Prepared by the North Dakota Legislative Council staff for the Tribal and State Relations Committee
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TRIBAL AND STATE RELATIONS COMMITTEE - BACKGROUND MEMORANDUM

House Bill No. 1524 (attached as Appendix A) establishes the Tribal and State Relations Committee. The Tribal and State Relations Committee is composed of the chairman of the Legislative Council or the chairman's designee; three members of the House of Representatives, two of whom must be selected by the leader representing the majority faction of the House of Representatives and one of whom must be selected by the leader representing the minority faction of the House of Representatives; 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. The chairman of the Legislative Council, or the chairman's designee, serves as chairman of the committee.

House Bill No. 1524 directs the Tribal and State Relations Committee to conduct joint meetings with the Native American Tribal Citizens' Task Force to study tribal-state issues, including government-to-government relations, the delivery of services, case management services, child support enforcement, and issues related to the promotion of economic development. House Bill No. 1524 requires that after the joint meetings have concluded, the committee must meet to prepare a report on its findings and recommendations, together with any legislation required to implement those recommendations, to the Legislative Council. The Native American Tribal Citizens' 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 Nation, or the chairman's designee; the chairman of the Three Affiliated Tribes--Mandan, Hidatsa, Arikara Nation, or the chairman's designee; the chairman of the Turtle Mountain Band of Chippewa, or the chairman's designee; and the chairman of the Sisseton-Wahpeton Oyate, or the chairman's designee. House Bill No. 1524 has an expiration date of July 31, 2007.

House Bill No. 1524, as introduced (attached as Appendix B), would have authorized the Department of Human Services to supervise and direct the comprehensive human services administered by county agencies, human service centers, or tribal entities through standard-setting, technical assistance, approval of county and regional plans, preparation of the comprehensive human services plan, evaluation of comprehensive human services programs, and distribution of public money for services. Under House Bill No. 1524, as introduced, the Department of Human Services would have been authorized to delegate to any county agency, human service center, or tribal entity the duties provided for in North Dakota Century Code (NDCC) Section 50-06.2-03. The Department of Human Services would have been required to supervise and direct any duties delegated under this section. House Bill No. 1524, as introduced, also would have created a new section to NDCC Chapter 50-24.1 relating to medical assistance for needy persons. The new section would have authorized the Department of Human Services to delegate to any county agency or tribal entity any case management services that may be provided to medical assistance recipients. The department would have been required to supervise and direct any case management services delegated under this section. Finally, the bill would have authorized the Department of Human Services to delegate to any county agency or tribal entity the duties provided for in NDCC Chapter 50-24.5 relating to aid to aged, blind, and disabled persons.

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 nonintercourse 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 itself. This is the origin of the term reservation.

With the enactment of the 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 allottee in fee 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 assimilation was regarded as a failure and the modern tribal self-determination era began with the 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 that 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 themselves 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 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, is as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they please, 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 Supreme Court held that the Cherokees could not be regarded as a foreign state within the meaning of Article III of the Constitution, so as to bring them within the federal judicial power and permit them to maintain an action in the Supreme Court. However, Chief Justice John Marshall characterized Indian tribes as "domestic dependent nations." In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Supreme Court further discussed the status of Indian tribes. The Court stated that "the 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 then the first discoverer of the coast of the particular region claimed . . . ." The Court concluded that 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 have generally 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

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 courthouse 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 so 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.

2005 LEGISLATION

The 59th Legislative Assembly enacted several bills relating to Indian issues. House Bill No. 1081 requires a school district that is contemplating entering an agreement with an Indian tribe to provide written notice to the Superintendent of Public Instruction that it is contemplating entering an agreement and consider written recommendations

that the Superintendent makes regarding the agreement.

House Bill No. 1190 sets the policy of determining further expansion of basic care facilities in the state. The bill states the two circumstances under which basic beds may be added between August 1, 2005, and July 31, 2007, provides the process for transferring basic care beds, and addresses requirements for basic care beds acquired by Indian tribes.

House Bill No. 1191 sets the policy of expansion of nursing facilities in the state. The bill retains one exception to limiting expansion of nursing facility beds, allowing a facility to revert a basic care bed to a nursing bed; allows transfers of beds from one facility to another; provides a nursing bed that is converted to a basic care bed may be transferred as a basic care bed, but that bed may then be relicensed as a nursing bed; and addresses requirements for nursing beds acquired by Indian tribes.

House Bill No. 1254 provides that acceptable identification for the purpose of voting means identification that allows the individual's residential address and date of birth and may include an official form of identification issued by the state or a tribal government, a form of identification described by the Secretary of State, or a combination of those forms of identification.

House Bill No. 1526 requires the Industrial Commission to establish at the Bank of North Dakota a guaranty program for a business located in the state which contracts with a business located in the state which is either owned by one of the five North Dakota Indian tribes or which is an American Indian-owned small business located in the state. The Industrial Commission is required to limit participation in the guaranty program so that the cumulative value of the guaranteed portion of the receivables under the program does not exceed $5 million at any one time. The bill is effective through June 30, 2007.

Senate Bill No. 2012 increases motor vehicle fuels and special fuels tax rates from 21 cents per gallon to 23 cents per gallon. The bill also allows an American Indian to claim a refund of motor vehicle fuel or special fuel taxes on fuel purchased from a retail fuel dealer located on the Indian reservation where the American Indian is an enrolled member. The refund provision applies to purchases made after December 31, 2004.

Senate Bill No. 2041 provides that an individual hunting on Indian land pursuant to a tribal hunting license is not required to possess a state license to hunt on that land. For purposes of this provision, Indian land includes 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. The bill also allows properly tagged game birds legally taken on Indian land to be possessed, transported, or shipped in state and big game legally taken on Indian land to be transported, shipped, or possessed off that land.

Senate Bill No. 2372 directs the Legislative Council to study the feasibility and desirability of establishing an organization or ombudsman to support and coordinate federal, tribal, state, including institutions of higher education, and local government and private efforts to discourage destructive behavior, including alcohol and drug abuse and tobacco use. This responsibility has been assigned to the Advisory Commission on Intergovernmental Relations.

House Concurrent Resolution No. 3001 directs the Legislative Council to study the legal and enforcement issues relating to child support collections on Indian reservations, including state and tribal court jurisdictions, recognition of income-withholding orders, and logistics involved in transferring child support collected to custodial parents. This study was not prioritized.

House Concurrent Resolution No. 3019 urges the United States Army Corps of Engineers to retain sufficient water in the upper portion of Lake Oahe to ensure a stable water supply for the residents of the Standing Rock Indian Reservation and surrounding communities. The resolution also compliments the Governor and the Attorney General on their efforts and urges them to continue their actions to ensure federal officials retain sufficient water in the upper portion of Lake Oahe to protect the health and well-being of the citizens of the area.

House Concurrent Resolution No. 3031 directs the Legislative Council to study issues relating to tribal-state relations, including methods for encouraging greater tribal-state cooperation; the promotion of economic development on Indian reservations in the state; the identification and study of health care, child welfare services, social services, environmental protection, education, and law enforcement issues on the reservations; the identification and study of the social and fiscal impact of providing social services in counties within and adjacent to the reservations; and the identification and proposals for the resolution of the water issues affecting the state and the tribes. This study was not prioritized.

Senate Concurrent Resolution No. 4024 urges Congress and the Secretary of the United States Department of the Interior to provide funding for United Tribes Technical College.

ATTACH:2