Wisconsin's Indian Country after *McGirt v. Oklahoma*

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On July 9, 2020, the United States Supreme Court issued its ruling in *McGirt v. Oklahoma*,[1] holding that the Muscogee (Creek)[2] reservation in Oklahoma, as established by treaty in 1833, was never dissolved or diminished. As a consequence, much of the eastern half of Oklahoma is again considered to be Indian[3] reservation. Although the specific effect of the ruling was narrow, the ramifications of the ruling are substantial, both in Oklahoma and nationwide.

This issue of *LRB Reports* explains the *McGirt* ruling and its impact on Wisconsin. In part I, a brief history of federal Indian law provides context for the ruling. Part II provides a brief history of the Creek people and their reservation and discusses the ruling in *McGirt*. Part III explains the jurisdictional issues that arise in Indian Country and the potential effects *McGirt* may have on jurisdiction. Part IV describes the Oneida Nation and a recent case involving their reservation, which was affected by the ruling in *McGirt*. Part V provides detail on the Stockbridge-Munsee reservation, the borders of which, as determined through decades of cases in state and federal courts, may conflict with the logic of *McGirt*. Finally, part VI briefly describes the history of the other Indian reservations in Wisconsin and the potential effect that the *McGirt* holding may have on each.

Part I: A brief history of federal Indian policy

The federal government's official policies towards American Indians have changed dramatically over the years. In 1830, Congress passed and President Andrew Jackson signed the Indian Removal Act, which allowed the president to negotiate tribes' removal and relocation west of the Mississippi River. Tribes and individuals who resisted this policy of removal were forcibly relocated, most notably during the Trail of Tears.

In the 1880s, federal policy pivoted to allotment. In 1887, Congress passed the General Allotment Act, also known as the Dawes Act. The act allowed the president, on a tribe-by-tribe basis, to divide land held communally by a tribe and parcel out individual allotments of land to heads of families and other tribal members. These allotments were generally held in trust by the federal government for a number of years before the individual tribal member could receive the land outright. Most allotment land was eventually sold to nontribal members.

Federal policy pivoted again under the administration of President Franklin D. Roosevelt, with the passage of the 1934 Indian Reorganization Act. The act slowed the process of allotment and authorized a system of tribal self-rule under federal supervision. The act also allowed the federal government to purchase additional lands and hold them in trust on behalf of tribes.

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1. No. 18-9256, slip op. (U.S. July 9, 2020).

2. For consistency with case law, the remainder of this report will use the terms Creek and Creek Nation, rather than Muscogee.

3. This report will generally use the term "Indian" instead of "American Indian" or "Native American," as that is the term used in state and federal laws.

Part II: *McGirt v. Oklahoma*

A brief history of the Muscogee (Creek)

At the heart of *McGirt v. Oklahoma* lies the Creek. At the time of European arrival, the Creek resided in what is now the American Southeast, primarily in Alabama and Georgia. Between 1739 and 1827, the Creek signed a series of treaties with the British and the U.S. federal government. These treaties ceded the vast majority of the Creek territory.[4] This trend culminated in 1832 in the Removal Treaty,[5] which ceded all Creek lands east of the Mississippi River in exchange for land in what is now Oklahoma.

Under the terms of the 1832 treaty, the Creek were encouraged to emigrate to the new reservation, but thousands remained in Alabama.[6] In 1836, President Jackson forcibly removed the remaining Creek in Alabama to the Creek reservation in what is now Oklahoma. Of the 15,000 Creek forced to leave, 3,500 died on the brutal march from hunger, exhaustion, and mistreatment.[7] The Creek resided primarily on their reservation, neighbored by the Cherokee, Chickasaw, Choctaw, and Seminole, who had also been removed from their lands east of the Mississippi. Collectively, these tribes are known as "the Five Tribes."[8] The land of these Five Tribes made up all of what is now Oklahoma, and was known at the time as "Indian Territory.[9]

During the Civil War, the Creek were divided, with some fighting for and signing treaties with the Confederacy.[10] At the conclusion of the war, the federal government imposed punitive treaties on the Five Tribes, including an 1866 treaty with the Creek, causing them to lose half of their territory.[11] The distribution of land following these treaties can be seen in figure 1. This newly ceded land formed the basis of the "Oklahoma Territory," with the remaining "Indian Territory diminished to include only the eastern half of what is now Oklahoma."[12] This 1866 treaty guaranteed the Creek "quiet possession of their country . . . Forever set apart as a home for said Creek Nation."[13]

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4. Dunbar Roland, *Mississippi Provincial Archives, English Dominion: 1763–1766* (Nashville, 1921): 184–255, https://books.google.com.

5. Treaty with the Creeks, 1832, in Charles Kappler, *Indian Affairs: Laws and Treaties* (Washington: Government Printing Office): 341, https://govinfo.gov.

6. Tribal members who wished to remain could stay on their lands, which were allotted to the tribe, but would become citizens of Alabama, subject to the state's laws.

7. Prucha, Francis Paul, *The Great Father: The United States Government and the American Indians, Volume I* (Lincoln, Nebraska: University of Nebraska Press, 1984), 233.

8. In the nineteenth century, the Five Tribes were referred to as the "Five Civilized Tribes," due to their relatively widespread adoption of several European practices, including agricultural techniques and dress.

9. Jeffrey Burton, *Indian Territory and the United States, 1866–1906* (Normand and London: University of Oklahoma Press 1997): 3–4.

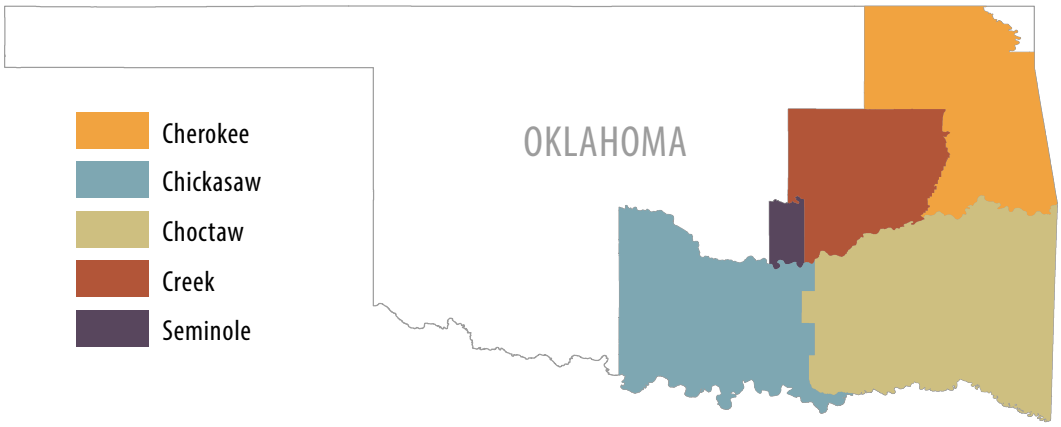
10. Arrell Morgan Gibson, "Native Americans and the Civil War," *American Indians Quarterly* 9 no. 4 (Autumn 1985): 385, 387, and 388–89, https://jstor.org.

11. Treaty with the Creeks, 1866, in Kappler, *Indian Affairs*, 931 and 932.

12. 26 Stat. 96 § 29 (1890).

13. Treaty with the Creeks, 1866, in Kappler, *Indian Affairs*, 932 and 933.

Figure 1. **The "Five Civilized Tribes" reservations of 1866**



Source: United States Census Bureau, 2019 TIGER/Line Shapefile Current American Indian/Alaska Native/Native Hawaiian Areas, catalog.data.gov.

Despite the 1866 treaty's guarantees of the rights of the Creek, their authority and lands were consistently diminished during the next 50 years. Ultimately, the Creek's lands were targeted for allotment by the Dawes Act, and finally allotted in 1901.[14] The Creek's legal authority was also diminished by laws in 1890,[15] 1897,[16] 1898,[17] 1906,[18] and 1908.[19] The practical effect of these actions was to strip the Creek of nearly all of their governing authority, assets, and lands.

The case

Under the federal Major Crimes Act (MCA), the federal courts, and not state courts, have jurisdiction over certain serious crimes, such as murder and rape, committed by an American Indian in "Indian Country," regardless of whether the victim is an American Indian.[20] The MCA defines "Indian Country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent."[21]

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14. Ch. 209, 27 Stat. 645 § 16 (1893); Ch. 676, 31 Stat. 862 §§ 2 and 3 (1901).

15. The Act of May 2, 1890, § 31, 26 Stat. 96, provided that, for offenses not covered by federal law, the criminal laws of the neighboring state of Arkansas would apply.

16. The Act of June 7, 1897, 30 Stat. 83, provided that federal and Arkansas laws would apply to all persons in Indian Territory, regardless of race.

17. The 1898 Curtis Act abolished all tribal courts and transferred all pending cases to the U.S. courts. Act of June 27, 1898.

18. The Five Tribes Act provided for the "final disposition of the affairs of the Five Civilized Tribes." Act of April 26, 1906, ch. 1876, 34 Stat. 137. The act abolished tribal taxes and allowed the secretary of the interior to collect the Creek Nation's remaining revenues and distribute them among tribal members. The act also directed the secretary to take possession of and sell all tribal buildings and the underlying lands. In addition, the 1906 Enabling Act, which paved the way for Oklahoma's statehood, and the 1907 amendment to the act transferred all pending cases involving Indians on Indian lands to the Oklahoma state courts, or to federal district courts if the prosecution was under federal law. Act of June 16, 1906, 34 Stat. 277; Act of Mar. 4, 1907, 34 Stat. 1287.

19. The Act of May 27, 1908, 35 Stat. 316, required Creek officials to turn over all tribal properties to the secretary of the interior.

20. 18 U.S.C. § 1153.

21. 18 U.S.C. § 1151. The term "patent" here includes an allotment.

In *McGirt v. Oklahoma*, Jimcy McGirt, an enrolled member of the Seminole Nation, had been convicted in an Oklahoma state court of several serious sexual abuse charges. At issue in the case was whether the crimes had occurred within the boundaries of the Creek Nation reservation and, therefore, within Indian Country for purposes of the MCA. If so, the crimes should have been tried in federal court rather than state court. The crimes occurred on land that had been reserved for the Creek Nation in the 1866 treaty with the United States.

Justice Neil Gorsuch wrote the majority opinion, which was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh dissented. In the majority opinion, Justice Gorsuch took a strict textualist approach to the legal question. In his view, "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."[22] The court relied on precedent that held that, in order to terminate reservation status, Congress must "clearly express its intent to do so," typically with an "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[23] The court also relied heavily on its decision in *Solem v. Bartlett*, which held that "[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."[24]

The court rejected Oklahoma's argument that allotment itself was sufficient evidence of Congress's desire to terminate the reservation, noting that the court had "explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others."[25] The court also refused to take Oklahoma's suggested approach of considering historical events and demographics together as a whole with acts of Congress when determining whether Congress intended to diminish the boundaries of a reservation. The court stated that the only proper consideration was to ascertain and follow the original meaning of the law; only if there is an ambiguous statutory term or phrase in the law would the court 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."[26] While the dissent argued that the overall context of congressional action and demographics unmistakably showed an intent to disestablish the Creek reservation, the majority noted that there had been no previous cases in which the court had concluded that a reservation was disestablished "without first concluding that a statute required that result."[27]

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22. McGirt v. Oklahoma, No. 18-9256, slip op. at 7 (U.S. July 9, 2020).

23. *McGirt*, 8, citing Nebraska v. Parker, 577 U.S. 481, 6 (2016).

24. *McGirt*, 18, citing Solem v. Bartlett, 465 U.S. 463, 470 (1984).

25. *McGirt*, 10, citing Mattz v. Arnett, 412 U. S. 481, 497 (1973) and other cases.

26. *McGirt*, 18.

27. *McGirt*, 20.

The court held that none of the acts of Congress affecting the Creek Nation included a clear intent to dissolve the reservation, and that the reservation therefore continued. While this holding has no effect on land ownership within those reservation boundaries, it does mean that crimes committed by an American Indian within those boundaries are under the jurisdiction of the federal courts.

Part III: Jurisdiction in Indian Country in Wisconsin

A brief history of Indian Country in Wisconsin

In the early 1800s, the federal government began signing treaties with the tribes in what is now Wisconsin in order to free up the territory for white settlers.[28] The territory reserved for the tribes was moved and diminished repeatedly as settlers sought new land and as industries sought more resources. In the reservations that persisted, the government pursued a policy of allotment. The stated policy was to "civilize" tribe members by giving them land for farming.[29] In practice, these allotments were often sold to white settlers and businesses, often in order to pay local taxes. Reservations continued to be diminished, dissolved, moved, and allotted until the 1930s. Following the 1934 Indian Reorganization Act, several Wisconsin tribes were recognized by the federal government and new reservations were created. These reservations have, in most cases, grown since their restoration. The current boundaries of Wisconsin's reservations and trust lands can be found in figure 2.

Within these boundaries, several actors have frequently overlapping civil and criminal jurisdictions. This section will provide a brief overview of jurisdiction in Indian Country in Wisconsin.

Jurisdiction in Indian Country and the general application of *McGirt*

In general, Indian tribes retain their inherent sovereignty and jurisdiction unless it is given away by treaty or taken away by an act of Congress or, by implication, by a decision of the federal courts.

The General Crimes Act of 1817 gave the federal courts jurisdiction over most crimes that occurred in Indian Country between an Indian and a non-Indian, but not including crimes committed by one Indian against another.[30] As previously discussed, the MCA gave the federal courts jurisdiction over 13 specific crimes,[31] even if the crime occurred

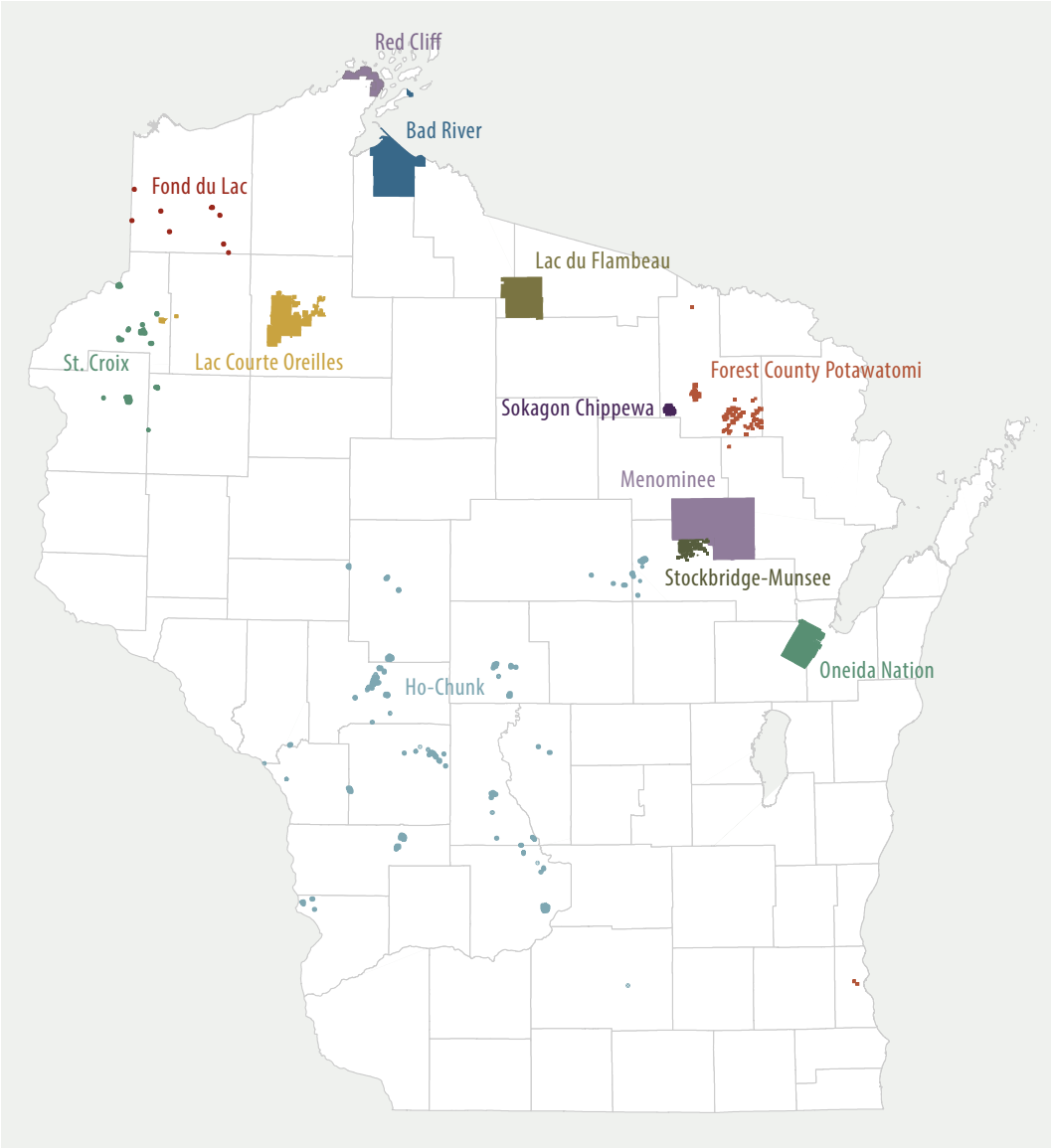
28. There are myriad sources for the general narrative of Wisconsin's American Indian tribes, but this section draws particularly from Ronald Satz, "Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective," *Transactions* 79, no. 1 (Madison, Wisconsin Academy of Sciences, Arts and Letters, 1991), http://digital.library.wisc.edu/.

29. Satz, "Chippewa Treaty Rights," 69 and 77.

30. Act of March 3, 1817, 3 Stat. 383, codified at 18 USC § 1152. The act also exempted from federal jurisdiction any Indian that had already been punished by a tribal court and any crime for which tribal jurisdiction was authorized by a treaty.

31. 18 USC § 1153. The specific crimes are murder; manslaughter; kidnapping; maiming; felony sexual abuse; incest; cer-

Figure 2. **Reservation and Indian trust land in Wisconsin**



The size of scattered lands are exaggerated for visibility.
Source: United States Census Bureau.

between an Indian perpetrator and an Indian victim.[32] The U.S. Supreme Court has also determined that tribes lack criminal jurisdiction over non-Indians for crimes committed in Indian Country.[33]

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tain felony assaults, including assault with intent to commit murder, assault with a dangerous weapon, and assault resulting in serious bodily injury; assault against an individual under 16 years of age; felony child abuse or neglect; arson; burglary; robbery; and felony theft.

32. The Major Crimes Act was passed in response to the U.S. Supreme Court's decision in *Ex parte* Crow Dog, 109 U.S. 556 (1883), which overturned the federal conviction of an Indian who had murdered another Indian. The court found that Congress had not taken away the ability of the tribe to hear such an offense between two Indians.

33. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In addition, the Indian Civil Rights Act (ICRA), 25 USC § 1301 et seq, as amended by the Tribal Law and Order Act (TLOA), 25 USC § 1302, limits tribal criminal jurisdiction to offens-

In 1953, Congress enacted Public Law 280, which transferred criminal jurisdiction held by the federal courts, and civil adjudicatory jurisdiction,[34] to state courts in six states, including Wisconsin.[35] P.L. 280 applies in all Indian Territory in Wisconsin except for the Menominee reservation.[36] P.L. 280 did not transfer civil regulatory jurisdiction[37] to the states.

Thus, on the Menominee reservation, the state has criminal jurisdiction over crimes between two non-Indians; the federal courts have jurisdiction over crimes between an Indian and a non-Indian (whether as perpetrator or victim) and over major crimes between two Indians; and the tribal courts have jurisdiction over non-major crimes between Indians.[38] In the remainder of Indian Country in Wisconsin, the state has criminal jurisdiction.[39]

The holding in *McGirt* is limited specifically to the application of the MCA. As the majority notes, "[T]he only question before us . . . concerns the statutory definition of 'Indian country' as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law."[40] However, although the MCA largely does not apply in Wisconsin, the majority in *McGirt* recognized that "many federal civil laws and regulations do currently borrow from [the MCA] when defining the scope of Indian country."[41] For example, the federal Clean Water Act and Clean Air Act allow tribes (under certain circumstances) to be treated as states, for the purposes of the acts, within the confines of a "federal Indian reservation," a term that has the same definition as "Indian Country" under the MCA.[42] In *McGirt*, Oklahoma's argument identified several more areas of federal law and funding that apply differently to Indian Country and federal Indian reservations. These include

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es for which the penalty is no more than incarceration for three years or a fine of $15,000 or both.

34. P.L. 83-280. Civil adjudicatory jurisdiction refers to a court's authority to hear and decide disputes between parties.

35. The other states were California, Minnesota, Nebraska, Oregon, and Alaska.

36. Menominee Restoration Act of 1973, P.L. 93-197.

37. Regulatory jurisdiction refers to the legislative authority to regulate certain activities, such as hunting and fishing.

38. On non-P.L. 280 reservations (the Menominee reservation), tribal courts retain criminal jurisdiction, *concurrent* with federal jurisdiction, over all crimes committed by an Indian, if the penalties are limited as prescribed by ICRA and TLOA as noted in note 33.

39. Although the U.S. Supreme Court has not expressly addressed the issue of whether tribal courts on P.L. 280 reservations share concurrent criminal jurisdiction with state courts, most lower courts, the U.S. Dept. of Justice, and Indian law experts share the nearly unanimous view that criminal jurisdiction is concurrent. See, e.g., Opinion of the Solicitor, M-36907 (Nov. 14, 1978), in Decisions of the U.S. Dept. of the Interior, Vol. 85 at 433; Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990); Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991); Jimenez and Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 Am. U.L. Rev 1627 (1998); and Office of Tribal Justice, U.S. Department of Justice, Concurrent Tribal Authority Under Public Law 83–280 (November 9, 2000).

40. McGirt v. Oklahoma, No. 18-9256, slip op. at 39–30 (U.S. July 9, 2020).

41. *McGirt*, 40.

42. 33 U.S.C. § 1377 (h) (1); 40 CFR §§ 49.2, 81.1.

homeland security,[43] nutritional programs,[44] tobacco regulation,[45] disability education,[46] highways,[47] waste management,[48] cultural artifacts,[49] and more.[50]

In addition, at least one court, in deciding a case involving the Oneida Nation in Wisconsin, has already applied the reasoning in *McGirt* to resolve a dispute about reservation boundaries for the purpose of determining the reach of local regulatory jurisdiction, as is discussed in more detail below. Thus, despite *McGirt*'s specific and narrow ruling, it has the potential to have far-reaching impacts nationwide in any dispute in which the boundaries of a reservation are at issue.

The remainder of this report discusses each of Wisconsin's 11 federally recognized tribes and the potential effect that the *McGirt* holding may have on them, depending on whether the boundaries of the tribes' reservation lands are in dispute.

Part IV: Oneida Nation

A brief history of the Oneida Nation

For several years, the Oneida Nation's reservation boundaries have been disputed in a federal lawsuit.[51] This section reviews the history of their reservation, and the current dispute. On July 30, 2020, the case was decided in favor of the Oneida Nation, in part on the basis of *McGirt*.

Unlike most Wisconsin tribes, the Oneida did not reside in what is now Wisconsin before the arrival of Europeans. The Oneida were one of the tribes constituting the Iroquois Confederacy, one of the largest and most powerful political entities in North America before the arrival of Europeans. The Iroquois tribes originally resided in what is now the state of New York. In two treaties with the State of New York, the 1785 Treaty of Fort Herkimer and 1788 Treaty of Fort Schuyler, the Oneida lost the majority of their lands to the state.

The Iroquois assisted the colonial army in the Revolutionary War, and the 1794 Treaty of Canandaigua formalized the Iroquois' relationship with the nascent federal U.S. government. That treaty provided for "perpetual peace" between the Iroquois and the United States, recognized the Oneida's treaties with New York, and established "their reservations, to be their property," noting that "the United States will never claim the same, nor disturb them or either of the Six Nations."[52] Over the following 50 years, the

43. 6 U.S.C. §§ 601, 606.

44. 7 U.S.C. §§ 2012, 2013 (b).

45. 15 U.S.C. § 376 (a) (3).

46. 20 U.S.C. § 1411.

47. 23 U.S.C. § 120.

48. 25 U.S.C. § 3903.

49. 25 U.S.C. § 3001 et seq.

50. Brief for Respondent at 43–44, McGirt v. Oklahoma, No. 18-9256, slip op. (U.S. July 9, 2020).

51. Oneida Nation v. Village of Hobart, 371 F. Supp. 3d 500 (2019) and Oneida Nation v. Village of Hobart, No. 19-1981 (7th Cir. July 30, 2020).

52. Treaty with the Six Nations, 1794, in Kappler, *Indian Affairs*, 34–37. "The Six Nations" refers to the Iroquois Confeder-

Oneida would lose nearly all of their remaining lands in New York through treaties with the United States and New York.

As their territory in New York shrank, parts of the Oneida, Stockbridge, and Brothertown tribes purchased land from the Ho-Chunk and Menominee tribes in Wisconsin and relocated to Wisconsin.[53] However, leadership in the Ho-Chunk and Menominee tribes came to feel they were deceived in the agreement, as they believed they had not sold all the rights to that land. Due to this controversy, the United States did not ratify these purchases and the tribes negotiated a new agreement. In 1831 and 1832, the Oneida signed treaties stipulating their land to be an approximately 500,000-acre area near Green Bay.[54]

In 1838, the Oneida signed yet another treaty with the United States, ceding their title and interest in the majority of the 1831 and 1832 reservations, reducing the reservation to less than 65,000 acres.[55] The boundaries created by the 1838 treaty are today still commonly referred to as the borders of the Oneida reservation.[56]

The 1887 General Allotment Act, and subsequent actions by the president in 1889 and Congress in 1906, resulted in the allotment of most of the Oneida reservation.[57] Following allotment, the lands held by the tribe, either collectively or individually, were reduced by more than 75 percent as land passed from members to nonmembers. In 1936, the Oneida reorganized under the Indian Reorganization Act, and the United States purchased some of the reservation's former land for the tribe, to be held in trust by the federal government.[58] Since then, the tribe has endeavored to repurchase land they lost that is within the reservation's 1838 boundaries.

Oneida Nation v. Village of Hobart

The Village of Hobart is wholly contained by the reservation boundaries set in the 1838 treaty. In 2016, the Village of Hobart imposed a permit requirement on large gatherings. That requirement was applied to a festival the tribe holds within the village's boundaries. The Oneida filed suit, claiming that the village cannot enforce a municipal ordinance on the tribe within the boundaries of the reservation. In *Oneida Nation v. Village of Hobart*,[59] the U.S. District Court for the Eastern District of Wisconsin ruled that the reservation was dissolved by allotment of the reservation in the wake of the 1887 General Allotment Act. The district court opinion argued that once the 25-year trust period imposed on the

acy, which at the time was made up of six tribes.

53. The remainder of this report will use the term "Oneida" to refer specifically to the Oneida Tribe of Indians of Wisconsin, also known as the Oneida Nation.

54. Treaty of Washington, 1831 and 1832.

55. Treaty with the Oneida, February 3, 1838, https://firstpeople.us.

56. Division of Intergovernmental Relations, "Oneida," in *Tribes of Wisconsin* (Madison, WI: Wisconsin Department of Administration, July 2020): 73.

57. 34 Stat. 325; see also Brief and Appendix of Plaintiff-Appellant at 4, Oneida Nation v. Village of Hobart, No. 19-1981 (7th Cir. July 30, 2020).

58. Division of Intergovernmental Relations, "Oneida," 73.

59. Oneida Nation v. Village of Hobart, 371 F. Supp. 3d 500, 523 (2019).

land allotments expired, the land had no federal claim upon it, and therefore could not be considered "reserved" for the tribe. The district court specifically cited nonstatutory sources to support this claim, including circumstances surrounding the passage of the act, "the manner in which the transaction was negotiated with the tribes," and "the subsequent treatment of the area in question and pattern of settlement there."[60]

Under the district court ruling, the Oneida reservation would consist of only the land reacquired by the federal government after 1936 and placed into trust.[61] It is difficult to say exactly how much the reservation would have been diminished by this ruling, but figure 3 provides some indication. That map illustrates the territory in the Oneida reservation, as understood before the district court ruling. The map also shows the land that county records show is held by either the Oneida or by the United States in trust, or that is listed as exempt from property taxes under federal law.[62]

The district court ruling was appealed to the Seventh Circuit of the U.S. Court of Appeals. On July 30, 2020, the appellate court issued its ruling, reversing the district court's decision and restoring the Oneida reservation to its pre-2019 extent.[63] The court held that the Village of Hobart could not impose its ordinance on the Oneida's on-reservation activities. The opinion relied on prior U.S. Supreme Court cases that were also cited in *McGirt* to hold that allotment alone does not diminish a reservation unless accompanied with "unequivocal contextual sources" pointing to that diminishment.[64]

The appellate court laid out its understanding of the "well settled" framework for determining whether the boundaries of a reservation have been diminished: first, a court must look to statutory text, which "provides the most probative evidence of diminishment"; next, a court must determine "whether the circumstances surrounding the legislation unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink"; and finally, demographic history and the government's later treatment of the area have "some evidentiary value" and can "reinforce a conclusion suggested by the text."[65] The appellate court interpreted *McGirt* as "adjusting this framework" by requiring the existence of ambiguity in a statute before allowing consideration of the other two factors.[66]

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60. *Oneida*, 371 F. Supp. 3d 500, 513.

61. *Oneida*, 519–20.

62. This is an imprecise illustration of the reservation's diminishment for four reasons. First, the data used are gathered by local officials, and there are inconsistencies across jurisdictions in how land is classified and the quality of the data. Second, under the district court ruling, lands held by the Oneida Nation and its people must be specifically incorporated into the reservation by the Department of the Interior in order to be considered part of the reservation. Third, some lands that are part of the reservation may be listed as having private ownership, but have been incorporated into the reservation after 1934. Finally, some land is listed as tax-exempt for reasons other than being part of the reservation, for instance, if it is land used by a federal agency. The Oneida Nation likely has a record of what lands have been placed in trust, but that information is not readily available.

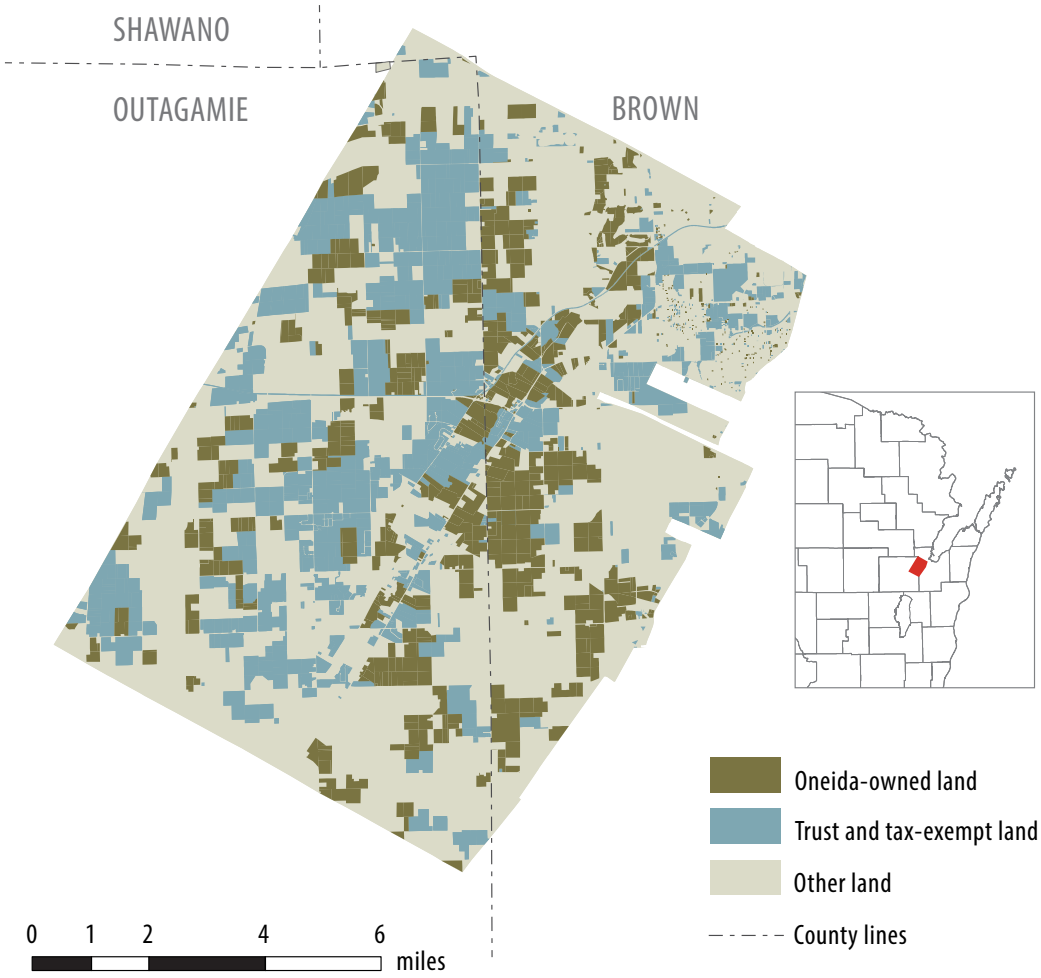
63. Oneida Nation v. Village of Hobart, No. 19-1981 (7th Cir. July 30, 2020).

64. *Oneida*, 18.

65. *Oneida*, 17 (internal quotations omitted).

66. *Oneida*, 17, note 4. See also *Oneida* at 2–3: "We read *McGirt* as adjusting the *Solem* framework to place a greater focus

Figure 3. **Trust, tribal, and federal property tax-exempt land within the Oneida reservation**



Source: Wisconsin Land Information Program, Version 6 Statewide Parcel Database (2020).

The court noted, "Each time the Supreme Court has applied [that] framework and found a reservation to be disestablished or diminished, a tribe-specific statute expressly removed a definite portion from the reservation."[67] The General Allotment Act of 1887 did not specifically address the Oneida reservation, and therefore didn't diminish it. The court then cited *McGirt*'s analysis, which it said further diminished the importance of contextual sources in an analysis of whether Congress intended to diminish a reservation:

> *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

on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation."

67. *Oneida*, 17.

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.[68]

As a result of the ruling, the boundaries of the Oneida reservation remain at their pre-2019 extent.

Part V: Stockbridge-Munsee Band of Mohican Indians

A brief history of the Stockbridge-Munsee

The Stockbridge and Munsee bands of Mohican Indians are from what is now New England and the Mid-Atlantic states.[69] They were moved to land in New York, and subsequently to Indiana.[70] The Stockbridge-Munsee tribe then moved to Wisconsin, along with the Oneida, following the purchase of land along the coast of Lake Michigan. The tribe moved twice more and found themselves along the banks of Lake Winnebago. Finally, the tribe moved to its present location in Shawano County following its 1856 treaty with the federal government.[71] The terms of the treaty said that "the United States agree to select as soon as practicable and to give them a tract of land in the State of Wisconsin, near the southern boundary of the Menominee reservation, of sufficient extent to provide for each head of a family and others lots of land of eighty and forty acres."[72] All previous Stockbridge and Munsee reservations were explicitly ceded by the treaty.[73]

In 1871, Congress passed an act that required the sale of the reservation's lands except for "a quantity of said lands not exceeding eighteen contiguous sections, embracing such as are now actually occupied and improved."[74] This resulted in the reduction of the tribe's lands to nearly a quarter of their 1856 size. In 1893, Congress expanded the membership of the tribe, specifically noting the 1856 treaty and the "reservation" offered to the Stockbridge-Munsee.[75] In 1906, Congress allotted the remainder of the reservation to the members of the tribe, giving the tribe's constituent families title to the lands. Following the allotment, federal courts treated the reservation as if it was dissolved.[76] Notably, however, none of these congressional actions explicitly diminished or dissolved the reservation.

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68. *Oneida*, 37.

69. Some Munsee trace their lineage from what is now Canada.

70. Division of Intergovernmental Relations, "Stockbridge-Munsee Band of Mohican Indians," in *Tribes of Wisconsin* (Madison, WI: Wisconsin Department of Administration, July 2020): 69.

71. Treaty with the Stockbridge and Munsee, February 5, 1856, in Kappler, *Indian Affairs*, 742–55.

72. Treaty with the Stockbridge and Munsee, Section 2, February 5, 1856, in Kappler, *Indian Affairs*, 743.

73. Some land along Lake Winnebago was given to specific Stockbridge-Munsee families under the treaty, but all other claims to a reservation were explicitly revoked.

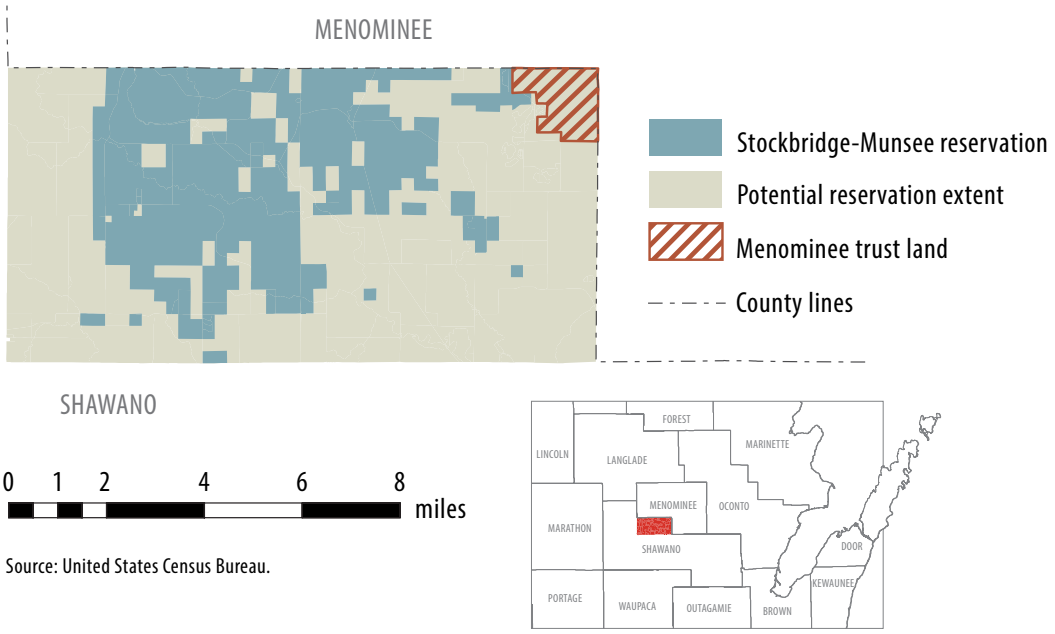
74. Ch. 38, 16 Stat. 404 § 2 (1871).

75. An Act for the relief of the Stockbridge and Munsee tribe of Indians, in the State of Wisconsin, (March 3, 1893), Ch. 219, 27 Stat. 744–45.

76. Wisconsin v. Stockbridge-Munsee Community, 554 F. 3d 665 (2009).

In 1937, the secretary of the interior partially restored the reservation under the 1934 Indian Reorganization Act.[77] Since then, the tribe has managed to recover enough land through purchases and congressional grants to restore the reservation to approximately half of its 1856 size.[78] Figure 4 shows the current extent of the reservation boundaries, and the 1856 extent.

Figure 4. **Potential extent of Stockbridge-Munsee reservation**



Cases involving the Stockbridge-Munsee reservation

Two major cases deal with the extent of the Stockbridge-Munsee reservation, *State v. Davids*[79] in 1995 and *Wisconsin v. Stockbridge-Munsee Community* in 2009. In both of these cases, the courts held that the reservation does not encompass lands that were originally granted by Congress in 1856. Critically, both cases rely on arguments that were eventually rejected by the majority in *McGirt*. If the issues in these cases were reexamined using the logic of *McGirt*, a court could conclude that the Stockbridge-Munsee reservation's boundaries are those granted by Congress in 1856, which would nearly double the reservation's size. This section examines these two cases to highlight how *McGirt* potentially conflicts with each.

The question in *State v. Davids* was whether the Stockbridge-Munsee reservation was diminished by the 1871 act that required the sale of most of the reservation's lands. The

77. "Stockbridge and Munsee Band of Mohican Indians, Wisconsin, Proclamation Setting Aside Land for Reservation," Federal Register 2, 629, https://tile.loc.gov.

78. Once repurchased, the Indian Reorganization Act allows the secretary of the interior to attach this land to the reservation.

79. 194 Wis. 2d 386 (1995).

specific issue was whether the tribe's special fishing rights extended to a pond that was on the original 1856 reservation's land, but not on the post-1937 reservation. In that case, the Wisconsin Supreme Court found that, although the 1871 act did not explicitly diminish the reservation, it *intended* to diminish the reservation to the 18 sections not placed for sale. This finding was supported by documents from the commissioner of Indian affairs indicating that the reservation had shrunk, and by a 1904 proposal for the "settlement of all obligations of the Government" to the tribe.[80]

Wisconsin v. Stockbridge-Munsee Community is the most recent case on the topic of the Stockbridge-Munsee reservation. The case arose because of slot machines at the Pine Hills Golf and Supper Club, which is located within the borders of the original 1856 reservation, but not within the post-1937 reservation borders. The Stockbridge-Munsee may operate gambling machines only if they are within the "boundaries of the reservation."[81] The court found that Congress had *implicitly* diminished the 1856 reservation with the 1871 act and the 1906 allotment act.[82] Specifically, the court noted the following:

> Today, a reservation can encompass land that is not owned by Indians . . . but back then, the 'notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.' . . . What's more, Congress believed that all reservations would soon fade away – the idea behind the allotment acts was that ownership of property would prepare Indians for citizenship in the United States, which, down the road, would make reservations obsolete.[83]

The court found that these beliefs meant that Congress was unlikely to employ any statutory language to explicitly dissolve the reservation. The court was therefore willing to rely on the context of the laws rather than the text of Congress's acts to determine if the reservation was diminished.

In both the *Davids* and *Stockbridge-Munsee* cases, the congressional acts at issue were determined by the court to have implicitly dissolved the original reservations.[84] However, the *McGirt* ruling says that, in order to diminish a reservation, an act must contain "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[85] The majority opinion in *McGirt* notes that "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others."[86] Some allotment acts contemporary to the Creek and

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80. *Davids*, 412–414.

81. 25 U.S.C. § 2710 and *Stockbridge-Munsee*, 661.

82. *Stockbridge-Munsee*, 665.

83. *Stockbridge-Munsee*, 662, quoting Solem v. Bartlett, 465 U.S. 463, 468 (1984).

84. Brief in Opposition at 14–16, McGirt v. Oklahoma, No. 18-9526, slip op. (U.S. July 9, 2020).

85. *McGirt*, 8, citing Nebraska v. Parker, 577 U. S. 481 (2016).

86. *McGirt*, 10.

Stockbridge-Munsee allotment acts did explicitly end reservation status,[87] but the Creek and the Stockbridge-Munsee allotment acts did not.[88] For both the Creek and the Stockbridge-Munsee reservations, none of the congressional actions allotting land include phrases like "present and total surrender of all tribal interests," "discontinued," or "abolished"—terms Congress used in other situations to dissolve a reservation.[89]

These rulings also relied on several sources other than statutes to show that Congress had diminished the reservations, including government reports and events before and after each congressional action. However, as noted above, the majority in *McGirt* was skeptical of considering any source but "the Acts of Congress."[90]

There are several differences between the legal histories of the Creek reservation and the Stockbridge-Munsee reservation. However, the majority opinion in *McGirt* appears to challenge at least some of the logic used in the rulings that found that the Stockbridge-Munsee reservation has been diminished. In addition, the decision in *Oneida Nation v. Village of Hobart* suggests that some courts are open to applying the logic of *McGirt* to Wisconsin reservations. Should another issue relating to the boundaries of the reservation come before a court, it is possible that that court could rely on *McGirt* to find that the boundaries of the reservation should be restored to their 1856 extent. As noted in figure 4, some of that land is currently held in trust for the Menominee tribe, and it is unclear how that conflict would be addressed.

Part VI: Effects of *McGirt* on other Wisconsin reservations

This section reviews the remaining nine of Wisconsin's eleven recognized tribes, and one unrecognized tribe that has a treaty history with the United States. It appears that the boundaries of these ten tribes' reservations are not currently in dispute, so *McGirt* is unlikely to significantly affect them.

Bands of the Lake Superior Chippewa—Bad River, Lac Courte Oreilles, Lac du Flambeau, and Red Cliff

Wisconsin's Lake Superior Chippewa[91] bands make up 38 percent of the Indian population of Wisconsin's reservations[92] and much of the land area of the reservations in Wisconsin. These reservations date to the early years of the state.

87. *McGirt*, 12.

88. Justice Gorsuch noted that while allotment may have been intended to dissolve the [Creek] reservation, "wishes are not laws." *McGirt*, 12.

89. *McGirt*, 8 and 10.

90. *McGirt*, 7.

91. The Chippewa are also known as the Ojibway or Ojibwe.

92. This percentage represents 6,037 out of 16,065 Indian persons. Division of Intergovernmental Relations, *Tribes of Wisconsin* (Madison, WI: Wisconsin Department of Administration, July 2020).

The first Chippewa treaty with the United States, the 1825 Prairie du Chien treaty, set the borders for the Sioux, Sac, Fox, Menominee, Ioway, Winnebago (Ho-Chunk), and Chippewa.[93] The Chippewa territory included the bulk of what is now northern Wisconsin, from Lake Superior to the center of the state. The United States purchased nearly all of that Chippewa land in subsequent treaties in 1837 and 1842.[94]

Following an aborted attempt to have the Chippewa leave their remaining lands, the United States negotiated a new treaty with the Chippewa. In the 1854 Treaty of La Pointe, four bands of Lake Superior Chippewa Indians agreed to move to permanent reservations: the Bad River Band, the Lac Courte Oreilles Band, the Lac du Flambeau Band, and the Red Cliff Band.[95] These reservations' boundaries appear to be unchanged since their establishment.[96] Much of the land within these reservations is currently owned by individuals who are not American Indians or members of a tribe. However, there have been no prominent disputes over whether the privately held lands should be reclassified as outside the reservations' boundaries, and the tribes maintain their sovereignty over their 1854 treaty-based reservations.

St. Croix Chippewa Indians of Wisconsin

The remaining Chippewa tribes were not parties to the 1854 Treaty of La Pointe. The St. Croix Chippewa Indians of Wisconsin remained mostly nomadic until achieving federal recognition following the Indian Reorganization Act of 1934.[97] The St. Croix reservation is a patchwork of land granted and held in trust by the federal government, as authorized by the Indian Reorganization Act and the secretary of the interior.[98] Their boundaries do not appear to be in dispute.

Sokaogon Chippewa Community (Mole Lake Band)

The Sokaogon Chippewa Community (Mole Lake Band) trace their origins to the Post Lake Chippewa Band. The Post Lake Band's representatives signed the 1854 Treaty of La Pointe, entitling the band to live at the reservations at La Pointe, Lac de Flambeau, or Lac Court Oreilles.[99] However, the Lake Band objected to attempts by the federal government

93. Treaty with the Sioux, Etc., 1825, in Kappler, *Indian Affairs*, 250.

94. Treaty with the Chippewa, 1837, and Treaty with the Chippewa, 1842, in Kappler, *Indian Affairs*, 487 and 542.

95. Treaty with the Chippewa, 1854, 10 Stat. 1109.

96. With the exception of the La Court Oreilles reservation, these reservations are contiguous, with compact borders. The La Courte Oreille's meandering borders are the result of the original 1873 Department of the Interior order finalizing the reservation: C. Delano, "Lac Court Oreilles Reserve," in *Executive Orders Relating to Indian Reserves: From May 14 1855 to July 1 1902*, (Washington: Indian Office, 1902): 140–141, http:// http://lcweb2.loc.gov.

97. Satz, *Chippewa Treaty Rights*, 69.

98. 3 Fed. Reg. 244, 3015–3016.

99. *Sokaogon Chippewa Community v. Exxon Corporation*, 805 F. Supp. 860, 688 (1992) and Treaty with the Chippewa, 1854, 10 Stat. 1109. Note the signatures of Chief Me-gee-see and Chief Ne-gig of the Sokaogon as members of the Lac de Flambeau Band.

to move them to the Lac de Flambeau reservation. In 1869, the Lake Band's chiefs wrote letters to the commissioner of Indian affairs, arguing that the government had made promises that the band would have a reservation of their own in exchange for their signing the 1854 treaty. The Lake Band maintains that 15 years after the 1854 treaty was negotiated, an agent with the Indian Affairs Bureau negotiated that new reservation, but the agent and the map of that reservation were lost in a shipwreck.[100]

If this story is true, then, because the reservation agreement was lost and not approved by Congress, it has no effect under federal law. As noted in a 1992 ruling on the band's claims, "[t]he alleged reservation has never been defined by static boundaries," and the tribe has not been able to prove that one was set aside for them in the nineteenth century.[101]

The Lake Band achieved federal recognition and was granted specific trust lands following the Indian Reorganization Act and authorization by the secretary of the interior.[102] The boundaries of their trust lands do not appear to be in dispute.

Forest County Potawatomi Community

The Forest County Potawatomi Community ceded all of their land in Wisconsin to the federal government in 1833.[103] Following their removal from those lands, some Potawatomi returned to Forest County in the 1880s. That community grew and was eventually recognized as a reservation, as authorized by the 1934 Indian Reorganization Act and the Department of the Interior.[104] The tribe's current reservation consists only of lands acquired or held in trust under the Indian Reorganization Act and the boundaries of those lands do not appear to be in dispute.

Ho-Chunk Nation of Wisconsin

The Ho-Chunk Nation was forced to sell its last remaining land in Wisconsin in 1837.[105] Although many Ho-Chunk were removed to Iowa, some remained, forming the base for the current community. The Ho-Chunk do not have a treaty-based reservation, but in 1994 they became a federally recognized tribe under the 1934 Indian Reorganization Act.[106] Since then, the Ho-Chunk, and the United States in trust for the Ho-Chunk, have

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100. *Sokaogon*, 689; Division of Intergovernmental Relations, "Sokaogon-Mole Lake," in *Tribes of Wisconsin* (Madison, WI: Wisconsin Department of Administration, July 2020), 86; and Sokaogon Chippewa Community, "History," http://sokaogon-chippewa.com/.

101. *Sokaogon*, 699.

102. Constitution and By-Laws of the Sokaogon Chippewa Community Minnesota (Washington: Government Printing Office, 1939), https://loc.gov and 4 Fed. Reg. 3431–32 (1939).

103. Treaty with the Chippewa, Etc., 1833, in Kappler, *Indian Affairs*, 402.

104. *Constitution and By-Laws*.

105. 1837 Treaty with the Winnebago. "Until 1993, the Ho-Chunk Nation was formerly known as the Wisconsin Winnebago Tribe, but the term Winnebago is a misnomer derived from the Algonquian language family and refers to the marsh lands of the region." Wisconsin First Nations, "Ho-Chunk Nation," https://wisconsinfirstnations.org/.

106. Constitution of the Ho-Chunk Nation (July 2019), 21, https://ho-chunknation.com.

acquired and held scattered lands in several Wisconsin counties, the boundaries of which do not appear to be in dispute.

Menominee Indian Tribe of Wisconsin

The original reservation of the Menominee Indian Tribe of Wisconsin, constituting what is now Menominee County, was created in 1854 in a treaty with the United States.[107] In 1954, the reservation was explicitly dissolved by an act of Congress.[108] The reservation was reorganized by the 1954 act, with its lands largely transferred to Menominee Enterprises, Inc., an organization created to hold the tribe's assets and businesses. The tribe's members became shareholders in the enterprise. However, the tribe was deeply dissatisfied by the arrangement and began petitioning for the restoration of the tribe.[109] The tribe was restored by an act of Congress in 1973.[110] The 1973 act allowed the tribe to accept property from the tribe's members that lies within Menominee County, if given willingly, as well as the property of Menominee Enterprises, Inc. The act states these lands "shall be their reservation." Accordingly, the reservation as reestablished following the 1973 act is the actual extent of the reservation; all previous reservation borders were explicitly dissolved by the 1954 act.

Brothertown Indian Tribe

The Brothertown Indian Tribe[111] originated among several tribes from New York and New England.[112] These tribes united in 1769. In the 1820s, the Brothertown came to Wisconsin, along with the Oneida and Stockbridge. In 1839, Congress passed an act allotting the Brothertown's land and explicitly dissolving the tribe and its reservation.[113] Many of the tribe's descendants have reorganized and, since 1980, have sought federal recognition. That recognition has not been granted.[114] Because the tribe and its reservations were explicitly dissolved by an act of Congress, *McGirt* will have limited to no effect on them.

Conclusion

The consequences of *McGirt* in Wisconsin are already taking effect, but its full impact is still unclear. The Supreme Court's opinion in *McGirt* was careful to note that it applied only to the controversy over the Creek reservation. However, a federal court has already

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107. Treaty with the Menominee, 1854, in Kappler, *Indian Affairs*, 626.

108. P.L. 399 (1954), 68 Stat. 250, 251–252

109. Stephen Herzberg, "The Menominee Indians: Termination to Restoration," *American Indian Law Review* 6:1, 171–186, and *Tribes of Wisconsin*, "Menominee Indian Tribe of Wisconsin," 63.

110. P.L. 93-197 (1973).

111. The Brothertown are also known as the "Brotherton."

112. Wisconsin Historical Society, "The Brothertown Indian Nation," https://www.wisconsinhistory.org/.

113. An Act for the relief of the Brothertown Indians, in the Territory of Wisconsin, Chapter 83, 5 Stats. 349 § 7 (1839).

114. Brothertown Indian Nation, "Recognition Restoration," http://www.brothertownindians.org/.

used the logic of *McGirt* to preserve the borders of the Oneida reservation. If the Stockbridge-Munsee reservation borders are challenged, a future court will need to determine whether *McGirt* applies. While these changing boundaries will have no effect on land ownership, they could change the scope of tribal, federal, and state jurisdiction over not only crimes committed on those lands, but also over the regulation of hunting, fishing, gaming, and the environment. ■