



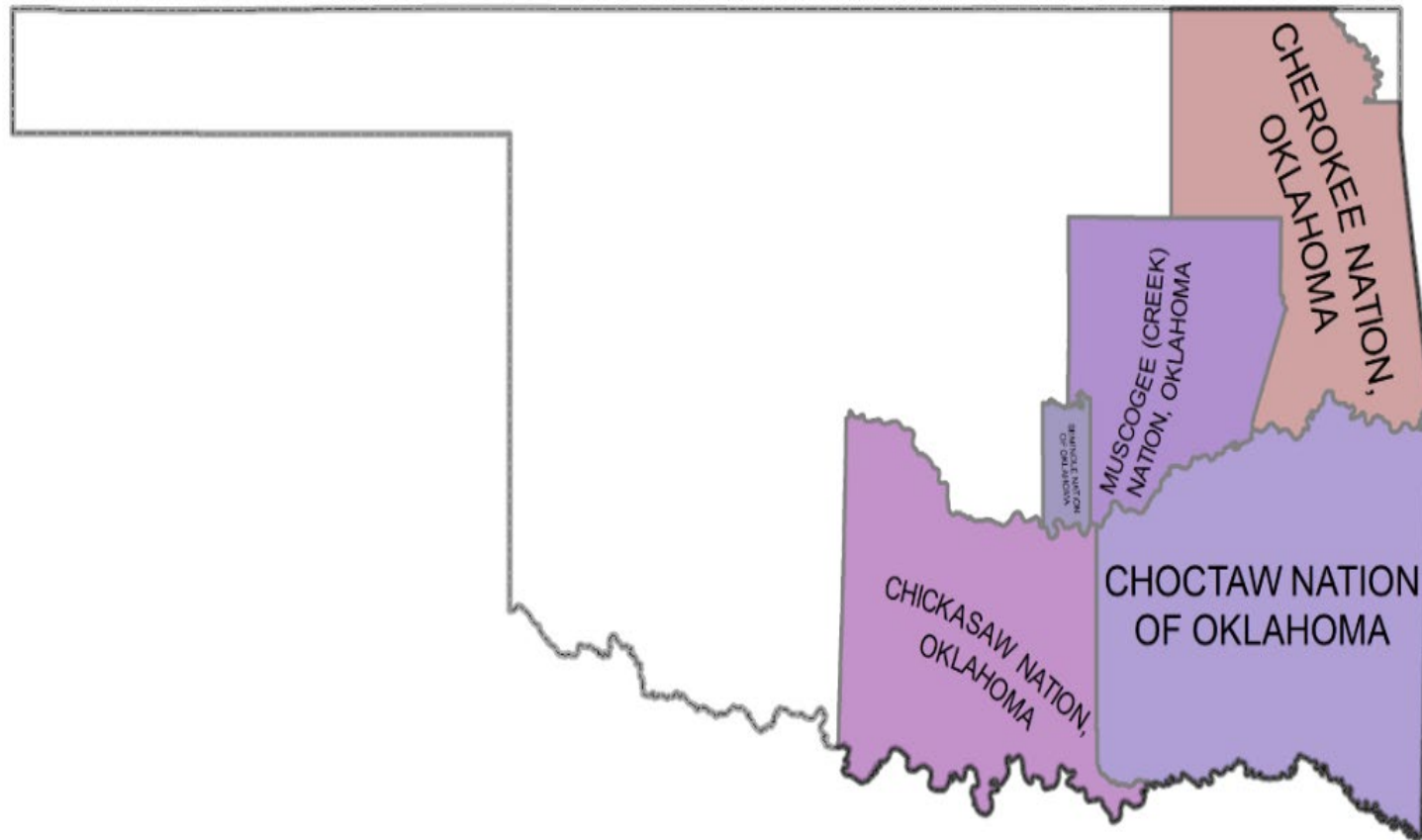
# THE MCGIRT DECISION AND IT'S IMPLICATIONS FOR OKLAHOMA

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# INDIAN TRIBES OF OKLAHOMA

- Five Civilized Tribes of Oklahoma
  - Cherokee Nation
  - Choctaw Nation of Oklahoma
    - ⊙ Mississippi-Choctaw
  - Seminole Nation of Oklahoma
  - The Chickasaw Nation
  - Muscogee (Creek) Nation

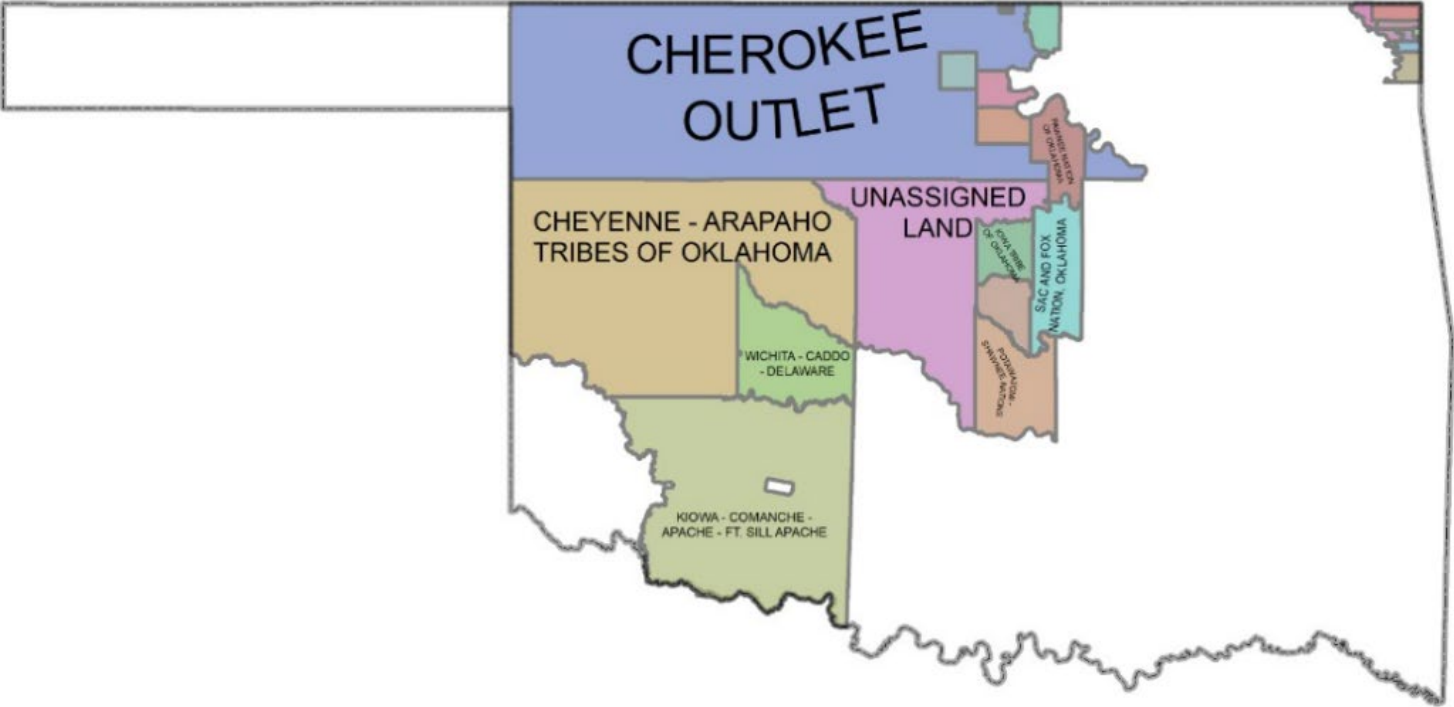
# FIVE TRIBES OF OKLAHOMA



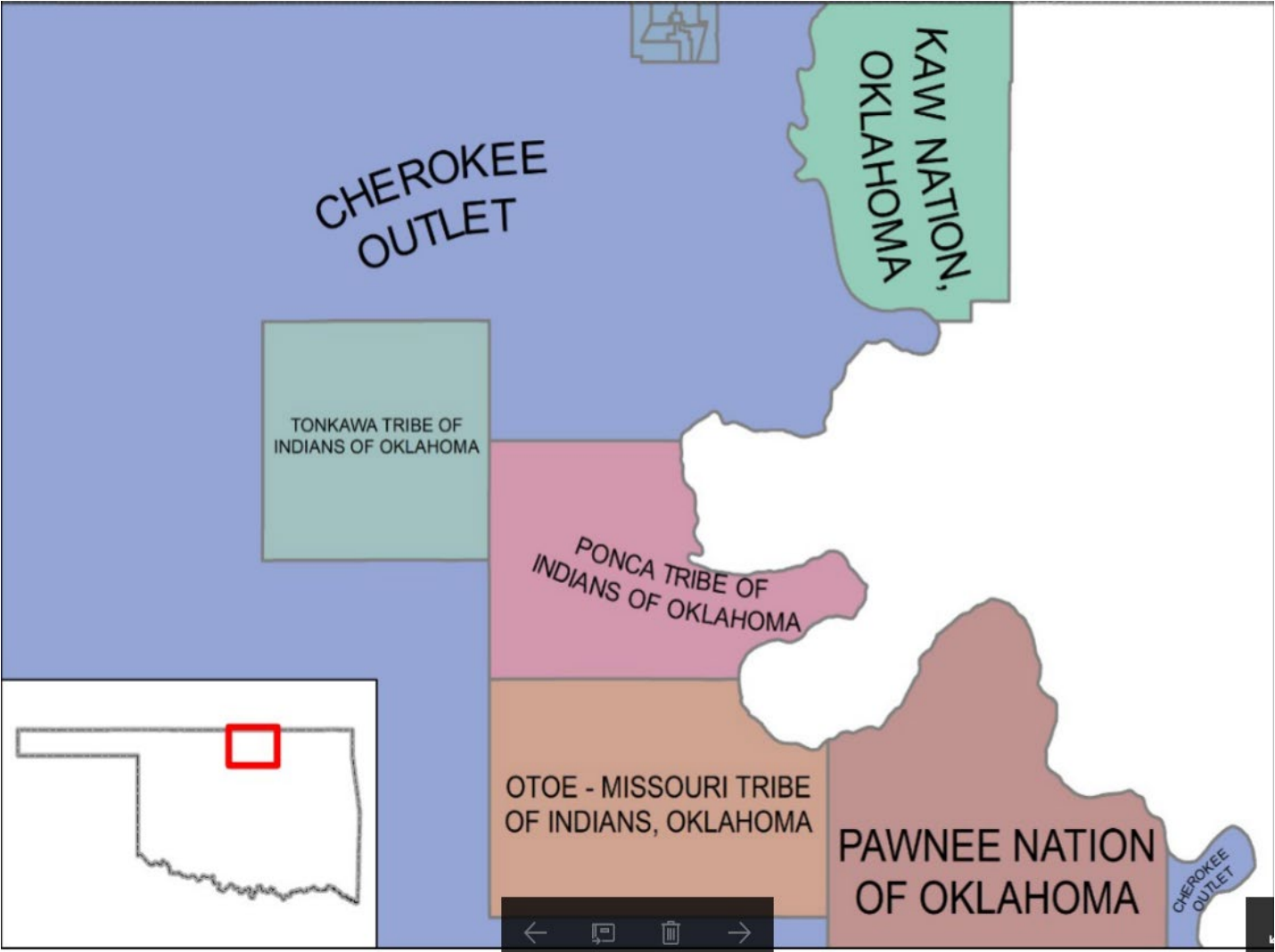
# INDIAN TRIBES OF OKLAHOMA

- Absentee-Shawnee Tribe of Indians
- Apache Tribe of Oklahoma
- Caddo Nation of Oklahoma
- Cheyenne and Arapaho Tribes
- Citizen Potawatomi Nation
- Comanche Nation
- Delaware Nation
- Delaware Tribe of Indians
- Eastern Shawnee Tribe of Oklahoma
- Fort Sill Apache Tribe of Oklahoma
- Iowa Tribe of Oklahoma
- Kaw Nation
- Kickapoo Tribe of Oklahoma
- Kiowa Indian Tribe of Oklahoma
- Miami Tribe of Oklahoma
- Modoc Tribe of Oklahoma
- Otoe-Missouria Tribe of Indians
- Pawnee Nation of Oklahoma
- Peoria Tribe of Indians of Oklahoma
- Ottawa Tribe of Oklahoma
- Ponca Tribe of Indians of Oklahoma
- Quapaw Tribe of Indians
- Sac & Fox Nation
- Seneca-Cayuga Nation
- Shawnee Tribe
- The Osage Nation
- Tonkawa Tribe of Indians of Oklahoma
- Wichita and Affiliated Tribes
- Wyandotte Nation

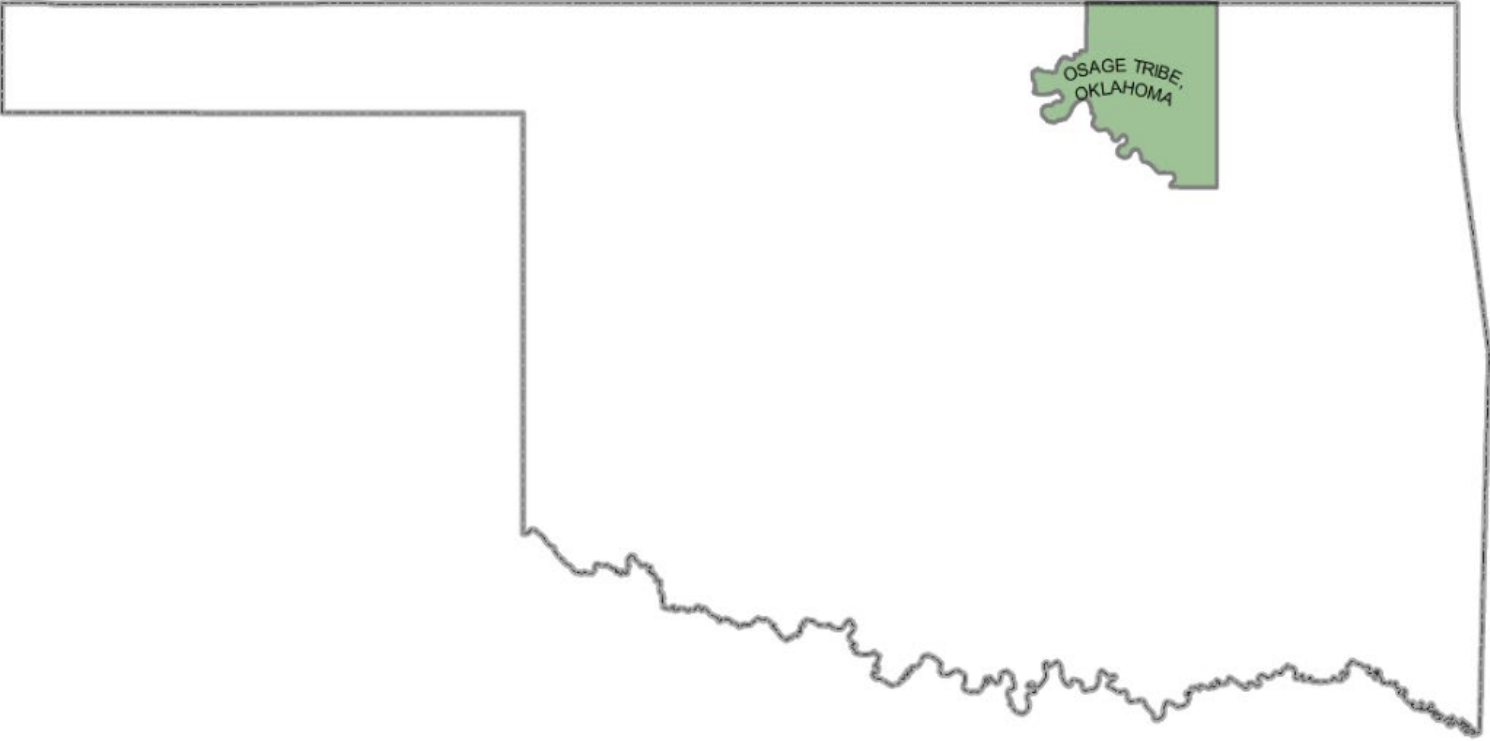
# WESTERN TRIBES



# WESTERN TRIBES



# OSAGE TRIBE



# MARSHALL TRILOGY

## ***Johnson v. M'Intosh*, 21 U.S. 543 (1823)**

- ⦿ Can a Tribe convey land to non-Indian individuals?
- ⦿ *Adoption* of the so-called Doctrine of Discovery as the origin of American property title, but the case more properly should be known as the decision that established federal supremacy in Indian affairs over the states and individuals;

## ***Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)**

- ⦿ Can Georgia enforce its laws in Cherokee Nation?
- ⦿ Marshall said Cherokee Nation is not a foreign state but a ***Domestic Dependent Nation***; established the guardian/ward relationship between federal government and Indians;

## ***Worcester v. Georgia*, 31 U.S. 515 (1832)**

- ⦿ Can Georgia enforce its law against non-Indian in Cherokee Nation?
- ⦿ Reaffirmed that the federal government, not the states, has authority over Indian affairs and that the tribes had inherent sovereignty, the authority to make and enforce their own laws within their lands;



# HISTORY

## Plenary Power

- Marshall decisions gives Congress the ultimate authority over Tribes

## Treaties

- US stopped negotiating treaties with the Tribes in 1871;
- Allotment and Assimilation Era begins at that time – 1871-1928
- Reorganization Era - 1928-1945
- Termination and Relocation Era - 1945-1961
- Tribal Self-Determination - 1961-present

## Cannons of Construction

- Any ambiguity in treaty or statute is to be found liberally in favor of the Tribes
- View treaties thru the eyes of the Tribes at the time
- Congress is presumed to never make a mistake; courts assume Congress knows what they were doing when they do it;

## HISTORY

- ⦿ The term "Five Civilized Tribes" came into use during the 1800's and refers to Cherokee, Choctaw, Chickasaw, Creek, and Seminole nations. Although these Indian tribes had various cultural, political, and economic connections before removal in the 1820s and 1830s, the phrase was most widely used in Indian Territory and Oklahoma.
- ⦿ The term indicated the presumption they were adopting to Anglo culture such as widespread Christianity, written constitutions, centralized governments, intermarriage with white Americans, market participation, literacy, animal husbandry, patrilineal descent, and even slaveholding.
- ⦿ Elements of "civilization" within Southeastern Indian society predated removal. The Cherokee, for example, established a written language in 1821, a national supreme court in 1822, and a written constitution in 1827. The other four nations had similar, if less noted, developments.
- ⦿ As a result, these tribes have always been treated differently by not only the federal government but also state governments and the private sector;

# INDIAN COUNTRY

Indian Country is a term of art defined by federal statutes

## ◉ 18 U.S.C. §1151

- “. . . means (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.”

## ◉ 18 U.S.C. §1152

- Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

## ◉ 18 U.S.C. §1153

- “(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

## CRIMINAL JURISDICTION IN INDIAN COUNTRY

CRIMINAL JURISDICTION IN INDIAN COUNTRY			
PERPETRATOR	VICTIM	SOVEREIGN	AUTHORITY
Non-Indian	Non-Indian	State	McBratney/Draper
Non-Indian	Victimless	State	McBratney/Draper
Non-Indian	Indian	Federal	18 U.S.C. §1152
Indian	Non-Indian	Tribal, Federal	18 U.S.C. §1152
Indian	Indian	Tribal	Inherent Sovereignty
Indian commits "Major Crime"	Any Person	Tribal, Federal	18 U.S.C. §1153

# CARPENTER V. MURPHY

871 F. 3d 1078 (10<sup>th</sup> Cir. 2017)

**Issue:** Do the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an “Indian reservation” today under 18 U.S.C. § 1151(a)?

Patrick Murphy is a member of the Creek Nation who was convicted in Oklahoma state court and sentenced to death for the 1999 murder of George Jacobs, a member of the same nation. Murphy’s conviction and death sentence were affirmed on direct appeal. After losing his claim for post-conviction relief, Murphy then sought habeas relief in the federal courts.

The Tenth Circuit held that the crime occurred on the Creek Reservation, and that the Oklahoma state courts lacked jurisdiction. Applying *Solem*’s three-part test, the court concluded that Congress had not disestablished the Creek Reservation. The crime had therefore occurred in Indian country under § 1151(a), meaning that the federal government had exclusive jurisdiction and Oklahoma lacked jurisdiction under § 1153(a).

# MCGIRT V. OKLAHOMA

591 US \_\_\_\_\_ (2020)

**Issue:** Can the state prosecute an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries?

Jimcy McGirt had been tried and convicted of performing sex crimes against an underage child in 1996 in Oklahoma and was serving a life sentence for the crime. When the Tenth Circuit delivered its verdict on Murphy's case in 2017, McGirt was one of several convicts who had similar cases to Murphy's, Native American descendants that had been tried and convicted in state courts for crimes committed on lands that were part of the former reservations, who sought appeals based on the new ruling from the Tenth Circuit after the state denied him relief.

# MCGIRT V. OKLAHOMA

591 US \_\_\_\_\_ (2020)

- ◉ McGirt case taken up as Gorsuch had to recuse from Murphy
- ◉ Amicus Briefs filed by just about everyone
  - For the State
    - ◉ United States, City of Tulsa, Environmental Federation of Oklahoma, Oklahoma Cattleman's Association, Oklahoma Farm Bureau, State Chamber of Oklahoma, Oklahoma District Attorneys Association
  - For Murphy/McGirt
    - ◉ Brad Henry, Tom Cole, Neal McCaleb, Chickasaw Nation, Choctaw Nation, Dan Boren, T.W. Shannon, National Congress of American Indians, Former US Attorneys, Creek Nation, Cherokee Nation, Historians
- ◉ Opinion written by Justice Gorsuch joined by Ginsberg, Breyer, Sotomayor, Kagan
- ◉ Dissent by Roberts, Alito, Kavanaugh, with separate dissent by Thomas

# MCGIRT V. OKLAHOMA

591 US \_\_\_\_\_ (2020)

- ◉ “On the far end of the Trail of Tears was a promise”
- ◉ There is no question that Congress established a reservation for the Creek Nation, it is also clear that Congress has broken numerous promises to the Tribe.
- ◉ Allotment broke the reservation into pieces and established the “checkerboard”
- ◉ There is only one place to look to determine if a reservation has been disestablished – the Acts of Congress.
- ◉ The US promised the Creeks a reservation in perpetuity. Congress, while having diminished the reservation, has NEVER disestablished.
- ◉ Over time, it has restricted and expanded the Tribe’s powers.
- ◉ If Congress wishes to disestablish the reservation, it must do so without ambiguity.
- ◉ “Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to evaluate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.



# MCGIRT V. OKLAHOMA

591 US \_\_\_\_\_ (2020)

## ⦿ Significance to other Tribes in Oklahoma

- Reservation-by-Reservation analysis
  - Treaties
  - Allotment Acts
  - Other Acts
  - Court Decisions

## ⦿ Practical Considerations

- Criminal Jurisdiction
  - Bosse v. State of Oklahoma, Oklahoma Court of Criminal Appeals Case No. PCD-2019-124
    - capital punishment cannot be imposed on a Native American convicted of committing a murder in Indian Country unless the tribe has ‘opted in’ to the death penalty. Of the 39 federally recognized tribes in Oklahoma, only the Sac & Fox Nation sanctions capital punishment.
- Law Enforcement – Cross-Deputization

# *CAN'T WE ALL JUST GET ALONG*

## *BY JUSTICE GORSUCH*

◎ “. . .in reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day . . . Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek.

These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. No one before us claims that the spirit of good faith, cooperative sovereignty” behind these agreements, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.”

# THE SKY IS FALLING

## ○ CIVIL JURISDICTION

- Tribal Courts

- Montana et al v. United States, 450 U.S. 544 (1981)

- Montana Exceptions

- The Court held that the Tribe lacked inherent authority to preclude fishing by nonmembers on waterways within the reservation in which the tribe did not hold the beneficial interest to the underlying land. It found no clear treaty or statutory right to regulate nonmember conduct on fee lands.
- The Court also set forth two exceptions to the general rule that tribes lack regulatory authority over non-Indians on non-Indian fee land within the reservation.
  - First, it stated that “the tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members.”
  - Second, it stated that tribes may regulate “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”
- Where the “Montana test” is satisfied, a tribe may exercise authority over non-Indians on fee land within the reservation. The test also governs when U.S. may authorize tribes to regulate non-Indian fee lands within reservations under the Clean Water Act. The Court later applied the Montana standard to tribal civil adjudicatory authority in Strate v. A-1 Contractors.

# THE SKY IS FALLING

## ○ CIVIL JURISDICTION

- *Canaan Resources X v. Calyx Energy, III, LLC*, In the Supreme Court of the State of Oklahoma Case No. CO-119245
  - Does the Oklahoma Corporation Commission have authority to regulate oil and gas activities on the Creek Reservation?
  - Stigler Act makes “all restricted lands of the Five Civilized Tribes . . . subject to all oil and gas conservation laws of the State of Oklahoma,” subject to the approval of the Secretary of the Interior. 61 Stat. 731.
  - Congress authorized state gross production taxes on tribal trust lands and has moved to require a tribal-state cooperative agreement before allowing EPA to grant tribes treatment as a state status to enforce federal environmental laws. 25 U.S.C. § 5201; 119 Stat. 1144 (transportation rider)

# THE SKY IS FALLING

## o Environmental Regulation

- Inhofe's rider to the 2005 transportation bill is an example of how Congress might react; rider forbid the EPA from treating the Tribes as states for purposes of environmental regulation

## o Indian Child Welfare Act

- Intergovernmental Agreements
- Pending case – *Brackeen v. Bernhardt*, No. 18-11479 (5<sup>th</sup> Cir.)

## o Taxation

- The Tribes do not “own” all of Eastern Oklahoma
- State property tax of fee lands is NOT affected by this decision;
- State Income tax of tribal members living and working inside the reservation??? Existing framework suggests that state taxation would be improper.

# ESTATE PLANNING & PROBATES

- McGirt does not change the jurisdiction of the Oklahoma District Courts in probates;
  - Congress gave the State of Oklahoma jurisdiction over the estates of members of the **Five Civilized Tribes** for NON-TRUST property – 25 U.S.C. § 375
    - Non-Trust property distributed by Oklahoma intestacy statutes
    - Stigler Act Amendment is still valid
  - Trust property must be probated and distributed by Department of Interior - 25 U.S.C. § 373, et seq.
    - Trust property distributed under the Indian Consolidation Act 25 U.S.C. § 2201 et seq.
  - Guardianships can be established in tribal court, however, they are NOT valid as to restricted property.
  - As always, if dealing with an Osage headright – consult BIA and attorney with extensive Osage experience;

# *SOMETHING TO THINK ABOUT*

- Oklahoma needs the Tribes
  - Jobs
  - Federal Funding
    - \$8.5 billion in CARES Act
  - Infrastructure Development
    - \$1 billion in broadband development
- Oklahoma Congressional Delegation
- Governor's Task Force
- Congressional Action
  - Another Rider?
  - Clarification of existing statutes
- Intergovernmental Agreements
- Supreme Court has a very different composition now

# RESOURCES

- Scotus Blog on McGirt case - Great blog regarding Supreme Court decisions; copies of opinion and all briefs
  - <https://www.scotusblog.com/case-files/cases/mcgirt-v-oklahoma/>
- Inter-Tribal Council of the Five Civilized Tribes - Organization made up of principal chiefs and five members from each tribe
  - <http://www.fivecivilizedtribes.org/>
- Canaan Resources X v. Calyx Energy, III, LLC, In the Supreme Court of the State of Oklahoma Case No. CO-119245
  - <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=CO-119245>
- Bosse v. State of Oklahoma, Oklahoma Court of Criminal Appeals Case No. PCD-2019-124;
  - <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=PCD-2019-124&cmid=125798>