

# TRIBAL TAXATION ISSUES COMMITTEE

Section 33 of House Bill No. 1015 (2017) established the Tribal Taxation Issues Committee. The committee is composed of 10 members as follows: the Governor, who was designated by the Legislative Management to serve as Chairman of the committee, the Lieutenant Governor, the Tax Commissioner, the Executive Director of the Indian Affairs Commission, the Majority and Minority Leaders of the House of Representatives and the Senate, and the Chairmen of the Finance and Taxation Standing Committees of the House of Representatives and the Senate. The nonlegislative members of the committee serve as nonvoting members. The legislation required the committee Chairman to invite tribal chairmen to each committee meeting.

The Tribal Taxation Issues Committee was directed to study tribal taxation issues, including the tax collection agreements that exist between the tribes and the state, the interaction between tribal sovereignty and state law, consideration of how statutory changes may affect provisions in existing agreements, the amount and manner of revenue sharing under the agreements, the costs and benefits to the state and the tribes if tax compacts are implemented, implementation models used in other states for tax compacts, best practices for negotiating and ratifying tax compacts, and the procedure for withdrawal from an agreement and how to handle disputed funds. In addition, Section 33 authorized the Tribal Taxation Issues Committee to study tribal-state issues, including government-to-government relations, human services, education, corrections, and issues related to the promotion of economic development.

Section 31 of House Bill No. 1015 suspended North Dakota Century Code Section 54-35-23 through July 31, 2019. Section 54-35-23 provides for the Tribal and State Relations Committee. This committee, which was created in 2005, conducts joint meetings with the North Dakota Tribal Governments' Task Force. The North Dakota Tribal Governments' Task Force is composed of six members, including the Executive Director of the Indian Affairs Commission, or the Executive Director's designee; the Chairman of the Standing Rock Sioux Tribe, or the Chairman's designee; the Chairman of the Spirit Lake Tribe, or the Chairman's designee; the Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, or the Chairman's designee; the Chairman of the Turtle Mountain Band of Chippewa Indians, or the Chairman's designee; and the Chairman of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, or the Chairman's designee. The Tribal and State Relations Committee is required to study tribal-state issues, including government-to-government relations, human services, education, corrections, and issues related to the promotion of economic development.

The committee members were Governor Doug Burgum (Chairman); Representatives Al Carlson, Craig Headland, and Corey Mock; Senators Dwight Cook, Joan Heckaman, and Rich Wardner; and Citizen Members Scott J. Davis, Indian Affairs Commission; Ryan Rauschenberger, Tax Department; and Brent Sanford, Lieutenant Governor.

The committee submitted this report to the Legislative Management at the biennial meeting of the Legislative Management in November 2018. The Legislative Management accepted the report for submission to the 66<sup>th</sup> Legislative Assembly.

## FEDERAL INDIAN LAW AND POLICY

Indian law is a very complex area of law. Due to the sovereign character of Indian tribes, most Indian law is necessarily federal in nature. Under the federal system, there have been several distinct eras of federal-tribal relations.

During the initial era of federal-tribal relations, from 1789 to approximately 1820, the federal government sought to minimize friction between non-Indians and Indians by limiting the contacts between these groups. This era was followed by the Indian removal era--approximately 1820 to 1850--when the federal government sought to limit friction between non-Indians and Indians by removing all Indians from east of the Mississippi River to open land in the Oklahoma Territory. This era was followed by what may be called the reservation era--1850 to 1887--when, as non-Indians continued to move westward and friction developed between non-Indians and Indians, the federal government developed a policy of restricting Indian tribes to specified reservations. This policy was implemented by treaty in which each tribe ceded much of the land it occupied to the United States and reserved a smaller portion of it. This is the origin of the term reservation.

With the enactment of the federal General Allotment Act of 1887, or Dawes Act, United States-Indian relations entered a new era. This era is known as the allotment era because the General Allotment Act authorized the President to allot portions of reservation land to individual Indians. Under this system, allotments of 160 acres were made to each head of a family and 80 acres to others, with double those amounts to be allotted if the land was suitable only for grazing. The General Allotment Act resulted in a decline in the total amount of Indian-held land from 138 million acres in 1887 to 48 million acres in 1934.

The allotment era was followed by the Indian reorganization era--1934 to 1953--during which the land base of the tribes was protected by extending indefinitely the trust period for existing allotments still held in trust and encouraging tribes to establish legal structures for self-government. The Indian reorganization era was followed by the termination and relocation era--1953 to 1968--when the federal government sought to terminate tribes that were believed to be prosperous enough to become part of the American mainstream, terminate the trust responsibility of the federal government, and encourage the physical relocation of Indians from reservations to seek work in large urban centers.

The policy of termination and relocation was regarded as a failure and the modern tribal self-determination era began with the federal Indian Civil Rights Act of 1968, the effect of which was to impose upon the tribes most of the requirements of the Bill of Rights. The Indian Civil Rights Act of 1968 also amended Public Law 280 so states could no longer assume civil and criminal jurisdiction over Indian country unless the affected tribes consented at special elections called for this purpose. Federal acts since 1968 designed to enhance tribal self-determination include the Indian Financing Act of 1974, which established a revolving loan fund to aid in the development of Indian resources; the Indian Self-Determination and Education Assistance Act of 1975, which authorized the Secretaries of the Interior and of Health, Education, and Welfare to enter contracts under which the tribes would assume responsibility for the administration of federal Indian programs; the Indian Tribal Government Tax Status Act of 1982, which accorded the tribes many of the federal tax advantages enjoyed by states, including that of issuing tax-exempt bonds to finance governmental projects; the Tribally Controlled Schools Act of 1988, which provided grants for tribes to operate their own tribal schools; the Indian Child Welfare Act of 1978; the American Indian Religious Freedom Act of 1978; and the Indian Gaming Regulatory Act of 1988.

### STATE-TRIBAL RELATIONS

Probably the most important concept in state-tribal relations is the concept of sovereignty. Both the states and Indian tribes are sovereigns in the federal system. In *Johnson v. McIntosh*, 21 U.S. 543 (1823), the United States Supreme Court stated "[t]he rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil . . . but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it." In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Court held that the Cherokees could not be regarded as a foreign state within the meaning of Article III of the United States Constitution, so as to bring them within the federal judicial power and permit them to maintain an action in the Court. However, Chief Justice John Marshall characterized Indian tribes as "domestic dependent nations." In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Court further discussed the status of Indian tribes. The Court stated "[t]he Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed . . ." The Court concluded the laws of Georgia have no force in Cherokee territory. Based upon these early cases, the tribes are sovereign and free from state intrusion on their sovereignty. Thus, state laws generally have been held inapplicable within the boundaries of reservations, although exceptions have been made under the plenary power of Congress to limit tribal sovereignty.

### STATE-TRIBAL COOPERATIVE AGREEMENTS

Chapter 54-40.2 provides for agreements between public agencies and tribal governments. A public agency means any political subdivision, including a municipality, county, school district, and any agency or department of North Dakota. Tribal government means the officially recognized government of an 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. Under this chapter, any one or more public agencies may enter 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 dispute in accordance with Chapter 54-40.2 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.

### STATE-TRIBAL TAX REVENUE SHARING AGREEMENTS

The committee received information from the Tax Department regarding the five tax revenue sharing agreements in effect between the state and tribal nations within the state and the revenue allocated to tribes in accordance with each agreement.

Tribe	Effective Date	Tax Type	Current Revenue Allocation		Admin. Fee	Tribal Share of Fiscal Year 2017 Revenue
			Tribe	State		
Standing Rock Sioux Tribe	July 1, 1993	Cigarette and other tobacco products	87%	13%	1%	\$123,391
Standing Rock Sioux Tribe	January 1, 1999	Motor fuel and special fuel	87%	13%	1%	\$487,714

Tribe	Effective Date	Tax Type	Current Revenue Allocation		Admin. Fee	Tribal Share of Fiscal Year 2017 Revenue
			Tribe	State		
Spirit Lake Tribe	September 1, 2006	Motor fuel and special fuel	76%	24%	1%	\$268,769
Turtle Mountain Band of Chippewa Indians	September 1, 2010	Motor fuel and special fuel	96%	4%	1%	\$724,086
Three Affiliated Tribes of the Fort Berthold Reservation	September 1, 2007	Motor fuel and special fuel	70%	30%	1%	\$1,990,770
Three Affiliated Tribes of the Fort Berthold Reservation	July 1, 2008	Oil and gas taxes	50%	50%	none	\$122,665,340

### Cigarette and Tobacco Excise Tax Agreement

On July 1, 1993, a collection agreement between the Tax Commissioner and the Standing Rock Sioux Tribe became effective. Under this agreement, the Standing Rock Sioux Tribe levies a cigarette and tobacco excise tax on all licensed wholesalers and distributors operating on the Standing Rock Sioux Reservation. The tax rates are identical to the state tax rates. The Tax Department serves as an agent of the tribe in collecting the tax. The renegotiated terms of the agreement, which became effective on May 1, 2015, provide 87 percent of the tax, less a 1 percent administrative fee, is returned to the tribe. Thirteen percent, plus the 1 percent administrative fee, is deposited in the general fund.

### Motor Vehicle Fuel and Special Fuel Tax Agreements

The state has entered motor vehicle fuel and special fuel tax agreements with all tribes in the state except the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. The tax applies at a rate of \$0.23 per gallon to sales of motor vehicle fuel and special fuel within the exterior boundaries of the reservation. The state's agreement with:

- The Standing Rock Sioux Tribe became effective January 1, 1999. The renegotiated terms of the agreement, which became effective on May 1, 2015, provide 87 percent of the tax, less a 1 percent administration fee, is returned to the tribe. Thirteen percent, plus the 1 percent administration fee, is deposited in the general fund.
- The Spirit Lake Tribe, which became effective September 1, 2006, provides 76 percent of the tax, less a 1 percent administration fee, is returned to the tribe. Twenty-four percent, plus the 1 percent administration fee, is deposited in the general fund.
- The Three Affiliated Tribes of the Fort Berthold Reservation, which became effective September 1, 2007, provides 70 percent of the tax, less a 1 percent administration fee, is returned to the tribe. Thirty percent, plus the 1 percent administration fee, is deposited in the general fund.
- The Turtle Mountain Band of Chippewa Indians, which became effective September 1, 2010, provides 96 percent of the tax, less a 1 percent administration fee, is returned to the tribe. Four percent, plus the 1 percent administration fee, is deposited in the general fund.

The committee received testimony from tribal representatives expressing a desire for sharing agreements to address bulk fuel sales, in addition to retail sales of fuel.

### Oil and Gas Tax Agreement

The oil and gas revenue sharing agreement between the Three Affiliated Tribes and the state was signed June 10, 2008, by Three Affiliated Tribes Chairman Marcus D. Wells, Jr., and Governor John Hoeven and was to remain in effect for 24 calendar months after July 1, 2008. The agreement was entered pursuant to the authority provided in Chapter 57-51.2, which was enacted following the passage of House Bill No. 2419 (2007). A renegotiated agreement was signed on January 13, 2010, by Three Affiliated Tribes Chairman Marcus D. Levings and Governor John Hoeven. The provisions of the 2010 agreement were to remain in effect indefinitely, unless formally cancelled by either party.

In 2013, Chapter 57-51.2 was extensively revised to provide more beneficial terms for the Three Affiliated Tribes under an oil and gas tax agreement. A new agreement implementing the 2013 legislative changes was signed on June 21, 2013, by Three Affiliated Tribes Chairman Tex Hall and Governor Jack Dalrymple. The 2013 agreement is to remain in effect until formally cancelled by either party and specify that, "[e]ither party may terminate [the] Agreement without cause and without liability, except as to any amounts collected and due to either party, upon thirty (30) days written notice to the other party."

Legislation enacted by the 2015 Legislative Assembly eliminated various triggered oil extraction tax exemptions and rate reductions. House Bill No. 1476 (2015) reduced the 6.5 percent oil extraction tax rate to 5 percent for production beginning January 1, 2016. Chapter 57-51.2 also was amended by the passage of Senate Bill No. 2226 (2015), but the

maximum oil extraction tax rate that may be imposed on production subject to an agreement entered under Chapter 57-51.2 remained unchanged. Specifically, Section 57-51.2-02(3) provides:

The state's oil extraction tax under chapter 57-51.1 as applied to oil and gas production attributable to trust lands on the reservation and on trust properties outside reservation boundaries may not exceed six and one-half percent but may be reduced through negotiation between the governor and the tribal governing body.

Similar language pertaining to the applicable oil extraction tax rate also is found in the 2013 agreement between the Governor and the Three Affiliated Tribes, which states "the tax rate attributable to production and extraction of oil from Trust Lands must not exceed eleven and one half percent" and "the tax rate attributable to production and extraction of oil from Non-Trust Lands must not exceed eleven and one half percent (11.5%) subject to applicable exemptions in N.D.C.C. chapters 57-51 and 57-51.1." The agreement further provides the parties to the agreement agree to the imposition of taxes at the rates specified in the agreement and "[n]either party will adjust, raise or lower the production and extraction taxes on oil and gas activities within the exterior boundaries of the Fort Berthold Reservation during the term of the Agreement."

Section 57-51.2-03, which states Chapter 57-51.2 supersedes any inconsistent provisions of Chapters 57-51 and 57-51.1, also remained unchanged under Senate Bill No. 2226. The changes effectuated by the passage of Senate Bill No. 2226 mainly expanded the scope of Chapter 57-51.2, which now applies to agreements entered by the Standing Rock Sioux Tribe and the Turtle Mountain Band of Chippewa Indians in addition to the Three Affiliated Tribes, and to add confirmation requirements for future agreements. Specifically, provisions were placed in Section 57-51.2-01 noting an agreement made pursuant to Chapter 57-51.2 "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 confirmation date or the effective date in the agreement, whichever is later." The changes in Senate Bill No. 2226 are effective for agreements entered after July 31, 2015.

Following the January 2016 oil extraction tax rate reduction from 6.5 to 5 percent under Chapter 57-51.1, the oil extraction tax rate applied to production subject to the 2013 agreement also was reduced to 5 percent. The 2013 agreement was not modified prior to the rate reduction nor did either party submit the required 30-day written notice of an intent to terminate the agreement following implementation of the rate reduction.

The committee received testimony from representatives of the Three Affiliated Tribes indicating 88 percent of the funds that comprise the tribe's budget are derived from oil and gas royalties and taxes. According to the testimony, it is the tribe's legal position that one-half of the 1.5 percent tax not collected when the rate was unilaterally lowered from 11.5 to 10 percent is due to the tribe. The tribal business council passed a resolution on January 11, 2017, stating the tribe intends to collect the tribe's portion of the 1.5 percent tax which was not collected by the state. The tribe noted it has discussed with the oil companies how the tribe can realize the tax it asserts is due under the agreement. Tribal representatives provided three possible means of resolving disagreements related to the oil and gas agreement:

- Remain in the agreement, but receive a commitment from the state regarding how the agreement will be modified in terms of revenue sharing, particularly in regard to allocation of revenues from trust land.
- Remain in the agreement, but negotiate with oil companies for the payment of one-half of the 1.5 percent tax that was not collected by the Tax Commissioner when the tax rate was unilaterally lowered.
- Submit notice to the state of the tribe's intent to terminate the agreement, and terminate the agreement if a resolution is not reached within 30 days. If the agreement is terminated, the tribe would notify oil companies all future tax is due and payable directly to the tribe.

The committee was informed the tribe's preference is to remain in the agreement but receive a more equitable division of revenues. According to the testimony, the tribe would consider a revenue split of 80 percent to the tribe and 20 percent to the state on trust lands and a revenue split of 80 percent to the state and 20 percent to the tribe on fee land. Any renegotiated revenue split would apply prospectively to newly drilled wells. The existing 50/50 revenue split would continue on any wells drilled before the effective date of a renegotiated agreement. The tribe also requested changes to the restrictions placed on tribal-state tax agreements by the 2015 Legislative Assembly, which require legislative ratification of agreements. Tribal representatives suggested a compromise of allowing agreements entered during the interim to become effective without legislative ratification, but providing the Legislative Assembly authority to rescind the agreement during the next legislative session if the Legislative Assembly does not support the agreement. Tribal representatives indicated the tribe would like to preview any proposed legislation intended to be introduced during the 2019 legislative session.

Committee members expressed understanding regarding the strain placed on the tribes' budgets as a result of falling oil and gas revenues because the state experienced similar budgetary strains. Committee members and tribal representatives acknowledged the chilling effect placed on the oil industry as a result of the threat of dual taxation.

Committee members agreed both the state and the tribe benefit when oil and gas resources are developed under a stable taxing environment.

### **Sales and Use Tax Collection Agreement**

House Bill No. 1406 (2015) created Chapter 57-39.8, which authorizes the Governor to enter an agreement with the Standing Rock Sioux Tribe for the state administration and collection of state-level and local-level tribal sales, use, and gross receipts taxes imposed within the exterior boundaries of the North Dakota portion of the Standing Rock Sioux Reservation. The chapter outlines the parameters for an agreement, including provisions relating to the rate of tax imposed, conformance with the state's sales tax base, allocation of revenues, the Tax Commissioner's authority to administer and collect the tax, and the proper venue for resolving disputes arising from an agreement.

The agreement between the state and the Standing Rock Sioux Tribe became effective July 1, 2016, and provided for an 80/20 tribal/state split of tax collections. The agreement required the Standing Rock Sioux Tribe to impose tax at a rate of 5 percent for general sales and use tax, 3 percent for sales and use tax on new manufactured homes, 7 percent for alcohol gross receipts tax, and 3 percent for farm machinery gross receipts tax on new farm machinery and new farm irrigation equipment, in conformance with the rates imposed for state sales, use, and gross receipts taxes. The Standing Rock Sioux Tribe also imposed a .25 percent tribal local tax that applied to all transactions subject to the state-level taxes.

On March 7, 2017, the Tax Department discontinued its administration of the Standing Rock Sioux Tribe's sales, use, and gross receipts taxes, including the tribal .25 percent local tax, as a result of disagreements concerning the collection of use tax from tribally owned businesses. The Standing Rock Sioux Tribe assumed the administrative duties relating to its tax when the collection agreement was terminated.

Representatives of the Standing Rock Sioux Tribe indicated certain changes would be required before the tribe would consider entering a new collection agreement. Requirements mandating the tribe report on the use of tribal tax revenue and provisions capping the amount of revenue that may be allocated to the tribe at \$2 million per biennium would need to be removed. According to the testimony, provisions allowing sharing of retailer tax information, to allow the tribe to determine which types of business on the reservation are tax-generating businesses, would need to be added.

Some committee members expressed agreement with the tribe's concerns regarding reporting requirements and caps. Other committee members indicated that caps may need to be included in an agreement for purposes of the Legislative Assembly formulating the state budget. Tribal representatives noted the tribe's budgeting process is hindered by the application of caps.

Representatives of several tribes expressed concern regarding the taxation of purchases made by an enrolled member of a tribe within the boundaries of a reservation that does not have a revenue sharing agreement in place. Tribal representatives indicated the burden is being placed on each enrolled member to prove that member's exempt status. The testimony indicated not all enrolled members, including children and some elders, have tribal identification cards. According to the testimony, some retailers located within reservation boundaries are placing an additional burden on enrolled members by requiring enrolled members to obtain coded sales tax exemption cards to make tax-exempt purchases. Tribal representatives asserted the burden of proving a purchaser is not entitled to the exemption should be on the retailer. The testimony asserted retailers should assume an individual making a purchase within the boundaries of a reservation is an enrolled member unless the retailer has reasonable grounds to believe otherwise.

Testimony from representatives of the Tax Department indicated a retailer issued a sales and use tax permit is a collection agent of the state and is required to collect sales tax on purchases made by nonnatives. If a retailer is audited by the state, the retailer must provide some type of record or documentation to verify the exempt status of a sale. Issuance of coded sales tax exemption cards is an individual business decision initiated by a retailer and is not a practice mandated by the state. According to the testimony, a tribal member who operates a business as a sole proprietor, or a business incorporated through the tribe, is not required to collect sales tax from a native or nonnative purchaser because the business is not being afforded protections by the state.

### **Framework for Future Revenue Sharing Agreements**

Committee members and tribal representatives agreed the primary goal of revenue sharing agreements is to avoid dual taxation and promote economic development. The Tax Department reported to the committee the results of an extensive review of revenue sharing agreements in other states to determine best practices. The report included information on formula-based revenue sharing agreements in Minnesota and Montana.

According to the information, Minnesota uses a "blind till concept" when collecting sales tax pursuant to an agreement, meaning tax is collected from every customer on tribal land regardless of whether the customer is a tribal member or is nontribal. Revenue is allocated using a per capita calculation that takes into account average income within a county,

sales tax paid based on the average income, and the location of the tribe in relation to urban areas. Montana also uses a per capita calculation that includes an enrolled member annual adjustment that takes into account tribal enrollment records, voter records, and data from the tribal enrollment office. In both states, fees are not charged for administration of the agreement and revenue is distributed to the tribes on a quarterly basis.

Tax Department representatives reviewed a proposed framework for a sales, use, and gross receipts tax revenue sharing agreements entered between the Governor and any of the four of the tribal nations in the state. The framework provided a means to remedy concerns expressed by representatives of all tribes regarding requirements for legislative approval of sharing agreements. According to the testimony, the framework would allow an agreement to be entered at any time, including times when the Legislative Assembly is not in session. Committee members and tribal representatives provided recommended changes to the framework, which included recommendations to add language addressing revenue allocation and exemptions for tribal businesses, clarify the Tax Commissioner's authority to cancel an agreement must be exercised in consultation with the Governor, emphasize the tribes' sovereignty and right to tax, and allow the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation the option to enter an agreement.

Further comments were solicited throughout the interim and incorporated into two privately sponsored bill drafts that would provide the framework for revenue sharing agreements pertaining to sales, use, and gross receipts taxes and agreements pertaining to alcoholic beverage and tobacco products wholesale taxes.

### **Sales, Use, and Gross Receipts Tax Revenue Sharing Agreements**

The committee considered a bill draft [19.0314.01000] relating to the framework for tribal-state sales, use, and gross receipts tax revenue sharing agreements. The bill draft would have provided for the repeal of the chapter of the North Dakota Century Code pertaining to sales, use, and gross receipts tax revenue sharing agreements between the state and the Standing Rock Sioux Tribe, and the creation of a new chapter pertaining to tribal-state sales, use, and gross receipts tax revenue sharing agreements between the state and any of the five tribal nations in the state. The bill draft would have required all transactions and activities by all persons and entities within the boundaries of a reservation in the state be subject to the sales, use, and gross receipts tax provisions in the Century Code, which would be subject to future amendments by the Legislative Assembly. An exemption from tax would have been provided for tribally owned entities that solely perform a governmental function or an essential government services that directly impacts the health, welfare, or safety of the tribe and its members. Exempt entities would have been required to be specified in the agreement entered by the tribe and the state. Other tribally owned businesses, whose moneys are used in whole or in part to fund government functions or services, would not have been subject to the exemption. The tribe would have been restricted from imposing any additional direct or indirect fees on retailers, transactions, or activities subject to an agreement, with the exception of tribal employment rights office fees. The Tax Commissioner would have retained authority to collect, administer, and enforce the taxes imposed pursuant to an agreement. The tribe would have received a list of retailers located within the boundaries of the reservation and the amount of tax collected from each retailer. The tribe would have been required to protect the confidentiality of tax information received from the Tax Commissioner. Tax revenue would have been shared pursuant to the terms of the agreement and any disputes relating to the agreement would have been subject to binding arbitration. An agreement would have been required to recognize the sovereign rights of the state and the tribe. The bill draft would have authorized both the Tax Commissioner, after consulting with the Governor, and the tribe to terminate the agreement at any time, with or without cause.

The bill draft would have allowed the parties to an agreement to determine the manner in which revenue is shared. The committee reviewed potential methods for determining revenue shares, including a formula-based method. A formula-based method would evaluate each party's propensity to spend on taxable sales and distribute revenue accordingly. Use of a formula-based method simplifies administration of the tax because it removes the burden of tracking the location at which each individual item was purchased or, in the case of online sales, delivered. The state has authority to require online retailers operating above certain thresholds to collect sales tax on sales delivered to North Dakota following the Supreme Court's ruling in *South Dakota v. Wayfair, Inc.* According to the testimony, over 1,200 online retailers have registered with the state to collect sales tax. Tribal representatives indicated tax is being collected improperly on many online sales delivered to enrolled members on the reservation and the state is receiving the revenue from those sales. Committee members highlighted the benefit of entering a revenue sharing agreement as a means to redistribute online sales tax collections back to the tribe.

Tribal representatives expressed concerns regarding bill draft provisions requiring binding arbitration. According to the testimony, legal issues may arise in regard to enforcing arbitration clauses. It was noted when Florida attempted to enforce gaming compact arbitration clause against the Seminole Tribe of Florida in 2009, the case was dismissed because an arbitration clause cannot be enforced against a tribe without a sovereign immunity waiver. It also was noted tribes and states have a history of not being able to enforce arbitration clauses.

Tribal representatives also expressed concerns regarding the bill draft provisions on the tax treatment of tribally owned businesses. Tribal representatives objected to an exemption only applying to those tribally owned businesses that perform a governmental function or an essential government services that directly impact the health, welfare, or safety of the tribe and its members and which are listed in the agreement. According to the testimony, there are tribally owned businesses that do not provide an essential government function, but the revenue of the business is returned to the tribe in full for the benefit of the tribe. Tribal representatives noted these businesses are no different than the Bank of North Dakota, which is exempt from state tax. Tribal representatives expressed an interest in more flexibility in determining which tribally owned businesses would be exempt pursuant to an agreement.

Representatives of the Turtle Mountain Band of Chippewa Indians expressed concerns regarding the use of the term "reservation" in the bill draft and the impact this term would have in relation to the pockets of land located outside the boundaries of a reservation. A representative of the tribe suggested replacing the word "reservation" with "Indian country" would allow an agreement to apply to sales made on non-trust lands located outside, or adjacent to, the boundaries of a reservation. The tribe noted it has a 550-acre land purchase pending fee-to-trust conversion which would not be covered under the current language in the bill draft.

Tribal representatives expressed concerns regarding tribal sovereignty and the perception a state tax would be imposed on tribal members pursuant to an agreement. Tribal representatives requested additional language be added to the bill draft to emphasize the tribe's status as a sovereign nation and to clarify the tax imposed pursuant to an agreement would be a tribal tax. Representatives of the Tax Department noted education regarding the framework of agreements would be important to ensure tribal members realize the state is not imposing its own tax, but rather is collecting a tribal tax on the tribe's behalf. Tribal members also expressed concerns regarding the Tax Commissioner's ability to terminate an agreement, after consulting with the Governor, rather than the Governor having the authority to terminate an agreement. Tribal representatives noted the language in the bill draft waters down the relationship implied in a government-to-government agreement. Representatives of the Tax Department explained the right to cancel the agreement lies with the Tax Commissioner because the Tax Department has the sole responsibility for administering the agreement.

#### **Alcoholic Beverages and Tobacco Products Wholesale Tax Revenue Sharing Agreements**

The committee also reviewed a bill draft [19.0349.01000] to create a framework for alcoholic beverage and tobacco product wholesales tax agreements entered between the Governor and any of the five tribal nations in the state. Many of the provisions in the bill draft relating to items that must be included in a revenue sharing agreement are similar to the items in the bill draft pertaining to the framework for sales, use, and gross receipts tax agreements. The bill draft would have provided the manner in which revenues are shared under an agreement would be determined by applying a formula. A tribe's share of revenue pursuant to the formula would have been equal to the amount arrived at by multiplying the tribe's enrollment figures by the state per capita amount of either alcohol beverage wholesale taxes or tobacco products wholesale taxes collected. The per capita amount of alcoholic beverage or tobacco products wholesale taxes would have been determined by dividing the statewide collections of alcoholic beverage wholesales taxes or tobacco products wholesale taxes by the total state population, as determined by the most recent actual or estimated census data. The enrolled membership of a tribe would have been required to be certified to the state by September 30 of each year based on the tribe's enrollment office records, Bureau of Indian Affairs (BIA) records, or other records maintained by the tribe. For purposes of the formula, the enrolled membership would have consisted only of the enrolled members residing on the portion of the reservation located within the boundaries of this state. Revenues would have been deposited quarterly into the newly created tribal allocation fund.

The Tax Department provided testimony regarding the estimated amount of revenue that would be distributed to the tribes based on the allocation formula in the bill draft. It was reported approximately \$8.8 million in alcoholic beverage wholesales taxes are collected statewide per year. Of that amount, roughly \$300,000 would be distributed to the tribes if all five tribes entered a revenue sharing agreement. Of the \$300,000, \$109,000 would be distributed to the Turtle Mountain Band of Chippewa Indians, \$79,000 to the Three Affiliated Tribes of the Fort Berthold Reservation, \$53,000 to the Spirit Lake Tribe, and \$52,000 to the Standing Rock Sioux Tribe. According to the testimony, the statewide collection amount for tobacco wholesale taxes is approximately \$29 million per year. Of that amount, an estimated \$934,000 would be distributed to the tribes if all five tribes entered a revenue sharing agreement. Based on that amount, distributions based on the formula would range from \$165,000 to the Standing Rock Sioux Tribe to \$345,000 to the Turtle Mountain Band of Chippewa Indians.

The testimony indicated the state would benefit from a revenue sharing agreement pertaining to tobacco products wholesale taxes because the state is subject to various reporting requirements under the Master Settlement Agreement. It was noted having all tobacco products subject to tax under an agreement would ease administrative difficulties encountered by the Tax Department in regard to those reporting requirements. Committee members expressed concern regarding the ability of a tribe to enter a tobacco products tax agreement without entering an alcohol beverage tax agreement and indicated provisions of the bill draft may need to be revised to require an agreement be entered for both tax types.

The committee received information from representatives of the Three Affiliated Tribes of the Fort Berthold Reservation indicating the tribe went through a lengthy process to develop an alcohol tax ordinance but temporarily suspended the ordinance as a result of concerns raised at meetings with alcoholic beverage wholesalers and retailers. The committee received a letter signed by various business owners operating within the boundaries of the reservation which encouraged committee members to support a state-tribal revenue sharing agreement pertaining to revenues from on-reservation sales of alcohol. Tribal representatives noted revenues from alcohol sales are needed to address the negative effects generated by alcohol consumption. The testimony indicated the tribe would be open to an agreement that split revenues based on population, similar to the manner in which revenues are split under motor fuel tax revenue sharing agreements.

Representatives of the Spirit Lake Tribe also expressed interest in entering a revenue sharing agreement pertaining to sales of alcohol because the tribe has some of the highest numbers of alcohol-related incidents in the state and is in need of revenues to address the negative impacts of alcohol. The committee was informed the amount of revenue generated by alcohol gross receipts tax under a sales, use, and gross receipts tax revenue sharing agreement would be larger than the amount of revenue generated under an alcoholic beverage wholesale tax sharing agreement. The committee learned a tribe could enter an agreement under the proposed framework for the taxation of alcohol at the retail level without entering an agreement for the taxation of alcohol at the wholesale level.

### **Conclusions**

The committee acknowledged revisions may be needed on both bill drafts and encouraged tribal representatives to continue working with legislators regarding recommended revisions. The committee expressed hope proposed legislation pertaining to the enabling language for both revenue sharing agreements would be ready for introduction during the 2019 legislative session.

### **Property Tax Concerns**

The committee also received testimony regarding the potential for property tax revenue sharing agreements. Representatives of the Spirit Lake Tribe testified regarding the application of property tax to trust land being leased to non-Indians. Tribal representatives disagreed with the application of tax to these properties. Testimony from representatives of the Tax Department indicated state law requires the county to assess leasehold interests. Tribal representatives noted the tribe would be interested in reviewing a revenue sharing agreement regarding property tax assessed within the boundaries of the reservation.

Tribal representatives also expressed concerns regarding the application of property tax to fee land in the process of being converted to trust land. According to the testimony, the tribe purchased 1,200 acres of land for approximately \$1.2 million but only \$1 million worth of land has been successfully converted. Because a 3-year waiting period applies when converting fee land to trust land, the tribe indicated its preference is the property tax not be applied for the remainder of the conversion period occurring after payment has been remitted for the land. The testimony indicated the tribe leases 190,000 acres to non-Native American farmers and ranchers and is considering imposing a \$0.25 per acre land tax.

## **INDIAN EDUCATION ISSUES**

### **Behavioral Health Concerns and K-12 Funding**

According to testimony, discussions with superintendents of the 17 largest school districts in the state indicated the lack of behavioral health resources is the number one issue facing schools. The testimony indicated behavioral health issues in schools also are a pressing concern on the reservation. The testimony noted because of the increasing number of children born to parents struggling with addiction on the Turtle Mountain Reservation, teachers are struggling to meet the needs of those children as those children begin to enter the school system. According to the testimony, truancy rates are high on the reservation which has a graduation rate of 70 percent. The testimony emphasized the need for a school resource officer in light of the tribe's K-12 enrollment of nearly 2,000 students. It was noted the amount of state funding received per student on the reservation has decreased by \$40 over the amount received in the previous year. Tribal representatives requested the Legislative Assembly consider increasing the weighting factor in the foundation aid formula relating to at-risk students from .025 to .1. According to the testimony, the current weighting factor provides less than \$50 per at-risk student. The testimony indicated because the reduced amount of taxable property on reservations creates school funding challenges, the Legislative Assembly should consider those reservation funding challenges when it considers any changes to the school funding formula. The committee recognized schools on the reservation may be facing challenges in addition to those faced by other schools in the state.

### **Tribal College Workforce Development Grants**

The committee received information regarding workforce development grants to tribally controlled community colleges in this state. The Legislative Assembly appropriated \$500,000 in Senate Bill No. 2144 (2017) for workforce development grants from the student loan trust fund, which has since been depleted. According to the testimony, proposed legislation seeking additional funding for workforce development grants will be introduced during the 2019 legislative session.



Committee members noted tribal community colleges are an untapped resource for the state's workforce needs. Committee members recognized political subdivisions in the western part of the state have a difficult time hiring drivers to operate plows and perform other maintenance services because more competitive pay is being offered to truck drivers by the energy sector. The committee was informed tribal colleges on the Spirit Lake Reservation and the Turtle Mountain Reservation offer commercial driver's license programs and employers may want to look to tribal colleges to help fill the state's workforce needs.

## **TRIBAL HEALTH AND HUMAN SERVICES ISSUES**

### **Health Care Funding Shortages**

The committee received information from tribal representatives regarding health care funding needs on reservations. The committee received testimony from a representative of the Three Affiliated Tribes of the Fort Berthold Reservation indicating Indian Health Services (IHS), which funds clinics and hospitals on the reservation, is chronically underfunded and understaffed. The testimony noted IHS is funding Indian nations at 50 to 51 percent of the need, leaving the tribe responsible for the remainder of costs. According to the testimony, the Three Affiliated Tribes exhausts its funding for contracted health services by June of each year. The tribe invested in a self-funded health insurance plan and spends in excess of \$20 million per year in premiums for members living on and off the reservation. The testimony emphasized the tribes are in dire need of health care and addiction treatment resources. Gaps created by insufficient addiction treatment services are being filled by law enforcement as addicted individuals fill jails.

The committee received information from a representative of the Turtle Mountain Band of Chippewa Indians. The tribe receives \$17 million per year in IHS contract funds for a service population of 14,000 people. The tribe exhausts its IHS funding by June of each year and does not have access to additional funding until the following October. Access to healthy food on the reservation is limited and what is available is expensive, with a gallon of milk costing up to \$7. The testimony noted 10 percent of the reservation population has diabetes.

### **Medicaid Reimbursement**

Services provided to Medicaid-eligible American Indians by non-IHS tribal providers that have entered care coordination agreements with IHS tribal facilities are eligible for enhanced federal matching at a rate of 100 percent. According to the testimony, tribes have engaged in discussions with the Department of Human Services and individual legislators to develop legislation to allocate the dollars generated from the enhanced federal match to the tribes. Tribal representatives stressed the importance of additional revenue to fund treatment centers and address other pressing health care needs.

### **Child Welfare**

The committee received information regarding child welfare challenges tribes are facing. The committee received testimony from representatives of the Turtle Mountain Band of Chippewa Indians indicating the tribe struggles with an overburdened child welfare system. According to the testimony, child welfare social workers on the reservation have up to 100 clients, whereas state caseloads are capped at 25 clients per social worker. The testimony indicated increased caseloads are due in part to the opioid crisis on the reservation. The committee was informed 13 children born to mothers addicted to methamphetamine were abandoned over the past 2 years.

The committee also received testimony from representatives of the Spirit Lake Tribe regarding issues related to tribal youth and social services. According to the testimony, the location of 80 children in the social service system on the reservation is unknown. The tribe noted it is in negotiations to regain tribal control of social services on the reservation.

### **Housing and Unemployment**

The committee received testimony from representatives of the Turtle Mountain Band of Chippewa Indians regarding housing shortages and unemployment. The testimony indicated nearly all the units in the tribe's housing authority are occupied and 112 families are on a waiting list for housing. According to the testimony, most vacant units are unusable, due in part to the cleaning required for units previously occupied by tenants evicted for issues related to methamphetamine. New housing is difficult to build on the reservation because banks generally will not issue loans for new home construction due to low property valuations on the reservation. The testimony indicated 1,800 families on the reservation use the low-income home energy assistance program, which is under threat of being cut at the federal level. The unemployment rate on the reservation is 70 percent but the tribe noted it hopes to decrease that rate when a manufacturing plant is opened on the reservation.

## **INFRASTRUCTURE AND LAW ENFORCEMENT ISSUES**

### **Infrastructure Needs**

The committee received information regarding various tribes' infrastructure needs and challenges. The committee received testimony from representatives of the Three Affiliated Tribes of the Fort Berthold Reservation indicating the reservation has 160 to 200 miles of road that needs paving to support oil and gas development. The cost to repair a

1.25 mile roadway is \$4 million. The federal government budgets \$1 million per year for roads on the Fort Berthold Reservation. The tribe has spent \$50 million to \$60 million on roads in the past 2 years. The need for road funding also was highlighted by representatives of the Spirit Lake Tribe, who noted the need for funding has been exacerbated in light of recent decreases in gaming revenue.

The committee received information from representatives of the Turtle Mountain Band of Chippewa Indians regarding infrastructure concerns. The committee was informed the tribe's lack of access to railroads and highways is one of the reasons the reservation has difficulty attracting industry and manufacturing. Existing reservation roads also are in need of repair, including Jack Rabbit Road, which accommodates school buses, ambulances, border patrol staff, and working professionals. Tribal representatives also expressed the need for sewer system and other public utility improvements.

The committee received testimony emphasizing the importance of investing in government and business infrastructure on reservations to avoid perpetuating multigenerational poverty. Committee members noted federal funding may be available to assist tribal governments in addressing infrastructure needs. Committee members also discussed the benefits that may result from tribal cities choosing to become incorporated under North Dakota Law, including the establishment of a tax base, a law enforcement office, and a fire department.

### **Law Enforcement Cooperation and Licensure**

The committee received information regarding law enforcement issues facing the tribes. The committee received testimony from a representative of the Spirit Lake Tribe indicating only six BIA officers patrol about 400,000 square acres. Tribal representatives noted the tribe would benefit from entering a memorandum of understanding with county and state officials for joint law enforcement to provide better border control and address illegal immigrant concerns.

The committee also received testimony from a representative of the Three Affiliated Tribes of the Fort Berthold Reservation. The Mandan, Hidatsa, and Arikara (MHA) Nation contracts for law enforcement pursuant to Public Law 93-638. Public Law 93-638 allows a tribe to contract with the federal government to operate programs serving their tribal members. The MHA Nation also created a drug enforcement agency, outside of Public Law 93-638, to address violence and drug use arising from oil and gas development. The MHA Nation's drug enforcement agency made nearly 600 drug related arrests over the past 2 years, which required cooperation with other state, county, and federal agencies through memorandums of understanding and agreements. The MHA Nation entered a model joint law enforcement agreement with McLean County, with additional counties considering following suit. According to the testimony, law enforcement agreements work well as long as jurisdictional details are clearly defined. Tribal representatives encouraged the Legislative Assembly to take a stronger and more formal stance in endorsing and enhancing joint law enforcement agreements to promote the safety of all citizens.

The committee received testimony from a representative of the Turtle Mountain Band of Chippewa Indians indicating the federal government does not provide sufficient funds for a police force on the reservation, and the crime rate on the reservation is high. According to the testimony, non-Indians have been entering the reservation to sell drugs; however, the state's attorney in Rolette County has not been prosecuting those arrested for selling drugs. It was noted the reservation has two judges to serve the entire reservation and one probation officer for 2,200 probationers.

The committee received testimony from representatives of BIA and the North Dakota Highway Patrol regarding potential clarifications to statutory provisions pertaining to law enforcement, which may be pursued during the 2019 legislative session. The definition of a "federal agent" in Section 29-06-05.2 does not contain a reference to employees of BIA law enforcement. As a result, BIA law enforcement officers are excluded from the immunity and liability insurance coverage applied to other peace officers in this state when rendering assistance to another peace officer upon request or in an emergency situation. The testimony indicated proposed legislation will seek to add a reference to BIA law enforcement officers to allow officers on either side of the line between tribal and state lands to cross over to render assistance to another officer in need while retaining liability protection. The committee expressed support for efforts to encourage mutual aid between counties, the state, and the tribe, especially in areas impacting public safety. Tribal representatives noted it would be important to discuss this issue with all five tribes to clarify neither of the parties rendering assistance would be relinquishing jurisdiction over their lands.

The committee also was informed proposed legislation may be sought to clarify Section 12-63-02.2, regarding recognition by the Peace Officer Standards and Training Board of tribal police officers as peace officers or part-time peace officers. According to the testimony, some tribal police officers require more extensive training than state peace officers. The testimony indicated the curriculum for peace officers and tribal police officers is being compared to determine if the requirements for a tribal police officer to receive licensure as a peace officer are unnecessarily complex.

## **OTHER ISSUES AFFECTING TRIBES**

### **Voter Identification Requirements**

The committee received testimony from a representative of the Secretary of State's office regarding a recent United States Supreme Court ruling pertaining to voter identification requirements. According to the testimony, a voter must provide identification verifying the voter's name, date of birth, and residential address when casting a ballot at the polling place or voting by mail. A residential address may not be a post office box. The committee was informed some tribal identification documents do not contain a residential address. The testimony indicated an individual seeking proof of that individual's residential address can contact the county 911 coordinator for documentation to verify the residential address. The documentation may be used to supplement tribal identification documents that do not contain a residential address. The Secretary of State's office sent a memorandum regarding voter identification requirements to all tribal leaders in the state and published the information in all newspapers in the state in each of the 3 weeks preceding the November election.

### **Unmanned Aircraft Systems**

The committee received information from a representative of the University of North Dakota regarding regulations for the operation of unmanned aircraft systems (UAS). The representatives of the UAS program were seeking assistance and input from state, local, and tribal governments in the development of UAS procedures and regulations. The testimony noted a state-level framework of regulations could benefit tribal and local governments. The committee received testimony from representatives of the Turtle Mountain Band of Chippewa Indians regarding the use of drone technology for youth and elder initiatives. The tribe has used drones to map buildings and tribal assets and find artifacts and burial sites previously believed to have been lost.

### **Signage Marking Tribal Lands**

The committee received testimony from a representative of the Spirit Lake Tribe regarding concerns pertaining to signage on the reservation and surrounding area. The testimony indicated a sign that designates the reservation boundary continues to be moved back without explanation. According to the testimony, tribal representatives met with representatives of the Department of Transportation regarding the location of the sign but were told the sign is for directional purposes rather than a sign to identify reservation boundaries. Tribal representatives expressed concern tourists' understanding of reservation boundary lines impact the hunting and fishing licenses tourists obtain. Tribal representatives indicated a desire to work with state agencies to have the sign moved to a mutually agreeable location that more accurately reflects the boundaries of the reservation according to treaty.