

TRIBAL GAME AND FISH COORDINATION STUDY - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4022 (attached as Appendix A) directs the Legislative Council to study proposed legislation permitting the Game and Fish Department to coordinate with game and fish programs conducted by the tribal governments of the federally recognized Indian tribes in North Dakota. The resolution notes 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. The resolution notes it would be mutually beneficial for the state and the tribal governments to work cooperatively to effectively manage the wild game and fish that exist within North Dakota.

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, 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.

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 where 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 (attached as Appendix B). 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 the 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 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. However, when hunting or fishing on deeded land, tribal members need to obtain permission of the landowner if the land is posted to no hunting or fishing. In addition, 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.

Concerning enforcement of game and fish laws, the position paper provides when a law enforcement officer discovers or responds 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. 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 the 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 the tribe.

STATE-TRIBAL COOPERATIVE AGREEMENTS

North Dakota Century Code Chapter 54-40.2 provides for agreements between public agencies and Indian tribes. As used in this chapter, public agency means any political subdivision, including 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. 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 that any one or more public agencies may enter an agreement with any one or more tribal governments to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments is authorized to perform by law and to resolve any dispute in accordance with Chapter 54-40.2 or any other law that authorizes a public agency to enter an agreement.

This section provides that the agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.

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 the 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 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 that upon the request of a political subdivision or any tribe affected by an approved agreement, the Indian Affairs Commission is

required to make findings concerning the utility and effectiveness of the agreement taking into account the original intent of the parties and may make findings as to whether the parties are in substantial compliance with all provisions of the agreement. In making its findings, the commission is required to provide an opportunity, after public notice, for the public to submit written comments concerning the execution of the agreement. The commission is required to prepare a written report of its findings made pursuant to Section 54-40.2-05.1 and to submit copies of the report to the affected political subdivision or public agency, the Governor, and the affected tribes. The findings of the commission made under Section 54-40.2-05.1 are for informational purposes only. In an administrative hearing or legal proceeding in which the performance of a party to the agreement is at issue, the findings may not be introduced as evidence, or relied upon, or cited as controlling by any party, court, or reviewing agency, nor may any presumption be drawn from the findings for the benefit of any party.

Section 54-40.2-06 provides that an agreement made pursuant to Chapter 54-40.2 must include provisions for revocation. Section 54-40.2-08 enumerates specific limitations on agreements between public agencies and Indian tribes. This section provides that Chapter 54-40.2 may not be construed to authorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments located in North Dakota; authorize a public agency or tribal government, either separately or pursuant to agreement, to expand or diminish the jurisdiction presently exercised by the government of the United States to make criminal laws for or enforce criminal laws in Indian country; authorize a public agency or tribal government to enter into an agreement except as authorized by its own organizational documents or enabling laws; or authorize an agreement that provides for the alienation, financial encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or subject to a restriction against alienation imposed by the United States. Finally, Section 54-40.2-09 provides that Chapter 54-40.2 does not affect the validity of any agreement entered into between a tribe and a public agency before August 1, 1999. (A number of state-tribal game and fish cooperative agreements are contained in a separate packet.)

POSSIBLE STUDY APPROACH

In conducting its study of proposed legislation permitting the Game and Fish Department to coordinate with game and fish programs conducted by the tribal governments of the federally recognized Indian tribes in North Dakota, the committee could solicit

testimony from a number of sources. These include the Game and Fish Department and representatives of the federally recognized Indian tribes in North Dakota.

ATTACH:2