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THE OKLAHOMA BAR
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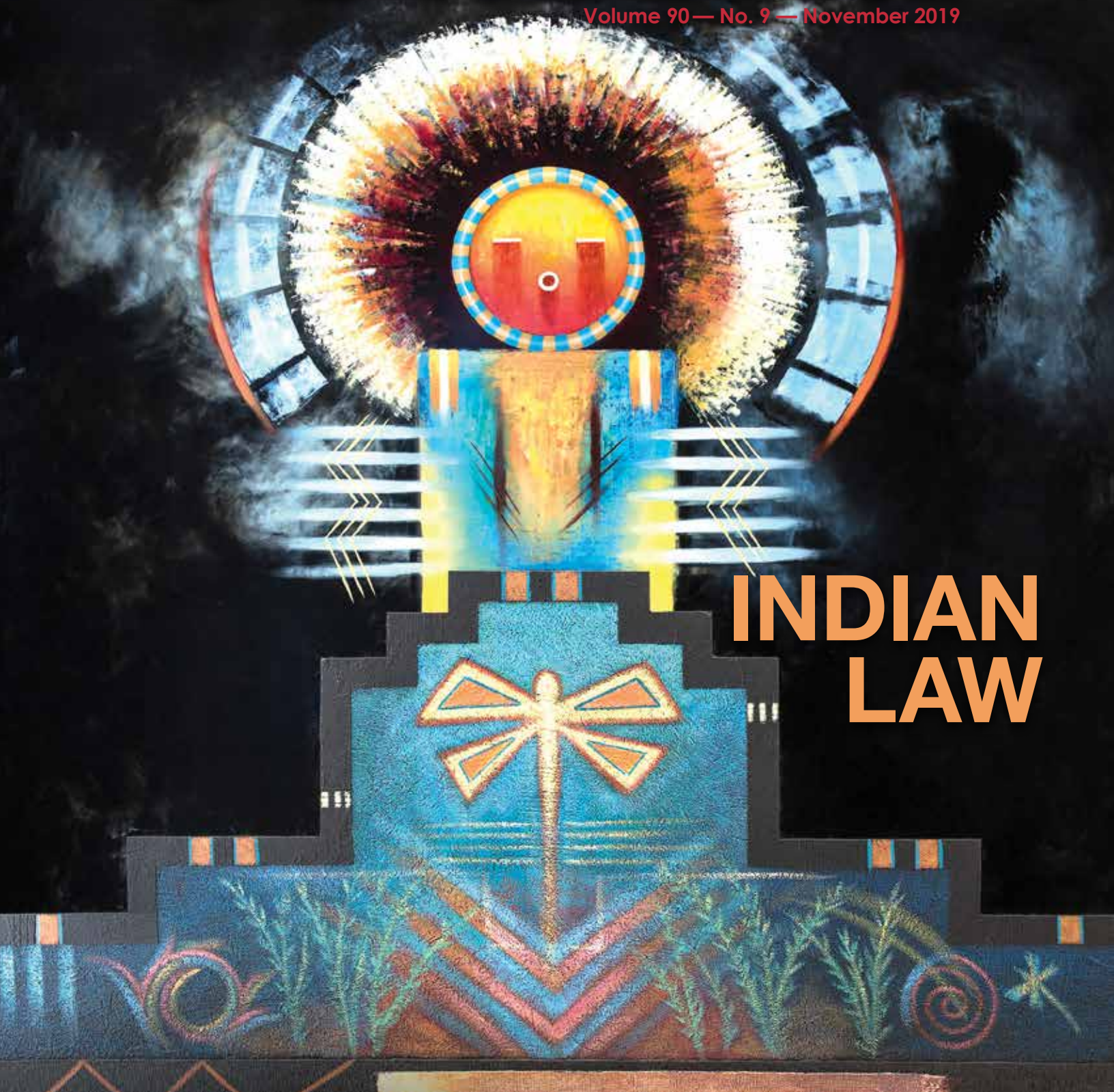
Volume 90— No. 9 — November 2019



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THE OKLAHOMA BAR Journal

contents

November 2019 • Vol. 90 • No. 9

THEME: INDIAN LAW

Editor: Leslie Taylor

Cover Photo: Night Guardian by Poteet Victory from the Oklahoma Judicial Center Collection, courtesy of the Oklahoma Arts Council. Photography by Ryan McCarty.

FEATURES

DEPARTMENTS

PLUS

PAGE 40 – Heroes Program

PAGE 44 – 2005 Habitat for Humanity House

Advice to My Younger Self

By Charles W. Chesnut

RECENTLY, I WAS REFLECTING on my year as president of the OBA. It is rapidly drawing to a close. Once the Annual Meeting is over, the remaining two months will fly by. My thoughts have been running more toward how I have evaluated the year so far from a personal standpoint and the lessons I have learned.

I think any bar president would tell you that the year is equal parts exciting and overwhelming. In spite of the amount of time and work invested, it is a wonderful experience because of the people you meet. I am grateful for the opportunities and the challenges it has brought me. When embarking on this journey initially, I often felt overwhelmed and it really made me wonder if I was up to the task. Candidly, I think we all feel that way about any new and significant undertaking in our life.

I was thinking of the lessons I have learned or re-learned in the last year. I thought it might be interesting in approaching it as if I was giving advice to a 30-year-old version of me, and after having experienced the events of the last year, what advice would I offer?

President Chesnut practices in Miami.
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918-542-1845

I reached out to our two immediate past presidents, Linda Thomas and Kim Hays, and asked them since they had served as OBA president, what words of advice would they give to their younger selves?

Kim responded, "Your professional reputation and your legal skills are always evolving. Seek the advice of a mentor or even engage as co-counsel a more experienced attorney when you are challenged with a new legal issue. Protect your reputation by remaining professional and courteous to opposing counsel, even when you may not be receiving the same courtesy."

Linda wrote, "Opportunity is everywhere, but often presents itself in small, seemingly insignificant ways. It may even be disguised as 'just more work to do.' Look for opportunity in places you'd never expect to find it. Don't sit back, waiting for opportunity to find you. Step out of your comfort zone and make it happen. Finally, don't be afraid to make mistakes – everybody makes them."

> Stop making decisions based upon your fears. Be brave. Take some calculated risks.

Here is my advice to a 30-year-old version of me:

1) You are capable of accomplishing much, much more than you ever think possible. Once you commit yourself and quit wondering if you can do it, the job falls into place. Take stock of what needs to be done. Prioritize. Then start knocking off the items on your list one by one. Make decisions promptly. Use common sense and your gut instinct when considering the best way to proceed. Get input from those around you. Make your decisions; then move on. Put your head down and your shoulder to the wheel. All of a sudden, when you look up, your year is almost over.

2) Don't worry about things you can't control. Things happen all the time that you have no control over. Floods. Lawsuits. When they do, take stock of the situation, gather your resources and move forward together to solve the problem at hand. This too shall pass.

(continued on page 49)

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Treaty Rights Curtail State Taxing Authority

By Wilda A. Wahpepah

THE U.S. SUPREME COURT'S RECENT DECISION in *Washington State Dept. of Licensing v. Cougar Den Inc.*,[1] a case pitting the Yakama Nation's treaty right to travel against the state of Washington's motor fuel importation tax, showed a majority of the court standing by the "Indian canons of construction." At least two justices, however, were ready to depart from the long-established rules of treaty interpretation.

Two keys to the *Cougar Den* decision were extensive factual findings based upon the expert testimony of a tribal elder, an anthropologist and historian and the Washington Supreme Court's characterization of the disputed tax as one on the importation of fuel, rather than on the possession of fuel. While the 5-4 decision vindicated the treaty rights of the Yakama Nation, it also gave vitality to the regulatory exception to pre-emption that would permit a state to regulate a tribe's exercise of treaty rights to prevent danger to health and safety.

CLASH OF DOCTRINES

The *Cougar Den* case involves the intertwining legal doctrines of treaty interpretation and the limits of state taxing authority. The Indian canons of construction, developed over more than a century of U.S. Supreme Court jurisprudence, are special rules of interpretation applied to treaties with tribes. These rules of construction are different than the more textual approach to interpreting federal statutes.[2] The Indian canons of construction are "rooted in the unique trust relationship between the United States and the Indians."[3] Treaties between the United States and a tribe are essentially a contract between two sovereign nations.[4] Terms of treaties are to be liberally construed and understood, not as we might today, but as the Indians who signed the documents understood them.[5] A court must examine the intention of the parties,[6] and ambiguities must be resolved in favor of the Indians.[7] The Indian canons of construction recognize that treaties were in many cases imposed upon tribes and were written in a language tribal members did not speak, leaving tribes little choice but to consent.[8] Application of the canons of construction, therefore, might ensure that tribes receive the benefit of their bargain in a coercive transaction.[9] Courts interpreting treaties must look beyond the written words and consider the larger context that frames the treaty, including the negotiations and the practical construction adopted by the parties.[10] Tribal property rights and tribal sovereignty are to be preserved unless Congress' intent is clear and unambiguous.[11] While the canons were developed in the context of treaty interpretation, courts have applied them to federal statutes, executive orders and regulations.[12] Treaties, once ratified, are the supreme law of the land.[13] Thus, a state's law cannot abridge treaty rights because of the Supremacy Clause of the U.S. Constitution.[14]

Under general principles of federal Indian law, tribes are immune from state taxes based upon their activity in Indian country.[15] For example, tribes are immune from fuel excise taxes triggered by on-reservation sales.[16] The court's cases have established that tribes' categorical immunity from state taxation is triggered by the legal incidence (as opposed to economic incidence) of the tax.[17] If the legal incidence of the tax falls on the tribe or tribal members, the tax is prohibited. State taxes on nontribal members in Indian country are not categorically prohibited. Instead, the court has established a "pre-emption analysis" of the relevant facts and legislation involved to determine if taxes can be imposed on nontribal members in Indian country.[18] If the legal incidence of the tax falls on nontribal

members, the examining court must analyze the state, federal and tribal interests at stake and determine if the exercise of state authority would violate federal law or interfere with the tribe's ability to exercise its sovereign functions.[19] Outside of Indian country, tribes and tribal members are subject to nondiscriminatory state taxes unless federal law dictates otherwise.[20] For example, a state may impose its gross-receipts tax on a tribal ski resort operated outside the boundaries of a reservation.[21] Where an activity occurs both in and outside of Indian country, a state tax may be imposed, but it must be tailored to the amount of activity occurring outside of Indian country.[22]

OLD ADVERSARIES

The principal players in the *Cougar Den* case – the company, Yakama Nation and the state of Washington – had met in the courtroom before. The owner of Cougar Den had challenged Washington's attempt to tax his timber-hauling trucks and the Yakama Nation had locked horns with the state over the nation's treaty rights to fish. The events giving rise to the *Cougar Den* case began on Dec. 9, 2013, when the state Department of Licensing assessed Cougar Den Inc. $3.6 million for unpaid taxes, penalties, interest and licensing fees owing to its transport of motor fuel by truck 27 miles over public highways from Oregon to the Yakama reservation in eastern Washington.[23] The assessment was for taxes accrued for approximately seven months of operation in 2013.[24] The tax is imposed per gallon on "licensees," defined by state law to include suppliers, exporters, blenders, distributors and importers of motor fuel.[25] The tax applies to fuel as it is removed from within the state, for example when a tanker truck is filled at a refinery or bulk storage facility and when fuel enters the state by highway or rail after being removed from a refinery or bulk storage facility outside of Washington. The state's motor fuel tax replaced a prior version that a federal court, in *Squaxin Island Tribe v. Stephens*, found placed the legal incidence of the tax on fuel retailers and therefore could not be imposed on tribal gas stations located in Indian country.[26]

Cougar Den is owned by Kip Ramsey, a Yakama tribal member, and is incorporated under the laws of the Yakama Nation.[27] The Yakama Nation designated Cougar Den as its agent to obtain fuel for members of the nation, and the fuel, once arriving at the Yakama reservation, was sold at the Yakama Nation's retail outlets.[28] Cougar Den appealed the assessment to the Department of Licensing's administrative law judge, who held that the assessment was an impermissible restriction on travel under the Yakama Nation Treaty of 1855.[29] At issue was the following provision of Article III of the treaty:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.[30]

The director of the Department of Licensing reversed the administrative law judge and entered his own findings of fact and conclusions of law that the treaty did not pre-empt the fuel tax and licensing requirements.[31] Cougar Den appealed the final agency order to the Yakima County Superior Court, which reversed the director.[32] The Superior Court held that the imposition of the tax on Cougar Den violated the Yakama Nation's right to travel found in Article III of the treaty.[33] The Department of Licensing then appealed to the Washington Supreme Court.

KEY FINDINGS OF FACT AID TREATY INTERPRETATION

The Washington Supreme Court relied upon prior interpretations of the same treaty in the U.S. Court of Appeals for the 9th Circuit, findings of fact developed in a separate federal case involving the treaty and the Indian canons of construction in its analysis. The treaty, the court stated, must be understood as the Yakamas themselves would have understood it, quoting *Choctaw Nation v. Oklahoma:*

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them.[34]

To determine what the Yakama Nation bargained for, the Washington Supreme Court turned to extensive findings of fact developed during a bench trial in a separate federal case involving the state's imposition of licensing and permitting fees on logging trucks owned by the Yakama Nation and by Kip Ramsey and other tribal members. These findings from *Yakama Indian Nation v. Flores*[35] were analyzed by the administrative law judge and incorporated into the decision of the Superior Court.

The findings of fact were developed during an evidentiary trial in the U.S. District Court and

included the testimony of a tribal elder, an anthropology professor and historian who had written extensively about Isaac I. Stevens, the territorial governor when the treaty was made.[36] According to the testimony, at the time the treaty was negotiated, the bands comprising the Yakama Nation engaged in a system of trade and exchange with other Plateau (eastern Washington, Idaho and eastern Oregon) tribes as well as more distant tribes of the Pacific Northwest coast and plains of Montana and Wyoming, traveling south to the Willamette Valley of Oregon and perhaps even as far as California for trading purposes.[37] Travel to other regions was essential for maintenance of the Yakama way of life, enabling tribal members to fish, hunt, gather, trade and maintain intermarriage cultural ties.[38] Prior to negotiations of the treaty, Gov. Stevens and his subordinates were aware the Yakamas traded on the Pacific coast, traveled the Columbia River to fish and traveled to the plains to hunt buffalo.[39]

At the time of the treaty, the United States did not charge fees for travel on its public highways in Washington territory.[40] Gov. Stevens was under pressure to quickly negotiate treaties with eastern Washington tribes to make way for both settlement and the construction of a railroad to Puget Sound. Thus, the United States' representatives believed that gaining the Yakamas' agreement to roads across their reservation was a different and special case and were willing to accommodate many of the demands of the Yakamas.[41] Gov. Stevens repeatedly assured the Yakamas they would be able to travel the public roads outside the reservation to take their goods to market.[42] The minutes of the treaty negotiations reflect the issue of highway travel by the Yakamas outside their reservation was raised several times, and the minutes showed no mention of restrictions upon the right of travel on the public highways or possible assessment of fees for that travel.[43]

The Washington Supreme Court found based upon the findings of fact that travel was

woven into the fabric of Yakama life, necessary for hunting, gathering, fishing, grazing, recreational, political and kinship purposes.[44] In reliance on "these vital promises," the court noted, the Yakama Nation ceded 90% of its land (10 million acres constituting roughly one-quarter of the present-day Washington state) in exchange for its reservation and the rights reserved in the treaty.[45] "Yakama Nation thus understandably assigned a special significance to each part of the treaty at the time of the signing and continues to view the treaty as a sacred document," the court noted.[46] Although the United States negotiated with many Pacific Northwest tribes, only treaties with the Yakama, Nez Perce tribe and Flathead, Kootenai and Upper Pend d'Oreille contained highway clauses such as that found in Article III, the court stated.[47]

STATE COURT CONSTRUES TAX AS ON IMPORTATION, NOT POSSESSION

The Washington Supreme Court also found that the tax was on the importation of fuel, as opposed to a tax on the possession of fuel. As noted *supra*, Washington's tax is imposed on motor fuels at the wholesale level, when the fuel is removed from the terminal "rack"[48] or imported into the state. Licensees who import fuel by means other than "bulk transfer" (pipeline or vessel) are liable for and obligated to pay the tax on each gallon of fuel imported.[49] The Department of Licensing argued that the tax was assessed based on incidence of ownership or possession of fuel, not the use or travel on roads or highways. The tax would apply even if Cougar Den did not use the highways, the Department of Licensing maintained.[50] The Washington Supreme Court, however, found that by imposing the tax, the Department of Licensing had placed a condition on travel that affected the Yakama Nation's treaty right to transport goods to market without restriction. "Where trade does not involve travel on public highways, the

right to travel provision in the treaty is not implicated. Here, travel on public highways is directly at issue because the tax was an importation tax."[51]

The Department of Licensing also argued that the tax constituted a regulation of travel rather than a prohibition of travel.[52] While the U.S. Court of Appeals for the 9th Circuit has found that state laws with a "purely regulatory" purpose can be validly applied without violating the treaty, the court noted, the fuel tax's requirement that fuel haulers obtain a license prior to operations was not regulatory but simply a means to collect taxes.[53] The Washington Supreme Court also rejected the Department of Licensing's argument that a decision in favor of the Yakama Nation could result in tribal members avoiding laws that regulate goods "simply by contriving to possess the goods on public highways."[54] The Department of Licensing gave the example of tribal members evading the law barring felons from possessing firearms.[55] The Washington State Supreme Court found that a similar argument already had been made and rejected by the U.S. Court of Appeals for the 9th Circuit in *Smiskin*.

> As determined by the federal courts, any trade, traveling and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty. The Department taxes the importation of fuel, which is the transportation of fuel. Here, it is simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways. Based on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes, this right is protected by the Treaty.[56]

After the U.S. Supreme Court granted the Department of Licensing's writ of *certiorari*, the Yakama Nation, the Nez Perce Nation, Sacred Ground Legal Services (a nongovernmental organization) and the National Congress of American Indians participated as *amici*. The U.S. solicitor general filed a brief in support of the Department of Licensing.

THE COURT'S DECISION

The U.S. Supreme Court's 5-4 judgment affirming the Washington Supreme Court was delivered on March 19, 2019, in an opinion by Justice Breyer, in which Justices Sotomayor and Kagan joined. Justice Gorsuch filed an opinion concurring in the judgment, in which Justice Ginsburg joined. Chief Justice Roberts filed a dissenting opinion, in which Justices Thomas, Alito and Kavanaugh joined. Justice Kavanaugh filed a dissenting opinion, in which Justice Thomas joined.

PLURALITY OPINION FINDS TAX BURDENS EXERCISE OF TREATY RIGHT TO TRAVEL

In the plurality opinion, Justices Breyer, Sotomayor and Kagan first declared that the tax was on travel by ground transportation with fuel, based upon the construction adopted by the Washington Supreme Court but also upon an elemental analysis of the statute itself.[57] The plurality found that since the legal incidence of a tax is a question of state law, citing *Chickasaw Nation*, the court was bound by the Washington Supreme Court's interpretation of Washington law.[58] The plurality also found that while it might be true fuel trucked into the state on public highways also could be described fuel "possessed" for the first time in the state, the tax is not a tax on first possession because other first possessors are not taxed, such as importers using pipelines or vessels.[59] "But even if the contrary were true," the plurality noted, "the tax would still have the practical effect of burdening the Yakamas' travel."[60] The plurality pointed to two prior decisions in the Yakamas' fishing rights struggle in which the court examined the practical effect of the state law in question on the exercise of treaty rights and found state laws were pre-empted. In the first case, *United States v. Winans*, the court found the treaty pre-empted Washington's enforcement of its trespass law against Yakama fishermen crossing private land to access fishing sites. In *Tulee v. Washington*, the court found the treaty pre-empted Washington's application of a fishing licensing fee to Yakama fishermen.[61]

The plurality opinion applied the Indian canons of construction, citing four prior instances where similar language in the same treaty had been interpreted by the court as the Yakamas would have understood the language in 1855.[62] The court noted that the treaty negotiations were conducted in Chinook jargon (a trading language of about 300 words that no tribe in the Pacific Northwest used as a primary language), the treaty was written in English, which the Yakama neither spoke nor wrote and many of the United States' representations about the treaty had no adequate translation in the Yakamas' own language.[63] In particular, the court noted, the phrase "in common with" found in the Article III provisions reserving the right to fish had previously been construed by the court as a bargain for continuing rights "beyond those that other citizens may enjoy" to fish at usual and accustomed places in the ceded territory.[64] Construing that phrase to give the Yakama Nation only a right against discrimination, as

Justice Kavanaugh's dissent did, would amount to an "impotent outcome to negotiations."[65] Rather, the plurality found, the Yakama bargained for the right to travel and would have understood the right to travel as including the right to travel with goods for purposes of trade.[66] Washington's fuel tax acts upon the Yakama Nation as a charge for exercising "the very right their ancestors intended to reserve."[67]

The plurality concluded by noting, in response to the dissent of Chief Justice Roberts, that it did not say or imply that the treaty grants protection to carry any and all goods, that it deprives Washington of the power to regulate to prevent danger to health or safety occasioned by a tribal member's exercise of treaty rights or that the treaty bars Washington from collecting revenue from sales or use taxes applied outside the reservation.[68] The "regulatory exception" discussed by the court developed during the Pacific Northwest fishing rights cases, holding that state regulations that were "purely regulatory" could be imposed on tribal members exercising their treaty fishing rights.[69]

CONCURRENCE FINDS BARGAIN FOR RIGHT TO TRAVEL CANNOT BE REWRITTEN

The concurring opinion was written by Justice Gorsuch and joined by Justice Ginsburg. In the concurrence, Justice Gorsuch applied the Indian canons of construction and relied heavily upon the factual findings in the *Yakama Indian Nation* case. The concurrence noted the state did not challenge these findings in *Yakama Indian Nation*, was found by the Yakima County Superior Court to be collaterally estopped from challenging them in the litigation below and failed to appeal the estoppel ruling, making the factual findings binding on the court as well.[70] In particular, Justice Gorsuch noted that Gov. Stevens "specifically promised the Yakamas that they would 'be allowed to go on the roads to take [their] things to market.'"[71] The concurrence dismissed the Department of Licensing's argument that the Yakamas bargained merely for the right to use public highways as any other person could. "But the record shows the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation."[72] The Yakama Nation bargained for the right to travel with goods off reservation just as it could on reservation, the concurrence found and just as it had for centuries.[73] "If the state and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this court."[74]

The concurring opinion also found the tax violated the Yakamas' treaty right to travel with goods to market even if the court were to construe the tax as one on possession because it was impossible to transport goods to market without possessing them.[75] While this might give rise to the hypothetical instance of a tribal member buying goods in Oregon, paying taxes owed there and moving the purchase tax-free to the reservation, the concurrence stated, that was the right bargained for in the treaty.[76] The concurrence dismissed fears raised in the chief justice's dissent that Washington would not be able to regulate transportation of diseased apples from Oregon or highway safety laws would be flouted by tribal members. If bad apples prove to be a public menace, the concurrence stated, Oregon, Washington, the Yakama Nation or the federal government could impose regulations either upon sale, during transport or upon arrival on the reservation.[77] Washington also might require tribal members to abide by nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation on the public highway.[78] "The only thing that Washington may not do is reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market."[79]

DISSENT FINDS TAX ON POSSESSION OF FUEL DOES NOT BURDEN TRAVEL

The chief justice's dissent was joined by Justices Thomas, Alito and Kavanaugh, and Justice Kavanaugh wrote a separate dissent joined by Justice Thomas. The chief justice's dissent construed *Tulee* as holding that a state law violates a treaty right only if the law imposes liability upon the Yakamas for exercising the right their ancestors intended to reserve.[80] The chief justice wrote that since the disputed tax was on the possession of fuel, it did not constitute a burden on the exercise of treaty rights.[81] The chief justice noted that the court had, in prior cases, interpreted the treaty's reservation of the right "of taking fish at all usual and accustomed places, in common with the citizens of the Territory" and had found the state laws at issue pre-empted because they blocked tribal members from fishing at traditional locations.[82] The fuel tax, however, did not block travel or exact a toll, the chief justice wrote. "It is a tax on a product imported into the State, not a tax on highway travel."[83]

The chief justice employed a hypothetical involving a luxury tax on mink coats to illustrate his point. If Washington taxed the purchase of mink coats, and the tax was assessed on the first possessor of the coat, if a Yakama member

purchased a mink coat in Oregon and traveled back to the reservation on public highways, he would not have to pay the tax.[84] This scenario would make no sense, the chief justice wrote, because the tax is a charge on individuals for possessing expensive furs. "It in no way burdens highway travel."[85] The chief justice found that the treaty right to travel with goods was "an application" of the right to travel and did not provide the Yakamas with "an additional right to carry any and all goods on the highways, tax free, in any manner they wish."[86] There is nothing in the "text of the Treaty, the historical record or our precedents," the chief justice wrote, that supports the conclusion that the right to travel upon all public highways "transforms the Yakamas' vehicles into mobile reservations, immunizing their contents from any state interference."[87]

The chief justice called the plurality's decision a "new rule" and suggested the public health and safety "escape hatch" discussed in the plurality's opinion might permit a state to regulate speed limits and rules of the road but not necessarily enforce regulations that have nothing to do with travel, such as possession of drugs or illegal firearms.[88] The chief justice noted that the court has only recognized an exception for state regulations in the interest of conservation.[89] In the context of a right to travel, the conservation exception would presumably include regulations that preserve the subject of the Yakamas' right by maintaining safe and orderly travel on the highways.[90] Many regulations that burden travel, however, such as emissions standards or noise restrictions, do not fit that description.[91] Chief Justice Roberts suggested that rather than constituting "good news" for tribes across the country, the plurality's creation of "an untested exception" to pre-emption could undermine rights the Yakamas did reserve and prevent them from hunting and fishing in their usual and accustomed places.[92]

JUSTICES KAVANAUGH AND THOMAS REINTERPRET 'IN COMMON WITH' TERM

In his dissent, Justice Kavanaugh, joined by Justice Thomas, focused his analysis on the meaning of the phrase "in common with" in the Article III provision reserving the right to travel on public highways and also found in the reservation of fishing rights. Despite the interpretation made in fishing rights decisions previously handed down by the court, Justice Kavanaugh found the phrase meant only that the Yakama Nation could travel on equal terms with other U.S. citizens.[93] Justice Kavanaugh drew this conclusion based not upon the historical record of negotiations of the treaty, but upon other treaties with other tribes, which required tribal members to seek permission before leaving their reservations.[94] Justice Kavanaugh also distinguished the fishing regulations the court had previously found pre-empted by the treaty from the fuel tax.[95] The fishing regulations were nondiscriminatory on their face but had a discriminatory effect because they prevented tribal members from catching a fair share of fish, he wrote. Since the fuel tax has no discriminatory effect, there is no need to "depart" from the treaty text, he wrote.[96]

Justice Kavanaugh stated that the effect of the *Cougar Den* decision would be to permit the Yakama Nation to disregard other taxes that their competitors and other tribes must pay and even disregard speed limits and reckless driving laws.[97] Rather than create an "atextual right," the court should leave it to Congress to provide additional benefits for the Yakamas, he concluded.[98]

IMPACT OF DECISION

As the solicitor general's brief stated, the precise language in the Yakama's treaty was used in only two other treaties for tribes in Idaho and Montana. The import of the case, however, is still notable as tribes in recent decades have not always had success in cases before the U.S. Supreme Court.[99] Five justices recognized and applied the Indian canons of construction. Only Justices Kavanaugh and Thomas gave little or no weight to prior interpretations of the treaty and in particular the Article III phrase "in common with," first interpreted by the court more than 100 years ago in *Winans*. Notably, the limits of the "public safety exception" to pre-emption of state laws that burden treaty rights are left to be determined. The structure of the fuel tax at issue – on the importer rather than the retailer –

is a common framework used by other states but in this case will send Washington back to the drawing board if it intends to further pursue taxing the Yakama Nation. Although Chief Justice Roberts saw no good news in the decision for tribes, the Yakama Nation saw a just outcome. "The United States and the state of Washington have reaped the historical, present, and future benefit to one-third of the land mass and resources of present day Washington state and it is this great sacrifice that our Yakama Nation gave up to have our rights memorialized forever," Yakama Nation Tribal Council Chairman JoDe Goudy said in a written statement issued after release of the decision.[100] "Today, the United States Supreme Court has acknowledged and upheld our treaty … and for that we are grateful."

ABOUT THE AUTHOR

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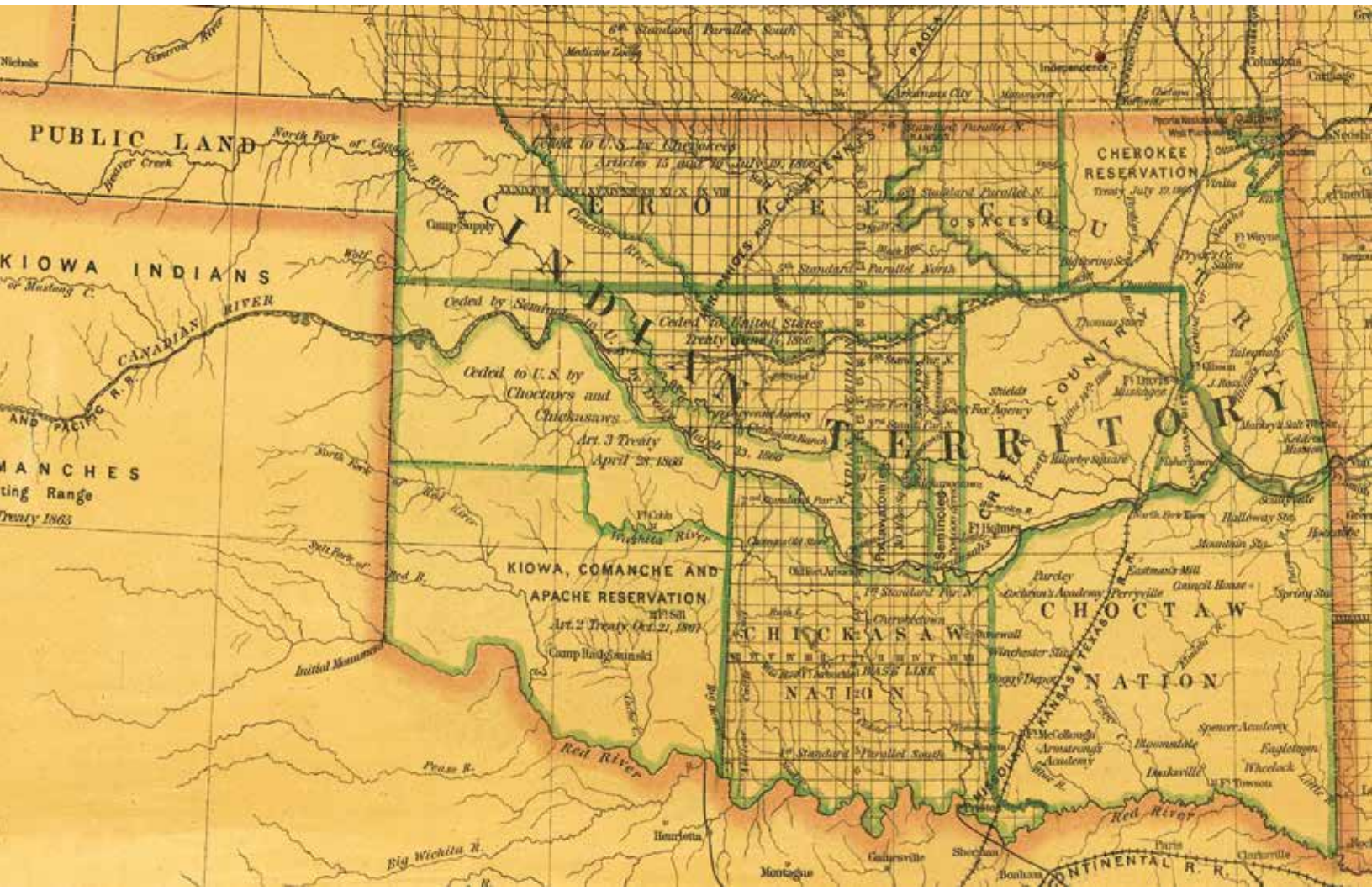
ENDNOTES

1. *Wash. Dept. of Licensing v. Cougar Den Inc.*, 139 S. Ct. 1000 (2019) (hereinafter *Cougar Den*).
2. *United States v. Providence Journal Co.*, 485 U.S. 693, 700-01 (1988); *United States v. Wilson*, 112 S. Ct. 1351, 1354 (1992); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 (1991).
3. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).
4. *Wash. v. Wash. State Comm'l Passenger Fishing Vessel*, 443 U.S. 658, 675 (1979) (hereinafter, *Fishing Vessel*).
5. *Jones v. Meehan*, 175 U.S. 1, 10-12 (1899).
6. *Fishing Vessel*, 443 U.S. at 675.
7. *Winters v. United States*, 207 U.S. 564, 576 (1908).
8. *Choctaw Nation v. Okla.*, 397 U.S. 620 (1970) (hereinafter *Choctaw Nation*).
9. *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (hereinafter *Winans*).
10. *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).
11. *Id*. at 202; *United States v. Dion*, 476 U.S. 734, 739-40 (1986).
12. *Mille Lacs*, 526 U.S. at 188-95, 202-08 (involving statute and regulations) and *HRI Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (involving regulations).
13. *Antoine v. Washington*, 420 U.S. 194, 204 (1975).
14. *Id*.
15. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168-69 (1973).
16. *Okla. State Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (state may not impose motor fuels excise tax on tribal retailers operating on tribal trust land) (hereinafter *Chickasaw Nation*).
17. *Id*. at 460.
18. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).
19. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Ramah Navajo Sch. Bd. Inc. v. Bur. Of Revenue*, 458 U.S. 832, 837 (1982).
20. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973); *Chickasaw Nation*, 515 U.S. at 462-63.
21. *Mescalero Apache*, 411 U.S. at 157-58.
22. *Wash. v. Confederated Tribes of Colville Indian reservation*, 447 U.S. 134, 163 (1980).
23. *Cougar Den*, at 1007.
24. *Cougar Den Inc. v. Wash. State Dept. of Licensing*, 188 Wash.2d 55, 58, 392 P.2d 1014, 1015 (2017) (hereinafter *Department of Licensing*).
25. Wash. Rev. Code Ann. §§82.36.010(12), 82.36.020 (West 2012).
26. *Squaxin Island Tribe v. Stephens*, 400 F. Supp.2d 1250, 1262 (W.D. Wash. 2005).
27. *Cougar Den* at 1007.
28. *Id*.
29. *Department of Licensing*, 188 Wash.2d at 59; 392 P.2d at 1015.
30. *Treaty with the Yakamas*, 12 Stat. 951, 952-53 (1855); *Department of Licensing*, 188 Wash.2d at 57; 392 P.2d at 1014.
31. *Department of Licensing*, 188 Wash.2d at 58; 392 P.2d at 1015.
32. *Id.* at 58; 392 P.2d at 1016.
33. *Id*. at 58; 392 P.2d at 1016.
34. 397 U.S. 520, 630-31, 90 S. Ct. 1328, 1334 (1970).
35. 955 F. Supp. 1229 (E.D. Wash. 1997) (Treaty prevents state imposition of certain timber truck licensing and permit fees) (hereinafter *Yakama Indian Nation*).
36. *Id*. at 1236.
37. *Id*. at 1262.
38. *Id*. at 1263.
39. *Id*.
40. *Id*.
41. *Id*. at 1264-65.
42. *Id*. at 1264.
43. *Id*. at 1264-65.
44. *Department of Licensing*, 188 Wash.2d at 62; 392 P.3d at 1016-17.
45. *Id*.
46. *Id*. at 53; 392 P.2d at 1017.
47. The United States has entered into treaties with tribes in Idaho and Montana that contain identically worded right-to-travel provisions. *See* Treaty of June 11, 1855, between the United States and the Nez Perce Indians, Art. III, 12 Stat. 958; Treaty of July 16, 1855, between the United States and the Flathead, Kootenay and Upper Pend d' Oreilles Indians, Art. III, 12 Stat. 976.
48. Washington's code defined the term "rack" as "a mechanism for delivering motor vehicle fuel from a refinery or terminal into a truck, trailer, railcar or other means of nonbulk transfer." Wash. Revised Code Ann §82.36.010(22).
49. Wash. Revised Code Ann §82.36.020(1)(2)(c).
50. *Department of Licensing*, 188 Wash. at 67; 392 P.2d at 1019.
51. *Id*.
52. *Id*.
53. *Id*. at 68; 392 P.2d at 1020 (citing *United States v. Smiskin*, 487 F.3d 1260, 1271 (9th Cir. 2007) (finding state requirement for notice prior to transport of unstamped cigarettes was to collect taxes and a condition that violated treaty)) (hereinafter *Smiskin*).
54. *Id*. at 68; 392 P.2d at 1019-20.
55. *Id*.
56. *Id*. at 69; 392 P.2d at 1020.
57. 139 S. Ct. at 1008-09.
58. *Id*. at 1010.
59. *Id*.
60. *Id*.
61. *Id*. at 1010-11.
62. *Id*. at 1011 (citing *Winans*, *Tulee*, *Fishing Vessel* and *Seufert Bros. Co. v. United States,* 249 U.S. 194 (1919) (trespass law could not be used to prevent tribal members from reaching historic fishing sites).
63. *Id*. at 1012.
64. *Id*.
65. *Id*. at 1012 (quoting *Winans*, *Tulee* and *Fishing Vessel*).
66. *Id*.
67. *Id*. at 1013 (quoting *Tulee*).
68. *Id*. at 1015.
69. *Tulee*, 315 U.S. at 684. (Treaty forecloses state from charging fee but state retains power to impose on Indians, equally with others, restrictions of a purely regulatory nature necessary for conservation of fish); *Puyallup Tribe v. Wash. Dept. of Game*, 391 U.S. 392, 402 n.14 (1968) (State regulation concerning time and manner of fishing outside reservation permissible if necessary for conservation).
70. *Id*. at 1016 (Gorsuch, J., concurring).
71. *Id*. at 1017 (quoting *Yakama Indian Nation*, 955 F. Supp. at 1244).
72. *Id*. at 1018.
73. *Id*. at 1020.
74. *Id*.
75. *Id*. at 1019.
76. *Id*. at 1020.
77. *Id*. at 1021.
78. *Id*.
79. *Id*.
80. Id. at 1022 (Roberts, C.J., dissenting).
81. *Id*.
82. *Id*. (citing *Winans*, *Seufert*, *Tulee).*
83. *Id*.
84. *Id*. at 1023.
85. *Id*.
86. *Id*. at 1024.
87. *Id*.
88. *Id*. at 1024-25.
89. *Id*. at 1025, citing *Mille Lacs,* 526 U.S. at 205 (state has authority to impose reasonable and necessary non-discriminatory regulations on Indian hunting, fishing, gathering rights in the interest of conservation); *Confederated Tribes of Colville reservation v. Anderson*, 903 F. Supp. 2d 1197, 1197 (E.D. Wash. 2011) (precedential cases do not refer to state's exercise of police power as a permissible regulation); *Fishing Vessel*, 443 U.S. at 682 (treaty fishermen immune from all regulations except those required for conservation).
90. *Id*.
91. *Id*.
92. *Id*. at 1026.
93. *Id*. at 1027 (Kavanaugh, J., dissenting).
94. *Id*.
95. *Id*. at 1028.
96. *Id*.
97. *Id*.
98. *Id*. at 1029.
99. Matthew Fletcher, "A Short History of Indian Law in the Supreme Court," *American Bar Association Human Rights Magazine*, vol. 40, issue 4 (Oct. 1, 2014).
100. Phil Ferolito, *"U.S. Supreme Court: Yakamas do not have to pay state tax on wholesale fuel," Yakima Herald*, March 19, 2019.

Carpenter v. Murphy: Will the U.S. Supreme Court Recognize the Continued Existence of the Muscogee (Creek) Nation's Reservation?

By William R. Norman



BEFORE THE UNITED STATES SUPREME COURT is a case that could drastically affect tribes' jurisdiction in Oklahoma. If the Indian defendant and the Muscogee (Creek) Nation (Creek Nation) are successful, *Carpenter v. Murphy* would reverse the state of Oklahoma's long-standing assumption that reservation boundaries located within its borders no longer exist.

Although the jurisprudence governing reservation status is well-settled – requiring clear congressional intent to disestablish a reservation and utilizing a three-factor test to assess whether that intent exists – Oklahoma seeks to turn this analysis on its head in order to maintain its posture that Oklahoma is reservation-less, despite being home to 38 federally recognized tribes. Oklahoma's position has had very real consequences for tribes located in Oklahoma – many of which have already suffered the devastating impacts of removal from their homelands. Oklahoma's stance not only supports its assertion of jurisdiction over crimes Congress has clearly said it does not have, but it also strips tribes of the jurisdiction they possess as an aspect of their inherent sovereignty over their reservation lands. The outcome in *Murphy* will either redress this wrong or further it (at least for the Creek Nation).

LAWS REGARDING JURISDICTION AND RESERVATION DISESTABLISHMENT ARE WELL SETTLED

While questions of jurisdiction on tribal land are often complicated, it is clear and well-settled law that the federal government, to the exclusion of states, has jurisdiction over murders committed by Indians in Indian country.[1] The Major Crimes Act, originally enacted in 1885, currently reads as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder … within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.[2]

Indian country, in turn, is defined to include:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[3]

Thus, when an Indian commits murder within the boundaries of a reservation, a state court does not have jurisdiction over prosecution of the crime.

The Supreme Court has affirmed that the Major Crimes Act applies to crimes committed within the boundaries of reservations regardless of the ownership of the particular parcel of land on which the crime was committed,[4] and formal designation as a reservation is not required.[5]

It is also well settled that a tribe's reservation boundaries remain intact unless Congress explicitly disestablishes or diminishes them. In one of the harshest decisions affecting tribes, *Lone Wolf v. Hitchcock*, the Supreme Court said Congress has the power to unilaterally abrogate treaties made with tribes,[6] later clarifying this includes the power to eliminate or reduce tribes' reservation boundaries.[7] The Supreme Court has taken pains to emphasize congressional intent to disestablish or diminish a reservation must be "clear and plain," with ambiguities resolved in favor of tribes.[8] In this vein, the Supreme Court has said that the allotment of land within a reservation does not itself disestablish the reservation.[9]

The Supreme Court has developed and repeatedly applied an analysis it refers to as the three-part *Solem* test to determine whether congressional intent exists to disestablish or diminish a reservation. Specifically, the *Solem* test looks to the following three factors, ranked from most to least weighty, to discern congressional intent:

1) The text of the statute purportedly disestablishing or diminishing a reservation, especially whether there are references to cessation, total surrender of all interests of the tribe, unconditional commitment for a specific sum of compensation for the land or restoring land to the public domain;

2) Events surrounding passage of the statute that *unequivocally* reveal a widely held and contemporaneous understanding that the affected reservation would be reduced as a result of the legislation; and

3) Events that occurred after passage of the statute, including Congress's treatment of the area, the way the Bureau of Indian Affairs and local judicial authorities treated the area, and who actually moved onto the opened land, where this evidence reinforces a finding under the other factors (it cannot alone establish disestablishment or diminishment).[10]

The continuing vitality of this test was reaffirmed by a unanimous Supreme Court in 2016 in *Nebraska v. Parker*.[11]

THE UNJUST HISTORY OF THE MUSCOGEE (CREEK) NATION

The Creek Nation's homelands were located in the southeastern United States, but it was forcibly removed in the 1820s by the United States to land west of the Mississippi River in what is today Oklahoma.[12] The United States undertook the Creek Nation's removal and relocation through a series of treaties. Even once removed from its homelands, in 1856 and 1866 the Creek Nation was pressured into treaties that diminished the size of its reservation in Oklahoma (hereinafter the Creek Reservation).

Due to increased westward expansion by white settlers, in 1893, Congress created the Dawes Commission to negotiate with the Creek Nation (as part of the Five Civilized Tribes) for the allotment of its land. When the Creek Nation resisted, Congress took actions to restrict the jurisdictional and other governmental powers of its government. Finally, after mounting pressure, in 1901, the Creek Nation agreed to allotment and Congress enacted the agreement into law – which called for elimination of the Creek Nation's government by March 4, 1906.[13] When it became clear that the deadline would not be met, Congress enacted the Five Tribes Act,[14] which delayed plans to terminate the Creek Nation's government. In 1906, Congress also passed the Oklahoma Enabling Act,[15] which allowed the Territory of Oklahoma, together with Indian Territory, to apply for statehood – paving the way for creation of the state of Oklahoma.

Remarkably, Oklahoma thereafter asserted that the reservations in Oklahoma ceased to exist – including the Creek Reservation. For the most part, the federal government allowed Oklahoma to continue under this faulty assumption without consequence. Because the extent of a tribe's governmental authority or jurisdiction to govern, care and provide for its people is often tied to its geographic boundaries, the existence and extent of those boundaries is critical to the tribe. The outer boundaries of tribes' reservations provide them governmental jurisdiction over their territorial land base – much like a state's jurisdiction within its borders. Oklahoma's assumption against reservation existence has created near continual friction between Oklahoma and tribes over the tribes' sovereign governmental powers.[16]

Oklahoma argued that the Creek Reservation did not survive Congress' allotment of the land and purported "dismantlement" of the Creek Nation's sovereignty leading up to creation of the state of Oklahoma, claiming these actions are incompatible with reservation status.

MR. MURPHY'S CASE

The case at hand, *Carpenter v. Murphy*, arises from the alleged 1999 murder of George Jacobs by Patrick Murphy – both citizens of the Creek Nation – in Henryetta on a roadside in a rural area. Although this is a murder prosecution at heart, these underlying facts are not often discussed, eclipsed by the case's potential jurisdictional impacts.

Mr. Murphy was prosecuted in an Oklahoma court, where, in the year 2000, a jury convicted him of murder and he was sentenced to death. Mr. Murphy filed an application for post-conviction relief alleging Oklahoma lacked jurisdiction because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute murders committed by Indians in Indian country. After the Oklahoma court ruled against him, Mr. Murphy included this claim in a federal *habeas* application, eventually appealing to the United States Court of Appeals for the 10th Circuit.

In 2017, the 10th Circuit concluded that although it owed deference to the Oklahoma court's determination that it had jurisdiction, in not applying the *Solem* test, the Oklahoma court had "applied a rule that was contrary to clearly established Supreme Court law" and the 10th Circuit "must apply the correct law."[17] The 10th Circuit examined the three factors laid out in the *Solem* test and found the Creek Reservation had not been disestablished, explaining:

> The most important evidence – the statutory text – fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders. The evidence of contemporaneous understanding and later history, which we consider at steps two and three, is mixed and falls far short of "*unequivocally* reveal[ing]" a congressional intent to disestablish.[18]

Oklahoma, thereafter, requested the United States Supreme Court grant its petition for *certiorari* and review the case, focusing on the question of whether the Creek Reservation had been disestablished. In a surprising move to many, the Supreme Court granted review of the case[19] and, on Nov. 27, 2018, heard oral arguments. Many *amicus* briefs were filed due to the potentially broad impacts of the case.

OKLAHOMA'S ARGUMENTS SUPPORTED BY DEPARTMENT OF JUSTICE

Oklahoma argued that the Creek Reservation did not survive Congress' allotment of the land and purported "dismantlement" of the Creek Nation's sovereignty leading up to creation of the state of Oklahoma, claiming these actions are incompatible with reservation status.[20] The United States through the Department of Justice (DOJ) – the trustee owing a legal fiduciary responsibility to tribes under federal law – echoed, via *amicus*, this argument. According to DOJ, in preparation for creating the state of Oklahoma, Congress disestablished the Creek Reservation through a series of statutes that broke up the Creek Nation's land, including through allotment, limited its governmental authority, applied federal and state law to Indians

and non-Indians on the land and set a timetable for dissolution of the Creek Nation.[21] DOJ said Oklahoma is unique from other states (whose formation did not disestablish reservations within their borders) because, according to DOJ, turning Oklahoma into a state was accomplished in part by replacing the tribes' governments with Oklahoma's government and disestablishing the tribes' territories in order to shift their territorial domain to Oklahoma.[22]

Oklahoma and DOJ emphasized stereotypical views of, as DOJ put it, "weaknesses in the Indian governments."[23] They used these stereotypes to support their assertions that Congress was unhappy with tribes' exercise of jurisdiction leading up to creation of the state of Oklahoma, alluding to harm that would result from a finding that the Creek Reservation's boundaries still remain intact.

Oklahoma and DOJ also claimed that Oklahoma's exercise of jurisdiction over the land evidences the Creek Reservation's disestablishment, with DOJ stating:

> For nearly a century, both Oklahoma and the United States have treated the statehood-era statutes as having disestablished the Creek Nation's former domain: the State has exercised criminal jurisdiction over offenses committed by Indians on unrestricted fee lands within the Creek Nation's former territory, while the United States has not attempted to exercise such jurisdiction.[24]

To support their claims of consequences that would follow from finding the Creek Reservation still exists, they said convictions under Oklahoma jurisdiction would be called into question, and DOJ said the requirement that the federal government, rather than Oklahoma, exercise criminal jurisdiction would be too large a burden.[25]

ASSERTIONS THE CREEK RESERVATION REMAINS INTACT

Mr. Murphy, and the Creek Nation as *amicus*, supported by the thorough and well-reasoned 10th Circuit decision below, argued that the Creek Reservation was never disestablished but, instead, remains intact today.[26]

As discussed previously, the Supreme Court's test for determining whether a reservation has been disestablished looks for clear congressional intent, evidenced by statutory text first and foremost. During oral arguments, Justice Kagan repeatedly described the test as examining whether a congressional act disestablished a reservation and nothing else.[27]

Mr. Murphy and the Creek Nation demonstrated that language disestablishing the Creek Reservation is lacking in the text of any statute.[28] Neither Oklahoma nor DOJ contended otherwise. In fact, the 10th Circuit examined each of the eight statutes Oklahoma identified as together establishing congressional intent to disestablish the Creek Reservation, finding that none contained textual language demonstrating such intent, but rather that their language indicated just the opposite: Congress continued to recognize the Creek Reservation.[29]

Moreover, although not necessary to find a reservation was not disestablished, the 10th Circuit decision cited cases supporting the continued existence of the Creek Reservation.[30] Most notably, in 1987, the 10th Circuit found the Creek Reservation still exists but reserved the question regarding whether its 1866 boundaries remained intact.[31]

Mr. Murphy and the Creek Nation also demonstrated, and the 10th Circuit below agreed, that Oklahoma's and DOJ's arguments regarding congressional acts to restrict the Creek Nation's governmental power, including over its land, are not relevant, including those meant: 1) to shift ownership of particular parcels of land away from the Creek Nation through allotment; and 2) to "dissolve" the Creek Nation's government.[32] Rather, all that matters in the analysis is whether a congressional act disestablished the reservation. Mr. Murphy and the Creek Nation asserted further that, as previously noted, the Supreme Court has expressly said reservation boundaries continue to exist despite allotment.[33] Additionally, Justice Breyer noted during oral arguments, many statutes limit tribes' jurisdictional authority over their reservation land (and sometimes even grant the state jurisdiction) without disestablishing the reservation.[34]

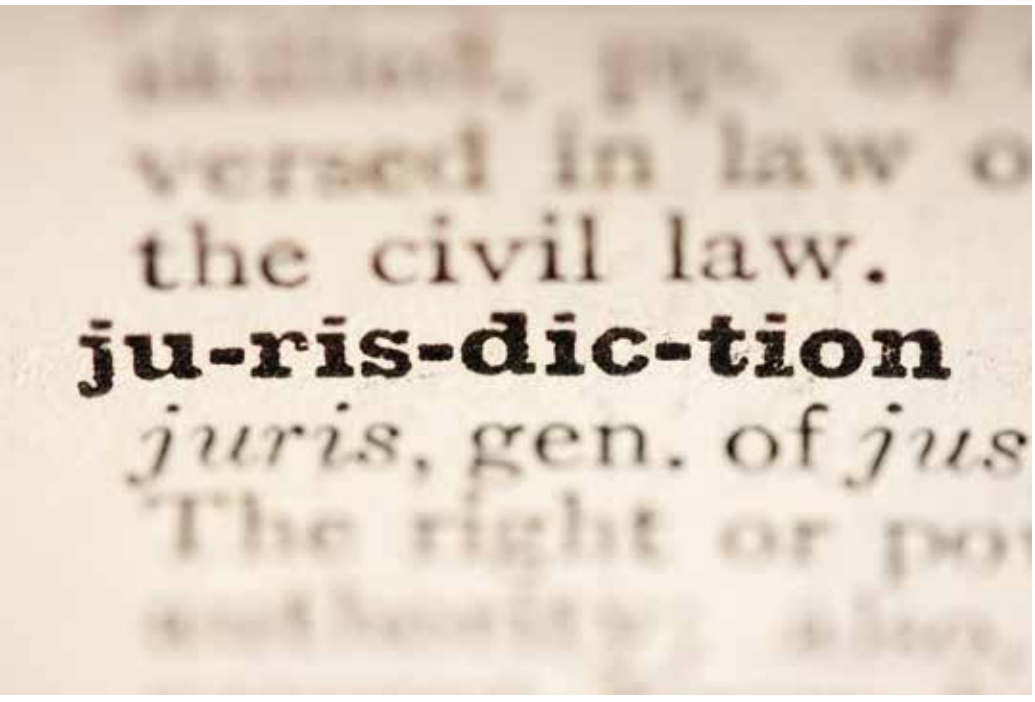
However, even if it were relevant, as established by Mr. Murphy and the Creek Nation, the Creek Nation continues to exist and exercise authority over the Creek Reservation. As the 10th Circuit recognized, congressional consideration of "dissolving" the Creek Nation's government never led to actual dissolution, but rather the Creek Nation continues on as a strong government with a vibrant community.[35]

Similarly, Mr. Murphy and the Creek Nation contended that creation of the state of Oklahoma did not disestablish the Creek Reservation. Instead, as they and the 10th Circuit noted,[36] Congress, in the Oklahoma Enabling Act, imposed restrictions on the new state of Oklahoma's ability to affect tribes' property,[37] and Oklahoma disclaimed title and jurisdiction at the time of statehood.[38] In fact, the 10th Circuit determined that no precedent supports the claim that creation of the state of Oklahoma in any way served as congressional

intent to disestablish the Creek Reservation.[39] Instead, as Mr. Murphy pointed out, other states, when admitted to the Union, contained a significant percentage of reservation land, and yet those reservations were not disestablished.[40]

In response to arguments that practical consequences would be too great, Mr. Murphy and the Creek Nation reminded the court that practical consequences are not relevant to a reservation disestablishment analysis[41] but, they said, even if they were significant, the practical consequences of a finding that the Creek Reservation still exists are not as significant as some would make them out to be.

First, as both Mr. Murphy and the Creek Nation noted, a court may find that a tribe no longer possesses sovereignty over reservation land even though the reservation boundaries continue



to exist.[42] Additionally, they both noted, tribes' jurisdiction, especially over noncitizens, even on reservation land, is seriously limited by Supreme Court precedent.[43]

Second, Mr. Murphy and the Creek Nation established, as previously discussed, the Creek Nation has been exercising jurisdiction over the Creek Reservation throughout time. Specifically, the Creek Nation demonstrated that it provides critical services to citizens and noncitizens alike throughout the Creek Reservation, including services related to health care and education as well as law enforcement and domestic violence.[44] Evidencing the importance of the Creek Nation to the safety and well-being of all persons throughout the Creek Reservation, its police department has entered into cross-deputization agreements with the United States, Oklahoma and 32 county and municipal jurisdictions, including the city of Tulsa. As the 10th Circuit had noted, there existed a continuous governmental presence of the Creek Nation on the Creek Reservation, and many of the powers Congress temporarily restricted through the allotment statutes were later restored.

Lastly, while it may be true that Oklahoma has been exercising jurisdiction (arguably unlawfully) over the Creek Reservation for many years, the 10th Circuit rightly stated that "Oklahoma's exercise of jurisdiction within the Creek Reservation is not a proper basis for us to conclude that Congress disestablished the Reservation."[45] Similarly, while there is a large non-Indian population living within the boundaries of the Creek Reservation, the 10th Circuit found controlling *Nebraska v. Parker*, where the Supreme Court held that the Omaha reservation was not disestablished despite a 100-year history of treating the lands as belonging to Nebraska and residents of the area being largely noncitizens.[46]

CREEK RESERVATION HANGS IN THE BALANCE OF THE SUPREME COURT, LITERALLY

In order for the 10th Circuit's decision that the Creek Reservation was not disestablished to stand, four of the Supreme Court justices must vote in its favor (as Justice Gorsuch, who participated in adjudication of the 10th Circuit appeal while presiding there, recused himself from the Supreme Court's proceedings). While it is always difficult to predict the vote of any particular justice, some observations are worth noting based upon the dialogue of the court during oral arguments.

Justices Kagan and Sotomayer seemed most interested in analyzing the case from the traditional disestablishment test standpoint, with Justice Kagan hammering home the point that the well-established test is congressional intent. Although Justice Thomas did not ask questions, he wrote the opinion in *Nebraska v. Parker* and is a textualist who usually adheres closely to the text of a statute. Justice Breyer began his questions by asking about the existence of statutory language disestablishing the Creek Reservation and noted that reservations exist with

limited tribal jurisdiction, although he went on to ask questions about the practical effects of a finding that the Creek Reservation continues to exist and the extent of the Creek Nation's authority.

Justice Roberts and Justice Alito asked questions about the possible consequences of a finding that the Creek Reservation continues to exist, as well as the level of the Creek Nation's authority retained over it. Justice Kavanaugh suggested examining the historical context, rather than specific statutory language alone, and referenced the importance of stability. The one question Justice Ginsburg asked suggested she may be concerned about taxation implications if the Creek Reservation is found to continue to exist.

After oral arguments, the Supreme Court directed the parties, the solicitor general and the Creek Nation to file supplemental briefs. Based on its questions, it appeared the court was looking for a way to find that Oklahoma has criminal jurisdiction over the land without finding the Creek Reservation was disestablished. The court directed the briefs to address whether any statute grants Oklahoma jurisdiction over the prosecution of crimes committed by Indians within the Creek Reservation, regardless of whether the reservation status remains, and whether there are circumstances under which land qualifies as a reservation but does not meet the statutory Indian country definition.

After much anticipation, on June 27, 2019, the Supreme Court issued a statement that it would not decide the case during its current term but would place the case on the calendar for re-argument in the upcoming term. This unusual move only adds to the question of what the Supreme Court will do: follow well-settled law or cave to arguments that the sky would fall if tribes were found to have jurisdiction over their own land.[47]

ABOUT THE AUTHOR

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ENDNOTES

1. *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993).
2. 18 U.S.C. §1153(a).
3. 18 U.S.C. §1151.
4. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962); *United States v. Celestine*, 215 U.S. 278, 290-91 (1909); *United States v. Thomas*, 151 U.S. 577, 586 (1894).
5. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.").
6. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903).
7. *Solem v. Bartlett*, 465 U.S. 463, 468-72 (1984) (noting its decision relied on factors discussed in previous cases examining whether reservation disestablishment had occurred). These factors have since been affirmed and applied by the Supreme Court. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994).
8. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citing *United States v. Dion*, 476 U.S. 734, 738 (1986)).
9. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973).
10. *Solem v. Bartlett*, 465 U.S. 463, 470-72 (1984). *See also Nebraska v. Parker*, 136 S. Ct. 1072, 1079-80 (2016).
11. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).
12. In its removal and subsequent dealings, it was loosely lumped into a group of tribes referred to as "the Five Civilized Tribes," also relocated from the southeastern United States and also placed on reserved lands held in "fee" by the tribes.
13. 31 Stat. 861 (1901).
14. 34 Stat. 137 (1906).
15. 34 Stat. 267 (1906).
16. Ironically, Congress has effectively rejected Oklahoma's assumption by equating the so-called "former reservations" in Oklahoma to existing reservations elsewhere. *See, e.g.*, 25 U.S.C. §2719(a)(2)(A) (treating "former reservations" in Oklahoma same as reservations existing when Indian Gaming Regulatory Act was enacted); 25 U.S.C. §2020(d)(1) ("Tribes that receive grants under this section shall use the funds made available through the grants ... to facilitate tribal control in all matters relating to the education of Indian children on reservations (and on former Indian reservations in Oklahoma)[.]").
17. *Murphy v. Royal*, 875 F.3d 896, 903-04 (10th Cir. 2017).
18. *Murphy v. Royal*, 875 F.3d 896, 937-38 (10th Cir. 2017) (citing *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016)) (emphasis in original). The 10th Circuit expressly did not decide whether the land qualified as allotment land. *Murphy v. Royal*, 875 F.3d 896, 908 n.8 (10th Cir. 2017).
19. 138 S. Ct. 2026 (2018).
20. Brief for Petitioner at 23, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 23, 2018).
21. Brief for the United States as Amicus Curiae Supporting Petitioner at 4-7, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 30, 2018).
22. Brief for the United States as Amicus Curiae Supporting Petitioner at 5-7, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 30, 2018).
23. Brief for the United States as Amicus Curiae Supporting Petitioner at 18, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 30, 2018).
24. Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 30, 2018).
25. Brief for the United States as Amicus Curiae Supporting Petitioner at 28-33, *Carpenter v. Murphy*, No. 17-1107 (U.S. July 30, 2018).
26. Brief for Respondent at 1, *Carpenter v. Murphy*, No. 17-1107 (U.S. Sept. 19, 2018); Brief for Amicus Curiae Muscokee (Creek) Nation in Support of Respondent at 15-19, *Carpenter v. Murphy*, No. 17-1107 (U.S. Sept. 26, 2018).
27. Transcript of Oral Argument at 32-34, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).
28. Transcript of Oral Argument at 36-40, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).
29. *Murphy v. Royal*, 875 F.3d 896, 934-51 (10th Cir. 2017) (discussing eight statutes identified by Oklahoma and determining that "[n]ot only do the State's statutes lack any language showing disestablishment, they show Congress's continued recognition of the Reservation's boundaries").
30. *Murphy v. Royal*, 875 F.3d 896, 951 (10th Cir. 2017).
31. *Indian Country, U.S.A., Inc. v. Okla. ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 975 n.3, 980 n.5 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).
32. Transcript of Oral Argument at 45-50, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018). Arguably, the United States, while possessing authority to remove federal recognition, cannot dissolve a tribe's government.
33. Brief for Respondent at 20, *Carpenter v. Murphy*, No. 17-1107 (U.S. Sept. 19, 2018); Brief for Amicus Curiae Muscokee (Creek) Nation in Support of Respondent at 15, *Carpenter v. Murphy*, No. 17-1107 (U.S. Sept. 26, 2018); *see also Mattz v. Arnett*, 412 U.S. 481, 497 (1973).
34. Transcript of Oral Argument at 66, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).
35. *Murphy v. Royal*, 875 F.3d 896, 964-65 (10th Cir. 2017).
36. *Murphy v. Royal*, 875 F.3d 896, 947 (10th Cir. 2017) ("In the Oklahoma Enabling Act, the final statute the State relies on, Congress did not dissolve the Creek government, but it granted permission to the inhabitants of both the Territory of Oklahoma and the Indian Territory to adopt a constitution and seek admittance into the Union as the State of Oklahoma.").
37. 34 Stat. 267 (1906).
38. Okla. Const. art. I, §3 ("Unappropriated public lands - Indian lands - Jurisdiction of United States. The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying

within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.").

39. *Murphy v. Royal*, 875 F.3d 896, 953-54 (10th Cir. 2017).

40. Transcript of Oral Argument at 42-44, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).

41. Transcript of Oral Argument at 41-42, 68-75, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).

42. They cited *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005).

43. Transcript of Oral Argument at 47-49, 62-63, *Carpenter v. Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).

44. *See* Brief for Amicus Curiae Muscokee (Creek) Nation in Support of Respondent at 26-31, *Carpenter v. Murphy*, No. 17-1107 (U.S. Sept. 26, 2018).

45. *Murphy v. Royal*, 875 F.3d 896, 964 (10th Cir. 2017).

46. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016).

47. Unfortunately, the space limitations herein preclude a more exacting examination of a number of legal issues related to the subject matter, including, but not limited to the following: the extent of limitations placed on tribes' exercise of jurisdiction even over their reservation land; the history of how and why Oklahoma tribes have suffered under the faulty assumption that their reservations were disestablished; ways tribes in Oklahoma do have jurisdiction over some of their land, including trust land and allotments; how the decision in this case affects other tribes in Oklahoma, recent Supreme Court cases in addition to *Nebraska v. Parker* upholding reservation boundaries or other treaty rights; and the ways in which tribes in Oklahoma have exercised their governmental authority and benefited Oklahoma more generally.

Industrial Hemp Production and the 2018 Farm Bill: Tax Implications for Tribal Producers

By G. Blake Jackson

THE PASSAGE OF THE 2018 FARM BILL[1] marked a historic development for Indian country, cementing 63 new provisions across 11 of the 12 titles aimed at specifically supporting the production of food, fiber and jobs for tribal governments and individual tribal producers. This created a number of new opportunities for the exercise of tribal sovereignty and opened new pathways for individual tribal producers to access federal programs. A critical development in this arena exists in the horticulture title, where Congress legalized the production of industrial hemp and fully authorized tribes to regulate hemp production in a manner consistent with their state counterparts.

Industrial hemp is a derivative of the *cannabis sativa* plant previously outlawed by the Controlled Substances Act of 1970 (CSA)[2] because of its similar appearance to marijuana.[3] The paradigm shift of fully legalizing hemp production under the 2018 Farm Bill has attracted the attention of those throughout the agricultural sector because it opens a new, value-added market for a plant which can be grown as a fiber, seed or dual-purpose crop. There are currently over 25,000 documented uses for hemp spanning across nine submarkets: agriculture, textiles, recycling, transportation, food and beverage, paper, construction materials and personal care.[4] In fact, domestic sales of hemp-based retail products were an estimated $820 billion in 2017.[5] Given that a local economy can add approximately 20.8 cents to the local food dollar by streamlining its supply chain by including processing, packaging and transportation,[6] tribal regulation and production of industrial hemp holds great promise for Indian country as a new market for job creation and building strong, diverse agricultural economies.

Although the development is promising, legal prerequisites must be fulfilled before hemp can be produced in accordance with the 2018 Farm Bill provisions. One requirement is that the state or tribal jurisdiction of intended production must have a hemp regulatory plan approved by the U.S. Department of Agriculture.[7] At a minimum, these plans must detail the jurisdiction's procedure for maintaining land records of where hemp is produced, THC testing procedures, disposal methods for plants and products over the 0.3% THC limit and a procedure for properly handling violations of federal hemp laws.[8] If the state or tribe does not develop such a plan, the USDA will assume regulatory authority within that jurisdiction according to a federally drafted regulatory plan meeting similar standards.[9] Regardless, nothing in the legislation is intended to preempt state or tribal laws prohibiting hemp production.[10]

While the 2018 Farm Bill afforded both Indian tribes and states full parity to regulate industrial hemp production within their

respective jurisdictions, its legislative language lacks precision in clearly delineating this authority between the two sovereigns.[11] Accordingly, this article attempts to clarify these boundaries, specifically focusing on federal and state taxation of industrial hemp production by tribes and individual Indian producers in a tribal jurisdiction.[12]

TAXATION OF HEMP PRODUCTION IN INDIAN COUNTRY

The power to tax is essential for any sovereign's functionality, and this is certainly the case when examining federal, state and tribal governments. When these governments all have varying levels of authority to levy taxes upon individuals within a geographic area, a careful evaluation of the parties involved and the type of taxes sought to be imposed is necessary to determine the bounds of each sovereign's authority. This analysis is further complicated by the jurisdictional complexities of federal Indian law when tribal members, Indian tribes and their property are involved.

Defining 'Indian Country'

Determining whether an area is "Indian country" is a threshold question in examining jurisdiction to tax tribes and individual Indians. Thus, as a starting point, one must first define "Indian country" and understand when this definition applies as determined by Congress. This term of art identifies the geographical area in which federal and tribal laws apply (taxes, in this case), normally to the exclusion of state law.[13] Specifically, 18 U.S.C. §1151 provides:

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[14]

Although this statute is contained in the U.S. criminal code, the Supreme Court has extended this provision to apply to the civil context.[15] The court has also held that, in enacting this statute, "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."[16] This statute merely codified the common law test for Indian country, which simply asked if the land in question was "validly set apart for the use of Indians as such, under the superintendence of the [federal government]"[17] and did not distinguish between reservation and trust land (individual or tribal).[18]

Congressional actions can terminate the Indian country status of reservation land.[19] An example of this is the "Indian allotment program" of the early 1900s where Congress broke up the tribal land base by allotting parcels of land to individual tribal members and then opening the "surplus land" of the tribe's reservation to non-Indian settlement.[20] The devastating aftermath of allotment leaves us with a jurisdictional conundrum in modern-day Indian law cases – deciding whether reservation "diminishment" or "disestablishment" occurred, resulting in a loss of tribal jurisdiction over the lands opened for non-Indian settlement.[21] Where diminishment has occurred, "the reservation itself remains intact, but the homesteaded lands are no longer part of it."[22] Disestablishment has occurred if "the reservation itself ceases to exist, [but]... tribal trust lands and trust allotments within the former reservation boundaries... still remain Indian country."[23] Otherwise stated, diminishment leaves reservations intact but homesteaded parcels are no longer Indian country, whereas disestablishment leaves no reservation but the trust and allotted lands remain Indian country.

Although the Indian allotment program was initially implemented on a national scale, the situation was later dealt with on a reservation-by-reservation basis.[24] Each of these individual surplus land acts contained its own language, which resulted from tribal negotiations and legislative compromises involved in each instance.[25] These acts largely did not state whether the open lands remained part of the reservation or were divested of their Indian country status.[26] The court, however, has never been willing to unilaterally assert that congressional intent for passing each surplus land act was to diminish the reservations involved. [27] While some acts did diminish tribal reservations and others did not, one can only determine the effect of each act by analyzing its language, legislative history and other factors surrounding its passage.[28]

Reservation diminishment, the Supreme Court has said, "will not be lightly inferred."[29] Rather, Congress must clearly show that it did, in fact, actually intend to change reservation boundaries.[30] The strongest evidence of intended diminishment is the language of the act that opened the reservation to non-Indian settlement.[31] When the statute explicitly references cession or otherwise displays "the present and total surrender of all tribal interests," the court has indicated that this "strongly suggests" an intent to diminish a tribe's reservation.[32] If such statutory language is coupled with an "unconditional commitment from Congress to compensate an Indian tribe for its opened land," this heightens that "strong suggestion" to an "insurmountable presumption" of congressional intent to diminish a tribe's land base.[33]

However, a finding of diminishment has also been found in the absence of these factors.[34] For example, "[w]hen events surrounding the passage of a surplus land act ... unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the court has been willing to infer congressional intent to diminish the tribal land base.[35] To the dismay of tribal interests involved, this has been the case even when

the statutory language otherwise indicated intent that the boundaries would remain unaffected.[36]

The court has also looked to the events occurring after the passage of these acts to determine congressional intent.[37] For example, subsequent treatment of the opened lands by Congress and governmental authorities.[38] In addition, where a large influx of non-Indians later settled the land, the court has stated, "*de facto*, if not *de jure*, diminishment may have occurred."[39] In any case, if the surplus land act and its history lacks "substantial and compelling evidence of congressional intent[] to diminish Indian lands," then the land remains Indian country.[40]

State Power to Tax Tribes and Tribal Members in Indian Country

In one of the earliest Supreme Court cases, Chief Justice John Marshall described Indian tribes not as states or foreign nations, but rather as "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."[41] The next year, Chief Justice Marshall explained that this relationship did not extinguish the power of tribal self-governance because "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with stronger, and taking its protection."[42]

Along these parameters, the court has held in three seminal cases that a state may not tax the activities of Indian tribes and their members within Indian country.[43] This principle is clearly articulated in *McClanahan v. Arizona State Tax Commission*, where the state sought to tax the income of a citizen of the Navajo Nation who lived on the reservation and whose income was solely derived from on-reservation sources.[44] The court articulated the principle that "[s]tate laws generally are not applicable to tribal Indians on Indian reservations except where Congress has expressly provided" otherwise.[45] Accordingly, because there was no congressional measure expressly authorizing state taxes on the Navajo Reservation, the state could not impose its income taxes on the tribal member in the case.[46]

The court revisited this rule in *Oklahoma Tax Comm'n v. Sac and Fox Nation*.[47] In *Sac and Fox*, the nation brought suit against the Oklahoma Tax Commission seeking to avoid the state's income and vehicle registration and excise taxes.[48] The commissioner argued that *McClanahan* did not apply because the relevant boundary to determine taxation authority is "the perimeter of a formal reservation."[49] The court held for the nation by stating that the only relevant determination under *McClanahan* was "whether the land [was] Indian country," which is land "within reservation boundaries, on allotted lands, or in dependent communities."[50]

Later, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, the state of Oklahoma sought to impose personal income taxes upon tribal members who lived outside Indian country, as well as its motor fuels excise tax upon fuel sold at tribal travel plazas on trust land.[51] The unanimous court provided that a state attempt to levy a tax directly on a tribe or tribal members in Indian country is not subject to a "balancing inquiry," but is rather analyzed by a "categorical approach."[52] Accordingly, states lack power to tax reservation lands and reservations "[a]bsent cession of jurisdiction or other federal statutes permitting it."[53]

Notwithstanding these cases, other precedent has shown circumstances where land fitting Indian country may be taxable, such as the presence of a congressional act allowing for alienation. Such was the case in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,[54] where the court upheld a county *ad valorem* tax upon the sale of fee-patented lands within the Yakima Reservation (*i.e.*, lands within Indian country) because of statutory language removing "all restrictions as [its] to sale, incumbrance, or taxation."[55] Similarly, in *Cass County v. Leech Lake Band of Chippewa Indians*,[56] the court upheld county *ad valorem* taxes on re-acquired tribal fee land based upon its intervening, non-Indian ownership and congressional allotment statute authorizing the parcel's initial alienation.[57] Lastly, in *City of Sherrill v. Oneida Indian Nation*,[58] the court upheld a city *ad valorem* tax where the nation re-acquired original reservation lands after 200 years of non-Indian possession, even though no act of Congress authorized initial alienation in fee.[59]

An evaluation of the court's precedent in this area suggests that hemp production in Indian country is best protected from state taxation at the zenith of tribal sovereignty – when done by individual tribal producers or Indian tribes themselves on trust or restricted fee land. This assertion is buttressed by cases imposing strong categorical prohibitions on such taxation – *McClanahan*, *Sac & Fox* and *Chickasaw*. These protections seemingly weaken where an intervening congressional act makes the land freely alienable to non-Indian ownership, even in cases where the reservation may not have been diminished or entirely disestablished.[60] Similarly, intervening conveyances from tribal to non-Indian fee ownership, whether done by congressional act or not, may subject a parcel to state taxation. The longer the time of such intervening non-Indian

ownership, the stronger the justification for state taxation seems to be, as per *Sherrill.* Therefore, avoidance of state taxes on tribal hemp production is best avoided when done by individual Indian producers or tribal governments on federal trust land or restricted fee land and is likely to be maintained so long as the land stays in Indian ownership.

Federal Power to Tax Tribes and Tribal Members in Indian Country

The Internal Revenue Code (IRC) [61] specifies that "gross income" shall include "all income, from whatever source derived."[62] In interpreting this statute, the Supreme Court originally defined "gross income" to mean "the gain derived from capital, from labor, or from both combined,"[63] but has since expanded this definition to include all "undeniable accessions to wealth, clearly realized, and over which the taxpayer[] ha[s] complete dominion."[64] Based on these definitions, an individual's tax liability is derived from all portions of gross income not otherwise deductible or exempt under federal law.[65]

While Indian tribes are non-taxable entities under federal law, no provision of the IRC exempts an individual's gross income from federal taxation based on his or her status as an Indian.[66] Instead, such an exclusion must be based on the interpretation of a tribe's treaties with the federal government or a related act of Congress.[67]

In *Squire v. Capoeman*,[68] the Supreme Court examined whether proceeds gained from selling timber harvested from an allotment held in trust by the federal government for an individual Indian qualified for a federal income tax exemption as per the General Allotment Act of 1887. Section 5 of the act stated that allotted lands were to be held in trust by the federal government for the individual allottee for a period not less than 25 years, then transferred to the allottee "free of all charge or encumbrance whatsoever."[69] Section 6 of the act provided that once an allottee received a patent in fee simple for his allotment, "all restrictions as to the sale, encumbrance, or taxation, of said land shall be removed, and said land shall not liable to the satisfaction of any debt contracted prior to the issuing of such patent."[70] To evaluate this matter, the court utilized an Indian law canon of construction under which ambiguities in federal law are interpreted liberally to benefit the rights of Indians involved.[71] Under this criteria, the court concluded these provisions manifested a congressional intent to leave Indian allotments tax exempt until the allottee is issued a fee patent, and held that income derived directly from the allotment was to be excluded from taxable income.[72]

The Internal Revenue Service used the *Capoeman* doctrine to develop its position that income derived directly from allotted Indian land[73] is exempt from federal taxation, provided that all of the following is fulfilled:

(1) The land in question is held in trust by the United States Government;
(2) Such land is restricted and allotted and is held for an individual... Indian, and not for a tribe;
(3) The income is 'derived directly' from the land;
(4) The statute, treaty, or other authority involved evinces congressional intent that the allotment be used as a means of protecting the Indian from [unjust financial dealing]; and
(5) The authority in question contains language indicating a clear congressional intent that the land, until conveyed in fee simple to the allottee, is not subject to taxation.[74]

The IRS has interpreted "derived directly from the land" under *Capoeman* to include "rentals (including crop rentals), royalties, proceeds from the sale of natural resources of the land, income from the sale of crops grown on the land and from the use of the land for grazing purposes, and income from the sale or exchange of cattle or other livestock raised on the land."[75] Additionally, certain federal conservation and farm program payments are considered "derived directly from the land" as such payments are made to individual Indians "for agreeing to use the land in certain ways, and for agreeing not to use the land in certain ways."[76]

Accordingly, an individual Indian producer's proceeds from growing hemp on allotted trust or restricted fee land will likely be tax exempt as per the IRS interpretation of *Capoeman*, because such activity would constitute "income from the sale of crops grown on the land." This assertion is further supported by congressional intent for the federal government to treat hemp much in the manner it does other commodities.[77] Similarly, an individual Indian hemp grower may be able to exclude certain conservation or federal farm program payments under the IRS interpretation based on the same premise. Thus, there appears to be a wide array of federal tax benefits for tribal producers looking to enter this emerging market. The same holds true for tribal governments looking to enter this sector, as Indian tribes are not taxable entities for federal income tax purposes.

CONCLUSION

The 2017 Census of Agriculture[78] indicates that 58.7 million acres of land throughout Indian country are already engaged in some type of food and/or agricultural production valued at $3.5 billion nationally.[79] The legalization of industrial hemp production marks a potential historic economic development opportunity for cultivation and value-added agriculture throughout Indian country. Still, there are many unknown quantities when one considers the outlook of this new market. Based upon existing doctrines of federal Indian law, it appears the protections from state taxation are best enjoyed when done by individual Indians or tribal governments on trust or restricted land that has remained in Indian possession. Federal protections appear to align closely with this assessment, as income derived directly from allotted trust or restricted land is exempt from individual Indian income as per *Capoeman*. In any instance, a careful approach to entering this market could hold potential for newfound economic stimulation throughout the rural and remote parts of Indian country, many of which are all too often forgotten.

ABOUT THE AUTHOR

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ENDNOTES

1. The Agricultural Improvement Act of 2018, Pub. L. 115-334.
2. *See generally* 21 U.S.C. §801 *et. seq.*
3. Marijuana, another derivative of the *Cannabis sativa* plant, was outlawed as a Schedule I substance under the CSA due to its high contractions of a psychoactive substance known as 9-tetrahydrocannabinol (THC). Under Section 10113 of the 2018 Farm Bill, industrial hemp cannot contain more than 0.3%THC on a dry weight basis.
4. CRS Report RL32725, Hemp as an Agricultural Commodity.
5. *Id.*
6. U.S. Dept. of Agric., *Food Dollar Series* (2019), data.ers.usda.gov/reports.aspx?ID=17885.
7. Section 10113 of the 2018 Farm Bill.
8. *Id.*
9. *Id.*
10. *Id.*
11. Section 10113 uses terminology such as "territory of an Indian tribe" to define tribal jurisdiction, which is divergent from other provisions of federal law defining tribal jurisdiction as "Indian country." For more discussion of the latter, please see *infra* Subsection 1.
12. There are additional layers of legal analysis when one considers possible non-Indian producers within a tribal jurisdiction.
13. *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (1998).
14. 18 U.S.C. §1151.
15. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 n.5 (1987) ("[The Indian country] definition applies to both criminal and civil jurisdiction.") (superseded by statute on other grounds).
16. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).
17. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).
18. *Id.*
19. *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).
20. *Id.* at 466-67.
21. Judith V. Royster et al., *Native American Natural Resources: Cases and Materials* 99 (3rd ed. 2013); it is worth noting that the court has used the terms "disestablishment" and "diminishment" interchangeably, but the analysis for both remains the same.
22. *Id.*
23. *Id.*
24. *Solem,* 465 U.S. at 467.
25. *Id.*
26. *Id.* at 468.
27. *Id.* at 468-69.
28. *Id.* at 469.
29. *Id.* at 470.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 470-71.
34. *Id.* at 471.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 472.
41. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
42. *Worcester v. Georgia*, 31 U.S. 515, 560-61 (1832) (emphasis added).
43. *See infra* at 37, 40, 44.
44. 411 U.S. 164, 165 (1973).
45. *Id.* at 170-71.
46. *Id.*
47. 508 U.S. 114 (1993).
48. *Id.* at 120.
49. *Id.* at 124.
50. *Id.* at 125-26.
51. 515 U.S. 450, 452-53 (1995).
52. *Id.* at 459.
53. *Id.* (citation omitted).
54. 502 U.S. 251 (1992).
55. *Id.* at 255.
56. 524 U.S. 103 (1998).
57. *Id.* at 114-15.
58. 544 U.S. 197 (2005).
59. *Id.* at 213-24. *Sherrill* also specified that placing the land back in federal trust would be the proper vehicle to remove it from city/state taxation.
60. There appears to be no precedent for this matter on record, but this assertion is based on the ability of a state to tax tribal land that has been subject to alienation or has passed to non-Indian ownership – both issues giving rise to the diminishment and disestablishment analyses.
61. 26 U.S.C. §61.
62. *Id.* at (14).
63. *Eisner v. Macomber*, 252 U.S. 189, 205 (1920).
64. *Glenshaw Glass Co. v. Commissioner*, 348 U.S. 426, 431 (1955).
65. Kratzke, William P., *Basic Income Tax 2018-2019 Edition Incorporating Tax Cuts and Jobs Act 9* (6th ed 2018).
66. Rev. Rul. 67-284.
67. *Id.*
68. 351 U.S. 1 (1956).
69. *Id.* at 3.
70. *Id.* at 7.
71. *Id.* at 6-7.
72. *Id.* at 8-10.
73. This IRS has clarified that its interpretation of *Capoeman* extends beyond trust alloments to also include lands acquired by Section 1 of the Oklahoma Indian Welfare Act and the lands of the Five Civilized Tribes. *See* Rev. Rul. 59-349; *see also*, Rev. Rul 74-13 (extending exemption to restricted lands in addition to those under a General Allotment Act).
74. *See supra* 65.
75. *Id.*
76. Rev-Rul. 69-289; this provision includes a number of USDA programs no longer operational under federal law, but the rationale of the ruling is still considered good precedent by the IRS at the time of this writing. Thus, it appears the principle arguably still applies to current farm program and conservation payments. The payments of one such program, the Conservation Reserve Program, are tax-exempt outside of the tribal context, as per the IRS website. *See Conservation Reserve Program "Annual Rental Payments" and Self Employment Tax*, Internal Revenue Serv. (July 21, 2019), www.irs.gov/businesses/small-businesses-self-employed/conservation-reserve-program-annual-rental-payments-and-self-employment-tax. *But see* Understanding Your Federal Farm Income Taxes, Penn State Extension (Jan. 8, 2013), extension.psu.edu/understanding-your-federal-farm-income-taxes (describing the taxability of certain farm program payments).
77. For instance, Section 11101 of the 2018 Farm Bill allows hemp growers to utilize federal crop insurance for their crop, a practice widely used by large-scale growers of agricultural commodities. The Farm Credit Administration has also announced that it will soon be releasing guidance concerning agricultural lending to hemp producers. *See* Dallas P. Tonsanger, chairman and CEO, Farm Credit Admin., Remarks at Farm Credit Council Annual Meeting (Jan. 30, 2019)(transcript available at: www.fca.gov/template-fca/news/Tonsager30Jan2019.pdf).
78. U.S. Dept. of Agric., *2017 Census of Agricultur: United States Summary and State Data Volume I, Geographic Area Series, Part 51 72* (2019), www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.
79. *Id.*

United States v. Osage Wind: An Example of How an Indian Tribe's Unique Status Governs Appeal Rights and Statutory Construction

By William R. Norman and Zachary T. Stuart

IN JANUARY 2019, THE U.S. SUPREME COURT denied a request to review the 10th Circuit's decision in *United States v. Osage Wind, LLC*.[1] The decision held that the Osage Minerals Council (OMC), acting on behalf of the Osage Nation (Osage or tribe), had a right to appeal an earlier decision where, though it was not party and had not intervened, it maintained a unique interest to appeal.[2]

The case highlights the special relationship between the United States and tribes generally, as well as tribes' right to pursue their interests when the United States fails to do so. The 10th Circuit's decision also clarified the meaning of "mining" under the Bureau of Indian Affairs' (BIA) regulations and, with it, the circumstances in which entities need to obtain a mineral lease from the secretary of the interior before performing construction above a mineral estate held in trust with the United States. In doing so, the 10th Circuit invoked an Indian canon of construction – "ambiguity in laws designed to favor Indians ought 'to be liberally construed' in the Indian's favor."[3] Here, it was the excavation of almost 30,000 cubic feet of material for each wind turbine of a wind farm that fell within the federal regulations' definition of mining.[4]

This article first summarizes the inception of the underlying dispute in which the Osage Nation sought to protect its interest, beginning in 2011, to prevent construction of a wind farm by Osage Wind LLC, a wind energy company unaffiliated with the Osage Nation or OMC. Next, the article addresses the United States' suit on behalf of the Osage Nation and the federal government's later refusal to appeal the lower decision on the Osage Nation's behalf. Finally, the article addresses the 10th Circuit's analysis on whether the tribe, an unnamed party, could appeal on its own behalf, as well as the invocation of a longstanding Indian canon of construction that ultimately tilted the court's hand in favor of the tribe.

THE OSAGE MINERAL ESTATE

In 1872, the Osage Nation bought its reservation, which coincides with present-day Osage County.[5] Petroleum development proceeded slowly in the 1890s, but by 1903, 40 wells had been completed on the reservation.[6] In 1906, Congress passed the Osage Act, severing the tribe's mineral estate from the surface estate.[7] While the surface estate was allotted, or divided up among individuals, the mineral estate – the "underground reservation" – was held in trust with the United States for the benefit of the Osage.[8] Today, under the Osage Nation's 2006 Constitution, the OMC manages the Osage mineral estate.[9]

THE OSAGE NATION MOVES TO PROTECT ITS INTERESTS

OMC and Osage Wind first butted heads in 2011 in *Osage*

Nation v. Wind Capital Group.[10] Osage Wind leased over 8,000 acres in Osage County from seven surface owners to construct a wind farm.[11] Between 80 and 100 turbines were planned for the wind farm, as well as a substation, an overhead transmission line, two meteorological towers and access roads – an estimated footprint of between 100 and 200 acres within the leased acreage.[12] OMC then sought to prevent the construction under both federal and state law.[13] The basis of OMC's causes of action was that the proposed wind farm would interfere with OMC's use of the surface estate for oil and gas development.[14] The tribe had leased its mineral interests to multiple energy and exploration companies.[15] Oil was originally discovered in the area in 1920, but increases in oil prices and improvements in drilling technology had recently piqued energy companies' interests.[16]

As part of its effort though, the tribe presented insufficient evidence relating to conflict between its lessees and Osage Wind.[17] After pointing out that structures would take up less than 1.5% of the leased acreage, the court found insufficient evidence to support OMC's claim that the energy and exploration lessees' use of the surface estate would be interrupted by Osage Wind's construction of the windmills.[18] Accordingly, the district court denied the Osage Nation's requests for declaratory and injunctive relief.[19] Within two years, Osage Wind had begun site preparation and excavation for the windmill foundations.[20]

THE UNITED STATES STEPS IN – AND BACKS OUT

In late 2013, the United States stepped in on Osage Nation's behalf as its trustee and sued to stop Osage Wind's construction of the windmills.[21] The basis for the United States' complaint was that Osage Wind's excavation work constituted "mining" under 25 C.F.R. §211.3 and, therefore, required a mineral lease approved by the secretary of the interior under 25 C.F.R. §214.7.[22] Section 214.7 provides that "No mining or work of any nature will be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior and delivered to the lessee."[23] Under §211.3, mining essentially means "the science, technique, and business of mineral development."[24]

As part of the construction, Osage Wind had done more than just pour concrete foundations for its structures. The foundation for each turbine required a 10-foot deep and 50-to-60-foot wide hole be dug to pour a concrete foundation.[25] For each turbine, this required the removal of between 20,000 and 30,000 cubic feet of soil, sand and rock.[26] Rocks smaller than 3 feet were crushed and pushed back into the hole.[27] Larger rock pieces were set aside.[28] The United States argued that the extraction, sorting, crushing and use of the minerals constituted mining under the regulation, as such activity involved the science, technique and business of mineral development.[29]

The district court disagreed, however, with the federal government's interpretation, stating that the definition of "mining" does not encompass the activities of an entity that incidentally encounters minerals with surface construction activities.[30] The district court then granted summary judgment to Osage Wind.[31]

Sixty days later, on the final day for the United States to file an appeal, it notified the Osage Nation of its intent not to pursue an appeal of the district court's dismissal.[32]

OSAGE ACTS SWIFTLY TO APPEAL

Upon receiving word of the United States' decision, OMC immediately moved to intervene, as a matter of right, and then filed its own notice of appeal.[33] After almost three months of briefing on the motion to intervene, the district court denied the motion by minute order, stating that it lacked jurisdiction "due to [OMC's] pending appeal."[34] The court was referring to the notice of appeal OMC filed only moments after its motion to intervene.[35] Thus, in addition to its appeal of the merits, OMC appealed the denial of the motion to intervene.[36]

The sequence of events left the 10th Circuit to decide a threshold issue – could OMC appeal the decision of the district court even though it had not been a party at the district court level? The court chose to avoid the issue of the motion to intervene altogether by addressing whether OMC had a "unique interest" that would allow it to appeal without having been a named party.

In 1988, the United States Supreme Court held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment."[37] In 2002, the Supreme Court clarified in a case involving an appeal by a non-named class member that it had "never … restricted the right to appeal to *named* parties to the litigation."[38] Later in 2002, the 10th Circuit quoted that same language in *Plain v. Murphy Family Farms*, holding that children, who were not named parties, could appeal the apportionment of damages in their deceased father's wrongful death action.[39] The 10th Circuit concluded that the children had a sufficient unique interest that would allow them to appeal, similar to that of the Supreme Court's non-named class member.[40]

Utilizing the foregoing principles in its appellate briefing, OMC asserted the unique interest argument, which Osage Wind mostly ignored, choosing only to address that line of argument in a footnote.[41] For the 10th Circuit, though, that was the threshold issue in deciding the appeal from the district court's denial of the motion to intervene and the merits appeal.[42]

10TH CIRCUIT FINDS OMC MAINTAINS A UNIQUE INTEREST

In considering the question of whether OMC could properly invoke and sustain the appeal, having not been a party below, the 10th Circuit ultimately found multiple reasons for concluding that OMC had a unique interest in the litigation. First and foremost, the tribe was the beneficial owner of the mineral estate that was the subject of the appeal.[43] Although OMC did not move to intervene until the day of the deadline to appeal, up to that point the United States had been representing OMC's interest as trustee for the mineral estate.[44]

Second, the 10th Circuit noted that the interests of the United States and OMC were not shared

In considering the question of whether OMC could properly invoke and sustain the appeal, having not been a party below, the 10th Circuit ultimately found multiple reasons for concluding that OMC had a unique interest in the litigation.

in their entirety.[45] Previously, in *Southern Utah Wilderness Alliance v. Kempthorne*, the court held that certain oil and gas companies did not have a unique interest to appeal from an order declaring that the Bureau of Land Management (BLM) violated procedural regulations in issuing leases to those same companies, effectively freezing the companies' lease interests.[46] The case had originally been brought by an environmental advocacy group against BLM – like OMC here, the companies there were not parties in the lower court proceeding.[47]

In *Kempthorne*, however, both the companies and BLM held a shared interest in seeking appeal: whether the federally issued leases were valid.[48] OMC had a larger, exclusive interest in appealing separate and apart from the United States. The Osage Nation holds all but legal title to the mineral estate, "and the United States," as the 10th Circuit stated, "is involved merely as a trustee."[49] However, perhaps this relationship should have required the United States to appeal or, in the very least, required the United States as trustee to inform the beneficiary prior to the appeal deadline that it was not going to appeal. Finally, as to the unique interest question, the 10th Circuit cited the fact that the environmental advocacy group was seeking vindication of a public right, as a basis for distinguishing *Kempthorne*.[50] In *Kempthorne*, the public advocacy group had sought vindication of a public right – compliance with procedural regulations as to oil and gas leasing on *public* lands.[51] Here, however, OMC sought vindication of a private right – management of its, and only its, mineral estate.[52]

In holding that OMC had a unique interest in the case entitling it to appeal, the 10th Circuit found OMC's failed intervention at the district court level irrelevant.[53] The 10th Circuit, therefore, dismissed as moot OMC's appeal from the denial of its motion to intervene, finding instead that OMC had established that it maintained a unique interest in the appeal sufficient to sustain it for consideration of the merits.[54] Having resolved OMC's authority to bring the appeal, the 10th Circuit turned to Osage Wind's *res judicata* argument.[55]

OSAGE WIND'S *RES JUDICATA* CLAIM

Osage Wind alleged that OMC's claims were precluded by the doctrine of *res judicata* from being reviewed on appeal, even if OMC was a proper appellant due to its unique interest.[56] According to Osage Wind, OMC could have, and should have, pursued the claim when it first brought suit in 2011.[57] The 10th Circuit disagreed, however, finding that Osage Wind failed to meet its burden to show the claims reasonably could have been brought previously.[58] More specifically, the court found plausible, and essentially uncontested by Osage Wind, that the current claims would not have been ripe for judicial review in 2011 – nearly three years before the turbine excavation work began.[59] The procedural issues having been dealt with, the 10th Circuit turned to the merits.[60]

MINING

The ultimate issue on the merits before the court was whether Osage Wind's activities constituted "mining" under 25 C.F.R. §214.7.[61] If so, Osage Wind needed a lease approved by the secretary of the interior to conduct such activities.[62] Section 214.7 specifically sets out "[n]o mining or work of any nature will be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior and delivered to the lessee."[63]

First, the 10th Circuit noted that its analysis did not depend on deference to agency materials presented by OMC – an informal policy of the BIA and an instruction memorandum by the BLM. OMC had argued agency materials of the BIA and the BLM required a lease.[64] The BIA had taken a position, even if an informal one, that a "Sandy Soil Lease" is required for surface roadwork that disrupts the mineral estate.[65] The record, itself, provided that a contractor for the Oklahoma Department of Transportation had requested such a lease for highway construction. The court, assuming the lease was required, did not grant the BIA's position *Skidmore* deference, which holds that deference is required for an informal agency opinion only to the extent that it is thoroughly considered and well-reasoned, or otherwise manifests qualities that gives it the power to persuade.[66] The court found the Sandy Soil Lease requirement – on its own – lacked the power to persuade, given the lack of information in the record justifying the need for the lease.[67]

The BLM guidance OMC proffered was also unavailing. In the preamble to 43 C.F.R. §3601.71, the BLM explained that "'a contract or permit' is required when a surface-estate owner engaged in more than 'minimal personal use of federally reserved materials … .'"[68] Further guidance by BLM on this regulation noted that any use of materials in a construction project, including building foundations, also constitutes mineral use.[69] Nevertheless, the 10th Circuit rejected this notion out-of-hand because the regulation itself – 25 C.F.R. §3601.71 – dealt with activities on "public lands," which specifically excludes "lands held for the benefit of Indians."[70]

The 10th Circuit then plowed its way into the textual analysis of the "mining" definition, first

addressing the district court's view, which it found to be too restrictive.[71] Under §211.3, mining is defined as "the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals."[72] The district court had contended that "mineral development" necessarily required some commercialization of the minerals – equating "mineral development" with developing minerals for commercial purposes.[73] In making this determination, the court relied on the examples provided in the definition: opencast work, underground work and in-situ leaching.[74] "Each term," the court concluded, "refers to a specific method of extracting minerals for commercial purposes."[75] The court reached this conclusion citing the canon of statutory construction that "other terms that would fall within the scope of 'including but not limited to' must be of the same character."[76] In turn, because the minerals were not being commercially developed, the enterprise was not "mining."

In contrast, the 10th Circuit prefaced its textual analysis by recognizing the "long-established principle that ambiguity in laws designed to favor the Indians ought 'to be liberally construed' in the Indians' favor."[77] The ambiguity in the mining definition lay in the meaning of "mineral development." "Neither the regulation nor the Osage Act clarify the outer limits of what it means to 'develop' minerals in this context."[78] Although noting that Osage Wind's definitional boundary of commercialization of minerals might be reasonable, "the Indian canon of interpretation," the court stated, "tilts our hand toward a construction more favorable to Osage Nation."[79]

Ironically, just as the examples assisted the district court in its interpretation, they were also of some assistance to the 10th Circuit in excavating the meaning of mining. The 10th Circuit though, focused on the clause after the examples: "opencast work, underground work, and in-situ leaching *directed to severance and treatment of minerals*."[80] For the 10th Circuit, the examples meant that "mining" not only included the narrow "commercial mineral development category," but also activities "directed to the *severance* and *treatment* of minerals."[81]

Noting that merely disrupting minerals would not trigger the mining definition, the 10th Circuit stated that "the problem here is that Osage Wind did not merely dig holes in the ground – it went further."[82] Osage Wind sorted, crushed and exploited the rocks as structural support for each wind turbine. Ultimately, Osage Wind "acted upon the minerals by altering their natural size and shape in order to take advantage of them for a structure purpose – stabilization of the turbines – and developed the removed rock in such a way that would accomplish that goal."[83] "This," the 10th Circuit held, "constitutes 'mining' as defined by § 211.3."[84] Reversing the district court's order granting summary judgment, the 10th Circuit remanded for further proceedings.[85]

In March 2018, Osage Wind filed its petition for a *writ of certiorari* with the Supreme Court, arguing first that OMC, a nonparty, should not have been allowed to appeal, and second, that the 10th Circuit

improperly invoked the Indian canon of construction.[86] Osage Wind based its petition on OMC "completely sit[ting] out" during the trial court proceedings, and the 10th Circuit resolving the definitional ambiguity in a way that harmed the surface estate owners.[87] The United States filed its brief siding with OMC and, on Jan. 7, 2019, the Supreme Court denied the petition for a *writ of certiorari*.[88]

CONCLUSION

As governmental institutions predating the U.S. Constitution and the establishment of the various states, Indian tribes occupy a special and unique position in the law and the courts. The impact of their sovereign status on federal jurisprudence, including appeal rights and statutory construction, is on full display in *United States v. Osage Wind, LLC*.

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ENDNOTES

1. *Osage Wind, LLC v. Osage Minerals Council*, 139 S. Ct. 884 (Jan. 7, 2019) (mem.).
2. *United States v. Osage Wind, LLC*, 817 F.3d 1078 (2017), *cert. denied sub nom. Osage Wind, LLC v. Osage Minerals Council*, 139 S. Ct. 884 (Jan. 17, 2019) (mem).
3. *Id.* at 1090.
4. *See id.* at 1083 ("Each turbine required the support of a cement foundation measuring 10 feet deep and up to 60 feet in diameter."); *United States v. Osage Wind*, 2015 WL 5775378, at *1 (N.D. Okla. 2015) ("The turbine foundations are made from concrete, with each foundation measuring approximately 10 feet deep and between 50 and 60 feet in diameter.").
5. *Cohen's Handbook of Federal Indian Law* §4.07, at 303 n.132 (Nell Jessup Newton ed., 2012).
6. Corey Bone, "Osage Oil," *The Encyclopedia of Oklahoma History and Culture*, www.okhistory.org/publications/enc/entry.php?entry=OS006.
7. Act of June 28, 1906, 34 Stat. 539.
8. *Id.*; Bone, *supra*.
9. Osage Nation Constitution art. XV, §4.
10. *See Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC*, 2011 WL 6371384 (N.D. Okla. 2011).
11. *Id.* at *2.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 9.
19. *Id.* at 11.
20. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1083 (10th Cir. 2017).
21. *United States v. Osage Wind, LLC*, 2015 WL 5775378 *3 (N.D. Okla. 2015).
22. *Id.* at *5.
23. 25 C.F.R. §214.7.
24. 25 C.F.R. §211.3.
25. *United States v. Osage Wind, LLC*, 2015 WL 5775378 at *1 (N.D. Okla. 2015).
26. *See id.* at *1 ("The turbine foundations are made from concrete, with each foundation measuring approximately 10 feet deep and between 50 and 60 feet in diameter."); *United States v. Osage Wind, LLC*, 871 F.3d at 1081 ("Each turbine required the support of a cement foundation measuring 10 feet deep and up to 60 feet in diameter.").
27. *Id.*
28. *Id.*
29. *Id.* at *6.
30. *Id.* at *9-*10.
31. *Id.* at 10.
32. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1084 (10th Cir. 2017)
33. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1084 (10th Cir. 2017).
34. *See* Motion to Intervene, *United States v. Osage Wind, LLC*, 2015 WL 5775378 (N.D. Okla. 2015) (No. 14-CV-704-JHP-TLW), ECF No. 46; Minute Order, *United States v. Osage Wind, LLC*, 2015 WL 5775378 (N.D. Okla. 2015) (No. 14-CV-704-JHP-TLW), ECF No. 69.
35. See Notice of Appeal, *United States v. Osage Wind, LLC*, 2015 WL 5775378 (N.D. Okla. 2015) (No. 14-CV-704-JHP-TLW), ECF No. 49.
36. Notice of Appeal, *United States v. Osage Wind, LLC*, 2015 WL 5775378 (N.D. Okla. 2015) (No. 14-CV-704-JHP-TLW), ECF No. 72.
37. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam).
38. *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (emphasis added).
39. *Plain v. Murphy Family Farms*, 296 F.3d 975, 979 (10th Cir. 2002).
40. *United States v. Osage Wind, LLC*, 817 F.3d 1078, 1085 (10th Cir. 2017).
41. *Compare* Appellant's Opening Brief for Appellant at 18-19 *with* Brief of the Appellees at 17 n.7.
42. 10th Cir. at 1084.
43. 10th Cir. 1086
44. 10th Cir. 1085.
45. *See* 10th Cir. 1086
46. 10th Cir. at 1086 (citing *Kempthorne*)
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1087.
59. *Id.*
60. *Id.*
61. *Id.* at 1081.
62. *Id.* at 1082.
63. 25 C.F.R. 214.7. The 10th Circuit confined its analysis to the meaning of "mining" and not to the additional "work of any nature" language in the lease regulation. The court noted that OMC had, perhaps unintentionally, simply argued that the work constituted "mining." The United States brought up the work-of-any-nature language with the lower court, but there, the district court had concluded the language to be inextricably tied to the commercial definition of "mining." As OMC did not argue the "work of any nature" language, the 10th Circuit declined to address it.
64. *Id.* at 1088.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1089.
72. 25 C.F.R. §211.3.
73. 2015 *6.
74. *Id.*
75. *Id.*
76. *Id.*
77. 10th Cir. 1090.
78. *Id.*
79. *Id.* at 1091.
80. *Id.* at 1090-91.
81. *Id.* at 1091.
82. *Id.*
83. *Id.* at 1091-92.
84. *Id.* at 1092.
85. *Id.* at 1093.
86. Petition for cert.
87. *Id.*
88. *Osage Wind, LLC v. Osage Minerals Council*, 139 S. Ct. 884 (Jan. 7, 2019) (mem.).

The Role of the Legal Professional Related to Disaster Preparedness in Indian Country

By Brian Candelaria

IMAGINE FOR A MOMENT THE FOLLOWING SCENARIOS:

- **It is a quiet spring morning in March. You are asleep in your modest little home outside of Oso, Washington, when you feel the ground shake. You briefly think it is an earthquake until you hear the sounds of buildings around you being crushed and destroyed. You look out your bedroom window and see a wall of mud tearing through the valley pushing and dragging houses and vehicles in its wake.**
- **It is a gorgeous summer day in August. You are on a bank of the San Juan River. You are about to step into the river, hand-in-hand with your grandson, when you notice the water is slowly turning a bright orange color you have never seen before in the river. Perplexed and a bit scared, you decide you and your grandson should not go into the river today. Your grandson turns to you and asks what happened to the river. You tell him you don't know. You each stare at the river.**

Now that you have those images in your mind, let us add to each scenario that you are experiencing these events as a Native American tribe member. Who would you have turned to before each disaster or emergency? Who do you turn to as the event is occurring and who do you turn to afterward? This article will explore why legal practitioners must have a basic awareness of complex jurisdictional issues in Indian country that can make disasters and emergencies, whether they be natural or man-made, extremely difficult for tribal authorities to address. The article will then conclude with some important takeaways to bear in mind regarding this subject.

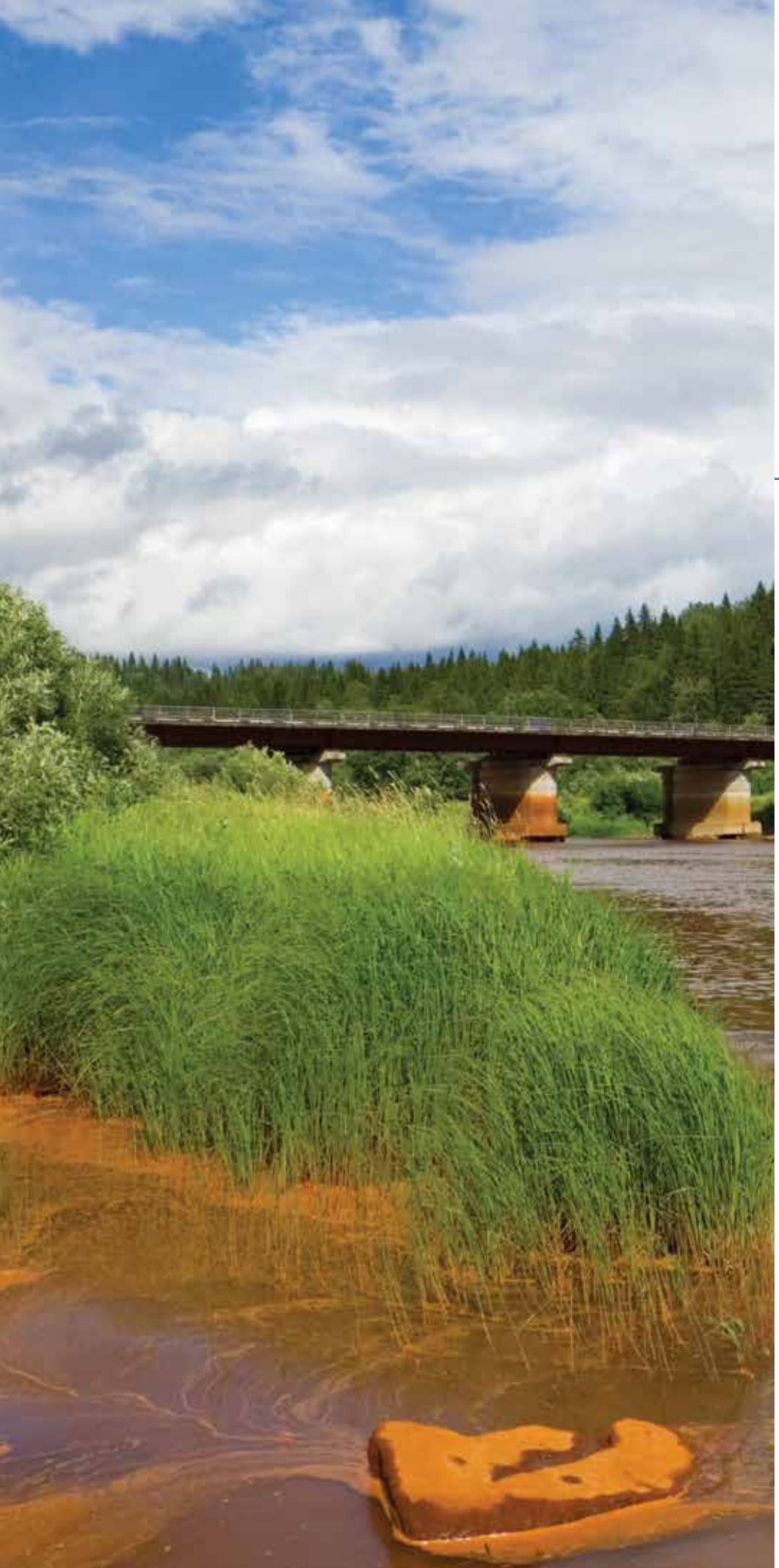
A BASIC HISTORY AND CONCEPTS OF FEDERAL APPROACH TO DISASTERS AND EMERGENCIES IN AMERICA

What is Indian Country?

As per the United States Code, "[e]xcept as otherwise provided in sections 1154 and 1156," "Indian country" refers to:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United State Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[1]

Through a complex history of Supreme Court cases, starting with the early rulings of *Johnson v. M'Intosh*,[2] *Cherokee Nation v. Georgia*,[3] *Worcester v. Georgia*[4] and continuing through to today,[5] a tangle of criminal and civil jurisdictional issues has



understandably left all parties lost and confused during times and situations when effected individuals can least afford it.

This is never more apparent than when discussing the effects of disasters in Indian country – especially those that are man-made. At the core of these difficulties is the fact that tribes are left with very few legislative, legal tools by which tribes can criminally punish evil-doers and civilly recover damages from negligent actors. It is important for tribes to be able to act "when discharges of hazardous substances and other pollutants result in injuries to these natural resources and natural resource services, impairing the important ecological and economic functions that they provide."[6] In order to better understand how detrimental these jurisdictional quagmires can be at times of disaster and emergency, let us look back to some example of past disasters, natural and man-made, that occurred in Indian country.

On April 1, 1979, President Jimmy Carter created the Federal Emergency Management Agency (FEMA) as the nation's single domestic agency entrusted to "managing the Nation's disasters."[7] Although not the federal

government's first "involvement in emergency management," since its 1979 inception and up to 2010, FEMA had coordinated "federal response and recovery efforts and supported State, Tribal, and local efforts in more than 1,800 incidents."[8] In 1988, Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)[9] and then the Homeland Security Act of 2002[10] (following the attacks of Sept. 11, 2001) to act as the legislative foundations upon which FEMA derives its core mission. That mission was modified when, following the passage of the Homeland Security Act of 2002, FEMA was consolidated to become an agency within the Department of Homeland Security, not an independent agency as it once had been. As a result, FEMA was tasked to lead "the coordination of efforts across the Federal Government to support its partners in the Federal, State, Tribal and local government and private sector to enhance the Nation's preparedness to prevent, protect against, respond to, recover from, and mitigate *all hazards*."[11]

FEMA accomplishes its mission by providing effected citizens with assistance in response and recovery from a variety of events. Using the National Response Framework (NRF) and National Disaster Recovery Framework (NDRF), FEMA can help states, tribes and local governments coordinate "resources from one another, the Federal Government, voluntary, non-profit and private sector agencies regardless of an event's size, scale, or whether it receives a Presidential declaration."[12] Additionally, FEMA can coordinate communities with federal support from agencies like the Environmental Protection Agency (EPA), Department of Agriculture, Department of Housing and Urban Development (HUD), Department of Health and Human Services (HHS) , Department of Defense (DOD) and many others.[13] Part of the process involved in communities seeking FEMA assistance involves determining the severity of the damage the community has suffered or may suffer.

Using the two important statutory concepts of "major disaster" and "emergency," FEMA categorizes its important duties and responsibilities toward affected geographic populations and governmental entities. Differences between the two classifications include the fact that: 1) the president cannot declare a major disaster without a formal request from the governor of the affected state or in the case of tribal land, a formal request from the affected federally recognized Indian or Alaska Native tribe,[14] 2) the president cannot declare a major disaster in regards to non-natural events unless the event involves a fire, flood or explosion[15] and 3) a major disaster declaration authorizes "the President to approve more assistance programs than emergency declarations."[16]

In order to start the disaster declaration process, the Stafford Act requires that "[o]nly the governor of a state or the chief executive of a federally-recognized Indian tribal government may request a Presidential declaration."[17] Within required paperwork, the governor or the American Indian nation chief executive "must furnish information on the nature and amount of state/tribe and local resources that have been or will be committed to alleviating the results of the disaster."[18] Additionally, the request must include the estimates of "the amount and severity of damage" with the projected "impact on the private and public sector," as well as "an estimate of the type and amount of assistance needed under the Stafford Act."[19] Finally, the Stafford Act requires that "[t]he request must be based upon a finding that the event is of such severity and magnitude that effective response is beyond the capabilities of the state/tribe and the affected local governments, and that federal assistance is necessary."[20] It is important to note, until recently, American Indian nations were required to submit their formal requests through the governor of the state within which the tribal boundaries exist. This was changed and codified in the Stafford Act so the chief executive of a federally recognized tribe could submit a formal request for declaration just as a governor of an affected state would.[21] However, nonfederally recognized tribes are still classified as "local governments" and require the governor of the affected state to actively assist in the application process.[22]

Once a formal request has been submitted by the appropriate leadership representative, FEMA will then evaluate the request using a number of factors. According to its own regulations, and codified in the Code of Federal Regulations (C.F.R.), the factors FEMA uses for major disaster declaration evaluation includes, but is not limited to:

> [t]he amount and type of damages; the impact of damages on affected individuals, the State, and local governments; the available resources of the State and local governments and other disaster relief organizations; the extent and type of insurance in effect to cover losses; assistance available from other Federal programs and other sources; imminent threats to public health and safety; recent disaster history in the State; hazard mitigation measures taken by the State or local governments, especially

implementation of measures required as a result of previous major disaster declarations; and other factors pertinent to a given incident.[23]

Once FEMA evaluates the request, the agency will then provide a written recommendation and analysis which is then delivered to the president for authorization as a formal declaration or rejection.

Upon formal presidential declaration of an affected area's status for "major disaster," FEMA and the state or tribe work together to navigate the daunting task of recovery amid the difficult terrain to federal agency bureaucracy. In a federal aid process already fraught with complexities and obstacles, major disasters involving tribal nations are even more so. Some of these complications can best be understood by reviewing past events affecting tribal communities in Indian country.

EXAMPLES OF PAST DISASTERS IN INDIAN COUNTRY

Example of a Past Natural Disaster in Indian Country

Mudslide in Oso, Washington. The first example of an American Indian community affected by a natural disaster was discussed within one of our opening scenarios. In this case, the reader was asked to imagine a quiet spring day in March and the mudslide that followed. This scenario is one in which members of the Sauk-Suiattle Indian tribe of Washington state were forced to experience. On the morning of March 22, 2014, deep within the North Cascade Mountains of Washington state a devastating mudslide "engulfed 49 homes, was responsible for the deaths of 43 people and destroyed utility infrastructure ... Without phone or Internet service, tribal government operation largely came to a standstill and made the process of initiating emergency services nearly impossible."[24] To compound these initial difficulties, the Sauk-Suiattle Indian tribe leadership were further hampered by the fact that the loss of State Route 530 forced tribe members to commute "92 miles each way to the town of Arlington using an alternate route" in order to access employment obligations and medical services.[25] In addition to the loss of life and property, the mudslide's effect on tribe members day-to-day transportation expenses proved to be disruptive. This is because tribe members had to pay "gasoline prices at nearly $4.00 per gallon" resulting in an extreme hardship for a community where many "household incomes [were] already under 200 percent below the poverty level."[26]

Example of Past Man-Made Disaster in Indian Country

While man-made events are technically categorized under "emergency" status, these types of events are no less devastating to those tribes affected by them.

Gold King Mine Disaster. As in the scenario discussed early in this article involving the grandfather and grandson on the bank of the San Juan River, an example of a man-made disaster or emergency is the Gold King Mine disaster on Aug. 5, 2015. An EPA contractor was attempting to contain a leak from the Gold King Mine near Silverton, Colorado.[27] "The contractor using heavy machinery ruptured the mine's containment barrier releasing millions of gallons of contaminated mine waste into a tributary of the Animas River, Cement Creek. This toxic wastewater containing heavy metals such as arsenic, lead, and cadmium flowed from Cement Creek into the Animas River, and into the San Juan River."[28] Delegate LoRenzo Bates noted that "the Navajo Communities along the river have experienced significant cultural and economic damages as a result of the spill. Water is sacred to the Navajo People; it is the basis of all life. Spiritually and culturally Navajo beliefs are deeply connected to the land, air, and water that lie between the four sacred mountains that form the aboriginal boundary of our land."[29] Most importantly, Delegate Bates emphasized that "[t]he spill has contaminated or destroyed many of the essential elements of our religious practice, and desecrated a river we have treated with reverence since time immemorial."[30]

FUTURE DISASTERS IN INDIAN COUNTRY

The Importance of Tribes Being Prepared and Active in Trying to Influence Federal Policy Formation

What can American Indian nations, tribes and legal professionals do when confronted with the jurisdictional hurdles and intrusions that occur during and after a disaster or emergency, no matter what the cause may be? What follows are three possible solutions that can address some of the "global" jurisdictional concerns that will someday affect most tribes during a disaster or emergency.

First, it is vital that tribes do what they can to develop "intergovernmental agreements" (IGA) with neighboring governmental entities in the form of state, county and municipal agencies and organizations. "An IGA is an agreement or memorandum of understanding (MOU) negotiated between a tribe and a neighboring government to clarify some aspect of their legal relationship. In some cases, these agreements permit cooperation and sharing of resources."[31] The result of an

agreement "instituted *before* an active emergency, would establish and specify roles, responsibilities, and authorities to which the involved governments could agree."[32] In establishing and specifying roles, responsibilities and authorities, the parties of the agreement also "clarify the application of broad and uncertain jurisdictional principles in very specific contexts likely to arise in a public health emergency."[33] Most importantly, just the "process of negotiation may foster a cooperative relationship between tribal and state or local governments that the involved governments can codify in an IGA or pledge of mutual assistance."[34]

Next, it is equally important for legal professionals who are entrusted with assisting the American Indian nations during this preparation process to make themselves and their tribal clients aware of the applicable statutory processes during and after a disaster or emergency occurs in Indian country. For instance, in the case of FEMA disaster recovery and assistance, tribes can take proactive steps that will pay in time, money and expenditure of resources during a disaster. One such step includes communities "pre-qualifying" debris removal contractors "or contractors for other emergency work that is commonly required, prior to an event and solicit bid prices from this list of contractors once an event has occurred. This method allows competitive bidding while preserving the ability to achieve reasonable market prices at the time the work is performed."[35] In other words, by planning ahead the tribe is more likely to develop a viable and economical budget plan rather than risk higher costs that might result from limited post-disaster resources and the ensuing risk for "price-gouging" from vendors and contractors.

Another pre-disaster preparation tool tribes can utilize is the establishment of "mutual aid agreements *before* disaster strikes, and to address the subject of reimbursement in their written mutual aid agreements."[36] Yet another example of how attorneys can help their tribal clients is by "work[ing] with their clients to formally adopt a local code or ordinance that gives local government officials the responsibility to enter private property to remove disaster-related debris or perform work in the presence of an immediate threat."[37]

One final example would be "[a]ttorney should ensure that their clients comply with requirements and permits for debris operations. For example, staging and disposal sites should be a safe distance from property boundaries, wetlands, surface water, structures, wells, septic fields, and endangered species, and appropriate sites should be identified for the disposal of hazardous materials."[38] While not an exhaustive list of pre-disaster legal tasks, this list shows just a glimpse of some of the expectations that federal agencies like FEMA will expect of those within Indian country during and following a disaster or emergency declaration.

The third proposed solution for American Indian nations and tribes to consider is to maintain constant communication and involvement in the continued formation of federal disaster relief and recovery policy with the knowledge that by doing so the voices of tribal citizens cannot be ignored.

CONCLUSION

Whether we imagine ourselves as a person suffering from the effects of a Washington state mudslide or a grandfather on the banks of his ancestral lands on the shore of the San Juan River, complex jurisdictional issues in Indian country make disasters and emergencies, whether they be natural or man-made, extremely difficult for tribal authorities to address. In the end, tribes and supportive legal professionals can help individual tribe members to navigate the logistical hazards that precede and follow natural and/or man-made disasters.

ABOUT THE AUTHOR

Brian T. Candelaria graduated from the OCU School of Law in May 2019. He also has an MLS in indigenous peoples law from the OU College of Law and is currently employed with Oklahoma Indian Legal Services. He has attended the Sovereignty Symposium for the past four years.

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The History of Veterans Day

More Volunteers Needed to Help America's Heroes

By Edward Maguire

IT IS DIFFICULT FOR ME TO comprehend the immensity of this year – the 100th anniversary of the creation of Veterans Day. In 1919, Woodrow Wilson penned out the framework of what was then called Armistice Day. This would later be reclassified by our nation's Congress as Veterans Day. Our nation was healing from the wounds received in the Great War (what we have come to know as World War I).

At that time, Woodrow Wilson stated, "To us in America, the reflections of Armistice Day will be filled with lots of pride in the heroism of those who died in the country's service and with gratitude for the victory, both because of the thing from which it has freed us and because of the opportunity it has given America to show her sympathy with peace and justice in the councils of the nations."

Back here in Oklahoma, this was something new and without precedence. The Nov. 26, 1919, issue of the *Wewoka Democrat* reported there was a rally by the veterans of Seminole County. That rally stemmed from the notion that the veterans would collectively voice their support of the day by not working past noon on Nov. 11.

Those veterans marked that day with an Army-Navy football game held in the city of Wewoka. That publication goes on to discuss how our leaders traveled the state to garner support for this day. U.S. House Rep. Scott Farris (5th Congressional District of Oklahoma) barnstormed and partially ran for the U.S. Senate on that platform.

The day would come and go from that point forward. It continued in this manner until 1926 when our nation's Congress voted to resolve that this day be memorialized by each president, by calling for the observance of Nov. 11 "with appropriate ceremonies and annual proclamations."

It would remain in this state of "pomp" and "circumstance" until May 13, 1938, when Congress enacted a resolution that each Nov. 11 will be observed as a national holiday and will "thereinafter be known as ARMISTICE DAY."

Almost a decade later, and after another war to end all wars, Rev. Raymond Weeks would take up the banner and the cause for all veterans. Rev. Weeks lobbied Congress and the president(s) to make Armistice Day a day for all those who have fought and sacrificed for our nation. Weeks believed that this was the best way to honor and support those who served in all times of conflict.

His requests for support of our nation's heroes paid off!

Eight years of devotion to our heroes had passed before Congress finally changed the name of Armistice Day to Veterans Day. In 1954, President Eisenhower would codify the vision of Rev. Weeks.[1] Weeks would later be aptly named by Elizabeth Dole, leader and lifelong supporter of veterans, as the "father" of Veterans Day. On Nov. 11, 1982, President Reagan awarded Rev. Weeks with the Presidential Citizen Medal to honor Weeks' self-sacrificing service to our nation's service members.

President Reagan concluded that ceremony by proclaiming, "So let us go forth from here, having learned the lessons of history, confident in the strength of our system, and anxious to pursue every avenue toward peace. And on this Veterans Day, we will remember and be firm in our commitment to peace, and those who died in defense of our freedom will not have died in vain."[2]

The common thread of this day is support. It is continued support. As a nation and a state, we have ebbed and flowed our patriotism to suit our times. In times of peace and prosperity our notion of commitment becomes strained. This

doesn't mean we do not support the veteran or this day. It just means that we have sometimes forgotten what this day is about.

The day is not a day for the veteran. It is a day for our nation to honor the veteran. This may seem a semantical distinction, but it is more important than that.[3] This day is our chance as a nation and as a state to say "Thank you" and thereby lift-up the veteran. This is the day that we raise our voices of gratitude and collectively offer our support of the veteran. Now, we ask for others to support the veteran as Raymond Weeks did so many years ago.

VOLUNTEER LAWYERS NEEDED TO HELP

Nov. 11, 2019, is no different. Now come ye presence and be known, as they used to say at muster, we need your help to support our state and nation's veterans.

You can do this in many ways, and many do this daily. Today, we ask that you consider joining in our efforts to service the legal needs of our veterans through the OBA's Oklahoma Lawyers for America's Heroes Program.

This is an amazing program that offers free legal services to veterans of our state who meet certain threshold needs and requirements. The vision of OBA Past President Deborah Reheard, the Heroes Program is a volunteer-driven service.

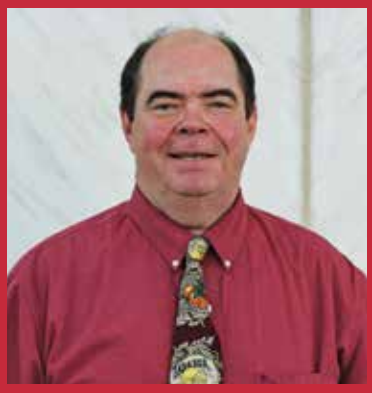
Currently, we have around 700 OBA member volunteers, who handle a wide array of opportunities to keep our nation on "mission ready status." They do this by assisting them in their daily needs. Attorneys from all walks of practice (and life) fight for our veterans' rights.

The volunteers come from various sections. Be it criminal, family, employment, estate planning or access to justice, we have people who stand up to answer the "rallying cry" that past Heroes Coordinator Margaret Travis discussed in last year's bar journal.

We ask that you join us in our annual cry for support!

WHO WE'VE HELPED

This year alone we have helped hundreds of veterans. We have handled criminal matters affecting special operations personnel. We have assisted our state's remaining World War II veterans in their



Ed Maguire

NEW HEROES COORDINATOR

Edward "Ed" Maguire is a Marine Corps veteran and attorney. Disabled on active duty during the Cold War, he remains a peace time veteran who is absolutely committed to serving our state and our state's veterans in a meaningful and impactful manner. A member and remaining participant of the Camp Lejeune Water Study project, Mr. Maguire has fought for veterans' rights for many years. He is a member of various organizations that exist to support the veteran. He has been an OBA member since 1995 and is a graduate of the OCU School of Law. He is a member of the PTSD Battle Buddies network.

estate planning needs. We have helped veterans of the Vietnam War obtain benefits. In addition, we have helped individuals suffering from post-traumatic stress disorder obtain much needed access to benefits. We have done numerous guardianships. We have handled dissolution of marriages. There is little we have not done.

Collectively we have donated millions of dollars in time to our veterans, but we need more assistance. Our numbers are down.

As Rev. Weeks found, our interest in support is waning a bit. As a result, many of our veterans remain unplaced and as a program we need more volunteers. We need champions who will say "I can help." Or, better yet "we can help."

Of the active requests this year, many remain open. These are largely in the family law area of practice. Many of our volunteers have retired. Some have moved on. Others have elevated their careers and are unable to offer the support at the same levels as before. That's why we need you!

WHO QUALIFIES FOR FREE SERVICES?

A hero must be a veteran of the U.S. Armed Forces, currently active or on reserve duty for the U.S. armed forces. If on active duty or a member of the guard or reserves, the hero's pay grade must be an E-6 or below. If a veteran, the hero's gross income per year cannot exceed $40,000 (all income is considered and the veteran must have an honorable discharge). Finally, they must have a legal issue that is tied to Oklahoma and cannot be currently represented by counsel.

Consistent with previous years, nearly half of the cases involve family law, such as dissolution of marriage, adoption and paternity. About 13% of legal services awarded are criminal issues (primarily VPOs and DUIs) followed by 8% of debt issue cases. General civil cases and disability each represent about 5% of cases. Other legal needs are real estate, tort/personal injury, estate planning, landlord/tenant, probate, military, employment, contracts/breach, administrative/immigration, discrimination and taxes.

HEROS WAITING FOR VOLUNTEER HELP

Being a part of this organization is an honor. As a veteran myself, I understand the crisis many veterans face each day. Persons from all walks of life have sacrificed for our freedoms, our way of life, and they need our help with their family, with their benefits, with such a wide array of legal needs.

Knowing that legal volunteers are willing to reach out and lend free help is powerful. It is the power of support that Rev. Weeks and Deborah Reheard envisioned.

How do you participate? Volunteer. Without the volunteers, this program will falter.

New processes and plans are being implemented daily. We have recently received a donation to help offset the fees for some of our veterans. That program is in its inception. Although new, this should help some of our volunteers defer the costs of some of their legal needs. New rules are in place that make us able to offer more support on a limited basis. Limited scope representation is what we call this, but that isn't really what we are saying.

What we are saying is that we will "triage" each veteran in a manner that gets the job done – quickly and without reservation.

Your service is a piece of string. YOU decide how long or short it will be.

Some volunteers are handling everything from trial to appeal. Others are handling no-contest dissolutions of marriage. Many answer daily questions. A few are handing out guardianship papers to the veterans like Bob S. from Owasso. He is a combat veteran who is now in the ubiquitous position of grandparent caregiver. He couldn't enroll his grandchild in sports, get immunizations or even grant the child's school permission to take his grandchild to the Capitol because he was not the child's guardian.

Guess what? A volunteer stepped in and helped Bob and his wife get things done. In doing so, that volunteer not only helped that veteran, they also helped the soldier (the next generation and father) stay on mission status in Afghanistan! This full circle of support and devotion has made that family's burden a lot smaller!

Bob asks all of us to help.

Without us he would have been out money that he can't afford to spend. Without us, he would have remained floundering on his own! Without us, his grandchild would have stayed behind for the annual trip to our state's Capitol.

Find a way. Make this a continued reality. Continue to support this program. Call me, your Heroes Program coordinator, and sign up to answer our call for support. Help continue the vision of honor that so many of us instill in our lives. It's easy to sign up as a volunteer online at www.okbarheroes.org.

Semper Fidelis!

Mr. Maguire is the OBA Heroes Program coordinator. You can reach him at 405-416-7086 or email him at heroes@okbar.org.

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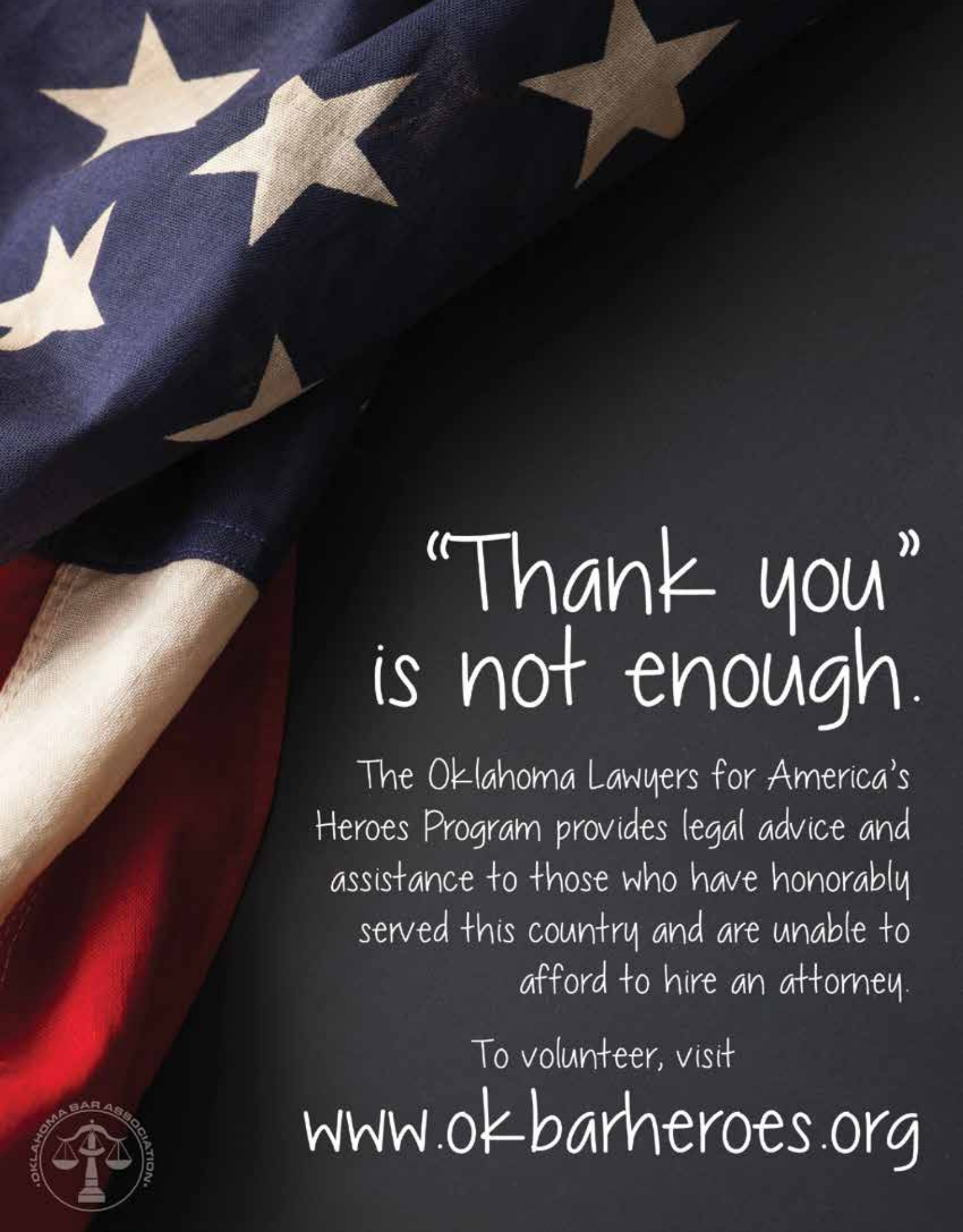
"Thank you"
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The House the OBA Built

A Visit With the Jim Gassaway Justice House Homeowner

By Laura Wolf

TO MANY, A HOUSE IS more than just four walls: it is the stream of memories created there with family and friends. For Sharie Northington, the house she has called "home" for the past 14 years is even more special.

"Life changed when we got this house," Ms. Northington said. "Life changed to where I felt like I should continue to strive for success, to not give up. Having someone believe in me helped me get better morals and goals in life."

Nov. 3, 2005, was the first day that Ms. Northington and her two children, Davion (DJ) and Aubriana, were able to officially call the Jim Gassaway Justice House their "home." DJ was 9 years old and Aubriana was 6.

"My son remembers the struggle from before," Ms. Northington said, describing the life they left behind in their old neighborhood. "You know south Oklahoma City, it isn't the best area. We lived on what was essentially 'Gang Street.' That's what I called it. This house allowed me to break the cycle and get my kids away from that environment."

Owning her own home allowed Ms. Northington the opportunity to set goals for herself and for her children.

"I told both of my kids they had to work hard to get a scholarship and go to college," she said. "I told my son he had better get an athletic scholarship if he couldn't get an academic one. Even now, my daughter gets all A's in college."

DJ is on track to graduate from Southeast Missouri State University in December with his degree in corporate communications. He plans to own his own

From November 2005 OBJ: Evie Gassaway (second from left) and OBA President Mike Evans present the OBA's gift of an heirloom clock to the Northington family. Mrs. Gassaway is the widow of Past President Jim Gassaway, for whom the Justice House was named.

A LOOK BACK AT THE JUSTICE HOUSE PROJECT

- The Jim Gassaway Justice House was named in honor of 1971 OBA President Jim Gassaway who passed away in May 2005.
- OBA President Michael D. Evans spearheaded the fundraising while Vice President Rick Bozarth focused on recruiting construction volunteers.
- The OBA committed to raising $65,000 to fund the construction of the house. The final amount raised was $75,000. The additional $10,000 went to funding other Habitat for Humanity of Central Oklahoma projects in the area.
- The house was completed in 14 work days spread out over two months of construction.
- About 150 members from across the state participated in the six-hour work days.

The Jim Gassaway Justice House in 2019.

Sharie Northington with her children, DJ and Aubriana, and her grandson, Kyree (© Photo by Portrait Innovations).

Sharie and her son, DJ, at a Southeast Missouri State University football game.

business someday. Aubriana is a psychology major at OSU. She wants to help people, likely in her own practice.

"I even got a degree myself," Ms. Northington said proudly. "I got my degree in criminal justice. I wanted to work as a police officer, but with two small kids, that just wasn't an option. Now I work as a docket court clerk at the Oklahoma Corporation Commission."

The house was built as a project with Habitat for Humanity of Central Oklahoma, enlisting the aid of many OBA members and staff. From planting flowers to painting walls, lawyers and judges worked alongside one another to put the pieces of the house together. Financially, donations were raised to help shoulder the cost of the home. The work put in by the OBA members was a key part of the driving force behind Ms. Northington's success, and she is always quick to make note of that.

"If not for the kind words and encouragement, I wouldn't be where I am today," she said. "Everyone kept telling me that I could do it, to keep it up for those kids, to keep on going, so I did. I didn't want to lose it and let everyone down after all the hard work they'd put in. Sometimes people get something like this and they take it for granted, but I wasn't going to do that. I couldn't do that."

Ms. Wolf is an OBA communications specialist.

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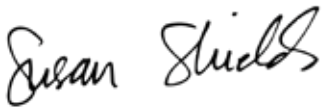
Most committees allow meeting attendance by conference call, so your geographical location does not matter in terms of participation if you are not able to make each meeting in person. In addition, some OBA committees are devoted to service to the community in which we live and practice, which in turn helps enhance the image of our profession within the community.

I have served on many OBA committees over the years and it has provided me with many benefits to my law practice, for which I am grateful. It is also a wonderful way to give back to our legal profession. Even if you have only a little time to spare, we can use your help. Please join us.

Joining a committee is easy. Go to www.okbar.org/committees and click "Committee Sign Up." I will be making appointments soon.



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- **Diversity**
  Identifies and fosters advances in diversity in the practice of law
- **Group Insurance**
  Reviews group and other insurance proposals for sponsorship
- **Law Day**
  Plans and coordinates all aspects of Oklahoma's Law Day celebration
- **Law Schools**
  Acts as liaison among law schools and the Supreme Court
- **Lawyers Helping Lawyers Assistance Program**
  Facilitates programs to assist lawyers in need of mental health services
- **Legal Internship**
  Liaisons with law schools and monitors and evaluates the legal internship program
- **Legislative Monitoring**
  Monitors legislative actions and reports on bills of interest to bar members
- **Member Services**
  Identifies and reviews member benefits
- **Military Assistance**
  Facilitates programs to assist service members with legal needs
- **Professionalism**
  Among other objectives, promotes and fosters professionalism and civility of lawyers
- **Rules of Professional Conduct**
  Proposes amendments to the ORPC
- **Solo and Small Firm Conference Planning**
  Plans and coordinates all aspects of the annual conference
- **Strategic Planning**
  Develops, revises, refines and updates the OBA's Long Range Plan and related studies
- **Women in Law**
  Fosters advancement and support of women in the practice of law

Law for People

By John Morris Williams

FOR SOME TIME "access to justice" has been the buzzword for helping to address the underrepresented and unrepresented. Many of us in the legal world understand the terminology and the concept. Basically, pro bono is good, unless you are too busy or struggling to survive in your practice.

My guess is that for most of the public the term "access to justice" ranks up there with the Pythagorean Theorem. The majority won't have a clue, but once you start to explain, most people will grasp the concept. My belief is that even when we are trying to help people we sometimes just "over lawyer" things.

One of the biggest challenges for low-income Oklahomans is the raising of grandchildren by grandparents. Between meth and opioids and various other reasons, we have more grandparents raising grandkids than just about anywhere else in the nation. I will say our legislature did important work on the meth issues in curtailing the availability of ingredients; however, people always seem to find a way to fuel their addictions. Thus, the problem lives on in large proportions.

At the current time, there are at least two OBA sections working on addressing the huge number of pro se guardianships that are causing some backlogs in dockets. The Family Law Section has created a *Handbook for Guardian Ad Litems* and the Estate Planning, Probate and Trust Section is working on some self-help guardianship materials. These two groups are not alone in working on filling the gap for assisting low- income grandparents.

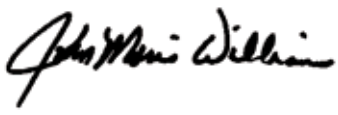
The difference in having a guardianship is the difference in the children getting routine medical care and participating in school activities. Schools will enroll them, and emergency rooms will usually treat them, but that's not the way it should be.

Currently, the OBA Access to Justice Committee is in the process of reaching out to the Oklahoma Supreme Court Access to Justice Commission to partner in creating a new web depository for "Law for People." It is not anyone's intent to steer people who can afford legal services to the self-help route. Usually people with assets need more than just basic forms and instructions. We already know that in dissolution of marriage cases the "paralegal" divorces have cropped up all over and created many problems for unsuspecting customers. Yes, I said customers. Because that's what people are when they buy forms from "paralegals."

The concept we are trying to create is one for the truly needy who may be over the financial guidelines for Legal Aid Services, but who lack resources to hire a lawyer for full-blown representation. I hope we can capture the concept and launch it in a way ordinary people can understand and get some meaningful assistance.

I call this Law for People because I could not come up with a better name. I believe that we all stand a bit taller and the world is a better place when we do things for people. Each of us has an obligation as a lawyer to aid in helping the disadvantaged and to support and defend the legal system. We have an excellent opportunity to do good here and should strive hard to seize it.

Right now, they are at the hands of people selling them forms and frustrated judges and court clerks. If you or your committee or section would like to get on board in helping us create "Law for People," please let me know, and I will get you to the people and place that would best assist you.



To contact Executive Director Williams, email him at johnw@okbar.org.

From the President

(continued from page 4)

3) Stop making decisions based upon your fears. Be brave. Take some calculated risks. Things tend to work out well if you don't get in your own way – and life is a lot more fun when you take some risks.

4) People want you to do well. There are a lot of wonderful people out there who are very supportive and willing to help and pitch in. They are also appreciative of the fact that you have devoted a year of your life to kicking the can a little further down the road on behalf of the OBA.

5) In organizations such as the OBA, great things are seldom accomplished in a year. Improvements usually happen incrementally; but when improvements consistently occur each year, even if incrementally, then over a period of years, the organization moves forward significantly. You are just a part of that change. Don't take yourself too seriously.

7) If you'd like to serve in a position, then ask. If necessary, ask again. Don't assume that people will reach out to you to serve. This group has 15,700 active members. You may not be on the radar, but it doesn't mean you can't be. The OBA is always looking for gifted, energetic attorneys to get involved. Ask to be appointed to a committee or a position. Then perform well. Great performance and contribution are always recognized and appreciated. It just takes time and energy. As likely as not, it will be a springboard to more opportunities ahead.

8) Finally, be grateful that you have the opportunity to serve. Not everyone gets the opportunity to serve and not everyone wants the responsibility that goes with it. Be grateful for it; and when it's over, let the next person play their part. Do everything you can do to ensure they have a successful year.

Be sure to recognize others around you for what they accomplish and give them credit.

6) Be sure to recognize others around you for what they accomplish and give them credit. Your part in all of this is really pretty insignificant. Other people move the organization forward. There is a new bar president every year. Keep your perspective and acknowledge others.

That's my advice to a 30-year-old me. Only two more months to go, but already I thank you. I appreciate the opportunity to serve each of you and the OBA as president. I certainly appreciate the OBA staff and the attorneys who volunteer their time and contribute their energy to make the OBA the organization that it is.

Tips to Avoid Some Major Technology Glitches

By Jim Calloway

TECHNOLOGY UPDATES and changes, like so many things in life, have positive and negative aspects. One thing that most end-users hate are the changes in our interface that happen with an automatic update. I recall one Adobe Acrobat Professional update where it seemed the developers changed most of the tools I commonly used for no apparent reason. I actually had to use online searches to quickly figure out how to do tasks that I had done for years.

So, this month I'm going to cover a selection of topics with an emphasis on what to avoid. Just like our "60 Tips in 60 Minutes" presentations at OBA Solo & Small Firm Conference, I am confident you will find something of use to you.

FOCUSED INBOX IN OFFICE 365 OUTLOOK IS A TRAP WAITING TO CATCH THE UNWARY ATTORNEY

I can see in my mind the developers meeting that resulted in the monstrosity that is Outlook Focused Inbox in Office 365. Someone said, "Oh wow, I just get too many emails," and someone else said, "Wouldn't it be cool if we could design a feature where the most important emails appeared in the top of your inbox?"

In theory it might be "cool," but no lawyer wants to trust a software algorithm with the power to bury an email deep in their inbox. There is a very real chance that some current email discussions will appear to the algorithm to be more important than that urgent email from the client you haven't heard from in weeks. We keep our client files in chronological order, and we want our inbox to be in chronological order as well. If we want to make decisions about what emails we see and don't see in our inbox, we can set rules and use Outlook folders to do that, but we shouldn't trust Microsoft to do that.

Turn off Focused Inbox in Office 365! Microsoft provides instructions on how to toggle Focused Inbox on and off online at tinyurl.com/turnoffview.

In the desktop version of Outlook for Windows:

1) Select the View tab.
2) Select Show Focused Inbox.

The Focused and Other tabs will then disappear from the top of your mailbox.

For Outlook on the Web:

1) At the top of the page, select Settings icon.
2) In the Settings pane, move the Focused Inbox toggle to off.

I strongly believe you should do this in both places even if you don't think you will use Outlook on the web. First of all, you should know how to log in so you can in case of an emergency and secondly, after I turned off Focused Inbox in my desktop version, it unexpectedly reappeared months later at about the same time as an automatic update. It is possible that I accidently clicked the button, but then I turned it off in both versions – and it hasn't reappeared since.

STOP USING INTERNET EXPLORER

"Stop using Internet Explorer immediately; also, why are you still using Internet Explorer?"[1] was the headline of a late September *Mashable* article that noted the day before Microsoft warned users of Internet Explorer that a critical vulnerability in the browser allowed malicious actors to hijack the computers of those running the outdated program. If the user is logged on with administrative user rights, an attacker might do even more damage.

This follows a report last April that stated even if you don't use Internet Explorer, a certain kind of email attachment could launch it and let hackers steal your data.[2] If this sounds scary, Microsoft has supplied a somewhat complicated set of instructions on how to disable Internet Explorer on Windows 10.[3]

Since Microsoft cybersecurity expert Chris Jackson

has advised anyone still using Internet Explorer to give it up and Microsoft officially discontinued it in 2015, it is a good question why it was installed on Windows 10 machines by Microsoft at all.

Whether you disable Internet Explorer or not, it's time for Windows users to stop using it on a daily basis and instead use Chrome, Firefox or even Microsoft Edge.

I recognize that certain Oklahoma government agencies require Internet Explorer to use their online services, but that is not a good situation, and I would encourage regular users of those services to discuss that with the relevant agency representatives.

WINDOWS 7 END OF LIFE IN JANUARY 2020 IS SERIOUS FOR LAWYERS

Here is more "good news" related to Microsoft.

Windows 7 support will end on Jan. 14, 2020, and it will be too dangerous to use a Windows 7 machine connected to the internet to hold client data after that date.[4]

I recognize buying several new computers by the end of the year is a serious budget issue for lawyers in any size law firm. A lot of tech websites and blogs passed along information earlier this year that Microsoft would allow Extended Security Updates (ESU) protection for Windows 7 for a fee of $50 per computer per year for the first year, increasing in future years. It turns out those earlier rumors *are not accurate*. The ESU option is only available to Windows 7 Professional and Windows 7 Enterprise customers with Volume Licensing – in other words, large corporate customers. I don't know how many Oklahoma law firms have Volume Licensing, but if so, it is only a few of the largest law firms.

All of the potential wrongdoers on the internet have had notice for many months that Windows 7 will not receive any security patches after Jan. 14. It doesn't take a great deal of imagination to assume that if they identify any vulnerabilities in the operating system, they are going to put off their attacks until then.

Lawyer competency relating to the "benefits and risks associated with relevant technology" under Comment [6] to Oklahoma Rules of Professional Conduct Rule 1.1 has to include acting reasonably to keep client data secure.

It may be possible to upgrade a Windows 7 computer to Windows 10, but I would certainly not wait until December to attempt to upgrade. The system requirements for installing Windows 10 are online at www.microsoft.com/en-us/windows/windows-10-specifications and outlined below:

You don't have to be an IT professional to understand the basics of cybersecurity because most attacks are targeted to end users.

These are the basic requirements installing Windows 10 on a PC. If your device does not meet these requirements, you may not have the great experience intended with Windows 10 and might want to consider purchasing a new PC.

- Processor: 1 gigahertz (GHz) or faster compatible processor or System on a Chip (SoC)
- RAM: 1 gigabyte (GB) for 32-bit or 2 GB for 64-bit
- Hard drive size: 32GB or larger hard disk
- Graphics card: Compatible with DirectX 9 or later with WDDM 1.0 driver
- Display: 800x600
- Internet connectivity is necessary to perform updates and to download and take advantage of some features.

There is more technical information contained on that page.

CYBERSECURITY BASICS FOR THE SOLO AND SMALL FIRM LAWYER

Our September *Digital Edge Podcast* was "Cybersecurity Basics for the Solo and Small Firm Lawyer." Sharon Nelson and I had her husband, John Simek, as our guest, and he provided quite a few tips that are useful for every lawyer in private practice.

The podcast is online at legaltalknetwork.com/podcasts/digital-edge/2019/09/ cybersecurity-basics-for-the-solo-and-small-firm-lawyer.

You don't have to be an IT professional to understand the basics of cybersecurity because most attacks are targeted to end users. You do have to make sure you provide the proper safeguards in your office and share the basics with everyone in the office. For the small firm lawyer, maybe your first cybersecurity update is hosting a lunch at which the firm orders pizza and salad, and everyone listens to this podcast and discusses it for a few minutes afterwards.

SAVE THE DATE FOR SOLO & SMALL FIRM CONFERENCE

In related news, I am pleased to announce that Sharon Nelson and John Simek will be two of our featured guests at the 2020 OBA Solo & Small Firm Conference. We will discuss cybersecurity and many other topics. The conference will be held June 18-20, 2020, at the Choctaw Casino Resort in Durant. Please calendar the date now so you won't have to miss it, but don't contact the resort to reserve a room yet, because our room block will not open until later in the spring.

HAVE OBA MANAGEMENT ASSISTANCE PROGRAM VISIT YOUR COUNTY BAR

OBA Management Assistance Program staff members have already booked presentations for several local bar luncheon meetings for 2020, but we still have many openings. We would love to talk to your local bar about the latest technology tips or delivering limited scope services under Oklahoma District Court Rule 33. Our OBA Practice Management Advisor Julie Bays also has a presentation suitable for a county bar luncheon on proper trust accounting procedures and tools. Contact us to schedule a program. I'm at 405-416-7008 or jimc@okbar.org, and Julie can be reached at 405-416-7031 or julieb@okbar.org. (Warning: If your local bar meets the first Wednesday of the month, I've already booked those dates for most of the spring, but maybe Julie is still available.)

CONCLUSION

This month my column focused on some warnings and technology challenges, but technology challenges are just a part of business operations in the 21st century.

Pay attention. Make sure you regularly back up your data, and hopefully, you won't experience any technology glitches – or disasters.

Mr. Calloway is OBA Management Assistance Program director. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or jimc@okbar.org. It's a free member benefit!

ENDNOTES

1. mashable.com/article/internet-explorer-vulnerability-just-stop-using-it/.
2. mashable.com/article/internet-explorer-hacker-windows-pc-exploit/.
3. support.microsoft.com/en-us/help/4013567/how-to-disable-internet-explorer-on-windows.
4. support.microsoft.com/en-us/help/4057281/windows-7-support-will-end-on-january-14-2020.

Don't let distance keep you from getting involved

Attend section and committee meetings remotely via BlueJeans. Use a mobile device, phone or computer. Visit www.okbar.org/bluejeans.

Attorney Discipline Decisions

By Gina Hendryx

THE FOLLOWING IS A summary of several attorney discipline matters recently issued by the Oklahoma Supreme Court. The court has exclusive, original jurisdiction over the licensure and discipline of Oklahoma attorneys.

STATE EX REL. OKLAHOMA BAR ASS'N V. LEVISAY, 2019 OK 62

Criminal convictions for harboring a fugitive and first-degree manslaughter resulted in license suspension for two Oklahoma attorneys. The Oklahoma Supreme Court ordered the immediate interim suspension of Shelley Levisay's license to practice law after she entered a plea of no contest to the felony crime of harboring a fugitive on Sept. 11. She received a two-year suspended sentence, was fined $5,000 and ordered to perform 100 hours of community service. Levisay has until Nov. 19 to show cause why a final order of attorney discipline should not be imposed.

STATE EX REL. OKLAHOMA BAR ASS'N V. ARNETT, 2019 OK 63

In another matter, the Oklahoma Supreme Court issued a final order of attorney discipline wherein the respondent attorney had been convicted of first-degree manslaughter. In the early morning hours of Aug. 27, 2017, Emma Arnett drove a vehicle after attending a party where she had consumed "several glasses of wine over a fairly substantial period of time." She was driving east bound on 51st Street in Tulsa when her vehicle struck Christopher Brown from behind as he walked in the roadway. Brown was transported to an area hospital where he died several hours later. Arnett's blood alcohol content was .142. She pled guilty to first-degree manslaughter and is currently incarcerated serving a four-year prison term. Upon notice of the conviction, the Oklahoma Supreme Court suspended Arnett's license to practice law on Sept. 10, 2018. On Oct. 7, 2019, the court entered an order of final discipline continuing Arnett's suspension from the practice of law for two years and one month or until her incarceration has ended … whichever is longer.

STATE EX REL. OKLAHOMA BAR ASS'N V. TRIPP, 2019 OK 56

The court approved the resignation pending disciplinary proceedings of an attorney who had been charged with practicing law in Oklahoma without a valid bar license. Douglas Stephen Tripp was licensed to practice law in Oklahoma in 1985. He was stricken from the roll of attorneys in 1995 for failure to pay dues. At the time, Tripp was living and working in Ohio. In 2006, Tripp returned to Oklahoma, joined the law firm of Crowe & Dunlevy, but did not seek reinstatement of his license to practice law. In a formal complaint filed against Tripp, the OBA alleged that from October 2006 until approximately November 2018, respondent engaged in the unauthorized practice of law in Oklahoma. Tripp opted to resign pending disciplinary proceedings rather than proceed through a formal disciplinary hearing. The court, noting that such a resignation is tantamount to disbarment, approved the resignation.

STATE EX REL. OKLAHOMA BAR ASS'N V. STOUT, 2019 OK 60

The court suspended the license of an Oklahoma attorney after he admitted to sending sexually suggestive text messages to two clients and had an inappropriate sexual relationship with a third client. Richard E. Stout admitted his improper behavior and acknowledged the harm caused to his clients. Upon receipt of the disciplinary letter from the OBA, he immediately sought help from Lawyers Helping Lawyers, voluntarily consented to inpatient treatment for sexual addiction and continued with outpatient therapy. Stout expressed deep remorse for his actions and has agreed to not accept employment from female clients. The Oklahoma Supreme Court suspended Stout from the practice of law for three months with conditions that he not accept female clients nor meet alone with females at any time associated with his practice of law, he remain in treatment as recommended by his counselor, he remain in contact with Lawyers Helping Lawyers and he maintain site blocking protection on his electronic devices.

Ms. Hendryx is OBA general counsel.

Meeting Summary

The Oklahoma Bar Association Board of Governors met Sept. 20 at the Oklahoma Bar Center in Oklahoma City.

EXECUTIVE SESSION

Board members voted to go into executive session. They met and voted to come out of executive session.

REPORT OF THE PRESIDENT

President Chesnut reported he spoke to the Leadership Academy, worked on Annual Meeting details and worked on appointments to the PRT, PRC and Child Death Review Board. He attended the Boiling Springs Legal Institute and Tulsa County Bar Association Annual Luncheon.

REPORT OF THE PRESIDENT-ELECT

President-Elect Shields reported she attended the Boiling Springs Legal Institute, 2020 budget preparation meetings and the Oklahoma Bar Foundation trustee meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the monthly staff celebration, Boiling Springs Legal Institute, staff technology meetings, budget preparation meetings, meeting with Lawyers Helping Lawyers Assistance Program leaders and Chance to Change regarding a possible change in service providers, Disaster Response and Relief Committee meeting via conference call and Young Lawyers Division board meeting. He also made a presentation to the Leadership Academy.

REPORT OF THE PAST PRESIDENT

Past President Hays reported she attended the OBA Family Law Section monthly meeting and CLE program and section's Annual Meeting planning meeting. She also0 received a report from the OBA Women in Law Committee.

BOARD MEMBER REPORTS

Governor DeClerck, unable to attend the meeting, reported via email he attended the Garfield County Bar Association meeting. **Governor Fields** reported he attended the Pittsburg County Bar Association meeting. **Governor Hermanson** reported he spoke to the Ponca City Lions Club on the upcoming sales tax vote to pay for the Kay County Courthouse remodeling and building an annex to the courthouse. He also gave a presentation at the Charlie Adams Day celebration in Newkirk about the early day fight to determine the county seat of Kay County. He attended numerous meetings with county officers on the sales tax vote, Northern Oklahoma Southern Kansas Law Enforcement Dinner, District Attorneys Council board meeting and Oklahoma District Attorneys Association board meeting. **Governor Hicks** reported he participated in the OBA Audit Committee conference call and attended the Tulsa County Bar Association Annual Luncheon and TCBF transition planning meeting. **Governor Morton** reported he attended the Cleveland County Bar Association meeting. **Governor Oliver** reported he attended the Payne County Bar Association meeting and worked on finding a candidate for the District 8 board position. **Governor Pringle** reported he attended the Oklahoma County Bar Association's *Briefcase* Committee meeting. **Governor Williams** reported he attended the Tulsa County Bar Association's Board of Directors meeting and OBA Diversity Committee meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Nowakowski reported the Wills for Heroes event in Vinita was very successful. About 35 first responders and retired military service members were helped. She was interviewed by a Tulsa TV station about the community service project prior to the event. She said the YLD will host a general reception at the upcoming swearing-in ceremony.

REPORT OF THE SUPREME COURT LIAISON

Justice Edmondson reported District Judge John Kane will be sworn in as the successor to Justice John Reif on Sept. 23 and will take his seat in the Supreme Court conference room as soon as possible thereafter. He said Chief Justice Gurich has circulated letters from President Chesnut and Board of Bar Examiners Chair Tom Wright concerning the uniform bar examination and adoption of a study commission to consider it or a form of it in the admission of

future Oklahoma lawyers. She has also circulated the State Bar of Texas report on this subject.

BOARD LIAISON REPORTS

Governor Williams said the **Diversity Committee** met and its award banquet is coming up featuring OCU School of Law Dean Jim Roth as the keynote speaker. The committee is seeking sponsors. Past President Hays said the **Professionalism Committee** will hold a three-hour CLE seminar on Oct. 3. She also reported the **Women in Law Committee** has two events coming up. They are recruiting volunteers for the Domestic Violence Intervention Services Mutt Strut on Oct. 5 in Tulsa. The Tulsa DVIS is the first in Oklahoma to have an animal shelter, so victims do not have to leave their animals behind. The committee will also have a booth at the new lawyers swearing-in ceremony to recruit people to attend the upcoming Women in Law Conference and to join the committee.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported a lawsuit has been filed involving the OBA, and representation has been engaged in New Jersey. She shared details regarding the lawsuit.

RESOLUTION NO. ONE: PROPOSED AMENDMENT OF MCLE REGULATION 7

President Chesnut said what was presented at the board meeting last month is what was recommended by the CLE Task Force and approved by the MCLE Commission. The board voted to give the House of Delegates resolution a do pass recommendation for it to be adopted.

BUILDING SECURITY

As Bar Center Facilities Committee chairperson, Governor Will said the committee had previously recommended funding to refurbish bar center landscaping; however, the matter of security has become a more urgent need and therefore plans for landscaping have been tabled. Administration Director Combs reviewed current security measures. He had security companies come to give bids on improvements. He outlined measures to increase security within the building to limit access, which includes installing locked doors and seven cameras inside and out. Discussion followed. Amounts of $50,000 were budgeted for landscaping, $10,000 for security and $10,000 for contingency. The board voted to reallocate the funds for security improvements and to notify the Supreme Court of the requested change.

PROPOSED AMENDMENTS TO RULES CREATING AND CONTROLLING THE OKLAHOMA BAR ASSOCIATION AND OKLAHOMA RULES OF PROFESSIONAL CONDUCT

Executive Director Williams said an amendment to the Rules Creating and Controlling the OBA, Art. II, Sec. 5 para. E and an amendment to Oklahoma Rules of Professional Conduct Rule 5.5 para (d) are proposed, which are essentially housekeeping matters. The board approved both amendments and to authorize Executive Director Williams to submit applications to the Supreme Court.

APPOINTMENTS TO THE PROFESSIONAL RESPONSIBILITY COMMISSION AND PROFESSIONAL RESPONSIBILITY TRIBUNAL

President Chesnut asked board members for recommendations of people who might be interested in serving. Action was tabled.

CHILD DEATH REVIEW BOARD

Action of submitting nominations of people to serve on the board was tabled until the October meeting.

RATIFICATION OF EMAIL VOTE TO HIRE OUTSIDE COUNSEL

The board voted to ratify the email vote approving the hiring of outside counsel to defend the OBA in the *Johnson & Johnson v. Oklahoma Bar Association* lawsuit.

BOARD OF GOVERNORS 2020 CANDIDATES

President Chesnut said only one candidate has filed for each vacancy, and according to Rule 3 Section 3 of the OBA Bylaws, the candidates are deemed to be elected.

NEXT MEETING

The Board of Governors met in October and November, and a summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be at 10 a.m. Friday, Dec. 13, in Oklahoma City.

Oklahoma Bar Foundation Announces 2020 Grants

The OBF is excited to announce it will provide $643,444 in grants to 27 nonprofit programs across the state for 2020 legal services funding. These programs are projected to help over 55,000 Oklahomans in the following categories: children and families, domestic violence, immigrants and refugees, juveniles, legal education and other general legal aid.

Grantee	Program/Services	Service Area	Lives Impacted	Funding Amount
CASA of Western Oklahoma	Advocacy for Abused Children	Beckham, Custer & Washita counties	166	$15,000
CASA of Canadian County	Advocacy for Abused Children	Canadian County	88	15,000
Center for Children & Families	Divorce & Co-Parenting Services	Cleveland & Oklahoma counties	900	15,000
Oklahoma Guardian Ad Litem Institute	GAL Services for Low-Income Families	Central Oklahoma	117	35,000
Oklahoma Lawyers for Children	Legal Services for Abused Children	Oklahoma County	2,249	54,000
The CARE Center	Victim Legal Services & Forensic Interviews	Statewide	4,020	10,000
Tulsa Lawyers for Children	Legal Services for Abused Children	Tulsa County	350	40,000
Legal Aid Services of Oklahoma	Civil Legal Services	Statewide	17,000	85,000
Oklahoma Access to Justice Foundation	Legal Assistance Resource Center	Statewide	10,000	12,500
Trinity Legal	Civil Legal Services	Oklahoma City Area	300	43,000
Community Crisis Center	Advocacy for Victims of Violence	Ottawa, Craig & Delaware counties	608	8,770
Domestic Violence Intervention Services	DVIS Legal Program	Tulsa & Creek counties	9,339	8,000
Marie Detty Youth & Family Services	New Directions Shelter	Comanche, Cotton & Caddo counties	1,565	15,000
Wings of Hope Family Services Center	Family Crisis Services	Logan, Noble & Payne counties	1,700	5,000
YWCA of Oklahoma	Forensic Nursing & Victim Legal Services	Oklahoma County	575	31,000
Catholic Charities Archdiocese of Oklahoma City	Immigration Legal Services	Canadian, Cleveland & Oklahoma counties	531	25,000

Grantee	Program/Services	Service Area	Lives Impacted	Funding Amount
Catholic Charities of Eastern Oklahoma	Immigration Legal Services	Eastern Oklahoma counties	892	25,000
The Spero Project	The Common - Refugee Legal Services	Oklahoma City Metro	350	20,000
TU College of Law	Immigrants' Rights Project	Statewide	300	15,000
YWCA Tulsa	Immigration Legal Services	Tulsa Area	1,080	15,000
Citizens for Juvenile Justice	Court Ordered Literacy Program	Oklahoma County	100	4,614
Citizens for Juvenile Justice	Family Workshops	Oklahoma County	102	3,360
Teen Court	Youth Court	Comanche County	1,063	50,000
Youth Services of Tulsa	Youth Court	Tulsa & Ottawa counties	450	10,000
OBA-YLD Mock Trial	High School Mock Trial	Statewide	800	50,000
OCU School of Law	Indian Wills Clinic	Statewide	100	30,000
YMCA of Greater Oklahoma City	Youth & Government Program	Statewide	735	3,200
		Total	55,480	$643,444

The OBF is thrilled to fund these grants received for such worthy legal service programs, but we do want you – the Oklahoma legal community – to know that the total grant requests received were more than $1 million for 2020 funding. We need your help and support to close this gap so more Oklahomans can receive access to justice.

GIVE NOW to support legal services at www.okbarfoundation.org/donate.

The Oklahoma Bar Foundation funds three annual grant cycles for law-related nonprofit programs, courthouse technology and housing/community development and also provides funds for law school scholarships.

OKLAHOMA BAR FOUNDATION IMPACT UPDATES

OBF funding impacts real people who need legal services as well as those who dedicate themselves to volunteering and working to provide these services. Meet Sharon, DeMarco and Andrew, three Oklahomans with unique stories influencing their passion to help others.

Sharon Byers, Oklahoma Guardian Ad Litem Institute founder and executive director

"Three years ago, I closed down my law firm to follow a dream of mine to help the children of Oklahoma who are going through a rough time in their lives – the breakup of their families. I spent many days in a family courtroom listening to gut wrenching stories about what parents were saying about how children were treated in the home of the other parent. I heard terrible allegations and saw no one standing there to speak for the children. I knew I could not sit by feeling sorry for those children and not do anything. That is where the idea of the Oklahoma Guardian Ad Litem Institute came from. The OBF was the first organization to believe in me and help fund my vision."

–Sharon Byers

DeMarco Davis, former client of Oklahoma Lawyers for Children (OLFC), is now paying it forward by helping kids during the intake process as OLFC's foster youth peer-to-peer coordinator

"My grandma always told me I was different. She told me I've been through more than most and that's what makes me so resilient and strong. Being with Oklahoma Lawyers for Children has taught me that being strong isn't about carrying the weight of the world on your shoulders – it's about giving all you can and realizing that you need the people closest to you as much as they need you."

–DeMarco Davis

Andrew Celedon, juvenile first offender court attorney at Teen Court

"This program means a great deal to me as an active participant in my community's affairs. I know that I can help change a teenager's life in a small way by allowing them the chance to go through the Teen Court system. Many of our youth are unfortunately members of disadvantaged households and with Lawton being a small place, they resort to drugs, gang activity and reckless behavior. These children are the ones who need our help the most, because we are investing in their future and trying to lead them down a path of positivity. I absolutely love the feeling of being a part of someone's journey and to know they made the most of their new opportunities."

–Andrew Celedon

This work is not possible without the support of our generous donors giving through the Fellows Programs. Thank you for your support!

Learn more about the Fellows Giving Programs at www.okbarfoundation.org/fellows-programs.

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Be Passionate About What You Do!

By Brandi Nowakowski

IT IS HARD TO BELIEVE that it is now November, and the year is coming to a close. As I sit and reflect on 2019, I am reminded just how quickly time flies. This past year has been both a success and a whirlwind for the Young Lawyers Division. It seems we were just getting started with the year ahead full of promise and opportunity. As with all new things, the year began with an air of excitement, anticipation and grand plans for the future. Then, in what felt like fast forward, the months breezed by as we checked off the boxes on our to-do list, those seemingly arbitrary accomplishments we set as the benchmarks for success.

Likewise, the past nine years have also been a whirlwind. Sometimes, when people ask me how long I've been practicing, I'm a little shocked to hear nine years come out of my mouth. Nearly 10 years. Wow. So many of you have experienced those times in life when something feels like a lifetime and a single moment all at once. That's exactly how I feel about practicing law.

I still vividly remember graduating from law school, spending the summer studying for and taking the bar exam, and finally being sworn in to the practice of law on Sept. 23, 2010. The pride, the excitement, the relief. At that moment, it felt like life could finally truly begin. This was the culmination of everything I had worked hard and sacrificed for and the start of a beautiful new journey. Now, nine years later, I am amazed by how far I've come and also painfully aware of how far I still have to go.

There are so many different aspects of being a lawyer, but at the core of it is the oath we take.

Over these past several years, I have learned so much personally and professionally. As a young lawyer, change is inevitable and should be welcomed as an opportunity for growth and development. Our day-to-day dealings with other lawyers, clients and the judiciary can teach us so much and make us better lawyers and people overall. We would all do well to keep an open mind so we can constantly learn from those around us – even if it's what not to do.

There are so many different aspects of being a lawyer, but at the core of it is the oath we take. At the most recent swearing in, I was struck by the fact that I still get goosebumps when I hear it. I take it very seriously, as I know all of you do as well. It embodies the commitment to the law and justice, the duty to our clients and the court and the professionalism with which we carry those out. Being a lawyer is an honor, don't take it for granted.

Embrace the opportunity to reflect on where you are now and where you want to go. In the blink of an eye, you will have been practicing 5, 10, 20 years. Be passionate about what you do and make the most out of your practice. In that same vein, make the most out of your time in the YLD and the bar association as a whole. You will meet some amazing people and get to do some awesome work that will enrich your personal and professional life. Take it from me, time flies! Make the most of it!!

Ms. Nowakowski practices in Shawnee and serves as the YLD chairperson. She may be contacted at brandi@stuartclover.com. Keep up with the YLD at www.facebook.com/obayld.

For Your Information

Supreme Court Chief Justice Gurich (center) being inducted to the Oklahoma Women's Hall of Fame.

CHIEF JUSTICE NOMA GURICH INDUCTED TO THE OKLAHOMA WOMEN'S HALL OF FAME

Chief Justice Noma Gurich was inducted to the Oklahoma Women's Hall of Fame Oct. 10 at the Oklahoma Judicial Center.

Chief Justice Gurich has served on the Supreme Court since 2011. She is the third woman to serve as a Supreme Court justice and has been a member of the Oklahoma judiciary for 30 years. She was appointed by four governors to judicial officer positions.

In 2011, the *Journal Record* inducted her into the Woman of the Year Circle of Excellence. In 2013, she received the Oklahoma City Chapter of the Association of Women in Communications Byliner Award for Civic Leadership and in 2014, the OU College of Law inducted her into the Order of the Owl Hall of Fame.

The Oklahoma Women's Hall of Fame was established in 1982 by then-Gov. George Nigh. Since then, 128 Oklahoma women have been inducted.

TU COLLEGE OF LAW OPENS THE TERRY WEST CIVIL LEGAL CLINIC

The TU College of Law opened the Terry West Civil Legal Clinic Oct. 1.

The Terry West Civil Legal Clinic will play a vital role in the TU College of Law's experiential learning opportunities. Participating students will serve as counselors, advocates and problem-solvers for clients who face diverse legal issues related to housing, education, health care, veterans' affairs and more.

The new clinic is named in honor of TU College of Law alumnus Terry West, a distinguished Oklahoma litigator and the senior partner of The West Law Firm in Shawnee.

Kim Henry, executive director of the Sarkeys Foundation, and Terry West next to the TU College of Law Terry West Civil Legal Clinic banner.

"I am very pleased and honored to be associated with this new civil legal clinic," Mr. West said. "I believe it addresses a need that has been prevalent for too long. More importantly, I am hopeful that this work will encourage many of our new lawyers to consider a career in public service law. That would be the biggest achievement of the new program."

The clinic is located across the street from the main TU College of Law building and was made possible through a generous contribution from Sarkeys Foundation.

IMPORTANT UPCOMING DATES

Don't forget the Oklahoma Bar Center will be closed Thursday and Friday, Nov. 28-29, for Thanksgiving and Tuesday and Wednesday, Dec. 24-25, for Christmas.

OBA MEMBER REINSTATEMENTS

The following members suspended for nonpayment of dues or noncompliance with the Rules for Mandatory Continuing Legal Education have complied with the requirements for reinstatement, and notice is herby given of such reinstatement:

Rodney Alan Edwards
OBA No. 2646
6226 E. 101st Street, Suite 100
Tulsa, OK 74137

David Brian Fuller
OBA No. 32207
3931 Highland Drive
Tahlequah, OK 74464

LHL DISCUSSION GROUP HOSTS DECEMBER MEETING

"Focusing on Gratitude" will be the topic of the Dec. 5 meeting of the Lawyers Helping Lawyers monthly discussion group. Each meeting, always the first Thursday of the month, is facilitated by committee members and a licensed mental health professional. The group meets from 6 to 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th St., Oklahoma City. There is no cost to attend and snacks will be provided. RSVPs to ken.skidmore@cox.net are encouraged to ensure there is food for all.

ON THE MOVE

Charles C. Smith, **Tara E. Hudson** and **Nicholas C. Mahn** have formed the firm of Smith Hudson Mahn LLC, located at 3831 East Memorial Road, Edmond, 73013. The firm will practice primarily in oil and gas law with a focus on title examination. **Michael D. Stack** and **Elizabeth Anne George** have joined the firm as of counsel.

Lauren Clifton has joined the Ponca City-based firm of Northcutt, Clark, Oldfield and Layton. She practices primarily in civil litigation, business transactions and organization and estate planning. Ms. Clifton received her J.D. from the OU College of Law in 2017.

Andrea Miller has been named the full-time legal director for the Oklahoma Innocence Project. Ms. Miller was previously the Oklahoma County Public Defender's Office Appellate Division chief. She also held a position as an adjunct professor at the OCU School of Law and has previously taught courses in legal writing and wrongful convictions. She received her J.D. from the OU College of Law, where she served as *Oklahoma Law Review* research editor.

David W. Wulfers joined the Tulsa office of Doerner, Saunders, Daniel & Anderson LLP as partner. Mr. Wulfers practices primarily in the areas of business litigation and planning, construction litigation, employment litigation, financial institutions, oil and gas litigation and transactions and real estate law. He received his J.D. from the TU College of Law in 1981. **Matthew T. Crook** and **Pamela K. Wheeler** have joined the firm as of counsel. Mr. Crook received his J.D. from the OU College of Law in 2002 and is a certified public accountant. He practices primarily in the areas of business law, corporate law, contract law, business transactions, oil and gas transactions, mergers and acquisitions, real estate law, estate planning and probate. Ms. Wheeler received her J.D. from the OU College of Law and has a master's degree in taxation from TU. She practices primarily in the areas of tax planning and tax controversies.

A. Grant Schwabe has joined the Tulsa office of Hall Estill as a shareholder. He received his J.D. from the TU College of Law in 2004. Mr. Schwabe practices primarily in banking and financial services litigation, real estate transactions, oil and gas litigation, construction disputes and labor and employment litigation. **Christopher J. Gnaedig** joined the firm as an associate. He received his J.D. with honors from the TU College of Law. **Chelsea Celsor Smith** has joined the Oklahoma City office as of counsel. Ms. Smith practices primarily in civil litigation in both state and federal court including governmental ethics, constitutional law, administrative law and employment law. She received her J.D. from the OCU School of Law in 2011.

Tony Mastin has joined the Tulsa office of McAfee & Taft as of counsel. He will practice primarily in advising individuals and businesses of all sizes on planning matters involving state and local taxation (SALT) including sales and use taxes, gross production tax, *ad valorem*, multi-state taxation, SALT controversy work and federal income tax. He received his J.D. from the OCU School of Law in 1986. **William J. Holland** has joined the firm's Tulsa office. He will practice primarily in resolutions of complex business disputes, including the defense of manufacturers of leading consumer and commercial products in high-stakes liability lawsuits. Mr. Holland graduated from the OU College of Law in 2013. **J. Cooper Davis**, **Allison Meinders Harvey**, **Katelyn M. King**, **Alyssa N. Lankford**, **Micah G. Mahdi**, **Hayley Blair Myers** and **Collen L. Steffen** have joined the firm as associates. Mr. Davis, Ms. Harvey, Ms. Lankford, Mr. Mahdi and Mr. Steffen are all recent graduates of the OU College of Law. Ms. King earned her J.D. from the OCU School of Law this year. Ms. Myers is a recent graduate of the Vanderbilt University Law School in Nashville, Tennessee.

Eric D. Janzen has returned to the Tulsa-based firm of Steidley & Neal PLLC as a partner. He received his J.D. from the OU College of Law in 1990.

Don Schooler has been appointed as chief of staff for the Oklahoma Department of Labor. He will remain in his position as general counsel for the agency in addition to this new role. He received his J.D. from the OU College of Law in 1993.

Michael W. Bowling has returned to the Oklahoma City office of Crowe & Dunlevy as director of the firm's Labor & Employment Practice Group. He practices

primarily on advising employers in all areas of human resource compliance. He also represents employers in employment-related litigation, including matters of discrimination, retaliation, harassment, interference and reasonable accommodation. Mr. Bowling received his J.D. from the University of Michigan Law School in 2003.

Benjamin K. Davis, **Katie Colclazier** and **Wil Norton** have joined the firm of Hartzog Conger Cason. Mr. Davis received his J.D. from the OU College of Law in 2013 and practices primarily in general corporate and business matters, commercial lending and financial transactions and real estate transactions. Ms. Colclazier received her J.D. from the OCU School of Law this year. She will join the firm's Litigation Practice Area. Mr. Norton received his J.D. from the OU College of Law in 2019. He will join the firm's Corporate Law Practice Area.

Carissa King has joined the Clinton branch of the Christensen Law Group. Her practice will focus in estate planning, probate administration and real estate transactions. She received her J.D. from the OU College of Law in 2011.

Ryan C. Owens has joined The Bethany Law Center LLP. He received his J.D. from the OU College of Law in 2008. He practices primarily in wills, trusts, probates, guardianships, business transactions, dispute resolution, entity formation and nonprofit law.

Justin G. Bates, **Kara K. Laster** and **Phoebe B. Mitchell** have joined the firm of Philips Murrah PC as associates. Mr. Bates and Ms. Mitchell will join the firm's Litigation Practice Group. Ms. Laster will join the firm's Transactional Practice Group. All three graduated from the OU College of Law this year.

Gerard D'Emilio, **Scott Kiplinger** and **Ashlyn Smith** have joined the Oklahoma City office of GableGotwals as associates. **Joya Rutland** has joined the Tulsa office as an associate. They are all recent graduates of the OU College of Law.

KUDOS

Judge Thad H. Balkman was awarded the Freedom of Information Oklahoma Sunshine Award. The Sunshine Award recognizes a public official or governmental body that has shown a commitment to freedom of information.

Ryan Kiesel was awarded the Marion Opala First Amendment Award for 2019. The award is named for the late Oklahoma Supreme Court Justice Marian Opala and recognizes individuals who have promoted education about or protection of the individual rights guaranteed by the First Amendment. Mr. Kiesel has led the American Civil Liberties Union of Oklahoma as executive director since 2011.

Evan G. E. Vincent was inducted as a Fellow of the Construction Lawyers Society of America (CLSA). The organization is an international, invitation-only construction lawyer honor society. Mr. Vincent is one of only 1,200 practicing Fellows in the society.

AT THE PODIUM

Paul R. Foster of Norman spoke at the Community Bankers Association of Oklahoma Annual Convention in Oklahoma City. He was involved in a panel covering current legislation, hot exam topics, banking, marijuana-related businesses and other trending regulatory issues.

In Memoriam

Jerry Dickman of Tulsa died Sept. 2. He was born June 18, 1933. He received his J.D. from the OU College of Law in 1957. Mr. Dickman was an instrumental part in the creation of the Oklahoma Nonprofit Excellence (ONE) Awards alongside the Oklahoma Center for Nonprofits. He served as chair of the ONE Awards Commission for many years.

Mark Allen Herndon of Dallas, died March 6. He was born May 24, 1951, in Ripley, Tennessee. He received his J.D. from the Southern Methodist University Dedman School of Law in 1979. He practiced corporate litigation for real estate and oil and gas, and focused on construction law the last 25 years of his career.

James "Jim" Pence of Norman died Sept. 4. He was born Oct. 28, 1943, in Biloxi, Mississippi. **In 1965, he joined the U.S. Army and served in Vietnam as a first lieutenant from 1966-67, earning a Purple Heart and Bronze Star. Following his discharge as a second lieutenant, he continued to serve in the Army National Guard, earning the rank of captain.** Mr. Pence earned his J.D. from the OU College of Law in 1970. He practiced law in Norman for 44 years. Mr. Pence served as president of the Cleveland County Bar Association in 1973 and on the Judicial Nominating Commission from 1995-2001. Memorial contributions may be made to Norman Meals on Wheels, Vietnam Veterans or a charity of your choice.

Lucas "Luke" Stapleton of Norman died Sept. 4. He was born Sept. 19, 1981, in Amarillo, Texas. He received his J.D. from the OCU School of Law in 2012 and practiced primarily in the area of family law. He spent his time volunteering for organizations like Civil Air Patrol, Oklahoma Youth Hunting Program, Thunderbird Youth Academy and anywhere he was able to mentor troubled youth. Memorial contributions may be made to Thunderbird Youth Academy at 824 Park St., Bldg. 313, Pryor, 74361 or to Oklahoma Youth Hunting Program at P.O. Box 21007, Oklahoma City, 73156.

HOW TO PLACE AN ANNOUNCEMENT:

The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees, and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (*e.g., Super Lawyers, Best Lawyers*, etc.) will not be accepted as announcements. (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing and printed as space permits.

Submit news items to:

Laura Wolf
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the January issue must be received by Dec. 1.

2019–2020 EDITORIAL CALENDAR

2019 ISSUES

DECEMBER
Starting a Law Practice
Editor: Patricia Flanagan
patriciaaflanaganlawoffice@cox.net
Deadline: Aug. 1, 2019

2020 ISSUES

JAUNARY
Meet Your Bar Association
Editor: Carol Manning

FEBRUARY
Family Law
Editor: Virginia Henson
virginia@phmlaw.net
Deadline: Oct. 1, 2019

MARCH
Constitutional Law
Editors: C. Scott Jones & Melissa DeLacerda
sjones@piercecouch.com
Deadline: Oct. 1, 2019

APRIL
Law Day
Editor: Carol Manning

MAY
Gender in the Law
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Jan. 1, 2020

AUGUST
Children and the Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: May 1, 2020

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
Mental Health
Editor: C. Scott Jones
sjones@piercecouch.com
Deadline: May 1, 2020

NOVEMBER
Alternative Dispute Resolution
Editor: Aaron Bundy
aaron@bundylawoffice.com
Deadline: Aug. 1, 2020

DECEMBER
Ethics & Professional Responsibility
Editor: Amanda Grant
amanda@spiro-law.com
Deadline: Aug. 1, 2020

If you would like to write an article on these topics, contact the editor.

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What's Online

How to Write an Affective Bio

Seventy-five percent of consumers know who they want to hire before they contact you and many of them determine this by reading bios. Your bio is your chance to show a prospective client that you're the right attorney for them. Here are several tips for writing an affective bio.

tinyurl.com/affectivebio

How Music Can Help Your Performance

Music is powerful, and there is research to support the positive effects music can have on the mind. Most athletes have "fight songs" they listen to while preparing for a big game because it helps get them excited and boosts their confidence. So, what is your "fight song" before entering a high-stake trial or mediation?

tinyurl.com/musichelpperformance

How to Enjoy Thanksgiving Day Leftovers

It's the day after Thanksgiving. You're hungry. You have leftovers in the fridge but are looking for a way to spruce them up. Check out these 45 recipes that will take your Thanksgiving Day leftovers and turn them into a completely new feast!

tinyurl.com/tdayleftovers

When to Travel During the Holiday Season

The holidays are around the corner, and many of us will be traveling home to spend time with family and friends. We all know that traveling this time of year can be expensive and stressful, but Smarter Travel gives you the 12 best and worst days to travel during the holiday season.

tinyurl.com/2019holidaytravel

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OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact 405-416-7086 or heroes@okbar.org.

WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to Info@TaxHelpOK.com.

CROOKS STANFORD & SHOOP IS SEEKING AN ASSOCIATE ATTORNEY with 3+ years of experience to join our team. Duties would include providing legal research and briefing, assisting with transactional document drafting and review, preparing court pleadings and filings, performing legal research, conducting pretrial discovery and preparing for and attending administrative and judicial hearings. The firm's practice areas include transactional work, commercial litigation, real property, contracts and administrative law. Successful candidates will have strong organizational and writing skills and a willingness to assist with work on all areas of law practiced by the firm. Please email resumes to Amber Johnson at aj@crooksstanford.com.

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TULSA LAW FIRM LOOKING FOR ATTORNEYS WHO WANT TO BUILD THEIR PRACTICE without the hassle of daily administration. We take care of the administration and help you market you. The Tulsa founding attorneys have practiced many years and recently were affiliated with a large international law firm headquartered in D.C. We realized there is something missing in Tulsa that is starting to take place in other major cities - firms that are designed to help lawyers do what they do best - practice law. This is not an office sharing arrangement or a virtual office. This is a law firm working as one unit with the firm taking care of administration headaches while the attorneys work together to help each other grow their business and become more profitable. We are looking for talented attorneys or groups of attorneys with a proven book of business who want to be a part of a law firm that is the future of law firms. Most sole practitioners and many law firms are not up to date in how they operate, are inefficient and do not work together to build up each member. We are very interested in attorneys who practice the following types of law, but if your practice is not listed, do not let that stop you from contacting us: corporate law, oil and gas, aviation, government contracts, intellectual property, banking law, labor (defense side), employee benefits and executive compensation and real estate. We take care of the overhead - bar dues, legal liability insurance, office rental, phones, computers and software, billing, internet, etc. We provide benefits. We market you individually and the group as a team to maximize growth in clientele and income. Contact tsullivent@sflegalgroup.com.

FOR SALE

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OELA Oklahoma Employment Lawyers Association
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2019 EMPLOYMENT LAW SEMINAR

When: Friday December 6, 2019 from 9 a.m. to 4:30 p.m. (*Lunch included*)

Where: Crabtown in Bricktown, 303 E. Sheridan Ave., Oklahoma City, Ok 73104

CLE: 8 hours proposed (*including at least 1 hour of ethics*)

Tuition: $175.00 (before Nov. 22); $200 Nov. 22 or after. E-Materials provided (*$50.00 discount for OELA members & gov./public service attorneys*)

Registration: Online at www.OELA.org

PROGRAM

Medical Marijuana: One Year Legalized	Allen Hutson, *Crowe & Dunlevy*
How Great Mediators Think	Steve Barghols & Amy Pierce, *Hampton Barghols Pierce, PLLC*
Tips from the Bench	Honorable Judge Charles B. Goodwin, *Western District of Oklahoma*
Fair Labor Standards Act: An Update for Employers and Employees	Kristin M. Simpsen, *McAfee & Taft*
Trial from Both Sides of the Aisle: What Changes and What Stays the Same	Justin Meek & Thomas A. Paruolo, *DeWitt Paroulo Meek*
2019 Year in Review: Federal & State Update	Mark E. Hammons, *Hammons, Hurst & Associates*
Plaintiff's Bankruptcy Filing 101: How to Preserve a Plaintiff's Rights and Work with the Trustee (Ethics)	Amber L. Hurst, *Hammons, Hurst & Associates*

**Contact for Questions: Amber Ashby (amberashby@hammonslaw.com)*

I Think My Truck is Possessed

By Holly Cinocca

WHEN MY HUSBAND left the practice of law to become a Methodist minister, we were appointed to a small town in a rural county, and I found a job as an assistant district attorney there. We decided we needed a truck, and my husband bought a Dodge Ram. He usually drove it, and he had a new alarm system installed in it. Well, one day he needed my SUV, so he left me the new "clicker" that could lock, unlock and remotely start the truck.

So, I grabbed the clicker and headed to work. It turns out this was the stupidest invention in the history of clickers. All of the buttons were right next to each other so that you have to have a fingertip the size of a toothpick to touch just one button at a time. Plus, they are extra sensitive so that if you even *breathe* near the clicker, all the buttons go off.

I pulled into the courthouse parking lot and took the keys out of the ignition. I accidentally touched the "lock" button, so I had locked myself inside my own truck. I pulled on the door handle to let myself out, which set the alarm off.

I got the alarm shut off and the door unlocked, and once again tried to exit the vehicle. I accidentally pushed the "remote start" button this time. So, I'm sitting in the front seat holding the keys, and the dang truck is running by itself. I had to put the keys back in the ignition to be able to shut the engine off, and in doing so, I accidentally pushed the "lock" button again. Well dang it!

By this time I just wanted to get AWAY from the truck, as it had become possessed and would not turn off *or* let me out. To top it off, someone pulled into the spot next to me, and I'm pretty sure they were dying of laughter and thinking, "That city girl can't control her own truck."

I finally managed to get out of the vehicle but was sorely tempted to just throw the clicker away and go back to using a plain ol' key to lock and unlock the door. I was just hoping the people in the parking lot laughing were not on my docket that morning.

Ms. Cinocca practices in Tulsa.

oba cle
continuing legal education

THURSDAY & FRIDAY, DECEMBER 5 & 6, 2019

9 A.M. - 2:50 P.M. (EACH DAY)

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73106

MCLE 6/0 (DAY ONE)
MCLE 6/1 (DAY TWO)

TEXAS CREDIT APPROVED

PROGRAM PLANNER/ MODERATOR:

Brian Huckabee,
Huckabee Law PLLC, Tulsa

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This two-day seminar will focus on a broad range of cutting-edge business and consumer bankruptcy-related legal topics.

DAY ONE TOPICS INCLUDE:

- **Foundations of Discharge of Debt**
- **Putting Them In Receivership**
- **Not a Witch Hunt: LLCs, Banks, and Other Surprising Recovery Sources**
- **Real News: United States Trustee Panel**
- **Colluding to Learn Electronic Evidence**
- **This Session's About Venue: Keeping Our Chapter 11 Cases Home**

DAY TWO TOPICS INCLUDE:

- **The Full Report: Recent Developments in Bankruptcy Law**
- **Chapter 12 Unobstructed**
- **Mulling Bankruptcy Ethics**
- **Cannabis Law Unredacted**
- **Amaze and Delight Your Friend(ly Bankruptcy Judge)s: Unredacted Effective Trial Techniques.**
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2019 LEGAL UPDATES

DAY ONE TOPICS INCLUDE:

- Bankruptcy Law
- Labor and Employment Law
- Health Law
- Criminal Law
- Oklahoma Tax Law
- Insurance Law

DAY TWO TOPICS INCLUDE:

- Business and Corporate Law
- Family Law
- Real Property
- Estate Planning & Probate Law
- Law Office Management and Technology
- Ethics

TUITION:

$275 - Both Days Early-Bird - Nov 27, 2018
$150 - Day1 and/or Day 2 Early-Bird - Nov 27, 2019
$300 - Both Days Nov 23 - Nov 29, 2018
$175 - Day 1 and/or Day 2 - Nov 23 - Nov 29, 2019
$325 - Both Days Walk-in
$200 - Day 1 and/or Day 2 Walk-in
$75 - Members licensed 2 years or less (late feels apply)