

**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

IN THE MATTER OF ELMER CLARK,
Defendant.

APPEAL No. 050

**ORDER GRANTING MOTION TO DISMISS THE
AMENDED PETITION FOR REVIEW AND ADVISORY OPINION**

THIS COURT HAVING REVIEWED Defendant's Motion to Dismiss the Amended Petition for Review in the above-referenced matter, dated January 15, 1988, and the Affidavit of Defendant's attorney, David L. Irving, attached thereto advising the Court of the following:

1. That Defendant will seek a Motion for Rehearing and the original Court below, and thereby exhaust his Tribal Court remedies before proceeding on appeal;
2. That the Tribal Code, Title XI, Health and Sanitation, Section 610, Annual Review, allows the Defendant a review hearing, subsequent to the final hearing. After the Defendant has been re-evaluated - by the Warm Springs Institution, but it does not provide for the appearance of the Defendant;
3. That Defendant herein has reached an agreement with the prosecutor in the above entitled matter in Tribal Court wherein the Defendant will be allowed to return and testify at said rehearing, which procedure may well eliminate the need for any Appeal of this matter.

and GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss the Amended Petition for Review is granted and the same is hereby dismissed without prejudice to enable Defendant to appeal after exhausting his Tribal Court remedies.

ADVISORY OPINION

As suggested, this Court will take notice of XI CCOJ 610, which allows for a review hearing of recommendations submitted by Warms Springs Institution for the detainee (Defendant) committed after a final hearing and will take notice of Defendant's comments that the code is silent as to the requirements of the attendance of the Defendant, or his involvement, or cooperation at any hearing thereafter. This Court also will take notice of the Affidavit submitted by David L. Irving wherein he suggests that the code be reviewed by the Tribal Executive Board for the purpose of amending that code section to hereafter allow all detainees to » be in attendance at said hearings and to be given reasonable notice and an opportunity to represent their interest with benefit of counsel. GOOD CAUSE APPEARING THEREFORE, this Court issues the following advisory opinion:

It would seem only appropriate under the Indian Civil Rights Act of 1968 that Defendant is entitled to attend all hearings held in regard to his mental competence. It would seem only appropriate that all individuals sentenced to the Warm Springs Institution or any other mental hospital or facility are entitled to attend all hearings held in regard to their mental competence.

Title XI CCOJ 610 requires that the Tribal Court hold a hearing not less than once each year, following the procedures under XI CCOJ 607 to determine for the basis of the original detention still exists. It would appear to this Court that before the Tribal Court could make an informed determination that the basis for the original detention still exists, the detainee would have to be present and by his presence provide that clear and convincing evidence that the detainee is still mentally ill and dangerous.

Therefore this Court would agree with Defendant's contention that the Tribal Executive Board should review XI CCOJ 610 for the purpose of amending the same to allow hereafter all defendants to be in attendance at annual hearings and to be given reasonable notice and opportunity to represent their interests with benefit of counsel.

IT IS FURTHER ORDERED THAT A COPY OF THIS ORDER GRANTING MOTION TO DISMISS THE AMENDED PETITION FOR REVIEW AND ADVISORY OPINION BE SERVED UPON THE CHAIRMAN OF THE TRIBES AND TRIBAL EXECUTIVE BOARD FOR ACTION THEY DEEM APPROPRIATE .IN CORRECTING TITLE XI CCOJ 610 WHICH SHOULD PROBABLY INCLUDE A MEANS TO FUND THE ATTENDANCE OF ALL DETAINEES AT THESE HEARINGS.

DATED this 15th day of April, 1988.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Daniel Schauer, Associate Justice

Gary J. Melbourne, Associate Justice
