

TRIBAL AND STATE RELATIONS COMMITTEE - BACKGROUND MEMORANDUM

North Dakota Century Code Section 54-35-23 establishes the Tribal and State Relations Committee. The committee is composed of a chairman designated by the Chairman of the Legislative Management; three members of the House of Representatives, two of whom must be selected by the leader representing the majority faction of the House and one of whom must be selected by the leader representing the minority faction of the House; 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.

Section 54-35-23 directs the committee to conduct joint meetings with the North Dakota Tribal Governments' Task Force to study tribal-state issues, including government-to-government relations, human services, education, corrections, 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 Management.

The North Dakota Tribal Governments' 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 Tribe, or the Chairman's designee; the Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, 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 of the Lake Traverse Reservation, 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.

House Bill No. 1060 (2009) extended the expiration date of the committee from July 31, 2009, to July 31, 2011. The bill also changed several tribal names of tribes whose chairmen are members of the task force.

Senate Bill No. 2053 (2011) extended the expiration date of the committee from July 31, 2011, to July 31, 2013. The bill replaced the Chairman of the Legislative Management, or the Chairman's designee, as Chairman of the committee, with a chairman designated by the Chairman of the Legislative Management. The bill changed the name of the Native American Tribal Citizens' Task Force to the North Dakota Tribal Governments' Task Force and expanded the scope of the committee from the study of the delivery of services, case management services, and child support enforcement to human services. In addition, the bill required the committee to study whether the members of the task force should be voting members of the committee.

Senate Bill No. 2047 (2013) removed the expiration date of the committee and made it a permanent statutory committee.

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 non-intercourse 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 it. 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 allotted 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 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 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 Court. However, Chief Justice John Marshall characterized Indian tribes as "domestic dependent nations." In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Court further discussed the status of Indian tribes. The Court stated "[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 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

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.

Section 54-40.2-02 provides 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 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 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.

Section 54-40.2-03.2 provides 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.

Section 54-40.2-04 provides 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 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.

Section 54-40.2-05.1 provides 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.

Section 54-40.2-06 provides 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 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 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 Chapter 54-40.2 does not affect the validity of any agreement entered between a tribe and a public agency before August 1, 1999.

2013 LEGISLATION

House Bill No. 1005 amends a portion of the statutory authority governing the state-tribal oil and gas tax agreement to make clear the state's share of oil and gas gross production tax revenue is subject to distribution among political subdivisions as provided in the gross production tax law.

House Bill No. 1180 establishes a pilot program for the provision of independent case management services under the service payments for elderly and disabled program and a pilot program for the provision of independent case management services under the medical assistance home and community-based services program. Both of the pilot programs are to be established within a county located entirely within an Indian reservation for the 2013-15 biennium.

House Bill No. 1198 eliminates stripper well property status for wells drilled and completed or reentered and recompleted after June 30, 2013. For wells drilled and completed or reentered and recompleted after June 30, 2013, wells must be evaluated on an individual basis for stripper well status based on the production from the well and are not eligible for the stripper well exemption unless the individual well produces 30 barrels or less per day outside the Bakken and Three Forks Formations and 35 barrels or less per day for wells in the Bakken or Three Forks Formation. The bill provides for a reduced oil extraction tax rate of 2 percent for the first 75,000 barrels of oil produced during the first 18 months after completion of a well drilled and completed outside the Bakken and Three Forks Formations after June 30, 2013.

The bill revises the statutory framework for the state-tribal oil and gas tax agreement. The bill eliminates the five-year exemption for wells drilled on an Indian reservation after June 30, 2013. The bill increases the tribal share of revenue allowable under the agreement for production on nontrust lands from 20 percent of oil and gas gross production taxes to 50 percent of total oil and gas gross production and oil extraction taxes. The bill provides the state-tribal agreement must require the Three Affiliated Tribes report annually to the Budget Section of the Legislative Management to identify investment of at least 10 percent of tribal oil and gas gross production and oil extraction tax receipts in essential infrastructure and inform the Budget Section of fees, expenses, and charges the tribe imposes on the oil industry.

The bill also provides for income tax withholding for oil and gas royalty payments to nonresidents. Any person who distributes royalty payments to oil and gas royalty owners is required to deduct and withhold from the net amount of royalty payment to each nonresident individual or business entity. If the royalty payment to a royalty owner is less than \$600 for the current withholding period or less than \$1,000 per year, the Tax Commissioner may grant a request to forgo withholding and a remitter is exempt from the withholding requirement if the remitter produced less than 350,000 barrels of oil or less than 500 million cubic feet of gas in the preceding calendar year.

House Bill No. 1278 establishes a North Dakota outdoor heritage fund into which up to \$30 million per biennium of oil and gas gross production tax revenues must be deposited. The bill provides the fund must be used to provide grants to state agencies, tribal governments, political subdivisions, and nonprofit organizations to provide access to private and public lands for sportsmen, support stewardship practices, develop and conserve wildlife and fish habitat, and conserve natural areas for recreation. The bill requires the Industrial Commission to manage the fund and provide staffing for meetings of the North Dakota Outdoor Heritage Advisory Board. The bill provides the board consists of 12 members appointed by the Governor.

House Bill No. 1443 directs the State Department of Health, Department of Human Services, Indian Affairs Commission, and Public Employees Retirement System to collaborate to identify goals and benchmarks to reduce the incidence of diabetes in the state, improve diabetes care, and control complications associated with diabetes and directs these state agencies to make a biennial report to the Legislative Management on identified diabetes-related topics.

Senate Bill No. 2030 authorizes an Indian Nation that occupies a reservation the external boundaries of which border more than four counties to form a health district or public health department, provides the terms of such public health unit, revises the definition of "regional public health network" as that term applies to the regional public health networks law, and revises the requirements a group of public health units must meet in order to be designated as a regional public health network and to qualify for state funding, including codifying core public health activities.

Senate Bill No. 2119 authorizes the Director of the Office of Management and Budget to coordinate with the Director of the Department of Transportation to establish or participate in contracts which may be made available to entities that have been determined by the department to be transportation providers eligible to receive state funds or federal funds for public transportation. The bill provides cooperative purchasing may include open-ended contracts with tribal entities or transportation providers. The bill also defines a transportation provider, for the purposes of public transportation funding, to include a tribal agency. The bill was declared to be an emergency measure and became effective upon its filing with the Secretary of State on March 27, 2013.

Senate Bill No. 2218 establishes within the Division of Workforce Development of the Department of Commerce a program to provide workforce development grants to tribally controlled community colleges. The bill provides a college may use a grant to develop programs that assist in providing certificates or degrees to North Dakota students attending the college that qualify the student to obtain jobs for which applicants are being sought within the state, as identified by the department, Job Service North Dakota, or any of the federally recognized Indian tribes within North Dakota or to assist any North Dakota student attending the college to establish, or to assist in establishing, a new business operating within North Dakota that will employ North Dakota citizens. The bill requires tribal colleges receiving grants to report annually to the department regarding the expenditures under the grant and the results of the grant program.

ADDITIONAL COMMITTEE RESPONSIBILITIES

Section 57-51.2-04 requires the Governor to file a report with the Legislative Management describing the negotiations and terms of any agreement between the Governor and the Three Affiliated Tribes of the Fort Berthold Reservation relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation and thereafter biennial reports describing the agreement's implementation and any difficulties in its implementation. The Legislative Management has assigned this responsibility to the Tribal and State Relations Committee.

Section 12 of 2013 Senate Bill No. 2030 requires the State Department of Health to report to the Legislative Management semiannually during the 2013-14 interim on the status of the tribal public health unit pilot project.