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OF THE STATE OF OKLAHOMA

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| **MICA ALEXANDER MARTINEZ,**<br><br>Petitioner/Defendant,<br><br>v.<br><br>**THE STATE OF OKLAHOMA.**<br><br>Respondent/Plaintiff. | **Case No.**<br><br>**PCD-2020-612**<br><br>**CF-2009-473** |

# COMANCHE NATION'S SUPPLEMENTAL AMICUS BRIEF


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**COMANCHE NATION'S SUPPLEMENTAL AMICUS BRIEF**

**STATEMENT OF INTEREST**

The Comanche Nation fully participated in the evidentiary hearing below as amicus curiae due to its strong, vested interest in the central issue of whether the Kiowa, Comanche, and Apache Reservation ("Reservation") still exists or was disestablished by Congress under the Supreme Court's principles in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), such that the Federal Government, rather than the State, has criminal prosecutorial jurisdiction over major crimes committed by an Indian on such lands. *See id.* at 2460. The Comanche Nation's participation is vital, because, "[a]t another level," this "case winds up as a contest between State and Tribe." *Id.*

The Comanche Nation is uniquely able to address this issue and give voice to the 17,000 currently-enrolled Comanche tribal members, 7,000 of whom reside in the tribal jurisdictional area around Lawton, Ft. Sill, and surrounding counties.[1] This issue bears directly on the Comanche Nation, whose jurisdiction under tribal law extends to "all Comanche Treaty lands over which the Comanche Nation retains jurisdiction." 1 Comanche Nation Tribal Court Code §1.03 (2018).[2] That

[1] *About Us*, COMANCHE NATION, https://comanchenation.com/our-nation/about-us (last visited May 5, 2021).
[2] *Available at* https://comanchenation.com/sites/comanchenation.com/files/depts/TRCO_All.pdf.

includes the reservation lands established for the Comanche in the 1867 Medicine Lodge Treaty to the extent the Reservation has not been disestablished. *Id.* The Comanche Nation is able to bring a historical perspective to the Federal Government's establishment of a reservation for the Comanche Nation in the 1867 Medicine Lodge Treaty, Congress's broken promises and unilateral actions in the Jerome Agreement of 1892 and Act of June 6, 1900, 31 Stat. 672 (*hereinafter* "1900 Act" or "Act"), and how those facts and the text of the 1900 Act play out against the Supreme Court's disestablishment precedent culminating in *McGirt*.

Critically, as the Comanche Nation argued below and the State conceded, the District Court's findings of fact and conclusions of law, if affirmed, would do what the United States Supreme Court has *never* done: rely on words of "cession" to find an *entire* reservation disestablished by a *unilateral* act of Congress. *See* Martinez Transcript at 70. For the reasons explained before the District Court and in this brief, such a holding is contrary to the principles established by Supreme Court precedent, culminating in *McGirt*. The Court and the public interest will benefit from this perspective, and the Comanche Nation thus requests leave to participate as amicus, which is unopposed by the other parties, to the extent the Comanche Nation's participation below does not provide an independent basis for its participation here.

## SUMMARY OF THE ARGUMENT

As the District Court's order reflects, it is undisputed that a reservation was established for the Comanche, Kiowa, and Apache through the Medicine Lodge Treaties, and undisputed that the Tribes never validly consented to the Reservation's entire disestablishment, either in the Jerome Agreement of 1892, or Congress' purported ratification of the Jerome Agreement in its 1900 Act. *See* Order p.2-6. Under this Court's Order, the remaining question of "whether Congress specifically erased those boundaries and disestablished the reservation," required "follow[ing] the

analysis set forth in *McGirt*" by the Supreme Court. Remand Order p.4. This was a burden that fell squarely on the State to prove. Order p.3. And it is a burden it cannot meet. That is because—as the State conceded—the Supreme Court has *never* held that Congress can *unilaterally* disestablish an *entire* reservation through language of "*cession*"—language the Supreme Court has recognized by definition "requires *bilateral* consent." Following *McGirt* and Supreme Court precedent thus compels that disestablishment has not been proven here.

The District Court's contrary conclusion is a product of its passing lip-service to *McGirt*, *see* Order p.6-7 (¶¶3-6), while instead pointing backwards to the Supreme Court's 1903 decision in *Lone Wolf* and the Tenth Circuit's dicta in *Murphy v. Oil* as already conclusively resolving the disestablishment question for the Comanche, Kiowa, and Apache Reservation. *See* Order p.7-9 (¶¶9, 11-12, 14, 16). But if those cases were dispositive, there would have been no reason for this Court's remand, and the District Court's treatment of them as conclusive and binding ignored this Court's directive "to follow the analysis set out in *McGirt*." Remand Order p.4.

Following the analysis set forth in *McGirt* instead requires following *McGirt*'s reaffirmance that Congress' singular ability to disregard promises made to tribes creates a correspondingly demanding burden that Congress expressly and emphatically articulate its intention to disestablish a reservation. *See McGirt*, 140 S.Ct. at 2462, 2469, 2482. "If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." *Id.* at 2482. *McGirt*'s demand for exactness on Congress' part, in turn demands that when Congress intends to act unilaterally—particularly as to the disestablishment of an *entire* reservation—it "say so" by using language reflecting action Congress can unilaterally take, such as referring to a reservation as "discontinued," "vacated," or "abolished." *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973); *McGirt*, 140 S.Ct. at 2465.

Language of "cession," in contrast, as the Supreme Court has recognized, "requires bilateral consent," and "[a]s a matter of strict English usage … refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977). Thus, although such language can be a strong indication of disestablishment, it also demands some degree of tribal consent. This is consistent with the District Court's own conclusions that "[a]n *agreement* to 'cede …'" "constitutes a termination of a reservation" and "'an unmistakable baseline purpose of disestablishment.'" Order p.7 (¶¶7-8) (emphasis added). It is also consistent with the Supreme Court's recognition that "explicit reference to cession" in exchange for a fixed payment gives rise to a "*presumption*" of Congress' intent to diminish a reservation. *See* Order p.7-8 (¶10). Such language of "cession" is not fully dispositive because that presumption can be rebutted where, as here, the tribe *never* reflected its consent—a critical requirement particularly where the disestablishment of the *entire* reservation, as opposed to its mere diminishment, is at issue.

This is consistent with a long line of Supreme Court precedent. The very Supreme Court cases the District Court cites discuss the relevance of tribal consent. *See* Order p.7-8 (¶¶6-8, 10) (*Solem*, *Nebraska*, *DeCoteau*, *Rosebud*, *Yankston*). And although, as the District Court concluded, "[b]ilateral consent is not necessary for cession of lands to *diminish* a reservation," *see* Order p.8 (¶13), when what is at issue is not just the diminishment of a reservation, *i.e.*, its *reduction*, but as here, its *entire disestablishment*, the Supreme Court has stated consent is then required when language of "cession" is used. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 448 (1975) (emphasis added). Nor does *Lone Wolf* compel a different result. In *Lone Wolf*—the same decision *McGirt* cites as establishing the need to hold Congress to a demanding, high bar—the Court upheld Congress' authority to pass the 1900 Act, but never held the Act's effect

was to disestablish the Reservation. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-67 (1903). Disestablishment was not before the Supreme Court in that case. *Lone Wolf* was brought by individual Indians, not the Tribe, and concerned the Indians' personal property rights, not political rights pertaining to the Reservation.

The Supreme Court's disestablishment cases, culminating in *McGirt*, are binding precedent. The District Court erred in concluding the State had met its burden of proving disestablishment had occurred here, contrary to the Supreme Court's consistent refusal to recognize Congress' unilateral disestablishment of an entire reservation based upon language of "cession."

## ARGUMENT

### I. Congress Established a Reservation for the Kiowa, Comanche, and Apache

It is undisputed that Congress established a reservation for the Kiowa, Comanche, and Apache. Order p.6 (¶2). At the time of the Louisiana Purchase in 1803, the Comanche were among the few tribes occupying what is now the State of Oklahoma.[3] In October 1867, representatives from the Kiowa, Comanche, and Apache nations gathered with a "Peace Commission" from the Federal Government and agreed to the Medicine Lodge Treaties. The First Treaty of Medicine Lodge with the Kiowa and Comanche "set apart" a swathe of approximately 3 million acres in Southwest Oklahoma "for the absolute and undisturbed use and occupation of the tribes ...."[4]

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[3] Kirke Kickingbird, "*Way Down Yonder in the Indian Nations, Rode My Pony Across the Reservation!" From "Oklahoma Hills" by Woodie Guthrie*, 29 TUL. L.J. 303, 310-11 (1993).

[4] This was a significantly smaller swathe of land then that set aside in Western Oklahoma and Northern Texas for the Comanche and Kiowa in their 1865 Treaty with the United States. Treaty with Comanche and Kiowa, U.S.-Comanche, art. I, II, Oct. 18, 1865, 14 Stat. 717. The 1865 Treaty proved unacceptable to Texas, and did not end the violence between Indians and white settlers. WILLIAM T. HAGAN, UNITED STATES/COMANCHE RELATIONS: THE RESERVATION YEARS 1, 23, 25, 27-28 (1976). Congress responded by creating a Peace Commission in 1867 (which exonerated the Comanche of any hostilities since the 1865 Treaty). *Id.*; Indian Peace Commission, *Report to the President by the Indian Peace Commission*, at 30-31 (Jan. 7, 1868) (*available at* http://eweb.furman.edu/~benson/docs/peace.htm). The Peace Commission's purpose was to select districts that, with congressional approval, "shall be

Treaty with the Kiowa and Comanche, U.S.-Kiowa and Comanche, Oct. 21, 1867, art. I, II, 15 Stat. 581, 581-82 (*hereinafter* "Medicine Lodge Treaty" or "Treaty"). This Treaty established the relevant Reservation at issue here, with references throughout to "this reservation," "said reservation," "their reservation," and "the reservation herein described." *See e.g.*, *id.* art. II, III, IV, VI, XI, XII, XV, XVI. Significantly, to prevent the Federal Government from unilaterally forcing the Comanche and Kiowa to acquiesce and surrender their Reservation in the future, the Treaty made clear that "[n]o treaty for the cession of any portion or part of the reservation … shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same …." *Id.* at art. XII; *see* Order p.3-4 (¶¶6-7).

On the same day, a second treaty incorporated the Apache with the Kiowa and Comanche, subject to the same benefits and obligations as the first Medicine Lodge Treaty. Treaty with the Kiowa, Comanche, and Apache, Oct. 21, 1867, 15 Stat. 589 (*hereinafter* "Second Medicine Lodge Treaty"). Through these treaties—ratified in July 1868, *see* 15 Stat at 587; 15 Stat. at 592—the Kiowa, Comanche, and Apache Reservation was established. *See* Order p.4 (¶8); *id.* p.6 (¶2).

## II. The Comanche, Kiowa, and Apache Never Agreed to the Federal Government's Subsequent Jerome Agreement or 1900 Act

### A. The Federal Government's Policy of Assimilation, Agriculture, and Allotment

Part of the Federal Government's clear aim in the Medicine Lodge Treaty was "the civilization of the tribe" and converting the Comanche's way of life to farming. *See* Medicine Lodge Treaty, art. VI-VIII, 15 Stat. at 583-84. While this was met with resistance by the Comanche, the Federal Government's efforts were accelerated by the implementation of its

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and remain permanent homes for said Indians …." Act of July 20, 1867, §2, 15 Stat. 17. Congress was also clear war would be the response if the Peace Commission was unsuccessful. *Id.* at §5.

allotment program.[5] The General Allotment Act (or Dawes Act) was enacted in 1887, giving the Federal Government authority to allot portions of reservation land to Indians, with the remainder then opened for white settlement.[6] *See McGirt*, 140 S.Ct. at 2464-65; *see* Order p.4 (¶9).

**B. The Jerome Agreement**

A Commission from the Federal Government pushed this allotment policy onto the Comanche in the form of the Jerome Agreement of 1892.[7] *See* Order p.4-5 (¶10). It was undisputed below that the Comanche, Kiowa, and Apache never validly consented to the Jerome Agreement, which provided for the cession of the Reservation's lands, upon which each adult tribal member could select a 160 acre allotment, with certain conditions. *See* Jerome Agreement, art. I, II, III. For the cession of this land, the United States would pay the Tribes $2 million, subject to certain terms. *Id.* art. VI. The Tribes, however, insisted their land was worth $2.5 million, and asked to be heard through an attorney and delegation to Washington. *See* S. EXEC. DOC. NO. 17 at 5-6.

The Jerome Agreement never received support from three-fourths of the adult male Indians as the Medicine Lodge Treaty required.[8] Moreover, soon after the Jerome Agreement's execution, the Indians who signed the Agreement protested, claiming they were victims of misrepresentation and fraud.[9] H.R. Doc. No. 333, 56th Cong., 1st Sess., at 8 (1900), *available at*

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[5] Hagan, *supra* n.4 at 166; *see generally id.* at 120-200.
[6] *See id.* at 201-02.
[7] The Jerome Agreement of 1892, S. EXEC. DOC. No. 17 at 11, 52d Cong., 2d Sess. (1893) (*available at* https://books.google.com/books?id=uz5HAQAAIAAJ&pg=RA18-PA1) (*hereinafter* "Jerome Agreement").
[8] As the Secretary of the Interior represented to Congress, the required three-fourths threshold was never met, since the Jerome Agreement under-reported the number of adult males, falling 87 signatures short of the three-fourths requirement of those 18 years and over (and 23 signatures short if 21 years and over). INDIAN AFFAIRS: LAWS AND TREATIES 1060 (Charles J. Kappler eds., 2d ed. 1902), *available at* https://play.google.com/books/reader?id=BhZPAQAAMAAJ&hl=en&pg=GBS.PA1060; *discussed* in *Lone Wolf*, 187 U.S. 553 (syllabus).
[9] In a letter to the Commissioner of Indian Affairs that was relayed to Congress, the Indians "pray[ed] that the so-called Jerome treaty … may not be ratified by Congress, because those of

https://play.google.com/books/reader?id=xgxUAAAAIAAJ&hl=en&pg=GBS.RA3-PA8; *discussed* in *Lone Wolf*, 187 U.S. 553 (syllabus).

### C. Congress' Ratification in the 1900 Act

Congress ignored the Tribes' pleas, and instead purported to ratify the Jerome Agreement in January 1900 by way of an amendment to another act ratifying an agreement with the Indians of the Fort Hall Indian reservation. 1900 Act, 31 Stat. 672, 672-81; *see United States v. Kiowa*, 163 F. Supp. 603, 607 (U.S. Ct. Cl. 1958) (summarizing the same). In doing so, Congress brazenly disregarded the Medicine Lodge Treaty's requirement for three-fourths consent. The District Court explicitly recognized what was undisputed below: what Congress "ratified" in the 1900 Act made a number of material changes to the Jerome Agreement without ever obtaining the Tribe's consent. *See* S. EXEC. DOC. NO. 17 at 6 (recognizing any amendment meant "the act shall take effect only upon ... the agreement by the said tribes of Indians"); *see also Kiowa*, 163 F. Supp. at 607 (summarizing changes between Jerome Agreement and 1900 Act); *see also* Order p.5 (¶11). As the Court of Claims and Indian Claims Commission later ruled, "Congress did not actually ratify the Jerome Agreement, which was in essence a contract between the Indians and the United States, because it was accepted in terms varying materially from the offer." *Kiowa*, 163 F. Supp. at 608.

### D. The Supreme Court Addresses Personal Property Rights, But Not Reservation Disestablishment, in *Lone Wolf*

Following the 1900 Act's passage, tribal members, led by Kiowa Chief Lone Wolf, sued to enjoin the 1900 Act as to their property rights, on the ground it was obtained by fraud, violated

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us who signed that treaty were misled by those who represented the Government through the interpreters ...." H.R. Doc. No. 333, 56th Cong., 1st Sess., at 8 (1900), *available at* https://play.google.com/books/reader?id=xgxUAAAAIAAJ&hl=en&pg=GBS.RA3-PA8. The Indians protested that "each and every one of us who signed that treaty do solemnly declare that if we had not been deceived we would never have signed it." *Id.* They "therefore pray[ed] that ... we may be heard in this, our repudiation of the Jerome treaty, and that Congress will cast it out and not accept it as our free act and deed." *Id.*

Article XII's three-fourths requirement, was ratified over the Indians' objections to Congress, and was significantly amended without Indian approval. *Lone Wolf v. Hitchcock*, 19 App. D.C. 315 (¶8), 320, 323-24 (D.C. App. 1902). The Supreme Court affirmed the Act's validity, on the basis that "the *power* to abrogate [an Indian treaty] existed in Congress," such that the 1900 Act "was constitutional." *Lone Wolf*, 187 U.S. at 566, 568 (emphasis in original). But although, as the District Court acknowledged, *Lone Wolf* supports the general proposition that "[n]either fraud, lack of tribal consent of amendments to the original treaty prevent Congress from having the *authority* to disestablish the reservation," Order p.8 (¶12) (emphasis added), *Lone Wolf* never held the Comanche, Kiowa, and Apache Reservation itself was disestablished. *Lone Wolf*'s holding was limited to affirming Congress' *authority* to so act, without resolving what the Act's provisions actually meant. In particular, *Lone Wolf* was silent as to whether the Act disestablished the Reservation—an issue never before the Court, as confirmed by the fact suit was "*not* filed by the tribes in their tribal capacity, but only as members of the tribes," and "involve[d] their property rights only." *Lone Wolf*, 19 App. D.C. at 315 (¶4), 320-21. *Lone Wolf* did "*not* involve the political rights of appellants or of the other Indians in whose behalf this suit is brought." *Id.* at 315 (¶4). This is a critical distinction, since "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others," *McGirt*, 140 S.Ct. at 2464, which was what was complained of in *Lone Wolf*.

*Lone Wolf* has since been interpreted as making clear, however, that although Congress "possess[es] even the authority to breach its own promises and treaties," the Supreme Court will *not* "lightly infer such a breach once Congress has established a reservation," particularly as to disestablishment. *Id.* at 2462. Nor has any other precedential authority addressed the Reservation's disestablishment since the Supreme Court's modern jurisprudence on disestablishment following

Congress' uncoupling of reservation status from Indian ownership in 1948.[10] *See Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (discussing 62 Stat. 757, ch.645 (1948) (codified at 18 U.S.C. §1151)); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (Court's first disestablishment case post-1948). And loose dicta from the Tenth Circuit in *Murphy* citing the 1900 Act among a laundry list of examples of Congress' ability to state its intent regarding disestablishment or diminishment, *Murphy v. Royal*, 875 F.3d, 896, 949 (10th Cir. 2017),[11] cannot trump what this Court recognized—that it is the Supreme Court's subsequent analysis in *McGirt* that must be followed.[12]

### E. The Federal Government Continues to Recognize the Reservation and Tribal Governments After the 1900 Act

Absent in the years after the 1900 Act and *Lone Wolf* is any uniform indication that Congress or the Department of the Interior considered the Kiowa, Comanche, and Apache Reservation to be disestablished, or the tribal government eliminated. As addressed in the record and in Martinez's arguments, Congress and the Interior Department have instead referred to the Reservation and tribal government as *still existing*, reflecting that disestablishment did not occur. *See* Martinez Remanded Brief & Exs. 7-36; Martinez Transcript at 24-39 & Exs. And the Comanche Nation has likewise continued to exercise its governance. *See supra* n.1 & 2.

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[10] In *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950), the Tenth Circuit held that the 1900 Act disestablished the Kiowa, Comanche, and Apache Reservation. That decision, however, was issued prior to the Supreme Court's modern precedent, culminating in *McGirt*. Nothing precludes this Court from reaching a contrary holding. *See McGirt*, 140 S.Ct. at 2460 (recognizing split between the State of Oklahoma and Tenth Circuit).

[11] *Murphy* recognized that its reference to the 1900 Act was based on its prior decision in *Tooisgah*, which as referenced has no bearing here. *See supra* n.10.

[12] What has been held, however, is that Congress' authority to enact the 1900 Act does not mean that the Federal Government acted fairly or appropriately towards the Kiowa, Comanche, and Apache. The U.S. Court of Claims affirmed that the Federal Government's actions towards the three tribes made them "entitled to the fair market value of the land as damages for breach of contract implied in fact, or as a measure of their recovery on the grounds of fair and honorable dealing." *Kiowa*, 163 F. Supp. at 608.

## III. Supreme Court Precedent, Culminating in *McGirt*, Compels that Congress Did Not Disestablish the Kiowa, Comanche, and Apache Reservation in the 1900 Act

This Court recognized what the District Court neglected to follow—that it is "the analysis set out in *McGirt*" that must be applied to determine whether Congress "disestablished the [Comanche, Kiowa, and Apache] reservation." *See* Remand Order p.4. *McGirt* reaffirmed the high and demanding standard for Congress to disestablish a reservation, there, finding that Congress' allotment of the Creek Reservation in Oklahoma failed to disestablish that reservation. *McGirt*, 140 S.Ct. at 2462-65. Applying the principles from *McGirt* and other Supreme Court precedent leads to the same result here—the demanding standard to show disestablished has not been met.

### A. The 1900 Act Does Not Include the Hallmark Language Dispositive as to Congress' Unilateral Disestablishment Highlighted by *McGirt*

Drawing upon past precedent, *McGirt* reiterated that "[o]nly Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 2462. And while Congress has "the authority to breach its own promises and treaties," *McGirt* stressed that it would not "lightly infer such a breach once Congress has established a reservation." *Id.* Instead, "[i]f Congress wishes to break the promise of a reservation it must say so." *Id.*

Critically, as *McGirt* explained, a reservation's allotment does not equal its disestablishment. "For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." *Id.* at 2464. Instead, Congress' general allotment policy at the end of the 19th Century was to allot tracts to Indians, with the reservation then being abolished after the lands had been allotted and the trust period expired. *See id.* at 2464-65. Although "[i]n some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation[,] [w]hen it deemed that approach appropriate, Congress included additional language *expressly ending* reservation status." *Id.* at 2465 (emphasis added).

This is consistent with what the Supreme Court has long-recognized and *McGirt* reaffirmed: "Congress has used clear language of express termination when that result is desired," citing as examples language that the "reservation is hereby *discontinued*," that a portion of a reservation "be, and is hereby, *vacated* and *restored to the public domain*," and that "the reservation lines … be, and the same are hereby, *abolished*." *Mattz*, 412 U.S. at 504 n.22 (emphasis added);[13] *McGirt*, 140 S.Ct. at 2462 (citing same). Particularly significant here, the last of these three examples (concerning the Ponca and Otoe Tribes) was highlighted in *McGirt* as an example of language "expressly ending reservation status" in other "reservations also lying within modern-day Oklahoma." 140 S.Ct. at 2465. This singular focus upon the Ponca and Otoe is also consistent with scholars, who—after canvassing Oklahoma tribes including the Kiowa, Comanche, and Apache—concluded that "[t]he *only* legislation passed by Congress disestablishing reservations in Oklahoma concerned the Otoe, Missouria and the Ponca." Kickingbird, *supra* n.3 at 337.

The 1900 Act, in contrast, makes frequent reference to "*said reservation*" in the present tense, without any accompanying language that the Reservation has been "discontinued," "vacated," or "abolished." *See* 1900 Act, art. III, VIII, IX, 31 Stat. at 672-81. Unlike the language Congress used regarding the Ponca and Otoe Tribes that *McGirt* highlighted as an example of clear disestablishment, no similar language clearly dispositive of disestablishment exists in the 1900 Act.

### B. The Supreme Court has Never Held that Language of "Cession" in a Unilateral Act by Congress such as the 1900 Act is Sufficient to Disestablish an Entire Reservation

What the 1900 Act does state is that the Comanche, Kiowa, and Apache Indians would "cede" the land of the Reservation boundaries under the Medicine Lodge Treaty[14] for $2 million

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[13] *Mattz* cited to 15 Stat. 221 (1868); 27 Stat. 63 (1892); and 33 Stat. 218 (1904).

[14] Art. I provides that "the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands," which tracked the Reservation's boundaries. 31 Stat. 672, 676-77.

in consideration. *See* Order p.5 (¶¶11, 13) (citing Arts. I, VI). As the District Court recognized, *McGirt* cited the Supreme Court's past decisions in *Solem* and *Nebraska* for the proposition that an "explicit reference to cession" can be indicative of Congress' intent to diminish or disestablish a reservation. *See* Order p.6-7 (¶¶5-6). But that does not mean it is dispositive. Instead, as explained in *Solem* and *Nebraska*, language of cession creates a "presumption" that is at its highest when partial *diminishment* of a reservation, rather than complete disestablishment, is at issue. *Solem*, 465 U.S. at 470-71 ("When such *language of cession* is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable *presumption* that Congress meant for the tribe's reservation to be *diminished*.") (emphasis added) (citing *DeCoteau*, 420 U.S. at 447-78); *Nebraska v. Parker*, 136 S.Ct. 1072, 1079 (2016) (same).

As addressed below, the District Court, while acknowledging the "presumption" under *Solem* and *Nebraska*,[15] *see* Order p.7 (¶10), failed to apply it, and thus erroneously treated the "explicit reference to cession" as dispositive. Second, the District Court also ignored that the heightened, "almost insurmountable presumption" addressed in *Solem* and *Nebraska* is specifically limited to Congress' intention to *diminish* a reservation, not, as here, its entire disestablishment. Third, when it comes to *disestablishment*, any presumption created by Congress' language of cession is defeated when, as here, what is at issue is the *unilateral* disestablishment of an *entire* reservation to which a tribe has *never* consented. Disestablishment has not been shown.

**1. Language of "Cession" for the Comanche, Kiowa, and Apache Reservation is Not Dispositive of Disestablishment and is Distinct from Language of Diminishment for the Other Tribe in the Same Act**

First, the District Court erred by effectively treating the 1900 Act's language of "cession" as dispositive of disestablishment. *See* Order p.6-8. Tellingly, in *Solem* itself, the Supreme Court

[15] *McGirt* never needed to squarely address this context regarding "language of cession," because no such language was used with respect to the Creek reservation at issue in that case.

found the reservation in question had not been diminished or disestablished, even though Congress there had referred to the "reservations thus diminished" and the lands as "part of the public domain," *Solem*, 465 U.S. at 474-75—phrases *McGirt* expressly recognized as reflecting diminishment or disestablishment. *See McGirt*, 140 S.Ct. at 2462-64. If Congress calling a reservation "diminished" is not dispositive as to the reservation actually having been diminished and disestablished, neither is the language of "cession" in the 1900 Act conclusive.

Moreover, here, there is strong support that the 1900 Act did not disestablish the Kiowa, Comanche, and Apache Reservation when compared to Congress' language for the Indians of the Fort Hall Indian Reservation in the same Act. Both provide "[t]hat the said Indians … do hereby cede, grant, and relinquish … all right, title, and interest" for a sum certain. But the provisions for the Indians of the Fort Hall Reservation state that cession "to the United States" results in "segregating the ceded lands from the *diminished* reservation," and makes reference to a "*reduced* reservation," with some "of the lands ceded, granted, and relinquished under this treaty remain[ing] *part of the public domain*." 1900 Act, art. I, II, IV, V, 31 Stat. 672-74. In contrast, the language as to the Comanche, Kiowa, and Apache in the same Act frequently refers to "said reservation," but includes no similar references to a "diminished" or "reduced" reservation, or to lands in the "public domain." *See id.* §6, 31 Stat. 676-81. Given that *McGirt* highlights the appropriateness of considering treaty language "from the same era," *McGirt*, 140 S.Ct. at 2461, the absence of these same terms of diminishment or disestablishment as to the Kiowa, Comanche, and Apache *in the same Act* is significant.

**2. The "Presumption" Surrounding Language of "Cession" in *Solem* and *Nebraska* Concerned Diminishment, Not Disestablishment**

The language of cession in the 1900 Act is not dispositive, but instead gives rise only to a *presumption* that Congress intended to diminish or disestablish the Reservation. And the

presumption applicable here is less than that referenced in *Solem* and *Nebraska.* That is because—as *Solem* and *Nebraska* make clear—the high, "almost insurmountable presumption" that attaches to such language of cession only relates to Congress' intention to *diminish* the reservation, not its wholesale *disestablishment. Nebraska*, 136 S.Ct. at 1079 (quoting *Solem*, 465 U.S. at 470). *Murphy*, the case the District Court itself relied upon, reiterated the key distinction between "diminishment" and "disestablishment": "disestablishment generally refers to the relatively rare *elimination* of a reservation while diminishment refers to the *reduction* in size of a reservation." *Murphy*, 875 F.3d at 917 n.25 (quoting *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999)). The Supreme Court recognizes this distinction between diminishment and disestablishment as well. *See e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357-58 (1998) (holding Congress intended "to *diminish*" the reservation, while declining to reach "whether Congress *disestablished* the reservation altogether").

The Supreme Court has highlighted that the Court's analysis is different when disestablishment of an entire reservation is at issue. It first did so in *DeCoteau.* There, the Court noted that Congress used similar language of "cession" for the Lake Traverse Reservation at issue in that case as was used regarding the *diminishment* of other tribes' reservations in the same comprehensive act. *DeCoteau*, 420 U.S. at 439. But the Supreme Court was not willing to similarly find *disestablishment* for the entire Lake Traverse Reservation on that basis alone, since "in these other cases the Indians sold only a described *portion* of their lands, rather than all 'unallotted' portions, the result being merely a reduction in the size of the affected reservation." *Id.* at 439 & n.22; *see also McGirt*, 140 S.Ct. at 2465 (citing *DeCoteau*). Instead, the Court based its finding that disestablishment had occurred in *DeCoteau* by "following and reaffirming, the guiding principles of *Mattz* and *Seymour*." *DeCoteau*, 420 U.S. at 449. In *Mattz* and *Seymour*, the Court

found the reservations at issue were *not* terminated or disestablished, based in part on what the Court found to be a critical distinguishing point between those cases and *DeCoteau*—*Mattz* and *Seymour* dealt with "a unilateral action by Congress," while *DeCoteau* dealt with "the ratification of a previously negotiated agreement, to which a tribal majority consented." *Id.* at 448-49.

Subsequent Supreme Court decisions have continued to recognize that there is a meaningful distinction between diminishment and wholesale disestablishment. In *Rosebud*, for example, in discussing the weight to give tribal consent, the Court noted that, "unlike the situation in DeCoteau, we are not faced with an Act which, if it disestablished the area under question, would terminate the entire reservation." *Rosebud*, 430 U.S. at 598 n.20; *see also Yankton Sioux*, 522 U.S. at 357-58. And both *Solem* and *Nebraska*—which were decided after *DeCoteau* and *Rosebud*—were themselves diminishment cases regarding the purported reduction of a reservation, rather than its entire disestablishment (and rejected a finding of diminishment in both cases).

In other words, the District Court may be correct that, strictly speaking, "[b]ilateral consent is not necessary for cession of lands to *diminish* a reservation . . . ." Order p.8 (¶13) (citing *Rosebud*, 430 U.S. 584) (emphasis added). But here, what is at issue is not the mere *diminishment* of the Comanche, Kiowa, and Apache Reservation, but whether Congress entirely "erased those boundaries and disestablished the reservation." Remand Order p.4. Thus, as explained in *DeCoteau* and addressed in more detail below, Congress' "language of cession" is an insufficient basis to find that the Comanche, Kiowa, and Apache Reservation was entirely disestablished when the 1900 Act was a *unilateral* Act to which the Tribes *never* consented.

### 3. Language of "Cession" is an Insufficient Basis for Congress to Unilaterally Disestablish an Entire Reservation

Although the District Court tried to minimize its relevance, whether the Tribe consented to Congress' action, or whether Congress acted unilaterally, matters to the disestablishment analysis.

Here, like in *Mattz* and *Seymour*—but distinct from *DeCoteau*—the 1900 Act was a *unilateral* act by Congress concerning the entire Comanche, Kiowa, and Apache Reservation. *See* 1900 Act, art. I, 31 Stat. at 676-77; *see also Kiowa*, 163 F. Supp. at 608 ("Congress did not actually ratify the Jerome Agreement ... because it was accepted in terms varying materially from the offer."); Order p.5 (¶11). This distinction matters.[16] As the Supreme Court recently noted in *Nebraska*, "what the tribe agreed to has been significant in the Court's diminishment analysis," particularly for negotiations pre-*Lone Wolf*. 136 S.Ct. at 1081 n.1 (citing *Yankton Sioux*, 522 U.S. at 351-53). "Historical evidence of how pre-*Lone Wolf* sales of lands were negotiated has been deemed compelling, whereas historical evidence of negotiations post-*Lone Wolf* might be less so." *Id.* (citing *Hagan v. Utah*, 510 U.S. 399, 416-17 (1994)). The key difference is that "before this Court's decision in *Lone Wolf*"—which would include when Congress passed the 1900 Act—"Congress may not have been entirely sure of its power to terminate an established reservation unilaterally." *McGirt*, 140 S.Ct. at 2463. The Supreme Court's subsequent decisions after *Lone Wolf*—including *Mattz*, *Seymour*, *DeCoteau*, and *McGirt*—make clear that when Congress acts *unilaterally*, it must use language reflecting its intent and authority to act without tribal consent. *See id.* at 2462.

This issue of tribal consent specifically arises when Congress has used language of "cession" to disestablish a reservation, as is the case for the 1900 Act. That is because Congress cannot unilaterally force a *tribe* to "cede, convey, transfer, relinquish, and surrender" the "claim, title, and interest" the tribe holds. *See supra* n.12, 14. Indeed, the Court has recognized that "'cession' requires bilateral consent," and that "[a]s a matter of strict English usage, ... 'cession' refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such

[16] It is also a distinction entirely unaddressed in *Tooisgah*, which was issued decades before the Supreme Court developed this distinction. *See supra* n.10.

jurisdiction by the authority of a superior sovereign." *Rosebud Sioux Tribe*, 430 U.S. at 597 (finding reservation partially diminished by 1904 Act, which, although it had not been consented to by super-majority of tribe, repeated verbatim language of "cession" from a 1901 Agreement which the tribe had validly approved, but which Congress had not then ratified).[17]

Indeed, the District Court's own conclusions implicitly recognize that tribal consent is inherent to language of cession disestablishing a reservation, by stating that "[a]n *agreement* to "cede …," "constitutes a termination of a reservation" and is "precisely suited to disestablishment." Order p.7 (¶¶7-8) (quoting *DeCoteau*; *Rosebud*). Likewise, *Solem* explicitly supported its conclusion that the reservation in that case was not diminished by highlighting that, "[i]n contrast to the Lake Traverse Act [in *DeCoteau*] and 1904 Rosebud Act [in *Rosebud*], the Cheyenne River Act [in *Solem*] did not begin with an agreement between the United States and the Indian Tribes, in which the Indians agreed to cede a portion of their territory to the Federal Government." *Solem*, 465 U.S. at 476. The same is true here and mandates finding no diminishment or disestablishment.

Adherence here to the consistent thread across Supreme Court precedent that language of cession in a unilateral act by Congress is insufficient to disestablish an entire reservation, in no way impugns the Supreme Court's recognition of Congress' "authority to breach its own promises and treaties" with tribes. *McGirt*, 140 S.Ct. at 2462. Instead, it is firmly consistent with *McGirt*'s emphasis that "once a reservation is established, it retains that status 'until Congress explicitly

[17] To the extent *Rosebud* departed from this plain meaning to instead find a reservation diminished unilaterally by Congress, the Court reasoned that "Congress was simply repeating verbatim language from a bill ratifying the 1901 Agreement, which had made the proper use of the word 'cession' *because the Agreement had been approved by the Tribe*." *Id.* (emphasis added). Moreover, *Rosebud* only concerned the *diminishment* of the reservation, not its entire disestablishment. *Id.* at 598 n.20. Those same historic facts, however, are entirely absent here, and compel the contrary result. Unlike *Rosebud*, the Kiowa, Comanche, and Apache *never* validly acceded to *either* the Jerome Agreement *or* the 1900 Act with respect to the disestablishment of their *entire* Reservation.

indicates otherwise," such that "[i]f Congress wishes to break the promise of a reservation, it must say so." *Id.* at 2462, 2469. When Congress wants to *unilaterally* disestablish an entire reservation, it knows how to say so. "Congress has used clear language of express termination when that result is desired," such as that the "reservation is hereby *discontinued*"; that a portion of a reservation "be, and is hereby, *vacated* and restored to the public domain"; and that "the reservation lines … be, and the same are hereby, *abolished*." *Mattz*, 412 U.S. at 504 n.22. The use of such language—which reflects action taken *by the Federal Government*, rather than the tribes—is required for Congress to *unilaterally* disestablish an *entire* reservation.[18] In contrast, language of "cession" in a *unilateral* act by Congress—without any corresponding reference to a "discontinued," "vacated" or "abolished" reservation, or to the lands being in the "public domain"—is insufficient to find Congress disestablished an *entire* reservation, particularly when no valid tribal assent to such

[18] For this same reason, the District Court's finding that "[t]he tribes were to *abandon* the aforementioned land ceded herein," is likewise insufficient to prove disestablishment. *See* Order p.5 (¶14). The term "abandon" means "to give up." *See e.g.*, "abandon." Merriam-Webster Online Dictionary, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abandon. It therefore is a term similar in meaning to "cede" inasmuch as both refer to actions to be taken by the *Tribes*, rather than action that can be unilaterally taken by the Federal Government. Moreover, viewed in context, the sole reference to the term "abandon" in the 1900 Act does not appear in the operative language of Article I, providing for the "cession" of lands, but instead in Article XI, a separate provision discussing a purported reversionary claim in the land alleged by the Choctaw and Chickasaw nations. This reference to the term "abandoned" appears only in Congress' description of the Choctaw and Chickasaw nations' alleged "*claim*" to a reversionary interest, and allowing that claim to be adjudicated in court. This is not a statement by Congress that the lands have been abandoned and does not support a finding of disestablishment. Indeed, Congress made clear that its summary of the Choctaw and Chickasaw's claim and reference to it in the 1900 Act was not a statement of Congress' agreement with the claim. Nor were the lands ever found to be abandoned through a court action by the Choctaw and Chickasaw. Instead, approximately six months after the 1900 Act was enacted, the Supreme Court in another case squarely rejected the Choctaw and Chickasaw's same claim to a reversionary interest, thus effectively quashing the Choctaw and Chickasaw's same claim in this suit. *See United States v. Choctaw Nation*, 179 U.S. 494 (Dec. 10, 1900) (similar claim involving the Wichita Band).

cession was *ever* given.[19] The absence of language that Congress intended to "discontinue," "vacate," or "abolish" the Reservation—where it is undisputed that the Comanche, Kiowa, and Apache *never* consented to the 1900 Act or the Jerome Agreement—renders the State unable to prove disestablishment.

### C. Subsequent Actions by Congress and the Secretary of the Interior Show that the Kiowa, Comanche, and Apache Reservation was Not Disestablished

The fact that the 1900 Act itself, for the reasons just discussed, does not explicitly indicate disestablishment, is on its own conclusive. *See McGirt*, 140 S.Ct. at 2470. But to the extent there is any ambiguity in the 1900 Act, *McGirt* recognizes that "extratextual sources" can help "clear up" any "ambiguity about a statute's original meaning." *Id.* at 2469. Here, Congress' and the Federal Government's subsequent actions show and support that the Reservation was not disestablished by Congress. *See supra* p.10. There is certainly no definitive indication of disestablishment in the years subsequent to the 1900 Act that "can be reconciled with … [the Court's] rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights." *McGirt*, 140 S.Ct. at 2470.

## CONCLUSION

For these reasons, and those raised by Martinez, the Comanche Nation respectfully requests that this Court find that the Reservation established in the Medicine Lodge Treaty has not been disestablished, and thus, the crimes in this case occurred in Indian Country.

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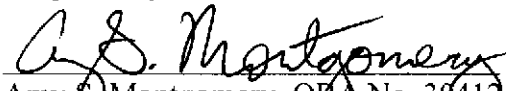
[19] Although *McGirt* credited how *Rosebud* discounted *subsequent* historical events after first coming "'to the firm conclusion that congressional intent' was to diminish the reservation in question," *McGirt*, 140 S.Ct. at 2469 (quoting *Rosebud*, 430 U.S. at 603), *Rosebud* was clear that it was "an examination of the process leading up to the enactment of the 1904 Act, as well as the language and legislative history [that] leads us … to the firm conclusion [of] congressional intent …," 430 U.S. at 603. Thus, under *McGirt*, that Congress unilaterally passed the 1900 Act is properly part of the Court's threshold analysis. And as discussed, *supra* n.17, the same "examination" here as in *Rosebud* leads to a contrary result, because the Comanche, Kiowa, and Apache Indians *never* validly signaled their assent to cession.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

On this 10th day of May, 2021, a true and correct copy of the foregoing was mailed via U.S. Mail along with an electronic copy via email to:

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