INDIAN LAND THEN, REMAINS INDIAN LAND NOW: THE SUPREME COURT CONFIRMS THAT A SIGNIFICANT PORTION OF EASTERN OKLAHOMA IS A NATIVE AMERICAN RESERVATION

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Indian Law Alert

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On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma* that, for purposes of the Major Crimes Act (MCA), land in eastern Oklahoma reserved for the Creek Nation pursuant to a treaty ratified by Congress over a century ago remains "Indian country" today. The Supreme Court's ruling brings long overdue justice to the Creek Nation, whose ancestors were displaced from their ancestral lands in Georgia and Alabama during the Trail of Tears. It also affirms that a Native American reservation is subject to being diminished only by clear congressional action. *McGirt* does not fundamentally change the landscape of federal Indian law or the law applicable to reservations. *McGirt*, however, has the potential to impact questions of not only criminal jurisdiction but also civil jurisdiction, including taxing and regulatory authority, within the Creek Nation's reservation. The ruling indicates that courts will look carefully at other historic reservations whose boundaries have ostensibly been modified without express Congressional action.

MCGIRT IN CONTEXT

Starting in 1833, Congress entered into treaties with the Creek Nation providing for a "permanent home" with "full jurisdiction" over enrolled members and their property.[1] Those congressional promises were followed by a formal patent to the Creek Nation for the land in 1852.[2] Over the years, Oklahoma has asserted various types of jurisdiction within and over the lands reserved to the Creek Nation, including criminal jurisdiction over crimes committed by Native Americans.[3] In *McGirt*, the Supreme Court considered whether the state had jurisdiction to prosecute a Native American for a major crime committed within the boundaries of the land base reserved to the Creek Nation, even though the MCA limits such jurisdiction to the federal government.[4]

MCGIRT COURT'S KEY FINDINGS

Recognizing federal treaties as the "supreme Law of the Land," the *McGirt* court held that Congress had not taken clear and express action to diminish or disestablish the Creek Nation's reservation, and therefore it remains in existence. Accordingly, under the MCA, the state does not have jurisdiction to prosecute Native Americans within the reservation.[5] The Court reasoned that to hold otherwise would lead to impermissible results: "A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States."[6] The Court explained that historical practices,

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demographics, and extra-textual considerations, including congressional legislation dividing the reservation into individual allotments for individual ownership, did not reduce or disestablish the reservation.[7] In short, acts other than clearly intended Congressional action to modify the United States' treaties with the Creek Nation cannot disestablish or diminish the reservation.[8] Thus, despite prior federal and state action to break promises with the Creek Nation, Congress has never clearly expressed an intention to disestablish or diminish the reservation.[9]

POTENTIAL IMPLICATIONS FOR CIVIL JURISDICTIONAL ISSUES IN EASTERN OKLAHOMA AND OTHER TRIBES

The Supreme Court's holding in *McGirt* did not create new law, but rather affirmed that treaties are the supreme law of the land and that the Creek Nation's reservation continues to exist absent clear and express Congressional action modifying or reducing it. Although the Court's holding focuses on the statutory definition of “Indian country” under the MCA, the decision may also impact civil regulatory authority within the Creek Nation's reservation. It could also serve as a model for other tribes around the country looking to substantiate their own reservation land bases.

The Supreme Court recognized that its decision could result in “cost and conflict around jurisdictional boundaries,” but concluded with a tone of optimism about future state and tribal partnerships, which could include new legislation and/or memorandums of agreement between the state and tribe regarding jurisdiction within the reservation.[10] In addition to state and tribal jurisdiction, the federal government may have primary permitting authority under various federal statutes, including the Clean Water Act, within the reservation. In the civil context, the decision is unlikely to upset private agreements in the eastern half of Oklahoma. The tribe could, however, potentially assert additional regulatory roles, such as taxing or land use authority, over certain activities and areas within the outer boundaries of the reservation. While this could impact the development of oil and gas, wind, solar, and agricultural facilities, for instance, or operations at existing facilities, these are not new or insurmountable issues. In fact, similar jurisdictional issues have been addressed in other parts of the country where there are checkerboard reservations, i.e., reservations consisting of land owned by private individuals and tribes.

Each tribe will have to consider its individual treaty and jurisdictional issues in their own terms and circumstances. The *McGirt* ruling does not recognize the existence of any reservation other than the Creek Nation's reservation in eastern Oklahoma or change the jurisdictional law within reservations. Other tribes may, however, be in a similar situation as the Creek Nation was before the Supreme Court's decision, and will need to analyze their own treaty language and history to determine whether they should bring a similar action to ensure that their own reservation boundaries are consistent with historical treaties.

CONCLUSION

By confirming the existence of the Creek Nation's reservation in eastern Oklahoma, the Court has reaffirmed foundational principles of federal Indian law and has established that those principles apply in a large part of eastern Oklahoma, specifically to the exclusion of state law with respect to major crimes committed by Native Americans under the MCA. The case may also impact civil jurisdiction, including taxing and regulatory authority, within the Creek Nation's reservation. Regardless, *McGirt* makes clear that (1) treaties remain “the supreme law of the Land,”[11] (2) “disestablishment may not be lightly inferred” and (3) “treaty rights are to be construed in favor

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of, not against, tribal rights."[12] Absent an explicit act from Congress, those treaties must be enforced as written, regardless of how much time has passed or how circumstances have changed.

FOOTNOTES

[1] Subsequent treaties have been considered sufficient to establish a Creek reservation with an "unrestricted right of self-government [and] with 'full jurisdiction' over enrolled Tribe members and their property." *See* Treaty with the Creek Nation of Indians, art. XV, 1856, 11 Stat. 700; *see also* Treaty with the Creek Nation of Indians, art. III, June 14, 1866, 14 Stat. 786.

[2] *McGirt v. Oklahoma,* No. 18-9526, 2020 S. Ct. WL 3848063, at *5 (S. Ct. July 9, 2020).

[3] *Id.* at *1.

[4] *Id*. at *3-5.

[5] *Id.* at *5.

[6] *McGirt* at *5.

[7] *Id.* at *10-12.

[8] *Id.* at *5 (there must be a clearly expressed congressional intent for disestablishment with "[an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests").

[9] *Id.*

[10] *Id.* at *22.

[11] *Id.* at *7.

[12] *Id.* at *21

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