6th Circ. Told McGirt Ruling Backs Mich. Tribe's Reservation

By [HYPERLINK "https://www.law360.com/nativeamerican/articles/1298601/6th-circ-told-mcgirt-ruling-backs-mich-tribe-s-reservation?nl_pk=894dd615-1d89-41ce-b438-7f19a35e0818&utm_source=newsletter&utm_medium=email&utm_campaign=nativeamerican"]
Law360 (August 5, 2020, 7:23 PM EDT) -- The Little Traverse Bay Bands of Odawa Indians has pressed the Sixth Circuit to overturn a ruling that the tribe never had a reservation, saying the [HYPERLINK "https://www.law360.com/agencies/u-s-supreme-court"]'s recent ruling in McGirt supports the Michigan tribe's contention that its reservation was established under a 19th-century treaty.

Michigan Gov. Gretchen Whitmer along with cities, counties and local interest groups [HYPERLINK "https://www.law360.com/articles/1275920/mich-tells-6th-circ-tribe-never-had-a-reservation"] in May to reject the Bands' appeal, saying a lower court rightly found that an 1855 treaty set aside land for individual band members to buy before the federal government disposed of the remaining lands but didn't create a reservation.

The Little Traverse Bay Bands, which comprise a single federally recognized tribal entity, told the circuit court Tuesday that the high court's [HYPERLINK "https://www.law360.com/articles/1285273/justices-back-toss-of-state-convictions-on-okla-reservation"] in [HYPERLINK "https://advance.lexis.com/api/search?q=2020%20U.S.%20LEXIS%203554&qlang=bool&origination=law360&internalOrigination=article_id%3D1298601%3Bcitation%3D2020%20U.S.%20LEXIS%203554&originationDetail=headline%3D6th%20Circ.%20Told%20McGirt%20Ruling%20Backs%20Mich.%20Tribe%27s%20Reservation&" \t "_blank"] that the Muscogee (Creek) Nation's reservation still exists "confirms that defendants' effort to relegate tracts reserved from the public domain to non-reservation status lacks any legal basis."

And Michigan's "dire warnings of disruption" to state and local jurisdiction and regulation if the tribe's reservation is recognized are also undermined by the McGirt case, in which Oklahoma similarly raised the specter of massive consequences if the Creek tribe's reservation were affirmed, according to the brief.

Michigan's position "ignores the extensive body of settled Supreme Court precedent that

presumptively constrains the exercise of tribal authority over non-Indians on fee lands (in areas ranging from regulation to taxation to adjudication) while providing that the corollary state authority remains intact," the Bands said.

"In the end, arguments about the purported negative consequences of honoring treaty promises, the McGirt court said, are no more than arguments that 'the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking.' This court should do the same," the Bands said.

In May, Michigan argued that the parties to the 1855 Treaty of Detroit agreed at the time that the United States would withdraw from sale unsold public lands in townships so that eligible band members could buy them before the federal government disposed of the remaining lands.

According to the state's brief, U.S. District Judge Paul L. Maloney correctly concluded in his August 2019 summary judgment ruling that the band leaders who negotiated the treaty did not want it to establish reservations under the federal government's control.

The Bands said in their brief Tuesday that "for all the sound and fury, not one of [the defendants'] arguments undermines the conclusion that the 1855 treaty established a reservation for the Band."

The McGirt decision — in which the high court ruled 5-4 that the Creek tribe's eastern Oklahoma reservation exists for federal criminal jurisdiction under the Major Crimes Act, despite Oklahoma's contention the reservation was never even established — backs the Bands' contention that the reservation was obviously established, regardless of whether the federal government kept any superintendence over it.

The 1855 treaty "set apart defined tracts of land" and that withdrawal of lands from the public domain was meant to be permanent, according to the brief.

The treaty didn't sever the tribe's relationship with the federal government, and "to claim that the Bands did not remain under federal superintendence in the wake of the treaty is only to engage in willful historical blindness," the tribe said.

The Bands also urged the circuit court to dismiss a cross-appeal from the cities of Petoskey

and Harbor Springs and Emmett and Charlevoix counties, which argued that the tribe's claims under the 1855 treaty were blocked by previous litigation before the Indian Claims Commission.

The lower court already granted those governments all the relief they asked for, and the tribe also "took no position in the ICC proceedings inconsistent with its position before this court," according to the brief.

The [HYPERLINK "https://www.law360.com/agencies/michigan-attorney-general-s-office"] declined to comment Wednesday.

Representatives for the other parties did not immediately respond to request for comment Wednesday.

The Little Traverse Bay Bands of Odawa Indians are represented by general counsel James A. Bransky and legislative services attorney Donna L. Budnick and by Riyaz A. Kanji and David A. Giampetroni of [HYPERLINK "https://www.law360.com/firms/kanji-katzen"].

Michigan is represented by Jaclyn Shoshana Levine, Kelly M. Drake and Laura R. LaMore of the Michigan Attorney General's Office.

The cities of Petoskey and Harbor Springs and Emmett and Charlevoix counties are represented by Jeffrey C. Gerish and David K. Otis of [HYPERLINK "https://www.law360.com/firms/plunkett-cooney"].

The case is Little Traverse Bay Bands v. Gretchen Whitmer et al., case number [HYPERLINK "https://www.law360.com/dockets/5f2a90f2623e662c388f4b2e"], in the [HYPERLINK "https://www.law360.com/agencies/u-s-court-of-appeals-for-the-sixth-circuit"].

--Additional reporting by Joyce Hanson. Editing by Orlando Lorenzo.