North Dakota Legislative Council
Prepared for the Tribal and State Relations Committee
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TAXATION OF LAND OWNED BY ENROLLED TRIBAL MEMBERS STUDY- BACKGROUND MEMORANDUM

INTRODUCTION

Section 1 of House Bill No. 1563 (2025) (appendix) directs the Legislative Management to study tribal land taxation issues related to taxation of land owned by enrolled tribal members who reside within the boundaries of any tribal reservation within the state. The study may include analysis of:

- Federal law;
- Judicial decisions concerning tribal taxation authority;
- State property tax exemptions related to property of Native Americans; and
- The interaction between tribal sovereignty and state law.

Testimony provided in support of the bill indicated the need to explore the creation of a property tax base on reservations to provide tribes with revenue to address essential services to benefit the community. Testimony also indicated the need to analyze the scope of state property tax exemptions for land owned by Native Americans.

BACKGROUND

The United States Supreme Court has classified tribes as "domestic dependent nations" who can exercise sovereignty over their territory. *Cherokee Nation v. Georgia,* 30 U.S. 1, 13 (1831). That territory is a reservation but also may be "Indian country." Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and, (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

Congress has defined the term "Indian" for a variety of purposes. Most definitions include citizens of all federally recognized tribal governments. *Cohen's Handbook of Federal Indian Law*, §4.03[4]. The United States Constitution describes Indians initially by referencing taxes. Specifically, apportionment included "free Persons… excluding Indians not taxed." U.S. Const. Art. I. However, since that time, Indian persons are now subject to federal tax law. *See* 8 U.S.C. § 1401(b); *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935). Generally, a state is without power to tax reservation lands and reservation Indians. *See County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Land Ownership Structures

In 1887, Congress enacted the General Allotment Act of 1887, or Dawes Act, which authorized the President to allot portions of reservation land to individual Indians. An allotment is a parcel of land owned by or held for individual Indians pursuant to federal law. *Cohen's*, § 4.04[2][c]. Allotments of 160 acres were made to each head of a family, with allotments of 80 acres made to others. Title to the allotted land

was to remain with the United States in trust for 25 years. Trust land is land in Indian country held by the federal government. At the end of the 25 years, the allottee was given a land patent in fee, free of encumbrance and fully alienable. *See* 25 U.S.C. § 348. Fee land is generally private property and can be owned by tribes, Indians, or non-Indians. The 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 was amended in 1906 to authorize early issuance of fee patents. *See* Burke Act of 1906, 25 U.S.C. § 349. Upon early issuance of these premature patents, the land was immediately given in fee. The Act resulted in a decline in the amount of Indian-held land from 138 million acres to 48 million acres between 1887 and 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 and terminate the trust responsibility of the federal government. There have been a number of federal acts since 1968 designed to enhance tribal self-determination, for example, the Indian Tribal Government Tax Status Act of 1982 accorded the tribes many of the federal tax advantages enjoyed by states.

State Taxation

A state is generally without power to tax reservation lands and reservation Indians without express authorization by Congress to tax. This is in part due to preemption by federal treaties and statutes. Tribes and tribal members within Indian country have been found to be immune from a variety of state taxes. *Cohen's*, §10.03[1][a]. Under the Indian Reorganization Act of 1934, Indian trust lands are exempt from state and local taxes, including property taxes. 25 U.S.C. § 5108. In North Dakota, the exemption from property tax is codified under North Dakota Century Code Section 57-02-08(4), which provides an exemption for the property of Indians if the title to the property is inalienable without the consent of the United States Secretary of the Interior. Fee land, however, is not exempt. Despite this, the preemption doctrine, and principles of tribal self-government provide barriers to forms of state taxation. *Cohen's*, §10.03[1][a].

The Supreme Court has addressed whether allotment has authorized states to impose real property taxes on lands owned in fee by tribes and individual Indians. While a state generally may be unable to tax reservation lands and reservation Indians, fee patents may differ. In 1906, the Court upheld county property taxes assessed against an original allottee. *Goudy v. Meath*, 203 U.S. 146.

However, later statutes, like the Indian Reorganization Act, which included fee land in the definition of "Indian country" created ambiguity regarding the analysis provided in *Goudy*. In *Moe v. Confederated Salish and Kootenai Tribes*, the Court held state cigarette sales tax, personal property tax, and vendor licensing fees did not apply to Indians on fee lands within the reservation. 425 U.S. 463, 479 (1976). However, in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, the Court determined all fee patents issued under the General Allotment Act, whether patented early or not, are subject to state property tax. *See* 502 U.S. 251, 254-58 (1992). The Court relied on the express language of the General Allotment Act and the Burke Act to conclude property taxes on fee lands were valid as express authorizations by Congress.

In Minnesota, a county issued taxes on lands held in fee by a tribe. The tribe had reacquired allotted lands, but the land had not been restored to trust status. *See Cass County v. Leach Lake Band of Chippewa Indians*, 524 U.S. 103, 106. The Court upheld the tax and noted the "clear intent to allow taxation" by Congress is satisfied if the allotment statute rendered the lands freely alienable, even without the express mention of taxation. *Id*. Together *Goudy*, *Moe*, and *Cass County* show Congress is presumed to authorize state taxation of real property when it renders land freely alienable. However, this does not apply if reservation land is alienable due to a treaty or other nonstatutory source. *Cohen's*, §10.03[1][b].

Generally, tribal property outside of Indian country is subject to state taxation. In *Mescalerao Apache Tribe v. Jones*, the Court upheld a state tax on a tribal ski resort operated outside the boundaries of the reservation. 411 U.S. 145 (1973). However, lands purchased by tribes can be taken into trust by the federal government for the tribe. 25 U.S.C. § 5108. These lands may not be alienated and are statutorily exempt from state and local taxation. *Id*.

Tribal Taxation

As a sovereign, taxation is an inherent power and federal authorization is not required for a tribe to tax within its jurisdiction. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143 (1982). The Court ruled a tribe may impose its regulatory, adjudicatory, or taxation authority on nonmembers in two circumstances: (1) "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; or (2) "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 565-66 (1981). The Court later narrowed the scope of permissible taxation by holding taxation of non-Indians or nontribal members on non-Indian fee lands within the tribal borders is impermissible. *See Atkinson Trading Co. v. Shirely*, 532 U.S. 645, 654 (2001). This holding does not apply to taxes related to commercial relationships between non-Indians and a tribe or its members. It also does not extend to trust land, as the Court has upheld the imposition of tribal taxes on nonmember activities on trust land. *See Cohen's*, §10.04[2][b]; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137. It remains an open question if federal trust status preempts tribal taxation of trust allotments, and no cases address the issue directly. *Id*.

STUDY APPROACH

In conducting this study, the committee may wish to receive testimony from:

- Tribal tax departments, offices, and agencies;
- The North Dakota Office of State Tax Commissioner;
- Tribal schools, regarding budgetary requirements with or without property taxes; and
- Tribes, tribal members, and other interested stakeholders.

ATTACH:1