McGirt v. Oklahoma: Implications for Minnesota

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“Half the land in Oklahoma could be returned to Native American hands. It should be.” – The Washington Post, November 28, 2020

“Supreme Court says much of eastern Oklahoma remains Indian land” – The Washington Post, July 9, 2020
INDIAN RESERVATION LAND

• Initial creation = (mostly) contiguous trust land
INDIAN RESERVATION LAND

• Initial creation = (mostly) contiguous trust land
• Allotment statute enacted by Congress
• Allotments held in trust for a period of time
• Allotments pass into fee status
• “Surplus” land sold to non-Indians
DOES THE RESERVATION BOUNDARY REMAIN?
Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, 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.
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18 U.S.C. §1151
THE TEST FOR RESERVATION DISESTABLISHMENT: 
SOLEM V. BARTLETT

Only Congress can disestablish a reservation; once an area is set aside as an Indian reservation, regardless of what happens to the title of individual plots of land, it remains an Indian reservation unless Congress says otherwise.

Three-prong test:
1. Language of the statute
2. Legislative history of the statute
3. Events after passage of the statute (e.g., exercise of jurisdiction, modern demographics)
STEP #1: STATUTORY LANGUAGE

Cede + Sum Certain = presumption of disestablishment or diminishment

vs.

Sale of land + $$ per acre = no evidence of disestablishment or diminishment

NOTE: it is the surplus land sale that matters!
STEP #2: LEGISLATIVE HISTORY

- Was there an agreement with the Indian tribe?
- Were reservation boundaries discussed?
STEP #3: SUBSEQUENT EVENTS

• What was the Indian vs. non-Indian population within reservation boundaries (before the statute was enacted, after the statute was enacted, and when the lawsuit is being brought)?

• Who exercised jurisdiction within reservation boundaries after the statute was enacted? (federal, state, tribal)

• What did Congress, the BIA, the state, and the tribe say about the reservation’s existence after passage of the statute?
STEP #3: SUBSEQUENT EVENTS

Usually the Supreme Court says post-enactment history is worthless!

“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition ‘could have had no effect on the congressional vote.’”

“Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.”

The Supreme Court limited the use of this prong in *Nebraska v. Parker*

“Finally, we consider both the subsequent demographic history of opened lands, which serves as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers, as well as the United States’ treatment of the affected areas, particularly in the years immediately following the opening, which has some evidentiary value. Our cases suggest that such evidence might reinforce a finding of diminishment or nondiminishment based on the text. **But this Court has never relied solely on this third consideration to find diminishment.**”

“[E]vidence of the changing demographics . . . is the least compelling evidence in our diminishment analysis . . . . Evidence of the subsequent treatment of the disputed land by Government officials likewise has limited interpretive value.”
SETTLED CASE LAW

• Seymour v. Superintendent, 368 U.S. 351 (1962)
• Mattz v. Arnett, 412 U.S. 481 (1973)
• DeCoteau v. District County Court, 420 U.S. 425 (1975)
• Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)
• Hagen v. Utah, 510 U.S. 399 (1994)
• Nebraska v. Parker, 136 U.S. 1072 (2016)
• Creek Reservation established by treaties in 1832 and 1833
  • The Nation ceded its lands in Alabama and Georgia in exchange for western lands in an 1832 treaty.
  • Land was held in fee simple, at the request of the Tribe
  • An 1833 treaty fixed the borders for a “permanent home to the whole Creek nation”
  • Rights were promised to last forever
  • In an 1856 treaty, the Creek were promised that the reservation would never “be embraced or included within, or annexed to, any Territory or State,” and they would be “secured in the unrestricted right of self-government” with “full jurisdiction” over their members and property.
The Key Facts in *McGirt*

- 1893: Congress directed the Dawes Commission to negotiate with the Creek Nation to allot the reservation and sell the “surplus” lands. The Nation refused to cede or sell any land.

- 1901: The Creek Nation agreed to allotment of the reservation without a land cession/sale. Allotments were inalienable for 21 years and could be sold thereafter.

- No surplus land sale
  - No “cession” language
  - No “sum certain” payment

- No evidence in negotiations/legislative history re: changing reservation boundaries
OKLAHOMA’S ARGUMENT?

If *Solem* is the test to be applied:

- State exercised jurisdiction over this area for 100+ years

- Federal government rarely prosecuted criminal cases

- Modern demographics

= arguing (despite *Parker*, that the 3\textsuperscript{rd} prong should control)

*Solem* shouldn’t apply here:

- Was there ever a Creek Reservation?
  - Fee land
  - Other components

- If Congress limits or attempts to terminate tribal sovereignty, does that disestablish a reservation?
  - Abolishing Creek courts
  - Requiring Presidential approval of certain Creek ordinances
  - Announcing that the Creek government would be terminated in 1906, but later reversing course
HOLD YOUR BREATH!

• Creek Nation not a formal party, but allowed to present at oral argument

• Limited historical record

• If the Court wanted to maintain the status quo as an outcome, how might it alter the law?
5-4

DEcision

Majority (Gorsuch, joined by Ginsburg, Breyer, Sotomayor, Kagan)

Dissent (Roberts, joined by Alito, Kavanaugh, Thomas)
“On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. . . . Today we are asked whether the land these treaties promised remains an Indian reservation for the purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”
“[C]ourts have no proper role in the adjustment of reservation borders. Muster ing the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges – facing no possibility of electoral consequences themselves – will deliver the final push. But wishes don’t make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.”
"When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. That is the only “step” proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. But Oklahoma does not point to any ambiguous language in any of the relevant statutes."

“To avoid further confusion, we restate the point. 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.”
“In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially ‘transformative’ effects of a loss today. . . . If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country. . . Oklahoma and the dissent fear, ‘thousands’ of Native Americans like Mr. McGirt ‘wait in the wings’ to challenge the jurisdictional basis of their state-court convictions . . . In any event, the magnitude of a legal wrong is no reason to perpetuate it.”
“The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe’s authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”
RESERVATION BOUNDARY CASES POST-MCGIRT
Nevertheless, the Supreme Court has inferred Congress's intent to diminish Indian reservation land in the absence of clear language when the events surrounding passage of the law, the manner in which the transaction was negotiated with the tribes, and the legislative reports presented to Congress reveal the widely-held contemporaneous understanding that the reservation would shrink under the legislation. Finally, courts may look to post-legislative events to determine congressional intent, particularly in the years immediately following the legislation, including the way the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands and who moved onto opened reservation lands.

These latter two extratextual factors have “limited interpretive value.” *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452, 2469 (quoting *Nebraska v. Parker*, 577 U.S. 481 (2016)). The value of such evidence “can only be interpretative—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment.” *Id.* In other words, the “only role such materials can properly play is to help ‘clear up ... not create’ ambiguity about a statute's original meaning.” *Id.* When both the act and its legislative history “fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands,” courts “are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.” *Solem*, 465 U.S. at 472.
“We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation. The Oneida Nation prevails under both the *Solem* framework and the adjustments made in *McGirt*."

**ONEIDA NATION V. VILLAGE OF HOBARTH,**
968 F.3d 664
U.S. Court of Appeals for the Seventh Circuit (Sept. 18, 2020)
PENDING CASES WHERE Mcgirt IS BEING USED

• Little Traverse Bay Bands of Odawa Indians v. Whitmer, U.S. Court of Appeals for the Sixth Circuit (pending 2020)

• Confederated Tribes and Bands of the Yakama Reservation v. Klickitat County, U.S. Court of Appeals for the Ninth Circuit (pending 2020)

• Penobscot Nation v. Mills (Frey), 861 F.3d 324 (1st Cir. 2017), vacated for en banc review, 954 F.ed 453 (1st Cir. 2020)
IMPACTS IN OKLAHOMA?
IMPACT OF MCGIRT

- Criminal Jurisdiction
  - Impacts prosecution of Indian defendants (Creek and other tribes)

- Civil Jurisdiction
  - Primarily impacts jurisdiction over Creek citizens
  - ICWA cases
  - Taxation
  - Private lawsuits
IMPACTS IN MINNESOTA?
IMPACT OF *McGirt*

- Reservation boundary case?
- Treaty interpretation/abrogation questions
- Statutory Interpretation