

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2132

2005 SENATE FINANCE AND TAXATION

SB2132

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2132

Senate Finance and Taxation Committee

☐ Conference Committee

Hearing Date January 10, 2005

Tape Number	Side A	Side B	Meter #
#1	X		0.8 - 17.4
Committee Clerk Signature <i>Sharon Kenyon</i>			

Minutes: All committee members present.

SEN. URLACHER: Called the meeting to order and opened the hearing on SB 2132.

DONNITA WALD, Legal Council for the State Tax Commissioner, on behalf of the Commissioner appeared in favor of the bill with written testimony stating its provides that These types of refund claims must be made within 120 days from the filing of the return or payment of the tax for those taxes filed or paid after 12-31-04 and secondly it provides a short window of time for the tax payers to make these refund claims if the tax was filed or paid before 1-1-05.

SEN. BERCIER: had concerns with how this would impact the tribes with their ongoing negotiations in court at the present time and if this passed and the court sides in favor of the Tribes, will they refund them for a couple of years back for the gas taxes.

DONNITA WALD: These will affect people not involved in the lawsuit.

SEN. BERCIER: Why would it go back to 2004 as opposed to 2005? If the Tribes weren't in litigation, would this affect them in refunding of gas tax?

DONNITA WALD: If those individuals who felt that the motor vehicle tax is unconstitutional would have until July 1, 2005 to file a claim. If you think something was unconstitutional prior to the passage of this act, for something you did prior to January 1, 2005, you have until July 1st to file a claim. Yes, this does include Tribal Entities.

SEN. WARDNER: When would they have paid taxes that they would have thought that they were unconstitutional when all it says is that they were getting a break? They were able to deduct it, unless your saying that the ones in the State have a 100% because they could not do a combined return, they would figure that was unconstitutional, am I in the ball park on that. I don't know why they would think they would have unconstitutionally paid some taxes.

DONNITA WALD: It regards the domestic dividend exclusion. Any dividends that you would received from that corporation, you'd get 100% deduction. If you invested in a company that did partial business in North Dakota, you would only a 50% deduction and what that Court said was that those people should have gotten 100% deduction or the other people should have gotten 0% deduction, one of the two.

SEN. WARDNER: What about 1999, paid on tax dividends from investments outside of the State, how would this bill affect that situation.

DONNITA WALD: They would have until July 1st.

SEN. WARDNER: So this just affects the dividend deduction, it doesn't affect any other taxes does it or could it? So this could be applied to other situations?

DONNITA WALD: Yes

SEN. COOK: Title 57, this does not apply to locally assessed property taxes?

DONNITA WALD: Yes, it does apply

SEN. COOK: So then the comment that you make, it does not apply to locally assessed property taxes is based on the fact there is no constitutional challenges of that right now or if there was one, it could apply?

DONNITA WALD: No, those are taxes that are really administered at the local level.

SEN. BERCIER: question if in general there is only one real case of unconstitutional taxes and why it arose.

DONNITA WALD: this is really a preventative bill in case something is determined to be unconstitutional. We haven't had this issue arise until the DDI case in 2003. So this was really put in just to kind of protect the states revenue base. It was because of the case that the issue arose, the issue was always there.

NO FURTHER TESTIMONY. Hearing was closed.

DISCUSSION:

SEN. WARDNER: It all came to a head when somebody brought it before the Supreme Court, so somebody was irritated by it and it was an issue but it probably wasn't enough money involved, so somebody finally brought it to the Supreme Court and the Supreme Court says its unconstitutional. So now the Tax Dept. Has to come up with some kind of procedure in case it happens again.

SEN. EVERY: felt that 120 days is more than fair.

SEN. TOLLEFSON: feels there is some kind of vagueness of the unconstitutionality of certain taxes and wondering if there is a broader sense. His understanding is that it is only taxes that is collected by the Tax Commissioner of the State of ND.

JOHN WALSTAD: of Legislative Council appeared to give some clarification before the committee, stating on the property tax side, if you pay your property taxes and you don't pay under protest, your taxes are locked down. When you find out later that there is a problem you can't go back and say now give me my money back. There is a lock out if you don't pay under protest. So if you don't raise a problem, then we will consider that you waived that problem if a Court some time in the future decides there was a problem, everyone can't beat to the tax commissioners door and say "give my money back".

SEN. COOK: concerns with making sure that this bill does not remove his right to get those tax dollars back. It just narrows my right to file for that down to 120 day period.

END OF DISCUSSION.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2132

Senate Finance and Taxation Committee

☐ Conference Committee

Hearing Date January 24, 2005

Tape Number	Side A	Side B	Meter #
# 1		X	43.2 - 61.4
# 2	X		0.0 - 1.3
Committee Clerk Signature <i>Sharon Penzance</i>			

Minutes: All committee members present.

SEN. URLACHER: called the committee to order and noted the fiscal note and asked the Tax Dept. To come forward to explain.

DONNITA WALD of the Tax Dept. Appeared to give explanation stating this is just a preventative measure to stop any huge refund claims coming into the state for people who slept on it. It came to our attention after the Mann case. Gave clarification on the Mann case.

There are 2 things that you may want to consider, we just stuck 120 days in that bill to make that claim for a starting point, that can be lengthened and also for those prepaid taxes, taxes that were paid before 1-1-2005, that time can be extended also.

SEN. COOK & SEN. WARDNER: had question on prepaid taxes have until 7-1-05 (6 months) and 120 days is only 4 months and if some rationale.

DONNITA: No rationale, I can't name one tax payer that would be affected by that time frame.

SEN. BERCIER: wondering why if no one is going to be affected and if the Supreme Court rules in favor of someone then state law prevails?

DONNITA: If the Supreme Court rules unconstitutional, we can put limitations on how to remedy those claims. All it says that if 20 yrs down the line, if the Supreme Court says one of our taxes is unconstitutional or tax credit is unconstitutional, a tax payer can't come back and get a refund of a tax 20 yrs later, plus the interest which is at 12%. It's a lot of money.

SEN. BERCIER: If it was found unconstitutional and taken, how you can not be responsible for that refund?

DONNITA: I think part of this says that the logic behind this is that you don't want people sleeping on their rights. If you think something has been unconstitutional and taken from you, you should do something about it and sooner rather than later. You've got to protect the state's money somehow.

SEN. COOK: had concerns on class action lawsuit and further discussion on 120 days.

SEN. WARDNER: asked if making it 180 days instead of 120 would be a problem.

DONNITA: no, we wouldn't object.

SEN. COOK: made a motion to amend the bill from 120 to 180 days, seconded by Sen. Wardner. And asked Donnita to draw up the amendment.

VOICE VOTE: 5 - 1 - 0 Sen. Bercier voted no.

SEN. WARDNER: motioned for a **DO PASS AS AMENDED**, seconded by Sen. Cook.

5 - 1 - 0 Sen. Bercier voted no. Sen. Wardner will carry the bill.

FISCAL NOTE
Requested by Legislative Council
12/23/2004

Bill/Resolution No.: SB 2132

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						
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.*

It is not possible to determine the fiscal impact, if any, due to enactment of SB 2132. This is preventative legislation.

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

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

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

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, 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:	Kathryn L. Strombeck	Agency:	Office of Tax Commissioner
Phone Number:	328-3402	Date Prepared:	01/07/2005

Date: 1-10-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. *SB 2132*

Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken	To Amend from 120 to 180 Days
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Motion Made By Cook Seconded By Wardner

[illegible]

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Date: 1-24-05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. *SB 2132*

Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP as Amended

Motion Made By Wardner Seconded By Cook

Senators	Yes	No	Senators	Yes	No
Sen. Urlacher	✓		Sen. Bercier		✓
Sen. Wardner	✓		Sen. Every	✓	
Sen. Cook	✓				
Sen. Tollefson	✓				

Total (Yes) 5 No 1

Absent 0

Floor Assignment Wardner

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

REPORT OF STANDING COMMITTEE (410)
January 25, 2005 2:09 p.m.

Module No: SR-16-1007
Carrier: Wardner
Insert LC: 58190.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2132: Finance and Taxation Committee (Sen. Urlacher, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2132 was placed on the Sixth order on the calendar.

Page 1, line 10, replace "twenty" with "eighty"

Renumber accordingly

2005 HOUSE FINANCE AND TAXATION

SB 2132

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **SB 2132**

House Finance and Taxation Committee

☐ Conference Committee

Hearing Date **February 23, 2005**

Tape Number	Side A	Side B	Meter #
1	X		16.4
Committee Clerk Signature <i>Janice Stein</i>			

Minutes:

REP. WES BELTER, CHAIRMAN Called the committee hearing to order.

RICK CLAYBURGH, STATE TAX COMMISSIONER Testified in support for Donnita Wald, who was scheduled to testify, but was unable to come to the committee hearing. See attached written testimony.

Mr. Clayburgh related to the lawsuit of Mann vs. Tax Commissioner

VANCE GILLETTE, ATTORNEY FROM MINOT Testified in support of the bill

Presented a handout to committee members, also proposed an amendment, asking for a procedure to get refunds. There is already a law in place for exempt customers. The law says tribal members are exempt, we are requesting a bill that sets up the administrative process. We are asking for a administrative process for setting up a fair process to get refunds. A lot of people don't have their receipts. There are 18,000 Indians in the state, roughly, there are 5,000 that live

on the reservation. We are talking about five million gallons of fuel, we estimate, we are talking about two million bucks, paid out by tribal members.

RICHARD MAYER, CEO FOR MANDAN, HIDATSA & ARIKARA NATION Testified in support of the bill. See attached written testimony.

REP. CONRAD to Vance Gillette Have you talked with the Tax Commissioner about this?

VANCE GILLETTE No we just found out about this.

RICK CLAYBURGH Answered the question, to make it clear for Chairman Hall, Senate Bill 2132, has no impact on the Mann vs. the State of North Dakota, that challenge is on the application of the statute, not on the statute itself. When we received the rule by the Court, it was somewhat murky, because of the record of the trail court, the Court really didn't do much, it basically said, we are dismissing both actions, sent it back. We are meeting with leadership and the governor and have proposed amendments to discuss with that group. We have not had a chance for everybody to visit. The United States Supreme Court, on the Kansas case, is deciding by the end of March. What we are doing on the state level is being proactive and saying, let's address this, we have the ability to fix the loss, and we don't have a problem, if the Supreme Court changes something that is different, but we are addressing this at the state level. I don't want the Mann Case, to conflict with the positive thing we are trying to do.

REP. CONRAD Is this bill the vehicle you will use, or is something new going to come in?

RICK CLAYBURGH Until we have had a chance to brief everyone, we have not had a chance to brief the governor yet, and one thing to keep in mind, the governor and the majority leaders are very interested in continuing to pursue the motor fuel agreements with the tribe. If more tribes adopt and agree to revenue shares for the benefit of their tribe, it will not impact us. We just as

soon not have you act immediately on the bill, to allow time to meet with leadership of both parties and also with the governor.

AUSTIN GILLETTE, TRIBAL BUSINESS COUNCIL OF FT. BERTHOLD. Testified in support of the bill. He stated in the time he has acted as lobbyist for the tribe, he has put on 40,000 miles, that would be 20,000 times 24, 480,000 times twenty one cents is a whole lot of money. I am in favor of taxes because they maintain our roads. But, if you illegally, take a tax from me, which the court has proven to be illegal, each one of you would be up in arms. You would be visiting the legislature to make a change. That is all we want. We believe in the legal system. This has been proven to be illegal to collect taxes. We do have a proposed agreement with the motor fuels tax for about five years.

STEVE KELLY, ATTORNEY FOR 3 AFFILIATED TRIBES Testified in a neutral position. Addressed some of the things that were raised regarding the tax agreements. The three affiliated tribes responded to the case and the decision which was last year on the legality of the gas tax as applied to tribal members on reservations. The tribe passed a resolution saying they would adopt North Dakota and impose North Dakota gas tax, and the tribe would collect that. Then we tried to enter into a tax collection agreement with the state and then the state would collect one percent and turn around and give it back to the tribe. The tribe has been in contact with the Governor's attorney, off and on, this past year, and I cannot get the agreement or get the state to sign anything. It is a problem. The tribes are a little frustrated in the fact that we can't collect this tax ourselves.

JULIANN GILLETTE, TURTLE MOUNTAIN RESERVATION Testified on behalf of her tribe. She stated they just celebrated 100 years of a treaty signing date. In that Treaty, there was

an agreement, February 15, 1905, was when we seeded over ten million acres of land, from Fargo to the Williston, Montana border. We sold all that land back then, for ten cents an acre. We call that the Ten Cent Treaty. Within that Treaty, there are several articles, but the most important is Article 7. Article 7 states that because we seeded our land, we were not to be taxed on all that land. A new tax commissioner came in and said all these people are delinquent on their taxes, they sent all these delinquent taxes on the reservations, but that got cleared up. She went on to say how much her relatives pay for gas to go to work. She stated the gas is always twenty to thirty cents higher on the reservation. She stated if they could save on the tax money, they could build better roads.

With no further testimony, the hearing was closed.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2132

House Finance and Taxation Committee

☐ Conference Committee

Hearing Date **March 7, 2005**

Tape Number	Side A	Side B	Meter #
1		x	36
Committee Clerk Signature			

Minutes:

COMMITTEE ACTION

REP. BELTER Related to committee members that he visited with the Tax Commissioner and he indicated to him to pass the bill as it is and not amend the bill. The concern the tribes had, they will deal with in another manner.

REP. BRANDENBURG Made a motion for a **do pass**.

REP. IVERSON Second the motion. **MOTION CARRIED.**

10 YES 3 NO 1 ABSENT

REP. IVERSON Was given the floor assignment.

Date: 3-7-05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2132

House FINANCE & TAXATION

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

Do Pass

Motion Made By

Rep. Brandenburg

Seconded By

Rep. Iverson

Representatives	Yes	No	Representatives	Yes	No
BELTER, WES, CHAIRMAN	✓				
DROVDAL, DAVID, V-CHAIR	✓				
BRANDENBURG, MICHAEL	✓				
CONRAD, KARI	✓				
FROELICH, ROD		✓			
GRANDE, BETTE	✓				
HEADLAND, CRAIG	✓				
IVERSON, RONALD	✓				
KELSH, SCOT		✓			
NICHOLAS, EUGENE	✓				
OWENS, MARK	✓				
SCHMIDT, ARLO		✓			
WEILER, DAVE	A				
WRANGHAM, DWIGHT	✓				

Total (Yes)

10

No

3

Absent

Floor Assignment

Rep. Iverson

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

REPORT OF STANDING COMMITTEE (410)
March 14, 2005 4:36 p.m.

Module No: HR-46-4932
Carrier: Iverson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2132, as engrossed: Finance and Taxation Committee (Rep. Belter, Chairman)
recommends **DO PASS** (10 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING).
Engrossed SB 2132 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

SB 2132

**TESTIMONY OF THE OFFICE OF STATE TAX COMMISSIONER
BEFORE THE
SENATE FINANCE AND TAXATION COMMITTEE**

SENATE BILL 2132

Monday, January 10, 2005

Chairman Urlacher, members of the Senate Finance and Taxation Committee, I am Donnita Wald, Legal Counsel for the Office of State Tax Commissioner. I am here today on behalf of the Commissioner to testify in support of Senate Bill 2132.

The bill was introduced by the Commissioner to address a concern that arose after the North Dakota Supreme Court found that the domestic dividend exclusion favored investment in corporations doing 100% of their business in North Dakota as opposed to investment in out-of-state corporations. The Court held this favoritism was unconstitutional discrimination under the Commerce Clause of the U.S. Constitution.

The impact of a finding that a tax is unconstitutionally discriminatory is twofold: one, it applies to all tax years that the statute was in place and two, all taxpayers burdened by the discriminatory treatment may potentially claim refunds. While the law is somewhat complex regarding what type of remedies a state may use to reverse the effect of an unconstitutional tax scheme, the U.S. Supreme Court has approved one thing that the States can (and have done) to protect their revenue base, and that is provide a shorter statute of limitations period for refund claims based on a claim that the tax is unconstitutional. Many other states, South Dakota being one, have already enacted a law similar to SB 2132.

Senate Bill 2132 does two things. First, it provides that these types of refund claims must be made within 120 days from the filing of the return or payment of the tax for those taxes filed or paid after December 31, 2004. Second, it provides a short window of time for taxpayers to make these refund claims if the tax was filed or paid before January 1, 2005. The time periods in this bill (lines 10-11 and line 14) were not made for any reason other than to raise the issue for discussion, and can be adjusted if the Committee so desires. I also want to point out that this bill does not apply to locally assessed property taxes.

We are unaware at this time of any potential claims that could be made due to a claim of unconstitutionality. This bill is being proposed solely as a preventative measure.

The Commissioner asks that you give this bill favorable consideration and recommends a "do-pass". If there are any questions, Mr. Chairman, I will be happy to respond to them at this time.

**TESTIMONY OF THE OFFICE OF STATE TAX COMMISSIONER
BEFORE THE
HOUSE FINANCE AND TAXATION COMMITTEE**

ENGROSSED SENATE BILL 2132

Wednesday, February 23, 2005

Chairman Belter, members of the House Finance and Taxation Committee, I am Donnita Wald, Legal Counsel for the Office of State Tax Commissioner. I am here today on behalf of the Commissioner to testify in support of Engrossed Senate Bill 2132.

BACKGROUND

The bill was introduced by the Commissioner to address a concern that arose after the North Dakota Supreme Court found that the domestic dividend exclusion favored investment in corporations doing 100% of their business in North Dakota as opposed to investment in out-of-state corporations. This statute had been in the tax code since 1919 and its sole purpose was to prevent double taxation. Nevertheless, the Court held this favoritism was unconstitutional discrimination under the Commerce Clause of the U.S. Constitution under standards set forth by the United States Supreme Court. In effect, the court found that corporations investing in out-of-state companies paid more in state income tax than did corporations investing in 100% North Dakota corporations. The 2003 legislature remedied the situation for the dividend received deduction, but the decision raised concerns in the Department that, due to the ever changing limitations placed by the U.S. Supreme Court on a state's ability to tax, other statutes may be found unconstitutional, notwithstanding the sound tax policy reasons for enacting them.

REASON FOR THE BILL

The impact of a finding that a tax is unconstitutionally discriminatory is twofold. First, the finding of unconstitutionality applies retroactively to all tax years that the statute was in place. Second, all taxpayers burdened by the discriminatory treatment may potentially claim refunds of the overpaid tax plus statutory interest (which is 12% per year in North Dakota). While the law is somewhat complex regarding what type of remedies a state

may use to reverse the effect of an unconstitutional tax scheme, the U.S. Supreme Court has approved one thing that the States can do (and have done) to protect their revenue base, and that is provide a shorter statute of limitations period for refund claims based on a claim that the tax is unconstitutional. Many other states have enacted shortened time periods for tax refunds similar to SB 2132.

EXPLANATION OF THE BILL

Senate Bill 2132 does two things. First, it provides that a refund claim for a refund of an unconstitutional tax enacted after December 31, 2004, must be made within 180 days from the filing of the return or payment of the tax. Second, it provides a short window of time for taxpayers to make a refund claim if the tax was filed or paid before January 1, 2005. The time period on lines 10-11 was changed from 120 days to 180 days by the Senate Finance and Taxation Committee and was the only change to the bill as introduced by the Department, although the Committee did discuss changing July 1 to December 31, 2005. There are no specific legal reasons for these time periods, and both can be adjusted if the Committee so desires.

I also want to point out that this bill does not apply to locally assessed property taxes as these taxes have their own protest and refunding procedures. SB 2132 also does not apply to the refund issues raised in the recently decided North Dakota case of *Mann v. Tax Commissioner*, 2005 ND 36 (Feb. 16, 2005).

We are unaware at this time of any potential claims that could be made due to a claim of unconstitutionality. This bill is being proposed solely as a preventative measure.

The Commissioner asks that you give this bill favorable consideration and recommends a "do-pass". If there are any questions, Mr. Chairman, I will be happy to respond to them at this time.

phone 701 858 0667

VANCE GILLETTE
PO Box 1577
Minot, ND 58702

fax 858 0667

February 22, 2004

To: Individual tribal members, ND Indian Tribes: Three Aff. Tribes, T. Mts., Spirit Lake
State legislators

From: Vance Gillette, attorney for members, Mann v. ND Tax Comm.
PO Box 1577 Minot, ND 58702 ph 858 0667 *P. Gillette*

Re: Court ruling - fuel tax refunds & SB 2132

On Feb. 23, 2005 2:15pm the Finance & Tax Comm. will meet on SB 2123 (to shorten time for refunds). We request an amendment to add a refund administrative process. See proposed bill attached.

Background. In Mann v. ND Tax Comm. Feb. 16, 2004 the ND Supreme Court rejected the states' appeal challenging the fuel tax issue. The court ruled the appeal was premature. The district court will now proceed on the class action motion, and request for fuel tax refunds by tribal members and small business owners. The district court will address whether refunds should be awarded. The suit is on behalf of 5,000 Indian persons who pay the 21 cents per gallon fuel tax.

In January 2004 the district court issued a permanent injunction that barred the state tax man from collecting the fuel tax on tribal members, who live on a ND Indian Reservation. The state appealed. The ND S. Ct. noted it was unlikely the state could win citing Okla. Tax Comm. v. Chickasaw Nation (Congress must specifically authorize a tax). Op. pages 9-10. The state says a 1936 Act allowed the fuel tax, though several courts have rejected this argument. The Indian plaintiffs relief on 1851 Treaty of Ft. Laramie 1851, and 1863 Pembina Chippewa Treaty and case law (Treaties preempt state law).

Refund Law. The court urged the ND legislature to address the refund law. Current ND law allows refunds for certain "exempt" groups such as industry. But refunds are not allowed to individual Indians or small businesses. The law requires actual receipts for refunds, or certified history and an affidavit. Ch. 57-43.1-04.

I drafted a proposed law that would set up an admin. process. and use available records, to avoid multiple hearings. Without a new law, then actual receipts will be needed. We request the refund law be proposed in the ND legislature 2005.

Proposed AMENDMENT to SB 2132
- hearing set for FEB 23, 2005 at 2:15 pm.

SECTION __ A new section is added to chapter 57-01 of the North Dakota Century Code is created an enacted as follows:

Refund process for exempt consumer, interest, and hearing. The tax commissioner is required to process refunds on motor fuel taxes for consumers who are declared exempt by a court, or when a tax is ruled illegal, Section 57-43.1-32 NDCC. Notwithstanding any provision relating to refunds, a refund claim can be based on actual receipts, copies, monthly or yearly summary, or other records, and an affidavit, submitted in an administrative process. The refunds will be processed within thirty (30) days, or will be processed later for good cause shown. A refund shall include interest at a rate of fifteen (15) per cent per annum.

If the commissioner denies a refund, the claimant is entitled to a hearing upon written request within thirty (30) days. The hearing will be conducted by an administrative law judge who will issue a final decision. In such a hearing the judge shall consider all relevant evidence including documents, summary of records, mileage logs, business records, and oral testimony in support of a refund claim. The decision of the judge shall be subject to judicial review.

Feb 22, 05 Comments by Vance Gillette:

-Present ND law allows refunds roughly 1 year to apply for a refund. The proposed bill shortens the time to apply for a refund to 180 days (6 months).

-Present ND law applies only to industry etc. or not to individual consumers. 57-43.1-04 NDCC, and requires actual receipts.

The proposed amendment (above) would provide a administrative refund process for exempt consumers. It would avoid the time and expense of separate hearings. Examples: the state exempts some from fuel taxes and allows for refunds. State law exempts sales tax on Canadians through an ID system. In the MANN tax case, the court ruled that the tribal members who reside on a ND Reservation are exempt consumers.

This scenario present the legislators with 2 choices:

1. If no refund law is passed, the MANN injunction against the fuel taxes will be done at the gas pumps. This will cause a headache for the consumers and fuel dealers on the ND Indian Reservations (New Town, Belcourt, Ft. Totten).

2. Or, an admin. process can be set up as noted above. The tax would still be collected at the pumps, and the refunds for Indian consumers processed like other exempt consumers.

(Effective January 1, 2004) Refund of tax for fuel used for agricultural purposes - Reductions. Any consumer who buys or uses any motor vehicle fuel for an agricultural purpose on which the motor vehicle fuel tax has been paid may file a claim with the commissioner for a refund under this chapter. The amount of the tax refund under this section must be reduced by six cents per gallon [3.79 liters] except for those fuels used in aircraft or with respect to refunds claimed by aircraft fuel users. Two cents per gallon [3.79 liters] withheld from the refund must be deposited in the agricultural fuel tax fund and four cents per gallon [3.79 liters] withheld from the refund must be deposited in the agricultural research fund.

57-43.1-04. Form of claim for refund. A refund claim must be on a form furnished by the commissioner and must have a written declaration by the claimant that it is made under the penalties of perjury. The tax commissioner may prescribe alternative methods for signing, subscribing, or verifying a return filed by electronic means, including telecommunications, that

shall have the same validity and consequence as the actual signature and written declaration for a paper return. The refund claim must state that the motor vehicle fuel was used or is to be used by the claimant other than in a licensed motor vehicle, the purpose or type of project for which the motor vehicle fuel was used, and such other information as the commissioner requires. The original invoices or sales tickets proving the purchase of motor vehicle fuel on which the refund is claimed must be attached to the refund claim. The invoices or sales tickets must include the seller's name and address, the date the fuel was purchased, the type of product, the number of gallons [liters] of motor vehicle fuel purchased, the state tax as a separate item or a statement that the state tax is included in the price, and the name of the claimant. If the original invoices or sales tickets are lost, the claimant may substitute duplicate invoices or sales tickets plus a separate affidavit (forms prescribed by the commissioner). A certified history of purchases detailing required information may be accepted by the commissioner in lieu of original sales invoices or sales tickets. A supplier, distributor, or retailer is prohibited from preparing a refund claim for the consumer.

57-43.1-05. Claim for refund - Limitation on filing. A refund claim must be filed, for all motor vehicle fuel purchases during a calendar year, on or after January first and before July first of the next year during which the purchase was made, or the claim for refund is barred unless the commissioner grants an extension of time for cause. However, any claim for refund may be filed in the calendar year of motor vehicle fuel purchase when:

1. The business is being discontinued;
2. No further purchases subject to fuel tax refund will be made in the remainder of the calendar year, or
3. The claim for refund exceeds four hundred dollars.

No claim for refund may be made or approved unless the amount of the claim is in excess of five dollars.

57-43.1-32. Erroneously or illegally collected taxes. If any taxes, penalties, or interest imposed by this chapter have been erroneously or illegally collected from any person, the commissioner may permit that person to take credit against a subsequent tax return for the amount of the erroneous or illegal overpayment. In the alternative, the commissioner shall present a voucher to the office of management and budget for payment of the amount erroneously or illegally collected and a warrant-check must be prepared by that office drawn on the state treasurer payable to that person. The refund must be paid to the person from undistributed funds received from the tax imposed by this chapter and any credit or refund may not be approved or paid unless it is an amount which is in excess of five dollars.

applies to
exempt
sales

JFWMS
144
6 mos.



CLAIM FOR FUEL TAX REFUND BY NATIVE AMERICAN TRIBAL AGENCY
MOTOR VEHICLE FUEL - TAX TYPE 61
OFFICE OF STATE TAX COMMISSIONER
SFN 22989 (4-02)

Name of Tribal Agency:	Federal ID:
Address:	Telephone No.:
City & State:	Zip Code:

A Native American Tribal agency is not subject to the North Dakota motor vehicle fuel taxes. If paid, the taxes are fully refundable.
A claim for refund may be filed at the following times:

- a. Between January 1 and June 30 of the year following the year during which the fuel was purchased.
- b. Any time during the year the fuel was purchased when the refundable taxes reach \$400 or more.

Claimant's Declaration of Eligibility:

The claimant is a Native American Tribal agency.
The North Dakota motor vehicle fuel taxes were billed directly to the Tribal Agency.
The claimant has paid the North Dakota tax to the seller of the fuel.

Verification of Eligibility:

The claimant must provide detailed proof of purchase and proof of tax payments with each claim. The proof may be in the form of individual invoices or a certified listing. The information must include:

The fuel seller's name and address (city and state).
The date the fuel was purchased.
The type of product purchased.
The number of gallon purchased.
Invoice number.

The state tax as a separate item; or
A statement that the state tax is included in the price.
A notation that the tax has been paid.
The name of the Tribal agency by whom the fuel was purchased.

Refund Calculation:

1. Enter total gallons of gasoline/gasohol purchased
2. Refund Payable - \$.21 times Line 1

	0
\$	

I declare, under the penalties of North Dakota Century Code § 12.1-11-02, which provides for a Class A misdemeanor for making a false statement in a governmental matter, that this report, including any accompanying attachments, has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

Signature of authorized official (required)

Date

Official's Telephone Number

Signature of preparer other than authorized official

Date

Mail To: Office Of State Tax Commissioner, State Capitol, 600 E. Boulevard Ave., Bismarck, ND 58505-0599

Do Not Write In This Space

MAN NO

clear congressional authorization"). The district court's ruling that the Hayden-Cartwright Act does not authorize imposition of the state motor vehicle fuels tax on Indian reservations is in accord with every federal and state court decision that has addressed the issue. See Marty Indian Sch. Bd., Inc. v. State of South Dakota, 824 F.2d 684, 688 (8th Cir. 1987) ("we agree with the district court's determination that section 104 does not support the imposition of the state's motor fuel tax on the Marty Indian School"); Winnebago Tribe of Nebraska v. Kline, 297 F. Supp. 2d 1291, 1304 (D. Kan. 2004) (rejecting argument that Hayden-Cartwright Act "expressly cedes tax jurisdiction to the states on fuel delivered to Indian reservations"); Prairie Band Potawatomi Nation v. Richards, 241 F. Supp. 2d 1295, 1304 (D. Kan. 2003) ("the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations"), rev'd on other grounds, 379 F.3d 979 (10th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3307 (U.S. Nov. 5, 2004); Coeur D'Alene Tribe v. Hammond, 224 F. Supp. 2d 1264, 1268 (D. Idaho 2002) (the "Hayden-Cartwright Act is not specific enough to authorize a motor fuels tax on Indian gas stations located in Indian Country"), aff'd, 384 F.3d 674 (9th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3298 (U.S. Nov. 5, 2004); Goodman Oil Co. v. Idaho State Tax Comm'n, 28 P.3d 996, 1002 (Idaho 2001) ("It is not unmistakably clear that Congress intended to eliminate the exemption of the Tribes from the taxes the state attempts to impose"), cert. denied, 534 U.S. 1129 (2002); Pourier v. South Dakota Dep't of Revenue, 658 N.W.2d 395, 399, 404 (S.D. 2003) (holding the "language of the statute does not make Congress' intention to allow such taxation 'unmistakably clear'" and that "a corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity"), cert. denied, 124 S. Ct. 2400 (2004). The risk that the district court committed error in its construction of the Hayden-Cartwright Act is negligible.

[¶23] The plaintiffs have conceded that the injunction prohibits collection of the motor vehicle fuels tax only from enrolled Native Americans on their own respective Indian reservations. Although the feasibility of enforcing the injunction prohibiting collection of the motor vehicle fuels tax from Native Americans on their own reservations is questionable, the plaintiffs have indicated they would be satisfied if a refund procedure similar to the procedure provided in N.D.C.C. ch. 57-43.1 were made available to them. We urge the Legislature to address this problem.

[¶24] We decline to exercise our supervisory jurisdiction in this case.

IV

[¶25] The appeals are dismissed.

[¶26] Carol Ronning Kapsner
Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
Gerald W. VandeWalle, C.J.



MANDAN, HIDATSA, & ARIKARA NATION

Three Affiliated Tribes • Fort Berthold Indian Reservation

HC3 Box 2 • New Town, North Dakota 58763-9402

59th LEGISLATIVE ASSEMBLY HOUSE FINANCE AND TAXATION COMMITTEE

TRIBAL BUSINESS HONORABLE WES BELTER, CHAIRMAN & COMMITTEE MEMBERS

(701) 627-4781

Fax (701) 627-3805

TESTIMONY OF TEX G. HALL MANDAN HIDATSA & ARIKARA NATION ON SENATE BILL 2132

Chairman Belter and Committee Members. My name is Rich Mayer. I am the CEO for the Mandan, Hidatsa & Arikara Nation. I am testifying on behalf of our Chairman, Tex Hall, who could not be here today.

Senate Bill 2132 requires any claim for a tax refund based on the claim that the tax was unconstitutional must be made within one hundred and twenty (120) days of the date the date of return or payment of the tax. As this Bill is currently written, it is my opinion that it would not apply to the cases that have recently held that the State gas tax imposed on tribal members on our Reservation is illegal. Thus, even if this Bill is passed, Tribal members that have a claim for a refund on the gas taxes that have been illegally charged them file a claim for a refund at any time and the 120-day limitation under this Bill would not apply to them. If there is any disagreement with my understanding of this Bill and this Committee or anyone else believes this Bill would apply to refund claims on the illegal gas taxes that have been imposed on Tribal members, then the Three Affiliated Tribes would request a do not pass if the intent of this Committee is to apply to these types of claims.

If nobody disagrees with my interpretation of the Bill, then I would ask that the Committee amend the bill to make it clear that this Bill would not apply to refund claims on illegal gas taxes imposed on Tribal members. I have attached a proposed amendment to my testimony.

Lastly, I believe that the State should consider legislation that will develop a process to refund the gas taxes that the state has collected from our Tribal members. The State has wrongfully collected these taxes for years and it is my hope that the State would return these taxes based on the formulas that the State uses in its tax agreements with Tribes. The Three Affiliated Tribes stands ready to work with the State and the North Dakota legislature to assist in developing a process that would be beneficial to the State and our Tribal members.

I urge this committee to recommend a DO NOT PASS on SB 2132 in its present form.

**TEX HALL'S PROPOSED AMENDMENT
TO
SENATE BILL NO. 2132**

Amend line fifteen (15) to read as follows:

Strike the period at the end of the sentence and add "or claims for reimbursement for gas taxes made by Tribal members."