

No. 07-7068 and 15-7041

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PATRICK DWAYNE MURPHY,

Petitioner-Appellant

v.

TERRY ROYAL, WARDEN,

Respondent-Appellee

**MOTION OF THE OKLAHOMA MUNICIPAL LEAGUE
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF PETITION FOR REHEARING
OR REHEARING EN BANC**

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September 28, 2017

The Oklahoma Municipal League respectfully requests that the Court grant it leave to file a brief as *Amicus Curiae* in support of the Appellee's Petition for Rehearing or for Rehearing En Banc, pursuant to Rule 29(d), Federal Rules of Appellate Procedure and Tenth Circuit Rule 29.1. In support of this Motion, Movant would show the Court:

1. The Oklahoma Municipal League ("League") is an Oklahoma not-for-profit corporation created to protect and advocate for the interests of municipalities in Oklahoma. The current membership of the League consists of over four hundred thirty (430) cities and towns throughout the State including numerous cities and towns located within what this Court recognized as the reservation of the Creek Nation.

2. In its August 8, 2017 opinion, this Court held that the original reservation of the Creek Nation had not been disestablished since it was first established in 1866. The League seeks to present to this Court the possible adverse impact the determination of the continued existence of the Creek Nation reservation may have on the ability of local governments to exercise their taxing powers, honor outstanding monetary obligations and obtain funds necessary to provide for the health, safety and welfare of all citizens located within their boundaries.

3. The potential impact of this Court's opinion is of great concern to the

numerous cities and towns whose interests are served by the League. The League believes that the Court should consider the arguments contained in its proposed *Amicus Curiae* Brief in determining whether to grant rehearing or rehearing en banc.

4. As required by Rule 29(b), Federal Rules of Appellate Procedure, the proposed Brief of the league as *Amicus Curiae* is attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 28th day of September, 2017, a true and correct copy of the forgoing was transmitted to the Clerk of this Court for filing and for transmission to the following:

Patti Palmer Ghezzi
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**CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS**

This is to certify that:

1. All required redactions have been made per Tenth Circuit Rule 25.5.
2. Every document submitted in Digital Form or scanned PDF format is an exact copy of the document filed with the Clerk; and
3. The digital submissions have been scanned for viruses with AVG AntiVirus Software Version 17.6.3029, updated September 28, 2017, and according to said program are free of viruses.

/s/ Margaret McMorrow-Love
Margaret McMorrow-Love

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PATRICK DWAYNE MURPHY
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Respondent-Appellee

**PETITION FOR REHEARING
OR
REHEARING EN BANC**

***AMICUS CURIAE* BRIEF IN SUPPORT OF
PETITION FOR REHEARING OR
REHEARING EN BANC OF RESPONDENT-APPELLEE
by
Oklahoma Municipal League**

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September 28, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c), the amicus curiae submits the following corporate disclosure statement as provided in Fed. R. App. P. 26.1.

The Oklahoma Municipal League is an Oklahoma not-for-profit corporation. It does not have a parent entity and no publicly held companies holding a 10% or more interest in the organization. It is deemed an instrumentality of its municipal members.

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Patrick Dwayne Murphy, Appellant, was tried and convicted of murder and sentenced to death through the state court system of Oklahoma. He filed two federal habeas applications pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Oklahoma. In his applications, he asserted, among other arguments, that the Oklahoma state court lacked jurisdiction over him since he is a member of the Creek Nation and the offense occurred in Indian Country. The United States District Court denied relief and Mr. Murphy appealed to this Court.

On August 8, 2017, this Court issued its opinion in favor of Mr. Murphy. In its opinion, this Court held that the original reservation of the Creek Nation had not been disestablished since it was first established in 1866. The boundaries of the Creek Nation reservation encompass all of four counties in Oklahoma as well as portions of seven other counties in eastern Oklahoma¹.

The Oklahoma Municipal League (“League”) is an Oklahoma not-for-profit corporation created to protect and advocate for the interests of municipalities in Oklahoma. The current membership of the League consists of over four hundred thirty cities and towns throughout the State including numerous cities and towns

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Muscogee (Creek) Nation Geospatial Department Geographic Information System at mcngis.com/index.php/maps.

located within what this Court recognized as the reservation of the Creek Nation. The fundamental issue on which the League seeks clarity is the entity that has sovereignty over the lands and people in these areas i.e. the Creek Nation or the State of Oklahoma and its municipalities.

SUMMARY OF ARGUMENT

The League seeks to present to this Court the possible adverse impact the determination of the continued existence of the Creek Nation reservation may have on the ability of local governments to exercise their taxing powers, honor outstanding monetary obligations and obtain funds necessary to provide for the health, safety and welfare of all citizens located within their boundaries.

The League also believes that the Court's holding may result in other tribes in eastern Oklahoma raising issues regarding the relationship between the tribes and their municipal neighbors.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Pursuant to Fed. R. App. P. Rule 29(c)(5), the League states that no party's counsel has authored this brief in whole or in part. It states that no party, counsel for a party or other person have contributed funds in connection with the preparation or submission of this brief. Only funds of the League were used in connection with the preparation and submission of this brief.

ARGUMENT

**THE HOLDING OF THIS COURT THAT THE
CREEK NATION RESERVATION WAS NEVER
DISESTABLISHED MAY ADVERSELY IMPACT
THE ABILITY OF MUNICIPALITIES LOCATED
WITHIN THE DEFINED RESERVATION AREA
TO PROVIDE SERVICES FOR THE HEALTH,
SAFETY AND WELFARE OF THE RESIDENTS**

A. BACKGROUND:

In Section III-Discussion; Subsection C(3)(i)(5), at pages 80-81, of its opinion this Court addressed the creation of “town sites” under the Original Allotment Agreement of 1901 (“Agreement”). It recognized that the Agreement excluded “town sites” from allotment and provided that towns with more than 200 people would be “surveyed, laid out and appraised.” The opinion states, at page 80, that town lots, once sold, were subject to municipal taxation. At footnote 50, it also noted that the Agreement gave municipal corporations the authority to issue bonds and borrow money for public projects.

When adopted, the Agreement contemplated the elimination of the Creek government by March 4, 1906. The Court observed in its opinion that the Creek government was not eliminated pursuant to the adoption of the Five Tribes Act of 1906, ch. 1876, 34 Stat.137, citing *Indian Country, U.S.A., Inc. v. Oklahoma ex.rel. Oklahoma Tax Commission*, 829 F.2d, 967, 978 (10th Cir. 1987), *cert. denied*, 487

U.S. 1218 (1988), in which it noted that “Congress expressly delayed any plans to terminate the tribes, and provided that the tribal governments ‘are hereby continued in full force and effect.’”

On June 16, 1906, the Enabling Act, 34 U.S. St. at large, pp. 267-278, was adopted to provide for the future admission of the State of Oklahoma into the United States. The Constitution of the State of Oklahoma was adopted on July 16, 1907, and went into effect on November 16, 1907².

Since November of 1907, all cities and towns in Oklahoma, including those within the eleven counties, have adopted forms of government under either Article XVIII, Section 3(a) of the Oklahoma Constitution or Title 11 of the Oklahoma Statutes-Cities and Towns. Consequently, no city or town has the same governmental system and may not have the same governmental geographical boundary it had as a “town site.” In addition, an issue arising as a result of the Court’s opinion is the status of municipalities created after November of 1907 that are located within the area of the Creek Nation reservation.

B. MUNICIPAL LAW:

Municipal corporations are created pursuant to Article XVIII, Section 1 of the

2

Pursuant to Article IV, Section 3 of the United States Constitution, Congress had to agree to the admission of the State of Oklahoma into the Union.

Constitution. Section 2 of Article XVIII states that every corporation then in existence would continue with all “present rights and powers” unless otherwise provided by law and would have any additional rights and powers conferred by the Constitution.

Article XXX, Section 10 of the Constitution provides, in part:

Until otherwise provided by law, incorporated cities and towns, heretofore incorporated under the laws in force in the Territory of Oklahoma or in the Indian Territory, shall continue their corporate existence...: Provided, that all valid ordinances now in force in such incorporated cities and towns shall continue in force until altered, amended, or repealed.

This provision included those municipal entities that had already come into existence within the reservation of the Creek Nation via the Agreement that contemplated that the Creek government would cease to exist by March 4, 1906.

A municipality is an arm of the State and derives its authority from the Constitution and statutes. *Shipp v. Southeastern Oklahoma Industries Authority*, 1972 OK 98, 498 P.2d 1395. It has powers incidental to or implied from the powers expressly granted as well as powers necessary to carry out its functions. *Development Industries, Inc. v. City of Norman*, 1966 OK 59, 412 P.2d 953.

The concern presented by the League in this amicus brief is how the determination by this Court that the Creek Nation reservation continues to exist will

or may impact the cities and towns located in the eleven counties that are wholly or partially included in the defined reservation. Specifically, the League believes that clarification is needed as to whether cities and towns may continue to exercise all of their rights and powers in areas that were not encompassed within the original “town sites.”

1. PUBLIC PURPOSE DOCTRINE:

Article X, Section 14 of the Oklahoma Constitution provides, in pertinent part that “Taxes shall be levied and collected by general laws, and for public purposes only...” A public purpose is a purpose that: 1) is affected with a public interest; and 2) is to be performed by the public body in the exercise of its governmental functions. *Board of Commissioners of Marshall County v. Shaw*, 1947 OK 181, 182 P.2d 507.

Article X, Section 17 of the Constitution prohibits municipalities from expending funds for the benefit of any other corporation, association or individual. The Oklahoma Supreme Court has held that no matter how desirable the object of an expenditure may be, public funds may not be spent for a purpose that the municipality has no power to perform. *Board of Commissioners of Grady County v. Hammerly*, 1921 OK 356, 204 P. 445.

Therefore, based on the Court’s determination that the Creek Nation reservation was not disestablished, questions arise concerning any limitations as to:

1) whether municipalities located within the Creek Nation reservation area may continue to expend public funds for the benefit of lands located within the reservation; 2) whether municipalities may assess, levy and collect taxes pursuant to 68 O.S. §2701 in those areas; and 3) whether ad valorem taxes on lands deemed part of the reservation area may be assessed and used to pay judgments as well as indebtedness on general obligation bonds secured by tax levies³.

As part of governmental functions, municipalities are the primary providers of local services and public works. They have traditionally been responsible for operations that provide for the basic health and safety needs of citizens in their communities.

The Oklahoma Constitution, Article X, Section 27, recognizes the constitutional authority of municipalities to incur debt for the purpose of owning and operating public utilities. *Barnes v. Hill*, 1909 OK 29, 99 P. 927. Article X, Section 27A of the Constitution authorizes a city or town, after approval of voters, to contract and pledge revenues for the purpose of purchasing, constructing, acquiring or

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The Oklahoma Supreme Court has held that a levy of an annual ad valorem tax sufficient to pay the interest on general obligation bonds when due and to retire the principal when due must be provided for before or at the time of the indebtedness and failure to do so invalidates the bond issue. *McMahan v. Board of Education of Oklahoma City*, 1930 OK 110, 285 P. 953.

operating water facilities.

Article X, Section 27B to the Constitution, entitled “Political Subdivisions-Public Utilities Financing-Indebtedness,” authorizes cities and towns to borrow money or issue bonds to finance the purchase or construction of public utilities. The indebtedness “shall be payable from and secured by revenues over a term of years...”

In the exercise of their authority to provide such services, municipalities may establish the terms of service, set policies, extend operations outside of their boundaries and may exercise the power of eminent domain for these purposes. *Sable v. Myers*, 563 F.3d 1120 (10th Cir. 2009).

Since November of 1907, municipalities operated under the long held understanding that the Indian reservation lands, including those of the Creek Nation, no longer existed. This understanding was validated and reinforced by the decision of this Court in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), in which this Court stated:

In preparation for Oklahoma’s statehood, the Dawes Commission had already implemented an allotment process with the Five Civilized Tribes that extinguished national and tribal titles to lands within the territory and disestablished the Creek and other Oklahoma reservations. *Id.* at 1124

The holding of this Court calls into question whether municipalities may

continue to collect revenues for public utilities provided on reservation lands to enable them to pay the indebtedness incurred in the construction of those utilities. Furthermore, the holding of this Court could call into question whether a municipality had the power to exercise eminent domain to acquire land now deemed to fall within the Creek Nation reservation for public utility purposes.

2. ECONOMIC GROWTH AND DEVELOPMENT:

The Oklahoma Supreme Court has long recognized that economic development projects serve a legitimate purpose for which public funds may be expended. *Burkhardt v. City of Enid*, 1989 OK 45, 771 P.2d 608. In *State ex rel Brown v. City of Warr Acres*, 1997 OK 117, 946 P.2d 1140, Justice Kauger, in her concurring opinion noted:

Municipalities today compete on a nation-wide level to attract new industries into their locality. A city cannot complete with other cities or even other states if other cities and states are competing with inducements devised under contemporary economic development plans...Economic development plans devised to provide gainful employment, improve living conditions, attract industry and advance the economy...*Id. at ¶9.*

In order to facilitate the ability of cities and towns to stimulate economic growth and development, municipalities must have flexibility in the pledging of revenues and certainty in the bond market in order to finance contemporary economic development

projects.

For example, to assist in carrying out the objective of economic growth and development, the citizens of Oklahoma first adopted and then amended Article X, Section 6C of the Constitution. The Oklahoma Legislature adopted an enabling statute, the Local Development Act, 62 O.S. §850 *et.seq.*, to carry out the intent of Article X, Section 6C. The Act specifically provides for tax increment financing (TIF) i.e. the use of local taxes and fees for public investments. It also allows for the direct apportionment of the taxes and fees. This includes apportionment of both sales and ad valorem taxes.

One of the primary goals of economic development is the creation of jobs for residents of the city or town. These new job opportunities, under both federal and state mandates, are open to all qualified applicants. In turn, the new jobs provide a better quality of life and further economic stimulation.

In order to be able to fulfill the goal of enhancing economic growth and development as authorized by the citizens of Oklahoma in approving the levy and collection of taxes to fund projects, clarity as to what revenues they may pledge and what taxes may be apportioned to pay the principal and interest on bonds would be of material benefit to all Oklahoma municipalities including those located within the eleven counties encompassed in whole or in part within the defined Creek Nation

reservation.

III. CONCLUSION

Amicus Curiae, the Oklahoma Municipal League, respectfully requests that this Court accept this brief that addresses concerns as to the potential impact of the Court's decision on the ability of the multitude of municipal corporations which either came into existence after 1906 or which expanded their borders after being recognized as "town sites" under the Agreement to continue to function and interact with the Creek Nation as they have since statehood.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g), I hereby certify that this Amicus Curiae Brief in support of Petition for Rehearing complies with the word limitation. The brief was prepared by using WordPerfect x5 in Times New Roman 14 point font, proportionally spaced and contains 2,327 words, excluding those items listed in Fed. R. App. P. 32 as not counting toward volume limitation. The word figure was calculated through the use of the word count function on WordPerfect.

I certify that the information on this form is true and correct to the best of my knowledge and belief.

/s/ Margaret McMorrow-Love
Margaret McMorrow-Love

CERTIFICATE OF SERVICE

On this 28th day of September, 2017, a true and correct copy of the forgoing was transmitted to the Clerk of this Court for filing and for transmission to the following:

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