

MINUTES: Committee on Tribal & State Court Affairs

(Unofficial until approved)

November 4, 2022 at 10:00 a.m.

Zoom

Members Present:

Justice Jerod Tufte, Chair, North Dakota Supreme Court

Judge Anthony Swain Benson, Northeast Judicial District

Judge Joseph Vetsch, Spirit Lake Nation Tribal Court

Kevin Hagen, Standing Rock Tribal Court, Probations

Sharon Thompson, Circling Eagle Law, Fargo

BJ Jones, Director, Tribal Judicial Institute

Michelle Rivard Parks, Assistant Director, Tribal Judicial Institute

Judge Madonna Marcellais, Turtle Mountain Band of Chippewa Tribal Court

Erica Thunder, DOCR

Members Absent:

Judge David Christensen, MHA Nation Tribal Court

Judge Michael Swallow, Standing Rock Tribal Court

Mandy Davis, Turtle Mountain Band of Chippewa Tribal Court, Juvenile Clerk

Scott Hopwood, Director of Juvenile Court Services, Unit 4

Nathan Davis, Executive Director, Indian Affairs Commission

Judge Ruth Hopkins, Chief Judge, Sisseton-Wahpeton Tribal Court

Kelly Swenseth, Devils Lake

Others Present:

Sara Behrens, Staff

Lorraine Davis, Native Inc.

Lisa Bjergaard, DOCR

Judge Daniel Traynor, United States District of North Dakota

Lorraine Davis from Native, Inc. was present to discuss an externship program. She discussed the programs they have available currently. She explained she had attended a conference in Grand Forks where she spoke with Justice McEvers who suggested she reach out to UND and BJ Jones to discuss the creation of an externship program for lawyers because there is an insufficient number of Native Americans working in the court system.

BJ Jones explained that he and Ms. Davis spoke with Patricia Hodny about placing students with district court judges and tribal court judges. We want to make sure our Native American students could do an externship with one of the judges in the areas with a larger Native American population or with a tribal court. Native American students and non-Native students working on the Indian Law Certificate would be the target groups.

Ms. Parks explained that the number of Native American students enrolled ebbs and flows but they have had more students seeking the Indian Law Certificate as part of their educational goals. Part of the purpose of the certificate is to expand knowledge and understanding of Indian law issues, communities, and tribal law irrespective of peoples' identities and backgrounds. They have seen those with the Indian Law Certificate take a variety of career paths. Two recent non-Native students have been hired by a tribal government to work in the legal department. Erica Thunder is a graduate with an Indian Law Certificate. It's helpful in reducing the learning curve and the cooperative work between the state and the tribes.

Judge Traynor mentioned that the federal courts in Fargo and Bismarck take externs during the summer as does the U.S. Attorneys' office. They are starting a remote externship in January at the Grand Forks courthouse. The expectation is that the externs will work 15 hours a week. The plan is to have the remote externship each semester and in person during the summer. It isn't targeted towards Native American students but they can certainly be directed to apply for it.

Ms. Davis explained the purpose of getting the Native American students into state courts is to make that connection on behalf of their clients. The cultural understanding is important. They are also working with public schools to get Native youth streamlined into the center here. BSC is also coming to Native, Inc. to deliver career readiness. UND can promote the law school through Native, Inc. Her email is lorraine@ndnadc.org

Justice Tufte asked that Ms. Davis keep us updated as she progresses through the concept of the extern program. He noted that if she needs some court data we can assist. Ms. Thompson invited Ms. Davis to speak at the next Indian Law Section meeting to give her a chance to get in front of attorneys who may offer clerk positions. Her law firm is hiring law clerks.

A quorum was achieved and Justice Tufte directed members' to the minutes from the previous meeting. Mr. Hagen had one correction to his title. BJ Jones moved to approve and Ms. Thompson seconded. The motion carried.

The next item is discussion of the U.S. v. Cooley decision. Justice Tufte noted that the North Dakota Supreme Court had a situation come up on this topic recently in State v. Suelzle. The issue in Cooley is whether a tribal police officer has authority to detain a non-Indian on the public right-of-way through the reservation. It typically comes up in DUI cases. In Suelzle, they determined that MHA Nation had inherent power to exercise authority over a non-Indian because it fell under one of the MT exceptions relating to health and welfare of the tribe.

BJ Jones explained that if you read *Cooley*, it not only says that tribal officers have authority to detain but also the authority to do a Terry frisk and search of the vehicle. In *Cooley*, the person was just sitting along the highway. Firearms, drugs, etc. had been thrown out of the vehicle. *Cooley* is very broad in authority of tribal law enforcement. It can be read to allow detention at the tribal jail until other law enforcement shows up. It's strong endorsement of tribal inherent authority. Justice Tufte noted the Supreme Court did discuss concerns of non-Indians being subject to tribal criminal authority when they had no say in the laws and regulations governing the reservation. Detention authority doesn't ultimately subject the individual to tribal law or tribal prosecution but the individual can be detained for a reasonable period of time while waiting for authorities. How long is reasonable is probably an open question. Ms. Parks commented that discussions have been had whether tribal protection officers would constitute law enforcement with authority under *Cooley*. It gets more complicated when we see tribal special jurisdiction unfold under VAWA. She and BJ Jones are also part of the intertribal workgroup on the national level.

The next item is discussion of the case *Oklahoma v. Castro-Huerta*. Castro-Huerta was a non-Indian who committed a serious crime against a Native child. He was thought to be outside Indian Country until the *McGirt* case said it is Indian Country. The Supreme Court found that nothing under the General Crimes Act preempts the state court from prosecuting non-Indians committing crimes against Indians in Indian Country. Many think this is a terrible case, however, tribal police are happy the state can prosecute these individuals. The concern is that it will be interpreted to give states more authority in Indian Country. The only issue in North Dakota is that Standing Rock and Sisseton Wahpeton tribes use the special authority. On those reservations since the tribes have inherent right to prosecute for domestic violence, he thinks under *Castro-Huerta* the tribe would have authority and the state wouldn't, but he doesn't think the other tribes have decided to exercise that jurisdiction. A lot of the victims of these crimes were probably treated at Indian Health Service and the state likely won't be able to easily get those records. Some witnesses will be difficult to subpoena so it would require a lot of cooperation. The perception has been that federal courts are not doing a good job of prosecuting misdemeanor cases and this is seen as a chance for Native victims to get some justice. There is no victim of crime money when the tribe prosecutes, but there may be some available through the state so it can hopefully make it positive.

Justice Tufte noted a common misconception is that if the state can prosecute only the state can but if they are separate sovereigns they can prosecute different offense on same set of facts. To the extent we have an offense that can be prosecuted by the state and the tribe, how do we work out how goes first or who should?

Ms. Parks also works for Spirit Lake and they have a statute that has been around forever which was passed at a time we didn't have a recognized tribal court system. They asked for assistance and the response by the federal government was one line saying the state can prosecute concurrent jurisdiction on misdemeanors happening on the reservation. The state very seldom

got involved or exercised concurrent jurisdiction and Spirit Lake often had to pressure the state to do so especially when the defendants were teenagers. Native teens were held accountable by tribal court and non-Native teens were not being held accountable. The misconception is if the state has concurrent jurisdiction then the state will come in and grab all the authority when the reality is that most states don't want to increase their caseload significantly. We've talked to the States' Attorney Association about bringing some of these issues to their conference as a round table discussion. She's been trying to get the statute repealed for a decade and this decision doesn't help. BJ Jones knows the federal government has a policy that they won't generally prosecute a case that is already being prosecuted by the state and the feds haven't applied the same to the tribes because the tribes have restricted sentencing. It's up to the prosecutor what happens. Ms. Parks wants to make sure the prosecutors have a good understanding of VAWA and jurisdiction over domestic violence cases. Justice Tufte suggested Kevin Hagen could talk with Parole and Probation. Mr. Hagen explained they have been able to get the criminal judgments and plea agreements from Standing Rock and use them as a violation of Appendix A. As long as they can get the proper documentation it has never been an issue. Ms. Parks noted that another big decision is coming: Brakeen case.

Justice Tufte asked if cross-deputization is less necessary now. Ms. Parks said no, in some cases it probably increases the need. The questions are still open as to who has jurisdiction and authority in the field. This is prompting a discussion of entering into those agreements to iron out some of the issues so we don't have to make judgment calls at three in the morning. In ND we're far better off than a lot of states across the country as far as state and tribal relations. Last year we had a lot of progress on law enforcement cooperative agreements. She's been involved in some of the drug task force agreements and some of those agreements eliminate those questions. Ms. Thunder thinks we will need to make sure everything is spelled out because they rulings are causing more anxiety.

The final issue on the agenda is Federal Exhaustion of Tribal Remedies. BJ Jones asked for this to be on the agenda and he's in court now and Justice Tufte doesn't know where he had hoped the discussion would go. Ms. Parks has an idea but she doesn't know if she should be a big part of the discussion since she is serving as Chief Justice of MHA Nation. We're seeing it on the economic front and not so much in criminal cases. Cases are being filed in tribal court and federal court at the same time. (*National Farmers Insurance v. Crow*). If the action arises in Indian Country the tribe should have first chance before we get to federal court. This seems to have changed in recent years. They question whether it's worthwhile to drag out the tribal analysis or whether we should just go to federal court. There are issues of field preclusion particularly in oil and gas cases. Those are some of the bigger issues coming through the MHA Supreme Court. She doesn't know where BJ wanted to take the discussion. Judge Traynor gets many of those questions here so he isn't comfortable being part of the conversation and would prefer to not comment.

Ms. Parks noted that there has been a tremendous amount of growth in infrastructure of tribal courts and it's important to educate others on that and the tribes need to keep investing in tribal courts and infrastructure because we are part of the landscape making up the courts of this nation. It's important to keep having these discussions. The Oliphant case had a litany of why non-Indians should not be subjected to non-tribal jurisdiction. A lot of the points have now been overcome by the strides made in tribal courts. There are close to 576 federally recognized tribes and not all of them even have a tribal court. North Dakota is doing pretty well.

Justice Tufte asked Staff to carry this topic over to the next agenda and directed anyone having suggestions for agenda items to raise them now or e-mail him or Staff.

Ms. Thunder would love to talk more about her new role with the DOCR as the Director of Diversity and Culture and see what the needs are. It's a new position that she is developing from the ground up so she is open to suggestions.

Ms. Parks would like to have a more concrete understanding of existing law enforcement agreements that are out there. She may have a list a student worked on but it would be a good idea to make sure we have a good understanding. Ms. Thunder volunteered to look into that and Mr. Hagen and Tom Erhart with the DOCR may also be helpful with that. Justice Tufte asked that Ms. Thunder collect those and send them to Staff.

Having no further business, the meeting was adjourned.