

# TRIBAL AND STATE RELATIONS COMMITTEE

North Dakota Century Code (NDCC) Section 54-35-23 establishes the Tribal and State Relations Committee. The committee is composed of the Legislative Council chairman 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 Legislative Council chairman, or the chairman's designee, serves as chairman of the committee.

North Dakota Century Code Section 54-35-23 directs the 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. 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 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, and Arikara Nation, 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, 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.

In addition to the committee's statutory responsibilities, the Legislative Council assigned to the committee responsibility under NDCC Section 57-51.2-05 to receive a report from the Governor describing the negotiations and terms of any agreement between the Governor and the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation;

and thereafter receive biennial reports describing the agreement's implementation and any difficulties in its implementation.

Committee members were Representatives Merle Boucher (Chairman), Duane L. DeKrey, and Daryl Lies and Senators Stanley W. Lyson, Tim Mathern, and Dave Oehlke. Representative Dawn Marie Charging was a member of the committee until her resignation and replacement by Representative Daryl Lies.

Members of the Native American Tribal Citizens' Task Force were David Brien, Chairman, Turtle Mountain Band of Chippewa Indians; Ron His Horse Is Thunder, Chairman, Standing Rock Sioux Tribe; Cheryl Kulas, Executive Director, Indian Affairs Commission; Myra Pearson, Chairman, Spirit Lake Nation; Michael Salvage, Sr., Chairman, Sisseton-Wahpeton Oyate; and Marcus Wells, Jr., Chairman, Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation. Chairman His Horse Is Thunder appointed Avis Little Eagle, Vice Chairman, Standing Rock Sioux Tribe, as his designee to serve on the task force.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2008. The Council accepted the report for submission to the 61<sup>st</sup> Legislative Assembly.

## 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 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 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 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 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 "[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 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 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

North Dakota Century Code 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.

North Dakota Century Code 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 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 that 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 that 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.

North Dakota Century Code Section 54-40.2-03.2 provides that 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.

North Dakota Century Code 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.

North Dakota Century Code 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 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.

North Dakota Century Code 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 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.

North Dakota Century Code 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; 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 that Chapter 54-40.2 does not affect the validity of any agreement entered between a tribe and a public agency before August 1, 1999.

## **2007 LEGISLATION**

The 60<sup>th</sup> Legislative Assembly enacted several bills relating to Indian issues. House Bill No. 1098 (2007) reduced the number of at-large members of the Indian Affairs Commission appointed by the Governor from four to three and reduced from three to two the at-large members who must be of Indian descent and must be enrolled members of a tribe. The bill also added as a member of the commission the chairman or the chairman's designee of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.

House Bill No. 1092 (2007) made changes to the Uniform Juvenile Court Act. The bill addressed the federal Indian Child Welfare Act requirement that "active efforts" to preserve the Indian family be shown before a court may place an Indian child in foster care or terminate parental rights with respect to an Indian child.

House Bill No. 1137 (2007) repealed provisions in NDCC Chapter 54-34.3 which related to the establishment of an international business and trade office, a North Dakota American Indian Business Development Office, and a North Dakota women's

business development office and reenacted similar provisions in Chapter 54-60, relating to the Department of Commerce.

House Bill No. 1393 (2007) provided an individual income tax exemption for income of a taxpayer from activities or sources within the boundaries of any Indian reservation in this state if the taxpayer resides within the boundaries of any reservation in this state and is an enrolled member of a federally recognized Indian tribe. The bill also provided sales and motor vehicle excise tax exemptions for tribal members.

House Bill No. 1012 (2007) eliminated the requirement of residency within the boundaries of a reservation in this state for a tribal member to qualify for the motor vehicle excise tax exemption as created by House Bill No. 1393. The Governor vetoed the provision of House Bill No. 1012, which would have eliminated the requirement of residency within the boundaries of a reservation in this state for a tribal member to qualify for the motor vehicle excise tax exemption created by House Bill No. 1393.

House Bill No. 1395 (2007) appropriated \$700,000 from the oil and gas trust fund to the State Board of Higher Education for the purpose of providing grant assistance payments to tribally controlled community colleges. The bill also provided that the first \$700,000 of the state's share of tax revenues from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation must be transferred to the permanent oil tax trust fund.

House Bill No. 1503 (2007) extended the effective date of the tribal-state guaranty program from June 30, 2007, to July 31, 2011.

House Bill No. 1504 (2007) provided that a tribal police officer of a federally recognized Indian tribe in this state who meets the requirements of the Peace Officer Standards and Training Board is eligible for a peace officer license or a part-time peace officer license. The bill provided that a tribal officer who is a member of a police force of a tribal government and who is licensed by the board may exercise the powers of a peace officer of this state within the exterior boundaries of the reservation or off the reservation in accordance with the terms and conditions of the special deputy appointment, the employment agreement, or the agreement between the state or political subdivision and the tribe.

House Bill No. 1513 (2007) authorized the State Water Commission to establish an emergency municipal, tribal, and rural water assistance program for municipalities, tribes, and rural water systems, whose primary source of water is the Missouri River, Lake Sakakawea, or Lake Oahe. The purpose of the program is to provide emergency grant funds to municipalities, tribes, and rural water systems facing a critical need or health risk as a result of the inability of the water intake system for the municipal, tribal, or rural water system to supply an adequate quantity of quality water to the people served by the municipal, tribal, or rural water system.

Senate Bill No. 2419 (2007) authorized the Governor to enter agreements with the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation relating to taxation

and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation. The state oil and gas gross production tax must apply to all wells within the Fort Berthold Reservation and the state oil extraction tax for trust lands on the Fort Berthold Reservation may not exceed a 6.5 percent rate but may be reduced through negotiation of the agreement. All revenues and exemptions from all oil and gas gross production and oil extraction taxes attributable to production from trust lands on the Fort Berthold Reservation must be divided evenly between the tribe and the state. For production from nontrust lands on the Fort Berthold Reservation, the tribe must receive 20 percent of total oil and gas gross production tax collections in lieu of application of the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation's fees and taxes related to production on such lands. The state's share of revenue under the agreement is subject to allocation among political subdivisions within the boundaries of the reservation. The bill is ineffective after June 30, 2009, unless by that date the Governor's office notifies the Tax Commissioner and Legislative Council that an agreement has been entered with the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation.

## **ECONOMIC DEVELOPMENT INITIATIVES IN INDIAN COUNTRY**

The committee received reports from the director of the North Dakota American Indian Business Development Office of the Department of Commerce. The director reported that two procurement assistance centers were consolidated in July 2007 and there are now procurement assistance centers in Bismarck, Belcourt, Dickinson, Fargo, Fort Yates, and New Town.

The director reported that the North Dakota American Indian Business Development Office contracts with the small business development centers located on the state's reservations. The committee learned that 184 companies have registered for services since May 2006. Of this total 101 are Native American-owned. This represents 90 percent of the current 8(a)/SDB certified companies in North Dakota and 70 percent of the companies registered at [www.CCR.gov](http://www.CCR.gov) as owned by Native Americans. The North Dakota American Indian Business Development Office has facilitated the awarding of 60 contracts worth \$84.4 million, \$60.1 million of which were obtained by American Indian firms. The committee learned that one issue affecting American Indian-owned firms in North Dakota is the effort by the Department of Defense to consolidate procurement for the Minot and Grand Forks Air Force Bases at Scott Air Force Base near St. Louis, Missouri.

The committee reviewed the implementation of the tribal-state loan guaranty program. Representatives of the Bank of North Dakota reported that the program is designed to authorize the Bank of North Dakota to provide a guaranty for a non-American Indian that is doing business with an American Indian-owned or tribally owned business. If there is a contract or payment dispute between the two parties, the Bank would satisfy the obligation and pursue litigation after the payment is made. Representatives of the Bank reported

that the Bank finalized its policy regarding the program in October 2007 and began marketing the program in December 2007.

## **TAXATION IN INDIAN COUNTRY**

The Tax Commissioner reported on motor vehicle fuels tax and special fuels tax agreements between the state, through the Tax Department, and the state's Indian tribes. At present the state is a party to three fuels tax agreements. Since January 1999 the state and the Standing Rock Sioux Tribe have had a business relationship whereby the state collects and administers the tribe's motor vehicle fuels tax and special fuels tax, in addition to the state's taxes. The Tax Commissioner reported that this relationship served as the model for business relationships that have been entered by the state and other tribal governments.

In October 2006 the state and the Spirit Lake Nation entered a similar motor vehicle fuels tax and special fuels tax collection and administration agreement.

In October 2007 the state began providing collection and administration services to the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation. Under this agreement, the tribal share of revenue collected from motor vehicle fuels tax and special fuels tax amounted to \$348,105.55 through April 2008.

The Tax Commissioner reported that the state hopes to finalize a similar motor vehicle fuels tax and special fuels tax agreement with the Turtle Mountain Band of Chippewa Indians before the end of 2008.

Each agreement provides that the Tax Department will collect and administer the tribal government's motor vehicle fuels taxes and special fuels taxes on fuel purchases made on the tribe's reservation by its enrolled members based upon ordinances enacted by that tribe's governing body. Each agreement also provides that the state will continue to collect and administer the state's motor vehicle fuels taxes and special fuels taxes on fuel purchases made by non-American Indians on each reservation under NDCC Chapters 57-43.1 and 57-43.2. In the absence of a collection and administration agreement, state law provides for a refund of the state fuels taxes paid by an American Indian after December 31, 2004, if the purchase was made on the reservation where that American Indian is enrolled. A refund claim must be filed before July 1 of the year following the year in which the purchase was made. In the case of the tribes that have entered agreements and have enacted ordinances imposing tribal fuels tax on purchases by enrolled members of that tribe in lieu of state taxes, however, none of the ordinances contains a refund provision for those tribal fuels taxes paid. The Tax Commissioner reported that this holds true for motor vehicle fuels and special fuels purchased by the members of the Standing Rock Sioux Tribe and the Spirit Lake Nation because those agreements have been in place for a number of years. As a result, enrolled members of both tribes have been paying tribal tax on motor vehicle fuels and special fuels purchased on their respective reservations, and are ineligible for a refund of state taxes because they did not pay the state taxes when making those fuel purchases.

In contrast, the agreement between the Tax Department and the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation was entered in late 2007. The Tax Commissioner reported that as of October 1, 2007, motor vehicle fuels and special fuels purchased by enrolled members of the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation, made on the Fort Berthold Reservation were subject to the tribe's fuels taxes, and no longer the state's fuels taxes. However, purchases of motor vehicle fuels and special fuels by enrolled members of the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation made on the Fort Berthold Reservation from January 1, 2007, through September 30, 2007, were subject to the state's fuel taxes. Accordingly, enrolled members of the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation who made purchases of motor vehicle fuels and special fuels on the Fort Berthold Reservation during this January to September 2007 window are eligible to receive a refund of the state fuels taxes paid, provided purchasers satisfy the requirements of state law regarding proof of purchase.

The Tax Commissioner reported that the state has engaged in preliminary discussions with representatives of the Turtle Mountain Band of Chippewa Indians pertaining to negotiation of an agreement similar to the three existing agreements. However, no agreement is in place and enrolled members of the Turtle Mountain Band of Chippewa Indians who make fuel purchases on their reservation continue to pay state fuels taxes on those purchases. As such, these purchasers remain eligible for a refund of taxes paid, provided they satisfy the requirements of state law regarding proof of purchase. The state law providing eligibility for a refund under qualifying circumstances, NDCC Section 57-43.1-03.2, provides that the purchases be made from a retail fuel dealer located on the reservation where the American Indian is an enrolled member. Because of this specific, clear, statutory language, purchasers of motor vehicle fuels and special fuels from areas outside the exterior boundaries of a reservation, such as lands held in trust by the United States Secretary of the Interior, are subject to state fuels taxes and not eligible for a refund under this law. The Trenton Indian Service Area is such an area.

The Tax Commissioner reported on individual American Indian motor vehicle fuels tax refunds for the 2007 calendar year issued through June 16, 2008. Of 144 applications by 129 different individuals, 136 applications, or 94 percent, had been paid. One hundred twelve of the 136 claims were paid in full and 24 claims were paid in part. Of the 136 paid claims, 13 claims had been returned to applicants for correction and resubmission. Of the eight unpaid applications, three claims were not able to qualify due to receipts from a reservation other than the reservation of enrollment, receipts from a prior year, or receipts from a reservation with a tribal agreement--i.e., Spirit Lake Reservation. Five applications that were returned to applicants with information on how to correct them have not been resubmitted. The reasons the applications were returned included an application received without

receipts, receipts received without an application, an application without tribal identification or only partial tribal identification, the receipts did not identify the applicant, and an application was missing a signature or Social Security number. Of the applications that were partially denied, 17 were October through December receipts from Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation claims, which do not qualify for a refund due to a tribal tax in effect as of October 1, 2007. The remaining seven partially paid claims were denied because receipts were from an off-reservation purchase, receipts were from a reservation other than the reservation of enrollment, applications included diesel fuel with a gas refund or vice versa, applications included transposed numbers or other errors in calculation, receipts did not indicate the fuel type or gallons, or receipts from 2008 were submitted with an application for 2007.

The tax director of the Standing Rock Sioux Tribe reported that the state and the tribe have had a tobacco tax agreement since 1993 and a motor vehicle fuels tax agreement since 1999. The tribe receives approximately \$250,000 per year under the motor vehicle fuels tax agreement. The tribe receives 75 percent of revenue less a 2 percent administration fee paid to the state. However, the Standing Rock Sioux Tribe tax director noted that the tribe does not enjoy a sales tax exemption similar to other governmental entities. It was noted that the Legislative Assembly considered a bill in 2003 which would have provided sales and use tax exemptions for purchases by an Indian tribe. In an effort to promote positive government-to-government relations, the tax director of the Standing Rock Sioux Tribe and the tax director of the Spirit Lake Nation urged the committee to consider a bill draft to extend this exemption to Indian tribes.

### **Committee Considerations**

The committee considered a bill draft to establish a sales and use tax exemption for purchases by an Indian tribe. Members of the committee noted that extending this exemption to purchases made by Indian tribes would promote state-tribal relations with the state treating Indian tribes the same as it does other governmental entities. A representative of the Tax Department estimated that, if enacted by the Legislative Assembly in 2009, the proposal would reduce state general fund and state aid distribution fund revenues by \$30,000 to \$40,000 during the 2009-11 biennium.

### **Recommendation**

The committee recommends Senate Bill No. 2053 to provide a sales and use tax exemption for purchases by an Indian tribe.

## **TRANSPORTATION IN INDIAN COUNTRY**

North Dakota Century Code Section 24-02-02.3 provides:

Notwithstanding the provisions of chapter 54-40.2, the director may enter into agreements with any one or more tribal governments for the purpose of construction and maintenance of

highways, streets, roads, and bridges. Each agreement may not exceed twenty-five thousand dollars.

The committee discussed the feasibility of the Department of Transportation entering agreements between the state and Indian tribes for state maintenance of roads in Indian country. Representatives of the Department of Transportation testified that the department's primary responsibility is to maintain the state's highway system and the department is facing several challenges. Inflation continues to be one of the greatest challenges facing the transportation industry, and the department is facing serious staffing shortages as a result of losing employees in western North Dakota to the oil and gas industry.

### **Committee Considerations**

The committee considered a bill draft relating to Department of Transportation agreements with tribal governments which would remove the \$25,000 limitation on such agreements. Representatives of the department testified in support of the bill draft. Several committee members noted that the \$25,000 limitation was outdated.

### **Recommendation**

The committee recommends Senate Bill No. 2054 to remove the \$25,000 limitation on Department of Transportation agreements with tribal governments.

## **TRIBAL-STATE NATURAL RESOURCES ISSUES**

The committee reviewed memorandums of understanding between the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation's Fish and Game Department and the North Dakota Game and Fish Department concerning regulation of fishing and boating on the Fort Berthold Reservation and the regulation of hunting on the Fort Berthold Reservation. The purpose of the memorandums of understanding is to facilitate a cooperative law enforcement effort between the Game and Fish Department and the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation relating to fishing and boating violations falling under each party's authority and hunting violations falling under each party's authority. The memorandums of understanding are the first of their kind between the department and an Indian tribe in North Dakota.

The committee reviewed efforts to identify and mark hazards in Lake Sakakawea. The committee learned that the Game and Fish Department had requested information from the Attorney General on the marking of potential dangers or hazardous conditions on lakes and rivers and the liability of the Game and Fish Department. The Attorney General concluded the department probably does not have a duty to mark dangerous conditions in the absence of willful or malicious conduct, and if the department starts marking hazards the marking must be done in a nonnegligent manner.

The committee received information on the production of oil and gas from the Bakken Formation, including information on the geology, engineering of

horizontal drilling, and estimated recoverable reserves of the Bakken Formation. The committee learned the original oil in place of the Bakken Formation within the thermally mature portion of the state is estimated to be 149.2 billion barrels. The Bakken Formation's estimated ultimate recovery using current drilling and completion practices within the thermally mature portion of the state has been estimated at 1.4 percent of the original oil in place or 2.1 billion barrels. The committee learned that the discovery and development of technology to exploit the Bakken Formation is the single largest event affecting the state's petroleum industry since the discovery of oil in 1951.

The committee received information from the State Engineer concerning implementation of the emergency drinking water program. This program is designed to assist communities, tribes, and rural water systems to obtain water from the Missouri River system, which includes the main stem of the Missouri River, Lake Sakakawea, and Lake Oahe. The committee learned that the water intake issues at Garrison and Mandaree have been resolved and that the Bureau of Reclamation is lowering water intakes at Twin Buttes, Four Bears, and White Shield. No request for an emergency water supply project has been made since the Legislative Assembly adjourned in 2007.

The committee reviewed efforts by the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation to construct a petroleum refinery on the Fort Berthold Reservation. The project first appeared in the Federal Register on November 7, 2003. An environmental impact statement was conducted--the first environmental impact statement ever required for a petroleum refinery. The environmental impact statement was required because the refinery will be constructed on Indian trust land. The draft environmental impact statement was released June 6, 2006. The comment period has closed and the final environmental impact statement is ready to be published in the Federal Register. However, the committee learned that the Bureau of Indian Affairs has stated it has not had sufficient time to review the document even though it has had the document since June 2006. Publication in the Federal Register is important because then the 60-day time period will begin to run, and after 60 days the National Pollutant Elimination Discharge System permit may be issued and construction may commence.

The committee instructed the chairman of the Tribal and State Relations Committee to seek approval from the chairman of the Legislative Council and, upon approval, forward a letter to the Bureau of Indian Affairs urging the bureau to expedite its review of the environmental impact statement relating to the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation's refinery project.

## **CHILD SUPPORT ENFORCEMENT IN INDIAN COUNTRY**

The committee reviewed periodic reports concerning the interaction of child support enforcement services between the tribes and the state. The Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation is the only

tribe in North Dakota that has a federally funded child support enforcement program. Representatives of the Child Support Enforcement Division of the Department of Human Services reported that the state and the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation have developed a government-to-government working relationship. The state and the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation have entered a cooperative agreement concerning child support enforcement. A review of statistics showed an estimated 700 cases with lack of jurisdiction on which no further collection action was being taken before the cooperative agreement. The cooperative effort began with recognition that each party is a sovereign government receiving federal funding for the operation of a child support program. The cooperative effort protects the cultural diversity of tribal members and citizens of the state and there is a desire to cooperate and share resources and expertise to ensure parents and children receive necessary child support. To the greatest extent possible, the cooperative effort recognizes that only one entity should provide child support enforcement services.

Representatives of the state Child Support Enforcement office reported that progress between the state and the Standing Rock Sioux Tribe is occurring. However, the committee learned that interactions between the state Child Support Enforcement office and the Turtle Mountain Band of Chippewa Indians have not been as successful as with other tribes. The committee learned that child support enforcement cases involving the Turtle Mountain Band of Chippewa Indians with concurrent jurisdiction that would have been taken to tribal court are now moving into state court as that is the only avenue available to the state.

## **INDIAN CASE MANAGEMENT, SOCIAL SERVICES, AND HEALTH ISSUES**

The committee reviewed the provision of home and community-based services to tribal members. Case management for home and community-based services may be defined as the process within the framework of social work practice of providing specialized assistance to aged and disabled individuals desiring and needing help in selecting or retaining resources and services and of coordinating the delivery of the services to assist functionally impaired persons to remain in the community in the most effective manner.

The committee learned that as of November 7, 2007, there were 115 active cases on the Turtle Mountain Reservation, 104 on the Fort Berthold Reservation, 37 on the Spirit Lake Reservation, and 12 on the Standing Rock Reservation. There were 90 clients identified as American Indian on the Turtle Mountain Reservation, 61 on the Fort Berthold Reservation, 32 on the Spirit Lake Reservation, and 9 on the Standing Rock Reservation. Representatives of the Medical Services Division of the Department of Human Services reported that the potential annual case management payment is \$33,211 for the Turtle Mountain Reservation, \$23,165 for the Fort Berthold Reservation, \$11,007 for the Spirit Lake Reservation, and \$2,791 for the Standing Rock Reservation.

The committee learned that the Medicaid state plan limits case management services to be delivered by public agencies that have individual case managers who meet specific qualifications. North Dakota Administrative Code Chapter 50-06.2 allows case management services to be provided by county agencies and human service centers. North Dakota Administrative Code Chapter 50-24.5 allows case management services to be provided by a county agency. The home and community-based services Medicaid waiver requires that individuals providing case management services meet minimum qualifications. On December 4, 2007, the Centers for Medicare and Medicaid Services issued an interim final rule, which proposes to make significant changes to Medicaid-funded case management. As a result of changes required by this rule, the Department of Human Services will be required to modify and submit various state plan amendments in order to assure continued Medicaid coverage of allowable case management services. The committee learned that it is the department's intention to submit language to the Centers for Medicare and Medicaid Services which would allow the community health representatives to provide case management services to American Indian elders. The committee learned that no direct care services may be claimed as case management, but only those activities defined by the Centers for Medicare and Medicaid Services will be eligible for Medicaid case management reimbursement. These activities include assessment of an individual to determine that person's service needs; development of a care plan that addresses the service needs identified in the assessment; referral and related activities to help an individual obtain needed services; and monitoring and followup activities, including contacts, to ensure the care plan is effectively implemented.

Representatives of Rolette County Social Services briefed the committee on county human service caseloads in Indian country. County social service providers are charged with providing many services, including temporary assistance for needy families (TANF), food stamps, medical assistance, fuel assistance, child care, foster care, home and community-based services, and child protection services. Rolette County is one of the few rural counties in North Dakota with a growing population. As a result, the challenges facing county social service providers in Rolette County are great. These include providing transportation for clients to services, affordable housing, lack of medical care, and attracting and retaining staff. The committee learned that reimbursement rates are substantially below the actual cost of providing services and that social service providers are unable to compete in attracting and retaining staff to provide needed services. The committee learned that 650 of the state's 2,400 TANF cases are in Rolette County. Twenty-six percent of the state's TANF cases are in the Devils Lake region, which includes the Spirit Lake Reservation and the Turtle Mountain Reservation.

## **Committee Considerations**

The committee received testimony from tribal and local social service office representatives that tribes should be more involved in identifying social service needs on the state's reservations and forwarding this information to the Department of Human Services to be used in preparation of the department's budget. The committee considered a concurrent resolution draft directing the Legislative Council to study the sustainability of tribal social service programs. A member of the committee noted the resolution reflects a concern of the Legislative Assembly with the sustainability of tribal social service programs and the study directed by the resolution will examine participation by tribal social service programs in development of the state's human services budget.

## **Recommendation**

The committee recommends House Concurrent Resolution No. 3003 directing the Legislative Council to study the sustainability of tribal social service programs.

## **NORTHERN PLAINS INITIATIVE**

The committee received information concerning the Northern Plains Initiative developed by Rural Dynamics, Inc. Rural Dynamics, Inc., was founded in 1968 in Montana as a consumer credit counseling service to provide credit counseling to residents across Montana and Wyoming. The organization provides programs and establishes partnerships to help youth, individuals, and families achieve economic independence. The vision of Rural Dynamics, Inc., is to develop and maintain a new generation of financially educated and responsible consumers. Rural Dynamics, Inc., is a private, nonprofit corporation dedicated to providing confidential and professional counseling in aiding and rehabilitating financially distressed families and individuals regardless of race, creed, color, sex, social position, or financial status and in fostering community. The organization provides consumer education on money management and intelligent use of credit.

The Northern Plains Initiative and Rural Dynamics, Inc., reported a number of successes. These include the common dialogue program, match savings program, free tax preparation program, and family economic security program. The common dialogue program identifies the wants and needs of Indian country and attempts to address these identified needs. The match savings program is a service provided whereby Rural Dynamics, Inc., promotes individual development by matching individual savings. The family economic security program assists families in preparing budgets, financial education, and homeownership incentives. Rural Dynamics, Inc., has invested \$50,000 in the Montana Indian Business Alliance and is planning to invest \$35,000 in the South Dakota Indian Business Alliance. Representatives of the program reported that it would like to establish a similar program in North Dakota.



## **ELEMENTARY AND SECONDARY EDUCATION IN INDIAN COUNTRY**

Representatives of the Standing Rock Community School briefed the committee on elementary and secondary education issues on the Standing Rock Reservation. They noted that tribally controlled or tribal grant schools are not eligible to receive state foundation aid and urged the committee to amend NDCC Section 15.1-29-10 to provide that "[a] school board may contract with federal and tribal officials for the education of students in a federal or tribal school." Standing Rock Community School officials noted that the Standing Rock Community School system is struggling to retain and attract teachers, counselors, and special education staff members, and this change would assist the school district in providing a quality education for its students.

Representatives of Trenton Public Schools briefed the committee on elementary and secondary education issues of the Trenton Service Area. Representatives of Trenton Public Schools reported that the school district is facing severe financial pressure as a result of losing \$1.9 million in federal Indian School Equalization Program funds for 2008-09. The school district usually receives \$3.2 million. To deal with this issue, Trenton Public Schools has developed a barebones budget proposal for 2008-09 which cuts several positions, programs, and services. The committee learned that the Department of Public Instruction does not have any emergency funds available and Trenton Public Schools receive foundation aid based upon the state formula. Representatives of the Department of Public Instruction reported that the reduction in Indian School Equalization Program funds is a federal issue and the state is not in the position to provide substitute state funding.

The committee reviewed concerns relating to 21<sup>st</sup> Century Learning Centers in Indian country. Twenty-first Century Learning Centers are funded from a federal grant and designed to replace latchkey programs for children. Grants are designed to enhance academic performance in reading, mathematics, and science. The committee learned the state was required to submit a plan containing performance measures in order to receive a grant. The program is designed for schools identified as located in high-poverty areas, and, in order to maximize the grant and make it available to smaller schools, it was determined to allow regional education associations to apply for the grants. Some previous recipients believed that only regional education associations would be eligible for 21<sup>st</sup> Century Learning Center grants, but representatives of the Department of Public Instruction informed the committee that all current grantees as well as regional education associations could apply for 21<sup>st</sup> Century Learning Center grants.

### **Committee Considerations**

The committee considered a concurrent resolution draft directing the Legislative Council to study Indian education issues. The resolution notes that the rate of population growth on the state's Indian reservations is one of the highest growth rates in the state, that a larger percentage of Indian youth remain in the state upon graduation than do other youth, that good quality

education is essential for Indian youth to fully develop their talents and contribute to the general welfare of the state, and that many schools in Indian country are challenged by school finance issues.

### **Recommendation**

The committee recommends House Concurrent Resolution No. 3004 directing the Legislative Council to study Indian education issues.

## **HIGHER EDUCATION IN INDIAN COUNTRY**

The committee reviewed licensure of American Indian language instructors. Representatives of Sitting Bull College reported that the mission of Sitting Bull College is to promote American Indian language and culture, specifically Lakota language and culture. However, because the Standing Rock Reservation is located in two states, Sitting Bull College has to meet South Dakota and North Dakota proficiency tests for licensing American Indian language instructors. The committee learned that the South Dakota and North Dakota standards are different, and Sitting Bull College would like a uniform process to train and eventually license American Indian language instructors. One difference between the South Dakota and North Dakota certification standards is that South Dakota requires an examination while North Dakota's statute provides that qualification is determined by an indigenous language board established by a tribal government. Other tribal college representatives cautioned the committee on revising the North Dakota statute and recommended the committee defer to tribal councils or leaders to certify individuals who are qualified to teach American Indian languages.

The committee reviewed implementation of legislation enacted by the 60<sup>th</sup> Legislative Assembly relating to grant assistance payments concerning tribally controlled community colleges. Representatives of the State Board of Higher Education briefed the committee on implementation of the program. They informed the committee that implementation is proceeding very well but recommended that language requiring a report on the ethnic status of students be deleted from the reporting requirement.

The president of Cankdeska Cikana Community College reported that the institution has received \$17,500 under the program. The college is applying the funds to student support services. The president of Sitting Bull College reported that the institution has received \$35,000 under the program. A representative of United Tribes Technical College reported that the institution has received \$350,000 under the program which has been used for programs for promoting the appreciation of diversity, scholarships, and funding a financial aid counselor. United Tribes Technical College and Turtle Mountain Community College received two-thirds of the available funding under the program because of the number of non-Indian students enrolled at those colleges.

The committee learned that there has been a change in federal law pursuant to reauthorization of the federal Higher Education Act. Under the reauthorized Act,

nonenrolled descendents of enrolled members are eligible for federal funding for attending a tribally controlled college. North Dakota Century Code Chapter 15-70 defines nonbeneficiary student as a resident of North Dakota who is enrolled in a tribally controlled community college but is not an enrolled member of a federally recognized Indian tribe. If the change in federal law is not recognized in state law, it may allow a student to be counted as a beneficiary student for federal purposes and a nonbeneficiary student for state purposes allowing a tribally controlled college to receive a double payment for attendance by that student at a tribally controlled college.

Representatives of several tribal colleges said the threshold limitation of \$4,581 for each nonbeneficiary student attending a tribally controlled community college should be revised. The committee learned that as a result of the change in federal law, the state's tribal colleges may not be able to access all of the funds appropriated in House Bill No. 1395 (2007) to provide financial assistance to tribally controlled community colleges.

### **Committee Considerations**

The committee considered a bill draft relating to financial assistance to tribal colleges. The bill draft revised the definition of nonbeneficiary student to include the biological child of a member, living or deceased, of an Indian tribe, as well as an enrolled member of a federally recognized Indian tribe. The bill draft also clarified that full-time equivalent basis is equal to 24 credit-hours per year in which a nonbeneficiary student is enrolled. Concerning submission of grant applications, the bill draft included a requirement that the application include documentation of enrollment status of each student on whose account financial assistance is sought. The bill draft increased the payment for each nonbeneficiary student on a full-time equivalent basis from \$4,581 to \$5,304. Concerning reporting requirements, the bill draft required that each institution receiving a grant provide annually an accurate and detailed account of expenditures of the grant funds received by the institution to the Budget Section of the Legislative Council and a copy of each institution's audit report to the Legislative Audit and Fiscal Review Committee. Finally, the bill draft was declared an emergency measure.

### **Recommendation**

The committee recommends House Bill No. 1058 relating to financial assistance to tribal colleges which revises the definition of nonbeneficiary student, provides that grant applications include documentation of enrollment status, increases the grant payments from \$4,581 to \$5,304 per nonbeneficiary student, and provides reporting requirements to the Budget Section of the Legislative Council and the Legislative Audit and Fiscal Review Committee.

## **INDIAN AFFAIRS COMMISSION**

The committee reviewed the membership, mission, and powers and duties of the Indian Affairs Commission.

The committee noted that the names of several of the state's tribes had been revised since enactment of NDCC Section 54-36-01, which lists the members of the commission. The executive director of the Indian Affairs Commission recommended that the commission be allowed to accept gifts, grants, donations, legacies, and devises from any source and that the money be appropriated for the purposes of the commission.

A member of the task force noted the current statute provides that the Indian Affairs Commission may assist and mobilize the support of state and federal agencies in assisting Indian individuals and groups in North Dakota. The members of the Indian Affairs Commission and task force felt that this duty should be mandatory and recommended that this change be made.

### **Recommendation**

The committee recommends House Bill No. 1059 to update the tribal names for members of the Indian Affairs Commission, make it a duty of the Indian Affairs Commission to assist and mobilize the support of state and federal agencies in assisting Indian individuals and groups in North Dakota mandatory, and allow the commission to accept gifts, grants, donations, legacies, and devises from any source which are appropriated for the purposes of the commission.

## **TRIBAL AND STATE RELATIONS COMMITTEE**

The Tribal and State Relations Committee expires as of July 31, 2009. Several committee members noted the committee is working well and is providing an opportunity for the Legislative Assembly to study issues relating to Indians indepth. Also, several issues under review by the committee need further study and committee members felt the committee should be extended for another interim.

### **Recommendation**

The committee recommends House Bill No. 1060 to extend the Committee on Tribal and State Relations through July 31, 2011.

## **TRIBAL FLAG DISPLAY IN LEGISLATIVE WING**

The issue of displaying the flags of the five tribes of North Dakota in the legislative wing was raised. Several committee members agreed that displaying the flags of the state's tribes would reflect the respect that the Legislative Assembly and the state of North Dakota have for the state's tribes. However, due to the variables involved in the issue, such as the size of the flags and whether they should be located in the Memorial Hall, the rear of each chamber, or the front of each chamber, several committee members noted the best solution would be to recommend that the Legislative Council arrange for the proper display of the tribal flags in the legislative wing.

### **Recommendation**

The committee recommends that the Legislative Council arrange for the display of flags from the state's five tribes in an appropriate place in the legislative wing of the State Capitol.

### **OIL AND GAS TAX AGREEMENT**

The Legislative Council directed that the committee receive a report from the Governor describing the negotiations and terms of any agreement between the Governor and the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation; and thereafter receive biennial reports describing the agreement's implementation and any difficulties in its

implementation. The committee received periodic reports from representatives of the Governor's office concerning negotiations with the Three Affiliated Tribes - Mandan, Hidatsa, and Arikara Nation and the eventual agreement. Representatives of the Governor's office reported that an agreement was signed June 10, 2008. Under the agreement, the total tribal and state tax rate applicable to production and extraction of oil from trust lands is 11.5 percent. The total state tax rate attributable to production and extraction of oil from nontrust lands is 11.5 percent with a 60-month exemption from the extraction tax--effectively 5 percent for 60 months--and 11.5 percent thereafter. All state exemptions apply on the reservation except the 60-month extraction tax exemption on trust land and the Bakken exemption on both trust and nontrust lands.