Welcome from the NPLC Chair

Hello all. As I hope I have communicated in the Year in Review in Oklahoma Indian Country, the later months of 2019 to the present in 2020 have been an exciting time. While the pandemic caused cancellations or moving to a virtual platform, the events of the year have been motivating to those of us interested in Native Peoples Law. And, of course, despite the hardships and unrest which have been severe in some native communities, the McGirt opinion has filled native peoples with some sense of hope. Even Google maps is recognizing the boundaries of tribal nations in Oklahoma. (See page 3.)

I was approached early in 2020 about working with the FCIL-SIS Indigenous Law Group to moderate a webinar on Indigenous Law Research this year. Unfortunately, because of a prior commitment, I was unable to moderate on the date selected. However, I hope to engage with Indigenous Law Group to coordinate additional webinars on issues related to law and native peoples. If you were also unable to attend the webinar, the recording is now available via AALL2GO. Traditional Law in a Modern World: Researching Indigenous Peoples’ Law is available at https://www.aallnet.org/recording/researchingindigenouspeopleslaw/.

This year our Caucus once again participated in the AALL CONELL Marketplace. CONELL is an important opportunity for the Caucus to reach newer law librarians to share with them the value of networking with experienced law librarians knowledgeable about research resources relating to native peoples. We had a limited number of visitors to our virtual room in the Marketplace, but they seemed enthusiastic to become involved.

Continued on Page 3
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**MISSION & VISION**

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**JOIN THE NATIVE PEOPLES LAW CAUCUS!**

Are you interested in Federal Indian and Tribal Law? Please join the Native Peoples Law Caucus!

Already a member? Please invite your colleagues! AALL Members can join our community by going to [bit.ly/aallnplc](http://bit.ly/aallnplc), signing in, and clicking on the “Join Community” button.

All AALL members are welcome!
Welcome, continued from Page 1:

Unfortunately, the schedule of the virtual AALL Annual Meeting did not provide an opportunity for the Caucus to meet. I am hopeful, however, that we will be able to arrange to meet virtually before the annual meeting rolls around again.

Finally, thank you to Anne Lucke for her great efforts serving for an extended period as the editor of the NPLC Newsletter and to Scott Stevens for his willingness to assume the responsibility as Anne steps down!

I hope you all are staying safe and healthy!

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**Items of Interest**

**The Native American Languages Act at 30**
The National Coalition of Native American Language Schools and Programs (NCNALSP) held a webinar on October 30, 2020 celebrating the 30th anniversary of NALA. Further information including a recording of the webinar and NALA resources can be found at [http://www.ncnalsp.org/nala30](http://www.ncnalsp.org/nala30). NCNALSP also posts news and stories on its Facebook page: [https://www.facebook.com/ncnalsp/](https://www.facebook.com/ncnalsp/).

**Operation Lady Justice — First Year of Operation Report**
On November 26, 2019 President Trump signed Executive Order 13898 establishing a task force focused on missing and murdered American Indians and Alaska Natives, particularly women and girls. On December 10, 2020 the task force released its first Report to the President. Further information about the task force including that report can be found at [https://operationladyjustice.usdoj.gov/](https://operationladyjustice.usdoj.gov/).

**Cherokee Language Speakers & Nation Treasures Receive First Round of COVID Vaccine**
_The Oklahoman_ reported on December 12, 2020 that “Tribal officials released a phased priority plan for allocating the vaccine, with frontline health care workers, emergency responders, Cherokee speakers, Cherokee National Treasures and those over the age of 65 receiving the first doses in Phase 1.” [https://oklahoman.com/article/5678130/cherokee-nation-to-distribute-covid-19-vaccine-to-tribal-members-next-week](https://oklahoman.com/article/5678130/cherokee-nation-to-distribute-covid-19-vaccine-to-tribal-members-next-week)

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All Five Civilized Tribes are represented in Google’s new mapping project. In addition, the Osage Nation reservation is also shown.
University of Wisconsin Law Library Receives IMLS Grant to Improve Access to Tribal Laws

Bonnie Shucha
Associate Dean for Library & Information Services & Director of the Law Library, University of Wisconsin Law School

The University of Wisconsin Law Library recently received an Institute of Museum and Library Services (IMLS) grant for their Digital Publication of Tribal Laws Pilot Project. The project will develop an open platform that will empower libraries to improve access to tribal laws published into the public domain and more fully serve the needs of diverse users - tribal members and leaders, legal, business, and government professionals, academic researchers and learners, and the public.

“The right to know the law by which we are governed is a fundamental right,” notes Bonnie Shucha, Associate Dean and Director of the Law Library. “This project addresses a critical gap in the availability of published and accessible tribal laws by developing tools to provide this content freely online.” The University of Wisconsin Law Library has partnered with the Stockbridge-Munsee Community Band of Mohican Indians, the UW Law School Great Lakes Indigenous Law Center, the National Indian Law Library (NILL), and the Open Law Library (OLL) on this pilot project. Together, they will address the national need for public access to tribal law.

The Digital Publication of Tribal Laws Pilot Project combines a publishing platform which addresses issues that plague other publishing methods - tribal control, currentness, authentication and preservation - with a newly created open source library platform that combines the law of many tribes via an open access, federated search portal for enhanced discovery.

“Through my work as a tribal court trial judge and appellate justice, tribal court staff attorney, and tribal court administrator for several tribes over the past two decades, I have seen first-hand the need for a simple and coordinated way to digitally publish and access tribal law,” observes Jill E. Tompkins (Penobscot) of the National American Indian Court Judges Association, “This pilot project will undertake the critical work of gathering and publishing tribal laws with direct input from members of the Native Nations. Tribes will retain full control over their laws and this tool will allow them to publish their laws in a standardized digital format, enabling unified access and search functionality across the laws of all participating tribes.”

Remembering Those We Lost This Year

Indian Country was not spared the effects of COVID-19. As we remember those we lost this year to the disease, please take a moment to also thank those on the frontlines trying to help everyone affected.
Oklahoma Indian Country: A Year in Review
By Darla Jackson

As noted in the 2019 newsletter, the Murphy case was a primary topic of discussion. However, when the U.S. Supreme Court did not decide the case and placed it on the calendar for reargument, many began to wonder how long it would take to get a decision. When the Court granted cert in McGirt v. Oklahoma, in December 2019, there was speculation that Justice Gorsuch, who had been recused in the Murphy case, would serve as the tiebreaker in a split court. Thus, McGirt became the focus of those interested in treaty, diminishment, and jurisdictional issues in Oklahoma Indian Country.

As background in the McGirt case, the primary issue involved criminal jurisdiction. McGirt was accused and successfully prosecuted in Oklahoma for committing a serious felony. McGirt is a Seminole tribal citizen. He argued that the state did not have jurisdiction because under federal law, both statutory and Supreme Court case law, the state has no jurisdiction over crimes involving Indians either as victims or as perpetrators. And in fact, if a citizen of a federally recognized tribe is accused of committing a serious crime in Indian Country, then the federal government has effectively exclusive jurisdiction. A tribal government might also be able to prosecute. However, tribes have sentencing caps that would have kept them from sentencing him at what most would have considered an appropriate degree. And so, McGirt is being re-prosecuted by the federal government because he won the argument before the U.S. Supreme Court.

The reason that McGirt was successful is that the Major Crimes Act, the statute that assigned to the federal government criminal jurisdiction over McGirt, applies in Indian Country. Indian Country as a “term of art” is defined in 18 U.S.C. §1151. More specifically, 18 USC §1151(a) defines Indian Country as “all lands within the limits of any Indian reservation under the jurisdiction of the United States Government[.]” McGirt’s argument was that the Muskogee Creek Nation Reservation boundaries of 1866 had never been disestablished and still existed. These are the boundaries that include all the parts of numerous counties in Oklahoma and major portions of the City of Tulsa.

Justice Gorsuch, who had served on the Tenth Circuit and is familiar with Indian law, wrote the opinion. Justice Gorsuch, as a textualist, wrote that the Court looked at what the Allotment Act said. This was the Act that allegedly disestablished the reservation. Because the Allotment Act did not clearly indicate an intent to disestablish, the Court was not going to infer that intent from extraneous circumstances existing either contemporaneously or subsequently. As a result, demographic evidence that the State of Oklahoma produced
about how many non-Indians lived in the area nor evidence of the challenges of administering such a decision were not factors given consideration by the majority.\(^4\)

Since the *McGirt* case, several tribes, including the Choctaw Nation and the Chickasaw Nation, have seen rulings that accept defense arguments that their reservations have never been disestablished.\(^5\)

During the *Murphy* and *McGirt* cases, there had been discussion about how the state and tribes might cooperate to implement possible outcomes of the cases. On July 16, one week after the Supreme Court’s decisions in the *McGirt* and *Murphy* cases,\(^6\) Oklahoma Attorney General Mike Hunter announced he had reached an agreement with five tribes to address jurisdictional issues raised by the ruling. While there was an announcement of an “agreement in principle,” Hunter indicated there were “many more details to be ironed out in the near future.”\(^7\) Soon after the announcement, first the Seminole Nation and then the leaders of other tribes began to distance themselves from the “agreement in principle.”\(^8\) Insisting that additional consultation needed to be undertaken.\(^9\)

Oklahoma Governor Stitt also established the Oklahoma Commission on Cooperative Sovereignty to address concerns and make recommendations to the State and the U.S. Congress in light of the *McGirt* and *Murphy* cases.\(^10\) However, there has been significant criticism of Stitt’s appointments to the Commission for lacking diversity.\(^11\) This was particularly true after the Commission issued a report,\(^12\) which was described by Cherokee Principal Chief Chuck Hoskins, Jr. as “light on sovereignty [considerations], but heavy on [creating] fear and uncertainty.”\(^13\)

Several tribes, including the Cherokee Nation, have formed their own Sovereignty Commissions to advise on sovereignty concerns in the wake of the *McGirt* decision and to make budgeting and resource recommendations.\(^14\) The Muscogee (Creek) Nation announced significant investment in the Lighthorse Police Department.\(^15\) Additionally, Attorney General Barr has met with tribes in Oklahoma and with the Muscogee (Creek) Nation\(^16\) to discuss federal support, including the hiring of additional federal prosecutors. Jonodev Chaudhuri, former Chairman of the National Indian Gaming Commission and current Muscogee (Creek) Nation Ambassador, indicates that such involvement is essential to ensure tribal sovereignty and prevent a rush to
federal legislation and perhaps some unintended consequences of hurriedly passed legislation. Perhaps providing a voice to caution against rushed legislation was one of the things the Cherokee Nation had in mind when it nominated Kimberly Teehee as the Cherokee Nation’s Delegate to Congress.18

Several tribal leaders joined together in a statement opposing potential federal legislation.19 However, Muscogee (Creek) Nation Principal Chief David Hill stated that he remained open to working with Governor Stitt if Stitt “is serious about finding real solutions that benefit all Oklahomans …”20 Governor Stitt’s response may not have been anticipated. On October 30th, Stitt announced that he hired Ryan Leonard, who made an unsuccessful bid to serve as the Oklahoma attorney general, as special counsel for Native American Affairs.21

As you might imagine, the McGirt case has been the subject of numerous presentations and CLEs throughout Oklahoma and in states across the U.S. Normally, the McGirt case would have been the subject of presentations at the Sovereignty Symposium, but, due to the pandemic, the 2020 Sovereignty Symposium was cancelled.22

In 2020, the Oklahoma Bar Association Indian Law Section’s annual CLE was a virtual offering. It included updates on McGirt as well as a session on the CARES Act funding available to tribes and tribal agricultural programs. For those interested in research resources, Bonnie Shucha and her colleagues discussed the Digital Publication of Tribal Laws Pilot Project (see page 4 of the main newsletter), the Oklahoma Indian Legal Services work on Tribal Code digitization,23 and Fastcase’s Initiative to make tribal court opinions more accessible. Professor Frank Pommersheim and Oklahoma Supreme Court Justice Dustin Rowe24 discussed Implicit Bias
Against Tribal Court Systems. Finally, Matthew Morgan, Chairman of the Oklahoma Indian Gaming Association, spoke about recent developments in Indian gaming.

In late 2019 and throughout 2020, Indian gaming followed the McGirt case as a top legal news issue in Oklahoma. The saga began in 2018 during the Oklahoma gubernatorial campaign. Candidate Stitt, a member of the Cherokee Nation, indicated that if he was elected, he anticipated renegotiating the exclusivity fees under the current gaming compacts. In July 2019, Governor Stitt published an editorial in a Tulsa newspaper indicating that he planned to renegotiate the gaming compacts rather than simply renegotiate the exclusivity fee. The method of communicating his plan as well as the fact that he wanted to renegotiate the compacts rather than simply the exclusivity fees came as a surprise to tribal leaders, who took the position that the compacts would renew for fifteen years by the terms of the current compact. Stitt responded that the current compact would expire after as of January 1, 2020 and tribal Class III gaming would be illegal. Tribal leadership rejected Stitt’s assertion and became troubled about cancellation of conferences and activities by groups concerned about the issue of gaming legality.

Relations between the tribes and Governor Stitt continued to worsen. While Governor Stitt continued to maintain that the compact terminated on January 1, 2020 as that deadline loomed, he offered an extension to the tribes. With limited exception the extension was rejected by the tribes, which also questioned the Governor’s authority to offer the extension. Lisa Billy, Oklahoma’s first Secretary of Native American Affairs, also resigned stating that Stitt’s position made it impossible for her to continue.

On December 31, 2019, several tribes filed suit in the Western District of Oklahoma federal court seeking declaratory relief regarding the renewal of the compact. The case was delayed, in part by COVID, and the tribes also expressed frustration that Governor Stitt was taking advantage of the situation created by the closure of tribal casinos due to safety concerns. There was a partial judgment in the case issued on July 28, 2020, only a few weeks after the McGirt decision. The judgment provided that by the plain language of the Oklahoma Gaming Compacts, the compacts automatically renewed and extended to 2035. In October 2020, Stitt announced that he would not appeal, citing need for cooperation regarding the results of McGirt.
Prior to the ruling, in April and July 2020, Governor Stitt entered into new compacts with four tribes. The Oklahoma Indian Gaming Association suspended two tribes as a result of the negotiations and accomplishment of the compacts.30

Provisions of the new compacts varied from the model compact set forth in the State-Tribal Gaming Act.31 Oklahoma’s Attorney General Hunter issued an opinion that Governor Stitt had exceeded his authority to enter the first two compacts.32 Following the issuance of the opinion Oklahoma legislative leaders filed suit before the Oklahoma Supreme Court regarding the authority of Governor Stitt to enter these two compacts. The Oklahoma Supreme Court noted that the "tribal gaming compacts were submitted to the United States Department of the Interior, and the Department of the Interior deemed them approved by inaction, only to the extent they are consistent with the Indian Gaming Regulatory Act ..."33 The Court further acknowledged that "the Comanche Nation and Otoe-Missouria Tribes are not parties in this matter; these tribes are sovereign nations and have not submitted to the jurisdiction of this Court."34 Finally, the Court held, "[t]he limited question before this Court is whether Governor Stitt had the authority to bind the State with respect to the new tribal gaming compacts with the Comanche Nation and Otoe-Missouria Tribes. We hold he did not."35 A second suit challenging the authority of the Governor to enter the second two compacts is still pending before the Oklahoma Supreme Court.36

Additional litigation was undertaken on August 7, 2020 by the Cherokee, Chickasaw, Choctaw, and Citizen Potawatomi Nations in the U.S. District Court for the District of Columbia. The tribes are seeking "reversal of the Defendant Secretary’s arbitrary, capricious, and unlawful 'no action' approval ... of two agreements signed by the Defendant Governor Stitt, and ... Chairman Nelson and Chairman Shotton, on behalf of the Comanche Nation and the Otoe-Missouria Tribe of Indians..."37

Despite high hopes for a Governor with tribal membership and a victory for tribal sovereignty in the U.S. Supreme Court in 2020, state-tribal relations in Oklahoma Indian country have “reached an inflection point”38 and the gaming compact dispute has made resolution of issues seem almost impossible. It is hoped by some that Governor Stitt’s recent announcement that he would not appeal the July gaming ruling will open the door for improvement of state-tribal relations. However, the ongoing nature of the suit in the U.S. District Court for the District of Columbia and the second suit before the Oklahoma Supreme Court, which have not yet been decided, may instead signal that the compact dispute has not recached a conclusion.

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Endnotes

1 Darla Jackson is a reference librarian at the University of Oklahoma College of Law. Any views expressed in this piece are her own and do not express the views of the University of Oklahoma or the OU College of Law.
3 24 Stat. 388.
7 Id.
8 Id.
9 Id.
24 Justice Rowe served as “Special Judge of the Chickasaw Nation District Court from 2005 to 2011, and has served as District Judge of the Chickasaw Nation District Court from 2011 to present …” Press Release, Governor Stitt Appoints Dustin P. Rowe to Supreme Court of Oklahoma (Nov. 20, 2019), https://www.governor.ok.gov/articles/press_releases/governor-stitt-appoints-dustin-p-rowe-to-supreme [https://perma.cc/CUY5-VXUS].
32 Governor’s Authority To Enter Into and Bind The State To Compacts With Indian Tribes That Authorize Gaming Activity Prohibited By State Law, 2020 OK AG 8 (05/05/2020), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteId=486531.
34 Id.
35 Id. at ¶3.