

STATE-TRIBAL SALES TAX COLLECTION AGREEMENT AUTHORITY

This memorandum was requested to examine the question of whether legislation is required to allow the Tax Commissioner to enter a sales tax collection agreement with the Standing Rock Sioux Tribe.

The Tax Commissioner entered tax collection agreements with the Standing Rock Sioux Tribe in 1993 for collection of taxes on tobacco products and in 1998 for collection of motor fuel and special fuels taxes. Each of these agreements cited North Dakota Century Code Chapter 54-40.2 as authority.

STATUTORY BACKGROUND

In 1983 the Legislative Assembly enacted the legislation now codified in Chapter 54-40.2. Before enactment of the law, it appears tribes and state agencies had entered agreements for various purposes. The 1983 bill was introduced by the Attorney General to create a general framework for uniformity and to provide statutory authorization for public agencies of the state and political subdivisions to enter agreements with tribal governments. The authorization was stated in very general terms and provides that public agencies may enter an agreement with a tribal government to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments are authorized to perform by law.

In 1991 Chapter 54-40.2 was amended to establish a role for the Indian Affairs Commission in proposing agreements and assisting in negotiation and development of agreements. The 1991 amendments also created requirements for newspaper notice of a pending agreement and posting of notice at the tribal office of any affected tribe. The 1991 law created a requirement for the Indian Affairs Commission to make findings concerning the agreement and the original intent of the parties and to determine whether the parties are in substantial compliance with the provisions of the agreement.

In 1995 Section 24-02-02.3 was created to provide authority for the Director of the Department of Transportation to enter agreements with tribal governments for construction and maintenance of highways, streets, roads, and bridges. The amendment provided that Chapter 54-40.2 does not apply to those agreements.

In 1999 Chapter 54-40.2 was amended to provide that the chapter does not apply to certain agreements with the Department of Human Services or to agreements entered with tribal governments under a state-funded or federally funded program, including any publicly announced offer of a grant, loan, request for proposal, bid, or other contract originating with a public agency for which the tribal government is eligible.

In 2005 Chapter 54-40.2 was amended to require that a school district entering an agreement with a tribe must provide notice to the Superintendent of Public Instruction before entering the agreement.

In 2007 legislation was enacted to create chapter 57-51.2, providing authority for the Governor to enter an agreement with the Three Affiliated Tribes of the Fort Berthold Reservation relating to taxation and regulation of oil and gas exploration and production within the Fort Berthold Reservation. Section 57-51.2-05 provides that Chapter 54-40.2 does not apply to any such agreement. In 2013 Chapter 57-51.2 was extensively revised to provide more beneficial terms for the Three Affiliated Tribes under an oil and gas tax agreement. A new agreement has been entered to implement the 2013 legislative changes.

ANALYSIS

There is a substantial body of case law from the United States Supreme Court holding that in general, tribal members on reservations are not subject to state tax laws unless Congress consents. The United State Supreme Court has succinctly stated "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). The North Dakota Supreme Court has concluded that enrolled tribal members who purchase goods or services on the reservation cannot be taxed by the state on that purchase. *White Eagle v. Dorgan*, 209 N.W.2d 621 (1973).

Abiding by United States and North Dakota Supreme Court decisions, the Tax Commissioner has developed the following guidelines for application of sales taxes for sales by or to American Indians:

1. An Indian retailer operating on an Indian reservation cannot be required to collect sales tax from any customer, Indian or non-Indian.
2. A non-Indian retailer operating on an Indian reservation may not collect sales tax from Indian customers but must collect sales tax on sales to non-Indians and remit that tax to the Tax Commissioner's office.

3. Any consumer, Indian or non-Indian, who makes a tax-exempt purchase of tangible personal property on an Indian reservation and then uses or consumes the tangible personal property off the reservation is subject to North Dakota use tax. Non-Indian customers who make tax-free purchases on the reservation are always subject to use tax, regardless where the product is used.
4. Purchases made by American Indians off an Indian reservation are taxable. However, deliveries by a retailer located off a reservation to an American Indian on the reservation are exempt. Deliveries to a non-Indian on an Indian reservation are taxable.

Officials of the Standing Rock Sioux Tribe have discussed with the Tax Commissioner entry of a tax collection agreement between the Tax Commissioner and the Standing Rock Sioux Tribe for collection and allocation of revenues under the state sales tax for sales within the reservation. It appears tribal officials would like to reach an agreement for the tribe to receive a designated percentage of taxes on taxable sales within the reservation. The Tax Commissioner declined to enter an agreement.

Chapter 54-40.2 would allow the Tax Commissioner to enter an agreement with the Standing Rock Sioux Tribe to perform any "administrative service, activity, or undertaking" that the Tax Commissioner is "authorized to perform by law." The Tax Commissioner is authorized by law to administer application of sales and use tax laws, within the limits of court decisions, within the Standing Rock Reservation. What the Tax Commissioner is not authorized by law to do is to compromise the state's share of the revenue collections within the reservation.

The lack of authority to compromise the state share of sales and use tax collections and the precedent established by legislative creation of authority for the Governor to enter an agreement with the Three Affiliated Tribes of the Fort Berthold Reservation regarding taxation and regulation of oil and gas exploration and production appear to be legal inhibitors to the Tax Commissioner unilaterally entering a sales and use tax agreement with the Standing Rock Sioux Tribe for sales tax collection if the agreement would include any sharing of revenues not provided by statute.

There appears to be no legal impediment for the Legislative Assembly to authorize by law the Tax Commissioner or another state official entering a state-tribal sales tax collection agreement with the Standing Rock Sioux Tribe. It appears the Tax Commissioner lacks authority to enter the kind of agreement suggested. It appears the most certain action to authorize the kind of agreement desired by the Standing Rock Sioux Tribe would be to obtain legislative authorization for the Tax Commissioner or another state official to enter such an agreement on behalf of the state. Based on the precedent of the state-tribal oil tax agreement, it appears to be advisable that such legislation should specify the allocation of sales tax revenue collections between the state and the tribe.