

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

TRIBAL TAXATION ISSUES COMMITTEE

Wednesday, October 10, 2018
Roughrider Room, State Capitol
Bismarck, North Dakota

Governor Doug Burgum, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Dwight Cook, Joan Heckaman, Rich Wardner; Representatives Al Carlson, Craig Headland; Citizen Members Scott J. Davis, Ryan Rauschenberger, Brent Sanford

Member absent: Representative Corey Mock

Others present: Representative Tracy Boe, Mylo
See [Appendix A](#) for additional persons present.

It was moved by Senator Cook, seconded by Representative Carlson, and carried on a voice vote that the minutes of the December 15, 2017, meeting be approved as distributed.

Governor Burgum said the committee's goal is to advance the opportunity for collaborative tax policy with the tribal nations in the state. He said a number of productive meetings were held with tribal leaders. He thanked the Legislative Assembly for forming the committee, and tribal leaders and their staff for attending and hosting meetings. He said a stable tax and regulatory environment attracts businesses and capital, which is beneficial for all the citizens of the state. He said he looks forward to continued dialogue and efforts to move tribal-state relationships forward in a collaborative environment.

Governor Burgum called on Mr. Davis for a summary of previous meetings with tribal officials. Mr. Davis said state and tribal officials have worked hard over the past several months holding working sessions to discuss a framework for tribal-state tax agreements. He said meetings were held with representatives of the Spirit Lake Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes of the Fort Berthold Reservation, and Sisseton-Wahpeton Oyate Tribe. He said he looks forward to further discussions with the Turtle Mountain Band of Chippewa Indians. He said tribal representatives raised issues other than taxation, including K-12 funding, tribal college workforce development, law enforcement, gaming, and health care. He said he encourages tribal representatives to bring forward any issues in addition to those involving taxation. He said he was pleased the tribal-state relationship address has been reinstated for the 2019 legislative session.

PROPOSED LEGISLATION

Governor Burgum called on Senator Cook for presentation of a bill draft [\[19.0314.01000\]](#) regarding the framework for tribal-state sales, use, and gross receipts tax revenue sharing agreements. Senator Cook said he enjoyed working with tribal representatives and seeing issues from their point of view. He said the Legislative Assembly understands only a tribe may impose a tax on its people and the Legislative Assembly has no say in the imposition of tribal tax. He said the most efficient way for a tribe to administer a tax it chooses to impose is to have the state administer and collect the tax. He said he is not trying to influence a tribe's decision to impose a tax, but rather remove any obstacles if a tribe elects to impose a tax. He said a primary obstacle to entering tribal-state revenue sharing agreements is the requirement for legislative approval, which can lead to delays as a result of biennial legislative sessions. He said the framework provided in the bill draft aims to remove any delays associated with legislative approval. He said he intends to introduce the bill draft during the 2019 legislative session, and requested the Legislative Council staff review the provisions of the bill draft.

The Legislative Council staff said an earlier version of the bill draft was prepared and presented by the Tax Department at the committee's previous meeting. She said interested parties were encouraged to submit comments on the draft language, which were incorporated by the department into the bill draft distributed today. She said the bill draft repeals the chapter of the North Dakota Century Code pertaining to sales, use, and gross receipts tax revenue sharing agreements between the state and the Standing Rock Sioux Tribe, and creates a new chapter pertaining to tribal-state sales, use, and gross receipts tax revenue sharing agreements between the state and any of the five tribal nations in the state. She said the language requires all transactions and activities by all persons

and entities within the boundaries of a reservation in the state be subject to the sales, use, and gross receipts tax provisions in Century Code, which are subject to future amendments by the Legislative Assembly. She said an exemption from tax is provided for tribally owned entities that solely perform a governmental function or an essential government service that directly impacts the health, welfare, or safety of the tribe and its members. She said exempt entities must be specified in the agreement entered by the tribe and the state. She said other tribally owned businesses, whose money is used in whole or in part to fund government functions or services, are not subject to the exemption. She said the tribe may not impose any additional direct or indirect fees on retailers, transactions, or activities subject to an agreement, with the exception of tribal employment rights office fees. She said the Tax Commissioner retains authority to collect, administer, and enforce the taxes imposed pursuant to an agreement. She said the tribe may receive a list of retailers located within the boundaries of the reservation and the amount of tax collected from each retailer. She said the tribe is required to protect the confidentiality of tax information received from the Tax Commissioner. She said tax revenue is shared pursuant to the terms of the agreement and any disputes relating to the agreement are subject to binding arbitration. She said the agreement must recognize the sovereign rights of the state and the tribe. She said either the Tax Commissioner, after consulting with the Governor, or the tribe may terminate the agreement at any time, with or without cause.

Senator Cook said subsection 9(b) on page 3 of the bill draft relates to Internet sales. He said North Dakota is a Streamlined Sales Tax member state and, following the Supreme Court's ruling in *South Dakota v. Wayfair, Inc.*, has the authority to require online retailers operating above certain thresholds to collect sales tax on sales delivered to North Dakota.

In response to a question from Senator Cook, Mr. Rauschenberger said the Streamlined Sales Tax Agreement requires states to submit rates and boundaries to the Streamlined Sales Tax Governing Board for use by businesses and certified services providers that collect tax. He said retailers may be coding certain sales delivered to the reservation as taxable transactions incorrectly. He said the growth in online sales increases the risk tax will be collected improperly from tribal members receiving shipments within reservation boundaries. He said a revenue sharing agreement would benefit a tribe because tax collections on online sales would be accounted for and redistributed to the tribe based on a formula. He said the formula simplifies administration of the tax because it does not require each individual sale to be tracked. He said the formula evaluates each party's propensity to spend on taxable sales and distributes revenue accordingly. He said over 1,200 retailers have registered with the state to collect sales tax and that number continues to grow.

In response to a question from Governor Burgum, Mr. Rauschenberger said Amazon collected and remitted sales tax before the Supreme Court's ruling because Amazon has a physical presence in the state. He said the tax collected on online sales is tied to the zip code to which the items are delivered. He said state and local taxes are collected in accordance with the tax rates in place at the location at which the purchased items are delivered. He said retailers are required to report the total amount of state tax collected and the total amount of local tax collected. He said retailers do not report each individual sale delivered to each individual zip code. He said applying a formula to share revenues based on each party's propensity to spend is beneficial because it removes the burden of tracking the location at which each individual item was purchased or, in the case of online sales, delivered.

In response to a question from Senator Heckaman, Mr. Rauschenberger said the Tax Commissioner is the individual who may cancel an agreement, after consultation with the Governor, because once an agreement is entered, the Tax Department is the sole agency responsible for administering the terms of the agreement. He said the tribe also has the ability to cancel an agreement, with or without cause.

In response to a question from Representative Headland, the Legislative Council staff said the provisions in the bill draft grant the Tax Commissioner authority to collect, administer, and enforce the tax subject to an agreement and the ability to audit and determine the exempt or nonexempt status of any transaction made within the boundaries of the reservation.

Senator Cook said retailers will benefit from an agreement because it eliminates the burden for retailers to determine which sales are taxable or exempt using two different sets of rules.

In response to a question from Senator Wardner, Mr. Rauschenberger said he agreed an agreement would not be revoked without good cause. He said disagreements relating to administrative provisions, which were previously spelled out in an agreement, potentially could lead to the revocation of an agreement.

In response to a question from Representative Carlson, Mr. Rauschenberger said a 1 percent administrative fee historically has been collected by the state to administer other revenue sharing agreements. He said the application of a propensity to spend formula, like the one used in Minnesota, was considered because it would reduce the administrative costs associated with programming and other items. He said the Tax Department charges an administrative fee for serving as the collection agent for other entities as well.

Senator Cook said he intends to introduce a second bill draft [\[19.0349.01000\]](#) during the 2019 legislative session to establish a framework for tribal-state revenue sharing agreements for wholesale alcohol and tobacco taxes. He requested the Legislative Council staff review the bill draft.

The Legislative Council staff said the bill draft [\[19.0349.01000\]](#) provides the framework for alcoholic beverage and tobacco product wholesales tax agreements entered between the Governor and any of the five tribal nations in the state. She said many of the provisions in the bill draft are similar to those found in the bill draft [\[19.0314.01000\]](#) pertaining to sales, use, and gross receipts tax agreements. She said the bill draft outlines the items that must be contained in revenue sharing agreements pertaining to the imposition of alcoholic beverage and tobacco product wholesales taxes. She said the manner in which revenues are shared under an agreement are determined using a formula. She said a tribe's share of revenue pursuant to the formula is equal to the amount arrived at by multiplying the tribe's enrollment figures by the state per capita amount of either alcoholic beverage wholesale taxes or tobacco products wholesale taxes collected. She said the per capita amount of alcoholic beverage or tobacco products wholesale taxes is determined by dividing the statewide collections of alcoholic beverage wholesales taxes or tobacco products wholesale taxes by the total state population, as determined by the most recent actual or estimated census data. She said the enrolled membership of a tribe must be certified to the state by September 30 of each year based on the tribe's enrollment office records, Bureau of Indian Affairs records, or other records maintained by the tribe. She said, for purposes of the formula, the enrolled membership consists only of the enrolled members residing on the portion of the reservation located within the boundaries of this state. She said revenues are deposited into the newly created tribal allocation fund and distributed to the tribe on a quarterly basis.

In response to a question from Senator Cook, the Legislative Council staff said a tribe could enter a revenue sharing agreement for one or both of the taxes in regard to the alcoholic beverage wholesale taxes and tobacco products wholesale taxes.

Senator Cook said each tax types carries its own pros and cons so it might be better if an agreement requires the collection of both tax types.

In response to a question from Representative Carlson, Mr. Rauschenberger said alcohol is taxed in accordance to a three-tier system that consists of manufacturers, wholesalers, and retailers. He said wholesalers are regulated at the state level and alcoholic beverage tax is assessed at the wholesale level on a volume basis. He said all alcohol sold in the state is subject to tax at the wholesale level regardless of where the alcohol is ultimately delivered. He said alcoholic beverage wholesale taxes are remitted to the state and amount to roughly \$8.8 million per year. He said the revenue generated from alcoholic beverage wholesale taxes is much less than the revenue generated from alcoholic beverage gross receipts taxes that would be collected pursuant to an agreement entered in accordance with the provisions in the first bill draft [\[19.0314.01000\]](#).

In response to a question from Representative Carlson, Mr. Rauschenberger said because the bill drafts pertain to different tax types, a tribe could enter a revenue sharing agreement pertaining to alcoholic beverage gross receipts taxes without entering an agreement pertaining to alcoholic beverage wholesale taxes.

In response to a question from Senator Cook, Mr. Rauschenberger said roughly \$300,000 in revenue would be distributed to the tribes if all five tribes entered a revenue sharing agreement, based on the \$8.8 million collection amount previously noted. He said, using the distribution formula in the bill draft [\[19.0349.01000\]](#), the \$300,000 in revenue would be distributed \$109,000 to the Turtle Mountain Band of Chippewa Indians, \$79,000 to the Three Affiliated Tribes of the Fort Berthold Reservation, \$53,000 to the Spirit Lake Tribe, and \$52,000 to the Standing Rock Sioux Tribe.

In response to a question from Governor Burgum, Mr. Rauschenberger said the per capita amount of alcoholic beverage wholesale taxes is \$12.61.

In response to a question from Mr. Davis, Mr. Rauschenberger said the calculation for tobacco wholesale taxes is a bit more complicated because there are untaxed cigarettes now which would be subject to tax under an agreement. He said based on a statewide collection figure of \$29 million per year, an estimated \$934,000 would be distributed if all five tribes entered a revenue sharing agreement. He said, using the \$29 million collection figure, the distribution amounts would range from \$165,000 distributed to the Standing Rock Sioux Tribe, to \$345,000 distributed to the Turtle Mountain Band of Chippewa Indians.

In response to a question from Representative Carlson, Mr. Rauschenberger said the state has a cigarette and tobacco products revenue sharing agreement with the Standing Rock Sioux Tribe. He said if the bill draft passes, the tribe would need to decide if it wishes to continue the existing agreement or enter a new agreement. He said an agreement entered pursuant to the requirements in the bill draft [\[19.0349.01000\]](#) likely would allocate more revenue to the tribe than the existing agreement that allocates revenue 87 percent to the tribe and 13 percent to the state.

In response to a question from Senator Cook, Mr. Rauschenberger said tribal-state revenue sharing agreements that resulted in all tobacco products being taxed would benefit the state from an administrative standpoint in terms of complying with requirements imposed by the master settlement agreement. He said concerns regarding untaxed cigarettes have been raised in the past as it pertains to compliance with the master settlement agreement.

Representative Carlson said the state imposes a relatively low tax of 44 cents per pack on cigarettes, which was last increased in 1993.

In response to a question from Governor Burgum, the Legislative Council staff said according to information published by the Federal Tax Administration in 2018, North Dakota is ranked 48th on the list of highest to lowest taxes imposed per pack of cigarettes. She said Georgia and Virginia impose a lower tax at 37 cents and 30 cents per pack, respectively.

In response to a question from Governor Burgum, Mr. Rauschenberger said craft brewers and local wineries that manufacture and sell their own products would be subject to alcoholic beverage taxes at the wholesale and retail level.

In response to a question from Governor Burgum, Senator Cook said he is not seeking committee action on the bill drafts. He said the language in the bill drafts likely will be modified before introduction and requested the tribes submit feedback on the bill drafts. He said comments on the bill drafts can be submitted directly, as his contact information is available on the Legislative Council's website. He said individuals who wish to discuss changes in person can reach out to Mr. Davis's office. He said tribes also can submit recommended edits to their local legislators who can work with the Legislative Council staff to prepare amendments to either bill draft. He said he hopes to have legislation in place for the Governor's signature in April.

Governor Burgum said his office and Mr. Davis's office would continue to work with tribal partners and pass along any feedback received before the introduction of the bill drafts.

STANDING ROCK SIOUX TRIBE

Governor Burgum invited comments from representatives of the Standing Rock Sioux Tribe regarding taxation and other issues affecting the tribe. He also thanked the tribe for agreeing to host K-12 task force representatives at Fort Yates to provide a better understanding of the challenges the tribe faces in regard to K-12 education.

Mr. Mike Faith, Chairman, Standing Rock Sioux Tribe, thanked the Governor and committee members for hearing the tribe's concerns and working to prepare the bill drafts presented today. He said the Standing Rock Sioux Tribe first began imposing tax in 1977. He said state-tribal memorandums of understanding and memorandums of agreement are important to the tribe. He said the tribe also has agreements with South Dakota. He said both tribal members and nontribal members use roads and other shared resources. He said citizens within the tribe's jurisdiction will benefit from these types of revenue sharing agreements and the state and tribe need to work together for the betterment of all people.

Mr. Ron His Horse Is Thunder, former Chairman, Standing Rock Sioux Tribe, said the state and tribe had an agreement regarding the collection of sales, use, and gross receipts taxes, which was in place for about 9 months. He said the agreement ended due to disagreements regarding the application of tax to sales made at the casino. He said the tribe imposes and collects its sales tax that essentially mirrors the state's tax. He said the only benefit the tribe would realize from entering a new revenue sharing agreement with the state is the ability to capture sales tax from Internet sales. He said the language in the bill draft [[19.0314.01000](#)] pertaining to sales and use taxes provides a good framework for future tax collection agreements, but raises a few concerns. He said the tribe's three main concerns pertain to the language referring to the tax imposed as a state tax, the taxation of tribal entities, and provisions requiring binding arbitration.

Mr. His Horse Is Thunder said the bill draft language would lead tribal members to believe they are subject to a state tax, rather than having the state collect a tribal tax on the tribe's behalf. He said language clarifying the tax is a tribal tax and acknowledging the tribe's right to tax as a sovereign nation would be preferred. He said in regard to the tax treatment of tribal entities, the tribe finds the language requiring a tribally owned entity to perform an essential government service to be exempt objectionable. He said the language excludes from the exemption tribally owned entities whose revenue is dedicated in full back to the tribe. He said the tribe has a number of businesses whose revenue goes back to the tribe, which may not be seen as providing an essential government service. He said the tribe has a telecommunications company and a propane company that may not be deemed essential but provide a service to individuals on the reservation. He said before the establishment of a tribal telecommunications company, long-distance charges were being applied to calls made from the North Dakota portion of the reservation to the South Dakota portion of the reservation. He said while the telecommunications

company might not be deemed essential, it has benefited both members and nonmembers. He said revenues are returned to the tribe once the company turns a profit. He said the tribe's propane company also benefits those living on reservation because other propane companies will not deliver outside certain business hours or deliver propane purchases of less than \$200. He said individuals who need service outside business hours, or who cannot afford to purchase \$200 worth of propane at a time, are served by the tribally owned propane company. He said the propane company employs tribal members and returns its profits to the tribe. He said the tribe objects to tribally owned entities, with all revenue being returned to the tribe, being taxable even if the entities are not providing an essential government service. He said these companies are no different than the Bank of North Dakota and the state's tax treatment of that entity.

Mr. Davis said he agreed with the benefit of clarifying the agreement is for the collection of a tribal tax to alleviate the perception the state is imposing a tax on tribal members. He said language recognizing the tribe's sovereignty may be better placed at the forefront of the agreement. He said more specifics should be included regarding exemptions.

Senator Cook thanked the tribe for its comments and said the bill draft will look different when it is introduced. He said the new chapter provides the enabling language for entering an agreement. He said more specific language regarding the tribal tax would be contained in the text of the agreement.

Mr. Rauschenberger said additional language recognizing the sovereign rights of the tribe was added since the committee's last meeting. He said education is very important to ensure tribal members realize the state is not imposing its own tax but rather is collecting a tribal tax on the tribe's behalf.

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

Governor Burgum invited comments from representatives of the Three Affiliated Tribes of the Fort Berthold Reservation regarding taxation and other issues affecting the tribes. He thanked the Mandan, Hidatsa, and Arikara Nation for hosting the committee's previous meeting and for its recent investments to help address the disease of addiction.

Mr. Mark Fox, Chairman, Three Affiliated Tribes of the Fort Berthold Reservation, thanked the Governor and the committee members for hearing the tribes' concerns and providing a forum to communicate government to government. He said the primary goal of revenue sharing agreements is to avoid dual taxation, which is one of the biggest impediments to economic development in Indian country. He said the threat of dual taxation drives businesses and opportunities away from the reservation. He said it would be beneficial for all parties to have a discussion regarding the fundamentals of taxation and how it relates to Indian law. He said the United States Constitution says Indians are not to be taxed unless there is an agreement by the federal government allowing them to be taxed. He said he is concerned with the unlawful collection of sales tax on the reservation, which benefits the state. He said an example of this was the sales tax he was charged on a recent purchase in New Town. He said he was charged tax because he did not have the store's coded identification card designating his purchases as exempt from tax. He said it is improper for retailers to be placing the onus of proving tribal membership on the tribal member. He said retailers should assume tribal members who identify themselves as such, and are making purchases within the boundaries of a reservation, are exempt unless the retailer has a reasonable suspicion to believe otherwise. He said only then should a retailer request additional documentation to verify the exempt status of the purchaser. He said he is concerned about all the instances in which tax was imposed unlawfully on tribal members and the millions of dollars the state has received in unlawfully charged taxes over the decades. He said he will continue to press the federal government to address this issue. He said until a revenue sharing agreement is in place, the tribe has cause to go after the millions of dollars in tax revenue that has been collected by the state unlawfully.

Chairman Fox said he also is concerned about bulk fuel sales, alcohol sales, and Internet sales. He said the tribe's motor fuels revenue sharing agreement only applies to retail sales of motor fuels and excludes bulk sales of fuel. He said alcohol wholesalers also are paying a wholesale tax on alcohol delivered to retailers on the reservation. He said like bulk fuel sales, the tribe does not receive any revenue from the wholesale tax on alcoholic beverages. He said the tax is being paid outside the reservation even though wholesalers are delivering the alcohol onto the reservation. He said the tribe has delayed applying dual taxation to alcohol because the tribe is awaiting clarification from the federal government. He said the tribe historically has lost revenue on tax generated by Internet sales delivered to tribal members on the reservation. He said he is concerned with recent gaming changes and the impact those changes may have on the tribe.

Chairman Fox said the tribe has outstanding issues with the current tribal-state oil and gas revenue sharing agreement and the tax rate being changed unilaterally by the Legislative Assembly without the tribe's consent. He said the state is approaching \$2 billion in revenue under the agreement. He said the tribe could be using that

revenue for infrastructure needs, law enforcement, drug treatment facilities, and other services. He said steps need to be taken to create a more equitable distribution of the tax revenue under the agreement because the more the tribe's resources are developed, the more the state will benefit. He said he would like to see proposed legislation introduced in January. He said in regard to the two proposed bill drafts, the tribe would object to any language implying a state tax is being imposed on tribal members. He said he does not want to establish a precedence of state tax being imposed on tribal members. He said the tribe also is concerned with the treatment of tribal businesses under the agreement. He said tribal businesses that conduct all their business within the boundaries of the reservation and are owned in full by tribal members are subject to state tax because the business is incorporated. He said state taxation hinders the development of the tribe's economy. He said the tribe also objects to the arbitration clauses in the bill drafts and would prefer language similar to that found in the oil and gas agreement which provides 30 days for the parties to resolve the problem before the agreement is terminated. He said the tribe would like the opportunity to work toward an agreement with the state all year, not just during the times the Legislative Assembly is in session. He said every day an issue arising under an agreement is unresolved equals lost revenue for the tribe.

Mr. John Fredericks III, legal counsel, Three Affiliated Tribes of the Fort Berthold Reservation, said the bill drafts seek to eliminate dual taxation but also mandate certain items. He said he plans to discuss Internet sales tax allocations with Mr. Rauschenberger. He said he would like the bill drafts to provide more leeway in the negotiation process for tribally owned business and businesses owned by tribal members.

In response to a question from Senator Wardner, Mr. Myles Vosberg, Director of Tax Administration, Tax Department, said an enrolled member of any tribe making a purchase within the boundaries of any reservation is exempt from sales tax. He said retailers are required to document exempt transactions. He said if the Tax Department audits a business and finds a large percentage of exempt transactions, the auditor will request some type of record or documentation verifying the exemptions. He said some retailers issue exemption cards to streamline the checkout process for exempt entities.

Chairman Fox said the burden is being placed unreasonably on the exempt purchaser rather than the retailer. He said the majority of individuals shopping at businesses in New Town are tribal members and it is wrong to assume those individuals are not tribal members. He said it is unlikely a child or an elder will have a tribal identification card or a coded retailer card to prove the exemption. He said the burden should not be placed on the individual to prove his or her exempt status unless the retailer has reasonable cause to believe the individual making the purchase is not a tribal member.

Mr. Rauschenberger said when a retailer is granted a sales tax permit the retailer becomes an agent of the state regarding tax collection. He said it is important for a retailer to keep some record of exempted sales. He said the Tax Department has not changed any of its practices regarding audits or required anything other than a tribal identification card to verify an exempt purchase. He said use of a coded exemption card issued by a retailer is a private business decision.

In response to a question from Chairman Fox, Mr. Rauschenberger said the tax collected on a tax exempt purchase made by a tribal member is an unlawful taking of the tax. He said the Tax Department will include discussions of current practices, in addition to potential changes to the proposed bill drafts, going forward.

Ms. Cynthia C. Monteau, Director, Tax Department, Three Affiliated Tribes of the Fort Berthold Reservation, said the retailer is imposing an extra burden on the purchaser. She said it would be helpful if a representative of the Tax Department would meet with retailers on the reservation to reassure the retailers a tribal identification card is sufficient to verify an exempt sale, rather than a coded identification card. She said this would be appreciated especially if the tribe does not enter a revenue sharing agreement with the state.

In response to a question from Governor Burgum, Chairman Fox said using reasonable grounds to ask for tribal identification is comparable to a bar owner asking for identification to verify an individual is of legal age to purchase alcohol. He said an individual with gray hair who obviously is over the age of 21 would not be asked for identification, but a younger looking individual would be if the owner had reason to suspect the individual was not 21. He said retailers place an enhanced burden on the purchaser if the retailers believe they are going to get in trouble with the state if the retailers do not attach a name to every tax exempt sale.

Governor Burgum said the issue appears to be at the retailer level and he would push back on any assertion the state is trying to collect taxes unlawfully. He said the state and tribe should work together to resolve issues to compliance rules are fair and equitable.

Chairman Fox said heightened restrictions imposed by retailers are a growing and concerning trend for the tribe.

In response to a question from Ms. Monteau, Mr. Rauschenberger said, in regard to auditing collections and distributions under a revenue sharing agreement, the State Auditor reviews the Tax Department's financial statements every year and conducts a performance audit to verify whether revenues are being collected according to law. He said the audit reports are public documents.

Ms. Monteau said she is concerned about the Tax Commissioner's ability to terminate an agreement, rather than the Governor's ability to terminate. She said the language in the bill drafts waters down the relationship implied in a government-to-government agreement.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

Governor Burgum invited comments from representatives of the Turtle Mountain Band of Chippewa Indians regarding taxation and other issues affecting the tribe.

Mr. Roman F. Marcellais, Vice Chairman, Turtle Mountain Band of Chippewa Indians, thanked the Governor and the committee members for their efforts, and the tribal members for their previous comments. He said each tribe has different goals and objectives. He said the unemployment rate is 70 percent on his reservation. He said a manufacturing plant is underway which will add new jobs. He said he has concerns regarding the arbitration provisions in the bill drafts and would like government needs better defined. He said he hopes the tribe and the state can continue to work together.

Ms. Alysia E. LaCounte, Tribal Legal Counsel, Turtle Mountain Band of Chippewa Indians, said the tribe's three main concerns regarding the bill drafts center around the requirement to engage in binding arbitration to resolve disputes, the treatment of trust lands outside or adjacent to reservation boundaries, and the provisions regarding essential government services. She said legal issues arise when attempting to enforce arbitration clauses. She said in 2009 Florida attempted to enforce a gaming compact arbitration clause against the Seminole Tribe of Florida. She said the case was thrown out because an arbitration clause cannot be enforced against a tribe without a sovereign immunity waiver. She said tribes and states have a history of not being able to enforce arbitration clauses. Secondly, she said, the tribe has purchased a large amount of land adjacent to the reservation. She said the tribe has 550 acres pending in a fee to trust conversion. She said she had concerns regarding whether the language in the bill draft [[19.0314.01000](#)] pertaining to sales and use tax revenue sharing agreements would apply to sales on lands outside the boundaries of the reservation. She said the tribe would request a reference to "nontrust lands" and "trust lands outside the reservation" be included in the bill draft. She said in regard to essential functions, the reservation has a significant drug problem but lacks the revenue to build a treatment facility. She said the tribe is using gaming revenues to fund infrastructure issues. She said the tribe has a large number of children in foster care and an insufficient number of social workers. She said the tribe only has two judges to serve the entire reservation and only has one probation officer for 2,200 probationers. She said if the language in the bill draft leads to the taxation of gaming revenue, the tribes would not have sufficient revenue to meet its needs. She said the prohibition in the bill drafts on imposing any additional fees or taxes also is burdensome to the tribe. She said the tribe has considered placing a tax on plastic bottles and dedicating the revenue to meet the tribe's garbage expenses. She said the provisions in the bill draft would not allow for this additional revenue source.

In response to a question from Senator Wardner, Ms. LaCounte said the probation officer and judges are hired by the tribe and funded partially with tribal dollars and partially with federal dollars.

Dr. Lana DeCoteau, Superintendent, Turtle Mountain Community School, Turtle Mountain Band of Chippewa Indians, said the tribe also struggles with an overworked child welfare system. She said the tribe experienced issues with children disappearing and children born to parents struggling with addiction. She said in the past 2 years, 13 children born to mothers addicted to methamphetamine were abandoned at the local hospital. She said teachers struggle to meet the needs of children born into addiction who are now entering the school system. She said there are 1,569 students in grades K-12. She said the school has been trying to hire a school resource officer. She said the school has one police officer assigned to the high school, but the officer also is responsible for other needs within the community. She said the ability to use revenues from a sharing agreement to provide resources to those in need earlier and to train staff would be beneficial.

Governor Burgum said the tribe's K-12 enrollment figures places it in the top quartile of school districts in the state. He said all the larger school districts are facing challenges, but the tribe may be facing additional challenges.

Mr. Duane Poitra, Business Manager, Belcourt School District, Turtle Mountain Band of Chippewa Indians, provided testimony ([Appendix B](#)) regarding the portion of the foundation aid formula relating to at-risk students, and requested the Legislative Assembly consider increasing the weighting factor for this item from .025 to .1. He said the current weighting factor provides less than \$50 per student. He said the tribe is limited to the funds received under the foundation aid formula because it does not levy property tax. He said, including the Ojibwa Indian School,

the tribe's total K-12 enrollment is roughly 2,000 students. He said the amount of state funding received per student decreased by \$40 from the previous year. He said the graduation rate on the reservation is only 70 percent and schools are in dire need of resource officers.

Mr. Davis said the tribe's lack of taxable property creates school funding challenges the Legislative Assembly should consider when considering any changes to the school funding formula. He said the tribe also has engaged in discussions with the Department of Human Services regarding Medicaid Expansion and coordinated care agreements.

Mr. Marcellais said the tribe is working with Representative George Keiser to prepare a bill draft that would allow Medicaid funding to be reimbursed to the tribe. He said a copy of the bill draft will be sent to all the tribal chairmen and the representatives of the United Tribes Board for review.

Mr. Davis said the bill draft would be a game changer for tribes because it would allow funding to go back to the tribes to be used for treatment centers or other needs.

In response to a question from Senator Cook, Mr. Rauschenberger said the bill draft [[19.0314.01000](#)] relating to sales and use tax revenue sharing agreements would not apply to sales made on lands located outside the exterior boundaries of the reservation.

Ms. LaCounte said the tribe had considered replacing bill draft references to "reservation" with "Indian country," as defined under federal law.

Ms. Donnita Wald, General Counsel, Tax Department, said a reference to "Indian country" would be broader than a reference to activity occurring within the boundaries of the reservation. She said a variety of other designations are used in states that do not have large amounts of formally recognized reservation area. She said retailers operating within the Trenton Indian Service Area are not subject to tax. She said use of the phrase "Indian country" would be appropriate to address those pockets of land held in trust for the tribe outside the boundaries of the reservation.

In response to a question from Governor Burgum, Mr. Rauschenberger said the language in the bill drafts would not allow the state to negotiate an agreement with the tribes pertaining to activity that occurs on lands adjacent to or outside reservation boundaries.

Governor Burgum said after meeting with the top 17 school districts in the state, which represent two-thirds of the state's students, the number one issue raised by school superintendents was the lack of behavioral health resources. He said one school district reported over 400 reportable behavioral health incidents between students and teachers. He said teachers are trained to teach, not to be addiction or behavioral health counselors. He said he appreciates hearing about the particularly acute issues the tribe is facing.

Mr. Davis said a bill draft to support workforce development also will be introduced during the 2019 legislative session.

Representative Boe said \$1.5 million originally was requested last session to fund workforce development grants for tribally controlled community colleges. He said the funding amount appropriated by the Legislative Assembly in Senate Bill No. 2144 (2017) was \$500,000 from the student loan trust fund, which since has been depleted. He said he will be seeking workforce development grant funds again this legislative session.

Senator Heckaman said the state's workforce needs include the need for drivers with commercial driver's licenses. She said areas in the western part of the state have had a difficult time finding drivers to operate plows and perform other maintenance services because more competitive pay is being offered by the energy sector. She said tribal colleges on the Spirit Lake Reservation and the Turtle Mountain Reservation offer commercial driver's license programs. She said employers may want to look to tribal colleges to help fill the state's transportation needs.

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION

Governor Burgum invited comments from representatives of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation regarding taxation and other issues affecting the tribe and thanked the tribe for its investments in North Dakota.

Mr. Arnold White Junior, Councilman, Buffalo Lake District, said he will pass the two bill drafts on to the tribe's legal team for review. He said he will reply with any comments tribal representatives have concerning the bill drafts.

In response to a question from Governor Burgum, Mr. Rauschenberger said the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation is the only tribe not to enter a motor fuel and special fuel revenue sharing agreement with the state. He said the Tax Department will continue to work with the tribe toward establishing an agreement if the tribal council and tribal tax commission are interested in entering an agreement.

SPIRIT LAKE TRIBE

Governor Burgum invited comments from representatives of the Spirit Lake Tribe regarding taxation and other issues affecting the tribe. He congratulated Ms. Myra Pearson, Chairperson, Spirit Lake Tribe, her on the receipt of a significant grant award and the groundbreaking of the tribe's new treatment facility.

Mr. Douglas Yankton, Sr., Vice-Chair, Spirit Lake Tribe, thanked Senator Cook for his efforts in establishing a framework for agreements between the tribes and the state. He said he stands with the other tribes regarding previously addressed concerns, including issues regarding arbitration. He said the Spirit Lake Tribe may be interested in entering revenue sharing agreements as long as modifications are made to the language of the bill drafts and any agreements do not impact the tribe's sovereignty or its treaty. He said other issues of concern are items he has raised in the past. He said non-native individuals who rent tribal trust land are being charged property tax. He said a majority of those living on fee land, regardless of whether they are native or non-native, also are paying property tax. He said none of the revenue is returned to the tribe. He said he would like to review an agreement framework that would address this issue. He said the state also receives revenue from alcohol sold within the boundaries of the reservation, even though the reservation has been a dry reservation since 1951.

In response to a question from Senator Wardner, Mr. Yankton said only a minimal amount of property tax revenue is returned to the tribe in the form of county services. He said the tribe blades the majority of tribal roads and recently had to assume even more responsibility for tribal roads due to budgetary restraints imposed at the state level. He said the Spirit Lake Tribe resides within five counties and the tribe could address a number of issues if it could share in the property tax revenues collected within its borders. He said the tribe owns roughly 40,000 acres of its 245,000 acre reservation and about 90 percent of the 40,000 acres is placed in trust. He said there is a 3-year waiting period to convert fee land to trust land. He said the tribe has purchased about 1,200 acres of land for approximately \$1.2 million and only \$1 million worth of land has been successfully converted. He said the remaining portion in the process of being converted is being taxed even though the tribe has paid for the land in full. He said property tax should cease once the land is purchased and fully paid by the tribe.

In regard to a question from Mr. Yankton, Mr. Rauschenberger said once a business is incorporated with the state and receives the legal protections of the state afforded by incorporation, the business is required to follow the laws of the state, including requirements for collection and remittance of sales tax on purchases made by non-natives. He said this is not the case when a tribal member is running a business as a sole proprietor or when the business is incorporated through the tribe. He said those businesses are not subject to the laws of the state or required to collect sales tax because the businesses are not being afforded any protections from the state.

In response to a question from Representative Carlson, Mr. Yankton said alcohol is sold on the reservation because it is being sold in townships, which are under the county's jurisdiction. He said the reservation has some of the highest numbers of negative alcohol-related incidents in the state, yet the tribe does not receive any tax revenue to address those concerns.

In response to a question from Governor Burgum, Mr. Yankton said some individuals are entering agreements with the county to sell alcohol at certain venues, such as weddings. He said he has heard other individuals have been selling alcohol on the reservation without a license.

Mr. Yankton said the final issue he would like to address pertains to the sign that designates the reservation boundary. He said the sign continues to be moved back without explanation. He said he has tried to work with the Department of Transportation regarding the location of the sign but has been told the sign is a sign of direction, not of reservation boundaries. He said he will continue to work on an agreement with state agencies regarding moving the sign back to a mutually agreeable location more accurately based on the boundaries of the reservation according to treaty.

OTHER TESTIMONY

Governor Burgum called on Mr. Jim Silrum, Deputy Secretary of State, for testimony regarding voting. He said the October 9, 2018, United States Supreme Court ruling upheld the validity of North Dakota's voter identification requirements that require identification provided at the polling place, or when voting by mail or absentee ballot, contain a residential address. He said a post office box does not qualify as a residential address for voting purposes.

In response to a question from Representative Carlson, Mr. Silrum said legislation was enacted during the 2017 legislative session to address concerns raised in the courts regarding ballots being counted for individuals who could not prove their residential address. He said the legislation sought to establish election integrity to ensure those casting ballots are qualified to do so. He said the identification required for voting purposes may be a driver's license, a nondriver identification, or a tribal identification. He said a tribal identification must contain the individual's name, date of birth, and residential address and can be issued by the tribe or the Bureau of Indian Affairs. He said a tribal identification, whether submitted by the individual or the tribe in card or letter form, will be accepted as long as it contains the required three elements. He said an individual who does not possess the necessary identification before voting can mark a set-aside ballot at the individual's polling location. He said the individual who returns to the polling place with the proper identification or supplemental information, or provides the proper identification or supplemental information to the county auditor's office before the meeting of the county canvassing board, will have his or her ballot counted. He said a memorandum has been sent to all tribal leaders and a poster regarding voting identification requirements is being published in all of the newspapers in the state this week and in the next 2 weeks leading up to the November election.

Representative Carlson said he wanted to stress that the intent of the legislation was never to disenfranchise voters but rather to verify that voters resided in the district in which the voters were casting their ballots. He said the goal was to maintain the integrity of elections.

In response to a question from Governor Burgum, Mr. Silrum said if tribal leaders encounter anyone who does not have a residential address, the process of obtaining the individual's address is as simple as calling the county 911 coordinator. He said the county 911 coordinator maintains a residential address for every structure in the county and can provide documentation regarding an individual's residential address that can be used to supplement a tribal identification that does not contain a residential address.

In response to a question from Senator Heckaman, Mr. Silrum said county 911 coordinators and county auditors can send residential address documents and absentee ballots to post office box addresses. He said absentee ballots often are sent to post office boxes considering the large number of residents that move south during the winter months.

Governor Burgum called on Ms. Erica Thunder, Judicial Systems Administrator, Indian Affairs Commission, and Ms. Jenna Clawson Huibregtse, State Trooper and Cultural Liaison Officer, North Dakota Highway Patrol, for testimony regarding potential changes to language pertaining to federal law enforcement officers in Century Code.

Ms. Thunder said she has worked with Ms. Clawson Huibregtse regarding some potential items that could be addressed during the upcoming legislative session. She said the first item pertains to the definition of a "federal agent" in Section 29-06-05.2. She said employees of the Bureau of Indian Affairs (BIA) law enforcement agency were not included in the definition, possibly as an oversight.

Ms. Clawson Huibregtse said the practical effect of these individuals being excluded from the definition is the BIA law enforcement officers are not covered by the immunity and liability insurance applicable to other peace officers in this state when rendering assistance to a peace officer upon request or in an emergency situation. She said adding language pertaining to BIA officers would allow officers on either side of the line between state and tribal lands to cross over and render assistance to another officer in need while retaining liability protection. She said the additional language would not result in any changes to state or tribal jurisdiction.

Ms. Thunder said the second item concerns Section 12-63-02.2 and the recognition of tribal police officers as peace officers or part-time peace officers by the Peace Officer Standards and Training Board.

Ms. Clawson Huibregtse said the curriculum required to obtain licensure as a peace officer is being compared to that required to become a tribal police officer to identify variations between the standards currently in place. She said Section 12-63-02.2 outlines various requirements that must be met before a tribal police officer may be licensed as a peace officer or a part-time peace officer. She said these requirements may be more complex than needed considering some tribal police officers require more extensive training than state peace officers.

Mr. Davis said these two items highlight potential areas for which language in Century Code could be clarified in the spirit of encouraging mutual aid between the counties, the state, and the tribes.

Chairman Faith said it would be important to discuss these issues with each of the five tribes to ensure consistency and to clarify neither party is giving up its jurisdiction. He said his tribe also requires a two-thirds vote before any cross-deputization can occur.

Mr. Davis said the intention is to ensure BIA law enforcement is recognized as a federal law enforcement agency in this state.

Representative Carlson said it would be advantageous for the tribes and the state to come to an agreement on issues that benefit public safety.

Chairman Fox said it may be easier to insert a blanket statement regarding federal agencies rather than listing each federal agency. He said the cross-deputization Chairman Faith was alluding to is in relation to Public Law 93-638, which allows a tribe to contract with the federal government to operate programs serving their tribal members. He said the Mandan, Hidatsa, and Arikara (MHA) Nation contracts for law enforcement and has created its own drug enforcement agency outside of Public Law 93-638 to address violence and drug use resulting from oil and gas development. He said over the last 2 years, the MHA Nation's drug enforcement agency has made nearly 600 drug-related arrests. He said this progress has required cooperation with other state, county, and federal agencies through memorandums of understanding and agreements. He said the MHA Nation has entered a model joint law enforcement agreement with McLean County with additional counties considering following suit. He said agreements seem to work well as long as jurisdictional details are clearly defined. He said he encourages the Legislative Assembly to take a stronger and more formal stance in endorsing and enhancing joint law enforcement agreements to promote the safety of all citizens.

Governor Burgum thanked the committee for its work and the tribes' engagement during the interim. He said he looks forward to receiving additional input from the tribes leading up to and during the legislative session.

It was moved by Representative Carlson, seconded by Senator Cook, and carried on a voice vote that the legislative committee members and the Legislative Council staff be requested to prepare a report and present the report to the Legislative Management.

It was moved by Senator Cook, seconded by Representative Carlson, and carried on a voice vote that the committee be adjourned sine die.

No further business appearing, Governor Burgum adjourned the committee sine die at 2:05 p.m.

Vonette J. Richter
Legal Division Director

Emily L. Thompson
Code Revisor

ATTACH:2