



October 8, 2020

The Hon. James M. Inhofe  
*United States Senator*

The Hon. James Lankford  
*United States Senator*

The Hon. Frank Lucas  
*United States Representative*

The Hon. Tom Cole  
*United States Representative*

The Hon. Markwayne Mullin  
*United States Representative*

The Hon. Kevin Hern  
*United States Representative*

The Hon. Kendra Horn  
*United States Representative*

To: All Members of the Delegation from the Great State of Oklahoma to the United States Congress

Below please find a letter with feedback from the Board of Trustees and staff of the Oklahoma Council of Public Affairs, regarding the United States Supreme Court decision in *McGirt v. Oklahoma*.

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*Executive Summary*

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In 1997, Jimcy McGirt was convicted of molesting, raping and forcibly sodomizing his wife's four-year-old granddaughter. In a 5-4 decision this July, the U.S. Supreme Court overturned McGirt's conviction—and in the process unleashed uncertainty, chaos and a legal nightmare on Oklahoma's criminal, civil, tax, business and environmental laws and regulations.

The *McGirt* decision was based on a determination by five members of the Court that more than a century's worth of actions by the federal government, the state of Oklahoma and the Creek Nation did not effectively disestablish the Creek reservation. This has already begun to result in legal chaos, with multiple laws and regulations in Oklahoma being challenged in the decision's aftermath.

The Oklahoma Council of Public Affairs desires to help craft solutions that meet the following standards: (1) **Fairness** to all Oklahomans in the applicability of laws, taxes and regulations, regardless of someone's race, ethnicity, geography or financial position; (2) **Certainty** for all Oklahoma citizens, Oklahoma families and Oklahoma businesses about the laws, taxes and regulations that govern their lives within their state; and (3) **Unity** for all Oklahomans, as our state was founded and admitted to the union as one state for all Oklahomans.

To accomplish these goals, OCPA recommends Congress act quickly to fix this problem in the manner described by a majority of the U.S. Supreme Court: by correcting the oversight of over a century ago and officially disestablishing the reservations in Oklahoma. While that permanent solution is being pursued, OCPA recommends the state of Oklahoma and the Five Tribes affected by *McGirt* enter into an accord that cements **fairness, certainty** and **unity** for all Oklahomans, as defined above, and that has the same effect of disestablishing the reservations.

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OCPA has been a trusted source for fact-based public policy analysis in Oklahoma for more than 25 years, pursuing the best interests of Oklahoma families, businesses, children and taxpayers.

In short, OCPA is in the business of making recommendations to Oklahoma policymakers that will improve opportunity for all Oklahomans, both tribal members and non-tribal members. Virtually every aspect of life in at least half our state is potentially impacted by the U.S. Supreme Court's *McGirt* decision.

The following is a summary of the most obvious policy areas that must be reckoned with due to the new *McGirt* precedent:

## 1. Taxation

- a. Are non-Indians subject to taxation from both the state and a tribe if they live on what is now considered a reservation?
  - i. A previous U.S. Supreme Court case dealing with similar issues in Pender, Nebraska, involved a tribe attempting to charge a 10% liquor tax on non-Indian businesses within historic reservation lands, on top of the state liquor tax (*Parker v. Nebraska*). In a unanimous decision, the Court confirmed the tribe's authority to levy an additional tax on reservation land.
- b. Are Indians living on their tribe's reservation, or on another tribe's reservation, exempt from state and local taxes?
- c. What about businesses? Will it now be necessary to determine if a business is owned by a registered tribal member before taxes can be determined?
  - i. Most small businesses are "pass-through" entities, meaning they are taxed at the individual level. Thus, if Indians on reservations are exempt from state taxes, their businesses likely are, too.
- d. Should similarly situated businesses in the state be taxed differently, merely on the basis of who the owners are? Many Oklahoma businesses are owned jointly by Indians and non-Indians or by Indians from different tribes.
- e. *The Oklahoman* newspaper, just this week, reported that the Oklahoma Tax Commission has stated that the *McGirt* decision casts doubt on the ability of the state of Oklahoma and local governments to collect hundreds of millions of dollars in taxes from Oklahomans who happen to be members of native nations. On a per-capita basis, at minimum, more than \$500 million in annual Oklahoma state and local taxing authority is now in doubt due to *McGirt*'s intersection with other reservation case law.
- f. In that same newspaper report, the senior counsel of the Chickasaw Nation suggested that the tribe would be eager to enter into compacts with the state on taxes and other issues, indicating the success the tribes have had with compacts with the state on casino gaming and other economic concerns. It is worth noting that those existing compacts between the state and the various tribes allow the state zero audit ability to ensure a tribe's compliance with the financial aspects of a given compact.

## 2. Regulation

- a. All state regulatory jurisdiction in eastern Oklahoma is now open for debate.
- b. For example, immediately after *McGirt*, an Indian-owned oil and gas company challenged the Corporation Commission's authority to regulate it. The case has not yet been decided.
- c. Every state regulatory agency will likely, at some point, contend with claims from Indians and Indian-owned businesses that the agency does not have jurisdiction

over them for activities conducted on the reservations—and potentially outside the reservations. This runs the gamut from environmental regulation to medical marijuana and everything in between. Any exercise of regulatory authority necessarily begins with the question of jurisdiction, as regulation is an exercise of the state’s police power.

- d. Various challenges to each agency’s regulatory jurisdiction will likely follow similar patterns but will be determined case by case over a long period of time, at the cost of legal uncertainty in eastern Oklahoma.
- e. Similar jurisdictional issues will touch countless other areas of concern to state policymakers, and therefore of concern to Oklahomans. Even if *McGirt* is found not to apply to a particular regulatory action, there will be many costly legal challenges until the matter in question is finally resolved by the courts or by Congress or by the state Legislature. If the state regulates an activity, a threshold jurisdictional issue must now be grappled with.

### 3. Civil Court Jurisdiction

- a. Federal case law indicates that tribes tend to have civil jurisdiction on reservations, even over non-Indians, in matters where a non-Indian enters a consensual relationship with the tribe or its members, or where the activity at issue affects “the political integrity, the economic security, or the health or welfare of the tribe.” This case law language is subject to extremely broad interpretation by the courts.
- b. This amorphous standard potentially covers a broad array of everyday activity in eastern Oklahoma, and potentially in the state as a whole.
- c. Numerous Oklahoma judges are both Oklahomans and members of native nations and their families are receiving specific benefit as a result of their membership in native nations. With criminal, civil, regulatory, tax and other matters now to be disputed in court, questions are rightly being raised about whether or not judges whose families receive native nation benefits should recuse themselves from cases in Oklahoma involving *McGirt* implications.

### 4. Land Use

- a. Tribes may now be able to exercise authority over non-Indian fee land through zoning and other land-use regulations.
- b. Consider a hypothetical non-Indian company seeking to build a housing development on fee land it owns on the newly declared reservation. Many factors will determine whether jurisdiction resides with the local zoning authority, the state, the tribe or concurrently with all three. Federal cases have gone both ways, depending on the particular facts. Just determining which zoning and building regulations govern will be difficult for the developer.
  - i. Was the original allotment restricted or unrestricted fee land?
  - ii. Will the lots be sold primarily to tribal members or to non-Indians?
  - iii. What is the impact of the development on the tribe’s political integrity, economic security, health and welfare?
  - iv. These and other particulars may cause similarly situated individuals and companies to be subject to different regulations.

### 5. Criminal Justice Reform

- a. Oklahoma must dig out of the problem of over incarceration. Key policy changes have resulted in improvements, but much work remains.
- b. The instability in criminal law created by *McGirt* threatens further justice reform. As

attitudes shift on criminal justice, our state's ability to enact smart crime policy changes. Cultural stability generally assists further justice reform.

- c. At a time when parts of the country are experiencing turmoil and unrest, fresh uncertainty about criminal law in our state adds to the uphill battle of reform.
- d. One concern involves appeals by those convicted of major crimes in "Indian country." It appears many individuals successful on appeal will be retried in federal court, but there remains the question of whether the statute of limitations could prohibit subsequent prosecution. There is also concern whether federal courts can keep up with the flood of new cases.
- e. Also, confusion exists around jurisdiction as applied to policing. There are already reports of police throwing in the towel when tribal membership is alleged during or following arrest.
- f. Oklahoma is still a "tough on crime" state, despite the mounting costs of mass incarceration. With current budget shortfalls, Oklahoma needs reforms that protect taxpayers while keeping the public safe. The uncertainty brought by *McGirt* is already resulting in hostility to common-sense criminal justice reforms.

#### 6. Uncertainty—and its Economic Impact

- a. Already, as a result of *McGirt*, title insurance companies are now including disclaimers for transactions that would include "Any defect, lien, encumbrance, adverse claim, restriction, regulation or other matter arising from any claim that the Insured, the Land or the Title is subject to the laws or jurisdiction of a Native American Tribe or Nation."
- b. Property insurance companies are also excluding the payment of claims that would be adjudicated by a Native American tribe.
- c. Due to concerns regarding lack of ability to enforce insurance, lenders and other investors are now concerned about the wisdom of investing in projects that because of *McGirt* are impaired. Even recent business recruitment attempts by the state of Oklahoma versus Texas for a Tesla plant were likely impaired during the final stages because the plant was originally intended to be located in the Tulsa metropolitan area, geographically contained within the U.S. Supreme Court's new interpretation of "Indian country."
- d. The full potential scope of the uncertainty resulting from *McGirt* is perhaps best captured in a recent quote by the attorney general of the Cherokee Nation: "The tribes and the state are looking at these cases through very different lenses. The state has a prosecution that they invested a lot of time and energy and money in, and they're very concerned about it from a public safety standpoint and they want to preserve those prosecutions. *The tribe's interest in this has nothing to do with the criminal case. It's really much more about an issue between the tribes and the United States than it is about anything else.*"

One thing's practically certain:

Within Oklahoma's borders, *McGirt* may be the ultimate lawyer full-employment act.

Dr. Martin Luther King famously said: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character.”

The *McGirt* decision sets in motion an Oklahoma which would be the opposite of Dr. King’s dream. Absent Congress acting explicitly as it and the federal government did implicitly since before statehood, Oklahoma will be divided.

Due to *McGirt*, there will be two sets of rules for Oklahomans, even many who live right next to each other. Whether one has to pay state and local taxes, or abide by civil, regulatory, and environmental laws, or is protected in matters including freedom of speech or anything that affects “the political integrity, the economic security, or the health or welfare of the tribe” is now in question.

Can a tribal citizen not pay state and local taxes in a reservation in Oklahoma yet still avail themselves of state and local taxpayer-supported schools, public safety, roads, bridges and other taxpayer- and fee-funded state and local government services?

For the sake of **unity**, fairness and equal treatment under the law, Congress must act and disestablish the reservations in Oklahoma to provide **certainty** and **fairness** for all Oklahomans regardless of race, ethnicity, geography or financial position, consistent with the one-state premise on which our state was founded. Until Congress acts, the state of Oklahoma and native nations should enter into an accord that has the effect of disestablishing the reservations in Oklahoma.

Thank you in advance for appropriately addressing this issue with your colleagues in Congress as soon as possible. The damage to our state’s economy as a result of *McGirt* is potentially catastrophic, and the rights of all Oklahomans are in serious jeopardy without prompt corrective action by Congress. We remain ready to be of any assistance that will be helpful to you.



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*Jonathan S. Small, President*



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*The Hon. Larry V. Parman, Chairman*

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