

IN THE DISTRICT COURT IN AND FOR CRAIG COUNTY  
STATE OF OKLAHOMA

SEP 14 2020

THE STATE OF OKLAHOMA, )  
Plaintiff, )  
v. )  
TRAVIS JOHN HOGNER )  
Defendant. )

DEBORAH MASON, COURT CLERK  
STATE OF OKLA, CRAIG COUNTY

BY \_\_\_\_\_  
DEPUTY

Case No. CF-2015-263

**CHEROKEE NATION’S PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Cherokee Nation presents herewith Proposed Findings of Fact and Conclusions of Law, and respectfully requests that the Court adopt them in making its decision on the issue of subject matter jurisdiction over the crime[s] charged.

**INTRODUCTION**

This matter came on for hearing before the Court on September 21, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 14, 2020. The State appeared by and through [Assistant] District Attorney \_\_\_\_\_, and Assistant Attorney General Carolina Hunt. Defendant appeared by and through \_\_\_\_\_. Cherokee Nation appeared as Amicus by and through Attorney General Sara Hill. Based upon the stipulations and evidence presented by the parties, review of the pleadings, and the briefs and argument of counsel, the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

**Background**

1. Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma (Oklahoma), including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties.
3. Cherokee Nation’s government, headquartered in Tahlequah, consists of executive, legislative, and judicial branches, including active district and appellate courts.
4. Cherokee Nation provides law enforcement through its Marshal Service, and maintains cross-deputation agreements with state, county, and city law enforcement agencies for protection of citizens and non-citizens.

5. Approximately 139,000 Cherokee citizens reside within the boundaries of Cherokee Nation.

6. Cherokee Nation provides services to communities within its boundaries, including, among others, health and medical centers, veteran's center, employment, housing, bus transit, waterlines, sewers, water treatment, bridge and road construction, food distribution, child support services, child welfare, youth shelter, victim services, donations to public schools and fire departments, and charitable contributions. "Rising Together, 2018 Annual Report to the Cherokee People" (FY 2018 Rep.) and "Popular Annual Financial Report for FY 2019, Cherokee Nation" (FY 2019 Rep.), available at [https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-\\_final-online.pdf](https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-_final-online.pdf); <https://www.cherokee.org/media/gaahnswb/pafr-fy19-final-v-2.pdf>.

7. Cherokee Nation is one of five tribes that have been treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes").

8. Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, Cherokee Tragedy: The Ridge Family and the Decimation of a People 22, 91, 209, 254 (rev. 2d ed. 1986).

9. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411, which implemented the national removal policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River.

10. The Indian Removal Act also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" § 3, 4 Stat. 411.

11. The Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under treaties with the United States.

12. Removal of Cherokees was completed in 1838, with many deaths occurring during the removal process. *See The Western Cherokee Indians v. United States*, 27 Ct. at Cl. 1, 3, 1800 WL 1779 (1891); Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991).

13. After removal, the Five Tribes occupied almost the entire area of what is now Oklahoma until after the civil war, when their treaties required cessions of lands in what is now western Oklahoma.

14. Since 1881, decades before Oklahoma statehood, states' criminal jurisdiction has been limited to offenses committed by non-Indians against non-Indians in Indian country. *United States v. McBratney*, 104 U.S. 621, 624 (1881); *see also Solem v. Bartlett*, 465 U.S. 463, 465 n. 2 (1984) ("Within Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians. . . and victimless crimes by non-Indians.").

15. In 1890, Congress authorized the establishment of Oklahoma Territory in the western portion of Indian Territory, and a territorial government was formed there. Act of May 2, 1890, ch. 182, §§ 1-28, 26 Stat. 81 (1890 Act).

16. “The lands in the east held by the Five Civilized Tribes remained Indian Territory, subject only to federal and tribal authority.” *Indian Country, U.S.A.*, 829 F.2d 967, 977(10th Cir. 1987); §§ 29-44, 26 Stat. 81.

17. “No territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance.” *Indian Country, U.S.A.*, 829 F.2d at 974, citing *Jefferson v. Fink*, 247 U.S. 288, 290–91 (1918); *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 584 (1916).

18. Criminal prosecutions in Indian Territory were split between tribal and federal courts. *McGirt*, 140 S.Ct. 2452, 2476 (2020), citing the 1890 Act, § 30, 26 Stat. 81, 94; *see also Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in Cherokee Nation under its treaties and the 1890 Act).

19. In 1906, Congress authorized the joinder of Oklahoma Territory and Indian Territory to form the State of Oklahoma. Act of June 16, 1906, ch.3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (Enabling Act).

20. The Enabling Act required transfer to the federal courts in Oklahoma of prosecutions of “all crimes and offenses” committed within Indian Territory “which, had they been committed within a State, would have been cognizable in the Federal courts.” § 16, 34 Stat. 267, 276, as amended by § 1, 34 Stat. 1286.

21. The State of Oklahoma entered the Union in 1907. Proclamation, 35 Stat. 2160-61 (Nov. 16, 1907).

## CONCLUSIONS OF LAW

### Criminal Jurisdiction in Indian Country

1. Federal statutes define federal and state jurisdiction over crimes committed by or against Indians in Indian country. Indian Country Criminal Jurisdictional Chart, available on United States Attorney Western District of Oklahoma website at: <https://www.justice.gov/usao-wdok/page/file/1300046/download>).

2. Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280, 25 U.S.C. § 1321, before it was amended to require tribal consent, and has thus never acquired jurisdiction over Indian country through that law. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6; *see Cravatt v. State*, 1992 OK CR 6, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (“The State of Oklahoma has never acted pursuant to Public Law 83-280,” quoting *State v. Klindt*, 1989 OK CR

75, 782 P.2d 401, 403 (Okla. Crim. App. 1989). *See also McGirt*, 140 S. Ct. at 2478 (“Oklahoma doesn’t claim to have complied with the requirements to assume jurisdiction voluntarily over Creeks”).

3. Congress has not enacted any law conferring criminal jurisdiction on Oklahoma over crimes committed by or against Indians in Indian country. *See McGirt*, 140 S. Ct. at 2476-78 (rejecting the State’s arguments that allotment-era statutes granted Oklahoma jurisdiction over all crimes in Indian country); *United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (Federal court had jurisdiction over prosecution of a non-Indian for the murder of an Osage Indian on restricted Osage allotment in Oklahoma).

4. The General Crimes Act (also known as Indian Country Crimes Act), 18 U.S.C. § 1152 (GCA), which applied immediately upon Oklahoma statehood, *see McGirt* at 140 S.Ct. at 2478, establishes federal jurisdiction over crimes by or against Indians in Indian country:

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.”

5. The GCA applies to a broad range of crimes, *McGirt* at 140 S.Ct. at 2479, not all of which are defined by federal law. However, the Assimilative Crimes Act, Act of Mar. 4, 1909, ch. 321, § 289, 35 Stat. 1145, codified at 18 U.S.C. § 13, authorizes federal courts to apply state laws for crimes “punishable if committed or omitted within the jurisdiction of the State. . . in which such place is situated.”) *See Williams v. United States*, 327 U.S. 711, 718 (1946) (finding Assimilative Crimes Act supplements the Federal Criminal Code); *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir. 1990) (holding Congress has provided for exclusive federal jurisdiction over crimes committed by Indians in Indian country, through the broad reach of 18 U.S.C. §§ 13, 1152, and 1153). The crime charged against defendant, possession of a firearm after a felony, is accordingly subject to federal jurisdiction, exclusive as to Oklahoma, if committed in Indian country.

6. The State of Oklahoma does not have subject-matter jurisdiction over the criminal offense of possession of a firearm after a felony, committed by Mr. Hogner, who is a member of the Miami Tribe of Oklahoma, if such crime was committed in Indian country.

### **Definition of Indian Country**

7. It is well-established that trust and restricted allotments in Oklahoma constitute Indian Country as defined by 18 U.S.C. § 1151(c) (“all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same”), and that

Oklahoma does not have jurisdiction over crimes committed on such lands. *Cravatt*, 825 P.2d at 279, overruling *Ex parte Nowabbi*, 1936 OK CR 123, 61 P.2d 1139, 1154; *State v. Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

8. The present case concerns the definition of “Indian country” in 18 U.S.C. § 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.”)

9. Tribal lands held in trust by the United States and unallotted tribal lands are classified as reservations for jurisdictional purposes. See *United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust lands are reservation lands); *Ross v. Neff*, 905 F.2d at 1352 (Cherokee tribal trust land is Indian country under 18 U.S.C. § 1151); *Indian Country, U.S.A.*, 829 F.2d at 976 (unallotted Creek lands are reservation lands).

10. “[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.” *United States v. Celestine*, 215 U.S. 278, 285 (1909).

11. “The purchase of lands by non-Indians is not inconsistent with reservation status. *McGirt*, 140 S. Ct. at 2464 n.3, citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-358 (1962).

12. “Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” *McGirt*, 140 S.Ct. at 2468, citing *Solem v. Bartlett*, 465 U.S. at 470.

### **Cherokee Reservation Establishment**

13. The Cherokee Nation’s treaties must be considered on their own terms, in determining reservation status. *McGirt*, 140 S.Ct. at 2479.

14. As noted by the Supreme Court, in *McGirt*, Creek treaties promised a “permanent home” that would be “forever set apart,” and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62 (describing in detail provisions in Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-68; Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419; Treaty with Creeks and Seminoles, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 704; and Treaty Between the United States and the Creek Indians, arts. III and IX, June 14, 1866, 14 Stat. 785, 786, 788.

15. “Under any definition, this was a [Creek] reservation.” *McGirt*, 140 S.Ct. at 2461.

16. The Cherokee treaties were negotiated and finalized during the same period of time as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.

17. The 1833 Cherokee treaty “solemnly pledged” a “guarantee” of seven million acres to the Cherokees on new lands in the West “forever.” Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.

18. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.

19. The 1835 Cherokee treaty, Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, was ratified two years later “with a view to re-unite their people in one body and to secure to them a *permanent home* for themselves and their posterity,” in what became known as Indian Territory, “*without the territorial limits of the state sovereignties,*” and “*where they could establish and enjoy a government of their choice,* and perpetuate such a state of society as might be consonant with their views, habits and condition.” *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

20. Like Creek treaty promises, the United States’ treaty promises to Cherokee Nation “weren’t made gratuitously.” *McGirt*, 140 S.Ct. at 2460.

21. Under the 1835 treaty, Cherokee Nation “cede[d], relinquish[ed], and convey[ed]” all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478.

22. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus “a perpetual outlet west.” Art. 2, 7 Stat. 478.

23. The 1835 Cherokee treaty described the United States’ conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be “included within the territorial limits or jurisdiction of any State or Territory” without tribal consent; and secured “to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country,” so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

24. After removal, on December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902).

25. The title was held by Cherokee Nation “for the common use and equal benefit of all the members.” *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894).

26. Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a “particular form of words.” *McGirt*, 140 S.Ct. at 2475, citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902).

27. The 1846 Cherokee treaty required federal issuance of a deed to the Nation for lands it occupied, including the “purchased” 800,000-acre tract in Kansas (known as the Neutral Lands”) and the “outlet west.” Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.

28. The 1866 treaty, which was negotiated after the civil war and resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet, required the United States, at its own expense, to cause the Cherokee boundaries to be marked “by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council.” Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.

29. The 1866 Cherokee treaty “*re-affirmed and declared to be in full force*” all previous treaty provisions “not inconsistent with the provisions of” the 1866 treaty, and provided that nothing in the 1866 treaty “shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties,” except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799 (emphasis added).

30. The “most authoritative evidence of [a tribe’s] relationship to the land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place.” *McGirt*, 140 S.Ct. at 2475-76.

31. Like Creek treaties, the Cherokee treaties that promised land in Indian Territory to the Cherokee Nation established the tribe’s relationships with that land and created a reservation.

### **Current Cherokee Nation Boundaries**

32. The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.

33. First, the 1866 treaty expressly ceded the Nation’s patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799. *See* Map, Goins, Charles Robert, and Goble, Danney, “Historical Atlas of Oklahoma” (4th Ed. 2006) at 61).

34. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation’s land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would “retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which

their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.” Art. 16, 14 Stat. 799.

35. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

36. The 1891 Agreement provided that Cherokee Nation “shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory” encompassing a strip of land bounded by Kansas on the North and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). See *United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906). See Map, Goins, Charles Robert, and Goble, Danney, “Historical Atlas of Oklahoma” (4th Ed. 2006) at 61).

37. The 1893 statute that ratified the 1891 Agreement required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would “become and be taken to be, and treated as, a part of the public domain,” except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.

38. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

39. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, “subject to such modification as may be made necessary” by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West’s Cherokee Nation Code Annotated (1993 ed.).

40. Cherokee Nation’s most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: “The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893.” 1999 Cherokee Constitution, art. 2.

### **Statutory Text Governing Reservation Disestablishment Inquiry**

41. Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S.Ct. at 2462, citing *Solem*, 465 U.S. at 470. There is a “presumption” against disestablishment. *Murphy v. Royal*, 875 F. 3d at 918, citing *Solem*, 465 U.S. at 481.

42. The only “step” proper for a court of law to consider in a disestablishment analysis is “to ascertain and follow the original meaning of the law” before it. *McGirt*, 140 S.Ct. at 2468.



43. Once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.” *McGirt*, 140 S.Ct. at 2468, citing *Solem*, 465 U.S. at 470.

44. Congress must clearly express its intent to disestablish, commonly by “[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.” *McGirt*, 140 S.Ct. at 2463, citing *Nebraska v. Parker*, 577 U.S. 481, \_\_\_, 136 S.Ct. 1072, 1079 (2016).

45. A statute disestablishing a reservation may provide an “[e]xplicit reference to cession” or an “unconditional commitment . . . to compensate the Indian tribe for its opened land.” *McGirt*, 140 S.Ct. at 2462, citing *Solem*, 465 U.S. at 470.

46. A statute disestablishing a reservation may direct that tribal lands be “‘restored to the public domain,’” *McGirt*, 140 S.Ct. at 2462, citing *Hagen v. Utah*, 510 U.S. 399, 412 (1994), or state that a reservation is “‘discontinued,’” “‘abolished,’” or “‘vacated.’” *McGirt*, 140 S.Ct. at 2463, citing *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22 (1973); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–440 n.22 (1975).

47. In 1893, Congress established the Commission to the Five Civilized Tribes (popularly known as the Dawes Commission) to negotiate agreements with the Five Tribes for “the extinguishment of the national or tribal title to any lands” in Indian Territory “either by cession,” by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645–646.

48. According to an 1894 Dawes Commission report, the Five Tribes “would not, under any circumstances, agree to cede any portion of their lands.” Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 (1897) at 14. *See McGirt*, 140 S.Ct. at 2463.

49. This refusal to cede tribal lands is also reflected in the Dawes Commission’s 1900 annual report: “Had it been possible to secure from the Five Tribes *a cession to the United States of the entire territory at a given price*, . . . the duties of the commission would have been immeasurably simplified . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions.” Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) at 9. (emphasis added).

50. Where Congress contemplates, but fails to enact, legislation containing express disestablishment language, the statute represents “a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]” *DeCoteau*, 420 U.S. at 448.

51. The “‘present and total surrender of all tribal interests’ in the affected lands” required for disestablishment is missing from the Creek allotment agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement). *McGirt*, 140 S.Ct. at 2464.

52. The Cherokee Nation ratified the Cherokee allotment agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement).

53. Like the Creek Agreement, the “present and total surrender of all tribal interests’ in the affected lands” required for disestablishment is missing in the Cherokee Agreement.

54. The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of “allotable lands” (defined in § 5, 32 Stat. 716, as “all the lands of the Cherokee tribe” not reserved from allotment) to tribal citizens individually. Ninth Ann. Rept. of the Comm. Five Civ. Tribes (1902) at 11.

55. Lands reserved from allotment included schools, colleges, and town sites “in Cherokee Nation,” cemeteries, church grounds, an orphan home, the Nation’s capital grounds, its national jail site, and its newspaper office site. §§ 24, 49, 32 Stat. at 719-20, 724; *see also* Creek Agreement, § 24, 31 Stat. at 868-869.

56. With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years (5 years for any portion, 21 years for the designated “homestead” portion). §§ 9-17, 32 Stat. at 717; *see also McGirt*, 140 S. Ct. at 2463, citing Creek Agreement, §§ 3, 7, 31 Stat. 861, 862-864.

57. The restricted status of the allotments reflects the Cherokee Nation’s understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection.

58. Cherokee citizens were given deeds that conveyed to them “all the right, title, and interest” of the Cherokee Nation. § 58, 32 Stat. at 725; *see also McGirt*, 140 S.Ct. at 2463, citing Creek Agreement, § 23, 31 Stat. at 867-868.

59. As of 1910, 98.3% of the lands of Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens; an additional 21,000 acres were reserved for town sites, schools, churches, and other uses; and only 50,301 acres scattered throughout the nation remained unallotted (approximately one percent of Cherokee Nation lands). Ann. Rept. of the Comm. Five Civ. Tribes (1910) at 169, 176.

60. Allotment alone does not disestablish a reservation. *McGirt*, 140 S.Ct. at 2464, citing *Mattz*, 412 U.S. at 496-97 (explaining that Congress’s expressed policy during the allotment era “was to continue the reservation system,” and that allotment can be “completely consistent with continued reservation status”); and *Seymour*, 364 U.S. at 356-58 (allotment act “did no more than open the way for non-Indian settlers to own land on the reservation”).

61. Allotment-era statutes “did not abrogate the federal government’s authority and responsibility, nor allow jurisdiction by the State of Oklahoma” over those [Creek] allotments). *United States v. Sands*, 968 F.2d at 1061-62.

62. The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act) recognized continuation of Cherokee boundaries, by referencing a “permanent settlement in the Cherokee Nation” and “lands in the Cherokee Nation.” §§ 21, 25, 30 Stat. at 502, 504.

63. Statutory provisions related to tribal self-governance during the allotment era were “serious blows” to the promised right to Creek self-governance, but did not prove disestablishment. *McGirt*, 140 S.Ct. at 2466.

64. “[P]erhaps in an effort to pressure the Tribe to the negotiating table,” the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S.Ct. at 2465, citing § 28, 30 Stat. 495, 504–505.

65. The 1901 Creek Agreement expressly recognized the continued applicability of the Curtis Act’s abolishment of Creek courts, by providing that nothing in that agreement “shall be construed to revive or reestablish the Creek courts which have been abolished” by former laws. § 47, 31 Stat. at 873.

66. The Curtis Act’s abolishment of Creek courts did not result in Creek reservation disestablishment. *McGirt*, 140 S.Ct. at 2465-66.

67. Unlike the Creek Agreement, the Cherokee Agreement did not describe tribal courts as “abolished” by the Curtis Act or prohibit revival of tribal courts.

68. The Five Tribes Commission’s early efforts to conclude an agreement with Cherokee Nation were futile, “owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer.” Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899 at 9-10.

69. The final ratified Cherokee Agreement omitted provisions in earlier unratified versions that consented to extinguishment of Cherokee courts, Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57, or that prohibited revival of Cherokee courts, Seventh Ann. Rept. of the Comm. Five Civ. Tribes (1900) at 13, Appendix No. 1, § 80 at 37,45, Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848, 859 (unratified by Cherokee voters).

70. Section 73 of the Cherokee Agreement, 32 Stat. at 727, provided that “no Act of Congress or treaty provision inconsistent with this agreement shall be in force in said Nation” except sections 14 and 27 of the Curtis Act, concerning towns in Indian Territory and an Indian inspector, “which shall continue in force as if this agreement had not been made.”

71. Treaty provisions not inconsistent with the Cherokee Agreement included the 1866 Treaty’s provision that Cherokee courts would “retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty.” Art. 13, 14 Stat. 799.

72. Another “serious blow” to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances “affecting the lands of the Tribe, or of individuals after allotments, or the moneys or other property of the Tribe, or of the citizens” thereof, on approval by the President. *McGirt*, 140 S.Ct. at 2465, citing § 42, 31 Stat. at 872.

73. This provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Creek Agreement, such as cession and compensation. *See McGirt*, 140 S.Ct. at 2465 and n.5.

74. The Cherokee Agreement does not contain a similar provision limiting the Cherokee Nation’s legislative authority by requiring Presidential approval of certain ordinances

75. Like the Creek Agreement, § 46, 31 Stat. 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. at 725.

76. Two days before the March 4 deadline, Congress approved a Joint Resolution continuing Five Tribes governments “in full force and effect” until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822.

77. The following month, Congress enacted the Five Tribes Act, which expressly continued the governments of all of the Five Tribes “in full force and effect for all purposes authorized by law, until otherwise provided by law.” *McGirt*, 140 S.Ct. at 2466, citing Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148.

78. The Five Tribes Act authorized the President to remove and replace the Five Tribes’ principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *McGirt*, 140 S.Ct. at 2466, citing §§ 6, 10, 28, 34 Stat. 139–140, 148.

79. The Five Tribes Act also addressed the handling of the Five Tribes’ funds, land, and legal liabilities in the event of dissolution. *McGirt*, 140 S.Ct. at 2466, citing §§ 11, 27, 34 Stat. at 141, 148.

80. The congressional intrusions on Creek pre-existing treaty rights “fell short of eliminating all tribal interests in the land.” *McGirt*, 140 S.Ct. at 2466.

81. Congressional intrusions on Cherokee treaty rights, which were less severe than intrusions on Creek treaty rights, likewise did not eliminate the Cherokee Nation’s tribal interest in its lands.

82. Congress left the Five Tribes “with significant sovereign functions over the lands in question.” *McGirt*, 140 S.Ct. at 2466.

83. For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as

required by the Creek Agreement, § 42, 31 Stat. 872). *McGirt*, 140 S.Ct. at 2466, citing Creek Agreement, §§ 39, 40, 42, 31 Stat. at 871–872.

84. The Cherokee Agreement similarly required that the Secretary operate schools under rules “in accordance with Cherokee laws;” required that funds for operating tribal schools be appropriated by the Cherokee National Council; required the Secretary’s collection of a grazing tax for the benefit of Cherokee Nation; and confirmed treaty rights. §§ 3, 32, 34, 72, 32 Stat. at 721, 727.

85. As with the Creek Agreement, there is no hallmark language in the Cherokee agreement of cession or compensation or other text that disestablished the reservation.

86. There is no ambiguous language in any of the relevant allotment-era statutes applicable to Cherokee Nation, including its allotment agreement, “that could plausibly be read as an Act of disestablishment.” See *McGirt*, 140 S.Ct. at 2468 (reaching same conclusion as to Creek Nation).

#### **Events Surrounding Enactment of Cherokee Allotment Legislation and Later Demographic Evidence**

87. A court may not favor contemporaneous or later practices instead of the laws Congress passed. *McGirt*, 140 S.Ct. at 2468.

88. “There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help ‘clear up ... not create’ ambiguity about a statute’s original meaning.” *McGirt*, 140 S.Ct. at 2469.

89. Because there is no ambiguous language in any of the relevant allotment-era statutes applicable to Cherokee Nation “that could plausibly be read as an Act of disestablishment,” *McGirt*, 140 S.Ct. at 2468, it is unnecessary to consider events surrounding enactment of Cherokee allotment legislation and later demographic evidence as second and third steps for purposes of a reservation disestablishment inquiry. *McGirt*, 140 S.Ct. at 2468.

90. Even when these steps are considered, “the carefully selected history” Oklahoma and the dissent recited in *McGirt* supplies the Court “with little help in discerning the law’s meaning and much potential for mischief.” *McGirt*, 140 S.Ct. at 2474.

91. The consideration of the events surrounding enactment of Cherokee allotment legislation and later demographic evidence is unnecessary and contributes nothing to the clear meaning of the statutes at issue.

92. However, consideration of the events surrounding the enactment of Cherokee allotment legislation confirms the clear meaning of the statutes.

93. Federal statutes enacted near the beginning of statehood recognized the existence of the Cherokee Reservation as a distinct geographic area. *See* Enabling Act, § 6, 34 Stat. 277 (the third district for the House of Representatives must “(with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State”); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory, including district 27, with boundaries along the northern and western “boundary line[s] of the Cherokee Nation,” and district 28, described as “lying within the boundaries of the Cherokee Nation”); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 (“common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations”); Act of May 25, 1918, ch. 86, 40 Stat. 561, 581 (“common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations”).

94. Demographic evidence, including the “speedy and persistent movement of white settlers” onto Five Tribes land throughout the late nineteenth and early twentieth centuries, is not helpful in discerning statutory meaning. *McGirt*, 140 S.Ct. at 2473.

95. Historical statements by tribal officials and others supporting an idea that “everyone” in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without reference to any ambiguous statutory direction, were merely prophecies that were not self-fulfilling. *McGirt*, 140 S.Ct. at 2472.

96. As was the case for the Creek Nation, “Congress never withdrew its recognition” of the Cherokee government, and “none of its [later] adjustments would have made any sense if Congress thought it had already completed that job.” *McGirt*, 140 S.Ct. at 2466.

97. Congress shifted its national Indian policy from assimilation to tribal self-governance in the early twentieth century. *See McGirt*, 140 S.Ct. at 2467.

98. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101, et seq.)

99. The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. §5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment.

100. The 1936 OIWA included a section acknowledging tribal authority to adopt constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209.

101. Oklahoma’s long historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is “a meaningless guide for determining what counted as Indian country.” *McGirt*, 140 S.Ct. at 2471.

102. The Five Tribes spent the better part of the twentieth century battling the consequences of the “bureaucratic imperialism” of the Bureau of Indian Affairs (BIA), which

promoted the erroneous belief that the Five Tribes possessed only limited governmental authority. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C.1976), aff'd sub nom. *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) (finding that the evidence “clearly reveals a pattern of action on the part of” the BIA “designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress,” as manifested in “deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act.”).

103. The BIA’s treatment of the Five Tribes, which impeded the Tribes’ ability to fully function as governments for decades, has limited interpretive value and cannot overcome lack of statutory text demonstrating disestablishment. *McGirt*, 140 S. Ct. at 2469, n. 8, citing *Parker*, 136 S. Ct. at 1082.

104. Oklahoma’s fears concerning challenges to past convictions based on a finding of Creek reservation status cannot force the Court “to ignore a statutory promise when no precedent stands before us at all.” *McGirt*, 140 S.Ct. at 2480.

105. Cherokee Nation’s government, like those of other tribes, was strengthened by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301, et seq.).

### **Conclusion**

106. The Cherokee Reservation was established in accordance with Cherokee treaties with the United States.

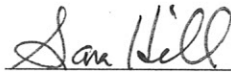
107. Congress has not disestablished the Cherokee Reservation.

108. The Cherokee Reservation boundaries exist as set forth in the 1833 and 1835 treaties, except for lands expressly ceded under the 1886 Cherokee Treaty and the 1891 Agreement ratified in 1893, as currently defined in the Cherokee Constitution.

109. All lands within the boundaries of the Cherokee Nation, including fee land, constitute Indian country as defined by § 1151(a) (Indian reservation).

110. Oklahoma has no subject-matter jurisdiction over crimes covered by the GCA when committed on the Reservation.

Respectfully submitted,



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Sara Hill, OBA No. 20072

*Attorney General*

Chrissi Ross Nimmo, OBA No. 22248

*Deputy Attorney General*

Paiten Taylor-Qualls, OBA No. 33285

*Assistant Attorney General*

Office of Attorney General

Cherokee Nation

P.O. Box 1533

Tahlequah, Oklahoma 74465-1533

(918) 458-6998

chrissi-nimmo@cherokee.org

L. Susan Work, OBA No. 3799

P.O. Box 1545

Norman, Oklahoma 73070

(405) 209-7856

susan@worklawoffice.com

ATTORNEYS FOR CHEROKEE NATION



CERTIFICATE OF MAILING

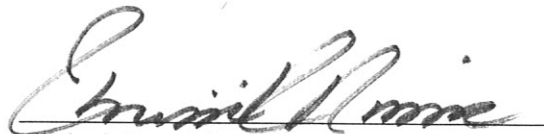
I hereby certify that on the September 14, 2020 a true and correct copy of the above document was hand delivered, emailed or mailed with proper postage fully prepaid thereon, to the following:

Mike Hunter, Attorney General  
Jennifer Crab, Assistant Attorney General  
Caroline Hunt, Assistant Attorney General  
Hannah White, Assistant Attorney General  
State of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
[mike.hunter@oag.ok.gov](mailto:mike.hunter@oag.ok.gov)  
[jennifer.crabb@oag.ok.gov](mailto:jennifer.crabb@oag.ok.gov)  
[caroline.hunt@oag.ok.gov](mailto:caroline.hunt@oag.ok.gov)  
[hannah.white@oag.ok.gov](mailto:hannah.white@oag.ok.gov)

Matt Ballard, District Attorney  
Craig County Courthouse  
210 West Delaware, Suite 202  
Vinita, OK 74301  
[Matt.Ballard@dac.state.ok.us](mailto:Matt.Ballard@dac.state.ok.us)

Travis Hartley  
Daniel Giraldi  
177 West Delaware Ave.  
Vinita, OK 74301  
[travis@hartleylawfirm.com](mailto:travis@hartleylawfirm.com)  
[daniel@hartleylawfirm.com](mailto:daniel@hartleylawfirm.com)

Lisbeth McCarty  
PO Box 926  
Norman, OK 73070  
[Lisbeth.McCarty@oids.ok.gov](mailto:Lisbeth.McCarty@oids.ok.gov)

  
Chrissi Ross Nimmo