TRIBAL AND STATE RELATIONS COMMITTEE - BACKGROUND MEMORANDUM

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

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

The North Dakota Tribal Governments' Task Force is composed of six members, including the Executive Director of the Indian Affairs Commission, or the Executive Director's designee; the Chairman of the Standing Rock Sioux Tribe, or the Chairman's designee; the Chairman of the Spirit Lake Tribe, or the Chairman's designee; the Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, or the Chairman's designee; the Chairman of the Turtle Mountain Band of Chippewa Indians, or the Chairman's designee; and the Chairman of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, or the Chairman's designee.

Senate Bill No. 2402 (2007) extended the expiration date of the committee from July 31, 2007, to July 31, 2009. The bill also provided that if the Executive Director of the Indian Affairs Commission or any of the tribal chairmen appoint a designee to serve on the task force, only one individual may serve as that designee during the biennium. A substitute designee may be appointed by the Executive Director of the Indian Affairs Commission or a tribal chairman in the event of the death, incapacity, resignation, or refusal to serve of the initial designee.

House Bill No. 1060 (2009) extended the expiration date of the committee from July 31, 2009, to July 31, 2011. The bill also changed several tribal names of tribes whose chairmen are members of the task force.

Senate Bill No. 2053 (2011) extended the expiration date of the committee from July 31, 2011, to July 31, 2013. The bill replaced the Chairman of the Legislative Management, or the Chairman's designee, as Chairman of the committee, with a chairman designated by the Chairman of the Legislative Management. The bill changed the name of the Native American Tribal Citizens' Task Force to the North Dakota Tribal Governments' Task Force and expanded the scope of the committee from the study of the delivery of services, case management services, and child support enforcement to human services. In addition, the bill required the committee to study whether the members of the task force should be voting members of the committee.

Senate Bill No. 2047 (2013) removed the expiration date of the committee and made it a permanent statutory committee.

FEDERAL INDIAN LAW AND POLICY

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

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

With the enactment of the federal General Allotment Act of 1887, or Dawes Act, United States-Indian relations entered a new era. This era is known as the allotment era because the General Allotment Act authorized the President to allot portions of reservation land to individual Indians. Under this system, allotments of 160 acres were made to each head of a family and 80 acres to others, with double those amounts to be allotted if the land was suitable only for grazing. Title to the allotted land was to remain in the United States in trust for 25 years, after which it was to be conveyed to the Indian allotted free of all encumbrances. The General Allotment Act also authorized the Secretary of the Interior to negotiate with tribes for the disposition of all excess lands remaining after allotment for the purpose of non-Indian settlement. The General Allotment Act resulted in a decline in the total amount of Indian-held land from 138 million acres in 1887 to 48 million acres in 1934.

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

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

STATE-TRIBAL RELATIONS

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

STATE-TRIBAL COOPERATIVE AGREEMENTS

Statutory Background

In 1983 the Legislative Assembly enacted the legislation now codified in Chapter 54-40.2. The provisions of this chapter are discussed in more detail below. Before enactment of the law, tribes and state agencies entered agreements for various purposes. The 1983 bill was introduced by the Attorney General to create a general framework for uniformity and to provide statutory authorization for public agencies of the state and political

subdivisions to enter agreements with tribal governments. The authorization was stated in very general terms and provides that public agencies may enter an agreement with a tribal government to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments are authorized to perform by law.

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

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

In 1999 Chapter 54-40.2 was amended to provide that the chapter does not apply to certain agreements with the Department of Human Services or to agreements entered with tribal governments under a state-funded or federally funded program, including any publicly announced offer of a grant, loan, request for proposal, bid, or other contract originating with a public agency for which the tribal government is eligible. Attached as an appendix is a brief description, prepared by the Department of Human Services, of the agreements between the Department of Human Services and the tribes of the state.

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

In 2007 legislation was enacted to create Chapter 57-51.2, providing authority for the Governor to enter an agreement with the Three Affiliated Tribes of the Fort Berthold Reservation relating to taxation and regulation of oil and gas exploration and production within the Fort Berthold Reservation. Section 57-51.2-05 provides that Chapter 54-40.2 does not apply to any such agreement. In 2013 Chapter 57-51.2 was extensively revised to provide more beneficial terms for the Three Affiliated Tribes under an oil and gas tax agreement. A new agreement has been entered to implement the 2013 legislative changes. In 2015 the scope of Chapter 57-51.2 was expanded to allow the Governor to enter agreements with the Standing Rock Sioux Tribe and the Turtle Mountain Band of Chippewa Indians for an oil and gas tax agreement.

In 2015 legislation was enacted to create Sections 57-39.8-01 and 57-39.8-02 authorizing the Governor to enter a state-tribal sales, use, and gross receipts tax agreement with the Standing Rock Sioux Tribe. Section 57-39.8-02 outlines the parameters for an agreement including provisions relating to the rate of tax imposed, conforming tribal taxes to the state sales tax base, allocation of revenues, authority for the Tax Commissioner to administer and collect the tax and allowances for the provision of these services, authority for the Tax Commissioner to offset future distributions to the tribe in the case of an overpayment, and the proper venue for resolving any disputes arising from an agreement.

Chapter 54-40.2

Chapter 54-40.2 provides for agreements between public agencies and tribal governments. As used in this chapter, public agency means any political subdivision, including a municipality, county, school district, and any agency or department of North Dakota. Tribal government means the officially recognized government of an Indian tribe, nation, or other organized group or community located in North Dakota exercising self-government powers and recognized as eligible for services provided by the United States. The term does not include an entity owned, organized, or chartered by a tribe that exists as a separate entity authorized by a tribe to enter agreements of any kind without further approval by the government of the tribe.

Section 54-40.2-02 provides any one or more public agencies may enter an agreement with any one or more tribal governments to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments are authorized to perform by law and to resolve any dispute in accordance with Chapter 54-40.2 or any other law that authorizes a public agency to enter an agreement. The agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement. Section 54-40.2-03.1 provides after the parties to an agreement have agreed to its contents, the public agency 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 also must be published in any newspaper of general circulation for the benefit of any members of the tribe affected by the agreement. The notice also must be posted plainly at the tribal office of any tribe affected by the agreement and in the county courthouse of any

county affected by the agreement. The notice must state the public agency will hold a public hearing concerning the agreement upon the request of any resident of the county in which the notice is published if the request is made within 30 days of the publication of the notice.

Section 54-40.2-03.2 provides if the public agency involved receives a request pursuant to Section 54-40.2-03.1, the public agency is required to hold a public hearing, before submitting the agreement to the Governor, at which any person interested in the agreement may be heard. Notice of the time, place, and purpose of the hearing must be published before the hearing in the official newspaper of each county of the state reasonably expected to be affected by the agreement. The notice also must be published in a newspaper of general circulation published for the benefit of the members of any tribe affected by the agreement. The notice also must be posted plainly at the tribal office of any tribe affected by the agreement and in the county courthouse of any county affected by the agreement. The notice must describe the nature, scope, and purpose of the agreement and must state the times and places at which the agreement will be available to the public for inspection and copying.

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

Section 54-40.2-05 provides within 10 days after a declaration of approval by the Governor and following approval of the agreement by the tribe or tribes affected by the agreement and before commencement of its performance, the agreement must be filed with the Secretary of the Interior, the clerk of court of each county where the principal office of one of the parties is located, the Secretary of State, and the affected tribal government.

Section 54-40.2-05.1 provides upon the request of a political subdivision or any tribe affected by an approved agreement, the Indian Affairs Commission must make findings concerning the utility and effectiveness of the agreement taking into account the original intent of the parties and may make findings as to whether the parties are in substantial compliance with all provisions of the agreement. In making its findings, the commission must 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 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 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 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 Chapter 54-40.2 may not be construed to authorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments located in North Dakota; authorize a public agency or tribal government, either separately or pursuant to agreement, to expand or diminish the jurisdiction presently exercised by the government of the United States to make criminal laws for or enforce criminal laws in Indian country; authorize a public agency or tribal government to enter an agreement except as authorized by its own organizational documents or enabling laws; nor 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 Chapter 54-40.2 does not affect the validity of any agreement entered between a tribe and a public agency before August 1, 1999.

Current Tribal-State Cooperative Agreements

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

The state also has entered motor fuel and special fuel tax agreements with several tribes in the state. The agreement with the:

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

On July 1, 2008, an oil and gas production and oil extraction tax agreement between the state and the Three Affiliated Tribes of the Fort Berthold Reservation became effective. Following the enactment of 2013 House Bill No. 1198, revisions to the tax agreement were negotiated to bring the agreement into compliance with the new law. The new tax agreement became effective July 1, 2013. Under the agreement the division of revenue was changed to reflect a 50-50 revenue allocation between the state and tribe for both gross production and extraction taxes on nontrust lands within the reservation. The agreement was also amended to acknowledge the $100,000 per well spud fee that the tribe had been imposing under the previous agreement.

2015 LEGISLATION

House Bill No. 1068 requires the Industrial Commission to give due consideration to the effect of rules, orders, and policies on locations under federal or tribal jurisdiction and provide sufficient information to indicate the effect of including these locations. The bill requires the Industrial Commission to allow access by the tribal government to the geographic information system database for pipelines located within the exterior boundary of the Fort Berthold Reservation.

House Bill No. 1129 expands the allowable uses of grant funds awarded to tribally controlled community colleges. The bill provides that funds may now be used for the enhancement of existing programs that assist students in obtaining certificates or degrees in workforce areas high in demand.

House Bill No. 1406 authorizes the Governor to enter into a state-tribal sales, use, and gross receipts tax agreement with the Standing Rock Sioux Tribe. The bill outlines the parameters for an agreement including provisions relating to the rate of tax imposed, conforming tribal taxes to the state sales tax base, allocation of revenues, authority for the Tax Commissioner to administer and collect the tax and allowances for the provision of these services, authority for the Tax Commissioner to offset future distributions to the tribe in the case of an overpayment, and the proper venue for resolving any disputes arising from an agreement. The bill also requires the Standing Rock Sioux Tribe to report annually to the Budget Section of the Legislative Management identifying projects totaling investment in essential infrastructure of at least 10 percent of tribal receipts arising from the agreement. Under the bill, use tax provisions are not applicable to these agreements, nor are taxes imposed under county or city home rule authority.

House Bill No. 1476 provides for a restructuring of oil extraction tax rates and exemptions. The bill provides current law regarding tax rates and the application of triggered incentives will remain in effect through December 31, 2015, subject to two exceptions:

1. Beginning December 1, 2015, if triggered rate exemptions are in effect, a 24-month exemption from the oil extraction tax will no longer be available for wells drilled and completed a horizontal well; and
2. Oil produced from new wells, drilled and completed after April 21, 1987, will no longer be eligible for a reduced tax rate of 4 percent but will instead be taxed at the full rate of 6.5 percent. The remaining term of all other rate reductions or exemptions eliminated by the bill may not be carried forward past December 31, 2015.

Beginning on January 1, 2016, the rate of extraction tax on all oil will be reduced from 6.5 percent to 5 percent. This rate is subject to change depending on the average price of a barrel of crude oil. If the average price of a barrel of crude oil exceeds the trigger price of $90 for three consecutive months, the rate will increase to 6 percent on all oil extracted. The rate will remain at 6 percent until the average price of a barrel of crude oil falls below the trigger price of $90 for three consecutive months, at which time the rate will revert back to 5 percent on all oil extracted. The bill eliminates several oil extraction tax exemptions.

Production that will continue to be subject to a reduced oil extraction tax rate after December 31, 2015, includes production from wells drilled and completed outside the Bakken and Three Forks Formations and 10 miles or more outside an established field that includes either formation. The first 75,000 barrels of oil produced during the first 18 months after completion are subject to a reduced tax rate of 2 percent on the gross value at the well of oil extracted. Exemptions and rate reductions the bill eliminates after December 31, 2015, include exemptions and rate reductions that are dependent on the average monthly comparison price of a barrel of oil dropping below the trigger price in current law for five consecutive months.

In addition, a 60-month exemption on the initial production from wells drilled and completed before July 1, 2013, on nontrust lands within the boundaries of an Indian reservation or on lands held in trust by the United States for an individual Indian or tribe, and wells drilled and completed before July 1, 2013, on lands held by an Indian tribe if the interest was in existence on August 1, 1997, will no longer be in effect after December 31, 2015.

Senate Bill No. 2015 further amends House Bill No. 1476 to remove any references to whether carbon dioxide is used in a tertiary recovery project for purposes of determining the duration for which the oil extraction tax exemption will apply to incremental production. The bill also provides that incremental production from a horizontal well drilled and completed within the Bakken and Three Forks Formations is not exempt from oil extraction tax from July 1, 2015, through June 30, 2017, but is thereafter exempt for a period of five years from July 1, 2017, or the date incremental production begins, whichever is later.

Senate Bill No. 2064 requires an affidavit prepared by the administrative county, or an agency or tribal council of an Indian reservation, to be submitted along with the petition to request continuing foster care services for a child between the ages of 18 and 21. The bill also requires that a continued foster care agreement for a child between the ages of 18 and 21 be willfully entered into between the child, the foster care provider, and the Department of Human Services or the tribal council of an Indian reservation. The bill also creates a definition for a "sibling of the child entering foster care" and requires legal custodians to notify parents and grandparents of a sibling of a child entering foster care within 30 days after the removal of the child from the custody of the parents for the purpose of placement into foster care.

Senate Bill No. 2219 allows the Attorney General to establish a statewide human trafficking commission composed of designees from state, local, and tribal agencies, as well as individuals from nongovernmental or other organizations and individuals possessing expertise that would benefit the commission. The bill tasks the commission with various duties including developing a plan to provide victim services, collecting and evaluating human trafficking data and providing an annual report, promoting public awareness on topics related to human trafficking, developing a public awareness sign containing the national human trafficking resource center hotline, coordinating training for employees who may have contact with victims or perpetrators of human trafficking, and coordinating training on human trafficking investigation and prosecution.

Senate Bill No. 2226 requires legislative confirmation of agreements approved by the Governor and the governing bodies of the tribes involved if the agreement is a tax collection agreement. The bill requires agreements between the Tax Commissioner and one or more tribes also receive confirmation by a majority of the members of the House of Representatives and the Senate. The bill provides the agreement does not become effective until its legislative confirmation date, or its effective date, whichever is later, and must expire not more than 16 years after its effective date. The bill provides that the agreement must be filed with the specified parties after approval by the Governor, the tribe or tribes affected by the agreement, and if required, legislative confirmation.

ADDITIONAL COMMITTEE RESPONSIBILITIES

Report

Section 57-51.2-04 requires the Governor to file a report with the Legislative Management describing the negotiations and terms of any agreement between the Governor and the Three Affiliated Tribes of the Fort Berthold Reservation relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation and thereafter biennial reports describing the agreement's implementation and any difficulties in its implementation. The Legislative Management has assigned this responsibility to the Tribal and State Relations Committee.

Tribal Youth Study

Pursuant to 2015 House Concurrent Resolution No. 3006, the Legislative Management is directed to study the feasibility and desirability of state, federal, and tribal collaboration in providing services for tribal youth in the state who are adjudicated in tribal courts. The Legislative Management has assigned this study to the Tribal and State Relations Committee. Additional information regarding this assigned study is included in another memorandum.

ATTACH:1