THE CIVIL JURISDICTIONAL LANDSCAPE IN EASTERN OKLAHOMA POST *MCGIRT V. OKLAHOMA*

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Introduction

The Supreme Court's decision in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), has caused considerable unrest in Eastern Oklahoma as non-Indian individuals, businesses, and organizations try to determine how the decision might affect them. That unrest sets the stage for potential conflict and litigation over tribal and state authority in the region.

But, while *McGirt* means that the rules governing civil jurisdiction on Indian reservations now apply to all lands within the Creek Reservation, it is cause for hope, not concern. First, as a practical matter, little is likely to change post-*McGirt*: tribal civil jurisdiction will mostly remain limited to "Indian lands" while the scope of state civil jurisdiction is also likely to remain largely static, although now subject to a somewhat more complicated and fact-specific inquiry. In addition, Congress has already resolved many potentially disputed jurisdictional issues and others have been avoided through successful intergovernmental cooperation between tribes and the State of Oklahoma. Ultimately, then, this overview of a post-*McGirt* world demonstrates that there is no reason "why pessimism should rule the day." *McGirt*, 140 S. Ct. at 2481. Rather than costly winner-take-all litigation or the uncertain outcomes of congressional politics, the decision instead opens the door for a new era of innovative and effective tribal-state relations.

1. Indian Country & *McGirt*: What Changed?

Prior to *McGirt*, "Indian Country" within Oklahoma was believed to include only "Indian lands," those lands held by patent guaranteed by treaty or otherwise held in trust for a tribe, as well as lands held either in trust or restricted fee by individual Indians. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987). In *McGirt*, however, the Supreme Court determined that Congress never disestablished the exterior boundaries of the Creek Reservation. 140 S. Ct. 2452 (2020). As a result, *all lands*—Indian lands and *non-Indian fee* lands—within those boundaries are Indian Country. 18 U.S.C. § 1151(a).

At first, the shift seems seismic—at the very least, the decision dramatically changes the geographic scope where jurisdictional questions may arise. But, by virtue of a string of Supreme Court decisions that largely defer to state interests and muddy the analysis of civil jurisdiction within Indian Country, the practical impact of the change is likely minimal. Instead, just as before, the dividing lines for civil authority within Indian Country continue to be tribal membership and Indian lands. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 557 (1975).

2. Tribal Civil Jurisdiction

Historically, the Supreme Court recognized tribes as distinct political communities exercising authority within reservation borders to the exclusion of state jurisdiction. *Worcester v. Georgia*, 31 U.S. 515, 561

(1832). On Indian lands, the Court has largely retained this traditional view. In *Merrion v. Jicarilla Apache Tribe*, for example, the Court sustained a tribal tax on non-Indian oil and gas lessees operating on tribal trust lands. 455 U.S. 130 (1982). In doing so, the majority relied on both the Tribe's inherent sovereign authority to levy a tax, *id.* at 140–41, and its right to exclude and condition the entry of non-Indians onto Indian lands. *Id.* at 145–47; *see also Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (upholding a similar tribal tax on non-Indian activities on tribal trust lands). By emphasizing that the Tribe's power to tax was not solely the result of its interest in land, the Court suggested that tribal sovereign authority could extend beyond Indian lands.

The Court's analysis of tribal authority over non-Indians on lands owned in fee by non-tribal members has evolved much differently. In *Montana v. United States*, the Court rejected tribal efforts to regulate non-Indian hunting and fishing on non-member owned fee lands within the Crow Reservation, holding that tribal powers are limited to "what is necessary to protect tribal self-government or to control internal relations." 450 U.S. 544, 564 (1981). In doing so, the Court formulated a general rule that tribes lack civil authority over non-Indian conduct on lands not controlled by the Tribe, subject to two exceptions. First, the Court recognized tribal authority to regulate the activities of nonmembers who have entered into "consensual relationships with the tribe or its members," including "commercial dealing[s], contracts, leases, or other arrangements." *Id.* at 565. Second, tribes may retain inherent authority over non-Indians whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

In recent years, both exceptions have been construed narrowly by the Supreme Court. Relying on *Montana*'s dismissive view of tribal sovereignty, the Court has consistently rejected tribal jurisdiction over non-member owned lands, *see, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), and, in one case, suggested (in dicta) that rule may apply on tribal trust lands in limited situations. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). In doing so, the Court has nearly universally upheld "State[ ] interests in regulating the affairs of non-Indians," despite competing tribal claims. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 171 (1973).

The Tenth Circuit has followed the Supreme Court's lead. It recognizes broad tribal power on lands held by the Creek Nation guaranteed by treaty and its original 1852 patent, *Indian Country U.S.A.*, 829 F.2d 967, 975 (10th Cir. 1987); on allotted lands, *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996); and on restricted fee lands. *United Keetoowah Band of Cherokee Indians v. Mankiller*, 2 F.3d 1161 (10th Cir. 1993). Likewise, the Tenth Circuit has applied *Montana* and its exceptions when tribes have sought to regulate non-Indians. *See, e.g., Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); *Enlow v. Moore*, 134 F.3d 993 (10th Cir. 1998).

Accordingly, the Creek Nation continues to exercise broad regulatory authority over tribal members anywhere on the reservation and likely over anyone on Indian lands, individual allotments, and restricted fee parcels. On non-member owned fee lands that were previously not recognized as Indian Country, the Nation must demonstrate that its exercise of authority over non-members would fit the narrow exceptions to the Supreme Court's *Montana* rule.

3. State Civil Jurisdiction

Traditionally, unless Congress said otherwise, state law could "have no force" within Indian Country, *Worcester*, 31 U.S. at 557, and state power over tribes, tribal members, and Indian lands in Indian Country remains substantially limited. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("'[A]bsent cession of jurisdiction or other federal statutes permitting it' . . . a State is without power to tax reservation lands and reservation Indians.") (quoting *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1976)). Conversely, more recent Supreme

Court jurisprudence has upheld greater state power over non-Indians and non-member owned lands in Indian Country, premised on the idea that "[s]tate sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. at 361.

Still, two independent barriers to state authority over non-Indians within Indian Country remain: the preemption of state authority by federal law *or* where state authority would infringe on tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980). Of these, the preemption test has taken center stage in recent decades but this type of preemption is quite different from its constitutional law cousin. Rather than analyzing whether federal law "occupies the field," Indian law preemption requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *Id*. at 145.

This inquiry begins with "the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id*. at 144–145. Accordingly, state action that directly affects tribes, touches on issues traditionally within the sphere of tribal governance, or is subject to the federal-tribal relationship is typically precluded. However, states are generally free to control subject matter beyond these categories "up to the point where tribal self-government would be affected." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 179 (1973) (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The Court applied this test when analyzing Arizona's attempt to tax a non-Indian trucking company that was operating exclusively within the Fort Apache Reservation via a contract with a tribally-owned timber company. *White Mountain Apache Tribe*, 448 U.S. at 145. The Court began by analyzing the extensive federal interests in the case, as demonstrated by the "comprehensive" federal regulations governing tribal timber production. Those federal interests combined with the economic burdens of the tax on the Tribe convinced the Court that the state tax was preempted. *Id.* at 151. A few years later, however, New Mexico sought to tax the same non-Indian oil and gas lessees that, according to *Merrion*, were subject to tribal taxes. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In that case, the Court upheld the state tax after finding no comprehensive federal regulatory scheme, only an indirect impact on the Tribe, and that the state was relying on the tax revenue to support the lessees. *Id*. at 186–87.

Prior to *McGirt*, the *Bracker* tests did not apply in Eastern Oklahoma. Instead, unless Congress said otherwise, the State had limited power over conduct on Indian lands but exercised plenary authority everywhere else, regardless of whether Indians or non-Indians were involved. After *McGirt*, the rule remains the same for Indian lands, but, because all lands within the boundaries of the Creek Reservation are Indian Country, *Bracker* and its progeny now control. Therefore, if a question of jurisdiction involves only Indians, "the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest," so state law will generally be preempted. *Bracker*, 448 U.S. at 144. Otherwise, Oklahoma law will typically still apply unless, on balance with tribal and federal interests, it is preempted by extensive federal control or interferes with "traditional notions of Indian self-government."

4. Conclusion: Pessimism Should Not Rule the Day

Supreme Court precedent strongly indicates that future disputes regarding civil jurisdiction will likely result in outcomes similar to the pre-*McGirt* state of play. This conclusion undoubtedly provides cold comfort in Eastern Oklahoma, given the uncertainty of the fact-specific, case-by-case approach demanded by *Montana* and *Bracker*. Importantly though, these tests need only be a *last resort* for resolving jurisdictional concerns. Further, any uncertainty caused by *McGirt* should be considered in the unique context of Eastern Oklahoma.

First, Congress has already resolved many potential issues through repeated actions to broaden state civil authority in Oklahoma. *See, e.g.*, 25 U.S.C. §§ 355, 375, 375a; 35 Stat. 312. For example, the 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. Likewise, 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.

More relevant for moving forward, the tribes and Oklahoma have forged their own agreements that avoid the uncertainties of congressional politics and judicial balancing tests. These workable solutions address emergency services, education, infrastructure, health care, and taxation, to name a few. *See*, *e.g.*, Brief for *Amici Curiae* Muscogee (Creek) Nation in Support of Petitioner at 36–40, McGirt v. Oklahoma (Feb. 11, 2020) (No. 18-9526). In addition, the tribes and state have negotiated compacts for concurrent jurisdiction over Indian children under the Indian Child Welfare Act, to address vehicle licensing, and, in one of the quickest settlements of its kind, to resolve the water rights of the Chickasaw and Choctaw Nations.

This type of intergovernmental cooperation allows for a more careful balance of tribal and state sovereignty, the pooling of resources, and better consideration of unique local conditions. Citizens across Oklahoma—both tribal and non-Indian—rely on and benefit from these arrangements daily. As a result, this is no time for hasty decisions that may upset the careful balance forged by the Tribes and Oklahoma. Undoubtedly more hard work is needed but, despite the specter of uncertainty lingering after *McGirt*, this history of cooperation gives reason to be optimistic that the decision will spark a brighter, more collaborative future for the Tribes, the State, and all their citizens.