IN THE DISTRICT COURT FOR MCCLAIN COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	**McClain County District Court**
Plaintiff,	)	**No. CF-2010-00213**
	)	
-vs.-	)	**Oklahoma Court of Criminal Appeals**
	)	**No. PCD-2019-124**
	)	
SHAUN MICHAEL BOSSE,	)	
	)	
Defendant.	)	

AMICUS CURIAE CHICKASAW NATION'S BRIEF IN SUPPORT OF THE CONTINUED EXISTENCE OF THE CHICKASAW RESERVATION AND ITS BOUNDARIES

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INTRODUCTION

The Chickasaw Nation ("Nation" or "Chickasaw") is a federally-recognized Indian tribe, *see* 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020), that governs its citizens and territory under a constitution approved by the Secretary of the Interior, *see* Chickasaw Const.[1] The Nation appears only to establish the Chickasaw Reservation and its boundaries still exist.

The Chickasaw Reservation was established by the 1837 Treaty of Doaksville, arts. 1, 2, Jan. 17, 1837, 11 Stat. 573 ("1837 Treaty"), which applied to the Chickasaw Nation the Treaty of Dancing Rabbit Creek, art. 2, Sept. 27, 1830, 7 Stat. 333 ("1830 Treaty") with the Choctaw Nation. The Chickasaw Reservation's boundaries were modified in the 1855 Treaty of Washington with the Choctaw and Chickasaw, art. 2, June 22, 1855, 11 Stat. 611 ("1855 Treaty"). *See infra* Figure 1; see also Chickasaw Const. pmbl. By the 1866 Treaty of Washington with the Choctaw and Chickasaw, Apr. 28, 1866, 14 Stat. 769 ("1866 Treaty"), the Nations ceded lands in their Treaty Territory that lay outside of the Chickasaw Reservation, but otherwise reaffirmed the Chickasaw and Choctaw Nations' rights under prior Treaties. 1866 Treaty arts. 10, 45.

Under federal law all land within the Reservation's boundaries retains reservation status "until Congress explicitly indicates otherwise," *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468-69 (2020) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909))). As Congress has not explicitly

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[1] *Available at* https://chickasaw.net/getattachment/Our-Nation/Government/Chickasaw-Constitution/CN_Constituion_Amended2002.pdf.aspx?lang=en-US.

extinguished the Chickasaw Reservation or its boundaries, the Reservation continues to exist and all land within the Reservation is therefore "Indian country," 18 U.S.C. § 1151(a).

Defendant Shaun Michael Bosse asserts that the State of Oklahoma ("State") lacked jurisdiction to prosecute him for the crimes of which he was convicted because the victims of those crimes were Indians, the crimes were committed within the Chickasaw Reservation, and because all land within the Reservation is "Indian country" under federal law, 18 U.S.C. § 1151(a). Successive Appl. for Post-Conviction Relief 15-33, *Bosse v. State*, No. PCD-2019-124 (Okla. Crim. App. Feb. 20, 2019). For these reasons, Defendant argues, the federal government has exclusive jurisdiction to prosecute him. The parties' Stipulation of September 14 resolved the question whether the victims of his crimes were Indians, but the question whether Defendant committed his crimes in Indian country is outstanding. The Nation's brief only addresses that issue, which is presented here because the crimes of which Defendant was convicted were committed at a location within the boundaries of the Chickasaw Reservation,[2] and thus in Indian country.[3] *See infra* Figure 2.

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[2] The location of the crime is identified as "15734 212th Street, McClain County, Oklahoma," Okla. State Bureau of Investigation, *ATF Examination of the Crime Scene on August 3, 2010* at 1, which is the location indicated as the location of the crime in Figure 2.

[3] The existence of Indian country relates only to which government has jurisdiction to prosecute a particular crime, not to guilt or innocence. *E.g.*, *McGirt*, 140 S. Ct. at 2460.

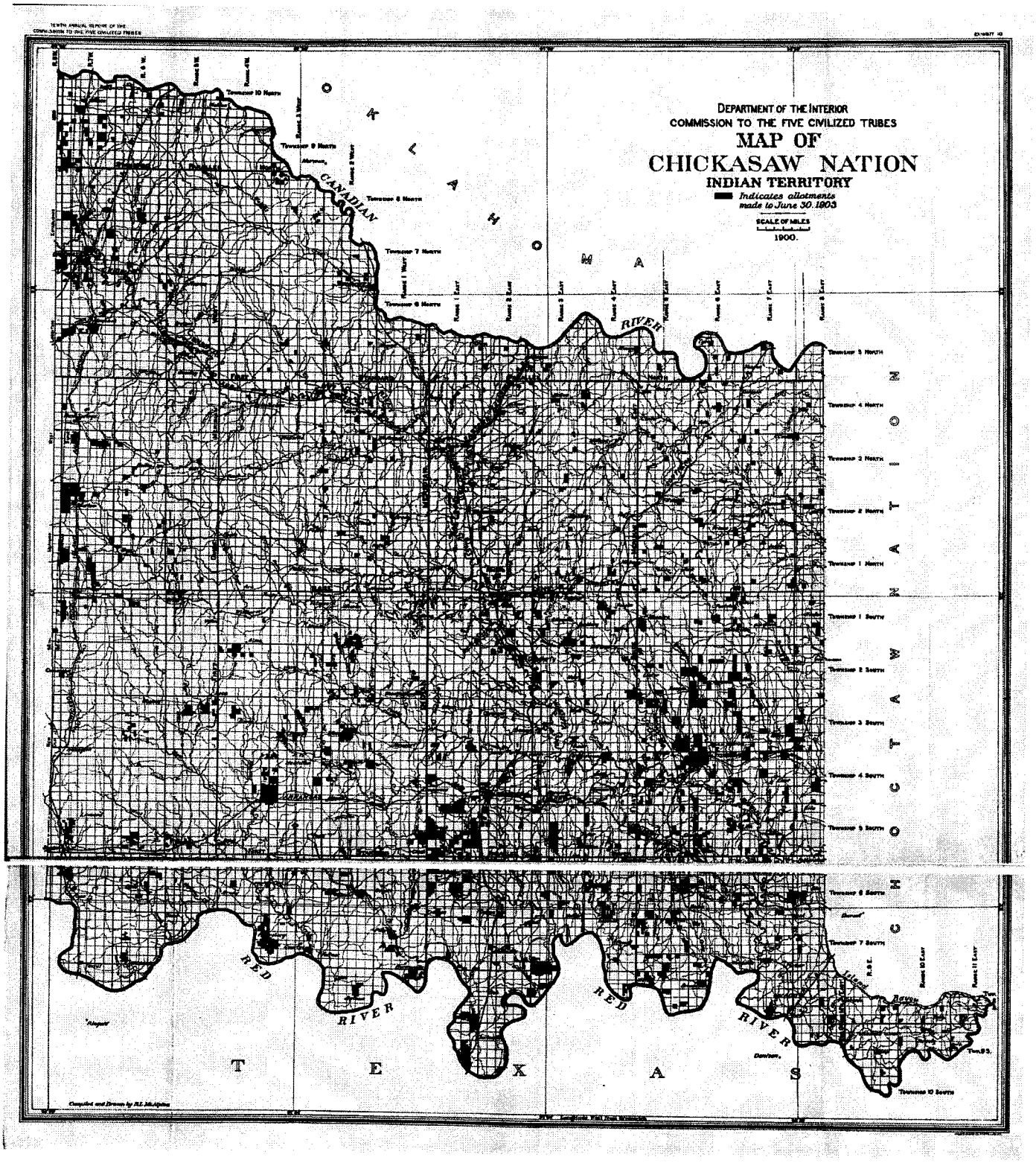

Figure 1: Map of Chickasaw Nation Reservation, Exhibit 10 to *Tenth Annual Report of the Commission to the Five Civilized Tribes*, *in* U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs for the Year 1903* (1903)

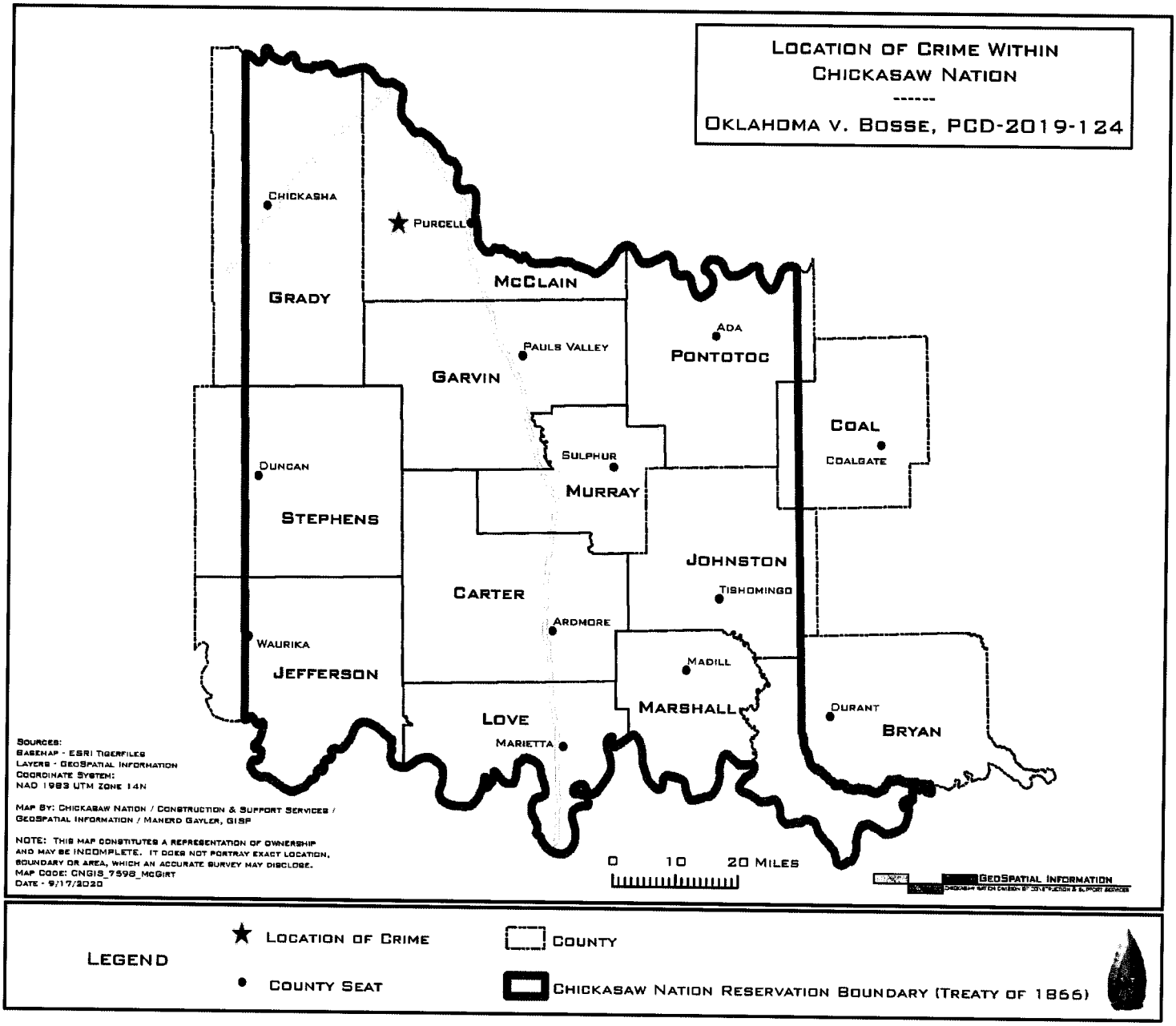

Figure 2: Map of Chickasaw Nation Reservation Showing That the Location of the Crime is Within the Chickasaw Reservation

I. THE SUPREME COURT SET FORTH THE GOVERNING STANDARD FOR WHETHER A RESERVATION EXISTS IN *MCGIRT V. OKLAHOMA*.

In *McGirt*, the Supreme Court set forth the controlling principle of federal law that determines whether an Indian reservation continues to exist: "once a reservation is established, it retains that status 'until Congress explicitly indicates otherwise,'" 140 S. Ct. at 2468-69 (quoting *Solem*, 465 U.S. at 470 (citing *Celestine*, 215 U.S. at 285)).[4] The "only 'step' proper for a court of law" in applying that rule is to interpret the relevant statutes and to "follow the[ir] original meaning." *Id.* at 2468. Neither historical events, nor demographics . . . are part of the analysis, as neither "can suffice to disestablish or diminish reservations." *Id.* at 2468-69.

The *McGirt* Court "[s]tart[ed] with what should be obvious: Congress established a reservation for the Creeks." *Id.* at 2460. This was shown by Creek Treaties that "not only 'solemnly guarantied' the land but also 'establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians.'" *Id.* (first quoting Treaty of Cusseta art. XIV, Mar. 24, 1832, 7 Stat. 366 ("1832 Creek Treaty"); and then quoting Treaty of Fort Gibson pmbl., Feb. 14, 1833, 7 Stat. 417 ("1833 Creek Treaty")). Those promises were made to secure the Creeks' agreement to cede all their lands east of the Mississippi River, and remove west of the River. *Id.* (quoting 1832 Creek Treaty arts. I, XII). The President was authorized to make these promises, and to grant the Creek Reservation in fee, by the Indian Removal Act of 1830, ch. 148, 4 Stat. 411 ("Indian

[4] As the Court explained, all land within an Indian reservation is "Indian country" under federal law, "notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." *Id.* at 2459, 2464 (quoting 18 U.S.C. § 1151(a)).

Removal Act"). *McGirt*, 140 S. Ct. at 2460 (quoting Indian Removal Act § 3, 4 Stat. at 412).

By the 1833 Creek Treaty, the Creek Reservation was to be granted in fee and held by the Creeks "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 140 S. Ct. at 2461 (quoting 1833 Creek Treaty art. III). Later, "Congress promised that 'no portion' of the Creek Reservation 'shall ever be embraced or included within, or annexed to, any Territory or State,'" *id.* (quoting 1856 Treaty of Washington with the Creeks and Seminoles art. IV, Aug. 7, 1856, 11 Stat. 699 ("1856 Creek Treaty")), and with certain exceptions, also promised "'the unrestricted right of self-government,' with 'full jurisdiction' over enrolled Tribe members and their property," *id.* (quoting 1856 Creek Treaty art. XV). These guarantees were later re-affirmed in the 1866 Treaty of Washington with the Creek, June 14, 1866, 14 Stat. 785 ("1866 Creek Treaty"). *McGirt*, 140 S. Ct. at 2461 n.1 (quoting 1866 Creek Treaty art. XII). "Under any definition, this was a reservation." *Id.* at 2462.

To decide whether the Creek Reservation had been disestablished, the Court applied the fundamental rule that "'[o]nly Congress can divest a reservation of its land and diminish its boundaries,'" *id.* (quoting *Solem*, 465 U.S. at 470), which "require[s] that Congress clearly express its intent to do so, '[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *Id.* at 2463 (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)). The Court also made clear that "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citing *Mattz v.*

Arnett, 412 U.S. 481, 497 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-58 (1962); *Parker*, 136 S. Ct. at 1079-80). In the statutes that allotted the Creek Reservation, the Court found no "statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," *id.* at 2464 (quoting *Parker,* 136 S. Ct. at 1079), and concluded that "the Creek Reservation survived allotment." *Id.*

Nor did Congress disestablish the Creek Reservation by "intrud[ing] on the Creek's promised right to self-governance during the allotment era," as Congress had "left the Tribe with significant sovereign functions over the lands in question." *Id.* at 2465-66. And while Congress had "cut[] away further at the [Five] Tribe[s'] autonomy" in the Five Tribes Act of 1906, ch. 1876, 34 Stat. 137, in that Act "Congress expressly recognized the Creek's 'tribal existence and present tribal governmen[t]' and 'continued [them] in full force and effect for all purposes authorized by law.'" *Id.* at 2466 (alterations in original) (quoting Five Tribes Act, § 28, 34 Stat. at 148). And Congress later restored the sovereignty it had earlier withdrawn, which the Creek exercises today. *Id.* at 2466-67. In sum, "there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2468.

When considered under these rules, the Chickasaw Nation's Treaties show Congress established the Chickasaw Reservation, that the Reservation continues to exist within boundaries defined by Article 2 of the 1855 Treaty, and that all land within the boundaries of the Reservation is Indian country under 18 U.S.C. § 1151(a).

II. THE CHICKASAW RESERVATION AND ITS BOUNDARIES WERE ESTABLISHED BY TREATIES THAT ARE THE LAW OF THE LAND.

As in *McGirt*, we start by showing that Congress established the Chickasaw Reservation. The 1837 Treaty established that Reservation within the Treaty Territory that the 1830 Treaty had granted to the Choctaw Nation, defined the Reservation boundaries, and promised the Chickasaw Nation the sovereign autonomy that the 1830 Treaty had secured to the Choctaw Nation. The 1855 Treaty reaffirmed the Chickasaw Reservation's existence, modified and explicitly set forth its boundaries, and reaffirmed the Chickasaw Nation's sovereign autonomy. And the 1866 Treaty reaffirmed those rights.

A. The 1837 Treaty Established The Chickasaw Reservation Within The Treaty Territory That The 1830 Treaty Granted To The Choctaw Nation.

The Chickasaw Reservation was established by the 1837 Treaty, which made provisions of the Choctaw Nation's 1830 Treaty applicable to the Chickasaw Nation. In the 1830 Treaty, the Choctaw Nation ceded their lands east of the Mississippi River and "agree[d] to move beyond the Mississippi River, early as practicable . . . ." *Id.* art. 3. In exchange, the Choctaw Nation secured a new homeland to be granted in fee, with boundaries that were explicitly defined, to be held by them for as long as "they shall exist as a nation and live on it." *Id.* art. 2. As the *McGirt* Court explained, the Indian Removal Act authorized the President's representatives to agree to these terms. In that Act:

> Congress authorized the President "to assure the tribe . . . that the United States will forever secure and guaranty to them . . . the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the [Indian Removal Act] continued, "the United States will cause a patent or grant to be made and executed to them for the same; *Provided*

> *always*, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same." *Ibid.*

McGirt, 140 S. Ct. at 2460 (quoting Indian Removal Act § 3, 4 Stat. at 412).

Article 4 of the 1830 Treaty guaranteed the Choctaw "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State." *Id.*

These same rights were secured to the Chickasaw Nation under the 1837 Treaty. They had ceded their remaining lands east of the Mississippi in the Treaty of Pontitock Creek art. 1, Oct. 20, 1832, 7 Stat. 381, and agreed to "seek a home in the west," *id.* pmbl. By the 1837 Treaty, they were granted a "district within the limits of [the Treaty Territory]," and guaranteed the same rights of homeland ownership and occupancy that the Choctaw held under the 1830 Treaty:

> It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws,) to be called the Chickasaw district of the Choctaw Nation . . . .

1837 Treaty art. 1. The 1837 Treaty also expressly defined the boundaries of the Chickasaw district. *Id.* art. 2. These terms were expressly authorized by the Indian Removal Act § 1, 4 Stat. 411-12 (authorizing the President to establish "districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there"). In addition, the 1837 Treaty secured to the Chickasaw

Nation "all the rights and privileges" of the Choctaw Nation under the 1830 Treaty. *Id.* art. 1; *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995) (Article 1 of the 1837 Treaty applied the 1830 Treaty to the Chickasaw Nation). These terms established the Chickasaw Reservation and the Chickasaw Nation's sovereign autonomy on that Reservation.

In 1842, President John Tyler conveyed fee patented title to the Treaty Territory to the Choctaw Nation ("1842 Patent"), reciting the terms of Article 2 in the patent and expressly reserving the Treaty Territory from sale without their consent, *Fleming v. McCurtain*, 215 U.S. 56, 58 (1909) (first quoting 1830 Treaty art. 2; and then quoting 1842 Patent).

B. The 1855 Treaty Reaffirmed The Chickasaw Reservation, Modified Its Western Boundary, And Reaffirmed The Chickasaw Nation's Sovereign Autonomy, And The 1866 Treaty Reaffirmed Those Rights.

In the 1855 Treaty, the Choctaw and Chickasaw Nations' common ownership of the Treaty Territory was expressly reaffirmed, "the boundaries of the Choctaw and Chickasaw country" were modified and as modified explicitly set forth, and Congress promised that "pursuant to an act of Congress approved May 28, 1830 [i.e., the Indian Removal Act], the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes." *Id.* art. 1. The 1855 Treaty also explicitly reserved those lands from sale "without the consent of both tribes." *Id.*

In addition, the 1855 Treaty reaffirmed the existence of the Chickasaw district, and modified its boundaries, which were explicitly defined as follows:

> A district for the Chickasaws is hereby established, bounded as follows, to wit: Beginning on the north bank of Red River, at the mouth of Island Bayou, where it empties into Red River, about twenty-six miles in a straight line, below the mouth of False Wachitta; thence running a northwesterly course, along the main channel of said bayou, to the junction of the three prongs of said bayou, nearest the dividing ridge between Wachitta and Low Blue Rivers, as laid down on Capt. R. L. Hunter's map; thence northerly along the eastern prong of Island Bayou to its source; thence due north to the Canadian River; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red River; and thence down Red River to the beginning: Provided, however, If the line running due north, from the eastern source of Island Bayou, to the main Canadian shall not include Allen's or Wa-pa-nacka Academy, within the Chickasaw District, then, an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district, north, west and south from the lines of boundary.

Id. art. 2. The 1855 Treaty also provided "[t]he remainder of the country held in common by the Choctaws and Chickasaws, shall constitute the Choctaw district." *Id.* art. 3.

The 1855 Treaty also reaffirmed the Chickasaw and Choctaw Nations' rights of self-government by providing that "[s]o far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes," the Chickasaw and Choctaw Nations "*shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits . . . .*" *Id.* art. 7 (emphasis added).

Finally, the Choctaw Nation did "absolutely and forever quit-claim and relinquish to the United States all their right, title, and interest in, and to any and all lands, west of the one hundredth degree of west longitude;" *id.* art 9, which altered the western boundary of the Treaty Territory, *see* 1855 Treaty art. 1, and the Choctaw and Chickasaw Nations

agreed to lease to the United States their lands "west of the ninety-eighth degree of west longitude." 1855 Treaty art. 9.[5]

The Chickasaw and Choctaw Nations entered into the 1866 Treaty following the Civil War. The 1866 Treaty ended any remaining hostilities by providing that "[p]ermanent peace and friendship are hereby established between the United States and said nations," and promising mutual amnesty. *Id.* arts. 1, 5. The Nations also "cede[d] to the United States the territory west of the 98 degrees west longitude, known as the leased district," for a sum certain of three hundred thousand dollars, *id.* art. 3, which altered the western boundary of the Chickasaw and Choctaw country, but not that of the Chickasaw district, earlier set as the "ninety-eighth degree of west longitude," 1855 Treaty art. 2.

The 1866 Treaty also reaffirmed the Nations' rights of self-government, *id.* art. 7, and all pre-existing Treaty rights of the Chickasaw and Choctaw Nations not inconsistent with the 1866 Treaty. *Id.* arts. 10, 45.

C. The Chickasaw And Choctaw Nations' Treaties Established The Chickasaw Reservation Just As The Creek Treaties Established The Creek Reservation.

The Chickasaw and Choctaw Nations' Treaties established the Chickasaw Reservation for the same reasons that the *McGirt* Court held that the Creek Nation's Treaties established the Creek Reservation.

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[5] These terms did not alter the western boundary of the Chickasaw district, which Article 2 of the 1855 Treaty had established as the "ninety-eighth degree of west longitude." *Id.*

1. The Chickasaw and Choctaw Nations' Treaties establish the Chickasaw Reservation in terms that parallel those of the Creek Treaties.

The Chickasaw and Choctaw Nations' Treaties established the Chickasaw Reservation for the same reasons that the *McGirt* held that the parallel terms of the Creek Treaties established the Creek Reservation.

By the 1830 Treaty, the Choctaw Nation was granted "a tract of country west of the Mississippi River, in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it," with boundary lines that were expressly defined (the "Treaty Territory"), *id.* art. 2. By the 1837 Treaty, the Chickasaw Reservation was established within the Treaty Territory, *id.* art. 1, the boundaries of the Chickasaw Reservation were expressly defined, *id.* art. 2, and the Chickasaw were granted "all the rights and privileges" of the Choctaw Nation under the 1830 Treaty, *id.* art. 1. In addition, the rights of the Choctaw Nation to "the jurisdiction and government of all the persons and property that may be within their limits west," 1830 Treaty art. 4, and the promise "that no part of the land granted them shall ever be embraced in any Territory or State," *id.*, were made applicable to the Chickasaw Nation, 1837 Treaty art. 1.

These terms parallel those of the 1832 and 1833 Creek Treaties that established the Creek Reservation, *see supra* at 5-6, and were made to secure the agreement of the Chickasaw and Choctaw Nations to remove west of the Mississippi, 1830 Treaty, art. 3; 1837 Treaty, art. 2, as were the promises made to the Creeks in the 1832 Creek Treaty, *see supra* at 5. In addition, the government was authorized to grant the Treaty Territory in fee

by the Indian Removal Act, as it was with the Creek. *McGirt*, 140 S. Ct. at 2460 (citing Indian Removal Act, § 3, 4 Stat. at 412).

In the 1855 Treaty, the Treaty Territory boundaries were modified and reaffirmed as modified, and it was "forever secure[d] and guarantee[d]" to the Chickasaw and Choctaw Nations, *id.* art. 1; the existence of the Chickasaw Reservation was reaffirmed, its boundaries modified and reaffirmed as modified, *id.* art. 2; and the Choctaw district was established, *id.* art. 3. All lands within the Treaty Territory, and thus all lands within the Chickasaw Reservation, were explicitly reserved from sale without the consent of both Nations. *Id.* art. 1. In addition, the Nations were promised "the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits." *Id.* art. 7. These terms parallel those of the 1856 Creek Treaty, *see supra* at 6.

And in the 1866 Treaty, the boundaries of the Treaty Territory were modified by an explicit cession to the United States of the lands west of 98 degrees west longitude, which was done for a sum certain. *Id.* art. 3. The 1866 Treaty also expressly reaffirmed the Nations' rights of self-government, *id.* art. 7, and all pre-existing Treaty rights of the Chickasaw and Choctaw Nations not inconsistent with the 1866 Treaty, *id.* arts. 10, 45. These terms accord with those of the 1866 Creek Treaty. *See McGirt*, 140 S. Ct. at 2461.

As *McGirt* makes clear, it makes no difference that the Chickasaw and Choctaw Nations' Treaties did not use the word "reservation" to describe the Chickasaw Reservation, as the Court "ha[s] found similar language in treaties from the same era sufficient to create a reservation." *Id.* (citing *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968) (grant of land "for a home, to be held as Indian lands are held," established

a reservation)). Indeed, in *Atlantic & Pacific R.R. v. Mingus*, the Supreme Court determined that the Indian Territory lands which had been granted to the Choctaw, Cherokee, and Creek under their treaties "were *reserved* lands, within the meaning of [the Act of July 27, 1866, ch. 278, § 2, 14 Stat. 292, 294 ("1866 Act")]," which excluded lands that had been "granted, sold, *reserved*, occupied by homestead settlers, or pre-empted or otherwise disposed of" from land grants to railroads. 165 U.S. 413, 435 (1897) (emphasis added) (citation omitted) (quoting § 2 of the 1866 Act). The Court further held that the railroad could not insist that the government extinguish Indian title to the land without "proving that the Indians were willing to make the cession," relying here on § 17 of the 1866 Act, "which authorized the [railroad] company to accept grants from '*any Indian tribe or nation through whose reservation* the road herein provided for may pass,' provided that any such grant" was approved by the President. *Id.* at 438-39 (emphasis added).

The Court concluded that Indian Territory "stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered as an independent country." *Id.* at 435-36. This was shown for the Cherokee by Article 5 of the Treaty of New Echota, Dec. 29, 1935, 7 Stat. 478, for the Choctaw by Article 4 of the 1830 Treaty, and for the Creek by Article 14 of the 1832 Creek Treaty. *Mingus*, 165 U.S. at 436. In sum, *Mingus* confirms that the Treaty Territory set aside under the 1830 Treaty is an Indian reservation under federal law, and therefore the Chickasaw district established within the Treaty Territory under the 1837 Treaty is also an Indian reservation. As the *McGirt* Court held with respect to the Creek Reservation, "[u]nder any definition, this was a reservation." 140 S. Ct. at 2462.

2. The grant of the Treaty Territory in fee does not affect the reservation status of the Chickasaw Reservation.

As the Supreme Court held in *McGirt*, it makes no difference that the Treaty Territory, and therefore the Chickasaw Reservation, is held in fee:

> Just as we have never insisted on any particular form of words when it comes to disestablishing a reservation, we have never done so when it comes to establishing one. *See Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902) ("[I]n order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been there results a certain defined tract appropriated to certain purposes"). As long as 120 years ago, the federal court for the Indian Territory recognized all this and rightly rejected the notion that fee title is somehow inherently incompatible with reservation status. *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900).

McGirt, 140 S. Ct. at 2475.

In addition, the Indian Removal Act had expressly authorized the President to grant Indian tribes a district west of the Mississippi in exchange for their eastern lands, and "if they prefer it, . . . [to] cause a patent or grant to be made and executed to them for the same." Indian Removal Act § 3, 4 Stat. at 412; *McGirt*, 140 S. Ct. at 2460. The President's representatives did just that in the 1830 Treaty, granting the Treaty Territory "in fee simple . . . to insure to them while they shall exist as a nation and live on it." *Id.* art. 2. And the 1855 Treaty modified and reaffirmed that grant, relying on "an act of Congress approved May 28, 1830 [i.e., the Indian Removal Act]," to "hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common." *Id.* art. 1. As the Court concluded in *McGirt*, it is an "untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less." 140 S. Ct. at 2476.

Any such suggestion is also rejected by the Supreme Court's decision in *Choctaw Nation v. Oklahoma*, which relied on the exceptional force of the 1830 Treaty to hold that the Choctaw and Chickasaw Nations own the banks and beds of the Arkansas River within the boundaries of the Treaty Territory.[6] 397 U.S. 620, 631-35 (1970). The Court further held that those boundaries are subject to the same rules that apply to a "boundary between nations or states," emphasizing that the grant to the Nations was made to them "as 'a political society.'" *Id.* at 631 n.8 (quoting *Barney v. Keokuk*, 94 U.S. 324, 337 (1877)). Rejecting the State's claim that it owned the river bed, the Court reasoned that "would have meant that [the Nations] were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low" even though "[i]n many respects . . . the Indians were promised *virtually complete sovereignty* over their new lands." *Id.* at 635 (emphasis added) (citing *Mingus*, 165 U.S. at 435-36); *cf. Montana v. United States*, 450 U.S. 544, 555 n.5 (1981) (discussing the unique strength of these treaties in contrast to other Indian treaties).

In *McGirt*, the Court also rejected the argument "that a reservation must be land 'reserved from sale,'" *id.* at 2475 (quoting *Celestine*, 215 U.S. at 285), holding that under the Treaties that established the Creek reservation, "the [Creek] land *was* reserved from sale in the very real sense that the government could not 'give the tribal lands to others, or to appropriate them to its own purposes,' without engaging in 'an act of confiscation.'" *Id.*

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[6] The Court recognized that under the 1837 and 1855 Treaties, the Chickasaw held "an undivided one-fourth interest" in the Choctaw lands granted under the 1830 Treaty. 397 U.S. at 626-27.

(quoting *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)). That holding applies with equal force to the fee lands of all of the Five Civilized Tribes[7] as their lands, similar to those of the Pueblo Indians, are "subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs," *United States v. Sandoval*, 231 U.S. 28, 48 (1913) (citations omitted), which does not "enable the government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Shoshone Tribe of Wind River Reservation v. United States*, 299 U.S. 476, 497 (1937) (quoting *Creek Nation*, 295 U.S. at 110 (citations omitted)). In addition, the 1842 Patent expressly provides that the Treaty Territory is "*liable to no transfer or alienation except to the United States or with their consent.*" *Fleming*, 215 U.S. at 58 (emphasis added) (quoting 1842 Patent (quoting 1830 Treaty art. 2)). And the 1855 Treaty expressly promises that "[n]o part [of the Chickasaw and Choctaw country] shall ever be sold without the consent of both tribes," *id.* art. 1, which includes the lands of the Chickasaw Reservation, *id.* arts. 1, 2.[8]

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[7] The "Five Civilized Tribes" refers to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations, *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 970 n.2 (10th Cir. 1987), each of whom was removed from the southeastern United States and relocated west of the Mississippi River, in present-day Oklahoma. *Id.* at 971. We refer to these tribes collectively as the "Five Tribes."

[8] In *McGirt*, the Court also rejected the argument that the Creek treaties only created a "dependent Indian community" under 18 U.S.C. § 1151(b) (defining Indian country to include "all dependent Indian communities within the borders of the United States"). *See McGirt*, 140 S. Ct. at 2474-76. For the reasons shown *supra* at 8-19, the Chickasaw district would be Indian country even if it were not a "reservation." *See McGirt*, 140 S. Ct. at 2474.

III. THE CHICKASAW RESERVATION AND ITS BOUNDARIES HAVE NOT BEEN EXTINGUISHED AND CONTINUE TO EXIST

A. Only Congress Can Disestablish A Reservation, And Congress May Only Do So By Clear Language That Surrenders All Tribal Interests.

As the Supreme Court made clear in *McGirt*, "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." 140 S. Ct. at 2462. While Congress's "significant constitutional authority" over tribal relations includes "the authority to breach its own promises and treaties," *id.* (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68 (1903)), that authority "belongs to Congress alone," and the Supreme Court will not "lightly infer such a breach once Congress has established a reservation," *id.* (citing *Solem*, 465 U.S. at 470).

McGirt also makes clear that "[u]nder our Constitution, States have no authority to reduce federal reservations lying within their borders," as the Constitution "entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'supreme Law of the Land.'" *Id.* (citing U.S. Const. art. I, § 8 and art. VI, cl. 2). "Likewise, courts have no proper role in the adjustment of reservation borders." *Id.* "'[O]nly Congress can divest a reservation of its land and diminish its boundaries.'" *Id.* (alteration in original) (quoting *Solem*, 465 U.S. at 470).

In addition, Congress only disestablishes a Reservation by enacting legislation that makes an "'[e]xplicit reference to cession' or an 'unconditional commitment . . . to compensate the Indian tribe for its opened land,'" *id.* (quoting *Solem*, 465 U.S. at 470), or that "direct[s] that tribal lands shall be 'restored to the public domain,'" *id.* (quoting *Hagen v. Utah*, 510 U.S. 399, 412 (1994)). "Likewise, Congress might speak of a reservation as

being 'discontinued,' 'abolished,' or 'vacated.'" *Id.* at 2463 (quoting *Mattz*, 412 U.S. at 504 n.22). In sum, while "[d]isestablishment has 'never required any particular form of words,'" *id.* (quoting *Hagen*, 510 U.S. at 411), "it does require that Congress clearly express its intent to do so, '[c]ommon[ly with an] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests,'" *id.* (alterations in original) (quoting *Parker*, 136 S. Ct. at 1079).

Applying this standard establishes that Congress has not extinguished the Chickasaw Reservation, nor has Congress altered the boundaries of the Chickasaw Reservation, with the sole exception of the explicit modification set forth in Article 2 of the 1855 Treaty, which established the western boundary of the Chickasaw Reservation as the "ninety-eighth degree of west longitude." 1855 Treaty art. 2.

B. Congress Does Not Extinguish A Reservation By Allotting Lands To Tribal Members Or Permitting Nonmembers To Purchase Reservation Lands.

As the *McGirt* Court explained, "[s]tarting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members." 140 S. Ct. at 2463 (citation omitted). Once "all the lands had been allotted and the trust expired, [then] the reservation could be abolished.'" *Id.* at 2464-65. But a reservation is not disestablished simply because Congress planned to do so, nor even if it nearly did so.

Nor does allotment extinguish a reservation. "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *Id.* at 2464 (citing and quoting *Mattz*, 412 U.S. at 497 ("[A]llotment

under the . . . Act is completely consistent with continued reservation status"); *Seymour*, 368 U.S. at 356-58 ("allotment act 'did no more than open the way for non-Indian settlers to own land on the reservation'"); *Parker*, 136 S. Ct. at 1079-80 ("'[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement . . . . Such schemes allow non-Indian settlers to own land on the reservation' . . . ")). As the *McGirt* Court explained, "[t]he federal government issued its own land patents to many homesteaders throughout the West . . . . But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another." *Id.* (citation omitted). And "there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally."[9] *Id.* That reasoning is directly applicable to the Treaty Territory set aside under the 1830 Treaty, whose boundaries are subject to the same rules that apply to a "boundary between nations or states," *Choctaw Nation*, 397 U.S. at 631 n.8 (quoting *Barney*, 94 U.S at 337).

C. Neither The Chickasaw Reservation, Nor Its Boundaries, Were Extinguished By The Allotment Era Legislation.

The Allotment Era legislation did not extinguish the Chickasaw Reservation or its boundaries because it contains no language by which "Congress clearly express[ed] its

[9] As the Court further concluded "such an arrangement seems to be contemplated by § 1151(a)'s plain terms," *id.* (citing *Seymour*, 368 U.S. at 357-58), "by including within the definition of Indian country "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." *Id.* (alteration in original) (quoting 18 U.S.C. § 1151(a)).

intent to do so," *McGirt*, 140 S. Ct. at 2463. More specifically, that legislation contains no "'[e]xplicit reference to cession' or an 'unconditional commitment . . . to compensate the Indian tribe for its opened land,'" *id.* at 2462 (quoting *Solem*, 465 U.S. at 470), neither does it "direct that tribal lands shall be 'restored to the public domain,'" *id.* (quoting *Hagen*, 510 U.S. at 412), nor does it "speak of [the Chickasaw] reservation as being 'discontinued,' 'abolished,' or 'vacated.'" *Id.* at 2463 (quoting *Mattz*, 412 U.S. at 504 n.22).

The Allotment policy was brought to bear on the Five Tribes by the Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645-46, § 16 of which established the Dawes Commission and charged it with persuading the Five Tribes either to cede territory to the United States or to allot their lands to tribal citizens. *See McGirt*, 140 S. Ct. at 2463. The Dawes Commission determined that the Five Tribes would not cede their lands, *id.* (quoting S. Misc. Doc. No. 24, at 7 (1894)[10]); *see also Indian Country, U.S.A.*, 829 F.2d at 977-78, and Congress then turned to allotment.

In *McGirt*, the Court reviewed the Creek allotment legislation, and found that it did not extinguish the Creek Reservation. The Act of June 30, 1902, ch. 676, 31 Stat. 861 ("1901 Creek Allotment Agreement") established procedures for allotting most of the Creek Reservation to Creek citizens in restricted fee and that limited their ability to sell or alienate the lands. *McGirt*, 140 S. Ct. at 2463 (citing 1901 Creek Allotment Agreement §§ 3, 7, 31 Stat. at 862-64). Allotment then proceeded, *id.* (citing 1901 Creek Allotment

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[10] *Available at* https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=7309&context=indianserialset.

Agreement § 23, 31 Stat. at 867-68), and shortly thereafter, Congress eased many of the restrictions on alienation of allotments, *id.* (citing Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312 ("1908 Act")). These enactments did not extinguish the Reservation because "[m]issing in all this . . . is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands." *Id.* at 2464. That conclusion also applies to the Chickasaw Reservation.

1. The Atoka Agreement did not extinguish the Chickasaw Reservation or its boundaries.

The Chickasaw Nation's Reservation lands were allotted under the Atoka Agreement, set forth in the Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 505 ("Curtis Act"), and the Act of July 1, 1902, ch. 1362, 32 Stat. 641 ("1902 Act").[11] The Atoka Agreement provided for the allotment of the Chickasaw Nation's lands to individual Tribal members "so as to give each member of these tribes so far as possible a fair and equal share thereof," 30 Stat. at 505-06, but exempted lands for the Nations' capitol buildings, "all court houses and jails and other public buildings," and lands for specifically identified schools, seminaries, missionaries, orphanages, and churches. *Id.* at 506. That is, it exempted lands necessary for the Chickasaw Nation to continue to "exist as . . . a nation and live on" the Treaty Territory, 1830 Treaty art. 2.

Each allottee was entitled to select a homestead from his or her allotment of 160 acres, which was to remain inalienable for 21 years. 30 Stat. at 507. Title to the allotted

[11] Section 30 of the Curtis Act contained a proposed allotment agreement with the Creeks, which they rejected, *Woodward v. De Graffenried*, 238 U.S. 284, 308 (1915), and later entered into the 1901 Creek Allotment Agreement.

lands was to be conveyed by "the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation . . . under their hands and the seals of the respective nations, and deliver[ed] to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him." *Id.* In short, the Atoka Agreement simply provided for the allotment of the Nations' lands within their country by their leaders.

Nor did the Atoka Agreement extinguish the boundaries of either the Treaty Territory or the Chickasaw Reservation within that territory. To the contrary, the Atoka Agreement relied on the existence of the Treaty Territory boundaries to implement its terms. The United States was to maintain records of "land titles in the territory occupied by the Choctaw and Chickasaw tribes," 30 Stat. at 508; all coal and asphalt "within the limits of the Choctaw and Chickasaw nations" was to remain their common property, *id.* at 510; and "the United States agree[d] to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality," *id.* at 509. In addition, federal jurisdiction was extended for certain specific purposes over "the territory occupied by the Choctaw and Chickasaw tribes." *Id.* at 511. In sum, the Atoka Agreement does not "evinc[e] anything like the 'present and total surrender of all tribal interests' in the affected lands," *McGirt*, 140 S. Ct. at 2464, much less language that could extinguish the Reservation boundaries.

2. The 1902 Act did not extinguish the Chickasaw Reservation or its boundaries.

Nor did the 1902 Act extinguish the Chickasaw Reservation or its boundaries. Under the 1902 Act, which modified the Atoka Agreement, each member's allotment was to be of "land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations," *id.* § 11, 32 Stat. at 642, within which each member was to designate a homestead of one hundred and sixty acres, which was to be "inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment," *id.* § 12, 32 Stat. at 642. The remainder of each member's allotment was to be alienable in portions, under a schedule triggered by issuance of the allottee's patent. *Id.* § 16, 32 Stat. at 643. In addition, the 1902 Act provided for Mississippi Choctaw to "make bona fide settlements within the Choctaw-Chickasaw country" and to obtain an allotment within that country. *Id.* § 41, 32 Stat. at 651.

The 1902 Act also specifically reserved from allotment lands for the capitol of each Nation, *id.* § 26(i), (o), 32 Stat. at 645, lands for "all tribal court-houses and jails and other tribal public buildings," *id.* § 26(s), 32 Stat. at 646, "[o]ne acre for any church under the control of and used exclusively by the Choctaw or Chickasaw citizens," *id.* § 26(u), 32 Stat. at 646, and "[o]ne acre each for all Choctaw or Chickasaw schools under the supervision of the authorities of the Choctaw or Chickasaw nations and officials of the United States," *id.* § 26(v), 32 Stat. at 646. Thus, like the Atoka Agreement, the 1902 Act exempted from allotment lands necessary for the Chickasaw to "exist as . . . a nation and live on" its Reservation.

The 1902 Act further provided that when all allotments had been made, the remaining lands—excepting those reserved from allotment—were to be sold and the proceeds applied to equalize the allotments made to tribal members, with any remaining funds paid to the credit of the Chickasaw and Choctaw Nations for distribution to their members. *Id.* § 14, 32 Stat. at 642. As the Court had earlier held in *Parker*, such a provision does not diminish the reservation boundaries. Statutes that "open[] reservation land to settlement and provide[] that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit," *Parker*, 136 S. Ct. at 1079 (quoting *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 448 (1975)), "allow 'non-Indian settlers to own land on the reservation,'" *id.* at 1080 (quoting *Seymour*, 368 U.S. at 356), "[b]ut in doing so, they do not diminish the reservation's boundaries," *id.* Thus, by equalizing allotments made to members with the proceeds of the sale of remaining lands to nonmembers, the 1902 Act did not diminish the Reservation's boundaries. Furthermore, the 1902 Act relied on the boundaries of the Chickasaw Reservation to implement its terms, confirming that those boundaries continued to exist. *See, e.g.*, § 25, 32 Stat. at 644 (land office to be opened "in both the Choctaw and the Chickasaw nations"); § 41, 32 Stat. at 651 (Mississippi Choctaw to select land "within the Choctaw-Chickasaw country"); § 45, 32 Stat. at 652 (referring "to town sites in the Choctaw and Chickasaw nations"); § 51, 32 Stat. at 653 (referring to purchase of lots in "any town site in the Choctaw and Chickasaw nations"); § 53, 32 Stat. at 653 (referring to "towns in the Choctaw and Chickasaw nations"); § 55, 32 Stat. at 653 (granting authority to municipal corporations "in the Choctaw and Chickasaw nations").

In short, the 1902 Act provides for the Chickasaw Nation to continue to "exist as . . . a nation and live on" the Treaty Territory under the 1830 Treaty and on the Chickasaw Reservation under the 1837 and 1855 Treaties. The 1902 Act therefore did not extinguish the boundaries of the Chickasaw Reservation.

3. *Morris v. Hitchcock* confirms that the Chickasaw Reservation was not extinguished by the Atoka Agreement or the 1902 Act.

The Supreme Court's decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904) confirms that neither the Atoka Agreement nor the 1902 Act, which were both enacted before *Morris* was decided, extinguished the Chickasaw Reservation or its boundaries. In upholding the validity of a privilege tax on livestock enacted by the Chickasaw Nation, the Supreme Court held that "the right of [the Chickasaw Nation] to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders" was recognized under Articles 7 and 14 of the 1855 Treaty and Article 8 of the 1866 Treaty, and that "under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence *within its borders* of persons who might otherwise not be entitled to remain within the tribal territory." *Morris*, 194 U.S. at 389 (emphasis added). Those borders are set forth in Article 2 of the 1855 Treaty, and *Morris* confirms that those borders remain in effect.

Finally, while Congress subsequently relaxed the restrictions imposed on the alienation of allotted lands by Creek allottees, *see McGirt*, 140 S. Ct. at 2463 (citing 1908 Act § 1, 35 Stat. at 312), as it did for the allottees of all of the Five Tribes, 1908 Act § 1, 35 Stat. at 312, that legislation does not alter the conclusion that: "Missing in all this,

however, is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," *McGirt*, 140 S. Ct. at 2464.

D. The Limited Effect Of The Allotment Era Legislation On Tribal Self-Government Did Not Extinguish The Chickasaw Reservation Or Its Boundaries.

In *McGirt*, the Court also rejected the argument that during the Allotment Era, Congress intruded on the Creek Nation's treaty rights of self-government to a degree that eliminated all tribal interests in the Creek lands. That holding rejects any such argument with respect to the Chickasaw Nation, as does the Supreme Court's decision in *Morris.*

There is, first, no question that the Chickasaw Nation's Treaty rights of self-government are comparable to the Creek Nation's. In Articles IV and XV of the 1856 Creek Treaty, "Congress promised that 'no portion' of the Creek Reservation 'shall ever be embraced or included within, or annexed to, any Territory or State,'" and that "within their lands, with exceptions, the Creeks were to be 'secured in the unrestricted right of self-government,' with 'full jurisdiction' over enrolled Tribe members and their property." *McGirt*, 140 S. Ct. at 2461. Likewise, Article 4 of the 1830 Treaty promised the Choctaw "the jurisdiction and government of all the persons and property that may be within their limits," and that "no Territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State . . . ." Those rights were secured to the Chickasaw by the 1837 Treaty, *id.* art. 1, and were then reaffirmed in the 1855 Treaty, *id.* art. 7, and the 1866 Treaty, *id.* arts. 7, 10, 45. And just

as the Allotment Era legislation did not extinguish the Creek Reservation, it did not extinguish the Chickasaw Reservation.

1. Decisions of the Supreme Court recognize the continuing force of the Chickasaw Nation's rights of self-government.

The Supreme Court has long recognized the continuing vitality of the rights of self-government secured to the Chickasaw Nation by the 1830 and 1837 Treaties. As the Court held in *Oklahoma Tax Commission*, Article 1 of the 1837 Treaty applied the 1830 Treaty to the Chickasaw Nation, 515 U.S. at 465 n.15, and Article 4 of the 1830 Treaty "provide[s] for the [Chickasaw Nation]'s sovereignty within Indian country." 515 U.S. at 466. Twenty-five years earlier, the Court relied on Article 4 of the 1830 Treaty to uphold the Chickasaw and Choctaw Nations' ownership of the bed and banks of the Arkansas River within the Treaty Territory. *Choctaw Nation*, 397 U.S. at 635; *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 198 (1987) ("[I]ndispensable to the holding [of *Choctaw Nation*] was a promise to the Indian Tribe that no part of the reservation would become part of a State."); *Montana*, 450 U.S. at 555 n.5 (describing the "crucial provision[]" of the 1830 Treaty "promising freedom from state jurisdiction").

While the Allotment Era enactments plainly had an impact on those rights, that legislation did not extinguish the Chickasaw Reservation for the same reasons that it did not extinguish the Creek Reservation. *See McGirt*, 140 S. Ct. at 2465-69.

2. Neither the Curtis Act nor the 1902 Act extinguished the Chickasaw Reservation or its boundaries.

The *McGirt* Court first considered the Curtis Act, which "abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U.S. Courts of the

Indian Territory." 140 S. Ct. at 2465 (citing Curtis Act § 28, 30 Stat. at 504-05). Section 28 of the Curtis Act did not, however, affect the sovereignty of the Chickasaw Nation. Section 28 provided that it would not apply to the Creek, Chickasaw, and Choctaw Nations until October 1, 1898, *see* Curtis Act § 28, 30 Stat. at 505, which afforded those tribes an opportunity to ratify separate agreements set forth in the Curtis Act itself, *id.* § 29, 30 Stat. at 505-13 (Atoka Agreement); *id.* § 30, 30 Stat. at 514-19 (Creek Agreement). If ratified by October 1, 1898, each ratifying tribe's agreement would supersede any inconsistent provisions of the Curtis Act (except for § 14, which addressed town sites) as to those Nations. *Id.* § 29, 30 Stat. at 505; *id.* § 30, 30 Stat. at 514. The Creek Nation did not ratify its agreement by the deadline, *see Woodward*, 238 U.S. at 311-12. But the Choctaw and Chickasaw Nations ratified the Atoka Agreement by the deadline, *id.* at 308, which rendered § 28 of the Curtis Act inapplicable to them, *Marris v. Sockey*, 170 F.2d 599, 602 (10th Cir. 1948), and preserved their courts, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441-42 (D.C. Cir. 1988).

Furthermore, the impact of the Atoka Agreement on the tribal court jurisdiction of the Chickasaw Nation was limited. It only provided that

> the United States courts now existing, or that may hereafter be created, in the Indian Territory shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with homicide, embezzlement, bribery, and embracery, breaches, or disturbances of the peace, and carrying weapons, hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime ....

Atoka Agreement, 30 Stat. at 511. With respect to tribal legislative jurisdiction, the Atoka Agreement provided only that law of the Chickasaw Nation

> affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizens thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any persons to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States

were not valid "until approved by the President of the United States." *Id.* at 512. This provision demonstrated that the Chickasaw Nation retained tribal legislative authority, as "Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate." *McGirt*, 140 S. Ct. at 2465-66 (referring to § 42 of 1901 Creek Allotment Agreement, 31 Stat. at 872).

In addition, the Atoka Agreement continued the Chickasaw Nation's tribal government in effect and relied on that government to govern the Treaty Territory, providing that

> [i]t is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for a period of eight years from [March 4, 1898].

30 Stat. at 512.[12]

That neither the Atoka Agreement nor the 1902 Act divested the Chickasaw Nation of its rights of self-government is shown by the Supreme Court's decision in *Morris*, which

[12] The Five Tribes' governments were subsequently continued in existence by Joint Resolution No. 7 of Mar. 2, 1906, 34 Stat. 822, and then by the Five Tribes Act.

was decided after both the Curtis Act and the 1902 Act had been enacted. Addressing the Atoka Agreement, the Court held that one of its objects

> was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation, as a preventive of arbitrary and injudicious action.

Morris, 194 U.S. at 393. The "power" to which the Court referred was the right of the Chickasaw Nation "to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders," held under the 1855 Treaty and the 1866 Treaty. *Morris*, 194 U.S. at 389. The Court found that "under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id. Morris* upholds the Chickasaw Nation's right to exercise sovereign authority within its boundaries, which were established under Article 2 of the 1855 Treaty.

3. The Five Tribes Act did not extinguish the Chickasaw Reservation or its boundaries.

Nor did the Five Tribes Act intrude upon Chickasaw rights of self-government such that it extinguished the Chickasaw Reservation or its boundaries. Instead, Congress declared "[t]hat the tribal existence and present tribal governments of the [Five Tribes] are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law." *Id.* § 28, 34 Stat. at 148.

With respect to the Chickasaw Nation, those rights included their Treaty rights within their borders that were upheld in *Morris*, of which Congress was presumed to be aware when the Five Tribes Act was enacted in 1906, *see Miles v. Apex Marine Corp.*, 498

U.S. 19, 32 (1990) (when Congress passes legislation it is presumed to be aware of existing law), their rights to the Chickasaw Reservation set aside for them by Article 1 of the 1837 Treaty, and reaffirmed as modified by Article 2 of the 1855 Treaty, and their right to be free from state interference, 1830 Treaty art. 4, on which the Court later relied in *Choctaw Nation*, 397 U.S. at 625, 635. In the Five Tribes Act, Congress also expressly protected the Five Tribes' legislatures' authority to pass laws, subject to approval by the President of the United States and a thirty-day limit on tribal legislative sessions. Five Tribes Act § 28, 34 Stat. at 148. Section 28 thus preserved the Chickasaw Nation's rights of self-government.

To be sure, the Five Tribes Act "cut[] away further at the [Five] Tribe[s'] autonomy," by authorizing the President to remove and replace principal chiefs, directing the Secretary of the Interior to assume control of their schools, and "provid[ing] for the handling of the [Five] Tribe[s'] funds, land, and legal liabilities in the event of dissolution." *McGirt*, 140 S. Ct. at 2466 (citing Five Tribes Act §§ 6, 10, 11, 27, 28, 34 Stat. at 139-41, 148). "Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek's 'tribal existence and present tribal governmen[t]' and 'continued [them] in full force and effect for all purposes authorized by law.'" *Id.* (quoting Five Tribes Act § 28, 34 Stat. at 148). So too for the Chickasaw Nation.

It is equally clear that the Five Tribes Act did not extinguish the Treaty Territory or the Chickasaw Reservation. Instead, the Five Tribes Act relied on the boundaries of the Treaty Territory to implement its terms. The Act reserved certain lands from allotment in the "Choctaw Nation, Indian Territory," Five Tribes Act § 7, 34 Stat. at 139, provided for

"the royalties on coal and asphalt in the Choctaw and Chickasaw nations" to be used to fund the schools, *id.* § 10, 34 Stat. at 140, and made provision for public highways "in the Choctaw, Chickasaw, and Seminole nations," which were to be paid for by the Secretary of the Interior "from the funds of the tribe or nation in which such public highways or roads are established," *id.* § 24, 34 Stat. at 145-46.

"In the years that followed, Congress continued to adjust its arrangements with the [Creek] Tribe," as it did with the other of the Five Tribes. 140 S. Ct. at 2466. "For example, in 1908, the Legislature required Creek officials [and those of the other Five Tribes] to turn over all 'tribal properties' to the Secretary of the Interior." *Id.* (quoting 1908 Act § 13, 35 Stat. at 316). And in 1907, the tribal courts of the Chickasaw Nation were abolished. *See* Indian Department Appropriations Act of 1907, ch. 2285, 34 Stat. 1015, 1027. But "none of these adjustments would have made any sense if Congress thought it had already" terminated tribal government. *McGirt*, 140 S. Ct. at 2466. And indeed, Congress has since recognized that the Chickasaw Nation has "maintained a continuous government-to-government relationship with the United States since the earliest days of the Union." Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act, Pub. L. No. 107-331, tit. VI, § 602(5), 116 Stat. 2834, 2845-46 (Chickasaw Nation).

4. The Chickasaw Nation exercises sovereign powers on its Reservation today.

As the *McGirt* Court found, "with time, Congress changed course completely. Beginning in the 1920s, the federal outlook toward Native Americans shifted 'away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian

culture.'" 140 S. Ct. at 2467 (citation omitted). Congress did so by enacting the Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5210) ("OIWA"), which "did away with allotment and included a provision for establishing a tribal government." *Hodel*, 851 F.2d at 1445. OIWA confers on Oklahoma tribes "all powers associated with self-government," except as limited by statutes of general applicability, *id.*, and gives those tribes "the same legal status," *id.*, and "the same powers as all other tribes, regardless of the source of those powers," *id.* at 1446.

In *McGirt*, the Court found that the Creek Nation has chosen to exercise those powers by, *inter alia*, ratifying a new constitution and reestablishing the jurisdiction of its courts. 140 S. Ct. at 2467. So has the Chickasaw Nation. Today the Chickasaw Nation exercises its sovereign authority under a constitution approved by the Secretary of the Interior, *see* Chickasaw Const. pmbl., and a tribal code[13] under which it exercises legislative and judicial authority within the boundaries in Article 2 of the 1855 Treaty.

The State also recognizes the Chickasaw Nation's authority to adjudicate disputes within its Treaty Territory. Oklahoma District Court Rule 30(B) provides that

> [t]he district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma, provided, a tribal court judgment shall receive no greater effect or full faith and credit under this rule than would a similar or comparable judgment of a sister state.

Okla. Stat. tit. 12, ch. 2, App., R. 30(B). *See Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994) (citing Rule 30(B)). Under that Rule, the State has extended full faith and credit to

[13] *Available at* https://chickasaw.net/Our-Nation/Government/Chickasaw-Code.aspx.

all the Five Tribes' court judgments. *See Full Faith and Credit of Tribal Courts*, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214.

The Chickasaw Nation also provides governmental services within their Treaty boundaries to protect the safety and well-being of its citizenry and Reservation residents. Law enforcement is provided by the Nation's Lighthorse Police, who protect public safety throughout the Reservation.[14] The Nation maintains a sex offender registry under the Adam Walsh Child Protection and Safety Act, 34 U.S.C. § 20912(a). *See* Chickasaw Code tit. 17, ch. 2, art. A § 17-201.6. And the Nation provides numerous governmental programs and services in the areas of health, education, and family services, among others.[15]

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[14] *See Lighthorse Police*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Government/Lighthorse-Police.aspx (last accessed Aug. 31, 2020).

[15] Those services include: a hospital and several health centers; childcare and early childhood programs; Adult Education, High School Equivalency certification, and vocational rehabilitation programs; family support services; Indian child and family service programs supported by Indian Child Welfare Act grants, *see* 25 U.S.C. §§ 1931(a), 1903(10); services for substance abuse recovery and family violence prevention, domestic violence shelters, and a group home for Native American children. *See Chickasaw Nation Medical Center*, Chickasaw Nation, https://www.chickasaw.net/Our-Nation/Locations/Chickasaw-Nation-Medical-Center.aspx (last accessed Aug. 31, 2020); *Chickasaw Nation Early Childhood and Head Start Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Nation-Early-Childhood-and-Head-Start-Program.aspx (last accessed Aug. 31, 2020); *Adult Learning Program*, Chickasaw Nation, https://www.chickasaw.net/Services/Adult-Learning-Program.aspx (last accessed Aug. 31, 2020); *Vocational Rehabilitation*, Chickasaw Nation, https://www.chickasaw.net/Services/Vocational-rehabilitation.aspx (last accessed Aug. 31, 2020); *Chokka Chaffa' (One Family)*, Chickasaw Nation, https://www.chickasaw.net/Services/Chokka-Chaffa%EA%9E%8C-(One-Family).aspx (last accessed Aug. 31, 2020); *Chickasaw Children's Village*, Chickasaw Nation, https://www.chickasaw.net/Services/Chickasaw-Children-s-Village.aspx (last accessed Aug. 31, 2020).

E. Neither Historical Practices Nor Current Demographics Can Diminish A Reservation Because Only Congress Has The Power To Do So.

In *McGirt*, the Court made clear that "the only 'step' proper for a court of law" to determine if a reservation has been diminished is "to ascertain and follow the original meaning of the law," 140 S. Ct. at 2468 (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538-39 (2019)), and that neither "historical practices," nor "current demographics can suffice to disestablish or diminish reservations," *id.* (discussing *Solem*, 465 U.S. at 471, 472 n.13, 478). The Court rejected Oklahoma's argument that *Solem* "requir[es a court] to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third." *Id.* The Court's conclusions on these points of course applies equally to the question whether Congress has diminished the Chickasaw Reservation as it did to the question of the Creek Reservation.

The reason that neither historical practices nor current demographics can disestablish a reservation is clear. As *McGirt* unequivocally held, "[o]nce 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*." 140 S. Ct. at 2468 (alteration in original) (emphasis added) (quoting *Solem*, 465 U.S. at 470). The value of historical practices and current demographics "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.* at 2468-69

(discussing *Parker*, 136 S. Ct. at 1082; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998)).

Accordingly, "[t]here 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." *Id.* (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)). In this case, there is no question that Congress established a Reservation for the Chickasaw Nation, *see supra* at 8-10, and the clear terms of the statutes by which that Reservation was allotted, and of those that impacted the Chickasaw Nation's rights of self-government, show that the Reservation was not disestablished, *see supra* at 21-28. Thus, there is no need to consider extrinsic evidence.

The *McGirt* Court went on to illustrate the flaws of relying on extratextual evidence to show reservation diminishment by pointing to the evidence on which Oklahoma relied. The Court found that the State's past practice of asserting criminal jurisdiction over Indians in state court for serious crimes on contested lands was not a reliable indicator of whether the Creek Reservation existed because "until the Tenth Circuit's *Murphy* decision a few years ago, no court" embraced federal jurisdiction over crimes on such lands on the Creek Reservation, *id.* (citing *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam)), and because the State's policy for decades had been to prosecute Indians for crimes regardless of where they occurred, until the Oklahoma courts repudiated the practice in 1989, *id.* at 2470-71. Second, the Court found the State's argument that in the late 19th and early 20th century "everyone" thought

reservations and the Creek Nation would soon be disbanded, *see id.* at 2470, 2472, either said nothing different from the federal statutes that indicated the demise of the tribal government was forthcoming (though never realized) or misstated the law. *Id.* at 2472. Third, the Court found the State's argument that non-Indians "swiftly moved" onto the reservation and that today Tribal members "constitute a small fraction" of those residing on that land, *see id.* at 2470, 2473, was "no more helpful in discerning statutory meaning" because settlers could have been motivated by bad faith motives, concluding that "the history and demographics placed before us . . . hardly tell a story of unalloyed respect for tribal interests." *Id.*

In the end, history and demographics "suppl[y] us with little help in discerning the law's meaning and much potential for mischief." *McGirt*, 140 S. Ct. at 2474. If the Court allowed the State to "proceed as it has always assumed it might" that would permit a reservation to be disestablished by a State's persistence and its might. In the Court's words, "[t]hat would be the rule of the strong, not the rule of law." *Id.*

IV. HYPOTHETICAL POLICY IMPLICATIONS PROVIDE NO BASIS FOR DEPARTING FROM ESTABLISHED LAW.

In *McGirt*, the Court also rejected broad allegations of chaos and uncertainty that the State said would result if the Court ruled against it, *id.* at 2479, concluding that those allegations did not involve legal analysis, *id.* at 2478-81, and were "not a license for us to disregard the law," *id.* at 2481. The Court also found those warnings were contrary to actual experience:

> With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated

> hundreds of intergovernmental agreements with tribes .... See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13-19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, *id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.

McGirt, 140 S. Ct. at 2481-82. This history of seeking to work in partnership, rather than in conflict, is reason for optimism, not pessimism. *See id.* at 2481.

CONCLUSION

For the foregoing reasons, the Chickasaw Nation respectfully submits that the Chickasaw Reservation continues to exist within the Treaty Territory established by the 1830 Treaty, that its boundaries continue to be defined by the 1855 Treaty, and that all land within the Chickasaw Reservation constitutes Indian country under federal law, 18 U.S.C. § 1151(a).

Dated: September 23, 2020 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September 2020, a true and correct copy of this AMICUS CURIAE CHICKASAW NATION'S BRIEF IN SUPPORT OF THE CONTINUED EXISTENCE OF THE CHICKASAW RESERVATION AND ITS BOUNDARIES was served via hand-delivery to each of the following:

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