

The Other Bakken Boom:

A Tribe Atop the Nation's
Biggest Oil Play



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Fort Berthold Indian Reservation sits at the center of the Bakken Oil Field in North Dakota. Since 2010, hundreds of reservation wells have generated more than 30 million barrels of oil, earning the tribal nation more than \$500 million.

Two-thirds of this revenue, in the form of lease payments and royalties, have gone to “allottees,” or individual members of the tribe who hold mineral rights; one-third has gone to the tribal government, including lease payments and royalties on minerals collectively held by the tribe, as well as taxes earned on all oil produced on the reservation. Oil companies will drill 1,000 more wells on Fort Berthold in the next five years, with payouts in the billions—more than any western Indian nation has seen in that short of a time.

Such a windfall was once unheard of on Fort Berthold. Apart from livestock grazing, there were few sources of income. Unemployment hovered at 40 percent and the pover-

ty rate at four times the national average. The tribe relies on federal support for its schools, police force, and social programs. Oil development offered a chance to break from this pattern of dependency. “We are of the firm belief we will become more sovereign by the barrel,” tribal council chairman Tex Hall has said.

But capitalizing on the boom has not been easy. All Indian minerals are managed in trust by the U.S. Department of Interior, a task largely delegated to the Bureau of Indian Affairs. To drill on Indian land, companies must endure a slow and costly bureaucratic gauntlet; many avoid it altogether. By 2009, impatient to open the reservation to oil development, tribal leaders

pushed the BIA to lease nearly all of Fort Berthold’s trust land—both allottee and tribal—for drilling. But while mineral owners off the reservation were earning thousands of dollars for each acre leased, most allottees within reservation boundaries saw only a few hundred. When tribal leaders and allottees noticed this disparity, it strained their already delicate relationship with the BIA, which had approved the lease deals, and which they accused of violating its federal mandate to “maximize” Indian mineral owners’ economic benefits. Not only had allottees accepted thousands of dollars in lease payments when they could have earned hundreds of thousands, but now it was taking years before their royalties arrived, and the BIA had yet to process hundreds of applications for permits to drill.

Despite these frustrations, the boom’s coming was inevitable. Only when it arrived in 2010 did tribal leaders realize how unprepared they were for rapid change. Instead of spending its oil profits on programs that

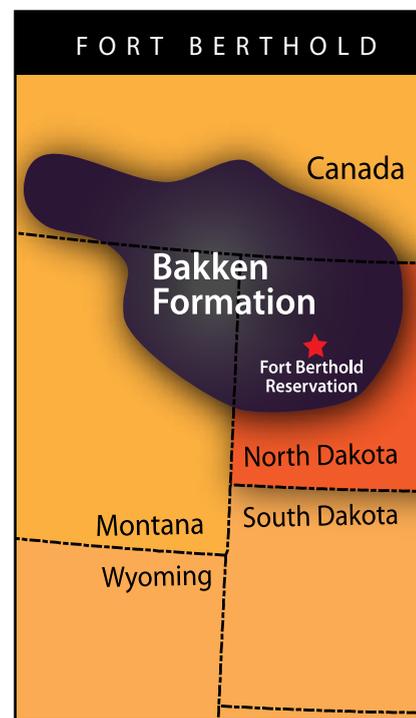


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could outlast the boom and benefit Fort Berthold's future generations, the tribe has directed the money toward fixing roads that collapsed under heavy hauling and bolstering its safety, medical, and social services for the growing population. Many tribal members now fear that the reservation will be worse off when the boom is over. "Twenty years from now, if we do it right, we should have things that last us forever," says Mark Fox, the tribe's tax director. "But if we have worse unemployment, worse health, worse poverty, worse crime, then we've failed. We were better off leaving it in the ground."

PRIVATION TO OIL

In the 1970s, an oil boom struck North Dakota, but oil companies hardly ventured onto the reservation. On Indian trust land, companies had to go through four federal agencies and 49 steps to acquire a permit to drill; off trust land, they dealt with only four steps. Furthermore, companies needed the consent of every person who owned a share of a tract's minerals. Indian land is fractionated by inheritance—one tract may have scores of owners—and convincing all to agree was often prohibitively difficult. In 1999, North Dakota Senator Byron Dorgan amended the



law specifically for Fort Berthold: The Interior Department could approve any lease involving Indian mineral owners if a simple majority within the tract agreed to the terms.

By 2004, North Dakota was heading toward another boom. Bonus offers to private landowners off the reservation climbed from tens to thousands of dollars an acre. But as oil rigs appeared around the reservation edge, Fort Berthold remained quiet. This frustrated the tribal council, which pressured the BIA to help attract oil companies to the reservation. That year, BIA petroleum engineer Jeff Hunt took a councilman to the North American Prospect Expo in Texas. "Rather than wait for a company to walk through your doors," Hunt reasoned, "why not go to them?"

The first buyer was an obscure outfit called Black Rock Oil & Gas, which in 2005 proposed to lease 10,000 tribal acres for 16 percent royalties and a \$35-per-acre bonus. Like many of the first companies to

lease reservation minerals, Black Rock had no intent of drilling wells; its purpose was to lease mineral rights for the cheapest price possible and, once mineral values rose on the reservation, to sell—or "flip"—their leases for a profit to larger oil companies. Council members say that they did not realize this; the council jumped at the offer, and the BIA signed off as well.

By the fall of 2008, nearly all of Fort Berthold had been leased. The tribe settled for royalties between 16 and 18 percent and bonuses no higher than \$110-per-acre; allottees did slightly better. The most fortunate in these early dealings was a tribal member, Spencer Wilkinson Jr., who was general manager of the tribe's casino and one of few tribal members to found his own oil company, Dakota 3. In January 2008, the council leased Wilkinson 42,000 tribal acres for 18 percent royalties and a \$50-per-acre bonus. He acquired an equal number of allotted acres under the same

terms. Then in December 2010, he sold his leases to Williams, an Oklahoma-based energy company, for \$925 million, and turned Dakota 3 into a subsidiary.

Flipping is a common industry practice, and all four companies that first acquired tribal mineral rights engaged in it. But the enormity of Wilkinson's profit—and on land that earned its owners very little in comparison—enraged many allottees. That the BIA had allowed companies to flip leases without allottee consent seemed a blatant violation of its duty to protect tribal members' economic interests. Some allottees blamed the council for encouraging the original deals and for leasing tribal acreage to their employee for such a low price, but mostly they blamed the BIA: Why had the agency never advised the tribe or allottees to negotiate for better terms?

According to Hunt, "Mineral owners got the price of the day." He argues that in 2006 and 2007,



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when the BIA signed the first lease agreements, drilling on the reservation was still a risk because Fort Berthold's Bakken oil potential was unproven; Marathon Oil Company did not drill the first Bakken well on the reservation until 2008. "It made sense that offers were low in the beginning," said Hunt. On a few occasions, he added, the BIA advised mineral owners to reject low offers (He could not recall examples or provide proof). The lease document, meanwhile, did not require the agency to consult with owners before permitting companies to flip. Had the BIA approved deals too readily? Hunt insisted,

"We had companies in the office. We had councilmen and mineral owners in the office—hundreds each day—and everyone saying, 'We want our money now. We want our leases now.' I think if we had said, 'Let's wait a while,' people would've strung us up."

RESIDUAL DISTRUST

On Fort Berthold, distrust of the federal government has deep roots: The Interior Department rarely acted in Indian peoples' favor, so why would it do so now? Over the past century, its mistakes and misdeeds—lost records, outstanding royalties—have amounted to

billions of dollars owed to tribes and individuals nationwide. In 1996, Elouise Cobell, a Blackfeet director of a nonprofit Native American bank, filed a class action suit on behalf of hundreds of thousands of plaintiffs alleging that the U.S. government had mishandled \$47 billion belonging to Indian landowners. Cobell died in October 2011, but the case has since settled for \$3.4 billion.

Fort Berthold allottees have filed their own suit, accusing the United States of failing to protect tribal members' economic interests. Among the evidence are Dakota 3 lease forms rubberstamped with the words, "This lease is in the

TIMELINE OF BOOM ON FORT BERTHOLD

1970s: An oil boom struck North Dakota, but oil companies hardly ventured onto the reservation.

1999: Senator Byron Dorgan amended law on Fort Berthold to allow approval of any lease if a majority of mineral owners agreed.

2004: North Dakota was heading toward another boom.

2008: Dakota 3 leased 42,000 tribal acres for 18 percent royalties and a \$50-per-acre bonus, later selling the leases for \$925 million.

2011: Fort Berthold allottees filed suit, accusing the U.S. government of failing to protect tribal members' economic interests.

2012: Interior Department approved a tribal plan to build an oil refinery on Fort Berthold, the first U.S. refinery built in more than thirty years.

best interest of the Indian mineral owner," and a letter to the BIA from the Elders Organization that states, "The BIA is allowing these lucrative agreements between oil companies ... knowing that (the original agreement) was not market value." According to the organization, the BIA never responded.

After the Black Rock deal, landowners' associations proliferated on the reservation as allottees turned to their neighbors for guidance. One of these groups was founded by Ken Hall, who works in the tribal energy department, and his wife Kara, an indigenous rights consultant. In 2007, Peak Energy Resources, based in Durango, Colorado, contacted Ken to lease his minerals. They agreed on 22.5 percent royalties and \$1,000 an acre. This was the best offer on the reservation yet, and benefited other allottees by driving up mineral values. "Leases off the reservation were going for substantially more than on [the reservation]," said company CEO, Jack Vaughn,

countering Jeff Hunt. "We believed that the geology wasn't any different—actually, the prospects on the reservation were much better."

Peak Energy Resources never intended to fully develop its acquired leases. Vaughn estimates that, with added fees, it costs a half-million dollars more to drill a well on Indian land than off. This cost was prohibitive for a small entity like Peak, but not for a larger company like Enerplus, to which Peak eventually flipped its leases. Still, the bureaucratic wrangling to acquire a permit to drill on Indian land frustrated Vaughn. "At every step, you had the potential for delay," he said. In particular, he bemoaned the months it took BIA officials to complete environmental assessments. In the spring of 2008, Peak Energy Resources organized allottees to lobby in Washington, D.C. Their request: Turn the Fort Berthold BIA office into a "one-stop-shop" by packing it with experts from every federal entity involved in the permitting process. This, they hoped, would

ensure that drilling applications turned over quickly, landowners earned royalties sooner, and tribal members could meet directly with officials to negotiate terms, ask questions, and locate lost records.

Senator Dorgan of North Dakota wrote a bill to extend the one-stop-shop format throughout Indian Country. Although the bill died in 2011 when Dorgan left office, Representative Don Young, R-Alaska, introduced the Native American Energy Act with similar

intent this year. The BIA, meanwhile, struggled to find qualified people willing to move to Fort Berthold. “Due to significant mistakes ... and lack of trained staff by the BIA,” tribal chairman Marcus Levings told the Senate Committee on Indian Affairs in April 2008, “the Fort Berthold Reservation may very well miss out on the economic boom that the rest of North Dakota appears to be enjoying.” Shortly thereafter, Levings struck a deal with the state to reduce the taxes oil companies

had to pay to the state and tribe for producing on Indian land. Likely, it was a combination of three factors—more BIA personnel, the tax deal, and the rising price of oil—that set the boom in motion.

THE STRUGGLE CONTINUES

Now that the boom has come many tribal members regret it. Those who do not own minerals or cannot work have reaped little economic benefit. Those who own minerals but do not want them drilled are



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forced to if a simple majority of allottees sharing their tract have already leased their own minerals. Many tribal members have expressed that they never trusted the BIA to look out for their interests, nor do they entirely trust the council.

“People think that when there’s more money floating around, our lives should be better,” says Mark Fox. “But the average person hasn’t seen that happen.” While the boom brought more jobs to the reservation, it also drove up the cost of living, forced many Indian families out of their homes, and generated a culture of crime. Since 2009, Fort Berthold’s population has doubled with oil workers over whom the tribe has no criminal jurisdiction. The council has spent much of its oil income on directly addressing the boom: repairing roads, building houses, establishing regulatory structures. But it has yet to invest in its proposed

“People’s Fund”—oil revenue reserved for tribal members’ benefit. In 2010, when oil revenue generated a billion-dollar budget surplus in North Dakota, Fort Berthold, despite earning \$60 million from royalties, bonuses, and taxes, remained \$100 million in debt.

In October 2012, Secretary of Interior Ken Salazar announced his approval of a tribal plan to build an oil refinery on the reservation. “We are supporting infrastructure that will help bring American oil and gas to market while promoting Tribal economic development and self-determination,” he said. If fully approved, the refinery would generate 140 long-term operational jobs and millions of dollars in annual revenue to the tribal council. The 13,000 barrel-per-day facility would be the first U.S. refinery built in more than thirty years. The plan, however, has stirred opposition among tribal

members who believe the refinery is the wrong kind of growth and a threat to peoples’ health.

Whose fault is the tribe’s incapacity to capitalize on the boom? The problem, perhaps, is not the BIA or the tribe itself, but the relationship between nation, tribe, and tribal member. Paul Joffe, an indigenous rights lawyer, said of the situation, “When you already have profound distrust, you’re bound to have a lack of cooperation and communication, and also a lack of regulation. And that’s a situation that is very easy for corporations to exploit.” This realization has tempted many tribal members to ask why they did not wait; after all, the oil would always be there.

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