

TRIBAL and STATE RELATIONS COMMITTEE
Representative Marvin Nelson, Chair
December 17, 2015

North Dakota Department of Corrections and Rehabilitation
Division of Juvenile Services

Lisa Bjergaard, Director
Presented Testimony Concerning Services Available at the North
Dakota Youth Correctional Center

For the record, I am Lisa Bjergaard, Director of the Division of Juvenile Services.

I was asked to speak to you today regarding the history and mechanism by which the North Dakota Department of Corrections and Rehabilitation (DOCR), through its Youth Correctional Center (YCC), has provided services to tribal youth.

The North Dakota Youth Correctional Center provides residential correctional services, education, and a variety of developmentally appropriate intervention programs for delinquent youth who are committed to the custody of the North Dakota Division of Juvenile Services (DJS) through the action of the District Court. In addition, there are contracts between the DOCR and most North Dakota counties for the provision of secure pre-trial detention services. Also, the DOCR has a contract with the federal Bureau of Prisons which allows the placement of youth who are under federal jurisdiction.

As you are aware, N.D.C.C. 54-40.2 outlines specifically the process for creating agreements between public agencies and Indian tribes. I am not aware of any agreements that have been drafted according to this process. However, the YCC and several of the tribes have entered informal agreements for the provision of services, both detention and longer term correctional placement, at various times over the years. The agreements allow for the case-by-case analysis and placement of tribal youth at the YCC.

CHAPTER 54-40.2
AGREEMENTS BETWEEN PUBLIC AGENCIES AND INDIAN TRIBES

54-40.2-01. Definitions.

In this chapter:

1. "Public agency" means any political subdivision, including municipalities, counties, school districts, and any agency or department of North Dakota.
2. "Secretary" means the secretary of interior of the United States.
3. "Tribal government" means the officially recognized government of any Indian tribe, nation, or other organized group or community located in North Dakota exercising self-government powers and recognized as eligible for services provided by the United States. The term does not include any entity owned, organized, or chartered by a tribe which exists as a separate entity authorized by a tribe to enter agreements of any kind without further approval by the government of the tribe.

54-40.2-02. Authorization to enter agreements - General contents.

1. Any one or more public agencies may enter into an agreement with any one or more tribal governments to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments are authorized to perform by law and to resolve any disputes, in accordance with this chapter or any other law that authorizes a public agency to enter an agreement. The agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.
2. The Indian affairs commission may propose agreements entered into pursuant to this chapter and may assist, at the request of any tribe affected by such an agreement, in the negotiation and development of such agreements.
3. If the public agency contemplating entering into an agreement under this chapter is a school district, the school district shall:
 - a. Provide written notice to the superintendent of public instruction that it is contemplating entering into an agreement under this chapter; and
 - b. Consider written recommendations that the superintendent makes regarding the agreement.
4. This chapter does not apply to agreements entered into under section 24-02-02.3 and chapter 54-38 or agreements entered with one or more tribal governments pursuant to a state or federally funded program or other activity, including any publicly announced offer of a grant, loan, request for proposal, bid, or other contract originating with a public agency, for which the tribal government is otherwise eligible under federal, state, or local law.

54-40.2-03. Specifications of agreement.

Repealed by S.L. 1991, ch. 606, § 10.

54-40.2-03.1. Agreement - Notice.

1. After the parties to an agreement have agreed to its contents, the public agency involved shall publish a notice containing a summary of the agreement in the official newspaper of each county of the state reasonably expected to be affected by the agreement. The notice must also be published in any newspaper of general circulation for the benefit of the members of any tribe affected by the agreement. The notice must also be posted plainly at the tribal office of any tribe affected by the agreement and in the county courthouse of any county affected by the agreement. The notice must state that the public agency will hold a public hearing concerning the agreement upon the request of any resident of the county in which the notice is published if the request is made within thirty days of the publication of the notice.
2. If the public agency contemplating entering into an agreement under this chapter is a school district, the school district must also provide the superintendent of public instruction a copy of the notice.

54-40.2-03.2. Public hearing - Notice.

1. If the public agency receives a request pursuant to section 54-40.2-03.1, the public agency shall hold a public hearing prior to the submission of the agreement to the governor at which any persons interested in the agreement may be heard. Notice of the time, place, and purpose of the hearing must be published prior to the hearing in the official newspaper of each county of the state reasonably expected to be affected by the agreement. The notice of the public hearing must also be published in any newspaper of general circulation published for the benefit of the members of any tribe affected by the agreement. The notice must also be posted plainly at the tribal office of any tribe affected by the agreement and in the county courthouse of any county affected by the agreement. The notice must describe the nature, scope, and purpose of the agreement and must state the times and places at which the agreement will be available to the public for inspection and copying.
2. If the public agency contemplating entering into an agreement under this chapter is a school district, the school district must also provide the superintendent of public instruction a copy of the notice.

54-40.2-04. Approval of agreement by governor and tribes - Approval by legislative assembly for tax collection agreements.

As a condition precedent to an agreement made under this chapter becoming effective, it must have the approval of the governor of North Dakota and the governing bodies of the tribes involved. If the agreement is a tax collection agreement between the tax commissioner and one or more tribes, the agreement also is subject to confirmation by a majority of members elected to the house of representatives and the senate and does not become effective until its legislative confirmation date or the effective date in the agreement, whichever is later. Each tax collection agreement presented for legislative confirmation must contain an expiration date not more than sixteen years after its effective date and the expiration date must be March thirty-first of an odd-numbered year. If the agreement obtains the approvals under this section and, if required, legislative confirmation under this section, it may be submitted to the secretary for approval.

54-40.2-05. Filing of agreement.

After approval by the governor and by the tribe or tribes affected by the agreement and, if required, legislative confirmation, and prior to commencement of its performance, an agreement made pursuant to this chapter must be filed with:

1. The secretary.
2. The clerk of court of each county where the principal office of one of the parties to the agreement is located.
3. The secretary of state.
4. The affected tribal government.

54-40.2-05.1. Review of agreement - Report.

Upon the request of any political subdivision or any tribe affected by an approved agreement, the Indian affairs commission shall make findings concerning the utility and effectiveness of the agreement taking into account the original intent of the parties and may make findings as to whether the parties are in substantial compliance with all provisions of the agreement. In making its findings, the Indian affairs commission shall provide an opportunity, after public notice, for the public to submit written comments concerning the execution of the agreement. The Indian affairs commission shall prepare a written report of its findings made pursuant to this section and shall submit copies of the report to the affected political subdivision or public agency, the governor, and the affected tribes. The findings of the Indian affairs commission made under this section are for informational purposes only. In any administrative hearing or legal proceeding in which the performance of any party to the agreement is at issue, the findings may not be introduced as evidence, or relied upon, or cited as controlling by any

party, court, or reviewing agency, nor may any presumption be drawn from the findings for the benefit of any party.

54-40.2-06. Revocation of agreement.

Any agreement made pursuant to this chapter must include provisions for revocation.

54-40.2-07. Authorization to appropriate funds for purpose of agreement.

Any public agency entering into an agreement pursuant to this chapter may appropriate funds for and may sell, lease, or otherwise give or supply material to any entity created for the purpose of performance of the agreement and may provide such personnel or services therefore as is within its legal power to furnish.

54-40.2-08. Specific limitations on agreements.

Nothing in this chapter may be construed to:

1. Authorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments located in North Dakota.
2. Authorize a public agency or tribal government, either separately or pursuant to agreement, to expand or diminish the jurisdiction presently exercised by the government of the United States to make criminal laws for or enforce criminal laws in Indian country.
3. Authorize a public agency or tribal government to enter into an agreement except as authorized by their own organizational documents or enabling laws.
4. Authorize an agreement that provides for the alienation, financial encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

54-40.2-09. Validity of existing agreements.

This chapter does not affect the validity of any agreement entered into between a tribe and a public agency before August 1, 1999.

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is by and between the State of North Dakota, acting through its **Department of Corrections & Rehabilitation** (hereafter called the DOCR), Division of Juvenile Services (DJS), Youth Correctional Center (YCC) in Mandan, ND, as Detention/Treatment Provider and the **Turtle Mountain Band of Chippewa** (TRIBE) in Belcourt, ND;

1. SCOPE OF SERVICE

DOCR, in exchange for the compensation paid by TRIBE under this MOU, agrees to provide the following services:

- A. The DOCR agrees to accept and provide for the custody, care and safekeeping of Tribal Court juveniles placed in detention (and juveniles considered for long-term treatment) in accordance with tribal or federal laws.
- B. The TRIBE shall determine eligibility of members for placement and payment. Before the DOCR will accept placement of a juvenile from the TRIBE, TRIBE shall provide the DOCR with tribal court orders, medical and psychiatric reports, law enforcement reports, and other reports or information pertinent to the referral.
- C. The DOCR, through the YCC, cannot accept for detention children who have been taken into custody for acts of unruliness as defined under N.D.C.C. § 27-20-02(19) or equivalent law or ordinance.
- D. The DOCR shall provide routine on-site medical services. Indian Health Services shall pay all in-hospital, same day surgery, clinical, psychiatric or psychological services, prescription medication, eye care and dental services, emergency medical services through prior arrangements between the DOCR and the TRIBE.
- E. The DOCR agrees to provide services based upon individualized need of each juvenile referred to and accepted by the DOCR.
- F. The DOCR may decline acceptance of a referral or return a juvenile to the TRIBE if the DOCR determines the juvenile is a threat to institutional safety or security or to staff or other students, if the juvenile has engaged in self-destructive behavior, or the juvenile is not adhering to institutional policies or programming.
- G. The TRIBE and DOCR shall maintain contact with one another regarding each juvenile from the TRIBE in placement at YCC. The DOCR shall provide TRIBE with quarterly progress reports on each placement and more frequent reports if the juvenile's behavior warrants of if a special report is requested.

2. TERM OF MOU

The term of this contract is for a period of **12** months, commencing on the **1st** day of **January, 2010**, and expiring on the **31st** day of **December, 2010**.

3. COMPENSATION

In consideration of the DOCR's satisfactory performance of services called for under this agreement, the TRIBE shall reimburse the DOCR, upon submission of a Request for Payment, the established per diem rate of **\$182.85**, as well as reimbursement for any medical expenses the DOCR has incurred on behalf of the juvenile. The rate covers one person per day. Services will not be billed for the day of arrival, but will be billed for the day of departure.

- A. If a juvenile were on an unauthorized absence (AWOL) or an authorized vacation status, billing will not include the time beyond three days.
- B. The DOCR shall bill for services provided on a monthly basis. Monthly Requests for Payment shall list each juvenile, the specific dates of confinement for each, and the total days to be reimbursed, the agreed upon rate per day, and the total amount billed (total days multiplied by the rate per day).
- C. The per diem rate shall be established on the basis of actual costs associated with the operation of the facility during a recent fiscal year. Notification of any rate increase shall be made at least thirty (30) days prior to the effective date of the rate increase.
- D. The TRIBE shall make payments directly to the YCC within thirty (30) days of billing.

4. TERMINATION OF CONTRACT

- A. Termination without cause. This contract may be terminated by mutual consent of both parties, or by either party upon 30-days written notice.

- i. Termination for lack of funding or authority. DOCR may terminate this contract effective upon delivery of written notice to TRIBE, or on any later date stated in the notice, under any of the following conditions:
 - 1) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term. The contract may be modified by agreement of the parties in writing to accommodate a reduction in funds.
 - 2) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
 - 3) If any license, permit or certificate required by law or rule, or by the terms of this contract, is for any reason denied, revoked, suspended or not renewed.

Termination of this MOU under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination.

- B. Termination for cause. DOCR by written notice of default to TRIBE may terminate the whole or any part of this contract:
 - i. If TRIBE fails to provide services required by this contract within the time specified or any extension agreed to by DOCR; or
 - ii. If TRIBE fails to perform any of the other provisions of this contract, or so fail to pursue the work as to endanger performance of this contract in accordance with its terms.
 - iii. The rights and remedies of DOCR provided in the above clause related to defaults by TRIBE are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.

5. FORCE MAJEURE

TRIBE will not be held responsible for delay or default caused by fire, riot, acts of God or war if the event is beyond TRIBE'S reasonable control and TRIBE gives notice to DOCR immediately upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

6. RENEWAL

This contract will not automatically renew. DOCR will provide written notice to TRIBE of its intent to renew this contract at least 30 days before the scheduled termination date.

7. SEVERABILITY

If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms must not be affected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

8. NOTICE

All notices or other communications required under this contract must be given by registered or certified mail and are complete on the date mailed when addressed to the parties at the following addresses:

<u>Youth Correctional Center</u> <u>Ron Crouse, Deputy Director</u> <u>701 16th Avenue SW</u> <u>Mandan, ND 58554</u> <u>Phone: (701) 667-1401</u> <u>Email: rcrouse@nd.gov</u>	OR	<u>Turtle Mountain Tribal Court</u> <u>PO Box 900</u> <u>Belcourt, ND 58316</u> <u>Phone: (701) 477-6121</u> <u>Email: Email Address</u>
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Notice provided under this provision does not meet the notice requirements for monetary claims against the DOCR found at N.D.C.C. § 32-12.2-04.

9. APPLICABLE LAW AND VENUE

This contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this contract must be brought in the District Court of Morton County, North Dakota.

10. SPOILIATION – NOTICE OF POTENTIAL CLAIMS

TRIBE agrees to promptly notify DOCR of all potential claims that arise or result from this contract. TRIBE shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to DOCR the opportunity to review and inspect the evidence, including the scene of an accident.

11. INDEMNITY

The DOCR and TRIBE each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

12. INSURANCE

The DOCR is insured under N.D.C.C. Chapter 32-12-1.

13. CONFIDENTIALITY

Records regarding the placement of juveniles under this agreement may only be disclosed in accordance with applicable state and federal law, including N.D.C.C. Chapter 27-20, N.D.C.C. Chapter 27-21, and the HIPAA privacy rule. The records may also be disclosed under N.D.C.C. Chapter 50-25.1. There may not be any re-disclosure except when authorized under applicable law.

14. NONDISCRIMINATION AND COMPLIANCE WITH LAWS

TRIBE agrees to comply with all applicable laws, rules, regulations and policies, including those relating to nondiscrimination, accessibility and civil rights. TRIBES agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes and unemployment compensation and workers' compensation premiums. TRIBE shall have and keep current at all times during the term of this contract all licenses and permits required by law.

15. STATE AUDIT

All records, regardless of physical form, and the accounting practices and procedures of TRIBE relevant to this contract are subject to examination by the North Dakota DOCR Auditor or the Auditor's designee. TRIBE will maintain all such records for at least three years following completion of this contract.

16. MERGER AND MODIFICATION

This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

17. EFFECTIVENESS OF AGREEMENT

This agreement is not effective until fully executed by both parties.

TRIBE
Turtle Mountain Band of Chippewa

STATE OF NORTH DAKOTA –DOCR
Department of Corrections & Rehabilitation

Its: _____
By: Richard Marcellais
Title: Tribal Chairman
Date: _____

Its: _____
By: Ron Crouse
Title: YCC Deputy Director
Date: _____

Its: _____
By: Dave Krabbenhoft
Title: DOCR Director of Administration
Date: _____