

**ORIGINAL**

2022 OK 84



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA **FILED**

SUPREME COURT  
STATE OF OKLAHOMA

OCT 25 2022

JOHN D. HADDEN  
CLERK

ANDREA SUE MILNE,

Plaintiff/Appellee,

v.

HOWARD JEFFRIES HUDSON

Defendant/Appellant.

Rec'd (date)	10-25-22
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Case No. 119,498

**Darby, C.J., concurring in result:**

¶1 I concur with the Court's judgment, but write separately to explain my understanding of the legal framework for when an Oklahoma state district court, a court of general jurisdiction, is otherwise preempted (or ousted)<sup>1</sup> of that authority in

<sup>1</sup> See *Lewis v. Sac & Fox Tribe of Okla. Hous. Auth.*, 1994 OK 20, ¶¶ 15-16, 896 P.2d 503, 510-11:

Under our system of federalism, a state's sovereignty is concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause. *Yellow Freight System, Inc. v. Donnelly* teaches that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction. In *Gulf Offshore v. Mobil Oil* the Court identified three different methods by which a congressional state-court ouster may be effected --- (1) by an explicit statutory directive, (2) by unmistakable implication from legislative history, or (3) by a clear incompatibility between state-court jurisdiction and federal interests.

The constitutional ouster-of-jurisdiction doctrine is not to be confused with federal preemption. Preemption occurs when federal law *displaces* a body of state law on the same subject. Unlike state-

civil protection order cases involving Indians on a reservation.<sup>2</sup> Federal Indian law jurisprudence requires this Court to hold that litigation arising from conduct occurring within the external boundaries of a reservation is within a district court's subject matter jurisdiction until it is determined not to be; exclusive jurisdiction with tribal courts occurs in limited circumstances. We must resolve jurisdictional challenges individually on a fact-specific, case-by-case determination.<sup>3</sup>

¶2 In this case, Hudson, a Cherokee Indian, challenges the McIntosh County District Court's denial of his motion to dismiss; he claims that the Muscogee (Creek)

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court ouster, which requires that we examine the law for the presence of an explicit statutory directive conferring *exclusive* federal-court jurisdiction, preemption is a *matter of congressional intent*, which may be effected even by regulations of a federal agency acting within the scope of congressionally delegated authority. *Preemption alone* cannot divest state courts of jurisdiction to entertain federal-law claims.

(Internal quotations and footnotes omitted).

<sup>2</sup> *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020) held that the Muscogee (Creek) Nation's Reservation was never disestablished and thus remains "Indian country" under the definition of the Major Crimes Act at 18 U.S.C. § 1151 (2018). *Ibid.* at 2460-82. As of June 29, 2022, the U.S. Supreme Court has recognized the following reservations within the external boundaries of Oklahoma: Creek, Cherokee, Choctaw, Chickasaw and Seminole Reservations. *Oklahoma v. Castro- Huerta*, 597 U.S. \_\_\_, 142 S. Ct. 2486, 2490, 213 L. Ed. 2d 847 (2022).

<sup>3</sup> See, e.g., *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d. 251 (1959) (transaction took place on reservation, the Tribe had developed legal court system, the defendant was a reservation Indian); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) (non-Indian owned business defendant at time of accident was subcontractor for wholly owned business of the Tribe, accident occurred within the external boundaries of the reservation, but on alienated, non-Indian land); *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (regulation of on-reservation conduct, but on non-Indian fee land by non-Indian persons); *Fisher v. Dist. Court*, 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976) (per curium) (adoption of tribal member wherein parents were tribal members and prospective adoptive parents were tribal members).

Nation's Tribal District Court has exclusive jurisdiction. Because state jurisdiction is not preempted, does not infringe on the Creek Nation's right to self-government, and the exercise of tribal power is not necessary to control internal relations among members, i.e. the protective order at issue involves a member Indian and a nonmember Indian,<sup>4</sup> the McIntosh County District Court retains subject matter jurisdiction. *Fisher v. Dist. Court*, 424 U.S. 382, 387, 96 S. Ct. 943, 943, 947, 47 L. Ed. 2d 106 (1976); *Montana v. United States*, 450 U.S. 544, 564-66, 101 S. Ct. 1245, 1257-58, 67 L. Ed. 2d 493 (1981). A review of the Muscogee (Creek) Nation Code reveals that the Nation's Tribal District Court actually has concurrent jurisdiction with the State, not exclusive jurisdiction. Muscogee (Creek) Nation Code Ann. tit. 6, §§ 3-401, 3-402 (2010).<sup>5</sup> The McIntosh County District Court correctly denied Hudson's motion to dismiss for lack of subject matter jurisdiction.

**I. OKLAHOMA'S DISTRICT COURTS HAVE GENERAL SUBJECT MATTER JURISDICTION AND ARE LIMITED BY THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.**

¶3 First, we must consider the source and scope of the state district courts' subject matter jurisdiction and understand how it differs from that of the Creek Nation's

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<sup>4</sup> The Court has at times referred to "nonmembers" and "non-Indians" interchangeably. An Indian tribe's inherent authority **extends to its members**, not nonmember Indians or non-Indians. See *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990); *Montana*, 450 U.S. 544 (1981); see also *Nevada v. Hicks*, 533 U.S. 353, 377 n.2, 121 S. Ct. 2304, 2319 n.2, 150 L. Ed. 2d 398 (2001) (Souter, J., concurring).

<sup>5</sup> See *infra*. Section 3-401 authorizes any person to file a protection order if the petitioner resides within Creek Nation's territorial jurisdiction. The Indian status is irrelevant.

Tribal District Court. Subject matter jurisdiction is the “power to deal with the general subject involved in the action” and includes the power of the court “to proceed in a case of the character presented, or power to grant the relief sought” *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 16, 353 P.3d 532, 539 (footnotes omitted). It is primary and fundamental in every case. *Pointer v. Hill*, 1975 OK 73, ¶ 14, 536 P.2d 358, 361. Oklahoma district courts derive their power from the Oklahoma Constitution; they are vested with “**unlimited original jurisdiction of all justiciable matters**” Okla. Const. art. VII, § 7(a) (emphasis added). The adjudicatory authority of Oklahoma district courts is comprehensive and only limited by the Oklahoma Constitution<sup>6</sup> and the U.S. Constitution. U.S. Const., amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¶4 When determining jurisdictional disputes for litigation arising within the external boundaries of a reservation, we must remember that Oklahoma’s sovereignty does not stop at reservation borders. *Castro-Huerta*, 597 U.S. at \_\_\_, 142 S. Ct. at 2488. The U.S. Constitution authorizes this State to exercise jurisdiction in Indian country. Oklahoma’s territory includes “Indian country.” *Id.*

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<sup>6</sup> “The District Court shall have unlimited original jurisdiction of all justiciable matters, **except as otherwise provided in this Article**, and such powers of review of administrative action as may be provided by statute.” Okla. Const. art. VII, § 7(a) (emphasis added).

at 2493.<sup>7</sup> “Indian country is part of the State, not separate from the State. To be sure, under [the United States Supreme Court’s] precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. CONST., Amdt. 10.” *Id.* The general rule is that Oklahoma is “entitled to the sovereignty and jurisdiction over all the territory within her limits.” *Id.* (citing *Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228, 11 L. Ed 565 (1845)).

## II. INDIAN TRIBAL NATIONS ARE NOT FULL TERRITORIAL SOVEREIGNS.

¶5 In comparison, tribal courts are not courts of general jurisdiction; they are limited. See *Nevada v. Hicks*, 533 U.S. 353, 367, 121 S. Ct. 2304, 2314, 150 L. Ed. 2d 398 (2001). A tribe’s inherent powers extend to their internal relations. *Montana*, 450 U.S. at 564, 101 S. Ct. at 1257-58. Tribal nations are not full territorial sovereigns. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650, 121 S. Ct. 1825,

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<sup>7</sup> “Indian country” is defined at 18 U.S.C. § 1151 (2018):

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

1831, 149 L. Ed. 2d 889 (2001). Instead they are “unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.” *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086, 55 L. Ed. 2d 303 (1978) superseded by statute, Department of Defense Appropriations Act, 1996, Pub. L. No. 101-511, tit. VIII, § 8077(b)-(c), 104 stat. 1856, 1892-93, as recognized in *United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).

¶6 It is true that tribes have lost many attributes of sovereignty, but not all. *Montana*, 450 U.S. at 564, 101 S. Ct. at 1257. Part of a tribe’s retained inherent powers included punishing tribal offenders, determining tribal membership, regulating domestic relations among members, and prescribing rules of inheritance for members. *Id.* “But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Id.* (citations omitted).

¶7 In distinguishing those inherent powers from those divested, the Court has said:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe . . . . These limitations rest on the

fact that the dependent status of Indian tribes within [the United States'] territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

*Id.* (citations & quotation marks omitted).

**III. FOR CASES ARISING IN INDIAN COUNTRY INVOLVING TRIBES AND THEIR MEMBERS, OKLAHOMA DISTRICT COURTS HAVE GENERAL SUBJECT MATTER JURISDICTION UNLESS PREEMPTED BY CONGRESS OR THE EXERCISE OF STATE JURISDICTION INFRINGES ON THE TRIBE'S RIGHT TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.<sup>8</sup>**

¶8 In civil cases, the determination of jurisdiction in a contest between state and tribe has depended heavily on the facts of that particular case. *See, e.g., Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d. 251 (1959); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997); *Montana*, 450 U.S. 544; *Fisher*, 424 U.S. 382.<sup>9</sup> Some principles, however, have been distilled from existing case law. *Montana v. United States*, 450 U.S. 544, prescribes the following rule: an Indian tribe generally lacks civil authority over the conduct of nonmembers and non-

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<sup>8</sup> *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); *see also Castro Huerta*, 142 S. Ct. at 2494 (“[A] State’s jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.”).

<sup>9</sup> *See supra*, note 3.

Indians on non-Indian land<sup>10</sup> within that tribe's reservation. *Ibid.* The *Montana* Rule is not without exceptions. *Id.* at 565-66. One of those exceptions is when that conduct infringes on tribal self-government. *Id.* at 564-66. Under the *Montana* exception when some on-reservation conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe, the tribe will exercise power to the point necessary to protect tribal self-government or to control internal relations. *Id.* The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341, 128 S. Ct. 2709, 2726-27, 171 L. Ed. 2d 457 (2008).

¶9 Civil protection orders regulate domestic relations among persons and are routinely matters adjudicated in Oklahoma district courts. They clearly fall within the district courts' plenary, general subject matter jurisdiction. Okla. Const. art. VII, § 7(a). To understand whether the Creek Nation's Tribal District Court had exclusive jurisdiction, the question here is really whether the McIntosh County District Court's exercise of jurisdiction unlawfully infringed on the Creek Nation's right to self-government. *See Williams*, 358 U.S. at 220, 79 S. Ct. at 271 ("Essentially, absent governing Acts of Congress, the question has always been

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<sup>10</sup> Subsequently alienated lands within external reservation borders owned in fee by non-Indians.

whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”); *see also Fisher*, 424 U.S. at 386, 96 S. Ct. at 946.

¶10 In this case, Milne, a Creek Indian, filed in McIntosh County District Court a petition for a protection order against Hudson, a Cherokee Indian, for events occurring within the external boundaries of the Creek Nation reservation. Hudson attacked Milne at her home in McIntosh County.<sup>11</sup> The attack serves as the basis for the protection order and a criminal case against Hudson.<sup>12</sup> The criminal case was ultimately dismissed after the U.S. Supreme Court’s decision in *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S. Ct. 2452, L. Ed. 2d 985 (2020).<sup>13</sup> In this appeal, Hudson challenges the jurisdiction of the district court to enter a civil order when the criminal case was dismissed for lack of jurisdiction.

¶11 State jurisdiction in Indian country may be preempted under ordinary principles of federal law. *Castro-Huerta*, 142 S. Ct. at 2494. Hudson’s criminal case was dismissed because the Major Crimes Act preempts state jurisdiction over “Indians” committing certain enumerated crimes in “Indian country.” 18 U.S.C. § 1153 (2018).<sup>14</sup> In civil cases, however, there is no similar provision granting any

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<sup>11</sup> More information about the location of her home is unknown from the record. For example, it is not shown that the property is on an allotment, on trust land, held for the benefit of the Tribe or otherwise.

<sup>12</sup> *See State v. Howard Jefferees Hudson, Jr.*, No. CF-2020-00187 in McIntosh County. The case was dismissed 3/2/2021 based on *McGirt*.

<sup>13</sup> *See supra* note 12.

<sup>14</sup> Section 1153 provides:

court exclusive jurisdiction of protection order cases involving “Indians.”<sup>15</sup> Instead, federal Indian law jurisprudence leads us to cases explaining the extent of a tribe’s inherent authority and the ability of a tribe to regulate domestic relations *among its members*. See *Montana*, 450 U.S. 544, 101 S. Ct. 1245. Preemption is not an issue in this case. Title 18 of the United States Code, § 2265(e) does provide “a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person” but it is in no way meant to create exclusive tribal jurisdiction. See Majority Op. ¶¶15-16.

¶12 If there is no preemption, then the next question concerns infringement on the Creek Nation’s right to make their own laws and be governed by them. There are

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(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153 (2018).

<sup>15</sup> Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted. See *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854, 105 S. Ct. 2447, 2453, 85 L. Ed. 2d 818 (1985).

two categories of claims the U.S. Supreme Court has held tribes have exclusive civil jurisdiction under the infringement test: the first is where a nonmember asserts a claim against a member Indian for conduct occurring on the member Indian's reservation, *see Williams*, 358 U.S. at 223, 79 S. Ct. 269, 3 L. Ed. 2d 251; the second is where the cases involve internal/domestic matters, all parties are members of the same Indian Tribe, and the relevant conduct for the case occurs on that Tribe's reservation. *See Fisher*, 424 U.S. at 387-89. In both cases the Tribe has a strong interest in adjudicating the case as incident to their retained inherent sovereign powers.

¶13 *Fisher* controls the analysis in this case; *however*, we reach a different result with respect to the jurisdictional question *because* the case is distinguishable. In *Fisher* the United States Supreme Court held that state jurisdiction over the adoption of a Northern Cheyenne Indian child—where *every party to the adoption* was also a *member of the Northern Cheyenne Indian Tribe and resided within the Tribe's reservation*—was infringement on the right of the Tribe to govern itself. *Fisher*, 424 U.S. at 389, 96 S. Ct. at 948. The Court recognized the right of the Tribe to independently govern itself had been protected; the Tribe adopted a constitution and bylaws intended to “revitalize their self-government.” *Id.* at 386-87, 96 S. Ct. at 946. Based on this, the Tribe established its Tribal Court and “granted it jurisdiction over adoptions among members of the Northern Cheyenne Tribe.” *Id.* at 387

(internal citations omitted). The revised law said the Tribal Court “shall have jurisdiction” to review “adoptions among members of the Northern Cheyenne Tribe.” *Id.* at 391 n.5. Acknowledging this, the U.S. Supreme Court recognized that the exercise of state-court jurisdiction over the adoption would plainly interfere with the Northern Cheyenne Tribe’s self-government. *Id.* at 387-88. If states were also allowed to adjudicate the adoption of a member Indian wherein all parties to the adoption were also member Indians and resided within the reservation of the Tribe, the Court reasoned there would be substantial risk of different decisions and cause a decline in the Tribal Court’s authority. *Id.*, 424 U.S. 388.

¶14 Because it was infringement, the Tribe had exclusive jurisdiction over the adoption proceeding. *Id.* at 389. A different result would be reached, however, had the adoption involved nonmember Indians or non-Indians or both who wished to adopt a member of the Northern Cheyenne Tribe. *Id.* at 391 n.5 (“On all adoptions involving nonmembers of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts.”). In that event, the Tribe had a law which provided that the Northern

Cheyenne Reservation *shall have concurrent jurisdiction* with State courts. *Id.* This legislative decision regarding jurisdiction—to extend concurrent jurisdiction—comports with case law that reiterates tribal inherent authority is *limited to their members and territory*,<sup>16</sup> and with case law that equates a tribe’s adjudicative jurisdiction at least to its legislative jurisdiction as it relates to nonmembers.<sup>17</sup>

¶15 In our case, the Creek Nation has enacted its own code, which includes Title 6 allowing for civil protection orders; it also has its Tribal District Court. Title 6 pertains to “Children and Family Relations.” Subchapter 4 regards civil procedures and remedies. Notably, § 3-401 of the Creek Code grants to the Nation’s Tribal District Court full civil jurisdiction to issue protection orders in certain instances, but it does not claim exclusive jurisdiction for itself.

#### **§ 3—401 Civil jurisdiction**

The District Court has full civil jurisdiction to issue protection orders if the petitioner currently or temporarily resides in the Muscogee (Creek) Nation territorial jurisdiction, if the respondent currently or temporarily resides in the Muscogee (Creek) Nation territorial jurisdiction or if the domestic, dating or family violence occurred in the Muscogee (Creek) Nation territorial jurisdiction or on other land under the authority of the Muscogee (Creek) Nation; provided that such civil jurisdiction may be exercised regardless of the Indian or

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<sup>16</sup> *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L. Ed. 2d 706 (1975); *Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); *Montana*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

<sup>17</sup> *Strate*, 520 U.S. at 453, 117 S. Ct. at 1413; *Plains Commerce Bank*, 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008); *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

non-Indian status of petitioners and respondents. There is no minimum requirement of residency to petition the District Court for an order for protection. In accordance with 18 U.S.C. § 2265(e), the District Court has full civil jurisdiction to enforce protection orders issued by the District Court and to enforce foreign protection orders pursuant to Title 6, §§ 3–415, 3–416 and 6–3–417.

Muscogee (Creek) Nation Code Ann. tit. 6, § 3-401 (West 2010), *as amended by Act of March 28, 2016, NCA 16-038, sec. 3, § 3-401, at 30-31, available at* <http://www.creeksupremecourt.com/wp=content/uploads/NCA-16-038-part-2.pdf>.

¶16 The next section, § 3-402, lists those petitioners eligible for civil protection orders in the Creek Tribal District Court—for each category of petitioner the code provision provides that they “may seek relief,” “may file a civil petition for an order,” or “may request an emergency temporary protection order”

**§ 3—402 Eligible petitioners for civil protection order**

**A. Petition by victim.** Any victim of domestic violence, stalking, harassment, sexual assault, dating violence or family violence may seek relief by filing a civil petition for protection order with the District Court as an independent action or by a motion in a pendent lite order in another proceeding on behalf of their self and/or any domesticated animals threatened. Provided, that if made by oral motion it shall be promptly memorialized by written motion.

**B. Petition on behalf of child.** A parent, guardian, or other representative may file a civil petition for an order for protection on behalf of a child or incapacitated adult or any minor age sixteen (16) or seventeen (17) years may seek relief under the provisions of this Code.

**C. Motion by Prosecutor.** The Prosecutor may move for an order of protection on behalf of a victim, minor child or incapacitated adult in an independent action or as a

pendent lite order in another proceeding provided that such motion is memorialized by a written motion.

**D. Request for emergency temporary order.** If the domestic, dating or family violence, stalking, harassment or sexual assault occurs when the District Court is not open for business, such person may request an emergency temporary protection order as provided by Title 6, §§ 3–306 and 3–405. The District Judge or other Court officer with authority to issue an order for protection shall be available twenty-four (24) hours a day to hear motions or petitions for emergency orders for protection.

Muscogee (Creek) Nation Code Ann. tit. 6, § 3-402 (West 2010), *as amended by Act of March 28, 2016, NCA 16-038, sec. 3, § 3-402, at 31, available at <http://www.creeksupremecourt.com/wp=content/uploads/NCA-16-038-part-2.pdf>.*

¶17 For civil protection orders the Creek Code is permissive and allows any person within their territorial limits to file a petition for civil protection order. The Code provides for concurrent jurisdiction.

#### IV. CONCLUSION

¶18 The Creek Nation Tribal Court and McIntosh County District Court have concurrent jurisdiction; tribal jurisdiction is not exclusive as it does not meet the criteria under *Montana*, or more specifically, *Fisher*.

¶19 In litigation between a member Indian and a nonmember “arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of the state and tribal courts has depended, absent a governing Act of Congress, on ‘whether the state action infringed *on the right of reservation Indians* to make their

own laws and be ruled by them.”” *Fisher*, 424 U.S. at 386, 96 S. Ct.at 946 (emphasis added).

¶20 Milne could have filed a civil protection order petition in more than one court. Nowhere in the Creek Code is exclusive jurisdiction claimed for the issuance of civil protection orders. No infringement on the right of the Creek Nation to govern itself can be shown in this case. Until there is some conduct that injures the Tribe’s right to self-government to the extent required under federal jurisprudence, there can be no infringement. The McIntosh County District Court had jurisdiction.