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## A Message from the Chair



*Guwadzee!*

Welcome to the *Indian Law Times* of the State Bar of New Mexico Indian Law Section!

I want to start this newsletter by acknowledging our Section members and their families who have been at the forefront of the fight against COVID-19

and ongoing recovery efforts. Indian Country has been and continues to be particularly affected by this tragedy. Nonetheless, many of our Section members have dedicated the past several months of time and effort as Indian law practitioners, educators, and as community members to help guide us out of these adverse times.

Although some of the Section's annual activities and social events have been curtailed this year, the Board has found success in carrying out its goals for 2020. As you will find in this newsletter, the Section was able to award four substantial Bar Preparation Scholarships to deserving students and has announced applications for its newest scholarship, the Karl E. Johnson Indian Law Scholarship, which will be awarded in August. The Board is also preparing for its annual CLE on the mornings of November 5 and 6, which will be held remotely. In addition, our Board has continued its sponsorship of the UNM Native American Law Students Association graduation by contributing funds towards gifts for the graduating class of 2020.

I want to thank you all for your interest in the Indian Law Section. We welcome any input for Section members. Please feel free to contact me, our Committee Chairs, or Board Members if you have any questions, comments, or concerns.

In closing, I want to give a big shout out to my fellow Board Members for all they have done this year. I am truly honored to be able to serve with such a talented and engaged group.

*- Justin Solimon, 2020 Chair*

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# Announcements

On this page, we list upcoming Section-related events and deadlines for easy reference. Fuller discussions on some of these announcements follow in the committee reports.

## **INDIAN LAW SECTION ANNUAL CLE: NOVEMBER 5-6, MORNINGS**

The Indian Law Section has scheduled its annual CLE for the mornings of November 5 and 6. Because of the pandemic, all participation will be online. With no travel involved, the Section concluded that it may be easier for members to split the 6-credit program into two mornings. See the CLE Committee report on page {{{}} for more information, including the agenda. Register for both sessions at [https://cle.nmbar.org/nmsbf/product\\_bundles/1619](https://cle.nmbar.org/nmsbf/product_bundles/1619). You can register for only the first or second morning at <https://cle.nmbar.org/nmsbf/courses/8099/documents/32015> or <https://cle.nmbar.org/nmsbf/courses/8099/documents/32065>, respectively.

## **INDIAN LAW SECTION ANNUAL MEETING: NOVEMBER 5**

Every year, the Indian Law Section holds its annual meeting. This year's meeting will follow the first morning of the CLE, at 12:10 p.m. All Section members are encouraged to attend, whether or not you're enrolling in the CLE itself. Please stay involved with your Section.

## **ATTORNEY ACHIEVEMENT AWARD NOMINATIONS: DECEMBER 4**

The Indian Law Section has opened nominations for its annual Attorney Achievement Award. The Attorney Achievement Award gives the Section an opportunity to recognize the amazing accomplishments of our members. Our Section includes some of the foremost Indian law practitioners in the country who have made important contributions to our profession and to our communities. The nominee for the Attorney Achievement Award must be a member of the Indian Law Section and the nomination must explain, in one page or less, the nature of the nominee's extraordinary achievements in Indian law and the nominee's contributions to the community. **The deadline for nominations is Friday, December 4.** The Attorney Achievement Award will be presented at an ILS event soon thereafter. Send nominations to Morgan Pettit at [mpettit@nmbar.org](mailto:mpettit@nmbar.org). Visit [www.nmbar.org/IndianLaw](http://www.nmbar.org/IndianLaw) to view a roster of Section members.

# A Major Supreme Court Victory for Indian Country: *McGirt v. Oklahoma*

On July 9, 2020, the last day of its October 2019 Term, the U.S. Supreme Court announced its long-awaited decision in *McGirt v. Oklahoma*. Reversing an Oklahoma state court decision, the high court held that the Indian reservation the U.S. government had established as a homeland for the Muscogee Creek Nation in 1833 in what is now Oklahoma remains a reservation today. Accordingly, the state of Oklahoma had no jurisdiction to prosecute and convict the *pro se* Native American petitioner Jimcy McGirt, an enrolled member of the Seminole Nation, for felonies allegedly committed within the reservation's boundaries. The Court ordered a new trial to take place in federal court, pursuant to the Major Crimes Act: "Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country."

The *McGirt* decision is a major victory for Indian country on a number of levels. First, as a case invoking the doctrine of reservation diminishment/disestablishment, *McGirt* follows the Court's unanimous 2016 decision in *Nebraska v. Parker*, affirming the boundaries of the Omaha Reservation in Nebraska. While both cases clarify the rules for deciding whether a reservation has been diminished or abolished, *McGirt* goes farther in deflating the notion of "*de facto* diminishment," a controversial term mentioned in earlier cases that threatened to undermine the core requirement of express statutory language as a prerequisite for finding that an act of Congress has terminated or shrunk the boundaries of an Indian reservation.

"To determine whether a tribe continues to hold a reservation," the *McGirt* Court wrote, "there is only one place we may look: the Acts of Congress. . . . Likewise, courts have no proper role in the adjustment of reservation borders." The Court underscored "the danger" of Oklahoma's "relying on state practices" and "demographics," observing that "Oklahoma asks us to defer to its usual practices *instead of* federal law, something we will not and may never do." To rule in Oklahoma's favor based on the state's persistent denial of the reservation's existence would be to "cast a blind eye" to solemn federal promises made to the Indians and would "elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."

*McGirt* also is a Supreme Court decision that holds promise for all Indian nations, not only because of its pro-tribal clarification of the reservation diminishment/disestablishment doctrine, but especially in light of the emergence of *McGirt's* author, Justice Neil Gorsuch, as an apparent champion for Indian rights. *McGirt* is the third Indian law case decided by the Supreme Court since Gorsuch joined the high court in 2017, and in each case – *McGirt* (2020), *Washington State Dept. of Licensing v. Cougar Den, Inc.* (2019), and *Herrera v. Wyoming* (2019) – Gorsuch's was the crucial swing vote in a 5 to 4 decision upholding Indian treaty and statutory rights. Although tribal attorneys and Indian rights advocates may find this trend reassuring, the recent death of Justice Ruth Bader Ginsburg, who voted with the majority in all three cases, ratchets up the stakes for Indian country in the national debate over Ginsburg's replacement.

The *McGirt* decision also holds promise for virtually all of the other Indian tribes in eastern Oklahoma, since the Court's analysis regarding the continuing existence of the Muscogee Creek Nation's reservation may be applicable in litigation involving those other tribes' reservations as well. In reaction to the decision and its implications, the attorney general of Oklahoma began spearheading a drive in July to have Congress enact legislation overriding the decision, including through an "agreement-in-principle" with tribal leaders

consenting to an extension of state criminal jurisdiction over Indians within Oklahoma Indian country. After “Creek leaders and citizens voiced serious concerns” about the attorney general’s efforts, a number of tribal leaders disavowed the “agreement-in-principle,” including Muscogee Creek Principal Chief David Hill, who issued a letter to all Creek citizens stating that the Muscogee Creek Nation “will oppose any proposed legislation,” such as the state attorney general’s plan, “that diminishes the Nation’s sovereignty.” See Acee Agoyo, “‘No Surrender’: Muscogee (Creek) Nation stands firm on sovereignty after historic Supreme Court win,” available at <https://www.indianz.com/News/2020/07/20/no-surrender-muscogee-creek-nation-stand.asp>.

Also since the Supreme Court’s decision, the Environmental Protection Agency recently has invoked a provision in a 2005 act of Congress, the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA), to grant the state of Oklahoma broad authority to administer EPA programs in Indian country, excluding trust lands, Indian allotments, and certain other Indian lands. See letter from EPA Administrator Andrew R. Wheeler to Oklahoma Governor J. Kevin Stitt, Oct 1, 2020, available at <https://turtletalk.files.wordpress.com/2020/10/epa-letter-to-gov.-stitt.pdf>; see also Lindsey Bark, “EPA gives authority to state on environmental issue over tribal lands,” available at <https://www.cherokeephoenix.org/Article/index/165375>. This action highlights that there are civil/regulatory ramifications that will be at issue in the wake of *McGirt*.

The media’s reporting of the *McGirt* decision often demonstrated the profound misunderstandings that many have regarding Indian land status specifically and Indian law more generally. For example, the Reuters headline was “U.S. Supreme Court deems half of Oklahoma a Native American reservation,” available at <https://www.reuters.com/article/us-usa-court-oklahoma-idUSKBN24A268>. Section members are well-positioned to help other lawyers and the public generally understand what *McGirt* does, and does not, mean.

Following are additional links to websites providing additional information and discussion regarding the *McGirt* decision and its ramifications:

Acee Agoyo, “Indian Country slams efforts to ‘abrogate’ sovereignty in wake of historic Supreme Court ruling,” available at <https://www.indianz.com/News/2020/08/13/indian-country-slams-efforts-to-abrogate.asp>.

D. Sean Rowley, “U.S. Attorney General Barr visits Cherokee Nation to talk *McGirt* decision,” available at <https://www.cherokeephoenix.org/Article/index/165349>.

Arizona State University Indian Legal Program, “The Most Significant Indian Law Case of the Century: *McGirt v. Oklahoma*” (panel discussion), available at <https://asu.zoom.us/rec/share/uPcqKq-05jtLZoXHoxHQc74fH626aaa8iCEY-VbnkZPoFiWv5GGmLkkzqx B7-DJ%20>

Turtle Talk, “*McGirt v. Oklahoma* Background Materials,” available at <https://turtletalk.blog/2020/02/12/mcgirt-v-oklahoma-background-materials/>

Democracy Now, “‘Most Important Indian Law Case in Half a Century’: Supreme Court Upholds Tribal Sovereignty in OK” (YouTube interview with Muscogee Creek law professor Sarah Deer, available at <https://www.youtube.com/watch?v=f7FcerlwfUE>

# COMMITTEE REPORTS

## CLE Committee: Annual Indian Law Institute

On the mornings of Thursday, November 5 and Friday, November 6, the Indian Law Section will hold the 2020 Indian Law Institute: Advancing the Profession in Times of Uncertainty. Because of the pandemic, participation will be only by live webcast. The CLE Committee of the Section is excited about this year's program and is grateful to all of the speakers who have agreed to participate. The agenda is below and is nearly final. We look forward to seeing you virtually. Register today for 6 CLE credits, including one ethics credits. Register for both sessions at [https://cle.nmbar.org/nmsbf/product\\_bundles/1619](https://cle.nmbar.org/nmsbf/product_bundles/1619). You can register for only the first or second morning at <https://cle.nmbar.org/nmsbf/courses/8099/documents/32015> or <https://cle.nmbar.org/nmsbf/courses/8099/documents/32065>, respectively.

AGENDA – DAY 1: NOVEMBER 5, 2020	
8:30-10 a.m.	<b>Covid-19 Impact on Indigenous Communities</b> <i>U.S. Representative Deb Haaland, (D-NM 1st District); Secretary Lynn Trujillo, New Mexico Indian Affairs Department</i>
10-10:05 a.m.	Break/Transition
10:05-11:05 a.m.	<b>State and Federal Indian Law Update</b> (including discussion of the recent Supreme Court decision in <i>McGirt v. Oklahoma</i> ) <i>Prof. Jeanette Wolfley, Wolfley Law Office</i>
11:05-11:10 a.m.	Break/Transition
11:10 a.m.-12:10 p.m.	<b>Discovery and Evidentiary Issues in Litigation Against State and Federal Governments</b> <i>Tierra Marks, Esq., Barnhouse Keegan Solimon &amp; West LLP and Michelle Miano, Esq., Barnhouse Keegan Solimon &amp; West LLP</i>
12:10 p.m.	Adjourn CLE
12:10-1 p.m.	<b>Annual Indian Law Section Meeting</b> (Not part of CLE, but Section members are encouraged to attend)
1 p.m.	Adjourn Section Activities

AGENDA – DAY 2: NOVEMBER 6, 2020	
8:30-9:30 a.m.	<b>Tribal Jurisdiction – Can't give it away</b> <i>Christina West, Esq., Barnhouse Keegan Solimon &amp; West LLP</i>
9:30-9:35 a.m.	Break/Transition
9:35-11:05 a.m.	<b>Missing and Murdered Indigenous Women</b> <i>Coalition to Stop Violence Against Native Women, Southwest Women's Law Center, and the New Mexico Indian Affairs Department</i>
11:05-11:10 a.m.	Break/Transition
11:10 a.m.-12:10 p.m.	<b>Compare and Contrast Navajo and New Mexico Ethical Rules</b> <i>Katherine Belzowski Esq., Acting Assistant Attorney General and Principal Attorney, and Lillian Schwaales, Esq., Economic and Community Development Unit, Navajo Nation Dept. of Justice</i>
12:10 p.m.	Adjourn

## Scholarship Committee

This year, the Section awarded Bar Prep Scholarships to four recipients: Naomie Droll, Amber Holland, Jordan Oglesby, and Heather Tanner. Each recipient demonstrated their passion in Indian law and their commitment to serving tribal communities. The Section and the Scholarship Committee extend their best wishes to these recipients and look forward to having them join the Section as attorney-members!

Here's a quick look at the recipients:



**NAOMIE DROLL** is a member of the Navajo Nation and is interested in engaging in legal work that protects the environment. During law school, Ms. Droll participated in the NNALSA moot court competition and interned for the National Council of Urban Indians and for Senator Udall on the Senate Committee on Indian Affairs, focusing on expanding coverage of the Radiation Exposure Compensation Act to include Navajo miners and others.



**AMBER HOLLAND** is a member of the Lumbee Tribe of North Carolina and was formerly a public-school teacher. During law school, Ms. Holland participated in the NNALSA moot court competition, interned at the Department of Interior's Office of the Solicitor, Division of Indian Affairs as a Udall Native American Congressional Intern, and externed with the Honorable James O. Browning.



**JORDAN OGLESBY** is a member of the Navajo Nation and a superior student organizer. During law school, Ms. Oglesby was heavily involved in UNM NALSA and National NALSA, the Tribal Law Journal, and coordinated food drives and clothing drives to support various native causes.



**HEATHER TANNER** is Native Hawaiian and spent her pre-law professional career working for various nonprofits in New Mexico. During law school, Ms. Tanner worked as a law clerk with the Indian Country Crimes Section at the US Attorney's Office and externed with the Family Law Unit at Legal Aid Society of Hawai'i.

The Committee is currently soliciting donations to go towards providing scholarships to assist new graduates with the costs associated with taking the bar exam. Donations can be made via the Indian Law Section website [www.nmbar.org/indianlaw](http://www.nmbar.org/indianlaw) or by check made payable to the "New Mexico Bar Foundation" indicating "Indian Law Section Bar Prep Scholarship" on the memo line. Checks should be mailed to: New Mexico State Bar, Attn: Stephanie Wagner, P.O. Box 92860, Albuquerque, NM 87199-2860. All donations are tax deductible.

Additionally, the Scholarship Committee has established of the Karl E. Johnson Indian Law Scholarship. The Karl E. Johnson Indian Law Scholarship is established in honor of Mr. Johnson's many contributions to Indian Law, including his dedication to the Indian Law Section. The 2020-2021 Scholarship recipients have not yet been announced, and the pool is open to class of 2021 and class of 2022 students currently enrolled at the UNM School of Law with demonstrated interest in practicing Indian law and financial need. Donations to the Karl E. Johnson Indian Law Scholarship can be made online at <https://form.jotform.com/sbnm/karl-johnson-indian-law-scholarship>.

## Mentorship Committee

The Mentorship Committee (Jannette Mondragón, chair, along with Rodina Parnell, John LaVelle, Josett Monette, Kathryn Becker, Alan Taradash, and Justin Solimon), was formed this year with a mission statement “[t]o mentor, facilitate, and support native students in bar preparation and bar passage.” The goal in forming this committee is to provide support and guidance as a Section to native students to increase bar exam passage. We are working on identifying any gaps that may exist and looking for solutions to fill them in order to help native students to be successful. We are currently working on drafting an email to send input to the New Mexico State Bar as a committee regarding the recent bar results regarding native students. Another need that has been identified is the recruitment of attorney coaches for native students. Any attorneys who are interested in signing up to volunteer can do so through the State Bar by emailing them at: [memberservices@nmbar.org](mailto:memberservices@nmbar.org). During these difficult times of COVID-19, many bar exams dates were or have been postponed, some jurisdictions switched to an remote format, and some states have granted a diploma privilege option for recent graduates. In addition, some jurisdictions have changed the passing requirement. For example, California lowered its passing bar exam score from 1440 to 1390. For any specific state regarding the summer/fall exam updates, please check the Nation Conference of Bar Examiners website: <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/>. For more general information on COVID-19 and bar exams, see <https://www.ncbex.org/ncbe-covid-19-updates/>. We will continue to advocate for and support our native students to ensure their success while navigating the bar exam. Stay tuned for more initiatives from this new committee to move Indian Country forward.

## Outreach Committee

The Outreach Committee has been hosting weekly mixers, pool parties, and Twister tournaments. We also continued a tradition begun last year by hosting an event at a recent New Mexico United Game. Regrettably, no one has been able to attend, but the Committee looks forward to what we hope can be a less socially-distanced 2021.

## UNM NALSA Update

UNM NALSA welcomes the new NALSA Board for the 2020-2021 academic year. The Board consists of President - Lora Church, Vice President - Rob Waldroup, Treasurer - Ahtza Chavez, and Law of Indigenous Peoples Representative - Joseph Lugo. Unfortunately, many of NALSA’s planned events have been cancelled because of the pandemic.