**THE RULE OF LAW: McGIRT V. OKLAHOMA AND THE RECOGNITION OF THE MUSCOGEE (CREEK) RESERVATION**

In what can only be described as a major victory for Indians in Oklahoma, the Supreme Court ruled 5-4 that the (Muscogee) Creek Reservation has remained intact. The decision in *McGirt v. Oklahoma*, No. 18–9526, 591 U. S. ____ (2020), contains no caveats limiting the Creek Reservation. The Creek Nation has a reservation, period.

*McGirt* is a case that on surface addresses a narrow question: what Court should have tried Jimcy McGirt, a Creek man whose crimes were committed within the traditional Creek reservation? There is no question of guilt in this case. Jimcy McGirt is a child molester who was convicted in Oklahoma State Court of three crimes. There is a federal law called the Major Crimes Act (MCA). This law requires that certain major crimes, including child sexual abuse, committed in Indian Country by tribal members be tried in federal court. McGirt’s entire argument at the Supreme Court was that his crimes occurred within the boundaries of Creek Reservation. The Federal Court in the Eastern District of Oklahoma should have tried him, not the State of Oklahoma. Oklahoma argued that the Creek Reservation no longer existed and McGirt was properly tried in state court.

While the question sounds narrow, the implications of the answer are broad. If the Creek Reservation is intact, it is not just about Indians being tried in federal rather than state courts. If the Creek Reservation is intact, the Tribe has civil, regulatory and criminal authority over a 13-county swath of Oklahoma, including part of Tulsa. If the Creek Reservation is intact, then are the Cherokee, Chickasaw, Seminole, and Choctaw Reservations also intact? What about the reservations of the Comanche Nation, or the Sac and Fox, or the Citizen’s Potawatomi Nation? If the Creek Reservation is intact, does each and every tribe in Oklahoma
have intact reservations as well? These are the underlying issues that were in the Court’s consideration.

I. THE MAJORITY OPINION

Justice Gorsuch wrote for the majority. He began by reminding readers how, exactly, this question began, and how it would finish:

"On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever... Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."1

Gorsuch then frames the issue before the Court in the context of being not just between Mr. McGirt and Oklahoma, but also between the state and the Creek Nation:

"At another level, then, Mr. McGirt’s case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma’s authority to try non-Indians for crimes against non-Indians on the lands in question. See United States v. McBratney, 104 U. S. 621, 624 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. Murphy v. Royal, 875 F. 3d 896, 907–909, 966 (2017). We granted certiorari to settle the question. 589 U. S. ___ (2019)."2


Justice Gorsuch starts “with what should be obvious – Congress established a reservation for the Creeks.” He examines the history of the Creek Trail of Tears, the resultant grant of lands in what would become Oklahoma, and finally the scope of the subsequent betrayal of those promises:

“While there can be no question that Congress established a reservation for the Creek Nation, it’s equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties’ treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today? To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.”

Justice Gorsuch then looked to the prior case law determining reservation status. The laws begin with a basic tenet: that only Congress may disestablish a reservation. The Courts or the President cannot disestablish a reservation. Disestablishment has “never required any particular form of words.... But it does require that Congress clearly express its intent to do so, “[c]ommon[ly with an] ‘[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests. Nebraska v. Parker, 577 U. S. 481 (2016).”

The majority then looked at the evidence Oklahoma presented from the allotment era in favor of disestablishment, and found it lacking:

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“Missing in all this, however, is a statute evincing anything like the “present and total surrender of all tribal interests” in the affected lands. Without doubt, in 1832 the Creek “cede[d]” their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they “cede[d] and convey[ed]” a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment. In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument...Remember, Congress has defined “Indian country” to include “all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation.” 18 U. S. C. §1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute’s terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.”

There is only one place to look for disestablishment information, according to the majority:

“To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. Lone Wolf v. Hitchcock, 187 U. S. 553, 566–568 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. Solem v. Bartlett, 465 U. S. 463, 470 (1984).”

Similarly, Justice Gorsuch does not accept Oklahoma’s view that since non-Indians own land titles in the reservation, it should not be considered Indian Country.

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It isn’t so hard to see why.”

Justice Gorsuch demolishes Oklahoma’s argument that Congress “believed to a man” that, after allotment, reservations would be extinguished in the early 1900’s by dryly noting that “...just as wishes are not laws, future plans aren’t either.” The opinion points out that ignoring the failure of Congress to include the noted specific language would ignore that Congress had included that very language when, for example, allotted reservations of the Ponca and Otoe Tribes were clearly disestablished. The majority notes that Congress’ intrusion into promised tribal rights after allotment did not demonstrate disestablishment, but rather the opposite. The Court states “And, in its own way, the congressional incursion


12 McGirt v. Oklahoma, Slip Opinion No. 18–9526 at page 12, 591 U. S. ____ (2020). As Justice Gorsuch notes: “Ignoring this distinction would run roughshod over many other statutes as well. In some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation. When it deemed that approach appropriate, Congress included additional language expressly ending reservation status. So, for example, in 1904, Congress allotted reservations belonging to the Ponca and Otoe Tribes, reservations also lying within modern-day Oklahoma, and then provided “further, That the reservation lines of the said . . . reservations . . . are hereby abolished.” Act of Apr. 21, 1904, §8, 33 Stat. 217–218 (emphasis deleted); see also DeCoteau v. District County Court for Tenth Judicial Dist., 420 U. S. 425, 439–440, n. 22 (1975) (collecting other examples). Tellingly, however, nothing like that can be found in the nearly contemporary 1901 Creek Allotment Agreement or the 1908 Act. [Emphasis added] That doesn’t make these laws special. Rather, in using the language that they did, these allotment laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land’s reservation status for another day.”
on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.”

The Court goes on to note that as time passed and further laws were adopted, Congress did not disestablish the Creek Reservation, but instead continued to modify and change tribal authority, first removing rights, but then, tellingly, granting them back as they moved away from assimilationist policies.

Justice Gorsuch’s opinion then considers Oklahoma’s argument regarding historical practices and demographics. Oklahoma argued that Solem v. Bartlett, the primogenitive case regarding disestablishment, established three steps, each of which should be considered independently. This is not accepted as correct:

“This is mistaken. When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. New Prime Inc. v. Oliveira, 586 U. S. ___ (2019) (slip op., at 6). That is the only “step” proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. Ibid. But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices instead of the laws Congress passed. As Solem explained, “[o]nce a block of land is set aside for an Indian reservation and no matter


what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” 465 U. S., at 470 (citing United States v. Celestine, 215 U. S. 278, 285 (1909)).”

The Court finds that while Solem may have discussed the possible use of demographics, it ultimately found them of little use. Justice Gorsuch also notes that these factors were clarified in Parker v. Nebraska, when the Court found that historical treatment of the land had “limited interpretive value.” The majority states that the standard to be used is clear and unambiguous:

“To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help “clear up . . . not create” ambiguity about a statute’s original meaning. Milner v. Department of Navy, 562 U. S. 562, 574 (2011). And, as we have said time and again, once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.” Solem, 465 U. S., at 470 (citing Celestine, 215 U. S., at 285); see also Yankton Sioux, 522 U. S., at 343 (“[O]nly Congress can alter the terms of


19 McGirt v. Oklahoma, Slip Opinion No. 18–9526 at page 19, 591 U. S. ____ (2020), citing Parker v. Nebraska, 577 U.S. ____ (2016). Justice Gorsuch does not accept the dissent’s position that Parker’s language was limited:

“The dissent suggests Parker meant to say only that evidence of subsequent treatment had limited interpretative value “in that case.” Post, at 12. But the dissent includes just a snippet of the relevant passage. Read in full, there is little room to doubt Parker invoked a general rule:

“This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our rule to ‘rewrite’ the 1882 Act in light of this subsequent demographic history. DeCoteau, 420 U. S., at 447. After all, evidence of the changing demographics of disputed land is ‘the least compelling’ evidence in our diminishment analysis, for ‘[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the “Indian character” of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.’ Yankton Sioux, 522 U. S., at 356... Evidence of the subsequent treatment of the disputed land by Government officials likewise has ‘limited interpretive value.’ Id., at 355.” 577 U. S., at ___ (slip op., at 11).” McGirt at page 19, Footnote 8, 591 U. S. ____ (2020).
an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain”) (citation and internal quotation marks omitted).“20

While the dissent argues that there are “compelling reasons” to consider the extratextual evidence, the majority does not find it so. In an accurate but cutting description, Justice Gorsuch leaves no doubt that this would merely be an excuse to deny the Creek Nation what the tribe clearly possesses: its Reservation.

“But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights. Solem, 465 U. S., at 472.

To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma’s long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit’s Murphy decision a few years ago, no court embraced that possibility. See Murphy, 875 F. 3d 896. Second, they offer statements from various sources to show that “everyone” in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a “vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors.” [Brief for Petitioner in Carpenter v. Murphy, O. T. 2018, No. 17–1107, p. 15.] All this history, we are told, supplies “compelling” evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State’s argument about its longstanding practice of asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, §1151(a) not only sends to federal court certain major crimes

committed by Indians on reservations. Two doors down, in §1151(c), the statute does
the same for major crimes committed by Indians on “Indian allotments, the Indian
titles of which have not been extinguished.” Despite this direction, however,
Oklahoma state courts erroneously entertained prosecutions for major crimes by
Indians on Indian allotments for decades, until state courts finally disavowed the
(overruling Ex parte Nowabbi, 60 Okla. Crim. III, 61 P. 2d 1139 (1936)); see also
United States v. Sands, 968 F. 2d 1058, 1062–1063 (CA10 1992). And if the State’s
prosecution practices disregarded §1151(c) for so long, it’s unclear why we should
take those same practices as a reliable guide to the meaning and application of
§1151(a).

Things only get worse from there. Why did Oklahoma historically think it
could try Native Americans for any crime committed on restricted allotments or
anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the
eastern half of the State was always categorically exempt from the terms of the federal
MCA. So whether a crime was committed on a restricted allotment, a reservation, or
land that wasn’t Indian country at all, to Oklahoma it just didn’t matter. In the State’s
view, when Congress adopted the Oklahoma Enabling Act that paved the way for its
admission to the Union, it carved out a special exception to the MCA for the eastern
half of the State where the Creek lands can be found. By Oklahoma’s own admission,
then, for decades its historical practices in the area in question didn’t even try to
conform to the MCA, all of which makes the State’s past prosecutions a meaningless
guide for determining what counted as Indian country. As it turns out, too,
Oklahoma’s claim to a special exemption was itself mistaken, yet one more error in
historical practice that even the dissent does not attempt to defend.”

The majority opinion eviscerates Oklahoma’s position arguing that everyone was
aware that the reservation had simply gone away. “Whatever else might be said about the
history and demographics placed before us, they hardly tell a story of unalloyed respect for
tribal interests.”


opinion further explains the limited nature of Oklahoma’s position: “The dissent asks us to examine a
hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes
that do no more than confirm there are former reservations in the State of Oklahoma. Post, at 30–31. It
cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind
when it added these in 1988. Post, at 31, n. 7. The dissent cites a Senate Report from 1989 and post-1980
statements made by representatives of other tribes. Post, at 30, 32–33. It highlights three occasions on
which this Court referred to something like a “former Creek Nation,” though it neglects to add that in each
the Court was referring to the loss of the Nation’s communal fee title, not its sovereignty. Grayson v.
The majority of the Supreme Court found Oklahoma’s carefully crafted history to be, strangely enough, the strongest evidence against the state’s position. Justice Gorsuch writes eloquently with what can only be described as anger, frustration and disbelief at the theories Oklahoma and the dissenters suggest should control in this case:

"In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the “practical advantages” of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law. [emphasis added]"

The majority of justices similarly expressed disbelief at Oklahoma’s argument of a “dependent Indian community.” Here, Oklahoma argues that the Creek Nation never had a reservation; rather, because their land was initially held in fee simple, they possessed a “dependent Indian community.” Justice Gorsuch’s opinion finds this unpersuasive in the extreme. He notes that even if the Court accepts “this bold feat of reclassification,” it would

_Harris, 267 U. S. 352, 357 (1925); Woodward v. DeGraffenreid, 238 U. S. 284, 289–290 (1915); Washington v. Miller, 235 U. S. 422, 423–425 (1914). The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, post, at 32, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes." Footnote 14 at page 27.


mean little in the great scheme of things, since the definition of Indian land includes
reservations, allotments, AND dependent Indian communities. However, Oklahoma argued
that *Solem* only applied to reservations and that a dependent Indian community could be
disestablished by history and demographics. The argument is that the Creek Nation only
held a fee title when they came to the land in Oklahoma. Since a reservation must be
“reserved from sale,” the state argued, the initial status of Creek land must control. The
disingenuousness of this argument, made only by Oklahoma, did not likely win the state any
points among the justices. Justice Gorsuch, in a few pithy sentences, demonstrates the
obvious weaknesses of the position:

“It’s hard to see, too, how any difference between these two arrangements
might work to the detriment of the Tribe. Just as we have never insisted on any
particular form of words when it comes to disestablishing a reservation, we have
never done so when it comes to establishing one.”

“By now, Oklahoma’s next move will seem familiar. Seeking to sow doubt
around express treaty promises, it cites some stray language from a statute that does
not control here, a piece of congressional testimony there, and the scattered opinions
of agency officials everywhere in between.”

“But the most authoritative evidence of the Creek’s relationship to the land
lies not in these scattered references; it lies in the treaties and statutes that promised
the land to the Tribe in the first place. And, if not for the Tribe’s fee title to its land, no
one would question that these treaties and statutes created a reservation. So the

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State’s argument inescapably boils down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.”

In the same fashion, Oklahoma’s arguments regarding the Oklahoma Enabling Act fell on, unfortunately for them, a Supreme Court Justice who was fully aware of the actual history of the Indian law. When Oklahoma argued that the state had jurisdiction over Creek land because, well, if Oklahoma didn’t, absolutely no one would have it, Justice Gorsuch noted that “... what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law.”

Finally, the majority addresses the “potentially transformative” effects that a finding of a Creek Reservation would have. Here the state simply argued essentially that if the Creek reservation was found intact, the skies would fall, dogs and cats would live together, and non-Indians would discover that they lived in Indian country. Oklahoma argued that if the Creek Reservation was valid, then other reservations would likely be valid as well. Ultimately, the state fears, half its land base and 1.8 million Oklahomans might be living in reservation lands.

“It is hard to know what to make of this self-defeating argument,” wrote Justice Gorsuch. He went on to write a balanced, nuanced response to the fearmongering:

“Each tribe’s treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly in-


33 McGirt v. Oklahoma, Slip Opinion No. 18–9526 at pages 36-37, 591 U. S. ____ (2020). “In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially “transform[ative]” effects of a loss today.”

significant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, e.g., Brief for National Congress of American Indians Fund as Amicus Curiae 26–28 (describing success of Tacoma, Washington, and Mount Pleasant, Michigan); see also Parker, 577 U. S., at __–__ (slip op., at 10–12) (holding Pender, Nebraska, to be within Indian country despite tribe’s absence from the disputed territory for more than 120 years). Oklahoma re-plies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there. What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State’s ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U. S. C. §1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See McBratney, 104 U. S., at 624. And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today. Still, Oklahoma and the dissent fear, “[t]housands” of Native Americans like Mr. McGirt “wait in the wings” to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-conviction review in criminal proceedings.

In any event, the magnitude of a legal wrong is no reason to perpetuate it.”35

The majority properly notes that an alternate finding would also create a diametrically opposed risk. Should Oklahoma’s argument prevail, the result would simultaneously call into effect every federal conviction under the Major Crimes Act.36 Similarly, Oklahoma arguing that reservations would have dramatic civil and regulatory


impacts are “far from obvious” to the majority.\textsuperscript{37} The dissent also notes that the consequences “will be drastic because they depart from... more than a century of settled understanding.”\textsuperscript{38} The consequence, Justice Gorsuch notes, of arguing the future results is that they are often wrong:

> “The prediction is a familiar one. Thirty years ago the Solicitor General warned that “[l]aw enforcement would be rendered very difficult” and there would be “grave uncertainty regarding the application” of state law if courts departed from decades of “long-held understanding” and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as Amicus Curiae in \textit{Oklahoma v. Brooks}, O.T. 1988, No. 88–1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out, and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand.”\textsuperscript{39}

Finally, Justice Gorsuch and majority suggest that maybe, just perhaps, the ruling today will not result in widespread chaos:

> “In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work success-fully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat, Tit. 74, §1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as \textit{Amici Curiae} 13–19. No one before us claims that the spirit of good faith, “comity and cooperative sovereignty” behind these agreements, \textit{id.}, at 20, will be imperiled by an adverse decision for the


State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe’s authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. 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. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”

II. THE DISSENTS

The dissent by Justice Roberts goes to full-on doom. The dissent expects that the other Five Civilized Tribes will no doubt soon recognize their reservations. Terrible things will no doubt happen:

“Across this vast area, the State’s ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma.”

Justice Roberts believes that the Creek Nation was disestablished through a series of “well settled” statutes, none of which actually used phrases of disestablishment. He believes that most tribal members were horribly mistreated by the tribes, and as a result, the

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benevolent Federal government had to take away tribal lands and distribute the property to each citizen. In a footnote, he makes it clear that he believes there was, at one time, a Creek Reservation despite the opposite theories of Oklahoma. Finally, he believes that Solem v. Bartlett has the steps ignored by the majority, any one of which would prove that the Creek Reservation was disestablished.

The majority of the dissent is taken up with a recognition that no specific disestablishment language has ever been provided by Congress regarding the Five Civilized Tribes, but that crucial language is unnecessary. Justice Roberts’ argument uses, literally, individual words plucked from statutes to demonstrate that NOT using words proved that they had been used. The Dissent substitutes phraseology from a plethora of statutes either reducing Creek authority or adding to it to “prove” disestablishment. To the dissenters, the lack of clear language is simply not important.

“These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court’s portrayal, this is not a scenario in


47 McGirt v. Oklahoma, Slip Opinion No. 18–9526 at Dissent page 9-10, 591 U. S. ____ (2020). “This is a school of red herrings. No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation.”


which Congress allowed a tribe to “continue to exercise governmental functions over land” that it “no longer own[ed] communally.”

The fact that the Creek Nation did and continues to exercise “government functions” is not a factor in the dissent; indeed, the only factors the dissent considers are those brought by non-Indians. Justice Roberts argues that in the past century, the Tribes and their attorneys never raised the argument that a reservation existed, even citing Sharp v. Murphy to demonstrate this. It is an interesting choice, since the Tenth Circuit in that case published a 110-page order finding that very thing, and the Court issued a one-page decision on this day upholding that Tenth Circuit decision.

The dissenters then rely upon the actions of Oklahoma to prove the reservation no longer existed. The dissent consistently uses the language of non-Creeks to define the Creek reservation, by taking excerpts and phrases from persons and equating them as proof of disestablishment. Finally, the dissent argues that the majority are causing problems for the state prosecutions of Oklahoma, which will no longer be valid. As the majority notes, it is concerning that the dissent would rather leave prosecutions alone even if the state had no


53 McGirt v. Oklahoma, Slip Opinion No. 18–9526 at Dissent page 29-32, 591 U. S. _____ (2020). “Tulsa, for example, has exercised jurisdiction over both Indians and non-Indians for more than a century on the understanding that it is not a reservation.”

authority to prosecute. Indeed, for several pages, the dissent makes a policy statement, rather than a legal argument. The dissent is concerned with “undermining state authority” and “conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses.” With this, the dissenting justices admit that their primary concern was crafting a decision that maintained the status quo, rather than truly determining the proper legal response:

“The Court responds to these and other concerns with the truism that significant consequences are no “license for us to disregard the law.” Ibid. Of course not. But when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis.”

Justice Thomas also wrote a dissent, for the express purpose to argue that the Supreme Court did not have jurisdiction over an Oklahoma Court of Criminal Appeals decision. No one joined his dissent.

III. THE LEGAL IMPACT: CURRENT CASES

In just forty-two pages, the majority of the Supreme Court makes it clear that the Creek Reservation has always existed, and that it will continue to exist, despite the protestations of Oklahoma. In a one-line unsigned opinion, the Supreme Court also affirmed the Tenth Circuit decision in *Sharp v. Murphy*, Case No. 17-1107, the progenitor case in the


Creek Reservation fight.\textsuperscript{59} Two days later, the Court remanded four other decisions for the Oklahoma Court of Criminal Appeals to reconsider.\textsuperscript{60} All of these four cases involve Indian defendants who committed major crimes, \textit{but none of them were within the Creek Reservation.} One is in Ottawa County, in the Miami, Oklahoma area;\textsuperscript{61} one is in Seminole County, in the Seminole Reservation;\textsuperscript{62} one was in Cleveland County, in the Citizen Potawatomi Reservation;\textsuperscript{63} and one within the Choctaw Nation.\textsuperscript{64} The Oklahoma Court of Criminal Appeal will have to consider the potential Reservations of these four tribes.

Meanwhile, other jurisdictions have already considered the impact of \textit{McGirt.} The Seventh Circuit Court of Appeals cited the case as controlling when it upheld the reservation status of the Oneida Nation in \textit{Oneida Nation v. Village of Hobart, --- F.3d --- (7th Cir. 2020).} In this case, the Village of Hobart, Wisconsin, had determined that the Oneida Reservation no longer existed. When the Tribe held its “Big Apple Fest” on land that was within the reservation but partially located within Hobart, the Village demanded that the tribe obtain a city permit for the festival. The Tribe refused, arguing that there

\begin{footnotesize}
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\item \textsuperscript{59} \textit{Sharp v. Murphy,} Slip Opinion No. 17-1107 at page 1, 591 U.S. ____ (2020).
\item \textsuperscript{60} \textit{Terry v. Oklahoma,} Slip Opinion No. 18-8801 at page 1, 591 U.S. ____ (2020); \textit{Johnson v. Oklahoma,} Slip Opinion No. 18-6098 at page 1, 591 U.S. ____ (2020); \textit{Bentley v. Oklahoma,} Slip Opinion No. 19-5417 at page 1, 591 U.S. ____ (2020); and \textit{Davis v. Oklahoma,} Slip Opinion No. 19-6428 at page 1, 591 U.S. ____ (2020).
\item \textsuperscript{61} \textit{Terry v. Oklahoma,} Slip Opinion No. 18-8801 at page 1, 591 U.S. ____ (2020).
\item \textsuperscript{62} \textit{Johnson v. Oklahoma,} Slip Opinion No. 18-6098 at page 1, 591 U.S. ____ (2020).
\item \textsuperscript{63} \textit{Bentley v. Oklahoma,} Slip Opinion No. 19-5417 at page 1, 591 U.S. ____ (2020).
\item \textsuperscript{64} \textit{Davis v. Oklahoma,} Slip Opinion No. 19-6428 at page 1, 591 U.S. ____ (2020).
\end{itemize}
\end{footnotesize}
was no need to do so since the reservation was intact. Hobart then issued a citation for violating their ordinance. The Court issued an opinion that would have found for the tribe before *McGirt*. The opinion presented after the Supreme Court had weighed in was succinct, to say the least:65

“McGirt’s allotment analysis has turned what was a losing position for the Village into a nearly frivolous one. McGirt teaches that neither allotment nor the general expectations of Congress are enough to diminish a reservation. The Village has no argument for diminishment grounded in the statutory text. The statutes on which it relies only allow for the allotment of the Oneida Reservation or speed along the allotment process. No statutory text comes close to creating an ambiguity regarding diminishment of Reservation boundaries.”

This case is interesting in that it takes *McGirt* and applies it to regulatory issue directly related to sovereign versus sovereign. McGirt’s status has already significantly changed Indian law for the better.

III. THE IMPACT IN THE FUTURE: ISSUES TO BE DETERMINED

This a time of great confusion in Indian Country. In addition to the criminal cases that will have to be redistributed to proper forums, many other jurisdictional issues may have to be considered, ranging from taxes to marijuana laws. There have already been social media disinformation, ranging from mortgages are now invalid to no longer being required to pay taxes.

None of these things are true, of course. For most people in Oklahoma Reservations, change will come slowly if at all. There are many issues to be considered, but most will have to addressed over time. And that, of course, is the factor: time. It is likely that many issues will come about not through a thoughtful, organized approach, but by individual tribal

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65 *Oneida Nation v. Village of Hobart*, --- F.3d ---, No. 19-1981 at page 38 (7th Cir. 2020)
members filing their own actions. Here are just a few of the potential issues that will have to be determined:

1. **Taxes**

Generally speaking, state and local taxes are not paid if a tribal member person has earned their money on a reservation; for example, if a tribal member works for their tribe and lives on the reservation, they do not have to pay state taxes (They may, however, have to pay taxes to the tribe).\(^6^6\) Similarly, a tribal member does not have to pay state sales tax or local property taxes if the transaction is on their reservation. However, other Indians who live on a reservation other than their own do have to pay those taxes.\(^6^7\)

Since Oklahoma has functioned as if no reservations existed, taxes both state and local will have to be addressed. Some people may argue that the state must refund any previous taxes paid. These issues will have to be discussed in a rational, realistic manner to minimize the impact to the state’s finances. Failing that, litigation may be necessary.

Generally, Tribes cannot tax non-Indians living on fee simple lands on a reservation.\(^6^8\)

Non-Indian and non-tribal people living on the Creek Reservation will continue paying taxes to Oklahoma. Tribes with businesses may also be required to collect sales taxes for services

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rendered to non-Indians or non-tribal Indians.\textsuperscript{69} Taxes such as sales taxes are sometimes called “pass through” taxes, in that they go toward the ultimate consumer, not the vendor. Oklahoma will not be able to tax the Tribe but can demand the tribe collect taxes on non-tribal members.\textsuperscript{70} Oklahoma cannot collect sales taxes on tribal members living on their reservation.

2. \textit{Environmental Requirements}

Tribal reservations may pass laws to establish rules and procedures for their lands, in conjunction with federal laws like the National Environmental Policy Act (NEPA) of 1969.\textsuperscript{71} Federal agencies may recognize Oklahoma tribes as states’ equal to authorize regulations such as clean water or pollution standards. Oklahoma Reservations will have the ability to work within the federal system and protect its lands – if allowed to do so.

In 2005, Sen. Jim Inhofe added a last-minute rider to a 286 billion transportation bill that blocked the Environmental Protection Agency from recognizing the sovereignty of Oklahoma tribes without first gaining the approval of the state.\textsuperscript{72} This prohibited the tribes from creating clean air or water regulations that would be stronger than the state.\textsuperscript{73} Neither

\begin{itemize}
\item \textsuperscript{69} Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995).
\item \textsuperscript{70} Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995).
\item \textsuperscript{71} National Environmental Policy Act, 42 U.S., Chap. 55 §§ 4321 et al.
\item \textsuperscript{72} “Inhofe defends tribal environmental rider,” indanz.com, August 18, 2005; https://www.indanz.com/News/2005/08/18/inhofe_defends.asp
\item \textsuperscript{73} SEC. 10211. ENVIRONMENTAL PROGRAMS.
\end{itemize}

(a) OKLAHOMA. Notwithstanding any other provision of law, if the Administrator of the Environmental
the EPA, Oklahoma, the tribes or other lawmakers were informed before the rider was added. The reason given by the Senator’s office was simply that “Oklahoma is unique.”

With the return of recognized Reservations, the posture of Oklahoma tribes is perhaps a little less “unique.” With a potential shift in government, Reservations may well begin regulatory authority. The Tribes are already aware of the risk of an “Inhofe surprise,” and are working to counter it.

Suffice to say that the current political environment is very different, and it is unlikely that Inhofe would be able to attack tribes without notice.

Protection Agency (referred to in this section as the “Administrator”) determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.

(b) TREATMENT AS STATE. Notwithstanding any other provision of law, the Administrator may treat an Indian tribe in the State of Oklahoma as a State under a law administered by the Administrator only if:

(1) the Indian tribe meets requirements under the law to be treated as a State; and

(2) the Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.


For what it is worth, Inhofe denies any ill intent: “As I’ve said from day one – the entire delegation agrees and has said that some action will need to be taken in response to McGirt,” Inhofe said. “We don’t know yet what that will be. That’s why the delegation is working together with the tribes and all Oklahomans to understand the scope and impact of the McGirt decision.” Id.
3. **Casinos**

The Governor is currently battling a majority of tribes, the Oklahoma Legislature, and the Oklahoma Attorney General about his authority to replace prior gaming compacts with new ones of his negotiation. Casinos on Reservations are clearly permitted, likely on the same requirements as previously defined. However, the Oklahoma Governor has entered into at least one compact that would permit one tribe to place a casino onto land on another tribe’s reservation.\(^{76}\) With *McGirt*, this compact provision will be obviously void. The Governor would have no authority to put anything on Reservation Lands.

4. **Tribal authority over non-Indian people living on the Reservation**

Most people living on the Creek Reservation will not notice a difference in their lives. They will pay taxes to Oklahoma and go to the same stores and entertainment venues as before. At this time, there are few legal interactions that a non-Indian living on fee land in the Creek Reservation will likely have with the tribe.\(^{77}\)

This status may someday change. Congress could pass new laws granting broader civil or criminal authority to tribes over non-Indians. There are also situations in which a


non-Indian may fall within the two exceptions located in *Montana v. United States*. These exceptions are (1) when non-Indians have entered into a consensual relationship with the tribe or its members, through commercial dealings, contracts, leases or other arrangements, and (2) when the activity of a non-Indian “threatens or has some direct effect on the political integrity, economic security or the health and welfare of the tribe.” While current legal authority does not favor these exceptions, they remain in the law. Certain actions that are now legal in Oklahoma, such as medicinal marijuana or concealed carry, could fall within a “direct effect on the political integrity, economic security or the health and welfare of the tribe.” It is also safe to say that based upon *McGirt/Murphy*, the current Supreme Court might be more inclined to consider *Montana’s* reasoning. Non-Indians on an Oklahoma reservation could find themselves in violation of these exceptions.

5. **Government to Government Relationships**

Oklahoma has generally had a good relationship with its tribes, but that relationship was based on a superior position. As tribes and Oklahoma began to explore this new paradigm, government to government agreements or compacts will need to address their shared concerns. Cities located within reservations will need to consider – or reconsider – their tribal relationships, especially for tribal businesses. For example, the Citizen Potawatomi have several restaurants, a gun range, a grocery store, and entertainment venues within their reservation boundaries in Shawnee. The Tribe and the city will need to

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consider their relationships regarding city and state taxes, local ordinances, and similar shared concerns.

6. **Indian Child Welfare Act**

Within one week of the decision, the Oklahoma Attorney General announced an agreement that would largely return the status quo to pre-McGirt. Almost immediately, at least two of the Five Tribes denied that ANY agreement had been reached, including the Creek Nation. On August 4, 2020, the State and Creek Nation filed an *Intergovernmental Agreement Between the State of Oklahoma and the Muskogee (Creek) Nation Regarding Jurisdiction Over Indian Children Within the Nation’s Reservation*. This agreement largely returned jurisdiction to the State in a status quo. By August 7, another Agreement, entitled *Intergovernmental Agreement Between the State of Oklahoma and Each of the Five Tribes Regarding Jurisdiction Over Indian Children Within Each Tribe’s Reservation*. However, only the Chickasaw Nation had signed it at the time of this writing. The Agreements are interesting, to say the least. (Both agreements are attached at the end of this paper).

Under section 1911 (a), the state has no authority over *any* Indian child living on the reservation:

**(a) Exclusive Jurisdiction**

*An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.*

25 CFR § 23.2:
**Domicile** means:

(1) For a parent or Indian custodian, the place at which a person has been physically present, and that the person regards as home; a person’s true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child’s parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child’s custodial parent.

Section 1911 (a) establishes exclusive tribal court jurisdiction over child custody proceedings if the Indian child is domiciled or residing in Indian country, as defined in 18 U.S.C. § 1151.81 Normally, in Oklahoma, this has meant children living on Trust or

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81 “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.
Restricted land. In light of *McGirt*, this is changed. If a tribal reservation exists, cases involving Indian children domiciled within reservation land can only be heard in tribal courts, not state district courts. It is likely that other parents and tribes will use *McGirt* to argue that no state district court has jurisdiction over Indian children, if that court sits within the boundaries of an existent reservation. As the map demonstrates, that is a significant portion of the state.

The United States Supreme Court has found that “domicile” is defined by federal common law, as should be any other crucial term not specifically defined by the Act.82 It is also now defined in the ICWA regulations.83 For parents or custodians, *domicile* is the place a person regards as home; a person’s true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere. The child’s *domicile* is the domicile of the parents or Indian custodian or guardian. If the parents are unmarried, the child’s domicile is the domicile of his or her custodial parent.84

This impact cannot be understated. Indian children constitute large segments of Oklahoma deprived actions. The resources that will now required for the tribes will be

82 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). “Domicile” is established by intent. In *Holyfield*, it was clear that the biological parents intended to reside on the reservation. In the case of *In Re S.G.V.E.*, 634 N.W.2d 88 (S.D. 2001), The Court found that the mother’s domicile had been established off reservation, so that her return to the reservation could not grant the tribe exclusive jurisdiction under 25 U.S.C. § 1911 (a).

83 25 CFR § 23.2.

84 25 CFR § 23.2.
enormous and ongoing. Tribal ICW departments will need to be available areas that they have never addressed before. The financial burden to tribes could well be devastating. When one considers the current lack of resources tribes place in courts and children, the sudden influx of cases no longer in state systems could be enormous – but not insurmountable. The question is always one of Tribal will and desire. Are the tribes willing to establish systems that keep their children in the tribe’s exclusive authority, regardless of the cost, or are the children of the tribe just another financial burden to be avoided? The answer to this question is contained within the State-Tribal Agreements and could certainly be read as… disheartening. The agreements are based upon 25 U.S.C. § 1919, which states:

(a) **Subject coverage**

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) **Revocation; notice; actions or proceedings unaffected**

Such agreements may be revoked by either party upon one hundred and eighty days’ written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction unless the agreement provides otherwise.85

85 **Oklahoma Indian Child Welfare Act: 10 O. S. §40.7: Agreements with Indian tribes for care and custody of Indian children**

The Director of the Department of Human Services is authorized to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. Section 1919.

**Oklahoma Indian Child Welfare Act: 10 §40.8: Payment of foster care expenses under certain circumstances**

A. In the event the Department of Human Services has legal custody of an Indian child, and that child is placed with a tribally licensed or approved foster home, the state shall pay the cost of foster care in the same manner and to the same extent the state pays the costs of foster care to state-licensed or state-approved foster homes, provided that the tribe shall have entered into an agreement with the state pursuant to Section 8 herein, which shall require tribal cooperation with state plans required by federal funding laws.

B. The state shall pay the costs of foster care of a child placed with a tribally licensed or approved foster home where the placement is made by a tribe having jurisdiction of the proceeding, provided that the tribe shall
This provision has not been widely used, but are generally for a division of case responsibilities.\textsuperscript{86} In \textit{S.M.M.D. and T.A.D.}, for example, the Nevada Court upheld an agreement requiring termination by the state, but any subsequent placement or adoption would be completed in the tribal court.\textsuperscript{87} However, Oregon held a state agency and tribe cannot enter into agreements that permit the tribe to determine placements with non-Indian children.\textsuperscript{88} The Klamath Tribe and the State had agreed, under this provision, to expand the definition of “Indian child” to include those Klamath children who were of a lower blood quantum than the tribe required for membership. The Oregon Supreme Court found that the state and tribe could not expand the clear language of the Act beyond the defined terms; since the children in question would not be “Indian children” under ICWA, then §1919 could not be used to expand that language.

The Oklahoma-Tribal Agreements may well fall within the same difficulty with 1919. While there are many provisions in the Agreements that are questionable, the waiver of exclusive jurisdiction is particularly concerning. Section 1911 (a) gives tribal court exclusive jurisdiction absent any specific Congressional grant of authority to the state, such as P.L. -280. The agreements give away that exclusive jurisdiction to the state, with the tribes only holding jurisdiction over children on trust or restricted lands. How can the tribe and state agree that “exclusive” means concurrent, without Congressional action? More to the point, have entered into an agreement with the state pursuant to Section 8 herein, which shall require tribal cooperation with state plans required by federal funding laws.

\textsuperscript{86} \textit{In The Matter of Parental Rights As To S.M.M.D. and T.A.D.}, 272 P.3d 126 (Nev. 2012).

\textsuperscript{87} \textit{In The Matter of Parental Rights As To S.M.M.D. and T.A.D.}, 272 P.3d 126 (Nev. 2012).

\textsuperscript{88} \textit{Matter of Kirk}, 11 P.3d 701 (Oregon App. 2000).
all Indian children and parents within the Five Tribes reservations have a right to exclusive tribal jurisdiction that the tribe is waiving in this agreement. This is not limited to the children of the particular tribe, but any Indian child within a tribe’s reservation. What, precisely, in Section 1919 allows the tribes to redefine away the rights of Indian children and parents who have no political ability to protect against this waiver?

There is a specific waiver to the Five Tribes in 1911 (a) that these agreements ignore. A provision of the Act of August 4, 1947 gives Oklahoma district courts exclusive jurisdiction in guardianship cases on reservation lands. That law requires guardianships to be in the “State Courts:”

SEC. 3. (a) The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes, of all proceedings to administer estates or to probate the wills of deceased Indians of Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606).

Under this requirement, states would maintain jurisdiction over guardianships of Indian children of the Five Civilized Tribes, including Restricted and Trust Lands. This would appear to be the only 1911 (a) limitation in the reservation lands in Eastern Oklahoma. Even this may not be as clear as it appears. In 1947, Oklahoma’s judiciary was divided into State and County Courts. State Courts became District Courts. County Courts were eliminated. County courts were elected offices requiring no particular legal knowledge; they were also notorious for improper and frankly criminal actions stealing land from members of the Five Civilized Tribes. The Act of August 4, 1947 was meant to

89 See P.L. 53-280.
eliminate county court jurisdiction over tribal members and their land and thus create a
more trustworthy court system. Since 1911 (a) had always been limited to trust and
restricted land in Oklahoma jurisprudence, there have been no opportunities to test
whether the 1947 provision is meant to control ICWA and tribal court jurisdiction until
now. The Agreements eliminate this federal law by granting the tribe jurisdiction over
guardianship on Restricted land. Section 1919 clearly has no authority to do so.

While this paper has discussed the Five Tribes and these agreements, multiple other
tribes in Oklahoma will find themselves in Federal or state Court arguing that their
reservations similarly remain intact. The tribes may not be able to control when and how
this happens as individual parties in ICWA cases seek to review 1911 (a) jurisdiction, as
permitted under 25 U.S.C. § 1914. As the criminal cases are redistributed to proper forums,
ICWA cases may be the schwepunkt of the next phase of tribal sovereignty's battles.

C. Steven Hager

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INTEGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION REGARDING
JURISDICTION OVER INDIAN CHILDREN WITHIN THE NATION'S
RESERVATION

I. PREAMBLE

The Indian Child Welfare Act of 1978 was passed by Congress to reverse the trend of the
destruction of Indian families. The intent of the Act was to protect Indian children and families by
defining how cases involving Indian children should be handled. The Act's provisions respected
the broad authority that Indian tribes had long exercised over Indian children located within tribal
jurisdictions. and the United States Supreme Court recognized that, "the ICWA designates the
tribal court as the exclusive forum for the determination of custody and adoption matters for
reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian

This Agreement is the result of a partnership formed by the Muscogee (Creek) Nation and the State
of Oklahoma. The intent of this Agreement is to further streamline the jurisdictional provisions
put forth in the Indian Child Welfare Act and create concurrent jurisdiction on the reservation of
the Muscogee (Creek) Nation with the State of Oklahoma and its political subdivisions.

II. DEFINED TERMS.

As used in this section, the term—

(1) "Child custody determination" means a judgment, decree, or other order of a court
providing for the legal custody, physical custody, or visitation with respect to a child.
The term includes a permanent, temporary, initial, and modification order. The term
does not include an order relating to child support or other monetary obligation of an
individual;

(2) "child custody proceeding" shall mean and include—

(A) "foster care placement" which shall mean any action removing an Indian child
from its parent or Indian custodian for temporary placement in a foster home
or institution or the home of a guardian or conservator where the parent or
Indian custodian cannot have the child returned upon demand, but where
parental rights have not been terminated;

(B) "termination of parental rights" which shall mean any action resulting in the
termination of the parent-child relationship;

(C) "preadoptive placement" which shall mean the temporary placement of an
Indian child in a foster home or institution after the termination of parental
rights, but prior to or in lieu of adoptive placement; and
(D) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(3) "Department" means the Oklahoma Department of Human Services, or other agency having responsibility for child protection and welfare in the state of Oklahoma.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "State or state" means the state of Oklahoma.

(6) "Tribe or tribe" means the federally recognized Indian Tribe known as the Muscogee (Creek) Nation.

III. LEGAL AUTHORITY

The Indian Child Welfare Act (hereinafter the "Act") 25 U.S.C. 1901 et seq. (Public Law 95-608), authorizes states and Indian tribes to enter into agreements concerning the care and custody of Indian children and jurisdiction over child custody proceedings involving such children. Oklahoma law similarly authorizes "[t]he Director of the Department of Human Services and the Executive Director of the Office of Juvenile Affairs … to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. § 1919."

Okl. Stat. tit. 10, § 40.7. The State of Oklahoma and the Muscogee (Creek) Nation, through their undersigned representatives, hereby enter into the following Agreement to provide for concurrent jurisdiction as authorized by §1919 of the Act. In the event the Tribe enters into separate agreements or MOUs with the State, those separate agreements shall control to the extent inconsistent with this Agreement.

IV. CONCURRENT JURISDICTION

The parties have agreed to enter into this jurisdiction sharing Agreement based on the premise that the Tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child domiciled within the boundaries of the Tribe's reservation as provided for in 25 U.S.C. §1911(a).

Within the reservation boundaries of the Tribe, the State of Oklahoma and the Tribe shall share concurrent jurisdiction over any Indian child domiciled within the reservation, except as follows:
(1) The Tribe shall retain exclusive jurisdiction over any child custody proceeding involving an Indian child domiciled or located on:

(A) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same; or

(B) land held in trust by the United States on behalf of an individual Indian or Tribe;

or

(C) land owned in fee by the Tribe, if the Tribe—

(i) acquired fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which the Tribe was a party; and (ii) never allotted the land to a citizen or member of the Tribe.

(2) Where an Indian child is a ward of the Tribe's court, the Tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

V. DETERMINATION OF TRIBAL OR STATE COURT JURISDICTION

Except in cases of emergency, the following procedures will apply to initiation of involuntary child custody proceedings in an Oklahoma court regarding an Indian child who is domiciled or resident on the Tribe's reservation, but not domiciled on the lands described above in Section (IV)(1). In cases of emergency, the procedures set forth in Part VI of this Agreement, regarding emergency foster care placements, shall be followed.

(1) Involuntary child custody proceedings where the State of Oklahoma is a party.

Prior to the State filing any petition to initiate an involuntary child custody proceeding in an Oklahoma court, the Department will seek to determine whether the Indian child is a ward of a tribal court or whether the child is domiciled or located on the lands described above in Section IV(1).

In seeking to determine whether the child is a ward of tribal court, the Department will contact the Tribe concerning the matter. If the child is a ward of tribal court, the Tribe has exclusive jurisdiction and the Department shall refer the case to the appropriate tribal authorities.

If the child is domiciled on the Tribe's reservation but is not a ward of the court or domiciled or located on lands described in Section IV(1), the Department will, at the earliest possible time, notify the Tribe of its intent to request the State file a petition in the State court on or after a specified date. The notice will include all documents and records in support of the necessity of initiating an involuntary child custody proceeding, and the Tribe must be given notice prior to the
filing of the deprived petition. If, prior to the date specified in the notice to the Tribe, a child custody proceeding is commenced in the tribal court then the matter will proceed in tribal court.

With respect to children identified in a notice sent by the Department, the Tribe will immediately notify the Department of any child custody proceeding commenced in tribal court prior to the date specified in the notice.

If the Department is notified or has knowledge that a child custody proceeding has been commenced in tribal court, the State will not file a child custody proceeding in State court and, upon request, will assist in the tribal court adjudication of the matter, including providing records and/or testimony from the Department.

The Department will keep a record on a case-by-case basis of the inquiries made to determine whether a child is a ward of the tribal court and of the facts considered in reaching a decision that the child is or is not domiciled or resident on an Indian reservation. This record, upon request, will be provided to the Indian child’s tribe, parent or Indian custodian, and any guardian ad litem appointed to represent the child.

If an Indian child is domiciled or located within the Tribe’s reservation and the child is not a member of or eligible for membership in the Tribe, nothing in this Agreement shall relieve the Department of any responsibilities to the child’s tribe imposed by the Act. If, in such circumstances, the provisions of this Agreement and the provisions of the Act are in conflict, the provisions of the Act shall prevail.

(2) Voluntary child custody proceedings and involuntary child custody proceedings where the State of Oklahoma is not a party.

In guardianships, adoptions, or other child custody proceedings where the State of Oklahoma is not a party and the child is domiciled or located within the reservation of the Tribe, the party initiating the child custody proceeding may file said action in either the state or the relevant tribal court. The state or tribal court that makes the first child custody determination concerning a particular child shall retain exclusive, continuing jurisdiction over the child custody proceeding, unless the Tribe seeks to transfer the matter to tribal court. The tribal court may relinquish its exclusive, continuing jurisdiction if the court finds that such relinquishment would be in the best interest of the child. The state court shall transfer any voluntary custody proceeding, or any involuntary custody proceeding where the State of Oklahoma is not a party, to the tribal court if requested by the tribe. The good cause provisions of 25 U.S.C. § 1911(b) and the accompanying regulations shall not operate to deny transfer to tribal court as the tribal court would have otherwise had exclusive jurisdiction. Provided, however that transfers requested by a parent, guardian, or other party pursuant to 25 U.S.C. § 1911(b) shall control, absent tribal court declination, as to any requests to transfer a foster care placement or termination of parental rights to the relevant tribal court.
Either the state or tribal courts may exercise temporary, emergency jurisdiction over an Indian child if the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling of the child is subjected to or threatened with mistreatment or abuse. Upon being informed that an initial child custody determination has been made previously by a tribal or state court, the court that exercised temporary, emergency jurisdiction over the Indian child should immediately communicate with that court to resolve the emergency, protect the safety of the child, and determine a period for the duration of the temporary order.

VI. EMERGENCY FOSTER CARE PLACEMENT OVER WARDS OF TRIBAL COURTS AND/OR CHILDREN DOMICILED ON LANDS DESCRIBED IN IV(1)

In general, if an Indian child is a ward of the tribal court or domiciled or located on lands described above at IV(1), neither the Department nor the state courts may exercise any authority to place the child in foster care, unless authorized to do so under the laws of the Tribe.

However, if such an Indian child is located off the reservation the Department may take steps to obtain a state court order authorizing an emergency placement of the child in foster care in order to prevent imminent physical damage or harm to the child, including sexual abuse.

Following placement, the Department will make active efforts to make it possible to return the child to its home and shall take necessary steps to insure that the emergency foster care placement of the child terminates immediately when such placement is no longer necessary to prevent imminent physical damage or harm to the child, including sexual abuse. Upon termination of the placement, the child shall immediately be returned to his/her parent(s) or Indian custodian(s).

Whenever an Indian child is placed in emergency foster care, the Department will seek tribal court approval of such placement at the earliest possible time, but in no event shall an emergency foster care placement extend for a period longer than 72 hours, excluding Saturdays, Sundays and holidays, without an order of the tribal court approving such placement, or if the tribal court is unable to issue an order within the 72 hour period, a state court order approving such placement. The Department will immediately seek dismissal of the state court proceeding as soon as the tribal court exercises jurisdiction over the child.

VII. WAIVER OF AGREEMENT PROVISIONS

A duly designated representative of the State and the Tribe, on a case-by-case basis, may agree in writing to waive any of the provisions of this agreement. The waiver shall identify the provision(s) to be waived, the case or circumstances to which the waiver is applicable, the reasons for the waiver and the duration of the waiver.

Any provision of this Agreement may be waived generally by agreement of the State and the Tribe, without regard to a particular case or circumstance. A general waiver of any provision of this Agreement shall take effect upon the date the State and the Tribe agree to such a waiver.
VIII. AMENDMENTS TO AGREEMENT

The State or the Tribe may amend or modify this Agreement at any time upon mutual consent. Amendments shall be effective when approved in the same manner as required for approval of the original Agreement.

IX. TERMINATION OF AGREEMENT

This Agreement or any part thereof may be revoked by mutual consent or by either the State or the Tribe upon ninety (90) days written notice to the other party. The notice shall state the reasons for and the effective date of the revocation. The parties agree to extend full faith and credit to all child custody determinations rendered under this Agreement in any court prior to revocation and consent not to petition to invalidate any such action.

Prior to notification of revocation, a party considering revocation shall, whenever possible, seek to cooperatively explore with the other party ways in which to avoid revocation.

Prior to the effective date of any revocation, the parties agree to cooperate in assuring that the revocation will not unnecessarily result in a break in service or in disruption of the services provided to Indian children and families.

X. RETROACTIVITY

The State and the Tribe agree that the concurrent jurisdiction provisions of this Agreement apply to any cases, actions, or proceedings pending at the time this Agreement becomes effective. Any cases pending in the state courts involving an Indian child domiciled on the Tribe’s reservation shall continue in the state courts pursuant to the concurrent jurisdiction described in this Agreement. The Tribe hereby ratifies and agrees to extend full faith and credit to all child custody determinations rendered in any state court prior to this Agreement, except those child custody determinations involving an Indian child domiciled or located on lands identified in Section IV(1), and consent not to petition to invalidate any such action under 25 U.S.C. § 1914 on the basis that such action violated § 1911(a).

XI. NO WAIVER OF OTHER RIGHTS

Except as otherwise agreed herein, this Agreement shall not be deemed as a waiver or abandonment of any jurisdictional power or prerogatives of the Tribe, the State, or any of its subdivisions. Nothing herein shall constitute a waiver of the Tribe’s right to subsequently request transfer of any child custody proceeding to tribal court.

XII. NO WAIVER OF SOVEREIGN IMMUNITY

Nothing in this Agreement waives the sovereign immunity of the Tribe for any purpose or for any action in any forum.
XIII. EFFECTIVE DATE

Upon execution by the State and the Tribe, this agreement shall be binding as to the State and the Tribe.
SIGNATURE PAGE FOR THE STATE OF OKLAHOMA

INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN THE NATION’S RESERVATION

Pursuant to the authority provided by Okla. Stat. tit. 10, § 40.7, the following agree on behalf of the State to this Agreement:

Approved:

[Signature]
Justin Brown
Director, Oklahoma Department of Human Services

7/31/20
Date

[Signature]
Rachel Canuso Holt
Interim Executive Director, Oklahoma Office of Juvenile Affairs

8/3/2020
Date
SIGNATURE PAGE FOR THE MUSCOGEE (CREEK) NATION

INTERGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION REGARDING
JURISDICTION OVER INDIAN CHILDREN WITHIN THE NATION’S
RESERVATION

Approved:

David W. Hill

7-31-2020
Date

Date

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INTERGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND EACH OF THE FIVE TRIBES REGARDING
JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE’S
RESERVATION

I. PREAMBLE

The Indian Child Welfare Act of 1978 was passed by Congress to reverse the trend of the destruction of Indian families. The intent of the Act was to protect Indian children and families by defining how cases involving Indian children should be handled. The Act’s provisions respected the broad authority that Indian tribes had long exercised over Indian children located within tribal jurisdictions, and the United States Supreme Court recognized that, “the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children.” Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52–53 (1989).

This Agreement is the result of a partnership formed by each of the Five Tribes and the State of Oklahoma. The intent of this Agreement is to further streamline the jurisdictional provisions put forth in the Indian Child Welfare Act and create concurrent jurisdiction on the respective reservations of the Five Tribes with the State of Oklahoma and its political subdivisions.

II. DEFINED TERMS.

As used in this section, the term—

(1) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual;

(2) “child custody proceeding” shall mean and include—

(A) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(B) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;

(C) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
(D) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(3) "Department" means the Oklahoma Department of Human Services, or other agency having responsibility for child protection and welfare in the state of Oklahoma.

(4) "Five Tribes" means the federally recognized Indian Tribes known as the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation of Oklahoma, the Muscogee (Creek) Nation, and the Seminole Nation of Oklahoma;

(5) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(6) "State or state" means the state of Oklahoma.

(7) "the most recent treaty or agreement" means—
(A) with respect to the Cherokee Nation, the Treaty of July 19, 1866, 14 Stat. 799, as modified by the Act of March 3, 1893, 27 Stat. 612;
(B) with respect to the Chickasaw Nation and the Choctaw Nation of Oklahoma, the Treaty of April 28, 1866, 14 Stat. 769;
(C) with respect to the Muscogee (Creek) Nation, the Treaty of June 14, 1866, 14 Stat. 785; and
(D) with respect to the Seminole Nation of Oklahoma, the Treaty of March 21, 1866, 14 Stat. 755;

(8) "Tribe or tribe" means any one of the Five Tribes.

III. LEGAL AUTHORITY

The Indian Child Welfare Act (hereinafter the "Act") 25 U.S.C. 1901 et seq. (Public Law 95-608), authorizes states and Indian tribes to enter into agreements concerning the care and custody of Indian children and jurisdiction over child custody proceedings involving such children. Oklahoma law similarly authorizes "[t]he Director of the Department of Human Services and the Executive Director of the Office of Juvenile Affairs ... to enter into agreements with Indian tribes in Oklahoma regarding care and custody of Indian children as authorized by the Federal Indian Child Welfare Act, 25 U.S.C. § 1919." Okla. Stat. tit. 10, § 40.7. The State of Oklahoma and the Five Tribes, through their undersigned representatives, hereby enter into the following Agreement to provide for concurrent jurisdiction as authorized by §1919 of the Act. In the event any of the Five
Tribes enter into separate agreement or MOU with the State, those separate agreements shall control.

IV. CONCURRENT JURISDICTION

The parties have agreed to enter into this jurisdiction sharing Agreement based on the premise that the Five Tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child domiciled within the boundaries of each tribe's respective reservation as provided for in 25 U.S.C. §1911(a).

Within the respective reservation boundaries of the Five Tribes, as those boundaries are described in the most recent treaty or agreement between each Tribe and the United States, the State of Oklahoma and each Tribe shall share concurrent jurisdiction over any Indian child domiciled within its reservation, except as follows:

1. Each Tribe shall retain exclusive jurisdiction over any child custody proceeding involving an Indian child domiciled or located on lands:

   (A) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same; or

   (B) land held in trust by the United States on behalf of an individual Indian or Tribe;

   or

   (C) land owned in fee by a Tribe, if the Tribe—

      (i) acquired fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party; and (ii) never allotted the land to a citizen or member of such Tribe.

2. Where an Indian child is a ward of a Tribe's court, the Tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

V. DETERMINATION OF TRIBAL OR STATE COURT JURISDICTION

Except in cases of emergency, the following procedures will apply to initiation of involuntary child custody proceedings in an Oklahoma court regarding an Indian child who is domiciled or resident on the Tribe's reservation, but not domiciled on the lands described above in Section (IV)(1). In cases of emergency, the procedures set forth in Part VI of this Agreement, regarding emergency foster care placements, shall be followed.

1. Involuntary child custody proceedings where the State of Oklahoma is a party.
Prior to the State filing any petition to initiate an involuntary child custody proceeding in an Oklahoma court, the Department will seek to determine whether the Indian child is a ward of a tribal court or whether the child is domiciled or located on the lands described above in Section IV(1).

In seeking to determine whether the child is a ward of tribal court, the Department will contact the Tribe concerning the matter. If the child is a ward of tribal court, the Tribe has exclusive jurisdiction and the Department shall refer the case to the appropriate tribal authorities.

If the child is domiciled on the Tribe’s reservation but is not a ward of the court or domiciled or located on lands described in Section IV(1), the Department will, at the earliest possible time, notify the Tribe of its intent to request the State file a petition in the State court on or after a specified date. The notice will include all documents and records in support of the necessity of initiating an involuntary child custody proceeding, and the Tribe must be given notice prior to the filing of the deprived petition. If, prior to the date specified in the notice to the Tribe, a child custody proceeding is commenced in the tribal court then the matter will proceed in tribal court.

With respect to children identified in a notice sent by the Department, the Tribe will immediately notify the Department of any child custody proceeding commenced in tribal court prior to the date specified in the notice.

If the Department is notified or has knowledge that a child custody proceeding has been commenced in tribal court, the State will not file a child custody proceeding in State court and, upon request, will assist in the tribal court adjudication of the matter, including providing records and/or testimony from the Department.

The Department will keep a record on a case-by-case basis of the inquiries made to determine whether a child is a ward of the tribal court and of the facts considered in reaching a decision that the child is or is not domiciled or resident on an Indian reservation. This record, upon request, will be provided to the Indian child’s tribe, parent or Indian custodian, and any guardian ad litem appointed to represent the child.

If an Indian child is domiciled or located within the Tribe’s reservation and the child is not a member of or eligible for membership in the Tribe, nothing in this Agreement shall relieve the Department of any responsibilities to the child’s tribe imposed by the Act. If, in such circumstances, the provisions of this Agreement and the provisions of the Act are in conflict, the provisions of the Act shall prevail.

(2) Voluntary child custody proceedings and involuntary child custody proceedings where the State of Oklahoma is not a party.

In guardianships, adoptions, or other child custody proceedings where the State of Oklahoma is not a party and the child is domiciled or located within the reservation of a Tribe, the party initiating the child custody proceeding may file said action in either the state or the relevant tribal court. The state or tribal court that makes the first child custody determination concerning a
particular child shall retain exclusive, continuing jurisdiction over the child custody proceeding, unless the Tribe seeks to transfer the matter to tribal court. The tribal court may relinquish its exclusive, continuing jurisdiction if the court finds that such relinquishment would be in the best interest of the child. The state shall transfer any voluntary custody proceeding to the tribal court if requested by the tribe. The good cause provisions of 25 U.S.C. § 1911(b) and the accompanying regulations shall not operate to deny transfer to tribal court as the tribal court would have otherwise had exclusive jurisdiction. Provided, however that transfers requested by a parent, guardian, or other party pursuant to 25 U.S.C. § 1911(b) shall control as to any requests to transfer a foster care placement or termination of parental rights to the relevant tribal court.

Either the state or tribal courts may exercise temporary, emergency jurisdiction over an Indian child if the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling of the child is subjected to or threatened with mistreatment or abuse. Upon being informed that an initial child custody determination has been made previously by a tribal or state court, the court that exercised temporary, emergency jurisdiction over the Indian child should immediately communicate with that court to resolve the emergency, protect the safety of the child, and determine a period for the duration of the temporary order.

VI. EMERGENCY FOSTER CARE PLACEMENT OVER WARDS OF TRIBAL COURTS AND/OR CHILDREN DOMICILED ON LANDS DESCRIBED IN IV(1)

In general, if an Indian child is a ward of the tribal court or domiciled or located on lands described above at IV(1), neither the Department nor the state courts may exercise any authority to place the child in foster care, unless authorized to do so under the laws of the Tribe.

However, if such an Indian child is located off the reservation the Department may take steps to obtain a state court order authorizing an emergency placement of the child in foster care in order to prevent imminent physical damage or harm to the child, including sexual abuse.

Following placement, the Department will make active efforts to make it possible to return the child to its home and shall take necessary steps to insure that the emergency foster care placement of the child terminates immediately when such placement is no longer necessary to prevent imminent physical damage or harm to the child, including sexual abuse. Upon termination of the placement, the child shall immediately be returned to his/her parent(s) or Indian custodian(s).

Whenever an Indian child is placed in emergency foster care, the Department will seek tribal court approval of such placement at the earliest possible time, but in no event shall an emergency foster care placement extend for a period longer than 72 hours, excluding Saturdays, Sundays and holidays, without an order of the tribal court approving such placement, or if the tribal court is unable to issue an order within the 72 hour period, a state court order approving such placement. The Department will immediately seek dismissal of the state court proceeding as soon as the tribal court exercises jurisdiction over the child.
VII. WAIVER OF AGREEMENT PROVISIONS

A duly designated representative of the State and a Tribe, on a case-by-case basis, may agree in writing to waive any of the provisions of this agreement. The waiver shall identify the provision(s) to be waived, the case or circumstances to which the waiver is applicable, the reasons for the waiver and the duration of the waiver.

Any provision of this Agreement may be waived generally by agreement of the State and a Tribe, without regard to a particular case or circumstance. A general waiver of any provision of this Agreement shall take effect upon the date the State and the Tribe agree to such a waiver, but no Tribe can waive any provision of this Agreement for any other Tribe.

VIII. AMENDMENTS TO AGREEMENT

The State or a Tribe may amend or modify this Agreement at any time upon mutual consent. Amendments shall be effective when approved in the same manner as required for approval of the original Agreement.

IX. TERMINATION OF AGREEMENT

This Agreement or any part thereof may be revoked by mutual consent or by either the State or the Tribes upon ninety (90) days written notice to the other parties. The notice shall state the reasons for and the effective date of the revocation. If any Tribe revokes this Agreement, such revocation will only affect that Tribe. The parties agree to extend full faith and credit to all child custody determinations rendered under this Agreement in any court prior to revocation and consent not to petition to invalidate any such action.

Prior to notification of revocation, a party considering revocation shall, whenever possible, seek to cooperatively explore with the other party ways in which to avoid revocation.

Prior to the effective date of any revocation, the parties agree to cooperate in assuring that the revocation will not unnecessarily result in a break in service or in disruption of the services provided to Indian children and families.

X. RETROACTIVITY

The State and Tribes agree that the concurrent jurisdiction provisions of this Agreement apply to any cases, actions, or proceedings pending at the time this Agreement becomes effective. Any cases pending in the state courts involving an Indian child domiciled on a Tribe's reservation shall continue in the state courts pursuant to the concurrent jurisdiction described in this Agreement. The Tribes hereby ratify and agree to extend full faith and credit to all child custody determinations rendered in any state court prior to this Agreement, except those child custody determinations involving an Indian child domiciled or located on lands identified in Section IV(1), and consent not to petition to invalidate any such action under 25 U.S.C. § 1914 on the basis that such action violated § 1911(a).
XI. NO WAIVER OF OTHER RIGHTS

Except as otherwise agreed herein, this Agreement shall not be deemed as a waiver or abandonment of any jurisdictional power or prerogatives of any Tribe, the State, or any of its subdivisions. Nothing herein shall constitute a waiver of the Tribe’s right to subsequently request transfer of any child custody proceeding to tribal court.

XII. NO WAIVER OF SOVEREIGN IMMUNITY

Nothing in this Agreement waives the sovereign immunity of a Tribe for any purpose or for any action in any forum.

XIII. INDIVIDUAL AGREEMENTS

Upon execution by the State and any/each Individual Tribe, this agreement shall be binding as to the State and the individual signatory Tribe. Signature by all Five Tribes is not necessary to bind the State and each individual signatory Tribe.
SIGNATURE PAGE FOR THE STATE OF OKLAHOMA

INTERGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND THE FIVE TRIBES REGARDING JURISDICTION
OVER INDIAN CHILDREN WITHIN EACH TRIBE’S RESERVATION

Pursuant to the authority provided by Okla. Stat. tit. 10, § 40.7, the following agree on behalf of
the State to this Agreement:

Approved:

Justin Brown
Director, Oklahoma Department of Human Services

7/15/2020
Date

Rachel Canuso Holt
Interim Executive Director, Oklahoma Office of Juvenile Affairs

July 15, 2020
Date

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SIGNATURE PAGE FOR THE CHEROKEE NATION

INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND CHEROKEE NATION REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE'S RESERVATION

Approved:

__________________________  ______________________

[Signature]               [Date]

__________________________  ______________________

[Signature]               [Date]
SIGNATURE PAGE FOR THE CHICKASAW NATION

INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE CHICKASAW NATION REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE'S RESERVATION

Approved:

[Signature]

Bill Anoatubby, Governor

JUL 16 2020
Date

__________________________

Date
SIGNATURE PAGE FOR THE CHOCTAW NATION OF OKLAHOMA

INTERGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND THE CHOCTAW NATION OF OKLAHOMA
REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE'S
RESERVATION

Approved:

__________________________________________________________________________

Date

__________________________________________________________________________

Date
SIGNATURE PAGE FOR THE MUSCOGEE (CREEK) NATION

INTERGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION REGARDING
JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE'S
RESERVATION

Approved:

_____________________________  ______________________

Date

_____________________________  ______________________

Date
SIGNATURE PAGE FOR THE SEMINOLE NATION OF OKLAHOMA

INTERGOVERNMENTAL AGREEMENT BETWEEN THE
STATE OF OKLAHOMA AND THE SEMINOLE NATION OF OKLAHOMA
REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBE'S
RESERVATION

Approved:

__________________________  ________________________

Date

__________________________  ________________________

Date