation and according to MHA Nation interests and preferences.

FACTUAL AND STATUTORY BACKGROUND

Goodnight Midstream is the largest saltwater disposal company in the Bakken Formation. Goodnight Midstream owns and operates 22 SWD wells, including 24 wellbores and 280 miles of water-gathering lines. In August 2016, Goodnight Midstream applied for a permit from EPA for a new SWD well to be located on the Fort Berthold Indian Reservation (the “Reservation”). The MHA Nation is the sovereign, governing authority for all actions within the Reservation. Goodnight Midstream submitted its permit application for approval pursuant to EPA’s Underground Injection Control (“UIC”) Program, as set forth under the Safe Drinking Water Act of 1974, 42 U.S.C. § 300f (2012) *et seq.* and 40 C.F.R. pt. 144 *et seq.*

On June 1, 2018, EPA issued a draft permit to Goodnight Midstream. The draft permit was for construction and operation of a

Commercial Class II SWD well under the UIC program. In conjunction with the issuance of the draft permit, and as required by law, EPA also gave public notice of a 30-day comment period. The notice was published in two local Dunn County newspapers, the *New Town News* and the *Dunn County Herald*, as well as posted on the EPA Region 8 website. EPA extended the comment period by two weeks specifically to provide the MHA Nation additional time to comment on the draft permit.

The MHA Nation is a federally-recognized Indian tribe and a sovereign nation. The MHA Nation has adopted a federally-approved Constitution, the “Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation” (“MHA Nation Constitution”), attached hereto and incorporated herein as Attachment A. Under Article 1 of the MHA Nation Constitution, the jurisdiction of the MHA Nation “shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Indian Reservation.” See Attachment A. Under Article VI § 3 of the MHA Nation Constitution, the MHA Nation’s governing body, the Tribal Business Council (“Tribal Council”), is empowered with all necessary sovereign authority for the purpose of exercising the jurisdiction granted in Article I of the MHA

Nation Constitution. *See id.* In addition, the MHA Nation has adopted Resolution No. 11-75-VJB to govern the disposal of waste from the exploration or production of oil and gas on the Reservation and which requires that the MHA Nation's Tribal Council approve any waste disposal facility within the boundaries of the Reservation (the "Resolution"). The Resolution is attached and incorporated as Attachment B.

On July 16, 2018, the MHA Nation submitted written comments to EPA urging that the draft permit be denied. The MHA Nation's written comments are attached hereto and incorporated herein as Attachment C. Consistent with the MHA Nation Constitution **Error! Bookmark not defined.** and the Resolution, the MHA Nation put forth a number of reasons why the draft permit should have been denied. *See id.* The comments that the MHA Nation submitted to EPA during the comment period for the draft permit are contained and further explained in the Argument section of this Petition. *See* 40 C.F.R. § 124.19(a)(4)(ii). The EPA would respond to the comments of the MHA Nation on February 15, 2019 when it granted the Final Permit. The response of the EPA is incorporated herein as Attachment D.

In sum, the MHA Nation commented that the draft permit did not comply with applicable MHA Nation laws governing waste disposal on the Reservation. *See* Attachment C. The MHA Nation contends that in addition to EPA’s requirements under the UIC Program, MHA Nation law requires that Goodnight Midstream obtain MHA Nation approval for the disposal of waste and other hazardous substances associated with the exploration or production of oil and gas on the Reservation. *See id.* MHA Nation approval for waste disposal within the Reservation is required to protect tribal trust lands and the health and welfare of MHA Nation members, who are also residents of the Reservation. *See id.* The MHA Nation’s authority over Goodnight Midstream’s proposed activities within the Reservation derives from the MHA Nation’s federally-approved Constitution and laws enacted pursuant to that Constitution. *See id.* In addition, the United States Supreme Court recognizes and affirmed the inherent authority of Indian tribes to regulate such activities to protect the health and welfare of a tribe. *See id.*; *see also Mont. v. United States*, 450 U.S. 544 (1981). Finally, EPA’s “Policy on Consultation and Coordination with Indian Tribes” (“Tribal Policy”) requires EPA to work directly with the MHA Nation in the issuance of

any permit related to the Reservation. *See* Attachment C. As the MHA Nation proffered in its written comments, EPA did not adhere to or comply with the foregoing requirements. *See id.*

In addition to its written comments, the MHA Nation provided verbal comments to EPA throughout the tribal consultation process. Furthermore, a staff member of the MHA Nation Energy Department submitted a comment to EPA, which EPA accepted even though it was submitted outside of the comment period. EPA has stated that it did not receive comments, written or verbal, from any other individuals or entities.

On February 15, 2019, EPA issued the final Permit to Goodnight Midstream, attached hereto and incorporated herein as Attachment E. EPA included with the final Permit a transmittal letter to Goodnight Midstream, attached and incorporated as Attachment F. EPA's transmittal letter stated, in part, as follows:

The public comment period ended on July 16, 2018. Comments on the draft Permit were received from the MHA Nation. No other public comments were received. The EPA's responses to the comments for this final Permit provides a written explanation about how the EPA Region 8 considered MHA Nation's input as part of our final action to issue this Permit.

See Attachment F.

The MHA Nation contends, that EPA did not adequately consider the MHA Nation's comments, concerns and input. MHA Nation law requires the MHA Nation to approve the issuance of any permit like the Final Permit at issue here. The MHA Nation did not, and still does not, approve of the issuance of the Final Permit and in fact has a firm policy that prohibits the operation of SWD wells on the Reservation. Nonetheless, EPA issued the Final Permit to Goodnight Midstream.

Under relevant EPA regulations, the Final Permit becomes effective 30 days from the date of issuance to provide a 30-day window for appeal of the Final Permit decision. *See* 40 C.F.R. § 124.19(a)(3). The MHA Nation timely files this Petition and respectfully requests the Environmental Appeals Board ("EAB") to deny, revoke, or modify the Final Permit and issue such orders to EPA that are consistent with the EAB's determination.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a Petition for Review under 40 C.F.R. pt. 124:

1. Petitioner has standing to petition for review of the Final Permit decision because Petitioner participated in the public comment period on the Draft Permit. *See id.* § 124.19(a).

2. The issues raised by Petitioner in this petition were raised during the public comment period and therefore were preserved for review. *See Attachment C.*

ARGUMENT

EPA issued the Final Permit to Goodnight Midstream in direct contravention of MHA Nation law and federal law. MHA Nation law requires that the MHA Nation approve the disposal of waste and other hazardous substances associated with the exploration or production of oil and gas on the Reservation. Federal law requires the EPA to defer to the MHA Nation for an approval or denial of the Final Permit. Instead the EPA has invaded the jurisdiction of the MHA Nation. The Final Permit must be voided, and a new draft permit issued only after the MHA Nation has provided its approval.

The EPA, like any federal agency, has a trust responsibility to the MHA Nation and the Final Permit violates that responsibility. The

EPA's conclusion that it does not have a trust responsibility under the SDWA is incorrect. The EPA's reliance on new fluid modeling only proves that fluid trespass of pore space and tribal drinking water will occur under the terms of the Final Permit.

I. The Permit Must Be Voided for Lack of Tribal Approval

The lack of Tribal approval of the Final Permit requires it be voided. As a sovereign nation the Tribe has the right to promulgate regulatory schemes to protect the health and wellbeing of its members. The EPA, as an agency of the federal government, must adhere to and assist in enforcing the MHA Nation regulatory scheme. Instead, the EPA incorrectly concluded that the SDWA prevents the EPA from requiring tribal approval.

The Tribe has federally granted jurisdiction and authority over all waste management within the boundaries of the Reservation. The MHA Constitution was drafted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2012) *et seq.* ("IRA"). Under the same authority the United States Federal Government approved the Tribe's Constitution in 1936. *See* MHA Constitution at 12. Article I of the MHA Constitution

provides that the jurisdiction of the Tribe “shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation...”. MHA Constitution at 1 (emphasis added). Not content with just broad declarations of power the MHA Constitution specifically creates jurisdiction over all “natural resources” within the boundaries of the Reservation. *Id.* at 8. The body to exercise such jurisdiction is the Tribal Council. *Id.* at 6.

In light of this federally granted regulatory power the Tribe, through Tribal Resolution No. 11-075-VJB, created a waste management scheme. The Resolution requires that all waste related to oil and gas production, including salt water, must be disposed of at an authorized facility. Attachment B at 2. The Resolution defines an authorized facility as those that are “approved by the Tribal Council”. *Id.* Currently, the MHA Nation has a policy that prohibits SWD wells on the Reservation.

The Tribe’s exercise over salt water waste disposal is a proper exercise of its inherent and federally granted authority. In *Montana v. United States*, the Supreme Court held that tribes retain inherent civil authority “over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the

political integrity, the economic security, or the health or welfare of the tribe". 450 U.S. 544, 566 (1981). The 9th Circuit, relying upon *Montana*, determined that "threats to water rights may invoke inherent tribal authority". *Montana v. U.S. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (Montana II). In *Montana II*, the Court determined that the tribal exercise of authority over CWA permits was necessary to protect tribal health and welfare due to the "mobile nature of pollutants" and the inability to "separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation". *Id*

The EPA's own regulations and policies on UIC permits recognize inherent tribal authority to protect member health and welfare. 40 C.F.R. § 144.2(a) provides that the EPA must consider "[t]he interest and preferences of the tribal government having *responsibility for given reservation or Indian lands*". (emphasis added). The EPA Policy on Consultation and Coordination with Indian Tribes (the "Tribal Policy") recognizes that tribes have "primary authority and responsibility for [their] land and membership". Tribal Policy at 3 (May 14, 2011).

Here the EPA attempts to avoid its trust responsibility to protect tribal law by taking an overly narrow view of its obligations. The EPA states that the SDWA and its regulations do not allow them to “deny permit applications based on the Tribe’s laws”. Attachment D at 3. The EPA response simply ignores its trust obligations to protect tribal property and self-government, presumably because that obligation is not in the regulations. In essence the EPA is arguing that if its trust duties are not laid out in the regulations, EPA can ignore them. Such a narrow assumption is not only arbitrary, it contravenes the law. “The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction.” *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) Further, the EPA’s trust obligation requires it “to consider its strict fiduciary obligation when interpreting regulations that directly affect its administration of Indian lands,” and “take 'all appropriate measures for protecting and advancing' those tribes' interests.” *Id.* at 1245, 1246 (citations and quotations omitted). These trust duties required the EPA to itself require adherence to tribal law as a condition of issuing the permit, regardless of whether the obligation is absent from the regulations.

EPA must enforce tribal jurisdiction when the health and welfare of the tribal members is implicated. There can be no question that saltwater injection can have significant impact on the health and welfare of tribal members. Water is a fundamental need for any community and the MHA Nation must be able to protect the quality of that supply. The SDWA makes clear that the purpose of the act “is to protect water supplies from contamination by pollutants”. *Narragansett Indian Tribe of R.I. & Narragansett Indian Wetuomuck Hous. Auth. v. Narragansett Elec. Co.*, 878 F. Supp. 349, 362 (D.R.I. 1995).

CONCLUSION

The MHA Nation respectfully requests the Environmental Appeals Board to: (i) deny, revoke, or modify the Final Permit and issue such orders to EPA that are consistent with the EAB’s determination; and (ii) grant such other and additional relief as the Board deems just and appropriate.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This Petition complies with the word limitation set forth in the Environmental Appeals Board regulations because the Petition contains 2,473 words, excluding those parts of the Petition exempted by 40 C.F.R. § 124.19(d)(3).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review in the matter of Goodnight Midstream Bakken, LLC, Permit No.

ND22349-11250, were served by United States First Class Mail, and

electronic mail, on the following persons, this 16th day of March, 2019:

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ATTACHMENT A

**CONSTITUTION AND BYLAWS
OF
THE THREE AFFILIATED TRIBES
OF
THE FORT BERTHOLD RESERVATION**

PREAMBLE

We, the Arickara, Gros Ventres, and Mandan Indians of the Fort Berthold Reservation, in North Dakota, eagerly embrace the opportunities for self-rule, and in order to enjoy the blessings of liberty and justice; to intelligently protect our vested rights under existing treaties and the Constitution of the United States; to guarantee to our posterity a more hopeful future; to preserve and develop our real estate and resources; to promote educational efficiency for the enhancement of good citizenship; to promote the general welfare of the three tribes; to make possible a more hopeful, self-sustaining, and honorable living, socially and economically, do with deep consciousness of God, as our sovereign, ordain and establish this Constitution for the Three Affiliated Tribes of this Reservation.

ARTICLE I - JURISDICTION

The jurisdiction of the Three Affiliated Tribes of the Fort Berthold Reservation shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation as defined by the Act of March 3, 1891, (26 Stat. 1032) to all lands added to the Fort Berthold Reservation by Executive Order of June 17, 1892; and to such other persons and lands as may hereafter come within the jurisdiction of the Three Affiliated Tribes, except as otherwise provided by law. (As amended by Amendment No. VIII, approved by the Secretary of the Interior's delegate on March 11, 1985.)

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HISTORICAL NOTE

The prior Article I in the Initial Indian Reorganization Act tribal constitution, as approved by the Secretary of the Interior on June 29, 1936, provided as follows:

ARTICLE I - TERRITORY

The jurisdiction of the Three Affiliated Tribes of the Fort Berthold Reservation shall extend to Indian Trust and Tribal lands within the confines of the Fort Berthold Reservation, as defined in the treaty of September 17, 1851; to New lands outside of such boundaries; and to such other lands, within or without such boundaries, as have been or may be hereafter added thereto under any law of the United States, except as otherwise provided by law.

ARTICLE II - MEMBERSHIP

SECTION 1. Membership. The membership of the Three Affiliated Tribes of the Fort Berthold Reservation shall consist of:

- (a) All persons whose names appear on the membership of the Tribes as of October 2, 1974.
- (b) Any persons born before the effective date of this amendment and to any member of the Tribes who was a resident of the Reservation at the time of birth of said person.
- (c) All persons of at least 1/4 degree Indian blood of a federally recognized tribe provided at least 1/8 Indian blood be of of the Gros Ventre, Mandan and/or Arickara Tribes.

SEC. 2 Dual Enrollment.

(a) Persons enrolled with another tribe and who have received benefits from such tribe in the form of land or payments shall not be eligible for enrollment with the Three Affiliated Tribes of the Fort Berthold Reservation, provided that inherited interests shall not be considered as being benefits.

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(b) A person eligible for membership with the Three Affiliated Tribes of the Fort Berthold Reservation and another tribe shall relinquish whatever rights of membership he may hold in the other tribe as a condition to his enrollment with the Three Affiliated Tribes of the Fort Berthold Reservation.

SEC. 3. The Tribal Business Council shall have power to promulgate ordinances, subject to review by the Secretary of the Interior, governing future membership, the adoption of new members and the revision of the membership rolls from time to time as determined by such ordinances.

HISTORICAL NOTE

1975 Amendments, which are presently in effect, made three changes as follows: (i) Section 1 was adopted by Amendment No. VI; (ii) a new Section 2 was added by Amendment No. VII; and (iii) the former Section 2 was renumbered as Section 3 by Amendment No. VI. The three amendments were approved by the Secretary of the Interior's delegate, Area Director Harley D. Zepher, on December 12, 1975.

The prior Article II was in the initial Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936. It reads as follows:

ARTICLE II - MEMBERSHIP

SECTION 1. The membership of the Three Affiliated Tribes of the Fort Berthold Reservation shall consist of all persons of Indian blood whose names appear on the official census roll of the three tribes as of April 1, 1935; and all children born to any member of the tribes who is a resident of the reservation at the time of the birth of said children.

SEC. 2. The Tribal Business Council shall have power to promulgate ordinances, subject to review by the Secretary of the Interior, governing future membership, the adoption of new members and the revision of the membership rolls from time to time as determined by such ordinances.

ARTICLE III - GOVERNING BODY

SECTION 1. The governing body of the Three Affiliated Tribes of the Fort Berthold Reservation shall be known as the Tribal

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Business Council.

SEC. 2. The Tribal Business Council shall consist of (7) members. The Chairman of the Tribal Business Council shall be elected at large by a majority of all of the votes cast for the Office of Chairman. The six (6) other Council members shall be elected from segments, one Council member to be elected from each of the following segments by a majority of all of the votes cast for the office of Council representative from that respective segment:

- White Shield.....1 representative
- Twin Buttes.....1 representative
- New Town/
Little Shell1 representative
- Mandaree1 representative
- Four Bears1 representative
- Parshall/
Lucky Mound1 representative

SEC. 3. The boundaries of the segments shall be described as follows:

White Shield: That part of the Reservation starting at a point intersecting the eastern boundary and the McLean-Mountrail County line, thence westerly on that line to its junction with Hwy #37, thence southerly on that line to the thread of Deep Water Bay, thence along that thread to its junction with the thread of the Missouri River, thence southerly and westerly along the thread of the Missouri to the extreme southeasterly corner of the Reservation boundary, thence north approximately two miles, thence due west to the line of the

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eastern boundary, thence due north to the point of beginning.

Twin Buttes: That part of the Reservation starting at a point at the confluence of the Missouri and Little Missouri Rivers, thence southwesterly along the stream of the Little Missouri to the southernmost border to a point on that line one mile beyond Beaver Creek Bay, thence in a northeasterly direction to the thread of the stream of the Missouri River, thence northwesterly along that stream to the point of beginning.

New Town/Little Shell: That part of the Reservation starting at a point at the junction of the thread of the stream of the Missouri River with the 48th parallel of north latitude, thence southward along the thread of the Missouri River to the thread of the Van Hook Arm, thence northward along the thread of the Van Hook Arm to the thread of Shell Creek, thence northeasterly along the thread of Shell Creek to its junction with the 48th parallel, thence due west along the 48th parallel to the point of beginning.

Mandaree: That part of the Reservation starting at a point at the junction of BIA Hwy #4 and the western boundary of the Reservation, thence due south to the thread of the Little Missouri River, thence eastward and northward along the thread of the Little Missouri River, to the thread of the Missouri River, thence northward and westward along the thread of the Missouri River to the northern boundary of this segment, the northern boundary starting at the point of origin eastward along BIA #4 to the junction of Hwy #22, thence along the line connecting the northern boundaries of Sections 32, 33, 34, 35, and 36 of T. 151 N. eastward to the thread of the Missouri River.

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Four Bears: That part of the Reservation lying within the northern and western Reservation boundaries with the thread of the Missouri River as the eastern boundary, the southern boundary being a line running eastward along BIA Hwy #4 to the junction of Hwy #22, thence along the northern boundaries of Sections 32, 33, 34, 35 and 36 of T. 151 N. eastward to the thread of the Missouri River.

Parshall/Lucky Mound: That part of the Reservation starting at a point at the junction of the thread of the stream of Shell Creek with the 48th parallel, thence southward along the thread of Shell Creek to the thread of the Van Hook Arm, thence southward on the thread of the Missouri River, to the thread of Deep Water Bay, thence easterly on a line to a point approximately one and one half miles due north to Hwy #37 and continuing along Hwy #37 to a point intersecting the McLean-Mountrail County line, thence easterly on that line to its junction with the line of the eastern boundary, thence north on that line to the point at the junction of the 48th parallel, thence westerly on that parallel to the point of beginning.

[As amended by Amendment IX, effective July 2, 1986 changing referendum vote September 1, 1970, Resolution No. 70-89]

SEC. 4. The Tribal Council shall have authority to change the segment boundaries, subject to the approval of the voters of the Reservation at any regular or special election.

SEC. 5. Within three (3) days after the installation of the successful candidates for Council positions elected at the general election, the newly constituted Tribal Business Council shall meet and organize by electing a Vice Chairman, a

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Secretary, and a Treasurer from its own members; and from within or outside its own members, it may elect or appoint a Sergeant-at-Arms and such other officers and committees as it may find necessary.

[This section amended by Amendment No. I, effective October 16, 1956 and further amended by Amendment No. III, effective September 10, 1974.]

SEC. 6. The members of the Tribal Business Council shall hold office until the next regular election and until their successors are elected or appointed and qualified.

[As amended by Amendment No. 1, effective October 16, 1956.]

HISTORICAL NOTE

The initial Article III of the Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936, reads as follows:

ARTICLE III — GOVERNING BODY

SECTION 1. The Governing Body of the Three Affiliated Tribes of the Fort Berthold Reservation shall be known as the Tribal Business Council.

SEC. 2. The Tribal Business Council shall consist of ten members elected from communities as follows: Nishu, 2 representatives; Elbowoods, 1; Shell Creek, 2; Santee, 1; Independence, 2; Little Missouri-Red Butte, 1; Beaver Creek, 1.

SEC. 3. For the first election of a Tribal Business Council, and until otherwise changed as provided herein, the boundaries of the communities shall be described as follows:

Nishu - That part of the Reservation east of the Torrie Road and north of the Missouri River, to the Reservation line north and east.

Elbowoods - West of the Nishu community, north and east of the Missouri River, and south of township 149 north, Ranges 89, 90, and 91 west.

Santee - Township 149 north and ranges 89 and 90 west.

Shell Creek - Township 150 north and ranges 90, 91, 92, and 93 west, lying north and east of the Missouri River.

Independence - That part of the Reservation lying west of the Missouri River

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and north of the Little Missouri River.

Little Missouri-Red Butte - That part of the Reservation lying south and east of the Little Missouri River and extending eastward to a north and south line running through the Antelope Woman place.

Beaver Creek - That part of the Reservation south of the Missouri River, the west boundary being a north and south line running through the Antelope Woman place, and extending eastward to the southeast corner of the Reservation.

SEC. 4. The Tribal Business Council shall have authority to change the community boundaries, subject to the approval of the voters of the Reservation at any regular or special election.

SEC. 5. The first election of the Tribal Business Council shall be held within 30 days after the adoption and approval of this constitution, and shall be called and supervised by the Superintendent of the Reservation with the cooperation of the present Tribal Business Committee.

SEC. 6. Within 3 days after the first election of a Tribal Business Council, that Council shall meet and organize by electing a chairman, a vice chairman, a secretary, and a treasurer from its own members, and from within or outside its own members, it may elect or appoint a sergeant at arms and such other officers and committees as it may find necessary.

SEC. 7. The members of the first Tribal Business Council shall serve until the first Tuesday in September 1938, and until their successors are elected and qualified.

AMENDMENTS:

1956 Amendment 1 provided as follows:

Article III - GOVERNING BODY - of the constitution shall be amended by striking Sections 1 to 7 inclusive and substituting therefor the following:

ARTICLE III - GOVERNING BODY

Section 1. The governing body of the Three Affiliated Tribes of the Fort Berthold Reservation shall be known as the Tribal Business Council.

Sec. 2. The Tribal Business Council shall consist of 10 members elected from segments of the Reservation as follows:

Western Segment	3 Representatives
Northern Segment	1 Representative
Northeastern Segment	1 Representative
Eastern Segment	3 Representatives
Southern Segment	2 Representatives

Sec. 3. The boundaries of the segments shall be described as follows:

Western - That part of the reservation bounded on the East by the Garrison Reservoir and on the South by the Little Missouri River arm of the Garrison Reservoir.

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Northern - That part of the reservation bounded on the West and South by the Garrison Reservoir and on the East by the Shell Creek arm of the Garrison Reservoir.

Northeastern - That part of the reservation bounded on the West by the Shell Creek arm of the Garrison Reservoir and on the South by the Lucky Mound Creek arm of the Garrison Reservoir.

Eastern - That part of the reservation bounded on the South and West by the Garrison Reservoir and on the West and North by the Lucky Mound Creek arm of the Garrison Reservoir.

Southern - That part of the reservation bounded on the North by the Garrison Reservoir and on the North and West by the Little Missouri River arm of the Garrison Reservoir.

Sec. 4. The Tribal Business Council shall have the authority to change the segment boundaries, subject to the approval of the voters of the reservation at any regular or special election.

Sec. 5. Within 3 days after the election for councilmen has been held, the newly elected Tribal Business Council shall meet and organize by electing a chairman, a vice chairman, a secretary, and a treasurer from its own members; and from within or outside its own members, it may elect or appoint a sergeant at arms and such other officers and committees as it may find necessary.

Sec. 6. The members of the Tribal Business Council shall hold office until the next regular election and until their successors are elected or appointed and qualified.

1970. The 1956 segment boundaries were changed by referendum vote on September 1, 1970 to read as follows:

Western: That part of the Reservation starting at a point at the junction of the western boundary of the Reservation with the 48th parallel of north latitude, thence east along the 48th parallel to the thread of the Missouri River channel, thence southerly and easterly along the thread of the Missouri River, to the juncture of the thread of the Little Missouri, thence westerly following the thread of the Little Missouri to its juncture with the western boundary line of the Reservation, thence northerly along that line to the point of beginning.

Northern: That part of the Reservation starting at a point at the junction of the thread of the stream of the Missouri River with the 48th parallel of north latitude, thence southward along the thread of the Missouri River to the thread of the Van Hook Arm, thence northward along the thread of the Van Hook Arm to the thread of Shell Creek, thence northeasterly along the thread of Shell Creek to its junction with the 48th parallel, thence due west along the 48th parallel to the point of beginning.

Northeastern: That part of the Reservation starting at a point at the junction

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of the thread of the stream of Shell Creek with the 48th parallel, thence southward along the thread of Shell Creek to the thread of the Van Hook Arm, thence southward on the thread of the Van Hook Arm to the thread of the Missouri River, then southward on the thread of the Missouri River to the thread of Deep Water Bay, thence easterly in a line to a point approximately 1-1/2 miles due south of North Dakota Highway Route 37, thence due north to that road and continuing along that highway route to a point intersecting the McLean-Mountzrail County line, thence easterly on that line to its juncture with the line that divides ranges 87 and 88 West, thence north on that line to a point at the juncture of the 48th parallel, thence westerly on that parallel to the point of beginning.

Eastern: That part of the Reservation starting at a point approximately 1-1/2 miles due south of North Dakota Route 37, thence westerly to the thread of the Deep Water Bay, thence along that thread to its juncture with the thread of the Missouri River, thence southerly and easterly along the thread of the Missouri to the extreme southeasterly corner of the Reservation boundary, thence north approximately two miles, thence due west to the line that divides ranges 87 and 88 West, thence north on that line to its juncture with the McLean-Mountzrail County line, thence west on that county line to its juncture with Route 37, thence southerly along Route 37 to a point where it curves sharply to the west, thence due south from that point until the point of beginning.

Southern: That part of the Reservation starting at a point at the confluence of the Missouri and Little Missouri Rivers, thence southwesterly along the stream of the Little Missouri to the southern-most border of the Reservation, thence eastward along that border to a point on that line one mile beyond Beaver Creek Bay, thence in a northeasterly direction to the thread of the stream of the Missouri River, thence northwesterly along that stream to the point of beginning.

1974 Amendment III provided as follows:

Sections 2, 5 and 6 of Article III, GOVERNING BODY, shall be deleted and replaced by Sections 2(a), 2(b), 2(c) and 5 which shall read as follows:

Sec 2(a). The Tribal Business Council shall consist of a chairman elected at large and ten (10) members elected on an at large basis to represent segments of the reservation as follows:

Western Segment	3 Representatives
Northern Segment	1 Representative
Northeastern Segment	1 Representative
Eastern Segment	3 Representatives
Southern Segment	2 Representatives

Sec 2(b). While candidates for each of the ten (10) council member positions

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(representatives) must qualify on the basis of the segment they propose to represent, they, as well as candidates for the office of chairman, shall be subject to an election open to all qualified voters on a reservation-wide basis, including those entitled to vote by absentee ballot.

In segments where there are three (3) representatives, the three (3) qualified candidates from each such segment receiving the highest number of votes shall be declared elected.

In the segment where there are two (2) representatives, the two (2) qualified candidates receiving the highest number of votes shall be declared elected.

In segments where there is only one (1) representative, the one (1) qualified candidate from each such segment receiving the highest number of votes shall be declared elected.

Sec. 4(c). The chairman of the Tribal Business Council shall be elected at large by a majority of all votes cast for the office of chairman. If no candidate for chairman receives a majority of the votes cast for that office at the general election, a special run-off election shall be held between the two (2) candidates which received the highest number of votes at the general election. The candidate receiving the highest number of votes at the special run-off election shall be declared elected as chairman.

Sec. 5. Within three (3) days after the installation of the successful candidates for council positions elected at the general election, the newly constituted Tribal Business Council shall meet and organize by electing a vice chairman, a secretary, and a treasurer from its own members; and from within or outside its own members, it may elect or appoint a sergeant at arms and such other officers and committees as it may find necessary.

ARTICLE IV - NOMINATIONS AND ELECTIONS

SECTION 1. All elections shall be by secret ballot.

SEC. 2(a). Any member of the Three Affiliated Tribes of the Fort Berthold Reservation, who is eighteen (18) years of age or over, shall be eligible to vote at any Tribal election.

[This section amended by Amendment No. I, effective October 16, 1956, and further amended by Amendment No. IV, effective September 10, 1974.]

SEC. 2(b). For the purpose of voting in Tribal Business Council elections exclusively, any eligible voter of the Three Affiliated

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Tribes, whose place of legal residence is located outside the exterior boundaries of the Fort Berthold Reservation on the date of an election, shall return to the Reservation in order to vote in the election and shall register to vote and cast his ballot at the appropriate segment polling place on the date of the election.

In the initial election actually voted in subsequent to the effective date of this Amendment, each such nonresident eligible voter shall be entitled to vote at the polling place located in the segment of his choice; provided, however, that such choice of segment shall be binding upon such nonresident voter in subsequent elections, until such time as he has established and maintains legal residence on the Fort Berthold Reservation in a different segment on the date of any subsequent election.

[As amended by Amendment XI, effective July 2, 1986.]

SEC. 3(a). The general election of the Tribal Business Council shall be held on the Tuesday next after the first Monday in November in every even numbered year. In the event, however, that the general election cannot be held on said date, the election shall be held on a date designated by the Tribal Business Council, which date shall be within a period of thirty (30) days from the day heretofore specified.

In case of a tie vote for any position on the Tribal Business Council in a general election, such that a qualified candidate for such position is not elected, a special runoff election shall be held between the tied candidates. The candidate who receives the higher number of votes in the special runoff election shall

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be declared elected to such position.

In case of a tie vote in a runoff election for any position on the Tribal Business Council, a second runoff election shall be held between the two (2) tied candidates for such position and the candidate who secures the higher number of votes cast in the second runoff election shall be declared elected to such position. In the case of a tie vote in the second runoff election, the two (2) tied candidates shall draw straws in a special lottery conducted by the tribal election board for the purpose of determining which candidate shall be declared elected to the position.

[As amended by Amendment XII, effective July 2, 1986.]

SEC. 3(b). A primary election shall be held for each vacant position on the Tribal Business Council, which election shall be held on the Tuesday next after the third Monday in September in every even numbered year. In the event, however, that, pursuant to the authority granted in Section 3(a) of this Article, the Tribal Business Council should extend the date of the general election beyond the Tuesday next after the first Monday in November in a particular election year, the date on which the primary election will be held in such year shall be likewise extended for the same period as the general election has been extended.

[As amended by Amendment XII, effective July 2, 1986.]

SEC. 3(c). The two (2) qualified candidates for each position on the Tribal Business Council, for which an election is being held, who secure the highest number of votes in the primary election shall stand for election in the ensuing general election. In the event, however, that any one qualified candidate for a

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particular position on the Tribal Business Council should secure a majority of the votes cast for such position in the primary election, such candidate shall be declared elected to such position at the primary stage of the election and a general election shall not be held for such position in that election year.

[As amended by Amendment XII, effective July 2, 1986.]

SEC. 3(d). Notice of each primary and general election to be held in a respective election year shall be given by the Secretary of the Tribal Business Council to each eligible voter of the Three Affiliated Tribes at least thirty (30) days previous to the date on which the primary election is to be held, which written notice shall set forth the respective locations, dates, and times of both the primary and general elections. In the event, however, that the Secretary of the Tribal Business Council should fail to give the requisite notice in a timely manner as prescribed herein, the Secretary of the Interior, upon receipt of a petition signed by at least ten (10) percent of the eligible voters of the Three Affiliated Tribes, shall call such elections and give at least twenty-five (25) days notice to each such eligible voter, wherein are set forth the respective locations, dates, and times of both the primary and general elections.

[As amended by Amendment XII, effective July 2, 1986.]

SEC. 3(e). For the purpose of the 1986 Tribal Business Council election, the respective terms of office of each of the incumbent members of the Council shall expire upon the installation of those persons duly elected in the 1986 Council election. Each of the seven (7) positions on the Tribal Business Council shall be elected, in the 1986 election. The three (3) segment representatives elected to the Council in the 1986 election by the first, second, and third highest proportionate percentage

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of votes cast in the respective segments and the person elected to the Office of Chairman shall each serve a four (4)-year term of office, each of which shall expire in 1990 upon the election and installation of the successors to such position, unless any such Council member is unable to serve throughout such term as provided for in Article V, Section 1. In the event that two (2) segment representatives elected to the Council should secure the same third highest proportionate percentage of votes, such tied Council members shall draw straws in a special lottery conducted by the tribal election board for the purpose of determining which of such members shall serve a four (4)-year term. The remaining three (3) segment representatives elected to the Council shall each serve a two (2)-year term, each of which shall expire in 1988 upon the election and installation of the successors to such positions, unless any such Council member is unable to serve throughout such term, as provided for in Article V, Section 1.

In the 1988 Tribal Business Council election and in the Council elections held every second year thereafter, three (3) segment representatives shall be elected to the Council, each of whom shall serve a four (4)-year term. The term of office of the Chairman of the Council shall expire in 1990, upon the election and installation of the successor to such office, and every four (4) years thereafter. The duly elected Council member shall serve for the respective specified terms of office, each of which term shall commence upon the installation of the elected Council member pursuant to Article I, Section 4 of the Bylaws of the Three Affiliated Tribes and shall expire upon the installation of the successor to such Council position, unless such Council member is unable to serve throughout such term, as provided for in Article V, Section 1.

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[Section 3(e) added by Amendment X, effective July 2, 1986.]

SEC. 4. Special elections may be called by a two-thirds vote of the Tribal Business Council in favor of such special election, or by a petition signed by at least 10 percent of the qualified voters of each community as provided in Article VIII.

SEC. 5. All elections shall be held under the supervision of the Tribal Business Council or an election board appointed by that Council, and the Tribal Business Council or the election board appointed by it, shall make rules and regulations governing all elections, and shall designate the polling places and the election officers.

SEC. 6. In the first election after the adoption of this Amendment, any qualified voter of the Three Affiliated Tribes of the Fort Berthold Reservation who is a bona fide resident of one of the segments described herein may become a candidate to represent said segment on the Tribal Business Council by filing a notice of his candidacy with the Secretary of the Tribal Business Council at least fifteen (15) days before the election in which he is to be a candidate. In all succeeding elections, a qualified voter to be eligible to become a candidate must have resided in the segment he proposes to represent for a period of at least six (6) months next preceding the date of the election. At least ten (10) days before the election, the Secretary of the Tribal Business Council shall post the names of all candidates in each voting community. In the event that any community has no qualified candidate, as provided herein, such community may nominate one or more candidates by petition, signed by at least ten (10) qualified voters of such community.

[As amended by Amendment No. 1, effective October 16, 1956.]

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Any qualified voter of the Three Affiliated Tribes of the Fort Berthold Reservation who is a bona fide resident of one of the segments described herein may become a candidate for the office of Tribal Chairman by filing a notice of candidacy with the Secretary of the Tribal Business Council at least fifteen (15) days before the election in which he is to be a candidate.

[New paragraph added to Section 6 by Amendment No. III, effective September 10, 1974]

HISTORICAL NOTE

The initial Article IV of the Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936, reads as follows:

SECTION 1. All elections shall be by secret ballot.

SEC. 2. Any member of the Three Affiliated Tribes of the Fort Berthold Reservation, who is eighteen (18) years of age or over, shall be entitled to vote at any election at which he or she appears at the polls in his or her community during official voting hours on election day.

SEC. 3. The regular election of a Tribal Business Council shall be held on the first Tuesday of September in even numbered years, beginning with 1938.

SEC. 4. Special elections may be called by a two-thirds vote of the Tribal Business Council in favor of such special election, or by a petition signed by at least 10 percent of the qualified voters of each community as provided in Article VIII.

SEC. 5. All elections shall be held under the supervision of the Tribal Business Council or an election board appointed by that Council, and the Tribal Business Council or the election board appointed by it, shall make rules and regulations governing all elections, and shall designate the polling places and the election officers.

SEC. 6. Any qualified voter of the Three Affiliated Tribes of the Fort Berthold Reservation who is 21 years of age or over, may become a candidate for the Tribal Business Council by filing a notice of his candidacy with the Secretary of the Tribal Business Council at least fifteen (15) days before the election in which he is to be a candidate. At least ten (10) days before the election, the Secretary of the Tribal Business Council shall post the names of all candidates in each voting community. In the event that any community has no qualified candidate, as provided herein, such community may nominate one or more candidates by petition, signed by at least ten (10) qualified voters of such community.

1956. Amendment 1 approved by Secretary of the Interior Fred A. Seaton on October 16, 1956 reads as follows:

Article IV - NOMINATIONS AND ELECTIONS - Sections 2, 3 and 6 of the

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constitution shall be amended to read as follows:

Sec. 2(a). Any member of the Three Affiliated Tribes of the Fort Berthold Reservation, who is 21 years of age or over, shall be entitled to vote at any election.

Sec. 2(b). Absentee ballots will be furnished to any enrolled nonresident member of the tribes upon request to the tribal secretary made 10 days before the election. The ballot must be returned to and reach the tribal secretary on or before the date of the election in order that it may be counted.

Sec. 3(a). Not less than 20 days nor more than 30 days after the date on which this amendment becomes effective an election shall be held. At said election representatives to the Tribal Business Council from the segments as described herein shall be elected to serve until September 1958. Thereafter, the regular election of a Tribal Business Council shall be held on the first Tuesday of September in even numbered years.

Sec. 3(b). Notice of regular elections shall be given by the secretary of the Tribal Business Council who shall give to all enrolled members of the tribe 30 days notice of the time and place of the regular election. In the event the tribal secretary shall fail to give the appropriate notice, or in case a regular election has not been held, the Secretary of the Interior, upon the receipt of a petition signed by at least 30 percent of the adult members of the tribe, shall call such election and give 25 days notice, setting the time and place.

Sec. 6. In the first election after the adoption of this amendment any qualified voter of the Three Affiliated Tribes of the Fort Berthold Reservation who is a bona fide resident of one of the segments described herein may become a candidate to represent said segment on the Tribal Business Council by filing a notice of his candidacy with the Secretary of the Tribal Business Council at least 15 days before the election in which he is to be a candidate. In all succeeding elections a qualified voter to be eligible to become a candidate must have resided in the segment he proposes to represent for a period of at least six months next preceding the date of the election. At least 30 days before the election, the Secretary of the Tribal Business Council shall post the names of all candidates in each voting community. In the event that any community has no qualified candidate, as provided herein, such community may nominate one or more candidates by petition, signed by at least 10 qualified voters of such community.

1974. Amendment III approved by Acting Deputy Commissioner of Indian Affairs

Raymond V. Butler on October 21, 1974 declaring the amendment to be effective on September 10, 1974 reads as follows:

Section 3(2) of Article IV, NOMINATIONS AND ELECTIONS, shall be amended

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to read as follows:

Sec. 3(1) The regular election to fill all vacancies on the Tribal Business Council shall be held on the third Tuesday of September in even numbered years, or, in the event the election cannot be held on said date, on a date designated by the Tribal Business Council which shall be within thirty (30) days of the date heretofore specified.

At the September, 1974 election the five (5) candidates elected receiving the highest number of votes and the successful candidate for chairman shall serve four-year terms, or until their successors are duly elected and installed.

In cases of a tie between elected candidates, those tied candidates shall draw straws in a special lottery conducted by the tribal election board to determine which elected candidate shall serve a four-year term. The remaining five (5) candidates elected to the Tribal Business Council shall serve two-year terms. Thereafter, five (5) representatives shall be elected every second year to serve four-year terms. The term of office for chairman shall expire in 1978 and every four (4) years thereafter. In each instance, the above officials shall serve for the specified term or until their successors are duly elected and installed, unless earlier removed from office.

In case of a tie vote for any position on the Tribal Business Council such that the qualified representative, or representatives, from that particular segment is, or are, not elected, a special run-off election shall be held between the tied candidates for that position on the Tribal Business Council, in which all qualified voting members of the Three Affiliated Tribes shall be eligible to vote. The candidate or candidates receiving the highest number of votes in the special run-off election shall, in order of vote, be declared elected to fill the vacant position or positions on the Tribal Business Council.

In the case of a tie vote in two (2) consecutive special run-off elections held between the same tie candidates for a particular position on the Tribal Business Council, those candidates shall draw straws in a special lottery conducted by the tribal election board to determine which candidate shall fill the position on the Tribal Business Council.

Section 6 of Article IV, NOMINATIONS AND ELECTIONS, shall be amended by adding to it the following paragraph:

Any qualified voter of the Three Affiliated Tribes of the Fort Berthold Reservation who is a bona fide resident of one of the segments described herein may become a candidate for the office of Tribal chairman by filing a notice of candidacy with the Secretary of the Tribal Business Council at least

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fifteen (15) days before the election in which he is to be a candidate.

1974. Amendment IV approved by Acting Deputy Commissioner of Indian Affairs Raymond V. Butler on October 21, 1974 declaring the amendment to be effective on September 10, 1974 reads as follows:

AMENDMENT IV

Section 2(a) of Article IV, NOMINATIONS AND ELECTIONS, shall be amended to read as follows:

Sec. 2(a). Any member of the Three Affiliated Tribes of the Fort Berthold Reservation, who is eighteen (18) years of age or over, shall be eligible to vote at any tribal election.

ARTICLE V - VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. If a Council member or officer shall die, resign, or be permanently removed from the Reservation, or be removed from office for cause, the Council shall have full authority to appoint a qualified Tribal member from the segment where the vacancy occurs to serve the unexpired term of said member or office.

However, in case the Chairman's position becomes vacant due to the Chairman's death, resignation, permanent removal from the Reservation or removal from office for cause, the unexpired term of the Chairman shall be filled by a member of the Council, selected by a majority vote of the Council. In that instance, the Council shall promptly appoint, as herein provided, to fill the vacancy created by a Council member assuming the Chairman's position.

SEC. 2. The Tribal-Business Council may remove a member for cause by five (5) or more members voting for such removal, but before any vote is taken on the matter, such member shall be given an opportunity to answer any and all charges at a

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designated meeting of the Council, and the decision of the Tribal Business Council shall be final as to the removal or retention of such member.

SEC. 3. The Tribal Business Council shall, within one (1) year of the date of approval of this Section, enact an ordinance setting forth what constitutes cause for the removal of a Council member pursuant to Section 2 of this Article.

HISTORICAL NOTE

The initial Article V of the Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936, reads as follows:

ARTICLE V — VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. If a council member shall die, resign, permanently remove from the reservation, or be removed for cause, the Council shall declare such position vacant and shall elect to fill the unexpired term from a list of names recommended by a petition signed by a majority of the voters of the community in which the vacancy occurs, and provided that the person elected or appointed by the Tribal Business Council to fill the unexpired term shall be a resident of the community in which the vacancy occurred, and otherwise eligible for the office.

SEC. The Tribal Business Council may expel a member for cause by seven or more members voting for such expulsion, but before any vote is taken on the matter, such member shall be given an opportunity to answer any and all charges at a designated meeting of the Council, and the decision of the Tribal Business Council shall be final as to expulsion or retention of such member.

Amendments:

Section 1 was amended by Amendment No. III, effective September 10, 1974, as it presently appears above.

Sections 2 and 3 of Article V were amended as shown above by Amendment DC, effective July 2, 1986.

ARTICLE VI - POWERS

SECTION 1. The Three Affiliated Tribes of the Fort Berthold Reservation, acting through their Tribal Business Council, shall have the powers granted by this Article; but any power

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exercised through that Council shall be subject to a popular referendum as provided by this Constitution.

SEC. 2. The exercise of the powers granted by this Constitution is subject to any limitations imposed by the statutes of the United States or by this Constitution and Bylaws.

SEC. 3. The people of the Fort Berthold Reservation hereby grant to the Tribal Business Council of the Three Affiliated Tribes all necessary sovereign authority — legislative and judicial — for the purpose of exercising the jurisdiction granted by the People in Article I of this Constitution. Further, the People hereby authorize the Tribal Business Council to delegate to the Tribal Court such judicial power and authority as may be necessary to realize the jurisdiction granted by the People in Article I of this Constitution.

SEC. 3(a). To present and prosecute any claims or demands of the Three Affiliated Tribes, and to assist members of the Tribes in presenting their claims or grievances before any court or agency of government, and to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

SEC. 3(b). The People of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. 1301, *et seq.*, including the award of injunctive relief only against the Tribal Business Council if it is determined through an adjudication that the Tribal Business

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Council has in a specific instance violated that Act.

SEC. 4. Any resolution or ordinance which, by the express requirements of federal law, is subject to the approval of the Secretary of the Interior, shall be presented to him, and he shall, within ten (10) days thereafter, approve or disapprove the same.

[Article VI - Powers. Sections 1 through 4 amended by Amendment No. VIII, effective March 11, 1985.]

SEC. 5. The Tribal Business Council shall have the following powers, the exercise of which shall be subject to popular referendum as hereinafter provided in this Constitution.

(a) To manage all economic affairs and enterprises of the Three Affiliated Tribes of the Fort Berthold Reservation in accordance with the terms of a charter to be issued to them by the Secretary of the Interior.

(b) To create and maintain a Tribal Business Council fund by accepting grants or donations from any person, State, or the United States, or by income from the Tribal enterprises, or by levying assessments of not less than 10 cents and not to exceed \$1 per year per capita on the qualified voters of the Three Affiliated Tribes, and to require the performance of labor in lieu thereof, provided the payment of such per capita levy shall be made before any person shall vote in any election held more than 6 months after the date of said levy.

(c) To administer any funds or property within the exclusive control of the Tribes to make expenditures from available Tribal funds for public purposes of the Tribes, including salaries or

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other remuneration of Tribal officials or employees. Such salaries or remuneration shall be paid only for services actually rendered. All expenditures from the Tribal Business Council fund shall be by resolution duly passed by the Council to such effect, and the amounts so paid shall be matters of public record at all times.

(d) To negotiate with the Federal, State and local governments on behalf of the Tribes, and to advise and consult with the representatives of the Interior Department on all activities of that Department that may affect the Fort Berthold Reservation.

(e) ~~(Stricken by Amendment No. 11, effective December 22, 1961.)~~

(f) To advise the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Three Affiliated Tribes prior to the submission of such estimates or projects to the Bureau of the Budget and to Congress.

(g) To purchase land of members of the organization under condemnation proceedings in courts of competent jurisdiction.

(h) To regulate the inheritance of real and personal property, other than allotted lands, within the territory of their jurisdiction.

(i) To make assignments and leases of Tribal lands, and otherwise to manage Tribal lands, interests in Tribal lands, and property upon such lands, in conformity with Article IX of this Constitution.

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(j) To protect and preserve the property, wildlife, and natural resources of the Tribes; to regulate hunting and fishing on all lands within the jurisdiction of the Tribes; and to cultivate and preserve native arts, crafts, culture, ceremonies and traditions.

HISTORICAL NOTE

Article VI - Powers. Section 5 (j) was amended by Amendment VIII, effective March 11, 1985. The prior subsection (j) reads as follows:

(j) To protect and preserve the property, wildlife, and natural resources of the Tribes; to regulate hunting and fishing on tribal lands; and to cultivate and preserve native art, crafts, culture, ceremonials, and traditions.

(k) To make recommendations to the Superintendent of the Fort Berthold Agency, the Commissioner of Indian Affairs, or the Secretary of the Interior, concerning the appointment and removal of employees assigned to duty of the Fort Berthold Reservation.

(l) To adopt resolutions regulating the procedure of the Tribal Business Council and other Tribal agencies and Tribal officials of the Reservation.

SEC. 6. Likewise subject to popular referendum, the Tribal Business Council may exercise such further powers as may in the future be delegated to the Three Affiliated Tribes of the Fort Berthold Reservation by the Secretary of the Interior or by any other duly authorized official or agency of government.

SEC. 7. Any rights and powers heretofore vested in the Three Affiliated Tribes of the Fort Berthold Reservation, but not expressly referred to in this Constitution, shall not be abridged by this Article, but may be exercised by the people of

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the Fort Berthold Reservation through the adoption of appropriate Bylaws and Constitutional amendments.

HISTORICAL NOTE

The initial subsection (e) of Article VI of the Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936, which was stricken by amendment II on December 22, 1961, reads as follows:

(e) To approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets, which may be authorized or executed by any authorized official or agency of the Government, provided that no tribal lands shall ever be sold or encumbered, leased for a period exceeding 5 years, except that mineral lands may be leased by the Tribal Business Council for such longer periods as may be provided by law.

(NO ARTICLE VII)

ARTICLE VIII - REFERENDUM

Upon a petition signed by at least 10 percent of the qualified voters of each community, demanding a referendum on any proposed or enacted ordinance or resolution of the Tribal Business Council, the Council shall call an election and the vote of a majority of the qualified voters voting in such referendum shall be binding upon the Tribal Business Council, provided that at least 30 percent of the eligible voters shall vote in such referendum.

ARTICLE IX - LAND

SECTION 1. The Tribal Business Council shall have authority to manage and lease or otherwise deal with Tribal lands and resources in accordance with law and to prevent the sale, disposition, lease or encumbrance of Tribal lands, interest in lands, or other Tribal assets.

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SEC. 2. Tribal lands. The unallotted lands of the Fort Berthold Indian Reservation and all lands which may hereafter be acquired by the Three Affiliated Tribes or by the United States in trust for the Three Affiliated Tribes, shall be held as Tribal lands and no part of such lands shall be mortgaged, sold, or ceded, except as permitted by law and then only with the consent and approval of the Secretary of the Interior. Tribal land shall not be allotted to individual Indians but may be assigned to members of the Three Affiliated Tribes, or leased, or otherwise used by the Tribes as hereinafter provided.

SEC. 3. Leasing of Tribal land — (a) Tribal land may be leased by the Tribal Business Council, with the approval of the Secretary of the Interior, for such periods as permitted by law. (b) Grazing permits covering Tribal lands may be issued by the Tribal Business Council, with the approval of the Secretary of the Interior, for such periods of time as permitted by law.

SEC. 4. Assignments of Tribal Land — (a) The Tribal Business Council may by ordinance, approved by the Secretary of the Interior, provide for granting and tenure of assignments of Tribal land to members of the Tribes. (b) Any member of the Tribes who owns an allotment or any share of heirship land or patent-in-fee land may voluntarily transfer his interest in such land to the Tribes in exchange for an assignment to the same land or for other land of a proportionate share in other Tribal assets.

SEC. 5. Use of Unassigned Tribal Land — Tribal land which is not leased or assigned, including Tribal timber lands, shall be managed by the Tribal Business Council subject to the

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approval of the Secretary of the Interior, for the benefit of the members of the Tribes.

SEC. 6. Acquisition of Land by Tribe — The Tribal Business Council of the Three Affiliated Tribes is hereby authorized and empowered to acquire by purchase, exchange of Tribal land, relinquishment, or otherwise any lands or interests in land for and on behalf of the Three Affiliated Tribes under such terms as may be agreed upon provided the acquisition is approved by the Secretary of the Interior.

HISTORICAL NOTE

Article IX — LAND was amended in its entirety by Amendment No. 11, effective December 22, 1961. The initial Article IX of the Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936, reads as follows:

ARTICLE IX — LAND

SECTION 1. Allotted lands, including heirship lands, within the Fort Berthold Reservation shall continue to be held as heretofore by their present owners. It is recognized that under existing laws such lands may be inherited by the heirs of the present owner, whether or not they are members of the Three Affiliated Tribes. Likewise it is recognized that under existing laws the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may be mortgaged or sold. The right of the individual Indian to hold or part with his land, as under existing law, shall not be abrogated by anything contained in this Constitution, but the owner of restricted land, may with the approval of the Secretary of the Interior, voluntarily convey his land to the Three Affiliated Tribes either in exchange for a money payment or in exchange for an assignment covering the same land, as hereinafter provided.

SEC. 2. The unallotted lands of the Fort Berthold Reservation and all lands which may hereafter be acquired by the Three Affiliated Tribes or by the United States in trust for the Three Affiliated Tribes, shall be held as tribal lands, and no part of such land shall be mortgaged, sold or ceded. Tribal lands shall not be allotted to individual Indians but may be assigned to members of the Three Affiliated Tribes, or leased, or otherwise used by the Tribes, as hereinafter provided.

SEC. 3. In the leasing of tribal lands or the granting of grazing permits,

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Departmental grazing regulations shall be observed and no lease or permit shall be granted to a nonmember unless it shall appear that no Indian cooperative association or individual member of the Three Affiliated Tribes is able and willing to use the land and pay a reasonable fee for such use.

SEC. 4. In any standard assignment of tribal lands which are now owned by the tribe or which may be hereafter purchased for the tribe by the United States, or purchased by the tribe out of tribal funds, preference shall be given, first, to members of the tribe who have been born since the allotment of land on the Fort Berthold Reservation and who have reached legal age and desire to establish a home but have no land or interests in land; and second, to heads of families which have no allotted lands or interests in allotted lands but shall have already received assignments consisting of less than an economic unit of agricultural land or other land or interests in land of equal value. Such economic unit shall be determined from time to time by the Tribal Business Council. No allotted member of the tribe who may hereafter have the restrictions upon his land removed and whose land may thereafter be alienated shall be entitled to receive an assignment of land as a landless Indian.

The Tribal Business Council may if it sees fit, charge a reasonable fee based upon the value of the land at the time of approval of an assignment made under this section.

Assignments made under this section shall be for the primary purpose of establishing homes for landless Indians, and shall be known as "Standard" assignment.

SEC. 5. If any member of the tribe holding a standard assignment of land shall for a period of two (2) years, fail to use the land so assigned or shall use such land for any unlawful purpose his assignment may be canceled by the Tribal Business Council after due notice and an opportunity to be heard, and the said land may be assigned in accordance with the provisions of section 4 of this Article.

Upon the death of any Indian holding a "standard" assignment his heirs or other individuals designated by him, by will or written request, shall have a preference in the reassignment of the land, provided such persons are members of the Three Affiliated Tribes who would be eligible to receive "standard" assignments.

SEC. 6. Assignments under this section shall be known as "exchange" assignments. Any member of the tribe who owns an allotment or any share of heirship land or patent-in-fee land may voluntarily transfer his interest in such land to the tribe in exchange for an assignment to the same land or other land of equal value. If the assignee prefers, he may receive, in lieu of a specific tract of land, a proportionate share in a larger grazing unit.

SEC. 7. "Exchange" assignments may be used by the assignee or leased by him to Indian cooperative associations, to individual members of the tribe, or, if no individual Indian or Indian cooperative association is able and willing to

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rent the land at a reasonable fee, such assignments may be leased to non-Indians, in the same manner as allotted lands.

SEC. 8. Upon the death of the holder of any exchange assignment, such land shall be reassigned by the Tribal Business Council to his heirs or devisees subject to the following conditions:

(a) Such lands may not be reassigned to any heir or devisee who is not a member of the Three Affiliated Tribes, except that a life assignment may be made to the surviving widower, widow, or child of the holder of such assignment.

(b) Such lands may not be reassigned to any heir or devisee who already holds more than 320 acres of grazing land, or other land or interests in land of equal value, either under allotment or under assignment.

(c) Such land may not be subdivided among heirs or devisees into units too small for convenient management. No area of grazing land shall be subdivided into units smaller than one hundred and (160) sixty acres, and no area of irrigated land shall be subdivided into units smaller than forty (40) acres except that land used for buildings or other improvements may be divided to suit the convenience of the parties. Where it is impossible to divide the land property among the eligible heirs or devisees, the Tribal Business Council shall issue to such heirs or devisees grazing permits or interests in tribal lands of the same value as the assignments of the decedent.

(d) If there are no eligible heirs or devisees of the decedent, the land shall be eligible for reassignment in accordance with the provisions of section 4 of this Article.

SEC. 9. Improvements of any character made upon assigned lands may be bequeathed to and inherited by members of the Three Affiliated Tribes under such regulations as the Tribal Business Council shall provide. No permanent improvements shall be removed without the consent of the Council.

SEC. 10. Assignments may be exchanged between members of the Three Affiliated Tribes by common consent in such manner as the Tribal Council shall designate.

SEC. 11. Tribal land which is not leased or assigned, including tribal timber reserves, shall be managed by the Tribal Business Council for the benefit of members of the entire tribe, and any cash income derived from such land shall accrue to the benefit of the tribe as a whole.

SEC. 12. Tribal funds in the United States Treasury may be used, with the consent of the Secretary of the Interior, to acquire land, under the following conditions:

(a) Land within the Fort Berthold Reservation or adjacent to the boundaries thereof, excepting allotments not in heirship status, may be purchased by or for the Three Affiliated Tribes.

(b) Land owned by any member of the tribe who desires to leave the

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reservation permanently may be purchased by the tribe under such terms as may be agreed upon.

SEC. 13. Applications for assignments shall be filed with the Secretary of the Tribal Business Council, and shall be in writing setting forth the name of the person or persons applying for the land and as accurate a description of the land desired as the circumstances will permit. Notices of all applications received by the Secretary shall be posted by him in the agency office and in at least three conspicuous places in the district in which the land is located for not less than 20 days before action is taken by the Council. Any member of the tribe wishing to oppose the granting of an assignment shall do so in writing, setting forth his objections to be filed with the Secretary of the Tribal Business Council, and may, if he so desires, appear before the Tribal Business Council to present evidence. The Secretary of the Tribal Business Council shall furnish the Superintendent or other officer in charge of the agency a complete record of all actions taken by the Tribal Business Council on applications for assignments of land and a complete record of assignments shall be kept in the agency office and shall be open for inspection by members of the tribe. Forms for assignments shall be prepared by the Tribal Business Council, subject to approval by the Secretary of the Interior.

ARTICLE X - AMENDMENTS

This Constitution and Bylaws may be amended by a majority vote of the qualified voters of the Tribes voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment when requested by a two-thirds (2/3) vote of the Tribal Council, or upon presentation of a petition signed by one-third (1/3) of the qualified voters.

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BYLAWS**ARTICLE I - DUTIES OF
OFFICERS**

SECTION 1. The Chairman of the Tribal Business Council shall preside at all meetings of the Council and direct the work of its officers. He shall appoint, subject to the approval of the council, such standing committees and special committees and other officers as the business of the tribe may require.

In the absence of the chairman from any regular council meeting or any special meeting regularly called, the vice-chairman shall preside in his place, and he shall have all the privileges, duties, and responsibilities of the Chairman in his absence.

SEC. 2. The Secretary of the Tribal Business Council shall conduct all correspondence of the Council, shall keep all records, minutes of meetings, and an accurate roll of members by communities. He shall receive all petitions, applications and other papers and prepare them for the action of the Council. He shall promptly submit a copy of the minutes of each Council meeting to the Superintendent of the Agency. He shall perform such other clerical duties relating to the business of the Council as it may direct.

SEC. 3. The Treasurer of the Tribal Business Council shall accept, receipt for, keep, and safeguard all funds in the custody of the Council, whether they be Tribal funds or special funds for which the Council is acting as trustee or custodian. He shall

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deposit all such funds in a bank or elsewhere as directed by the Council and shall make and keep a faithful record of such funds, and shall report on all receipts and expenditures and the amount and nature of all funds in his possession or custody to the Council at regular meetings and at such other times as requested by the Council, his reports to be in writing and matters of record. He shall not expend or otherwise disburse any funds in his possession or in the possession or custody of the Tribal Business Council except when he is authorized to do so by resolution duly passed by the Council. All checks shall be signed by the Treasurer and shall be countersigned by the Chairman of the Tribal Business Council, and all checks issued prior to July 1, 1940, shall be approved by the Superintendent of the Reservation.

The books and records of the Treasurer shall be audited at least once each year by a competent auditor employed by the Council, and at such other times as the Council or the Commissioner of Indian Affairs may direct. The Treasurer shall be required to be under a surety bond satisfactory to the Council and to the Commissioner of Indian Affairs.

SEC. 4. The Tribal Business Council, or an election board appointed by it, shall certify to the election of the duly elected Council members within 3 days after the election, and the newly elected Councilmen who have been certified shall be installed at the first meeting of the Tribal Business Council thereafter, upon subscribing to the oath of office as follows: "I do solemnly swear that I will support and defend the Constitution of the United States and the Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, and will faithfully and impartially discharge the

THREE AFFILIATED TRIBES

duties of Councilman to the best of my ability.

SEC. 5. The duties of all appointed committees and officers shall be clearly defined by resolution of the Council at the time of their appointment, and such committees and officers shall report from time to time as required by the Council, and their activities and decisions shall be subject to review by the Council at any time.

ARTICLE II - SALARIES

The Tribal Business Council may prescribe such salaries for Council members and Tribal officers appointed by the Council as it deems advisable, from such funds as may be available, provided that no compensation shall be paid to any Tribal officer out of any Tribal funds except by resolution duly passed and approved by the Council, and subject to popular referendum the same as other powers of the Council, and further provided that no compensation shall be paid to any Tribal officer out of Tribal funds under the control of the Federal Government except upon a resolution stating the amount of the compensation and the nature of the services rendered, and said resolution shall be of no effect until approved by the Secretary of the Interior.

ARTICLE III - MEETING OF COUNCIL

SECTION 1. The regular meetings of the Tribal Business Council shall be held at such place as may be designated by the Tribal Business Council, on the second Thursday of each month.

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SEC. 2. Special meetings may be called by the Chairman or by any three Councilmen who shall notify all members of the Council at least twenty-four (24) hours before the time of convening such meeting unless a majority of the Council approves a shorter call in an emergency.

SEC. 3. Five (5) members shall constitute a legal quorum of the Tribal Business Council.

SEC. 4. In the absence of the Chairman and Vice Chairman, if a quorum is otherwise present, the Secretary shall act as Chairman until a temporary Chairman is selected.

SEC. 5. At the first meeting of a newly elected Tribal Business Council, it shall establish by resolution a regular order of business such as: Roll call, reading of minutes of previous meeting, report of Treasurer, report of committees, unfinished business, new business, etc.

HISTORICAL NOTE

The initial Article III of the Indian Reorganization Act Constitution approved by the Secretary of the Interior, Harold L. Ickes, on June 29, 1936, reads as follows:

ARTICLE III — MEETING OF COUNCIL

SECTION 1. The regular meetings of the Tribal Business Council shall be held at Elbowoods, N. Dak., on the second Thursday of each month.

SEC. 2. Special meetings may be called by the Chairman or by any three councilmen who shall notify all members of the council at least twenty-four (24) hours before the time of convening such meeting unless a majority of the council approve a shorter call in an emergency.

SEC. 3. Seven members shall constitute a legal quorum of the Tribal Business Council.

SEC. 4. In the absence of the Chairman and Vice Chairman if a quorum is otherwise present, the Secretary shall act as chairman until a temporary chairman is selected.

SEC. 5. At the first meeting of a newly elected Tribal Business Council, it

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shall establish by resolution a regular order of business such as: Roll call, reading of minutes of previous meeting, reports of Treasurer, reports of committees, unfinished business, new business, etc.

AMENDMENTS:

SECTION 1 was amended by Amendment V, effective September 10, 1974., to read as it appears above.

SECTION 3 was amended by Amendment IX, effective July 2, 1986, to read as it appears above.

ARTICLE IV • ADOPTION OF CONSTITUTION AND BYLAWS

This Constitution and attached Bylaws, when adopted by a majority of the qualified voters of the Arickara, Gros Ventres, and Mandan Tribes of the Fort Berthold Reservation, voting at a special election called by the Secretary of the Interior, in which at least 30 percent of those qualified shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be in effect from the date of his approval.

CERTIFICATION OF ADOPTION

Pursuant to an order, approved March 11, 1936, by the Secretary of the Interior, the attached Constitution and Bylaws was submitted for ratification to members of the Arickara, Gros Ventres, and Mandan Tribes of the Fort Berthold Reservation and was on May 15, 1936, duly ratified by a vote of 366 for, and 220 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the act of June 15, 1935 (49 Stat. 378).

GEORGE W. GRINNELL
Chairman of Election Board.

INDIAN REORGANIZATION ACT CONSTITUTION

ARTHUR MANDAN,
Chairman of the Business Council.
PETER H. BEAUCHAMP
Secretary

W. R. BEYER, *Superintendent.*

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and Bylaws are hereby declared inapplicable to the members of the Three Affiliated Tribes.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws.

Approval recommended June 3, 1936.

JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior
[SEAL]

WASHINGTON, D. C., June 29, 1936.

ATTACHMENT B



**RESOLUTION OF THE GOVERNING BODY OF THE
THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD INDIAN RESERVATION**

A Resolution Entitled: "Interim Regulation governing the disposal of Waste and other Hazardous substances Associated with the Exploration or Production of Oil and Gas on the Fort Berthold Indian Reservation"

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act and having adopted a Constitution and By-Laws pursuant to said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, Article III of the Constitution of the Three Affiliated Tribes provides that the Tribal Business Council is the governing body of the Tribes; and

WHEREAS, Article VI, Section 5 (l) of the Constitution of the Three Affiliated Tribes provides that the Tribal Business Council has the power to adopt resolutions regulating the procedure of the Tribal Business Council and other Tribal agencies; and

WHEREAS, Article VI, Section 5 (j) of the Constitution of the Three Affiliated Tribes provides that the Tribal Business Council has the power to protect and preserve the property, wildlife and natural resources of the Tribes; and

WHEREAS, The rapid development of the oil industry on the Fort Berthold Indian Reservation due to oil exploration and production has resulted in a myriad of environmental concerns including the disposal of wastes associated with oil and gas exploration and production on tribal and allotted lands; and

WHEREAS, there are currently no tribal or federal regulations that prohibit dumping, disposing or discharge of waste associated with the exploration or production of oil and gas on the Reservation; and

WHEREAS, certain companies doing business on the Reservation have engaged in the improper disposal of such wastes; and





WHEREAS, The United States Supreme Court held in *Montana v. United States* 450 U.S. 544, 1980, that Indian Tribes have inherent power to exercise civil authority over the conduct of non- Indians on fee lands within a reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the Tribe; and

WHEREAS, The Tribes' Environmental Division is the process of developing a Solid and hazardous waste management and remediation code for the Tribes however, those codes are in the preliminary stage of development; and

WHEREAS, The Tribal Business Council has determined that an interim regulation governing the disposal of waste associated with the exploration and production of oil and gas on the Fort Berthold Reservation should be adopted.

NOW THEREFORE BE IT RESOLVED, that the Tribal Business Council of the Three Affiliated Tribes hereby adopts the following interim regulations governing the disposal of waste associated with the exploration and production of oil and gas on the Fort Berthold Reservation:

1. DEFINITIONS: the following definitions apply to this regulation:

Authorized facility: means a waste management, storage, transfer or disposal site or facility which meets the requirements of applicable federal, tribal or state regulations and is approved by the Tribal Council as the place for such management or disposal of waste covered by this regulation.

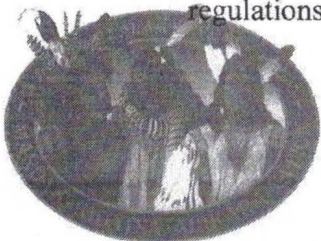
Discharge: means the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, injecting or dumping of waste into or on any land or water.

Disposal: means the discharge, abandonment, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any soil, air or water, intentional or otherwise.

Hazardous substances: means any substance which, because of its quantity, concentration or physical, chemical or infectious characteristics may pose a substantial present or future hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise mismanaged.

Remediate: means to abate, contain, or remove a hazardous substance from the environment.

2. DISPOSAL OF WASTE. All waste or other hazardous substances associated with the exploration or production of oil and gas on the Fort Berthold Reservation must be disposed of in an authorized facility in accord with all tribal, local, state and federal laws and regulations.





3. DISPOSAL ON RESERVATION LANDS PROHIBITED. The willful, negligent or accidental disposal of any waste associated with the exploration or production of oil and gas on any lands within the boundaries of the Fort Berthold Reservation that is not in compliance with section 1 of this regulation is strictly prohibited and shall result in civil penalties as set forth in section 6.

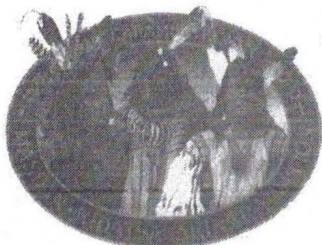
4. AUTHORITY TO AUDIT RECORDS. In order to ensure compliance with this regulation the compliance officers within the Tribes Energy Department and Environmental Department and Tribal Employment Rights Office (“TERO”) are hereby authorized to audit the records of companies who are in the business of removing, hauling and disposing of oil field waste to ensure that such companies are complying with the requirements of this regulation. Compliance audits shall be made upon 24 hour notice to the company provided however if the Tribe receives a report of any willful violation of this regulation, the audit shall be done immediately. Audits shall include checking records for the receipt of oil field waste against the records of the receipt of the authorized disposal site.

5. ENFORCEMENT. Enforcement of this Regulation shall be the joint responsibility of the Tribes’ Energy Department, Environmental Department, law enforcement services, TERO, Fire Management, and Game and fish Departments all of which are hereby authorized to issue citations for violations of this regulation. The Tribal Court shall have jurisdiction to hear all complaints and appeals of any citations issued pursuant to this regulation.

6. PENALTIES FOR VIOLATIONS. Any individual or company found to be in violation of this regulation shall be cited and fined as follows:
 - a. Willful violations:
First violation- \$10,000.00
Second violation: 25,000.00
Subsequent violation- \$1,000,000.00

 - b. Negligent violations
First violation: - \$5,000.00
Second violation: \$10,000.00
Subsequent violations: \$50,000.00

7. OTHER PENALTIES: in addition to the fines assessed above any individual or company found to be in violation of this Regulation shall be subject to the following remedies:
 - a. Suspension or revocation of the individual or company’s TERO license by the TERO Commission for repeated violations of this regulation, for failure to pay any fine assessed under Section 6 or for failure to comply with the remediation provisions of this regulation.





b. Any company or individual found to be in violation of this Regulation shall be required to remediate or pay for the cost of remediation of lands affected by the violation in order to prevent or minimize any environmental damages and minimize the risk to public health or to the environment. Remediation will be completed in accordance with standards set and determined by the Tribes.


CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Indian Reservation hereby certify that the Tribal Business Council is composed of seven (7) members of whom five (5) constitute a quorum, 7 were present at a regular Meeting thereof duly called, noticed, convened and held on the 14 day of July, 2011, that the foregoing Resolution was duly adopted at such meeting by the affirmative vote of 7 members, 0 members opposed, 0 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

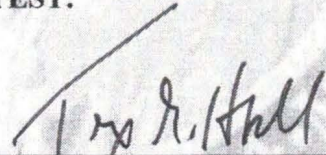
Chairman [] Voting. [] Not Voting.

Dated this 14 day of July 2011.

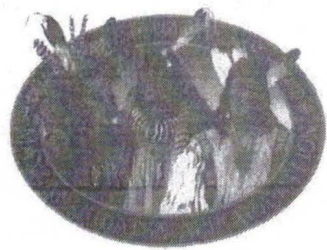
ATTEST:



Tribal Secretary V. Judy Brugh
Tribal Business Council
Three Affiliated Tribes



Tribal Chairman Tex G. Hall
Tribal Business Council
Three Affiliated Tribes



ATTACHMENT C



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Mark N. Fox
Office of the Chairman

July 16, 2018

Craig Boomgaard
Environmental Protection Agency
Region 8
Mail Code: 8P-W-UIC
1595 Wynkoop Street
Denver, Colorado 80202-1129

Re: Draft Class II UIC Permit No. ND22349-11250 for Red Murphy SWD No. 1

Dear Mr. Boomgaard:

Please find enclosed the Mandan, Hidatsa and Arikara Nation's ("MHA Nation") comments on the Draft Class II Underground Injection Control ("UIC") Permit No. ND22349-11250 for Red Murphy SWD No. 1 ("Draft Permit") to be operated by Goodnight Midstream Bakken, LLC within the Fort Berthold Indian Reservation. The Environmental Protection Agency ("EPA") issued a public notice for the Draft Permit on June 1, 2018.

EPA should deny the proposed permit until approval for waste disposal is obtained from the MHA Nation in accordance with MHA Nation laws. The use of underground disposal wells within the boundaries of the Reservation is prohibited without prior authorization from the MHA Nation. The MHA Nation enacted its waste disposal laws to protect tribal trust lands and ensure that the health and safety of our members and residents of the Reservation are not threatened by the disposal of harmful oil and gas byproducts on the Reservation.

Any permit issued by EPA must be directly coordinated with the MHA Nation. As highlighted in EPA's Policy on Consultation and Coordination with Indian Tribes ("Tribal Policy") issued on May 4, 2011, "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, ..." Denying or withholding the Draft Permit until approval is obtained from the MHA Nation is required by EPA's Tribal Policy, EPA's treaty and trust responsibilities, and the MHA Nation's sovereign authority to protect the health and welfare of its members and its homelands. Thank you for your consideration of the enclosed comments.

Sincerely,

/Mark N. Fox/

Mark N. Fox
Chairman



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Mark N. Fox
Office of the Chairman

Mandan Hidatsa and Arikara Nation Comments on Draft Class II UIC Permit No. ND22349-11250 for the Red Murphy SWD No. 1

July 16, 2018

I. Introduction

The Environmental Protection Agency (“EPA”) should deny the Draft Class II Underground Injection Control (“UIC”) Permit No. ND223490-11250 for Red Murphy SWD No. 1 (“Draft Permit”) sought by Goodnight Midstream Bakken, LLC (“Goodnight”). Currently, Goodnight’s application does not comply with applicable laws of the Mandan, Hidatsa and Arikara Nation (“MHA Nation”) governing waste disposal on the Fort Berthold Indian Reservation (“Reservation”). In addition, EPA’s assessment of the Draft Permit does not include the likelihood that waste disposed in the well will impact tribal trust lands and waters. At a minimum, EPA should withhold issuing any permit until Goodnight complies with MHA Nation law.

Goodnight is seeking a permit to operate a waste disposal well within the exterior boundaries of the Reservation. The Draft Permit was submitted for approval pursuant to the EPA’s Underground Injection Control program, as set forth under the Safe Drinking Water Act of 1974, 42 U.S.C. § 300f *et seq.* (“SDWA”), and Title 40, Part 144 of the Code of Federal Regulations. In addition to EPA’s requirements, MHA Nation law requires that Goodnight obtain approval for the disposal of waste and other hazardous substances associated with the exploration or production of oil and gas on the Reservation. Goodnight has not contacted the MHA Nation to obtain approval for waste disposal within the Reservation.

MHA Nation approval for waste disposal within the Reservation is required to protect tribal trust lands and the health and welfare of MHA Nation’s members, residents of the Reservation. The MHA Nation’s authority over Goodnight’s proposed activities within the Reservation stems from the MHA Nation’s federally approved Constitution and laws enacted pursuant to that Constitution. In addition, the United States Supreme Court recognizes and affirmed the inherent authority of Indian tribes to regulate such activities to protect the health and welfare of a tribe.

Finally, EPA’s Policy on Consultation and Coordination with Indian Tribes (“Tribal Policy”) requires that that EPA work directly with the MHA Nation in the issuance of any permit as the sovereign entity with the primary authority over the Reservation. EPA’s Tribal Policy highlights the Guiding Principle that “EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s

land and membership, ..." EPA Tribal Policy at 3 (May 4, 2011). This Guiding Principle implements and is required by EPA's treaty and trust responsibility to the MHA Nation. In light of MHA Nation's laws and EPA's requirement to coordinate with the MHA Nation any permit should be denied or withheld until Goodnight obtains approval from the MHA Nation.

II. MHA Nation Approval is Required Prior to Issuance of Any Permit

MHA Nation laws governing waste disposal within the Reservation require that Goodnight obtain approval from the MHA Nation. Goodnight has not contacted the MHA Nation for this approval. Approval is needed to comply with MHA Nation laws, to prevent the contamination of trust lands, and ensure the protection of the health and welfare of MHA Nation members, residents of the Reservation, and the Reservation itself.

As EPA is aware, the MHA Nation's Reservation is located in the heart of the Bakken Formation, which is the largest continuous oil accumulation in the lower 48 states. Oil and gas development within the Reservation significantly expanded over the past decade. While oil and gas development presents opportunities for economic growth, it also presents hazards to the health and safety of the members of the MHA Nation if not properly regulated. In order to protect the MHA Nation's members and residents of the Reservation from the harmful effects of oil and gas development, the MHA Nation enacted Resolution No. 11-75-VJB governing the disposal of waste associated with the exploration and development of oil and gas on the Reservation. Please see Resolution No. 11-75-VJB attached.

Resolution No. 11-75-VJB provides that "[a]ll waste or other hazardous substances associated with the exploration or production of oil and gas on the Fort Berthold Reservation must be disposed of in an authorized facility in accord with all tribal, local state, and federal laws and regulations." The Resolution defines "authorized facility" as a "waste management, storage, transfer or disposal site or facility which meets the requirements of applicable federal, tribal or state regulations and is approved by the Tribal Council as the place for such management or disposal of waste covered by this regulation." Accordingly, Resolution No. 11-75-VJB requires that the MHA Nation's Tribal Council approve any waste disposal facility.

The Draft Permit for Red Murphy SWD No. 1 fits squarely within the scope of facilities and activities regulated by the MHA Nation under Resolution No. 11-75-VJB. When enacting this Resolution, the MHA Nation was keenly aware that the waste injected into disposal wells, even on fee lands within the Reservation, contains harmful compounds that could contaminate trust lands and groundwater resources. Consequently, the MHA Nation required that such disposal wells be strictly regulated by the MHA Nation and obtain approval prior to construction or use.

The MHA Nation's regulatory authority over waste disposal wells stems from its federally approved *Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation* ("MHA Nation Constitution"). Please see MHA Nation Constitution attached. The MHA Nation drafted its constitution under to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA). Then, pursuant to authority delegated by Congress, the Secretary of the

Interior reviewed and approved the MHA Nation Constitution in 1936. *See* MHA Nation Constitution at 12.

Similar to the authority Congress delegated to EPA under the Clean Water Act or the Safe Drinking Water Act for the approval of tribal standards governing water quality within a Reservation, under the IRA, Congress delegated to the Department of the Interior the authority to approve tribal constitutions that would organize the tribal governing body and set out the authority of Indian tribes to govern their members, lands and resources. The MHA Nation utilized the authority provided in its Constitution to pass its laws regulation waste disposal facilities within its Reservation.

The MHA Nation Constitution provides in Article I that the jurisdiction of the MHA Nation “shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation....” MHA Nation Constitution at 1 (emphasis added). In addition, Article VI § 3 empowers the MHA Nation’s governing body, the Tribal Business Council, with “all necessary sovereign authority - legislative and judicial - for the purpose of exercising the jurisdiction granted ... in Article I of this Constitution.” *Id.* at 6. Article VI § 5 (j) provides the MHA Nation’s governing body with authority over “natural resources” which includes land, water and groundwater resources. *Id.* at 8.

The MHA Nation’s regulation of waste disposal wells pursuant to its authority under its Congressionally authorized and federally approved Constitution is similar to tribal authority exercised under the Clean Water Act. For example, in *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998), the Court upheld EPA’s approval of tribal regulation of reservation water resources pursuant to the Clean Water Act even when that regulation affects non-Indians—such as Goodnight in this case. The Court’s affirmation of tribal authority was based in part on EPA’s “generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation....” *Id.*

Similarly, the MHA Nation took action to protect its members and Reservation lands, waters and groundwater from waste disposal associated with oil and gas activities. Whether under the Clean Water Act or the Indian Reorganization Act, in both cases federal officials approved the tribal enactments, the tribes took action to protect their land and water resources, and the approved tribal authority extends to both Indians and non-Indians within the boundaries of the respective reservations. As the Ninth Circuit noted it would be practically impossible to separate damage to water resources on “non-Indian fee land from impairment on the tribal portions of the Reservation.” *Id.* The same is true for waste injected into fee lands as it migrates or trespasses onto trust lands and could contaminate groundwater and drinking water through cracks in the well.

The MHA Nation also has inherent authority over non-Indian activities on fee lands within the Reservation. While it is not necessary for the EPA to reach this issue, given the Federal government’s affirmation of the MHA Nation’s authority in the MHA Nation Constitution, the MHA Nation’s inherent authority provides for the regulation of all waste

disposal facilities within the Reservation including facilities operated by non-Indians on fee lands.

The U.S. Supreme Court recognized and upheld the inherent authority of Indian tribes to regulate the activities of non-Indians on fee lands within reservations. In *Montana v. United States*, the Supreme Court held that tribes retain inherent civil authority “over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 (1981). Underground disposal of oil and gas waste products, including hazardous waste, is exactly the kind of non-Indian activity that threatens the “health of welfare” of an Indian tribe.

Oil and gas operations, including waste disposal, is an inherently dangerous activity that results in numerous spills and leaks of hazardous fluids. In the last 12 months, oil and gas companies operating in North Dakota reported 300 “general” spills outside of the oil field. Many of these spills occurred during activities related to waste disposal. See <https://deq.nd.gov/FOIA/Spills/default.aspx/> (accessed on June 30, 2018). All of these spills threatened the “health and welfare” of the MHA Nation, its members, residents of the Reservation and Reservation lands and waters. When a spill occurs within the Reservation, in most cases it is the MHA Nation, not EPA and not the State of North Dakota that responds.

III. EPA Regulations Implementing the Safe Drinking Water Act Recognize Tribal Authority Over Waste Disposal Wells

Consistent EPA’s treaty and trust responsibility to Indian tribes and its Tribal Policy, the regulations implementing the SDWA affirm that EPA should consider tribal authorities and interests in overseeing and permitting Class II wells in Indian Country like the Red Murphy SDW No. 1 disposal well under consideration here. EPA regulations provide that the Administrator “may promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands.” 40 C.F.R. § 144.2. In its oversight and permitting, EPA is further directed to consider “[t]he interest and preferences of the tribal government having responsibility for the given reservation or Indian lands.” 40 C.F.R. § 144.2 (a).

In this case, EPA should promulgate “an alternative UIC Program” to manage the large number of disposal wells proposed for the Reservation and prevent impacts to tribal trust lands and waters. This alternative UIC program should be developed in consultation to include the “interest and preferences” of the MHA Nation. As set out in Resolution No. 11-75-VJB, EPA’s alternative UIC Program for the Reservation should include coordination with and the approval of the MHA Nation.

EPA’s regulation of Class II wells and EPA incorporation of tribal “interests and preferences” extends to all lands and persons within the Reservation. EPA regulations define “Indian lands” to mean “‘Indian Country’ as defined in 18 U.S.C. 1151. That section defines Indian country as: (a) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;...” 40 C.F.R. § 144.3.

Red Murphy SDW No. 1 is within the Reservation and within Indian Country as defined by EPA. As a result the Red Murphy SDW No. 1 is subject to EPA's requirements in 40 C.F.R. § 144.2 for the consideration of the MHA Nation's "interests and preferences." The MHA Nation expressed its interests and preferences in Resolution No. 11-75-VJB and EPA should abide by this clear expression of the MHA Nation's interests and preferences.

IV. EPA Must Assess Impacts to Trust Lands and Waters from Waste Disposal Wells

Red Murphy SWD No. 1 must also be assessed for its likely impact to tribal trust lands and waters. As a result of disastrous federal allotment policies in the late 1800's and early 1900's the MHA Nation's Reservation is a checkerboard of fee, allottee and trust lands. Oil and gas activities on any of these lands will have an impact on neighboring lands. Red Murphy SWD No. 1 and any other disposal well within or near the Reservation must be assessed for its impacts on trust lands and waters. This is one of the obvious reasons why the MHA Nation's authority and EPA's SDWA authority cover the entire Reservation or Indian Country and not specific types of parcels.

EPA should obtain and include in its assessment of Red Murphy SDW No. 1 and other UIC wells, an August 15, 2017 analysis by Bureau of Land Management's (BLM) Branch of Fluid Minerals in the Montana/Dakotas State Office entitled "Reconnaissance Study of the Potential Area and Radius of Influence from Saltwater Disposal Wells Within and Near the Fort Berthold Indian Reservation, North Dakota." This analysis shows that a number of disposal wells on the Reservation, whether on fee or allottee lands, are already impacting neighboring tribal trust lands. While this report is marked "confidential," EPA should obtain this report from its sister Federal agency as a starting point for its assessment of disposal wells within the Reservation

Even using BLM's overly conservative assumptions regarding substrate pore space and despite BLM's lack of site specific geological analysis, BLM's results show that many disposal wells within the Reservation are being injected with waste at a rate and volume that is already resulting in migration of waste on to trust lands. In addition, a recent review of the wells assessed by BLM in this analysis shows that current disposal volumes, less than a year later, can be as high as eight times (8x) the amounts assessed by BLM. EPA must consider these impacts in assessing Red Murphy SDW No. 1 as well as the potential for waste, injected at high volumes and pressures to fracture or breakthrough the well and impact the MHA Nation's groundwater and drinking water resources.

Even a brief geologic analysis shows that the Draft Permit proposes drilling Red Murphy SWD No. 1 in one of the poorest sandstone intervals on the Reservation. This means that the disposed waste will migrate far from the injection site and contaminate MHA Nation trust lands only about 700 feet away. For example, assuming an injection rate of 15,000 barrels per day, the waste disposed in Red Murphy SWD No. 1 will infiltrate trust lands in 3 years. Consistent with its trust responsibility, EPA must, in consultation with the MHA Nation, study the geological characteristics of waste disposal sites and determine an acceptable injection rate prior to issuing waste disposal permits.

V. Draft Permit Violates EPA's Trust Responsibility to the MHA Nation and EPA's Tribal Policy

In administering the UIC program under the Safe Drinking Water Act, EPA retains its fiduciary obligation to "safeguard Indian interests in land." *HRI Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (10th Cir. 2000) (citing *Drummond v. United States*, 324 U.S. 316, 318 (1945)). Therefore, when overseeing and permitting underground injection wells located in Indian country, or otherwise having a potential impact on Indian lands, EPA's duties extend beyond ensuring that drinking water sources remain untainted. EPA, as trustee for the MHA Nation and its members, must also protect against other adverse impacts on Indian lands. The Draft Permit, as currently written, does not adequately monitor and protect against potential harms to MHA Nation lands and waters, including the infiltration of contaminated waters into tribally owned pore space.

Each underground injection well has an associated "injection zone" defined as "a geological 'formation,' group of formations, or part of a formation receiving fluids through a well." 40 C.F.R. § 146.3. The injection zone for the Red Murphy SWD No. 1 is a sandstone formation known as the Inya Kara formation. Because of the sandstone lithology of the Inya Kara formation, contaminated fluids can percolate through the formation and enter into pore space owned by the MHA Nation. Any such infiltration of contaminated fluids would constitute a trespass on the part of the well operator and a breach of trust on the part of the EPA. The Draft Permit does not contain measures to prevent this harmful phenomenon from occurring.

Review of the Draft Permit reflects that the injection zone underlies the MHA Nation's trust lands. The Draft Permit identifies an Area of Review ("AOR"), consisting of lands within a fixed three quarter mile radius of the proposed Red Murphy SWD No. 1. Lands comprising this AOR include MHA Nation trust lands. Pursuant to federal regulations, the purpose of the AOR is to establish an estimated perimeter within which injected fluids could potentially migrate into drinking water sources. *See* 40 C.F.R. § 146.6. Thus, the Draft Permit acknowledges the potential for injected fluids to infiltrate portions of the injection zone underlying MHA Nation trust lands, yet fails altogether to establish any mechanism to prevent this infiltration. In fact, the Draft Permit provides for an unlimited volume of fluid to be injected into the Red Murphy SWD No. 1, meaning that an unlimited quantity of contaminated water is likely to permeate MHA Nation trust lands.

The Draft Permit must contain adequate mechanisms to monitor the volume of contaminated fluid flowing into portions of the injection zone underlying MHA Nation's trust lands. The Draft Permit must also establish a maximum injection volume, as is necessary to prevent infiltration into tribally owned pore space. These additional terms must be developed with reliance on empirical studies performed in consultation with the MHA Nation. The Draft Permit should also establish penalties for injection of fluids in excess of the maximum volume, including, without limitation, forced shutdown of the injection well and the payment of fines for any violation to provide for any needed remediation.

In addition, EPA's Tribal Policy highlights the Guiding Principle that "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, ..." EPA Tribal Policy at 3 (May 4, 2011). This Guiding Principle implements and is required by EPA's treaty and trust responsibility to the MHA Nation. In light of MHA Nation's laws and EPA's requirement to coordinate with the MHA Nation any permit should be denied or withheld until Goodnight obtains approval from the MHA Nation.

VI. Environmental Appeals Board Decisions Do Not Limit Tribal Authority and EPA's Trust Responsibility in Issuing UIC Permits

The MHA Nation is not aware of any Environmental Appeals Board (EAB) decisions that would limit EPA's ability to consider and abide by MHA Nation Resolution No. 11-75-VJB when processing a UIC permit application. In consultation with the MHA Nation, EPA referenced five decisions potentially affecting EPA's ability to incorporate tribal law in its permitting decisions. Those decisions were:

- In Re: Envirotech, 6 E.A.D. 260 (EAB 1996)
- In Re: Beckman Production Services, 5 E.A.D. 10 (EAB 1994)
- In the Matter of Terry Energy Ltd., E.A.D. 159 (EAB 1992)
- In Re: Environmental Disposal Systems Inc., 12 E.A.D. 254 (EAB 2005)
- In Re: Core Energy LLC, Order Denying Review, UIC Appeal No. 07-02 (Dec. 19, 2017)

Each of these decisions involved an appeal by parties who argued that EPA failed to adequately incorporate limitations required by state and local law or ensure that property rights were adequately protected when issuing a UIC permit. The EAB denied all of these appeals on the basis that EPA is not authorized to consider factors beyond those specifically set forth in the SDWA and its regulations when deciding whether to issue a UIC permit.

None of these decisions considered the sovereign authorities of Indian tribes, EPA's government-to-government relationship with Indian tribes, EPA's ability to implement alternate UIC Programs on tribal lands, and EPA's Tribal Policy. EPA has a trust responsibility to administer its programs in compliance with EPA's Tribal Policy, in which EPA recognizes tribes as "sovereign entities with primary authority and responsibility for each tribe's land and membership." As this language reflects, EPA's trust responsibility includes administering its programs in a manner that acknowledges and respects tribes' "primary authority" over their reservation lands.

The SDWA and its regulations also do not circumscribe this trust responsibility in any way. To the contrary, by incorporating Tribe-specific provisions authorizing EPA to "promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands" and to consider "[t]he interest and preferences of the tribal government having responsibility for the given reservation or Indian lands," the applicable regulations acknowledge the unique trust relationship between federal agencies and Indian Tribes. 40 C.F.R. § 144.2.

Based on this review, there does not appear to be an EAB decision that would limit EPA's existing regulations, policy and responsibilities to defer to and coordinate with the MHA Nation.

VII. Conclusion

Pursuant to Safe Drinking Water Act regulations, EPA's Tribal Policy, and EPA's treaty and trust responsibility to the MHA Nation, EPA must deny or withhold the Draft Permit until Goodnight obtains approval for the proposed waste disposal pursuant to MHA Nation laws. MHA Nation laws governing waste disposal within the Reservation were enacted pursuant to the MHA Nation Constitution approved by the Secretary of the Interior. The MHA Nation has its own authority to regulate waste disposal on the Reservation and EPA regulations direct that EPA exercise its permitting authority in direct coordination with the MHA Nation and according to MHA Nation interests and preferences.

ATTACHMENT D

**EPA Region 8 Underground Injection Control (UIC) Program
Response to Public Comments**

**Class II Commercial Permit No. ND22349-11250
Red Murphy SWD # 1
Salt Water Disposal Well**

Issued to:

**Goodnight Midstream Bakken, LLC
5910 N. Central Expressway, Suite 630
Dallas, Texas 75206**

Final Permit issuance: February 15, 2019

Background:

The Red Murphy SWD #1 Permit (Permit) is a Class II UIC commercial salt water disposal Permit for a new injection well on the Fort Berthold Indian Reservation (FBIR). The draft permit for this well was issued on June 1, 2018 with a 30-day public comment period. A public notice of the comment period was published in the New Town News and the Dunn County Herald. It was also posted on EPA Region 8's website. A two-week extension for public comments was granted to provide the Mandan, Hidatsa and Arikara Nation (MHA Nation or Tribe) additional time to comment on this draft permit. The Final Permit authorizes commercial disposal of oil-produced fluids through injection.

The EPA only received one set of written comments on the draft permit during the comment period, from the MHA Nation. However, the EPA also received verbal comments from the MHA Nation throughout the tribal consultation process. Finally, the EPA received a written comment outside of the comment period from the MHA Nation Energy Department staff. While EPA does not generally accept public comments outside of the comment period, it decided to do so in this case to ensure that the EPA could understand and give full consideration to the Tribe's interests. All comments are included in the administrative record for EPA's Final Permit decision.

Changes to the Final Permit:

Pursuant to the UIC permitting regulations at 40 CFR § 124.17, the Response to Comment must specify which provisions of the draft permit have been changed in the final permit decision and provide a reason for the change. The following changes have been made to the Final Permit:

1. Appendix C. Operating Requirements

Draft Permit Language: “There is no limitation on the fluid volume permitted to be injected into this well.... If an aquifer exemption is required and approved for this Permit, then a volume limit will be set based on the conditions of the aquifer exemption, through the modification process.”

Final Permit Language: The permittee, upon being granted authorization to inject, may dispose of up to 5,200,000 barrels of produced fluids as described in the Permit.

Reason for change: The Final Permit includes a volume limitation based on modeling results and analysis and limiting injection fluid movement to a 736-foot radius around the well bore. This volume limitation is designed to prevent injection fluid from migrating beneath tribal land, which lies 736 feet away from the well bore. The EPA’s preliminary assessment is that the portion of the Inyan Kara aquifer proposed to receive injected fluids is an underground source of drinking water (USDW), including the area of the aquifer underneath tribal land 736 feet from the well bore. This is based on EPA’s general knowledge of the aquifer’s water quality in this area of the Fort Berthold Indian Reservation (FBIR) and the lack of available site-specific data indicating that it is not a USDW. However, if the required water samples indicate that the aquifer is not a USDW at the well bore, this volume limitation is imposed as an additional protective measure to prevent injection fluid from migrating to potential USDWs under Tribal lands. The permittee is required in Appendix B to sample the aquifer prior to being authorized to inject. The EPA will use these sampling results to definitively determine whether this portion of the aquifer is a USDW, in which case the permittee may request, and EPA must review and approve, an aquifer exemption before injection can commence.

Response to Comments

In accordance with 40 CFR § 124.17, this section briefly describes and responds to all significant comments on the draft permit. The EPA Region 8 only received comments from two commenters, the MHA Nation Tribal Government and MHA Nation Energy Department staff. The MHA Nation provided comments in both written and verbal form.

1. Comment 1:

The EPA should withhold or deny the Class II Underground Injection Control (“UIC”) Permit No. ND22349-11250 for Red Murphy SWD No. 1 to be operated by Goodnight Midstream Bakken, LLC (“Goodnight”) until the company complies with MHA Nation law, which requires MHA Nation approval prior to issuance of the Permit. Oil and gas development presents opportunities for economic growth, but it also presents hazards to the health and safety of the members of the MHA Nation if not properly regulated. To protect Tribal members and Reservation residents from the harmful effects of oil and gas development, the MHA Nation enacted Resolution No. 11-75-VJB governing the disposal of waste associated with

the exploration and development of oil and gas on the Reservation. The Resolution requires that the MHA Nation's Tribal Council approve any waste disposal facility. Goodnight has not contacted the MHA Nation to obtain approval for waste disposal within the Reservation.

MHA Nation authority over waste disposal wells stems from its Constitution, approved under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA). The MHA Nation regulation of waste disposal wells pursuant to its authority under its Congressionally authorized and federally approved Constitution is similar to tribal authority exercised under the Clean Water Act. For example, in *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998), the Court upheld the EPA's approval of tribal regulation of reservation water resources pursuant to the Clean Water Act even when that regulation affects non-Indians—such as Goodnight in this case. The MHA Nation has inherent authority over non-Indian activities on fee lands within the Reservation. This authority provides for the regulation of all waste disposal facilities within the Reservation including facilities operated by non-Indians on fee lands.

The EPA should find that the following legal authorities and principles provide authority to condition or deny UIC permits based on the tribal resolution: the IRA, the federal trust responsibility to federally recognized Indian tribes, the “mild and equitable regulation” language under the 1825 Trade and Intercourse Treaties, the 1851 Fort Laramie Treaty, and principles of cooperative federalism.

Other federal agencies defer to tribal law, including the Department of Energy (DOE) and the Bureau of Land Management (BLM). At an Indian Country Energy and Infrastructure Working Group meeting, DOE Deputy Secretary of Energy Dan Brouillette gave a speech in which he said: “And let me be clear: it is not Administration Policy to dictate terms to tribes, but to consult, respecting tribal sovereignty by affording all tribes the opportunity to decide whether and how energy is developed on their lands, and to negotiate the benefits they reap from development....Moreover, the Administration is committed to the principle of Indian Energy Sovereignty...the concept that tribal governments, not feds, should decide which regulatory, tax, environmental, historic preservation, and sacred sites laws apply on Indian lands and govern Indian energy development.” A recent BLM final rule defers to tribal law by including a regulation that allows oil and gas operators to vent or flare oil-well gas royalty free when the venting or flaring is done in compliance with applicable rules, regulations, or orders of the State regulatory agency (for Federal gas) or tribe (for Indian gas). 83 FR 49184 (Sept. 28, 2018).

EPA Response 1:

The EPA cannot condition or deny permit applications based on the Tribe's laws. The Safe Drinking Water Act (SDWA) and its implementing regulations establish the only criteria under which the EPA may condition, approve, or deny permit applications for underground injection,

and the regulations generally are limited to the protection of USDWs. These regulations do not provide authority to make permitting decisions based on another entity's laws; those laws are outside the scope of the UIC program. However, issuance of a UIC permit by the EPA does not shield a permittee from compliance with other applicable laws. Consistent with 40 CFR § 144.35(b) and (c), the Permit specifies that “[i]ssuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of any other federal, state or local law or regulations.” Therefore, it is the Permittee's responsibility to comply with any other applicable laws which are outside the scope of the EPA's program.

The EPA respectfully acknowledges the MHA Nation's arguments regarding its authority to regulate oil and gas operations on the Fort Berthold Indian Reservation. However, the issue of Tribal authority is not before the EPA and is outside the scope of this permitting action. The EPA directly implements the UIC program throughout Indian country in North Dakota under authority from the SDWA. See 40 CFR § 147.1752. Accordingly, this Permit is being issued under the EPA's authority.

The EPA reviewed the legal authorities and principles cited by the MHA Nation, including the IRA, the federal trust responsibility to federally recognized Indian tribes, the “mild and equitable regulation” language under the 1825 Trade and Intercourse Treaties, the 1851 Fort Laramie Treaty, and principles of cooperative federalism. None of these legal authorities or principles alter the EPA's authority under the SDWA or provide the EPA authority to deny or condition UIC permits based on the MHA Nation's tribal resolution. The EPA provided a letter to the MHA Nation on December 28, 2017, summarizing its analysis on each of these authorities and principles. We are attaching a copy of the letter to this Response to Comments. (Attachment 1).

Finally, the DOE's and the BLM's purported ability to defer to tribal law does not affect the EPA's legal authority in this EPA UIC permitting action. The EPA reviewed the speech that the MHA Nation cited, given by DOE Deputy Secretary of Energy Dan Brouillette at an Indian Country Energy and Infrastructure Working Group meeting. The speech referenced DOE policies and principles of deferring to tribal law. However, the MHA Nation does not reference any legal authority that would require or allow the EPA to implement these policies and principles consistent with the SDWA. The DOE policies and principles of deferring to tribal law do not authorize the EPA to deny or condition UIC permit applications based on Resolution No. 11-75-VJB. Similarly, the BLM final rule regarding venting and flaring of oil and gas operations does not affect EPA's legal authority in this EPA UIC permitting action. According to the BLM, its legal authority for the rule is based on the Mineral Leasing Act and related statutes. 83 Fed. Reg. 49184, 49188 (September 28, 2018). The BLM's legal authorities do not apply to the EPA, do not provide the EPA any additional legal authority, and are outside the scope of the EPA UIC program.

2. Comment 2:

EPA regulations implementing the SDWA recognize tribal authority over waste disposal wells. SDWA regulations, consistent with EPA's treaty and trust

responsibility and Tribal Policy, affirm that EPA should consider tribal authorities and interests in overseeing and permitting Class II wells in Indian country. EPA regulations allow the Administrator to promulgate an alternate UIC program for Class II wells in Indian country. 40 CFR § 144.2. In its oversight and permitting, EPA is further directed to consider “[t]he interest and preferences of the tribal government having responsibility for the given reservation or Indian lands.” 40 CFR § 144.2(a). In this case, EPA should promulgate an alternative UIC Program to manage the large number of disposal wells proposed for the Reservation and prevent impacts to tribal trust lands and waters, including the well relating to the draft permit. This alternative UIC program should be developed in consultation to include the “interest and preferences” of the MHA Nation. As set out in Resolution No. 11-75-VJB, EPA’s alternative UIC program for the Reservation should include coordination with and the approval of the MHA Nation. The MHA Nation expressed its interests and preferences in Resolution No. 11-75-VJB, and EPA should abide by this clear expression of the MHA Nation’s interests and preferences.

EPA Response 2:

The UIC regulations do acknowledge two roles for tribes under the UIC program; these roles are detailed at 40 CFR § 144.2 and 40 CFR § 145.52. However, neither of these regulations apply in this permitting action.

The MHA Nation specifically commented that 40 CFR § 144.2 allows the EPA Administrator to promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands. It urged the EPA to promulgate such an alternative program and consider the interests and preferences of the Tribal government, as directed by the regulation. While it is possible to promulgate an alternate Class II UIC program to the one outlined in the federal regulations, such a promulgation must be done through notice and comment rulemaking, not through a specific permitting action. Therefore, this is outside the scope of this UIC permitting action. The current applicable program on the Fort Berthold Indian Reservation is codified at 40 CFR § 147.1752, is EPA-administered, and includes the requirements of 40 CFR parts 124, 144, 146, and 148.

The MHA Nation also cited to 40 CFR § 144.2 to support an argument that EPA is directed to consider the Tribal Government’s interest and preference in oversight and permitting. As explained above, 40 CFR § 144.2 allows the EPA to promulgate an alternate UIC Class II program for an Indian reservation; it does not contain any requirements with regard to specific permitting actions. Therefore, this provision does not provide authority for the EPA to condition or deny a permit based on the Tribe’s resolution.

The second role for tribes described in the UIC regulations can be found at 40 CFR § 145.52-.58. Under these regulations, a tribe can apply for primary enforcement responsibility to administer the UIC program. These regulations detail a process to transfer administration of the UIC program from the EPA to an Indian tribe. This process is also outside the scope of this permitting

action. The EPA is currently responsible for implementing the UIC program on the Fort Berthold Indian Reservation, as the MHA Nation has not applied for and been approved to do so. The EPA must implement the program in accordance with the applicable program as set out in 40 CFR § 147.1752.

3. TECHNICAL CONCERNS

- a. **Lateral Migration of Fluid - EPA must assess impacts to trust waters from waste disposal wells. Oil and gas activities on any of the lands on the Reservation will have an impact on neighboring lands. The Draft Permit proposes drilling Red Murphy SWD No. 1 in one of the poorest sandstone intervals on the Reservation. Injection into this Inyan Kara sandstone interval will result in disposed waste migrating far from the injection site and contaminate MHA Nation trust lands only about 700 feet away. Any such infiltration of contaminated fluids would constitute a trespass on the part of the well operator and a breach of trust on the part of the EPA. For example, assuming an injection rate of 15,000 barrels per day, the waste disposed in Red Murphy SWD No. 1 will infiltrate trust lands in 3 years. The Draft Permit does not contain measures to prevent this harmful phenomenon from occurring. Review of the Draft Permit reflects that the injection zone underlies the MHA Nation's trust lands.**

The Draft Permit identifies an Area of Review ("AOR"), consisting of lands within a fixed three-quarter mile radius of the proposed Red Murphy SWD No. 1. Lands comprising this AOR include MHA Nation trust lands. Pursuant to federal regulations, the purpose of the AOR is to establish an estimated perimeter within which injected fluids could potentially migrate into drinking water sources. See 40 C.F.R. § 146.6. Thus, the Draft Permit acknowledges the potential for injected fluids to infiltrate portions of the injection zone underlying MHA Nation trust lands, yet fails altogether to establish any mechanism to prevent this infiltration. In fact, the Draft Permit provides for an unlimited volume of fluid to be injected into the Red Murphy SWD No. 1, meaning that an unlimited quantity of contaminated water is likely to permeate MHA Nation trust lands. We need to know how far out the produced water goes once it goes into the formation.

The rock characteristics of the Inyan Kara (Dakota) Formation is more complex than a blind perforation program with fluid flow diagrams showing multiple configurations depending on the clean sandstone interval variations. EPA should obtain and include in its assessment, an August 15, 2017 analysis by BLM, which shows that a number of disposal wells on the Reservation, whether on fee or allottee lands are already impacting neighboring tribal

trust lands. Even using BLM's overly conservative assumptions regarding substrate pore space and despite BLM's lack of site specific geological analysis, BLM's results show that many disposal wells on the Reservation are being injected w/ waste at a rate and volume that resulting in migration of waste on to trust lands.

EPA Response 3a:

The MHA Nation's comments on the lateral migration of fluid concerns two different issues. The first issue is that fluids could migrate laterally within the injection zone and affect pore space underlying tribal trust lands. The Tribe also refers to this as "trespass" or "subsurface trespass." The second issue is that fluids could migrate laterally within the injection zone and affect water underlying trust lands. We discuss each issue separately.

Pore Space – The issue of subsurface trespass into pore space underlying an owner's land is a property rights issue that is expressly outside the scope of the UIC program. Consistent with 40 CFR § 144.35(b) and (c), the Permit specifies that "[i]ssuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of any other federal, state or local law or regulations." Therefore, the EPA has no authority to consider this issue in this UIC permitting decision.

Migration of fluid into waters underlying tribal trust lands – The Tribe raises a couple of issues regarding the potential for the injectate to migrate into waters under trust lands. The Tribe appears to call into question the EPA's analysis about fluid movement in the Inyan Kara Formation. It provides an alternate calculation and asserts that the injectate will cross into groundwater underneath tribal trust land in 3 years. The Tribe raises concerns that the EPA did not adequately assess the impact of underground injection on groundwater underlying tribal trust land. It also asserts that EPA must prevent fluids from crossing into groundwater under tribal trust land.

Modeling of fluid movement – The Tribe cites the BLM's August 2017 analysis to support its concern that fluid movement has already impacted tribal trust land on other parts of the Reservation. The EPA obtained a copy of the BLM report and reviewed it. In addition to this review, the EPA did some further modeling and analysis of fluid movement in this area. The EPA conducted an analysis based on a set of models previously developed and presented by the Department of Energy's Pacific Northwest National Laboratory (PNNL). In developing the model, a rigorous approach was taken to more accurately reflect the fluid movement in the Inyan Kara sandstone injection zone, by assuming fluid flow only into the proposed well's discrete perforations each separated by less permeable layers. The results of the models show that injecting at a rate of 14,000 barrels per day would result in the injectate entering waters underlying tribal trust land in approximately one year. The volumetric model that EPA used is generally similar to the BLM model. However, BLM uses the entire interval from the top of the uppermost perforation to the bottom of the lowermost perforation interval. The EPA took a more

conservative approach and assumed flow to only occur within the portion of the injection zone that were perforated. Furthermore, the porosity values were based on values from each discrete interval and not a gross value.

Migration of injectate into waters underlying tribal trust lands – The EPA’s authority to protect groundwater from underground injection derives from the SDWA and its UIC regulations. The UIC program as set out in the regulations does not authorize the EPA to protect all groundwater but rather aquifers defined as “underground sources of drinking water” or “USDWs.” 40 CFR § 144.3.

The UIC regulations at 40 CFR § 144.12, and the Permit in Part I, prohibit injection into a Class II well if it causes movement of a contaminant into a USDW. Therefore, following construction of the well, the Permittee is required to submit the results of its water quality sampling, which will provide data indicating whether the aquifer is a USDW at this site. If the aquifer is a USDW at this location, the EPA would not issue an authorization to inject, and the Permittee could not use the well to inject without first securing an aquifer exemption to exempt a specified area from protection as a USDW.

In addition to the prohibition on injecting into a USDW, the permit has been changed to include an injection volume limitation. As discussed in Response 3c below, the Final Permit includes an injection volume limitation based on an updated modeling analysis to limit injection fluid movement to a 736-foot radius around the well bore. This volume limitation is designed to prevent injection fluid from migrating beneath tribal land, which lies 736 feet away from the well bore. This change to the permit is based on the premise that the water in the aquifer underneath the neighboring tribal trust land meets the definition of a USDW, based on EPA’s general knowledge of the aquifer’s water quality in this area of the FBIR and the lack of site-specific data available indicating that it is not a USDW. In response to the Tribe’s ground water quality concerns, the EPA is exercising its discretion in incorporating this volume limit into the permit to protect this potential USDW.

- b. **Monitoring - The Permit must contain adequate mechanisms to monitor the volume of contaminated fluid flowing into portions of the injection zone underlying MHA Nation’s trust lands. The lack of monitoring is a glaring omission.**

Response 3b:

The EPA requires monitoring of injection volumes, both monthly and cumulatively. In Part II(A)(3)(d) *Sampling and Monitoring Devices*, the Permit requires the installation of a non-resettable flow meter that records the cumulative volumes on the injection line. Part II(D)(2)(b) *Monitoring Methods* requires injected volumes, cumulative injective volumes, and injection rates be recorded. Appendix D - *Monitoring and Reporting Parameters* requires weekly and annual reports on injection rates and volumes. The EPA has incorporated monitoring requirements

throughout the Permit. This monitoring includes both injection rates and volumes. Compliance with the injection volume limit will be verifiable with the monitoring requirements in place. These requirements will ensure that the fluids injected will stay within the limits/distances set in the permit.

- c. **Maximum injection volume and rate - The Permit must establish a maximum injection volume, as is necessary to prevent infiltration. Consistent with its trust responsibility, EPA must, in consultation with the MHA Nation, study the geological characteristics of waste disposal sites and determine an acceptable injection rate prior to issuing waste disposal permits. These additional terms must be developed with reliance on empirical studies performed in consultation with the MHA Nation.**

Response 3c:

After consideration of the MHA Nation's concerns about potential impacts to its waters due to the proximity of these waters to the proposed well, the Final Permit establishes an injection volume limitation to prevent endangerment to USDWs in the injection zone underneath tribal lands that are located 736 feet from the well bore. The injection volume limitation is based on the additional modeling discussed in Response 3a above, limiting the fluid migration to 736 feet from the well. The EPA is incorporating this volume limit into the Permit to protect this potential USDW. Once the well is drilled and the water quality of the aquifer is definitively determined, EPA will take whatever further action(s) may be needed prior to authorizing injection to ensure protection of USDWs.

The Permit also includes other measures to protect USDWs. First, the Permit prohibits any injection activity that allows movement of fluid containing any contaminant into USDWs, except as authorized by 40 CFR part 146. Coupled with this prohibition, the Permit contains a two-step process as briefly noted above. Specifically, the initial issuance of the Permit only allows the Permittee to construct the well, and during and after construction, the Permittee is required to collect data and perform testing. The Permittee must submit the data and testing results for EPA review. Only following EPA review and approval will EPA issue an Authorization to Inject, which would authorize injection by the Permittee. If submission of the data indicates that proposed injection zone is a USDW, the Permittee will not be authorized to inject; they will need to submit a proposal to the EPA for an aquifer exemption. Aquifer exemption requests typically specify the areal extent of the aquifer to be exempted and must demonstrate that injected fluids will remain within the exempted portion of the aquifer. The areal extent is generally consistent with the Permittee's total disposal needs. In this case, because there is an injection volume limitation in the Permit, the Permittee may also need to request an increase in the volume limit through a modification to the permit. The aquifer exemption process can be found at 40 CFR § 144.7 and 146.4; it is a process to exempt USDWs from protection under the SDWA because it

does not currently and will not in the future be used as a source of drinking water. The process provides an opportunity for public notice and comment.

The Permit does not include a specific rate limitation, but it does include a maximum allowable injection pressure (MAIP), which necessarily limits the injection rate and thereby prevents movement of fluid out of the authorized injection zone to ensure USDWs are protected. More specifically, increasing the injection rate will increase the injection pressure within the injection zone due to the increase in back pressure caused by resistance within the receiving formation. This resistance is determined by many hydrogeologic variables including porosity, permeability, and transmissivity. The Permit also requires that injection pressures and rates be monitored and reported.

The modeling results discussed above in Response 3a provides EPA the necessary level of certainty to determine how far fluids would travel from the injection well based on volume and rates of injection. More specifically, the model calculated travel distances over time based on injection rates proposed by the operator. The model assumed injection only into the proposed perforations (as provided in the Permit application), which correspond to clean sands that would readily accept injected fluids rather than the entire aquifer thickness. Consequently, this modeling more accurately reflects natural subsurface conditions. Using data from nearby wells and these specific injection intervals provided a more realistic assessment of fluid migration over time.

The EPA has consulted several times with the MHA Nation regarding UIC permits, and the Red Murphy permit specifically, on the FBIR and provided opportunities for the Tribe to give input on the Red Murphy application and draft permit, including the geologic information available at this time. However, the EPA does not have a legal obligation to perform any studies or modeling in conjunction with the Tribe.

- d. **Confinement - The EPA must consider the potential for waste, injected at high volumes and pressures to fracture or breakthrough the well and impact the MHA Nation's groundwater and drinking water sources.**

Response 3d:

The EPA did evaluate potential pathways for injected fluids to migrate outside of the authorized injection zone to ensure that no USDWs are endangered by the permitted activity. As required by the regulations, this analysis included consideration of the potential for injection to fracture the confining zone. The Permit contains conditions related to this concern, as discussed below. In addition, the Permit includes requirements for the Permittee to maintain mechanical integrity so that the well itself is not a conduit for fluid migration outside of the authorized injection zone.

There are two permit conditions that specifically address the Tribe's concerns about fracturing of the confining zone and the potential for waste to impact the Tribe's drinking water sources. First, the Permit prohibits injection activity that allows movement of a contaminant into USDWs. See Final Permit, Part I. Second, the Permit includes a provision prohibiting injection at a pressure

that would propagate existing or initiate new fractures in the confining zone. See Final Permit, Part II, Section B.4. (a). This permit condition limits injection pressure to ensure such fracturing does not occur, thereby preventing migration of fluids out of the authorized injection zone and into USDWs. Additionally, more than 3,000 feet of impermeable rock layers within the Dakota Group and the Pierre Shale provide adequate confinement between the proposed injection zone and overlying USDWs including the Fox Hills aquifer.

In response to the Tribe's concerns regarding "breakthrough" of the well, there are permit conditions that ensure well integrity so that the well itself does not serve as a conduit for injected waste to migrate to out of the injection zone and into USDWs. First, the Permit includes well construction requirements designed to protect USDWs adjacent to the well. For example, Part II, Section A.1 of the Permit requires that the well "shall be cased and cemented to prevent the movement of fluids into or between USDWs, and shall be in accordance with 40 CFR § 146.22." Well construction requirements are also described in Appendix A in the Permit. Second, during operation, the Permit prohibits injection between the outermost casing and the well bore. See Part II, Section B.1. In addition to the specific well construction and operating requirements, the Permit requires both initial testing and periodic testing to ensure that the well has mechanical integrity and is operating as designed. There are two types of mechanical integrity tests. Part I evaluates the potential for leaks from inside the well. This includes the injection tubing, packer and well casing. This test is performed by pressurizing the tubing-casing annulus of the well and observing the pressure over a specified period for leaks. Part II evaluates the external construction of the well, to ensure the cement between the well casing and the formation is protective of USDWs. This is done by running a cement bond log (CBL) which measures the quality and seal of cement between the casing and the formation (borehole). Depending on the CBL's results, additional Part II test methods may be required including radioactive tracer surveys, temperature logs, and oxygen activation logs to ensure there is no upward migration of fluids outside of the well casing and into USDWs.

- e. **Penalties - The Draft Permit should also establish penalties for the injection of fluids in excess of the maximum volume, including, without limitation, forced shutdown of the injection well and the payment of fines for any violation to provide for any needed remediation.**

Response 3e:

The purpose of a UIC permit is to regulate underground injection through appropriate construction, operating and maintenance, recording and monitoring, and plugging and closure requirements. These regulations can be found at 40 CFR §§ 144.51 and 144.52, and specific Class II requirements can be found at 40 CFR part 146 subpart C. The SDWA and its implementing regulations do not specify a process to establish penalties in a permit. Any enforcement of a permit violation must go through the enforcement process and is governed by the SDWA at 42 USC section 300h-2.

Exceeding the volume limitation would be considered a violation of the permit and would be addressed using EPA's enforcement authority to determine any appropriate penalties or remedies. The potential for an exceedance would be identified based on the EPA's review of the Permittee's ongoing monitoring and reporting of injection rates and cumulative volumes required in the Permit. Therefore, both the Permittee and the EPA will know well in advance whether injection volumes are nearing the limit thereby enabling EPA to take timely and appropriate action to prevent or address exceedance of this limit.

In addition, the Permit requires that the Permittee shut-in the well if there is a loss of mechanical integrity. See Part II. Section C.5. This is to prevent endangerment to nearby USDWs due to the potential for injected fluids to migrate from inside the well or along the outside of the well's casing.

4. Comment 4:

The draft permit violates EPA's trust responsibility to the MHA Nation. In administering the UIC program under the Safe Drinking Water Act, EPA retains its fiduciary obligation to "safeguard Indian interests in land." *HRI Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (10th Cir. 2000) (citing *Drummond v. United States*, 324 U.S. 316, 318 (1945)). Therefore, when overseeing and permitting underground injection wells located in Indian country, or otherwise having a potential impact on Indian lands, EPA's duties extend beyond ensuring that drinking water sources remain untainted. EPA, as trustee for the MHA Nation and its members, must also protect against other adverse impacts on Indian lands. The Draft Permit, as currently written, does not adequately monitor and protect against potential harms to MHA Nation lands, including the infiltration of contaminated waters into tribally owned pore space.

Response 4:

The Tribe asserts that the federal trust responsibility for federally recognized Indian tribes in this instance extends beyond the protection of drinking water sources and requires the EPA to protect Indian lands. The federal general trust responsibility does not create an independent, enforceable mandate or specific trust requirement beyond the EPA's obligation to comply with the legal requirements generally applicable to this situation under federal law – in this case the SDWA. While the EPA does not have authority under the SDWA to consider impacts to surface or subsurface property interests, the Final Permit complies with the SDWA by including adequate permit conditions to protect USDWs under tribal lands. As explained in Response 1, the UIC program is limited in scope, and the UIC regulations establish the only criteria under which the EPA can approve, deny, or condition permits. There are no UIC regulations authorizing the EPA to consider property interests or well siting, unless the siting concerns are related to geologic suitability relative to endangerment of USDWs. Issues regarding property interests (either surface or subsurface) are outside the scope of the UIC program, and the EPA has no authority or discretion to condition or deny permits based on these considerations. Further, as noted in

Attachment 1, the EPA has not identified any statute that would impose on the EPA a specific trust responsibility in this matter.

EPA is committed to maintaining its long-standing work with federally recognized Indian tribes on a government-to-government basis. Indeed, one of the key principles of the EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984) is that the Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments. Consistent with the federal trust responsibility, EPA has consulted and coordinated with the MHA Nation for over a year on UIC permitting issues on the Fort Berthold Indian Reservation. As we expressed in the EPA's December 28, 2017 letter to John Fredericks, the Tribe's attorney, EPA considers tribal interests in decision-making where we have discretion or authority to do so, consistent with the federal general trust responsibility. However, that trust responsibility does not grant the Agency additional authorities beyond those granted to us by Congress under the SDWA. Therefore, where we do not have authority or discretion to pursue a course of action, the general trust responsibility does not provide us any additional authority to do so.

The HRI, Inc. v. EPA case, cited by the Tribe, is consistent with the scope of the federal general trust responsibility described above. As referenced by the court, the federal general trust responsibility includes an obligation to protect tribal jurisdiction and tribal sovereignty over its lands, HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000), but does not create an independent, enforceable mandate or specific trust requirement beyond the EPA's obligation to comply with the legal requirements generally applicable under federal law. See, e.g., Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998); Gros Ventre Tribe v. United States, 469 F.3d 801, 809-814 (9th Cir. 2006).

5. Comment 5:

The MHA Nation referred to EPA's Policy on Consultation and Coordination with Indian Tribes (Policy) several times in its comments. The Tribe stated that the Policy requires that EPA work directly with the MHA Nation in the issuance of any permit as the sovereign entity with the primary authority over the Reservation. It quoted the Policy, stating that the "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership...." and expressed that "[t]his Guiding Principle implements and is required by EPA's treaty and trust responsibility to the MHA Nation." The Tribe's comments suggested that the Policy provides the EPA with the authority to deny the UIC permit application for Red Murphys SWD No. 1 on the basis of the Tribe's resolution.

EPA Response 5:

The EPA acted consistently with the Policy throughout the permitting process. As stated in the Policy, "EPA's policy is to consult on a government-to-government basis with federally

recognized tribal governments when EPA actions and decisions may affect tribal interests.” The EPA has engaged in government-to-government consultation with the MHA Nation for over a year on UIC permitting issues and sought its input regarding tribal concerns about UIC well permit applications within the Fort Berthold Indian Reservation, including the application for Red Murphy SWD No. 1. Specifically, the EPA held tribal consultations with the Tribe on September 1, 2017, December 20, 2017, and September 11, 2018 concerning the application for Red Murphy SWD No. 1.

The Tribe cites one of the guiding principles of the Policy in support of its position that the EPA should deny the UIC permit application for Red Murphy SWD No. 1 on the basis of the Tribe’s resolution – “EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership....” Where we have discretion to do so, the EPA has considered the Tribe’s input and sought to address its concerns. See Responses 3 and 4 above. The Tribe further states that “[t]his Guiding Principle implements and is required by EPA’s treaty and trust responsibility to the MHA Nation,” and suggests that the Policy provides the EPA with the authority to deny the UIC permit application. However, the Policy does not create independent legal authorities separate from the SDWA, and as explained above in Response 1, the MHA Nation’s treaties and the federal trust responsibility do not provide the EPA with the authority to deny UIC permit applications on the basis of the Tribe’s resolution, and neither does the Policy.

6. Comment 6:

EPA Environmental Appeals Board (EAB) decisions do not limit tribal authority and EPA’s trust responsibility in issuing UIC permits. The MHA Nation is not aware of any EAB decision that would limit EPA’s ability to consider and abide by MHA Nation resolution. None of the cited decisions considered the sovereign authorities of Indian tribes, EPA’s gov’t-to-gov’t relationship with Indian tribes, EPA’s ability to implement alternate UIC programs on tribal lands, and EPA’s Policy on Consultation and Coordination with Indian Tribes. The SDWA and its regulations do not circumscribe this trust responsibility in any way. To the contrary, by incorporating tribe-specific provision authorizing EPA to promulgate an alternate UIC Program for Class II wells, applicable regulations acknowledge the unique trust relationship between federal agencies and Indian Tribes. Based on this review, there does not appear to be an EAB decision that would limit EPA’ existing regulations, policy and responsibilities to defer to and coordinate with the MHA Nation.

EPA Response 6:

During the tribal consultation process for UIC permits, including for Red Murphy SWD No. 1, the EPA discussed the limitations on our authority with the MHA Nation, explaining that the SDWA does not authorize the EPA to implement the Tribe’s laws in UIC permit decisions by the Agency. As the Tribe notes in its comments, the EPA provided a list of relevant EPA

Environmental Appeals Board (EAB) decisions that discuss limitations on the scope of the EPA's UIC permitting authority. These cases speak to the limited scope of the EPA's authority in issuing UIC permits and hold that matters of state or local law and property rights, which include pore space ownership, are outside the scope of the EPA's permitting authority.

The Tribe disputes the effect of these cases in this permitting decision and asserts that the application of the federal trust responsibility to federally recognized Indian tribes would allow the EPA to consider and abide by, and effectively implement, the MHA Nation Resolution No. 11-75-VJB. The Tribe asserts that the EAB has never before considered the following factors in these previous decisions: the sovereign authorities of Indian tribes, EPA's government-to-government relationship with Indian tribes, EPA's ability to implement alternate UIC programs on tribal lands, and EPA's Policy on Consultation and Coordination with Indian Tribes. Even if the EAB has not had the opportunity to consider these factors in prior decisions, the EPA Region 8 did consider these factors in the context of this permitting decision. Our analysis of our authorities under the SDWA is informed by EAB decisions. We address the scope of the EPA's SDWA legal authority, including the EPA's lack of authority under the SDWA and its regulations to condition or deny UIC permit applications based upon MHA Nation Resolution No. 11-75-VJB, in Responses 1 and 4. We address tribal sovereign authority in Response 1. We address the federal trust responsibility (i.e. – the government-to-government relationship) in Responses 1 and 4. We address alternate UIC programs in Response 2. We address EPA's Policy on Consultation and Coordination with Indian Tribes in Response 5.

ATTACHMENT E

**EPA Region 8 Underground Injection Control (UIC) Program
Response to Public Comments**

**Class II Commercial Permit No. ND22349-11250
Red Murphy SWD # 1
Salt Water Disposal Well**

Issued to:

**Goodnight Midstream Bakken, LLC
5910 N. Central Expressway, Suite 630
Dallas, Texas 75206**

Final Permit issuance: February 15, 2019

Background:

The Red Murphy SWD #1 Permit (Permit) is a Class II UIC commercial salt water disposal Permit for a new injection well on the Fort Berthold Indian Reservation (FBIR). The draft permit for this well was issued on June 1, 2018 with a 30-day public comment period. A public notice of the comment period was published in the New Town News and the Dunn County Herald. It was also posted on EPA Region 8's website. A two-week extension for public comments was granted to provide the Mandan, Hidatsa and Arikara Nation (MHA Nation or Tribe) additional time to comment on this draft permit. The Final Permit authorizes commercial disposal of oil-produced fluids through injection.

The EPA only received one set of written comments on the draft permit during the comment period, from the MHA Nation. However, the EPA also received verbal comments from the MHA Nation throughout the tribal consultation process. Finally, the EPA received a written comment outside of the comment period from the MHA Nation Energy Department staff. While EPA does not generally accept public comments outside of the comment period, it decided to do so in this case to ensure that the EPA could understand and give full consideration to the Tribe's interests. All comments are included in the administrative record for EPA's Final Permit decision.

Changes to the Final Permit:

Pursuant to the UIC permitting regulations at 40 CFR § 124.17, the Response to Comment must specify which provisions of the draft permit have been changed in the final permit decision and provide a reason for the change. The following changes have been made to the Final Permit:

1. Appendix C. Operating Requirements

Draft Permit Language: “There is no limitation on the fluid volume permitted to be injected into this well.... If an aquifer exemption is required and approved for this Permit, then a volume limit will be set based on the conditions of the aquifer exemption, through the modification process.”

Final Permit Language: The permittee, upon being granted authorization to inject, may dispose of up to 5,200,000 barrels of produced fluids as described in the Permit.

Reason for change: The Final Permit includes a volume limitation based on modeling results and analysis and limiting injection fluid movement to a 736-foot radius around the well bore. This volume limitation is designed to prevent injection fluid from migrating beneath tribal land, which lies 736 feet away from the well bore. The EPA’s preliminary assessment is that the portion of the Inyan Kara aquifer proposed to receive injected fluids is an underground source of drinking water (USDW), including the area of the aquifer underneath tribal land 736 feet from the well bore. This is based on EPA’s general knowledge of the aquifer’s water quality in this area of the Fort Berthold Indian Reservation (FBIR) and the lack of available site-specific data indicating that it is not a USDW. However, if the required water samples indicate that the aquifer is not a USDW at the well bore, this volume limitation is imposed as an additional protective measure to prevent injection fluid from migrating to potential USDWs under Tribal lands. The permittee is required in Appendix B to sample the aquifer prior to being authorized to inject. The EPA will use these sampling results to definitively determine whether this portion of the aquifer is a USDW, in which case the permittee may request, and EPA must review and approve, an aquifer exemption before injection can commence.

Response to Comments

In accordance with 40 CFR § 124.17, this section briefly describes and responds to all significant comments on the draft permit. The EPA Region 8 only received comments from two commenters, the MHA Nation Tribal Government and MHA Nation Energy Department staff. The MHA Nation provided comments in both written and verbal form.

1. Comment 1:

The EPA should withhold or deny the Class II Underground Injection Control (“UIC”) Permit No. ND22349-11250 for Red Murphy SWD No. 1 to be operated by Goodnight Midstream Bakken, LLC (“Goodnight”) until the company complies with MHA Nation law, which requires MHA Nation approval prior to issuance of the Permit. Oil and gas development presents opportunities for economic growth, but it also presents hazards to the health and safety of the members of the MHA Nation if not properly regulated. To protect Tribal members and Reservation residents from the harmful effects of oil and gas development, the MHA Nation enacted Resolution No. 11-75-VJB governing the disposal of waste associated with

the exploration and development of oil and gas on the Reservation. The Resolution requires that the MHA Nation's Tribal Council approve any waste disposal facility. Goodnight has not contacted the MHA Nation to obtain approval for waste disposal within the Reservation.

MHA Nation authority over waste disposal wells stems from its Constitution, approved under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA). The MHA Nation regulation of waste disposal wells pursuant to its authority under its Congressionally authorized and federally approved Constitution is similar to tribal authority exercised under the Clean Water Act. For example, in *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998), the Court upheld the EPA's approval of tribal regulation of reservation water resources pursuant to the Clean Water Act even when that regulation affects non-Indians—such as Goodnight in this case. The MHA Nation has inherent authority over non-Indian activities on fee lands within the Reservation. This authority provides for the regulation of all waste disposal facilities within the Reservation including facilities operated by non-Indians on fee lands.

The EPA should find that the following legal authorities and principles provide authority to condition or deny UIC permits based on the tribal resolution: the IRA, the federal trust responsibility to federally recognized Indian tribes, the “mild and equitable regulation” language under the 1825 Trade and Intercourse Treaties, the 1851 Fort Laramie Treaty, and principles of cooperative federalism.

Other federal agencies defer to tribal law, including the Department of Energy (DOE) and the Bureau of Land Management (BLM). At an Indian Country Energy and Infrastructure Working Group meeting, DOE Deputy Secretary of Energy Dan Brouillette gave a speech in which he said: “And let me be clear: it is not Administration Policy to dictate terms to tribes, but to consult, respecting tribal sovereignty by affording all tribes the opportunity to decide whether and how energy is developed on their lands, and to negotiate the benefits they reap from development....Moreover, the Administration is committed to the principle of Indian Energy Sovereignty...the concept that tribal governments, not feds, should decide which regulatory, tax, environmental, historic preservation, and sacred sites laws apply on Indian lands and govern Indian energy development.” A recent BLM final rule defers to tribal law by including a regulation that allows oil and gas operators to vent or flare oil-well gas royalty free when the venting or flaring is done in compliance with applicable rules, regulations, or orders of the State regulatory agency (for Federal gas) or tribe (for Indian gas). 83 FR 49184 (Sept. 28, 2018).

EPA Response 1:

The EPA cannot condition or deny permit applications based on the Tribe's laws. The Safe Drinking Water Act (SDWA) and its implementing regulations establish the only criteria under which the EPA may condition, approve, or deny permit applications for underground injection,

and the regulations generally are limited to the protection of USDWs. These regulations do not provide authority to make permitting decisions based on another entity's laws; those laws are outside the scope of the UIC program. However, issuance of a UIC permit by the EPA does not shield a permittee from compliance with other applicable laws. Consistent with 40 CFR § 144.35(b) and (c), the Permit specifies that “[i]ssuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of any other federal, state or local law or regulations.” Therefore, it is the Permittee's responsibility to comply with any other applicable laws which are outside the scope of the EPA's program.

The EPA respectfully acknowledges the MHA Nation's arguments regarding its authority to regulate oil and gas operations on the Fort Berthold Indian Reservation. However, the issue of Tribal authority is not before the EPA and is outside the scope of this permitting action. The EPA directly implements the UIC program throughout Indian country in North Dakota under authority from the SDWA. See 40 CFR § 147.1752. Accordingly, this Permit is being issued under the EPA's authority.

The EPA reviewed the legal authorities and principles cited by the MHA Nation, including the IRA, the federal trust responsibility to federally recognized Indian tribes, the “mild and equitable regulation” language under the 1825 Trade and Intercourse Treaties, the 1851 Fort Laramie Treaty, and principles of cooperative federalism. None of these legal authorities or principles alter the EPA's authority under the SDWA or provide the EPA authority to deny or condition UIC permits based on the MHA Nation's tribal resolution. The EPA provided a letter to the MHA Nation on December 28, 2017, summarizing its analysis on each of these authorities and principles. We are attaching a copy of the letter to this Response to Comments. (Attachment 1).

Finally, the DOE's and the BLM's purported ability to defer to tribal law does not affect the EPA's legal authority in this EPA UIC permitting action. The EPA reviewed the speech that the MHA Nation cited, given by DOE Deputy Secretary of Energy Dan Brouillette at an Indian Country Energy and Infrastructure Working Group meeting. The speech referenced DOE policies and principles of deferring to tribal law. However, the MHA Nation does not reference any legal authority that would require or allow the EPA to implement these policies and principles consistent with the SDWA. The DOE policies and principles of deferring to tribal law do not authorize the EPA to deny or condition UIC permit applications based on Resolution No. 11-75-VJB. Similarly, the BLM final rule regarding venting and flaring of oil and gas operations does not affect EPA's legal authority in this EPA UIC permitting action. According to the BLM, its legal authority for the rule is based on the Mineral Leasing Act and related statutes. 83 Fed. Reg. 49184, 49188 (September 28, 2018). The BLM's legal authorities do not apply to the EPA, do not provide the EPA any additional legal authority, and are outside the scope of the EPA UIC program.

2. Comment 2:

EPA regulations implementing the SDWA recognize tribal authority over waste disposal wells. SDWA regulations, consistent with EPA's treaty and trust

responsibility and Tribal Policy, affirm that EPA should consider tribal authorities and interests in overseeing and permitting Class II wells in Indian country. EPA regulations allow the Administrator to promulgate an alternate UIC program for Class II wells in Indian country. 40 CFR § 144.2. In its oversight and permitting, EPA is further directed to consider “[t]he interest and preferences of the tribal government having responsibility for the given reservation or Indian lands.” 40 CFR § 144.2(a). In this case, EPA should promulgate an alternative UIC Program to manage the large number of disposal wells proposed for the Reservation and prevent impacts to tribal trust lands and waters, including the well relating to the draft permit. This alternative UIC program should be developed in consultation to include the “interest and preferences” of the MHA Nation. As set out in Resolution No. 11-75-VJB, EPA’s alternative UIC program for the Reservation should include coordination with and the approval of the MHA Nation. The MHA Nation expressed its interests and preferences in Resolution No. 11-75-VJB, and EPA should abide by this clear expression of the MHA Nation’s interests and preferences.

EPA Response 2:

The UIC regulations do acknowledge two roles for tribes under the UIC program; these roles are detailed at 40 CFR § 144.2 and 40 CFR § 145.52. However, neither of these regulations apply in this permitting action.

The MHA Nation specifically commented that 40 CFR § 144.2 allows the EPA Administrator to promulgate an alternate UIC Program for Class II wells on any Indian reservation or Indian lands. It urged the EPA to promulgate such an alternative program and consider the interests and preferences of the Tribal government, as directed by the regulation. While it is possible to promulgate an alternate Class II UIC program to the one outlined in the federal regulations, such a promulgation must be done through notice and comment rulemaking, not through a specific permitting action. Therefore, this is outside the scope of this UIC permitting action. The current applicable program on the Fort Berthold Indian Reservation is codified at 40 CFR § 147.1752, is EPA-administered, and includes the requirements of 40 CFR parts 124, 144, 146, and 148.

The MHA Nation also cited to 40 CFR § 144.2 to support an argument that EPA is directed to consider the Tribal Government’s interest and preference in oversight and permitting. As explained above, 40 CFR § 144.2 allows the EPA to promulgate an alternate UIC Class II program for an Indian reservation; it does not contain any requirements with regard to specific permitting actions. Therefore, this provision does not provide authority for the EPA to condition or deny a permit based on the Tribe’s resolution.

The second role for tribes described in the UIC regulations can be found at 40 CFR § 145.52-.58. Under these regulations, a tribe can apply for primary enforcement responsibility to administer the UIC program. These regulations detail a process to transfer administration of the UIC program from the EPA to an Indian tribe. This process is also outside the scope of this permitting

action. The EPA is currently responsible for implementing the UIC program on the Fort Berthold Indian Reservation, as the MHA Nation has not applied for and been approved to do so. The EPA must implement the program in accordance with the applicable program as set out in 40 CFR § 147.1752.

3. TECHNICAL CONCERNS

- a. **Lateral Migration of Fluid** - EPA must assess impacts to trust waters from waste disposal wells. Oil and gas activities on any of the lands on the Reservation will have an impact on neighboring lands. The Draft Permit proposes drilling Red Murphy SWD No. 1 in one of the poorest sandstone intervals on the Reservation. Injection into this Inyan Kara sandstone interval will result in disposed waste migrating far from the injection site and contaminate MHA Nation trust lands only about 700 feet away. Any such infiltration of contaminated fluids would constitute a trespass on the part of the well operator and a breach of trust on the part of the EPA. For example, assuming an injection rate of 15,000 barrels per day, the waste disposed in Red Murphy SWD No. 1 will infiltrate trust lands in 3 years. The Draft Permit does not contain measures to prevent this harmful phenomenon from occurring. Review of the Draft Permit reflects that the injection zone underlies the MHA Nation's trust lands.

The Draft Permit identifies an Area of Review ("AOR"), consisting of lands within a fixed three-quarter mile radius of the proposed Red Murphy SWD No. 1. Lands comprising this AOR include MHA Nation trust lands. Pursuant to federal regulations, the purpose of the AOR is to establish an estimated perimeter within which injected fluids could potentially migrate into drinking water sources. See 40 C.F.R. § 146.6. Thus, the Draft Permit acknowledges the potential for injected fluids to infiltrate portions of the injection zone underlying MHA Nation trust lands, yet fails altogether to establish any mechanism to prevent this infiltration. In fact, the Draft Permit provides for an unlimited volume of fluid to be injected into the Red Murphy SWD No. 1, meaning that an unlimited quantity of contaminated water is likely to permeate MHA Nation trust lands. We need to know how far out the produced water goes once it goes into the formation.

The rock characteristics of the Inyan Kara (Dakota) Formation is more complex than a blind perforation program with fluid flow diagrams showing multiple configurations depending on the clean sandstone interval variations. EPA should obtain and include in its assessment, an August 15, 2017 analysis by BLM, which shows that a number of disposal wells on the Reservation, whether on fee or allottee lands are already impacting neighboring tribal

trust lands. Even using BLM’s overly conservative assumptions regarding substrate pore space and despite BLM’s lack of site specific geological analysis, BLM’s results show that many disposal wells on the Reservation are being injected w/ waste at a rate and volume that resulting in migration of waste on to trust lands.

EPA Response 3a:

The MHA Nation’s comments on the lateral migration of fluid concerns two different issues. The first issue is that fluids could migrate laterally within the injection zone and affect pore space underlying tribal trust lands. The Tribe also refers to this as “trespass” or “subsurface trespass.” The second issue is that fluids could migrate laterally within the injection zone and affect water underlying trust lands. We discuss each issue separately.

Pore Space – The issue of subsurface trespass into pore space underlying an owner’s land is a property rights issue that is expressly outside the scope of the UIC program. Consistent with 40 CFR § 144.35(b) and (c), the Permit specifies that “[i]ssuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of any other federal, state or local law or regulations.” Therefore, the EPA has no authority to consider this issue in this UIC permitting decision.

Migration of fluid into waters underlying tribal trust lands – The Tribe raises a couple of issues regarding the potential for the injectate to migrate into waters under trust lands. The Tribe appears to call into question the EPA’s analysis about fluid movement in the Inyan Kara Formation. It provides an alternate calculation and asserts that the injectate will cross into groundwater underneath tribal trust land in 3 years. The Tribe raises concerns that the EPA did not adequately assess the impact of underground injection on groundwater underlying tribal trust land. It also asserts that EPA must prevent fluids from crossing into groundwater under tribal trust land.

Modeling of fluid movement – The Tribe cites the BLM’s August 2017 analysis to support its concern that fluid movement has already impacted tribal trust land on other parts of the Reservation. The EPA obtained a copy of the BLM report and reviewed it. In addition to this review, the EPA did some further modeling and analysis of fluid movement in this area. The EPA conducted an analysis based on a set of models previously developed and presented by the Department of Energy’s Pacific Northwest National Laboratory (PNNL). In developing the model, a rigorous approach was taken to more accurately reflect the fluid movement in the Inyan Kara sandstone injection zone, by assuming fluid flow only into the proposed well’s discrete perforations each separated by less permeable layers. The results of the models show that injecting at a rate of 14,000 barrels per day would result in the injectate entering waters underlying tribal trust land in approximately one year. The volumetric model that EPA used is generally similar to the BLM model. However, BLM uses the entire interval from the top of the uppermost perforation to the bottom of the lowermost perforation interval. The EPA took a more

conservative approach and assumed flow to only occur within the portion of the injection zone that were perforated. Furthermore, the porosity values were based on values from each discrete interval and not a gross value.

Migration of injectate into waters underlying tribal trust lands – The EPA’s authority to protect groundwater from underground injection derives from the SDWA and its UIC regulations. The UIC program as set out in the regulations does not authorize the EPA to protect all groundwater but rather aquifers defined as “underground sources of drinking water” or “USDWs.” 40 CFR § 144.3.

The UIC regulations at 40 CFR § 144.12, and the Permit in Part I, prohibit injection into a Class II well if it causes movement of a contaminant into a USDW. Therefore, following construction of the well, the Permittee is required to submit the results of its water quality sampling, which will provide data indicating whether the aquifer is a USDW at this site. If the aquifer is a USDW at this location, the EPA would not issue an authorization to inject, and the Permittee could not use the well to inject without first securing an aquifer exemption to exempt a specified area from protection as a USDW.

In addition to the prohibition on injecting into a USDW, the permit has been changed to include an injection volume limitation. As discussed in Response 3c below, the Final Permit includes an injection volume limitation based on an updated modeling analysis to limit injection fluid movement to a 736-foot radius around the well bore. This volume limitation is designed to prevent injection fluid from migrating beneath tribal land, which lies 736 feet away from the well bore. This change to the permit is based on the premise that the water in the aquifer underneath the neighboring tribal trust land meets the definition of a USDW, based on EPA’s general knowledge of the aquifer’s water quality in this area of the FBIR and the lack of site-specific data available indicating that it is not a USDW. In response to the Tribe’s ground water quality concerns, the EPA is exercising its discretion in incorporating this volume limit into the permit to protect this potential USDW.

- b. **Monitoring - The Permit must contain adequate mechanisms to monitor the volume of contaminated fluid flowing into portions of the injection zone underlying MHA Nation’s trust lands. The lack of monitoring is a glaring omission.**

Response 3b:

The EPA requires monitoring of injection volumes, both monthly and cumulatively. In Part II(A)(3)(d) *Sampling and Monitoring Devices*, the Permit requires the installation of a non-resettable flow meter that records the cumulative volumes on the injection line. Part II(D)(2)(b) *Monitoring Methods* requires injected volumes, cumulative injective volumes, and injection rates be recorded. Appendix D - *Monitoring and Reporting Parameters* requires weekly and annual reports on injection rates and volumes. The EPA has incorporated monitoring requirements

throughout the Permit. This monitoring includes both injection rates and volumes. Compliance with the injection volume limit will be verifiable with the monitoring requirements in place. These requirements will ensure that the fluids injected will stay within the limits/distances set in the permit.

- c. **Maximum injection volume and rate - The Permit must establish a maximum injection volume, as is necessary to prevent infiltration. Consistent with its trust responsibility, EPA must, in consultation with the MHA Nation, study the geological characteristics of waste disposal sites and determine an acceptable injection rate prior to issuing waste disposal permits. These additional terms must be developed with reliance on empirical studies performed in consultation with the MHA Nation.**

Response 3c:

After consideration of the MHA Nation's concerns about potential impacts to its waters due to the proximity of these waters to the proposed well, the Final Permit establishes an injection volume limitation to prevent endangerment to USDWs in the injection zone underneath tribal lands that are located 736 feet from the well bore. The injection volume limitation is based on the additional modeling discussed in Response 3a above, limiting the fluid migration to 736 feet from the well. The EPA is incorporating this volume limit into the Permit to protect this potential USDW. Once the well is drilled and the water quality of the aquifer is definitively determined, EPA will take whatever further action(s) may be needed prior to authorizing injection to ensure protection of USDWs.

The Permit also includes other measures to protect USDWs. First, the Permit prohibits any injection activity that allows movement of fluid containing any contaminant into USDWs, except as authorized by 40 CFR part 146. Coupled with this prohibition, the Permit contains a two-step process as briefly noted above. Specifically, the initial issuance of the Permit only allows the Permittee to construct the well, and during and after construction, the Permittee is required to collect data and perform testing. The Permittee must submit the data and testing results for EPA review. Only following EPA review and approval will EPA issue an Authorization to Inject, which would authorize injection by the Permittee. If submission of the data indicates that proposed injection zone is a USDW, the Permittee will not be authorized to inject; they will need to submit a proposal to the EPA for an aquifer exemption. Aquifer exemption requests typically specify the areal extent of the aquifer to be exempted and must demonstrate that injected fluids will remain within the exempted portion of the aquifer. The areal extent is generally consistent with the Permittee's total disposal needs. In this case, because there is an injection volume limitation in the Permit, the Permittee may also need to request an increase in the volume limit through a modification to the permit. The aquifer exemption process can be found at 40 CFR § 144.7 and 146.4; it is a process to exempt USDWs from protection under the SDWA because it

does not currently and will not in the future be used as a source of drinking water. The process provides an opportunity for public notice and comment.

The Permit does not include a specific rate limitation, but it does include a maximum allowable injection pressure (MAIP), which necessarily limits the injection rate and thereby prevents movement of fluid out of the authorized injection zone to ensure USDWs are protected. More specifically, increasing the injection rate will increase the injection pressure within the injection zone due to the increase in back pressure caused by resistance within the receiving formation. This resistance is determined by many hydrogeologic variables including porosity, permeability, and transmissivity. The Permit also requires that injection pressures and rates be monitored and reported.

The modeling results discussed above in Response 3a provides EPA the necessary level of certainty to determine how far fluids would travel from the injection well based on volume and rates of injection. More specifically, the model calculated travel distances over time based on injection rates proposed by the operator. The model assumed injection only into the proposed perforations (as provided in the Permit application), which correspond to clean sands that would readily accept injected fluids rather than the entire aquifer thickness. Consequently, this modeling more accurately reflects natural subsurface conditions. Using data from nearby wells and these specific injection intervals provided a more realistic assessment of fluid migration over time.

The EPA has consulted several times with the MHA Nation regarding UIC permits, and the Red Murphy permit specifically, on the FBIR and provided opportunities for the Tribe to give input on the Red Murphy application and draft permit, including the geologic information available at this time. However, the EPA does not have a legal obligation to perform any studies or modeling in conjunction with the Tribe.

- d. **Confinement - The EPA must consider the potential for waste, injected at high volumes and pressures to fracture or breakthrough the well and impact the MHA Nation's groundwater and drinking water sources.**

Response 3d:

The EPA did evaluate potential pathways for injected fluids to migrate outside of the authorized injection zone to ensure that no USDWs are endangered by the permitted activity. As required by the regulations, this analysis included consideration of the potential for injection to fracture the confining zone. The Permit contains conditions related to this concern, as discussed below. In addition, the Permit includes requirements for the Permittee to maintain mechanical integrity so that the well itself is not a conduit for fluid migration outside of the authorized injection zone.

There are two permit conditions that specifically address the Tribe's concerns about fracturing of the confining zone and the potential for waste to impact the Tribe's drinking water sources. First, the Permit prohibits injection activity that allows movement of a contaminant into USDWs. See Final Permit, Part I. Second, the Permit includes a provision prohibiting injection at a pressure

that would propagate existing or initiate new fractures in the confining zone. See Final Permit, Part II, Section B.4. (a). This permit condition limits injection pressure to ensure such fracturing does not occur, thereby preventing migration of fluids out of the authorized injection zone and into USDWs. Additionally, more than 3,000 feet of impermeable rock layers within the Dakota Group and the Pierre Shale provide adequate confinement between the proposed injection zone and overlying USDWs including the Fox Hills aquifer.

In response to the Tribe's concerns regarding "breakthrough" of the well, there are permit conditions that ensure well integrity so that the well itself does not serve as a conduit for injected waste to migrate to out of the injection zone and into USDWs. First, the Permit includes well construction requirements designed to protect USDWs adjacent to the well. For example, Part II, Section A.1 of the Permit requires that the well "shall be cased and cemented to prevent the movement of fluids into or between USDWs, and shall be in accordance with 40 CFR § 146.22." Well construction requirements are also described in Appendix A in the Permit. Second, during operation, the Permit prohibits injection between the outermost casing and the well bore. See Part II, Section B.1. In addition to the specific well construction and operating requirements, the Permit requires both initial testing and periodic testing to ensure that the well has mechanical integrity and is operating as designed. There are two types of mechanical integrity tests. Part I evaluates the potential for leaks from inside the well. This includes the injection tubing, packer and well casing. This test is performed by pressurizing the tubing-casing annulus of the well and observing the pressure over a specified period for leaks. Part II evaluates the external construction of the well, to ensure the cement between the well casing and the formation is protective of USDWs. This is done by running a cement bond log (CBL) which measures the quality and seal of cement between the casing and the formation (borehole). Depending on the CBL's results, additional Part II test methods may be required including radioactive tracer surveys, temperature logs, and oxygen activation logs to ensure there is no upward migration of fluids outside of the well casing and into USDWs.

- e. **Penalties - The Draft Permit should also establish penalties for the injection of fluids in excess of the maximum volume, including, without limitation, forced shutdown of the injection well and the payment of fines for any violation to provide for any needed remediation.**

Response 3e:

The purpose of a UIC permit is to regulate underground injection through appropriate construction, operating and maintenance, recording and monitoring, and plugging and closure requirements. These regulations can be found at 40 CFR §§ 144.51 and 144.52, and specific Class II requirements can be found at 40 CFR part 146 subpart C. The SDWA and its implementing regulations do not specify a process to establish penalties in a permit. Any enforcement of a permit violation must go through the enforcement process and is governed by the SDWA at 42 USC section 300h-2.

Exceeding the volume limitation would be considered a violation of the permit and would be addressed using EPA's enforcement authority to determine any appropriate penalties or remedies. The potential for an exceedance would be identified based on the EPA's review of the Permittee's ongoing monitoring and reporting of injection rates and cumulative volumes required in the Permit. Therefore, both the Permittee and the EPA will know well in advance whether injection volumes are nearing the limit thereby enabling EPA to take timely and appropriate action to prevent or address exceedance of this limit.

In addition, the Permit requires that the Permittee shut-in the well if there is a loss of mechanical integrity. See Part II. Section C.5. This is to prevent endangerment to nearby USDWs due to the potential for injected fluids to migrate from inside the well or along the outside of the well's casing.

4. Comment 4:

The draft permit violates EPA's trust responsibility to the MHA Nation. In administering the UIC program under the Safe Drinking Water Act, EPA retains its fiduciary obligation to "safeguard Indian interests in land." *HRI Inc. v. Environmental Protection Agency*, 198 F.3d 1224, 1245 (10th Cir. 2000) (citing *Drummond v. United States*, 324 U.S. 316, 318 (1945)). Therefore, when overseeing and permitting underground injection wells located in Indian country, or otherwise having a potential impact on Indian lands, EPA's duties extend beyond ensuring that drinking water sources remain untainted. EPA, as trustee for the MHA Nation and its members, must also protect against other adverse impacts on Indian lands. The Draft Permit, as currently written, does not adequately monitor and protect against potential harms to MHA Nation lands, including the infiltration of contaminated waters into tribally owned pore space.

Response 4:

The Tribe asserts that the federal trust responsibility for federally recognized Indian tribes in this instance extends beyond the protection of drinking water sources and requires the EPA to protect Indian lands. The federal general trust responsibility does not create an independent, enforceable mandate or specific trust requirement beyond the EPA's obligation to comply with the legal requirements generally applicable to this situation under federal law – in this case the SDWA. While the EPA does not have authority under the SDWA to consider impacts to surface or subsurface property interests, the Final Permit complies with the SDWA by including adequate permit conditions to protect USDWs under tribal lands. As explained in Response 1, the UIC program is limited in scope, and the UIC regulations establish the only criteria under which the EPA can approve, deny, or condition permits. There are no UIC regulations authorizing the EPA to consider property interests or well siting, unless the siting concerns are related to geologic suitability relative to endangerment of USDWs. Issues regarding property interests (either surface or subsurface) are outside the scope of the UIC program, and the EPA has no authority or discretion to condition or deny permits based on these considerations. Further, as noted in

Attachment 1, the EPA has not identified any statute that would impose on the EPA a specific trust responsibility in this matter.

EPA is committed to maintaining its long-standing work with federally recognized Indian tribes on a government-to-government basis. Indeed, one of the key principles of the EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984) is that the Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments. Consistent with the federal trust responsibility, EPA has consulted and coordinated with the MHA Nation for over a year on UIC permitting issues on the Fort Berthold Indian Reservation. As we expressed in the EPA's December 28, 2017 letter to John Fredericks, the Tribe's attorney, EPA considers tribal interests in decision-making where we have discretion or authority to do so, consistent with the federal general trust responsibility. However, that trust responsibility does not grant the Agency additional authorities beyond those granted to us by Congress under the SDWA. Therefore, where we do not have authority or discretion to pursue a course of action, the general trust responsibility does not provide us any additional authority to do so.

The HRI, Inc. v. EPA case, cited by the Tribe, is consistent with the scope of the federal general trust responsibility described above. As referenced by the court, the federal general trust responsibility includes an obligation to protect tribal jurisdiction and tribal sovereignty over its lands, HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000), but does not create an independent, enforceable mandate or specific trust requirement beyond the EPA's obligation to comply with the legal requirements generally applicable under federal law. See, e.g., Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998); Gros Ventre Tribe v. United States, 469 F.3d 801, 809-814 (9th Cir. 2006).

5. Comment 5:

The MHA Nation referred to EPA's Policy on Consultation and Coordination with Indian Tribes (Policy) several times in its comments. The Tribe stated that the Policy requires that EPA work directly with the MHA Nation in the issuance of any permit as the sovereign entity with the primary authority over the Reservation. It quoted the Policy, stating that the "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership...." and expressed that "[t]his Guiding Principle implements and is required by EPA's treaty and trust responsibility to the MHA Nation." The Tribe's comments suggested that the Policy provides the EPA with the authority to deny the UIC permit application for Red Murphys SWD No. 1 on the basis of the Tribe's resolution.

EPA Response 5:

The EPA acted consistently with the Policy throughout the permitting process. As stated in the Policy, "EPA's policy is to consult on a government-to-government basis with federally

recognized tribal governments when EPA actions and decisions may affect tribal interests.” The EPA has engaged in government-to-government consultation with the MHA Nation for over a year on UIC permitting issues and sought its input regarding tribal concerns about UIC well permit applications within the Fort Berthold Indian Reservation, including the application for Red Murphy SWD No. 1. Specifically, the EPA held tribal consultations with the Tribe on September 1, 2017, December 20, 2017, and September 11, 2018 concerning the application for Red Murphy SWD No. 1.

The Tribe cites one of the guiding principles of the Policy in support of its position that the EPA should deny the UIC permit application for Red Murphy SWD No. 1 on the basis of the Tribe’s resolution – “EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe’s land and membership....” Where we have discretion to do so, the EPA has considered the Tribe’s input and sought to address its concerns. See Responses 3 and 4 above. The Tribe further states that “[t]his Guiding Principle implements and is required by EPA’s treaty and trust responsibility to the MHA Nation,” and suggests that the Policy provides the EPA with the authority to deny the UIC permit application. However, the Policy does not create independent legal authorities separate from the SDWA, and as explained above in Response 1, the MHA Nation’s treaties and the federal trust responsibility do not provide the EPA with the authority to deny UIC permit applications on the basis of the Tribe’s resolution, and neither does the Policy.

6. Comment 6:

EPA Environmental Appeals Board (EAB) decisions do not limit tribal authority and EPA’s trust responsibility in issuing UIC permits. The MHA Nation is not aware of any EAB decision that would limit EPA’s ability to consider and abide by MHA Nation resolution. None of the cited decisions considered the sovereign authorities of Indian tribes, EPA’s govt-to-govt relationship with Indian tribes, EPA’s ability to implement alternate UIC programs on tribal lands, and EPA’s Policy on Consultation and Coordination with Indian Tribes. The SDWA and its regulations do not circumscribe this trust responsibility in any way. To the contrary, by incorporating tribe-specific provision authorizing EPA to promulgate an alternate UIC Program for Class II wells, applicable regulations acknowledge the unique trust relationship between federal agencies and Indian Tribes. Based on this review, there does not appear to be an EAB decision that would limit EPA’ existing regulations, policy and responsibilities to defer to and coordinate with the MHA Nation.

EPA Response 6:

During the tribal consultation process for UIC permits, including for Red Murphy SWD No. 1, the EPA discussed the limitations on our authority with the MHA Nation, explaining that the SDWA does not authorize the EPA to implement the Tribe’s laws in UIC permit decisions by the Agency. As the Tribe notes in its comments, the EPA provided a list of relevant EPA

Environmental Appeals Board (EAB) decisions that discuss limitations on the scope of the EPA's UIC permitting authority. These cases speak to the limited scope of the EPA's authority in issuing UIC permits and hold that matters of state or local law and property rights, which include pore space ownership, are outside the scope of the EPA's permitting authority.

The Tribe disputes the effect of these cases in this permitting decision and asserts that the application of the federal trust responsibility to federally recognized Indian tribes would allow the EPA to consider and abide by, and effectively implement, the MHA Nation Resolution No. 11-75-VJB. The Tribe asserts that the EAB has never before considered the following factors in these previous decisions: the sovereign authorities of Indian tribes, EPA's government-to-government relationship with Indian tribes, EPA's ability to implement alternate UIC programs on tribal lands, and EPA's Policy on Consultation and Coordination with Indian Tribes. Even if the EAB has not had the opportunity to consider these factors in prior decisions, the EPA Region 8 did consider these factors in the context of this permitting decision. Our analysis of our authorities under the SDWA is informed by EAB decisions. We address the scope of the EPA's SDWA legal authority, including the EPA's lack of authority under the SDWA and its regulations to condition or deny UIC permit applications based upon MHA Nation Resolution No. 11-75-VJB, in Responses 1 and 4. We address tribal sovereign authority in Response 1. We address the federal trust responsibility (i.e. – the government-to-government relationship) in Responses 1 and 4. We address alternate UIC programs in Response 2. We address EPA's Policy on Consultation and Coordination with Indian Tribes in Response 5.

ATTACHMENT F



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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Denver, CO 80202-1129
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FEB 15 2019

Ref: 8WP-SUI

Patrick Walker, CEO
Goodnight Midstream Bakken, LLC
5910 North Central Expressway, LLC
Dallas, Texas 75206

Re: Final Permit, ND 22349-11250, for the Red Murphy SWD No. 1 Class II Commercial Disposal Well

Dear Mr. Walker:

Enclosed is your copy of the final U.S. Environmental Protection Agency Region 8 Underground Injection Control (UIC) Permit for the proposed Red Murphy SWS No. 1 injection well.

The public comment period ended on July 16, 2018. Comments on the draft Permit were received from the MHA Nation. No other public comments were received. The EPA's responses to these comments for this final Permit provides a written explanation about how the EPA Region 8 considered MHA Nation's input as part of our final action to issue this Permit. The responses to comments, along with the final Permit, are enclosed and can also be found on the EPA's website at www.epa.gov/uic/underground-injection-control-epa-region-8-co-mt-nd-sd-ut-and-wy.

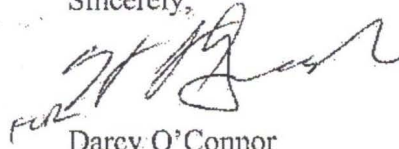
Because comments were received, this final Permit becomes effective 30 days from the date of issuance per Title 40 Code of Federal Regulations (40 CFR) section 124.15, to provide a 30-day window for appeal of the final Permit decision. See 40 CFR 124.19. All conditions set forth herein refer to Title 40 Parts 124, 144, 146, and 147 of the CFR and are regulations that are in effect as of the effective date of this Permit.

Once the final Permit becomes effective, the Permit's terms and conditions only authorize you to construct the proposed injection well. You must first fulfill all requirements prior to commencing injection found in Part II of the final Permit and obtain written authorization to inject from the EPA. It is your responsibility to be familiar and comply with all provisions of your final Permit. The EPA forms referenced in the Permit are available at <https://www.epa.gov/uic/underground-injection-control-reporting-forms-owners-or-operators>. Guidance documents for performing required tests and logs and other UIC guidance are available at <https://www.epa.gov/uic/underground-injection-control-epa-region-8-co-mt-nd-sd-ut-and-wy>.

This Permit is issued for the operating life of the well unless terminated (40 CFR section 144.40). The EPA may review this Permit at least every five years to determine whether any action is warranted pursuant to 40 CFR section 144.36(a).

If you have any questions, etc. about the above action, please contact Craig Boomgaard by email at boomgaard.craig@epa.gov or by telephone at (303) 312-6794. You may also respond in writing using the letterhead address, citing "Attention: Craig Boomgaard, Mail Code 8WP-SUI.

Sincerely,



Darcy O'Connor
Assistant Regional Administrator
Office of Water Protection

Enclosures (2)

cc: Mark Fox, Chairman
Three Affiliated Tribes

Edmund Baker, Environmental Director
Three Affiliated Tribes

Carson Hood, Acting Energy Director
Three Affiliated Tribes

Kevin Shelley, Acting North Dakota Supervisor
U.S. Fish and Wildlife

Loren Wickstrom, North Dakota Field Manager
U.S. Bureau of Land Management

Kayla Danks, Superintendent
Bureau of Indian Affairs Fort Berthold Agency