MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2041

2005 SENATE NATURAL RESOURCES

SB 2041

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2041

Senate Natural Resources Committee

❑ Conference Committee

Hearing Date January 13, 2005

Tape Number	Side A	Side B	Meter #
1	X		1.5 -end
			0.0 -27.8
Committee Clerk Signature			

Minutes:

Senator Stanley Lyson Chairman of the Senate Natural Resources Committee brought the committee meeting to order.

Roll call was taken indicating all committee members present except **Senator Joel Heitkamp.**

Senator Lyson opened the hearing on SB 2041 relating to transportation of game and fish taken on Indian trust lands.

Jeff Nelson attorney with the Legislative Council who served as counsel to the Natural Resources Interim Committee presented SB 2041 only for the purpose of explaining the bill. He stated that SB 2041 was developed after the Interim committee studied SCR 4022 which directed a study of proposed legislation permitting the North Dakota State Game and Fish Department to coordinate with the game and fish programs conducted by the tribal governments of the federally recognized Indian tribes in North Dakota. The committee reviewed several documents regarding hunting relations, history and regulations.

Senator Lyson asked for a definition of "Indian Trust Lands".

Jeff Nelson explained that Indian Trust Land is land that has been set aside by the United States and placed in trust for the tribe involved as a result of a treaty, statute or agreement. The title is held by the United States in trust for the tribe. This land is not necessarily on a reservation.

Senator John Warner (5.8) of District 4, Chairman of the Interim Natural Resources Committee testified in support of SB 2041 (See attached testimony). He also mentioned the checkerboard pattern where Indian trust lands and fee lands intermingle all through the reservation. This happens in about 8 or 9 counties in the state.

Tiffany Johnson (17.6) testified on behalf of Tex Hall, Chairman of the Mandan, Hidatsa and Arirkara Nation, (See attached testimony). Mr. Hall recommended a Do Pass of SB 2041 if his proposed amendments were accepted.

Tom Disselhorst (19.6) attorney for United Tribes Technical College, works on behalf of many of the tribes in North Dakota. He gave back ground information to clarify the checkerboard pattern. He wanted to expel the myth that there is unlimited bag limits on the reservation and that it is just the contrary. The reservations have an excellent game and fish program and conservatively manage their hunting resources. He further explained the issue here at hand was interference and lack of acknowledgment of tribal hunting laws when they do not coincide with the state hunting laws. The amendments presented would attempt to cure the problem by having the state recognize the tribal hunting laws on Indian lands. The tribes would like to have the right to fully regulate the hunting on all Indian lands including both fee and trust land whether they are within reservation boundaries or not. The tribes claim this right as given to them by the Enabling Act of 1889 that created the state of North Dakota and is referred to in the state constitution. The

tribes do not like how the Supreme Court of the United States has changed the nature of the powers states have on fee lands within the reservations. These amendments are an attempt to compromise on this issue.

Senator Lyson asked for clarification of fee lands.

Tom Disselhorst explained that fee lands are held by either a tribe or a non tribal member that are subject to property taxes of the county were the land is located. This might be non Indian owned land.

Senator Ben Tollefson asked for clarification if a tribe has the right to regulate Indian owned fee land through sovereignty.

Tom Disselhorst answered that this is a matter of dispute and in all honesty it is not all together clear. The tribes feel this is true but there has not been anything in the court system to dispute the matter to effect the state of North Dakota. The state could clarify the tribes sovereignty through state law and probably would not be challenged.

Senator John Traynor asked if "indian lands" in the proposed amendment is better than "indian trust lands" within the bill.

Tom Disselhorst agreed with Senator Traynor that the words defining the land in this bill needs to be carefully used. He feels the way the bill came out of the interim committee it was meant to refer to Indian Trust Lands and not just on the reservation. A clarification needs to be made in the proposed amendment to not include tribal owned fee lands off the reservation.

Senator Traynor asked once more for clarification that if the amendments are accepted and the bill is passed, a non tribal person could hunt on indian lands without a state hunting license and transport the game off the Indian lands.

Tom Disselhorst agreed that was the intent of the amendments to make it clear the state would then recognizes the tribal hunting licenses granted to non indians.

Roger Rostvet (45.1), Deputy Director of the North Dakota State Game and Fish Department testified in support of SB 2041 (See attached testimony). Testimony included amendments.

Senator Lyson asked if this bill interfere with out of state hunters.

Roger Rostvet confirmed that the bill would not interfere and that it was intended for tribal members to be able to transport game off the Indian lands. The North Dakota State Game and Fish Department will honor and respect tribal rights afforded by law to tribal members, however tribal treaty rights cannot be bought.

Archie Fool Bear (49.0), Member of the Standing Rock Sioux Council and a member of Standing Rock Sioux Tribe testified on SB 2041. He stated the tribe is still recognizing and holding true to the beliefs of the 1886 Treaty, although their territory is smaller that the treaty originally declared. He presented to the committee copies of the Accord signed by Governor Ed Schafer in January, 1996 which recognizes the sovereignty of the other. (See attached).

Tape Side B

Archie Fool Bear (0.0) He continued that through time the Indian lands has diminished by the US government by the Daws Act. The tribe feels the Treaty of 1886 still stands, that tribal law still stands and the state of North Dakota should recognize the sovereignty to regulate hunting and fishing within their bounties set by that treaty.

Senator Rich Wardner stated that the bill before the committee has one point and that is that the North Dakota State Game and Fish Department wants non indians who hunt on the reservation not to transport game. The department has no problem Indians doing this.

Archie Fool Bear stated the tribes want complete sovereignty to be able to regulate what happens on their lands.

Jeff Kelly (5.9) Director of Standing Rock Game and Fish Department testified that their department is run much as the state's department. Their wardens are trained just as the state's wardens and they use the services of biologists that help set the bag limits for resource management.

Senator Lyson turned the hearing over to Vice Chairman **Senator Tollefson.**

Representative Dawn Charging (11.4) of District 4 and member of the Three Affiliated Tribes testified in support of SB 2041. She wanted to expel some myths, stating that each tribe governs their hunting resources differently but always conservatively and within the state's limits. Double bagging is not allowed and lawlessness in everywhere. She stated the larger issue is that the federal law supersedes the state law and they will follow that law and that tweaking the bill could be a workable solution.

Senator Wardner again stated that the issue here is for non indian hunters to transport game they have legally taken on the reservation off the reservation.

Mike Donahue representing the North Dakota Wildlife Federation and the United Sportsmen of North Dakota testified in support of SB 2041 for a Do Pass only if the amendments offered by the North Dakota State Game and Fish Department are accepted.

Senator Tollefson asked for opposing testimony of SB 2041.

Senator Wardner asked Roger Rostvet for clarification of SB 2041 that in it's present form it is open to interpretation and would appear that it includes both tribal and non tribal members. With the North Dakota State Game and Fish Department amendment to the bill it would restrict the transportation of game off the reservation to only non tribal members.

Roger Rostvet confirmed this to be true.

Senator Tollefson asked for neutral testimony and hearing none closed the hearing on SB 2041.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2041

Senate Natural Resources Committee

☐ Conference Committee

Hearing Date January 20. 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 -end
2	X		0.0 - 27.6
Committee Clerk Signature			

Minutes:

Senator Stanley Lyson Chairman of the Senate Natural Resources Committee brought the committee meeting to order.

All member of the committee were present **Senator Rich Wardner** who joined the meeting later.

Senator Lyson opened the continued hearing on SB 2041 relating to transportation of game and fish taken on Indian trust lands. He presented the protocol to be followed in the hearing which would be the order of testimony to be in support, opposed and in a neutral position. The committee would then work on the bill.

Senator Layton Freborg asked if the committee was taking more testimony or taking testimony from the same people or hearing amendments or what.

Senator Lyson stated this was to be a continuance of the hearing of SB 2041 and asked because the committee has already heard about treaties and Indian rights, these do not need to be repeated.

Tiffany Johnson testified on behalf of Tex Hall , Chairman of the Mandan, Hidatsa and Arikara Nation the Three Affiliated Tribes (See attached testimony). They are in support of SB 2041 if their proposed amendments are accepted. A colored map of Indian trust and fee lands, on and off the reservation were presented to the committee.

Senator Joel Heitkamp, not being present at the first hearing of SB 2041 asked for clarification if the tribes feel that both tribal member and non tribal members do not need to buy a North Dakota State Game and Fish Department hunting license to hunt on tribal lands. He also questioned the management of the game resources on Indian lands.

Tiffany Johnson confirmed this to be true and further explained that they have their own game and fish management programs.

Senator Layton Freborg asked her to explain exterior boundaries and inquired about the last page of Chairman Hall's testimony where he states he supports passage of SB 2041 provided his amendments are adopted. He asked if this means if the committee does not adopt his amendments does he not want the bill passed.

Tiffany Johnson referred the boundaries question to the tribal attorney and was not able to answer the last.

Senator Lyson again wanted those testifying to address him the chairman and would not allow conversation to be held within the audience.

Steve Kelly attorney with the Three Affiliated Tribes took the podium for questions. He answered that exterior lands means all lands and according to the Mescalero Apache case, it says the tribes have regulatory jurisdiction over hunting and fishing within the exterior boundaries which includes all lands. Chairman Hall stated the tribes want is an exemption for non Indians to hunt on the trust lands owned by individual Indians and the fee lands owned by the tribes and individual Indian. This excludes fee lands owned by non Indians. Chairman Hall feels his amendments are a good compromise well within the law and would completely settle the matter, however the present form of the bill is better than nothing.

Senator Rich Wardner stated that SB 2041 is about non members of the tribe transporting game off the reservation and asked for a comment about the North Dakota State Game and Fish Department making a statement at the first hearing that you can't buy treaty rights.

Steve Kelly stated that the Game & Fish do not have a valid point and that obviously treaty rights are not for sale. This is not about treaty right but about the tribes exercising it's sovereignty to regulate hunting activities on it's lands.

Senator John Traynor gave an example of transporting game of the reservation and asked if what the tribes want is for recognition by the North Dakota State Game and Fish Department of the Indian hunting license and questioned if SB 2041 does this for them.

Steve Kelly stated that with the acceptance of the amendments proposed it does.

Senator Michael Every cited the fact that transporting game off the Indian lands could be very complicated.

Steve Kelly commented that it really isn't all that complicated and that if you are non Indian hunting on non Indian land you need a state license. If you are non Indian hunting on tribal land,

tribal trust land or if the amendments are adopted on all land owned by the tribe you only need a tribal license.

Senator Heitkamp asked why the tribes would not want the need for a double license when the fees would return back to invest in the resources that have so carefully been managed.

Steve Kelly stated hunters do not like to buy two licenses and the tribes want the state to recognize and respect their licenses instead of interfering with their relationship with the hunters by requiring them to buy two licenses.

Todd Hall (21.3) Director of the Three Affiliated Tribes Fish and Wildlife Division testified in support of SB 2041 (including amendments as presented by Tex Hall) (See attached testimony).

Senator Lyson questioned the difficulty a hunter might have knowing exactly where he might be out in the field to know if he is within the Indian lands or on state required license hunting lands.

Todd Hall stated his department takes reasonable effort to assist hunters to know which lands they can and cannot hunt including maps and in the field assistance.

Senator Every asked if his stated amendments in his testimony are the same as Chairman Hall's or different.

Todd Hall confirmed the same except he added the definition of Indian lands for clarification.

Senator Heitkamp asked if there is any interaction between the North Dakota State Game and Fish Department and the tribes program as a help or a revenue resource.

Todd Hall answered no and in fact it has been an adversarial relationship but with the passage of this bill maybe it would open up communications and possible cooperative relationship. He

clarified that the fees collected by the North Dakota State Game and Fish Department for licenses is not reinvested back to the management of the hunting resources on the reservation.

Senator Traynor asked how many additional acres would be added to the hunting acres controlled by the tribes if the Hall amendments were adopted.

Todd Hall stated approximately 8,000 acres.

Senator Traynor asked for confirmation if what the tribes want is jurisdiction for hunting purposes on all lands within the reservation except those owned by non Indians.

Todd Hall answered yes, as confirmed by federal law.

Senator Tollefson asked if a dual license would be unmanageable or a problem even if required by law.

Todd Hall felt it would be a matter of cost and would deter tourism. He addressed one other issue as to buying treaty rights and was insulted by these remarks.

Marcus Wells (40.2) Vice Chairman of the Three Affiliated Tribes testified to support the personnel of the Tribe Game and Wildlife Program. He questioned why there is this issue at all when we should be promoting tourism like other states do. North Dakota State Game and Fish Department is the best in the nation and his tribe mirrors that program. We need to support a united effort to manage this resource and promote tourism. The Tribes are extending a hand to work together.

Tape #2 Side A 0.0 - 27.6

Steve Kelly wanted to clarify some things stating that obtaining a North Dakota State Game and Fish Department license to hunt on Indian land is illegal according to the Mescalero Apache Tribe legal case. Secondly the concept of needing both licenses only complicates matters in

regards to the regulations set by the each agency. Thirdly, Chairman Hall's amendments simplifies matters as hunting would be on all Indian land whether it is fee and or trust land.

Senator Traynor asked if it is illegal to have a state license on tribal land and could he be arrested for having one.

Steve Kelly confirmed this and said they could go to the court and enjoin the state from forcing its regulation on tribal land.

Senator Lyson further explained that it is illegal for the state to say you need a state license if you only want to hunt on the reservation.

Steve Kelly agreed stating that a duel license would open the door to state regulation.

Austin Gillette (2.8) representing the Tribal Business Council of the Mandan, Hidatsa and Arikara Tribes testified in support of SB 2041 to include Chairman Hall's amendments. He reflected on the time of Lewis and Clark when there were no laws, only common sense. When there was respect of each other and not a battle of who had the upper hand. Their rights were won in the US Supreme Court and are written laws that give them the right. The tribes have made every effort to compromise, accommodate and be reasonable with the legislation that comes out of North Dakota.

Michael Swallow is an enrolled member of the Standing Rock Sioux Tribe and an attorney representing the Game and Fish Department of the Tribe. He stated he has suggested amendments prior to this bill being introduced to the committee and although they are not the same, they support the amendments purposed by Chairman Hall. They should go one step further and include "Indian Lands" and be defined. They have always worked well with the executive branch and would now like to work with the legislative branch. This bill will be good a

start to build a working relationship. He asked for the legislators to get on board and recognize the federal law to allow a non Indian to come on their lands, purchase their license, transport that game off the reservation and not worry about being subjected to criminal sanction. The amendments proposed need to be adopted and supported by this committee so that cooperation will happen with the North Dakota State Game and Fish Department.

Carol Two Eagles (10.7) bringing the concerns of the Traditional Indigenous People, testified in support of SB 2041 as amended by Chairman Hall (See attached testimony).

Representative Dawn Charging (11.5) of District 4 did not want to add to her testimony but wanted to introduce the hard working game wardens from her reservation. She also presented copies of the licenses that are issued to hunt on the reservation to prove the reality of them.

Eric Antoine, attorney with the legal department of the Standing Rock Sioux Tribe, testified in support of SB 2041 with the amendments of Chairman Hall and those presented today. He wanted to point out that non Indians who hunt on tribal land with a tribal license are subject to federal law for criminal violations of tribal law.

Archie Fool Bear (14.3) a Standing Rock Sioux Tribes Councilman testified in support of SB 2041 with the amendments. He stated that removing Indian Trust land and replacing it with defined Indian lands will be a big victory or support of reservations that have Game & Fish Departments. The issue is for the tribes to be able to regulate within the reservation boundaries those hunters that come to enjoy themselves. Hunting is to be enjoyed and complicating it with jurisdictional questions can it can be eliminated by giving support to the tribal Game & Fish Department to continue the regulations. Stating "Indian lands" would be the strongest stand point for all the tribes.

Copies of the Attorney General's opinion of SB 2041 as prepared for North Dakota State Game and Fish Department were distributed to the committee members.

Senator Lyson asked for any testimony in opposition to SB 2041. Hearing non the hearing was closed.

BREAK

Senator Lyson brought the committee back to order to discuss SB 2041 stating a copy of the purposed amendments were distributed to everyone. He stated that he felt that in the last paragraph of Section 1 the words " within the exterior boundaries of the Indian reservation" should be inserted after the word Indian as is stated in Section # 2. This really only involves one reservation in North Dakota, the Turtle Mountain Chippiwea Tribe. In discussion with the attorney from the Turtle Mountain Tribe, he had no problem taking out of the bill the phrase "the trust land outside of the reservation.". He further commented that 30% of Williams County is trust land and about 80 or 90% of that trust land is owned or farmed by non Indians. There is even some PLOTS land included in this trust land. He stated that he thinks it is almost a necessity to keep this within the boundaries of the reservation.

Senator Every made a motion to adopt the amendments as presented with the addition of the phrase "within the boundaries of the Indian reservation" after the word Indian in Section 1, as requested by **Senator Lyson**. .

Senator Tollefson second the motion.

Senator Lyson asked for discussion.

Senator Traynor stated that this goes beyond what the interim committee did because in the first sentence it states that a state license is not required for anyone, on only Indian land within the reservation.

This does not stop anyone from purchasing both license as what is happening now.

This seems to be the bulk of the problem about the bill with the tribes. They do feel the bill does not give them the authority they have received from the federal case.

Senator Freborg asked that one of the attorneys say for the record that this amendment would not create a problem with someone hunting within the reservation on privately owned land by a non tribal member.

Senator Lyson understood to make sure there is no question that to go on the reservation Indian owned land, a person will need a tribal license, a state license is not needed. If going on reservation non Indian owned fee lands, a state license is required to hunt on that land and a tribal license is not needed. Asked **Steve Kelly** if this was correct and asked for those words in the bill.

Steve Kelly confirmed it to be correct and explained that the code states a license is needed in general with exceptions and this exception is narrow to Indian lands which defined as Indian trust lands and Indian owned fee lands. So by implication it does not include non Indians hunting on non Indians lands within the exterior boundaries of an Indian reservation. He absolutely feels this will take care of it.

Senator Traynor being asked by **Senator Lyson** if he agrees, stated that he thinks it says it pretty plainly that if person does not have a state license, is not a tribal member and hunts on Indian land with a tribal license that person is okay.

Senator Freborg stated that within that same reservation boundary, privately owned land by a non tribal member, non Indian, a North Dakota State Game and Fish Department license is needed and not a tribal license.

Roll call vote # 1 for adoption of the amendments indicating 7 YEAS, 0 NAYS A 0 ABSENT OR NOT VOTING.

Senator Heitkamp made a motion for a Do Pass as Amended of SB 2041.

Senator Every second the motion.

Roll call vote # 2 of SB 2041 for Do Pass as Amended was taken indicating a 7 YEAS, 0 NAYS AND 0 ABSENT OF NOT VOTING.

Senator Lyson will carry SB 2041.

Senator Traynor will take the bill and the amendments to the Legislative Council for review.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2041

Senate Natural Resources Committee

❑ Conference Committee

Hearing Date January 21, 2005

Tape Number	Side A	Side B	Meter #
1		X	14.1 - 14.4
Committee Clerk Signature			

Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee brought the Committee to order to discuss amendments of SB 2041, relating to the transportation of game and fish taken on Indian trust lands. Prepared amendments of SB 2041 were pass to the committee and after review by the committee, they approved them as written. SB 2041 will proceed to the full Senate floor.

FISCAL NOTE

Requested by Legislative Council
01/25/2005

Amendment to: SB 2041

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.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				($30,000)		($30,000)
Expenditures						
Appropriations						

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

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This bill would eliminate the requirement that non-Indians hunting on tribal or Indian owned land have state hunting licenses. This change will result in reduced sales of State of North licenses, especially to nonresidents who hunt only on Indian land.

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.*

It is difficult to predict the revenue change for this bill. A reduction of 150 nonresident small game hunting license per year would result in a reduction in revenue of $30,000 for the biennium.

   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, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Paul Schadewald	**Agency:**	ND Game and Fish Department
Phone Number:	328-6328	**Date Prepared:**	01/26/2005

Date: 1-20-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2041

Senate Senate Natural Resources Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Acceptance of proposed A by Tex Hall w/ addition to #1 to include

Motion Made By Every Seconded By Tollefson

Senators	Yes	No	Senators	Yes	No
Senator Stanley Lyson, Chairman	✓		Senator Joel Heitkamp	✓	
Senator Ben Tollefson, Vice Chair	✓		Senator Michael Every	✓	
Senator Layton Freborg	✓				
Senator Rich Wardner	✓				
Senator John Traynor	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment _____

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

Date: 1-20-05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2041

Senate Senate Natural Resources Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amen

Motion Made By Heitkamp Seconded By Every

Senators	Yes	No	Senators	Yes	No
Senator Stanley Lyson, Chairman	✓		Senator Joel Heitkamp	✓	
Senator Ben Tollefson, Vice Chair	✓		Senator Michael Every	✓	
Senator Layton Freborg	✓				
Senator Rich Wardner	✓				
Senator John Traynor	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Lyson

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

REPORT OF STANDING COMMITTEE

SB 2041: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2041 was placed on the Sixth order on the calendar.

Page 1, line 1, after "to" insert "create and enact a new subsection to section 20.1-01-02 and a new section to chapter 20.1-03 of the North Dakota Century Code, relating to hunting on Indian land; and to"

Page 1, line 2, remove "trust"

Page 1, after line 3, insert :

"**SECTION 1.** A new subsection to section 20.1-01-02 of the North Dakota Century Code is created and enacted as follows:

"Indian land" means 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.

SECTION 2. A new section to chapter 20.1-03 of the North Dakota Century Code is created and enacted as follows:

General game license not required for hunting on Indian land. An individual hunting on Indian land pursuant to a tribal hunting license is not required to possess a state license to hunt on such land."

Page 1, line 9, remove "trust"

Page 1, line 20, remove "trust"

Renumber accordingly

2005 HOUSE NATURAL RESOURCES

SB 2041

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2041

House Natural Resources Committee

❑ Conference Committee
Hearing Date March 4, 2005

Tape Number	Side A	Side B	Meter #
1	x		2482-End
1		x	0-End
2	x		0-End
Committee Clerk Signature	Karen Bonnet		

Minutes: **Chr. Nelson:** Called meeting to order. Rep. Keiser absent. Bill was read aloud.

Sen. John Warner, Dist. 4, 6 west ND counties: This bill originated as a study resolution, recognizing that there were very serious conflicts between the Tribal Game & Fish Department and the State Game & Fish Department. I think we in state government are finally coming around to the idea that tribal governments are sovereign, that they have special status very akin to our own. They govern their people much as we do and have much the same relationship with federal government as states do. The thing we have some trouble coming around to some times is that they are also very sovereign from each other. They have developed from different treaties rising under different circumstances in different eras. So they have very different laws from one another. It was the realization of the committee early in the interim process that this was going to be an issue of enormous complexity. We made some very serious attempts and realized that we'd never have consensus between all of the tribes in the state. But it is useful. Even though all are separate entities, all of them have separate laws and relationships, it is useful to think of

the tribes as two blocks. Think of them as those as having large land masses and those with small land masses. The small land mass reservations have relatively large populations and few game available for hunting on those reservations. They're really not very interested in issuing licenses to non-native hunters. The two large land mass reservations do have large amounts of game and would to be able to use that both as an economic development tool and as simply a way of being a good neighbor to their white neighbors. They have been very generous in their offers for white hunting on those reservations. It's clear in federal law that all Indian tribes have the right to refuse hunting privileges to any non member, that it's also implicit in federal law that they also have the right to welcome white hunters or natives of other tribes. The issue for the committee became quite simply, was it legal to transport that game across the reservation boundary? It was the committee's feelings that the status of the tribe is very akin to that of another state, so we looked at our state statute from the Century Code which regulated the transportation of game across state lines. In the interim committee, we simply amended that statute to include Indian reservations, granting the Indian tribes the same status in that particular instance as is granted to other states. When this was heard in the Senate, the Senate felt uncomfortable and thought the language was a little vague. So the Senate adopted an amendment which I believe is consistent with the work of the interim committee and I would support the amendments that were adopted in the Senate. I would recommend to you that the amended bill be passed. One of the things that should come to mind, this is going to be an ongoing process. The state is going to be needing to work in continual negotiations with the tribes to develop a trusting relationship. I really want to reemphasize the word trust and the word respect. We need to respect sovereignty and the person hood of each other in this process. We

need to bring forward some new ideas, but we need to rely on both of us to give up some things and accept some things. I would urge you, keeping in mind that this will be an ongoing process with lots of other opportunities to introduce new legislation, I will urge you to pass this bill in as lean a form as possible.

Chr. Nelson: Thank you, Sen. Warner, and I appreciate the work that you and your committee did during the interim. I think you got this issue out in front of the legislative process and the citizens of the state. As a result of that, we're discussing this most seriously for the first time since statehood. Rep. Drovdal has a question.

Rep. Drovdal: Senator, you said something about some amendments that you felt were all right. Do you have those amendments with you, that we can look at them?

Warner: No, they are in the engrossed bill.

Chr. Nelson: Further questions for Sen. Warner?

Rep. Hanson: In the title it mentions game and fish, but no place in the bill does it mention fish. Is any amendment proposed including fishing on the reservation?

Warner: Not that I'm aware of. I think it refers to game and fish because those respective departments, both in the tribe and in the state, regulate both.

Hanson: It says "the transportation of game and fish taken on Indian lands," it doesn't refer to the department.

Warner: There was no discussion during the interim about fishing or the taking of fish and transportation of fish.

Chr. Nelson: Any further questions for Sen. Warner? Seeing none, thank you for your testimony.

Are there any other state legislators that want to testify on this bill?

Rep. Kenton Onstad, Dist. 4: District 4 encompasses Parshall, and the Three Affiliated Tribes. I come before you today because we have an interest in the situation because of our location and the Three Affiliated Tribes. Part of the area that I have is an area of non-enrolled members owning a good portion of the property. Part of that is in consideration here. Over years and time, there has always been (a question of) who is in really in charge of certain areas? This senate bill corrects many of those problems, and I hope the committee will consider it as it is and not make any major changes to the bill that is before you. I can speak for residents as enrolled and non-enrolled members that the bill is an adequate compromise and is very workable. Our area sees it as a good compromise.

Chr. Nelson: Are there any questions for Rep. Onstad?

Rep. Nottestad: I would like to clarify something. Is this bill a Fort Berthold bill or a reservation bill for the state of ND? You kept referring to "our area." Which is it?

Onstad: I believe it is for the entire state. Speaking from our area, probably the area of largest concern because there are a large number of acres from enrolled members, trust lands, and non-enrolled members. Tribal gaming is in charge of Indian trust land; they issue their licenses on that property. When it's in fee land or non-enrolled members property, the Game & Fish is in charge. I look at it as not a lot different than between North Dakota and South Dakota.

Nottestad: Statewide?

Onstad: Statewide. That's my understanding.

Rep. Charging: Through all the discussions, have you received any concerns from our local residents in regards to the impact of non Indians?

Onstad: When it was first introduced, there was a lot of concern to clarify that. As of late, I have not received *any* e-mail one way or the other on that concern. There are concerns regarding fishing, but we're directing this to a hunting issue and I have not (heard anything).

Chr. Nelson: Further questions for Rep. Onstad? Thank you for your testimony. Committee members, for your information, if there are legal questions, Charles Carvell is here from the Attorney General's Office and would be available for clarification or interpretation. Rep. Charging.

Rep. Charging, Dist. 4: This has been an incredible and rewarding process. I live on the reservation and this has been the first solution that I can say that I have seen. **(Written testimony attached.)**

Rep. Nelson: Rep. Charging, for your information as well as those in attendance today, I will appoint a subcommittee to work on this bill because I anticipate several amendments that will be offered. At this time, I will ask Jeff Nelson from Legislative Council to speak. He has some background information for us.

Jeff Nelson, Staff Attorney, Legislative Council, and Counsel for the Interim Natural Resources Committee: For the record, my comments this morning should not be construed as being in favor of or opposed to the proposal. My purpose this morning is to review the bill with you, the activities of the interim committee, and answer any questions that you as committee members might have concerning SB 2041. I will be working with the engrossed version of SB 2041. Section 1, SB 2041, Page 1, of the bill would create a new subsection, Sec. 20.1-01-02 of the Code. Section 1, Pg. 1 is the definitional section for the Game & Fish title and would create a new definition for the term "Indian land," as that term is used in the Game & Fish title.

Indian land means land within the exterior boundaries of an Indian reservation held in trust by the federal government for the benefit of an Indian tribe or Indian, and land within the exterior boundaries of an Indian reservation owned in fee by an Indian tribe or an Indian. Section 2 of SB 2041, pg. 1, adds a new section to Chapter 20.1-03 of the ND Century Code. This is the licensing chapter of the Game & Fish title and would provide that an individual hunting on Indian land pursuant to a tribal hunting license is not required to possess a state license to hunt on such land. The caption uses the term "general game license" so there may be a little confusion in that the caption mentions general game license and the text of that section only mentions a state license. Captions are *not* law, they are merely description of what is in the section, so the text of that section is the governing language. Section 3, amends Section 20.1-04-06, Pg. 1 of SB 2041, Page 1. This section deals with the possession limit of three birds and provides that a person may not possess, control or ship, transport or store, can or otherwise preserve more than the number authorized in the Governor's Proclamation of the species of game bird mentioned in this chapter. Properly taken game birds legally taken out of state or taken on Indian land may be possessed, transported or shipped in state. Section 4 of SB 2041, Page 2, would amend section 20.1-05-03. This also deals with the transportation of big game (in) the last sentence, "the section does not prohibit the transportation, shipment, or possession within the state or properly taken big game legally taken in other states or taken on Indian land." In response to Rep. Hanson's comment, perhaps the title is over broad in that it refers to game *and fish* taken on Indian land. **(Written testimony attached as backup to interim committee study, pages 295-299.)**

Chr. Nelson: I have a question on Section 2 of the bill, the general game title section. Do you personally feel that it needs some clarification?

Jeff Nelson: I think it probably does. Even though the caption is not long and the text of that section is the governing language, I think that they should be compatible. The caption should not talk about general game and licenses unless what the thinking of the senate is, is there *any* game license rather the general game license, the paper that you put your stamps on. Maybe their thinking was that it was just general, meaning any game license. I think removing the word "general" in Line 14 would solve the problem.

Chr. Nelson: Thank you, that is one issue that perhaps the subcommittee should look at. Further questions?

Rep. Nottestad: In Section 1, where it speaks about the individual areas, is it broad enough to also include the areas of Trenton, ND and the area around Belcourt, ND? Would it cover the entire state situation?

Jeff Nelson: I don't believe so. As both Sen. Warner and Rep. Charging mentioned in their testimony, North Dakota is unique in that each of the tribes or reservations hold their land in different ownership patterns. For example, the Turtle Mountain Chippewa have quite a small, contiguous reservation and owns quite a bit of land outside the exterior boundaries of the reservation. At the Three Affiliated Tribes, I understand that there is some in holdings that non members have within that reservation. It is a situation unique to ND, which perhaps makes the coalition more complicated in ND than in some of the other states. I think you have hit on an issue that Indian land means land within the exterior boundaries of Indian reservations. "Held in

trust" would not apply to trust land held by a tribe or an individual member outside the exterior boundaries of the reservation.

Chr. Nelson: Are there any further questions for Jeff?

Rep. Charging: Could you describe the types of lands that are held within the exterior boundary of a reservation? Are you able to do that?

Jeff Nelson: Perhaps. There are people in this room who are experts in this area and certainly know more about this than I do. It is my understanding that within the reservation, land may be owned by the tribe in trust, by individuals in trust, by members of the tribe in fee, and by non members in the exterior boundaries of a reservation. How that land is treated (unintelligible).

Chr. Nelson: Any further questions of Jeff? Seeing none, thank you for your testimony. At this point in time, I think protocol would suggest that we ask tribal chairmen next up. Chairman Hall, would you like to be first? Are there any other tribal chairmen in attendance today?

Tex Hall, Chairman, Mandan, Hidatsa & Arikara Nation: (Written testimony attached.)

Chr. Nelson: If there are amendments that are proposed, the subcommittee will work with those and you or somebody from your tribe will be asked to participate in that discussion. Are there any questions for Chairman Hall?

Hall: Thank you very much.

Rep. Hanson: How long ago did you start selling bird licenses?

Hall: It's got to be 30 years or more.

Hanson: It's even more than that because when I lived in Garrison, I was there for five years. We hunted on the Brewer pasture west of Garrison and that was in the 1960's, so it's 40 some years. I didn't think we had any problems then but it must have changed.

Hall: I think you are on point, Rep. Hanson. We haven't had any problems and we have good relations, but the latest incidences that I mentioned in my testimony about the State Game & Fish warden citing a non Indian on trust lands clearly shows this is going in a bad direction. This bill clarifies it. Otherwise, there is going to be conflict because the tribe retains that authority to issue licenses on Indian land. In our trust land, to have the State Game & Fish wardens cite, is clearly going (to cause) a battle, conflict or possible litigation. I think this would probably resolve that.

Rep. Charging: In the hearings there has always been a question about uniform seasons. That seems to be a point of contention. How do you feel about uniform seasons?

Hall: I believe that the tribal Game & Fish Department through it's proclamations year just like the states governor's proclamations should reserve that right depending on the science, depending on the surveys, how much should be harvested on birds, pheasants, deer, coyotes. If not retained, there could be an overkill of a certain species. That question was clarified in the Mescalero Apache case, that the tribe needs to retain that authority because that's what it's Game and Fish Department and biologists do, just like the state's Game & Fish Department. They have to take annual surveys and come up with those starting dates and bag limits and so on. Our tribe and I know other tribes obviously want to work with the state Game & Fish Department.

Chr. Nelson: Further questions for Chairman Hall? Seeing none, thank you for your testimony. I will continue to take testimony in support of SB 2041.

Todd Hall, Three Affiliated Tribes Fish & Wildlife Div.: (Shared letter of Feb. 2005, from Benjamin Hall, U.S. Dept. Of the Interior-attached) (His written testimony also attached)

Chr. Nelson: Thank you, Todd. Are there questions for Mr. Hall?

Rep. Nottestad: ND Game & Fish has an agreement with most of the western states so that if someone gets picked up for a game violation in Montana, for example, ND would not issue a license to that individual for a period of time. It's an agreement to keep the bad eggs out. Are the tribal Game & Fish involved in this in any way or would this cause a situation where these bad actors could come on your reservation if they wanted to hunt?

Todd Hall: Speaking as a Fish and Wildlife Director from my reservation, that would definitely be something that we would like to explore and possibly enter into that compact. Speaking as a representative of the Native American Fish and Wildlife Society, I would like to take that one step further. The tribes throughout the nation have started to develop just such a program where rule violators on other reservations mirror that compact and go on the no-hunt or black list. We would probably institute that. That is just an example of the cooperation and coordination that could be developed.

Nottestad: I appreciate that answer because you don't want those bad eggs on your reservation any more than we want them on the fields of ND.

Hall: Exactly.

Rep. Charging: That brings up another question that a lot of people have asked me that maybe you can clarify. For example, if you are hunting in ND and have a state Game & Fish license are you allowed to buy a double license (also from the tribe) and double take?

Hall: No. On Fort Berthold, and that is nation law, there is not a double take. It keeps from over harvest of the species. Because of certain population dynamics, there may be more in one area. To head that conflict off, that has been the policy of the Tribe to only allow one take.

Charging: Other concerns that have been brought to me are regarding the possibility of opening the door to outfitting operators and guides on the reservation. Is there a policy on Fort Berthold, for example to regulate outfitters and guides?

Todd Hall: There is existing law regarding outfitting and guiding on the Reservation. The tribal members (usually) oppose any outfitting and guiding on our Reservation. They're pretty territorial over our resources.

Chr. Nelson: Any further questions?

Rep. Porter: Just a follow-up to Rep. Nottestad's question. What would you see as a solution to a resident in ND that has lost his hunting privileges for a game violation. Then, during this time, they say they will hunt at one of the reservations.

Hall: That is one area that opening of communication lines will help. I see that with the passage of this bill the communication will flow. I don't want lawbreakers hunting my resource any more than you would on yours.

Porter: In looking at this bill, where is the coming provision in SB 2041?

Hall: I believe for the prudent management of the resource, the state and the tribes have to communicate to effectively manage. The tribes are extending our hands here.

Chr. Nelson: Further questions? Seeing none, thanks, Todd. I would remind people who want to testify for the sake of time, if there is new information, we would take that. If you don't want to testify in person, there is a clipboard going around. You can sign up and testify on that by checking the for, against, or neutral areas. I will continue to take supporting testimony.

Jesse Taken Alive, member Standing Rock government: (Addresses committee first in his native language.) I needed to address you in the language that is natural to me and many of our

people. I needed to do that to illustrate to you that we are nations of people. There have been a lot of comments made this morning and I wish to enter my comments for the record. We are on record as a tribal government with Resolution 253-05 in support of this particular piece of legislation that you are presently discussing. However, I can't today say that I would recommend a do pass. (unintelligible), simply because of comments that were said today. One, Mr. Chairman, is the fact that you mentioned that you would have a subcommittee review this. We can support what was presented to us and I have done that with this resolution that is being shared with you. If there are changes in it, we would probably have to go back and re-address these changes to make certain, one, that we are a part of this change as well. On the bottom of the first page of the resolution, it says, **(Resolution No. 253-05 attached)** "Whereas, the Standing Rock Sioux Tribe and the State of North Dakota have entered into an Accord, which recognizes the sovereign authority of each government and is a commitment by the Tribe and State to deal with each other on a government-to-government basis." The accord that has been referenced here is an accord that was signed between me and at that time, Governor Schafer, on January 31, 1996. At that time I was Tribal Chairman on Standing Rock. The fifth section, where it says Sovereignty and Disclaimers, **"Quote," (See attached testimony, Year of the People Accord...).** You heard a lot of testimony to that effect this morning, Mr. Chairman. However, two things I would like to remind this committee and do so respectfully. One, that we are nations of indigenous peoples because it's recognized simply by the United States government, even before the country was a country back in 1776. So we have been here since time immemorial. What I would like to illustrate with you is to show support of our respect for the United States Constitution with the treaty making powers derived *with* other nations. I need

to do this, Mr. Chairman, because there have been a lot of comments made about treaties this morning. Before we misunderstand each other, that we're going to agree with your interpretations of the treaties, I need to share with you our comments today about the treaties. Short and simple, one, we reflect in this resolution that is in front of you, the September 17, 1851 treaty. I am talking about this because I'm going to show you where it references hunting rights and others as outlined. I am doing this because it is important to know the background of why the United States of America wanted to enter into these agreements with the indigenous nations. Article I **(Treaty of Fort Laramie, Sept. 17, 1851, is attached by clerk, quote)** says, "The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith, friendship, and all their mutual intercourse, to make an effective and lasting peace." It's important to know, Mr. Chairman, that the United States *came* to the indigenous people wanting peace. Why did they want peace? Because there were encroachments on our aboriginal homelands. We did not encroach, we did not take ourselves on other people's lands. The United States saw that it's important to establish peace because that (unintelligible). Article V **(Fort Laramie Treaty of Sept. 17, 1851, clerk attached)** of this treaty says "It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." That's important to know when we say treaties, because it's outlined in Article V of the 1851 treaty. Secondly, the April 29, 1868 treaty also has language of wanting to establish

peace because of the continued encroachment of our lands, Mr. Chairman. **(Fort Laramie Treaty of April 29, 1868, clerk attached),** Article 1, pg. 1, quote: "From this day forward, all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and in its honor is hereby pledged to keep it. The Indians desire peace, and now pledge their honor to maintain it. When we take a look at these types of review, we may think that these are things of the past. And they are not. This is why we are here today, to try to resolve any issues with regard to hunting and fishing rights within our aboriginal homeland. Furthermore, we talk about what laws apply to who, when, where, what. The treaties also mention that. I'm reading these, Mr. Chairman, because the records say to them and I can only show to you what our ancestors agreed upon. **(Fort Laramie Treaty, April 29, 1868, attached by clerk, quote, Article 1, pg. 1, para. 2):** "If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained." This protects our people within our original homelands, within the exterior boundaries of our reservations. Article II wants to outline the territory of our treaties. **(Fort Laramie Treaty, April 29, 1868, attached by clerk, quote, Article 2, pg. 2, 3rd sentence, top of page.)** It said that this land, "is set apart for the absolute and undisturbed use and occupation of the Indians herein named." You can't find a simpler way to describe property and the use of it within our boundaries. Article 11 references hunting with the 1868 treaty. It talks about the treaty boundaries and reservations. It says **(Fort Laramie Treaty, April 29,**

1868, attached by clerk, quote, Article 11, pg. 5, beginning at 4th line of Article 11), "as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree." This is important to know because our boundaries go well into North Dakota. The treaties we made from the Great Sioux Nation go well into North Dakota. That's documented time and time again by the United States of America itself. The records in this, when it says Smoky Hill River and North Platte, are talking about the furthest southern boundaries that we agreed to back in 1868. These are important to know. There was mention here of the state and it's statehood, 1889. It's very important and imperative, Mr. Chairman, that I bring these to the attention of this committee so we can know when we talk about treaties exactly what we're talking about and that it's important to know that as we make these treaties nation to nation that as it has been said earlier to conform to (unintelligible), that we're ready to work however we can to resolve issues for the mutual consent and benefit of all of our people, non-Indian and otherwise. So, Mr. Chairman, these are my (unintelligible, *promise?)* this morning and I want to say, for the record as well, as we talk about game and fish, one element that has never been talked about in setting as such. Many of our people continue to view game and fish as our relatives. That may seem archaic, that may seem barbaric, but that's what we are and that's who we are, Mr. Chairman. When we can also talk in your language as I'm doing presently, on behalf of those understandings and teachings that have been here since time immemorial (and .unintelligible.. Promise, too?) I appreciate the questions and comments that this committee has made thus far. But, when you mention treaties, Mr. Chairman, we have to speak to these in a way that we know how. What I

said today isn't by all means what we would like to share with you about treaties, only with reference to hunting and fishing. From here, I would like to conclude my comments. Thank you very much for this opportunity. I know that you are on very tight time constraints this morning, but I thank you for this opportunity to speak from Standing Rock. (Speaker ends with native language) What I have said, in all due respect is that we come before you as nations of people. We have common men's knowledge, common men's hearts, just as all of you do. We are here to try to resolve any of these issues so that our children and grandchildren and those yet born will be able to finish what cometh. I will leave a copy of this Accord with the clerk in the event that any of you would like to review this Accord. Thank you.

Chr. Nelson: We'd appreciate that, Mr. Taken Alive. We will enter that into the public record. A couple of comments, first of all, I would like to assure you that in the role of the subcommittee the tribes at Standing Rock and Three Affiliated that have been leaders in promoting this bill will certainly have a place at the table through representation in the subcommittee. There will be scheduled meetings and you're certainly welcome to be in attendance. It's a fairly informal situation, so your comments would be welcome. The other comment I would make is that in reference to the importance of game and fish to your culture, if there is a committee in the ND Legislature that can understand that, I think the House Natural Resources Committee is one of those because it seems like that plays a very important role in the work that we do throughout the legislative sessions. It certainly crosses cultures in that regard. Are there questions from the committee for Mr. Taken Alive? Seeing none, thank you for your testimony. Is there further support for SB 2041?

Michael Swallow, Standing Rock Sioux Tribe , member & attorney for SRT Game & Fish Dept.: (Note: The clerk missed the talk before Mr. Swallow reached the podium) Excuse, me Chairman and members of the Committee, I said that because I'm concerned. When we came here today, we came here with the understanding that you were going to at least attempt to take action on SB 2041. When you talk about forming a subcommittee, that sends up red lights in my mind that there's going to be some amendments. This has been a very interesting process for me. Since we first began with the interim committee to discussion the Concurrent Resolution 4022, one of the aspects of this whole process that I'm most grateful for is the ability and willingness of both parties to share information. That includes the proposed amendments that could be coming forth from your committee today. I would ask that the committee take action on SB 2041 as it's presented because this is a bill that is supported by the tribes. More importantly, this is a bill to protect the non Indian when they come to our lands. That's all it is. You heard our tribal council representative, Taken Alive, talk about the treaty issues and how that relates to us as native peoples. SB 2041 is a bill to protect the *non Indian* when they come on our lands so that they can feel secure in the knowledge that they're hunting without any fear of violating anyone's law or being called into court. More importantly, this is a bill that not only protects the non Indian, but it recognizes the existing law as it is right now. In all my presentations that I have had before, at the interim committee, the Senate Natural Resources Committee and now to you, I present this tidbit of information. On Standing Rock Indian Reservation, we are located in South Dakota as well. Our relations with the state of SD have not always been as (good) as we would like them to be. In fact, our relations with the state of ND, as evidenced by the Accord, by our Motor Fuels Tax Agreement, our Joint Powers Agreement for Education, is a clear indication

that we can work together with the state of ND. We don't have any of those in SD. That relationship is not the way that we would like it to be. But, in key differences, in the state of SD, when the non Indian wants to hunt on our lands, all he or she needs is a Tribal license. When they leave the reservation and go to Mobridge to the motel, they don't have to worry about the SD Game & Fish Department waiting there for them to cite them for not being in possession of a state-issued license or tag. That's a major difference for us because when the non-Indian hunter comes to our reservation, he can go with the Tribal tag and hunt in SD and not have to worry about leaving the reservation and going back to wherever he is from. But in ND, they have to be concerned because if they leave the reservation with a (Tribal) tag **(End of Tape 1B; Change to Tape 2 A)** (they may be stopped by State Game & Fish for being in state violation). We don't see any difference in how that non-Indian hunter is treated by the two states. Actually, there is no difference. Legally, there is no difference. It's a matter of interpretation by the respective Game & Fish Departments. SD Game & Fish Department understands the Mescalero (Apache) decision and they abide by it. The ND Game & Fish Department for some reason wants to focus in on the nature of the land, the fact that there is trust land, there's allotted land, there's a fee land. That was not the focus in the Mescalero case. The focus on that matters was what services did the state of New Mexico provide to the people on the Mescalero, to the tribe, with regard to providing resources and services with the Game & Fish. That's the focus, the inquiry. You heard earlier that ND Game & Fish does not provide any services on the Fort Berthold Indian Reservation. That is also true at Standing Rock. There is no presence in terms of services or resources that are provided by the ND Game & Fish. We operate those services and provide those resources ourselves. We conduct aerial surveys, we have annual surveys, we have

biologists, we understand the nature of our game on our reservations. Some of the discussion that I've heard in all of our meetings with you is the differences in the game season, the differences in the bag limits. Our response to that is that there are differences. We have to acknowledge that. Our differences are based on what we view as being available to offer to you. That's based on surveys and also on cultural and traditional needs. We have never viewed that we own the game or winged animals on our reservation. They are put there for us to protect. We've never said that those are ours and you can't share in them. We've always been willing to share with the non Indian. We've shared our land, we share our game and resources with you. That's our job. That's how we view our purpose, is to protect what we are given. But we freely share that as well. If our bag limits say you can be in possession of three birds and your limits say you can be in possession of two birds, the non Indian should be allowed to come on a reservation and feel secure that he can possess those limits. But, they cannot have five. Our law and proclamation say that you can only have one possession limit, so naturally, if you purchase our license and you hunt on our land, you're going to get three birds. However, if that non Indian leaves, he'd better go to Mobridge (SD) when he leaves because he can be cited in Mandan or Bismarck (ND) for being in possession beyond the (state) limits. This is not fair, it's not what the law is. We have had the opportunity the view the amendments that could be forthcoming. In our view, those amendments do not seek to achieve anything. They will not resolve the ability of the non Indian to hunt on our lands. In fact, in our view, it doesn't change anything. It would just be a continuation of the same circumstances, and we ask on behalf of the game and fish that you not consider these amendments. For example, there seems to be concern on SB 2041 about the language on Line 14-16. I'm thankful for the state officials who have shared this concern with

us. Mr. Nelson has responded to a question about the use of the term "general game license." He said he would not object to the deletion of the word "general." We don't have a problem with that, either. Lines 14, 15 and 16 are an expression of the existing law. That is the law as pronounced in the Mescalero case, that the right to regulate hunting on Indian land is exclusive to the tribes. We have the exclusive authority. If there is a violation of our law, it's not a state offense. It's a federal offense. That's why the tribe presented those lines to you because it's a recognition of what the existing law is. I'm anticipating that there will be some amendments proposed to you that want to either delete or change the language. We, on behalf of the (Tribal) Game & Fish Department do not want those amendments. This is a bill that we have presented to you from our perspective of what the law is. Again, it's a bill to protect the non Indian so that they can feel secure when they hunt on our lands. We urge this committee to take action on SB 2041 with a do pass.

Chr. Nelson: Any questions for Mr. Swallow? I would just assure you that by forming a subcommittee that in past history that has worked well in this committee to work through some of the more difficult issues that we've had. It shouldn't be construed as promoting amendments, but recognizing that this is a big issue and it's an important issue that a subcommittee would be formed. There's no particular outcome that should be construed in that formation.

Swallow: Our position is that it's a simple bill, it recognizes what the existing federal law is and our view of the law, and it can be passed in its present form.

Rep. Nottestad: This may be a simple bill, but I point out that it is the third engrossment of this simple bill, meaning that within the Senate there were many amendments and many changes on to this simple bill to make it the simple bill we have today. We are still a two house legislature.

If we were not and took the bills that the Senate sent us and rubber stamped them we would have gone home two weeks ago because our work would have been done for the session. Subcommittees are common in everything and on much more controversial things than this. They work well. The value of the subcommittee is that it gives both sides a chance to talk about the issue. Without a subcommittee, amendments would come to us, we would act on them, and you wouldn't even be here. The subcommittee is for your benefit rather than to your detriment.

Swallow: Thank you for clarifying that. We had a meeting Tuesday night and had a senator explain to us as tribal people why there was a third engrossment. There were some maneuverings that we were not involved in. The key point that I would like to make is that whatever the maneuverings were on that side, it had nothing to do with the language that you see. It had to do with political maneuvering of an interpretation of lands outside the exterior boundaries of the reservation. The bill that you have is what came out of the committee; it was never amended when it went to the Senate and came back. When it came out, this is it.

Chr. Nelson: Thank you.

Nicki Weissman, Dir. ND Hospitality Association: The association is in support of the amended SB 2041.

Chr. Nelson: Just for clarification, you are talking about the re-engrossed bill, not (the original).

Weiszman: That's correct.

Chr. Nelson: Any questions for Nicki? Seeing none, thank. Is there any further testimony in support of SB 2041?

Archie Fool Bear, Standing Rock Sioux Tribe: I've been to every one of the sessions dealing with the subcommittee that was assigned to work with this bill from day one to now. Today I

was told that we were going to be here to offer our support that the House was going to move on, hopefully a do pass on the bill. The bill as it's written has had a lot of fights, it's fair share of definitions and (changes) of words and language. We got it down to where it's at. To me, it's one of the best things that can come about for the state to work with the tribes. You heard this morning about the Accord. The Accord was talked about at one of the committee meetings. That Accord was dealing with our tribe. The court didn't apply it to Spirit Lake, Turtle Mountain, or Fort Berthold. That's my understanding of that Accord. In this law, the definitions on certain lines come to question at times. But I would ask that the House support this bill as it's written. It's been two years fighting to get this where it's at right now. I've testified on the fact that our sovereignty is an issue of our tribe and still stands. We're not relinquishing anything. Our treaty rights predate the state code of ND, and SD. We just want the recognition that we deserve as a sovereign nation to be upheld by the state and the state legislators. The tribe passed the resolution that you are reading. The resolution states the tribe's standpoint in support of this bill. It went to the full tribal council. The full tribal council understood the bill and passed it the way it stands. Let's not drag it out for another two-three years. I'm asking you to move (a do pass) on this. These are the wishes of a nation. A nation voted on this and we voted to support SB 2041.

Chr. Nelson: Archie, would you restate your last name?

Fool Bear: Fool Bear. (spelled it)

Chr. Nelson: Thank you for your testimony. Are there questions for Mr. Fool Bear? Seeing none, I will take further support for SB 2041.

Cheryl Bergian, Dir., ND Human Rights Coalition: (Written testimony attached)

Chr. Nelson: Any questions for Cheryl? Seeing none, thank you.

Alvah Quinn, Dir., Fish and Wildlife Dept., Sisseton Wahpeton Oyate: (Written testimony attached.)

Chr. Nelson: Are there any questions from the committee for Mr. Quinn? Seeing none, thank you for your testimony. Any further testimony in support of SB 2041?

Vincent Greyhorn, Sr., Vice-Chairman, Spirit Lake Tribe: (Written testimony attached) Wants passage with additional amendments.

Chr. Nelson: Are there any questions of Mr. Greyhorn from the committee? Seeing none, thank you. Is there further support for SB 2041. Seeing none, is there any opposing testimony? Seeing none, is there any neutral testimony?

Roger Rostvet, ND Game & Fish Dept.: (Written testimony attached: Official Department Position Paper, a proposed amendment, and an opinion issued by the state Office of the Attorney Gen. Of Aug. 11, 1998) SB 2041 is appropriately timed. It's time to look at both sides of this issue and move forward. I'm not saying it's 100% in the final form; I think it's a work in progress. When the interim study was going on they passed out the original bill as a work in progress. The Senate started with that bill, changed it numerous times with amendments and now we're looking SB 2041. The majority of 2041 is fairly clear. There is a small portion that I will address later that seems to be confusing or at least may not solve the problem that we're looking to solve. We've heard a lot of testimony about treaty rights and being a layman myself, I view listening to talks on treaty rights as almost like a discussion on quantum physics between a number of scientists. I think the easiest way from the state perspective is to look at my handout of the Attorney General's 1998 opinion that we had requested to clarify what the state

jurisdiction over non Indians are. This response from then Attorney General Heidi Heitkamp addresses her views on Mescalero, which are quite different than we've heard earlier today in testimony. Also, she addresses the Enabling Act in ND, action rescinded in 1953, decision on the Enabling Act of North Dakota. I'm not going go into the details. It's something that I hope people have a chance to look at. I also handed out a copy of our official positions on hunting on Tribal Lands. This was developed in part with help from the Attorney General's Opinion. As you can see, that's quite different than what would occur if 2041 passed. I won't try to address all the concerns because whenever you deal with cross jurisdictional issues, treaty rights, state laws, there is a wide variety of issues that could be covered. The main things that seem to have come up as far as confrontations, is the conflict of who has the authority to issue the license. One that really has caused a lot of concern is where you have two game wardens and a hunter in the middle of an argument over when the season opens and what the bag limits are. We do have checkerboard lands up there. A good example, last fall a guy from instate bought a tribal license and, right or wrong, ended up hunting out of season on a state game management area. I got drug in, the state's attorneys spent time on it. It was determined that the guy probably was entrapped. His charges were dismissed because he'd been told that when he bought a license that he could hunt outside the state, he could hunt on the state wildlife management area. The confusion comes solely with those conflicting views; the guy didn't know which rules to follow. I passed out an amendment that would address that. It's pretty straight forward. The Lines 14-16 in the (current form) can be interpreted in a variety of ways. In fact, I've had several attorneys look at it and they all gave me different opinions. The reason for this (amendment) is that it doesn't say that the tribes have to be exactly the same, it only talks about two different points, one is that

when the season opens, it opens all at the same time. That's common sense. We have checkerboard land, you could actually have two opening season dates on the same square mile involving several different people. The other one is bag limits. This just says so that we don't exceed, at the least the state limit more or less as a boundary. If they have drought conditions, nothing in this would prohibit them from cutting their season, bag limits, access, or whatever. I think this very important. You can take a look at it from a state policy decision. You can decide if that is something that you want the state to relinquish the authority on. It would set a state policy on Tribal Indian lands as described in this bill, The Tribal license would be all that you would need if you were a non Indian. It has nothing at all to do with Tribal members. We already recognize those treaty rights. This is only dealing with non Indian people who go on tribal land to hunt. Our wardens would like to have some clear direction as to what the rules and regulations are. The public would like to have clear direction. I think this small amendment would clearly set up the rules for everyone to follow. It would allow the flexibility of variable licensing within the reservation, having the ability to ignore some of the restrictions of state licensing such as not having non residents the first week because the season would be open, not having to abide by the 10-day or 14-day restrictions of waterfowl and upland game. It would allow the flexibility for providing turkey licenses to non residents as long as the season date is open at the same time. So I think it spells out a lot of the authority that the Tribe would gain. It also provides that game management in general would have some direction. We heard a speaker earlier say that it is tribal. It does that already. I think this would just codify it. As Game & Fish directors, governor's, and Tribal chairman come and go, this would at least be codified so everybody would be working off the same guidelines.

Chr. Nelson: I have some questions. One, I see in your proposed amendment that you don't have a problem with the tribe having lower bag limits than the state. What would be your opposition to them having higher bag limits?

Rostvet: The reason on that is for its consistency across the state. Let's just use an example of bag limits at three and five. The lands are intermingled extensively. At least the hunter wouldn't have to sort out why the bag limits are higher or lower. That would force us to work with the tribe and settle on a state-wide or region-wide bag limit that would be compatible.

Chr. Nelson: Is there a bag limit with Montana that is the same as ND?

Rostvet: No.

Chr. Nelson: Is there a particular problem with that?

Rostvet: When you start dealing with a quarter section of land that has multiple rules on it versus the state of Montana which has a huge land mass, I don't think we're comparing apples to apples.

Chr. Nelson: O.K. That may be true, but I thought we were just talking about the exterior of the reservation. That (must be) as easy to find the exterior border of the reservation as it is to find a quarter of state land, isn't it?

Rostvet: If you look at the definition of the bill, under Indian land it says, "tribal trust and tribal member owned land." That could mean within the exterior boundaries you are setting up a dual pattern of lands. We're not just talking about the entire reservation, we're talking about intermingled jurisdictions within the reservation itself, right on down to the quarter section level.

Chr. Nelson: O.K. In the fiscal note, I see there is a $30,000 deficit or negative. In one of the earlier testimony they talk about the possible loss of some U.S. Federal funds. I'm not sure if

that is Pittman/Robertson funds. I thought that was based on licenses sold, not land. There was some reference to 800,000 acres of land that you include in that federal section for funding. If this bill would pass, would that limit the amount of federal funding that comes to your department?

Rostvet: I'm not exactly sure on that. Right now, we generally have more federal funds than we have state match when it comes to Pittman/Robertson. I would probably view it that the federal government views tribal trust lands with a different method than the state. I don't think that would probably have much of an effect. There is a fiscal note. We would assume that some individuals would buy a tribal license and not a state license.

Chr. Nelson: Are you aware of any tribes that are members of that multi-state compact that was referred to earlier?

Rostvet: I'm not aware of one.

Chr. Nelson: Is that something that you can check on? There has been a number of western states that are members of that compact. I was curious if individual tribes are or could be members of that particular compact.

Rostvet: I'll do some checking on that.

Chr. Nelson: With the checkerboard or the dual type of ownership on the tribal (lands), some of the programs, and the enhancement program that the Game & Fish Department has in practice, are there any state funds used for projects like the deer proof hay yards? Are there individuals who would qualify for programs such as that?

Rostvet: There are a number of programs with private individuals. Our private land program is just that, a private land. We deal on reservations with private land owners. We even have a

couple of PLOTS areas, not on tribal lands but on individually owned land. We have worked on depredation on reservations, even on some tribal members land.

Chr. Nelson: Do you have any halyards out there on tribal lands?

Rostvet: I'm not aware of one but there could be.

Chr. Nelson: Are there any further questions of Roger?

Rep. Nottestad: The amendment that has been passed out today is being discussed. You speak that you are concerned about *opening* dates. Is there a concern about closing dates?

Rostvet: If we could keep this as flexible as possible, those are the ones that we've recognized now, especially like the local, non-tribal landowners within those areas. We know that the tribes may have different opening dates with tribal members, and that is treated right.

Chr. Nelson: Further questions for Roger?

Rep. Charging: I want to thank you. You have been a part of the open-minded communications and the partners have been very good about that. When you relate to the quantum physics, this is very complex. We understand that, but we *have* to depend on the treaties and we have to as a committee through diligence that this will (fit) in the ND statute. It is the state's law and it does have to become something that we as a committee will research, to protect and to assist ND. We don't want to have a contradiction of federal law. That's who we have to answer to as members on the reservation. In regards to the Heidi Heitkamp opinion, it is that, an *opinion*, and has not been challenged in court. We hear often in this committee, we need to make this law to help people avoid breaking the law, or over bagging, or whatever it might be. As citizens in any state or country, we have the responsibility of knowing the law of the land and of the lands which we're entering. Most of the people who live on Fort Berthold go back to the 1900's. If anybody

understands the ambiguity, people who live there do. The guests that come on have the responsibility to understand the law of the land. I think the tribes and the state, with the passage of this bill, will open up a greater line of communication. I think the wardens are going to be more friendly.

Rostvet: I do agree that this law will not solve everything because you still have tribal members that may need both a state and a federal license because it continues under dual jurisdictions. There will have to be some common sense used on that. Our reliance on the attorney general's opinion is generally from an agency standpoint. It is who we seek legal advice from for our interpretations. We don't have our own legal staff.

Charging: Back to the question of uniform seasons. Having heard some of the tribal concerns regarding it, does that alter your thinking on the amendment at all?

Rostvet: It probably points out that there is a real solid need to have that consistency put down because within the testimony we heard different opinions about what (works). I think this clarifies it. It may look like the state is overbearing in this instance, but somewhere you have to choose the middle ground to take a look at what's going to work. From the state's standpoint, we know that different bag limits and different seasons are what cause a majority of the conflicts that we have right now.

Chr. Nelson: Further questions? Seeing none, thanks, Roger. At this point, I will take opposing testimony to SB 2041.

Bill Schaller, Dist. Game Warden, Killdeer, representing the ND Game Wardens' Assoc.:

(Written testimony attached)

Chr. Nelson: In earlier testimony it came out that non-tribal members hunting on tribal land without a state license were being cited outside these areas. Is that happening and what was the reason for that interpretation?

Schaller: There have been some non Indian members cited for hunting outside the season and hunting in closed seasons, and the reason for that is because the state season wasn't open. According to the attorney general's office and as Roger explained, those people were in violation of state law. It would make things *a whole lot easier* if everything was the same for non members.

Chr. Nelson: So you are saying that if the season is open in ND, and on the tribal lands, that a non tribal member on reservation land has never been cited for hunting without a state license?

Schaller: No, I'm sorry if I mislead you. Yes, non-Indian members who are hunting on the reservations have been cited in the past. When this occurs outside of the state season, they may have been cited for closed season or for not having the state license, more than likely. That has occurred in the past.

Chr. Nelson: Not in season?

Schaller: I don't believe it has.

Chr. Nelson: Further questions for Mr. Schaller?

Rep. Nottestad: You say that you support the amendment that Mr. Rostvet has (proposed). You heard my questioning about the ending date. In your testimony, you say that the ending date must be in. Which is it?

Schaller: The Game Warden Association would like to see the seasons structured the same, beginning and ending. As Mr. Tex Hall and Mr. Todd Hall both indicated earlier, we have very

liberal state seasons and they can surely fall within that framework at any time, and restrict it any way they want, either with lesser bag limits or shorter seasons.

Rep. Nottestad: That is in conflict with this amendment.

Bill Schaller: I didn't see the amendment but it evidently reads just a start date.

Rep. Charging: In your experience, I'm assuming the association is involved in a nation wide group and you participate in training (with other states). Has this been an issue across the United States and have you had an opportunity to visit with other states (to see whether they face similar differences and overcome them?)

Schaller: The ND Game Warden's Association is just ND. We do visit with wardens from other states. I realize SD has a different system than we have. They are obviously going by advice from their attorneys just the same as we are. I don't have experience with states other than SD.

Chr. Nelson: Are there further questions for Mr. Schaller? Seeing none, thank you for your testimony. Is there further testimony in opposition to SB 2041? Seeing none, is there neutral testimony?

Mike McEnroe, ND Chapt. Of the Wildlife Society: (Written testimony attached)

Chr. Nelson: Are there questions for Mr. McEnroe?

Rep. Porter: Since the waterfowl are migratory birds and controlled by the federal government, how does that play into a tribal license for a non tribal member. Do they still need to buy a duck stamp?

McEnroe: It is my understanding that to hunt waterfowl on the reservation, on Indian lands, you still need the Federal Duck Stamp and you have to operate seasons within the federal guidelines regarding days and bag limits.

Chr. Nelson: Any further questions of Mr. McEnroe? Seeing none, thanks, Mike.

Steve Kelly, Attorney for the Three Affiliated Tribes: Obviously, I'm not neutral, but I just wanted to give you some information regarding the attorney general's opinion by Heidi Heitkamp that was issued in 1998 which is being heavily relied upon by the state Game & Fish Dept. This opinion is really inconclusive. On page 2 of the opinion, the last paragraph states: "The decision in Mescalero Apache does not establish a general rule that a state may not regulate non-member hunting on tribal trust lands. The unique facts of each case must be analyzed in the balancing of tribal, state, and federal interests. Because I am unaware of all the facts needed to make this decision for each of the reservations in North Dakota, I can only provide you with the framework governing the legal analysis and suggest that you continue to work with this office to reach a decision." In other words, this is a case-by-case basis determination whether or not there is state jurisdiction on tribal trust land or tribal land, reservations. Then it says, (top of page 3) "Here are some questions to ask when considering whether non-member hunters on trust land are subject to state law." Then they go through and ask the questions that were asked in the Mescalero Apache tribe case. If you go to the middle of the page, "Although I have not given you a direct answer to your question, I trust that I have provided you with sufficient guidance so that *you* (Mr. Kelly's emphasis) can answer it after *your* (Mr. Kelly's emphasis) consideration of the factors described above. I know that your department has in the past been willing to seek to resolve tribal/state issues by agreement. Addressing this matter by agreement is *worth keeping in*

mind (Mr. Kelly's emphasis). " So, the determination that the State Game & Fish Department has jurisdiction on the reservation has also been made by the Game & Fish based on these factors. The A.G. herself has never come out with an opinion stating that the Game & Fish, under the facts of the Fort Berthold Reservation or any of the other reservations has jurisdiction.

Chr. Nelson: Thank you, Mr. Kelly.

Mike Donahue, ND Wildlife Federation, and The United Sportsmen of ND: We're neutral on the bill although we think some parts need to be fixed. We're going to rely on the wisdom of this committee to do that. I have not read the amendment proposed by the Game & Fish Department. Generally speaking, we are in support of something along that line. What we did not see in the bill is anything with a later requirement to come to the table and coordinate it. That is what we're looking for. We do generally support the Game & Fish.

Chr. Nelson: Thank you, Mike. Mr. Carvell, did you have some comments that you would like to make?

Charles Carvell, Ass't Attorney General: You invited me here to answer any questions that anyone might have. One of the instructions of the Attorney General was the merits of the bill and the amendments. I'm here to answer questions if there are any.

Chr. Nelson: Any questions of Mr. Carvell?

Carvell: I appreciate the attorney's clarification of the Attorney General's opinion. He's right on.

Carol Two Eagle, self: (Written testimony attached for the public record, not read aloud.)

Chr. Nelson: O.K. I appreciate that. The subcommittee will consist of Representatives Porter, Charging, and Kelsh. With that, I will close the hearing on SB 2041.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2041

House Natural Resources Committee

☐ Conference Committee

Hearing Date March 11, 2005

Tape Number	Side A	Side B	Meter #
1	x		560-3372
Committee Clerk Signature	Karen Bonnet		

Minutes: **SUBCOMMITTEE MEETING**

Subcommittee Chr. Todd Porter: We will open the subcommittee on Reingrossed SB 2041. The record can show that all the subcommittee members are present. What we are going do today is go through any new information that anyone wants to present to the subcommittee, then plan on meeting again next Thursday morning and Thursday afternoon and try to take full committee action. My intention is to put the bill before the full committee on Thursday afternoon. If there are still areas to work out, or items to work out that no agreement is made on, then it might be Friday morning. It's my intention to get something put together by next Thursday morning and put the bill before the whole committee next Thursday afternoon. At this time if anybody has any new information that they want to offer on SB 2041, we will take that information. You will have to go up to the microphone in order to offer it because of the tape recording.

Ladd Erickson, McLean County States Attorney: I have a couple concerns about the Game & Fish amendment. I am a little confused as to what that was crafted to mean. I understand that it takes some of the concerns they are trying to address here, but I have some word problems with it. It may cause confusion. Mr. Chairman, my view of this bill is not as a wildlife management bill. It doesn't have anything to do with whether the state needs to be out managing wildlife on reservations; the reservations have the ability to do that. I am confident of that. I view this and how people view this bill really depends on the direction that you look at the bill. From my direction is my concern about the people management issues that are addressed here. I'm primarily concerned with problems that have historically happened where people are relying on information that they get from a government entity. That information and the reliance on it is getting them charged into the criminal court system. A lot of that revolves around having different season dates. About 1/3 of my county is on the reservation and we have a situation where hunters come out before the state season, and start hunting on game management areas and such. They claim they've been told they can do that by the tribe. The state game warden cites them for doing that. Then they (hunters) are mad at everybody. If we don't go out to do something, the landowners complain because they want to be out hunting a week early, too. A lot of area people come in and are hunting around their houses or barns. It causes a *huge* problem. The season date issue is a significant problem area, that week (prior to state open season) is the main concern. If that can get resolved, I think there is a lot of potential. I think it is important for the Legislature to look at policies that eliminate dual licensing of hunters. In other words, I support the fact that we don't charge people two different times to hunt over particular tracts of land. I think that's ridiculous and I think the intent of this bill is to start

(Ladd Errickson, cont'd): eliminating that and I think it is a worthy goal for the Legislature to start. In fact, I think long term solutions for this issue are to have tribal licenses' ability to be recognized throughout the Reservation and not just on this cookie-cutter approach. I think that would require some trade offs for having state licenses recognized, at least on the areas that they are recognized now. I think a good scenario from my county would be that the tribe could sell a tribal license to a person from Minneapolis, who wouldn't ordinarily have a resident hunting license. That person could just buy that one license and then hunt. They wouldn't have to have a GPS to know where they were standing. That would be a good thing for everybody; it reduces a lot of enforcement conflicts. The other thing that I think should be a long-term goal of the Legislature is to look at a way of reducing the duplication of enforcement resources on Reservations. In other words, we have state game wardens that have patrol areas and tribal game wardens with patrol areas out there. I would think, long term, that should be looked at. The state is always going to need some enforcement jurisdiction to respond to citizen complaints and come in and assist the tribes. However, cops are very territorial. Every month, my drug task force or my deputies are in some sort of fight over who was doing what in whose town. We have to get together, beat the drum and settle it all. It's non stop. I think when you have tribal wardens and state Game & Fish game wardens out doing their jobs in the same area, you create conflict. I think it would be a worthy goal for this Legislature to look at a way of having the state game wardens pull back, and giving the tribal game wardens the ability to enforce state law through cross deputization or whatever agreement you could come up with. They could cite non-enrolled members into their states attorney's office and resolve conflicts that way. That may be too lofty to address now or in the future, but I think they are some things that need to be discussed. I think

(Ladd Erickson, cont'd): the season dates are important. A lot of the debate over this type of bill revolves around what federal law is. I can't advise the committee as to what that is. In essense, the conflict comes about generally when states have concurrent jurisdiction over non-enrolled members in general terms for DUI's, domestic violence. We're always on reservations doing those things with non-enrolled members. In the area of game law, it depends on what the treaty said, what particular federal acts involving Game & Fish issues have been enacted on the reservations, and then whether the facts of that particular reservation, the land statuses, the game and fish programs, etcetera, reach the point where state concurrent jurisdiction has been preempted. That might be different at Standing Rock than it is at Fort Berthold or Spirit Lake or elsewhere. There is no hard and fast rule and I can't say that state law is or isn't always going to be concurrently applied. The issue in this case is that the Legislature is looking at legislatively reducing state jurisdiction. I think there is some value to the state in doing that here, especially over the licensing fees. One of the concerns that I have about the bill and the Game & Fish amendment, Mr. Chairman, is the clarity on whether state *criminal* jurisdiction is maintained. There is, in my mind, is a difference in a regulatory scheme. I think some of the phrases I saw in the G & F amendment were setting up a hunting program and you have a regulatory scheme. In my mind that means, and I might be wrong, if you have pheasants and set up a regulatory program with seasons, daily limit, etcetera. To me, that does not mean, and I think this needs to be clarified in the bill, that state criminal laws are exempted. The reason I think that is important to make sure is clear. We have a lot of state criminal laws that are used on reservations in game areas, such as shooting out of a vehicle. That is a Title 62 violation and it's not even in the G & F code entitled 20.1. What I don't want to see is the scenario coming out of

this bill where, i.e. in a routine deer poaching case on the reservation, a landowner (enrolled or non-enrolled) calls the Garrison game warden and says I've got somebody out here poaching deer. The warden responds, comes across the vehicle, makes the stop, finds the evidence of the dead deer. Now, I can prove that jurisdictionally. All I need to prove is that it's a non-enrolled member, and it happened in McLean Co. What I'm concerned about is getting to a point where I would also have to prove that that violation did not happen on a Tribal Trust Land, because that may be impossible in many circumstances. You might have an automatic defense to all of your G & F cases in state court. Even if it didn't happen on Tribal Trust Lands, they'll say I have the burden of proving that it didn't happen. I want to make sure that that concept gets debated by the committee. I'm not sure from the tribal point of view if there is concern about exempting state criminal law as opposed to any type of G & F regulatory scheme. We have to be clear about that. There is one case from Standing Rock that involves Guide and Outfitter Law. This could be an unintended consequence of the bill. This is a case where the enforcement is not an issue between the tribal law enforcement, federal or state. We license our Guide's and Outfitters under the state licensing scheme. That might mean they do guiding and outfitting on a reservation. If they commit a violation under our state licensing scheme while it's on the reservation, the current argument the defense is making to court in that case is that they are already under the law. There's a lack of jurisdiction for the state to prosecute that. If we start adding language without considering those things, we could run into unintended consequences for our Guide and Outfitter law because it is solely a state licensing scheme. Those are the kinds of things that I have a concern about in the language. It think there are some doable things in the bill. The season dates are a big issue because I think it's a real concern in public policy if we have citizens that are

relying on advice that they get from a government, then end up in a state court system with criminal charges. That, I'm concern about. I'd like the bill to address those things.

Chr. Porter: Are there any questions of Mr. Erickson?

Rep. Charging: We actually covered most of your points of concern in our first hearing. Why didn't you attend?

Erickson: I had court that day and would have had to change court. I have court at 11:30 (today) and have to meet witnesses at 11:00. I can come back this afternoon.

Chr. Porter: Mr. Erickson, we won't we doing anything further on this bill. At 10:30, we're going into full committee. We won't be doing anything (on this bill) until next Thursday. If you are going to leave prior to that, I'd plan on setting it up for 9:30 next Thursday morning.

Erickson: We'll check our schedule. Thank you.

Chr. Porter: Any further questions for Mr. Erickson? Seeing none, thank you. Does anyone have additional information to add at this point? Committee, I have a couple of amendments with language that Mr. Erickson has given to me and I had drafted by Legislative Council. We will hand those out at this time. The first amendment is .0402 is a redraft of the G & F amendment. That amendment goes into the bill on Pg. 1, Line 16, after the period behind "land." It states that "except for the state hunting license requirement, all other state laws and regulations apply to nontribal members hunting on Indian land. This section does not apply to an Indian tribe that opens a season before a state season or closes the season after the state season. An individual may not take or possess more than the state limit of a species." That is the first amendment. The other amendment is a redrafting of the bill, putting it into a compact form so that it would more or less be something that empowers the director of Game & Fish to enter into a compact

agreement with the Tribes. The areas of the amendment are also covered in that particular piece. Without any new information I think what we'll do is let that be the digested areas. Since everybody just got these today, we will make them part of the record and open for discussion next week on Thursday morning so that everybody has a chance to look them over and see what they think.

Steve Kelly, Attorney, Three Affiliated Tribes: Thank you. I didn't have anything to add to the bill, but I would like to have an opportunity to respond to some of the comments that were made by Mr. Erickson.

Chr. Porter: Sure

Kelly: First of all, it's real important to understand that the Three Affiliated Tribes (TAT) and other tribes in the state have been trying to negotiate a compact, which I believe Mr. Hildebrand, the Director of G & F, already has the authority to enter into. We've been trying to do that for five years. The sticking point has always been whether or not the state has jurisdiction, and whether the state Game & Fish wardens have jurisdiction to come on a reservation and arrest somebody that we've invited to hunt on our reservation under our regulations. We've always asserted the Mescalero Apache case, because we have a comprehensive regulatory scheme on our reservation that has been approved by the federal government. Because there are no off reservation (unintelligible) that we win under the Mescalero Apache tribe case, and that we would have jurisdiction. What has happened is the state has, in our view, ignored the case, and has come on the reservation on three occasions and have arrested non Indians that we have invited to hunt for birds. Granted, some of them were hunting the week before the season opened for the state.

Chr. Porter: Mr. Kelly, if I could ask a question on that particular comment. What happens in a situation where the individuals are hunting on land owned by the state of ND within the exterior boundaries of the reservation and our season isn't open, yet?

Kelly: On fee lands the state would have jurisdiction over non Indians. Your state laws would apply to them. This whole issue of hunting on Trust Land, I'd say you don't have the ability to regulate. We really don't know what your interests are. Everytime we met, (and I think I met three or four times) with our Natural Resources Director and the state, and every time the sticking point was this jurisdictional issue. Once we get past this, which SB 2041 does, then we can move on with an MOU (Memorandum of Understanding). If they want to talk about bag limits and hunting seasons with respect to non Indians on Trust Land, we're willing to talk about that. We've always made that very, very clear. One thing that everyone has to understand is, this is a trust issue. We've never been able to get past that issue with the state Game & Fish department. These issues that Mr. Erickson has brought up can be addressed in an MOU. We have been and always will be willing to sit down and talk about these things. We feel we've made some good progress with the Legislature. Trying to address all these problems now at the 11th hour, in my view, isn't the time to do it. So, if you pass the bill the way it is written right now, this Legislature meets again in two years. That gives us two years to work this stuff out. That's the time to address your concerns that are being brought up now, in our view. It's late in the day and some of these amendments may end up killing the bill and we've lost all progress that we've made. Remember, this bill is to *protect* non Indians. We want to establish relationships and develop our economies on our reservation and within the state. You have to remember, bag limits and season opening dates go both ways. In other words, if we have

different bag limits from the state, and Game & Fish wants us to honor their bag limits for non Indians who come on the reservation to hunt, will they honor ours if our bag limit is less than the state's on fee lands within the reservation? Those are the things we have to talk about, the things we probably can't answer before this bill gets considered next week. We have to sit down, there are a lot of issues to talk about. There are even more issues than have been identified here today that we have to talk about. It's going to take more than a week. The state and tribal game warden conflict is another issue. The big conflict has been, and I've explained this to the state when we sit down and talk, is we feel like they're poking a stick in our eye when they come on and ignore laws and arrest non Indians that turn around, after they get arrested, and are angry at us because we told them they could hunt. That's the big conflict. Once we get past that, we can sit down and work. We have MOU's with other agencies with problems on law enforcement. It works out. These things are workable. Tribal licenses being good throughout the reservation; that's something we'd entertain. We don't have a problem with that, but again, addressing it now is not the time to do it. We will sit down within the next two years and talk about all these things. We've been willing to for the last five years. I won't talk about the Mescalero decision. State criminal laws exempted...they are not exempted when you're hunting on fee land. The whole issue, and the reason why we're here with this bill, is whether or not they can hunt on trust land. In our view, and the reason for this bill is that they don't. I don't know of one case in McKenzie County where we have (our's cited) and the county attorney, R. Dean, refused to prosecute it. They thought it was a mistake. The state wasn't going to back them up on the jurisdictional issue, either. If you're on fee land, or on state land within the borders of the reservation, state laws are going to apply. Tribal laws apply if you're on trust land or Indian

lands in the bill. It's real clear. These areas where it's not real clear, we can work together and address those on what will be enforced, what won't be enforced, and who will enforce it.

Chr. Porter: Mr. Kelly, can a tribal game warden issue a citation and summons to appear in tribal court to a non tribal member for a game violation on trust land?

Kelly: Not criminally. Civililly, they can.

Chr. Porter: What happens if that individual doesn't show up?

Kelly: We generate an adjudgement and file that judgement within the state court where they reside, and collect.

Chr. Porter: There would be time to discuss that next Thursday, too.

Kelly: The point I want to make is that there are a lot of issues for us to discuss and things that we can agree on and ways to remedy these things. The way to do it is through an MOU. It's not to amend this bill to try to address all these factors. What the bill does is get us past the big stumbling block. Once we're past that, we will make progress.

Chr. Porter; Any questions of Mr. Kelly? Seeing none, thank you. There's about three minutes if anybody has three minutes of information that they want to add to the record at this point in time.

Todd Hall, Three Affiliated Tribes Game & Fish Director: To answer the question that was asked about what happens in case a non member doesn't come. It gets bumped federally up to U.S. Statute 1167.

Chr. Porter: Then it becomes criminal, or does it still remain civil?

Hall: It becomes criminal at that point.

Chr. Porter: For failure to pay the civil, or the whole offense becomes criminal?

Todd Hall: The whole offense becomes criminal under 1165. (Note, I did not confirm with Mr. Hall whether this statute should be 1167 or 1165-K. Bonnet)

Chr. Porter: So it starts out as a civil and moves to criminal?

Hall: It starts out as criminal and stays criminal. I thought you were asking about tribal code. There are two sets of laws that can apply. You can use the federal law as criminal or (civil?) law. We don't have criminal jurisdiction over non Indians, and a civil fine can be opposed to the tribal will. But it is subject to a criminal sanctions under the federal law. I would like to state that we support SB 2041 and strongly urge a do pass out of this committee.

Chr. Porter: Thank you. Questions for Mr. Hall? Seeing none, thank you. At this time, committee, we are going to close the subcommittee hearing on SB 2041 until 9:30 next Thursday morning.

Rep. Charging: I just took the opportunity to speak to our chairman (Nelson). I am a little disappointed in how this hearing has gone. These folks have driven to Bismarck I believe on six occasions, not including today, regarding this bill. I asked Chr. Nelson if it was at all possible to continue the subcommittee hearing, allow them time today to look at these amendments and, or, ask them to come up and (discuss) these amendments. I would like to see some progress, rather than letting them turn around and drive 200 miles home again.

Chr. Porter: The only time there would be is the afternoon. We have full committee starting right now and we can certainly open up the record again. The full committee would be here. We're still going to meet next Thursday morning at 9:30, so from a standpoint of being able to look things over and digest it and have a meaningful discussion on the amendments, I think that next Thursday would be the most appropriate time to do that.

Rep. Charging: May I ask one question of Game & Fish?

Chr. Porter: Sure. Mr. Rostvet, would you come to the podium?

Charging: Roger, have you had time to look at the amendments that were brought in today?

Roger Rostvet, ND Game & Fish: I have not. I just looked quickly at it and have a question already that I need to check on. The last sentence, "an individual may not take or possess more than the state limit on a species." I'm not sure if that means the same section line and bagging two bag limits. I don't know if that covers that or not. I will research that.

Charging: Based on today's hearing, are you in agreement with the opposition regarding the questions on your proposed language on the amendment that the Department of Game & Fish had offered in relation to SB 2041?

Rostvet: I'm not exactly sure what you meant by the question.

Charging: Do you believe there is a problem with your amendment?

Rostvet: I not an attorney or a wordsmith, but I assume the proposed amendment would have been looked at by Legislative Council for grammatical (content). The reason for proposing that is we're relinquishing jurisdiction that we're talking about here. Then, are there any protections for the state? That was my reason for bringing up those sideboards.

Charging: Thank you.

Chr. Porter: Are there further questions for Mr. Rostvet? Seeing none, thank you. Subcommittee, we will close for now and reconvene next Thursday at 9:30. Thank you everybody for coming down.

(NOTE: Todd Porter's amendment dated 2/25/05 is on file, as is one dated 3/10/05. Both were presented today.)

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **SB 2041**

House Natural Resources Committee

❑ Conference Committee

Hearing Date **March 17, 2005**

Tape Number	Side A	Side B	Meter #
1	x		0-End
1		x	0-End
2	x		0-406
Committee Clerk Signature	Karen Bonnet		

Minutes:

Vice Chr. Todd Porter: I call the House Natural Resources Committee to order and ask the clerk to call the roll. A quorum is present. We will stand at ease, waiting for some amendments from Legislative Council, as we take up SB 2041.

Chr. Jon O. Nelson: Call the HNAT back to order. An explanation is in order to the full committee. Last week, the subcommittee on SB 2041 met and several amendments were distributed. Since then, there have been conversations with the Attorney General's office and it was my feeling that this bill needs the full work of the whole committee. I will dissolve the subcommittee. (New and old amendments passed out). There was also an amendment that ND G & F had provided. We will work off the amendment 50017.0404 this morning.

Rep. Darrell D. Nottestad: The only two amendments before us are the Game & Fish's and today's.

Chr. Nelson: Yes. Rep. Kelsh, is it your understanding that there is one amendment from last week's subcommittee?

Rep. Scot Kelsh: Yes.

Chr. Nelson: We're working on the assumption of two amendments right now.

Rep. Nottestad: Are there any amendments that are going to be proposed by the tribe, so we know about them as we are working?

Chr. Nelson: I'm not aware of any, but it's been my understanding that the tribal entities represented have little desire to amend this bill. The subcommittee did meet last Thursday. They took testimony and we're still the same as after the initial hearing. Rep. Porter will explain the subcommittee's work.

Rep. Porter: There was a Game & Fish amendment and a rewrite of the G & F amendment by Legislative Council that I asked for. We also passed out another amendment which Ladd Erickson, the McLean Co. States attorney had drawn up. We took additional testimony from tribal representatives that were present. The basic input from them was that they were not interested in any further amendments to SB 2041 and wanted it passed the way that it came from the Senate. The ND G & F Dept. gave testimony and wanted to amend the bill to include language that would make sure that the bag limits and season opening dates are identical. Today's amendment, 0404 was a rewrite of one of the amendments that was passed out during the subcommittee. There were a couple wording changes to be made in order to make it less controversial. The initial language did not fit what was being discussed.

Chr. Nelson: Are there any questions?

Rep. Nottestad: When you say "we," are you talking about the subcommittee?

Rep. Porter: This is the draft that I took from the information from ND G & F.

Rep. Nottestad: So this was from Game & Fish and you.

Rep. Lyle Hanson: Are we dealing with all the reservations or just one, two, or more?

Rep. Porter: The way the bill is written deals with all reservations within the state of ND. There are no exclusions.

Rep. Hanson: Was there input from others?

Rep. Porter: We had input from the Three Affiliated Tribes, Standing Rock, and I don't remember if Sisseton-Wahpeton was here. (Unintelligible) was present, but did not (unintelligible)

Chr. Nelson: Further questions?

Rep. Mike Norland: Did the Game & Fish try to add this amendment in the Senate, also?

Rep. Porter: The way the bill came out of the interim dealt only with the transportation of game off tribal lands. The Senate added Section 2, which is the main section that we are dealing with. I don't think anybody has a problem with the transportation issue. At the initial hearing, G & F put in their objections to Section 2.

Chr. Nelson: We're going to change our normal mode of considering amendments. At this time, I will ask Roger Rostvet to the podium. I don't want it said that G & F or the tribes have been cut out of these proceedings on the basis of these amendments. Roger, you came to the initial hearing with the concern of the bag limits and the season opening and closing dates. Do you feel that issue is addressed in these amendments?

Roger Rostvet, ND Game & Fish: Are we talking about .0404?

Chr. Nelson: Yes. Is there anyone who doesn't have a copy of 50017.0404? That's the copy we are basing this discussion upon.

Rostvet: This amendment provides for concerns that we initially raised about the opening and closing dates. It may go further in clarification. About halfway down, it reads "whether the state hunting license exemption is in effect, the state retains criminal enforcement jurisdiction over non tribal members hunting on Indian land." That part may go farther than what we had originally requested. If the hunting season dates and bag limits are the same, then the tribe would basically be in charge of all other jurisdiction and enforcement. That is the difference from the original amendment that we put out.

Rep. Nottestad: If this becomes an issue, would you have a problem if that portion was struck from this amendment?

Rostvet: No.

Chr. Nelson: Further questions?

Rep. George J. Keiser: I'm trying to look at this issue on a bigger scale. If we were ever to attempt to enter into a reciprocal agreement with an adjacent state, not the tribes, as we've done in Work Force Safety, Unemployment Insurance, etc., would we impose the same standards on another state? Would we suggest that Montana had to meet this?

Rostvet: We'd probably go farther. When you look at other reciprocal agreements, they are very specific and to the point. A good example is non resident spear fishing. As it says, you cannot spear fish in ND if your state does not allow ND residents to spear fish in that state.

Rep. Keiser: That's true reciprocity. What I'm saying is if for some reason we would say a ND licensed hunter could hunt within Montana and use their ND license, or use a MT license.

Would we still want to prosecute them here if they violated Montana's law? Would we still want the bag limits to have to be the same as ours if they were in MT?

Rostvet: If Montana was located within the exterior boundaries of ND and had state ownership of parts of MT in ND, then we'd be talking more apples than oranges. They are an entirely separate geographic separation.

Rep. David Drovdal: I have as much problem understanding this issue between the tribe and sovereign nation. These are my neighbors, and I certainly don't agree with everything that goes on. I also recognize that they are, under treaty, a "sovereign nation." They're like Canada. They really are, even though they are within our boundary. It's hard for me to understand that and always has been. We have to treat them as a sovereign nation under federal law. That supersedes our law. They may not be like Montana, but they're like Canada. Canada has a deer season that isn't in conjunction with ours. Do we stop that ND hunter who brings a deer back from Canada? Are we putting different restrictions on tribal authorities than we would on Canada?

Rostvet: If you are assuming that whichever federal law you're looking at applies, then there is no question. The one that keeps coming up is Mescalero as one of the court rulings. If that was exactly the same situation and the courts would rule that, then that would be a determination. Right now, some people are making the assumption that that applies. There is nothing that says from the federal law that that actually applies. It has not been challenged. That went into effect in 1983. I'm no expert on constitutional law. We deal with those variances all the time. It's not a clear sovereignty issue, I'm not a constitutional lawyer.

Rep. Drovdal: I did look into Mescalero. What I understand is that there were some questions put out in Mescalero that would determine and set the standards for what tribes or whoever was in the boundaries. This isn't just a ND issue. They set certain standards. If we pass this bill, we're saying they met those standards and can issue their own license. That's the way I understand this. The standards look pretty easy to understand. For example, does the tribe have laws governing hunting? Are they a tribal law or comprehensive? Are they able to enforce and do they have the infrastructure to manage their own resources? Does it affect how it can manage it's resources? It goes on and on. If the courts have ruled that they are valid, we wouldn't be here discussing it. What we're doing by discussing it, is saying that we agree that they are meeting those and we aren't going to challenge them. If I'm wrong, we have an attorney sitting here who could address it better than I. Is that what you're saying, too?

Rostvet: No, I'm not saying that. I'm saying that if the state wants to declare jurisdiction or to relinquish certain parts of jurisdiction voluntarily, that in order to protect interests that are probably not covered by Mescalero, having the same opening dates and same bag limits, would protect the resources of the state in advance. Just make those assurances. If we were to look at Mescalero now, it's obvious that we've looked at it and not agreed that all those criteria have been met. Certainly a lot have been. That's open for interpretation, but you go point by point.

Chr. Nelson: As I look at the provisions of Mescalero in it's application in ND, it's basically a tribe-by-tribe basis. Some tribes would come closer to meeting those points than others. Some conceivably may meet the points that were laid out in Mescalero, some may not meet any of them. That complicates our decision making when we have five tribes in the state and not all of

them are as aggressive in moving towards a licensing consideration in relationship to game laws. Is that a fair statement?

Rostvet: That's a very fair statement. My comments are directed at all of the reservations in ND, not just one in particular. We have variances not only in what they're doing as far as meeting Mescalero, but in geography and the treaties that set them up in the first place. Making blanket statements is hard.

Chr. Nelson: Are there further questions for Roger?

Rep. Mike Norland: Is there one game and fish department for the Three Affiliated and does that agency cover Fort Berthold and Standing Rock, Turtle Mountain...or does each tribe have their own?

Rostvet: Each tribe has their own departments and activities.

Rep. Dawn Marie Charging: We keep coming back to the same thing. I think it's an easy problem to solve in principal. One of the biggest problems is the concern that season dates don't correspond. Is that the number one problem that we have at the table today?

Rostvet: That's basically our main concern, based on past history. When the seasons and bag limits don't match up, we have conflicts. My concern is why would we want to have legislation that leaves those conflicts unresolved?

Rep. Charging: I believe, after speaking with the various tribes, each tribe can have their own regulation and code much like we do. Each tribe has its own statutes to follow. I believe in principal that's not in question. In principal, the tribes would have no problem agreeing to the dates. But if it's put in statute, which is what we're asking them to do here, is to present the overreach of state and federal law. I cited in my testimony, and if there is a way we can word this

in the amendment so that it's not a statute, not law, I don't see that there would be a problem. It crosses over a certain area, whether it's Mescalero or a half dozen others that have been heard across the Great Plains in the last ten years. The concept was to keep away from some of those questions, make it easier for the guests of ND no matter who he is, member or non member. I brought a copy of the actual license structure that Three Affiliated has. When you purchase this license, you're a member of that tribe or a non member. You could be from Timbuktu, Michigan Standing Rock Sioux, or from Bismarck, ND. I think a potential problem that we need to resolve today is in regards to jurisdiction. It exceeds just season dates. It's also a matter of the jurisdiction of those states as well. That's another area where in supreme court decisions, Mescalero being one of many, that brings us to where we're at today. Correct?

Rostvet: Things evolve as time goes on. I think that by having some assurances, the state could move forward. I know that the tribes want trust. It also goes back to the state wanting trust. We know that seasons have varied in the past and all we're asking for from a Department standpoint is written assurance that that would take place in the future.

Rep. Charging: Does that written assurance have to be in statute?

Rostvet: That seems to be the most expedient, efficient and binding way. I do not thoroughly understand the sovereignty issues that go on within tribes. I know that's a very important part of their government process, but also being charged with looking out for the interests of ND, I have to take a look at some of the long term assurances that the state would have. That's why I suggested those amendments.

Rep. Charging: Let's just take one at a time. Regarding the licensing, "not required for hunting on Indian lands, in certain instances. If any tribe agrees to open tribal hunting seasons for non

tribal members on or after the date the season opens and does not extend the tribal season beyond the state season for a given species, an individual need only adhere to the tribal licensing requirements for hunting on Indian land." That would be Section 1 if we were to take the bill apart. That goes back to- does it have to be written in statute that there is a what if or what else?

Rostvet: No, it's up to this body to decide if that needs to be written in statute. Looking at the bill and down the road to eliminate as many problems as we can right off the bat, and make this thing work and run smoother, the suggested amendments would do that. I personally think that is the most expedient and gives the assurance to people in ND that if the state relinquishes all jurisdiction on (these?) that minimum assurance is there.

Rep. Charging: I'm not following when you say relinquishing all jurisdiction. You're not really relinquishing jurisdiction on fee lands within the exterior boundaries, you're not really (unintelligible). All it's stating is that you allow, if you pull someone over in those areas leaving the reservations or coming out of the game management area which we do have within the boundaries of the reservation. That's where they pull the licenses, and be on their way if they are not found illegal in the laws of ND if they are carrying this license and have hunted on the proper lands. That's all we're asking. It's not relinquishing jurisdiction. That's the part I'm not following. Why do you feel that you're relinquishing so much jurisdiction? The law is clearly there already.

Rostvet: The clarity of the law in many people's view is open to interpretation. Right now, we interpret it entirely differently than you have. No disrespect, each person can look at a particular set of circumstances and when agreement can't be made, it generally ends up in a court case.

What we're probably looking at here from a state standpoint, is forgoing that process and trying to move forward rather than sitting back and saying we can't agree on anything, so let's litigate.

Rep. Nottestad: In listening to this discourse, if it's going to go this route with this bill, I think it needs to be place in law. The reason is, if it's not placed in law and it's recommended by a proclamation, everything is fine between this governor and our present commissioner. But with a different governor and commissioner, we could be back at ground zero. If it were placed in law, future governors, commissioners, and the future tribal people would accept them as well. My concern would be if we don't place it in law, we could just as well not be here about this issue. Do you see that if it doesn't go into law, that it could change with commissioner or governor changes?

Rostvet: That's always possible, policies change with (a change of administration). This sets statewide guidelines.

Rep. Nottestad: If it were placed in law, then they would have to adhere to law on both sides.

Rostvet: Yes.

Rep. Porter: This bill in its present form came up through the Senate with Section 2 added. When it first came out of the interim committee, of which I was a member, it really dealt only with the transportation of game. It was considerably expanded. I look at this as an executive branch authority to do compacts and memorandums of understanding with each individual tribal nation. The one part that I think is lacking in the state law for you to do that, and I want to be clear about that, is the relinquishing of existing state laws in a memorandum of understanding. Does your department or the governor have the ability to relinquish licensing without us dealing with it at a legislative level?

Rostvet: I don't believe the Game & Fish Dept. has that authority right now. I checked with the Spirit Lake tribe about making some allowances for them to get non resident deer licenses. It was deemed that this Department could not arbitrarily give licenses away or make agreements to overlook state law under the current format of law.

Rep. Porter: The other thing that we're being asked to do in the third engrossment of SB 2041 is to make a blanket agreement across the state of ND with the five tribes. In reading Mescalero and other traditions of law, there are certain tests that need to be applied, as Rep. Drovdal brought up, in each individual case. My problem is that by doing Section 2 without the proposed amendment, aren't we just opening it wide, not knowing if those standards have been met.

Rostvet: We are probably doing that even with the amendments. We're expanding the interpretation quite liberally to certain reservations that may be quite a ways away from ever being considered under Mescalero. I think if you have some overall guidance for the entire state, it reduces confusion. Different rules and regulations on different tribal lands across the state becomes even more complex. It might be a more liberal interpretation by doing this, but it may solve some of the confusion.

Rep. Charging: One of the questions I have and I think the tribes have wondered, as a state we do have a pretty complex scheme of licensing. We deal with that in our meeting every week, looking at adding more or tweaking some that have unintended consequences. Certainly, we bring state experience to the table, in how you've dealt with non residents for years. All we're talking about is seasons and season dates. The tribes currently follow all the federal law in regards to waterfowl. I don't believe we've ever had a problem with those that I'm aware of. That takes care of the waterfowl issue. Are you asking with your amendment to what degree are

we following season dates? Are you going to recommend that the tribes have the same structure of season in relation to non residents?

Rostvet: Under this, it only says the opening and closing dates, the season structure. Within that if you issue a license it's good for, I assume you could issue a license for one day or the entire season. The state has a licensing structure that is more complex. If you wanted to simplify that, that would be the beauty of having a system like this. You would have flexibility. If you wanted to issue deer tags to non tribal members, you'd have that flexibility and not be concerned with a 1% restriction. Some of the problems that have plagued some of the tribal licensing issue are some of the restrictions that the state imposes in its licensing structure on non residents. My understanding is that the tribe would have the ability to issue licenses (at any day, term or cost).

Rep. Charging: My concern is there isn't enough clarity in SB 2041 as you see it. It's open to question because it says the same state season open dates. For example, we have a potential youth pheasant season, a resident opening. I don't see clearly enough that they have the freedom to maintain their own scheme of licensing. If it's the same day, wouldn't you interpret it as the same dates, for a non resident, tribal member?

Rostvet: It says on or after the state season opens.

Rep. Charging: The state deer season, upland game?

Chr. Nelson: Let me offer an example. In the upland game season, state residents are allowed that first week on all lands, non residents are not allowed to hunt on public lands that week. That first week on the provision of a tribe would be open for their interpretation of who would hunt, is the way I would interpret it. Is that your understanding? That would be the opening date?

Rostvet: Under my interpretation of this, if the season is open, they can open it to any particular group or regulate them under their licensing scheme because that's where the regulations (unintelligible),

Chr. Nelson: Under the provisions of the waterfowl opener, non residents are not allowed to hunt in ND for the first week of the season. Let's say it begins on Oct. 1 for example, and in ND non residents couldn't hunt that first week. The tribes would be able to supersede that state law and allow non residents to hunt with their (tribal) licenses that first week. Is that correct?

Rostvet: That would be part of the licensing scheme. That's where we regulate non residents now is through licensing.

Chr. Nelson: Also with youth seasons, that's not a general opener. We're talking about general openers, right?

Rostvet: The youth season would not be allowed under this, outside our regular season dates. That's how I read that. If the state did not have a youth pheasant season, the earliest they could open a non tribal member season would be on the first day of the regular, statewide pheasant season.

Rep. Charging: (unintelligible)

Rostvet: No, for the opening date, irrespective of resident or non resident because the dates of opening generally follow license restrictions. You buy a waterfowl license, it's only open for those particular dates, but the season is still open.

Rep. Nottestad: A point of clarification on Line 3 where it's states and seasons, if the word "species" were inserted between state and season, then you would have it by species and there

would be no question. We'd be talking about species rather than a state season for a given species.

Rep. Porter: .0404 does say "...species."

Rostvet: I believe that would clarify it. This way, it just has state seasons and leaves that question open.

Chr. Nelson: Are there further questions? Seeing none, thank you for your testimony. Please stick around if you can.

Rostvet: I do have an appropriations hearing at 10:30.

Chr. Nelson: I will ask Rep. Froelich to come to the podium. I don't think he testified in the original hearing. He has some information for us.

Rep. Rod Froelich, Dist. 31: District 31 encompasses all of the Standing Rock Reservation in the North Dakota side. I was born and raised on the reservation and am probably more aware of the laws, and the variances that there are between state and tribal laws. Do I always agree with the tribes? No. Do I always agree with the state? No. To be objective on this bill, I saw this bill when it came out of the Senate and they had many amendments, too. If you get down to this amendment that doesn't have a line or line number, where it says "the state license exemption is in respect, the state retains it's criminal enforcement jurisdiction over non tribal members." We have a problem right there, because we also have Indian people that are non tribal members who live on the reservation where the state has no jurisdiction. **(Copies of various quotes attached)**

Chr. Nelson: We have that flagged.

Rep. Froelich: "..In effect, the state retains its criminal enforcement jurisdiction over non tribal members *hunting on Indian lands*." (speaker's emphasis) The state of ND has *no* (speaker's

emphasis) jurisdiction, I repeat, *no jurisdiction* (speaker's emphasis) to enforce any state laws on any Indian land, whether that is Indian land that's fee owned, Indian land that is in trust, tribal land that is fee owned, or whether that's federal land that's in trust. We need to make that clear.

Chr. Nelson: We will have a full discussion on that particular sentence in these amendments and if need be, a roll call vote on that provision. It very likely will be.

Rep. George J. Keiser: Don't you need to qualify your statement, "unless there's a joint agreement"?

Rep. Froelich: I'm speaking for Standing Rock. I think Fort Berthold is here and can speak for themselves. I don't believe that there is compact, there are some compacts with fishing agreements.

Chr. Nelson: There is no compact, yet, but certainly a tribe could enter into a state/tribal or multi-state/tribal compact. Then, I think there would be some cross-jurisdictional issues.

Rep. Froelich: I'm trying to say, for the state to say some of these things, that they are going to usurp the sovereignty of the tribes, will open up a can of worms that will never get shut. With all due respect to Mr. Rostvet, he said that we've got this problem with game laws and have a bag limit here or there. We have that same problem with South Dakota, Minnesota, or Montana residents. We have a separate state, basically, five separate states within the state of ND. Whether all agree to that, that is a fact. We have sovereign nations, the same as Montana or South Dakota. We have to start working with them. The way this bill came out of the Senate, it covers pretty much everything that would happen on Standing Rock and I believe on Fort Berthold. I know of some laws in Standing Rock right now that if the state comes down there

and wants to prosecute me while I am hunting on Indian land without a state license, how would they enforce that law? They, in fact, would be trespassing on Indian land.

Chr. Nelson: I agree with your analysis, if the exterior boundaries of the reservation was entirely Indian land. Unfortunately, in ND, I think Three Affiliated has about 65% tribal, 35% non tribal lands within the exterior boundaries of the reservation. That does complicate the issue as far as jurisdiction and enforcement, wouldn't you agree?

Rep. Froelich: It would not. This bill as it came out of the Senate is plain and simple. The amendments that I'm looking at really complicating things. They really, truly are. I've looked at three different amendments here. You guys are opening a can of worms that aren't going to get shut. On Line 14 of the amendment, where it says "general game license not required to hunt on Indian land. An individual hunting on Indian land, whether he's native or non native, enrolled or non enrolled, pursuant to a tribal hunting license is not required to possess a state license to hunt on such land." It's real simple. On the back page, it says they are going to honor licenses. I think we've really started something here.

Rep. David Drovdal: Mr. Chairman, you bring up a very good point when you talk about the percentage of ownership of land. The way I understand this bill is that we're dealing with tribal land only. We're not dealing with the fee lands. They're still maintaining authority over fee lands. Rep. Froelich, your statement about the five states within the state of ND. I would like to do the comparison, and I think it would be better to say that we have five countries, like Canada, inside the state. When we're dealing with Montana, we're dealing with the Legislatures of MT and ND. When we deal with Canada, we have to go through Congress. When we deal with the Tribes, that's through Congress, too. They have jurisdiction over them, not us.

Rep. Froelich: I studied this bill coming out. The state would not usurp their rights to come in and handle fee lands, and I don't think the tribes are looking for that. I haven't had one of them say to me, we want to talk over this whole deal. The way the bill came out of the Senate is really, truly workable for the Standing Rock Sioux tribe. We own land on Fort Berthold, and on Standing Rick, so my wife and I know what's going on. This bill, the original bill, will work. What the amendments are doing, we'll be fighting about this for the next 50 years.

Chr. Nelson: We're trying to come to some resolution on it. Are there any questions? Seeing none, thank you for your testimony. I am going to ask Mr. Erickson to come forward now. Following that, I'd like a member of Standing Rock and Three Affiliated to testify as well. I see Mr. Swallow and Mr. Kelly are here. Assuming that those are the people you would like to testify, if there is somebody else, I would like to know. You will have an opportunity, as well.

Rep. Charging: Since the subcommittee hearing, these folks hadn't had a chance to respond or visit with those amendments at all, nor anything that we've discussed prior to today.

Chr. Nelson: My understanding is that the four amendments were distributed last week.

Rep. Charging: Before we vote...

Chr. Nelson: Let me clarify, we will stay here until we're done today. We're going to make a decision on this bill today. Everybody's voice is going to be heard, both from the tribal and state perspective.

Ladd Erickson, McLean County States Attorney: I have been working on this bill since it came out of the Senate. If you put the current language of the bill next to the .0404 amendment, one way of interpreting the bill is that the amendment makes no change to the bill. That's where I think there is a significant conflict. People are reading this bill completely different. For

example, in the current language, it reads, "an individual hunting on Indian land pursuant to an Indian hunting license is not required to possess a state license to hunt on that land." That does not say a person can hunt outside of the state hunting season. They just need a tribal license. We have statute 20.108-01, you cannot hunt outside of state season. I understand that there is an interpretation that when you add 'you don't need a tribal license,' you exempt all the state laws. That's not in the bill now, but it's already a source of different interpretations. I feel that's going to lead to conflict. The amendment makes it clear that the state season applies to non enrolled members. This is why that is such a contentious issue. About one third of my county is on Fort Berthold. In my part of the county, there are a lot of fee lands, intermingled with Corps land, Game & Fish lands, and trust lands. We've got a problem when hunters come out after relying on information they've been given from a government entity, hunting with a tribal license on Game & Fish lands a week before the seasons open. The landowners out there know that you can't do that. They call the Game & Fish because they're mad people are hunting. Game & Fish goes out there. The hunters are upset because they've been told they can do this and are now being charged into a court system. I think the number one policy issue for this legislature is to try to find ways to eliminate situations where you have people who rely on information that they get from one government that's ending them up in another government's court system. It's a huge problem. If the season dates are lined up and for example, a person comes out, and trust land is mixed with fee lands, and trust lands aren't marked... I'm not too worried about people hunting on a Game & Fish area if they're hunting within a season because the landowners don't get upset. The fact that they didn't get the right license or not the state license, that's minor. What I am worried about is the conflict that keeps coming up for many counties for many years where you

have that season date difference. If you look at the proposed amendment, it clarifies specifically. After the session, I could see the attorney general's opinion or a court case saying the language of the statute did not allow the person to hunt before the state season opens. There will be conflict over that. The amendment makes that clear. The state species limits, if you look at Section 3 of this bill, it says, "A person may not possess, control, or ship or store more than the authorized amount of that bird in the governor's proclamation." The new language on there, "properly tagged birds may be taken off Indian land." It already says you have to have the same species limit. The proposed amendment has language to make sure that people don't misread. You can have a tribal license and a state license and walk across 80 acres of trust land, shoot three pheasants, walk on to a game management area and shoot three more. The game warden has to determine the location you shot each bird because you're on different jurisdictions when you shot the birds. If you don't put the amendment on, what's going to be the state interpretation, is that you can only have one state possession limit. What we're trying to do is try to change it from implicit things to express legislative intent. The criminal jurisdiction issue is important to me because I will not take criminal cases off reservation lands. Sometimes, I take those cases when enrolled members, who are ranchers out there, call our game wardens out and take people who have committee game violations. I think the committee has to make a decision, either clearly exempt state criminal jurisdiction or clearly don't exempt it and put it in the amendment. The amendment proposed is to make it clear that it's not exempt. Don't leave it in limbo because that will lead to conflict and a lot of litigation. I know I will have to start that this fall if it's unclear on these intermixed lands. Requiring a game warden to prove **exact** land status when he finds a deer poacher, have criminal jurisdiction, is a conflict that is going to have to be decided in court

or by juries. I understand that the tribes can't come before the committee and say, "The state has criminal jurisdiction on trust lands." That is a huge debate. As the committee has addressed with Mescalero, there are reservations in the state that I w ...(unfinished). There is no way the state, in my opinion, is not going to have jurisdiction. There might be other matters, but the problem is that we have lands that ....(unfinished). Wildlife moves, we don't have the reservation boundaries marked. If you go onto Fort Berthold from the east, unless you're on Hwy. 37, you never know when you are on the reservation in some areas. So to try to determine who has jurisdiction, these are the kind of problems you develop. I don't look at this as trying to intrude on tribal rights; it's trying to create clarity in this amendment and assure that we don't have to resolve this in court. The next sentence is, "The tribal member must possess a state hunting license on non Indian land within the exterior boundaries of the reservation." I don't think that is in conflict, but it needs to be clarified, and in statute, that it is the law. I don't think there is a disagreement that it is federal or state law. If you're on fee lands or Game & Fish lands, you need to have a state license. The bill came out of the Senate very vague, would create a lot of conflict, and it needs to **(Change to tape 1-B)....**

....If a tribal court has criminal jurisdiction over a person, which they don't over non Indians, which is one of the vacuums created here, then the intention of the Legislature I believe is that the tribal courts take the case. The states attorneys will always do that. Not every problem can be solved in an amendment or in the bill. This is the first big step. I think we're moving back the licensing. There are three areas that overlap: The management policy. Licensing. Enforcement. The state is starting the process of removing the licensing and that's a good idea in my opinion. There is no reason to require somebody to have two licenses to hunt the same

ground. As we move the enforcement and management back, we have to move in increments and make sure the accommodations to protect state interests. Rep. Drovdal had some very good questions. The state does have interests on the reservations. Make sure what we do here is *clear* (speaker's emphasis) so it's not done in controversy after the session.

Chr. Nelson: That is what we're attempting to do. I have a question. Listening to the debate, it seems very difficult, if I was a tribal member or leader of the tribe, to accept that provision of giving the state the jurisdiction when non tribal members hunt on Indian land. That's basically why we're still here. You have explained why that's important to you in your enforcement duties as states attorneys. If that sentence was removed from the amendment, give me a an idea of how your life changes as a law enforcement officer.

Erickson: It would be my view that if you remove that part, that you exempt out-of-state jurisdiction and not leave it just gray about who's in charge. Second, we're going to need to prove our jurisdiction based on the land status, as opposed to now in a criminal case, I have to prove that the thing happened in McClean County. I have criminal jurisdiction over the person. I will have to prove that, but then have to prove the land status of the violation. That might be when a poacher has left the area and the game warden got a call from a landowner, he intercepted the person, and the exact status of where that violation occurred will be part of the jurisdictional issue. That is not insurmountable.

Rep. Porter: In that Section where we're making it clear rather than the gray area that you're concerned with, after the word, "state" in there, it's states, "retains its criminal enforcement jurisdiction." What you're saying is that we as a committee need to decide whether that word

stays in the bill, or we put in a word "'relinquishes' it's criminal enforcements. Either way, we need to make sure that we're clear as a committee which way it goes.

Erickson: Yes.

Chr. Nelson: Are there any questions?

Rep. George J. Keiser: I think I understand how you are suggesting that this clarifies parts of the bill. I'm not sure of that, because this bill is in the ND Century Code, dealing with ND citizens. It deals with land outside of this sovereign area, and all of it except for the very last sentence in the amendment is clarification to deal with the authority of a sovereign nation. So it's great to say that it clarifies for North Dakota Century Code, but this isn't the tribal century code. So this amendment would be in conflict with the tribal code, wouldn't it? Which one applies when you're on the reservation?

Erickson: I'll try to do the best I can. In 1832, the U.S. Supreme Court ruled that states have concurrent jurisdiction over non enrolled members within the boundaries of a reservation. So the tribe has jurisdiction over tribal members, the state has (unintelligible) jurisdiction. What happens is the law develops through time. A number of federal acts developed in the Game & Fish area, treaties and federal congressional acts. For example, there is no debate before this committee that I have DUI or domestic violence jurisdiction on the reservation. The question comes in the Game & Fish area, does the federal law preempt states jurisdiction because it's occupied in the field. There is an appropriate enforcement, the state interests are going to be covered by the tribe. That Mescalero case was not part fee land, part private land. It was an enclosed reservation. This is a simplicity version of the big debate, that the state is still asserting it has concurrent jurisdiction. If this bill fails, the state is going to be doing criminal enforcement

on the reservation. If the bill passes, there is a grey area the way the bill is currently written because people are interpreting that giving up the license is giving up the jurisdiction.

Rep. Keiser: There has been a lot of reference to the Mescalero case. I've not seen this before. Shouldn't we be adding that if certain elements of the Mescalero case are met, then they qualify? That would resolve some of the concerns that Roger and others have.

Erickson: I think you're right. The long term approach to the problem is about game compacts. The Game & Fish has the ability to wave state statute, giving up state jurisdiction to resolve overall conflicts. Our current statute allowing state tribal relations will not work on MOA's because the state is stuck with the statutes that may not make the best sense on the reservation when you're working with another government. What you're talking about is exactly the long term solution. I'm looking at this bill as a starting point. I'm prepared to come back before the committee in two years, trying to redress that issue, to get it so the Game & Fish has the ability to give up some management, law enforcement, and licensing in trade so state interests that we consider very important are protected in another way.

Chr. Nelson: Further questions? Seeing none, thank you for your testimony. (Chr. Welcomed his wife and family and a group of 36 junior and senior students from Napoleon, and explained this bill to them.) I will ask Mike Swallow, attorney from Standing Rock tribe, forward.

Mike Swallow, Attorney, Standing Rock Sioux tribe: The purpose of SCR 4022 was to study proposed legislation permitting the Game & Fish Department to coordinate with game & fish programs conducted by the tribal governments of ND. As a result of that concurrent resolution, we approached you with what we thought would work, so our Game & Fish Department could work with the state's Game & Fish Dept. I believe, on behalf of the Standing Rock Sioux tribe

that SB 2041, in its present form without any amendments, will do that. It will do that because it will *require* (speaker's emphasis) the State Game & Fish to recognize our authority to regulate hunting on our lands, which is not happening now. That's why Standing Rock Sioux Tribe requests your support of SB 2041 in its present form. Presently, in Sioux County, there is no coordination of effort between the Standing Rock Sioux Tribe Game & Fish Dept. and the ND Game & Fish Dept. We believe that with passage of SB 2041 there will have to be coordinated efforts because the State Game & Fish will understand that we have authority to regulate hunting on our lands. The two departments will have to work together and discuss fee land, trust land, tribal lands, and which department has jurisdiction. That's why we approached the Senate to consider the language that is currently in 2041. This is what we considered to be a resolution of the problem that you recognized in 4022. We approached you because of the season limits and the bag limits. The problem was, is and will continue to be with this amendment is if our bag limits and our season limits don't coincide with yours. They don't. Therefore, the state is taking the position that they can enforce their laws on hunters when they come *off* (speaker's emphasis) the reservation. That's the problem. This is not a new problem, because in 1977 it was a problem in New Mexico. This is the same reason the Mescalero went to the Supreme Court. Quoted from the (Mescalero/Supreme Court?) Opinion: "Numerous conflicts exist between state and tribal hunting regulations. For instance, tribal seasons and bag limits for hunting does not coincide with those imposed by the state. Moreover, the tribes ordinances have specified that state hunting and fishing licenses are not required for Indians or non Indians who hunt on the reservation. The New Mexico Game & Fish has enforced the state's regulations by arresting non Indian hunters for illegal possession of game killed on the reservation in accordance with tribal

law, but not in accordance with state hunting regulations." That was the problem there then, and that is the problem here now. We've tried to work with this on the executive side of the state government. It's not working because the Supreme Court in the Mescalero case said, state, you can't do that. You cannot enforce your game laws on the reservation. The reason we came to the Legislature is that the executives were not following this language. They were not following the requirements of the Supreme Court. We're half way there with SB 2041. Now, you're committee is seeking to amend 2041. It's our view that (amendment) .0404 will not resolve it, but will put us right back to the same position that we were in before we went to the Senate. I've had the honor of working for the Standing Rock Sioux Tribe for 12-14 years. As part of my duties, I've been able to draft legislation for the tribe. When we do legislation, we try to make the language as clear as possible. The problem that I see here is the first word under the bold face, the first word after when you start with the word "if." It begins with ambiguity, "if," "If an Indian tribe agrees to follow your...." To paraphrase, "to open the hunting season for non tribal members on or after the date the state season opens, and does not extend the tribal season before the state season for a given species." You've all heard testimony that our season dates and our bag limits are *different* (speaker's emphasis) from yours. Right there, "if an Indian tribe agrees to open its hunting season," we're not going to agree. We have our established hunting season and established species limits. They're different from yours. Take that as the way the law is on our reservation. Our laws are different from yours. That means that with the word "if" this statute doesn't apply. Then, "an individual need only adhere to the tribal licensing requirement." If we don't have the same seasons, does that mean an individual has to adhere to the state licensing? The Mescalero case already told us that an individual does not. Who does the word

"individual," mean? Does it mean me as an enrolled member of the Standing Rock Sioux Tribe, if I'm hunting on a season that is not coinciding with yours? You can cite me under this (your) law? That is stepping backwards to the same pattern that I read you in Mescalero. The word "individual" is not legally correct. The second line says, "for non tribal members." I'm assuming that you will change that because that is not the law, either. It's clear, the Federal law is that if I hunt on the Fort Berthold Reservation, and I violate their limits, the state doesn't have authority to prosecute me. The federal government has preempted this entire area of law and said tribal courts have jurisdiction over Indians. When they talk about non tribal members, arguably, the state would try to prosecute me for hunting under the laws of Fort Berthold if those laws don't coincide with yours. I'm assuming the remaining proposed amendments, the next sentence, "whether the state hunting license exemption is in effect, the state *retains* (speaker's emphasis) it's criminal enforcement jurisdiction over non tribal members." Again, the Mescalero case has told you that the state never had any criminal jurisdiction. Federal law, The Lacy Act, takes jurisdiction over the non Indian who violates tribal hunting laws. The state doesn't have the jurisdiction for violations of tribal hunting laws. With all due respect, why are we being forced to protect and argue what the law has already established. Indians have jurisdiction over Indians. The state does not. But there is the language. It's a slap in our face because we're not being accorded the jurisdiction that we already have. The following line, "over non members hunting on tribal land, and an individual may not take or possess more than the state limit." Again, what does an individual mean? Does that mean you can enforce this law against me on the Standing Rock? "A non tribal member must possess a state hunting license to hunt on non Indian lands." That doesn't do anything, either. This entire proposed amendment, in our view (Standing Rock),

takes us back to where we were before we walked in the Senate, before we obtained 2041. We vehemently oppose the amendment and ask that you pass SB 2041 in its present form. Last time I was here, Rep. Nottestad had a question about the compact for violators. Would we recognize a violator who committed a violation of state laws on our reservation? Under state law that's in effect. (Quote's the Interstate Wildlife Violator Compact, NDCC 20.1-16). We ask that you take care of this matter, or two years from now, we'll be back to ask that you amend this law as well. That's what (Rep. Nottestad) was referencing. Unfortunately, we don't. Unfortunately, you don't recognize ours, either. The reason is because the compact that's in NDCC defines the state and omits an Indian tribe. If you were to amend that law to include a definition of a state to include an Indian tribe, then we would work with you on our reservation to say we'll pass a law saying we'll recognize it. That's a simple fix to the violators compact. That has to do with enforcement. But the licensing issue before us today, in our view, is simple. From our perspective, it's a clear statement of existing law. We believe we've met the criteria that Rep. Drovdal mentioned, that is bound in the Mescalero case. You can't refute the fact that there is fee land, non fee land, and trust land on our reservation, but we believe that 2041 is going to require the State Game and Fish and the Tribal Game & Fish to work together so that we can better enforce our laws and you can better enforce your laws. We ask that you not consider any amendments, and take SB 2041 in its present form.

Rep. David Drovdal: Many concerns have been brought up. You realize that this is a bill, and we revisit all our Century Codes every two years. If those concerns are legitimate they will come back up and we will open the debate in two more years. That's my argument for voting against

this amendment. We need to see where this is going and continue to move on. We do recognize that this not a treaty, that it's just the Century Code. It can be amended if things don't work out.

Swallow: (Unintelligible). One other point, there are nine Indian reservations in South Dakota. This is not a problem (in SD). Here, we do. Rep. Charging was kind enough to hand us the SD codified laws. They have language that recognizes tags issued by Indian tribes upon tribal or trust land of an Indian reservation. It's not a problem, and it's been in effect since 1982. Lets give it a try. If it's a problem, we can work it out.

Rep. Dorvan Solberg: You referred to SB 2041, that you agreed to the language in the bill. To clarify, this is the third engrossment. Do you agree with the language in the third engrossment?

Swallow: That's correct. We (Standing Rock Sioux Tribe) support the third engrossment.

Chr. Nelson: Are there any further questions?

Rep. Keiser: You referred to the Mescalero case. Do all of the tribes currently meet the conditions identified in the Mescalero case? Do they have laws covering (unintelligible)? Are the laws comprehensive? Are they actively enforced? Does the tribe have in place an infrastructure to manage the resource? Etc.

Swallow: I represent the Standing Rock Sioux Tribe. As you heard in testimony, we have five tribes in our state (ND). All five tribes are different. I cannot speak for Sisseton-Wahpeton, Spirit Lake, Belcourt, or Fort Berthold. I can only speak for Standing Rock and can unequivocally state that we meet those conditions.

Chr. Nelson: Rep. Keiser, for your information, there are representatives from four of the tribes here. I believe Spirit Lake, to the best of my knowledge, isn't represented here today. The other four tribes are. Seeing no other questions, Mr. Swallow, I appreciate your testimony.

Steve Kelly, Attorney for Three Affiliated Tribes (TAT), New Town: TAT concurs completely with everything that Mr. Swallow just said. There are a few other points I'd like to make. I won't go through a detailed analysis of the amendments. You do need to understand that the tribes cannot support an amendment or any bill that infringes upon their tribal sovereignty. They cannot support a bill that infringes on their right to make their own laws and be governed by them. That's exactly what the amendment does when it tries to set the season dates and bag limits. The resource on each reservation determines what their season dates and bag limits are going to be. The resource (numbers) dictate those factors. The state should not be able to dictate those, because they don't know exactly what our resource is. By getting both the State and Tribal Game & Fish together, we can work those things out. We can say, "What's your count? Our count is this. What do you think of our opening?" Why haven't they been able to work together? It's because it's been a sticking point regarding enforcement of state laws on our tribal lands. This bill remedies that, especially Section 2. I wrote Section 1 and the amendment to Section 2 to this bill because transportation was not the problem. It does need to be addressed. The real problem was, on the Fort Berthold Reservation, the State Game Warden coming on to our Indian land and arresting or citing non Indians. It's completely unacceptable. It's been done the last three years. There hadn't been a problem until recently. Now we have to do something. This creates a fix. Every time we sat down with the Game & Fish, and I had four-five meetings with them myself, along with Paul Banks, our Natural Resources Director, and Tex Hall, our Director of Game & Fish Dept. Every time we talked to them about it, they said state laws that we can't agree to. As Mr. Erickson pointed out, when you get it in an MOA, you can't agree to something that's inconsistent with state law. We totally agree. That's why we're here today, to

fix that. Now, we can address the finer points of an MOA regarding season dates, bag limits and coordination of enforcement on the Reservation. When I reviewed the original legislation as proposed by Mr. Swallow, I said the bigger problem is state enforcement on our Indian lands and this is what we need to fix. The Senate Natural Resource Committee agreed, and passed this bill 8-0. The TAT seeks your support on passage of this bill without any amendments. We don't believe any amendments are needed, because an MOA is going to be needed to carry out the hunting on the Reservation and coordinating the enforcement efforts. We can address many things that Mr. Erickson seeks to address. For instance, in an MOA with the state, jurisdiction has to be addressed. There are notice requirements for people to comment on any MOA that the governor signs. There is 30-day period during which there is supposed to be a public meeting, a notice of that meeting, and people show up to comment on the agreement. There is (also) a section that says, "This section provides a 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." In other words, the jurisdiction is what it is. That's determined by federal law. As Mr. Swallow pointed out in Mescalero, you have no criminal jurisdiction on the reservations. The way the bill limits, we limit it to Indian lands which means that non Indians will not have to get state licenses to hunt on Indian land, trust lands and lands owned by the tribe and by tribal members. On our reservation, our whole northeast quadrant is all fee land. Under this bill, non Indians hunting on that section would have to get a state license to hunt on it. People are sometimes confused as to the scope of this bill. The intent is to protect non Indians who hunt on our land. It does not impact fee land owned by non members on the reservation. Mr. Erickson alluded to the fact that

there is a void in criminal jurisdiction. There is not a void in criminal jurisdiction because the federal government, under the Lacy Act, would have jurisdiction. I have that act here and will read from it, "It is unlawful for any person to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce to (unintelligible-present?) any fish or wildlife taken, possess, transport or sold in violation of any law or regulation of any state or in violation of any foreign law or Indian tribal law." It's a real broad section for enforcement by the federal government for criminal violations of hunting on the reservation. There is no vacuum.

Rep. Todd Porter, Vice Chairman: Mr. Kelly, when you wrote Section 2 on the Senate side, you stated that "a memorandum of agreement would have to be in place in order for any tribe to enact Section 2 of this law." Was there any particular reason why you didn't include that language in the bill, that in order to enact Section 2 a memorandum an agreement had to be arranged by the tribal government and the state of ND?

Kelly: It has been our intent, and my assumption, that would enter into an MOA with the state Game & Fish.

Rep. Porter: In that section, on Line 16, after the word land, then it should actually state, "that before this section goes into effect, an MOA is required."

Kelly: If doesn't have to say that. If you're looking for some assurances that an MOA will be entered into, that is something you can do. When I listen to people, I listen to what they say, and then what they don't say. When the state Game & Fish testified (here), also when we met, when we talked about the Mescalero Apache case, it's important for this committee to understand, there was a letter of opinion that was requested in 1998 by Mr. Hildebrand from Heidi Heitkamp, who was attorney general at the time. The opinion came regarding state jurisdiction on tribal

Erickson yesterday, we want to work with the people of the state of ND in getting those lands back. Chairman Hall is on record, as well, saying that we want to honor the leases and preexisting commitments.

Chr. Nelson: I am having a hard time understanding how this is germane to the bill, Rep. Drovdal.

Rep. Drovdal: My visit with Chr. Hall is that I'm really nervous about this and so are a lot of other people. If we can solve that, I think you would find a lot more support.

Kelly: It is not law for the TAT. The concerns of this bill arose after the articles on the (unintelligible). To us, this is a trust issue. I think that the comments about passing the law the way it is and giving everyone two years to see how things work out is a wise comment. The TAT ask that you trust us to do the right thing by the state and by non Indians and by the tribe itself. It has to (start?) the way it is and then we'll enter into an MOA with Game & Fish that meets everyone's needs.

Chr. Nelson: Thank you, Mr. Kelly. Are there any questions? Seeing none, thank you for your testimony. For the information for all those in attendance today, we will come back this afternoon if need be. Unfortunately, from a time standpoint, that will be about 4 p.m, because after floor session we do have a program honoring the legislators that have passed away in the last two years. If we can complete action this morning, we will try to do that. I do want to hear from the other tribes in the state if you have additional testimony.

Alvah Quinn, Lake Traverse Res., Southeast ND: On behalf of our tribe, we support all of the comments by Mr. Swallow and Mr. Kelly. We would like to see this bill passed in its present form. I'm glad (who?) came back because he mentioned something interesting this morning. It

had to do with sovereignty. He said he doesn't really understand sovereignty. When the representative mentioned how tribes are foreign countries like Canada, and when the comment was made about sovereignty, perhaps that's why we are all here today. *Nobody fully understands sovereignty.* (Speaker's emphasis). Sovereignty is the ability to govern oneself. We as tribes have sovereignty to govern ourselves. The Lake Traverse Reservation fits the criteria of Mescalero, and I think all the tribes in ND do. Like Mr. Swallow said, in SD -we, too, have the majority of our lands in SD- we've never had a problem. We work with the state game wardens there. We don't have any agreements in place but we sit down. We have five counties in SD and two counties in ND. We sit down with the game wardens in SD, we have our seasons in SD concurrent with SD *for the non members* (speaker's emphasis). We have tribal member seasons starting at least up to a month before the state season opens. We do this for enforcement purposes. If we're to have tribal members and non Indians out there all at once, we only have three tribal rangers. It helps us to have the two different seasons. We haven't had any problems since I've been working with the tribe, going on 25 years. We've had some agreements on particular areas that apply to fishing. It's been working fine and I was really happy to hear that this bill was going to move forward. Then to see the amendments, it throws a monkey wrench into everything. I appreciated the comments from Rep. Drovdal about sovereignty because that is really important.

Chr. Nelson: Are there any questions?

Rep. Porter: Does your reservation have land in Minnesota, also?

Quinn: No. Just SD and ND. The east boundary is the water boundary of the lake itself.

Chr. Nelson: Further questions of Mr. Quinn? Seeing none, thank you for your testimony. At this time, I ask Mr. Burcier from the Turtle Mountain Tribes to appear.

Travis Bercier (sp?), Turtle Mountain Tribes (TMT), Belcourt: The Turtle Mountain Chippewa Tribe is in agreement with the other tribes that SB 2041 should pass in its present form. Because of the TMT minimal land base, we are not primarily interested in allowing non members to utilize hunting and fishing opportunities. Our primary interest does lie in allowing the tribes to exercise that right if it does choose to do so. We also meet the criteria of the Mescalero case and as stated before, we fully support and request the passage of SB 2041 in it's present form.

Chr. Nelson: Are there any questions? Seeing none, thank you for your testimony.

Rep. Darrell D. Nottestad: For the sake of moving this along, **I make a motion for a do pass on SB 2041 without amendments.**

Rep. David Drovdal: Second.

Chr. Nelson: Before I accept the motion, Mr. Carvell, did you have any comments that you would like to make prior to committee action?

Mr. Carvell: No.

Chr. Nelson: We have a do pass motion on the floor by Rep. Nottestad. First of all, Travis, did you sign the register? Please do, and for those that haven't signed the register, it helps us as far as completing the minutes. We have a second by Rep. Drovdal. Committee discussion.

Rep. Porter: During the discussion of this bill, I sat on the interim study committee along with the subcommittee. I think that as we look at this bill and move forward, the problems that it creates are that there are some definite clarifications that need to be made. I'm not going to

support the do pass because I don't think that by passing it the way it is that we've done our job as a committee in looking at all the problems that it creates in addressing those problems with the amendments that have been presented. I don't necessarily think that all of the amendments address the problem. Certainly in Mr. Kelly's testimony today, to say that we need, before anything happens, a Memorandum of Understanding is (unintelligible). I don't see that anywhere within this bill. **(End tape 1B, change to tape 2A)**

Porter, continued: Without those clarifications of problems that exist, I can't support the bill.

Rep. Mike Norland: I'm going to support the bill. To me, the amendments clog things up and I don't think we're going to get anywhere with them. I like the bill the way it is. It's simple. Section 2 is basically one sentence. I can't understand why if we pass it, that as some testimony was given, the Game & Fish from the state of ND and the sovereign nations work some of those things out together. I'm going to support the bill the way it is.

Rep. Duane DeKrey: One of the things in this amendment that I didn't like was the fact that ND Game & Fish is going to be able to police on tribal lands. I understand that the land in the boundaries of the reservation is privately owned and not part of the reservation and that the Game & Fish is going to have jurisdiction on that. But I didn't think Game & Fish should have jurisdiction on the actual Indian lands. Is that clear in this bill?

Rep. Nottestad: I asked Mr. Rostvet, do you need anything beyond where it says Indian lands and he said they did not, so that was not necessarily not a Game & Fish option. This is not on the bill. That was the answer to my question.

Chr. Nelson: Further questions?

Rep. Bob Hunskor: I don't know a lot about the issue, I haven't said much. I will just say what comes through in all the testimony. It seems to me that if we pass this with all the amendments the two entities involved are going to be in conflict for the next two years. That's not going to accomplish anything. I heard talk about an MOA, so if the original bill passes without the amendments, then that puts an element of trust in it again. The state Game & Fish and the tribes can work together, come up with an MOA, and if it doesn't work in two years it can be revisited. If we do it with all the amendments on, it's just going to be a hassle, fighting one another, not getting together. That's the way I see it. That's just my thoughts.

Rep. Scot Kelsh: My only thoughts on this is that this is a unique relationship between the state and the tribes. It's sovereign in a way but in another way it's not. If I go to Canada, I have to go through customs to cross the border, and I don't have to go through customs to cross onto tribal lands. I don't have to comply with other regulations. I think this whole issue is we're trying to tread new ground and how to determine what this relationship really means. I'm still wavering.

Rep. Lyle Hanson: Question.

Chr. Nelson: Question has been called on a do pass motion on SB 2041. I'll ask the clerk to call the roll: **Do pass, vote:**

13-Yeas, 1-Nay; 0-Absent; CARRIER: Charging

Items submitted for the public record:

Charles Carvell, Asst. Attorney General: Proposed amendment

Rep. Dawn Charging: SD codified law 41-14-33 regarding transportation of big game

Rep. Rod Froelich: References to treaties

Todd Hall, Dir. Three Affiliated Tribes Fish & Wildlife Div.: Testimony

By: Rep. Porter
initial language for
possible amendment
Re: SB 2041 - 3/17/05

Option 1 - Current Bill language plus the pending amendment

General game license not required for hunting on Indian land. An individual hunting on Indian land pursuant to a tribal hunting license is not required to possess a state license to hunt on such land. Except for the state hunting license requirement, all other state laws and regulations apply to an Indian tribe that opens a season before the state season or closes the season after the state season. An individual may not take or possess more than the state limit of a species.

Option 2 - A re-write that may be more clear?.

General game license not required for hunting on Indian land. If an Indian tribe agrees to open the tribal hunting season on or after the state season opens and does not extend the tribal season beyond the state season for a given species, an Individual need only adhere to the tribal licensing requirements for hunting on Indian lands. Whether this state hunting license exemption is in effect or not, the state retains its criminal enforcement jurisdiction over non tribal members hunting on Indian lands, and no individual may ever take or possess more than the state limit for a species. A non-tribal member must always possess a state hunting license to hunt on non-Indian lands within the exterior boundaries of an Indian reservation.

By: Rep. Porter
Re: Subcommittee Hearing of 3/11/05

50017.0401
Title.

Prepared by the Legislative Council staff for
Representative Porter
February 25, 2005

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2041

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact two new sections to chapter 20.1-02 of the North Dakota Century Code, relating to hunting by Indians and power of the game and fish director to enter compacts with Indian tribes.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Two new sections to chapter 20.1-02 of the North Dakota Century Code are created and enacted as follows:

Hunting by Indians. An Indian legally hunting within the exterior boundaries of an Indian reservation does not fall under the jurisdiction of the state and may transport game off the Indian reservation that was taken legally under the jurisdiction, rules, and regulations of the tribe unless the tribe sets different season dates or species limits from the state. In such case, the state retains its jurisdiction to enforce state game laws against that person for any offense committed while transporting game beyond the exterior boundaries of an Indian reservation.

Director's power to enter game compacts with tribes. The director may enter a game compact with an Indian tribe subject to this section. Absent an executed game compact, all state hunting license requirements and other state hunting laws and rules apply to hunting by non-Indians within the exterior boundaries of an Indian reservation.

1. Except for state licensing requirements, a game compact may not infringe upon the state's jurisdiction to enforce violations of game laws and rules, including season dates and species limits, against all non-Indians hunting within the exterior boundaries of an Indian reservation. As a condition of being in a game compact with the state, the director shall require that a tribe not limit any public access to any lands or water bodies to which the public has access as of the effective date of this Act.

2. In a game compact, the director may permit a non-Indian to hunt anywhere within the exterior boundaries of an Indian reservation without a state license if the individual obtains and possesses a valid tribal license for that hunting activity. The director may require a tribe to recognize a state hunting license for waterfowl and upland game anywhere within the exterior boundaries of an Indian reservation. However, a compact may not limit a non-Indian's right to hunt with only a state hunting license on federal, state, private-fee lands, or lands that the department manages or makes a payment for public access that are within the exterior boundaries of a reservation.

3. In a game compact, a non-Indian may transport legally taken game outside the exterior boundaries of an Indian reservation.

4. In a game compact, the department and the tribe shall agree to share necessary information, resources, and technical expertise as the licensing, game management, and enforcement of a game compact requires to ensure a quality hunting experience for all citizens.

5. The department may enter a licensing sales agreement with a tribe but may not charge a fee or surcharge to the tribe for the agreement.

6. In a game compact, a state court shall recognize a valid tribal license and a non-Indian who fails to obtain or possess a tribal license as required may be charged in state court for any state violation for hunting without obtaining or possessing a state hunting license.

7. In a game compact, the director and a tribe may establish separate provisions for the hunting of waterfowl, upland game, furbearers, and big game.

8. The director may not exempt a non-Indian who conducts guiding or outfitting within the exterior boundaries of an Indian reservation from the guiding and outfitting provisions of this title.

9. A game compact must include an enforcement agreement that may include provisions for cross-deputization of tribal and state game wardens and crime scene security authority. The director may not allow an individual who has had that individual's hunting privileges suspended in this state, or in a state that is a member of the interstate wildlife violation compact under section 20.1-16-01, to hunt with a tribal license. In such case, an individual may be charged in state court under this title even if the individual possessed a valid tribal license.

10. Whether in a game compact with a tribe, the department shall include in the governor's proclamation the applicable rules for hunting within the exterior boundaries of each reservation in the state. If including the rules in the proclamation is not practicable, the department may place a reference in the governor's proclamation that requests hunters to review the applicable reservation rules and regulations on the department's internet website.

11. Any game compact entered by the department and a tribe must be published in the administrative rules of the department, have a sunset clause subjecting the compact to reratification, include fair notice to the parties of provisions for withdrawl by a party, and may include formal or informal grievance procedures to address conflicts that may arise between the state and a tribe."

Renumber accordingly

By: Rep. Porter
Re: Subcommittee Hearing of 3/11/05

50017.0402
Title.

Prepared by the Legislative Council staff for
Representative Porter
March 10, 2005

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2041

Page 1, line 16, after the underscored period insert "Except for the state hunting license requirement, all other state laws and regulations apply to nontribal members hunting on Indian land. This section does not apply to an Indian tribe that opens a season before the state season or closes the season after the state season. An individual may not take or possess more than the state limit of a species."

Renumber accordingly

By: Rep. Porter
3/17/05

50017.0404
Title.

Prepared by the Legislative Council staff for
Representative Porter
March 17, 2005

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2041

Page 1, replace lines 14 through 16 with:

"**License not required for hunting on Indian land in certain instances.** If an Indian tribe agrees to open the tribal hunting season for nontribal members on or after the date the state season opens and does not extend the tribal season beyond the state season for a given species, an individual need only adhere to the tribal licensing requirements for hunting on Indian land. Whether the state hunting license exemption is in effect, the state retains its criminal enforcement jurisdiction over nontribal members hunting on Indian land, and an individual may not take or possess more than the state limit for a species. A nontribal member must possess a state hunting license to hunt on non-Indian land within the exterior boundaries of an Indian reservation."

Renumber accordingly

Date: 3/17/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2041

House **NATURAL RESOURCES** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number :

Action Taken : Do Pass (without Amendments)

Motion Made By : Nottestad Seconded By : Drovdal

Representatives	Yes	No	Representatives	Yes	No
Chairman - Rep. Jon O. Nelson	✓		Rep. Lyle Hanson	✓	
Vice Chairman - Todd Porter		✓	Rep. Bob Hunskor	✓	
Rep. Dawn Marie Charging	✓		Rep. Scot Kelsh	✓	
Rep. Donald L. Clark	✓		Rep. Dorvan Solberg	✓	
Rep. Duane DeKrey	✓				
Rep. David Drovdal	✓				
Rep. Dennis Johnson	✓				
Rep. George J. Keiser	✓				
Rep. Mike Norland	✓				
Rep. Darrell D. Nottestad	✓				

Total (Yes) 13 No 1

Absent 0

Floor Assignment Charging

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

REPORT OF STANDING COMMITTEE

SB 2041, as reengrossed: Natural Resources Committee (Rep. Nelson, Chairman) recommends **DO PASS** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Reengrossed SB 2041 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

SB 2041

MANDAN, HIDATSA & ARIKARA NATION
Three Affiliated Tribes • Ft. Berthold Reservation
404 Frontage Road • New Town, ND 58763-9402

Janet James, Clerk

59th LEGISLATIVE ASSEMBLY
NATURAL RESOURCES COMMITTEE
HONORABLE LYSON, CHAIRMAN & COMMITTEE MEMBERS

TESTIMONY OF TEX G. HALL, CHAIRMAN
MANDAN, HIDATSA & ARIKARA NATION
ON SENATE BILL 2041

Chairman Lyson and Committee Members my name is Tiffiany Johnson and I am here on behalf of Chairman Tex Hall do to the fact Chairman Hall could not be here today. Chairman Hall has asked me to read this testimony on his behalf.

Chairman Lyson and Committee Members my name is Tex Hall and I am the Chairman of the Mandan, Hidatsa & Arikara Nation. Thank you for allowing me to testify before you today. As Chairman of our Tribe, I serve as the official spokesman of the Tribe and am authorized to provide the Tribe's position on proposed legislation.

Senate Bill 2041 would amend Sections 20.1-04-06 and 20.01-05-03 to allow properly tagged game birds and big game legally taken on "Indian trust land" to be transported within the state of North Dakota. As these laws presently read and are applied by the North Dakota Game and Fish Department, non-Indians that hunt on Indian Reservations with tribally-issued hunting licenses cannot legally transport this game within the State because these laws only reference game legally taken "in other states." This law does not preclude Tribal members from transporting game "legally taken" on our Reservations because the State Game and Fish Department recognizes tribal licenses issued to Tribal members.

Senate Bill 2041 is a product of Senate Concurrent Resolution No. 4022 passed in the 58th Legislative Assembly that directed the Legislative Council to study proposed legislation permitting the Game and Fish Department to coordinate with game and fish programs conducted by North Dakota Tribes. The Bill attempts to remedy the primary conflict between Tribes and the State which is the recognition of Tribally-issued hunting licenses to non-members. I believe that the Bill is a good starting point and that the goal of Senate Concurrent Resolution No. 4022 can be attained with a few amendments to Senate Bill 2041.

Before I talk about my proposed amendments however I would like to give you some perspective by talking a little bit about the law surrounding the regulation of non-members hunting on Indian reservations and the history of the negotiations between the Tribes and the North Dakota Game and Fish Department.

In 1983, the United States Supreme Court decided the case of New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) which held that the State of New Mexico could not regulate hunting and fishing of non-members on the Mescalero Apache Reservation. The Mescalaro Apache Tribe sued to enjoin the State of New Mexico from enforcing its laws against non-members hunting on their reservation as the New Mexico's Game and Fish Department was arresting non-Indians for hunting on the Mescalero Apache's Reservation without a state license even though the non-Indians had a Tribal license. The Supreme Court found in favor of the Mescalero Apache Tribe and the State was enjoined from enforcing its hunting laws on the Mescalero Apache Reservation because federal law had preempted New Mexico's authority.

North Dakota's Game and Fish Department is doing the same thing the New Mexico Game and Fish Department was doing. Over the past three years or so, a warden from the Game and Fish Department has come on to our reservation and cited non-Indians for hunting birds on our trust land even though these individuals were hunting with a Tribal license and in accordance with our Tribe's Game and Fish Ordinance. The North Dakota Game and Fish Department cited these individuals for hunting without a state license just like the game wardens in New Mexico. The non-Indians that were cited on our reservation by the North Dakota game wardens were very angry with the Tribe and have vowed to never come back. Of course, we are very frustrated because we are trying to develop business and personal relationships with non-Indians and we believe that the North Dakota Fish and Game Department's interference violates federal law and is completely without any legal justification.

Rather than run to the courts concerning this problem, we have tried to work with the North Dakota's Game and Fish Department over many years. Our Tribe has met with Game & Fish numerous times and tried to iron out a memorandum of understanding that both sides can accept but the sticking point always comes down to State regulation of non-Indians hunting on our lands. We simply cannot agree to this - especially in light of the Supreme Court's decision in Mescalero Apache Tribe v. New Mexico which clearly settles this issue in the Tribes' favor.

The Game and Fish Department has been, at best, difficult to deal with on this issue. Consequently, we decided to seek to have the State legislature to resolve this matter so that non-Indians can enjoy the hunting resources of our reservation without undue interference from the State Game & Fish Department. We could have gone to the courts to enjoin the State from enforcing its laws just like the Mescelaro Apache Tribe did but we have chosen not to. We would prefer to work with the State – either through State agencies or the State legislature – to work out our jurisdictional differences. Our Tribe appreciates the legislatures' efforts in passing Senate Concurrent Resolution 4022 and the efforts of the Interim Natural Resources Committee in introducing Senate Bill 2041. I believe that the successful passage of the amendments we have proposed and this bill will help the economies of the Tribe and State. Senate Bill 2041 and Senate Concurrent Resolution 4022 were a result of a lot of hard work by the Tribes, the Natural Resources Committee members of the State legislature and the State Game & Fish Department officials. Therefore, this bill deserves our attention and passage.

As stated above, with a few amendments to Senate Bill 2041, I believe that we can resolve this issue.

My proposed amendments to Senate Bill 2041 are as follows:

1. I propose that the added language referencing "Indian trust land" be replaced by a reference to "Indian land";

2. I propose that a section **20.1-03-10.11** be added to Title 20 Chapter 1 to read as follows:

   20.1-03-10.11 General Game License Not Required for Hunting on Indian lands. Any individual hunting on Indian lands pursuant to a tribal hunting license shall not be required to obtain a State license to hunt on such land. For purposes of this title, "Indian lands" shall mean: (1) land held in trust by the federal government for the benefit of an Indian tribe or an Indian; or (2) land owned in fee by Indians or Indian tribes within the exterior boundaries of an Indian reservation.

If these amendments are adopted, non-Indians will be able to hunt on Indian trust land and fee lands owned by Indians and the Tribe within our Reservation boundaries. These proposed amendments are modest when you consider that the Mescalaro Apache decision involved all lands – fee and trust - within the exterior boundaries of an Indian Reservation. If my proposed amendments are adopted, non-Indians will still have to obtain State hunting licenses and be subject to State regulation if they desire to hunt on non-Indian owned fee land on our Reservations. Thus, I believe my proposed amendments are a very reasonable compromise to the jurisdictional dispute between the State Game and Fish and North Dakota's tribes.

In considering this bill and my proposed amendments, please keep in mind that this bill protects non-Indians. This bill has no affect whatsoever on our Tribal members. It is a bill that, if passed, will promote the relationships between Tribes and non-Indians.

This concludes my comments on the proposed bill. Again, thank you for addressing a long-standing issue between the State and North Dakota Tribes.

Provided these amendments are adopted by this Committee, I recommend a DO PASS on SB 2041.

Testimony of Sen. John Warner

Senate Bill 2041
Senate Natural Resources Committee
13 January 2005

Senator Lyson, Members of the Committee,

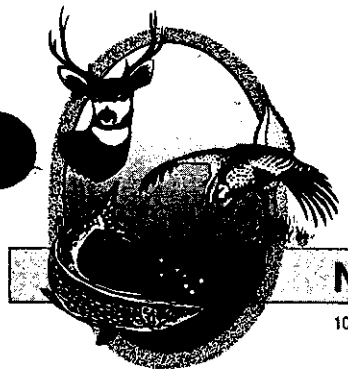
This bill arose out of a concern on the part of some of the tribes that the state Game and Fish Department was not respecting tribal sovereignty and the issuance of tribal licenses to hunt on Indian trust land. The issue was introduced last session as a bill, converted to a study resolution and referred to the Interim Committee on Natural Resources.

I understand that federal law explicitly recognizes the right of tribes to forbid non-tribal members hunting privileges on trust land and I believe that implies that the tribes have the right to permit non-tribal members hunting. But the issue here is not the issue of which license is required to hunt game but the more narrow issue of which license, tribal or state is required to transport taken game across state land. The state has taken the position, "If you shoot it there, you eat it there." The state Game and Fish department requires dual licensing if taken game is to be transported off of trust land.

I believe that is disrespectful to the concept of tribal sovereignty and fails to recognize the modern reality of reservation life with about half of the membership of most tribes living off the reservation and the desire of many tribes to extend hunting privileges to nonmembers as an economic development tool.

The situation that this bill addresses is analogous to a hunter from Minnesota traveling to Montana for elk hunting. Current North Dakota law explicitly requires the state Game and Fish Department to recognize the sovereignty of those states and recognize their licenses when that game is transported through the state. This bill simply requires the same respect be accorded to sovereign tribes and their licenses.

Mr. Chairman, members of the committee, I would urge you to follow the recommendation of the interim committee and give this legislation a DO PASS.



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NORTH DAKOTA GAME AND FISH DEPARTMENT

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SB 2041

SENATE NATURAL RESOURCES COMMITTEE

JANUARY 13, 2005

The North Dakota Game and Fish Department supports what we believe is the intent of SB2041, which would clarify that tribal members are entitled to transport and posses game legally taken on reservations to of reservation locations. This would be consistent with how game legally take out of state is handled. There is some ambiguity in this bill which could be clarified by adding the following amendments.

Page 1, line 9, after "or" insert "legally" and after "land" insert "by tribal members"

Page 1.line 20, after "or" insert "legally" and after "land" insert "by tribal members"

MANDAN, HIDATSA & ARIKARA NATION
Three Affiliated Tribes • Ft. Berthold Reservation
404 Frontage Road • New Town, ND 58763-9402

59th LEGISLATIVE ASSEMBLY
NATURAL RESOURCES COMMITTEE
HONORABLE LYSON, CHAIRMAN & COMMITTEE MEMBERS

TESTIMONY OF TEX G. HALL, CHAIRMAN
MANDAN, HIDATSA & ARIKARA NATION
ON SENATE BILL 2041
JANUARY 20, 2005

Chairman Lyson and Committee Members my name is Tiffiany Johnson and I am here on behalf of Chairman Tex Hall due to the fact Chairman Hall could not be here today. Chairman Hall has asked me to read this testimony on his behalf.

Chairman Lyson and Committee Members my name is Tex Hall and I am the Chairman of the Mandan, Hidatsa & Arikara Nation. Thank you for allowing me to testify before you today. As Chairman of our Tribe, I serve as the official spokesman of the Tribe and am authorized to provide the Tribe's position on proposed legislation before the North Dakota legislature. This testimony supplements the testimony I provided to this committee at the hearing held on this bill last Thursday, January 13, 2005.

At the hearing last Thursday, I provided this Committee with proposed amendments that I believe will remedy the conflict between North Dakota's Tribes and the State's Game & Fish Department. Specifically, I recommended that Senate Bill 2041 be amended to use the term "Indian lands" instead of the term "trust lands." I further proposed that an amendment be made to specifically exempt non-Indians from having to obtain State game license for hunting on "Indian lands." My proposed amendment defines "Indian lands" to mean:

> (1) land held in trust by the federal government for the benefit of an Indian tribe or Indian; or
> (2) land owned in fee by Indians or Indian tribes within the exterior boundaries of an Indian reservation.

My proposed amendments seem to have confused some of the members of this Committee and I would like clear up this confusion.

Indian tribes and Indian people can own land two ways. One way is to have the land "held in trust" for them by the United States Government. When land is held this way it is called "trust land." The other way for us to own land is to own the land in fee just like you own your land. This land is owned by the Tribe or an individual Indian "in fee" and we call these lands "fee land." On the Fort Berthold Reservation, the vast majority of our lands are held in trust for us by the United States Government. However, approximately 8,000 acres is owned in fee by the Tribe and individual Indians. I have provided you with a map that shows the Tribally and

Indian owned "fee lands" within our reservation. My proposed amendment simply includes the "fee lands" owned by the North Dakota Tribes and individual Indians within the exterior boundaries of our respective reservations. Thus, if my proposed amendment is adopted, non-Indian hunters hunting on our "trust lands" and our "fee lands" would be exempt from having to purchase a State hunting license.

As all of you know, non-Indians own lands within our reservations as well. Non-Indians hunting lands owned by non-Indians would still be required to obtain a State hunting license under my proposed amendment.

Again, please keep in mind that the amendment I have proposed is a compromise. We believe that the Supreme Court case of New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) clearly prohibits the State from regulating hunting and fishing of non-members within the exterior boundaries of our reservation. This includes lands owned by non-members. However, rather than litigate this matter, my proposed amendment compromises with the State and only exempts non-Indians from having to obtain State hunting licenses while hunting on our trust and fee lands.

I also understand that there may be some confusion concerning the applicability of my proposed amendments to off-reservation lands. My proposed amendment is consistent with Senate Bill 2041 in its present form. Thus, non-Indians hunting on off-reservation fee land owned by a Tribe or individual Indian would still be required to obtain a State hunting license.

I trust that this information clarifies the intent and scope of my proposed amendment.

I would like to touch on the comments made by the State Game & Fish Department at the hearing last Thursday. I believe that the State Game & Fish Department's testimony misstated the intent of Senate Bill 2041 and the purpose of Senate Concurrent Resolution No. 4022 passed by the 58th Legislative Assembly. Contrary to what was stated in the Department's testimony, the intent of Senate Bill 2041 is not to allow our tribal members to transport game off of our reservations. The Game & Fish Department knows better. This Committee specifically asked the Game & Fish Department about the applicability of the states laws with respect to tribal members hunting on our reservations during the Committee's interim hearings and the Department responded that the Department recognizes the tribal hunting licenses issued to our members. Thus, the purpose of Senate Bill 2041 is not to protect our Tribal members as they are already protected. Rather, the purpose of Senate Bill 2041 is to protect non-Indians from the unlawful interference of the State Game & Fish Department while hunting on our Indian lands. Please keep this in mind when considering the bill and my proposed amendments.

Thank you Mr. Chairman and Committee members for allowing me to testify before you once again today. Again, provided my amendments are adopted by this Committee, I recommend a DO PASS on SB 2041.

TEX HALL'S PROPOSED AMENDMENT
TO
SENATE BILL NO. 2041

Amend line nine (9) to read as follows:

Strike "Indian trust land" and insert "Indian land".

Amend line 20 to read as follows:

Strike "Indian trust land" and insert "Indian land",

Add the following language:

Section 3. Amendment. The following Section 20.1-03-10.11 is added:

20.1-03-10.11 General Game License Not Required for Hunting on Indian lands. Any individual hunting on Indian lands pursuant to a tribal hunting license shall not be required to obtain a State license to hunt on such land. For purposes of this title, Indian lands shall mean: (1) land held in trust by the federal government for the benefit of an Indian tribe or Indian; or (2) land owned in fee by Indians or Indian tribes within the exterior boundaries of an Indian reservation.

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North Dakota State Legislature
59th LEGISLATIVE ASSEMBLY
NATURAL RESOURCES COMMITTEE
HONORABLE LYSON, CHAIRMAN & COMMITTEE MEMBERS

TESTIMONY OF TODD HALL, DIRECTOR
THREE AFFILIATED TRIBES FISH & WILDLIFE DIVISION
MANDAN, HIDATSA & ARIKARA NATION
ON SENATE BILL 2041

January 20, 2005

Chairman Lyson and Committee Members, my name is Todd Hall and I am the Fish and Wildlife Director for the Mandan, Hidatsa and Arikara Nation. Thank you for allowing me to testify before you today in support of proposed Senate Bill 2041. I am authorized by Tribal Law to speak on behalf of and for the benefit of the Mandan Hidatsa and Arikara Nation. I would like to state that I support Chairman Tex Hall's testimony given to you on January 13th, but would like to state a few additional points in support of this proposed legislation.

Senate Bill 2041 is a product of Senate Concurrent Resolution No. 4022 passed in the 58th Legislative Assembly that directed the Legislative Council to study proposed legislation permitting the North Dakota Game and Fish Department to coordinate with Tribal Game and Fish Programs. The Bill is a product of a joint, Tribal and State effort to remedy the primary conflict between Tribes and the State Game and Fish Department, which is the recognition of Tribally-issued hunting licenses on Tribal lands. I agree that the Bill is a good starting point and that the goal of Senate Concurrent Resolution No. 4022 can be attained with a few simple amendments that were previously introduced by Chairman Tex Hall.

Those proposed amendments are as follows:

1. The proposition that the added language referencing "Indian trust land" be replaced by a reference to "Indian land", and include the definition "For the purposes of this title, "Indian Lands" shall mean land held in trust by the federal government for the benefit of an Indian Tribe or an Indian and land owned in fee by Indians or Indian Tribes within the exterior boundaries of an Indian reservation."

2. The proposal that a section **20.1-03-10.11** be added to Title 20 Chapter 1 to read as follows:

20.1-03-10.11 General Game License Not Required for Hunting on Indian Lands. Any individual hunting on Indian lands pursuant to a tribal hunting license shall not be required to obtain a State license to hunt on such land. For purposes of this title, "Indian Lands" shall mean land held in trust by the federal government for the benefit of an Indian Tribe or an Indian and land owned in fee by Indians or Indian Tribes within the exterior boundaries of an Indian reservation."

As Chairman Hall pointed out, if these amendments are adopted, non-Indians will be able to hunt on Indian trust and fee lands owned by Indians and the Tribe within our reservation boundaries. With those amendments, non-Indians will have to obtain State hunting licenses and be subject to State regulation if they desire to hunt on non-Indian owned fee patent land on our reservations. The proposed amendments are consistent with existing federal and case law. The proposed amendments are also consistent with the **December 2003 TRIBAL GAME AND FISH COORDINATION STUDY – BACKGROUND MEMORANDUM Prepared by the North Dakota Legislative Council Staff for the Natural Resources Committee** where it states; "In *Lacoste v. Department of Conservation,* 263 U.S. 545, 551 (1924), the United States Supreme Court said that protection of fish and wildlife is "particularly within the police power and the state has great latitude in determining what means are appropriate for its protection." However, the state regulation of fish and wildlife must yield when it conflicts or interferes with federal law. Treaties and other federal laws that guarantee Indian hunting or fishing rights may preempt state police powers under the supremacy clause of the United States Constitution." The memorandum goes on to quote the *American Indian Law Desk Book* by stating "that states presumptively have jurisdiction over non-member conduct on reservations where the conduct does not occur on tribal lands. Generally, states have full police powers outside Indian Country."

In considering this bill and the proposed amendments, Senate Bill 2041 would foster the long-term involvement of the State and the Tribes to work cooperatively concerning the prudent conservation, preservation and protection of natural resources on Reservation lands. The roles and responsibilities of the State and the Tribes are predicated on the management of healthy ecosystems, while recognizing the Tribes' aboriginal rights, sovereign authorities, and institutional capacity to manage their own lands and resources within the reservations. Senate Bill 2041 will also aim to develop the cooperative efforts of the State and the Tribes to involve all aspects of fish and wildlife resource management, law enforcement, habitat protection, endangered species, and the protection of State and Tribal natural resources.

This concludes my comments on the proposed bill and thank you again for addressing this issue.

Provided these amendments are adopted by this Committee, I also recommend a DO PASS on Senate Bill 2041.

Testimony on SB 2041

Hau mitakuyapi. Hello my relatives. For the record, my name is Carol Two Eagle, and I bring the concerns of Traditional Indigenous People who are concerned about Treaty matters to you regarding this bill. The words here are theirs; I am merely the messenger.

North Dakota Game and Fish has historically either disregarded or tried to downplay our various Reservations' Sovereignty, has refused to regard our tribes as the Nations they are, and as a result has refused to honor our tribal hunting and fishing licenses and seasons in the reciprocal manner that they honor the licenses and seasons of Canada or even of North Dakota's fellow states.

The relationship of the tribes to the federal government is one of sovereign-government-to-sovereign-government, guaranteed by various Treaties, latest being the Treaty of 1868. The relationship between the tribes and the federal government is higher than the relationship of our tribal governments and any state, therefore ND Game and Fish should have reciprocally honored our licenses and seasons all along.

When ND Game and Fish personnel detain or arrest hunters or fishers for poaching because those people have tribal licenses, they are assaulting our Sovereignty and practicing discrimination on the basis of race; since most of the detainees are Indians. We have heard that non-Indians have on occasion been detained for having fish or game taken with a tribal license, but the incidence is much smaller for non-Indians than for Indians. This is insulting, in any case.

Our Traditions have been around for thousands of years, and they have always guided us in the taking of fish and game. Our Traditions taught us what to take and what not to, and when, and why. We did not survive here by accident on Turtle Island for thousands of years before Europeans came here. We have always managed our resources well.

Because of the Indian Reorganization Act of 1934, today we have majority-culture-style government forms, rather than our Traditional ones, but we have always managed our resources well. The fact that we do not kowtow to the North Dakota Game and Fish Department has apparently galled them so that they take it out on our people when our people travel from the Reservations with their game that has been legally taken with Reservation licenses. A bill such as SB 2041 is long overdue.

We think that the bill should read "... on Indian lands", rather than "... on Indian trust lands", however. Just because an Indian owns land on a Reservation in fee rather than in trust does not make that land any less "Indian land", nor does it make the Indian owner any less an Indian or any less entitled to Treaty Rights.

Thank you for hearing us, through our messenger, in a good way now. Mitakuye oiasin.

Rostvet, Roger W.

om: Sagsveen, Matthew A.
nt: Friday, January 14, 2005 9:55 AM
: Hildebrand, Dean C.; Schadewald, Paul T.; Rostvet, Roger W.

Gentlemen,
After listening to the testimony on SB 2041, it seems as though the ultimate question will be whether the State wants to restrict the Game and Fish Dept. from regulating nonmembers on Trust land. You may want to reread this A.G. Opinion for the next committee hearing. This is a complicated area of law that should be addressed carefully. Remember, I will be out of the office next week until late Thurs. or Friday, but will have access to my email. If you have any Indian law questions, you may want to contact Charles Carvell.

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Matthew A. Sagsveen
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
(701) 328-3640
(701) 328-4300 Fax

Office of the Attorney General
State of North Dakota

***1** August 11, 1998

Mr. Dean C. Hildebrand
Director
Game & Fish Department
100 N Bismarck Expressway
Bismarck, ND 58501-5095

Dear Mr. Hildebrand:

Thank you for your letter asking whether non-tribal members must comply with state law when hunting on tribal trust land. You state that federal, state, and tribal officials have been giving the hunters conflicting advice and that "a very confusing situation" exists.

The fact conflicting advice is being given is not all together surprising since the law does not provide a simple answer to your question. "Whether a State may . . . assert its authority over the on-reservation activities of nonmembers raises '. . . difficult questions."' New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983). Tribal sovereignty and federal preemption of state law complicate defining the state's jurisdictional boundaries over non-members hunting on trust land. The state has important interests at stake, but the tribe and federal government also have interests that require consideration. The varied interests of the tribe, state, and federal government must be recognized and then balanced in deciding whether non-tribal members are subject to state law when hunting on reservation trust land.

The Supreme Court addressed just the question you ask in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). New Mexico sought to regulate non-members hunting and fishing on tribal lands. The Court stated that New Mexico's jurisdiction does not rest on mechanical or absolute notions of either state or tribal sovereignty. Id. at 333. It is much more complicated and requires "'a particularized inquiry into the nature of the state, federal, and tribal interests at stake."' Id., quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). State jurisdiction will be pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. Id. at 334.

In balancing the interests, the Court looked at a number of factors. It began by noting general considerations supportive of Indian sovereignty. These include such matters as traditional notions of Indian sovereignty, the federal government's goal of promoting tribal self-government, self-sufficiency, and economic development, and the ability of tribes to manage their territory and resources. Mescalero at 334-35.

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The Court also noted some general state interests at stake. If the state provides services in connection with the on-reservation activity in question, it has a heightened interest in regulating the activity. Mescalero. at 336. Also, "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." Id.

To carry out its "particularized inquiry," the Court then examined more specific factors. Although it eventually found that New Mexico could not regulate non-tribal members hunting and fishing on tribal lands, its conclusion rested on the facts of the case. A different conclusion could well be reached on other reservations.

***2** The Mescalero Apache, "[w]ith extensive federal assistance and supervision...established a comprehensive scheme for managing the reservation's fish and wildlife resources." Mescalero. at 325, 328. It constructed a six million dollar resort complex with federal financing. Id. at 327 n.3. It received substantial revenue from its hunting and fishing resources. Id. at 327 n.4. These resources were developed through a sustained cooperative effort by the tribe and federal government. Id. at 327-28. For example, the tribe established eight artificial lakes that, along with reservation streams, are stocked with fish by the tribe and the U.S. Fish & Wildlife Service (FWS). Id. at 328. The FWS also operated a fish hatchery on the reservation. Id. None of the reservation waters were stocked by the state. Id. The tribe and National Park Service developed the reservation's elk herd. Id. The tribe and federal government jointly conduct a comprehensive fish and game management program. Id. Finally, tribal bag limits and seasons are subject to approval by the Secretary of Interior and based on the reservation's conservation needs as assessed by annual game counts and surveys. Id. at 329, 339.

The Court also noted that the tribe owns all but 194 acres on its 460,000 acre reservation and that almost all reservation residents are tribal members. Mescalero at 326.

The Court then examined the state's interests.

> The State has failed to 'identify any regulatory function or service...that would justify' the assertion of concurrent regulatory authority....The hunting and fishing permitted by the Tribe occur entirely on the reservation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other 'governmental functions it provides,'. . .in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority.
>
> The State also cannot point to any off-reservation effects that warrant state intervention. Some species of game never leave tribal lands, and the State points to no specific interest concerning those that occasionally do. . . . The State concedes that the Tribe's management has 'not had an adverse impact on fish and wildlife outside the Reservation.'

Mescalero at 341-342. The Court added that New Mexico's financial interest in revenue from the sale of state licenses is insufficient to justify state regulation. Id. at 342-43.

The decision in Mescalero Apache does not establish a general rule that a state

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may not regulate non-member hunting on tribal trust lands. The unique facts of each case must be analyzed in the balancing of tribal, state, and federal interests. Because I am unaware of all the facts needed to make this decision for each of the reservations in North Dakota, I can only provide you with the framework governing the legal analysis and suggest that you continue to work with this office to reach a decision.

*3 Here are some questions to ask when considering whether non-member hunters on trust land are subject to state law. Does the tribe have laws governing hunting? Are the tribal laws comprehensive? Are they actively enforced? Does the tribe have in place the infrastructure to manage the resource and does it in fact actively manage the resource? What kind of economic reliance does the tribe place on non-member hunting? What has the state done to manage the resource? What services does the state provide to hunters on trust land? How has state law been applied in the past? What role has the federal government played in developing and managing the resource? Does the species migrate off the reservation? Does the species migrate off reservation trust land to reservation fee land? How frequent are migrations off the reservation and off trust land? Is the species endangered in any way if hunted under the tribe's regulatory regime?

I would like to add that there have been lower court decisions in which states have shown adequate state interests supporting the right to regulate hunting by non-members on trust land. In White Earth Band of Chippewa v. Alexander, 683 F.2d 1129, 1138 (8th Cir. 1982), the court found that Minnesota could enforce state hunting laws against non-members, including on reservation trust land. Minnesota has "a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic management of reservation game and fish resources." Id. at 1137. And in United States v. Montana, 604 F.2d 1162, 1170 (9th Cir. 1979), rev'd on other grounds sub nom. Montana v. United States, 450 U.S. 544 (1981), Montana game laws were held to apply to hunting and fishing by non-members throughout the Crow Indian Reservation.

Although I have not given you a direct answer to your question, I trust that I have provided you with sufficient guidance so that you can answer it after your consideration of the factors described above. I know that your department has in the past been willing to seek to resolve tribal/state issues by agreement. Addressing this matter by agreement is worth keeping in mind.

I also note that in 1953 this office addressed the issue you raise. 1952-54 Att'y Gen. Op. 44. The opinion is brief, unclear, and its legal analysis is, at best, perfunctory. It concludes that state game and fish laws may not be enforced on "Indian Lands" within Indian reservations. It doesn't define "Indian Lands," but I assume the term refers to land owned by a tribe or tribal members. It is also uncertain whether the opinion applies to regulation of tribal members or non-tribal members, or both.

The basis for the conclusion is the state's enabling act. It states that the people of North Dakota "forever disclaim all right and title" to land owned or held by Indians or Indian tribes, and that until the United States extinguishes Indian title, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress." 25 Stat. 676-677, § 4. Our constitution incorporates this provision of the enabling act. N.D. Const. Art. XIII, § 4.

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***4** The 1953 opinion misunderstood the disclaimer. It does not disclaim the state's regulatory jurisdiction on reservations. It disclaims only proprietary title to Indian land. "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands." Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 562 (1983). "The disclaimer of right and title by the State [of Alaska] was a disclaimer of proprietary rather than governmental interest." Organized Village of Kake v. Egan, 369 U.S. 60, 69 (1962). See also Draper v. United States, 164 U.S. 240 (1896); State v. Seneca-Cayuga Tribe, 711 P.2d 77, 87 (Okla. 1985); White Mt. Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981); Comment, "State Disclaimers of Jurisdiction over Indians: A Bar to the McCarran Amendment," 18 Land & Water Law Rev. 175, 186 (1983)("These disclaimers...have amounted to nothing more nor less than the state's constitutional echo of the principle of federal preemption of Indian affairs").

The 1953 opinion applies the "disclaimer" provision far too broadly. To the extent the 1953 opinion conflicts with this opinion, it is overruled.

Sincerely,

Heidi Heitkamp

Attorney General

1998 N.D. Op. Atty. Gen. L-90, 1998 WL 1058295 (N.D.A.G.)

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10/8/03 Bis Trib

SB 2041

Questions about hunting on reservation lands

Questions about hunting or fishing on tribal lands? Here are some common questions and their answers. Most questions relate to those who are not enrolled tribal members.

What type of state licenses do I need to hunt and fish on a reservation in North Dakota?

All applicable state licenses are required, just as if you were hunting or fishing in any other part of the state. In addition, if you are going to hunt or fish on tribal lands, you may be required to have an additional license from the tribe.

I have relatives coming in from out of state. They plan on buying a tribal license because they are going to hunt on tribal lands. Do they also need a state license?

Yes.

If I buy a tribal deer, turkey, or antelope license am I entitled to take both the state and tribal limits?

No. All state seasons and limits apply. For example, to take a deer on the reservation, you must first have drawn a North Dakota license. Then you may be required to purchase a tribal license if you are going to hunt on tribal lands. In any case you may take only one deer.

What kind of fishing or hunting license do I need to access Corps of Engineers land along the river near the reservation?

Unless you cross tribal land to get there, you need only the North Dakota license. To access areas across tribal lands, a tribal permit may be required.

I've heard regulations are different in South Dakota. Is that correct?

Yes. South Dakota honors tribal hunting licenses in lieu of state licenses on several reservations.

Many tribes open their season at different time than the state and offer different bag limits. If I buy a tribal license and have the appropriate state license, whose rules do I follow?

In all instances state regulations apply, unless you are a tribal member.

I plan on hunting within the reservation only on lands owned in fee-title by a friend or relative. In addition to my state license, do I need a tribal license?

No. The key is that you are hunting on non-tribal land owned in fee title by a friend or relative.

How do I contact the reservations for licenses and information?

Contact reservations at the following addresses and phone numbers:

- Fort Berthold Game and Fish Department, HC3-Box 2, New Town, N.D. 58763, 701-627-4760.
- Standing Rock Game and Fish Department, Box D, Fort Yates, N.D. 58538, 701-854-7236.
- Turtle Mountain Department of Natural Resources, Box 570, Belcourt, N.D. 58316, 701-477-2600.
- Spirit Lake Fish and Wildlife Department, Box 359, Fort Totten, N.D. 58335, 701-766-4221.

YEAR OF THE PEOPLE ACCORD
BETWEEN THE
STANDING ROCK NATION
AND THE
STATE OF NORTH DAKOTA

I. PREAMBLE AND GUIDING PRINCIPLES

This ACCORD is executed between the Standing Rock Nation of the Standing Rock Reservation and the State of North Dakota, in order to better achieve mutual goals through an improved relationship between their respective governments. This ACCORD provides a framework for that government-to-government relationship.

11. PARTIES

This ACCORD seeks to enhance and refine, through agreement and understanding, the relationship between the State of North Dakota and the Standing Rock Nation of the Standing Rock Reservation. The Government of the Standing Rock Nation has an independent relationship with other Tribes, the State, and the Federal Government.

The parties recognize that the State of North Dakota is governed in part by independent elected officials. Therefore, although, this ACCORD has been initiated by the Standing Rock Nation and the Governor, agencies directed by independently elected officials are encouraged to respect and abide by these guiding principles.

111. PURPOSES AND OBJECTIVES

This ACCORD illustrates the commitment by the parties to the government-to-government relationship. This relationship recognizes the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.

This ACCORD is intended to build confidence among the parties in the government-to-government relationship, and is intended to identify issues and formulate solutions between the parties.

It also commits the parties to the tasks that will translate the relationship into more efficient, improved and beneficial services to Indian and non-Indian people of our state. This ACCORD under N.D.C.C § 54-40.2 and the Standing Rock Sioux Tribe Constitution Article IV, Section 1A encourages specific agreement among the parties herein.

IV. IMPLEMENTATION PROCESS AND RESPONSIBILITIES

While this ACCORD addresses the relationship between the parties, its ultimate purpose is to improve the services delivered to the citizens of North Dakota which includes members the Standing Rock Sioux Tribe. The parties shall establish goals for improved services and identify the obstacles to the achievement of those goals.

The State of North Dakota is organized into a variety of separate departments under its governor, other independently elected officials, and variety of boards and commissions. Standing Rock Sioux Tribe, on the other hand, is a unique government organization with different management and decision-making structures.

Each party will initiate a procedure by which the government-to government policy will be implemented, will establish a documented plan of accountability, and may establish more detailed implementation procedures in subsequent agreements between tribes and a particular agency.

Each party also recognizes that a system of accountability within its organization is critical to successful implementation of the relationship. Therefore, the parties will direct their staff to communicate within the spirit of this ACCORD with the entity which has the authority and responsibility to deal with the particular issue of concern.

As a component of this ACCORD, the parties will review and evaluate at an annual meeting of the North Dakota Indian Affairs Commission, the implementation of the government-to-government relationship. A management report will be issued summarizing this evaluation and will include joint strategies and specific agreements to outline tasks, overcome obstacles, and achieve specific goals.

V. SOVEREIGNTY AND DISCLAIMERS

Each of the parties recognizes the sovereignty of the other. In executing this ACCORD, no party waives any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction. This ACCORD neither diminishes nor expands rights or protections afforded other persons or entities under state or federal law. Through this ACCORD, the parties seek to strengthen their collective ability to successfully resolve issues of mutual concern.

Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, the party's executive office.

The parties have executed this ACCORD on the date(s) set forth below, and agree to be duly bound by its terms:

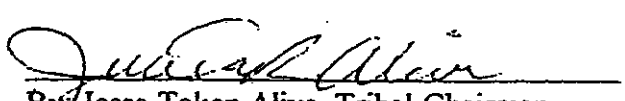
Dated this 31 day of January, 1996.

State of North Dakota

By: Edward T. Schafer, Governor

Dated this 31 day of January, 1996.

Standing Rock Sioux Tribe



By: Jesse Taken Alive, Tribal Chairman

By: Jeff Nelson, LC
Re: SB 2041
Pg: 1 of 4

hoarding of land under bond by North Dakota's coal companies and that while there are acres that have been reclaimed for a number of years and which are still under bond, the commission has found that there are almost always sound reasons the bond has not been released. In some cases, the commissioners testified, the land is an oddly shaped parcel that is unsuitable for sale until adjacent land is reclaimed and that in other cases the land is held under bond because future mine plans necessitate further use of the land. The commissioners testified it is unlikely that there is an incentive for mining companies to hoard land because the faster they can release the land, the quicker their liability ends.

Representatives of the Dakota Resource Council testified that nearly 12,000 acres of reclaimed land at active and inactive mines are fully reclaimed but only a small number of acres of agricultural land has been returned to private hands. They testified the bill draft would provide an incentive for mining companies to expedite bond release applications.

The committee considered a bill draft that would have provided that in addition to the annual map that must be submitted by a mine operator to the Public Service Commission for each year of the permit term and until the total bond amount has been released, that not later than September 1, 2005, each mine operator would have to submit a map to the commission indicating parcels of reclaimed land for which the operator intends to apply for final bond release during the 12-month period immediately subsequent to the report. The bill draft would have provided further that for active mines, the total acreage of these parcels could not be less than the total acreage disturbed during the immediately preceding 12 months and that for inactive mines, the total acreage of these parcels could not be less than 25 percent of all land eligible for final bond release or 10 percent of the total remaining acreage. The bill draft also would have provided that before October 1, 2006, the commission would have to submit to the Legislative Council a report on the progress of mine operators in applying for final bond releases.

Representatives of the Dakota Resource Council testified the bill draft would serve to notify the Public Service Commission as well as the public of acreage that has been through the 10-year revegetation reclamation process and is eligible for final bond release and encourage mining companies to apply for final bond release as soon as possible in order that the land may be returned to farm and ranch operators.

The bill draft was supported by a member of the Public Service Commission who indicated that it would be very helpful to have a requirement in state law that serves to focus the mining company's attention on final bond release on a yearly basis. The commissioner testified that an annual map would provide helpful information to the commission and would provide a document that would be helpful to the public as well. However, the commissioner said the bill draft should be amended to provide that not later than September 1, 2005, and each year thereafter, each operator should be required to submit a map to the commission indicating parcels of reclaimed land for which the operator intends to apply for final bond release during the 36-month period immediately subsequent to the report. The commissioner testified that inserting a 36-month planning period would allow mining companies to group bond-release properties together in logical parcels.

The Lignite Energy Council opposed the bill draft. A representative of the Lignite Energy Council testified that mine operators are already required to submit maps to the commission indicating parcels of reclaimed land for which each operator intends to apply for final bond release, that establishing a percentage of lands to be released each year is arbitrary and impractical, and that requiring the Public Service Commission to report to the Legislative Council is administratively burdensome.

Two members of the Public Service Commission testified in opposition to the bill draft. The commissioners testified that requiring mining companies to submit a map to the commission indicating the reclaimed lands that a mine operator intends to apply for final bond release during the next 12-month period is not necessary because the commission has the rulemaking authority to require mining companies to file such plans if the commission deems it necessary. The commissioners testified that requiring the Public Service Commission to report to the Legislative Council is not necessary as such reports could be requested by the Legislative Council at any time.

Recommendation

The committee recommends Senate Bill No. 2040 to delete the requirement that a request for bond release be published in other daily newspapers of general circulation in the locality of the surface coal mining operation in addition to the official newspaper of the county and that subsurface owners within the permit area proposed for bond release be notified.

TRIBAL GAME AND FISH COORDINATION STUDY

Background

Senate Concurrent Resolution No. 4022 reflected the Legislative Assembly's concern that the various tribal governments of the federally recognized Indian tribes within North Dakota assert a federally recognized right to regulate hunting and fishing within the reservations set aside for their benefit and have established game and fish departments that assist in that regulation and that various issues have arisen between the state Game and Fish Department and the Indian tribes regarding such issues as jurisdiction, recognition of tribal and state hunting and fishing permits, and coordination of activities such as hunting and fishing seasons, among others, and that it would be desirable to resolve these issues, if at all possible.

By: Jeff Nelson, LC
Re: SB 2041
Pg: 2 of 5

State Ownership of Wildlife

North Dakota Century Code Section 20.1-01-03 provides that the ownership and title to all wildlife in this state is in the state for the purpose of regulating the enjoyment, use, possession, disposition, and conservation of the wildlife and for maintaining action for damages. A person catching, killing, taking, trapping, or possessing any wildlife protected by law at any time or in any manner is deemed to have consented that the title to the wildlife remains in the state for the purpose of regulating the taking, use, possession, and disposition of the wildlife. This section provides that the state, through the Attorney General's office, may institute and maintain any acts for damages against any person who unlawfully causes, or has caused within this state, the death, destruction, or injury of wildlife, except as may be authorized by law.

The state has a property interest in all protected wildlife. This interest supports a civil action for damages for the unlawful destruction of wildlife by willful or grossly negligent act or omission. The United States Supreme Court in *Geer v. Connecticut*, 161 U.S. 519, 530 (quoting *State v. Rodman*, 59 N.W. 1098, 1099 (Minn. 1894)), stated that "[w]e take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as a representative and for the benefit of all its people in common." In *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924), the United States Supreme Court said that protection of fish and wildlife "is particularly within the police power and the state has great latitude in determining what means are appropriate for its protection." However, state regulation of fish and wildlife must yield when it conflicts or interferes with federal law. Treaties and other federal laws that guarantee Indian hunting or fishing rights may preempt state police powers under the supremacy clause of the United States Constitution.

Regulation of Game and Fish in Indian Country

Indian rights to hunt and fish, and tribal power to regulate hunting and fishing, may arise from treaties, statutes, judicial decisions, executive orders, or agreements. The *American Indian Law Desk Book* published by the Association of Western Attorneys General notes that a treaty or other federal law creating a reservation may provide for exclusive tribal use and occupancy of the reserved lands, from which courts have inferred a tribe's power to exclude others from those lands. Therefore, within Indian reservations, tribal hunting and fishing rights and regulatory powers arise generally from the federal law creating the reservation and the tribal power of exclusion. Indian rights outside reservation boundaries typically arise from a specific federal law that reserves or creates such off-reservation rights.

Outside reservation boundaries, the issue is whether tribal members have federally protected hunting or fishing rights and, if so, the extent to which state law may be applied to their activities. The *American Indian Law Desk Book* notes that tribal members seldom are subject to state fish and game laws when hunting or fishing on lands reserved for the tribe. However, there is an exception to this general rule. The exception is when state regulation is necessary for conservation of the resource. The *American Indian Law Desk Book* notes that states presumptively have jurisdiction over nonmember conduct on reservations when the conduct does not occur on tribal lands. Generally, states have full police powers outside Indian country.

Concerning state regulation of off-reservation hunting and fishing, an Indian tribe or its members may assert hunting or fishing rights within an area that once was a part of the tribe's reservation or aboriginal territory. However, even when a federally secured off-reservation hunting and fishing right exists, its exercise may be subject to some measure of state regulation. These include state health and safety regulations that do not otherwise prevent the exercise of off-reservation treaty rights provided they are nondiscriminatory or not banned by express federal regulation and necessary conservation measures designed to conserve fish and game resources.

Game and Fish Department Position Paper

The Game and Fish Department has issued a position paper on hunting and fishing within the external boundaries of North Dakota Indian reservations. This paper provides that the department recognizes tribal self-governance and the protocols of a government-to-government relationship with Indian tribes and recognizes that Indian tribes are governmental sovereigns. Inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights, and protect tribal trust resources. The position paper provides that Indian lands are not state public lands nor part of the public domain and are not subject to state public land laws. Indian lands are retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders, or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

However, the position paper provides that because of the checkerboard nature of reservations in North Dakota, people need to be acutely aware of the obligation to nonmembers or at least non-Indians who happen to own land in fee title or live within Indian reservations. These nonmembers have the right to be governed by the state, not the tribe, and to enjoy the privileges provided by state law, such as the right to certain property rights, licenses, landowner preference, and free hunting privileges on their own land. The right to regulate those fee lands, and to assure that those individuals enjoy the same privileges and state services as are afforded other residents of the state, must be protected. The position paper states that it has always been the position of the state of North Dakota that the department has jurisdiction in wildlife-related matters throughout the state over all its citizens and any visitors within the state's boundaries.

Concerning tribal hunting and fishing licenses issued to nonmembers, the position paper provides that the department regards these as "trespass fees" to allow nonmembers to use Indian trust lands and that non-Indians must possess a valid state license and federal waterfowl stamp, if hunting migratory waterfowl, when hunting or fishing on any land within the exterior boundaries of a reservation, and must abide by state and federal law and related proclamations.

Finally, the position paper provides that as a practical matter, not related to jurisdictional activity, members of a tribe are allowed to hunt or fish, according to tribal game and fish code and related proclamations, anywhere within the exterior boundaries of a reservation, without state licenses. However, when hunting or fishing on deeded land, tribal members must obtain permission of the landowner if the land is posted to prohibit hunting or fishing. In addition, if wildlife is removed from a reservation for processing or other reasons, it must be tagged so as to indicate it was taken on the reservation according to tribal regulations.

Concerning enforcement of game and fish laws, the position paper provides that when a law enforcement officer discovers or responds to a complaint of violation of state law or tribal law on any land inside a reservation boundary and the violator is an enrolled member or a nonmember Indian, the violation will be turned over to tribal officers for prosecution. The position paper provides that if tribal law does not cover the violation, the state reserves the right to prosecute the violation in state court. When tribal officers encounter non-Indians who are in violation of state law on land within a reservation, they are to refer the individual to state or federal officers. Non-Indians found in violation of tribal law will be referred to federal officers. Finally, the position paper concludes by stating that nothing in these procedures is intended to acquire or relinquish jurisdiction over anyone by the state or a tribe.

State-Tribal Cooperative Agreements

North Dakota Century Code Chapter 54-40.2 provides for agreements between public agencies and Indian tribes. "Public agency" means any political subdivision, including municipalities, counties, school districts, 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, but does not include an entity owned, organized, or chartered by a tribe which exists as a separate entity authorized by a tribe to enter agreements of any kind without further approval by the government of the tribe.

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.

Section 54-40.2-03.1 provides that after the parties to an agreement have agreed to its contents, the state 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 court of any county affected by the agreement. The notice must state that the state agency will hold a public hearing concerning the agreement upon the request of any resident of the county in which the notice is published if the request is made within 30 days of the publication of the notice.

Section 54-40.2-03.2 provides that if a state agency receives a request pursuant to Section 54-40.2-03.1, the state 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.

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 provides, it may be submitted to the Secretary of the Interior for approval.

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 prior to commencement of its performance, the agreement must be filed with the Secretary of the Interior, the clerk of court of each county in which the principal office of one of the parties is located, the Secretary of State, and the affected tribal government.

Section 54-40.2-05.1 provides 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 the Indian Affairs Commission may make findings as to whether the parties are in substantial compliance with all provisions

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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.

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 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.

Testimony and Committee Activities

The committee received testimony from a representative of the Game and Fish Department that the department has several concerns with the current status of hunting on the state's reservations. These include the dual-licensing system, the status of nontribal members hunting within reservations, and the different seasons between the reservations and the rest of the state. Department representatives testified that although the department has had discussions with tribal leaders on developing a single state-tribal cooperative agreement that would be uniform for the state and the tribes, developing a uniform agreement is very difficult because of different federal laws and treaties governing each, the different tribal game and fish codes, the different ways in which land is held within the external boundaries of the different reservations, and the different goals and objectives each tribe has for its game and fish programs.

The committee received testimony from representatives of the Standing Rock Sioux Tribe that the state should recognize tribal game and fish licenses and tags issued to both members and nonmembers and that the state should recognize tribal game and fish licenses just as it honors licenses issued by other states.

The chairman of the Three Affiliated Tribes testified that that tribe believes that the reservation of game and fish rights on the reservation not only guarantees tribal members the right to hunt and fish on tribal lands, but as an attribute of tribal sovereignty, allows the tribe to issue nonmembers licenses to hunt on tribal trust lands. The chairman testified that the Three Affiliated Tribes would like to avoid an adversarial relationship with the state on game and fish issues but would like to work cooperatively with the state as it has on Missouri River issues. The chairman of the Three Affiliated Tribes testified the tribe has prepared a draft memorandum of understanding between the Three Affiliated Tribes fish and game department and the North Dakota Game and Fish Department which recognizes tribal sovereignty as well as state game and fish laws and regulations and provides for a dual license for tribal lands with a state license at no cost and a tribal license at cost which would solve the problem of transportation of game taken on tribal trust lands off the reservation.

Committee Considerations

The committee considered a bill draft that provided that properly tagged game birds legally taken on Indian trust land could be possessed, transported, or shipped in state and that properly tagged big game legally taken on Indian trust land could be transported, shipped, or possessed within the state.

The chairman of the Three Affiliated Tribes testified that the bill draft will help rectify the tribe's problems with the Game and Fish Department as it would allow nonmembers who take game on Indian trust land to transport the game throughout the state. However, he suggested, "Indian trust lands" be replaced with "Indian reservation" so that lands owned by tribal members but not held in trust were covered by the bill draft. A representative of the Standing Rock Sioux Tribe testified that the words "and allotted lands" within any Indian reservation should be added to the bill draft.

A representative of the Game and Fish Department testified that the bill draft is confusing in that it does not clarify who is entitled to take game and fish on Indian trust land. The representative testified that if the bill draft is interpreted to mean anyone may take game and fish on Indian trust land and that nonmembers could take game and fish on Indian trust land without a state permit, it would be a shift in state policy. The representative testified that although tribes have the right to set game and fish seasons for tribal members on tribal lands, if the bill draft is interpreted to mean that nonmembers do not need a state-issued license to take game on Indian trust

land, it would make the management of the state's game and fish resources more difficult.

Recommendation

The committee recommends Senate Bill No. 2041 to provide that properly tagged game birds legally taken on Indian trust land may be possessed, transported, or shipped in state and that properly tagged big game legally taken on Indian trust land may be transported, shipped, or possessed within the state.

GARRISON DIVERSION UNIT PROJECT, DEVILS LAKE, AND NORTHWEST AREA WATER SUPPLY PROJECT

Representatives of the Garrison Diversion Conservancy District testified that in fiscal year 2003-04, the federal appropriation for the Garrison Diversion Unit Project was $47.3 million, which included funds for Indian and non-Indian municipal, rural, and industrial water supply projects, Indian irrigation projects, and wildlife mitigation. Representatives of the Garrison Diversion Conservancy District also noted this funding is supplemented by a one-mill levy on the counties within the conservancy district. As of June 30, 2004, federal municipal, rural, and industrial water supply funds expended during the fiscal year for rural water systems in North Dakota was over $3.5 million with total state and federal funding for construction of the All Seasons Rural Water Project, McKenzie County Rural Water Project, Ramsey County Rural Water Project, Williams County Rural Water Project, Tri-County Rural Water Project, and Northwest Area Water Supply Project at over $52 million. Also, in fiscal year 2003-04, the conservancy district budgeted $238,500 for research on high-value crop production, processing, and marketing.

Representatives of the Garrison Diversion Conservancy District testified that the conservancy district is the state lead and co-partner on the Red River Valley Water Supply Project Environmental Impact Statement. The conservancy district's role is to work with state, local, and end users to determine the best way to meet the water supply needs of the Red River Valley. The environmental impact statement is scheduled to be completed in December 2005. Representatives of the conservancy district testified that the Dakota Water Resources Act increased the federal authorization for recreation development and the Garrison Diversion Conservancy District has dedicated two-tenths of its one-mill levy to its recreation program. Representatives of the conservancy district reported that last fiscal year, the district provided over $253,000 in funding for 20 projects across the district.

The committee received updates concerning Devils Lake flooding from the State Engineer. Devils Lake has risen approximately 24 feet since 1993. The lake's flooded area has increased from 47,000 acres to 120,000 acres. Over $400 million has been spent on flood control at Devils Lake. Devils Lake's natural outlet is still 11 to 12 feet higher than the current water level and the lake would double in size before it reaches its natural overflow elevation.

The State Engineer testified that the state has taken a three-pronged approach to finding a solution to Devils Lake flooding. The first prong involves infrastructure changes in the Devils Lake Basin, such as raising roads, building dikes, and moving houses and towns. The second prong involves changes within the watershed, including restoring wetlands and increasing storage in the basin. The third prong is construction of an outlet to Devils Lake. The estimated cost of a federal outlet is $208 million, of which $135 million would be federal funds and $73 million state funds. In addition, the state would be responsible for all operation and maintenance costs, including operating a sand filter system at a cost of over $1 million per year, on a federal outlet. The committee received testimony from the State Engineer that although a state outlet raises concerns, state officials believe these concerns are more manageable than those relating to a federal outlet. The State Engineer testified that an outlet with a capacity of 100 cubic feet per second and an operating plan that provides for pumping only when downstream water quality standards can be met satisfies the provisions of the Boundary Waters Treaty of 1909 between the United States and Canada.

The committee received testimony that construction on the Northwest Area Water Supply Project began in April 2002. The two pipeline contracts for 2002 and 2003 totaled 19 miles of the 45 miles between Lake Sakakawea and the city of Minot with bidding for another 10 miles of pipeline to take place in 2004. This project is being constructed with 65 percent federal municipal, rural, and industrial water supply funds and 35 percent nonfederal funds, mostly provided by Minot city sales tax revenue.

By: Tex Hall, Chr.
3/4/05
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MANDAN, HIDATSA & ARIKARA NATION
Three Affiliated Tribes • Ft. Berthold Reservation
404 Frontage Road • New Town, ND 58763-9402

59th LEGISLATIVE ASSEMBLY
HOUSE NATURAL RESOURCES COMMITTEE
HONORABLE JON O. NELSON, CHAIRMAN & COMMITTEE MEMBERS

TESTIMONY OF TEX G. HALL, CHAIRMAN
MANDAN, HIDATSA & ARIKARA NATION
ON SENATE BILL 2041

Chairman Nelson and Committee Members my name is Tex Hall and I am the Chairman of the Mandan, Hidatsa & Arikara Nation ("MHAN"). Thank you for allowing me to testify before you today. As Chairman of our Tribe, I serve as the official spokesman of the Tribe and this testimony serves as the Tribes' official position on this proposed legislation.

As North Dakota Century Code presently reads and is applied by the North Dakota Game and Fish Department, non-Indians that hunt on lands owned or held in trust for us with tribally-issued hunting licenses cannot legally transport this game within the State because the North Dakota Century Code only allows the transfer of game legally taken "in other states." This law does not preclude Tribal members from transporting game "legally taken" on our Reservations because the State Game and Fish Department recognizes tribal licenses issued to Tribal members.

Senate Bill 2041 would amend the North Dakota Century Code to allow properly tagged game birds and big game legally taken on "Indian land" to be transported within the state of North Dakota.

Senate Bill 2041 is a product of Senate Concurrent Resolution No. 4022 passed in the 58th Legislative Assembly that directed the Legislative Council to study proposed legislation permitting the Game and Fish Department to coordinate with game and fish programs conducted by North Dakota Tribes. Senate Bill 2041 resolves this conflict between tribes and the State because it provides for State recognition of hunting licenses issued to non-tribal members hunting on "Indian land" which is defined as land owned in fee by or held in trust for an Indian tribe or an Indian within the exterior boundaries of an Indian reservation.[1]

[1] "Fee land" owned by an Indian tribe or and Indian is land owned just like any other individual owns land. "Trust land" is land owned by the United States but held "in trust" for an Indian tribe or an Indian. The major difference being that there are major federal restrictions concerning the alienation of trust land. Furthermore, please note that this bill would only exempt an individual hunting on "Indian lands" - "within the exterior boundaries of an Indian reservation." Thus, it does not apply to any lands outside of an Indian reservation. Lastly, this bill would still require non-Indians to obtain a state hunting license when hunting on fee land owned by non-Indians within an Indian reservation.

If you would allow me, I would like to explain the status of federal law in regard to jurisdiction over hunting and fishing on Indian reservations and explain to you why this Senate Bill 2041 is needed by giving you some perspective by talking a little bit about the history of the negotiations between the Tribes and the North Dakota Game and Fish Department.

In 1983, the United States Supreme Court decided the case of New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983). In this case, the Mescalero Apache Tribe sued to enjoin the State of New Mexico from enforcing its laws against non-members hunting on its reservation because the New Mexico's Game and Fish Department was enforcing its laws against non-members hunting on the Mescalero Apache's Reservation even though the non-members had a Tribal license. The Supreme Court found in favor of the Mescalero Apache Tribe and the State was enjoined from enforcing its hunting laws on the Mescalero Apache Reservation finding that federal law had preempted New Mexico's authority to regulate hunting and fishing on the Mescalero Apache Reservation.

North Dakota's Game and Fish Department is doing the same thing the New Mexico Game and Fish Department was doing. Over the past three years or so, a warden from the North Dakota Game and Fish Department has come on to our reservation and cited non-Indians for hunting birds on our trust land even though these individuals were hunting with a Tribal license and in accordance with the Tribes' Game and Fish Ordinance. These non-Indians got very angry and have vowed to never come back. Of course, the Tribes are very frustrated because we are trying to develop business and personal relationships with non-Indians and we believe that the North Dakota Game and Fish Department's interference with hunting on our reservation violates federal law and is completely without any legal justification.

Rather than run to the courts concerning this problem, we have tried to work with the North Dakota's Game and Fish Department over many years. MHAN has met with Game and Fish numerous times and tried to iron out a memorandum of understanding that both sides can accept but the sticking point always comes down to State regulation of non-Indians hunting on our lands. We simply cannot agree to this - especially in light of the Supreme Court's decision in Mescalero Apache Tribe v. New Mexico which clearly settles this issue in our favor.

The Game and Fish Department has been, at best, difficult to deal with on this issue. Consequently, we decided to seek to have the State legislature resolve this matter so that non-Indians can enjoy the hunting resources of our reservation without undue interference from the State Game and Fish Department. We could have gone to the courts to enjoin the State from enforcing its laws just like the Mescalaro Apache Tribe did but we have chosen not to. However, we would prefer to work with the State – either through State agencies or the State legislature – to work out our jurisdictional differences.

Tribes appreciate the legislatures' efforts in passing Senate Concurrent Resolution 4022 and the efforts of the Interim Natural Resources Committee in introducing Senate Bill 2041. Senate Bill 2041 and Senate Concurrent Resolution 4022 were a result of a lot of hard work by the Tribes and the interim Natural Resources Committee members. I would like to thank Chairman Lyson, the Senate Natural Resources Committee, and the Senate for passing this Bill 8-0 in the Natural Resources Committee and 40-6 in the Senate.

Here are some other facts you should know in considering this bill:

1. The fees obtained from hunting licenses on our reservation are reinvested in the management of game on our reservation

2. The State Game & Fish Department does not invest any monies in the management of game on Indian lands within our reservation.

3. We have not sold any hunting licenses to non-Indians to hunt deer on our reservation unless their spouses are Tribal members. We sold approximately nine deer hunting licenses to non-Indians married to Tribal members last year.

4. We do sell licenses to non-Indians to hunting pheasants and coyotes on our lands. We normally sell twenty-five of these licenses a year.

5. We have a comprehensive game and fish code that has been approved by the Secretary of Interior. In many respects, it is more restrictive that the State's Century Code.

6. We have a game and fish department that enforces our laws. Our game wardens are trained by the State Academy or by the Federal Law Enforcement Training Center.

In sum, Senate Bill 2041 is a bill that protects non-Indians (it has no affect whatsoever on Indians hunting on our reservation); it promotes non-Indian relationships with tribes and their members; and it promotes economic development on our reservations and within the State as some of these hunter fly into or travel through this great State to hunt on our lands. Thus, Senate Bill 2041 deserves your support.

I have heard that some amendments to this bill may be introduced that will substantially change this bill. I hope that this is not the case. Any amendments substantially changing this bill will do nothing but cause confusion. If any amendments are introduced, I respectfully request this committee hold another hearing so that tribes may respond to any proposed amendments that this committee may seriously consider.

This concludes my comments on the proposed bill. Again, thank you for addressing a long-standing issue between the State and North Dakota Tribes.

I urge this committee to vote DO PASS on SB 2041.

Referenced & submitted By: Todd Hall 3/4/05 Re: SB 2041 Pg 1 of 2

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Great Plains Regional Office
115 Fourth Avenue S.E.
Aberdeen, South Dakota 57401

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IN REPLY REFER TO
Natural Resources
MC-301

FEB 25 2005

The Honorable Tex Hall
Chairman, Three Affiliated Tribes
Attention: Todd Hall
404 Frontage Road
New Town, North Dakota 58763

Dear Chairman Hall:

This is in response to a request for information concerning Senate Bill Number 2041 in the 59th Legislative Assembly of North Dakota. I would like to provide you with some background on the issue of hunting and fishing rights of tribal governments as it pertains to North Dakota.

First and foremost, the Bureau of Indian Affairs (Bureau) has a trust responsibility to protect the trust assets of the tribes as per Part 56 Chapter 2 Section 2.2 of the Indian Affairs Manual (IAM). As a key program policy the Bureau will protect against the loss, infringement and abrogation of hunting, fishing, gathering, and related rights guaranteed to federally-recognized tribes by the United States through treaty, statute, or Executive Order, and support fulfilling tribal co-management responsibilities associated with the exercise of such rights (IAM Part 56, Chapter 2, Section 2.2). To meet this obligation, we will continue to provide assistance to the Tribal Fish and Wildlife departments in North Dakota on the very public position the North Dakota Game and Fish Department has taken that tribal licenses issued to non-members are "trespass fees" to allow non-members to use Indian lands.

North Dakota Game and Fish Department told our Regional Wildlife Biologist on May 28, 2002, that in their opinion the Mescalero decision (New Mexico v. Mescalero Apache Tribe 103 S. Ct. 2378(1983)) has no bearing on Indian lands in North Dakota because of the fractionation of reservations into allotments. Therefore, they claim to have the right to require state licenses of non-members hunting or fishing on Indian lands. They have proposed a uniform licensing, but this requires the Tribe(s) to recognize the State's authority to regulate non-members on Indian lands. They indicated that they are working under the direction of the Attorney General's Office. This position is unprecedented. No other state has taken such a position, including states with more fractionated lands within a reservation boundary.

The *New Mexico v. Mescalero Apache Tribe* decision has allowed tribes throughout the nation to implement fish and wildlife codes with active enforcement and wildlife management along with economic development through the use of hunting and fishing revenues. This has not been the

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case for tribes in North Dakota. Our Regional Wildlife Biologist was told by the Biologist for the National Wild Turkey Federation that their members would love to hunt on Indian land in North Dakota but they do not because they fear getting a citation from the state. An out-of-state entrepreneur owning land in North Dakota recently contacted his Congressman about the threat of citation for hunting on Indian lands with only a tribal license. All of the tribes in North Dakota have been delaying development of hunting and fishing opportunities to non-members because of this threat. For instance, the Sisseton-Wahpeton Oyate has delayed offering goose hunting packages through their casino because of the state's threat. This is a loss in revenue to the tribes' fish and wildlife departments which depend upon license sales to support resource improvements, code enforcement, and personnel. The cost of licenses ranges from $25 to $250 depending upon the species and tribe. There are also losses in indirect revenues from fuel, lodging, meals, and incidental purchases that non-residents would bring to the reservation and surrounding areas.

The tribes are expending funds from the Bureau, license revenues, or grants for wildlife and fish resource conservation and enhancement projects. The tribes do not have access to Federal Aid funds from the Sport Fish Restoration Act (16 USC 777-777k, 64 Stat. 430) and Wildlife Restoration Act (16 USC 669-669i, 50 Stat. 917) distributed through the U.S. Fish and Wildlife Service. However, more than 860,000 acres of trust land within North Dakota are used in the calculation of the funds North Dakota receives for Federal Aid. The Service's Federal Aid Office has no knowledge of any projects within Reservation boundaries with the exception of fish restoration in shared waterways.

I hope this information is useful in your pursuit to rectify this situation and fully utilize your natural resources. Please contact Diane Mann-Klager, Wildlife Biologist, at (605) 226-7621, if you have any questions or need additional information.

Sincerely,

William L. Leyendecker

Regional Director

cc: Director, Bureau of Indian Affairs
Superintendent, Fort Berthold Agency
Superintendent, Turtle Mountain Agency
Superintendent, Fort Totten Agency
Superintendent, Sisseton Agency
Great Plains Fish and Wildlife Commission
Native American Liaison, Fish and Wildlife Service, Denver, CO
Jim James, Trust Fiduciary Administrator, Office of Special Trustee

By: Todd Hall
Re: SB 2041
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North Dakota State Legislature
59th LEGISLATIVE ASSEMBLY
HOUSE NATURAL RESOURCES COMMITTEE
HONORABLE NELSON, CHAIRMAN & COMMITTEE MEMBERS

TESTIMONY OF TODD HALL, DIRECTOR
THREE AFFILIATED TRIBES FISH & WILDLIFE DIVISION
MANDAN, HIDATSA & ARIKARA NATION
ON SENATE BILL 2041

March 4, 2005

Chairman Nelson and Committee Members, my name is Todd Hall and I am the Fish and Wildlife Director for the Mandan, Hidatsa and Arikara Nation. Thank you for allowing me to testify before you today in support of proposed Senate Bill 2041. I am authorized by Tribal Law to speak on behalf of and for the benefit of the Mandan Hidatsa and Arikara Nation. I am also a National Board member of the Native American Fish and Wildlife Society, which is comprised of 295 member tribes throughout the United States. I am also the Vice-Chairman of the Great Plains Inter-Tribal Fish and Wildlife Commission which is composed of Tribes from North Dakota, South Dakota, and Nebraska. This Commission includes the five tribes of North Dakota.

Senate Bill 2041 is a product of Senate Concurrent Resolution No. 4022 passed in the 58th Legislative Assembly that directed the Legislative Council to study proposed legislation permitting the North Dakota Game and Fish Department to coordinate with Tribal Game and Fish Programs. The Bill is a product of a joint, Tribal and State effort to remedy the primary conflict between Tribes and the State Game and Fish Department, which is the recognition of Tribally-issued hunting licenses on Tribal lands. The Bill is a good starting point for positive Tribal/State relationships regarding resource management, and its passage as written; the goals of Senate Concurrent Resolution No. 4022 can be attained. I would add that the Three Affiliated Tribes opposes any amendments and/or manipulation to Senate Bill 2041 without our prior concurrence. We adamantly do so when considering that any such amendments and/or manipulation to Senate Bill 2041 may or will cause irreparable harm or threaten the Tribe's political integrity, economic security (including commerce), or health and welfare.

Three Affiliated Tribes Background Information Regarding Fish and Wildlife Mgmt. on the Fort Berthold Indian Reservation

The following is a simple question and answer session of commonly asked questions regarding Fish and Wildlife Management on the Fort Berthold Reservation. While the

situations and management schemes on each reservation may vary slightly, the general framework for biologically sound management decisions remains the same.

Does the Three Affiliated Tribes have laws governing hunting?

Yes we do. The Chapter 18 Game, Fish & Recreation Code of Laws for the Three Affiliated Tribes of the Fort Berthold Indian Reservation was adopted by the Tribal Business Council by Resolution #75-203, on December 16, 1975.

The laws are very comprehensive and periodically reviewed and updated in order to meet the specific needs that are identified by a staff of professional resource managers.

The Fish and Wildlife Division also issues proclamations for each hunting season. Taking limits, harvest quotas, along with Tribal management goals and objectives are all taken into consideration while developing those proclamations.

Why do State seasons and Tribal Seasons periodically differ from each other?

From time to time the State seasons do not coincide with the Tribal seasons regarding opening dates or species which are available to the hunt. For example, on Fort Berthold the Tribe has offered hunter opportunity to non-members to hunt wild turkeys. Generally speaking, the members of the Three Affiliated Tribes do not actively hunt this species, and turkey populations have flourished. In many instances they have become a nuisance to area ranchers, (depredating crops and forage) and become a menace to other species. Therefore it makes perfect sense that the Tribe open the season to non-members (which may be non-residents of North Dakota). Under current North Dakota law, non-residents are prohibited from hunting that species. Therein, arises a conflict between the State and the Tribes. This conflict has served as a disincentive for hunters to participate in the Tribal fall or spring hunting seasons resulting in a compounding biological dilemma and the continued depredations to area farmers and ranchers property. Senate Bill 2041 will address and rectify this conflict by allowing the North Dakota State Game and Fish law to recognize and honor Tribal issued licenses.

Another example of conflict resolution by the passage of Senate Bill 2041 once again deals with the comprehensive management schemes developed on Fort Berthold regarding a certain species. One example that is often cited is for pheasant. Tribal regulation of this species regarding taking limits of this species have, in the past, at times not been as liberal as the State's taking limits. This is due to the on-going drought conditions and other climactic factors which are affecting the resident populations of pheasant. Having the Tribe simply adopt the States more liberal taking limits simply for the sake of simplicity itself would potentially have long-term negative affects to the pheasant populations of our reservation. Senate Bill 2041 would rectify problems such as this by opening lines of communication between the North Dakota State Game and Fish Department and the Tribes of North Dakota.

The Three Affiliated Tribes depends on non-member hunting and conservation fees to fund many program activities including but not limited to: enforcement training, enhance recreational opportunities to the general public, habitat restoration and enhancement, endangered species, and more. Without the addition of non-member hunting fees, the division would not have adequate funding to adequately carry out several of its management objectives.

Are the laws actively enforced?

Yes they are, violators who are cited for an infraction are done so according to the Chapter 18 Code of Laws, federal law, and existing Case law. Law enforcement staff have attended and completed (at a minimum) Basic Peace Officer Training at a federal or equivalent training academy and are required by law to maintain at least 80 hours of training each year. Currently, the Three Affiliated Tribes enforcement personnel meets and exceeds the Law Enforcement requirements as mandated by the Bureau of Indian Affairs.

Due to the alleged checkerboard nature of the reservation, do the species migrate off of Indian land to fee lands?

Most of the fee land on the Fort Berthold Reservation has been developed for farming. This extensive development has destroyed most of the available habitat within the fee lands. Therefore, wildlife populations do not readily migrate back and forth. Observations and surveys are conducted in a manner to determine population and dynamics. In most instances, only hunter opportunity is impacted, and does not affect overall species health determining factors (total population, densities, and related information).

Senate Bill 2041 is Constitutional

Senate Bill 2041 is consistent with existing federal and case law. The proposed bill as written is consistent with the **December 2003 TRIBAL GAME AND FISH COORDINATION STUDY – BACKGROUND MEMORANDUM Prepared by the North Dakota Legislative Council Staff for the Natural Resources Committee** where it states; "In *Lacoste v. Department of Conservation,* 263 U.S. 545, 551 (1924), the United States Supreme Court said that protection of fish and wildlife is "particularly within the police power and the state has great latitude in determining what means are appropriate for its protection." However, the state regulation of fish and wildlife must yield when it conflicts or interferes with federal law. Treaties and other federal laws that guarantee Indian hunting or fishing rights may preempt state police powers under the supremacy clause of the United States Constitution." The memorandum goes on to quote the *American Indian Law Desk Book* by stating "that states presumptively have jurisdiction over non-member conduct on reservations where the conduct does not occur on tribal lands. Generally, states have full police powers outside Indian Country."

Senate Bill 2041 is Good for North Dakota

In considering this bill as written, Senate Bill 2041 would foster the long-term involvement of the State and the Tribes to work cooperatively concerning the prudent conservation, preservation and protection of natural resources on Reservation lands. The roles and responsibilities of the State and the Tribes are predicated on the management of healthy ecosystems, while recognizing the Tribes' aboriginal rights, sovereign authorities, and institutional capacity to manage their own lands and resources within the reservations. Senate Bill 2041 aims to develop the cooperative efforts of the State and the Tribes to involve all aspects of fish and wildlife resource management, law enforcement, habitat protection, endangered species, and the protection of State and Tribal natural resources. Senate Bill 2041 does not augment or concede either the State's or the Tribes' authorities and/or jurisdictions. It serves as a clarification to those existing jurisdictions and authorities of both parties without unwanted and costly litigation.

One recent example of possible cooperation is the recent amendment adoption of Section 2 and passage of House Bill No. 1102 which promotes the cooperation of the State Game and Fish Department and Tribal Departments. House Bill 1102 brings the departments together to assess the status of Mountain Lions. With the concurrent passage of House Bill 1102 and Senate Bill 2041; the state and tribal departments will immediately "come to the table". Provided the passage of Senate Bill 2041, tribal authorities are more than willing to participate in such a study as House Bill 1102 proposes. Such cooperation and participation will enhance and enlighten all North Dakota citizens' knowledge and understanding of Mountain Lions. The Tribe has a definite stake in such a study because preliminary information indicates that a considerable amount of Mountain Lion activity has and is alleged to have occurred in and around the Fort Berthold Reservation.

This concludes my comments on the proposed bill and thank you again for addressing this issue. Please keep in mind that this bill is intended to protect non-Indians while hunting within the exterior boundaries of our reservation. This bill has no effect whatsoever, on those hunting and fishing rights enjoyed by Indians within our boundaries.

In consideration of my testimony given here today, I pray the House Natural Resources Committee recommend a DO PASS on Senate Bill 2041.

Thank you,

Todd Hall

situations and management schemes on each reservation may vary slightly, the general framework for biologically sound management decisions remains the same.

Does the Three Affiliated Tribes have laws governing hunting?

Yes we do. The Chapter 18 Game, Fish & Recreation Code of Laws for the Three Affiliated Tribes of the Fort Berthold Indian Reservation was adopted by the Tribal Business Council by Resolution #75-203, on December 16, 1975.

The laws are very comprehensive and periodically reviewed and updated in order to meet the specific needs that are identified by a staff of professional resource managers.

The Fish and Wildlife Division also issues proclamations for each hunting season. Taking limits, harvest quotas, along with Tribal management goals and objectives are all taken into consideration while developing those proclamations.

Why do State seasons and Tribal Seasons periodically differ from each other?

From time to time the State seasons do not coincide with the Tribal seasons regarding opening dates or species which are available to the hunt. For example, on Fort Berthold the Tribe has offered hunter opportunity to non-members to hunt wild turkeys. Generally speaking, the members of the Three Affiliated Tribes do not actively hunt this species, and turkey populations have flourished. In many instances they have become a nuisance to area ranchers, (depredating crops and forage) and become a menace to other species. Therefore it makes perfect sense that the Tribe open the season to non-members (which may be non-residents of North Dakota). Under current North Dakota law, non-residents are prohibited from hunting that species. Therein, arises a conflict between the State and the Tribes. This conflict has served as a disincentive for hunters to participate in the Tribal fall or spring hunting seasons resulting in a compounding biological dilemma and the continued depredations to area farmers and ranchers property. Senate Bill 2041 will address and rectify this conflict by allowing the North Dakota State Game and Fish law to recognize and honor Tribal issued licenses.

Another example of conflict resolution by the passage of Senate Bill 2041 once again deals with the comprehensive management schemes developed on Fort Berthold regarding a certain species. One example that is often cited is for pheasant. Tribal regulation of this species regarding taking limits of this species have, in the past, at times not been as liberal as the State's taking limits. This is due to the on-going drought conditions and other climactic factors which are affecting the resident populations of pheasant. Having the Tribe simply adopt the States more liberal taking limits simply for the sake of simplicity itself would potentially have long-term negative affects to the pheasant populations of our reservation. Senate Bill 2041 would rectify problems such as this by opening lines of communication between the North Dakota State Game and Fish Department and the Tribes of North Dakota. Furthermore, the State of North Dakota already has varying season dates, species limits, and other regulations throughout the state depending on differing management units. The idea of the reservations as separate

management units would not be a new concept to resource managers. Once again I stress, Senate Bill 2041 would enable the State and Tribal departments to foster and develop management schemes that would benefit all stakeholders.

Does the Three Affiliated Tribes depend on Non-member hunting fees for program activities?

The Three Affiliated Tribes depends on non-member hunting and conservation fees to fund many program activities including but not limited to: enforcement training, enhance recreational opportunities to the general public, habitat restoration and enhancement, endangered species, and more. Without the addition of non-member hunting fees, the division would not have adequate funding to adequately carry out several of its management objectives.

Are the laws actively enforced?

Yes they are, violators who are cited for an infraction are done so according to the Chapter 18 Code of Laws, federal law, and existing Case law. Law enforcement staff have attended and completed (at a minimum) Basic Peace Officer Training at a federal or equivalent training academy and are required by law to maintain at least 80 hours of training each year. Currently, the Three Affiliated Tribes enforcement personnel meets and exceeds the Law Enforcement requirements as mandated by the Bureau of Indian Affairs.

Due to the alleged checkerboard nature of the reservation, do the species migrate off of Indian land to fee lands?

Most of the fee land on the Fort Berthold Reservation has been developed for farming. This extensive development has destroyed most of the available habitat within the fee lands. Therefore, wildlife populations do not readily migrate back and forth. Observations and surveys are conducted in a manner to determine population and dynamics. In most instances, only hunter opportunity is impacted, and does not affect overall species health determining factors (total population, densities, and related information).

Senate Bill 2041 is Constitutional

Senate Bill 2041 is consistent with existing federal and case law. The proposed bill as written is consistent with the **December 2003 TRIBAL GAME AND FISH COORDINATION STUDY – BACKGROUND MEMORANDUM Prepared by the North Dakota Legislative Council Staff for the Natural Resources Committee** where it states; "In *Lacoste v. Department of Conservation,* 263 U.S. 545, 551 (1924), the United States Supreme Court said that protection of fish and wildlife is "particularly within the police power and the state has great latitude in determining what means are appropriate for its protection." However, the state regulation of fish and wildlife must yield when it conflicts or interferes with federal law. Treaties and other federal laws that

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In consideration of my testimony given here today, I pray the House Natural Resources Committee recommend a DO PASS on Senate Bill 2041.

Thank you,

Todd Hall

By: Jesse Taken Alive
Re: SB 2041 3/4/05
Pg: 1 of 2 (Resolution)

RESOLUTION NO. 253-05

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians, having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Section 16; and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

WHEREAS, the Standing Rock Sioux Tribal Council, pursuant to the Amended Constitution of the Standing Rock Sioux Tribe, Article Iv, Section 1[a] and 1[c], is empowered to negotiate with Federal, State and local governments and others on behalf of the Tribe, and to promote and protect the health, education and general welfare of the Tribe and its members; and

WHEREAS, the Standing Rock Sioux Tribe possesses the inherent authority through the Treaties of September 17, 1851 and April 29, 1868 to regulate hunting and fishing; and

WHEREAS, the Standing Rock Sioux Tribe regulates the hunting and fishing through its Game, Fish and Wildlife Conservation Code, found in the Standing Rock Sioux Tribe's Code of Justice, Title IX, over all individuals; and

WHEREAS, the Fifty-ninth Legislative Assembly of North Dakota is currently considering Senate Bill No. 2041, a Bill that recognizes in part, the right of individuals to hunt on Indian lands without the need to purchase a State license and transport properly tagged game or game birds in the State of North Dakota; and

WHEREAS, the Standing Rock Sioux Tribe's Game and Fish Department supports Senate Bill No. 2041 and views the Bill as a recognition by the State of North Dakota of the Standing Rock Sioux Tribe's authority to regulate hunting on Indian lands as defined in Senate Bill No. 2041; and

WHEREAS, Senate Bill No. 2041 has passed the North Dakota Senate and is currently before the House Natural Resources Committee for consideration on hearings that will occur on Friday, March 4, 2005; and

WHEREAS, the Standing Rock Sioux Tribe and the State of North Dakota have entered into an Accord, which recognizes the sovereign authority of each government and is a commitment by the Tribe and State to deal with each other on a government-to-government basis.

By: Jesse Taken Alive
Re: SB 2041 3/4/05
Pg: 2 of 2 t Resolution

NOW THEREFORE BE IT RESOLVED, that the Standing Rock Sioux Tribe hereby supports the passage of Senate Bill No. 2041 in its current form and views Senate Bill No. 2041 as a recognition of the right of the Standing Rock Sioux Tribe to regulate hunting on Indian lands; and

BE IT FURTHER RESOLVED, that the Standing Rock Sioux Tribe hereby recommends to the North Dakota House Natural Resources Committee to pass Senate Bill No. 2041 is its current form as presented; and

BE IT FURTHER RESOLVED, that the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

CERTIFICATION

We, the undersigned, Chairman and Secretary of the Tribal Council do hereby certify that the Tribal Council is composed of **[17]** members of whom **17** constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, convened and held on the **1st** day of **MARCH, 2005,** and that the foregoing resolution was duly adopted by the affirmative vote of **16** and with **0** opposing, and with **1** not voting. **THE CHAIRMAN'S VOTE IS NOT REQUIRED, EXCEPT IN CASE OF A TIE.**

DATED THIS 1st DAY OF MARCH, 2005.

Charles W. Murphy, Chairman
Standing Rock Sioux Tribe

ATTEST:

Sharon Two Bears, Secretary
Standing Rock Sioux Tribe

[Official Tribal Seal]

Meeting Date: 03-01-05
Motion No. 33

By: Cheryl Bergian

North Dakota Human Rights Coalition

P.O. Box 1961, Fargo, ND 58107-1961 (701) 239-9323 Fax (701) 478-4452 www.ndhrc.org

Testimony
Senate Bill 2041
Senate Human Services Committee
March 4, 2005

Chairman Nelson and members of the Committee, I am Cheryl Bergian, Director of the North Dakota Human Rights Coalition. The Coalition includes a broad-based, statewide membership of individuals and organizations interested in the furtherance of human rights in North Dakota; the Coalition's mission is to effect change so that all people in North Dakota enjoy full human rights.

We support the passage of SB 2041, which recognizes that a state game license is not needed for an individual hunting with a tribal hunting license on Indian land, and that game taken on Indian land may be possessed and transported in the state. We support the sovereignty of the Indian tribes in North Dakota, and appreciate the state's recognition of this sovereignty with regard to game regulations.

We ask for a do pass recommendation on Senate Bill 2041. I appreciate this opportunity to testify on behalf of the North Dakota Human Rights Coalition.

By: Alvah Quinn
3/4/05

NORTH DAKOTA STATE LEGISLATURE

59th Legislative Assembly
Natural Resources Committee
Honorable J. Nelson, Chairman and Committee Members

Testimony of Alvah Quinn, Director
Fish and Wildlife Department
Sisseton Wahpeton Oyate
On Senate Bill 2041

Chairman J. Nelson and Committee members, my name is Alvah Quinn. I am the Director for the Fish and Wildlife Department of the Sisseton Wahpeton Oyate (people), located on the Lake Traverse Reservation in southeast North Dakota. I am authorized by Tribal Chairman, James Crawford to speak on behalf of the Oyate regarding Senate Bill 2041.

As you are aware Senate Bill 2041 is a product of Senate Concurrent Resolution No. 4022 passed in the 58th Legislative Assembly that directed the Legislative Council to study proposed legislation permitting the North Dakota Game and Fish Department to coordinate with Tribal game and Fish Departments. The Bill is a product of a joint, Tribal and State effort to remedy the primary conflict between tribes and the state which is the recognition of Tribally-issued hunting Licenses on Tribal lands.

Under the forward in the Sourcebook entitled Indian tribes as Sovereign Governments, second edition Senator Daniel K. Inouye of the United States Senate writes "The sovereign status of Indian nations predates the formation of the united States. It is the subject of many writings of our nation's Founding Fathers and the debates of the Continental Congress. In addressing the powers and authorities of the three branches of the national government of the United States, the United States Constitution identifies three, and only three, sovereigns other than the Federal government – the several states, foreign nations, and Indian tribes.

This sovereign status of Indian nations is the fundamental premise upon which a course of dealings between the United States and Indian tribal governments ensued and the foundation upon which hundreds of Federal statutes and thousands of Federal court rulings have been based".

Based upon this premises Tribes have the inherent right to regulate Hunting and fishing activities on Reservations. However, the current law prohibits the Tribe from offering any hunting opportunities for non-members on trust lands of the Lake Traverse Reservation. This continues to have an economic impact on our Tribe. It is refreshing to know that if this proposed legislation passes this could resolve the jurisdiction problems that exist on Indian Reservations in North Dakota.

Furthermore, this would bring North Dakota into compliance with Federal Law (Mescalaro Apache Tribe v. New Mexico).

This concludes our comments on the proposed bill and we thank you for addressing this issue.

Again, we urge the passage of this bill.

By: Vincent Greyhorn, Sr.
Re: SB 2041 - 3/4/05
Pg: 1 of 2

SENATE BILL 2041

NORTH DAKOTA STATE LEGISLATURE
59TH Legislative Assembly
Natural Resource Committee
J.Nelson, Chairman and Committee Members

Mr. Chairman & Committee Members my name is Vincent Greyhorn Sr., Vice-Chairman of the Spirit Lake Tribe. This testimony is given in support of our Tribal Fish & Wildlife Department. Spirit Lake Tribe is located in central North Dakota and with different issues relative to our inherent right to hunt and fish it is extremely important that the Spirit Lake Tribe's Natural Resources are protected by our Tribal Department within our boundaries and tribal land under the jurisdiction of the Tribe outside of these same boundaries.

The present bill 2041 is the result of Senate Concurrent Resolution No. passed in the 58th Legislative Assembly, which directed the Legislative Council to study proposed legislation permitting the North Dakota Game and Fish Department to coordinate with the Tribe's Fish & Wildlife Departments. The bill is a product of a joint, Tribal and State effort to remedy the primary conflict between our Tribe's and the State differences on our Tribal Hunting & Fishing License. We do not need anyone's permission on how we regulate our Tribal lands on our Reservations. Spirit Lake Tribe like the other North Dakota Tribe's is a "Sovereign Nation" and according to our Treaty Rights can hunt and fish without State regulations within our boundaries and Indian land on the exterior boundaries of the reservation, provided it is land held in trust either belonging to a Tribal member or to the Spirit Lake Tribe.

Our hunting and fishing rights have not been taken away and are not subject to regulations especially when members are hunting on reservation lands unless of course the Tribe is regulating. Also important is the fact that non-members are under the jurisdiction of the Tribe when on the reservation. The main issue is the Tribe is supposedly without authority to regulate non-Indians on Spirit Lake Reservation.

Under State law the State contends it possesses the right to come into the reservation and regulate non-Indians and this interfers with the economics of the Tribe in relation to hunting & fishing license. If the State and Tribe can work toward a solution and let the Tribe issue a Tribal License that would be honored by the State this would go a long way in settling our differences in this field. The Senate Bill 2041 would help but some amendments have to be included so the Tribe does not come up on the short end of the stick with the way the bill is presently written.

We would favor the passage of the Bill and I reiterate that this would be with additional amendments.

TESTIMONY GIVEN BY:

By: Roger Rostvet
3/4/05
Re: SB 2041
Pg: 1 of 3

» 2005 Season Dates
» 2004 PLOTS Guide
» Buy/Apply for a License
» Report a Violation
» Hunt/Fish Regulations
» Aquatic Nuisance Species
» Chronic Wasting Disease Q&A
» Official G&F Positions
» Map Services/GIS
» Contact Us

Official Department Position Paper

Hunting and Fishing Within the External Boundaries of North Dakota Indian Reservations (1998)

The North Dakota Game & Fish Department recognizes tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The North Dakota Game & Fish Department recognizes that Indian tribes are governmental sovereigns. Inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The North Dakota Game & Fish Department is sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not state public lands or part of the public domain, and are not subject to state public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the checkerboard nature of reservations in North Dakota, we need to be acutely aware of the obligation to nonmembers, or at least non-Indians who happen to own land in fee title or live within Indian reservations. These non-members have the right to be governed by the state, not the tribe, and to enjoy the privileges provided by state law, such as the right to certain property rights, licenses, landowner preference, and free hunting privileges on their own land. We must protect the right to regulate those fee lands, and to assure that those individuals enjoy the same privileges and state services as are afforded other residents of our state. It has always been the position of the State of North Dakota that the North Dakota Game & Fish Department has jurisdiction in wildlife related matters throughout the State of North Dakota over all of its citizens and any visitors within our boundaries.

The North Dakota Game and Fish Department position on tribal hunting

By: Roger Rostvet
Re: SB 2041, 3/4/05
Pg: 2 of 3

and fishing licenses issued to nonmembers is that these are "trespass fees" to allow nonmembers to use Indian trust lands. Non-Indians must possess a valid state license and federal waterfowl stamp, if hunting migratory waterfowl, when hunting or fishing on any land within the exterior boundaries of the reservation, and must abide by state and federal law and related proclamations.

As a practical matter, not related to jurisdictional activity; Members of the tribe are allowed to hunt or fish, according to tribal game and fish code and related proclamations, anywhere within the exterior boundary of the reservation, without state licenses. When hunting or fishing on deeded land, they need to obtain permission of the landowner if the land is posted to no hunting or fishing. If wildlife is removed from the reservation for processing or other reasons, it must be tagged so as to indicate it was taken on the reservation according to tribal regulations.

When law enforcement officer's discover or respond to a complaint of a violation of state law or tribal law on any land inside the reservation boundary and the violator is an enrolled member or a nonmember Indian, the violation will be turned over to tribal officers for prosecution. If tribal law does not cover the violation, the state reserves the right to prosecute the violation in State Court. When tribal officers encounter non-Indians who are in violation of state law on land within the reservation, they will refer the individual to state or federal officers. Non-Indians found in violation of tribal law will be referred to federal officers. Nothing in these procedures is intended to acquire or relinquish jurisdiction over anyone by the state or the tribe.

For more information on this paper contact:

Paul Schadewald, administrative services chief, (701) 328-6328
Robert Timian, chief game warden, (701) 328-6324
Roger Rostvet, deputy director, (701) 328-6305

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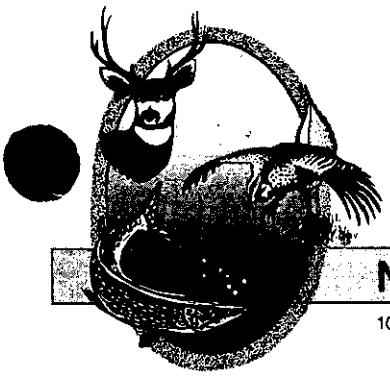
North Dakota Game and Fish Department
100 N. Bismarck Expressway, Bismarck, ND 58501-5095
701.328.6300 General Inquiries

By: Roger Rostvet
3/4/05
Re: SB 2041
Pg: 3 of 3



"VARIETY IN HUNTING AND FISHING"

NORTH DAKOTA GAME AND FISH DEPARTMENT
100 NORTH BISMARCK EXPRESSWAY BISMARCK, NORTH DAKOTA 58501-5095 PHONE 701-328-6300 FAX 701-328-6352

Proposed Amendment to SB2041

Line 14 – 16 replace with:

If an Indian Tribe develops and maintains a hunting season structure for non-Indians where aggregate bag limits do not exceed state bag limits, and season opening dates are identical, the tribe shall then have exclusive licensing and regulatory authority for hunting on Indian Lands.

By: Bill Schaller
3/4/04

Senate Bill No. 2041

House Natural Resources Committee

March 4, 2005

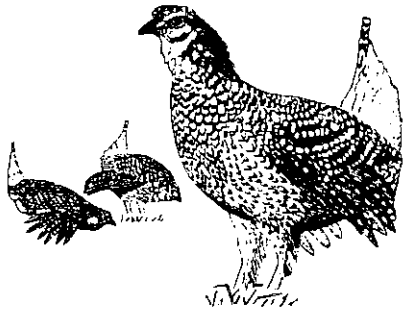
My name is Bill Schaller. I am the District Game Warden in Killdeer and I'm representing the North Dakota Game Wardens Association today. Members of the Association oppose this bill as written because of the confusion that will result if this bill is passed. Game wardens – both state and tribal, are confused now, but more importantly, the public is confused as well. Frustrated hunters contact us all the time and unfortunately, we cannot assure them. Seasons start and end on different dates and bag limits are different just by crossing a reservation line. Almost all conflicts in the past have resulted from different seasons and bag limits. The Association doesn't really care how this matter is settled as long as in the end we know, the tribal wardens know, and the public knows exactly what the rules are and how to apply them. Thank you.

By: Mike McEnroe

North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF MICHAEL McENROE
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
AT THE HOUSE-NATURAL RESOURCES COMMITTEE
ON SB 2041, MARCH 4, 2005

Chairman Nelson and Members of the House Natural Resources Committee:

My name is Mike McEnroe, and I am representing the North Dakota Chapter of The Wildlife Society, comprised of over 300 wildlife biologists, land managers, natural resource administrators, and educators. The Chapter is neutral on SB 2041, but believes it raises several issues that must be addressed.

We agree with individuals hunting with a tribal license on Indians lands do not need a State license, and that game legally taken on Indian lands may be legally transported within the State. We also realize that the State may not agree with this. Non-Indians purchasing a tribal hunting license may wrongly believe that they are then entitled to hunt anywhere within the exterior boundaries of the reservation. This is not the case. Therefore, we ask the Tribal wildlife and natural resource departments to develop and provide accurate maps showing "Indian lands" (lands held in trust by the federal government or lands owned in fee-title by the Tribe or Native Americans) and that land owned by non-Tribal members or non-Indians. For example, approximately 20 percent of the land within the exterior boundary of the Ft. Totten Reservation is "Indian land". On the Three Affiliated Tribes reservation, approximately 50-60 percent of the land within the reservation is Indian land. Somehow the lands within the reservation that are included in this Legislation must be identified to protect the Tribes, the non-Indian landowners and the hunters, whether they are using Tribal or State hunting licenses.

We recommend that the Tribes and the NDGFD work closely to provide hunting seasons with similar dates and bag limits so that there are not differences in hunting season on different sides of the road or across a fence.

We wonder about the fate of a draft wildlife management compact between the Ft. Totten Reservation and the NDGFD that grants the Department some measure of game law enforcement authority on tribal lands within the reservation. This is a cooperative program that has great potential to work for the benefit of all concerned citizens. We recommend that the Tribal wildlife departments and the ND Game and Fish Department develop compacts for all reservations with Tribal wildlife management and hunting programs.

We urge the Tribal natural resource or wildlife departments work with the Native American Fish and Wildlife Society to develop credible wildlife management and hunter safety programs and hunting regulations if they have not already done so.

We support a Natural Resources Sub-Committee looking at these issues while this legislation is being considered. Thank you for the opportunity to comment.

By: Carol Two Eagle
3/4/05

Testimony on SB 2041

Hau mitakuyapi. Hello, my relatives. For the record, my name is Carol Two Eagle, and I appear on behalf of American Indian Traditional & Treaty rights People. I carry their words in support of SB 2041.

We First Nations of this Turtle Island are sovereign nations, therefore it is only right that the state of North Dakota's Game and Fish Department recognize our game management seasons and licenses, the same as they do Canada's, and stop arresting people for poaching when their game was legally taken on a Reservation. It is bigoted on the part of ND Game and Fish to harass people in this way, and refuse to recognize our sovereignty and our licenses. It is illegal. Your support of this bill will do much to reduce litigation between the First Nations of North Dakota & the state.

During the Senate Natural Resources testimony on this bill, the question was raised about how have we Indns "historically" managed our natural resources. In case that question comes up again in this hearing today or at any time in the future, the answer is, "We First Nations of this Turtle Island have *always* managed our resources well. We did not survive in a good way on this Turtle Island *for thousands of years before* the coming of Europeans by happy accident, and we did live here in a good way. Our Traditions taught us what to take, and when, and why or why not. They still do, although today we also have people with majority culture game management education.

We have ***always*** managed our resources well, "historically" including today.

Thank you for hearing me in a good way now, and giving this bill a unanimous Do Pass recommendation. It is a good step toward furthering cooperation between the state of North Dakota and the First Nations of Dakota Territory. Mitakuye oiasin.

By: Rep. Dawn Charging
Pg: 1 of 3

Testimony in Support of SB 2041
Rep. Charging Dist. 4
March 4, 2005

Chairman Nelson and Committee members,

I am Representative Dawn Charging from District 4 which comprises parts of six counties and encompasses the Ft. Berthold Indian Reservation home of the Three Affiliated Tribes the Mandan, Hidatsa and Arikara Nation. For your kind consideration I stand before you in support of Senate Bill 2041. For the record I am an enrolled member of TAT but I am not testifying on behalf of the tribal business council the governing entity of the Three Affiliated Tribes. SB 2041 is a bill that is long over due and seeks to clarify the position of the State and Tribes and their respective jurisdictions. The bill is essentially the codification of already existing federal law on the ability of Indian tribes to regulate non-Indians on Indian land. The ability for Indian tribes to regulate the activities of non-Indians on Indian land is anchored by several considerations of federal and constitutional law.

First, as sovereign nations tribes maintain the ability to regulate activities within their own territory absent a clear declaration from the United States Congress that they cannot do so. Indian nations maintain certain aspects of sovereignty due to their historical existence before contact with euro-Americans. Tribal sovereignty is also anchored by a litany of United States Supreme Court decisions stretching back to the founding of the Republic.[1]

The federal government is the only government which can regulate Indian tribes and their members while they are within Indian country. The ability for Congress to regulate Indian peoples and their affairs is founded upon two principles. First, within the United States Constitution under what is commonly known as the "Indian commerce clause" Congress reserves the right to regulate the interaction of tribes with other sovereigns such as the states.[2] Second, The ability to regulate and even terminate Indian tribes is part of the plenary authority of congress over the affairs of Indian governments.[3] This constitutional understanding of plenary authority, which is foundational to Indian law, is a development by the United States Supreme Court since Indian nations are "domestic dependent nations".[4]

Under the Indian commerce clause and the doctrine of plenary authority the United States government has reserved the right to deal with Indian nations to the exclusion and preemption of State governments. Thus, since tribes are sovereign entities

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[1] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832);
[2] U.S. Con. Art. I Sec. 8 cl. 3.
[3] U.S. v Kagama, 118 U.S. 375 (1886); U.S. v. John, 437 U.S. 634 (1978).
[4] Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823).

which have entered into treaties with the United States they maintain sovereignty at the behest of the federal government.

The second anchoring principle is that the United States Supreme court has held that Indian tribes maintain the right to regulate hunting by non-members.[5] This ability to regulate stems from the inherent sovereignty of the tribe and from the ability for the tribe to exclude non-Indians from land held in trust for them.[6] This "power to exclude" allows tribes to exclude people from their lands and thus to regulate their presence as well.

Third, the United States congress in 1960 passed 18 U.S.C. § 1165 which makes it illegal for a non-Indian to willfully come onto Indian lands with the intent to hunt in violation of tribal regulations. 18 U.S.C. § 1165. Congress passed this statute out of a sense of concern that non-Indians were violating the property rights of Indians. Since the state has no jurisdiction on Indians lands, and tribal courts are without jurisdiction to charge and convict non-Indians, the prosecution of this crime must be a federal matter.

By looking to the legislative history of 18 U.S.C. §1165 we can see that Congresses intent in passing the statute was to step in and protect Indian land since the state and the tribe could not prosecute such trespass crimes. 1165 provides the federal authorities the ability to enforce Indian regulation of non-Indian hunters. This is one of the several sources mentioned of tribal regulatory authority over non-Indians.[7] As legislative history from the House regarding the purpose of 18 U.S.C. § 1165 states,

> "Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit fee. One who comes on such lands without permission may be prosecuted under State law *but a non-Indian trespasser on an Indian reservation enjoys immunity.*"[8] [Emphasis added]

Congresses passage of 18 U.S.C.§ 1165 was meant to fill the gap caused by the lack of jurisdiction that tribal courts and the state has over non-Indians on Indian lands.

Thus, it is clear that as an exercise of the retained sovereignty that an Indian tribe maintains regulating authority over non-Indians. It is also clear from several Supreme Court decisions that tribes maintain the ability to regulate the presence of non-Indians on Indian lands and that tribal regulations preempt state regulation. Furthermore, Congress has recognized the ability for Indian tribes to regulate non-Indians and to do so in the absence of State jurisdiction by passing 18 U.S.C. § 1165.

It should be further noted that the State is arguably violating the United States Constitution by citing and fining non-Indians as they leave Indian lands after they have

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[5] New Mexico, 462 U.S. 324 (1983); Montana v. United States, 450 U.S. 544, 557. (1981).
[6] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
[7] Quechen Tribe of Indians v. Rowe, 350 F. Supp. 106, 110 (S.D. Cal. 1972); United States v. Pollmann, 364 F. Supp. 995, 1001 (D. Mont. 1973).
[8] H.R. Rep. No. 2593, 85th Cong., 2d Sess., at 2.

hunted with permission from the tribe. Hunting on Indian lands by non-Indians is a question of commerce and any attempt at arresting those who leave the Indian reservation with legally taken game is arguably regulating such commerce. As I noted earlier in my testimony, commerce between the Indian tribes and the States can only be regulated by the United States Congress under the Indian commerce clause.

For the following reason SB 2041 is an excellent bill for it clarifies the position of the State and Tribes and is in complete conformity with federal law. Neither side is claiming or asserting jurisdiction that they already do not have under federal law. Furthermore, the States jurisdiction over land that is held by non-Indians within the exterior boundary of an Indian reservation is confirmed by this bill. SB 2041 will protect non-Indians and comfort any fears they might have about enjoying the tradition of hunting on Indian reservations. On a personal note, I would like to add that this will also assist myself and my tribe in carrying out the hospitality that we have extended to our visitors, friends and neighbors for over 200 years. This will be in keeping with the proud tradition of hospitality that is a cornerstone of Indian culture.

TO: Chr. Don Nelson
House Natural Resources Committee

FROM: Karen Bonnet, Clerk KBonnet

RE: SB 2041
Tribal Members on House Subcommittee

DATE: .7 March 2005

* *

Tiffany Johnson just called from the Three Affiliated Tribes with the names of the tribal members who will be on the subcommittee for SB 2041.

Three Affiliated Tribes:

Name	Phone	E-Mail
Steve Kelly	(701) 421-1411	skelly@mhanation.com
Tiffany Johnson	(701) 421-1489	tjohnson@mhanation.com
Todd Hall	(701) 627-4781 -office	

Standing Rock:

Archie Fool Bear	(701) 471-4857	sinteska@westriv.com

By: Charles Carvell
Submitted to HNAT,
not given in person
Re: SB 2041 - 3/17/05
Pg: 1 of 3

Senate Bill 2041 – Proposed Amendments

Testimony of Assistant Attorney General Charles Carvell

Yesterday I was asked by members of this committee to draft a proposed amendment to the bill. I did so, and am here to explain it. Before doing so, I point out that this proposed amendment is not an amendment from the Attorney General's Office. Attorney General Stenehjem is not taking a position on this bill.

Before discussing the amendment, I have two preliminary points.

I think everyone in state government understands that federal law, and in particular federal law as applied by the U.S. Supreme Court in the 1983 *Mescalero* decision, governs jurisdiction over hunting by non-Indians on Indian land. That decision set forth a number of criteria to examine in sorting out jurisdictional disputes between states and tribes. Some committee members have a concern that the legislative process is not the best one in which to conduct the fact finding and analysis required by *Mescalero*. They believe that is better left to the executive branch.

The amendment refers to the need for consistency in state and tribal season dates and bag limits. The committee members desired this because such consistency will contribute to greater public acceptance of this legislation, will reduce conflicts in the field, will ease the work of law enforcement, and it will better protect the resource. The committee members understand that season dates and bag limits could certainly be a matter of discussion and agreement by tribal and state natural resource officials.

Now on to the amendment; it has the following features.

By: Charles Carvell
Submitted to HNAT,
not given in person
Re: SB 2041 - 3/17/05
Pg: 2 of 3

1. The first sentence states that if a tribe wishes to assert jurisdiction over non-Indian hunters, that triggers action by the director of the game and fish department. The director must then examine what the tribe has put in place to manage the resource and to manage hunting.

2. The amendment's next two sentences require the director to establish some criteria by which he makes the review and sets forth a few principles to guide the director in developing the criteria.

3. The fourth sentence describes what happens if the director's review is positive. In that event, the governor must issue a proclamation stating, in essence, that the tribe, not the state, has jurisdiction over non-Indians hunting on Indian land. There is, however, a condition to issuing such a proclamation. The condition requires that tribal and state season dates and bag limits be consistent. What the proclamation will say is substantively no different than what is in Section 2 of the bill, which is the guts of bill and part that has generated the debate.

4. The governor issues hunting proclamations under chapter 20.1-08. The fifth sentence of the amendment states that the "jurisdictional proclamation" called for here will issue through the process described in that chapter.

5. The committee members expressed some concern about the director's authority to enter compacts with tribes. I think he already has such authority but the sixth sentence expressly so states. **I'm not sure anyone wanted this. I seem to recall someone so requesting but may have been mistaken. Let me know if it should come out.**

By: Charles Carvel
submitted to HNAT,
not given in person,
Re: SB 2041, 3/17/05
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6. Because of the desire is that the process described here is to be accomplished quickly and efficiently to better protect tribal interests, the last sentence exempts the director from the numerous procedures and attendant delays if he were required to go through the administrative rulemaking and rule approval process.

By: Rep. Charging
Re: SB 204 - 3/17/05

FOR EDUCATIONAL USE ONLY
SDCL. § **41-14-33**

South Dakota Codified Laws Currentness
Title 41. Game, Fish, Parks and Forestry
Chapter 41-14. Possession, Transportation and Sale of Game and Fish (Refs & Annos)

⇒41-14-33. Transportation of lawfully taken big game animal prohibited unless tagged--Violation as misdemeanor

No person may transport within the jurisdiction of this state any big game animal lawfully taken outside of South Dakota or upon tribal or trust land of an Indian reservation unless the big game animal is properly and securely tagged with a tag supplied by the governmental entity issuing the license. A person transporting a big game animal without such tag is guilty of a Class 1 misdemeanor. If the governmental entity issuing the license does not issue a tag, other proof that the animal has been lawfully taken is necessary.

Source: SL 1982, ch 292.

CROSS REFERENCES

Crimes, penalties for classified misdemeanors, see § 22-6-2.

LIBRARY REFERENCES

Game ⇐7.
Westlaw Key Number Search: 187k7.

S D C L § **41-14-33,** SD ST § **41-14-33**
Current through the end of the 2004 Regular Session and the Nov. 2, 2004 election.
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which have entered into treaties with the United States they maintain sovereignty at the behest of the federal government.

The second anchoring principle is that the United States Supreme court has held that Indian tribes maintain the right to regulate hunting by non-members.[5] This ability to regulate stems from the inherent sovereignty of the tribe and from the ability for the tribe to exclude non-Indians from land held in trust for them.[6] This "power to exclude" allows tribes to exclude people from their lands and thus to regulate their presence as well.

~~Third, the United States congress in 1960~~ passed 18 U.S.C. § 1165 which makes it illegal for a non-Indian to willfully come onto Indian lands with the intent to hunt in violation of tribal regulations. 18 U.S.C. § 1165. Congress passed this statute out of a sense of concern that non-Indians were violating the property rights of Indians. Since the state has no jurisdiction on Indians lands, and tribal courts are without jurisdiction to charge and convict non-Indians, the prosecution of this crime must be a federal matter.

By looking to the legislative history of 18 U.S.C. §1165 we can see that Congresses intent in passing the statute was to step in and protect Indian land since the state and the tribe could not prosecute such trespass crimes. 1165 provides the federal authorities the ability to enforce Indian regulation of non-Indian hunters. This is one of the several sources mentioned of tribal regulatory authority over non-Indians.[7] As legislative history from the House regarding the purpose of 18 U.S.C. § 1165 states,

> "Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit fee. One who comes on such lands without permission may be prosecuted under State law *but a non-Indian trespasser on an Indian reservation enjoys immunity.*"[8] [Emphasis added]

Congresses passage of 18 U.S.C.§ 1165 was meant to fill the gap caused by the lack of jurisdiction that tribal courts and the state has over non-Indians on Indian lands.

Thus, it is clear that as an exercise of the retained sovereignty that an Indian tribe maintains regulating authority over non-Indians. It is also clear from several Supreme Court decisions that tribes maintain the ability to regulate the presence of non-Indians on Indian lands and that tribal regulations preempt state regulation. Furthermore, Congress has recognized the ability for Indian tribes to regulate non-Indians and to do so in the absence of State jurisdiction by passing 18 U.S.C. § 1165.

It should be further noted that the State is arguably violating the United States Constitution by citing and fining non-Indians as they leave Indian lands after they have

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[5] New Mexico, 462 U.S. 324 (1983); Montana v. United States, 450 U.S. 544, 557. (1981).
[6] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
[7] Quechen Tribe of Indians v. Rowe, 350 F. Supp. 106, 110 (S.D. Cal. 1972); United States v. Pollmann, 364 F. Supp. 995, 1001 (D. Mont. 1973).
[8] H.R. Rep. No. 2593, 85th Cong., 2d Sess., at 2.

By: Rep. Froehlich, Dist. 31
Re: SB 2041 - 3/17/05
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The Court also noted that the tribe owns all but 194 acres on its 460,000 acre reservation and that almost all reservation residents are tribal members. Mescalero at 326.

The Court then examined the state's interests.

> The State has failed to 'identify any regulatory function or service…that would justify' the assertion of concurrent regulatory authority….The hunting and fishing permitted by the Tribe occur entirely on the reservation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other 'governmental functions it provides,'. . .in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority.
>
> The State also cannot point to any off-reservation effects that warrant state intervention. Some species of game never leave tribal lands, and the State points to no specific interest concerning those that occasionally do. . . . The State concedes that the Tribe's management has 'not had an adverse impact on fish and wildlife outside the Reservation.'

Mescalero at 341-342. The Court added that New Mexico's financial interest in revenue from the sale of state licenses is insuffici ent to justify state regulation. Id. at 342-43.

The decision in Mescalero Apache does not establish a general rule that a state may not regulate non -member hunting on tribal trust lands. The unique facts of each case must be analyzed in the balancing of tribal, state, and federal interests. Because I am unaware of all the facts needed to make this decision for each of the reservations in North Dakota, I can only provide you with the framework governing the legal analysis and suggest that you continue to work with this office to reach a decision.

Here are some questions to ask when considering whether non -member hunters on trust land are subject to state law. Does the tribe have laws governing hunting? Are the tribal laws comprehensive? Are they actively enforced? Does the tribe have in place the infrastructure to manage the resource and does it in fact actively manage the resource? What kind of economic reliance does the tribe place on

By: Rep. Froelich, Dist. 31
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non-member hunting? What has the state done to manage the re source? What services does the state provide to hunters on trust land? How has state law been applied in the past? What role has the federal government played in developing and managing the resource? Does the species migrate off the reservation? Does the species migrate off reservation trust land to reservation fee land? How frequent are migrations off the reservation and off trust land? Is the species endangered in any way if hunted under the tribe's regulatory regime? What is nature of land - what portion is non-T- owned;

I would l ike to add that there have been lower court decisions in which states have shown adequate state interests supporting the right to regulate hunting by non -members on trust land. In White Earth Band of Chippewa v. Alexander , 683 F.2d 1129, 1138 (8 th Cir. 1982), the court found that Minnesota could enforce state hunting laws against non-members, including on reservation trust land. Minnesota has "a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic manag ement of reservation game and fish resources." Id. at 1137. And in United States v. Montana, 604 F.2d 1162, 1170 (9th Cir. 1979), rev'd on other grounds sub nom. Montana v. United States , 450 U.S. 544 (1981), Montana game laws were held to apply to hunting and fishing by non - members throughout the Crow Indian Reservation.

Although I have not given you a direct answer to your question, I trust that I have provided you with sufficient guidance so that you can answer it after your consideration of the fact ors described above. I know that your department has in the past been willing to seek to resolve tribal/state issues by agreement. Addressing this matter by agreement is worth keeping in mind.

I also note that in 1953 this office addressed the issue you raise. 1952-54 Att'y Gen. Op. 44. The opinion is brief, unclear, and its legal analysis is, at best, perfunctory. It concludes that state game and fish laws may not be enforced on "Indian Lands" within Indian reservations. It doesn't define "Indian L ands," but I assume the term refers to land owned by a tribe or tribal members. It is also uncertain whether the opinion applies to regulation of tribal members or non-tribal members, or both.

The basis for the conclusion is the state's enabling act. It states that the people of North Dakota "forever disclaim all right and title" to land owned or held by Indians or Indian tribes, and that until the United States extinguishes Indian title, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress." 25 Stat. 676 -677, § 4. Our constitution incorporates this provision of the enabling act. N.D. Const. Art. XIII, § 4.

By: Todd Hall
Re: SB 2041-3/17/05
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(Submitted for record)

North Dakota State Legislature
59th LEGISLATIVE ASSEMBLY
HOUSE NATURAL RESOURCES COMMITTEE
HONORABLE NELSON, CHAIRMAN & COMMITTEE MEMBERS

TESTIMONY OF TODD HALL, DIRECTOR
THREE AFFILIATED TRIBES FISH & WILDLIFE DIVISION
MANDAN, HIDATSA & ARIKARA NATION
ON SENATE BILL 2041

March 17, 2005

Chairman Nelson and Committee Members, as stated on March 4th, my name is Todd Hall and I am the Fish and Wildlife Director for the Mandan, Hidatsa and Arikara Nation. Thank you for allowing me to testify before you today in support of proposed Senate Bill 2041. I am authorized by Tribal Law to speak on behalf of and for the benefit of the Three Affiliated Tribes, Mandan Hidatsa and Arikara Nation (Tribe). I am also a National Board member of the Native American Fish and Wildlife Society, which is comprised of 295 member tribes throughout the United States. I am also the Vice-Chairman of the Great Plains Inter-Tribal Fish and Wildlife Commission which is composed of Tribes from North Dakota, South Dakota, and Nebraska. This Commission includes the five tribes of North Dakota.

Senate Bill 2041 is a product of Senate Concurrent Resolution No. 4022 passed in the 58th Legislative Assembly that directed the Legislative Council to study proposed legislation permitting the North Dakota Game and Fish Department to coordinate with Tribal Game and Fish Programs. The Bill is a product of a joint, Tribal and State effort to remedy the primary conflict between Tribes and the State Game and Fish Department, which is the recognition of Tribally-issued hunting licenses on Tribal lands. The Bill is a good starting point for positive Tribal/State relationships regarding resource management, and its passage as written; the goals of Senate Concurrent Resolution No. 4022 can be attained.

The Three Affiliated Tribes opposes any amendments and/or manipulation to Senate Bill 2041 without our prior concurrence. We adamantly do so when considering that any such amendments and/or manipulation to Senate Bill 2041 may or will cause irreparable harm or threaten the Tribe's political integrity, economic security including commerce, and health or welfare. We especially oppose those amendments that were introduced by Representative Porter, last week in sub-committee. Representative Porter's amendments are unconstitutional and, at best, nothing more than a capricious attempt to create conflict.

I have provided testimony prior to this so I will not, in the interest of time reiterate what I previously presented. However, I will state that the Three Affiliated Tribes as well as the other Tribes in North Dakota are not here to ask for permission to exercise our existing hunting rights. This includes allowing non-Indians to hunt on our lands to manage game populations, create commerce, and promote Indian self-determination. In disagreement, the North Dakota Game and Fish Department has taken the position and acted contrary to Supreme Court Case Law, federal rules and regulations, and has introduced legislation that is in conflict with the Constitution of the United States of America.

North Dakota Game Warden Bill Schaller's offensive and condescending remarks on March 4th towards tribal wardens is very representative of the adversarial attitudes and unprofessionalism that Tribes have had to endure from certain individuals acting on the State's behalf. But, it is very understandable that he may take such a position when the Deputy Director of the North Dakota Game and Fish Department presented testimony comparing *Indian Law* to *Quantum Physics*. Let me state that **for the record** *Indian Law is not Quantum Physics*. It is that type of attitude and lack of comprehension that have motivated the Tribes to become proponents of Senate Bill 2041. The bill will be a legislative fix to provide guidance to the North Dakota Game and Fish Department by which, in its own admission is very confused as avowed in Bill Schaller and Roger Rostvet's March 4th testimony.

The Three Affiliated Tribes sincerely supports Senate Bill 2041 in its present form. However, should it fail or be amended in any way without our prior concurrence, the Tribe will continue to seek relief for the illegal actions and unconstitutional position the North Dakota Game and Fish Department has taken. The Tribe will take action, both civilly and criminally against any person who acts without authority and interferes or disrupts the Tribally lawful hunting of any Indian or non-Indian. This includes the lawful transport to their own residence, any legally taken game from within our territory. The Tribe will no longer tolerate the bully tactics by anyone which are meant to threaten and intimidate decent, law-abiding citizens.

The Three Affiliated Tribes is fully prepared to exhaust all remedies and utilize all resources to rectify this issue where legal precedence weighs heavily on our side. There is even precedence whereas injunctions can be implemented to curb malicious actions by states and its officers acting without authority can be held personally liable for any injury their illegal actions cause. To date, State officials have infringed upon the right of the tribe's right of self-government (failing the infringement test) and their actions have not been and their position is not consistent with federal law (failing the preemption test).

In prospect of litigation, therein lies a fight that as a North Dakota citizen, I do not want. As a North Dakota citizen, I do not like the idea that a panel of judges possibly several States away will be deciding our fate as North Dakotans, on an issue that we should have resolved ourselves. Senate Bill 2041 is a starting point to resolving that issue.

By: Todd Hall
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(Submitted for the record)

I would like to thank Chairman Nelson and committee members for taking the time to educate yourselves on a complex issue and considering Senate Bill 2041. I realize that few people have the patience or resources to withstand a 200 year history lesson to become educated on why Tribes have a unique relationship with the United States and the State of North Dakota regarding hunting and fishing. I pray that some will overcome their personal sentiments and consider the merit of the issue and realize the importance of Senate Bill 2041.

On March 4th, overwhelming support and Do Pass recommendations from various organizations and individuals were presented. On March 11th in Sub-committee opposition to proposed amendments was clearly stated.

A DO PASS on Senate Bill 2041 in its current, clean form is strongly encouraged.

Thank you,

Todd Hall