

Jurisdiction Up for Question: The Supreme Court's Disestablishment Cases & *Murphy v. Royal*

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What is disestablishment?

- Have reservation boundaries established by treaty or executive order been altered by subsequent Congressional action?
 - Since 1903, Congress can unilaterally divest a tribe of jurisdiction and diminish reservation boundaries.
- Supreme Court's test for disestablishment under surplus lands acts summarized in *Solem v. Bartlett*, 465 U.S. 463 (1984):
 - 1. Review Congressional act for “statutory language used to open the Indian lands”; does not require explicit language of cession or compensation
 - 2. Review events surrounding passage of Congressional acts for contemporaneous understanding
 - 3. Review events that occurred after Congressional act to determine subsequent and modern understanding

Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017)

- Death penalty imposed by Oklahoma court; before 10th Cir. on habeas
- Defendant, Muscogee (Creek) Nation member, raised question of jurisdiction over land on which murder was committed
- Tenth Circuit disestablishment ruling:
 - Applied *Solem* over objection that “ill suited for round hole of Oklahoma statehood”
 - Step 1: Reviewed series of Congressional acts but found no “magic works” indicating diminishment
 - Step 2: Shows new government, allotment of tribal lands, but not clear understanding that jurisdiction of Nation divested
 - Step 3: Evidence on demographics, court jurisdiction, subsequent treatment by Congress, Oklahoma, and Nation inconsistent
- Concludes Nation’s reservation not disestablished

Five Civilized Tribes 1866 Boundaries



Muscogee (Creek) Nation 1866 Boundaries



Five Civilized Tribes 1866 Boundaries

Maps from State of Oklahoma's Petition for Certiorari (filed 2/6/18)

Reservations in the U.S. (2016)

Map prepared by BIA, 2016; shows Okla. as tribal stat. area, not reservation (ex. Osage)



Murphy's Local Impact

- Uncertainty!
- If the Supreme Court affirms:
 - Shift in criminal jurisdiction from State to Muscogee (Creek) Nation, U.S.
 - Shift in civil jurisdiction from State to Muscogee (Creek) Nation, U.S.
 - *Montana* test to determine tribal jurisdiction over fee lands; expansion of *Nevada v. Hicks*?
 - May support tribal taxation of non-Indian individuals, businesses
 - Assertion of tribal court jurisdiction over non-Indians could limit or delay consideration of rights by State, federal courts
 - Assertion of tribal regulatory jurisdiction
 - SAFETEA likely will limit assertion of environmental jurisdiction
 - May see increase in claim for water reserved rights
 - Tribal regulation of alcohol sales, land use possible
 - Expanded need to comply with NHPA, other consultation requirements

Finding disestablishment: Wind River Reservation

- *Wyoming v. United States EPA*, 875 F.3d 505 (10th Cir. 2017)
 - Dispute arose when EPA granted Eastern Shoshone and Northern Arapaho Tribes joint authority to administer Clear Air Act on Wind River Reservation, recognizing reservation boundaries as of 1897
 - Tenth Circuit applied *Solem* to hold reservation disestablished
 - Express language of cessation, evidence of contemporary and subsequent understanding that the reservation was diminished
- Petition for Cert denied

Differences between the diminished Wind River Reservation & the un-disestablished MCN Reservation

Wind River Reservation

- 1905 Act – “cede, grant, and relinquish to the United States, all right, title, and interest”
- No unconditional payment of sum certain; US act as trustee while lands allotted as surplus
- Evidence of Congressional intent to disestablish – series of failed acts attempting same outcome
- Subsequent treatment – 1934 IRA authorization to restore ceded lands; Congress reference to lands as former reservation; mixed evidence on jurisdiction
- Step 1 evidence conclusive

MCN Reservation

- Series of 8 Congressional Acts, none used “cede”, provided sum certain payment
- Congress continued to recognize Nation’s jurisdiction, transfer of title to Oklahoma at statehood irrelevant
- Dissolution of tribal government and replacement with new State not inconsistent with disestablishment
- No unequivocal evidence at Step 2 that proves disestablishment – mixed references to continued existence of Creek Reservation
- Step 3 evidence insufficient - demographic and State authority favor diminishment, but tribal government never destroyed and recognized as having authority in parts of 1866 territory

Murphy's Policy Implications

- Environmental
 - SAFETEA protects Oklahoma regulation, but similar protections don't exist elsewhere
- Taxation
 - Loss of tax base
- Business
 - Will businesses choose to operate where jurisdictional questions settled
- Water
 - Federal reserved water rights recognized for Native American reservations
- Courts
 - Criminal & Civil; exhaustion doctrine
- Law Enforcement

Murphy Briefing Schedule

State of Oklahoma's brief due today, July 23

Amicus supporting Oklahoma briefs due July 30

(on petition, supported by EFO et al., Okla. Indep. Petroleum Assoc., United States)

Royal's brief due September 7

Amicus supporting Royal briefs due September 14

(no supporting briefs on petition; below, by Muscogee (Creek) Nation, Seminole Nation of Okla., United Keetowah Band of Cherokee Indians)

Expect oral argument winter 2019



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