OG Energy Education Series

Celebrating 10 Years

OLIVA GIBBS LLP

Part II: State vs. Tribal Severance Taxes

Legal History and Recent Cases

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Title 36 Ch. 8. Oil and Gas Severance Tax Code (MCN)

- § 8-103. Tax levied on oil:
  - There is hereby levied a tax equal to ten percent (10%) of the gross market value of all petroleum or other crude, condensate or mineral oil produced, severed, saved and removed from any Tribal lands located within the jurisdictional boundaries of the Muscogee (Creek) Nation.
- § 8-104. Tax levied on gas:
  - There is hereby levied a tax equal to ten percent (10%) of the gross market value of all gas, natural gas, casing head gas and other valuable hydrocarbon substances produced, severed, saved and removed from any Tribal lands within the jurisdictional boundaries of the Muscogee (Creek) Nation.

Issues Affecting Oil and Gas Taxation (and Other Civil Jurisdictional Issues)

- Tribal Self Sufficiency
  - Ability to raise revenue (including through taxation)
  - Ability to govern and regulate its members and non-members on the reservation
- State Authority
  - Same concerns as Tribes
  - Desire to have common laws throughout state boundary
- What are "the boundaries between state regulatory authority and [the Tribe's] self-government?"
  - *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 141 (1980).
- How can dual taxation problems like the one in Cotton v. NM be avoided?

OIPA Brief in *Royal v. Murphy*, 138 S. Ct. 2026 (2018)

Previously (*State v. Murphy*), (*Murphy v. Sirmons*), (*Carpenter v. Murphy*), now *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

- OIPA Amicus Brief dated March 9, 2018
- Issue: Whether the 1866 boundary of Creek Nation constitutes an "Indian reservation" subject to federal and tribal jurisdiction and regulation.
- "The Tenth Circuit's decision… will upend Oklahoma's unified, statewide oil and gas regulatory regime and throw all economic activity in eastern Oklahoma-including the oil and gas industry-into turmoil, resulting in overlapping and duplicative regulation and severe uncertainty."
- "The 10th Circuit Decision was Wrong."
- So what is this case that concerns the OIPA?

Sharp v. Murphy, 140 S. Ct. 2412 (2020)

- Per Curiam decision
- The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in McGirt v. Oklahoma.
- Justice Gorsuch took no part in consideration or decision of this case.
- Dissent by Justice Thomas and Justice Alito.

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)

- Subsequent to *Patrick Dwayne Murphy v. Terry Royal, Warden*, Oklahoma State Penitentiary 875 F. 3rd 896 (2019). Jimcee McGirt appealed his conviction on the same grounds.
- J. Gorsuch delivered the majority opinion, joined by JJ. Ginsburg, Breyer, Sotomayor, and Kagan
  - Held that McGirt was entitled to a federal trial. Land reserved for the Creek Nation under the existing treaty remains "Indian country."
  - An 1856 Treaty promised that "no portion" of Creek lands "would ever be embraced or included within, or annexed to, any Territory or State"
  - The Creeks would have the "unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members.
  - Once a federal reservation is established, only Congress can diminish or disestablish it. (SCOTUS made)
  - Congress did not end the Creek Reservation during the "allotment era."
- Chief Justice Roberts, and Justices Alito, Kavanaugh, and Thomas dissented

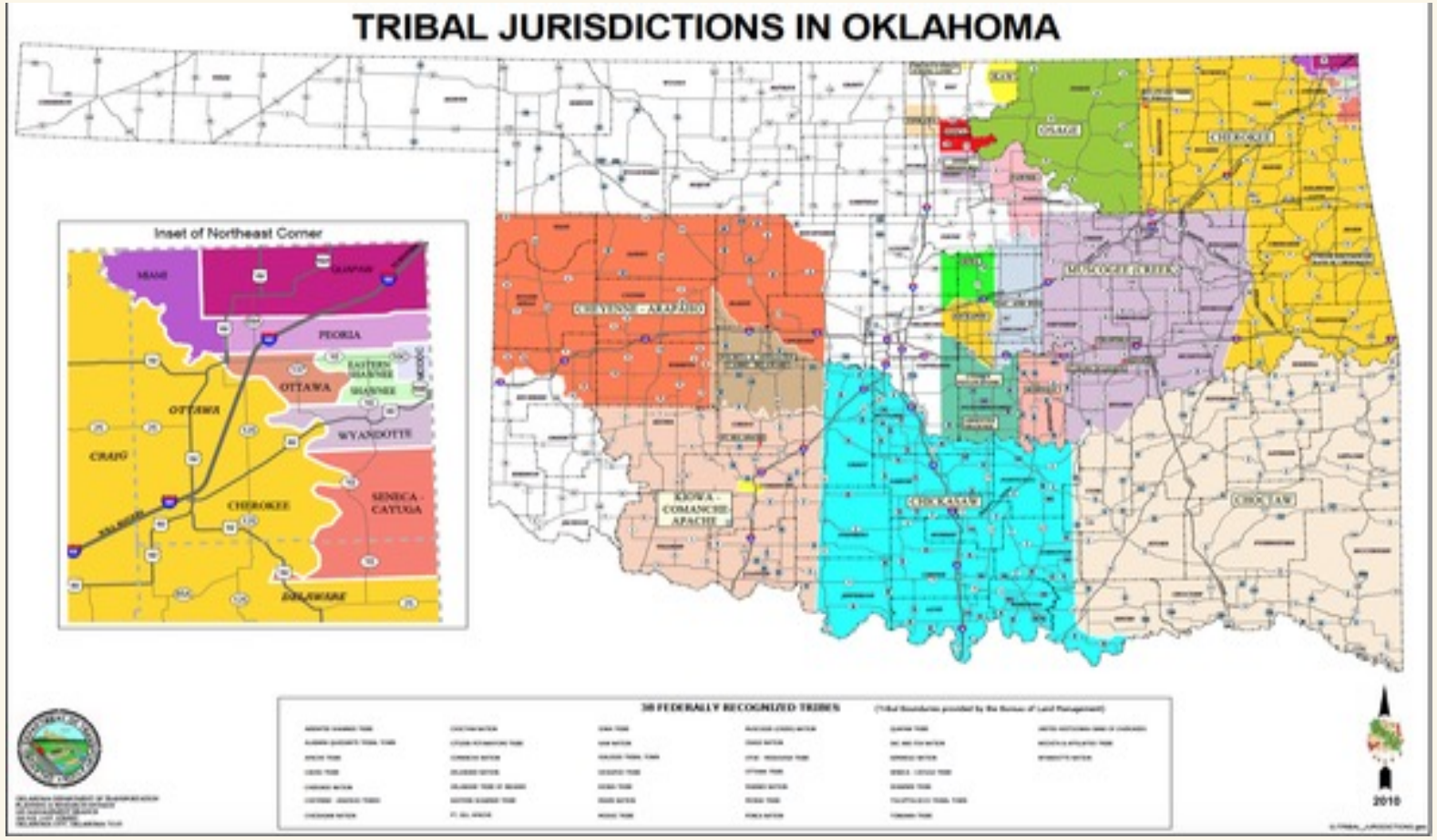
2020 Oklahoma Corporation Commission Order No. 715548

- In 25 U.S.C. 355, Section 11, Congress granted jurisdiction to the State of Oklahoma over restricted lands of the Five Tribes, stating "all restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma." **Not really**
  - Actual text of Section 355 states, "The lands of full-blooded members of any of the Five Civilized Tribes are made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."
- The court determined that its decision did not extend beyond application of the MCA. **Again, not so much.**
- SCOTUS determined that the Creek reservation had never been disestablished **and therefore, the MCA applies.**
- The SCOTUS decision was based on the absence of any Congressional Act disestablishing the Creek reservation.
- **Personal observation: The idea that that the SCOTUS decision is limited to any particular application is either intentionally misleading or without understanding of the issue that the Court decided.**

Original Reservations per 1832 Treaty

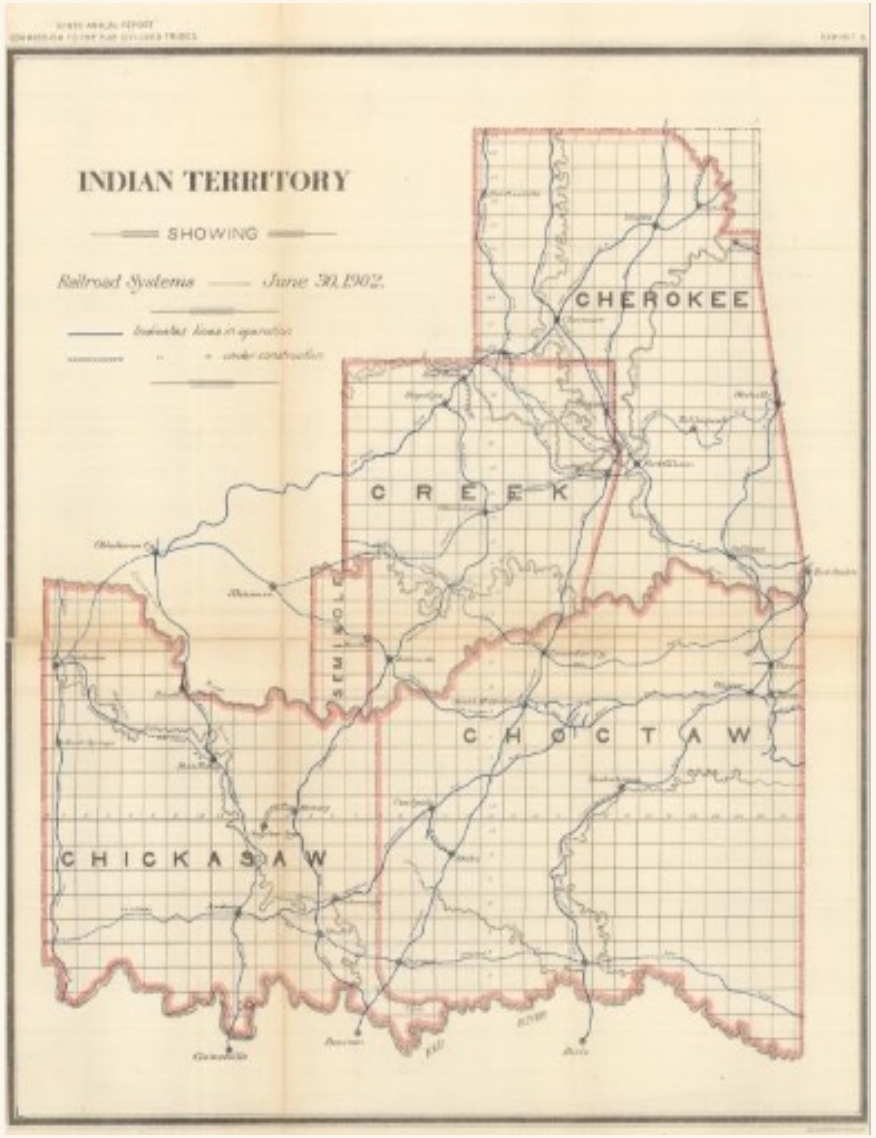
Post Civil War Reservations

- Significance of the jurisdictional issues presented by Murphy and McGirt.



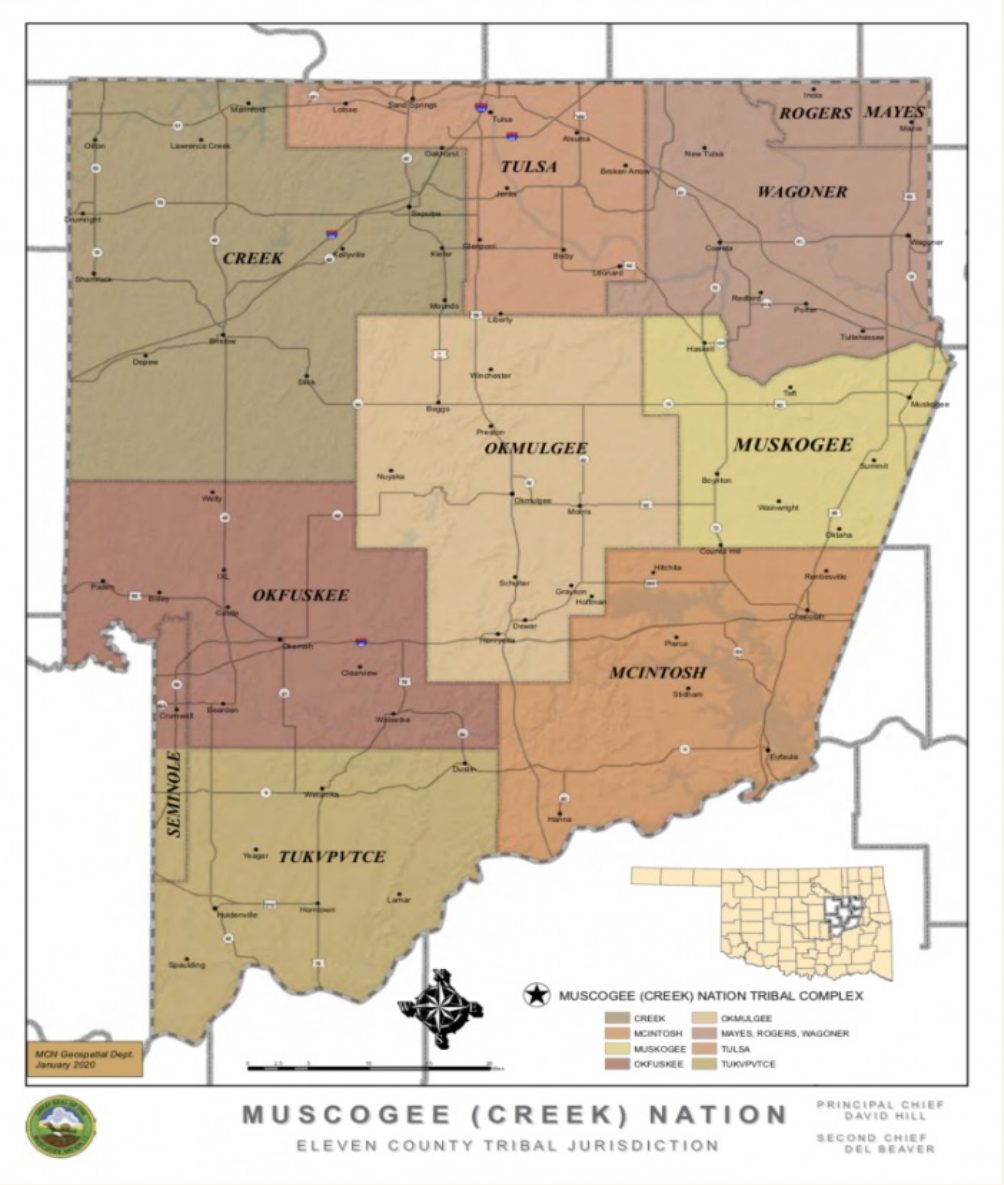
Five Tribes Current Reservations

- 1866 Treaty



Muscogee (Creek)

- 4th largest tribe in U.S.
  - 90,000 citizens



The Basics

- 574 federally recognized Tribes
  - *39 in Oklahoma*
- Navajo Nation is the largest reservation 16 million acres in Arizona, New Mexico, and Utah.
- Reservations were originally exempt from State Taxation and Jurisdiction.
- Tribal Governments held the exclusive authority to tax on reservation.
  - Included Authority to tax Members
  - Authority to tax non-Indians

NMSA 9-11-12.1. Tribal Cooperative Agreements

- The secretary may enter into cooperative agreements with the Pueblos of Acoma, Cochiti, Jemez, Isleta, Laguna, Nambe, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, San Juan, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni; the Jicarilla Apache Nation; the Mescalero Apache Tribe; and the nineteen pueblos.
- The agreements act collectively for the exchange of information and the reciprocal, joint, or common enforcement, administration, collection, remittance, and audit of gross receipts tax and cannabis excise tax revenues of the party jurisdictions.
- The agreements provide that if a pueblo, tribe, or nation grants a 25% credit against its tax and meets other specified conditions. In return, the state grants a 75% credit against state and local gross receipts tax due from taxpayers who are subject to both taxes (Section 7-9-88.1 NMSA 1978).
- This eliminates dual taxation and ensures that taxpayers pay the same tax as they would under state and local taxes alone.
- Tribal taxes apply only to businesses operating on land owned by a tribe or held by the United States in trust for the tribe.

Definitions: Indian Country

- 18 USC § 1151 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.
- **18 U.S.C. § 1152 General Crimes Act.** The "general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States … extend to Indian Country."

Foundation of the Plenary Power

- **Treaties: agreements between Nations**
- The U.S. Constitution
  - Article 1 Section 2 references “Indians not taxed”
  - Article 1, Section 8 gave congress the power to regulate commerce with foreign nations, between the States and with the Indian Tribes.
  - Article 2, Section 2 gives POTUS the power to make treaties on behalf of the U.S.
    - *Holden v. Joy*, 84 U.S. 211, 242 (1872) established that the President's power to make treaties with tribal nations is coextensive with the power to make treaties with foreign nations.
  - Article 6, Section 2 states, “All treaties made, or shall be made, under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution of laws of any state to the contrary notwithstanding.”

Worcester v. Georgia, 31 U.S. 515 (1832)

- Legislature of Georgia passed, "An act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians"
- Samuel Worcester, a missionary to the Cherokees, was arrested by Georgia.
  - Worcester was arrested "for residing, on the 15th July 1831, in that part of the Cherokee Nation attached by the laws of the State of Georgia to that County, without a license or permit from the Governor of the State, or from anyone authorized to grant it…" and for not having "taken the oath to support and defend the Constitution and laws of the State of Georgia and uprightly to demean himself as a citizen thereof, contrary to the laws of the said State."
  - Worcester was convicted and sentenced to 4 years of hard labor.
- SCOTUS held: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States."

Foundation of Indian Country (Modern)

- "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi."
- Informally known as the Indian Removal Act of 1830
  - Section 3: "to assure the tribe . . . that the United States will forever secure and guaranty to them . . . the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same."

Treaty March 24, 1832

- The Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River.
  - "[the] Treaty shall be obligatory on the contracting parties."
- Article fourteen of the treaty provided that, "[t]he Creek country west of the Mississippi shall be solemnly guarant[i]ed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them."

1833-1852

- 1833 Treaty
  - Addressed problems with the 1832 treaty "established boundary lines which will secure a… permanent home to the whole Creek nation of Indians…"
  - Established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty."
- 1849
  - BIA transfers from the War Department to the Department of the Interior
- 1852
  - Patent issued to Creeks

Treaty of August 7, 1856

- "So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property, within their respective limits . . ."
- The Creeks agreed to cede to the Seminole Tribe a portion of their lands.
- The United States guaranteed the "same title and tenure" as promised and secured under the 1832 and 1833 treaties.
- "No State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians."

Treaty of June 14, 1866

- Article 1: "Creeks bind themselves to remain firm allies and friends of the United States."
- Article 3: "Creeks hereby cede and convey to the United States .... the west half of their entire domain .... estimated to contain 3,250,560 acres."
- Article 10: "The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of persons and property within the Indian territory: Provided, however, said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges and customs."

Osage Nation Mineral Rights and Royalties

- In 1870, Osage Nation purchased 1.5 million acres of land from Cherokee Nation.
- Section 3 of the 1906 Act designated the United States as the owner of all minerals in the entire County in trust for Osage Nation.
- Tribe currently pays 5% severance tax on its royalty interest.
- Tribe distributes quarterly royalty to headright owners including corporations and non-Indians (approximately 25% of the total royalty)

1871 Appropriations Act

- Ceased the ratification of treaties with Tribal nations
- Declared Congress has the sole governing power to make laws controlling the lives of Tribal governments and their citizens
  - "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

1885 Congress Response to Ex parte Crow Dog, 109 U.S. 556 (1883)

- Federal court had no jurisdiction to try an Indian for the murder of another Indian
- 18 U.S.C. Section 1153 The Major Crimes Act
  - (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Beginning of Federal Paternalism

- *United States v. Kagama*, 118 U.S. 375 (1886)
  - Kagama, an Indian, killed Ike, also Indian, near the Hoopa valley reservation.
  - DA declined prosecution.
  - Feds wanted to test constitutionality of MCA
- Circuit court was divided.
  - SCOTUS held MCA constitutional, but not under the Indian Commerce Clause, but rather that Indians were wards of the Federal government.
  - Note: (under what legal authority?)

Beginning of Federal Paternalism (Cont.)

- *United States v. Kagama*, 118 U.S. 375 (1886)
- Case sent back to the District court which found the crime was off–reservation and directed not guilty verdict. Sheriff then declined to arrest.
- Ironically, the Feds supported the disestablishment position as argued in McGirt. Is that an ethical position for the Trust responsibility of the federal government?

Act of March 3, 1887 "Dawes Act"

- **Dawes Commission**
- **Extinguish Tribal title either by cessation or allotment**
- **Big 5 rejected.**
- Curtis Act: 1898 "Act for the Protection of the People of Indian territory"
  - Brought Allotment to Big Five
  - Abolished Tribal Courts
  - Any tribal legislation had to be approved by POTUS

Act of Feb. 28, 1891, 26 Stat. 795, 25 USC 397

- Congress first authorized mineral leasing on Indian Lands
  - Subsequently amended by 1924 Act
  - Again by 1938 Act

Act of March 1, 1901

- Provided for the actual dissolution of the Creek's government
- "The tribal government of the Creek nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper."

1906 Survival

- March 2, 1906: Congress passed a joint resolution, 34 Stat. 822, extending the life of the tribes until the allotment and property distribution process had been completed, or until otherwise provided by Congress.
- April 26, 1906: An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.
- Section 28 states, "…[T]he tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council …shall not be in session for a longer period than thirty days in any one year"
  - *Provided*, That no act…of the tribal council … shall be of any validity until approved by the President of the United States.

Intergovernmental Tax Immunity Doctrine

- *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522 (1916)
  - A tax upon a lease made is a tax upon the power to make the lease
- *Gillespie v. Oklahoma*, 257 U.S. 501 (1922)
  - Held that states cannot tax private parties who contract with government because it burdens the government's power to enter into contracts
  - The rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract.
  - Later overruled by *Helvering* in 1938

State Taxation Authorized in 1924

- The Act of May 29, 1924, modified the 1891 Act that first authorized mineral leasing of Indian lands
  - "Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: Provided, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians." 25 USC 398c (1927)

Indian Reorganization Act 1934

- Ended the allotment of Tribal land
- Authorized the Secretary of the Interior to take land into trust
- Recognized Tribal governments
- Encouraged Tribes to adopt constitutions
- Originally did not apply to Oklahoma.
- In 1936, the OIWA extended the IRA to Oklahoma tribes.

Indian Mineral Leasing Act 1938

- Codified along with unrepealed portions of prior act 25 U.S.C. §§ 396a-396g
- One stated purpose was to ensure Indians the greatest return on their property.
- However, this Act was silent about the State's ability to tax production on Indian lands.
- Legislative history did not include a discussion of tax

Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938)

- Overruled Gillespie & Burnet v. Coronado Oil & Gas Co. thus ending the Intergovernmental Immunity Doctrine
- Immunity from nondiscriminatory taxation sought by a private person because he is engaged in operations under a government lease cannot be supported by merely theoretical conceptions of interference with the functions of government.
- Regard must be had to substance and direct effects.
- Where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote.

Act of April 25, 1940, Volume 54, Chapter 158

- Oklahoma is authorized to tax all oil and gas produced in Osage County, including the royalty interests of the Osage Indians.

Public law 280 (1953)

- Codified 18 USC 1162
- Congress transferred criminal jurisdiction in Indian country to six states.
  - Nebraska
  - California
  - Wisconsin
  - Oregon
  - Minnesota
  - Alaska
  - Subsequently joined Nevada , Washington, South Dakota, Florida, Idaho, Montana North Dakota, Arizona, Iowa, and Utah

Amendment to Public Law 280 in 1968

- Required tribal consent before additional states could extend jurisdiction
- No tribe has consented since 1968

1970 Indian Self Determination Era Begins

- The Act of October 22, 1970, was a change in federal policy from paternalism to tribal self-government.
- "The principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and or governing entity. Such established procedures shall be subject to approval by the Secretary of the Interior."

Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976)

- Background: 1867 Constitution
- Circa 1900 BIA began the policy of non-recognition of the tribal council
- Act of March 1, 1901, Sec. 46, "The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper."
- Five Tribes Act in early 1906, extended the life of tribes
- Chief required federal appointment until 1971
- Held: 1867 Constitution never dissolved

ICWA 25 USC 1901

- Enacted by Congress for the purpose of keeping Indian families together.
- *Haaland v. Brackeen* is currently awaiting a SCOTUS decision. The decision could have a major impact on:
  - Congressional power under Article 1
  - Indians could be viewed as a race rather than as a political entity
  - Could backfire against States.
  - If Indian preference statutes are unconstitutional, then there would be numerous statutes that are detrimental to the Tribes that are also unconstitutional
    - Example: Act of April 25, 1940.

White Mountain Apache Tribe et al. v. Bracker et al., 448 U.S. at 136, (1980)

- This case held the state of Arizona could not tax a non-Indian logging company operating solely on the Fort Apache reservation.
- Even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government.
- Under Bracker's balancing test, the Court considers tribal interests, federal interests, and state interests.

Montana v. United States, 450 U.S. 544 (1981)

- Held that the Tribe lacked inherent authority to preclude fishing by nonmembers on waterways within the reservation in which the tribe did not hold the beneficial interest to the underlying land.
- It found no clear treaty or statutory right to regulate nonmember conduct on fee lands.
- The Court also set forth two exceptions to the general rule that tribes lack regulatory authority over non-Indians on non-Indian fee land within the reservation.
  - The first exception states that "the tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members."
  - The second exception stated that tribes may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."

Montana v. United States, 450 U.S. 544 (1981) (Cont.)

- The "Montana test"
  - Where the "Montana test" is satisfied, a tribe may exercise authority over non-Indians on fee land within the reservation.
  - The test also governs when U.S. may authorize tribes to regulate non-Indian fee lands within reservations under the Clean Water Act.
  - The Court later applied the Montana standard to tribal civil adjudicatory authority in *Strate v. A-1 Contractors*.

Indian Mineral Development Act, 25 U.S.C. §§ 2101-08 (1982)

- One stated purpose was to "maximize the economic return to a tribe for its oil and gas".
- The Act is silent on the issue of the state's right to tax Lessee.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

- Jicarilla tribe is in Northwest New Mexico, approx. 745,000 acres
- Executive Order reservation.
- The Tribe has the inherent power to impose the severance tax on petitioners' mining activities as part of its power to govern and to pay for the costs of self-government.
- 1953 leases, taxes not enacted until 1976

Ramah Navajo School Board, Inc. et al v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982)

- New Mexico closed the only reservation high school, then sought to impose a gross receipts tax on two non-Indian firms constructing a new school.
- Comprehensive federal regulatory scheme for the construction of Indian schools leave no room for the additional burden sought to be imposed by New Mexico.
- Express federal policy of encouraging Indian self-sufficiency in the area of education preempts State tax is here, even in the absence of federal preemption statutes. (White Mountain Apache Tribe v. Bracker)
- The interest asserted by the State relating to its providing services to the non-Indian contractor for its activities off the reservation is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.
- The State's purpose in imposing the tax pursuant to a general desire to increase revenues is insufficient justification.
- Ambiguities in federal law should be construed generously

Solem v. Bartlett, 465 U.S. 463 (1984)

- In 1979, the State of South Dakota charged respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, with attempted rape.
- Respondent pleaded guilty to the charge and was sentenced to a 10-year term in the state penitentiary at Sioux Falls.
- Bartlett filed habeas petition in federal court which found state lacked jurisdiction.
- Eighth circuit affirmed the decision.
- U.S. Supreme Court affirmed the decision.
- Holding: The Cheyenne River Act (Act), enacted in 1908, "to sell and dispose of" for homesteading a specified portion of the Cheyenne River Sioux Reservation did not diminish the reservation.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985)

- "It is clear that the 1924 Act does not authorize Montana to enforce its tax statutes with respect to leases issued under the 1938 Act."
- "In the absence of clear congressional consent to taxation, we hold that the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act."

Indian Country USA Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987)

- "Once Congress has set lands apart as Indian country, they remain so until Congress divests them of that character."
- "In Cabazon, the Supreme Court noted that "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." 107 S. Ct. at 1088.

Indian Country USA Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987) (Cont.)

- "Although Congress at one time may have envisioned the termination of the Creek Nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority. See Harjo, 420 F. Supp. at 1121 n. 20 ("Congress did not intend here to divest the [Creek] National Council's power to legislate")."
- "We affirm the district court's judgment that the State's substantive bingo regulations and sales tax laws are preempted with respect to Creek Nation Bingo because they impermissibly interfere with tribal jurisdiction and federal laws and policies."

Cotton v. New Mexico, 490 U.S. 163 (1989)

- Cotton Petroleum paid 6% severance tax to the Tribe and 8% State taxes (which include a severance tax)
- So, wells on the reservation are taxed at 14% whereas off the reservation the burden is only 8%.
- Basic issue: 25 U.S.C. § 398c enacted in 1927 authorizes state taxation of executive order reservations, but does the 1938 Indian Mineral Leasing Act repeal the immunity waiver of 25 U.S.C. § 398c?

Cotton v. New Mexico, 490 U.S. 163 (1989) (Cont.)

- Basic issue: 25 U.S.C. § 398c enacted in 1927 authorizes state taxation of executive order reservations, but does the 1938 Indian Mineral Leasing Act repeal the immunity waiver of 25 U.S.C. § 398c?
  - Held that States may validly impose severance taxes because, inter alia, the 1938 Act silence does not reflect congressional intent to preclude taxation, NM is providing services to Cotton and Tribe, and there is no economic burden on Tribe
  - There is no merit to Cotton's contention that the State's severance taxes -- insofar as they are imposed without allocation or apportionment on top of tribal taxes -- impose an unlawful multiple tax burden on interstate commerce.

County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251 (1992)

- Yakima County, Washington, imposed an ad valorem tax on real property within its jurisdiction and an excise tax on sales of such land.
- The county proceeded to foreclose on various properties for which these taxes were past due, including certain fee-patented lands held by the Yakima Indian Nation or its members on the Tribe's reservation within the county.

County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251 (1992) (Cont.)

- SCOTUS held:
  - The ad valorem taxes were valid under the General Allotment Act
  - The excise taxes on the sale of the land were invalid
    - "However, the excise tax on sales of fee-patented reservation land cannot be sustained. The Indian General Allotment Act explicitly authorizes only "taxation of ... land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the activity of selling real estate, this Court's cases require that that interpretation be applied for the benefit of the Tribe. *See, e. g., Blackfeet Tribe, supra,* at 766. Pp. 268-270."

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)

- Petitioner's trading post on such land within the Navajo Nation Reservation is subject to a hotel occupancy tax that the Tribe imposes on any hotel room located within the reservation's boundaries.
- The Federal District Court upheld the tax, and the Tenth Circuit affirmed.
- "And if you have the power to tax, then you have jurisdiction to enforce that tax." - Justice Ginsburg during oral argument
- SCOTUS applied Montana Test: Held neither exception applied
  - No consensual relationship
  - Operation of hotel on non-Indian fee land does not threaten or have a direct effect on the tribe's political integrity.

Nevada v. Hicks, 533 U.S. 353 (2001)

- Unanimous Court decision delivered by Justice Scalia: "[b]ecause the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties…"
- "…State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court."

Ute Mountain Ute Tribe v. Rodriguez, 660 F. 3d 1177 (2011)

- 10th Circuit Court case
  - (1) The federal regulatory scheme is not "exclusive," although it is indeed "extensive"
  - (2) The economic burden—as that concept was applied by the Supreme Court in Bracker, Ramah, and Cotton Petroleum—falls on the non-Indian operators, not on the Tribe
  - (3) The State has asserted a sufficient justification for imposing the taxes.
- Dissent
  - I cannot agree with the majority's conclusion that the economic effect of the challenged taxes on the Ute Mountain Ute is "too indirect and too insubstantial." Nor can I agree that New Mexico's provision of off-reservation services may be used to justify taxation of on-reservation activities. Because of the extensive (if not exclusive) federal regulation of tribal oil and gas extraction, the economic burden borne by the Ute Mountain Ute, and New Mexico's de minimis interest in collecting the taxes at issue, the district court should be affirmed.

Nebraska v. Parker, 136 S. Ct. 1072 (2016)

- Omaha Tribal members attempted to enforce liquor licenses and taxes on local vendors and clubs selling alcoholic beverages in Pender, Nebraska.
- Justice Thomas issued a unanimous opinion.
  - "The Tribe was almost entirely absent from the disputed territory for more than 120 years…The Omaha Tribe does not enforce any of its regulations—including those governing businesses, fire protection, animal control, fireworks, and wildlife and parks—in Pender or in other locales west of the right-of-way. Nor does it maintain an office, provide social services, or host tribal celebrations or ceremonies west of the right-of-way.
  - This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our role to "rewrite" the 1882 Act in light of this subsequent demographic history. 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."

Oklahoma v. Castro-Huerta, 597 U.S. _____ (2022)

- Kavanaugh delivered opinion, Roberts, Thomas, Alito, Barrett joined
- Gorsuch, Breyer, Sotomayor, Kagan dissented.
- Held: "The General Crimes Act does not preempt state authority to prosecute Castro-Huerta's crime."

Haaland v. Brackeen

- ICWA: Indian Child Welfare Act, 25 USC 1901 et seq
- Challenge:
  1. Violates Article 1 of the Constitution
  2. Violates Anticommandeering of 10th Amendment
  3. Violates equal protection 5th Amendment
  4. Violates Substantive Due Process
  5. Violates non-delegation doctrine
  6. 2016 rule is unconstitutional under Admin Proc. Act. (APA)

Act of April 25, 1940

[CHAPTER 158]

JOINT RESOLUTION

To amend section 5 of Public Law Numbered 360, Sixty-sixth Congress.

April 25, 1940
[H. J. Res. 289]
[Pub. Res., No. 66]

Osage Act, amendment.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Osage Act (S. 4039, Public, Numbered 360, Sixty-sixth Congress; 41 Stat. 1249) be amended to read as follows:

State tax upon oil and gas produced in Osage County, Okla.; exception.

"SEC. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross-production tax, not to exceed the existing rate, upon all oil and gas produced in Osage County, Oklahoma, except as herein otherwise provided, and all taxes so collected shall be paid and distributed, and shall be in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma. The gross-production tax on the royalty interests of the Osage Indians shall be at the rate levied by said State but in no event to exceed 5 per centum and said tax shall be paid by the Secretary of the Interior, through the proper officers of the Osage Agency, to the State of Oklahoma from the amount received by the Osage Indians from the production of oil and gas to be distributed in like manner as gross-production tax under the laws of said State and the Secretary shall pay the tax herein authorized upon the condition and not otherwise that an additional one-fifth of said sum or sums paid by the Secretary in pursuance of this Act shall be delivered over to Osage County, Oklahoma, at the same time or times as the other payment or payments herein provided for are made to said county, one-half thereof to be apportioned to a fund to be used by said county only for the construction and maintenance of roads and bridges therein, the other one-half thereof to be used for the maintenance of common schools of said county as provided by law."

To be in lieu of other State taxes.

Rate, on royalty interests.

Conditional provision.

Approved, April 25, 1940.

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