IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUSTIN HOOPER,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 21-CV-165-JED-JFJ
	)	
CITY OF TULSA,	)	
	)	
Defendant/Appellee.	)	

DEFENDANT CITY OF TULSA'S REPLY TO PLAINTIFF'S REPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff's Response to the City's Motion To Dismiss relies on the same fruitless arguments presented in his Complaint and, as such, still fails to overcome the City's Motion. The City should prevail on its motion because the Curtis Act grants jurisdiction to the City of Tulsa and has not been repealed or invalidated.

A. THE CURTIS ACT GRANTS JURISDICTION TO THE CITY OF TULSA

Plaintiff's response brief opens with the false assertion that the United States Supreme Court in *McGirt v. Oklahoma*, 591 U.S. __ (2020), "made clear that, for more than a century, the state of Oklahoma". . ."and its political subdivisions (through the various cities and towns) have charged, fined and otherwise imposed court costs or administrative fees resulting in large sums of money being taken from Tribal members without the jurisdiction to do so." [Doc. No. 12, p. 1] As set forth in the City's Motion To Dismiss and Brief in Support [Doc. No. 6], the only question before the Supreme Court in McGirt was "the statutory definition of 'Indian country' **as it applies in federal criminal law under the Major Crimes Act**, 18 U.S.C. § 1153." *McGirt*, 140 S.Ct. at 2477 (emphasis added). The United States Supreme Court did not take up or address any issues in *McGirt* related to fines or court imposed administrative costs charged by cities or political subdivisions.

In fact, in contrast to the Major Crimes Act ("MCA") which was at issue in *McGirt*, the Curtis Act unequivocally grants jurisdiction to the City for the misdemeanor prosecution of Plaintiff. Further, it is clear that, unlike the MCA, the Curtis Act does not rely on definitions such as "Indian Country" to limit the scope of jurisdiction which was at issue in *McGirt,* therefore, the jurisdiction granted under the Curtis Act to municipalities remains untouched by the decision in *McGirt* despite Plaintiff's attempts to stretch the Court's holding.

With the passage of the *Curtis Act of 1898*, 30 Stat. 495, Congress established a legal system for the Indian Territory. Rather than draft a new set of territorial laws, Congress borrowed the laws of the State of Arkansas and applied them to the Indian Territory, granting the federal courts jurisdiction over cases arising from those laws. *Curtis Act*, at 500. Municipalities were granted jurisdiction separately, with § 14 of the Curtis Act stating that "mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory." *Id.*, at 499. The Curtis Act further states that "the marshal or other executive officer of such city or town may execute all processes issued in the exercise of the jurisdiction hereby conferred." *Id.* Finally, the Curtis Act states that "all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments." *Id.* at 499-500.

The Plaintiff, by his reliance on the holding in *Hodel, infra*, seemingly admits that this legal system established by the Curtis Act was still in full force and effect at least until 1988 when the D.C. Circuit Court of appeals entered its decision in that case. As set forth in detail below, an examination of the *Hodel* decision makes clear the only portion that the *Hodel* Court found was

repealed in 1988 did not effect § 14 of the Curtis act which grants municipalities jurisdiction over Indians and, therefore, still remain in effect today.

Plaintiff argues that when the Curtis Act states, "the United States court therein shall have jurisdiction," it grants the United States courts authority to hear cases. *Id.* at 500. Then, in the same breath, Plaintiff inexplicably argues that when the Curtis Act states that mayors "shall have the same jurisdiction in all civil and criminal cases," it somehow does not confer the authority to hear cases to cities and towns. *Id.* at 499. Clearly, Plaintiff agrees that having jurisdiction over a matter allows an entity to hold court over such matters. Plaintiff even concedes later that "these mayoral courts apparently had the authority to conduct jury trials in both civil and criminal matters and to render verdicts in those matters." [Doc. No. 12 at 8]. The clear language of the Curtis Act shows that municipalities were granted jurisdiction over matters within their limits and the United States courts were given jurisdiction to apply territorial law throughout the Indian Territory. Plaintiff argues that the grant of jurisdiction to the United States somehow precludes the exercise of jurisdiction by the City. However, these are not mutually exclusive propositions. Rather, the Curtis Act granted subject-matter jurisdiction over territorial laws to the United States courts and subject-matter jurisdiction over municipal ordinances to municipalities.

Additionally, Plaintiff argues nebulously that the Curtis Act was somehow otherwise invalidated by either the State of Oklahoma or the City itself. While state and local laws dictate the general powers of a municipal corporation, as well as its form of local government and governance, only Congress through federal legislation, as it does in the Curtis Act §14, can dictate whether those powers may be exercised as to Indians in Indian Country. Congress exercised its plenary power in enacting §14 and granting criminal jurisdiction over Indians violating municipal ordinances within municipal corporate city limits. This is best illustrated by the fact that §14 was

incorporated into all of the allotment agreements with the United States ratified by Tribes after §14 went into effect. The allotment agreements for the Cherokee, Chickasaw, Choctaw and Creek Nations all contained language *expressly* noting that §14 of the Curtis Act remained in full force and effect. The Seminole Nation ratified its agreement in 1897, and that agreement was subject to the provisions of the Curtis Act as such provisions were not in conflict with the agreement. Thus, changes in the laws of municipal corporations and their forms of government, including how or what branch(es) of its government enforces its ordinances or adjudicates violations thereof, cannot abrogate the terms of Tribal agreements with the United States, nor repeal acts of Congress.

B. SECTION 14 OF THE CURTIS ACT HAS NOT BEEN INVALIDATED

Congress passed the Curtis Act in 1898 and has not since rescinded the powers granted to the City of Tulsa and other municipalities. Predictably, Plaintiff urges this court to apply the imprecise language of *Hodel v. Muscogee (Creek) Nation,* 851 F.2d 1439 (D.C. Cir. 1988) in the instant matter without further examining the facts or analysis of *Hodel*.

1. THE OIWA DID NOT REPEAL THE ENTIRETY OF THE CURTIS ACT.

In *Hodel*, the D.C. Circuit Court of Appeals examined the effect of the Oklahoma Indian Welfare Act ("OIWA") on the section of the Curtis Act dealing with tribal courts. While the opinion in *Hodel* used broad language which the Plaintiff latches onto such as the "Curtis Act was repealed by the OIWA" this must be examined in the context of the issues in the case and a review of the decision in its entirety. *Hodel*, at 1446.

While the Court in *Hodel* correctly determined that § 3 of the OIWA of 1936 (allowing the creation of tribal governments) implicitly repealed § 28 of the Curtis Act (abolishing tribal courts), it used imprecise language leading to Plaintiff's present confusion and used a chainsaw where a scalpel would suffice.

At issue in *Hodel* was whether tribal courts could exist under § 3 of the OIWA when they had previously been abolished in § 28 of the Curtis Act. As the Municipal Court found in its Order addressing this topic, it is also clear from the language of *Hodel* that the findings in that case were issue specific and never addressed any of the other multiple provisions of the Curtis Act that deal with municipalities.

The Curtis Act consists of 30 sections, each dealing with a different issue in the Indian Territory, with two ratifying agreements with tribal governments. The Tenth Circuit pointed this out in *U.S. v. City of McAlester*, 604 F.2d 42, 51 (10th Cir. 1979) noting there are multiple provisions of the Curtis Act that deal with issues ranging from allotment of land to individual Indians, to developing cities and towns in the Indian Territory to the creation of cities and towns and the powers to be exercised by them. The holding in *Hodel* related *only* to § 28 of the Curtis act and the provision of OIWA which related to the establishment of tribal courts. *Hodel* has nothing to do with § 14 of the Curtis Act which is at issue in the case presently before this Court.

Importantly, the OIWA was not silent as to the repeal of prior law and contained a general repealer provision, which stated, "[a]ll Acts or parts of Acts inconsistent with this chapter are repealed." 25 U.S.C. §5209. While implicit repeal is generally disfavored, *Hodel* held that "[i]f there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA must be construed in favor of the Indians." *Hodel* at 1445. The only inconsistency between the Curtis Act and the OIWA is the one in § 28 as addressed in *Hodel*.

Additionally, Plaintiff fails to address the fact that the Court of Appeals for the D.C. Circuit's opinion in *Hodel,* is not binding on this Court. This Court is not bound by a decision from another Circuit and should carefully examine *Hodel*, as well as the change in the legal landscape since the D.C. Circuit's ruling, before using the same unnecessarily broad stroke mistake.

2. CONGRESS CAN GRANT POWERS TO THE CITY SEPARATE AND DISTINCT FROM THE STATE.

Plaintiff complains that for the municipalities to maintain jurisdiction over Indians when the state does not have the same jurisdiction is "counter-intuitive" and would yield an "absurd result". [Doc. No. 12, p. 6]. However, Plaintiff's unfounded belief that municipalities should not have different powers or rights than the state in which they reside, is not the basis for a legal claim.

As the Municipal Court ruled in its Order, citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), a municipality may be granted powers by the federal government *different than those granted to the state*. [Doc. No. 1-1, at p. 16] In *City of Tacoma,* the Supreme Court found that the federal government gave the power to condemn state land to the City of Tacoma because it "has dominion, to the exclusion of the States, over navigable waters of the United States." *Id.* at 334. The State of Washington argued that "Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws." *Id.* at 328. However, the Supreme Court ruled that the City of Tacoma ***could have authority distinct from, and even contrary to, that of the State of Washington*** because authority over navigable waters was "under the domination of the United States." *Id.* at 339.

Like its power over navigable waters, Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Congress may wield this power however it wishes. With the passage of the Curtis Act, Congress chose to allow municipalities in Indian Territory to exercise jurisdiction over all individuals, including Native Americans, and only Congress can rescind that grant of power.

3. ONLY CONGRESS MAY INVALIDATE THE CURTIS ACT AND IT HAS NOT DONE SO.

In opposition to the application of the Curtis Act, Plaintiff makes many of the same arguments that fell flat when made by the State of Oklahoma in *McGirt.* Plaintiff contends that the powers granted to the City of Tulsa by the Curtis Act have been extinguished through "practice or

modification of law". [Doc. No. 12 at 8]. This is contrary to the Supreme Court's holding in *McGirt* that "[w]hen interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." *McGirt* at 2468 citing *New Prime Inc. v. Oliveira*, 586 U. S. ——, ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019). A Court may not "favor contemporaneous or later practices instead of the laws Congress passed." *McGirt*, 140 S. Ct. at 2468. *McGirt* goes on to state "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear." *Id.* at 2469.

The language of the Curtis Act was clear and unambiguous regarding the power and authority of municipalities, despite the apparent confusion it has caused for Plaintiff. Just as the Supreme Court did in *McGirt,* this Court must strictly apply the clear intent of Congress when it exercises its power over Indian affairs. Plaintiff argues that by following Oklahoma law regarding municipal courts, the City has somehow relinquished its authority of the Curtis Act. [Doc. No. 12 at 8]. It is true that the City of Tulsa has not heard felony criminal cases or civil cases in its Court. This alone does not extinguish Curtis Act jurisdiction, however, because only Congress may do so. While it confuses Plaintiff to hear that the City of Tulsa has jurisdiction over Native Americans in all criminal and civil matters under the Curtis Act, it is far from "counter-intuitive" as this is precisely the jurisdictional structure that existed for the first decade of Tulsa's existence.

No amount of arguments made by the Plaintiff that the Curtis Act does not fit into the "legal political landscape at this time" can overcome the clear will of Congress. [Doc. No. 12 at 8].

4. *McGirt* Had No Effect On The City's Jurisdiction Under The Curtis Act.

The timing of the enactment of the Curtis Act in relation to the establishment of the Indian reservation (as recognized in *McGirt*) is significant in understanding that it was Congress's intent for the Curtis Act to provide municipalities criminal jurisdiction over Indians. It is clear that § 14

of the Curtis Act provided the City of Tulsa jurisdiction over Indian tribal members who, within its corporate city limits, violate the City's ordinances. Plaintiff's argument that the Supreme Court's 2020 holding in *McGirt* that the Creek reservation was not disestablished by Congress and such reservation falls within the definition of "Indian Country" under the federal Major Crimes Act, effectively repealed the Curtis Act and abrogated the City of Tulsa's jurisdiction is specious and does not stand up under close examination.

The history and existence of the Creek reservation was established, according to the Supreme Court in the mid-1800s. Implicit in Plaintiff's argument that the *McGirt* decision repeals Congress' 1898 Curtis Act, is the admission by Plaintiff that prior to the *McGirt* decision the Curtis Act provided such criminal jurisdiction on the Creek reservation to the City of Tulsa municipal courts.

The Supreme Court clearly stated in *McGirt*: "The **only question** before us, however, concerns the statutory definition of 'Indian country' as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law." *McGirt*, 140 Supreme Ct. 2452, at 2480. (Emphasis added). Further, the Supreme Court stated: "When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise." *Id*.

The Court in *McGirt* found that the Creek reservation was established through a series of treaties between the Creek Nation and the United States beginning in 1833 and extending into the

1860s.[1] The majority opinion sets forth a detailed history of the treaties and statutes that created the Creek reservation. *Id.*, at 2460-2462.

Finding that the Article I, § 8 and Article VI, Clause 2 of the United States Constitution makes federal treaties and statutes … "the supreme Law of the Land," the Supreme Court emphasized that only Congress had the plenary power to disestablish the Creek reservation established in the 1830s by treaties ensconced by Congress in the statutes of the United States and it did not do so, resulting in their holding that land within the reservation boundaries established by Congress is Indian Country for purposes of the federal Major Crimes Act. *Id.*, at 2461-63.

Until 1898, all offenses committed within Creek reservation boundaries were prosecuted in federal courts and tribal courts as Oklahoma had not yet become a state.[2] However, in the 1898 Curtis Act, Congress again used its plenary authority to: 1) abolish the Creek Nation tribal courts and transfer all pending civil and criminal cases to the U.S. Courts of the Indian Territory;[3] and 2) in § 14 thereof, specifically carve out and grant jurisdiction over all persons, including Indians, to municipal corporations located in the reservation boundaries and incorporated pursuant to the

[1] *McGirt, id.*, at 2459-2462. And, at p. 2460, the Court stated: "No one disputes that Mr. McGirt's crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute."

[2] *McGirt*, *id.*, at 2476: "Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts. See Act of May 2, 1890, § 30, 26 Stat. 94. But, in 1897, Congress abolished that scheme, granting the U. S. Courts of the Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense." Act of June 7, 1897, 30 Stat. 83. These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons ... irrespective of race." *Ibid.* A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. Courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505." Emphasis added.

[3] *McGirt, id.*, at 2465: "For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, §28, 30 Stat. 504–505."

Curtis Act, such as the City of Tulsa.[4] Such Curtis Act jurisdiction is for enforcement of municipal corporation ordinances applying only within the jurisdiction of such municipalities.

In 1907, upon Oklahoma's statehood together with the approval by Congress of Oklahoma's Enabling Act the references to Arkansas law were replaced by references instead to the law of the new State of Oklahoma. Since Oklahoma statehood, there has been no amendment to § 14 of the Curtis Act. And as definitively shown, § 14 of the Curtis Act was not affected by any holding or finding in *McGirt*.

CONCLUSION

In his Response, Plaintiff continues down the same futile rabbit holes as his Complaint. Plaintiff has consistently misrepresented the effect of the Curtis Act by ignoring the very provisions at issue in this case and grasping at any straw that might confuse this Court. Plaintiff has failed to call into question the validity of the Curtis Act as a matter of law and has put no other issue before this Court. For the reasons set forth herein and those detailed in the City's Motion To Dismiss And Brief In Support [Doc. No. 6] the City asks this Court to dismiss the Plaintiff's Appeal of the Municipal Court's Order and Dismiss Plaintiff's Complaint For Declaratory Judgment.

[4] The Supreme Court emphasized: "To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear." *McGirt, id.*, at 2469.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants (names only are sufficient):

John Dunn

/s/David E. O'Meilia
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