UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF LINDSAY G. ROBERTSON IN OPPOSITION TO MOTIONS TO DISMISS

LINDSAY G. ROBERTSON declares under penalty of perjury as follows:

1. I reside in Norman, Oklahoma, where I am employed as Professor of Law, History and Native American Studies at the University of Oklahoma College of Law. I received an A.B. (American Studies, with Honors) from Davidson College in 1981, an M.A. (History) and J.D. from the University of Virginia in 1986, and a Ph.D. (History) from the University of Virginia in 1997. After teaching for several years as a member of the adjunct faculty of the University of Virginia School of Law and the George Washington National University Law Center, in 1997 I joined the faculty of the University of Oklahoma College of Law as a full-time professor. In 2002, I was named Sam K. Viersen, Jr. Presidential Professor of Law. In 2005, I was named Orpha and Maurice Merrill Professor of Law. I am a member of the affiliate faculty of the University of Oklahoma Departments of History and Native American Studies.

2. I have conducted historical research into the question of the Onondaga Nation's

historical access to state and federal courts to maintain suit to establish title to lands purportedly ceded by the Nation to the State of New York by documents dated 1788, 1790, 1793, 1795, 1817 and 1822. This declaration is based on the results of that research. The methods I used to research and analyze this evidence conform to the standard practices in the legal history profession that are ordinarily and customarily used in the field.

3. My research into the question of the Onondaga Nation's access to state and federal courts to litigate its land claims against the State of New York and others leads to the following conclusion: because of limitations on access to courts, it is not established that, in the absence of specific authorizing legislation, the Onondaga would have capacity to sue in the courts of New York even today. Similarly, the jurisdiction of the federal courts to hear such suits was not established until 1974.

Access to New York State Courts

4. Subject to constitutional constraints, access to the courts of a sovereign is at the discretion of the sovereign. New York State Indian legislation after the Revolution indicates a tentative willingness to permit individual members of certain tribes access to state courts to resolve disputes with non-Indians, at least where those disputes arose from non-Indian interference with Indian possession of recognized reservation lands.

5. On February 21, 1791, the legislature authorized the Indians residing at Brothertown and New Stockbridge to choose three trustees with power to allot reservation lands, each allottee thereafter being empowered "to maintain an action for any trespass which may be committed by any white person or persons on the lands so laid out to him or her for improvement in any court having cognizance of the same. . . . " The trustees were empowered to "bring

actions for any trespass committed by any white person on any of the undivided lands in Brothertown or New Stockbridge . . . not laid out for improvement or leased for the use of a minister and school. . . ." Act for the Relief of the Indians Residing at Brothertown and New Stockbridge, 1791 N.Y. Laws 212.

6. The following year, on April 12, 1792, the legislature repassed these provisions replacing the trustees with "peacemakers" and expanding the range of prospective trespass defendants to include "any white man, Indian, or any other person whomsoever." Act for the Relief of the Indians Residing in New Stockbridge and Brothertown, 1792 N.Y. Laws 379, 380. Within four years, the legislature had rethought this plan. The Brothertown Indians had proven incapable of effectively prosecuting claims.

7. On March 4, 1796, the legislature passed An Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, repealing the 1791 and 1792 acts as to them. "[T]he said Indians are liable to impositions and losses from the ignorance of the laws of this State and of the proper means of seeking redress for injuries" the act began. "[F]or remedy whereof," the legislature authorized the Governor, with the advice and consent of the Council of Appointment:

> to appoint and commission some proper person learned in the law, to be the attorney of the said Indians during the pleasure of the said council. And the person so appointed shall from time to time advise and direct the said Indians residing in Brothertown in all controversies among themselves, and with any other person, and defend all suits brought against any of them by any white person, and commence and prosecute all such suits and actions for them or any of them as he may find necessary or proper; and in the prosecution and defence of any such suits, he shall observe and pursue such advice and directions, as shall be given him if any by [superintendents also to be appointed by the Governor under the act].

Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, 1796 N.Y. Laws 655, 657.

8. In particular, the attorney was authorized "to sue and maintain actions of trespass in the name of the Brothertown Indians, for any trespass which has been since the first day of October last or shall be hereafter committed upon any part of the said land so set off for the said Indians and not assigned to any particular Indian or family," and directed to bring trespass actions for persons assigned lands, even if not directed to do so by the person to whom the lands were assigned. Id. at 657, 658.

9. On March 11, 1793, evidently anticipating similar difficulties, the legislature passed An Act Relative to the Lands Appropriated by this State to the Use of the Oneida Onondaga and Cayuga Indians, 1793 N.Y. Laws 454, appointing Israel Chapman, John Cantine and Simeon De Witt agents to negotiate for the sale of tribal lands. By the act, the agents were directed to

> propose to the said Indian nations severally, that the attorney general of this State for the time being, and the clerk and the treasurer for the time being, of the county in which any of the lands, the rights to which the Indians may chuse (sic) to retain shall be situated, and the successors in office of the said officers, shall be vested with the property, the rights whereof the said Indians shall chuse (sic) to retain as trustees for the said Indians, to prevent any encroachments on the said rights and property, and to bring suits for trespasses thereon, and to prosecute the same to effect for the benefit of the said Indians; and in case the said Indian nations, or either of them shall agree to such proposal and shall convey the rights so to be retained for the use of the said Indians to the said officers and their successors, then and from thenceforth the said officers shall be vested with the said property in the manner and for the purposes aforesaid.

Id. at 455. Assuming this proposal was made, the Onondagas evidently declined, as the 1793 treaty executed by the state for the alienation of Onondaga lands includes no such provision. In consequence, the Onondagas were left without a means to prosecute trespass actions.

10. On March 23, 1797, the legislature passed An Act Supplementary to an Act Entitled An Act for the Relief of the Indians Residing in New Stockbridge and Brothertown,

1797 N.Y. Laws 60, which provided that any white person taking timber from or improving any assigned or common land at New Stockbridge without the consent of the peacemakers would be guilty of trespass, "and forfeit and pay the sum of twenty five dollars for each offence; and it shall and may be lawful for the Peace makers to prosecute for and recover such forfeiture with costs of suit in any court having cognizance thereof. . . ." Id. at 61. The New Stockbridge Indians thus continued uniquely authorized to bring actions, but those were confined to trespass actions.

11. More common were legislated appointments of counsel following or anticipating difficulties by tribal members in utilizing the state court system. Of lasting significance were those difficulties experienced by Jacob Dockstedder, an Oneida. Dockstedder's unauthorized venture into state courts proved especially discouraging, and on March 15, 1799, in An Act Relative to the Oneida Indians, 1799 N.Y. Laws 337, the legislature provided that, "whereas Jacob Dockstedder an Oneida Indian by reason of ignorance of the laws of the State, has been subjected to considerable loss in a suit at law with one Benjamin Pierson: And whereas it is highly important to preserve unabated the confidence of the Indian tribes in the justice of our laws," the treasurer would pay Dockstedder fifty dollars to reimburse him for his loss. The Act further provided that:

> it shall be the duty of the assistant attorney general of the district in which the Oneida tribe of Indians reside; to advise and direct the said Indians in all controversies that may arise between the said tribe or any individual thereof, and any other person or persons whatever; and to defend any suit or suits that may be instituted against the said Indian or any of them; and also to institute any suit or suits, he may deem necessary and proper for the said Indians; and in case of trespasses committed on the lands reserved for the use of the said Indians, to bring such action or actions, in the name of the Oneida Indians as may be necessary to recover damages for such trespasses....; provided nevertheless, that in the prosecution or defence of any such suits or actions as aforesaid, the said assistant attorney general shall observe such advice and directions as shall be given him, if any, by the

person administering the government of this State for the time being.

Id. This resolution of the Dockstedder dispute proved the model for subsequent legislation regarding individual Indian and tribal participation in state court proceedings.

12. Increasingly, the legislature provided for the naming of attorneys to make legal decisions for and represent tribes and individual Indians. By 1800 this model would be applied even to the Stockbridge Indians. On April 7, 1800, by An Act for the Relief of the Oneida, Stockbridge, Brothertown and Shinnecock Indians, 1800 N.Y. Laws 573, 574, the legislature directed that "it shall be the duty of the assistant attorney general of the district in which the Stockbridge tribe of Indians reside to do and perform every duty matter and thing, for and on behalf of the said Stockbridge tribe of Indians which by the act entitled 'An act relative to the Oneida Indians' passed the fifteenth day of march one thousand seven hundred and ninety nine he is directed and required to do and perform for and on behalf of" the Oneidas.

13. On April 4, 1801, the legislature created the position of district attorney and assigned to the district attorney of the district in which the Oneida and Stockbridge Indians resided the duties formerly imposed on the assistant attorney general for the district. An Act Relative to District Attornies, 1801 N.Y. Laws 362, 364. The same day, April 4, 1801, in An Act Relative to Indians, 1801 N.Y. Laws 364, the legislature reauthorized the appointment of an attorney for the Brothertown Indians and the bringing of trespass actions by the New Stockbridge peacemakers, simultaneously rendering them and other Indians, including the Onondagas, incapable to make enforceable contracts, by directing "[t]hat no person shall sue or maintain, any action on any bond, bill note, promise or other contract hereafter to be made, against any of the Indians, called the Stockbridge Indians, nor against any Indian residing in Brothertown, or on any

lands reserved to the Oneida, Onondaga or Cayuga Indians and every person, who shall sue or prosecute any such action against any of the said Indians shall be liable to pay treble costs to the party grieved. . . ."

14. Seven years later, the legislature added the St. Regis Indians to those whose legal interests were to be safeguarded by a state appointed attorney. On April 11, 1808, the New York legislature directed that "it shall be the duty of the district attorney, residing in the county of Washington, to . . . commence and prosecute all such actions for [the St. Regis Indians] . . . as he may find proper and necessary." An Act Relative to the Lot of Land Appropriated for the Use of the Missionary to the Oneida Tribe of Indians, and for Other Purposes, 1808 N.Y. Laws 410.

15. The Onondagas were certainly aware of the legislature's moves to provide attorneys who would in theory assist the tribes to find relief for legal wrongs in state courts. In 1806, they petitioned the legislature to appoint an attorney for them. On April 7, 1806, in response, the New York legislature passed an act authorizing the Council of Appointments to appoint and commission an attorney for the Onondaga tribe, to be paid $50 per year. Among other responsibilities, the attorney was to "commence and prosecute all such actions, for them, as he may find necessary and proper. . . . " An Act to Amend an Act, Entitled "An Act Relative to Indians," 1806 N.Y. Laws 601, 604. The same day, the Council of Appointments named Medad Curtis attorney for the Onondagas. New York, Minutes of the Council of Appointment, vol. 8, pages 51, 53 (New York State Archives series A1845), attached as Exhibit A. The appointment of Curtis proved ineffectual, and five years later, complaining to Governor Daniel Tompkins, as Tompkins relayed to the legislature, that "numerous and unprovoked trespasses and injuries which evil-minded white persons commit upon the property and persons of those inoffensive

Indians," the Onondagas requested the appointment of a resident agent. Journal of the Assembly of the State of New York, 1811: 296-97, attached as Exhibit B. The legislature proved willing to comply, and on March 29, 1811, in An Act for the Benefit of the Onondaga Tribe of Indians, and for Other Purposes, 1811 N.Y. Laws 168, the legislature provided that, "Whereas the chiefs of the Onondaga tribe of Indians have represented to his excellency the governor, that the appointment of an attorney for the said Indians has not been found to answer the salutary purposes thereby intended, and have prayed the appointment of an agent resident amongst them," the office of attorney for the Onondagas was abolished, and Ephraim Webster was appointed agent for the Onondagas, he and his successors to "hold that office during the pleasure of the legislature". Id.

16. Webster's duties were materially identical to those of the attorney:

> to advise and direct the said Indians in controversies amongst themselves, and with other persons; and to cause actions brought against any of them with any white person to be defended, and to cause to be commenced and prosecuted all such actions for them, as he may think necessary and proper; and that any suits which may be so commenced for trespasses committed by any white person on the lands called the Onondaga reservation, now possessed by the said Indians, shall and may be prosecuted in the name of the people of this state, and the damages recovered shall be distributed by the said agent among the said Indians as he shall think just.

Id. at 168-69. In the event vacancies in the office occurred while the legislature was out of session, the Governor was authorized to make interim appointments, to be valid until the legislature should act. Id. at 169.

17. Webster proved a major disappointment to the Onondaga Nation. In 1817, he acted as interpreter during negotiations between the Onondagas and New York at Albany that led to the treaty by which the Onondaga Nation allegedly sold the State 4,000 acres for $1,000,

annual payments of $430 and 50 bushels of salt and gave Webster 300 acres he had been leasing from the Onondagas prior to the treaty. In March 1819, 21 Onondagas petitioned Governor DeWitt Clinton to replace Webster as their agent, on grounds of distrust. We "believe that we have been deceived by him, and that he does not attend to our concerns as he ought to do," they complained. "[T]he misunderstanding between us is such that we think he cannot be useful to us as our agent and that we are determined not to have any further dealings with him." Journal of the Assembly of the State of New York 1819: 731, 750, attached as Exhibit C. Governor Clinton relayed these concerns to the legislature, but it failed to replace him.

18. In 1822, during treaty negotiations in New York, Webster again interpreted in the drafting of the treaty by which the Onondagas allegedly sold 800 acres for $1,700. Webster evidently remained the Onondaga agent until his death in 1824.

19. In April 1825, the legislature repealed "so much of" the 1811 act "as relates to the appointment of an agent for the Onondaga Indians," authorizing the Governor to appoint an agent who would hold his office for two years, unless earlier removed. 1825 N.Y. Laws 231. There is no clear indication in the records of the Council of Appointments that anyone was appointed agent for the Onondaga Nation under this statute; these records show no Onondaga agent until the 1840s, when a new act came into play.

20. Regardless of what the law might otherwise have been regarding tribal capacity to sue in state court, it was clear that the appointment of an attorney for a tribe restricted tribal access to suits brought by the attorney. The key case, Jackson ex dem Van Dyke v. Reynolds, was decided by the Supreme Court of New York in 1817. The case was an action on a lease brought against a non-Indian lessee by several individual Oneida Indians. The court relied on

sections 1, 2 and 27 of the 1813 Act Relative to the Different Tribes and Nations of Indians within this State, R.L. 153, 36th sess: ch. XCII (R.L.), which collected earlier statutes by which it was made a public offense to purchase lands of any Indian resident in the state or to make any contract with an Indian for the sale of land, all persons were barred from suing or maintaining an action on contract against any Indian on lands reserved to the Oneida, Onondaga or Cayuga Indians, and the Governor was empowered to appoint an attorney for the Brothertown, Oneida and Stockbridge Indians. The court held:

> we have considered the legislature to have declared those Indians incapable of contracting; and if they cannot make a valid contract for the sale of their individual lands, if they are not amenable to the law upon any of their contracts, and if, upon these hypotheses, the government has taken them under its protection, and authorized the appointment of an attorney to prosecute and defend all actions brought by or against any of them, it cannot be doubted that the only way in which the intention of the legislature can be effectuated, is to construe the statute as confiding to their attorney the exclusive right to prosecute and defend all actions by or against any of the Indians, whose interests are committed to him.
>
> The power of the legislature to restrain these Indians from suing or being defended, except exclusively by the attorney appointed for them, is as unquestionable as is the right to prevent them from alienating their lands, or declaring them disqualified from contracting. . . .
>
> It is desirable, as regards the rest of the community, that the right should be considered exclusive, and it is equally important to the Indians themselves; because, if left at liberty to resort to any attorney they please, they may be involved in ruinous litigation; and they may too carelessly vex those against whom they have resentments. I would not be understood as speaking disparagingly of a profession, not only useful, but learned and upright, but it would be too much to believe, however honorable, in general, it may be, that it contains no unworthy members.

Jackson ex dem Van Dyke v. Reynolds, 14 Johns. 335 (1817).

21. The language construed, as noted in the act itself, appertains as well to the Onondaga attorney and agent. Control over any claim the Onondaga might have had lay in the hands of Medad Curtis and Ephraim Webster. Neither they nor any other tribal agent or attorney

would venture a claim to invalidate state treaties; indeed, Webster himself had acted as interpreter for the treaties of 1817 and 1822.

22. In any event, my research uncovered one reported decision arising from a claim brought by a tribe during this period (the St. Regis Indians, suing by their attorney), and it was a failure. In 1821, in St. Regis Indians v. Drum, 19 Johns. 127 (1821), the Supreme Court of New York affirmed a Justice Court's decision nonsuiting the tribe in an action of assumpsit for use and occupation of its land brought against a non-Indian lessee of the tribe on the ground that such contracts were void under New York law.

23. On May 25, 1841, the legislature formally abolished the office of Onondaga agent. In the event of trespass on lands they possessed – always the legislature's primary concern – the Onondagas (and other tribes) now were to appeal either to the local district attorney, who, "upon security for the payment of the costs of such suit being given to his satisfaction," was empowered to bring trespass actions in the name of the people of New York, or to the town supervisor or county judge, who was then empowered to authorize three chiefs to bring suit on the tribe's behalf. An Act in Relation to Certain Tribes of Indians, 1841 N.Y. Laws 214, 215. Provision of attorneys to tribes – either generically, as in this statute, or specifically, as above, continued to be the preferred legislative path for decades, with the primary intent clearly to afford tribes a judicial means to evict intruding non-Indians.

24. Two years later, on April 18, 1843, the legislature restored the position of Onondaga agent, but the form of authorization had changed. First, the legislature directed the Governor to appoint an Onondaga agent annually, with the advice and consent of the senate. Second, the agent's duties were changed. The new authorization made no reference to bringing

suit on the tribe's behalf. Instead, the statute provided that it would be the agent's duty "to see that the rights and interests of said tribe are duly protected; and generally to perform such duties in relation to said tribe of Indians as the governor from time to time shall direct." An Act for the Appointment of an Agent of the Onondaga Tribe of Indians, 1843 N.Y. Laws 310. The statute also repealed "all acts and parts of acts inconsistent with the provisions of this act. . . ." Id. It is not clear that having the duty to see that tribal rights and interests were protected gave the agent to power to initiate litigation for the tribe. In any event, the general instruction to obey the Governor effectively obviated the possibility of the agent's initiating an action challenging the validity of New York's purchases of Onondaga lands. Numerous people would hold the position of agent under the 1843 act. None would initiate any litigation to recover Onondaga lands.

25. Tribes without appointed attorneys or agents were completely without even arguable direct recourse to state courts for any purposes. Thus in 1845, when the Seneca of the Cattaraugus and Allegany reservations, who did not have a state-appointed attorney or agent, tried to bring an ejectment action on their own, the New York Chancery Court denied the tribe's capacity to sue, even though, as the court said, its right to possession of the lands at issue was recognized by the state. In the court's words, "No provision has been made at law for the bringing an ejectment to recover the possession of Indian lands in the Cattaraugus reservation. For the right of possession is in several thousand individuals, in their collective capacity; which individuals, as a body, have no corporate name by which they can institute an ejectment suit." Strong v. Waterman, 11 Paige Ch. 607 (1845).

26. The court did, however, suggest two possible avenues around the bar on suits by

tribes. First, the court indicated, the tribe could authorize individuals on behalf of themselves and the other tribal members to sue in equity to enjoin a non-Indian from committing waste or trespass on their recognized lands and from interfering with their possession. Id. The second avenue is discussed in paragraph 29 below.

27. The Strong v. Waterman ruling was evidently based on a misapprehension of New York law. In explaining its view that individuals might bring representative actions, the court cited Jackson v. Goodell, 20 Johns. 188 (1822), for the proposition that individual Indians were state citizens. Apparently unknown to the court, this opinion had been reversed on appeal, Chancellor James Kent stating categorically that individual Indians were not state citizens. Goodell v. Jackson, 20 Johns. 693, 709-18 (1823). Moreover, even to the extent it was well-founded, the right was not unlimited, and the limitation would foreclose action by individual Onondagas. Individual tribal members had capacity to bring injunction claims relative to the "lands of their respective reservations, which have not been by them voluntarily ceded to the people of the state, or granted to individuals with the assent of the state. . . ." Strong v. Waterman, 11 Paige Ch. 607.

28. In other words, from New York's vantage, all Strong v. Waterman recognized was a right to bring an injunctive claim to protect a possessory right to lands within the bounds of state-recognized reservations: in the case of the Onondaga, the 7,300 acres New York recognized as remaining to them in 1845. Consistent with this limitation, a search of the court records of the Onondaga County courts revealed no action filed by the Onondaga tribe or tribal individuals based on Strong v. Waterman.

29. The second avenue suggested by Strong v. Waterman was legislative

authorization. Indeed, two days after the issuance of the Chancery Court's opinion in Strong v. Waterman, the New York legislature passed an act providing:

> the Seneca Indians residing on the Allegany and Cattaraugus reservations in this state, shall be deemed to hold and possess the said reservations as a distinct community, and in and by the name of "The Seneca Nation of Indians" may prosecute and maintain in all courts of law and equity in this state, any action, suit or proceeding which may be necessary or proper to protect the rights and interests of the said Indians and of the said nation , in and to the said reservations, and in and to the reservation called the "oil spring reservation," and every part thereof, and especially may maintain any action of ejectment to recover the possession of any part of the said reservations unlawfully withheld from them, and any action of trespass on the case, for any injury to the soil of the said reservations . . .; and where such injury has been heretofore sustained, or any such injuries have heretofore been suffered by the said Indians in common, or as a nation, actions therefor, and to recover damages for such wrongs may likewise be brought and maintained as herein provided, in the same manner and within the same time, as if brought by citizens of this state, in relation to their private individual property and rights. . . . .

An Act for the Protection and Improvement of the Seneca Indians, Residing on the Cattaraugus and Allegany Reservations in this State, 1845 N.Y. Laws 146.

30. The act also provided for the appointment of an attorney for the Seneca Nation, who was directed "from time to time [to] advise the said Indians respecting controversies between themselves, and between them or any of them, and any other person; he shall prosecute and maintain all such actions, suits or proceedings for them or any of them, as he may find necessary and proper. . . ." The act further imposed a duty on the attorney to prosecute specifically trespass actions upon "the written complaint of a majority of the chiefs of the reservation." Id. at 147.

31. It is difficult to reconcile the authorization of suits by the tribe with the appointment of an attorney who, under existing law, had absolute authority to determine when the Seneca should sue. The state courts wrestled with this in subsequent cases. In his dissenting

opinion in Crouse v. New York, P. & O. R. Co., New York Supreme Court Justice Haight reminded that Jackson v. Goodell held that the appointed attorney "is authorized to prosecute such actions as 'he may find necessary and proper.' He may bring an action without the consent, or even the knowledge, of the Indian . . . ." Crouse v New York, , P. & O. R. Co., 2 N.Y.S. 453, 457 (1888). This raised the possibility of conflict between the individual Indians or the tribe and the attorney, not an issue in Crouse.

32. Such a conflict was an issue in Jemmerson v. Kennedy, 7 N.Y.S. 296 (1889), an assault and battery action involving two members of the Seneca Nation. The plaintiff's attorney was not the appointed attorney for the Seneca Nation, nor is there any indication on the record that he had authorized the suit. The court held that this did not render the plaintiff incapable of proceeding. Legislation subsequent to Strong v. Waterman, the court noted, illustrated that the State wished "to elevate the character and improve the condition of these wards of the state by encouraging in them a spirit of self-reliance, and cultivating habits of industry, thrift, and providence." Id. at 297. In 1843, two years prior to Strong v. Waterman, for example, the legislature had authorized any Indian to own and convey real estate in the state "in the same manner as a citizen," and, once he had "become a freeholder to the value of $100," to contract and be subject to taxation and the civil jurisdiction of state courts. Id., citing 1843 N.Y. Laws, ch. 87, § 4.

33. More importantly, in 1847, two years after Strong v. Waterman, the legislature had authorized any individual Seneca to maintain and prosecute in state court any demand or right of action he may have against any other Indian if the amount in controversy exceeded the amount awardable by the Seneca peacemakers, then $100. Id., citing 1847 N.Y. Laws, ch. 365,

§14. According to the court, "[t]here can, it would seem, be no question of the effect of this provision on the rights of Seneca Indians in the courts of this state. The enactment was subsequent to that which provided for the appointment of an attorney for the nation (act of 1845, supra.) The last-mentioned provision, if not more radically affected, must at least be rendered subordinate and auxiliary, merely, to that quoted from the act of 1847." Id. at 297-98.

34. In 1909, the New York Supreme Court held, on the authority of Jemmerson v. Kennedy, that under the 1845 enabling act, the Seneca Nation itself also could maintain a civil action not brought by their appointed attorney. Seneca Nation of Indians v. Jimeson, 114 N.Y.S. 401 (1909).

35. The 1845 authorizing statute enabled the Seneca to initiate actions in state courts, at least within the limitations set forth in the statute. Thus in Seneca Nation of Indians v. Tyler, 14 How. Pr. 109 (1857), the Supreme Court held that in consequence of the 1845 statute the Seneca had capacity to maintain an action on a promissory note. Similarly, in Seneca Nation v. Christie, 126 N.Y. 122 (1890), the Court of Appeals of New York found that, because of the 1845 enabling statute, the Seneca Nation had capacity to bring an ejectment action, a ruling the Supreme Court of the United States found dispositive in denying a writ of error. Seneca Nation v. Christy, 162 U.S. 283, 16 Sup. Ct. 828 (1896).

36. Key to the success of the Seneca Nation was the 1845 enabling statute. When the Montauk Tribe tried to bring an ejectment action in state court, they were turned away for lack of capacity to sue. Montauk Tribe of Indians v. Long Island R. Co., 51 N.Y.S. 142 (1898). When Eugene A. Johnson, a Montauk tribal member, subsequently brought an ejectment action in reliance on Strong v. Waterman, the Court of Appeals of New York found that he too lacked

capacity. In distinguishing Strong v. Waterman, the Court explained that the earlier court had "held that the two persons named as complainants, having been authorized by the council of chiefs, might file a bill for an injunction . . . to protect their possession. . . . The learned chancellor evidently recognized a broad distinction between the rights of the tribe in defending its possession of lands and bringing ejectment to secure possession." Johnson v. Long Island R. Co., 162 N.Y. 462, 466 (1900).

37. Contemporaneously, the Onondaga Nation and three individual tribal members, together with a Seneca tribal member, a Cayuga tribal member and the University of the State of New York unsuccessfully sued in the Supreme Court of Onondaga County to recover four wampum belts from a non-Indian purchaser. Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (1899). In dismissing the tribe's claim for lack of capacity, the court noted:

> the statutes of the state . . . indicate the intent upon the part of the state to treat the Indians as wards, and, except when otherwise especially provided, to trust the protection of their rights, as tribes or nations, to its agents, rather than to proceedings by themselves. Where it was deemed wise to have tribal action in relation to tribal rights, as in the case of trespasses upon tribal lands, and in the case of certain rights in "oil spring reservations," express authority is given for the prosecution of suits in the name of the "nation" interested. Indian Law, §§ 11, 55. There was, of course, no necessity for this, if the general power was possessed by the different tribes or nations of Indians, as such, to bring suits. In addition to this reasoning, the subject is settled by direct adjudication (citing Strong v. Waterman, Seneca Nation v. Christie, and Montauk Tribe of Indians v. Long Island R. Co.).

Id. at 1030. The Supreme Court was prepared to recognize a right to sue in the individual tribal members, however, but when the case reached the Court of Appeals of New York, that court affirmed the judgment on the ground that "neither the Onondaga Nation nor the individual Indians named as plaintiffs had legal capacity to bring and maintain the action." Onondaga Nation v. Thacher, 169 N.Y. 584 (1901), aff'd Onondaga Nation v. Thacher, 189 U.S. 306, 23

S.Ct. 636 (1903).

38. The New York rule was clear: absent statutory authorization, tribes had no capacity to sue. At best, under Strong v. Waterman, individual tribal members could bring suit for possession of state recognized reservation lands. Indeed, entrusting to tribes the responsibility for initiating actions to oust non-Indian trespassers from such lands appears to have been the legislature's primary motive from the beginning in authorizing those tribes it did to pursue state claims. Even the Seneca were confined in their enabling statute to bringing claims relating to recognized reservation lands. The only party who might have brought a claim in state court to invalidate the treaties at issue in this case was in theory the Onondaga agent, assuming his authority extended to bringing land claims. No Onondaga agent ever brought such a claim.

39. The Onondaga Nation did obtain authority to sue on its own behalf on one occasion. In 1940, the legislature directed that:

> [t]he Onondaga nation of Indians is hereby authorized to commence an action either in the name of the Onondaga nation or in the name of one of its duly constituted chiefs in behalf of said Onondaga nation of Indians against the Tully Pipe Line Company . . . for the recovery of damages for injuries sustained by the Onondaga nation arising out of the damage to the soil, trees, and property in the cemetery owned and controlled by the Onondaga nation in the Onondaga Reservation . . . , such damage alleged to have been caused by salt and salt-brine from a pipe or pipe lines alleged to be owned and controlled by said Tully Pipe Line Company, and said damage alleged to have been sustained during the year nineteen hundred thirty-nine . . . . Such Onondaga nation in any action commenced pursuant to the provisions of this act, may prosecute and enforce any of its rights or causes of action independent of any act conferring jurisdiction upon such person to bring such action.

1940 N.Y. Laws 1889, 1889-90. The Onondaga Nation was given one year to file its claim. No other Onondaga-specific or general authorizing statutes have been found.

40. In the 1950s, in conjunction with the United States Congress, the New York

legislature began amending its Indian laws to provide for greater participation in state institutions by tribes and individual Indians. In 1950, guided by the New York State Legislative Committee on Indian Affairs, the U.S. Congress passed 25 U.S.C. § 233, providing that New York state courts "shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of the state," excepting, however, jurisdiction over "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952," the statute's effective date. 25 U.S.C. § 233, 64 Stat. 845. Congress was evidently motivated by a concern that, absent federal conferral, state courts could not assume jurisdiction over Indians subject to federal authority.

41. In April 1953, New York amended its Indian Law § 5 to provide that "[a]ny action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted in any court of the state to the same extent as provided by law for other actions and special proceedings." 1953 N.Y, Laws 1517. In combination, these statutes effectively eliminated incapacity as a bar to New York court jurisdiction over civil claims involving individual Indians. Not until 1987, however, did a state court suggest that the statutes also accorded state courts jurisdiction over civil actions involving tribes. Oneida Indian Nation of New York v. Burr, 522 N.Y.S.2d 742 (1987). And in 1995, the New York Court of Appeals intimated that this suggestion may be wrong. People v. Anderson, 529 N.Y.S.2d 917 (1998)("Petitioners seek to predicate the jurisdiction of the New York courts on 25 U.S.C. § 233 and New York's Indian Law § 5, which similarly grant our courts jurisdiction in civil actions

'between Indians or between one or more Indians and any other person or persons.' However, those provisions govern private disputes between individual Indians, not disputes between an Indian and a sovereign tribe").

42. Although Burr has not overruled, tribal capacity predicated on Indian Law § 5 appears not entirely settled even today. See Ransom v. St. Regis Mohawk Education and Community Fund, 86 N.Y.2d 553, 560 (1995)(Because the St. Regis Mohawk Education and Community Fund is to be treated as the Tribe itself, it is not "an Indian;" nor is it a "person," within the meaning of New York's Indian Law § 5).

43. On April 7, 1958, the New York legislature added § 11-a to the Indian Law, providing that "[i]n addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band, may maintain any action or proceeding to recover the possession of lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation." An Act to Amend the Indian Law, in Relation to Actions and Proceedings for Recovery of Reservation Land, 1958 N.Y. Laws 1081. To the extent it purported to empower tribal officers to bring claims for lands lost before September 13, 1952, it conflicts with 25 U.S.C. § 233, and is therefore of questionable validity. Oneida Indian Nation of New York State v. County of Oneida, 464 F.2d 916, 924 (2d Cir. 1972)("[A]lthough § 11-a . . . is broad enough on its face to encompass [a pre-1952 treaty claim], it may not be effective because of the proviso in [§ 233] restricting the grant of jurisdiction to New York courts so as to exclude land claims based on transactions or events antedating September 13, 1952, . . . a matter on which we take no position.")

Access to Federal Court

44. The history of New York Indian nations' opportunity to sue in the federal courts is similar. Two theoretical avenues have been available: suit in the Supreme Court via the Court's original jurisdiction grant and suit in a lower federal court. The first route was attempted by the Cherokee Nation in 1831. The Court held in Cherokee Nation v. Georgia, 30 U.S. 1 (1831), that the Cherokees did not constitute a "foreign state" for purposes of Article III original jurisdiction and could not, therefore, maintain its action. This holding remains the law.

45. Consequently, the only possible federal route was an action commenced in a lower federal court. Allocation of jurisdiction to these courts is a matter entrusted to Congress by Article III. Federal courts were established in New York by the Judiciary Act of 1789. The civil jurisdiction they were authorized to exercise was limited to suits between citizens of different states. For diversity jurisdiction purposes, state citizenship is a matter of federal law. Dred Scott v. Sandford, 60 U.S. 393 (1857). Individual Indians did not become citizens universally until 1924. Act of June 2, 1924, c. 233, 43 Stat. 253. In consequence, absent the acquisition of citizenship by different means (treaty or special statute, neither of which applied in the case of the Onondagas), individual Indians gained access to federal courts via diversity claims only in 1924. The members of the Onondaga Nation had not become citizens before the 1924 Act. Even today, Indian tribes are not clearly entitled to claim citizenship for diversity purposes. Romanella v. Howard, 114 F.3d 15, 16 (2d Cir. 1997).

46. Even were the Onondaga held to be citizens of New York for diversity purposes, the defendants in any claim they might have brought would have been as well, thereby defeating the claim under the rule of complete diversity announced by Chief Justice John Marshall in

Strawbridge v. Curtiss, 7 U.S. 267 (1806), cited in Oneida, 463 F.2d at 953. The claim at issue has thus never been federally justiciable in diversity.

47. In 1875, Congress by statute empowered federal lower courts to hear claims based on federal treaties, statutes, and the Constitution. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)). In 1914, the U.S. Supreme Court foreclosed the use of this new federal question jurisdiction to regain Indian lands allegedly taken in violation of federal law. In Taylor v. Anderson, the Court held nonjusticiable an ejectment action contending that defendants held lands under deeds executed in violation of federal law restricting the alienation of Choctaw and Chickasaw allotments. According to the Court, "it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim. . . unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose. [citations omitted]." 234 U.S. 74, 75-76 (1914).

48. The U.S. District Court for the Northern District of New York followed Taylor in 1927 in dismissing an ejectment action challenging the allegedly unlawful taking of St. Regis lands. Deere v. New York, 22 F.2d 851 (N.D.N.Y. 1927), aff'd Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2nd Cir. 1929). Deere remained authority in the Second Circuit through Oneida Indian Nation of New York State v. County of Oneida, 464 F.2d 916 (2nd Cir. 1972). Only in 1974 did the Supreme Court in Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661 (1974) hold that an Indian tribal land claim raised a federal question for jurisdictional purposes. Moreover, the Oneida Court distinguished Taylor on the ground that in

the latter, "the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands." Oneida thus did not resolve the question whether individual Indians could bring federal question claims for the recovery of tribal lands in federal court.

49. The only clear avenue for federal judicial relief was thus an action brought by a tribe under federal question jurisdiction. Even assuming tribal capacity, the earliest indication that such was possible was 1974.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 14, 2006

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Education

A.B. – **Davidson College**, American Studies (with Honors), 1981
Certificate in International Law – **University of Madrid** Faculty of Law, 1982
M.A.– **University of Virginia**, History, 1986
Thesis: "'Hazardous Philanthropy': Conflict over the Use of Contingent Fee Contracts in Civil Litigation, 1887-1919"
J.D. – **University of Virginia**, 1986
Ph.D.– **University of Virginia**, History, 1997
Dissertation: "*Johnson v. M'Intosh*: Land, Law and the Politics of Federalism, 1773-1842" (Advisor: Charles W. McCurdy)

Academic Experience

Professor (2003-present), **Associate Professor** (1998-2003) **of Law, History & Native American Studies** and **Faculty Director**, Center for the Study of American Indian Law & Policy (1998-present), University of Oklahoma College of Law, Norman, Oklahoma
Honors: Outstanding Professor Award, 2004
Sam K. Viersen Jr. Presidential Professorship, 2002-06
Orpha and Maurice Merrill Professorship, 2005-present
Visiting Associate Professor of Law, University of Oklahoma College of Law, Norman, Oklahoma, 1997-98
Lecturer, University of Virginia School of Law, Charlottesville, Virginia, 1990-94, 1996-97
Professorial Lecturer, The George Washington University National Law Center, Washington, D.C., 1996

Professional Experience

Special Justice, Supreme Court of the Cheyenne-Arapaho Tribes, 2004-present
Special Counsel on Indian Affairs to the Governor of Oklahoma, 2000-present
Attorney, McGuire, Woods, Battle & Boothe, Charlottesville, Virginia, 1992-93, 1996-97
Judicial Clerk, The Honorable Sue L. Robinson, United States District Court for the District of Delaware, Wilmington, Delaware, 1994-96
Associate, Lichtman, Trister, Singer & Ross, Washington, D.C., 1989-90
Associate, Ober, Kaler, Grimes & Shriver, Washington, D.C., 1986-89

Editorial Positions

Series Editor, American Indian Law and Policy Series, University of Oklahoma Press, 2002-present

Member, International Advisory Board, *Indigenous Law Bulletin* (University of New South Wales), 2001-present

Articles Editor, *The Journal of Law & Politics*, 1984-86

Scholarship: Books

Lindsay G. Robertson, *CONQUEST BY LAW* (Oxford University Press, 2005)

Book Chapters

"History of Indian Policy, 1532-1871" in Rennard Strickland et al., eds., *FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* (forthcoming)

Essays

"Native Americans Under Current United States Law" in Kermit Hall, ed., *THE OXFORD COMPANION TO AMERICAN LAW* (Oxford University Press, 2002)

"Blackstone, William", "Judiciary Act of 1789", "Judiciary Act of 1801", "Lawyers", "Marbury v. Madison", "Marshall, John", "McCulloch v. Maryland", "Story, Joseph", "Supreme Court" and "Yazoo Claims" in Gary B. Nash, gen. ed., *ENCYCLOPEDIA OF AMERICAN HISTORY, Vol. 3: REVOLUTION AND NEW NATION (1754-1820)*(Facts on File, 2003)

Law Review Articles

"Legacy of Discovery: The Constitutionalization of Native American Tribal Governments" (in progress)

"Neutral Principles and Judicial Legitimacy: A Response to Professor Erwin Chemerinsky's 'Getting Beyond Formalism in Constitutional Law,'" 54 *Okla. L. Rev.* 53 (2001)

"'A Mere Feigned Case': Rethinking the *Fletcher v. Peck* Conspiracy and Early Republican Legal Culture," 2000 *Utah L. Rev.* 249 (2000)

"*Johnson v. M'Intosh* Reargument: Brief for the Appellant," 9 *Kan.J.L. & Pub. Pol'y.* 852 (2000)

"Justice Henry Baldwin's 'Lost Opinion' in *Worcester v. Georgia,*" 13 *J. Sup. Ct. Hist.* 50 (1999)

"John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine," 13 *J. Law & Pol.* 759 (Fall 1997)

Book Reviews

Review, Tim Alan Garrison, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* (2002), *Law and History Review* (forthcoming)

Review, R. Kent Newmyer, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001), *American Nineteenth Century History* (2002)

Review, *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED*

STATES, 1789-1800, Vol. 3: *THE JUSTICES ON CIRCUIT, 1795-1800* (1990), 13 *J. Early Republic* 423 (1993)

Selected Papers and Commentaries at Professional Conferences

"International Indigenous Peoples Law," Sovereignty Symposium XIX, Oklahoma City, Oklahoma, 2006

"Conquest by Law," University of California School of Law, Berkeley, California, 2005

"Evolution of the Draft Declarations on the Rights of Indigenous Peoples," OAS Annual Conference, Ottawa, Canada, 2005

"Conquest by Law," Leadership Oklahoma, Lawton, Oklahoma, 2005

"International Indigenous Peoples Law," Sovereignty Symposium XVIII, Oklahoma City, OK, 2005

"State-Tribal Relations," Leadership Oklahoma, Lawton, Oklahoma, 2004

"Tribal Water Claims," Oklahoma Governor's Water Conference, Oklahoma City, OK, 2004

Moderator, Regional Cooperation for Water Management Northern Tier Meeting, (participants from Syria, Turkey, and Iraq), Ankara, Turkey, 2004

Moderator, Regional Cooperation for Water Management Northern Tier Meeting (participants from Syria, Turkey, Lebanon and Jordan), Damascus, Syria, 2004

"State-Tribal Environmental Compacting," Oklahoma Environmental Council Annual Conference, Tulsa, OK, 2004

"The State-Tribal Compacting Process," Muscogee (Creek) Nation Doing Business in Indian Country Conference, Okmulgee, OK, 2004

"Changing Administrations: The Future of State-Tribal Relations," Sovereignty Symposium XVI, Oklahoma City, OK, 2003

"The Use of Information Technology in Teaching Comparative Indigenous Peoples Law," Information Technology panel, Sovereignty Symposium XVI, Oklahoma City, OK, 2003

"State-Tribal Tobacco Compacting," Native American Tobacco Coalition of Oklahoma conference, Oklahoma City, OK, 2003

"State-Tribal Tobacco Compacting," Muscogee (Creek) Nation Doing Business in Indian Country Conference, Okmulgee, OK, 2003

"Native American Property Rights," Muscogee (Creek) Nation Doing Business in Indian Country Conference, Okmulgee, OK, 2003

"State-Tribal Relations," Chickasaw Nation Continuing Legal Education Conference, Ada, OK, 2003

"Current Issues in Federal Indian Law," Federal Executive Board American Indian Council Annual Conference, Oklahoma City, OK, 2003

"The State-Tribal Water Compact," Tribal Water Rights and Water Quality Administration panel, Oklahoma Governor's Water Conference, Tulsa, OK, 2002

"The Model Cross-Deputization Agreement," Law Enforcement in Indian Country

panel, Sovereignty Symposium XV, Oklahoma City, OK, 2002

"The Use of Information Technology in Teaching Federal Indian Law," Information Technology panel, Sovereignty Symposium XV, Oklahoma City, OK, 2002

"The State-Tribal Water Compact," Continuing Legal Education program, Norman, OK, 2002

Moderator, "Jefferson's Empire: Law, Society and Culture at the Dawn of the American Republic," Norman, OK, 2002

"Current Status of State-Tribal Tax Compacting," Inter-Tribal Tax Association Conference, Lawton, OK, 2001

Moderator, State-Tribal Compacting panel, Oklahoma Tribal Governance Symposium, Norman, OK, 2001

"State-Tribal Compacting," Sovereignty Symposium XIV, Oklahoma City, OK, 2001

Moderator, "Rethinking Foundational Indian Law Decisions" panel, American Society for Legal History Annual Meeting, Princeton, NJ, 2000

Moderator, "Indian Rights" panel, Frontier Justice Symposium, Buffalo Bill Historical Center, Cody, WY, 2000

"Reformulating the *Cherokee Nation* Paradigm in an Era of Economic Expansion," Frontier Justice Symposium, Cody, WY, 2000

"Judicial Construction of Indian Identity," Sovereignty Symposium XIII, Tulsa, OK, 2000

Johnson v. M'Intosh Reargument, University of Kansas School of Law, Tribal Law and Governance Conference, Lawrence, KS, 1999

"Was Luther Martin Really Drunk? Rethinking the *Fletcher v. Peck* Conspiracy," Utah Law Review Symposium, Salt Lake City, UT, 1999

Moderator, "A Reexamination of Historical 'Truths' Concerning Indian Law" panel, Sovereignty Symposium XII, Tulsa, OK, 1999

"Justice Henry Baldwin's *Worcester* Dissent," Sovereignty Symposium XII, Tulsa, OK, 1999

"Indian Health Service Health Care Providers' Liability under the Federal Tort Claims Act," Choctaw Nation First Annual Health Conference, Lake Eufaula, OK, 1999

"Introducing an Interdisciplinary Dimension into the Teaching of Federal Indian Law," Sovereignty Symposium XI, Tulsa, OK, 1998

"Constitutional Law and Federal Indian Law," Sovereignty Symposium XI, Tulsa, OK, 1998

Plenary Luncheon Speaker, "The Origins of Discovery," Federal Bar Association Indian Law Section Annual Meeting, Albuquerque, NM, 1998

Moderator, "American Indian Law: Where Are We and Where Are We Going?" panel, *American Indian Law Review* 25th Anniversary Symposium, Norman, OK, 1998

Commentator, "Legal Rights of Indigenous Peoples" panel, American Society for Legal History Annual Meeting, Richmond, VA, 1996

"Property Rights and the Acquisition of a Continent: Rediscovering the Post-Virginia Cession 'Indian Title' Debate," American Society for Legal History Annual Meeting, Memphis, TN, 1993

Selected Speeches and Public Presentations

"The Supreme Court and the Trail of Tears" and "The Trail of Tears Digital Legal History Project," National Trail of Tears Association Annual Meeting, Fort Smith, AR, 2002

"The Supreme Court and the Trail of Tears" and "The Trail of Tears Digital Legal History Project," National Trail of Tears Association Annual Meeting, Cape Girardeau, MO, 2001

"Early Federal Indian Law," OU Elderhostel program, "American Indians: Past, Present and Future," Norman, OK, 2001

"The Supreme Court and Indian Removal," OU Elderhostel program, "American Indians: Past, Present and Future," Norman, OK, 2000

Panelist, "Legal Aspects of Tribal Sovereignty" panel, Second Annual American Indian Big XII Student Conference, Norman, OK, 1999

Inaugural Speaker, "Rethinking *Worcester v. Georgia*," OU Interdisciplinary Native American Studies Organization Faculty Speakers Series, 1999

"Indians in Oklahoma: Beyond the Trail of Tears," OU Elderhostel program, "American Indians: Past, Present and Future," Norman, OK, 1999

Fellowships

Visiting and Research Fellow, Philadelphia (*now* MacNeil) Center for Early American Studies, 1992-94

Governor's Fellow, University of Virginia, 1993

Media Consultancies

U.S. News & World Report
New York Times
American Indian Report
Daily Oklahoman
Tulsa World
Dallas Morning News
Martha's Vineyard Times
WKY Radio, Oklahoma City, OK
KPBS Public Radio, San Diego, CA
KTLC Public Television, Norman, OK

Governmental Consultancies

Private Sector Advisor, United States Delegation to the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Geneva, Switzerland, 2004-06

Private Sector Advisor, United States Delegation to the Working Group on the Draft American Declaration on the Rights of Indigenous Peoples,

Washington DC, Antigua, Guatemala and Brasilia, Brazil, 2004-present

Special Counsel on Indian Affairs to Governors Frank Keating and Brad Henry of Oklahoma on matters related to state-tribal relations, including drafting of legislation and compacting with tribes on taxation, gaming, water rights, motor vehicle registration and other issues; testified before United States Senate Indian Affairs Committee on Governor's behalf on H.R. 2880, the Five Nations Land Reform Act of 2002

Consultant to United States Department of Justice, Environment and Natural Resources Division, Indian Resources Section in several ongoing federal litigation matters on issues involving, *inter alia*, indigenous property rights under British colonial law and rights of states in the direction of Indian affairs during the early republican period

Consultant to Office of the Solicitor General of the United States on argument in *Lara v. United States* (argued before the Supreme Court of the United States 2004)

Advisor to Branch Chief, Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, on revisions to *The Official Guidelines to the Federal Acknowledgment Regulations, 25 CFR 83*

Consultant to numerous tribal officials, tribal members and attorneys from around the country on a wide range of legal matters, including gaming, tribal sovereign immunity, tribal environmental claims, and standing to challenge contested tribal elections

Consultant to various Australian federal officers on indigenous peoples' law issues, including tribal sovereignty and economic development

Professional Associations

Oklahoma Indian Bar Association
Oklahoma Bar Association
Virginia State Bar
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Service Activities

Member of Board of Directors, Norman Alcohol Information Center, 2004-present

Member of Board of Directors, Oklahoma Indian Legal Services, 1998-2004

Honorary Member, Campaign Committee, Five Civilized Tribes Museum and Center for the Study of Indian Territory, Muskogee, Oklahoma, 1997-present

Senator, Faculty Senate, University of Oklahoma, 1999-2003 (**Parliamentarian**, 2000-03)

Adjunct Professor, University of Oklahoma Department of History, 1997-present; University of Oklahoma Department of Native American Studies, 1998-present

Member, Affiliate Faculty, University of Oklahoma School of International and Area Studies, 2002-present; University of Oklahoma Graduate Faculty, 2000-present

Member, Rhodes Scholarship Selection Committee, 2003; Marshall Scholarship Selection Committee, 2003

Member, three History Ph.D. dissertation committees, 2000-present

Member, Department of History Search Committee for faculty position in Nineteenth Century United States History, 1998-99

Faculty Advisor, University of Oklahoma Native American Law Students Association, 1998-present; *American Indian Law Review*, 1997-present; Native American Pre-Law Society, 2001-present

Member, College of Law Enrichment Committee, 1997-98, 2001-present; Law Reviews Anniversary Committee, 1997-98; Law Reviews Advisory Committee, 1997-present; Building Committee, 1998-99; Student Recruitment Committee, 1998-present; Admissions Committee, 1999-2003; Law Day/Moot Court Committee, 1999-present; Probation and Readmission Committee, 1999-2003

Chair, College of Law Code of Academic Responsibility Appeals Board, 1998-present

Coach, OU National NALSA Moot Court teams, 1997-present

Judge, National Native American Law Students Association Moot Court competition, 1998, 1999; *American Indian Law Review* Annual National Writing Competition, 1998-present; First Year Moot Court Competition, University of Oklahoma College of Law, 1998

Faculty Host, W. DeVier Pierson, OU Foreign Policy Conference, 1999; Patricia Turner, former Chief Executive Officer, Aboriginal and Torres Strait Islander Commission, Australia, College of Law Visit, 1999; Judd Epstein, Monash University Faculty of Law, College of Law Visit, 2001

Visitor, Monash University Faculty of Law, Melbourne, Australia, 2001 (arranged student-faculty exchange agreement and delivered a series of lectures on Indigenous Peoples' Law in the United States)