North Dakota Legislative Council
Prepared for the Tribal and State Relations Committee
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TRIBAL AND STATE RELATIONS COMMITTEE - BACKGROUND MEMORANDUM

North Dakota Century Code Section 54-35-23 establishes the Tribal and State Relations Committee. The committee consists of a chairman designated by the Chairman of the Legislative Management; three members of the House of Representatives, two of whom are selected by the leader representing the majority faction of the House and one of whom is selected by the leader representing the minority faction of the House; and three members of the Senate, two of whom are selected by the leader representing the majority faction of the Senate and one of whom is selected by the leader representing the minority faction of the Senate.

Section 54-35-23 directs the committee to conduct joint meetings with the North Dakota Tribal Governments' Task Force to study tribal-state issues, including government-to-government relations, human services, education, corrections, and issues related to the promotion of economic development. After the joint meetings have concluded, the committee is required to meet to prepare a report on its findings and recommendations, together with any legislation required to implement those recommendations, to the Legislative Management.

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. If the Executive Director of the Indian Affairs Commission or any of the tribal chairmen appoint a designee to serve on the task force, only one individual may serve as that designee during the biennium. A substitute designee may be appointed by the Executive Director of the Indian Affairs Commission or a tribal chairman in the event of the death, incapacity, resignation, or refusal to serve of the initial designee.

House Bill No. 1015 (2017) suspended Section 54-35-23 through July 31, 2019, and established the Tribal Taxation Issues Committee. The Tribal Taxation Issues Committee consisted of 10 members--the Governor, who was designated by the Legislative Management to serve as Chairman, the Lieutenant Governor, the Tax Commissioner, the Executive Director of the Indian Affairs Commission, the Majority and Minority Leaders of the House and the Senate, and the Chairmen of the Finance and Taxation Standing Committees of the House and the Senate. The nonlegislative committee members served as nonvoting members, and the committee Chairman was required to invite tribal chairmen to each committee meeting.

Senate Bill No. 2312 (2019) suspended Section 54-35-23 through July 31, 2021, and again established the Tribal Taxation Issues Committee with the same membership as the previous interim.

FEDERAL INDIAN LAW AND POLICY

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

From 1789 to approximately 1820, the federal government sought to minimize friction between non-Indians and Indians by limiting contact between the groups. This 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 the Oklahoma Territory. This 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 reserved a small portion of the land the tribe occupied and ceded the remainder to the United States. 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 known as the allotment era. The General Allotment Act authorized the President to allot portions of reservation land to individual Indians. 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. Title to the allotted land was to remain in the United States in trust for 25 years, after which it was to be conveyed to the Indian allotted free of all encumbrances. The Act also authorized the Secretary of the Interior to negotiate with tribes for the disposition of all excess lands remaining after allotment for the purpose of non-Indian settlement. The Act resulted in a decline in the amount of Indian-held land from 138 million acres to 48 million acres between 1887 and 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 this Act 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. There have been a number of federal acts since 1968 designed to enhance tribal self-determination. These 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

One of the most important concepts 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 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. 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 Georgia laws have no force in Cherokee territory. Based upon these early cases, 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

Statutory Background

In 1983, the Legislative Assembly enacted the legislation now codified in Chapter 54-40.2. The 1983 bill was introduced by the Attorney General to create a general framework for uniformity and to provide statutory authorization for public agencies of the state and political subdivisions to enter agreements with tribal governments. The authorization was stated in very general terms and provides public agencies may enter an agreement with a tribal government to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments are authorized to perform by law.

In 1991, Chapter 54-40.2 was amended to establish a role for the Indian Affairs Commission in proposing agreements and assisting in negotiation and development of agreements. The 1991 amendments also created requirements for newspaper notice of a pending agreement and posting of notice at the tribal office of any affected tribe. The 1991 law required the Indian Affairs Commission to make findings concerning the agreement and the parties' original intent and to determine whether the parties are in substantial compliance with the agreement.

In 1995, Section 24-02-02.3 was created to provide authority for the Director of the Department of Transportation to enter agreements with tribal governments for construction and maintenance of highways, streets, roads, and bridges. The amendment provided Chapter 54-40.2 does not apply to those agreements.

In 1999, Chapter 54-40.2 was amended to provide the chapter does not apply to certain agreements with the Department of Human Services or to agreements entered with tribal governments under a state-funded or federally funded program, 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 eligible.

In 2005, Chapter 54-40.2 was amended to require a school district entering an agreement with a tribe to provide notice to the Superintendent of Public Instruction before entering the agreement.

In 2007, legislation was enacted to create Chapter 57-51.2, providing authority for the Governor to enter an agreement with the Three Affiliated Tribes of the Fort Berthold Reservation relating to the taxation and regulation of oil and gas exploration and production within the reservation. Section 57-51.2-05 provides Chapter 54-40.2 does not apply to any such agreement.

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, and a new agreement was entered to implement the 2013 legislative changes.

In 2015, the scope of Chapter 57-51.2 was expanded to allow the Governor to enter oil and gas tax agreements with the Standing Rock Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. Legislation also was enacted to create Chapter 57-39.8 authorizing the Governor to enter a state-tribal sales, use, and gross receipts tax agreement with the Standing Rock Sioux Tribe. Section 57-39.8-02 outlined the parameters for an agreement, including provisions relating to the rate of tax imposed, conforming tribal taxes to the state sales tax base, allocation of revenues, authority for the Tax Commissioner to administer and collect the tax and allowances for the provision of these services, authority for the Tax Commissioner to offset future distributions to the tribe in the case of an overpayment, and the proper venue for resolving any disputes arising from an agreement.

In 2019, Chapter 57-39.8 was repealed and legislation was enacted to create Chapters 57-39.9 and 57-39.10. Chapter 57-39.9 authorizes the Governor, in consultation with the Tax Commissioner, to enter an agreement with any tribe in this state for the collection and administration of sales, use, alcohol beverage gross receipts, and farm machinery gross receipts tax. Chapter 57-39.10 authorizes the Governor, in consultation with the Tax Commissioner, to enter an agreement with any tribe in this state for the collection and administration of alcoholic beverage and tobacco wholesale taxes and alcoholic beverages gross receipts tax. Each chapter outlines the parameters and requirements for such agreements and provides that Chapter 54-40.2 does not apply to any such agreements.

In 2019, Chapter 57-51.2 was amended to remove the requirement that each state-tribal oil and gas tax agreement be confirmed by a majority of the Legislative Assembly. The legislation also changed the split of the tax revenue between the state and the tribe affected by the agreement from being split equally to the tribe receiving 80 percent of the oil tax revenue from trust lands and the state receiving 20 percent. For all other production, the state receives 80 percent of the oil tax revenue and the tribe receives 20 percent. In early 2019, a new oil and gas tax agreement was signed by the Governor and the Three Affiliated Tribes which contained the new revenue split.

In 2021, legislation was enacted to provide for the distribution of oil and gas tax revenue from straddle wells, or wells located outside the exterior boundaries of a reservation with one or more laterals penetrating a reservation boundary. For wells drilled before July 1, 2019, a tribe receives 50 percent of the straddle well tax revenue multiplied by the associated spacing unit acreage located within the reservation boundaries. For wells drilled on or after July 1, 2019, the tribe receives 80 percent of the straddle well tax revenue multiplied by the associated trust land spacing unit acreage located within the reservation boundaries and 20 percent of the straddle well tax revenue multiplied by the associated nontrust land spacing unit acreage located within the reservation boundaries. The legislation applies to oil and gas tax revenue collections allocated by the State Treasurer after September 1, 2021.

Chapter 54-40.2

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. The term does not include an entity owned, organized, or chartered by a tribe that exists as a separate entity authorized by a tribe to enter agreements of any kind without further approval by the government of the tribe.

Section 54-40.2-02 provides 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 the powers, rights, obligations, and responsibilities of the parties to the agreement. Section 54-40.2-03.1 provides after the parties to an agreement have agreed to its contents, the public agency must publish a notice containing a summary of the agreement in the official newspaper of each county reasonably expected to be affected by the agreement. The notice also must be published in any newspaper of general circulation for the benefit of the members of the tribe affected by the agreement and 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 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 30 days of the publication of the notice.

Section 54-40.2-03.2 provides if the public agency receives a request pursuant to Section 54-40.2-03.1, the public agency must hold a public hearing, before submitting the agreement to the Governor, at which any person interested in the agreement may be heard. Notice of the time, place, and purpose of the hearing must be published before the hearing in the official newspaper of each county reasonably expected to be affected by the agreement. The notice also must be published in a newspaper of general circulation published for the benefit of any tribal members affected by the agreement and 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.

Section 54-40.2-04 provides as a condition precedent to an agreement made under Chapter 54-40.2 becoming effective, the agreement must have the approval of the Governor and the governing body of the tribes involved. If the agreement so provides, it may be submitted to the Secretary of the Interior of the United States for approval.

Section 54-40.2-05 provides after approval by the Governor and by the tribe or tribes affected by the agreement and before commencement of its performance, the agreement must be filed with the Secretary of the Interior, the clerk of court of each county in which the principal office of one of the parties is located, the Secretary of State, and the affected tribal government.

Section 54-40.2-05.1 provides, upon request of a political subdivision or any tribe affected by an approved agreement, the Indian Affairs Commission must make findings concerning the agreement’s utility and effectiveness taking into account the parties' original intent and may make findings as to whether the parties are in substantial compliance with the agreement's provisions. In making its findings, the commission must provide an opportunity, after public notice, for the public to submit written comments concerning the agreement's execution. The commission must prepare a written report of its findings and submit copies of the report to the affected political subdivision or public agency, the Governor, and the affected tribes. The findings of the commission are for informational purposes only. In an administrative hearing or legal proceeding in which the performance of a party to the agreement is at issue, the findings may not be introduced as evidence, 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.

Section 54-40.2-06 provides an agreement made pursuant to Chapter 54-40.2 must include provisions for revocation. Section 54-40.2-08 enumerates specific limitations on agreements between public agencies and Indian tribes. That section provides Chapter 54-40.2 may not be construed to 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; 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; authorize a public agency or tribal government to enter an agreement except as authorized by its own organizational documents or enabling laws; or 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 Indian tribe, band, or community which is held in trust by the United States or subject to a restriction against alienation imposed by the United States. Section 54-40.2-09 provides Chapter 54-40.2 does not affect the validity of any agreement entered between a tribe and a public agency before August 1, 1999.

TRIBAL-STATE COOPERATIVE TAX AGREEMENTS

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 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. Under the agreement, 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. The terms of the renegotiated agreement became effective on May 1, 2015.

Motor Vehicle Fuel and Special Fuel Tax Agreements

The state has entered motor vehicle fuel and special fuel tax agreements with several tribes in the state. The tax applies to motor vehicle fuel and special fuel within the exterior boundaries of the reservation at a rate of 23 cents per gallon. The state's agreement with:

- The Standing Rock Sioux Tribe became effective January 1, 1999. A renegotiated agreement was signed on May 1, 2015, and provides for a revenue allocation of 87 percent, less a 1 percent administration fee, 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 for a revenue allocation of 76 percent, less a 1 percent administration fee, 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 for a revenue allocation of 70 percent, less a 1 percent administration fee, 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 for a revenue allocation of 96 percent, less a 1 percent administration fee, to the tribe. Four percent, plus the 1 percent administration fee, is deposited in the general fund.

Oil and Gas Tax Agreement

The oil and gas revenue sharing agreement between the Three Affiliated Tribes and the state was signed on June 10, 2008, and was to remain in effect for 24 calendar months after July 1, 2008. The agreement was entered pursuant to Chapter 57-51.2, which was enacted following the passage of Senate Bill No. 2419 (2007). A renegotiated agreement was signed on January 13, 2010, and 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. In 2015, Chapter 57-51.2 was amended to expand the scope of the chapter to apply to agreements entered by the Standing Rock Sioux Tribe and the Turtle Mountain Band of Chippewa Indians and to add confirmation requirements for future agreements. Specifically, any agreement entered after July 31, 2015, was subject to confirmation by a majority of members elected to the House and the Senate.

In 2019, legislation removed the confirmation requirements, and the revenue sharing split was changed from a 50/50 revenue split to an 80/20 split in favor of the tribe for oil tax revenue from trust lands and an 80/20 split in

favor of the state for revenue from all other production. An agreement reflecting the new revenue split was signed on February 28, 2019, and became effective on March 29, 2019.

Sales and Use Tax Collection Agreement

House Bill No. 1406 (2015) authorized the Governor to enter an agreement with the Standing Rock Sioux Tribe for the state administration and collection of state- 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 bill outlined the parameters for an agreement, including provisions relating to the rate of tax imposed, conforming tribal taxes to the state sales tax base, allocating revenues, authorizing the Tax Commissioner to administer and collect the tax and providing for these services, authorizing for the Tax Commissioner to offset future distributions to the tribe in the case of an overpayment, and determining the proper venue for resolving any disputes arising from an agreement.

The agreement, which became effective July 1, 2016, provided for an 80/20 tribal/state split of tax collections. The agreement required the Standing Rock Sioux Tribe to impose a 5 percent general sales and use tax, a 3 percent sales and use tax on new manufactured homes, a 7 percent alcohol gross receipts tax, and a 3 percent farm machinery gross receipts tax on new farm machinery and new farm irrigation equipment. The taxes were identical to North Dakota's 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. All exceptions that applied to the state's taxes also applied to the tribal taxes.

On January 27, 2017, Tax Commissioner Ryan Rauschenberger issued a memorandum to North Dakota sales and use tax permitholders which provided "[e]ffective March 7, 2017, the North Dakota Office of State Tax Commissioner will discontinue its administration of the Standing Rock Sioux Tribe's sales, use and farm machinery and alcohol gross receipts taxes including the tribal .25 percent local tax." The memorandum further provided the Standing Rock Sioux Tribe's taxes would be administered by the Standing Rock Sioux Tribe Tax Department rather than by the state Tax Department. Chapter 57-39.8, which authorized the agreement, was repealed by Senate Bill Nos. 2257 and 2258 (2019). The authority to enter sales tax agreements is now provided under Chapter 57-39.9.

2021 LEGISLATION

House Bill No. 1052 authorizes juvenile services agreements between the Department of Corrections and Rehabilitation, the Supreme Court, and the Indian Affairs Commission and tribal governments and extends the effective date through July 31, 2023.

House Bill No. 1101 authorizes the Director of the Department of Transportation to enter agreements with tribal governments regarding federally funded safety improvement projects on tribally owned highways, streets, roads, and bridges.

House Bill No. 1126 clarifies tribal police officers may provide emergency services or mutual aid to a state or political subdivision law enforcement officer without being licensed in that jurisdiction.

House Bill No. 1407 revises the medical assistance tribal health care coordination agreement program, increasing from 60 to 80 percent the amount of excess federal medical assistance funding the Department of Human Services shall deposit in the tribal health care coordination fund, revising the authorized uses for which a tribe may use the tribal share of the excess funds, directing a tribe that receives funds under the program to report to the Legislative Management, and repealing the program if by December 31, 2022, no tribe has used the program.

Senate Bill No. 2304 requires elementary and middle schools to provide instruction in North Dakota studies with an emphasis on the federally recognized Indian tribes in the state, requires high schools to provide instruction in Native American tribal history, and adds Native American tribal history to the high school graduation requirement effective August 1, 2025.

Senate Bill No. 2319 provides for the distribution of oil and gas tax revenue from straddle wells. For wells drilled before July 1, 2019, a tribe receives 50 percent of the straddle well tax revenue multiplied by the associated spacing unit acreage located within the reservation boundaries. For wells drilled on or after July 1, 2019, the tribe receives 80 percent of the straddle well tax revenue multiplied by the associated trust land spacing unit acreage located within the reservation boundaries and 20 percent of the straddle well tax revenue multiplied by the associated nontrust land spacing unit acreage located within the reservation boundaries. The bill applies to oil and gas tax revenue collections allocated by the State Treasurer after September 1, 2021.

ADDITIONAL COMMITTEE RESPONSIBILITIES

Section 57-51.2-04 requires the Governor to file a report with the Legislative Management describing the negotiations and terms of any separate agreement between the Governor and the Three Affiliated Tribes of the Fort Berthold Reservation, Standing Rock Sioux Tribe, and Turtle Mountain Band of Chippewa Indians, relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation, that portion of the Standing Rock Reservation located in this state, or Turtle Mountain Band of Chippewa Indians Reservation and on trust properties outside reservation boundaries and thereafter biennial reports describing the agreement's implementation and any difficulties in its implementation. The Legislative Management has assigned this responsibility to the Tribal and State Relations Committee.