

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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ROLL NUMBER

DESCRIPTION

1393

2007 HOUSE FINANCE AND TAXATION

HB 1393

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1393 A

### House Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: January 23, 2007

Recorder Job Number: 1705

Committee Clerk Signature

*Mickie Schmidt*

#### Minutes:

Chairman Belter opened the hearing on HB 1393 and asked for testimony in support of the Bill.

**Representative Froelich: (See Attachment #1)** This Bill deals with the Reservations. What this Bill tries to do is put everybody on the same level. Right now if you're a Native Indian of Standing Rock Sioux Tribe, you're exempt from a lot of sales tax. We don't have a lot of sales tax on the Reservations because we don't have a lot of business. But most people come up here to shop, so it's not a real huge issue. There's an income tax issue with the Tribes.

Basically the problem that we have here is someone from Fort Totten who happens to be an enrolled member of the Sioux Tribe. He moved to Standing Rock, now we have a problem. He may be married to a Native of Standing Rock. Now he's subject to the sales tax. I have asked the Tax Dept. to come down to explain how complex and difficult it can be. So basically all this does is requests a few conditions of what this Bill does, saying that if you're a Native American from a Reservation and enrolled on the Reservation in this State and you move to another Reservation, that you're treated the same as the other people on that Reservation. There are some people here who can offer technical advice as far as what the federal statutes are.

**Rep. Dawn Charging:** This Bill will affect and be very helpful to a large population of five Nations that are in North Dakota. It is difficult to understand issues and we have so much time

to learn about effective equality. What we can do is address the issues specifically that we're brought up by Rep. Meier that are affecting our people. Whether I'm an Indian or not shouldn't matter whether I'm standing on Standing Rock or Belcourt, which reminds me of Indian enrollment number. And what I understand is the Tax Dept. has interpreted and has led us to where we're at. My concern, long term is that if we don't address the policy, we don't address the concerns that are coming forth. We'll end up in litigation. And of course that's not the goal of Tribal State Relations. So you're not doing something here that isn't already acceptable in terms of the Nations. If I was to marry a fine gentleman in Standing Rock and I live there, I'd be a federally recognized person; I have a Federal Enrollment number. And the Supreme Court gave us something as simple as this. With that I will refer to other people who can answer your questions.

**Tom Disselhorst, Attorney in Bismarck: (See attachment #2)** I am testifying today as a citizen, not as a lobbyist in support. I work with United Tribes Technical College and the Tribes of ND and have done so for the last 31 years. This is an issue that's coming from the practice (?) of the kinds of exemptions that Tribal members are entitled to, whom live and work on the Reservations within ND. None of the Tribes in ND, not one has ever given that permission to the State to give them civil or criminal jurisdiction over their Reservations. That's the status of the law today. The State Tax Dept. and its wisdom, at some point, looking at various Supreme Court decisions, sent a ND Supreme Court decision called *White Eagle vs. Dorgan*, which says what I just told you, that the State doesn't have jurisdictions of tax Tribal members on the Reservations, that case was decided back in the early 70's. Since that time there's been Supreme Court decisions that the Tax Dept. believes gives the State the right to tax Tribal members who are from one Reservation, who live on another within the State. The Enabling Act says "Indians", period. It doesn't specify what Tribe they're from. The Supreme Court

decisions that are being relied on, basically talk of that, potentially having the State jurisdiction over fee lands which end the Reservations in certain circumstances. There's a famous case in the early 80's called Grindale vs. Confederated Tribes in WA State. That case basically said that the State may have jurisdiction to tax non-Indian lands within a Reservation. Fee lands are lands not held at trust for the benefit of a Tribal member within the Reservation. This is a complex and cumbersome issue. Some may say, "Let's just let the Supreme Court in ND decide this issue again." I think the effort here is to say, "Look, you're the Legislature, and you have the power to make sure that these laws are interpreted correctly in the first instance. So why apparat the exemptions that are out lined in the Legislation HB 1393 and make a claim to the Native population of the State that the State is not going to assert civil jurisdiction where it doesn't really have any to assert. That's all that 1393 really tries to do.

**Representative Froelich:** If I was an enrolled member of Fort Totten and I move to Standing Rock. For some reason or another I got down there and I got into a little problem, I committed a felony. Who would have jurisdiction over that?

**Tom Disselhorst:** Under the present status of the law, a Tribal member who is arrested for a misdemeanor on another Reservation, not his or her own, is subject to the jurisdiction of the Tribal Court in that Reservation.

**Representative Froelich:** My point being; A Native American from another Reservation that moves to another Reservation is subject to that Reservation's law.

**Tom Disselhorst:** That's correct.

**Representative Weiler:** I'm trying to understand this as best as I can... Currently does the Tribal member pay income tax to the State of ND?

**Tom Disselhorst:** Not if they are working on the Reservation and they are a member of that Reservation where they are working. There's been a slight shift in the way that State Tax Dept.

has interpreted this. They've no aggressively gone after Tribal members who are members of one Tribe and working on another Reservation. But it is a little problematic because sometimes people get jealous of somebody making money and they get reported to the State Tax Dept., and that's the way the State Tax Dept. finds out, and then the Tax Dept. ends up sending them tax bills. It just doesn't seem right under our Enabling Act.

**Chairman Belter:** Just a point of clarification; if a Tribal member who lives off of the Reservation, but works on the Reservation, would their income be taxable?

**Tom Disselhorst:** That's a fair question. I don't have a complete answer to that. I think generally they could be subject to State Tax. Tribal members pay all the other taxes, workers compensation, unemployment, sales tax and gasoline tax off of the Reservation, even though in some States you can get an exemption if you're a Tribal member. Trust lands were created by the US as tax free because that is in fact traditionally the way Tribal members and Tribal citizens have been treated under the US Constitution.

**Representative Weiler:** Currently, a Tribal member is not taxed in the State of ND, income and these other various taxes, if they live on a Reservation.

**Tom Disselhorst:** Correct.

**Representative Weiler:** Then is this Bill just simply reiterating that? Is that what this is doing?

**Tom Disselhorst:** I think so.

**Elaine McLaughlin, Tax Director for the Standing Rock Sioux Tribe:** I'm here to offer support to HB 1393. It's a long awaited legislation. I get a lot of calls in my office and it's very cumbersome to explain the processes to these people. It would certainly simplify a lot of procedures and collection procedures. We have a lot of people who live on Standing Rock who have been born and raised there who are not enrolled there. So they do pay State income, sales and all the taxes that everybody else does. We also have a recruiting problem because a

lot of times when people come here that have to pay these taxes and it's not a positive recruitment when you have to have these people pay taxes. And because of that, we loose a lot of good people who provide important services to our Tribes. I will also add that we have a National Intro Tribal Taxes Association via of Tax Dept. throughout the United States. We're meeting annually with the State Tax Dept. and the legislation that you have before you has been enacted in a number of other States. This is something that is happening throughout the US that's clarifying this kind of language in this Bill. Another issue is that the Tribal Governments have not reported the exemptions under your State law, when it comes to sales tax and income tax, and I would humbly request that you also amend the Bill to include this.

**Archie D. Fool Bear, Member of the Standing Rock Sioux Tribe:** I have worked for the US government for 23 years. On the other side of the fence, in taxation and these issues you're talking about today, I have had the opportunity to work with several different individuals who are from different Tribes other than Standing Rock. During this time, I got to see my fellow employees hit below by the State of ND, horrendous dollar amounts, going back in time over years that they were residents of ND. I came to find out that there was a Supreme Court ruling that gave the State of Oklahoma the right to go ahead and tax Tribal members not living on their Reservation. At that time, trying to find out and do the research on it, I couldn't find anything on ND doing the same. But I was billed as a member of our Tribe to pay \$1300 dollars in back taxes to the State of ND. I lived on the Reservation all of my life, I've worked on the Reservation all of my life, but the State of ND with their broad ruling and interpretation decided that everybody was going to get a bill. So, I'm here, hoping that you will pass this Bill and insert certain language in there that will recognize Tribal Governments. As it stands right now, we don't have the same status as City, County, or Government divisions when it comes

down to tax exemption. We don't have that same status. I just wanted to offer my support today.

**Representative Weiler:** One of the issues that I have right now with this Bill is the fact that on the fiscal note, it says "we do not have adequate information to estimate the fiscal impact. You use the term "horrendous dollar amounts", and if this a State wide issue for Tribal members, I guess in order for me as a Legislature to act on this Bill in a favorable position, I would like to know how horrendous is horrendous? What kind of dollar amounts are we talking about and maybe you can't answer that and maybe someone from the Tax Dept. can. If this is a huge issue, then we need to see some kind of fiscal impact on this.

**Archie D. Fool Bear:** There were 2 individuals that work in the building that I work. One, her dollar amount was \$13,000. The other individual's was like \$6,200, that she was told that they were basing on income and date of residency. And myself, I never did pay taxes all of my life, but for those 2 years or whatever time period that the State finally made a decision, I was sent a bill for \$1,300. So as far as the overall actual fiscal figures looking at dollar amounts, I don't have that.

**Representative Weiler:** If you're not supposed to be taxed by the State of ND because of the laws, then you shouldn't be taxed, but we need to somehow find out what kind of dollar amount we're talking about so that we can fix this situation.

**Representative Froelich:** I asked the Tax Dept. to come down and give us some answers.

**Chairman Belter:** Any other questions? Is there any other testimony in support? Is there any opposition? Is there any neutral testimony?

**Donnita Wald, Legal Counsel for Tax Dept.:** I just want to make a couple of points of clarification to testimony that was presented earlier. For years, since at least the late 80's, our position with respect to the income taxation of Native Americans, in fact you must live, work

and be enrolled on the Reservation that you're working and living on. Mr. Disselhorst alluded to a number of Supreme Court decisions that they believe support their position that our interpretation is wrong and we do have a legitimate difference of opinion to what those Supreme Court cases and the Law says. We are currently in litigation on this issue. We have just issued an administrative opinion. We have not heard from the other party whether they're going to appeal or not, we anticipate they would. This Bill does change the law as we currently see it. We have no objection to broadening the exemption to all enrolled members. I just wanted to make those two points and try to explain we believe the current State of the law is with respect to the income taxation. With respect to the fiscal note question, we can't give you a number because we don't know who those individuals are. It's really been a compliance issue for us. Frankly I think some of the clarification that Rep. Froehlich and others are proposing here, will help some of that. So we have no issue with the changing of the policy.

**Chairman Belter:** When it comes to Federal taxation, there is no federal income tax taxation of Tribe members?

**Donnita Wald:** That's incorrect. Enrolled Tribal members are subject to Federal taxation. It's just that the issue becomes one of the States jurisdictions over the Native Americans.

**Chairman Belter:** So the Federal tax is paid regardless of where you work or live?

**Donnita Wald:** That's correct.

**Chairman Belter:** Any other questions? Hearing none, we will close the hearing on HB1393.

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1393 B

## House Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: January 31, 2007

Recorder Job Number: 2465

Committee Clerk Signature

*Mickie Schmidt*

### Minutes:

Chairman Belter opened the hearing on HB 1393 and asked Rep. Froelich if his amendments were ready. He responded no. The Chairman said he has some amendments.

**Chairman Belter:** What these amendments do is under current law, if a Tribal member buys a car, you'll have to correct me if I'm wrong, lives on a Reservation and basically I think it fills the same squares as you have with your income tax that when they buy a vehicle, if the dealer delivers the vehicle to the Indian Lands, there is no tax on that vehicle as long as they are an enrolled member of the Tribe. What this Bill does is; if a Tribal member qualifies for that tax exemption then the dealer does not have to deliver the car. Tribal members can come in from Bismarck or Grand Forks and buy a vehicle and take it off the dealer's lot and it eliminates the hassle of the dealer having to drive the vehicle to the Reservation to deliver it.

**Representative Froelich:** That's kind of the basis of it. This is going on currently. We really don't have a law on the books when it comes to this stuff. All we ever had was an Attorney General's opinion from Heidi Heitkamp. When I talked to Mr. Walstad he said he had the same impression. I believe when Mr. Disselhorst spoke, he said it could be a potential lawsuit because it was just an opinion. Mr. Lap is the one that approached me; he said why don't we

just let them pick it up right here? I wasn't going to muddy the waters, but Mr. Chairman if you want that amendment, it's up to you.

**Representative Weiler:** so if a Tribal member buys a car in Bismarck, they don't have to pay the excise tax on it? Which tax is it that they don't have to pay?

**Chairman Belter:** The vehicle excise tax.

**Vice Chairman Drovdal:** If a Tribal member lives on the Reservation and buys something and has it delivered on the Reservation whether it's a couch, a refrigerator or a vehicle, he doesn't have to pay our taxes.

**Representative Weiler:** Tribal member comes to Bismarck and purchases a vehicle, takes it off the lot; they have to pay the tax?

**Chairman Belter:** Yes.

**Representative Weiler:** When I go buy a car from a dealer, they don't deliver it to my house.

**Representative Froelich:** Yes.

**Representative Weiler:** Does the Tribal member kind of say, I'm going to buy this car, I want you to deliver it to my home and therefore I don't have to pay taxes and if the dealer says, I don't want to go through the hassle of taking it to your home, then the Tribal member just uses that as leverage, otherwise they won't buy the car from you, is that kind of the scenario?

**Representative Froelich:** Yes and no. The dealer always figuring a price of what it's going to cost to deliver it to them. I'm sure they figure that into their price. I have never come across or heard of a dealer yet that won't deliver. This amendment says if you buy it here, you don't have to have it delivered on the Reservation.

**Representative Weiler:** They still don't have to pay the excise tax?

**Representative Froelich:** Correct.

**Chairman Belter:** This amendment is strictly a convenience for the dealer, but it's also a convenience for the Tribal member too.

**Representative Froelich:** The Native population is not asking for this amendment. It's the dealers that are.

**Representative Weiler:** A Tribal member goes to Stan Pucklich, buys a vehicle, why can't he just drive it off the lot?

**Representative Froelich:** The way the Attorney General's opinion is written is it has to be delivered. This will change that.

**Representative Wrangham:** It's the same thing in sales tax. It's not only on automobiles or sales tax on Reservations. This same theory is used in Cities. For instance, I went outside the City of Bismarck. If I come in and buy a load of lumber at the lumber yard, they charge me sales tax on it. If I buy that lumber and they deliver it outside of the City of Bismarck, I don't have to pay the sales tax. I think it's a question of where does the actual sale or transfer takes place?

**Vice Chairman Drovdal:** The way I read this, if we accept this amendment it reads; a motor vehicle acquired at any location in the boundaries of any Reservation in this State by an individual who resides within this State and is an enrolled member of a federal recognized Tribe, that means that a Native American is enrolled who lives in Amegard who went on to the Reservation and bought a vehicle...

**Representative Froelich:** I'm not sure of the technicality of the Bill; it's not the intent of the Bill. The whole deal is if you are Native American and living on a Reservation. You have to live on a Reservation. For instance; if you're a Native American living in Fargo, you of course not are on a Reservation. None of this would apply to you. I did some numbers last night; I took

Standing Rock, they got 5,000 enrolled members. The only way to track this is when you get a complaint.

**Chairman Belter:** How does a dealer know when he sells a vehicle that this individual is a properly enrolled Tribal member?

**Representative Froelich:** They have enrollment cards. They would have to show it.

**Vice Chairman Drovdal:** This not only deals with vehicles, I don't understand that statement at all. It also deals with income and regular sales tax. In section 3 where the regular sales tax, my question is how is that dealer going to know for sure where their residency is at? Aren't we putting a big burden on retailers?

**Representative Froelich:** It's like a driver's license. There's a picture on there, it's very similar to a driver's license. If they walk into a place and say here's my enrollment card, they have to place that. You cannot go to a dealer and say I'm Indian and I don't want to pay this tax. That's not possible, because they've got a form to fill out also.

**Vice Chairman Drovdal:** I understand that but I also know I've got a daughter out there that has a driver's license that she renews every four years and she moves about every year. They don't have to get a new license every time they move so it really doesn't prove where they live. I know they can come in and say they're from a Reservation and do that even though they might not be.

**Representative Froelich:** I can't dispute that. When we had this discussion too about sales tax; when we get down in my Reservation we have one business in my local community and it's sad. And I walked in there and asked, how do you know who's enrolled and who's not if the person comes in and has the appearance of being a Native American? How do you know if you should charge him sales tax? They replied we don't, it's too big of a hassle to ask for the card, so it's kind of a mess. This Bill would help clean it up.

**Vice Chairman Drovdal:** We had a Bill in Natural Resources that had to do with water rights. In that Bill we had the wording "federally recognized Indian Tribes" and we had every single Tribe in there telling us "you cannot pass this Bill, you have to have Three Affiliated Tribes, Sioux; we could not list them as federally recognized Tribes, now how can you do it in here when we couldn't down there? They really hammered on us and we had to acknowledge each one of those as Sovereign Nations. So why can you do it here?"

**Representative Froelich:** I remember that water Bill. This is a deal that all you're saying here, forget about the Tribes, we're not talking about the Tribes in this Bill. Here you're talking about individuals. That's the difference between this Bill and that Bill. This get's really complex. This Bill is here to try to clear up some of the complication.

**Representative Pinkerton:** Do you know what the regulation is when you come from Montana and you make a purchase in North Dakota and you don't have to pay sales tax. What is their proof based on?

**Vice Chairman Drovdal:** They would be required to show a Montana drivers license as your residency.

**Representative Pinkerton:** That's essentially what's used for what they're doing here in this Bill.

**Vice Chairman Drovdal:** That's true, but in residency in ND if you come here and get a job, you're required by our law to get residency and a driver's license in a short period of time. So there is a little leeway there.

**Representative Pinkerton:** Is that pretty much the same requirement as you would have outside of Bismarck and purchase goods in Bismarck, how does work?

**Vice Chairman Drovdal:** If I bought furniture in Minot when the caps are on and they had to deliver that to my home outside the City of Bismarck, then they would know the residency of whoever bought it.

**Chairman Belter:** Just a point of clarification; if you buy something in Bismarck, have it delivered to Minot, doesn't that City sales tax actually go to the point of delivery doesn't it?

**Vice Chairman Drovdal:** Yes, the tax would go to Minot. But what happens when you have it delivered to an area that doesn't have a sales tax?

**Chairman Belter:** Then you don't have to pay that sales tax. Is that not right, Myles?

**Myles Vosberg, Tax Dept.:** The point of delivery is the point of taxation. So if it's delivered in an area without a tax, there would be no tax.

**Representative Froelich:** I live in Selfridge and I order a washer and dryer from Bismarck and say you deliver it to Selfridge and we don't have a City sales tax there, then I shouldn't be charged City sales tax, right? Well that's what we're basically talking about in this Bill.

**Vice Chairman Drovdal:** Currently; if you call up and you're on a Reservation and you have it delivered there, they're not supposed to charge you City tax; state tax neither and that's current law.

**Representative Wrangham:** I think we're kind of getting off the point of the Bill. I think the point of the Bill was to solve a big problem out there where if a registered enrolled member lives on one Reservation but works on another, then is not taxed. I think this Bill is a great Bill because it clears that up. I think that adding the motor vehicle thing in there is whatever, that's all right. But I question you and Rep. Froelich, why didn't you include excise tax in this so that the gasoline purchasing would also be clarified?

**Representative Froelich:** The gasoline tax in Standing Rock, they have a compact with the State. They collect all of the gas tax. They go back to the Tax Dept. and the Tribe gets 75% of

the gas tax back. It's the same with the cigarette tax. The State takes out its administrative fee and then they give so much back to the Tribe. Everybody's happy. I can't speak for the other Reservations.

**Representative Wrangham:** I believe that a couple of the Reservations don't have this compact in place. And for the ones that don't like in New Town, they do have this dispute going on right now as they're trying to get gas and cigarette tax refunded as to whether the enrolled member who bought the gas in New Town is enrolled in New Town or if they're enrolled in Belcourt. So, I guess if we're going to fix the problem three-fourths of the way, should we go the rest of the way?

**Representative Froelich:** The way I understand it is at Standing Rock the Tribes get's that money, not the individual. In Fort Berthold they want the individuals to get it back by showing tax receipts.

**Chairman Belter:** Committee members, I have no axe to grind in this amendment, so what are your wishes?

**Representative Weiler:** I will move the amendments.

**Representative Headland:** Second it.

**Chairman Belter:** Any discussion?

**Representative Froelich:** Is this amendment going to get to the floor and then kill the Bill? Can we explain it well enough to get it passed? That's my only question on the amendment.

**Chairman Belter:** Don't know.

**Representative Froelich:** Mr. Lamp had come to me and asked to put this on and I said, you know, it's hard enough to try to explain this whole situation. I'm just nervous that this will convolute things.

**Representative Weiler:** I believe that in this committee room, we've gotten off the path. I don't think that'll happen on the floor. I think the amendment is simple to understand and that it won't harm the Bill at all.

**Representative Froelich:** I have my constituents that ask to push this Bill forward. They never said, "Well, we just want to drive up and pick it up and not have to go through this hassle".

They said to fix this and I'm all for it, do you understand what I'm saying?

**Chairman Belter:** Yes. Well we have a motion before us. All those in favor of the amendment signify by saying aye. The motion carries. What are your wishes on the Bill?

**Representative Owens:** I'll move a Do Pass as Amended.

**Representative Brandenburg:** Second it.

**Chairman Belter:** Is there any discussion? Hearing none, will the clerk read the roll; 12-y; 1-n; 0-absent; Rep. Weiler will carry the Bill. We will close the hearing on HB 1393.

**FISCAL NOTE**  
**Requested by Legislative Council**  
02/06/2007

Amendment to: HB 1393

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2A. Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Eng. HB 1393 creates an income tax deduction for all income earned within the boundaries of a reservation by an enrolled member of any Indian tribe. The bill also creates certain sales and motor vehicle excise tax exemptions on reservations as well.

**B. Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

We do not have adequate information to estimate the fiscal impact of this bill.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

<b>Name:</b>	Kathryn L. Strombeck	<b>Agency:</b>	Office of Tax Commissioner
<b>Phone Number:</b>	328-3402	<b>Date Prepared:</b>	02/06/2007

**FISCAL NOTE**  
**Requested by Legislative Council**  
01/16/2007

Bill/Resolution No.: HB 1393

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

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**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

<b>Name:</b>	Kathryn L. Strombeck	<b>Agency:</b>	Office of Tax Commissioner
<b>Phone Number:</b>	328-3402	<b>Date Prepared:</b>	01/21/2007

70302.0101  
Title.0200

Prepared by the Legislative Council staff for  
Representative Belter  
January 30, 2007

**House Amendments to HB 1393 (70302.0101) - Finance and Taxation Committee**  
**02/01/2007**

Page 2, line 3, after "acquired" insert "at any location" and remove "the boundaries of any reservation in"

Renumber accordingly

Date: 1-31-07  
Roll Call Vote #: 1393

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

House \_\_\_\_\_ Finance & Tax \_\_\_\_\_ Committee

☐ Check here for Conference Committee

Legislative Council Amendment  
Number \_\_\_\_\_

Action Taken Do Pass AS Amended

Motion Made By Rep. Owens Seconded By Rep. Brandenburg

Representatives	Yes	No	Representatives	Yes	No
Chairman Belter	✓		Rep. Froelich	✓	
Vice Chairman Drovdal		✓	Rep. Kelsh	✓	
Rep. Brandenburg	✓		Rep. Pinkerton	✓	
Rep. Froseth	✓		Rep. Schmidt	✓	
Rep. Grande			Rep. Vig	✓	
Rep. Headland	✓				
Rep. Owens	✓				
Rep. Weiler	✓				
Rep. Wrangham	✓				

Total (Yes) 12 No 1

Absent 1

Floor Assignment Rep. Weiler

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1393: Finance and Taxation Committee (Rep. Belter, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1393 was placed on the Sixth order on the calendar.

Page 2, line 3, after "acquired" insert "at any location" and remove "the boundaries of any reservation in"

Renumber accordingly

2007 SENATE POLITICAL SUBDIVISIONS

HB 1393

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1393

Senate Political Subdivisions Committee

☐ Check here for Conference Committee

Hearing Date: February 23, 2007

Recorder Job Number: 3748 and 4288

Committee Clerk Signature



Minutes:

**Chairman Cook** called the committee to order. Four members present. Senator Warner absent.

**Chairman Cook** opened the hearing on HB 1393 relating to income tax exemptions and sales, use, and motor vehicle excise tax exemptions for enrolled tribal members.

**Rod Froelich**, District 31, introduced and testified in support of HB 1393. (Attachment #1)

**Chairman Cook** asked what the problem is.

**Rod Froelich** said years ago I went to Attorney General Heitkamp and she ruled that if you were a member of one reservation and you lived on another reservation you were not eligible for tax deferring; you would be subject to state sales tax and excise tax.

**Senator Hacker** asked if a Native American lives on the reservation and works off of the reservation so they pay income tax then.

**Rod Froelich** answered yes this bill applies only to people that live and work on any reservation.

**Ron HisHorse is Thunder**, Chairman of the Standing Rock Sioux Tribe, testified in support of HB 1393. We don't have a lot of educated tribal members and as the tribe grows we need to take a look at attracting the best professional minds that we can to the reservation to assist in

developing and growing. Most of the jobs on the reservation are either Indian Affairs, Federal Government, School and Casinos. We need qualified people and with the lack of all members being education, it is hard to attract people to our reservation and retain them. This bill will go along way in attracting professional people to the reservation.

**Bob Lamp**, Automobile Dealers Association of North Dakota, appeared in support of specifically Section four of HB 1393. (Attachment #2)

**Senator Richard Marcellais**, District 9, Belcourt, testified in support of HB 1393 relating to the income tax exemptions for native Americans.

**Kurt Luger**, testified in support of HB 1393. This will clarify and take care of the future.

**Tom M. Disselhorst**, Attorney, United Technical College, Bismarck, ND testified in support of HB 1393. (Attachment #3)

**Steve Kelly**, Supervising Attorney for the three affiliated tribes, testified in support of HB 1393.

It is a good common sense bill to applying your income sales and used tax and your motor vehicle motor excise tax. The distinction that has been created here between tribal members and non tribal member Indians on the reservation has been done by federal law and that is why we are in the fix we are in. The federal government doesn't have a dog in the fight so each state has to fix this situation. This is a distinction that is not needed and unworkable.

**Joe Dunn**, Standing Rock Sioux Tribe testified in support of HB1393. This bill does affect my family. My wife is an enrolled member of the Cheyenne River Sioux Tribe and because of employment purposes we chose to reside in Standing Rock where he is enrolled. The taxation issue could be a burden because of the lack of available dollars within the reservation.

**Richard FullBear**, Standing Rock Sioux Tribe testified in support of HB 1393. This is a start to undo what has been done in the past.

**Myles Vosberg**, ND Sales Taxes appeared to answer questions.

No further testimony in support, opposed or neutral on HB 1393.

**Chairman Cook** closed the hearing on HB 1393.

February 2, 2007 Recorder # 4288

**Chairman Cook** reopened HB 1393 so Representative Charging could testify.

**Representative Charging** testified in support of HB 1393. This is a bill is in regards to how the state is defining who is an enrolled member of a federally recognized Indian Tribe. We need to understand the potential liability we are placing on the state. The goal is to correct this in a proactive way rather than a reactive way.

**Chairman Cook** closed the hearing on HB 1393

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1393

Senate Political Subdivisions Committee

☐ Check here for Conference Committee

Hearing Date: March 8, 2007

Recorder Job Number: 4738

Committee Clerk Signature

*Shirley Borg*

Minutes:

**Chairman Cook** called the committee to order. All members present.

**Chairman Cook** asked the committee if they were comfortable with HB 1393.

**Senator Hacker:** My problem with this is that when you start exempting all taxes from them, then why is the state paying for the road to go through the reservation?

**Senator Warner:** Another point is social services.

**Chairman Cook:** Not one hundred per cent of the roads are fixed with state dollars. I think that the tax that we have with certain tribes as far as the gas tax is we collect the tax and then it goes back to the tribe for their share of road repair.

**Senator Olafson** moved a Do Pass on HB 1393

**Senator Warner** seconded the motion.

Discussion:

Roll Call Vote: Yes 5 No 0 Absent 0

Carrier: **Senator Warner**

Date: 3-8-07  
Roll Call Vote #: 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1393

Senate	Political Subdivisions	Committee
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☐ Check here for Conference Committee

**Legislative Council Amendment Number** \_\_\_\_\_

Action Taken Do Pass

Motion Made By Senator OLAFSON Seconded By Senator WARNER

[illegible]

Total Yes 5 No 0

**Absent** \_\_\_\_\_ 0

Floor Assignment Senator Warner

**If the vote is on an amendment, briefly indicate intent:**

**REPORT OF STANDING COMMITTEE (410)**  
March 9, 2007 2:18 p.m.

**Module No: SR-45-4889**  
**Carrier: Warner**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1393, as engrossed: Political Subdivisions Committee (Sen. Cook, Chairman)**  
recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).  
Engrossed HB 1393 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1393

**Report of the**  
**TRIBAL AND STATE RELATIONS COMMITTEE**  
**submitted to the**  
**NORTH DAKOTA LEGISLATIVE COUNCIL**  
**November 2006**

**Senators**

Bob Stenehjem, Chairman  
Randel Christmann  
Stanley W. Lyson  
David O'Connell

**Representatives**

Rick Berg, Vice Chairman  
Duane DeKrey  
Kenton Onstad

**Legislative Council Staff**

John D. Olsrud, Director  
Jay E. Buringrud, Assistant Director  
Jim W. Smith, Legislative Budget Analyst and Auditor  
John Walstad, Code Revisor  
Jeffrey N. Nelson, Assistant Code Revisor  
Allen H. Knudson, Assistant Legislative Budget Analyst and Auditor  
John Bjornson, Counsel  
L. Anita Thomas, Counsel  
Vonette J. Richter, Counsel  
Timothy J. Dawson, Counsel  
Jennifer S. N. Clark, Counsel  
Roxanne Woeste, Senior Fiscal Analyst  
Donald J. Wolf, Senior Fiscal Analyst  
Becky Keller, Fiscal Analyst  
Marilyn Johnson, Research Librarian  
Carla Unrath, Office Manager  
Maryann F. Trauger, Manager, Information Technology Services  
Karen J. Mund, Legislative Administrator  
Mary H. Janusz, Information Technology Education Administrator  
John A. Dvorak, Information Technology LAN Technician  
Deb Gienger, Information Technology Systems Administrator

#1A  
1393

01-23-07  
#1 HB 1393-A

## TRIBAL AND STATE RELATIONS COMMITTEE

House Bill No. 1524 (2005) established the Tribal and State Relations Committee. The Tribal and State Relations Committee is composed of the Legislative Council chairman or the chairman's designee; three members of the House of Representatives, two of whom must be selected by the leader representing the majority faction of the House of Representatives and one of whom must be selected by the leader representing the minority faction of the House of Representatives; and three members of the Senate, two of whom must be selected by the leader representing the majority faction of the Senate and one of whom must be selected by the leader representing the minority faction of the Senate. The Legislative Council chairman, or the chairman's designee, serves as chairman of the committee.

House Bill No. 1524 directed the Tribal and State Relations Committee to conduct joint meetings with the Native American Tribal Citizens' Task Force to study tribal-state issues, including government-to-government relations, the delivery of services, case management services, child support enforcement, and issues related to the promotion of economic development. After the joint meetings have concluded, the committee is to meet to prepare a report on its findings and recommendations, together with any legislation required to implement those recommendations, to the Legislative Council. The Native American Tribal Citizens' 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 Nation, or the chairman's designee; the chairman of the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation, 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, or the chairman's designee. House Bill No. 1524 has an expiration date of July 31, 2007.

Committee members were Senators Bob Stenehjem (Chairman), Randel Christmann, Stanley W. Lyson, and David O'Connell and Representatives Rick Berg, Duane DeKrey, and Kenton Onstad.

Members of the Native American Tribal Citizens' Task Force were Ken W. Davis, Chairman, Turtle Mountain Band of Chippewa Indians; Gerald Flute, Chairman, Sisseton-Wahpeton Oyate; Tex G. Hall, Chairman, Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation; Ron His-Horse-Is-Thunder, Chairman, Standing Rock Sioux Tribe; Cheryl Kulas, Executive Director, Indian Affairs Commission; and Myra Pearson, Chairman, Spirit Lake Nation. James "J. C." Crawford, Sisseton-Wahpeton Oyate, was a member of the Native American Tribal Citizens' Task Force until replaced by Chairman Flute.

### 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, 1789 to approximately 1820, known as the nonintercourse era, 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 to itself. This is the origin of the term reservation.

With the enactment of the 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. 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 allottee in fee free of all encumbrances. The General Allotment 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 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 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 that 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 themselves 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 please, 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 Supreme Court held that the Cherokees could not be regarded as a foreign state within the meaning of Article III of the Constitution, so as to bring them within the federal judicial power and permit them to maintain an action in the Supreme Court. However, Chief Justice John Marshall characterized Indian tribes as "domestic dependent nations." In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Supreme Court further discussed the status of Indian tribes. The Court stated that "[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 that 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 have generally 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

North Dakota Century Code (NDCC) Chapter 54-40.2 provides for agreements between public agencies and Indian tribes. As used in this chapter, 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.

North Dakota Century Code Section 54-40.2-02 provides that 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 is 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. This section provides that the agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.

North Dakota Century Code Section 54-40.2-03.1 provides that after the parties to an agreement have agreed to its contents, the public agency involved is required to 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 any members of the 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 30 days of the publication of the notice.

North Dakota Century Code Section 54-40.2-03.2 provides that if the public agency involved receives a request pursuant to Section 54-40.2-03.1, the public agency is required to 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 of the state reasonably expected to be affected by the agreement. The notice of the public hearing must also be published in a 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.

North Dakota Century Code Section 54-40.2-04 provides that 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 for approval.

North Dakota Century Code Section 54-40.2-05 provides that within 10 days after a declaration of approval by the Governor and following approval of the agreement 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 where the principal office of one of the parties is located, the Secretary of State, and the affected tribal government.

North Dakota Century Code Section 54-40.2-05.1 provides that upon the request of a political subdivision or any tribe affected by an approved agreement, the Indian Affairs Commission is required to 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 commission is required to provide an opportunity, after public notice, for the public to submit written comments concerning the execution of the agreement. The commission is required to prepare a written report of its findings made pursuant to Section 54-40.2-05.1 and to submit copies of the report to the affected political subdivision or public agency, the Governor, and the affected tribes. The findings of the commission made under Section 54-40.2-05.1 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, 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.

North Dakota Century Code Section 54-40.2-06 provides that 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. This section provides that 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 into 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 that is held in trust by the United States or subject to a restriction against alienation imposed by the United States. Finally, Section 54-40.2-09 provides that Chapter 54-40.2 does not affect the validity of any agreement entered between a tribe and a public agency before August 1, 1999.

## 2005 LEGISLATION

The 59th Legislative Assembly enacted several bills relating to Indian issues. House Bill No. 1081 required a school district that is contemplating entering an agreement with an Indian tribe to provide written notice to the Superintendent of Public Instruction that it is contemplating entering an agreement and consider written recommendations that the Superintendent makes regarding the agreement.

House Bill No. 1190 set the policy of determining further expansion of basic care facilities in the state. The bill stated the two circumstances under which basic care beds may be added between August 1, 2005, and July 31, 2007, provided the process for transferring basic care beds and addressed requirements for basic care beds acquired by Indian tribes.

House Bill No. 1191 set the policy of expansion of nursing facilities in the state. The bill retained one exception to limiting expansion of nursing facility beds, allowing a facility to revert a basic care bed to a nursing bed; allowed transfers of beds from one facility to another; provided a nursing bed that is converted to a basic care bed may be transferred as a basic care bed, but that bed may then be relicensed as a nursing bed; and addressed requirements for nursing beds acquired by Indian tribes.

House Bill No. 1254 provided that acceptable identification for the purpose of voting means identification that allows the individual's residential address and date of birth and may include an official form of identification issued by the state or a tribal government, a form of identification described by the Secretary of State, or a combination of those forms of identification.

House Bill No. 1526 required the Industrial Commission to establish at the Bank of North Dakota a guaranty program for a business located in the state which contracts with a business located in the state which is either owned by one of the five North Dakota Indian tribes or which is an American Indian-owned small business located in the state. The Industrial Commission is required to limit participation in the guaranty program so that the cumulative value of the guaranteed portion of the receivables under the program

does not exceed \$5 million at any one time. The bill is effective through June 30, 2007.

Senate Bill No. 2012 increased motor vehicle fuels and special fuels tax rates from 21 cents per gallon to 23 cents per gallon. The bill also allowed an American Indian to claim a refund of motor vehicle fuel or special fuel taxes on fuel purchased from a retail fuel dealer located on the Indian reservation where the American Indian is an enrolled member. The refund provision applies to purchases made after December 31, 2004.

Senate Bill No. 2041 provided that an individual hunting on Indian land pursuant to a tribal hunting license is not required to possess a state license to hunt on that land. For purposes of this provision, Indian land includes land within the exterior boundaries of an Indian reservation held in trust by the federal government for the benefit of an Indian tribe or an Indian and land within the exterior boundaries of an Indian reservation owned in fee by an Indian tribe or an Indian. The bill also allowed properly tagged game birds legally taken on Indian land to be possessed, transported, or shipped in state and big game legally taken on Indian land to be transported, shipped, or possessed off that land.

Senate Bill No. 2372 directed the Legislative Council to study the feasibility and desirability of establishing an organization or ombudsman to support and coordinate federal, tribal, state, including institutions of higher education, and local government and private efforts to discourage destructive behavior, including alcohol and drug abuse and tobacco use. This responsibility was assigned to the Advisory Commission on Intergovernmental Relations.

House Concurrent Resolution No. 3001 directed the Legislative Council to study the legal and enforcement issues relating to child support collections on Indian reservations, including state and tribal court jurisdictions, recognition of income-withholding orders, and logistics involved in transferring child support collected to custodial parents. This study was not prioritized.

House Concurrent Resolution No. 3019 urged the United States Army Corps of Engineers to retain sufficient water in the upper portion of Lake Oahe to ensure a stable water supply for the residents of the Standing Rock Indian Reservation and surrounding communities. The resolution also complimented the Governor and the Attorney General on their efforts and urged them to continue their actions to ensure federal officials retain sufficient water in the upper portion of Lake Oahe to protect the health and well-being of the citizens of the area.

House Concurrent Resolution No. 3031 directed the Legislative Council to study issues relating to tribal-state relations, including methods for encouraging greater tribal-state cooperation; the promotion of economic development on Indian reservations in the state; the identification and study of health care, child welfare services, social services, environmental protection, education, and law enforcement issues on the reservations; the identification and study of the social and fiscal impact of providing social services in counties within and adjacent to the reservations; and the

identification and proposals for the resolution of the water issues affecting the state and the tribes. This study was not prioritized.

Senate Concurrent Resolution No. 4024 urges Congress and the Secretary of the United States Department of the Interior to provide funding for the United Tribes Technical College.

## **ECONOMIC DEVELOPMENT INITIATIVES IN INDIAN COUNTRY**

The committee reviewed implementation of Section 36 of Senate Bill No. 2018 (2005), the appropriation bill for the Department of Commerce, which expanded the responsibilities of the North Dakota American Indian Business Office to include the provision of services to assist in the formation of partnerships between American Indian and non-American Indian businesses.

Representatives of the Department of Commerce reported that the goals of this office are to provide leadership in state government to work in partnership with tribal and individual economic developers, businesses, and entrepreneurs to help grow American Indian-led businesses in the state. The office also is charged with facilitating partnerships between Indian and non-Indian businesses. Representatives of the Department of Commerce reported that a director has been hired and an additional responsibility of the office will be to improve communication between non-Indian businesses and tribal-owned and Indian-owned businesses. The functions of the office will include conducting strengths, weaknesses, opportunities, and threats analysis with top American Indian businesses, facilitating partnerships between Indian and non-Indian businesses, providing a link to government and private resources and programs, promoting the Bank of North Dakota tribal-state guaranty program, building a resource data base, communicating government procurement opportunities to American Indian businesses and helping to leverage their status, understanding current government programs and keeping up to date on changing regulations, providing recommendations to the Legislative Assembly on law and regulation changes, and working closely with the federal Small Business Administration.

The committee reviewed the implementation of the tribal-state loan guaranty program. The program was created by House Bill No. 1526 (2005). Representatives of the Bank of North Dakota reported that the Bank had formed a tribal-state guaranty working group to develop recommendations concerning implementation of the program. The working group reported that the real issue is communication between non-Indian business and tribal-owned or Indian-owned business. The working group noted that the North Dakota American Indian Business Office should facilitate improved communication between these entities. The working group reported that there are a number of loan guaranty programs available from the Bureau of Indian Affairs, Small Business Administration, United States Department of Agriculture's rural development business

and industry program, and the Bank's beginning entrepreneur loan program which may be accessed. The working group reported that there does not appear to be payment problems between holders of 8A contracts and subcontractors, but there may be an issue with attracting contractors to perform work on reservations, although there are alternative methods of attracting these contractors such as escrow of funds and letters of credit. Finally, the working group reported that the Bank of North Dakota as a financial institution could help with the timing differences between paying out on a claim and final settlement, but the Bank does not have the legal expertise to review contracts required to be in the performance and payment bond business.

## TAXATION IN INDIAN COUNTRY

The committee reviewed existing tax collection agreements between the state and Indian tribes in North Dakota. North Dakota Century Code Chapter 54-40.2 addresses agreements between public agencies and Indian tribes and specifically provides authority for a public agency to perform administrative services. This includes the authority for the Tax Commissioner to administer a tax collection agreement that previously has been approved by the Governor and the affected tribe. The committee learned the first tax collection agreement entered by the state occurred on May 28, 1993, with the Standing Rock Sioux Tribe. This agreement provides for the collection of cigarette and tobacco products taxes. A second tax collection agreement was entered by the state on December 1, 1998, also with the Standing Rock Sioux Tribe. This agreement provides for the collection of motor fuel and special fuel taxes.

Representatives of the Tax Commissioner reported the cigarette and tobacco products tax collection agreement between the state and the Standing Rock Sioux Tribe was a result of the tribe approving a tribal cigarette and tobacco products tax ordinance. The ordinance provides for the administration of the taxes in a manner similar to that provided for state cigarette and tobacco products taxes and having the same tax rates. For state cigarette and tobacco products taxes, licensed distributors located in this state are required to pay these taxes on cigarettes and tobacco products intended for sale to retailers in this state. This means cigarettes and tobacco products purchased by retailers from licensed distributors have been subjected to tax. However, for sales occurring on tribal lands, an exemption exists in the state's cigarette and tobacco products tax law which allows a licensed distributor to sell untaxed products to Indian retailers. Products intended for non-Indian retailers on tribal lands remain taxable. Under the tax collection agreement with the Standing Rock Sioux Tribe, only licensed distributors may sell cigarettes and tobacco products to tribal retailers, and out-of-state distributors or retailers who are not licensed are not authorized to sell these products to tribal retailers.

The motor fuel and special fuel taxes tax collection agreement between the state and the Standing Rock Sioux Tribe was the result of the tribe approving a motor fuel and special fuel tax ordinance. For purposes of the

tribal tax, motor fuel includes all products commonly known or sold as gasoline and includes agriculturally derived alcohol blended with gasoline. Special fuels means all clear diesel fuel sold for use in a motor vehicle intended for use on public roads. The motor fuel and special fuel tax ordinances apply only to the sale of fuel intended for use in motor vehicles to be used on public roads. The tax ordinances for the motor fuel and special fuel provide for the administration of the taxes in a similar manner as those provided by the state's fuel tax laws, including the same tax rates. The tribe uses the fuel tax revenues received from the tribal fuel taxes to maintain roads under the tribe's jurisdiction.

The committee learned that both of the tax collection agreements between the state and the Standing Rock Sioux Tribe recognize the tribal share of tax revenues collected on the reservation to equal 75 percent of the total tax collections less a small administration fee to be paid the state for the service of collecting the tribal taxes. The remaining 25 percent represents the sales subject to state taxes. The tribal tax is paid to the tribe on a monthly basis and the remainder is retained by the state.

The state cigarette and tobacco products portion is deposited in the general fund and the state fuel tax portion is deposited in the highway distribution fund. The formula that resulted in the 75 percent and 25 percent fixed allocation of taxes for the agreement between the state and the Standing Rock Sioux Tribe was approved based upon population demographics provided by the United States Bureau of the Census at the time the agreements were entered. The following table shows the tax collection agreement distributions for the Standing Rock Sioux Tribe for fiscal years 2001 through 2005.

Standing Rock Sioux Tribe Tax Collection Agreement Distributions for Fiscal Years 2001 to 2005*			
	Cigarette and Tobacco Products	Motor Fuels	Special Fuels
Fiscal year 2001	\$70,985	\$296,424	\$31,208
Fiscal year 2002	\$95,185	\$320,145	\$23,317
Fiscal year 2003	\$61,872	\$299,667	\$22,504
Fiscal year 2004	\$74,403	\$285,362	\$18,986
Fiscal year 2005	\$74,910	\$272,518	\$222,351

\*These amounts are after the administrative fee and adjustments (refunds).

For those tribes that do not currently have a tax collection agreement for cigarette and tobacco products, the state's authority in administering and collecting taxes is limited. The state is permitted to apply tax on products sold by an Indian retailer to a nonmember of the tribe, but the tribe's sovereign immunity prevents the state from requiring the Indian retailer operating on tribal lands to participate in the collection and remittance of taxes.

For fuel purchases occurring on tribal lands other than the Standing Rock Indian Reservation, and where a tax collection agreement does not exist and where the fuel has been subjected to state fuel tax laws, tribal

members may apply for refunds of fuel taxes directly from the Tax Commissioner. The 2005 Legislative Assembly approved legislation that provides a refund of tax for fuel purchased by tribal members. To qualify for this refund, a person must be a member of a tribe located in this state, the fuel must have been purchased from a retailer or distributor located on the tribal lands of the member's tribe, and the fuel must have been subject to the state's fuel taxes. The actual claim for refund must then be accompanied by the original receipts or invoices for the fuel purchases or an affidavit from the seller certifying the fuel purchases. The state's fuel tax laws provide a provision identifying tribal agencies as being eligible for refund for fuels used in tribal agency vehicles.

Concerning administration of tax collection agreements, representatives of the Tax Commissioner reported that tax collection agreements between the state and a tribe provide a means for the tribe to ensure state taxes are not applied incorrectly to enrolled members based on the tribe's sovereign immunity, yet enable the state to collect taxes owed by nonmembers of the tribe. The benefits of tax collection agreements, such as those between the Standing Rock Sioux Tribe and the state, allow the tribe to use the Tax Commissioner's tax collection processes and thereby receive a stable revenue source.

The committee learned that tribal tax ordinances in place are similar to those provided by state law. For cigarette and tobacco products, all retailers located on the Standing Rock Indian Reservation must purchase products from licensed distributors. With this requirement, the tribe and the state have assurances that cigarettes and tobacco products purchased and subsequently sold by non-Indian retailers and Indian retailers located on the Standing Rock Indian Reservation have been subjected to tax. This benefit to the tribe and the state is evidenced by the assurance that cigarette and tobacco products are not being purchased tax-free from out-of-state unlicensed distributors or retailers for which the state has no jurisdictional authority.

Although motor fuel and special fuel taxes do not prevent the sale of tax-free fuel to retailers located on the Standing Rock Indian Reservation, the tax collection agreements do provide for the registration of retailers and the monthly reporting of fuel purchases. In the event tax-free fuel is purchased by a retailer, the retailer is responsible under the agreement to make payment of the fuel tax. This reporting requirement provides assurances to both the tribe and the state that fuel intended for use in motor vehicles on tribal lands has been subjected to tax.

The committee learned that tax collection agreements between the state and tribes encourage fair competition between businesses operating on and off tribal lands. This goal is accomplished by having agreements in place that provide for similar laws and tax rates regardless of location. Representatives of the Tax Commissioner reported that tax collection agreements provide the process that can remove many of the

jurisdictional issues and misunderstandings that may come to the attention of both the tribe and the state as it relates to transactions occurring on tribal land involving tribal members and nonmembers.

The committee learned for fuel purchases occurring on tribal lands other than the Standing Rock Indian Reservation, where a tax collection agreement does not exist and where the fuel has been subjected to state fuel taxes, enrolled tribal members can apply for a fuel tax refund directly from the Tax Commissioner. This fuel tax refund is subject to the same requirements as other refund programs, such as agriculture and business purposes, and that the person seeking the refund must provide a receipt for the fuel. The committee also reviewed the Tax Commissioner's education program for motor vehicle tax refunds for individual American Indians.

### **DELIVERY OF SERVICES AND CASE MANAGEMENT SERVICES IN INDIAN COUNTRY**

The committee reviewed the provision of home and community-based services case management and other home and community-based services available to tribal members and other eligible citizens who are older persons or persons with physical disabilities. Case management for home and community-based services may be defined as the process within the framework of generic social work practice of providing specialized assistance to aged and disabled individuals desiring and needing help in selecting or obtaining resources and services and in coordinating the delivery of the services in order to assist functionally impaired persons to remain in the community in the most effective manner. Specialized assistance is based on the result of a comprehensive assessment.

The committee learned the provision of home and community-based services case management is currently limited to county social service boards. Case management services are currently provided to approximately 2,057 home and community-based services consumers, 214 of whom are identified as American Indian. Other services that are available to tribal members include personal care, homemaker, family home care, chore, emergency response system, respite care, adult foster care, adult day care, nonmedical transportation, environmental modification, specialized equipment, adult residential, traumatic brain injury residential, traumatic brain injury transitional living, and traumatic brain injury supported employment. These services are funded through the long-term care services budget of the Department of Human Services, which includes service payments for elderly and disabled, expanded service payments for elderly and disabled, Medicaid state plan for personal care, Medicaid waivers for aged and disabled and traumatic brain injury, and targeted case management. Home and community-based services recipients currently have the right to choose who will provide their services for all service categories except case management.

The committee learned there are currently two tribal entities enrolled as providers of home and community-based services. In addition, several tribal members are enrolled as qualified service providers of in-home care.

The committee learned that Older Americans Act Title III-funded services are also available to tribal members. The Department of Human Services Aging Services Division contracts with each of the tribal governments except the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation, to provide transportation, outreach, health maintenance, and congregate and home-delivered meals. In addition, each tribal government receives Title VI Older Americans Act funds directly from the Administration on Aging to provide services to elders. This includes the National Family Caregiver Support Program.

Adult protective services, provided through the regional human service centers, are available to tribal members on the Spirit Lake and Turtle Mountain Reservations through an agreement between the Lake Region Human Service Center and both of the tribal governments. The West Central Human Service Center coordinates adult protective services with the elder protection team of the Standing Rock Sioux Nation.

The committee learned that consumer choice and consumer direction are concepts increasingly supported by the federal and state governments. As part of the New Freedom Initiative, the state has applied for and received two Real Choice Systems Change grants. One of the projects funded by the first grant, through the Olmsted Commission, was to the Indian Affairs Commission to increase the cultural appropriateness of home and community-based services.

The committee learned that the Aging Services Division of the Department of Human Services is currently implementing a Real Choice Systems Change Grant Rebalancing Initiative. The goals of this grant are to increase access to and utilization of home and community-based services for people aged 60 and above and people with disabilities, to provide a financing mechanism for home and community-based programs and services, to increase choice and self-direction for people aged 60 and above and people with disabilities, to decrease reliance on institutional forms of care, and to develop quality management mechanisms for service delivery.

The committee learned that the Governor's Committee on Aging includes five members appointed to represent each of the tribal governments and the Trenton Indian Service area. Also, two of the individuals who represented North Dakota at a recent White House conference on aging were tribal members.

The committee reviewed the status of nursing facility and basic care bed licensing on the Turtle Mountain Indian Reservation. House Bill Nos. 1190 and 1191 (2005) required basic care and nursing facility beds to be licensed within 48 months of acquisition. Representatives of the Department of Human Services reported that the Turtle Mountain Band of Chippewa Indians acquired 15 basic care beds on October 22, 2004, and the 48-month period will expire on

October 22, 2008. The tribe acquired 45 nursing facility beds between August 1, 2003, and October 8, 2003, and the 48-month period will expire between August 1, 2007, and October 8, 2007. Although the State Department of Health will not license an entity on tribal property, the entity must meet licensing requirements in order to be eligible for Medicaid payments. The chairman of the Turtle Mountain Band of Chippewa Indians reported the original financing package for the Turtle Mountain Band of Chippewa Indians facility was delayed when the tribe was unable to secure a grant from the United States Department of Agriculture for the facility. However, a site has been selected, feasibility studies have been completed, and the design is complete. The tribe is confident the new financing package will be completed and construction will commence in 2007. However, the facility will not be completed by August 1, 2007, when the 48-month expiration commences, and thus it will be necessary for the tribe to request an extension during the 2007 legislative session.

### **CHILD SUPPORT ENFORCEMENT IN INDIAN COUNTRY**

The committee reviewed the interaction of child support enforcement services between the tribes and the state. One of the greatest challenges for the North Dakota Child Support Enforcement office is the jurisdictional issue that arises between the tribes and the state in an environment overshadowed by the federal government. The Child Support Enforcement office's caseload includes approximately 1,100 court orders issued by tribal courts in North Dakota. The office also handles court orders issued by other tribes throughout the county but has not tracked those separately. The office has approximately 5,000 additional cases, primarily with the Devils Lake and Bismarck regional child support enforcement units, where the office's options may be limited because it lacks jurisdiction to take the next step to obtain or enforce a court order.

The committee learned the federal government is a major player in addressing tribal child support issues, primarily through its authority to control intergovernmental operations and the ability to fund or not fund programs. The federal role has impacted child support enforcement in several ways. The Child Support Enforcement office has underwritten a tribal and state workgroup that has addressed a number of subjects and searched for solutions for existing problems. Regulations have been modified so tribes can obtain funding to start their own child support programs. The regulations authorize up to \$500,000 over a two-year period for a tribe to develop and implement the needed infrastructure and provide 14 core services, either through staff or contract. Federal law prescribes that states must enact the Uniform Interstate Family Support Act, which governs reciprocity among states. However, tribes are not subject to this law; instead, they follow the Full-Faith and Credit for Child Support Orders Act, which states that a court, tribal or state, which first enters a support order over parties within its jurisdiction retains continuing, exclusive jurisdiction in the case until none of

the parties reside in that jurisdiction. Representatives of the Child Support Enforcement office reported the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation has received federal approval to run its own child support program.

## **TRANSPORTATION FINANCE ISSUES IN INDIAN COUNTRY**

Representatives of the Department of Transportation reported the department is holding annual meetings with each tribe to discuss the department's four-year construction and transit programs. The department also is holding tribal meetings to update the state transportation plan, TransAction.

The committee learned the state has concurrent jurisdiction with the tribes on state roads that run through the reservations. For Bureau of Indian Affairs roads, the bureau, and not the state, has jurisdiction on roads located on the reservation. The committee learned that fuel tax revenues returned to the tribes may be used by the tribes to match federal transportation funds for construction and maintenance of roads on the state's reservations.

## **SOVEREIGN LANDS AND OIL AND GAS RESOURCE DEVELOPMENT IN INDIAN COUNTRY**

The committee invited a representative of the Attorney General to discuss the issue of sovereign lands. The representative reported that beds of rivers and lakes owned by the state are known as sovereign lands. The State Engineer manages these lands with the exception of minerals that are managed by the Board of University and School Lands. The board leases the Missouri River's riverbed throughout the oil and gas-producing areas of the state, including that area within the Fort Berthold Indian Reservation's original boundaries. At least since the mid-1980s, the Land Department has issued oil and gas leases in this area and there are approximately 100 outstanding leases. Lands leased are based on the river's pre-Garrison Dam characteristics. Relying primarily on aerial photographs from the 1940s and early 1950s, the Land Department identifies the location and acres over which it asserts authority. The department has not leased the bed of Lake Sakakawea, only the old riverbed under the lake.

When North Dakota entered the Union in 1889, the state took title to the beds of all navigable waters. An origin of this title is English law. Under English law, the Crown owned navigable waterways because title to navigable waters was important to the sovereign's ability to control navigation, fishing, and other commercial activities and thus was an essential attribute of sovereignty. The Crown's title extended to waterways in the colonies. After the Revolution and the creation of the United States, the original 13 states, as sovereign successors to the Crown, assumed title to the beds of navigable waters. The original 13 states held absolute right to all their navigable waters and the soils under them. Each new state entering the Union was entitled to

the same rights held by the original states; each state enters the Union on an equal footing with the original states. State title to navigable waters thus became founded on the equal footing doctrine. This doctrine also requires the federal government to hold sovereign land in trust for future states.

The Missouri River was navigable in 1889 and, therefore, North Dakota acquired title to it. However, where navigable waters border or flow through an Indian reservation, the question has arisen whether the equal footing doctrine applies. The tension between state title under the equal footing doctrine and tribal title recognized by treaty has resulted in considerable litigation. The strong presumption to state title to land under navigable waters provides perhaps the best rationale under which the Land Department exercises jurisdiction over the minerals in question. This presumption can be overcome if the intent to do so was definitely declared or otherwise made plain. A state can be deprived of title to navigable waters but only in the most unusual circumstances.

## **WATER ISSUES IN INDIAN COUNTRY**

The committee reviewed water issues in Indian country. The State Engineer briefed the committee on tribal water rights and water issues. Many western states have entered negotiations with Indian tribes to settle Indian reserved water rights claims. These claims are usually adjudicated based upon one of two standards, the practicable irrigable acreage standard or the economic viability standard. Under the practicable irrigable acreage standard, the tribe receives sufficient water to irrigate the reservation it occupies; while under the economic viability standard, the tribe receives the amount of water necessary for economic viability or to fulfill the purposes of the reservation. Whichever standard is adopted, the settlement of Indian reserved water rights claims requires a large amount of water. Indian reserved water rights have a priority date from the date the reservation was created and thus are senior to any other water rights in a specific area. Recently, an agreement was negotiated between New Mexico and several tribes from that state which is awaiting congressional ratification. The agreement calls for over \$1 billion in water development in New Mexico. The cost of the settlement is one reason the settlement has not been ratified by Congress.

The State Engineer testified that negotiation is preferable to litigation and although North Dakota does not have much experience negotiating Indian reserved water rights, there is a lot of experience nationwide. Also, there have not been any Indian reserved water rights settlements involving the Missouri River. It is incumbent upon a tribe to determine if and when it wishes to quantify and adjudicate its reserved water rights claims. The State Engineer reported the only tribe in North Dakota that has expressed any interest in pursuing its reserved water rights claims is the Turtle Mountain Band of Chippewa Indians.

The State Engineer also briefed the committee on the Indian municipal, rural, and industrial water supply

program. This program is administered by the Bureau of Reclamation. Garrison municipal, rural, and industrial water supply funds are essentially split 50-50 between the state and tribes. One difference between the state program and the tribal program is that the federal government pays 100 percent of Indian municipal, rural, and industrial water supply operation and maintenance costs. Under the state municipal, rural, and industrial water supply program, water users are responsible for 100 percent of the operation and maintenance costs. The state municipal, rural, and industrial water supply program is composed of 75 percent federal funds and 25 percent nonfederal funds.

The Indian municipal, rural, and industrial water supply program was authorized under two federal Acts—the Garrison Reformulation Act of 1986 and the Dakota Water Resources Act of 2000. The Garrison Reformulation Act of 1986 authorized \$200 million of state municipal, rural, and industrial water supply projects and \$20 million in Indian municipal, rural, and industrial water supply projects. The Indian municipal, rural, and industrial water supply funds were indexed for inflation while the state funds were not. All of the money authorized in this Act has been expended. The Dakota Water Resources Act of 2000 authorized \$200 million in state projects, \$200 million in Indian projects, and a \$200 million Red River Water Supply Project. The 2000 authorizations were indexed for inflation. The state has not received any of the money authorized in 2000 and, indexed for inflation, the total authorization is now \$260 million. Tribes in North Dakota have spent \$48 million in Indian municipal, rural, and industrial water supply funds since 1986 and have approximately \$240 million in authorized funds remaining.

### **GAME AND FISH ISSUES IN INDIAN COUNTRY**

The committee reviewed the implementation of 2005 Senate Bill No. 2041, which dealt with hunting on Indian land. Representatives of the Game and Fish Department reported that, in general, the legislation is working very well and there have been fewer conflicts involving Indian and non-Indian hunters hunting on or off reservation. Also, the bill has led to improved communication between the state Game and Fish Department and tribal fish and game departments. Positive aspects include the cooperative season on mountain lions, separate regulations implemented for North Dakota and South Dakota by the Wahpeton-Sisseton Oyate Tribe, and similarity of seasons between the state and the Three Affiliated Tribes - Mandan, Hidatsa and Arikara Nation. However, representatives of the Game and Fish Department reported the department does have several concerns. These concerns involve the Standing Rock Sioux Tribe which has adopted certain regulations counter to state law and there is a lack of coordination between state and tribal seasons.

Representatives of the Three Affiliated Tribes - Mandan, Hidatsa and Arikara Nation testified that enactment of 2005 Senate Bill No. 2041 was a huge

success and emphasizes state and tribal cooperation in the game and fish area. They characterized North Dakota as a leader among the states in relations between the states and tribes on game and fish issues.

### **METHAMPHETAMINE ISSUES IN INDIAN COUNTRY**

The committee reviewed the methamphetamine problem and how the state and tribes can work together to confront the methamphetamine epidemic in North Dakota. Representatives of the Bureau of Criminal Investigation reported that from January 1, 2003, to October 10, 2003, the state discovered 254 methamphetamine laboratories. The state discovered 175 laboratories during the same period in 2004 and 184 during the same period in 2005, while only 38 laboratories have been discovered during the same period in 2006. The representative of the Bureau of Criminal Investigation attributed the decline in methamphetamine laboratories in North Dakota to the work the Legislative Assembly and the Attorney General have done to control the distribution of psuedophedrine. However, the majority of methamphetamine present in North Dakota is not being produced in North Dakota but is being brought in from out-of-state producers. Thus, 40 percent of the state's Highway Patrol officers have been trained to identify drug couriers.

Representatives of the Bureau of Criminal Investigation reported the Safe Trails Task Force has recently been established. The task force is composed of 10 members, including tribal and Federal Bureau of Investigation officers, and is headquartered in Bismarck. The task force is establishing contacts on each of the state's reservations to combat the methamphetamine problem. Also, the Bureau of Indian Affairs and the Indian Affairs Commission assisted the United Tribes Technical College in applying for and receiving a grant to develop information-sharing techniques between state, federal, and tribal law enforcement agencies. The grant is designed to reduce alcohol and drug-related crimes in a borderless environment.

The president of United Tribes Technical College reported the objective of the task force established under the grant is to develop better communication between the state and the tribes on law enforcement issues. The task force learned that because methamphetamine does not respect jurisdictional lines, there needs to be greater cooperation among the state's various law enforcement agencies to combat these problems. The task force is grappling with the issue of how sensitive information can be shared between law enforcement agencies without violating any confidentiality restrictions.

### **LAW ENFORCEMENT ISSUES IN INDIAN COUNTRY**

The committee reviewed law enforcement issues in Indian country. The committee learned the North Dakota Supreme Court has recognized that NDCC Section 11-15-02 provides a sheriff wide latitude in the appointment of special deputies. The appointment of a

special deputy is not limited to only one-time conditions and the special deputy appointed by a sheriff does not have to be a peace officer licensed by the Peace Officer Standards and Training Board. As a deputy to a county official, a special deputy has the same peace officer powers of the sheriff unless such powers are limited by the appointment.

## **EDUCATION IN INDIAN COUNTRY**

The committee reviewed the activities of the P-16 Education Task Force. In September 2005, the State Board of Public School Education, State Board of Higher Education, the Education Standards and Practices Board, and State Board for Career and Technical Education established a steering committee charged with developing a P-16 Education Task Force. The task force consisted of members representing various levels of education, the business community, school boards, associations, agencies, students, and parents selected from throughout North Dakota. The task force was established to examine all levels of education and to review standards, student assessments, the rigor of the curriculum, data availability, public awareness, teacher availability and development, resources, and best practices.

Goals agreed upon by the task force included the goal that North Dakota should put in place and enforce throughout its P-16 education system uniform, consistent proficiency expectations and standards to ensure that each student has a support system in place to enable the student to achieve proficiency; the goal that all North Dakota students should have equitable access to and the expectation of completing a rigorous core curriculum and standards taught by effective and highly qualified P-16 educators; the goal that top performing North Dakota students should be encouraged to become P-16 educators; the goal that North Dakota should provide academic and career assessment and counseling that is comprehensive, developmental, and systematic from preschool through postsecondary education and to employment and life to help students enhance their academic achievement by linking classroom studies to future choices, achieve skills the students will need to transition successfully to post-secondary education and work, and develop the skills needed to make informed decisions throughout life; the goal to educate the public about the importance of identifying and correcting weaknesses in the North Dakota education system; and the goal to seek new and to reallocate current resources to accomplish these goals.

In order to accomplish the first four goals, the task force developed 26 strategies, including establishing statewide requirements for graduation from high school and admission into postsecondary institutions of four years of language arts and reading, four years of mathematics, three years of science, three years of social and multi-cultural studies, one year of physical education, and two years of foreign language or career and technical education or fine arts by 2014; developing a statewide data system, ensuring that all students are

proficient in these areas through regular assessments and individual assistance; creating an alignment commission to develop on a continuing basis a common set of standards and expectations at all levels education in North Dakota; increasing the number of student-teacher contact days from 173 to 183 by 2013; enhancing educator salaries consistent with increased number of teaching days and student achievement and providing more professional development incentives and opportunities; adding three units to the current 21 units required to graduate by 2011; requiring immediate implementation of full-day kindergarten beginning at age 6; and increasing substantially the number of academic and career counselors to assist students and parents to set and achieve appropriate career paths and goals.

The executive director of the Indian Affairs Commission reported that the tribal members of the P-16 Education Task Force identified several goals in addition to the six contained in the final report. The tribal members believed the task force should have endorsed the adoption of a policy of systematic representation and creation of an Indian education advisory council so that education professionals would have a cadre of educators to work on American Indian specific strategies designed to approve student achievement. This goal may be realized through legislation enacted during the 2007 legislative session. This legislation should target schools with significant enrollments of American Indian students, provide focused professional development for teachers of American Indian students on cultural, sensitive and appropriate strategies, provide summer school enrichment strategies for students, create college-bound cohorts of American Indian students, and provide career path counseling.

The superintendent of the Twin Buttes Public Schools reviewed high school tuition shortfalls for the Twin Buttes Public School District. The Twin Buttes Public School District is an elementary school district located within the Fort Berthold Indian Reservation in the southern segment of the reservation. The district has had to send its high school students to off-reservation public high schools for their high school education. The Twin Buttes Public School District is being asked to pay as much as \$24,000 for tuition per student per year by the Halliday Public School District, \$10,359 by Golden Valley, and \$5,000 by Killdeer. The cost for tuition and transportation payments has become cost-prohibitive to the Twin Buttes Public School District. The superintendent testified that NDCC Section 15.1-29-03 should be amended so that elementary school districts that are charged with educating their students outside the district are given the resources to pay the high school tuition and transportation costs.

Representatives of the state's tribal colleges briefed the committee on the function of the state's tribal colleges and the services provided by these institutions. There are five tribal colleges located in North Dakota—Fort Berthold Community College at New Town, Turtle Mountain Community College at Belcourt, Cankdeska Cikana Community College at Fort Totten, Sitting Bull

Community College at Fort Yates, and United Tribes Technical College at Bismarck. The Sisseton-Wahpeton Community College is located just across the border in Sisseton, South Dakota. There are 54,074 tribal members in North Dakota, and reservations in North Dakota consist of 3,829,221 acres of land. American Indian unemployment and poverty rates greatly exceed the national average while high school and college graduation rates are less than the national average. Ten percent of North Dakota's school-age population is American Indian, and this segment of the state's population is the only portion that is growing. The tribal college system was created because of a lack of a state commitment to the tribes and the need for tribal access to higher education. Tribal colleges are distinctly indigenous and do what other colleges cannot. Tribal colleges provide education for American Indians, including American Indian culture, history, languages, rights, and law. In addition, the state's tribal colleges are land grant colleges similar to North Dakota State University and thus can compete for United States Department of Agriculture grants. There are no enrollment caps at the state's tribal colleges and the colleges have an open door policy in that they turn no students away. Tribal colleges and universities receive no Section 471 federal money or state funds for education for non-Indian students and thus must absorb the cost for educating non-Indian students. Non-Indian students comprise 7.3 percent of total enrollment at the state's tribal colleges.

The president of Sitting Bull College at Fort Yates testified that tribal colleges provide a valuable service to American Indian students and benefit not only the tribes and tribal communities but the entire state of North Dakota. The president of United Tribes Technical

College testified the state's tribal colleges have a large economic impact on the state. United Tribes Technical College has experienced a near doubling of its enrollment in the last few years and as United Tribes Technical College grows, so does its impact on Bismarck and Mandan. United Tribes Technical College's total direct impact on Bismarck and Mandan is \$21,552,865 and accounts for 1.8 percent of taxable sales in those cities. During the United Tribes International Powwow, total direct impact on Bismarck and Mandan is \$4,344,320 with a statewide impact of \$4,551,525. United Tribes Technical College's total direct impact in North Dakota is \$21,780,070.

The president of United Tribes Technical College testified the state's tribal colleges are facing several fundamental issues. These include non-Indian student enrollment; transfer students; cooperation and collaboration protocol; the P-16 Education Task Force recommendations; economic development; and inequity in science, technology, engineering, and mathematics. The state's tribal colleges are recommending that partnerships be formed that respect the integrity of tribes and tribal colleges, that the state and tribal colleges explore mechanisms to fund non-Indian students attending tribal colleges and universities, that tribal colleges be included in the state's centers of excellence program and that the state work with tribal colleges to strengthen partnerships in education, business, technology, health, and research.

### **CONCLUSION**

The committee makes no recommendation concerning tribal and state relations.

#2 HB 1393-A



## National Congress of American Indians (NCAI) - [www.ncai.org](http://www.ncai.org)

This page can found at: <http://www.ncai.org/Taxation.31.0.html?&print=1>  
You are here: [Home](#) » [Policy Issues](#) » [Tribal Governance](#) » [Taxation](#)

### Taxation

#### Do tribal governments pay federal taxes?

Tribal government revenues are not taxed, just like state and local government revenues are not. The federal government has never taxed governmental revenue of state, tribal or local governments. This is a long-standing federal policy with Constitutional support that prevents interference with the ability to raise revenue for government functions. Like state and local governments, tribal governments use their revenues to provide essential services for their citizens. Unlike state governments, tribal governments are not in a position to levy property or income taxes. Income from tribal businesses is the only non-federal revenue source.

#### Do tribal governments pay state taxes?

States cannot directly tax a tribal government. The Supreme Court has held that state governments can collect excise taxes on sales to non-members that occur on tribal lands, so long as the tax does not fall directly on the tribal government. States and tribes have developed a variety of methods for collecting these taxes, which most often take the form of intergovernmental agreements or pre-taxing at the wholesale level.

#### Do Indian people pay taxes?

Individual American Indians and Alaska Natives and their businesses pay federal income tax just like every other American. The one exception is when an Indian person receives income directly from a treaty or trust resource such as fish or timber, that income is not federally taxed. States also cannot tax tribal members who live and derive their income on tribal lands.

The April 16, 2005 version of the Streamlined Sales and Use Tax Agreement includes changes that the streamlined sales tax implementing states approved at an April 16 meeting in Annapolis, MD. On October 1, 2005 this same group will consider additional amendments to the Agreement.

In April, Congressman Bob Goodlatte, introduced H. R 1956, the "Business Activity Tax Simplification Act." It is now with the House Judiciary Committee.

S. 1736 (Senators Enzi & Dorgan) and HR. 3184 (Congressmen Istook & Delahunt), "The Streamlined Sales and Use Tax Act" were pieces of legislation from the 108th Congress. S. 1736 was sent to the House Committee on the Judiciary and then sent the Subcommittee on Commercial and Administrative Law where it remained. H. R. 3184 remained in the Finance Committee.

### Documents

- Streamlined Sales and Use Tax Agreement
- H. R 1956 - the "Business Activity Tax Simplification Act."
- S. 1736 - "The Streamlined Sales and Use Tax Act"
- HR. 3184 - "The Streamlined Sales and Use Tax Act"
- Rep. Young Introduced Bill to Assist Collection of State Taxes on Reservation Sales, Legislative Update #375, 08/13/01
- NCAI Testimony, House Resources Committee Hearing on the Collection of State Transactions Taxes by Tribal Retail Enterprises, 10/12/99
- IRS Fed Reg Notice 8,9,06
- NCAI Resolution #SAC-06-043

### Links

- Internal Revenue Service Tribal Issues Page

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## NORTH DAKOTA LEGISLATIVE ASSEMBLY

Senator Cook and members of the Political Subdivision Committee: For the record, I am Rep. Rod Froelich from District 31. District 31 is comprised of all of Sioux County, all of Grant County and parts of Hettinger County and Morton County. The northern part of Standing Rock Indian Reservation encompasses all of Sioux County in North Dakota. The southern part of Standing Rock Indian Reservation is in SD.

House Bill 1393 is a product of the Interim committee's report of the Tribal and State Relations Committee. This bill would clarify an Attorney General's opinion. The Council has found nothing in statue to support the current opinion. There is a complexity of laws on reservations - federal, tribal and state. Tribal laws govern all Indians on reservations, including non-enrolled Indians living on reservations. Indians from one reservation living on another reservation are governed by tribal or federal jurisdiction.

There are others here that will discuss tribal sovereignty and tribal jurisdiction.

I have asked the tax department to be present to discuss the complexity of the current policy, the difficulty involved for the state and their fiscal problems trying to enforce the current opinion.

I will now try to explain the different sections of the bill:

Section 1 deals with the income tax part of the bill. Keep in mind you must be an enrolled member of a federally recognized Indian Reservation. Indians living off a reservation do not qualify.

Section 2 speaks to the income tax forum. Legislative Council advised that this needs to be in the bill.

Section 3 speaks to the sales tax part of the bill. Keep in mind there are few businesses on reservations. This bill does not affect individuals when they are not on a reservation.

Section 4 speaks to the excise tax for motor vehicles. Mr. Lamp can explain this section much better than I. Mr. Lamp can explain the amendment that was added to HB 1393.

Senators, before I introduced HB 1393, I visited with the Tax Department at length. To my knowledge, there is no fiscal note.

Chairman Cook and Committee members, as you will hear from individuals who will testify following me, this bill clarifies and (Attorney General's opinion) I believe it will simplify tax regulations dealing with Indians on reservations.

I have attached a photocopy of an enrolled member to clarify any discussion about who is or is not enrolled.

Mr. Chairman and committee members, I hope this bill will help clarify a very complex opinion and keep this issue out of the courts and will help provide better tribal and state relations.

I will try to answer any questions at this time.

*Attachment  
#1  
1393*

Turtle Mountain Band of Chippewa Indians

BELCOURT, NORTH DAKOTA

Name of Enrollee

MARCELLAIS, Richard

Birthdate

01/25/47

Enrollee No.

304-52-2225

Roll No.

304-52-2225

Enrollee Blood

304-52-2225

Signature of Enrollee

*Richard Marcellais*

Signature of Issuing Officer

*Patricia K. Davis*

Issue Date

7/22/98



#10  
1393

**57-38-01.2. Adjustments to taxable income for individuals and fiduciaries. (Effective for taxable years beginning before January 1, 2009)**

1. The taxable income of an individual, estate, or trust as computed pursuant to the provisions of the United States Internal Revenue Code of 1954, as amended, shall be:

a. Reduced by any interest received from obligations of the United States that is included in taxable income or in the computation thereof on the federal return.

b. Reduced by any other income included in the taxable income, or in the computation thereof, on the federal return which is exempt from taxation by this state because of the provisions of the Constitution of North Dakota or the Constitution of the United States.

c. Reduced by the amount of federal income tax liability, but not social security and self-employment taxes, as computed under chapter 1 of the Internal Revenue Code of 1954, as amended, for the same taxable year for which the North Dakota return is being filed, to the extent that such taxes are computed upon income which becomes a part of the North Dakota taxable income. Provided, that no adjustment to federal income taxes, paid or accrued, is required because of allowable deductions to federal taxable income made under the cost recovery provisions of subdivision b of subsection 5 of section 57-38-01. However, such federal income tax liability must be reduced by all credits thereon except credits for federal income tax withholding payments, estimates of federal income tax, and income taxes of foreign countries. Federal income taxes for prior periods assessed against the taxpayer by reason of audit or other adjustment by the internal revenue service, or voluntary disclosure by the taxpayer, are not deductible except in the period in which income so taxed was reported or reportable or in which an adjustment was required but only after an adjustment is made by or with the office of the state tax commissioner. A refund of federal income tax must be reported and included in North Dakota taxable income in the year in which the tax was originally deducted.

d. (1) Reduced by three hundred dollars if the return filed is a joint return by husband and wife. If separate returns are filed by husband and wife, no deduction can be taken under this subdivision. This subdivision shall not be applicable to estates or trusts.

(2) Reduced by three hundred dollars if the return filed is the return of a "head of household" as defined by the United States Internal Revenue Code of 1954, as amended; provided, that the term "head of household" shall also include a "surviving spouse" as defined by said code.

(3) Reduced by seven hundred fifty dollars for each adopted child who is under the age of twenty-one years and who is either irreversibly mentally retarded or, on the basis of the annual findings of a licensed physician, is blind or disabled as determined pursuant to the provisions of title XVI of the United States Social Security Act, provided the return filed is the return of the parent of an adopted child and such child qualifies as a dependent of such parent for

federal income tax purposes.

(4) Reduced, up to a maximum of one thousand dollars, by the amount of filing fees, attorney's fees, and travel costs incurred in connection with an adoption and by the actual costs paid to a licensed child-placing agency in making the adoptive study and in supervising and evaluating the adoptive placement. Provided, however, that the reduction allowed under this paragraph shall apply only to such adoption expenses of a child who qualifies under the provisions of paragraph 3.

(5) Reduced by one thousand seven hundred fifty dollars for each child under the age of twenty-one years adopted by the taxpayer. The reduction under this paragraph may be claimed only by an adoptive parent of an adopted child and the child must qualify as a dependent of the adoptive parent for federal income tax purposes. The reduction may be claimed by only one spouse, for spouses filing separately under this chapter. The reduction provided by this paragraph may be claimed for the taxable year in which the adoption becomes final and any unused portion of the reduction may be carried forward by the taxpayer for up to five taxable years. The reduction does not apply to the adoption of children of the taxpayer's spouse.

e. Reduced by the actual amount of the medical expenses that were incurred but not allowed on the federal return by reason of the federal medical deduction limitation.

f. Increased by the amount of any income taxes, or franchise or privilege taxes measured by income, to the extent that such taxes were deducted to determine federal taxable income.

g. Increased by the amount of any interest and dividends from foreign securities and from securities of state and their political subdivisions exempt from federal income tax; provided, that interest upon obligations of the state of North Dakota or any of its political subdivisions shall not be included.

h. Except for residents, reduced by the amount of net income not allocated and apportioned to this state under the provisions of chapter 57-38.1, but only to the extent that the amount of net income not allocated and apportioned to this state under the provisions of that chapter is not included in any adjustment made pursuant to the preceding subdivisions.

i. Repealed by S.L. 2003, ch. 529, § 3.

j. Reduced by any amount, up to a maximum of five thousand dollars, received pursuant to the firefighters relief associations authorized by chapters 18-05 and 18-11, policemen's pension funds authorized by chapter 40-45, or the highway patrolmen's retirement system authorized by chapter 39-03.1; provided, however, that the adjustment provided in this subdivision shall be reduced by any amount received pursuant to the federal Social Security Act.

k. Reduced by any amount, up to a maximum of one thousand dollars, received by any person as payment for services performed while on active duty in the armed forces of the United States or as payment for attending periodic training meetings for drill and instruction as a

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member of the national guard or of a reserve unit of the armed forces of the United States. However, persons serving in the armed forces of the United States, except field grade and general officers, who are stationed outside of any state of the United States or the District of Columbia for not less than thirty days during the tax year shall be allowed an additional reduction of up to three hundred dollars per month for each month or portion of a month received as payment for services performed while on active duty at such location.

l. Reduced by any amount, up to a maximum of five thousand dollars, received by any person fifty years of age or older as retired military personnel pay for service in the United States army, navy, air force, coast guard, or marine corps or reserve components thereof; provided, however, that the adjustment provided in this subdivision shall be reduced by any amount received pursuant to the federal Social Security Act.

m. Reduced by the amount of interest received during that taxable year on a contract for deed on the sale of eighty or more acres [32.37 or more hectares] of agricultural land to a beginning farmer. The contract for deed must extend for not less than ten years and have an annual interest rate equal to or less than the minimum rate allowed by the internal revenue service before interest is imputed. In order for an individual, estate, or trust to qualify for this reduction, the taxpayer must obtain a statement from the buyer stating that the buyer meets all requirements of the beginning farmer definition, together with such other information as the state tax commissioner may require. The value placed on any real property located in North Dakota and owned by the buyer must be the amount listed as the true and full value on the most recent real estate tax statement for that particular piece of property. In determining the net worth of any person, including the person's dependents and spouse, if any, for purposes of this subdivision, the value of their equity in their principal residence, the value of one personal or family motor vehicle, and the value of their household goods, including furniture, appliances, musical instruments, clothing, and other personal belongings may not be included. This statement must be filed along with the income tax return. For the purposes of this subdivision, "beginning farmer" means any person who is:

(1) A resident of this state.

(2) Receiving more than one-half of that person's gross annual income from farming, unless the person initially commences farming during the tax year for which an adjustment will be claimed under this subdivision.

(3) Intending to use any farmland to be purchased or rented for agricultural purposes.

(4) Except for contracts for deed entered into prior to July 1, 1985, having adequate training by education in the type of farming operation which the person wishes to begin through satisfactory participation in the adult farm management education program of the state board for career and technical education or an equivalent program approved by the agriculture commissioner.

(5) Having, including the net worth of any dependents and spouse, a net worth of less than one hundred thousand dollars.

n. Reduced by the amount of interest received during that taxable year on a contract on the sale of any land, buildings, improvements, and equipment associated with the land, buildings, or improvements, used or useful in connection with a revenue-producing enterprise to a beginning businessman, excluding beginning farmers as defined in subdivision m. The contract must extend for not less than ten years and have an annual interest rate equal to or less than the minimum rate allowed by the internal revenue service before interest is imputed. In order for an individual, estate, or trust to qualify for this reduction, the taxpayer must obtain a statement from the buyer containing a list of the buyer's assets and debts and giving the buyer's net worth, together with any other information required by the state tax commissioner. The value placed on any real property located in North Dakota and owned by the buyer shall be the amount listed as the current market value on the most recent real estate tax statement for that particular piece of property. In determining the net worth of any person, including that person's dependents and spouse, if any, the value of their equity in their principal residence, the value of one personal or family motor vehicle, and the value of their household goods, including furniture, appliances, musical instruments, clothing, and other personal belongings is not to be included. This statement is to be filed along with the income tax return. For the purposes of this subdivision, "beginning businessman", excluding beginning farmers as defined in subdivision m, means any person who is:

(1) A resident of this state.

(2) Receiving more than one-half of that person's gross annual income from a revenue-producing enterprise, unless the person initially commences business during the tax year for which an adjustment will be claimed under this subdivision.

(3) Intending to use any revenue-producing enterprise purchased or rented for business purposes.

(4) Adequately trained, by experience or education, in the type of revenue-producing enterprise which that person wishes to begin.

(5) The owner of property with a net worth, including the net worth of property of that person's dependents and spouse, if any, of less than one hundred thousand dollars.

o. Reduced by any amount, up to a maximum of three hundred dollars received by any person or six hundred dollars if a joint return is filed, as interest earned from a financial institution located in this state. For purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

p. Repealed by S.L. 1999, ch. 487, § 3.

q. Reduced by the amount, up to a maximum of five thousand dollars for any person or ten thousand dollars if a joint return is filed, of investment made after January 1, 1989, in a venture capital corporation organized pursuant to chapter 10-30.1. This deduction may only be taken in the tax year in which the taxpayer qualifies for a credit pursuant to chapter 10-30.1. However, a taxpayer that makes an investment in a venture capital corporation on or after July 1, 1989, is only entitled to a deduction if the venture capital corporation uses the funds it receives from the taxpayer to invest or provide financing to qualified entities, which entities do not include a business or an affiliate of a business that owns tax-exempt securities.

r. Reduced by any amount, up to a maximum of five thousand dollars, received as retirement benefits paid by the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, other than retired military personnel pay, as exempted in subdivision l; provided, however, that the adjustment provided in this subdivision must be reduced by any amount received pursuant to the federal Social Security Act.

s. Reduced by the portion of a distribution from a qualified investment fund described in section 57-38-01 which is attributable to investments by the qualified investment fund in obligations of the United States, obligations of North Dakota or its political subdivisions, and any other obligation the interest from which is exempt from state income tax under federal statute or United States or North Dakota constitutional provisions; provided the amount of the distribution excluded under this subdivision is included in federal taxable income.

t. Reduced by an amount equal to the earnings that are passed through to a taxpayer in connection with an allocation and apportionment to North Dakota under chapter 57-35.3.

u. Reduced by the amount received by the taxpayer as payment for services performed when mobilized under title 10 United States Code federal service as a member of the national guard or reserve member of the armed forces of the United States. An individual claiming the reduction under this subdivision may not also claim the reduction under subdivision k for the time the individual was under federal orders for active duty and may not claim a reduction on income already excluded from federal taxation due to service in a combat or hazardous duty zone. This subdivision does not apply to federal service while attending annual training, basic military training, or professional military education.

v. Reduced by up to ten thousand dollars of qualified expenses that are related to a donation by a taxpayer or a taxpayer's dependent, while living, of one or more human organs to another human being for human organ transplantation. A taxpayer may claim the reduction in this subdivision only once for each instance of organ donation during the taxable year in which the human organ donation and the human organ transplantation occurs but if qualified expenses are incurred in more than one taxable year, the reduction for those expenses must be claimed in the year in which the expenses are incurred. For purposes of this subdivision:

(1) "Human organ transplantation" means the medical procedure by which transfer of a human organ is made from the body of one person to the body of another person.

(2) "Organ" means all or part of an individual's liver, pancreas, kidney, intestine, lung, or bone marrow.

(3) "Qualified expenses" means lost wages not compensated by sick pay and unreimbursed medical expenses as defined for federal income tax purposes, to the extent not deducted in computing federal taxable income, whether or not the taxpayer itemizes federal income tax deductions, and not already deducted under subdivision e.

w. Increased by the amount of the contribution upon which the credit under section 57-38-01.21 is computed, but only to the extent that the contribution reduced federal taxable income.

Provided, however, that each adjustment in the above subdivisions authorized under law shall be allowed only to the extent that the adjustment is allocated and apportioned to North Dakota income.

2. The tax commissioner is hereby authorized to prescribe rules and regulations to prevent requiring income that had been previously taxed under this chapter from being taxed again because of the provisions of this chapter and to prescribe rules and regulations to prevent any income from becoming exempt from taxation because of the provisions of this chapter if it would otherwise have been subject to taxation under the provisions of this chapter. (Effective for taxable years beginning after December 31, 2008) Adjustments to taxable income for individuals and fiduciaries.

1. The taxable income of an individual, estate, or trust as computed pursuant to the provisions of the United States Internal Revenue Code of 1954, as amended, shall be:

a. Reduced by any interest received from obligations of the United States that is included in taxable income or in the computation thereof on the federal return.

b. Reduced by any other income included in the taxable income, or in the computation thereof, on the federal return which is exempt from taxation by this state because of the provisions of the Constitution of North Dakota or the Constitution of the United States.

c. Reduced by the amount of federal income tax liability, but not social security and self-employment taxes, as computed under chapter 1 of the Internal Revenue Code of 1954, as amended, for the same taxable year for which the North Dakota return is being filed, to the extent that such taxes are computed upon income which becomes a part of the North Dakota taxable income. Provided, that no adjustment to federal income taxes, paid or accrued, is required because of allowable deductions to federal taxable income made under the cost recovery provisions of subdivision b of subsection 5 of section 57-38-01. However, such federal income tax liability must be reduced by all credits thereon except credits for federal income tax

withholding payments, estimates of federal income tax, and income taxes of foreign countries. Federal income taxes for prior periods assessed against the taxpayer by reason of audit or other adjustment by the internal revenue service, or voluntary disclosure by the taxpayer, are not deductible except in the period in which income so taxed was reported or reportable or in which an adjustment was required but only after an adjustment is made by or with the office of the state tax commissioner. A refund of federal income tax must be reported and included in North Dakota taxable income in the year in which the tax was originally deducted.

d. (1) Reduced by three hundred dollars if the return filed is a joint return by husband and wife. If separate returns are filed by husband and wife, no deduction can be taken under this subdivision. This subdivision shall not be applicable to estates or trusts.

(2) Reduced by three hundred dollars if the return filed is the return of a "head of household" as defined by the United States Internal Revenue Code of 1954, as amended; provided, that the term "head of household" shall also include a "surviving spouse" as defined by said code.

(3) Reduced by seven hundred fifty dollars for each adopted child who is under the age of twenty-one years and who is either irreversibly mentally retarded or, on the basis of the annual findings of a licensed physician, is blind or disabled as determined pursuant to the provisions of title XVI of the United States Social Security Act, provided the return filed is the return of the parent of an adopted child and such child qualifies as a dependent of such parent for federal income tax purposes.

(4) Reduced, up to a maximum of one thousand dollars, by the amount of filing fees, attorney's fees, and travel costs incurred in connection with an adoption and by the actual costs paid to a licensed child-placing agency in making the adoptive study and in supervising and evaluating the adoptive placement. Provided, however, that the reduction allowed under this paragraph shall apply only to such adoption expenses of a child who qualifies under the provisions of paragraph 3.

(5) Reduced by one thousand seven hundred fifty dollars for each child under the age of twenty-one years adopted by the taxpayer. The reduction under this paragraph may be claimed only by an adoptive parent of an adopted child and the child must qualify as a dependent of the adoptive parent for federal income tax purposes. The reduction may be claimed by only one spouse, for spouses filing separately under this chapter. The reduction provided by this paragraph may be claimed for the taxable year in which the adoption becomes final and any unused portion of the reduction may be carried forward by the taxpayer for up to five taxable years. The reduction does not apply to the adoption of children of the taxpayer's spouse.

e. Reduced by the actual amount of the medical expenses that were incurred but not allowed on the federal return by reason of the federal medical deduction limitation.

f. Increased by the amount of any income taxes, or franchise or privilege taxes measured by income, to the extent that such taxes were deducted to determine federal taxable income.

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g. Increased by the amount of any interest and dividends from foreign securities and from securities of state and their political subdivisions exempt from federal income tax; provided, that interest upon obligations of the state of North Dakota or any of its political subdivisions shall not be included.

h. Except for residents, reduced by the amount of net income not allocated and apportioned to this state under the provisions of chapter 57-38.1, but only to the extent that the amount of net income not allocated and apportioned to this state under the provisions of that chapter is not included in any adjustment made pursuant to the preceding subdivisions.

i. Reduced by any amount, up to a maximum of five thousand dollars, received pursuant to the firefighters relief associations authorized by chapters 18-05 and 18-11, policemen's pension funds authorized by chapter 40-45, or the highway patrolmen's retirement system authorized by chapter 39-03.1; provided, however, that the adjustment provided in this subdivision shall be reduced by any amount received pursuant to the federal Social Security Act.

j. Reduced by any amount, up to a maximum of one thousand dollars, received by any person as payment for services performed while on active duty in the armed forces of the United States or as payment for attending periodic training meetings for drill and instruction as a member of the national guard or of a reserve unit of the armed forces of the United States. However, persons serving in the armed forces of the United States, except field grade and general officers, who are stationed outside of any state of the United States or the District of Columbia for not less than thirty days during the tax year shall be allowed an additional reduction of up to three hundred dollars per month for each month or portion of a month received as payment for services performed while on active duty at such location.

k. Reduced by any amount, up to a maximum of five thousand dollars, received by any person fifty years of age or older as retired military personnel pay for service in the United States army, navy, air force, coast guard, or marine corps or reserve components thereof; provided, however, that the adjustment provided in this subdivision shall be reduced by any amount received pursuant to the federal Social Security Act.

l. Reduced by the amount of interest received during that taxable year on a contract for deed on the sale of eighty or more acres [32.37 or more hectares] of agricultural land to a beginning farmer. The contract for deed must extend for not less than ten years and have an annual interest rate equal to or less than the minimum rate allowed by the internal revenue service before interest is imputed. In order for an individual, estate, or trust to qualify for this reduction, the taxpayer must obtain a statement from the buyer stating that the buyer meets all requirements of the beginning farmer definition, together with such other information as the state tax commissioner may require. The value placed on any real property located in North Dakota and owned by the buyer must be the amount listed as the true and full value on the most recent real estate tax statement for that particular piece of property. In determining the net worth of any person, including the person's dependents and spouse, if any, for purposes of this subdivision,

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the value of their equity in their principal residence, the value of one personal or family motor vehicle, and the value of their household goods, including furniture, appliances, musical instruments, clothing, and other personal belongings may not be included. This statement must be filed along with the income tax return. For the purposes of this subdivision, "beginning farmer" means any person who is:

(1) A resident of this state.

(2) Receiving more than one-half of that person's gross annual income from farming, unless the person initially commences farming during the tax year for which an adjustment will be claimed under this subdivision.

(3) Intending to use any farmland to be purchased or rented for agricultural purposes.

(4) Except for contracts for deed entered into prior to July 1, 1985, having adequate training by education in the type of farming operation which the person wishes to begin through satisfactory participation in the adult farm management education program of the state board for career and technical education or an equivalent program approved by the agriculture commissioner.

(5) Having, including the net worth of any dependents and spouse, a net worth of less than one hundred thousand dollars.

**m.** Reduced by the amount of interest received during that taxable year on a contract on the sale of any land, buildings, improvements, and equipment associated with the land, buildings, or improvements, used or useful in connection with a revenue-producing enterprise to a beginning businessman, excluding beginning farmers as defined in subdivision 1. The contract must extend for not less than ten years and have an annual interest rate equal to or less than the minimum rate allowed by the internal revenue service before interest is imputed. In order for an individual, estate, or trust to qualify for this reduction, the taxpayer must obtain a statement from the buyer containing a list of the buyer's assets and debts and giving the buyer's net worth, together with any other information required by the state tax commissioner. The value placed on any real property located in North Dakota and owned by the buyer shall be the amount listed as the current market value on the most recent real estate tax statement for that particular piece of property. In determining the net worth of any person, including that person's dependents and spouse, if any, the value of their equity in their principal residence, the value of one personal or family motor vehicle, and the value of their household goods, including furniture, appliances, musical instruments, clothing, and other personal belongings is not to be included. This statement is to be filed along with the income tax return. For the purposes of this subdivision, "beginning businessman", excluding beginning farmers as defined in subdivision 1, means any person who is:

(1) A resident of this state.

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(2) Receiving more than one-half of that person's gross annual income from a revenue-producing enterprise, unless the person initially commences business during the tax year for which an adjustment will be claimed under this subdivision.

(3) Intending to use any revenue-producing enterprise purchased or rented for business purposes.

(4) Adequately trained, by experience or education, in the type of revenue-producing enterprise which that person wishes to begin.

(5) The owner of property with a net worth, including the net worth of property of that person's dependents and spouse, if any, of less than one hundred thousand dollars.

n. Reduced by any amount, up to a maximum of three hundred dollars received by any person or six hundred dollars if a joint return is filed, as interest earned from a financial institution located in this state. For purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

o. Reduced by any amount, up to a maximum of five thousand dollars, received as retirement benefits paid by the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, other than retired military personnel pay, as exempted in subdivision k; provided, however, that the adjustment provided in this subdivision must be reduced by any amount received pursuant to the federal Social Security Act.

p. Reduced by the portion of a distribution from a qualified investment fund described in section 57-38-01 which is attributable to investments by the qualified investment fund in obligations of the United States, obligations of North Dakota or its political subdivisions, and any other obligation the interest from which is exempt from state income tax under federal statute or United States or North Dakota constitutional provisions; provided the amount of the distribution excluded under this subdivision is included in federal taxable income.

q. Reduced by an amount equal to the earnings that are passed through to a taxpayer in connection with an allocation and apportionment to North Dakota under chapter 57-35.3.

r. Reduced by the amount received by the taxpayer as payment for services performed when mobilized under title 10 United States Code federal service as a member of the national guard or reserve member of the armed forces of the United States. An individual claiming the reduction under this subdivision may not also claim the reduction under subdivision j for the time the individual was under federal orders for active duty and may not claim a reduction on income already excluded from federal taxation due to service in a combat or hazardous duty zone. This subdivision does not apply to federal service while attending annual training, basic military

training, or professional military education.

s. Reduced by up to ten thousand dollars of qualified expenses that are related to a donation by a taxpayer or a taxpayer's dependent, while living, of one or more human organs to another human being for human organ transplantation. A taxpayer may claim the reduction in this subdivision only once for each instance of organ donation during the taxable year in which the human organ donation and the human organ transplantation occurs but if qualified expenses are incurred in more than one taxable year, the reduction for those expenses must be claimed in the year in which the expenses are incurred. For purposes of this subdivision:

(1) "Human organ transplantation" means the medical procedure by which transfer of a human organ is made from the body of one person to the body of another person.

(2) "Organ" means all or part of an individual's liver, pancreas, kidney, intestine, lung, or bone marrow.

(3) "Qualified expenses" means lost wages not compensated by sick pay and unreimbursed medical expenses as defined for federal income tax purposes, to the extent not deducted in computing federal taxable income, whether or not the taxpayer itemizes federal income tax deductions, and not already deducted under subdivision e.

t. Increased by the amount of the contribution upon which the credit under section 57-38-01.21 is computed, but only to the extent that the contribution reduced federal taxable income.

Provided, however, that each adjustment in the above subdivisions authorized under law shall be allowed only to the extent that the adjustment is allocated and apportioned to North Dakota income.

2. The tax commissioner is hereby authorized to prescribe rules and regulations to prevent requiring income that had been previously taxed under this chapter from being taxed again because of the provisions of this chapter and to prescribe rules and regulations to prevent any income from becoming exempt from taxation because of the provisions of this chapter if it would otherwise have been subject to taxation under the provisions of this chapter.

**Source.** S.L. 1967, ch. 446, § 4; 1969, ch. 508, § 1; 1969, ch. 509, § 1; 1973, ch. 466, § 1; 1973, ch. 467, § 1; 1973, ch. 468, § 1; 1975, ch. 530, § 1; 1975, ch. 531, § 1; 1975, ch. 532, § 1; 1975, ch. 533, § 1; 1979, ch. 603, § 1; 1979, ch. 604, § 1; 1979, ch. 612, § 1; 1981, ch. 565, § 6; 1981, ch. 587, § 1; 1981, ch. 588, § 1; 1981, ch. 589, § 1; 1983, ch. 626, § 1; 1983, ch. 627, § 1; 1985, ch. 135, § 5; 1985, ch. 630, § 1; 1985, ch. 631, § 1; 1987, ch. 141, § 32; 1987, ch. 692, § 1; 1987, ch. 693, § 1; 1987, ch. 694, § 1; 1989, ch. 134, §§ 17 to 19; 1989, ch. 709, § 1; 1991, ch. 671, § 2; 1993, ch. 54, § 106; 1993, ch. 62, § 18; 1993, ch. 72, § 9; 1993, ch. 92, § 14; 1995, ch. 107, § 13; 1997, ch. 490, §§ 3, 4; 1997, ch. 491, § 1; 1999, ch. 31, § 5; 1999, ch. 211, § 20; 1999, ch. 487, §§ 2, 3; 2001, ch. 522, § 1; 2003, ch. 138, § 102; 2003, ch. 526, § 1; 2003, ch. 529, § 3; 2005, ch. 151, § 7; 2005, ch. 557, § 1; 2005, ch. 558, § 1; 2005, ch. 560, § 2.

**Effective Date.** - The 2005 amendment of this section by section 7 of chapter 151, S.L. 2005 becomes effective January 1, 2009, pursuant to section 25 of chapter 151, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 557, S.L. 2005 is effective for taxable years beginning after December 31, 2004, pursuant to section 3 of chapter 557, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 558, S.L. 2005 became effective January 1, 2005.

The 2005 amendment of this section by section 2 of chapter 560, S.L. 2005 is effective for taxable years beginning after December 31, 2004, and applies to qualifying planned gifts made after July 31, 2005, pursuant to section 5 of chapter 560, S.L. 2005.

The 2003 amendment of this section by section 3 of chapter 529, S.L. 2003 applies retroactively to taxable years beginning after December 31, 1999, pursuant to section 5 of chapter 529, S.L. 2003.

**Note.** - Section 57-38-01.2 was amended 4 times by the 2005 Legislative Assembly. Pursuant to section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in section 1 of chapter 558, Session Laws 2005, House Bill 1474; section 1 of chapter 557, Session Laws 2005, Senate Bill 2362; section 2 of chapter 560, Session Laws 2005, Senate Bill 2391; and section 7 of chapter 151, Session Laws 2005, Senate Bill 2032.

**Cross-References.** - Federal Social Security Act, see USCS. Title 42.

United States Civil Service Retirement Act, see USCS. Title 5.

Withdrawals from judges' retirement fund not taxable income, see § 27-17-06.

Federal and State Discrepancy.

Federal Tax Refunds.

Income Earned While Nonresident and Received While Resident.

Income Received from Corporate Liquidation.

Undistributed Corporate Earnings.

#### **Federal and State Discrepancy.**

Federal self-employment tax is tax separate from federal income tax, so there was no real conflict in allowing husband and wife to split farm income on state income tax return even though they did not split it on federal self-employment tax return. *Messner v. Dorgan*, 228 N.W.2d 311 (N.D. 1974), cert. denied, 421 U.S. 949, 95 S. Ct. 1681, 44 L. Ed. 2d 103 (1975).

#### **Federal Tax Refunds.**

Federal income tax refund received by taxpayer in 1977, for federal income taxes paid for the tax years 1973 and 1974, was not taxable by state as 1977 income; this section does not provide for such adjustment of 1977 taxable income. *Running v. Tax Comm'r*, 313 N.W.2d 772 (N.D. 1981).

#### **Income Earned While Nonresident and Received While Resident.**

Income received by a cash basis taxpayer while a resident of North Dakota, but earned in another state when the taxpayer was a nonresident, is subject to the state income tax, and this section authorizes no exemption or deduction. *Hardy v. State Tax Comm'r*, 258 N.W.2d 249 (N.D. 1977).

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### **Income Received from Corporate Liquidation.**

Stockholders were entitled to deduct from taxable income only that part of income, in excess of stock basis, received as a result of a corporate liquidation, upon which the corporation had paid income tax. *Lanterman v. Dorgan*, 255 N.W.2d 891 (N.D. 1977).

Where taxpayer reported corporate liquidation distributions on federal income tax return by deducting his stock basis from the amount of distributions received and reporting the balance as a capital gain or loss, taxpayer was entitled to use his federal taxable income as the starting point in computing his state income tax and was not required to increase the federal taxable income figure to include as ordinary income gross liquidation distributions received in excess of \$15,000. *Erdle v. Dorgan*, 300 N.W.2d 834 (N.D. 1980).

State income tax law allows capital gain treatment of corporate liquidation distributions for purposes of determining the federal taxable income figure to be used as a starting point in computing state income taxes while allowing dividend or income treatment of such liquidation distributions in qualifying for a deduction under this section. *Erdle v. Dorgan*, 300 N.W.2d 834 (N.D. 1980).

### **Undistributed Corporate Earnings.**

Where corporation elected to be taxed as a subchapter S corporation for federal tax purposes and as a regular corporation for state income tax purposes, and the corporation had undistributed earnings which were taxable to the shareholders under the federal income tax but were not taxable to the shareholders under the state income tax due to the corporation's election to be taxed as a regular corporation, shareholders were entitled to use a stepped up basis reflecting federal tax paid on the undistributed earnings in determining gain or loss from sale of their corporate stock in establishing their federal taxable income and were entitled to use the federal taxable income figure reflecting the stepped up basis as a starting point in determining their state income tax, and were not required to adjust the federal taxable income figure to reflect the fact that they paid no state income tax on the undistributed earnings. *Erdle v. Dorgan*, 300 N.W.2d 834 (N.D. 1980).

### **DECISIONS UNDER PRIOR LAW**

Gain from Sale of Stock.

Losses from Sale of Property.

Losses from Sale of Securities.

#### **Gain from Sale of Stock.**

Where corporate stock was acquired before January 1, 1919, had no value on that date, for more than twenty-five years had no market value and was considered worthless, the entire proceeds received from the sale of such stock was clear gain and subject to income tax. *Langer v. State*, 75 N.D. 435, 28 N.W.2d 523 (1947).

#### **Losses from Sale of Property.**

Deductions were allowed for losses resulting from the sale of property acquired and used for profit. *Stern v. Gray*, 72 N.D. 134, 5 N.W.2d 299 (1942).

#### **Losses from Sale of Securities.**

Loss incurred from the sale of securities was not a proper deduction for income tax purposes where the loss was not incurred in connection with the sale or exchange of capital assets. *Stern v. Gray*, 72 N.D.

134, 5 N.W.2d 299 (1942).

**Collateral References.** - Taxation <key> 1031-1049.

71 Am. Jur. 2d, State and Local Taxation, § 419 et seq.

85 C.J.S. Taxation, §§ 1715-1755.

Recognition of gain or loss on receipt of public refunding bonds for old bonds, 1 A.L.R.2d 415.

Comment note: gain to owner of mortgaged property, for income tax purposes, where property is sold on foreclosure and adjusted cost basis is less than mortgage debt, 3 A.L.R.2d 639.

Credit for income tax paid to another state or country, construction and application of statutory provisions allowing, 12 A.L.R.2d 359.

Market value as ascribable to agreement to pay a life annuity to another for purpose of determining a capital gain or loss, 12 A.L.R.2d 589.

Tort, crime or statutory violation, deductibility of expense incurred by taxpayer on account of his liability for, 20 A.L.R.2d 600.

Year in which guarantor may take loss or bad debt deduction, *Curtis v. Commissioner*, 183 F.2d 7, 23 A.L.R.2d 427 (1950).

Deduction of cost of acquiring, protecting, or disposing of title to income-producing property as a nontrade or nonbusiness expense, 23 A.L.R.2d 902.

Stockholder's loan to corporation as basis for business bad debt deduction, 25 A.L.R.2d 633.

Deduction of loss sustained on sale of property under sale and lease back transactions, 26 A.L.R.2d 703, 727.

Capital gain or loss on failure to exercise an option or privilege, 36 A.L.R.2d 1391.

**57-38-30.3. Simplified method of computing tax.**

1. A tax is hereby imposed for each taxable year upon income earned or received in that taxable year by every resident and nonresident individual, estate, and trust. A taxpayer computing the tax under this section is only eligible for those adjustments or credits that are specifically provided for in this section. Provided, that for purposes of this section, any person required to file a state income tax return under this chapter, but who has not computed a federal taxable income figure, shall compute a federal taxable income figure using a pro forma return in order to determine a federal taxable income figure to be used as a starting point in computing state income tax under this section. The tax for individuals is equal to North Dakota taxable income multiplied by the rates in the applicable rate schedule in subdivisions a through d corresponding to an individual's filing status used for federal income tax purposes. For an estate or trust, the schedule in subdivision e must be used for purposes of this subsection.

a. Single, other than head of household or surviving spouse.

Click to view table.

b. Married filing jointly and surviving spouse.

Click to view table.

c. Married filing separately.

Click to view table.

d. Head of household.

Click to view table.

e. Estates and trusts.

Click to view table.

f. For an individual who is not a resident of this state for the entire year, or for a nonresident estate or trust, the tax is equal to the tax otherwise computed under this subsection multiplied by a fraction in which:

(1) The numerator is the federal adjusted gross income allocable and apportionable to this state; and

(2) The denominator is the federal adjusted gross income from all sources reduced by the net income from the amounts specified in subdivisions a and b of subsection 2.

In the case of married individuals filing a joint return, if one spouse is a resident of this state for the entire year and the other spouse is a nonresident for part or all of the tax year, the tax on the joint return must be computed under this subdivision.

g. For taxable years beginning after December 31, 2001, the tax commissioner shall prescribe new rate schedules that apply in lieu of the schedules set forth in subdivisions a through e. The new schedules must be determined by increasing the minimum and maximum dollar amounts for each income bracket for which a tax is imposed by the cost-of-living adjustment for the taxable year as determined by the secretary of the United States treasury for purposes of section 1(f) of the United States Internal Revenue Code of 1954, as amended. For this purpose, the rate applicable to each income bracket may not be changed, and the manner of applying the cost-of-living adjustment must be the same as that used for adjusting the income brackets for federal income tax purposes.

2. For purposes of this section, "North Dakota taxable income" means the federal taxable income of an individual, estate, or trust as computed under the Internal Revenue Code of 1986, as amended, adjusted as follows:

a. Reduced by interest income from obligations of the United States and income exempt from state income tax under federal statute or United States or North Dakota constitutional provisions.

b. Reduced by the portion of a distribution from a qualified investment fund described in section 57-38-01 which is attributable to investments by the qualified investment fund in obligations of the United States, obligations of North Dakota or its political subdivisions, and any other obligation the interest from which is exempt from state income tax under federal statute or United States or North Dakota constitutional provisions.

c. Reduced by the amount equal to the earnings that are passed through to a taxpayer in connection with an allocation and apportionment to North Dakota under chapter 57-35.3.

d. Reduced by thirty percent of the excess of the taxpayer's net long-term capital gain for the taxable year over the net short-term capital loss for that year, as computed for purposes of the Internal Revenue Code of 1986, as amended. The adjustment provided by this subdivision is allowed only to the extent the net long-term capital gain is allocated to this state.

e. Increased by the amount of a lump sum distribution for which income averaging was elected under section 402 of the Internal Revenue Code of 1986 [26 U.S.C. 402], as amended. This adjustment does not apply if the taxpayer received the lump sum distribution while a

nonresident of this state and the distribution is exempt from taxation by this state under federal law.

f. Increased by an amount equal to the losses that are passed through to a taxpayer in connection with an allocation and apportionment to North Dakota under chapter 57-35.3.

g. Reduced by the amount received by the taxpayer as payment for services performed when mobilized under title 10 United States Code federal service as a member of the national guard or reserve member of the armed forces of the United States. This subdivision does not apply to federal service while attending annual training, basic military training, or professional military education.

h. Reduced by income from a new and expanding business exempt from state income tax under section 40-57.1-04.

i. Reduced by interest and income from bonds issued under chapter 11-37.

j. Reduced by up to ten thousand dollars of qualified expenses that are related to a donation by a taxpayer or a taxpayer's dependent, while living, of one or more human organs to another human being for human organ transplantation. A taxpayer may claim the reduction in this subdivision only once for each instance of organ donation during the taxable year in which the human organ donation and the human organ transplantation occurs but if qualified expenses are incurred in more than one taxable year, the reduction for those expenses must be claimed in the year in which the expenses are incurred. For purposes of this subdivision:

(1) "Human organ transplantation" means the medical procedure by which transfer of a human organ is made from the body of one person to the body of another person.

(2) "Organ" means all or part of an individual's liver, pancreas, kidney, intestine, lung, or bone marrow.

(3) "Qualified expenses" means lost wages not compensated by sick pay and unreimbursed medical expenses as defined for federal income tax purposes, to the extent not deducted in computing federal taxable income, whether or not the taxpayer itemizes federal income tax deductions.

k. Increased by the amount of the contribution upon which the credit under section 57-38-01.21 is computed, but only to the extent that the contribution reduced federal taxable income.

l. Reduced by the amount of any payment received by a veteran or beneficiary of a veteran under section 37-28-03 or 37-28-04.

3. Married individuals filing a joint federal income tax return shall file a joint state income tax return if the return is filed under this section. If separate federal income tax returns are filed, one spouse's state income tax return may be filed under this section and the other spouse's

income tax return may be filed under the other provisions of this chapter.

4. a. A resident individual, estate, or trust must be allowed a credit against the tax otherwise due under this section for the amount of any income tax imposed on the taxpayer for the taxable year by another state or territory of the United States or the District of Columbia on income derived from sources therein and which is also subject to tax under this section.

b. The credit provided under this subsection may not exceed the proportion of the tax otherwise due under this section that the amount of the taxpayer's adjusted gross income derived from sources in the other taxing jurisdiction bears to the taxpayer's federal adjusted gross income as reported on the taxpayer's federal income tax return.

c. The tax commissioner may require written proof of the tax paid to another state. The required proof must be provided in a form and manner as determined by the tax commissioner.

5. Individuals, estates, or trusts that file an amended federal income tax return changing their federal taxable income figure for a year for which an election to file state income tax returns has been made under this section shall file an amended state income tax return to reflect the changes on the federal income tax return.

6. The tax commissioner may prescribe procedures and guidelines to prevent requiring income that had been previously taxed under this chapter from becoming taxed again because of the provisions of this section and may prescribe procedures and guidelines to prevent any income from becoming exempt from taxation because of the provisions of this section if it would otherwise have been subject to taxation under the provisions of this chapter.

7. A taxpayer filing a return under this section is entitled to the credit provided under section 57-38-01.20.

8. A taxpayer filing a return under this section is entitled to the exemptions or credits provided under sections 40-63-04, 40-63-06, and 40-63-07.

9. a. A taxpayer is entitled to a credit against the tax imposed by this section for any unused federal credit for prior year minimum tax. "Unused federal credit for prior year minimum tax" means the amount of the federal credit for prior year minimum tax attributable to federal alternative minimum tax included in the taxpayer's federal income tax liability for purposes of this section for taxable years beginning before January 1, 2001, reduced by the total amount of the federal credit for prior year minimum tax claimed on the taxpayer's federal income tax return for all taxable years beginning after December 31, 2000.

b. The credit under this subsection is equal to fourteen percent of the portion of the unused federal credit for prior year minimum tax claimed on the taxpayer's federal income tax return and may not exceed the taxpayer's tax liability under this section for the taxable year. For a nonresident taxpayer, the credit determined under this subsection must be multiplied by the percentage that the nonresident taxpayer's North Dakota adjusted gross income is of the

nonresident's federal adjusted gross income.

c. The credit under this subsection is not allowed for taxable years beginning after December 31, 2004.

10. a. If an individual taxpayer engaged in a farming business elects to average farm income under section 1301 of the Internal Revenue Code [26 U.S.C. 1301], the taxpayer may elect to compute tax under this subsection. If an election to compute tax under this subsection is made, the tax imposed by subsection 1 for the taxable year must be equal to the sum of the following:

(1) The tax computed under subsection 1 on North Dakota taxable income reduced by elected farm income.

(2) The increase in tax imposed by subsection 1 which would result if North Dakota taxable income for each of the three prior taxable years were increased by an amount equal to one-third of the elected farm income. However, if other provisions of this chapter other than this section were used to compute the tax for any of the three prior years, the same provisions in effect for that prior tax year must be used to compute the increase in tax under this paragraph. For purposes of applying this paragraph to taxable years beginning before January 1, 2001, the increase in tax must be determined by recomputing the tax in the manner prescribed by the tax commissioner.

b. For purposes of this subsection, "elected farm income" means that portion of North Dakota taxable income for the taxable year which is elected farm income as defined in section 1301 of the Internal Revenue Code of 1986 [26 U.S.C. 1301], as amended, reduced by the portion of an exclusion claimed under subdivision d of subsection 2 that is attributable to a net long-term capital gain included in elected farm income.

c. The reduction in North Dakota taxable income under this subsection must be taken into account for purposes of making an election under this subsection for any subsequent taxable year.

d. The tax commissioner may prescribe rules, procedures, or guidelines necessary to administer this subsection.

11. The tax commissioner may prescribe tax tables, to be used in computing the tax according to subsection 1, if the amounts of the tax tables are based on the tax rates set forth in subsection 1. If prescribed by the tax commissioner, the tables must be followed by every individual, estate, or trust determining a tax under this section.

12. An individual, estate, or trust is entitled to a credit against the tax determined under this section as calculated under section 57-38.6-03.

13. A taxpayer filing a return under this section is entitled to the credit provided under section 57-38.5-03.

14. An individual taxpayer filing a return under this section is entitled to the credit provided under section 57-38-01.21.

15. A taxpayer filing a return under this section is entitled to the credits provided under sections 57-38-01.22 and 57-38-01.23.

**Source.** S.L. 1981, ch. 594, § 1; 1983, ch. 624, § 2; 1983, ch. 632, § 4; 1985, ch. 634, § 1; 1985, ch. 635, § 1; 1986 Sp., ch. 695, § 2; R.M. approved March 18, 1987; 1987, ch. 73, § 39; S.L. 1989, ch. 708, § 4; 1989, ch. 710, § 2; R.M. disapproved December 5, 1989 insofar as ch. 710, § 2 amended subsection 2, S.L. 1991, ch. 740; S.L. 1991, ch. 671, § 3; 1993, ch. 72, § 10; 1993, ch. 269, § 3; 1997, ch. 490, §§ 6, 7; 1997, ch. 492, § 2; 1999, ch. 31, § 6; 1999, ch. 369, § 11; 1999, ch. 512, § 1; 2001, ch. 488, § 53; 2001, ch. 522, § 2; 2001, ch. 526, § 1; 2001, ch. 527, § 1; 2001, ch. 528, § 1; 2003, ch. 96, § 20; 2003, ch. 524, § 4; 2003, ch. 526, § 2; 2003, ch. 527, § 2; 2003, ch. 529, § 2; 2003, ch. 530, § 1; 2005, ch. 94, § 4; 2005, ch. 317, § 10; 2005, ch. 557, § 2; 2005, ch. 558, § 2; 2005, ch. 560, §§ 3, 4; 2005, ch. 561, § 1; 2005, ch. 562, § 1.

**Effective Date.** - The 2005 amendment of this section by section 4 of chapter 94, S.L. 2005 is effective for taxable years beginning after December 31, 2004, pursuant to section 8 of chapter 94, S.L. 2005.

The 2005 amendment of this section by section 10 of chapter 317, S.L. 2005 is effective for taxable years beginning after December 31, 2004, pursuant to section 10 of chapter 317, S.L. 2005.

The 2005 amendment of this section by section 2 of chapter 557, S.L. 2005 is effective for taxable years beginning after December 31, 2004, pursuant to section 3 of chapter 557, S.L. 2005.

The 2005 amendment of this section by section 2 of chapter 558, S.L. 2005 became effective January 1, 2005.

The 2005 amendment of this section by section 3 of chapter 560, S.L. 2005 is effective for taxable years beginning after December 31, 2004, and applies to qualifying planned gifts made after July 31, 2005, pursuant to section 5 of chapter 560, S.L. 2005.

The 2005 amendment of this section by section 4 of chapter 560, S.L. 2005 is effective for taxable years beginning after December 31, 2004, and applies to qualifying planned gifts made after July 31, 2005, pursuant to section 5 of chapter 560, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 561, S.L. 2005 became effective for taxable years beginning after December 31, 2004, pursuant to section 3 of chapter 561, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 562, S.L. 2005 became effective for taxable years beginning after December 31, 2004, pursuant to section 2 of chapter 562, S.L. 2005.

**Note.** - Section 57-38-30.3 was amended 8 times by the 2005 Legislative Assembly. Pursuant to section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in section 1 of chapter 561, Session Laws 2005, House Bill 1145; section 1 of chapter 562, Session Laws 2005, House Bill 1052; section 2 of chapter 558, Session Laws 2005, House Bill 1474; section 2 of chapter 557, Session Laws 2005, Senate Bill 2362; section 3 of chapter 560, Session Laws 2005, Senate Bill 2391; section 4 of chapter 560, Session Laws 2005, Senate Bill 2391; section 10 of chapter 317,

#### 57-39.2-04. Exemptions.

There are specifically exempted from the provisions of this chapter and from computation of the amount of tax imposed by it the following:

1. Gross receipts from sales of tangible personal property which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of North Dakota.

2. Gross receipts from the sales, furnishing, or service of passenger transportation service and gross receipts from the sales, furnishing, or service of freight transportation service when provided by a common carrier and title to the transported tangible personal property has passed from the seller to the purchaser.

3. Repealed by S.L. 1971, ch. 567, § 1.

4. Gross receipts from sales of tickets, or admissions to state, county, district, and local fairs, and the gross receipts from educational, religious, or charitable activities, unless the gross receipts from the event exceed five thousand dollars and the activities are held in a publicly owned facility, when the entire amount of net receipts is expended for educational, religious, or charitable purposes and the gross receipts derived by any public school district if such receipts are expended in accordance with section 15.1-07-10 or 15.1-07-11. This exemption does not apply to regular retail sales that are in direct competition with retailers. Gross receipts from educational, religious, or charitable activities held in a publicly owned facility are exempt if the sponsoring organization is a nonprofit music or dramatic arts organization that is exempt from federal income taxation and is organized and operated for the presentation of live public performances of musical or theatrical works on a regular basis.

5. Gross receipts from sales of textbooks to regularly enrolled students of a private or public school and from sales of textbooks, yearbooks, and school supplies purchased by a private nonprofit elementary school, secondary school, or any other nonprofit institution of higher learning conducting courses of study similar to those conducted by public schools in this state.

6. Gross receipts from all sales otherwise taxable under this chapter made to the United States or to any state, including the state of North Dakota, or any of the subdivisions, departments, agencies, or institutions of any state. A political subdivision of another state is exempt under this subsection only if a sale to a North Dakota political subdivision is treated as an exempt sale in that state. The governmental units exempted by this subsection must be issued a certificate of exemption by the commissioner and the certificate must be presented to each retailer whenever this exemption is claimed.

7. Gross receipts from the sale of drugs sold under a doctor's prescription.

8. Gross receipts from sales of adjuvants required by the chemical label for application of

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a product warranty, commercial fertilizers, fungicides, seed treatments, inoculants and fumigants, herbicides, and insecticides to agricultural or commercial vegetable producers and commercial applicators; chemicals used to preserve agricultural crops being stored; and seeds, roots, bulbs, and small plants to commercial users or consumers for planting or transplanting for commercial vegetable gardens or agricultural purposes.

9. Gross receipts from sales of oxygen sold to any person who purchases it upon the written order of a doctor for the person's own use for medical purposes.

10. Gross receipts from the sale of motor vehicles, farm machinery, alcoholic beverages, gasoline, insurance premiums, gaming tickets, or any other article or product, except as otherwise provided, upon which the state of North Dakota imposes a special tax.

11. Gross receipts from the sale of feed which is fed to poultry or livestock, including breeding stock and wool-bearing stock, for the purpose of producing eggs, milk, meat, fibers, or other products for human consumption and the gross receipts from the sale of feed purchased for the purpose of being fed to draft or fur-bearing animals. The word "feed" as used herein shall be construed to mean and include only salt, grains, hays, tankage, oyster shells, mineral supplements, limestone, molasses, beet pulp, meat and bone scraps, meal, drugs to be used as part of a feed ration, and other generally recognized animal feeds. The term "feed" includes drugs used as part of a feed ration, medicants, disinfectants, wormers, tonics, and like items.

12. Gross receipts from a sale otherwise taxable under this chapter made to a person who is a resident of an adjoining state which does not impose or levy a retail sales tax under the following conditions:

a. The nonresident is in the state of North Dakota for the express purpose of making a purchase and not as a tourist.

b. The nonresident furnishes to the North Dakota retailer a certificate signed by the nonresident in a form as the commissioner may prescribe reciting sufficient facts establishing the exempt status of the sale. Unless the certificate is furnished it must be presumed, until the contrary is shown, that the nonresident was not in the state of North Dakota for the express purpose of making a purchase.

c. The sale is fifty dollars or more.

13. Gross receipts from the sale of any motor vehicle taxable under the provisions of the motor vehicle excise tax laws of North Dakota. However, gross receipts from the rental of any motor vehicle for fewer than thirty days are not exempt but taxes imposed under home rule authority do not apply to such rentals.

14. Repealed by S.L. 1969, ch. 528, § 24.

15. Gross receipts from sales in which a contractor furnishes to the retailer a certificate which includes the contractor's license number assigned to the contractor under the provisions of

chapter 43-07. Such certificate shall be in the form prescribed by the commissioner and shall be furnished by the contractor to the retailer each calendar year prior to the making of any purchases during such calendar year from the retailer without liability for paying the tax to the retailer. Any contractor furnishing such certificate must report and remit the tax to the commissioner on purchases taxable under this chapter made by the contractor in the same manner as retailers remit such tax under this chapter.

16. Gross receipts from the sale of newsprint and ink used in the publication of a newspaper.

17. Gross receipts from the sale of all services furnished by any hospital, infirmary, sanatorium, nursing home, basic care facility, or similar institution to any patient or occupant.

18. Repealed by S.L. 1973, ch. 480, § 6.

19. Repealed by S.L. 1971, ch. 555, § 3.

20. Gross receipts from the sale of food supplies to any public school, to any parochial or private nonprofit school conducting courses of study similar to those conducted by public schools in this state, or to any nonprofit organization, for use by the public, parochial, or private school or nonprofit organization in sponsoring or conducting a lunch program or programs in and for any such public, parochial, or private nonprofit school.

21. Gross receipts from the leasing or renting of motion picture film to motion picture exhibitors for exhibition if the sale of tickets or admissions to the exhibition of the film is subject to the sales tax imposed by this chapter.

22. Gross receipts from the leasing or renting of factory manufactured homes, including mobile homes, modular living units, or sectional homes, whether or not placed on a permanent foundation, for residential housing for periods of thirty or more consecutive days and the gross receipts from the leasing or renting of a hotel or motel room or tourist court accommodations occupied by the same person or persons for residential housing for periods of thirty or more consecutive days.

23. Food purchased by a student under a boarding contract with a college, university, fraternity, or sorority.

24. Gross receipts from all sales when made to an eligible facility or emergency medical services provider for the use or benefit of its patient or occupant. For the purposes of this subsection:

a. "Eligible facility" means any hospital, skilled nursing facility, intermediate care facility, or basic care facility licensed by the state department of health, or any assisted living facility licensed by the department of human services; and

b. "Emergency medical services provider" means an emergency medical services

operation licensed by the state department of health under chapter 23-27.

25. Gross receipts from the sale of Bibles, hymnals, textbooks, and prayerbooks sold to nonprofit religious organizations.

26. Gross receipts from sales of prosthetic devices, durable medical equipment, mobility-enhancing equipment, or supplies for ostomy care or bladder dysfunction. For purposes of this subsection:

a. "Durable medical equipment" means equipment, not including mobility-enhancing equipment, for home use, including repair and replacement parts for such equipment, which:

- (1) Can withstand repeated use;
- (2) Is primarily and customarily used to serve a medical purpose;
- (3) Generally is not useful to a person in the absence of illness or injury;

and

- (4) Is not worn in or on the body.

"Durable medical equipment" includes equipment and devices designed or intended for ostomy care and management and equipment and devices used exclusively for a person with bladder dysfunction.

b. "Mobility-enhancing equipment" means equipment, not including durable medical equipment, including repair and replacement parts for mobility-enhancing equipment, which:

(1) Is primarily and customarily used to provide or increase the ability to move from one place to another and which is appropriate for use either at home or in a motor vehicle;

- (2) Is not generally used by persons with normal mobility; and

(3) Does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

"Mobility-enhancing equipment" includes crutches and wheelchairs for the use of disabled persons, equipment, including manual control units, van lifts, van door opening units, and raised roofs for attaching to or modifying a motor vehicle for use by a permanently physically disabled person, equipment, including elevators, dumbwaiters, chair lifts, and bedroom or bathroom lifts, whether or not sold for attaching to real property, for use by a permanently physically disabled person in that person's principal dwelling, and equipment, including manual control units, for attaching to or modifying motorized implements of husbandry for use by a permanently physically disabled person.

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c. "Prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for such a device, worn on or in the body to:

- (1) Artificially replace a missing portion of the body;
- (2) Prevent or correct a physical deformity or malfunction; or
- (3) Support a weak or deformed portion of the body.

"Prosthetic device" includes artificial devices individually designed, constructed, or altered solely for the use of a particular disabled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure, including the extremities of the individual, artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body, artificial teeth sold by a dentist, and eyeglasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.

d. "Supplies for ostomy care or bladder dysfunction" includes:

(1) Supplies designed or intended for ostomy care and management, including collection devices, colostomy irrigation equipment and supplies, skin barriers or skin protectors, and other supplies especially designed for use of ostomates.

(2) Supplies to be used exclusively by a person with bladder dysfunction, including catheters, collection devices, incontinent pads and pants, and other items used for the care and management of bladder dysfunction.

27. Gross receipts from the sale of electricity.

28. Gross receipts from the leasing or renting of any tangible personal property upon which a North Dakota sales tax or use tax has been paid or is payable.

29. Gross receipts from all sales otherwise taxable under this chapter when made to any nonprofit organization for meals, including the containers, packages, and materials used for wrapping food items, for delivery to persons who are confined to their homes by illness or incapacity, including senior citizens and disabled persons, for consumption by such shut-ins in their homes.

30. Gross receipts from all sales of recreational travel trailers not exceeding eight feet [2.44 meters] in width or thirty-two feet [9.75 meters] in length which are designed to be principally used as temporary vacation dwellings when made to persons who are residents of other states which impose excise taxes upon registration of such recreational travel trailers.

31. Gross receipts from the sale of money, including all legal tender coins and currency, and from the sale of precious metal bullion that has been refined to a purity of not less than nine hundred ninety-nine parts per one thousand and is in such form or condition that its value

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depends upon its precious metal content and not its form.

32. Gross receipts from sales to nonprofit voluntary health associations which are exempt from federal income tax under section 501(c)(3) of the United States Internal Revenue Code [26 U.S.C. 501(c)(3)]. As used in this subsection, a voluntary health association is an organization recognized by the internal revenue service, the national health council, the state tax commissioner, and the North Dakota secretary of state as a nonprofit organization that is exempt under section 501(c)(3) of the United States Internal Revenue Code and meets the following requirements: It has been organized and operated exclusively in providing services for the purposes of preventing and alleviating human illness and injury. Methods used to obtain these goals would include education, research, community service, and direct patient services, income being derived solely from private donations with some exceptions of a minimal membership fee. Its members are not limited to only individuals, who themselves are licensed or otherwise legally authorized to render the same professional services as the organization. The disbursement of funds within a volunteer health association is to be controlled by a board of directors who work voluntarily and without pay.

33. Repealed by S.L. 2005, ch. 580, § 19.

34. Gross receipts from the sale of byproducts, arising from the processing of agricultural products, for use in the manufacture or generation of steam or electricity.

35. Gross receipts from the sale of a mobile home which has been sold, bargained, exchanged, given away, or transferred by the person who first acquired it from a retailer in a sale at retail and upon which the North Dakota sales tax has previously been imposed.

36. Gross receipts from all sales of insulin in all its forms dispensed pursuant to the direction of a licensed physician, all sales of glucose usable for treatment of insulin reactions, all sales of urine and blood testing kits and materials, and all sales of insulin measuring and injecting devices, including insulin syringes and hypodermic needles.

37. Gross receipts from the sale of any aircraft taxable under the provisions of chapter 57-40.5.

38. Gross receipts from all sales of air carrier transportation property subject to ad valorem property taxation pursuant to the provisions of chapters 57-06, 57-07, 57-08, 57-13, and 57-32.

39. Gross receipts from sales of tangible personal property consisting of flight simulators or mechanical or electronic equipment for use in association with a flight simulator.

40. Gross receipts from sales of tickets or admissions to, or sales made at, an annual church supper or bazaar held in a publicly owned facility. For purposes of this subsection, "annual" means occurring not more than once in any calendar year.

41. Gross receipts from the initial sale of beneficiated coal taxed under chapter 57-60.

42. Gross receipts from electronic gaming devices licensed by the attorney general under chapter 53-06.1.

43. Gross receipts from all sales made to a nonprofit medical research institute. For purposes of this subsection, "nonprofit medical research institute" means an institute that is a member of the association of independent research institutes, which is not a private foundation, and which is recognized by the internal revenue service as having exempt status under 26 U.S.C. 501(c)(3).

44. Gross receipts from all sales of coal used in agricultural processing or sugar beet refining plants located within this state.

45. Gross receipts from the sale or lease of farm machinery, farm machinery repair parts, or irrigation equipment used exclusively for agricultural purposes.

46. Gross receipts from sales of tangible personal property purchased by a charitable organization to be awarded as a prize in a raffle conducted in accordance with law if the winner of the tangible personal property will be subject to sales or use taxes upon receiving the property.

47. Gross receipts from the sale of lottery tickets under chapter 53-12.1.

48. Gross receipts from all sales of tangible personal property purchased by a commerce authority and made a part of the infrastructure of a commerce authority, otherwise taxable under this chapter, if the personal property is placed within the geographic boundaries of the political subdivisions that created the commerce authority and is necessary and directly services infrastructure needs of the commerce authority. The commissioner shall issue a certificate of exemption to a political subdivision exempted by this subsection, and the political subdivision shall present the certificate of exemption to each retailer whenever the exemption is claimed.

49. Gross receipts from sales of carbon dioxide used for enhanced recovery of oil or natural gas.

50. Gross receipts from the sale at retail of hydrogen to power an internal combustion engine or fuel cell and equipment used directly and exclusively in production and storage of the hydrogen by a hydrogen generation facility in this state. For purposes of this subsection, "storage" means stationary and portable hydrogen containers or pressure vessels, piping, tubing, fittings, gaskets, controls, valves, gauges, pressure regulators, safety relief devices, and other accessories intended for hydrogen storage containers or pressure vessels.

51. Gross receipts from the sale of equipment to a facility, licensed under section 57-43.2-05, to enable the facility to sell diesel fuel containing at least two percent biodiesel fuel by volume. For purposes of this subsection, "biodiesel fuel" means fuel meeting the specifications adopted by the American society for testing and materials.

**Source.** S.L. 1967, ch. 459, § 4; 1967, ch. 460, § 2; 1969, ch. 472, § 3; 1969, ch. 520, § 1; 1969,

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ch. 521, § 1; 1969, ch. 522, § 1; 1969, ch. 523, § 1; 1969, ch. 528, § 24; 1971, ch. 176, § 2; 1971, ch. 555, § 3; 1971, ch. 567, § 1; 1971, ch. 568, § 1; 1971, ch. 569, § 1; 1971, ch. 570, § 1; 1971, ch. 571, § 1; 1971, ch. 572, § 1; 1973, ch. 479, § 1; 1973, ch. 480, §§ 1, 6; 1973, ch. 481, § 1; 1975, ch. 546, § 1; 1975, ch. 547, § 1; 1975, ch. 548, § 1; 1975, ch. 549, § 1; 1975, ch. 550, § 1; 1975, ch. 551, § 1; 1977, ch. 543, § 1; 1977, ch. 544, § 2; 1977, ch. 545, § 1; 1977, ch. 546, § 1; I.M. approved November 2, 1976, S.L. 1977, ch. 593, § 4; 1979, ch. 598, § 6; 1979, ch. 615, § 2; 1979, ch. 616, § 1; 1979, ch. 617, § 1; 1979, ch. 618, § 1; 1981, ch. 598, § 3; 1981, ch. 601, § 2; 1981, ch. 602, § 2; 1981, ch. 603, § 1; 1981, ch. 604, § 1; 1981, ch. 605, §§ 1, 2; 1983, ch. 592, § 6; 1983, ch. 644, § 2; 1983, ch. 647, § 2; 1987, ch. 670, § 2; 1987, ch. 709, § 1; 1987, ch. 710, § 1; 1987, ch. 711, § 1; 1989, ch. 170, § 8; 1989, ch. 317, § 13; 1989, ch. 717, § 1; 1989, ch. 718, § 1; 1989, ch. 719, § 1; 1991, ch. 677, § 1; 1991, ch. 678, § 1; 1993, ch. 562, § 1; 1993, ch. 563, § 1; 1993, ch. 564, § 1; 1995, ch. 243, § 2; 1997, ch. 496, § 2; 1997, ch. 497, § 1; 1999, ch. 164, § 11; 2001, ch. 534, § 3; 2001, ch. 535, § 3; 2001, ch. 536, § 2; 2001, ch. 537, § 1; 2003, ch. 96, § 21; 2003, ch. 454, § 6; 2003, ch. 524, § 5; 2003, ch. 536, § 1; 2003, ch. 539, §§ 6 to 10; 2005, ch. 15, § 40; 2005, ch. 94, § 5; 2005, ch. 470, § 7; 2005, ch. 571, §§ 1, 2; 2005, ch. 572, § 1; 2005, ch. 573, § 1; 2005, ch. 574, § 3; 2005, ch. 575, § 1; 2005, ch. 580, §§ 7, 19; 2005, ch. 582, § 2.

**Effective Date.** - The 2005 amendment of this section by section 5 of chapter 94, S.L. 2005 became effective for taxable events occurring after June 30, 2005, pursuant to section 8 of chapter 94, S.L. 2005.

The 2005 amendment of this section by section 7 of chapter 470, S.L. 2005 became effective May 4, 2005, pursuant to an emergency clause in section 12 of chapter 470, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 571, S.L. 2005 became effective for taxable events occurring after June 30, 2005, pursuant to section 3 of chapter 571, S.L. 2005.

The 2005 amendment of this section by section 2 of chapter 571, S.L. 2005 became effective for taxable events occurring after June 30, 2005, pursuant to section 3 of chapter 571, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 572, S.L. 2005 became effective July 1, 2005.

The 2005 amendment of this section by section 1 of chapter 573, S.L. 2005 is effective for taxable years or events occurring after June 30, 2005, pursuant to section 2 of chapter 573, S.L. 2005.

The 2005 amendment of this section by section 3 of chapter 574, S.L. 2005 is effective for taxable events occurring after June 30, 2005, pursuant to section 5 of chapter 574, S.L. 2005.

The 2005 amendment of this section by section 1 of chapter 575, S.L. 2005 became effective July 1, 2005.

The 2005 amendment of this section by section 7 of chapter 580, S.L. 2005 is effective for taxable events occurring after September 30, 2005, pursuant to section 20 of chapter 580, S.L. 2005, as amended by section 40 of chapter 15, S.L. 2005.

The repeal of subsection 33 of this section by section 19 of chapter 580, S.L. 2005, is effective for taxable events occurring after September 30, 2005, pursuant to section 20 of chapter 580, S.L. 2005, as amended by section 40 of chapter 15, S.L. 2005.

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The 2003 amendment of this section by sections 6 to 10 of chapter 539, S.L. 2003 is effective for taxable events occurring after September 30, 2005, pursuant to section 26 of chapter 539, S.L. 2003, as amended by section 2 of chapter 582, S.L. 2005.

**Note.** - The reference in subsection 4 to section 15.1-07-12 was corrected under section 46-03-10 because the history of this section and section 15-29-13 indicate that the reference should be to section 15.1-07-10 or 15.1-07-11.

Section 57-39.2-04 was amended 11 times by the 2005 Legislative Assembly. Pursuant to section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in and section 5 of chapter 94, Session Laws 2005, Senate Bill 2217; section 7 of chapter 470, Session Laws 2005, House Bill 1259; section 1 of chapter 571, Session Laws 2005, House Bill 1179; section 2 of chapter 571, Session Laws 2005, House Bill 1179; section 1 of chapter 572, Session Laws 2005, House Bill 1368; section 1 of chapter 573, Session Laws 2005, Senate Bill 2176; section 3 of chapter 574, Session Laws 2005, Senate Bill 2170; section 1 of chapter 575, Session Laws 2005, House Bill 1496; section 7 of chapter 580, Session Laws 2005, House Bill 1043; section 19 of chapter 580, Session Laws 2005, House Bill 1043; and section 2 of chapter 582, Session Laws 2005, Senate Bill 2050.

**Cross-References.** - Exemptions from taxation, see Const., Art. X, § 5.

Motor vehicle excise tax, see ch. 57-40.3.

Constitutional Exemption.

Exemption for Transportation.

Hotel or Motel Rental Accommodations.

Out-of-State Purchases.

Plant Fuel.

#### **Constitutional Exemption.**

Where federal contractor was found to be prime purchaser and user of goods, for purposes of deriving profit, such contractor was liable for sales tax. *Boeing Co. v. Omdahl*, 169 N.W.2d 696 (N.D. 1969).

#### **Exemption for Transportation.**

If retailer quotes a delivered price to a customer, then such price becomes the retail price, and sales and use tax will be computed upon the whole amount; but where the cost of transportation is added onto a quoted retail price and stated separately on the seller's invoice, receipts from transportation charges are not subject to tax; the statutory exemption of transportation costs is not limited to those who deal primarily in freight and passenger service, but also applies to retailers of goods who incidentally, but separately, provide transportation service; thus, where sales of drilling mud were made at taxpayer's warehouse and there were separate negotiations regarding its transportation to the oil field, receipts from transportation charges were not taxable. In re Sales & Use Tax Determination by State Tax Comm'r, 225 N.W.2d 571 (N.D. 1974).

Whether any sales or use tax is owed for freight charges depends on who has title to the goods at the time of delivery. *Cladding Technology, Inc. v. State*, 1997 ND 84, 562 N.W.2d 98 (1997).

#### **Hotel or Motel Rental Accommodations.**

When the legislature amended subdivision 22 of this section to include the "same person" restriction, the legislature intended to restrict the sales tax exemption to situations where the same natural person or

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natural persons occupy an accommodation for 30 consecutive days or more. Under the amended version of this section, corporations are not "persons;" accordingly, corporations that rent rooms for their employees are subject to sales tax, unless the same employee or employees occupy the accommodation for 30 consecutive days or more. *Burlington N.R.R. v. State ex rel. Hanson*, 500 N.W.2d 615 (N.D. 1993).

#### **Out-of-State Purchases.**

Former Section 57-40.2-04(15) (now 57-40.2-04(12)) grants a use tax exemption for items purchased out of state that would not be subject to sales tax if purchased in-state, under this section. *Cladding Technology, Inc. v. State*, 1997 ND 84, 562 N.W.2d 98 (1997).

#### **Plant Fuel.**

Because the legislature has expressly provided that the gross production tax is not in lieu of excise taxes, the legislature did not intend to exempt plant fuel from sales or use taxes under the exemption provided by subsection 10 of this section. *Rocky Mt. Oil & Gas Ass'n v. Conrad*, 405 N.W.2d 279 (N.D. 1987).

### **DECISIONS UNDER PRIOR LAW**

Foreign Retailer Doing Business in State.  
Tax on Federal Instrumentality.

#### **Foreign Retailer Doing Business in State.**

The sales tax law applied to sales made by a foreign retailer doing business in the state and did not impose an unconstitutional burden on interstate commerce. *Jewel Tea Co. v. State Tax Comm'r*, 70 N.D. 229, 293 N.W. 386 (1940).

#### **Tax on Federal Instrumentality.**

The test of whether a tax laid on a federal instrumentality was constitutional was whether it hindered or embarrassed the instrumentality in the performance of its governmental functions. *Federal Land Bank v. Bismarck Lumber Co.*, 70 N.D. 607, 297 N.W. 42 (1941), rev'd on other grounds, 314 U.S. 95, 62 S. Ct. 1, 86 L. Ed. 65 (1941).

Tax laid on sales of lumber to a federal land bank to be used in the conservation and repair of buildings and fences on farm lands acquired by the bank through mortgage foreclosures was invalid and unconstitutional. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S. Ct. 1, 86 L. Ed. 65 (1941).

#### **Collateral References. - Taxation <key> 1231.**

68 Am. Jur. 2d, Sales and Use Taxes, §§ 122-134, 136-141, 143-152, 157, 161.

Exemption of casual, isolated, or occasional sales under sales and use taxes, 42 A.L.R.3d 292.

Religious organization's exemption from sales or use tax, 54 A.L.R.3d 1204.

Transportation, freight, mailing, or handling charges billed separately to purchaser of goods as subject to sales or use taxes, 2 A.L.R.4th 1124.

Applicability of sales or use taxes to motion pictures and video tapes, 10 A.L.R.4th 1209.

Eyeglasses or other optical accessories as subject to sales or use tax, 14 A.L.R.4th 1370.

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Exemption, from sales or use tax, of water, oil, gas, other fuel, or electricity provided for residential purposes, 15 A.L.R.4th 269.

What constitutes newspapers, magazines, periodicals, or the like, under sales or use tax law exemption, 25 A.L.R.4th 750.

Exemption of charitable or educational organization from sales or use tax, 69 A.L.R.5th 477.

Parts and supplies used in repair as subject to sales and use taxes, Sales Tax on Repair Parts, 113 A.L.R.5th 313.

#### 57-40.3-04. Exemptions.

There are specifically exempted from the provisions of this chapter and from computation of the amount of tax imposed by it the following:

1. Any motor vehicle acquired by, or leased and in the possession of, a resident disabled veteran under the provisions of Pub. L. 79-663 [38 U.S.C. 3901] or who has a one hundred percent service-connected disability as determined by the department of veterans affairs who registers the vehicle with a distinctive license plate issued by the department of transportation under subdivision j of subsection 2 of section 39-04-18.

2. Any motor vehicle owned by or in possession of the federal or state government or a political subdivision thereof.

3. Motor carrier vehicles in excess of twenty thousand pounds [9071.85 kilograms] gross weight, whether owned or leased, engaged in interstate commerce but only to the extent their fleet miles outside North Dakota bear to their total fleet miles. For the purposes of this subsection, "fleet miles" means those miles reported in accordance with the international registration plan and must coincide with the mileage reporting period required by the plan. For the purposes of this subsection, "motor carrier vehicles" means any vehicles used upon public streets or highways for the purpose of transporting persons or property for commercial purposes.

4. Any motor vehicle transferred without consideration to or from a person within thirty days prior to that person entering into the armed services of the United States or within thirty days after discharge therefrom or while serving in the armed services of the United States; provided the person certifies to the director of the department of transportation that the transfer is made only by reason of entering into, serving in, or being discharged from the armed services of the United States.

5. a. A motor vehicle acquired by inheritance from, by bequest of, or operation of a trust created by a decedent who owned it;

b. The transfer of a motor vehicle that was previously titled or licensed in the name of an individual or in the names of two or more joint tenants and subsequently transferred without monetary consideration to one or more joint tenants, including a transfer into a trust in which one or more of the joint tenants is beneficiary or trustee;

c. The transfer of a motor vehicle by way of gift between a husband and wife, parent and child, or brothers and sisters, including a transfer into a trust in which the trustor and beneficiary occupy one of these relationships;

d. The transfer of a motor vehicle without monetary consideration into a trust in which the beneficiary is the person in whose name the motor vehicle was previously titled or licensed;

e. The transfer of a motor vehicle to reflect a new name of the owner caused by a business reorganization in which the ownership of the reorganized business remains in the same person or persons as prior to the reorganization, but only if the title transfer is completed within one hundred eighty days from the effective date of the reorganization; and

f. The transfer of a motor vehicle without monetary consideration from a revocable living trust to the spouse, child, or sibling of the trustor.

6. Motor vehicles transferred between a lessee and lessor; provided, that the lessee has been in continuous possession of such vehicle for a period of one year or longer, and further provided that the lessor has paid either the tax imposed under section 57-40.3-02 at the time of titling or licensing the vehicle in this state or the use tax imposed by chapter 57-40.2.

7. Any motor vehicle in the possession of and used as a bus exclusively by a nonprofit senior citizens' or handicapped persons' corporation; provided, that such bus may not be used for commercial activities.

8. Any motor vehicle that does not exceed ten thousand pounds [4535.92 kilograms] gross weight and which is acquired by, or leased and in the possession of, a permanently physically disabled, licensed driver who is restricted to operating only motor vehicles equipped with special controls to compensate for the disability, or by permanently physically disabled individuals who have either surrendered or who have been denied a driver's license because of a permanent physical disability, provided the individuals obtain from the director of the department of transportation or the director's authorized representative a statement that the individual has a restricted driver's license or has either surrendered or has not been issued a driver's license because of a permanent physical disability; a copy of the statement must be attached to the application for registration of the title to the motor vehicle for which the exemption from tax under this chapter is claimed. Any motor vehicle acquired subject to this exemption must be disposed of either by transfer to another permanently physically disabled person or by a trade-in on another exempt sale or by a transfer involving a sale subject to sales or use tax before another motor vehicle can be acquired subject to the benefits of this exemption clause.

9. Any motor vehicle registered under chapter 39-04 for the first time by a person other than a manufacturer of motor vehicles, as defined in section 39-01-01, who assembled the motor vehicle for that person's own use.

10. Motor vehicles acquired by, or leased and in the possession of, any parochial or private nonprofit school to be used for the transportation of students; provided, that to qualify a school must normally maintain a regular faculty and curriculum and must have a regularly organized body of students in attendance, and provided that the vehicles are not to be used for commercial activities.

11. Any motor vehicle with a gross vehicle weight of at least a class six, seven, or eight chassis, purchased for installation or assembly of heavy duty equipment by a person engaged in

the business of installing or assembling the equipment, which when completed forms an integral part of a vehicle, has limited marketability, and is not normally sold to the general public. This exemption applies only when the manufacturer's statement of origin is reassigned to the installer or assembler by a licensed new motor vehicle dealer on a form prescribed by the tax commissioner. The motor vehicle and installed equipment must be sold as a unit when completed. "Heavy duty equipment" includes fuel delivery tanks, refuse bodies, cranes, aerial bucket devices, bus bodies regardless of gross vehicle weight, and digger derricks.

**12.** Motor vehicles acquired through purchase or gift by any nonprofit county and local historical societies that are exempt from federal income taxation under section 501(c)(3) of the United States Internal Revenue Code [26 U.S.C. 501(c)(3)].

**13.** Any motor vehicle acquired by, or leased and in the possession of, a resident who was a prisoner of war and who registers the vehicle with a distinctive license plate issued by the department of transportation under subdivision o of subsection 2 of section 39-04-18. The owner or lessor of the motor vehicle who qualifies for the exemption under this subsection is entitled to a refund of taxes paid under this chapter on acquisition or leasing of the vehicle if the distinctive license plate was acquired not more than sixty days after acquisition or leasing of the vehicle.

**14.** Any motor vehicle acquired by a charitable organization to be awarded as a prize in a raffle conducted in accordance with law if upon registration the motor vehicle will be subject to taxes under this chapter or the motor vehicle is registered in another state.

**Source.** S.L. 1967, ch. 462, § 3; 1967, ch. 463, § 3; 1969, ch. 530, § 2; 1973, ch. 483, § 1; 1975, ch. 555, § 2; 1977, ch. 550, § 1; 1977, ch. 551, §§ 1, 2; 1979, ch. 618, § 3; 1979, ch. 619, § 1; 1981, ch. 607, § 1; 1983, ch. 653, § 1; 1989, ch. 722; 1991, ch. 683, § 1; 1991, ch. 684, § 1; 1991, ch. 685, § 1; 1999, ch. 523, § 1; 1999, ch. 524, § 1; 2001, ch. 334, § 2; 2001, ch. 543, § 3; 2001, ch. 544, § 1; 2003, ch. 536, § 2; 2003, ch. 540, § 1; 2005, ch. 340, § 8; 2005, ch. 583, § 1.

**Effective Date.** - The 2005 amendment of this section by section 8 of chapter 340, S.L. 2005 became effective August 1, 2005.

The 2005 amendment of this section by section 1 of chapter 583, S.L. 2005 became effective July 1, 2005.

**Note.** - Section 57-40.3-04 was amended 2 times by the 2005 Legislative Assembly. Pursuant to section 1-02-09.1, the section is printed above to harmonize and give effect to the changes made in section 1 of chapter 583, Session Laws 2005, Senate Bill 2123; and section 8 of chapter 340, Session Laws 2005, Senate Bill 2208.

**TESTIMONY  
HOUSE BILL 1393  
SENATE POLITICAL SUBDIVISIONS  
FEBRUARY 23, 2007**

- Mr. Chairman and members of the committee. My name is Bob Lamp and I am appearing before you in support of Section 4 of House Bill 1393 on behalf of the Automobile Dealers Association of North Dakota. This association consists of the franchised new car dealers in our state.
- We are appearing specifically in support of Section 4 of House Bill 1393. We do not have a position on the other three sections of the bill. Section 4 relates to the tax exempt status of the sale of motor vehicles to Native Americans who are enrolled members of a federally recognized Indian tribe and reside within the boundaries of any reservation in this state. This section, if approved, will allow delivery of a motor vehicle to qualified Native Americans at the point of sale rather than requiring them to be delivered to the reservation.
- The issue for dealers revolves around an Attorney General's opinion which states that a motor vehicle sold to a Native American must be delivered to the reservation where the purchaser resides in order for the transaction to be tax exempt. If the dealer fails or refuses to deliver the vehicle, motor vehicle excise tax must be collected. This opinion has become very cumbersome and costly for dealers.
- It is important to understand that motor vehicle excise tax is a title transfer tax. Unlike sales tax that is due and payable at the point of sale, motor vehicle excise tax is paid at the time the purchaser applies for title and license for the motor vehicle. Dealers are not required to collect this tax at the time of the sale. In nearly all situations, however, the dealer will make application for title and license as a service to their customers but they are not required to do so. Requiring dealers to collect from Native Americans if the vehicle is not delivered to the reservation distinguishes these transactions from all other dealer sales.
- Our industry believes the tax exemption for qualifying Native Americans should not be determined on where the purchaser takes possession of the motor vehicle. If the Native American can verify they are an enrolled member of a federally recognized Indian tribe and resides within the boundaries of a reservation the transaction should be tax exempt regardless of where they take possession of the motor vehicle.
- Before requesting an amendment to House Bill 1393 in the House, we visited with the bill's prime sponsor, Tax Commissioner Cory Fong and Attorney General Wayne Stenehjem about this issue. None of them indicated any concern about our request for making this legislative change. On behalf of the franchised new car dealers in North Dakota, we ask for your support to this section of House Bill 1393.

Robert L. Lamp  
Automobile Dealers Association of North Dakota

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**North Dakota State Legislature  
60<sup>th</sup> Legislative Assembly**

**Before the Senate Political Subdivisions Committee**

**Testimony in favor of HB 1393**

**Thomas M. Disselhorst  
Attorney at Law**

**February 23, 2007**

Mr. Chairman, members of the Senate Political Subdivisions Committee. My name is Tom Disselhorst. I am a practicing attorney in Bismarck, North Dakota. For purposes of identification only, I am also the full-time general counsel for United Tribes Technical College in Bismarck, North Dakota. This testimony is provided at the request of Representative Rod Froehlich, a sponsor of HB 1393 and is in favor of the bill, as amended.

For most of the past 31 years, I have been a practicing attorney in North Dakota and have represented both Indian tribes, tribal organizations and tribal members in a variety of circumstances. From 1992 to 1995 I represented the Turtle Mountain Band of Chippewa as general counsel, and from 1995 to 2003, I represented the Three Affiliated Tribes as general counsel. I still work with the Three Affiliated Tribes on certain matters. Since 1981, I have been general counsel for United Tribes Technical College and United Tribes of North Dakota, which is the umbrella organization for all of the five tribes with a presence in North Dakota.

Over about the last five years, I have been approached by a least half-dozen individuals who believe they are being taxed unfairly by the state in a variety of circumstances. I have referred these individuals to other attorneys because I am fully employed at the present. But in my work with the Indian tribes I have represented and with United Tribes of North Dakota, I have researched the issue that is dealt with in HB 1393 thoroughly, discussed this issue with the previous tax commissioner, Rick Clayburgh and his staff and with other attorneys working on the issue.

HB 1393 does three things, all of which are in significant respects recognize the current state of the law in the State of North Dakota, but which are not explicitly set forth in the North Dakota Century Code: In Sections 1 and 2, it exempts from the state income tax income that is earned by any Indian who is enrolled in any federally recognized Indian tribe and who is residing and

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working within the boundaries of any Indian reservation in the state. In Section 3, it exempts Indians living on a reservation and enrolled in any federally recognized Indian tribe from paying state sales tax within the boundaries of any Indian reservation in the state, and in Section 4, it exempts Indians living on any Indian reservation in the state from paying the sales tax on motor vehicles purchased anywhere in the state. All of these provisions are prospective only – HB 1393 does not provide relief for those who already have been assessed state income taxes or other taxes.

If the bill simply recognizes current law, the question might be why is the bill necessary?

To explain, a bit of background on state and federal law regarding Indians and Indian tribes is helpful.

When North Dakota became a state in 1889, the federal enabling statute, the provisions of which were enshrined in the state's constitution in Article XIII, Section 4, provided that the state would have no jurisdiction over the Indian tribes and the tribal members residing on the reservations of those tribes within the state. Of course, the laws have changed some since 1889.

First, Tribal members were granted U.S. citizenship in 1924. Second, using its plenary power over Indian affairs, the Congress in 1953 authorized states to assume jurisdiction over Indian reservations if the state chose to do so. North Dakota never chose to assume jurisdiction over Indian reservations, and the 1953 law, also called P.L. 280, was later amended to require that the Tribes must consent before the state can exercise jurisdiction over them. No Tribe in North Dakota has ever agreed to state jurisdiction over its members and its reservation.

Subsequently, starting in 1978, the U.S. Supreme Court decisions have said that tribes only have very limited jurisdiction over non-Indians within the boundaries on the reservations, and the Supreme Court has also distinguished in certain circumstances state powers over Indians who are members of one reservation and living on another. It is from these last decisions mentioned that the state tax department believes it has the authority to tax Indians working and living on one reservation but enrolled in another.

It is therefore one purpose of HB 1393 to clarify the law regarding this kind of income tax collection by providing an additional exemption. The specific reasons for the exemption and the current status of these issues are set forth below.

#### 1) Regarding the income tax exemptions

Currently, the state tax department has been seeking to recover state income tax from Indians who work and live on one reservation but are enrolled in another reservation. This policy, the tax department states, has been in effect for a number of years (since the 1980's). The tax department argues that the policy is lawful because of certain U.S. Supreme Court decisions; but in fact there is nothing stated directly in North Dakota or federal law that allows such taxation of the income of Indians who work and live on one reservation but are enrolled in another tribe.

The state tax department will note that apparently at least one or two other states collect income tax from Indians who work and live on one reservation but are enrolled in another tribe. However, there is no North Dakota Supreme Court decision that allows such taxation, there is no U.S. Supreme Court decision directly on this point. Finally, the state tax department did not seek an Attorney General's opinion on this issue despite the fact that a current Supreme Court decision, White Eagle v. Dorgan, decided in 1975, a copy of which is attached, does not allow such taxation, claiming that this decision has been "superseded" by the U.S. Supreme Court decisions relied upon.

Instead, the state tax department, relying on the opinion of the assistant attorney general who works for the tax department, decided on its own to start taxing Indians living and working on one reservation but enrolled in another, and then let the taxpayers seek judicial relief if the taxpayers believed the taxation was in error. There is now pending in the District Court of North Dakota an appeal of an administrative law judge's decision regarding this issue, and so the legal issue for those taxpayers affected by the state tax department's policies in the past will eventually be decided in the state Supreme Court.

In this situation, the Enabling Act admitting North Dakota into the United States, has not been altered by Congress. The Enabling Act does not distinguish among the various Indian tribes in North Dakota, it simply says the state has no jurisdiction over them. Further, as noted, no Tribe within North Dakota has accepted the jurisdiction of the state. Therefore, there is no good reason to apply the income tax laws unevenly to Indian citizens enrolled in one tribe who live and work on another reservation.

The policy of the tax department is also applied very unevenly and intermittently. The unevenness of the enforcement is one reason the state tax department cannot give a fiscal note. This uneven enforcement occurs for several reasons:

- a) The state only learns about income earned on the reservation by an Indian who is enrolled in another tribe if someone tells the state tax department about that Indian's earnings. This invites an atmosphere of retribution, if someone learns about the tax department's policy and wants to make life more difficult for the Indian working and living on one reservation but enrolled in another tribe – for example, the person who complains about another Indian to the tax department may feel that the Indian complained about has taken his or her job.
- b) In many situations, the state cannot enforce its tax collection against the Indian working and living on one reservation but enrolled in another because the Indian is working for the tribe or a tribal agency or a tribal political subdivision, and the state cannot enforce its tax collection powers against any tribe within North Dakota under present federal and state law.

Because the tax department's policy regarding income taxation of Indians living and working on the reservations is applied so unevenly, it would be better state policy, and should be state law, to provide a uniform income tax exemption for Indian citizens who are from one reservation but living and working in another.

2) In Section 3, HB 1393 also exempts Indians living on the reservation from state sales taxes for goods purchased on the reservation. This is a recognition of present law, and makes it clear again that it is better policy not to try to distinguish between members of one tribe who live and work on another reservation.

3) The same kind of argument applies to Section 4, exemption purchases of motor vehicles anywhere in the state from state motor vehicle taxes.

The question has been asked whether this issue is of importance to Indian citizens. I can assure you that it is, because when you are asked to pay several years of back taxes, the penalties involved are substantial and the tax burden could mean bankruptcy and business failure. There is no reason for the state to impose this burden on its Indian citizens.

For the reasons stated above, I urge the Senate Political Subdivisions Committee to give a DO PASS recommendation to HB 1393. This bill, if passed, will certainly mean a great deal to many Indian citizens of our state.



North Dakota Supreme Court Opinions ◀▲□/?

White Eagle v. Dorgan, 209 N.W.2d 621 (N.D. 1973)

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Melvin White Eagle, Plaintiff and Respondent

v.

Byron L. Dorgan, Tax Commissioner, State of North Dakota,  
Defendant and Appellant

and

R. B. Luger, doing business as the Diamond Z Food Center; and  
Dean Barker, doing business as Barker's Indian Trading Post;  
Defendants

Civil No. 8855

Joseph F. Condon, Plaintiff and Respondent

v.

Byron L. Dorgan, Tax Commissioner, State of North Dakota,  
Defendant and Appellant

Civil No. 8856

Henry Bailey, Plaintiff and Respondent

v.

Byron L. Dorgan, Tax Commissioner, State of North Dakota,  
Defendant and Appellant

Civil No. 8857

Harry Fast Horse, Plaintiff and Respondent

v.

Byron L. Dorgan, Tax Commissioner, State of North Dakota,  
Defendant and Appellant

and

Lloyd L. Martinson, doing business as the Martinson Store,  
Defendant

Civil No. 8858

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[209 N.W.2d 621]

**Syllabus of the Court**

1. In the absence of an express enactment by the Congress providing that State law shall apply, the State of North Dakota may not assume jurisdiction to impose state income tax on individual Indians

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residing on the Standing Rock Sioux Indian Reservation, on income earned on the reservation, without specific agreement of the tribal members residing on the reservation conferring jurisdiction on the State.

2. Business done on the reservation with reservation Indians is immune from state tax not only because such business takes place on the reservation but also because the Congress, in the exercise of the power granted in the United States Constitution, has undertaken to regulate business on the reservation so completely that there is no room for the States to legislate on the subject.

3. For reasons stated in the opinion, all attempts by the State to tax the plaintiffs in these actions are invalid, and the judgment of the district court in each of these cases is affirmed.

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Appeals from the District Court of Burleigh County, the Honorable W. C. Lynch, Judge.

AFFIRMED.

Opinion of the Court by Strutz, C. J.

Albert A. Wolf, Bismarck, and Marvin J. Sonosky, Washington, D. C., for plaintiffs and respondents.

Paul M. Sand, First Assistant Attorney General, and Kenneth M. Jakes, Albert R. Hausauer, and Robert W. Wirtz, Special Assistant Attorneys General, Bismarck, for defendant and appellant Tax Commissioner.

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**White Eagle v. Dorgan**

Civil No. 8855

**Condon v. Dorgan**

Civil No. 8856

**Bailey v. Dorgan**

Civil No. 8857

**Fast Horse v. Dorgan**

Civil No. 8858

**Strutz, Chief Justice.**

Each of the plaintiffs in the above four actions is an Indian residing on the Standing Rock Indian Reservation in North Dakota. Three are members of the Standing Rock Sioux Tribe, and the fourth is a member of the Shenyenne River Sioux Tribe. All of them earn their livelihood on the reservation, the plaintiff White Eagle as an employee of the Standing Rock Sioux tribal office in Fort Yates; the

plaintiff Condon as an employee of the United States Bureau of Indian Affairs; the plaintiff Bailey as the owner and operator of a service station on the reservation; and the plaintiff Fast Horse, who has lived on the reservation for many years, has purchased food and other items from retail outlets on the reservation and has been compelled to pay sales tax on the purchases so made.

Three non-Indian owners of retail stores located on the reservation were joined as defendants in the actions in the district court. At the time the actions were commenced, one of such owners was licensed as an Indian trader under the provisions of Title 25, U.S.C.A., Section 261. The other two stores were licensed as Indian traders after the commencement of suit and before the trial of these actions.

The plaintiffs White Eagle and Fast Horse were required to pay North Dakota sales tax on purchases of food and other items from such retailers. White Eagle, in addition, was required to pay income tax on his income as an employee of the tribe, which income was earned exclusively on the reservation. The appellant Dorgan, as State Tax Commissioner, demanded that the plaintiff Condon pay state income tax on his income as employee of the United States Bureau of Indian Affairs, which income was earned exclusively on the reservation. The Tax Commissioner asserts that the plaintiff Bailey, who owns and operates a service station on the reservation, must pay state income tax on his income and sales tax on the gross receipts of his business, and that he must pay a business-privilege tax for doing business in the State of North Dakota, although such business is conducted exclusively on the reservation.

These four actions were commenced to test the power of the State of North Dakota to impose taxes on and collect taxes from Indians on the reservation. The facts, as briefly outlined above, were stipulated by the parties. The trial court, after hearing, held for the plaintiff in each of the actions, and appeal by the State Tax Commissioner to this court followed,

The sole issue for this court to determine on these appeals is whether the State has the power to collect taxes from an

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Indian residing on an Indian reservation, where the income is earned and the business is conducted entirely on the reservation.

The problems presented by the appeals in these four cases are problems which have plagued the courts for many years. Indians born in the United States and subject to its jurisdiction are citizens of the United States and of the State in which they reside. As such citizens, they have constitutional rights, privileges, and immunities, but they also have corresponding legal duties and obligations. However, the many and varied treaties which have been entered into with different Indian tribes by the Federal Government, the many laws enacted by the Congress on the subject of Indian rights and obligations, and the many Federal court decisions interpreting such

treaties and laws make it very difficult to define an Indian's rights and obligations. As a general rule, however, Indians while living on Indian reservations are not subject to the laws of the State in which they reside.

It has been stipulated that each of the plaintiffs in these actions is an Indian and that he resides on an Indian reservation. Thus the fact that an Indian may terminate his tribal relationship, and may cease to be an Indian for all legal purposes whenever he determines to do so, is immaterial so far as these actions are concerned.

It now is well settled that the State has no power over the conduct of Indians in Indian country. Gourneau v. Smith, N.W.2d (N.D. 1973); In re Whiteshield, 124 N.W.2d 694 (N.D. 1963). Although methods by which Indians may accept jurisdiction of State courts have been provided by Federal and State law, such jurisdiction has not, in fact, been accepted by Indians on any North Dakota reservation. Until Indians do so act, the State has no jurisdiction over any civil cause arising on an Indian reservation in this State. Public Law 90-284, Sec. 402; Chap. 27-19, N.D.C.C.; In re Whiteshield, *supra*.

We now face the question of whether the State may levy and collect taxes from an Indian residing on an Indian reservation under the conditions set forth above. The recent decision of the United States Supreme Court in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct. 1257,

36 L.Ed.2d 129 (1973), would seem to settle the issue of payment of income tax by White Eagle and Condon on income which they earn on the reservation. In McClanahan, the United States Supreme Court held that the State of Arizona may not assume jurisdiction to impose state income tax upon individual Navajo Indians, residing on the Navajo Reservation, in the absence of an agreement by the tribe submitting to such jurisdiction.

We believe the same would be true in this State, and that in the absence of an agreement by the Indians residing on the Standing Rock Sioux Reservation accepting jurisdiction of the State of North Dakota to impose income tax upon individual members of the tribe, this State has no jurisdiction to impose such tax.

The issue of the validity of a levy by a State of a sales tax or business-privilege tax upon a seller doing retail trading business with Indians on a reservation has previously been determined by the United States Supreme Court in the case of Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In that case, the validity of a tax on the gross sales of a company doing retail business with Indians was considered by the Supreme Court. Arizona sales tax was levied on the gross sales of an Indian trader doing business on the Arizona part of the Navajo Indian Reservation. We believe that the decision in Warren Trading Post Co. applies to our situation and makes it illegal to collect a tax on sales made by a licensed Indian trader to Indians living on a reservation. The Supreme Court held in that case that

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the Congress, in the exercise of its power granted by Article I, Section 8, of the United States Constitution, which gives to the Congress the power to regulate commerce with foreign nations and among the several States, "and with the Indian Tribes," has undertaken to regulate trading on the reservation in so complete and comprehensive a manner that there is no room for States to legislate on that subject. The Court stated:

"We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax. Insofar as they are applied to this federally licensed Indian trader with respect to sales made to reservation Indians on the reservation, these state laws imposing taxes cannot stand." [Emphasis supplied.]

We believe this ruling is so sweeping that it cannot be successfully argued that the attempt by the State to impose its taxes in these cases can in any way be sustained.

For reasons stated in this opinion, the judgment of the district court in each of these cases must be affirmed.

**Per Curiam.**

The foregoing opinion was prepared by the Honorable Alvin C. Strutz, Chief Justice, before his death. It is adopted by the undersigned as the opinion of this court.

Ralph J. Erickstad, C.J.  
Obert C. Tiegen  
William L. Paulson  
Harvey B. Knudson

Vogel, J., not being a member of this court at the time of submission of this case, did not participate.

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