



August 25, 2020

Senator James Inhofe
205 Russell Senate Office Building
Washington, DC 20510

Dear Senator Inhofe:

McGIRT DECISION AND ITS IMPACT ON REAL ESTATE

The Supreme Court's opinion in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), holding that part of the eastern half of Oklahoma remains a Muscogee (Creek) Nation reservation¹ has the potential to create significant uncertainty for real estate transactions in the boundaries of the reservation. While the decision focused on a narrow question of criminal law, the holding brings up a host of jurisdictional and sovereignty questions that will need to be addressed in a timely manner to avoid deleterious effects on the value of the impacted real estate, its use, and role in the broader regional economy.

While not exhaustive, this document attempts to highlight some of the major questions and concerns arising from the decision. Until these are definitively resolved, disruptive and negative impacts will unfortunately be felt by current and future owners of real estate within the reservation.

Current court precedents do not sufficiently address many of the issues that will be critical to rectify for people to buy and sell real estate with clarity and stability with respect to the laws and regulations governing real property on a go forward basis within the reservation. Many of the decisions necessary for driving new economic development or transactions hinge on the central question of which government has sovereignty and jurisdiction over the residents, property and businesses located there.

More immediately, the decision also creates uncertainty for past transactions where all parties were under the belief that parcels of land were not located on a reservation and that transactions were solely under the jurisdiction of the law of the state of Oklahoma. Confirming everyone's legal expectations when they entered into these transactions over the past century is an absolutely necessary step for effectively protecting people's property rights.²

As title professionals look to serve their customers and secure their property rights going forward, here are some of the key questions and concerns that the *McGirt* decision raises, and which will require thoughtful and expedient resolution to minimize doubt around real estate transactions:

- **Ownership of real estate**
 - Which jurisdiction's laws and forms (tribal or state) govern the transfer of a parcel of real estate?
 - Was ownership transferred or established in accordance with requirements of the proper governing jurisdiction? If not, what corrective actions will need to take place?
 - What about purchases or transfers by legal entities (trusts, partnerships, LLC's, corporations), or using statutory legal processes (powers of attorney, foreclosures, adverse possession, condemnation proceedings, etc.)?
- **Priority of mortgages**
 - Which jurisdiction's land records govern each parcel for recording purposes?
 - What laws or rights do those jurisdictions give for documents recorded in their land records?
 - Was a past mortgage recorded in the proper jurisdiction, or are there certain liens or interests that are given special priority?
- **Property boundaries**
 - Was any division of the land or adjustment of the boundaries approved by and recorded in the proper jurisdiction?
- **Dispute resolution**
 - Which courts have jurisdiction for bringing disputes and actions such as mortgage and other lien foreclosures? Are past court decisions still valid?
- **Mechanics' liens**
 - If a contractor or service provider was unpaid by the property owner and had lien rights, where would the correct jurisdiction or venue have been (or still be) to enforce its lien rights? Are the rules the same for tribal members and non-members?
- **Taxation**
 - Was the property owner taxed by the appropriate authority, or could an owner now be faced with another authority attempting to collect unpaid real estate or personal property taxes?
- **Land use regulation**
 - Did the property owner or lessee abide by the proper regulation in the use of property? This could include the subdivision of land, zoning regulations, building codes use restrictions, and homeowner associations, including the enforcement of private covenants and restrictions.

- **Access via public roads**

- Were the public roads and highways now used in Eastern Oklahoma established in accordance with the requirements of the proper governing jurisdiction?
- Will any current landowners lose access to their real property as a result of the McGirt decision?

The title insurance and abstracting industry appreciates the opportunity to engage with the Oklahoma delegation on this important matter, and looks forward to collaborating on timely solutions to resolve the open questions and challenges that the McGirt decision will have on the real estate industry, property owners, developers and lenders working in the state of Oklahoma.

Leaving these issues to courts is not a viable option and will only lead to protracted and expensive litigation and further uncertainty for untold numbers of Oklahoma residents and businesses. The American Land Title Association (ALTA) and the Oklahoma Land Title Association (OLTA) believe the federal government, in coordination with the tribes and state, working alongside stakeholders, must act expeditiously to confirm the legal effect of past transactions conducted under the laws of Oklahoma for property currently within the reservations while these issues are comprehensively considered by Congress for permanent resolution.

Should you have any questions about this letter, please do not hesitate to contact Emily Tryon at etryon@alta.org. Thank you for starting this critical dialogue.

Sincerely,

/Chris Morton/

Chris Morton
Senior Vice President of Public Affairs

cc: Oklahoma Congressional Delegation

¹ The effect of this holding may extend far beyond the Muscogee (Creek) reservation and will presumably apply to the other four of the Five Tribes in Oklahoma, as well as other tribes both within and outside of Oklahoma. The US Court of Appeals for the Seventh Circuit has already applied *McGirt* to reaffirm the original boundaries of the Oneida Nation in Wisconsin. *Oneida Nation v. Village of Hobart*, No. 19-1981 (7th Cir. 2020).

² This uncertainty relates both to questions of whether state, federal or tribal law governs a variety of issues involving tribal members and non-members within the boundaries of the reservation, and also issues of whether federal, state or tribal courts have subject matter jurisdiction to resolve various disputes.

With respect to the issue of subject matter jurisdiction, in *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court established the general rule that tribes do not have civil and regulatory jurisdiction over non-members on non-Indian land located within a reservation, with two exceptions: (1) a tribe may regulate the activities of non-members who enter a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or other arrangements; and (2) a tribe may regulate the conduct of non-member on non-Indian land located within a reservation when the non-member's conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe. But, in the aftermath of *Montana*, there has been significant confusion over the extent to which a tribe may exercise its inherent sovereign power over non-members' activities on the reservations or non-member ownership of lands within the reservation. The holding in *McGirt* is likely to exacerbate such confusion.