

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**DEC 20 2017**

Harold J. Olson, )  
)  
Appellant, )  
)  
vs. )  
)  
North Dakota Department of )  
Transportation, )  
)  
Appellee. )

STATE OF NORTH DAKOTA

**Supreme Court No. 20170351**

**District Court No. 31-2017-CV-00113**

.....  
**APPEAL FROM THE DISTRICT COURT  
JUDGMENT DATED SEPTEMBER 26, 2017  
MOUNTRAIL COUNTY, NORTH DAKOTA  
NORTH CENTRAL JUDICIAL DISTRICT**

**HONORABLE RICHARD L. HAGAR**

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**BRIEF OF APPELLEE**

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State of North Dakota  
Wayne Stenehjem  
Attorney General

By: James E. Nicolai  
Deputy Solicitor General  
State Bar ID No. 04789  
Office of Attorney General  
500 North 9th Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [jnicolai@nd.gov](mailto:jnicolai@nd.gov)

Attorney for Appellee

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## **STATEMENT OF THE ISSUES**

[¶1] Whether Deputy Maloney had authority to assist with a law enforcement investigation and arrest within the boundaries of a tribal reservation pursuant to N.D.C.C. § 44-08-20(3).

[¶2] Whether federal law preempts enforcement of a state's civil/regulatory laws within the boundaries of a tribal reservation when the offender is a nonmember Native American.

## **STATEMENT OF THE CASE**

[¶3] Appellant Harold Olson appeals from an administrative agency decision that revoked his driving privileges for a period of two years. The civil/regulatory proceedings against Olson arose out of an investigation by a Mountrail County Deputy Sheriff on the Fort Berthold Indian Reservation after the officer received a request for assistance from another law enforcement agency, i.e., a tribal police officer from the Three Affiliated Tribes police department.

[¶4] The administrative hearing officer found the deputy sheriff had authority to assist in the investigation pursuant to N.D.C.C. § 44-08-20(3) and the district court affirmed that decision.

[¶5] Olson appeals to this Court contending the deputy sheriff lacked authority to assist in the investigation under federal law. In response, the North Dakota Department of Transportation asserts that the strong interests of the State in enforcing its traffic laws in civil/regulatory proceedings does not infringe on the Three Affiliated Tribes' self-governance where Olson – although a Native American – is not a member of the Three Affiliated Tribes.

## STATEMENT OF THE FACTS

[¶6] On May 13, 2017, around or after midnight, Officer Klave from the Three Affiliated Tribes police department detained Olson because a caller had stated that Olson was parked in the middle of the road and asleep at the wheel. Transcript (Tr.) 4, line (l.) 14 – Tr. 5, l. 3; Tr. Ex. 1b. The incident occurred within the boundaries of the tribal reservation. Tr. 13, ll. 3-7. At the time, Olson did not have identification as an enrolled member of a tribe and he told Officer Klave that he was not an enrolled Indian, so Officer Klave called Deputy Maloney, a law enforcement officer from the Mountrail County Sherriff's Department, to conduct the DUI investigation. Tr. 11, l. 21 – Tr. 12, l. 21. At the hearing, however, Olson identified himself as a Chippewa native from Turtle Mountain. Tr. 14, ll. 22-23. The Turtle Mountain Band of Chippewa is a distinct and separate tribe from the tribes that live within the boundaries of the land where Olson was detained. Id.

[¶7] Olson testified he did not have his tribal identification with him when he spoke to the officers. Tr. 16, ll. 10-12. He stated, "All I can remember is them saying about the enrolled member and I'm pretty sure that I said yes. But I do not have my ID ... tribal ID on me." Id. Later, when the hearing officer inquired whether Officer Klave had asked him if he was an enrolled member Olson added, "Yes, and no. I'm saying that I had talked to him. I did not have my ID with me." Tr. 18, ll. 23-24.

[¶8] When Deputy Maloney made contact with Olson, he smelled "a strong odor of what appeared to be an alcoholic beverage." Tr. 7, ll. 16-17. Deputy Maloney asked Olson if he had been drinking, but Olson did not respond. Tr. 7, l.

24 – Tr. 8, l. 3. Deputy Maloney administered the horizontal gaze nystagmus test to Olson, who exhibited six out of six clues, indicating alcohol impairment. Tr. 8, l. 24 – Tr. 9, l. 20. Deputy Maloney had intended to administer the walk-and-turn and the one-legged stand tests, but did not because Olson was having trouble standing. Tr. 9, l. 22 – Tr. 10, l. 8. Deputy Maloney then placed Olson under arrest for driving under the influence of alcohol. Tr. 10, ll. 8-13. Deputy Maloney read Olson his Miranda rights and the North Dakota implied consent advisory. Tr. 16-18. Deputy Maloney requested Olson submit to a chemical breath test and Olson refused. Tr. 10, l. 20 – Tr. 11, l. 8. On May 13, 2017, Deputy Maloney issued Olson a Report and Notice that indicated Olson's refusal to take a chemical breath test. Tr. 4, ll. 6-8; Tr. Ex. 1b.

[¶9] An administrative hearing was held on June 8, 2017, to determine whether Olson's North Dakota driver's license should be revoked. Tr. 1, ll. 5-6; Tr. Ex. 2. At the hearing, Olson contended that Deputy Maloney was acting outside his jurisdiction as the offense occurred within the boundaries of a tribal reservation. The administrative hearing officer found, however, that Deputy Maloney was acting under a singular request for assistance from the Three Affiliated Tribes Police Department, and therefore had authority to assist in the investigation pursuant to N.D.C.C. § 44-08-20(3). Appendix (App.) 3.

[¶10] Olson appealed the hearing officer's decision to district court. App. 1, at Docket ID# 1. The district court agreed with the hearing officer's determinations that Deputy Maloney was responding to an expressed request for assistance from the Tribe, and he therefore had authority under state law to assist in the



investigation and the arrest that gave rise to the subsequent civil/regulatory proceedings involving Olson's driver license. App. 4-7.

[¶11] Olson filed a timely appeal with this Court. App. 9. On appeal, Olson does not challenge whether the facts of this case fall within the statutory parameters set forth at N.D.C.C. § 44-08-20(3). Rather, Olson challenges only whether federal law supplants the Deputy's state-law-based authority to assist in Olson's investigation and arrest.

### STANDARD OF REVIEW

[¶12] This Court reviews the administrative revocation of a driver's license under the standards set forth in N.D.C.C. § 28-32-46. Castillo v. Levi, 2016 ND 253, ¶ 8, 888 N.W.2d 190, 192-93. The Court must affirm the agency's decision unless it determines one of the eight enumerated items set forth in the statute is present. Id.

[¶13] In applying § 28-32-46, the Court does "not make independent findings of fact or substitute [its] judgment for that of the agency." Id. (citing Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979)). "We determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Power Fuels, 283 N.W.2d at 220. "An agency's conclusions on questions of law are subject to full review." Castillo, 2016 ND 253, ¶ 8 (internal quotation marks and citations omitted).

## LAW AND ARGUMENT

I. **Deputy Maloney had authority to assist with a law enforcement investigation and arrest within the boundaries of a tribal reservation pursuant to N.D.C.C. § 44-08-20(3).**

A. Olson does not contend Deputy Maloney's authority fell outside the statutory parameters of N.D.C.C. § 44-08-20(3), but only whether that authority was preempted by federal law.

[¶14] Significantly, the only issue Olson raises in his statement of issues on appeal is whether federal law supplants the authority that Deputy Maloney enjoys under state law pursuant to N.D.C.C. § 44-08-20(3). See Appellant's Br. ¶ 1.

[¶15] In other words, absent his argument that federal law preempts state law, Olson does not contend that the statutory prerequisites found within N.D.C.C. § 44-08-20(3) would not otherwise apply to the circumstances involved in this case.

[¶16] As a consequence, any factual contentions that Deputy Maloney's assistance in the investigation and arrest fell outside the statute's provisions, or legal contentions regarding the interpretation of the statute itself, have been waived. See, e.g., Midthun v. N. D. Workforce Safety & Ins., 2009 ND 22, ¶ 7, 761 N.W.2d 572, 575 ("When a party does not enumerate an issue in their specifications of error, we will not consider that issue on appeal.").

B. State law gave Deputy Maloney authority to respond to another law enforcement agency's request for assistance as to the particular and singular event involving Olson.

[¶17] Even if Olson has not waived all legal or factual contentions regarding the application of N.D.C.C. § 44-08-20(3), it is clear that state law gave Deputy Maloney the authority to respond to a tribal law enforcement agency's request for assistance under the facts of this case.

[¶18] The hearing officer concluded that N.D.C.C. § 44-08-20(3) “extends the power of law enforcement to act anywhere within the state of North Dakota upon a request to assist.” App. 3. She explained that Deputy Maloney responded to “an expressed request for assistance from the Tribe, and complied with the Tribes request for further investigation. This is in accordance with the Tribes usual practice, when they have detained a non-enrolled tribal member.” Id.

[¶19] The agency’s findings should not be disturbed unless they are against the greater weight of the evidence. Voigt v. N.D. Pub. Serv. Comm’n, 2017 ND 76, ¶ 9, 892 N.W.2d 149, 152; see also Bollin v. N.D. Dep’t of Transp., 2005 ND 91, ¶ 8, 696 N.W.2d 527 (“We give great deference to the Department’s findings of fact.”)

[¶20] A number of this Court’s prior decisions support Deputy Maloney’s actions and the premise that N.D.C.C. § 44-08-20(3) permits law enforcement officers to provide aid and assistance outside of their jurisdictions on a temporary, non-continuous basis when responding to requests from law enforcement in those jurisdictions. See State v. Beilke, 489 N.W.2d 589, 592 (N.D.1992) (holding that neighboring law enforcement agencies may assist one another in times of need); State v. Demars, 2007 ND 145, ¶ 10, 738 N.W.2d 486 (“This Court has also recognized that city police officers have jurisdiction to stop vehicles and arrest individuals outside of their geographical jurisdiction when responding to requests from another law enforcement agency for aid and assistance.”); State v. Graven, 530 N.W.2d 328, 330 (N.D.1995) (holding that although the officer’s observation and stop of defendant’s vehicle occurred outside of the officer’s geographical

jurisdiction, the officer still had jurisdiction where he was requested by a state trooper to stop the suspect's vehicle); Mead v. N.D. Dep't of Transp., 1998 ND App 2, ¶ 12, 581 N.W.2d 145 (holding peace officer who responded to a request from another law enforcement agency for assistance had authority to complete the investigation and make an arrest); Kroschel v. Levi, 2015 ND 185, ¶ 19, 866 N.W.2d 109, 115-16 ("Under section 44-08-20(3), additional powers of peace officers permit giving assistance only by request, and only for a particular instance.").

[¶21] Olson cites Kroschel v. Levi for the general proposition that a police officer acting outside his territorial jurisdiction is without power to arrest a driver. Appellant's Br. ¶ 12. Kroschel is inapposite. In Kroschel, the North Dakota State University (NDSU) and the Fargo Police Department entered into a Memorandum of Understanding (MOU) allowing certain NDSU police officers to have police authority throughout the city of Fargo. Kroschel, 2015 ND 185, ¶ 3. The MOU was not based on N.D.C.C. § 44-08-20(3), the statute applicable here. Id. Acting under this blanket authority, an NDSU police officer stopped and arrested Kroschel for driving under the influence of alcohol. Id. at ¶ 2. The Court held that the applicable law in that case, N.D.C.C. § 44-08-24 on interagency cooperation, "only applies to temporary assistance and exchange of officers in unique situations and not on an ongoing basis." Id. at ¶ 36.

[¶22] Here, Deputy Maloney responded to another law enforcement agency's request for assistance on a particular and singular event involving Olson. As such, his actions fall squarely within the parameters of N.D.C.C. § 44-08-20(3).

**II. Federal law does not preempt enforcement of state civil/regulatory laws within the boundaries of a tribal reservation when the offender is a nonmember Native American.**

[¶23] The only issue Olson raises on appeal is whether Deputy Maloney's otherwise lawful authority under N.D.C.C. § 44-08-20(3) is preempted by federal law because it infringes on tribal law regulating traffic on the Fort Berthold Indian Reservation. See Appellant's Br. ¶ 1.

[¶24] Although this Court has not had the opportunity to consider whether federal law preempts the enforcement of civil/regulatory traffic laws within the boundaries of a tribal reservation when the offender is a nonmember Native American, other courts have. In State v. Davis, 773 N.W.2d 66 (Minn. 2009), the Supreme Court of Minnesota addressed the same issues this Court must address here, and laid out a well-reasoned and thorough road map for this Court to follow.

[¶25] Similar to these facts, Davis involved civil/regulatory proceedings brought against David Michael Davis, a Native American registered with the Leech Lake Band of Chippewas, arising from a traffic stop that occurred on the Mille Lacs Reservation. Id. at 67-68. Davis argued the state courts did not have jurisdiction over his alleged traffic violations because, although he was not a member of the Mille Lacs Band of Chippewas, he was nevertheless "an Indian who committed an offense in Indian Country . . . and that therefore only the tribal court had jurisdiction" over his offenses. Id. at 68.

[¶26] In relevant part, Davis first noted that – with respect to laws classified as civil/regulatory in nature – there is no express delegation of jurisdiction from

Congress to the states over matters committed on Indian reservations. Id. at 69 (citing Bryan v. Itasca Cty., 426 U.S. 373, 384-86 (1976)). This case, like Davis, involves a law classified as civil/regulatory in nature. The underlying regulatory law at issue is N.D.C.C. § 39-20-05, which does not impose any criminal penalties against Olson but merely regulates his driving privileges within the State of North Dakota.

[¶27] Consistent with the United States Supreme Court's decision in Bryan, there is no express delegation of jurisdiction from Congress to North Dakota over the matters at issue in this case.

[¶28] Second, the Minnesota Supreme Court said “[i]n the absence of an express delegation of jurisdiction from Congress, courts engage in a preemption analysis [that] balances the federal interests of promoting tribal sovereignty and Indian self-governance and autonomy and any state interests in order to determine whether the state law at issue may operate.” Id. (citing Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 884 (1986)); see also Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 392 N.W.2d 87 (N.D. 1986) (recognizing, pursuant to the United States Supreme Court's decision in Three Affiliated Tribes, that North Dakota cannot disclaim all jurisdiction over matters arising on reservations). Davis also stated a state's civil/regulatory law should be preempted “if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” Id. at 72 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

[¶29] Consistent with the United States Supreme Court's decisions in Three Affiliate Tribes and Cabazon, this Court should engage in a preemption analysis that balances the federal interests of promoting tribal sovereignty against North Dakota's interests in enforcing the civil/regulatory laws that regulate driving privileges within the State of North Dakota, to determine whether the state interests at stake are sufficient to justify the assertion of state authority.

[¶30] Third, the Minnesota Supreme Court recognized "that the State has a strong interest in ensuring traffic safety on state highways." Id. (citing State v. R.M.H., 617 N.W.2d 55, 65 (Minn. 2000)). The Court then reaffirmed "that the State retains that strong interest" and that "[p]rosecuting Davis in state court for conduct that occurred on a state highway allegedly in violation of state traffic laws furthers this strong interest." Id.

[¶31] Similarly, this Court should recognize that North Dakota has a strong interest in ensuring traffic safety on state highways by regulating the driving privileges of the citizens to whom it issues a driver's license, like Olson. In addition, permitting the state to revoke those driving privileges for conduct that occurs on a state highway in violation of state traffic laws furthers this strong interest.

[¶32] Finally, the Davis court "consider[ed] whether enforcing Minnesota traffic laws against Davis in state court interferes or is incompatible with federal and tribal interests." Id. (internal quotation marks and citation omitted). The Minnesota Supreme Court then focused directly on Davis's nonmembership in the Mille Lacs Band of Chippewas, noting:

Thus, if Davis were a member of the Mille Lacs Band, the interest in tribal self-governance would be directly served through the Band's enforcement of its laws against one of its members in its tribal court for conduct that occurred on the reservation. But Davis is not a member of the Mille Lacs Band and so operation of state law to Davis' on-reservation conduct does not infringe on the Band's self-governance. . . . Thus, prosecution of Davis in state court for violation of state traffic laws committed while driving on a state highway does not interfere with and is not incompatible with the [Minnesota Chippewa Tribe's] interest in self-governance.

Id. at 74.

[¶33] Similarly, this Court should focus on Olson's nonmembership in the Three Affiliated Tribes, and conclude that the application of state law to Olson's conduct on the Fort Berthold Indian Reservation does not infringe on the Three Affiliated Tribes' self-governance. Consequently, permitting the state to revoke Olson's driving privileges through these administrative proceedings is not incompatible with the Three Affiliated Tribe's interest in tribal self-governance.

[¶34] Indeed, the conclusion that this regulatory administrative proceeding against Olson does not infringe on tribal self-governance is even stronger in this case than in Davis. Davis, although not a member of the Milles Lacs Band of Chippewas, was nevertheless a member of the Minnesota Chippewa Tribe. Despite Davis' affiliation with tribal self-governance of the Minnesota Chippewa Tribes as a whole, the Minnesota Supreme Court held the State of Minnesota could still enforce traffic laws against Davis when his conduct occurred on a reservation other than his own.

[¶35] Here, Olson does not have any tribal relationship with the Three Affiliated Tribes or the Fort Berthold Indian Reservation. Instead, he is an enrolled member of the Turtle Mountain Band of Chippewa. In this respect, the state's



interest in regulating Olson's driving conduct on the Fort Berthold Reservation is largely the same as its interest in regulating the driving conduct of any of its citizens who are not members of the Three Affiliated Tribes.

**III. These civil/regulatory proceedings against Olson's driving privileges are not governed by the Lara decision.**

[¶36] Finally, this Court may interpret Olson's brief as contending that North Dakota cannot bring this administrative proceeding to revoke Olson's driving privileges based on the United States Supreme Court's decision in United States v. Lara, 541 U.S. 193 (2004).

[¶37] Lara is inapposite. It did not involve a civil/regulatory proceeding such as this one, but a "limited" holding involving the question of double jeopardy in a criminal proceeding arising out of tribes' inherent authority to prosecute Native Americans. 541 U.S. at 204. In contrast, this case involves the interaction between tribes and state government, an issue that does not implicate a tribe's inherent authority to prosecute its members criminally, but rather the federal government's ultimate authority over issues involving jurisdiction on reservations.

[¶38] In Davis, again, the Minnesota Supreme Court provided a road map for this Court to follow:

Lara is a federal criminal case that analyzes the application of the Double Jeopardy Clause to Indian and federal prosecutions. The Court stated that its holding that tribes have inherent authority to prosecute Indians was "a limited one" arising from already well-settled principles of Indian law. Lara, 541 U.S. at 204, 124 S.Ct. 1628. The Court specifically noted that its decision did not involve "interference with the power or authority of any State." Id. at 205, 124 S.Ct. 1628. We recognize that the interaction between Indian tribes and state government does not present a traditional federalism question because the federal government has ultimate authority over Indian jurisdiction.

773 N.W.2d at 71.

[¶39] This Court should likewise recognize that Lara does not implicate North Dakota's ability to regulate driving conduct within the boundaries of the Fort Berthold Indian Reservation when the offender is a nonmember of the Three Affiliated Tribes.

### CONCLUSION

[¶40] The North Dakota Department of Transportation respectfully requests that this Court affirm the Judgment of the Mountrail County District Court and the Department's decision revoking Olson's driving privileges for a period of two years.

Dated this 20<sup>th</sup> day of December, 2017.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By:

  
James E. Nicolai  
Deputy Solicitor General  
State Bar ID No. 04789  
Office of Attorney General  
500 North 9th Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [jnicolai@nd.gov](mailto:jnicolai@nd.gov)

Attorney for Appellee.

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Harold J. Olson, )  
 )  
 Appellant, ) **AFFIDAVIT OF SERVICE BY**  
 ) **ELECTRONIC MAIL**  
 vs. ) **Supreme Court No. 20170351**  
 )  
 North Dakota Department of ) **District Court No. 31-2017-CV-00113**  
 Transportation, )  
 )  
 Appellee. )

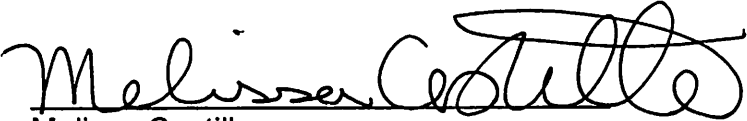
STATE OF NORTH DAKOTA )  
 ) ss.  
 COUNTY OF BURLEIGH )

[¶1] Melissa Castillo states under oath as follows:

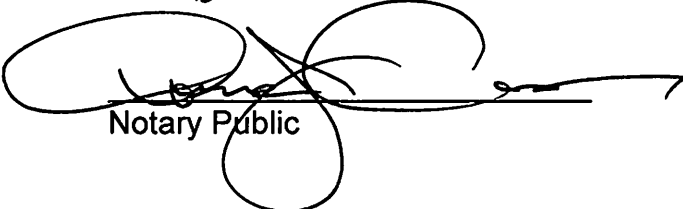
[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 20th day of December, 2017, I served the attached **BRIEF OF APPELLEE** upon Harold J. Olson, by and through his attorney, Vance R. Gillette by electronic mail as follows:

Vance R. Gillette  
vanceg@restel.com

  
Melissa Castillo

Subscribed and sworn to before me  
this 20th day of December, 2017.

  
Notary Public

**DONNA J CONNOR**  
Notary Public  
State of North Dakota  
My Commission Expires Aug. 6, 2021