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## TRIBAL TAXATION ISSUES COMMITTEE

Friday, September 4, 2020  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Governor Doug Burgum, Chairman, called the meeting to order at 10:30 a.m.

**Members present:** Senators Dwight Cook, Joan Heckaman, Rich Wardner; Representatives Josh Boschee, Craig Headland, Chet Pollert; Citizen Members Governor Doug Burgum, Scott J. Davis, Brent Sanford

**Members absent:** Citizen Member Ryan Rauschenberger

**Others present:** See [Appendix A](#)

**It was moved by Representative Headland, seconded by Senator Wardner, and carried on a voice vote that the minutes of the December 16, 2019, meeting be approved as distributed.**

Governor Burgum called on Ms. Donnita Wald, General Counsel, Tax Department, for a presentation ([Appendix B](#)) regarding other states' models for tax collection agreements and existing state-tribal tax collection agreements. Ms. Wald said the most common methods other states use for tax revenue sharing agreements with tribal nations include a fixed percentage revenue split, a per capita split, and a per capita plus a fixed percentage split. She said revenue sharing agreements in Montana use a per capita method based on consumption for all tax types, including cigarette, alcohol, and motor fuels. She said the only exception is Montana's oil and gas tax revenue sharing agreement, which uses a fixed percentage split allocating 50 percent of revenue to the state and 50 percent to the tribe. She said South Dakota uses a fixed percentage method for all tax types allocating 69 percent of revenue to the tribe and 31 percent to the state. She said Minnesota uses a per capita plus a fixed percentage method for all tax types with the per capita formula creating the base and the base being shared equally between the state and the tribe. She said North Dakota uses a per capita plus a fixed percentage method for all tax types except the oil and gas tax, which uses a fixed percentage method. She reviewed the common elements in existing and potential state-tribal tax agreements and the revenues for existing state-tribal tax agreements.

In response to a question from Governor Burgum, Ms. Wald said South Dakota's fixed percentage method specifically tracks sales made on each tribal reservation. She said Minnesota's formula, which is similar to North Dakota's, consists of a per capita formula based on the entire state and then a fixed percentage split based on each tribe's population.

Governor Burgum called on Mr. Lynn Helms, Director, Department of Mineral Resources, for an update on oil and gas activity and horizontal drilling near the boundaries of the Fort Berthold Reservation. Mr. Helms said an issue had been raised regarding the exact location of the reservation boundaries and which wells fall on either side of the boundary. He said the department has been using a map provided by the Bureau of Indian Affairs. He said 214 wells cross the reservation boundary. He said only nine drilling rigs are operating in the state, and of the eight rigs drilling oil and gas, three are located on the Fort Berthold Reservation. He said concerns voiced by oil and gas operators operating on the reservation include uncertainties surrounding the Coronavirus (COVID-19) pandemic's effects on drilling; changes to the administration in January 2021; tariff proposals with potential negative impacts on the state; gas capture requirements; uncertainty regarding the Dakota Access Pipeline; the legal battle regarding the ownership of minerals underneath the riverbed; and the stability of the existing state-tribal oil and gas tax agreement.

In response to a question from Mr. Mark Fox, Chairman, Three Affiliated Tribes of the Fort Berthold Reservation, Mr. Helms said the oil and gas operators have expressed appreciation for the certainty of the state-tribal oil and gas tax agreement and have noted a preference not to work with multiple taxing environments.

Governor Burgum called on Mr. Joel Brown, President, MineralTracker, for a presentation ([Appendix C](#)) on the estimated ultimate recovery of oil and gas wells horizontally drilled near the Fort Berthold Reservation boundaries. Mr. Brown said his company conducted a forecast and analysis of projected production for the 214 wells subject to the study and for which wellbores cross the reservation boundary. He said the study analyzed each well individually, accumulated each well's historical production, used a reservoir engineering technique to project how much oil and gas likely remains in each well, and conducted a forecast and analysis to calculate the well's projected production based on historical and economic data. He said the study estimated an additional 73 to 93 cross-border wells might be drilled in the future.

Mr. Brown said for the 132 wells whose wellheads are located outside the reservation boundary, 42 percent of the lateral footage is within the boundary and 58 percent is outside the boundary, and the wells are estimated to produce 30.6 million barrels of oil in the future. He said the study determined the prorated reserves attributable to footage inside the boundary would be 12.9 million barrels of oil, and the reserves attributable to footage outside the boundary would be 17.8 million barrels of oil, for a difference of 4.9 million barrels of oil.

Mr. Brown said for the 82 wells whose wellheads are located inside the reservation boundary, 44 percent of the lateral footage is within the boundary and 56 percent is outside the boundary, and the wells are estimated to produce 21.5 million barrels of oil in the future. He said the study determined the prorated reserves attributable to footage inside the boundary would be 7.8 million barrels of oil, and the reserves attributable to footage outside the boundary would be 13.7 million barrels of oil, for a difference of 5.9 million barrels of oil.

In response to a question from Governor Burgum, Mr. Brown said in determining the number of additional cross-border wells that could be drilled in the future, the study only considered spacing units that already had some level of development in place.

In response to a question from Governor Burgum, Mr. Brown said the study estimated the 214 cross-border wells would produce approximately 50 million barrels of oil in the future. He said the study calculated the prorated amount of oil associated with the footage inside and outside the boundary and determined the footage outside the boundary would produce 10.8 million barrels of oil more than the footage inside the boundary.

In response to a question from Lieutenant Governor Sanford, Mr. Brown said the study did not separate the data between trust land and fee land, but that analysis could be completed if requested.

In response to a question from Senator Wardner, Chairman Fox said any well that crosses the reservation boundary should be subject to the state-tribal oil and gas tax agreement, regardless of where the wellhead is located. He said the tribe is losing tax revenue on the portion of cross-border wells which are not subject to the tax agreement. He said the decline curve of production exacerbates the loss on these wells. He said if a well is padded and drilled within the exterior boundaries of the reservation and a horizontal lateral from the well extends to land outside the exterior boundaries of the reservation, the tribe receives 80 percent of the tax revenue attributable to production from trust lands within the spacing unit and 20 percent of the tax revenue attributable to nontrust land within the spacing unit. He said if a well is padded and drilled outside the exterior boundaries of the reservation, and a horizontal lateral from the well extends to land within the exterior boundaries of the reservation, the tribe does not receive any tax revenue attributable to the production derived from the spacing unit. He said the past tax revenue collected from the cross-border wells not subject to the tax agreement could be calculated using historical data. He said the revenue the tribe did not receive because certain cross-border wells were not subject to the oil and gas tax agreement should be considered when trying to resolve this issue.

In response to a question from Lieutenant Governor Sanford, Mr. Brown said the numbers outlined in the executive summary demonstrate the forward-looking forecast. He said the full report contains historical numbers in addition to the forecast.

In response to a question from Lieutenant Governor Sanford, Mr. Brown said the total historical cumulative production through June 2020 for the 132 cross-border wells with a wellhead outside the reservation boundary was approximately 35 million barrels of oil, with 14.5 million barrels of oil attributable to footage inside the boundary and 20 million barrels of oil attributable to footage outside the boundary. He said the total cumulative production for the 82 cross-border wells with a wellhead inside the boundary was approximately 24 million barrels of oil, with 11.8 million barrels of oil attributable to footage inside the boundary and 12.6 million barrels of oil attributable to footage outside the boundary.

Chairman Fox said the tribe has not received tax revenue from cross-border wells that have a wellhead located outside the reservation boundary and a horizontal lateral that traverses the boundary because those wells are not subject to the state-tribal oil and gas tax agreement. He said the cross-border well issue was tabled to get the tax agreement signed, but the issue remains a concern for the tribe.

Governor Burgum said the study will help drive the policy discussion because historical and projected data on the cross-border wells is now available. He said another important issue is the ongoing legal battle regarding the ownership of riverbed mineral rights. He said there have been discussions surrounding the potential for a tax agreement for the riverbed minerals. He said the discussion included placing tax revenue derived from riverbed minerals in an escrow account until the ownership issue is resolved. He said these are important issues to resolve to create more certainty with oil and gas operators and to benefit both the state and the tribe.

### **SPIRIT LAKE TRIBE**

Governor Burgum called on Mr. Douglas Yankton, Chairman, Spirit Lake Tribe. Chairman Yankton said the tribe's economic development has been negatively impacted by the COVID-19 pandemic. He said the tribe might be interested in entering a state-tribal tax agreement for tobacco and alcohol, but the tax revenue allocation formula might need to be re-evaluated. He said the formula only considers the number of enrolled members living on the reservation, but fails to account for over 1,000 members who live off the reservation in surrounding communities and use the tribe's services. He said the formula also neglects to account for nonenrolled members who use the tribe's local establishments.

In response to a question from Governor Burgum, Chairman Yankton said the tribe has roughly 7,800 enrolled members and over half of the total enrolled members live on the reservation. He said a large number of enrolled members live within 25 miles of the reservation.

Lieutenant Governor Sanford said since a legislative session is quickly approaching, the tribe should bring proposals or concerns regarding state-tribal tax agreements to the Indian Affairs Commission and the Governor's office in the next month.

Ms. Collette Brown, Executive Director, Gaming Commission, Spirit Lake Tribe, provided testimony ([Appendix D](#)) regarding the adverse effects of electronic pull tab devices on tribal casinos and an article ([Appendix E](#)) published by Gaming Laboratories International regarding illegal and unregulated gambling activity.

### **STANDING ROCK SIOUX TRIBE**

Governor Burgum called on Mr. Mike Faith, Chairman, Standing Rock Sioux Tribe. Chairman Faith said the tribe's tax department does not have any issues or recommended changes to report. He said low census responses have been an issue in Indian country in the past, and the tribe is encouraging tribal members to respond. He said tribal members have been encouraged to vote in the upcoming general election.

Mr. Davis said the Indian Affairs Commission will be working with the Department of Transportation to assist tribal members in obtaining state identification cards before the general election.

In response to a question from Governor Burgum, Chairman Faith said tribal revenue has decreased since March 2020, and the tribe's casinos have reopened after being closed due to COVID-19 concerns. He said the casinos have been taking numerous precautions relating to COVID-19 upon reopening, including temperature checks and required facial coverings, to protect the general public and casino employees.

Chairman Faith said the tribal casinos are heavily regulated, while the regulations for the state's charitable gaming, and specifically electronic pull tab devices, appear to have several loopholes.

### **TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS**

Governor Burgum called on Mr. Jamie Azure, Chairman, Turtle Mountain Band of Chippewa Indians. Chairman Azure said drug use is prevalent on the reservation, and there has been an uptick in drug use during the pandemic. He said criminals know the legal loopholes and thresholds for state and federal prosecution better than some law enforcement officials, and casinos are being used as hubs for criminal activity. He said a joint drug task force should be formed, and more resources are needed to combat the rampant drug activity. He said many issues affecting the tribe have a behavioral health component.

Lieutenant Governor Sanford said he has spoken to United States Attorney Drew Wrigley. He said Mr. Wrigley indicated the United States Attorney's Office is focusing on prosecuting cases involving firearms and drugs due to the large volume of drug cases on the reservation. Lieutenant Governor Sanford encouraged individuals to communicate proposed solutions and action items to address drug activity on the reservation to the Governor's office and to the Indian Affairs Commission.

Chairman Azure said state-tribal gaming compacts initially were entered to help promote tribal economic development. He said the state's gaming regulations for electronic pull tab devices need to be compared to the extensive regulations with which the tribal casinos are required to comply. He said gaming activities on the

reservation have not reopened since the COVID-19 pandemic began in March 2020 due to health and safety concerns, but the tribe is planning on phasing in gaming activities.

Chairman Azure said the tribe has been prioritizing census responses by tribal members. He said some rural areas do not have adequate access to the Internet and some elder tribal members are still self-isolating in their homes due to COVID-19 concerns. He said the tribe has been upgrading technology to help members respond to the census remotely.

Chairman Azure said the tribe has set aside funding the tribe received from the federal Coronavirus Aid, Relief and Economic Security (CARES) Act to buy Chromebooks for students and to set up virtual classrooms.

In response to a question from Lieutenant Governor Sanford, Chairman Azure said he will discuss issues surrounding a potential future state-tribal tax agreement with the Indian Affairs Commission.

### **THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION**

Governor Burgum called on Chairman Fox. Chairman Fox said the tribe views the COVID-19 pandemic differently due to the history of epidemics significantly impacting the tribe's population in the past. He said the pandemic has affected the tribe economically. He said the tribe's casino was the first to close after the outbreak of the pandemic and was the first to reopen. He said the casino implemented safety measures upon reopening, including reduced operating hours, increased cleaning and sanitizing, frequent testing of employees, and facial covering requirements for employees and customers.

Chairman Fox said there are key reasons why the tribe has not entered a state-tribal alcohol tax agreement. He said the proposed formula requires the tribe to split tax revenue based on the tribe's membership. He said federal law substantiates the tribe's right to tax nontribal members within the boundaries of the reservation. He said the tribe is reluctant to sign an agreement giving sole regulatory control to the state, and the tax revenue split should be more favorable to the tribe because of the impact of alcohol use on the reservation.

Chairman Fox said the tribe historically has lost tax revenue generated by Internet sales delivered to tribal members on the reservation. He said he is concerned with the unlawful collection of sales tax from tribal members' purchases on the reservation which benefits the state. He said until the issue of the riverbed minerals' ownership is resolved in court, the state and the tribe each should take 20 percent of the oil and gas tax revenue and place the remaining 60 percent in an escrow account.

### **COVID-19 TRIBAL TESTING**

Governor Burgum called on Ms. Nicole Brunelle, Chief Nursing Officer and Section Chief, Research and Response Section, State Department of Health, for a presentation ([Appendix F](#)) on COVID-19 testing in tribal communities. Ms. Brunelle said the State Department of Health developed a strategy to accommodate testing availability in rural areas by dividing the 28 local public health units into 8 regions with a regional lead. She said the department has been working closely with the Indian Affairs Commission and tribal councils to provide resources and testing supplies. She said the department has been monitoring hot spots and updated risk levels in certain counties. She said the department's approach is preventative rather than reactive, and the department is seeking to collaborate with local public health districts, tribal nations, federal qualified health centers, and schools. She said there are several upcoming tribal testing events, and the department will be meeting with representatives of the United Tribes Technical College to discuss participating in a pilot testing event involving sputum tests.

In response to a question from Governor Burgum, Ms. Brunelle said the department has been prioritizing efforts to deliver test specimens to the laboratory quickly. She said the department has been working to develop a courier system so specimens can arrive at the laboratory more frequently to prevent a testing bottleneck.

Mr. Davis said every tribal nation has been cooperative regarding COVID-19 testing. He said the record number of tribal tests completed in 1 day is 995. He said technology has helped with testing preregistration, and the testing process and turnaround times have improved.

Governor Burgum said underlying medical conditions are prevalent in tribal communities, but North Dakota's tribal populations have not had some of the serious outcomes that have occurred in other tribal communities around the country. He said testing has helped slow the spread and isolate the virus.

Mr. Davis said the Centers for Disease Control and Prevention (CDC) selected North Dakota as one of four states to be part of a pilot project to plan for distribution of a COVID-19 vaccine. He said there was a misconception the project was a vaccine trial, and tribes were going to be experimented on. He said he has tried to correct that misconception. He said the vaccine planning committee had its first meeting, and he distributed a condensed

version of the PowerPoint presentation given at that meeting to tribal leaders. He said the presentation outlined statements by federal officials regarding when a vaccine might be available and how a vaccine likely will be administered.

Governor Burgum said the pilot project is a logistical planning project regarding how a vaccine would be distributed, if one became available. He said misinformation was spread that the pilot project was a statewide vaccine trial, but that is untrue. He said there are clinical trials occurring, and the White House has encouraged letting individuals know they can be a part of the trials if they desire.

## K-12 EDUCATION

Governor Burgum called on Ms. Kirsten Baesler, Superintendent of Public Instruction, for a presentation ([Appendix G](#)) on K-12 school reopening. Ms. Baesler said the Department of Public Instruction has been developing a PowerSchool element to enable schools to document the instruction method being used with each student, whether it is face-to-face, distance learning, or a hybrid approach. She said the challenge is school districts have to enroll the students in PowerSchool differently, but the data on the number of schools and students in each type of learning model should be available this month. She said each school district's health and safety plan requires the district to identify a COVID-19 coordinator for the district, and the individual must report the number of positive COVID-19 cases for students and staff to the department. She said since schools have reopened, there have been 150 reported COVID-19 cases for students and 119 cases for staff. She said 38 of the 174 school districts have reported at least 1 positive case. She said the federal CARES Act provided funding for K-12 education and other educational expenses caused by COVID-19. She said the department applied for and received \$33.3 million of funding from the federal Elementary and Secondary School Emergency Relief Fund established by the CARES Act. She said the department allocated those funds to school districts using the Title I allocation formula. She said the funds were allocated to the school districts by August 1, 2020, and the districts have until September 2022 to spend the funds.

In response to a question from Senator Heckaman, Ms. Baesler said there is a separate bank of leave available for teachers for certain situations involving COVID-19. She said staffing is the number one issue with which the department is dealing. She said there is a shortage of food service workers and substitute teachers.

Senator Heckaman said the Broadband Association of North Dakota has indicated a willingness to assist districts or families with students that need Internet access.

In response to a question from Chairman Fox, Ms. Baesler said the CDC has recommended schools weigh the pros and cons of taking students' temperatures and the logistics of doing so, and the CDC has cautioned temperature taking is only one factor to consider in the comprehensive fight to stop the spread of the virus. She said hybrid learning can reduce the number of close contacts if implemented correctly, but K-12 education is not a separate ecosystem, and a community-wide effort must be in effect to stop the spread of COVID-19.

In response to a question from Chairman Fox, Ms. Baesler said she will have the Healthy Return to Learning Team contact Parshall school administrators to provide information regarding how schools may take students' temperatures as a precautionary measure, and to inform the school district what can or cannot be done in schools per CDC policy.

In response to a question from Governor Burgum, Ms. Baesler said fall enrollment numbers currently are not available, but student enrollment reports are due October 1, 2020. She said enrollment numbers likely are trending down due to homeschooling and students enrolling in private schools.

## GAMING

Governor Burgum called on Ms. Deborah McDaniel, Director of Gaming, Gaming Division, Attorney General's office, for a presentation ([Appendix H](#)) regarding charitable gaming revenues and electronic pull tab devices. Ms. McDaniel said during the 2018 fiscal year, licensed gaming organizations accepted over \$266 million in gross proceeds, raised over \$21 million for charitable uses and generated over \$3.1 million for the state's general fund. She said electronic pull tab device activity doubled the gross proceeds for the 2019 fiscal year to over \$585 million and generated over \$8.1 million for the general fund. She said gross proceeds are estimated to exceed \$887 million for the 2020 fiscal year, and an estimated \$15 million will be generated for the general fund. She said there were over 2,700 electronic pull tab devices in 618 sites across the state as of June 30, 2020.

In response to a question from Governor Burgum, Ms. McDaniel said Slope County is the only county that does not have an electronic pull tab device.

In response to a question from Governor Burgum, Ms. McDaniel said the state's charitable gaming regulations treat electronic pull tab devices the same as paper pull tabs, but electronic pull tab devices are regulated differently than slot machines. She said there is no electronic pull tab device reporting requirement for winnings.

Chairman Fox said tribal casinos are extensively regulated and are overseen by several different entities.

Mr. Davis said electronic pull tab devices are largely unregulated by the state, and the devices' implementation across the state have impacted tribal economies.

In response to a question from Senator Cook, Ms. McDaniel said the federal government has imposed certain reporting requirements for tribal casinos whereas the federal reporting requirements do not apply to the state's charitable gaming. She said the casinos are operating as a business and generating revenue, while the state's charitable gaming involves a charity using gaming to supplement the charity's primary purpose. She said it is hard to compare tribal casinos to the state's charitable gaming, and there is a different level of security between the two.

Representative Headland said the interim Judiciary Committee is studying charitable gaming regulations, and the interim Taxation Committee is studying the taxation on charitable gaming.

In response to a question from Governor Burgum, Ms. Emily L. Thompson, Code Revisor, Legislative Council, said information received by the interim committees regarding gaming will be summarized in the respective interim committee's final report. She said any information provided by Ms. McDaniel subsequent to the meeting will be distributed to committee members and summarized in the committee's final report.

Chairman Fox said it is incorrect to assert the state does not play a role in the federal government's regulatory governance of tribal casinos. He said gaming under Class III of the federal Indian Gaming Regulatory Act requires the state and tribe to enter a compact outlining the regulatory procedures for tribal gaming. He said by signing the compact, the state agrees to carry out federal law in relation to those operations.

Representative Headland said electronic pull tab devices are regulated in the same manner as paper pull tabs, and there are limits to the number of devices that can be at each site or location. He said comparing the state's charitable gaming to tribal casinos is not a fair comparison. He said it is unlikely the Legislative Assembly would be in favor of implementing similar regulations on charitable gaming as the federal government imposes on tribal casinos.

## FEDERAL CENSUS

Governor Burgum called on Ms. Cheryl Kary, Executive Director, Sacred Pipe Resource Center. Ms. Kary said the census self-response rate is the number of individuals who respond to the census before enumerators follow up with nonresponders. She said if the self-response rate is 30 percent or lower, it is classified as an area of concern, and most reservations are below that mark. She said the self-response rate of the Spirit Lake Reservation is 21.3 percent, the Fort Berthold Reservation is 22.4 percent, and the Standing Rock Reservation is 34.7 percent. She said tribes have to provide permission to allow enumerators to follow up with nonresponders on the reservation. She said the Turtle Mountain Reservation gave permission for enumerators early, and the reservation is at 72 percent completion. She said the Standing Rock Reservation is at 44 percent completion, and the Spirit Lake Reservation is at 33 percent completion. She said the Fort Berthold Reservation was the last tribe to give enumerators permission to follow up. She said permission was provided approximately 2 weeks ago, and the reservation is at 20 percent completion.

In response to a question from Governor Burgum, Ms. Kary said to reach out to more tribal members, tribal chairmen should encourage tribal programs to reach out to the complete count committees so census assist events can combine with other tribal events.

In response to a question from Senator Heckaman, Ms. Kary said the federal census deadline was extended to September 30, 2020, due to the COVID-19 pandemic, but every census process was pushed back due to the pandemic which has compressed the time available to reach places with low response rates.

In response to a question from Senator Heckaman, Governor Burgum said he will speak to the North Dakota congressional delegation on seeking to further extend the census deadline.

## REQUIRED REPORT

A report from the Department of Corrections and Rehabilitation, the Juvenile Court, and the Indian Affairs Commission ([Appendix I](#)) regarding recommendations on the status, effectiveness, performance, and sustainability of a memorandum of understanding to provide services to juveniles adjudicated in tribal court was received by the

Legislative Council on July 1, 2020, pursuant to Senate Bill No. 2153 (2019). The report was distributed to committee members.

### COMMITTEE DISCUSSION

The committee members and tribal representatives thanked Senator Cook for his leadership on tribal taxation issues over the years and his role in successful state-tribal taxation agreements and wished him the best in his retirement.

**It was moved by Senator Cook, seconded by Senator Heckaman, and carried on a voice vote that the Chairman and the Legislative Council staff be requested to prepare a report and to present the report to the Legislative Management.**

**It was moved by Senator Heckaman, seconded by Senator Cook, and carried on a voice vote that the committee be adjourned sine die.**

No further business appearing, Governor Burgum adjourned the committee sine die at 3:45 p.m.

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Jill Grossman  
Counsel

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Emily L. Thompson  
Code Revisor

ATTACH:9