

TRIBAL AND STATE RELATIONS COMMITTEE - BACKGROUND MEMORANDUM

North Dakota Century Code (NDCC) Section 54-35-23 establishes the Tribal and State Relations Committee. The Tribal and State Relations 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 Tribal and State Relations 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 extended the Tribal and State Relations 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.

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 in fee 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 themselves 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 please, 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 have generally 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 Indian tribes. 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 is 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. This section provides that the agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement. North Dakota Century Code 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 must also be published in any newspaper of general circulation for the benefit of any members of the tribe affected by the agreement. The notice must also 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 of the public hearing must also be published in a newspaper of general circulation published for the benefit of the members of any tribe affected by the agreement. The notice must also 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 is required to 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 is required to 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 made pursuant to Section 54-40.2-05.1 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 made under Section 54-40.2-05.1 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; or 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 60th Legislative Assembly enacted several bills relating to Indian issues. House Bill No. 1098 reduced the number of members of the Indian Affairs Commission appointed by the Governor from four to three and reduced from three members to two 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 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 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.

House Bill No. 1393 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 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 bill also 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 but the Governor vetoed the relevant section of House Bill No. 1012.

House Bill No. 1395 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 extended the effective date of the tribal-state guaranty program from June 30, 2007, to July 31, 2011.

House Bill No. 1504 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.

As described earlier in this memorandum, House Bill No. 1513 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. 2402 changed the expiration date of the committee on tribal and state relations 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 Native American Tribal Citizens' Task Force, only one individual may serve as that designee during a biennium but allows a substitute designee to be appointed by the executive director of the Indian Affairs Commission or a tribal chairman in the event of the death, incapacity, or resignation, or refusal to serve of the initial designee.

Senate Bill No. 2419 authorized the Governor to enter agreements with the Three Affiliated Tribes 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 evenly divided 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' 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.