St. Regis Mohawk Tribal Court

545 State Route 37

Akwesasne, NY 13655

ADDRESS OF

P.J. Herne

Chief Judge

St. Regis Mohawk Tribal Court

BEFORE THE

New York State Office of Indigent Legal Services

PRESENTED

August 26, 2015

Elizabethtown, NY

Sekon/Greetings,

On behalf of the St. Regis Mohawk Tribal Court I would like to thank this committee for affording me the opportunity to present testimony with respect to the important issues this body is facing.

I. History

The St. Regis Mohawk Tribe (hereinafter SRMT) and SRMT Court are located in the northernmost part of New York.[1] The St. Regis Mohawk Indian Reservation (hereinafter SRMIR) was formally settled in and around 1749 and is mostly comprised of Mohawks and descendants from the Kahnawake reserve near Montreal. The SRMIR territory is addressed in a federally ratified treaty which recognizes and affirms the lands making up the SRMIR which is called Akwesasne. *See* Seven Nations of Canada Treaty.[2] This Treaty was negotiated in May of 1796 and was ratified by Congress in January of 1797.

Upon the creation of the United States and the State of New York there has always been conflict with respect to criminal jurisdiction in Indian country. The historical experience of Akwesasne has mirrored that which many other Tribal Nations have had with the Federal government. In a generalized sequence this includes; exclusive tribal jurisdiction, to joint jurisdiction with the Federal government to shared/concurrent jurisdiction with the State government, federal government, and Tribal Nations.

For current discussions the 'break-water' moment occurred in 1939 when the Federal Second Circuit issued their decision in *Forness*.[3] In *Forness* the Second Circuit held that New York laws had no effect on the Indian Reservation within the State, as Congress never consented to such jurisdiction. This decision caused an immediate effort by numbers of the New York State legislature to acquire jurisdiction over all Indian Reservations within the State. This resulted in the passage of §25 USC 232 in 1948[4], which permits the exercise of criminal jurisdiction by New York on Reservations within the State.

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[1] *See Attachment 1*

[2] Seven Nations of Canada Treaty 7 Stat. 55

[3] *United States v. Forness* 125 f.2d.928 (2d Circ. 1942)

[4] *See Attachment 2*

Following the *Forness* decision in 1942,[5] and during consideration of 25 USC §232, there were conducted various State legislative hearings. Prior to this point, and for the SRMIR, most criminal jurisdiction was exercised by the Federal government. Many members of various Tribal Nations testified at these State Legislative hearings, and it is clear from the record that not only was there 'non-consensus' among the Tribal Nations, but many in fact opposed any jurisdictional transference to New York. It therefore should not be surprising to learn that, since passage of §25 USC 232 it can be fairly said that relations between the Tribal Nations and the State have been strained, contentious, and sometimes this results in open conflict with one another.

Caught up in the backwash of some of these disagreements are individual members and residents of the Tribal Nations who come into contact with the New York Criminal Justice System. It is in this light that we would like to discuss issues that residents of the St. Regis Mohawk Indian Reservation experience in their interactions with the NY Criminal Justice System as a result of passage of §25 USC 232.

II. Purpose of the ILS committee

Our understanding of the purpose of this Hearing is to establish the criteria and procedures by which to determine eligibility for assigned counsel in either family court or criminal court. As such, we would like to address what we perceive to be substantial issues that affect Tribal Nation members constitutional and statutory rights when they come into contact with the NY Criminal Justice System. Particularly when they are trying to obtain legal representation. The first of the issues is the status of reservation lands.

A.) Reservation Land and NY Criminal Justice System

As we have indicated there is a federal treaty recognizing and affirming that the lands of the SRMIR belong to the SRMIR members. This means that the land comprising the SRMIR/ Akwesasne is not a part of New York State, and case law indicates that Reservation lands are therefore not a part of any New York Township, County or Village. Further, our lands are not subject to taxation by any State entities nor are they permitted to be encumbered by any sovereign. However, this land status causes substantial legal issues when a SRMIR resident comes in contact with the NY Criminal Justice system.

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[5] Note, as *cert.*; was denied to the Supreme Court the 2d Circuit decision become the binding law.
For Hearing example see "Hearing before Joint Legislative Committee on Indian Affairs" Thurs. Jan. 4, 19455- Van Eyek Hotel, Albany, NY available at NY Library website.

For instance, with respect to setting of bail, the recent NY Court of Appeals decision of *McManus v. Horn*[6] requires that NY judges are to offer two forms of bail. Research conducted by the SRMT Court clearly disclosed that the most common form of bail set in town/village/county courts neighboring our Indian Reservation, (courts which are exercising criminal jurisdiction over Indian Reservation residents), nearly always offer bail in the form of "cash or bond"[7]. In fact the most common practice is to require double the bail amount for bond. For example, if cash bail was $500 it would be a $1,000 bond. If the bail was $5,000 cash it would be $10,000 bond. With the legal status of Reservation lands, the ability to secure a commercial bond by pledging real property is non-existent. Therefore, the *practical reality* for any SRMIR resident who comes into contact with the NY criminal justice system via 25 USC § 232 is that they are being offered one form of bail: Cash.

Should a Reservation resident even be able to post 'cash' bail, the consequence they will face in the event of a plea of guilt (which occurs in over 90% of cases), is that they will lose 3% of the cash bail to the statutory 'bail poundage fee'. In some cases this bail 'poundage fee' is greater than any amount which other non-reservation residents may pay to a commercial bond company in administrative fees, (which are in fact limited by State statute.)

Therefore, even though our research shows that the Criminal Procedure Law (hereinafter CPL) affords that other forms of bail could be utilized,[8] these other forms are never utilized for SRMIR residents by courts nearby the reservation. The practice has been, and continues to be, just cash bail. We have attached statistics which shows the number of SRMIR residents who are facing this issue.[9]

Next, Tribal Nations are recognized sovereigns under the constitution and existing case law. Many Tribal Nations have governance structures resembling the Federal and State governments (e.g. 'Court' Systems). However, those Tribal Nations having a court system similar to the State and federal government are NOT required to give full faith & credit to orders, judgments or decrees of outside courts.[10] Included in this principle is any commercial contracts/obligations which may provide for liens or encumbrances. This can include contracts entered into with commercial bond companies by Indian Reservation residents.

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[6] *McManus v. Horn 18 3d 660 (2012)*
[7] *See Attachment 3*
[8] See NY CPL § 510.10 et. al.
[9] *See Attachment 4*
[10] The most common case law reason for this is the principle of 'separate sovereigns.'

Further complications are created by the fact that outside governments,[11] non-native persons, and non-native businesses could never own or possess Indian Land on the reservation, nor can they place any liens or other encumbrances on Reservation land.[12] In this setting commercial bond companies are reluctant to work with any SRMIR residents, which restricts the opportunity for Indian Reservation residents to be afforded the opportunity to be released via a posted commercial bail bond.

Therefore, the combination of the foregoing factors; inalienable land, the inherent sovereignty of the Tribal Nations, and the inapplicability of many 'common' NY commercial bond practices, leaves many Tribal Nation members/residents forced to face a 'cash only' NY criminal justice system, irrespective of the recent court of Appeals decision in McManus v. Horn, or what is afforded under the C.P.L.

III. Reservation land as an 'asset'

We would like to now address how this reservation land issue can also affect a Tribal Nation member and the efforts of this Commission.

Internally on the SRMIR there is a historic custom as to how land is transferred to and from residents of the Tribal Nation. However, there are also Tribal laws providing that non-natives are not permitted to hold or transfer land on the reservation.[13] This fact makes it extremely difficult for members and residents of the SRMIR to acquire or construct a home or residence as this prevents mortgaging of property. A practice which is so common in the State. It is only recently that a housing program administered by the SRMT, its Housing Authority, and some private lenders, are now making private home mortgages available. This program works as the mortgage is backed by the SRMT and its Housing Authority. Additionally, it has only been recently that military veterans from the SRMIR can acquire VA assistance to build, construct or purchase a home. In either event, the number of members/residents in these programs is currently less than ten (10).

In light of the foregoing the largest provider of housing on the SRMIR has been the SRMT and its Housing Authority. They do this through programs offered by U.S. government/HUD. Currently, the most common program is a 'rent-to-own,' which is heavily subsidized by HUD and the SRMT. Here though, the Housing Authority is technically the owner of the property.

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[11] The SRMT Land Dispute Resolution Ordinance in fact prohibits non-member ownership of Reservation lands.
[12] *See* also NY CPL-which provides that criminal fines and fees can be reduced to a judgement.
[13] *See* SRMT-LDRO'

Therefore, when considering guidelines for eligibility for assigned counsel we are concerned as to how this body is going to develop guidelines/policies for any "homeowners" of the SRMIR.

IV. The right to traverse the International border.

As we have indicated the SRMIR is located in what would be considered the most northern portion of the State. However, and as we have provided, the actual formal settlement of Akwesasne began in 1749 and it was actually located between two communities which were already thriving. This would be Oswegatchie, which you may now know as Ogdensburg, NY, and Kahnawake, which is directly across from Montreal, Quebec, Canada.

We bring this to light because those persons who are descendants and members of these communities enjoyed a liberty, a right, to travel by and between these Nations. Therefore, it is not surprising to learn that following the creation of the United States this practice by Native Americans of traveling by and between these communities continued. Following the War of 1812 this right would be embodied in treaties between the United States and Great Britain, and aspects would eventually be codified into U.S. Law (8 USC & 1359).

This is relevant because there are numerous instances where a member of our community is going to be, perhaps temporarily, residing on a portion of the SRMIR which is described as being "in Canada". Therefore, our concern relates to how the Committee is going to treat and/or deal with this group in regards to the eligibility for Assisted Counsel and/or bail implications.

V. A "State" cost

In our recommendations we have included a request, (which we are sure many other agencies and jurisdictions also requested), of more adequate funding. We can understand that it is more than likely that this committee is being pulled and prodded in many directions with respect to this issue.

What we would like to emphasize is that when New York made the request, and actively pursued the acquisition of, criminal jurisdiction in "Indian Country", it was in fact the **State** that advocated for this judicial "control" in pursuing these actions.

Clearly the Criminal Justice System that was in place in 1947 is in stark contrast to that which exists today. Perhaps just as important is how those systems are administered and funded.

As we have pointed out, when New York was seeking to acquire criminal jurisdiction there was no consensus among Tribal Nations. In fact, any review of the record tends to show that the Tribal Nations were opposed to the New York request.

Nonetheless, as this jurisdiction transference legislation was ratified over Tribal Nation members protests, it is also clear that the costs of this State request has fallen on many NY localities. This includes the Town and Village courts, County jails and Prosecution departments, the County public defender's offices, and once involved in a system that most do not want to be in, Indian Reservation residents. Therefore, we would be remiss if we did not recommend that we believe it to be appropriate for the State itself to step-up and finally, and appropriately, provide the proper funding for Indian Reservation residents to obtain their constitutionally guaranteed right to legal counsel.

Recommendations

We respectfully submit the following recommendations for this Committee to consider in an effort to address the issues we have brought forward:

1.) We believe a separate criteria must be established and utilized when addressing Indian Reservation Residents in applying for assigned counsel services.

2.) Likewise, we hope that this board can create a review/appeal mechanism to adequately and properly address the unique circumstance that Indian Reservation residents face when attempting to secure constitutionally mandated legal representation, or appeals when legal representation is denied.

3.) The State itself should meet all constitutional requirements for Indian Reservation residents when they are forced to interact with the State Criminal Justice system, as it was the State who insisted upon obtaining Criminal jurisdiction on the Reservation.

Other Recommendations:

A.) Targeted and Tailored legal knowledge and expertise.

Recently we at the SRMT Court have begun a process of attempting to review the arraignments conducted by courts in NYS where the defendant is a Native American.[14]

[14] *See Attachment 5*

As a part of this review we also focused upon courts which are near or adjacent to the Nine (9) Indian Reservations within the State. The results of these efforts clearly show that those courts adjacent to the Indian Reservations tend to have the highest number of Native Americans being arraigned.

We hope that whatever program/criteria that is being developed by this committee takes this into consideration, for we would like to recommend that these areas which are most likely to see Native American defendants facing the issues we have identified, that these jurisdictions be afforded additional training and resources so that they can adequately represent Native American defendants who are Reservation residents.

B.) Tailored C.L.E. credits for lawyers, and judicial training credits for judges.

We openly acknowledge that our issues and concerns are, for lack of a better term, unique. Nonetheless, it is clear to us that with a substantial number of Indian Reservations residents not only coming into contact with the NY Criminal Justice system, but with many also facing severe consequences for that interaction, we believe it is important that both bench and bar should possess the adequate legal knowledge to ensure that Indian Reservation residents are in fact treated equally under the law.

It is clear that one of the most effective ways to achieve that goal is through the mandated legal education that both the bench and bar must attend and/or have access to. It is here also where we feel that dissemination of the requisite legal knowledge can be most effective.

C.) Consultation.

We would like to also bring to the committee's attention that as a Federally recognized Tribal Nation the SRMT enjoys some pretty profound legal rights and legal relationships with the Federal government.

Among these is the policy of government to government relations and Tribal Consultation. These policies were originally implemented during the Clinton Administration and has since that time been renewed by every U.S. president. This has been furthered by many recent congressional legislative acts which require Tribal consultation when actions taken by a Federal agency may affect a Tribal Nation.

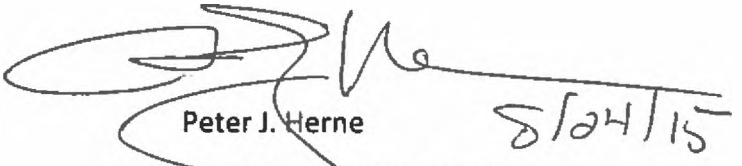
This has branched out significantly from its original location within the Bureau of Indian Affairs (BIA) and the Indian Health Services (IHS). Now nearly every federal agency has a Tribal consultation

The popularity and effectiveness of this effort has even been implemented by various States. Wisconsin, Michigan, Washington and New Mexico are just a few of the States that have robust Tribal consultation policies.

Therefore, it is surprising to see that New York, a State ranked 8th by some estimates in Native American population, has no such policy. Based upon this, we would like to recommend that the ILS be the first New York agency to formally and publicly adopt a Tribal consultation policy for its interactions with Tribal Nations. This is crucial where Indian Reservation residents who interact with the NY criminal justice system and where legal representation is in issue.

We thank the Indigent Legal Services Committee for the opportunity to present these concerns.

Respectfully,



Peter J. Herne 8/24/15

Chief Judge, SRMT Court