**DCTAC Statement on the relevance of McGirt v Oklahoma**
**to the Shab-eh-nay allocation**
**May 25, 2024**

On May 25, 2024, the Illinois Senate Executive Committee met to discuss the plan to turn over Shabbona Lake State Park to the Prairie Band Potawatomi. Backers of the plan made it clear that one of their goals was to remove the "cloud" hanging over the titles to properties within the historic Shab-eh-nay allotment.

An argument was made that the Prairie Band claim to continued reservation status of the Shab-eh-nay allotment corresponded exactly to the Creek claim to their land allocated by the 1833 Treaty with the Creeks. In 2019, in McGirt v Oklahoma, the Supreme Court of the United States upheld the Creek's reservation claim, and so, the theory goes, the Potawatomi claim should also be recognized.

However, the two treaties in question have vastly different language, and this matters. The 1829 Treaty of Prairie du Chien states, in Article 3,

> From the cessions aforesaid, there shall be reserved, for the use of the undernamed Chiefs and their bands, the following tracks of land …. for Shab-eh-nay, two sections at his village near the Paw-paw Grove.

We have long argued that this "usufructory right" was never intended to create treaty-recognized title. Compare the language with the Creek allocation, from Articles 2, 3 and 4:

> [Article 2 spells out specific boundaries to the Creek allocation]
>
> 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 or convention
>
> It is hereby mutually understood and agreed between the parties to this treaty, that the land assigned to the Muskogee Indians, by the second article thereof [describing specific boundaries], shall be taken and considered the property of the whole Muskogee or Creek nation,

The language of the two treaties is completely different. Shab-eh-nay had only a "right to use"; the Creeks had "fee-simple title" and a "permanent and comfortable home" [Article 4]. The Creeks had reservation title, in other words, and Shab-eh-nay did not. It was that "fee-simple" title that Shab-eh-nay wanted in the 1833 Treaty of Chicago but which was denied him by Congress.

Every Federal official responding to the Shab-eh-nay claim thought there was no reservation title: William Medill in 1848, Orlando Brown in 1849, Charles Mix in 1853 and 1854, and George Manypenny in 1856. Shab-eh-nay's land "was reserved for the *use* of himself and his band only". And, in fact, his band decamped in 1837 for Kansas.

In light of all this, we feel that the Prairie Band's claim to the Shab-eh-nay allocation remains extremely tenuous. Turning over a priceless state park – one of only half a dozen larger parks near the Chicago area – seems to us to be an egregious overreaction.

The Prairie Band remains free to sue in Federal court, of course, but we think it unlikely they will prevail there. And if the courts do decide to overturn a century and a half of precedent, and the Prairie Band does succeed, the same negotiation option would still exist: to turn over the entirety of the state park in exchange for clear title for the affected homeowners. Turning over the park today would seem to be entirely premature.

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