McGirt v. Oklahoma:

The Shift to a More Conventional Approach to Statutory Interpretation Protecting Tribal Homelands

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Photo by Jennifer Weston, Standing Rock Sioux Tribe

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U.S. Constitution

Treaties and Congressional Plenary Power

- US Constitution Article VI—Supremacy Clause-- "This Constitution, and the Laws of the United States…and all Treaties made, or which shall be made…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"
- US Constitution Article 1, Section 8—Commerce Clause--"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Treaties made between the United States and Indian tribes form the foundation of the unique federal-tribal relationship.

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Canons of Construction

Three basic Indian canons employed by the Court:

1. Treaty language must be construed as the Indians would have understood it, and the rights reserved by treaties remain intact unless Congress has expressed clear and unambiguous contrary intent.
2. Indian treaties must be construed liberally in favor of the Indians
3. Ambiguities in the treaty language must be resolved in favor of the Indians

"Treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."
U.S. v. Winans, 198 U.S. 371, 381 (1905).

Relevant Indian Policy

Removal

- The Indian Removal Act (1830) move Tribes west of the Mississippi in exchange for lands in the East
- “Trail of Tears”

Allotment

- General Allotment Act “Dawes Act” (1887) broke up reservation land held in common by the Tribe into small allotments parceled out to individuals
- Goal to assimilate Native Americans

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Indian Country Definition, 18 USC § 1151

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

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Major Crimes Act, 18 U.S. C. 1153 (1885)

- In response to SCOTUS ruling in *Ex Parte Crow Dog*—overturned Crow Dog's federal court conviction for the murder of Spotted Tail on the Rosebud Reservation.
- Placed certain crimes under federal jurisdiction (exclusive of states) if they are committed by Native Americans

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Jurisdiction for Indian Country Crimes

DEFENDANT	VICTIM	JURISDICTION
Indian	Indian	Federal for felonies (MCA) Tribal for misdemeanors
Indian	Non-Indian	Federal for felonies (MCA) Tribal for misdemeanors
Non-Indian	Non-Indian	State jurisdiction only
Non-Indian	Indian	Federal for most felonies and misdemeanors (ICCA) Tribal for VAWA offenses
Indian	Victimless	Federal and tribal jurisdiction
Non-Indian	Victimless	State jurisdiction

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SCOTUS Cases

Seymour v. Superintendent, 386 U.S. 351 (1962)

Facts: Petitioner, a Colville Tribal member is in prison in Washington State Penitentiary for attempted burglary he filed a habeas corpus, alleging that he is an Indian and the alleged offense was committed in "Indian Country" so state had no jurisdiction.

Issue: Was the Colville Indian Reservation disestablished by the allotment Act of 1906?

Holding: The Act of March 22, 1906 providing for the disposition of surplus lands did not dissolve the Reservation and it is still in existence. Even if the land upon which the alleged offense was committed was held by a non-Indian in fee, a different conclusion would not be required because 18 U.S.C §1151 defines "Indian Country" as including "all land within the limits of any Indian reservation…, notwithstanding the issuance of any patent." A different conclusion is not required by the fact that the land on which the offense occurred is located within a governmental townsite laid out by the federal government under the 1906 Act.

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SCOTUS Cases

Mattz v. Arnett, 412 U.S. 481 (1973)

Facts: Petitioner is Tribal Member fisherman who was seeking return of his nets confiscated by a California game warden. He alleged the nets were seized in Indian Country and the state lacked jurisdiction. The Klamath River Reservation was established by Ex Order in 1855. In 1892, Congress passed a statute allotting the former Reservation and opening it up for homesteaders.

Issue: Was the Klamath River Reservation terminated by the 1892 Act?

Holding: "A Congressional determination to terminate [an Indian Reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." The Klamath River Reservation was not terminated by the Act of June 17, 1892, and the land within the reservation boundaries is still Indian country. The conclusion that the 1892 Act did not terminate the Reservation is reinforced by repeated recognition thereafter by the Department of the Interior and by the Congress.

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SCOTUS Cases

DeCoteau v. Dist. Ct., 420 U.S. 425 (1975)

Facts: Two cases, consolidated for decision, concern tribal members of the Sisseton Wahpeton Oyate were subject to State jurisdiction for crimes committed on lands owned and settled by non-Indians due to a Congressional statute. The Lake Traverse Indian Reservation in South Dakota was created by an 1867 Treaty, but an 1891 allotment Act opened all unallotted lands to settlement , provided payment for the land, and relinquished the tribes "claim, right, title, and interest" in the unallotted lands.

Issue: Whether the Lake Traverse Indian Reservation in SD was terminated under 1891 Statute?

Holding: South Dakota state courts have civil and criminal jurisdiction over conduct of the members of the tribe on the non-Indian unallotted lands within the 1867 reservation borders. The fact of the act and its surrounding circumstances and legislative history all point unmistakably to this conclusion.

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SCOTUS Cases

Rosebud Sioux v. Kneip, 430 U.S. 584 (1977)

Facts: The Rosebud Sioux Tribe sued for a declaratory judgment that the original boundaries of their reservation as defined by 1889 Act had not been diminished by three subsequent acts of congress opening certain lands up for homesteaders.

Issue: Was the Rosebud Reservation diminished by homestead Acts?

Holding: "The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted…" Homestead Acts of 1904, 1907,1910 clearly evidence a congressional intent to diminish the boundaries of the Reservation.

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SCOTUS Cases

Solem v. Bartlett, 465 U.S. 463 (1984)

Facts: Bartlett was a CRST Tribal member and convicted of a crime in SD State Court. He argued the state lacked jurisdiction b/c he was Indian and crime was committed in Indian Country. The Cheyenne River Act (1908) authorized the Secretary of Interior to "sell and dispose of" for homesteading a specified portion of the Cheyenne River Sioux Reservation. The crime was committed on an area opened up for allotment.

Issue: Did the Cheyenne River Act of 1908 diminish reservation boundaries such that the opened areas of the CRST Reservation were no longer Indian Country?

Holding: Cheyenne River Sioux Reservation was not diminished. Affirmed the issuance of the writ of habeas corpus. The Court found that the language of the Act did not indicate that Congress intended to diminish the reservation boundary. Subsequent circumstances indicated that the land at issue did not lose its Indian Country attributes.

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Solem v. Bartlett Factors

Three principles to determine Congress' intent to diminish a Reservation:

1. Statutory Language used to open the Indian Lands
2. Events surrounding the passage of Surplus Land Act
3. Events that occurred after the passage of a surplus land Act

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SCOTUS Cases

Hagen v. Utah, 510 U.S. 399 (1994)

Facts: Petitioner, a Tribal member was charged in Utah state court with distribution of a controlled substance in the town of Myton, which was land within the original boundaries of the Uintah Indian Reservation but opened up to non-Indian settlement in 1905. Hagen argued that he was an Indian who committed a crime within Indian Country so the State didn't have jurisdiction.

Issue: Was the Reservation diminished by the 1905 allotment Acts?

Holding: Using the Solem factors the court determined that Congress had intentionally diminished tribal lands with surplus lands acts in the Uintah Reservation. The Court selected language from a 1902 allotment act plan that stated that "all the unallotted lands within said reservation shall be restored to the public domain" but this language wasn't even contained in the 1905 Act that actually opened up the reservation for settlement. The Court concluded that both acts should be read together and demonstrated an intent to diminish. The court also looked at the other two factors in Solem and determined that letters and statements by DOI officials, congressional bills and statements and the Presidential proclamation supports the understanding that the Reservation would be diminished. Furthermore, the Court stated that current population and demographics of the area support this conclusion.

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SCOTUS Cases

South Dakota v. Yankton Sioux Tribe , 522 U.S. 329 (1998)

Facts: South Dakota wanted to put a waste dump with a subpar clay lining within the original 1858 boundaries of the Yankton Sioux Reservation near Lake Andes on unallotted non-Indian fee land. Tribal, federal, and state officials disagreed as to the applicable environmental regulations. An allotment statute in 1894 required Tribe to "cede, sell, relinquish, and convey to the United States" all of its unallotted lands; in return, the Government agreed to pay the Tribe $600,000. Article XVIII of the agreement, a saving clause, stated that nothing in its terms "shall be construed to abrogate the [1858] treaty" and that "all provisions of the said treaty ... shall be in full force and effect, the same as though this agreement had not been made."

Issue: Did the 1894 statute diminish the Yankton Sioux Reservation?

Holding: The court found that Congress used clear statutory language to diminish the boundaries of the Yankton Sioux Reservation and that the agreement to pay for these lands further supported they had been ceded through the statute. Surplus land Act contains both explicit cession language, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," provided a "nearly conclusive," or "almost insurmountable," presumption of diminishment. (Quoting *Solem* and *Hagen*)

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SCOTUS Cases

Nebraska v. Parker, 577 U.S. ___ (2016)

Facts: 1854 Treaty establishing the Omaha Reservation. An 1882 Act allowed the Secretary of Interior to sell tracts of reservation land and deposit proceeds in trust for the Tribe. W.E. Peebles purchased a tract of land and established the town of Pender, Nebraska. The Omaha Tribe passed a Beverage Control Ordinance and sought to enforce liquor licenses and taxes on local venders selling alcoholic beverages in Pender. Venders, joined by Nebraska, sued for injunctive relief claiming they are not on an Indian reservation and therefore not subject to tribal jurisdiction.

Issue: Did the 1882 Act diminish the boundaries of the Omaha Reservation?

Holding: The 1882 Act did not diminish the Omaha Reservation. The framework for diminishment starts with the statutory text. The act only allowed the Tribe to sell plots of tribal lands to non-tribal members and Congress made no clear indication that Congress intended to diminish the boundaries of the Omaha Indian Reservation so the club members were subject to the tax. The historical evidence cannot overcome the text of the 1882 Act.

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Sharp v. Murphy, 591 U.S.__(2020)

Facts: member of Muscogee Creek Nation convicted in Oklahoma of murder. He argued that state lacked jurisdiction because his crime was committed within the Creek Reservation.

- Was accepted by the court then held over in the 2018 term for reargument during 2019-20 term—Gorsuch recused himself due to participating as a federal appellate judge when the case was heard in the lower courts
- Pending when McGirt was accepted

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McGirt v. Oklahoma, 591 U. S. ____ (2020).

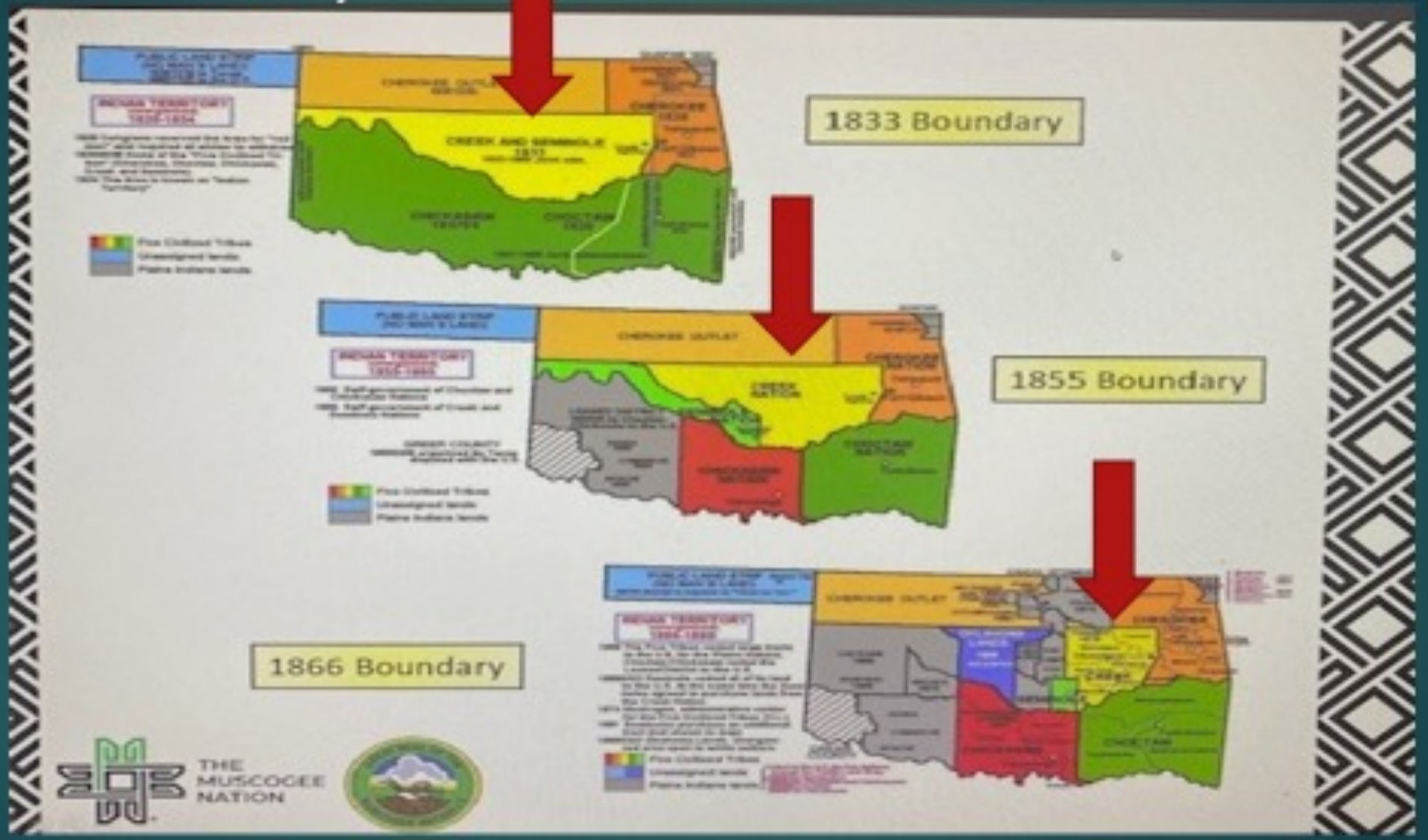
Background:

- James McGirt is enrolled with Seminole Nation of Oklahoma
- He was convicted in the State of serious sexual offenses
- He argues that he is an Indian who committed his crimes within the boundaries of the Creek Reservation and therefore the State lacked jurisdiction to prosecute him according to the Major Crimes Act
- The Creek Nation joined McGirt as *amicus curiae* not because they are interested in overturning his conviction but because of the implication of tribal interests

Issue: Did he commit his crimes within the boundaries of the Creek Reservation?

Ancestral Homelands

Land Today


1833 Boundary
1855 Boundary
1866 Boundary
THE MUSCOGEE NATION

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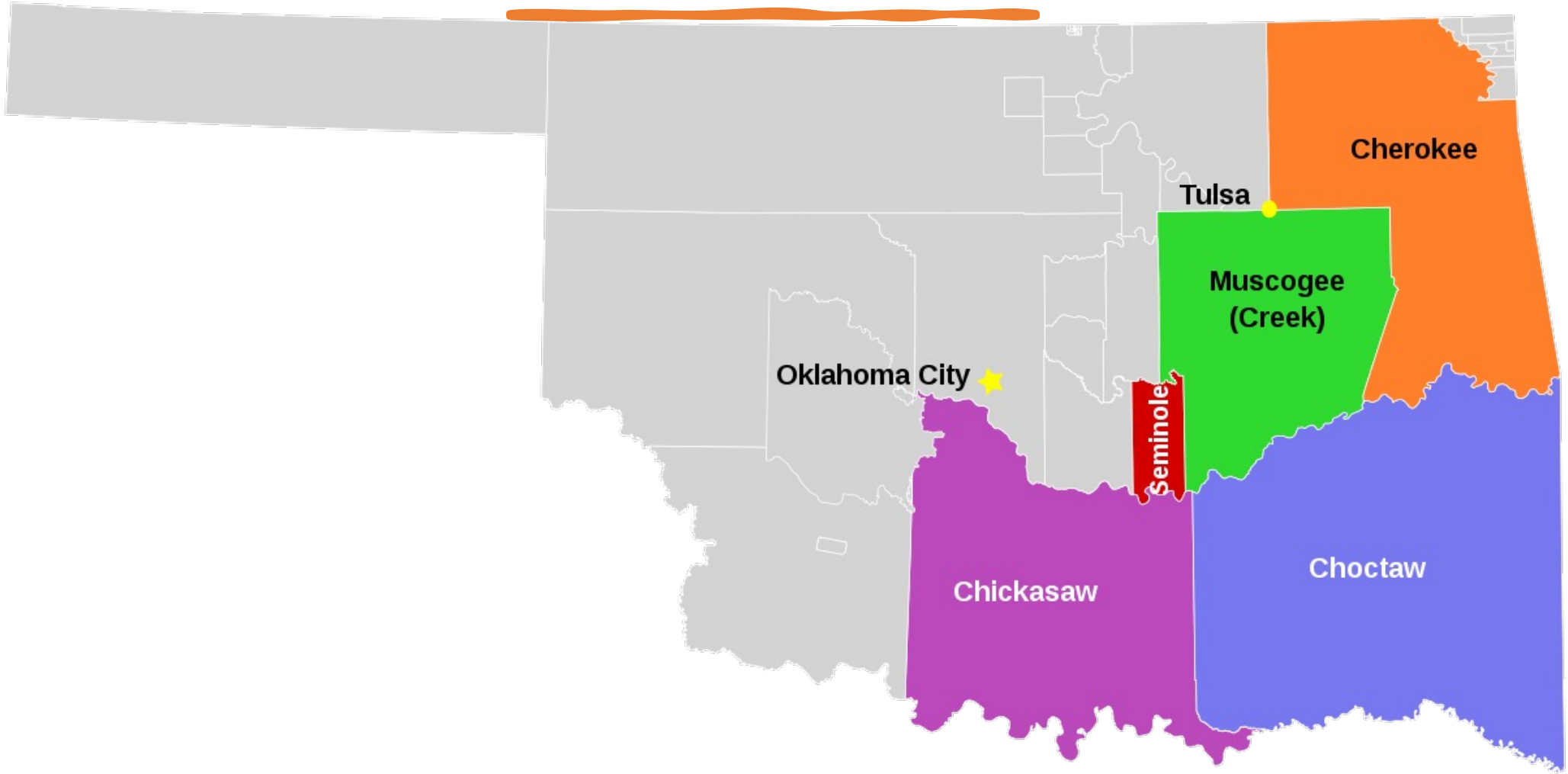
Map of Creek Reservation



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Creek Nation Treaties

- **1832**— US to remove the Creek west of the Mississippi and exchange for their land Creeks received cash, gifts, annuities, and US was to replace their homeland in the west and provide for education and some other services. The Nation was to receive the patent, fee simple title.

  "permanent home to the whole Creek Nation" "solemnly guaranteed" "govern themselves" never under state or territorial law.

- **1833**—defined their lands in the Indian Territory, which is now Oklahoma. They actually received the fee simple title in 1852

- **1856**— "no portion" of Creek lands "would ever be embraced or included within, or annexed to, any Territory or State" Creeks have "unrestricted right of self-government" with "full jurisdiction" over tribal citizens and their property.

- **1866**—Creek and other four of five civilized tribes ceded western half of their reservation for "other civilized Indians" US paid .30 acre for 3+million acres. Creeks east half "forever set apart as a home for said Creek Nation," on "the reduced Creek reservation."

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Oklahoma's Arguments

1. Allotment-era congressional statues resulted in disestablishment of the Reservation

   The Court had already rejected the argument that allotment alone results in disestablishment. In addition, there was no clear expression in the statutes that Congress intended to disestablish the Reservation.

2. Congress expressed intent to disestablish the Reservation when it abolished the Creek Tribal Court, transferred all civil and criminal cases to the US Courts of the Indian Territory and subjected tribal legislation to presidential review.

   The Tribe was not stripped of all sovereign powers and Congress began to restore the Nation's authority in 1920's

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Oklahoma's Arguments

3. The statehood Enabling Act created an exception to the Major Crimes Act.

   On the contrary, that statute sent state-law cases to state court and federal-law cases to federal court, which would include cases that fall under the MCA. "That argument…rests on state prosecutorial practices that defy the MCA, rather than on the law's plain terms."

4. Creek Nation never existed but rather Congress created a dependent Indian community.

   To find a reservation was never created would require a "willful blindness to the statutory language" furthermore, dependent Indian communities still fall within the definition of Indian Country.

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Oklahoma's Arguments

5. Disestablishment should be recognized based on historical practices and demographics

"Oklahoma replies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there."

Dissent— the consequences will be "drastic precisely because they depart from…more than a century [of] settled understanding"

"the magnitude of a legal wrong is no reason to perpetuate it"

"…dire warnings are just that, and not a license for us to disregard the law."

"[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law."

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Implications

- Criminal jurisdiction
  - McGirt of course
  - Murphy—July 9,2020—affirmed 10th circuit that State did not have jurisdiction
  - Non-Indian who commits a crime against Indian in Tulsa that falls within Reservation will now be subject to federal prosecution instead of State prosecution
  - Non-Indian who commits VAWA crime against Indian woman
- Other Tribal arguments to preserve tribal homelands—particularly the "Five Civilized Tribes", Sisseton Wahpeton Oyate?
- Civil regulatory authority
- Taxes

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"On the far end of the Trail of Tears was a promise."

"If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough with sufficient vigor, are never enough to amend the law. To hold otherwise would elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."

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