

2021 SENATE FINANCE AND TAXATION

SB 2318

2021 SENATE STANDING COMMITTEE MINUTES

Finance and Taxation Committee Fort Totten Room, State Capitol

SB 2318
2/10/2021
AM

A BILL for an Act to amend and reenact subsection 4 of section 57-39.10-01 and sections 57-39.10-02, 57-39.10-03, and 57-39.10-05 of the North Dakota Century Code, relating to state-tribal agreements for the administration and collection of alcoholic beverages wholesale tax and alcoholic beverages gross receipts tax within the exterior boundaries of a reservation in this state; and to provide for application.

Chair Bell calls the meeting to order. Chair Bell, Vice Chair Kannianen, Senators Meyer, J. Roers, Patten, Piepkorn, Weber are present. [9:37]

Discussion Topics:

- Alcohol and gross receipts taxes
- Dual taxation
- Tax agreements between the Tribe and State
- Alcohol related healthcare costs
- Domestic violence and human trafficking
- Alcohol wholesale deliveries

Senator Kannianen [9:38] introduces the bill in favor and proposes an amendment #6188 and 6217.

Mark Fox, [9:38] Chairman, Mandan Hidatsa Arikara Nation in favor #6212

Pat Ward [9:48] Lobbyist, ND Wholesale Liquor Distributors in opposition and proposed an amendment 6159 and 6160

Additional written testimony:

Sheila Steele, Retailer, Saddle Rack Saloon, Inc. in opposition #6117

Tara Clayton Ranchman's 23 in opposition #6156.

Chair Bell adjourns the meeting. [9:55]

Joel Crane, Committee Clerk



NORTH DAKOTA SENATE

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360

#6188



Senator Jordan Kannianen

District 4
8011 51st Street NW
Stanley, ND 58784-9562
C: 701-421-8813
jkannianen@nd.gov

COMMITTEES:

Finance and Taxation
Political Subdivisions

Testimony on SB 2318

Jordan Kannianen, District 4 Senator

Last session, the legislature passed SB 2257, which established a template and the authorization for state/tribal tax agreements for alcohol wholesale and gross receipts taxes. The sharing split would be based on the proportionate enrolled member population within the boundaries of the given reservation.

In the more than year and a half since this law took effect, no agreements have materialized from the template that's in place. The two main reasons for this are disagreements from the tribes over the sharing split and regulatory authority. This bill establishes the wishes of the tribes on both issues.

The proportionate split is changed to an 80/20 split in favor of the tribes. This follows similar splits as on other taxes, and it simplifies things for the tax department.

The regulatory issue is addressed in the bill by allowing for business and alcohol licensing by the tribes. An amendment, supported by the retail establishments and wholesale providers, is also submitted that would remove this regulatory authority from the bill.

Thank you.

21.1033.01002
Title.

#6217
Prepared by the Legislative Council staff for
Senator Kannianen
February 9, 2021

PROPOSED AMENDMENTS TO SENATE BILL NO. 2318

Page 5, line 9, remove "business and alcohol license fees or"

Renumber accordingly



MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
404 Frontage Road New Town, ND 58763
Tribal Business Council

Office of the Chairman
Mark N. Fox

**SENATE BILL 2318
SENATE FINANCE AND TAXATION COMMITTEE
FEBRUARY 10, 2021**

**TESTIMONY OF MARK FOX, CHAIRMAN
MANDAN, HIDATSA AND ARIKARA NATION**

Madam Chair and members of the Committee, my name is Mark Fox, I am the Chairman of the Mandan, Hidatsa and Arikara (MHA) Nation. The MHA Nation supports Senate Bill 2318, a bill that allows for a fair collection of a single alcoholic beverages wholesale tax and alcoholic beverages gross receipts tax under state-tribal agreements.

By federal statute, the sale and consumption of alcohol by any person is prohibited in Indian Country unless it is authorized by both state and tribal law. The tribal liquor law must be approved by the Secretary of Interior. Like other North Dakota tribes, the MHA Nation has a Liquor Ordinance approved by the Secretary which provides for the regulation and taxation of all liquor transactions on the Fort Berthold Indian Reservation.

Because federal law requires that the sale of alcohol conform to both state and tribal law, dual state and tribal taxation of alcohol is an ongoing issue. For over 70+ years of alcohol being sold on the Reservation the MHA Nation has not collected one dime in tax revenue, due in large part to the dual taxation issue.

In the 2017 Legislative Session and the following interim session, we worked together to come up with an agreement to share alcohol taxes. Unfortunately, legislation adopted in 2019 did not solve the problem because the tax sharing methodology was unworkable, it did not account for the tribes right to share taxes from all sales generated on the reservation. The problem was exacerbated by the fact that state officials demanded exclusive regulatory authority over alcohol sales, even though federal law requires alcohol sales to conform to both state and tribal law, and even though the 2019 legislation expressly recognized the sovereign rights of both the state and the tribes. As a result, not a single tax agreement was signed under the 2019 legislation. SB 2318 is intended to fix this problem.

The current state law allows the tribe entering into an agreement with the state to receive a portion of the tax revenue allocated based on multiplying the enrolled membership of the tribe by the state alcohol tax revenue per capita. Essentially, this means that we would only be collecting revenue from our own membership instead of all sales on our reservation. This makes no sense, which

is one reason no tribes have entered into such an agreement since this law was passed last session.

SB 2318 allows for 80% of the revenue collected from alcohol sales on the reservation to be distributed to the tribes and the remainder to the state. The 80/20 split recognizes that reservation alcohol sales place a disproportionate burden on tribal government and that the majority of services provided around the sale and consumption of alcohol on the reservation are provided by the tribal government.

The tribal share collected under SB 2318 will help relieve the tremendous amount of money that we spend to provide treatment and alcohol related services for our members addicted to alcohol. At any given time, we have approximately 50-60 members in treatment for an average of 60-90 days, with 5-10 inquiries for treatment each week. The cost is exponential. For example, in 2020, we were billed \$9.3 million from facilities providing treatment for alcohol dependency of our tribal members.

The sale and consumption of alcohol on the reservation also places a disproportionate burden on our judicial system. For example, 90% of all criminal cases in our Fort Berthold District Court are alcohol related. Our tribal police respond to countless calls that result from the sale and consumption of alcohol on the reservation. Domestic violence involving our members and nonmembers remains an ongoing problem, as does human trafficking, alcohol related injuries

and deaths from vehicle accidents, and overdoses. The notion that persons who benefit from the sale of alcohol must pay their fair share of taxes to the tribal government shouldering the burdens created by these alcohol sales should be self-evident.

Current law clearly recognizes our sovereign authority to regulate the sale of alcohol on Fort Berthold. The MHA Nation will not and should not be expected to waive our regulatory authority in order to enter into an agreement with the state to share tax revenue from the sale of alcohol on our reservation. The law as written allows for both the state and tribe to jointly regulate alcohol sales on our reservation should we decide to enter into a revenue sharing agreement. The expectation that tribes must rescind our regulatory authority within our boundaries before the state can administer the collection of taxes and distribute the revenue under a state-tribal agreement is simply a misinterpretation of plainly stated law.

SB 2318 provides a fair mechanism to share taxes generated from the sale and consumption of alcohol on the reservation, while recognizing the concurrent regulatory authority of both the state and tribes. Madam Chair, we urge a do pass of SB 2318. Thank you.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2318

Page 3, line 27, after the period insert “A North Dakota licensed wholesaler shall be permitted to deliver to retailers within reservation boundaries as authorized by state law and without having to register or obtain additional licensure from a tribe.”

Page 3, line 28, remove “.”

Page 3, line 29, remove “not in conflict with federal law.”

Page 5, line 4, remove “.”

Page 5, line 5, remove “not in conflict with federal law.”

Page 5, line 9, remove “business and alcohol license fees or”

Page 5, line 10, after the period insert “A North Dakota licensed retailer shall be permitted to operate within Reservation boundaries as authorized by state law and without having to register or obtain additional licensure from a tribe.”

Re-number accordingly

#6160

Testimony of Patrick Ward on behalf of ND Wholesale Liquor Distributors
in Opposition to SB 2318

Senate Finance and Tax

February 10, 2021

Chairwoman Bell and Members of the Senate Finance and Tax
Committee:

My name is Patrick Ward and I represent the North Dakota Wholesale
Liquor Dealers Association in opposition to SB 2318. While we support
some parts of this bill, there are other parts we oppose.

Our ND liquor and beer wholesalers have been doing business with liquor
retailers on the Fort Berthold reservation, including with the Four Bears
Casino, for many years under ND state and federal licensing laws.

About three years ago, the MHA nation adopted a new tribal liquor
ordinance and regulations. Those regulations were sent to North Dakota
wholesalers and retailers doing business within the boundaries of the
reservation by the Tribal Tax department. The wholesalers and retailers
were being told to register with the Tribe to receive a wholesale or retail
liquor license from the tribe.

As part of that registration process, the wholesalers and retailers were asked to submit to tribal court jurisdiction and regulations to do so, as well as pay a licensing fee. There were provisions in that law and the implementing regulations enacted more onerous than any under state law. The wholesalers, who are not located on the reservation, and retailers on private fee land within the reservation boundary, objected. We tried to work out a compromise which was unsuccessful. And so, for a time, wholesalers stopped making deliveries to those businesses.

We did appear here last session on SB 2257 which allowed for these State-Tribal tax compacts to be created. We supported that bill as did the MHA Nation.

However, near the end of the session after the bill had passed the House and Senate, the Tribe began to ask for a modification to the bill to increase the amount of its share of the tax. No modification was made. Following the session, no agreement was reached between the state and MHA, despite one or more meetings between the Tax Commissioner and MHA.

Since that time and up until just before January of this year, the Tribal Business Council had been granting monthly exemptions to allow wholesale deliveries on the reservation without requiring the wholesalers to get licensed by the tribe. My clients value the business relationship with the tribe and would like to continue their business. Accordingly, we would ask that the language on page 3, line 29, "not in conflict with federal law" be deleted. We would ask that new language be inserted at page 3, line 27 to provide: "A ND licensed wholesaler shall

be permitted to deliver to retailers within reservation boundaries as authorized by state law and without having to register or obtain additional licensure from a tribe.”

We respect and understand the sovereignty of the tribes over tribal members on Tribal owned land. However, we disagree that the tribe should have authority to enforce its regulations or rules against nonmembers of the tribe for activities taking place on their own private property or off the reservation. None of the ND wholesalers of beer or liquor are located on the reservation. Rather than submit to dual regulation, many of my clients would rather not do business on the reservation.

Wholesalers are already heavily regulated by the federal and state government. My clients pay the wholesale liquor tax on every bottle of wine or spirits they bring into this state. ND Wholesalers are not inclined to subject themselves to other regulatory authorities or courts when the state is the one collecting the tax, enforcing compliance, and distributing the tax under the Compact.

We are neutral on how the tax is split but we would oppose any attempt at dual taxation or regulation.

We would be happy to work with this committee and with the MHA Nation to come to an accommodation that would improve this bill.

Without that, we strongly urge a Do Not Pass on SB 2318.

#6117

Terry W. Clayton, Tara M Clayton

3945 Hwy. 8 #100

New Town, ND 58763

2/9/2021

To Whom it may concern:

In regards to SB 2318,S - Changes to the tribes ability to collect alcohol licensing fees and dual regulation. The current law provides that the tribe may not impose any direct or indirect tribal tax or fee on retailers. NDCC 57-39.10-05(4).

Simply put if the tribe was able to require retailers license fees and tribal tax with tribal regulations under this new bill, the liquor retailers would have no rights or jurisdiction in tribal law. In other words we have no way to defend ourselves in tribal court.

Attached is a letter in response to the tribe trying to tax us direct that we sent from our attorneys to the tribe – this makes reference to a federal case, US v Morgan, also attached a newspaper article from 1985 which specifically addressed that non- Indian fee simple land within the outer boundary of the reservation would never be subject to taxation.

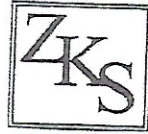
This is of great concern to us, this will not only affect us but also every other type of retailers in the area and will effect a lot of jobs. Because we are governed under the State and the Mountrail county already we feel that we should have never had to retain attorneys and fight on this issue predicated on the ruling in 1985 stipulating that we would never be subject to taxation or regulation by the tribe.

In closing I am not an attorney, but I believe under the constitution as a US citizen, non Indian, fee simple land owner the state cannot subject us to be regulated by tribal law in which we have no rights to defend ourselves.

Terry W Clayton 701-690-9281

Tara M Clayton

Patrick J. Ward
Lawrence E. King***
Constance N. Hofland**
John E. Ward++
Alyssa L. Lovas
Dennis R. Pathroff
Nathan J. Svihovec



ZUGER KIRMIS & SMITH, PLLP
— Since 1909 —

316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695
p: 701.223.2711
f: 701.223.9619
www.zkslaw.com
lking@zkslaw.com

Also licensed in
Minnesota **
Montana ++
South Dakota ^^

John A. Zuger
(1940-2006)
Lyle W. Kirmis
(1949-2020)
Thomas O. Smith
(1944-2001)

December 31, 2020

VIA EMAIL:

chairmanfox@mhanation.com & cynthia.monteau@Tax-MHANation.com

Mark Fox, Chairman, Tribal Business Council
Mandan Hidatsa & Arikara Nation
404 Frontage Road
New Town, ND 58763

Dear Chairman Fox,

Please be advised that I represent Retailers who operate small businesses including bars and restaurants on fee land within the Fort Berthold Homestead Boundary. These businesses include: Ranchman's 23, Saddle Rack, Inc, Bruski's, Teddy's, Corner Liquor, Sportsmans Bar, LLC, Legion Bar, and Big Water Bottle shop.

I am in receipt of your December 18, 2020 correspondence to these business owners indicating that the Tribal Business Council (TBC) is no longer suspending the alcohol licensure requirements. The TBC had been continually suspending the licensure requirements pending negotiations with the state regarding taxation and regulation.

We would respectfully request that the TBC suspend the alcohol licensure requirements for 30 days and allow the Retailers to negotiate directly with the state.

My clients are not willing to agree to the burdensome and intrusive nature of the ordinances; nor are they comfortable submitting to tribal regulation, control and jurisdiction. We do believe that direct negotiations between yourself and the Retailers could address all parties' interests.

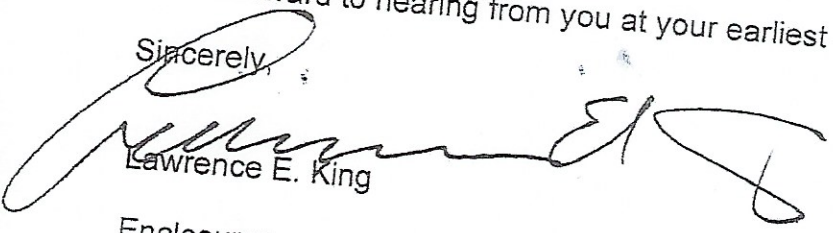
As you are aware, in U.S. v. Morgan, 614 F.2d 166 (8th Cir.1980) the businesses were operating on fee-patented lands and were considered within non-Indian Communities and therefore exempt from the liquor requirements that the Standing Rock Sioux Tribe attempted to impose. Obviously, we are aware of the City of Timberlake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir.1993) decision. As that case noted, generally one panel of the Court must follow the decision of an earlier panel. In City of Timberlake, the panel attempted to distinguish the Morgan decision. It is our position that the situation my clients are in is similar to that in the Morgan case. We believe that if litigated the "Homestead" area will be found to be non-Indian community pursuant to the Morgan decision.

Also enclosed is a newspaper article from 1985. The article addressed the MHA Nations Constitutional amendment attempting to assert jurisdiction over all people and property on the reservation. It sought to include the "Homestead" area including Parshall and New Town. A local group met with Senators Andrews and Burdick and Representative Byron Dorgan as well as the Undersecretary of the Interior. The individuals were assured that the people on the "Homestead Area" would continue to have all of the rights as citizens of the United States and the State of North Dakota. Particularly, according to the Undersecretary of the Interior "even if the constitution of the Three Affiliated Tribes was changed and approved, it would only affect those persons on "TRIBAL" or "TRUST" lands within, but not on any "fee patent" land such as is held in the present Fort Berthold Homestead Boundary. We believe the present Congressional delegation would continue to support that position.

Obviously, a lengthy, drawn out legal battle is not in the interests of any of the parties. As such, it is our hope that the MHA Nation will agree to suspend the liquor license requirements for 30 days and enter into good faith negotiations with my clients, the Retailers.

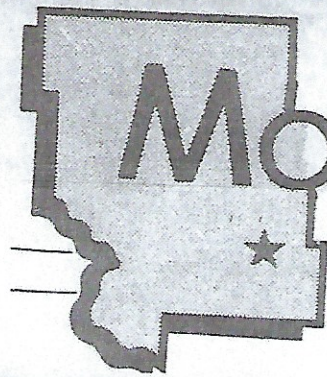
I look forward to hearing from you at your earliest convenience.

Sincerely,


Lawrence E. King

Enclosures

P:\LKING\Retailers ads TAT (17747)\Word documents\2020 12.31 - LEK letter to Mark Fox.docx



MOUNTAIN TRAIL CO

OFFICIAL CITY NEWSPAPER

VOLUME NO. 70-34

WEDNESDAY, M.

JURISDICTION

"Homestead Reservation" Jurisdiction Settled

The argument of the jurisdictional rights on the Fort Berthold Reservation have been settled. Parshall Mayor Al Christianson, Aldermen Arlo "Bucky" Jacobson, Whit Dwyer and City Auditor Loren Hoffman made a trip to Washington, D. C. last week and met with Senators Andrews and Burdick and Rep. Byron Dorgan and Pete Taylor, General Counsel to discuss the recent election by the Three Affiliated Tribes to change their constitution to read, "they have jurisdiction over all people and property on the reservation" which was to include the "homestead" area including Parshall and New Town. Both Senators Burdick and Andrews assured the Parshall delegation: "that the people on the 'homestead area' of the Fort Berthold Reservation which includes Parshall and New Town have all their rights as citizens of the United States and the State of North Dakota."

According to the Congressman and Secretary of Interior Hodel, "even if the Constitution of the Three Affiliated Tribes was changed and approved, it would only affect those persons on "TRIBAL" or "TRUST" lands within, but not on any "fee patent" land such as is held within the present Fort Berthold Homestead boundary.

The group met with Sens. Burdick and Andrews and General Counsel Pete Taylor on Thursday morning, March 21 and discussed the resolution of the Tribe's constitution and dealing with jurisdiction with Indians and non-Indians. And when they met with the Secretary of the Interior Hodel they asked him not to ratify the resolution and election until all facets of the resolution were investigated, check out and determine the legal rights of both parties, Indian and non-Indian.

dian.

On Friday morning, the group met with Rep. Byron Dorgan, Bill Horn 2nd Under Secretary of the Interior and discussed the ramifications of the election and resolution of the Tribes. Again the delegation was assured that the resolution would be checked thoroughly before it was ratified and reassured that the resolution would not affect any but "Tribal" and "Trust" land. i. e. it would not affect any non-Indian on the "Homestead" portion of the Fort Berthold Reservation which includes the towns of Parshall and New Town.

Also the group was told that the Tribes "Could Not Tax" any of the lands or businesses in the "Homestead" portion of the Reservation which includes Parshall and New Town.

The only thing, that was stipulated at the meeting was, "any non-Indian who wanted to do business on the 'Indian Reservation' or 'Tribal' or 'Trust' lands, the Tribes could tax and regulate that business.

Among other questions asked was "Could the Tribes stop our water plant from being built? The answer was "no", because no Tribal or Trust land was involved and the Tribes could not control the water intake from the lake.

"Can the Tribes stop people from fishing on the lake?" Again the answer was "no", because public access did not belong to the Tribes, however, if you have to cross Tribal or Trust land to get to where you are going, they could stop you.

The following is a letter to Sen. Mark Andrews from Pete Taylor General Counsel concerning the election and resolution...

"Sen. Mark Andrews Re: Ft. Berthold Constitution. On Jan. 18,

1985, Leo Brockie, Supt. of the Fort Berthold Indian Reservation, issued a Notice of a Secretarial Election for the purpose of amending the constitution of the Three Affiliated Tribes of the Fort Berthold Reservation. The election is being held today (Mar. 11) and the results will be announced tomorrow.

While there are a number of changes in the constitution, the most important one is that dealing with tribal jurisdiction within the bounds of the Fort Berthold Reservation. Under the existing constitution, the jurisdiction of the Three Affiliated Tribes is limited to Indian trust and tribal lands. The revised constitution will extend the tribal jurisdiction to "all persons and all lands," including lands held in fee, within the exterior bounds of the reservation."

Over the past two weeks we have received a number of letters from non-Indians residing within the homestead area of the reservation objecting to this proposed constitutional amendment. On the face of it, the proposed constitutional change would grant extensive powers to the tribal government. However, as a practical matter, the constitutional amendment **CANNOT VEST IN THE TRIBES ANY MORE AUTHORITY THAN IS RECOGNIZED TO REPOSE IN ANY OTHER TRIBAL GOVERNMENT** (ed's. caps). The authority of the tribe is limited by any applicable federal statutes or judicial decisions. Indian tribes inherently lack criminal jurisdiction over non-Indians even when they are on Indian lands (Oliphant v. Suguamish Tribe (1978) and their authority to regulate non-Indian hunting and fishing on non-Indian or fee patent land within a reservation is limited to regulate activity directly affecting an

activity directly affecting an vital resource or activity of the (U. S. v. Montana (1980)). do have limited powers to regulate non-Indian activities that have a direct relationship to a tribal interest. Thus the courts have recognized limited authority of tribal matters of zoning and land and the Solicitor's Office at Interior has recognized tribal authority over non-Indians on matters involving use of herbicides when the application of such herbicides effect tribal lands.

Tribes are recognized to have authority over issuance of business licenses and taxation, but it is knowledge no tribe has ever successfully imposed a business license requirement or a tax on Indians who were not actually occupying Indian owned lands. sole exception that I am aware of was a tribal ordinance requiring a business license to operate a loon within the Wind River Reservation in Wyoming and the tribe that case acted under a federal statute that authorized the tribe to impose such a requirement. (U. S. v. Mazurie (1973)).

Looking at the proposed revision of the constitution of the Three Affiliated Tribes from an objective standpoint, there is no question but what tribal authority over its own members extends any way within the boundaries of the reservation. However, under the existing tribal constitution, the Three Affiliated Tribes cannot legally exercise jurisdiction over their members unless they are on Indian owned land. If the tribes are to exercise lawful jurisdiction over their own members for conduct within the reservation but off Indian owned land, then this constitutional revision is necessary.

Moderate Growth Predicted For State's Non-Farm Economy

Peoples Bank & Trust Wins State's "A"

#6156

SENATE BILL NO. 2318

I want to express my opposition to SENATE BILL NO. 2318. My business is already regulated by state law and there is no need for dual licensure and regulation.

2021 SENATE STANDING COMMITTEE MINUTES

Finance and Taxation Committee Fort Totten Room, State Capitol

SB 2318
2/10/2021
PM

A BILL for an Act to amend and reenact subsection 4 of section 57-39.10-01 and sections 57-39.10-02, 57-39.10-03, and 57-39.10-05 of the North Dakota Century Code, relating to state-tribal agreements for the administration and collection of alcoholic beverages wholesale tax and alcoholic beverages gross receipts tax within the exterior boundaries of a reservation in this state; and to provide for application.

Chair Bell calls the meeting to order. Chair Bell, Vice Chair Kannianen, Senators Meyer, J. Roers, Patten, Piepkorn, Weber are present. [2:56]

Discussion Topics:

- Tribal regulatory authority

Senator Patten [2:58] moved DO NOT PASS

Senator Meyer second

Ryan Rauschenberger [3:01] Tax Commissioner provided verbal information

Senators	Vote
Senator Jessica Bell	Y
Senator Jordan Kannianen	Y
Senator Scott Meyer	Y
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Jim Roers	Y
Senator Mark Weber	Y

Motion carries 7-0-0

Senator Patten carries

Chair Bell adjourns the meeting. [3:06]

Joel Crane, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2318: Finance and Taxation Committee (Sen. Bell, Chairman) recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2318 was placed on the Eleventh order on the calendar.