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Introduction

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INTRODUCTION

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In the late winter of 1994, a telephone call came into the University of Arkansas Law School, where Bob Laurence teaches Indian law. Two Salt Lake City attorneys named Phillip Lear and Blake Miller were inquiring about a case they were then litigating. They represented resource developers entitled by lease to drill for oil and gas in a so-called "severed estate," that is to say where the minerals are owned by a party other than the surface owner. This estate is located on the portion of the Navajo Reservation in southern Utah, and was part of the land swap between the federal government and the tribe at the time of the building of the Glen Canyon Dam and the flooding of Lake Powell. The mineral estate is owned by the federal government; the surface is tribal trust land.

Lear and Miller had recovered judgment in federal court enjoining certain activity that was taking place, without tribal authorization, on the surface estate, which activity prevented their client from exploring for oil and gas in the mineral estate. Frustrated by the federal marshal's unenthusiastic enforcement efforts, they were now interested in the enforceability of that judgment through tribal process, and called Bob Laurence for advice.

That advice was to sue in tribal court both for recognition of the federal court injunction under all known theories, which are several,[1] and, independently, to seek a tribal court injunction on the same merits as had prevailed in federal court. This advice confirmed Lear and Miller's predisposition to the problem, and the lawsuit was brought in Navajo District Court. The request for recognition of the federal injunction was denied, but the tribal injunction was granted and enforced. The drilling proceeded; the hole was dry. No opinion from any court was ever published, and no particular notoriety was ever to be expected from the case . . . except for a rather extraordinary convergence of events which led, eventually, to the Symposium for which this is the Introduction.

Discussions around the American Indian Law Center (AILC) in Albuquerque, where Sam Deloria is the Director, are always wide-ranging and eclectic, and the Lear-Miller case of *Boyd & McWilliams*

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1. *See generally* Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy and Practice*, 18 AM. IND. L. REV. 239 (1993).

Energy Group v. Tso[2] became part of the mix. In particular, there were two aspects of the case—one explicit, one implicit—that fit in nicely with continuing AILC discussions. The first was the issue of federal court jurisdiction, or not, over reservation disputes, and the related question of when, or not, a federal court with jurisdiction should abstain for the moment from exercising it. So, much discussion was had of whether the federal court in Utah should have issued the federal injunction against the reservation activity in Lear and Miller's case.

The second topic of discussion into which the case seemed to fit was the trust responsibility and the federal government's ever-present potential for conflict of interest. In *Boyd & McWilliams v. Tso*, the government owned the mineral estate outright and the surface in trust for the tribe. Or, hypothesize the opposite: suppose the tribe owns the mineral estate and leases it to the developers, but the surface is owned by the United States and the Bureau of Land Management thinks the drilling would threaten endangered animals. In either case, the same question is presented: how does the federal trust responsibility restrict the government's freedom of decision-making and action?

And so *Boyd & McWilliams* came to be, perhaps, the most discussed unpublished decision in the history of Navajo-Anglo-American jurisprudence.

The next step seemed obvious: We began to plan a roundtable discussion of the case, under AILC sponsorship. The discussion would be not of the case's ramifications, which were minor, but of its variations, which were multiple and fascinating. We planned a "litigation panel," which would discuss the strategic and practical side of cases like *Boyd & McWilliams*, for example, the legitimacy of and limitations upon, the kind of forum shopping that Lear and Miller used in the actual case. We planned an "environmental" panel, which would discuss all the many environmental issues surrounding the exploitation of reservation natural resources. We planned an "ethics panel," which would discuss the conflict of interest problems inherent in the government's oversight of reservation resource development. We planned an "abstention panel," which would focus on the narrow question of when and in what circumstances a federal court must refuse to exercise otherwise appropriate federal jurisdiction. And we planned a "diminishment panel" to talk about the issue of Indian-reservation diminishment, which seemingly preempts all of these other issues by removing land from the reservation proper. Plans were many; the list of potential speakers was

2. No. 93-C-1083A (C.D. Utah Dec. 17, 1993).

lengthy; projected costs were mounting; the administrative details were daunting. Frankly, our energy flagged.

And then the phone rang again. The *North Dakota Law Review* was thinking of having an Indian law symposium and wondered, did we have any ideas? Did we have an idea! With poorly hidden relief, we "suggested" to the North Dakotans the case of *Boyd and McWilliams v. Tso* and its many-fold variations. And we were happy to have the entirely capable hands of Angela Elsperger, Symposium Editor of the *North Dakota Law Review*, take administrative control.

An academic year later, the contents of this book reveal the success of what became the *North Dakota Law Review*'s project. The basic structure of the symposium retains the "case, with variations" focus, admittedly a rather diffuse focus, with the panels on litigation, the trusteeship, reservation diminishment, the environment and federal court abstention, and a new one on state-court-tribal-court relations. The list of speakers has both expanded and taken a North Dakota flavor, making the symposium both one of the most complete gatherings of Indian law scholars in recent memory and, at the same time, a nicely regionalized conference.

From North Dakota came two fine judges, Hon. Ralph Erickstad, retired Chief Justice of the North Dakota Supreme Court, and Hon. P. Diane Avery, Associate Justice from the Three Affiliated Tribes of Fort Berthold; Chief Justice Erickstad was assisted by James Ganje, a staff attorney with the North Dakota Supreme Court. Heidi Heitkamp, the Attorney General of North Dakota, also addressed the symposium. On the academic side, Professors Patti Alleva, James Grijalva and Bill Rice, of U.N.D.'s law school, and Professor Richard Monette of the University of Wisconsin Law School, a member of the Turtle Mountain Chippewa tribe in North Dakota, presented papers or commented on the papers of others.

Inherent in the diffuse focus on *Boyd & McWilliams v. Tso* was the determination that litigators would be active participants in the Symposium. Of course, Phillip Wm. Lear, of Snell & Wilmer in Salt Lake City, and Blake Miller, of Suitter, Axland & Hanson in the same city, made presentations and responses. They were joined as litigators by Lynn Slade, of the Modrall firm in Albuquerque.

From the national academic scene came both well-known scholars and rising stars. Robert Clinton, the Wiley B. Rutledge Distinguished Professor at the University of Iowa, and Frank Pommersheim of the University of South Dakota are two of the most well-written and widely cited Indian law scholars in the country. Judith Royster, of the University of Tulsa, and Alexander Tallchief Skibine, of the University

of Utah, have seen their reputations in the field secured by recent publications. Bruce Duthu, of the Vermont Law School, Rebecca Tsosie, of Arizona State University, and John Harbison, of the University of Arkansas's National Center for Agricultural Law Research and Information are newer to the field and, as their presentations in this Symposium show, bring the new ideas that make the field one of the most dynamic in the law. Laurie Reynolds, of the University of Illinois, was a late addition to the Symposium, as her recent return to Indian law publication fit in precisely with the topic under discussion.

We note finally one unlucky and sad occasion in the midst of all the happy convergence that brought this Symposium together. Nell Newton, of American University in Washington, D.C., and one of the leading scholars in the field, was to be a participant, but the untimely death of her brother made that impossible. We all missed her presence, and the wisdom, insight, sensibility and good humor that always go along with it. From the entire Indian law community, our heartfelt condolences go to our absent colleague.

With that introduction, we begin this Symposium. The first paper presents the case of *Boyd & McWilliams v. Tso* and the litigation strategy that went into it. Following the "case-in-chief" are the "variations" previously mentioned. Expect the presentations to be provocative, the responses sharp, the discussion worthy. Questions-in-conclusion will be found at the end.