



August 21, 2020

The Honorable James M. Inhofe
United States Senate
205 Russell Senate Office Bldg.
Washington, D.C. 20510

Re: Analysis of Potential Impacts on Farmers and Ranchers in Oklahoma after the *McGirt* Decision

Dear Senator Inhofe,

Thank you for the opportunity to provide input on this historic issue. The Oklahoma Farm Bureau Legal Foundation and other organizations joined to submit amicus curiae briefs in *Carpenter v. Murphy*¹ and *McGirt v. State of Oklahoma*² to the Supreme Court of the United States (SCOTUS) in support of the State of Oklahoma's position that a Muscogee Creek Reservation did not exist in Oklahoma. Our organization and others were concerned that if it were determined a reservation existed in Oklahoma, it threatened to impact our members by authorizing tribal taxation or overturning State, county, and municipal taxation of activities and properties; investing tribal courts with broader jurisdiction or divesting State courts of long-accepted authority; and authorizing greater, and potentially exclusive, tribal and federal regulation over lands, businesses and energy resource development.

In July, SCOTUS spoke on *McGirt* and determined the Muscogee Creek Nation has a reservation in Oklahoma for purposes of the Major Crimes Act. We are concerned the *McGirt* decision has sovereignty implications beyond the applicability of the Creek Nation and the Major Crimes Act; it is our understanding the SCOTUS decision will apply to the Choctaw, Chickasaw, Cherokee and Seminole Tribes, as well.

We recommend Congress enact legislation clarifying that the *McGirt* decision be limited to criminal jurisdiction under the Major Crimes Act and that it shall not affect the authority and jurisdiction of Oklahoma, its agencies, counties and municipalities, to regulate civil conduct or civil transactions, to tax, and to exercise judicial authority over civil matters, nor shall it enlarge the civil jurisdiction of the Five Tribes, and such authority and jurisdiction shall remain as it existed prior to the decision.

It is our understanding the Creek Nation's sovereignty is based upon treaties from the 1800s, decades before Oklahoma was a state. We are not familiar with the treaties and federal laws the Tribes may

¹ https://www.supremecourt.gov/DocketPDF/17/17-1107/38327/20180309124905769_17-1107acEnvironmentalFederationOfOklahomaInc_.pdf

² https://www.supremecourt.gov/DocketPDF/18/18-9526/138803/20200320201701399_18-9526bsacEnvironmentalFederationOfOklahomaInc.pdf

further assert their sovereignty. We do not know what sovereignty issues will be asserted and we are concerned we will be forced to address never-ending sovereignty issues over a long period of time.

We prefer the State and tribal jurisdiction as it existed prior to the *McGirt* decision, except for the application of the Major Crimes Act. If Congress is unable to achieve this through legislation, we believe it is in the best interest of the counties, State and federal government to work together cooperatively with the Tribes. Oklahoma and many tribal nations have successfully achieved agreements regarding fuel and cigarette taxes, gaming, law enforcement and hunting and fishing. The State of Oklahoma, Choctaw Nation of Oklahoma, Chickasaw Nation, City of Oklahoma City Water Settlement of 2016 is an excellent example of how cooperation resolved a difficult natural resource issue. It can serve as a model for how to address similar issues in the future.

Since Oklahoma Farm Bureau was organized in 1942, a major tenet of our members has been the belief that they can utilize their private property as needed to productively and sustainably grow food and fiber for our Nation and the world. As an agricultural organization, we are not concerned about the Tribes physically taking nontribal private property, as much as how they could regulate natural resources and tax nontribal properties and businesses. Oklahoma's farmers and ranchers are already subject to numerous state and federal regulations. Part of Farm Bureau's role as an agricultural organization is to work with governmental agencies, nongovernmental organizations and other stakeholders, to shape those regulations. It is important to us to have the same opportunity to participate with the Tribes in forming any regulations that affect our livelihoods.

The following are areas of concern to farmers and ranchers. These issues are subjects of ongoing litigation nationally. Sovereignty-related litigation is fact specific and often not considered settled law.

Water

Water is essential to farming and ranching operations. Oklahoma's farmers and ranchers utilize ground and stream water in their operations. Eastern Oklahoma is rich with water development with numerous reservoirs and the McClellan-Kerr Navigation System. It is unknown how the Tribes might assert their sovereignty over Oklahoma's water assets. Will the Creek, Cherokee and Seminole Tribes claim senior water rights based on treaties which existed prior to statehood? How might that affect our State's physical water supplies, water quality, regulation of existing streams and reservoirs, power generation, navigation, removal of dams, etc. Some tribes in the pacific northwest have litigated for the removal of dams.

Will the Tribes assert their sovereignty to try to limit certain types of agricultural operations which they find objectionable? Currently, poultry producers in eastern Oklahoma are defending legal challenges to their water rights brought by tribal members, who are funded by their tribe.

Regulations

Assertions of sovereignty could include anything from attempting to require additional regulations or limiting practices on nontribal agricultural operations.

Zoning

As an organization, we have worked to avoid rural/urban conflicts. We have worked to discourage municipalities from annexing agricultural land. We are concerned there could be assertions of sovereignty to limit locations of certain types of agricultural operations by utilizing zoning. Zoning is a subject of ongoing tribal litigation around the Nation.

Hunting and Fishing

Many Oklahoma farmers and ranchers enjoy hunting and fishing on their own property and/or rely upon income from leased hunting and recreation on their property. We do not know how the Tribes might try to assert their sovereignty over wildlife and natural resource management in eastern Oklahoma. Oklahoma has hunting and fishing compacts with two tribes, the Choctaws and Cherokees, which are set to expire at the end of 2020.

Taxation

There are two sides of the coin on this issue. One side of the coin is how might the Tribes assert their sovereignty to tax or place fees on nontribal citizens doing business in eastern Oklahoma? For example, might the Tribes attempt to place fees on nontribal property transfers? On the other side of the coin, what if the Tribes propose that tribal members do not pay income or other taxes? What would be the revenue loss to municipal, county and State government? How much additional financial burden might be placed on nontribal citizens to fund essential government services?

Economic Development

Will the requirement to work with multiple sovereigns serve as an obstacle or cause a chilling effect on economic development in eastern Oklahoma?

Oklahoma Department of Agriculture, Food and Forestry

The Oklahoma Department of Agriculture, Food, and Forestry (ODAFF) is the primary regulatory agency for our members. ODAFF anticipates a variety of potential impacts from the *McGirt* decision on its role as a regulatory agency as its jurisdictional authority in eastern Oklahoma is uncertain. ODAFF provides licensing, registration, and inspection services for numerous programs related to agricultural production and businesses. This includes programs to maintain the State's livestock herd health, protect consumers, and conserve natural resources, as well as investigative services for agricultural theft and arson.

The *McGirt* decision creates uncertainty of ODAFF's authority to administer these programs in eastern Oklahoma and potentially leaves crucial gaps in protections for both producers and consumers of Oklahoma agricultural products. For example, pesticides offered for sale in Oklahoma are required to be registered with ODAFF. Under the *McGirt* decision, pesticide companies could potentially need to register with as many as six entities, the State, and each individual Tribe. This concept can be applied to the dozens of programs ODAFF manages. Additionally, ODAFF Investigative Services will need to be cross deputized or commissioned with the Bureau of Indian Affairs and tribal law enforcement to investigate and file charges where the victim, suspect, or both are Native American.

The potential impacts of this decision create significant uncertainty for ODAFF, and thus Oklahoma agricultural producers and supporting businesses.

Conclusion

The *McGirt* decision has created uncertainty in eastern Oklahoma's future. We urge cooperation among all parties to successfully address state-tribal sovereignty issues. Ongoing litigation would be costly and delay progress for everyone. Our goal is a "win-win" for the benefit of tribal and nontribal citizens alike.

As there are so many unknowns, we would welcome the opportunity for future dialogue on this issue. Please let us know if we can provide you with additional information or if you have any questions.

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Rodd Moesel". The signature is fluid and cursive, with the first name "Rodd" being more prominent.

Rodd Moesel
President

cc: Governor Kevin Stitt
Secretary of Agriculture Blayne Arthur
Oklahoma's Congressional Delegation
OKFB Board of Directors