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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

[1] The Modoc Nation,

Plaintiff,

v.

VERIFIED COMPLAINT

Civil No. 23-cv-437-CDL

[1] GENTNER DRUMMOND, in his
capacity as Attorney General of Oklahoma,
[2] DOUGLAS PEWITT, in his capacity as
District Attorney for District 13, Oklahoma,

Defendants.

For its Verified Complaint against the Defendants, Plaintiff Modoc Nation alleges the
following:

INTRODUCTION

This is a suit for declaratory and injunctive relief by which Plaintiff, the Modoc Nation, seeks (1) a declaration that the Modoc Reservation was established by the United States in 1874 and exists today, 2) a declaration that the Defendants must give effect to the United States Supreme Court ruling in *McGirt v. Oklahoma*, (3) a declaration that the State's attempted prosecution of Indian defendants for conduct in Indian Country violates both federal law and the Modoc Nation's sovereignty and ability to self-govern, and (4) an order prohibiting the Defendants from attempting to assert criminal jurisdiction over Indians for conduct occurring in Indian country.

JURISDICTION AND VENUE

1. This action is brought by the Modoc Nation (Nation), a federally recognized Indian tribe, for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 for the purpose of determining a question of actual controversy between the parties and for equitable relief as requested and described herein.

2. The matter in controversy thus arises under the Constitution, laws, and treaties of the United States. This Court has jurisdiction over this action under 28 U.S.C. § 1331 and 28 U.S.C. § 1362.

3. This action seeks to enjoin the Defendants from exercising jurisdiction reserved exclusively to the federal government and the Modoc Nation under the laws and treaties of the United States. It presents an actual justiciable controversy between Plaintiff and Defendants with adverse interests, which is not possible of settlement without a judicial determination declaring the rights and obligations of the parties. Further, said controversy admits of an immediate and definitive determination of the legal rights of the parties and is capable of specific relief based upon the allegations below.

4. Although this action challenges the legality of state criminal proceedings, abstention by this Court under the *Younger* doctrine is not appropriate because whether a state has criminal jurisdiction in Indian country is a question of federal law “in an area in which federal interests predominate” and the importance of any State interest in the state litigation is “minimal.” *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 714 (10th Cir. 1989).

5. Venue is proper in this Court under 28 U.S.C. § 1291(b) because all the actions from which the claims arise occurred or are occurring within the Northern District of Oklahoma.

PARTIES

6. The Nation is a federally recognized Indian Tribe with an intergovernmental relationship with the United States of America for more than 150 years, including as a party to a Treaty with the United States on October 14, 1864, 16 Stats. 707. The Nation appears on the Federal List Act of “*Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*” published pursuant to Section 104 of the Act of November 2, 1994, PL 103-454, 108 Stat. 4791, 4792.

7. Defendant Gentner Drummond is the Attorney General of the State of Oklahoma. Defendant Drummond is sued in his official capacity. The Attorney General is the chief legal and law enforcement officer of the State and is responsible for representing the State in criminal appeals.

8. Defendant Douglas Pewitt is the District Attorney for Oklahoma District 13, which includes the Modoc Reservation. Defendant Pewitt is sued in his official capacity. The District Attorney is responsible for representing the State in the prosecution of criminal matters arising in their District, subject to limitations imposed by federal law.

FACTUAL BASIS FOR CLAIMS

9. The Nation’s ancestral home lies along what is now the California-Oregon border.

10. Euro-American expansion during the mid-19th century placed increasing pressure on, and violence against, the Modoc people, ultimately leading to the establishment of a reservation near Fort Klamath, Oregon for their use. Treaty of October 14, 1864, 16 Stat. 707 (shared by the Klamath, Modoc, and Yahooskin Band of Snake Indians).

11. Conditions on the reservation caused many of the Modoc to return to their homelands in 1872. The United States efforts to “capture” and return the Modoc to the reservation sparked the Battle of Lost River and what became known as the Modoc Wars.

12. The war raged for two years through 1873. At the war’s end, the United States executed Modoc leaders, imprisoned others at Alcatraz Island, and transported others as prisoners of war on railroad cattle cars to the Quapaw Agency in the then-Indian Territory, now Oklahoma. There, the Modoc took up residency on lands set apart for their use and occupation by the United States as a result of the purchase of land from the Eastern Shawnee (Reservation). Burl E. Self, *The Encyclopedia of Oklahoma History and Culture Modoc*, Oklahoma Historical Society, last accessed Oct. 4, 2023 9:30 AM, <https://www.okhistory.org/publications/enc/entry.php?entry=MO002>.

13. The Nation continues to occupy and exercise sovereign governmental authority over its Reservation.

14. In 1891, the Modoc Reservation was allotted pursuant to the Dawes Act of 1887 P.L. 49-105, 24 Stat. 388. *History*, Modoc Nation, last accessed Oct. 4, 2023 9:22 AM, <https://modocnation.com/history/>.

15. The Modoc Nation’s intergovernmental relationship with the United States was terminated in 1954. Act of August 13, 1954, 68 Stat. 718.

16. On May 5, 1978, the relationship between the federal government and the Modoc Nation was restored. The provisions of the Termination Act of August 13, 1954 were deemed no longer applicable to the Modoc Nation, the Nation was recognized as a federally recognized tribe located in the State of Oklahoma, and the Department of the Interior was authorized to assist the Nation to organize its government under the provisions of the Thomas Rogers Oklahoma Indian Welfare Act of 1936, Act of May 15, 1978, P.L. 95-281, 92 Stat. 246 (OIWA).

17. The Modoc people adopted a Constitution and Bylaws and have since exercised governmental authority by its terms, as amended in 2010.

18. An Indian reservation can only be disestablished by clear expression of Congressional intent, under *McGirt v. Oklahoma*, 140 S. Ct. 2453 (2020), and no act of Congress after 1978 contains a clear expression of Congressional intent to disestablish the Modoc Reservation.

19. The Defendants have engaged in a litigation campaign to unlawfully assert criminal jurisdiction over Indian defendants state-wide, including in the Indian country of the Modoc, Quapaw, Ottawa, Miami, Eastern Shawnee, and Seneca-Cayuga Reservations, all of which are in Ottawa County, contending that it has inherent jurisdiction over Indians in Indian country. The following is a summary of notable cases arising out of Ottawa County.

The Lawhorn Prosecution – Quapaw Reservation

20. In 2020, the District Attorney of Ottawa County charged Jeremy Lawhorn, a member of the Cherokee Nation, with committing Lewd or Indecent Acts with a Child Under 16 on the Quapaw Reservation, which shares the northeast corner of Oklahoma with the Modoc Nation. *See State v. Lawhorn*, No. CF-20-189 (Ottawa Cnty. Ct. 2021).

21. On November 18, 2020, the State stipulated to the Ottawa County District Court that 1) Mr. Lawhorn is an Indian, and 2) the alleged criminal activity occurred within the historical

boundaries of the Quapaw Reservation. *See* Ct. Order with Findings of Fact and Conclusions of Law, *State v. Lawhorn*, No. CF-20-189, (Ottawa Cnty. Ct. Nov. 18, 2021).

22. The State offered no evidence of a clear expression of Congressional intent to disestablish the Quapaw Reservation and the Ottawa County District Court noted that “although it has searched and spent extensive time looking into the issue, [the State] has no evidence to support the position that the Quapaw reservation has been disestablished by any Act of Congress.” *Id.*

23. The Ottawa County District Court dismissed the case, concluding that Mr. Lawhorn is an Indian and his conduct occurred in Indian country and that, as a result, the State lacked jurisdiction pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2453 (2020). *Id.*

24. The District Attorney gave his notice in open court of his intention to appeal to the Court of Criminal Appeals. *Id.*

25. On October 21, 2021, the Oklahoma Court of Criminal Appeals affirmed the District Court’s dismissal based on *McGirt*. *State v. Lawhorn*, 499 P.3d 777 (Okla. Crim. App. 2021).

The Brester Prosecution – Ottawa and Miami/Peoria Reservations

26. Between July 14 and August 14, 2020, the State charged Winston Brester, a member of the Seneca-Cayuga Nation, for multiple offenses occurring on both the Ottawa and Miami/Peoria Reservations, which share the northeast corner of Oklahoma with the Modoc Nation. *See State v. Brester*, No. CF-2020-129 (Ottawa Cnty. Ct. 2021), *State v. Brester*, No. CF-2020-177 (Ottawa Cnty. Ct. 2021), *State v. Brester*, No. CF-2020-178 (Ottawa Cnty. Ct. 2021).

27. On March 2, 2021, the Ottawa County District Court dismissed the State’s complaint against Mr. Brester for lack of jurisdiction because it concluded that the Ottawa, Miami, and Peoria Reservations remained Indian country for the purpose of criminal jurisdiction. Ct.

Order with Findings of Fact and Conclusions of Law, *State v. Brester*, No. CF-2020-129, (Ottawa Cnty. Ct. Mar. 2, 2021). Like it has concluded in other Orders to dismiss for lack of State criminal jurisdiction over Indian defendants within the Indian country of northeast Oklahoma, the Court repeated in *Brester* that “the State has not presented any evidence of specific congressional language” indicating that the Ottawa Reservation had been disestablished, stating that “although [the State] has searched and spend extensive time looking into the issue, it has found no clear statutory language of disestablishment by any Act of Congress.” *Id* at 3.

28. On May 11, 2023, the Oklahoma Court of Criminal Appeals affirmed the District Court’s dismissal based on *McGirt*. *State v. Brester*, 531 P.3d 125 (2023). The OCCA remanded the matter to allow for an evidentiary hearing regarding the State’s jurisdiction over non-member Indian criminal conduct in Indian country, with the condition that if the State did not pursue the claim within 60 days, the District Court’s ruling would become final. The State did not pursue that claim.

The Dixon Prosecution – Ottawa Reservation

29. On March 20, 2020, the District Attorney of Ottawa County charged Destrie Dixon, a member of the Eastern Shawnee Tribe of Oklahoma, with, among several other charges, felony driving under the influence occurring on the Ottawa Reservation, which shares the northeast corner of Oklahoma with the Modoc Nation. *See State v. Dixon*, No. CF-2020-72 (Ottawa Cnty. Ct. 2021)

30. On March 1, 2021, the State stipulated to the Ottawa County District Court that 1) Mr. Dixon is an Indian, and 2) Mr. Dixon’s alleged criminal activity occurred within the boundaries of the Ottawa Reservation. *See Ct. Order with Findings of Fact and Conclusions of Law, State v. Dixon*, No. CF-20-72, (Ottawa Cnty. Ct. Mar. 8, 2021).

31. The State offered no evidence of a clear expression of Congressional intent to disestablish the Ottawa Reservation; the Ottawa County District Court noted that “although it has searched and spent extensive time looking into the issue, [the State] has found no clear statutory language of disestablishment by any Act of Congress.” *Id* at 2.

32. The Ottawa County District Court dismissed the case, concluding that Mr. Dixon is an Indian and his conduct occurred in Indian country and that, as a result, the State lacked jurisdiction pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2453 (2020). On June 29, 2023, the Oklahoma Court of Criminal Appeals affirmed the District Court’s ruling concerning the status of the Ottawa Reservation. Summary Opinion, *State v. Dixon*, No. S-2021-205 (Okla. Ct. App. June 29, 2023). The OCCA remanded the matter to allow for an evidentiary hearing regarding the State’s jurisdiction over non-member Indian criminal conduct in Indian country, with the condition that if the State did not pursue the claim within 60 days the District Court’s ruling would become final.

The Spurgeon Prosecution – Ottawa Reservation

33. On October 23, 2020, the District Attorney of Ottawa county charged Christopher Spurgeon, a member of the Cherokee Nation, with several crimes occurring on the Ottawa Reservation, which shares the northeast corner of Oklahoma with the Modoc Nation. *See State v. Spurgeon*, No. CM-2020-390 (Ottawa Cnty. Ct. 2021) and *State v. Spurgeon*, No. CM-2020-519 (Ottawa Cnty. Ct. 2021).

34. On March 5, 2021, the State stipulated to the Ottawa County District Court that 1) Mr. Spurgeon is an Indian, and 2) Mr. Spurgeon’s alleged criminal activity occurred within the boundaries of the Ottawa Reservation. *See Ct. Order with Findings of Fact and Conclusions of Law, State v. Spurgeon*, No. CM 2020-519, (Ottawa Cnty. Ct. Mar. 8, 2021) at 1.

35. The State offered no evidence of a clear expression of Congressional intent to disestablish the Ottawa Reservation; the Ottawa County District Court noted that it “relies on the argument it presented in *State v. Brester*,” and on the “non-statutory considerations set out in *Solem v. Barlett*, 104 S. Ct. 1161,” which *McGirt* overruled. *Id.* at 2.

36. The Ottawa County District Court dismissed the case, concluding that Mr. Spurgeon is an Indian and his conduct occurred in Indian country and that, as a result, the State lacked jurisdiction pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2453 (2020). *Id.*

37. On June 29, 2023, the Oklahoma Court of Criminal Appeals affirmed the District Court’s ruling concerning the status of the Ottawa Reservation. Summary Opinion, *State v. Spurgeon*, No. S-2021-208 (Okla. Crim. App. June 29, 2023). The OCCA remanded the matter to allow for an evidentiary hearing regarding the State’s jurisdiction over non-member Indian criminal conduct in Indian country, with the condition that if the State did not pursue the claim within 60 days the District Court’s ruling would become final. The State did not pursue that claim.

The Lee Prosecution – Miami Reservation

38. On January 13, 2021, the District Attorney of Ottawa county charged David Allen Lee, a member of the Cherokee Nation, with several crimes occurring on the Miami Reservation, which shares the northeastern corner of Oklahoma with the Modoc Nation. *See State v. Lee*, No. CF-2021-12 (Ottawa Cnty. Ct. 2021)

39. On March 5, 2021, the State stipulated to the Ottawa County District Court that 1) Mr. Lee is an Indian, and 2) Mr. Lee’s alleged criminal activity occurred within the boundaries of the Miami Reservation. *See Ct. Order with Findings of Fact and Conclusions of Law, State v. Lee*, No. CF 2021-12 (Ottawa Cnty. Ct. Mar. 5, 2021).

40. The State offered no evidence of a clear expression of Congressional intent to disestablish the Miami Reservation and offered no argument in support of any such assertion,

stating that there were “no clear and obvious answers” to the jurisdictional quandary it was injecting. *See* State’s Resp. to Def.’s Mot. to Dismiss for Lack of Jurisdiction, *State v. Lee*, No. CF 2021-12 (Ottawa Cnty. Ct. Feb. 24, 2021).

41. The Ottawa County District Court dismissed the case, concluding that Mr. Lee is an Indian and his conduct occurred in Indian country and that, as a result, the State lacked jurisdiction pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2453 (2020).

42. On June 29, 2023, the Oklahoma Court of Criminal Appeals affirmed the District Court’s ruling concerning the status of the United Peoria and Miami Reservation. Summary Opinion, *State v. Lee*, No. S-2021-206 (Okla. Crim. App. June 29, 2023). The OCCA remanded the matter to allow for an evidentiary hearing regarding the State’s jurisdiction over non-member Indian criminal conduct in Indian country, with the condition that if the State did not pursue the claim within 60 days the District Court’s ruling would become final. The State did not pursue that claim.

The Hull Prosecution

43. On September 24, 2019, the District Attorney of Ottawa county charged Harry Hull, a member of the Miami Tribe of Oklahoma, with several crimes, including unauthorized use of a vehicle after former conviction of a felony, occurring on the Eastern Shawnee Reservation, which shares the northeast corner of Oklahoma with the Modoc Nation.

44. On February 3, 2021, the State stipulated to the Ottawa County District Court that 1) Mr. Hull is an Indian, and 2) Mr. Hull’s alleged criminal activity occurred within the boundaries of the Eastern Shawnee Reservation, and 3) there is no evidence that the Eastern Shawnee Reservation has ever been disestablished. *See* Ct. Order with Findings of Fact and Conclusions of Law, *State v. Hull*, No. CF-19-218 (Ottawa Cnty. Ct. Feb. 11, 2021).

45. Like it has in the litany of other prosecutions it has brought against Indians in the Indian country of northeastern Oklahoma, the State offered no evidence of a clear expression of Congressional intent to disestablish the Eastern Shawnee Reservation and stipulated to the Ottawa County District Court that there was no evidence that the Reservation had been disestablished. Transcript of Proceedings at 5, *State v. Hull*, No. CF-2019-218 (Ottawa Cnty. Ct. March 1, 2023).

46. Shortly after the Lawhorn decision was issued, and while *Brester, Dixon, Spurgeon*, and *Lee* remained pending before the Oklahoma Court of Criminal Appeals, the United States Supreme Court issued an opinion in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), in which it determined that the State possesses concurrent criminal jurisdiction over the conduct of non-Indians in Indian country.

47. The Oklahoma Enabling Act of 1906, 34 Stat. 267, and the Oklahoma Constitution, art. I, § 3, provide that the State of Oklahoma forever disclaimed all right and title to “all lands lying within [the State’s] limits owned or held by any Indian, tribe, or nation.” The disclaimer disclaims both proprietary and governmental authority.

48. The permanent disclaimer of state governmental authority within the Indian Country of Oklahoma enshrined in the Oklahoma Enabling Act of 1906 and the Oklahoma Constitution has never been amended and thus remains the law of the people. *See generally Inst. for Responsible Alcohol Policy v. State*, 457 P.3d 1050, 1058 (Okla. 2022) (“Only an amendment to the Constitution can change what the people enshrined.”).

49. The State has engaged in a concerted effort—which continues to date—to assert jurisdiction over Indians allegedly engaged in criminal conduct on the reservation of a tribe which the Indian was not a member, in violation of the Oklahoma Enabling Act and the Oklahoma Constitution, which relinquished any State claim of jurisdiction over Indians in Oklahoma Indian country. *See, e.g., State v. Crosson*, No. MA-2023-623 (Okla. Crim. App., pending decision).

50. On March 3, 2023, Defendant Drummond issued a letter to Defendant Pewitt, attached to this complaint as Appendix A, requiring that State jurisdiction be exercised in all of Ottawa County (District 13) Indian country, which is a directive to continue to unlawfully assert State criminal jurisdiction over Indians in Indian country. Defendant Drummond did so despite 1) the Supreme Court’s ruling in *McGirt*; 2) the State’s stipulations before the Ottawa County District Court that the Miami, Ottawa, and Eastern Shawnee Reservations were established and the State’s failure to produce any evidence that the Reservations were ever disestablished; and, 3) multiple Ottawa County District Court decisions confirming that the Reservations have never been disestablished.

51. In the Letter of March 3, 2023, Defendant Drummond made explicit his intent to undermine *McGirt* by stating that 1) “we are initiating appeals, where appropriate, of *McGirt* dismissals by District 13 judges,” and 2) by indicating that if District 13 judges “continue[] to dismiss cases and release[] defendants based on *McGirt*,” his office “will take appropriate legal action, including filing an extraordinary writ in the OCCA.”

52. The Letter of March 3, 2023, purported to memorialize a conversation between Defendants Drummond and Pewitt, including an agreement that Defendant Pewitt “must” assert criminal jurisdiction over Indians on Reservations within District 13 (except the Cherokee and Quapaw Reservations).

53. Enforcing state criminal jurisdiction over Indians on Indian land is an “invasion of tribal sovereignty” that constitutes irreparable injury. *See, e.g., Wyandotte Nation v. Sebelius*, 443, F.3d 1247, 1255–56 (10th Cir. 2006).

54. There has been no disavowal by the Defendants of the state’s intention to exercise criminal jurisdiction over Indians in the Indian Country of Oklahoma. *See State v. Crosson*, No. MA-2023-623 (Okla. Crim. App., pending decision) (forcing state prosecution of Indian conduct

in Indian Country); *see also Babbit v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979) (ruling that a plaintiff “need not first expose himself to actual . . . prosecution” to have standing, particularly where “the State has not disavowed any intention” of continuing its unlawful behavior).

55. The Modoc Nation recognizes the credible threat of unlawful State prosecution of Indians within the Modoc Reservation and its Indian country. *See, e.g., Silva v. Farrish*, 47 F.4th 78 (2nd Cir. 2022) (ruling that the “credible threat of prosecution” of Indians in Indian country is sufficient for Article III standing to pursue prospective relief); *Babbit*, 442 U.S. at 302 (concluding that in the absence of a disavowal of the threat of unlawful prosecution, parties are “sufficiently adverse . . . to present a case or controversy”).

56. The Nation has no adequate remedy at law.

Count I

Declaratory Judgement, 28 U.S.C. § 2201

57. The Nation realleges paragraphs 1 through 56 and incorporates them by reference.

58. A long-standing body of federal statutory and decisional law prohibits state courts in Oklahoma from exercising criminal jurisdiction over Indian conduct in Indian country. That body of federal law includes, without limitation:

- a. The Supremacy Clause of the U.S. Constitution, art. VI, § 2, which provides that “the Laws of the United States . . . and all Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”
- b. The Act of May 15, 1978, which recognized the Modoc Nation;
- c. 18 U.S.C. §§ 1151 and 1152, which statutorily preclude state jurisdiction and the application of state law in “Indian country,” defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government,

notwithstanding the issuance of any patent, and in including rights-of-way running through the reservation.” This definition applies to questions of both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975)). It precludes the exercise of state criminal jurisdiction within Indian country absent an express grant from Congress;

- d. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which held that once a federal reservation is established, it remains Indian country unless Congress expressly acts to disestablish it;
 - e. The Oklahoma Enabling Act of 1906, 34 Stat. 267, and the Oklahoma Constitution, art. I, § 3, in which the State of Oklahoma “forever” disclaimed all right and title to “all lands lying within [the State’s] limits owned or held by any Indian, tribe, or nation.” The disclaimer disclaims both proprietary and governmental authority. *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 710, 716 (10th Cir. 1989); *Indian Country, USA, Inc. v. Oklahoma tax Comm’n*, 829 F.2d 967, 976-81 (10th Cir. 1987).
 - f. 25 U.S.C. §§ 1321-1326, which prescribes the exclusive means by which the State of Oklahoma may exercise criminal jurisdiction over Indians within Indian country in Oklahoma. The State of Oklahoma has never taken steps to acquire criminal jurisdiction under Public Law 280. Nor have Indian tribes in the State of Oklahoma ever consented to State jurisdiction over their reservations pursuant to 25 U.S.C. §§ 1321-1326.
59. The Modoc Nation has never consented to State jurisdiction over its Reservation.

60. Defendants have asserted, and continue to assert, State criminal jurisdiction over Indian defendants for conduct in Indian country in northeast Oklahoma.

61. The Nation requests a declaration under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, that:

- a. The Modoc Reservation was established and continues to exist today;
- b. The Modoc Reservation constitutes Indian country for all purposes under law, including specifically 18 U.S.C. §§ 1151 and 1152;
- c. The State Defendants lack criminal jurisdiction over Indians on the Modoc Reservation as a matter of federal law; and
- d. The State Defendants attempted prosecution of Indians for alleged criminal conduct occurring on the Modoc Reservation would violate both federal law and the Nation's sovereignty over its territory.

62. The Nation requests a judicial declaration that the State Defendants must give effect to the United States Supreme Court's decision in *McGirt v. Oklahoma* and immediately cease attempting to unlawfully assert State criminal jurisdiction in Indian Country within northeast Oklahoma.

Count II

Preliminary Injunction, Fed. R. Civ. P. § 65(a)

63. The Nation realleges paragraphs 1 through 62 and incorporates them by reference.

64. To obtain a preliminary injunction the Nation must show 1) a substantial likelihood of success on the merits, 2) irreparable harm to the Nation unless an injunction is issued, 3) that the threatened injury to the Nation outweighs any potential harm to the State, and 4) that the injunction, if issued, will not adversely affect the public interest. *See, e.g., Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 22 F.4th 892, 907-908 (10th Cir. 2022).

65. The Nation’s substantial likelihood of success on the merits is satisfied because “it’s long since settled that a state and its subdivisions generally lack authority to prosecute Indians for criminal offenses arising in Indian country.” *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1006 (10th Cir. 2015).

66. If a preliminary injunction does not issue, the State’s still pending appeals to the Oklahoma Court of Criminal appeals (e.g. *State v. Fuller*, No. S-2023-409 (Okla. Crim. App., pending decision)) demonstrate its disregard for *McGirt*, its prosecutions of Indians in Indian country, its imminent threat of appealing other “*McGirt* dismissals,” and its imminent threat to prosecute other Indian defendants for conduct occurring on the Modoc Reservation, will cause irreparable injury to the Nation because Indian tribes are irreparably harmed by unlawful invasions of their sovereignty and infringement on their ability to self-govern. *See, e.g., Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1205-06, 1210-11 (W.D. Okla. 2005); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).

67. A preliminary injunction against the State’s campaign to disregard and undermine the United States Supreme Court’s holding in *McGirt* is necessary to protect the public interest because the risk of inconsistent judgments from state and federal courts is contrary to the public interest. *See Seneca-Cayuga Tribe of Oklahoma v. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989).

68. The Defendants must be preliminarily enjoined from pursuing the State’s aggressive campaign to unlawfully prosecute Indians for conduct occurring in Indian country by disregarding 1) *McGirt*, 2) the State’s own stipulations that there is no evidence of express Congressional intent to disestablish the Quapaw, Eastern Shawnee, Miami, or Ottawa Reservations, and 3) multiple Ottawa County District Court decisions ruling that the Quapaw, Eastern Shawnee, Ottawa, and Miami Reservations are Indian country and therefore the State lacks jurisdiction to prosecute Indians for conduct occurring on those Reservations.

69. The Defendants must be preliminarily enjoined from acting on their stated intent to initiate appeals of and seek extraordinary writs against Ottawa County District Court decisions and judges that apply *McGirt* to dismiss State prosecutions where the State lacks jurisdiction.

Count III

Writ of Prohibitory Injunction, 28 U.S.C. § 2202

70. The Nation realleges paragraphs 1 through 69 and incorporates them by reference.

71. To obtain a permanent injunction the Nation must prove (1) actual success on the merits, (2) irreparable harm unless the injunction is issued, (3) the threatened injury outweighs the harm that the injunction may cause the opposing party, and (4) that the injunction, if issued, will not adversely affect the public interest. *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 822 (10th Cir. 2007).

72. The Nation prevails on the merits because the Modoc Reservation is Indian country under *McGirt*, and the State lacks jurisdiction to prosecute Indian defendants for conduct occurring in Indian country.

73. If it is not enjoined, the imminent threat of the Defendant's unlawful prosecution of Indian defendants for conduct occurring on the Modoc Reservation will cause irreparable injury to the Modoc Nation because Indian tribes are irreparably harmed by unlawful invasions of their sovereignty and infringement on their ability to self-govern. *See, e.g., Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1205-06, 1210-11 (W.D. Okla. 2005).

74. The Tenth Circuit has "repeatedly stated" that enforcing state criminal jurisdiction on Indian land is an "invasion of tribal sovereignty" constituting irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255-56 (10th Cir. 2006). State encroachments on tribal sovereignty constitute irreparable injury because the harm to tribal self-government is "not easily subject to valuation," and because "monetary relief might not be available because of the

state’s sovereign immunity.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001); *see also Choctaw Nation of Oklahoma v. Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. Okla. 2010) (noting that remedies at law are inadequate to remedy illegal assertions of state jurisdiction in Indian country); *Winnebago Tribe of Nebraska v. Stovall*, 205 F. Supp. 2d 1217, 1222 (D. Kansas 2002) (monetary damages are not sufficient “to undo the damage” caused by encroachments on tribal sovereignty).

75. The public interest and the balance of equities require that the State Defendants’ prosecution of Indian defendants in Indian country be enjoined. *See, e.g., United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1182 (10th Cir. 1991) (affirming a permanent injunction enjoining the Tulsa County District Attorney from exercising criminal jurisdiction over a single Indian allotment in Indian country).

76. The Defendants must be enjoined from attempting to assert its criminal jurisdiction over Indians for conduct occurring on the Modoc Reservation.

PRAYER FOR RELIEF

Based on the allegations above, the Nation prays that the Court enter an Order as follows:

1. Declaring that the Modoc Reservation was lawfully created and exists today;
2. Declaring that the Modoc Reservation constitutes Indian Country, specifically within the meaning of 18 U.S.C. §§ 1151 and 1152;
3. Declaring that the State of Oklahoma lacks jurisdiction over Indian criminal conduct on the Modoc Reservation;
4. Enjoining the State Defendants from:
 - a. Prosecuting Indians for alleged criminal conduct on the Modoc Reservation.
 - b. Asserting in any court, administrative forum, other law-applying forum, or otherwise express publicly that the Modoc Reservation does not exist, that the State

possesses criminal jurisdiction to prosecute Indians on the Modoc Reservation, that the Modoc Reservation is not Indian Country for the purpose of federal criminal jurisdiction, or that the Modoc Nation lacks any power of a sovereign Indian tribe over any part of the Modoc Reservation;

- c. Seeking, obeying, carrying out, issuing, enforcing, or otherwise treating as having any lawful force or effect, any order of any court which is inconsistent with the mandate issued by the United States Supreme Court in *McGirt v. Oklahoma* or the orders of this Court.
 - d. Taking any other action inconsistent with the mandate of is Court;
5. Exercising continuing jurisdiction to ensure compliance with the Court's Order for as long as the Court deems appropriate;
 6. Awarding the Nation its reasonable attorneys' fees and costs incurred to protect its sovereign interests and jurisdiction from the State's illegal actions; and
 7. Provide such other relief as this Court determines is appropriate.

Dated: October 4, 2023

By: s/ Joseph F. Halloran
Joseph F. Halloran (MN #244132; OBA #31905)
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Special Counsel for the Modoc Nation

VERIFICATION

STATE OF OKLAHOMA)
)ss.
COUNTY OF OTTAWA)

I, Robert Burkybile, being duly sworn, depose and state as follows:

1. I am the Chief of the Modoc Nation, the Plaintiff in the case captioned Modoc Nation v. Gentner Drummond and Douglas Pewitt, United States District Court for the Northern District of Oklahoma.
2. I have authorized the filing of this complaint.
3. I have reviewed the allegations made in the complaint, and to those allegations of which I have personal knowledge, I believe them to be true.
4. As to those allegations of which I do not have personal knowledge, I rely on Appendix A to the Complaint, and I believe them to be true.

Robert Burkybile, Modoc Nation

Subscribed and sworn before me this 10th day of October, 2023.

Notary Public

