

DISTRICT COURT
FILED

IN THE DISTRICT COURT IN AND FOR CRAIG COUNTY
STATE OF OKLAHOMA

SEP 30 2020

THE STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
 vs.)
)
 TRAVIS JOHN HOGNER,)
)
 Defendant.)

DEBORAH MASON, COURT CLERK
STATE OF OKLA. CRAIG COUNTY
BY Renee T. Hill
DEPUTY

Case No. CF-2015-263

ORDER ON REMAND

This matter came on for hearing before the Court on September 21, 2020, in accordance with the remand order of the Oklahoma Court of Criminal Appeals issued on August 14, 2020. The State appeared through District Attorney Matthew Ballard, and Assistant Attorneys General Caroline Hunt and Hannah White. Defendant appeared through counsel Danny Joseph and Nicollette Brandt. Cherokee Nation appeared as Amicus through Attorney General Sara Hill. Based upon the stipulations and evidence presented by the parties, review of the pleadings, and the briefs and argument of counsel, the Court makes the following findings.

In the August 14, 2020, Order Remanding for Evidentiary Hearing, this Court was directed to address only the following issues:

First, the Appellant's status as an Indian. The District Court must determine (1) Defendant/Appellant has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government.

Second, whether the crime occurred in Indian Country. The District Court is directed to follow the analysis set out in *McGirt*, determining (1) whether Congress established a reservation for the Cherokee Nation, and (2) if so, whether Congress specifically erased those boundaries and disestablished the reservation. In making this determination the District Court should consider any evidence the parties provide including, but not limited to, treaties, statutes, maps and/or testimony.

At the hearing, the parties stipulated to the following:

1. The Oklahoma Court of Criminal Appeals (OCCA) remanded this matter for an evidentiary hearing pursuant to the recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), to determine Mr. Hogner's (a) Indian status and (b) whether the crime occurred in Indian Country.
2. The State of Oklahoma has agreed to stipulate to Mr. Hogner's Indian status.
3. The State of Oklahoma has agreed to stipulate to the crime occurring within the historical boundaries of the Cherokee Nation.

I. Defendant/Appellant's Status as an Indian.

The State of Oklahoma and Defendant/Appellant have stipulated to Defendant/Appellant's Indian status by virtue of his tribal membership and proof of blood quantum. Based upon the stipulations provided, the Court specifically finds Defendant/Appellant (1) has some Indian blood and (2) is recognized as an Indian by a tribe or the federal government. The Defendant/Appellant is an Indian.

II. Whether the Crime Occurred in Indian Country.

The State of Oklahoma and Defendant/Appellant stipulated that the crime occurred within the historical boundaries of the Cherokee Nation. The State takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation.

In regard to whether Congress established a reservation for the Cherokee Nation, the Court finds as follows:

1. The Cherokee Nation is a federally recognized Indian tribe. 84 C.F.R. § 1200 (2019).
2. The current boundaries of the Cherokee Nation encompass lands in a fourteen-county area within the borders of the State of Oklahoma, including all of Adair, Cherokee, Craig, Nowata, Sequoyah, and Washington Counties, and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Tulsa, and Wagoner Counties as indicated in Combined Hearing Exhibit 1, Tab 3.
3. The Cherokee Nation's treaties are to be considered on their own terms, in determining reservation status. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

4. In *McGirt*, the United States Supreme Court noted that Creek treaties promised a “permanent home” that would be “forever set apart,” and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. *McGirt*, 140 S.Ct. at 2461-62. As such, the Supreme Court found that, “Under any definition, this was a [Creek] reservation.” *McGirt*, 140 S.Ct. at 2461.
5. The Cherokee treaties were negotiated and finalized during the same period of time as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state.
6. The 1833 Cherokee treaty “solemnly pledged” a “guarantee” of seven million acres to the Cherokees on new lands in the West “forever.” Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414.
7. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of the new Cherokee lands, and provided that a patent would issue as soon as reasonably practical. Art. 1, 7 Stat. 414.
8. The 1835 Cherokee treaty was ratified two years later “with a view to re-unite their people in one body and to secure to them a *permanent home* for themselves and their posterity,” in what became known as Indian Territory, “without the territorial limits of the state sovereignties,” and “where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be consonant with their views, habits and condition.” Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 and *Holden v. Joy*, 84 U.S. 211, 237-38 (1872).
9. Like the Creek treaty promises, the United States’ treaty promises to Cherokee Nation “weren’t made gratuitously.” *McGirt*, 140 S.Ct. at 2460. Under the 1835 treaty, Cherokee Nation “cede[d], relinquish[ed], and convey[ed]” all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus “a perpetual outlet west.” Art. 2, 7 Stat. 478.
10. The 1835 Cherokee treaty described the United States’ conveyance to the Cherokee Nation of the new lands in Indian Territory as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be “included within the territorial limits or jurisdiction of any State or Territory” without tribal consent; and secured “to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country,” so long as they were consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Arts. 1, 5, 8, 19, 7 Stat. 478.

11. On December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new lands in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The title was held by the Cherokee Nation “for the common use and equal benefit of all the members.” *Cherokee Nation v. Hitchcock*, 187 U.S. at 307; see also *Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). Fee title is not inherently incompatible with reservation status, and establishment of a reservation does not require a “particular form of words.” *McGirt*, 140 S.Ct. at 2475, citing *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902).
12. The 1846 Cherokee treaty required federal issuance of a deed to the Cherokee Nation for lands it occupied, including the “purchased” 800,000-acre tract in Kansas (known as the Neutral Lands) and the “outlet west.” Treaty with the Cherokee, Aug. 6, 1846, art. 1, 9 Stat. 871.
13. The 1866 Cherokee treaty resulted in Cherokee cessions of lands in Kansas and the Cherokee Outlet and required the United States, at its own expense, to cause the Cherokee boundaries to be marked “by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council.” Treaty with the Cherokee, July 19, 1866, art. 21, 14 Stat. 799.
14. The 1866 Cherokee treaty “re-affirmed and declared to be in full force” all previous treaty provisions “not inconsistent with the provisions of” the 1866 treaty, and provided that nothing in the 1866 treaty “shall be construed as an acknowledgment by the United States, or as a relinquishment by Cherokee Nation of any claims or demands under the guarantees of former treaties,” except as expressly provided in the 1866 treaty. Art. 31, 14 Stat. 799.
15. Under *McGirt*, the “most authoritative evidence of [a tribe’s] relationship to the land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place.” *McGirt*, 140 S.Ct. at 2475-76.

As a result of the treaty provisions referenced above and related federal statutes, this Court hereby finds Congress did establish a Cherokee reservation as required under the analysis set out in *McGirt v. Oklahoma*, 591 U.S. ____ (2020), 140 S. Ct. 2452 (2020).

In regard to whether Congress specifically erased the boundaries or disestablished the Cherokee Reservation, the Court finds as follows:

1. The current boundaries, indicated on the map found at Tab 3 of the Combined Hearing Exhibit 1, are the established boundaries of the Cherokee Reservation by the 1833 and 1835 Cherokee treaties, diminished only by two express cessions.

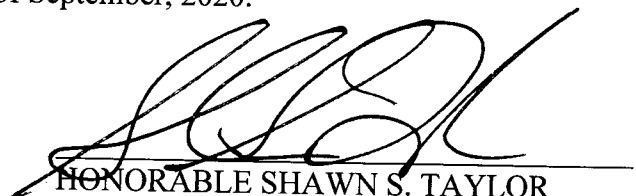
2. First, the 1866 treaty expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. Art. 17, 14 Stat. 799.
3. Second, the 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet); and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." Art. 16, 14 Stat. 799.
4. The Cherokee Outlet cession was finalized by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, Ch. 209, § 10, 27 Stat. 612, 640-43.
5. The 1891 Agreement provided that the Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the North and the Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). See *United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).
6. The 1893 federal statute that ratified the 1891 Agreement required payment of a sum certain to the Cherokee Nation and provided that, upon payment, the ceded lands would "become and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. 27 Stat. 612, 640-43; *United States v. Cherokee Nation*, 202 U.S. at 112.
7. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement. No evidence was presented that any other cession has occurred since that time.
8. The original 1839 Cherokee Constitution established the boundaries as described in the 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty. 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, reprinted in Volume I of West's Cherokee Nation Code Annotated (1993 ed.).
9. Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of Mar. 3, 1893." 1999 Cherokee Constitution, art. 2.

During oral argument and in selected portions of their brief, the State argues the burden of proof regarding whether Congress specifically erased the boundaries or disestablished the

reservation rests solely with the Defendant/Appellant. The State also made it clear through argument and briefing the State of Oklahoma “takes no position as to the facts underlying the existence, now or historically, of the alleged Cherokee Nation Reservation. No evidence or argument was presented by the State specifically regarding disestablishment or boundary erasure of the Cherokee Reservation. The Order Remanding for Evidentiary Hearing states, “Upon Appellant’s presentation of prima facie evidence as to the Appellant’s legal status as an Indian and as to the location of the crime in Indian Country, the burden shifts to the State to prove it has subject matter jurisdiction.”

On this point, *McGirt* provides that once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.” Reading the order of remand together with *McGirt*, regardless of where the burden of production is placed, no evidence was presented to this Court to establish Congress explicitly erased or disestablished the boundaries of the Cherokee Nation or that the State of Oklahoma has jurisdiction in this matter. As a result, the Court finds the Defendant/Appellant is an Indian and that the crime occurred in Indian Country.

IT IS SO ORDERED this 30th day of September, 2020.


HONORABLE SHAWN S. TAYLOR
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

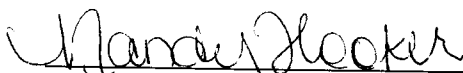
I, Mandy Hooker, Secretary/Bailiff for the Honorable Shawn S. Taylor, District Judge, do hereby certify that on the 30th day of September, 2020, a true and correct copy of the foregoing was mailed, postage prepaid, to the following:

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