

The Dirt on McGirt

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Speakers

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Today's Agenda

1. History: Native American landholdings in Oklahoma
2. Case Summary: *McGirt v. Oklahoma*
3. Impact of *McGirt*
4. Jurisdiction inside reservation boundaries
5. ALTA 47 Operative Law Endorsement Series and Policy Addendums
6. Endorsement Form Modifications



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History: Native American Lands in Oklahoma

- **Indian Removal Act of 1830**
 - US government relocated the Cherokee, Muscogee (Creek), Seminole, Chickasaw and Choctaw tribes (the “Five Civilized Tribes”) to “Indian Territory” (prior designation of what became Oklahoma).
 - Half of the Muscogee and Cherokee populations died during the forced march 2,200 miles across nine states to their new homelands (the “Trail of Tears”).
- **General Allotment Act of 1887**
 - Allotment of tribal lands reduced the land of Oklahoma tribes to approximately 27 million acres.
- **1889: Redesignation of 2 million acres in western Oklahoma**
 - Redesignated as “Unassigned Lands” and opened to white settlement.
- **Curtis Act of 1898**
 - Designed to permanently dissolve all formal tribal governments and judicial systems.
- **Oklahoma Statehood - 1907**
- **Indian Self-Determination and Education Assistance Act of 1975**
 - Resulted in 39 tribal governments in Oklahoma that have been federally recognized.

MCGIRT V. OKLAHOMA



“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”

Justice Gorsuch



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McGirt v. Oklahoma

- United States Supreme Court decision issued July 9, 2020.
- Jimcy McGirt was an enrolled member of the Seminole Nation who was convicted of a sex crime in Oklahoma.
- McGirt asserted that because he is Native American and he had committed his crime on an Indian reservation, he should not have been tried in state court due to a lack of jurisdiction, but instead should have been tried in federal court pursuant to the Federal Major Crimes Act.
- The State of Oklahoma in turn asserted that the Muscogee Reservation had been disestablished by Congress many years ago during the allotment era.

McGirt v. Oklahoma

- Court ruling: Muscogee Reservation was established by treaty between the tribe and the United States and has never been disestablished.
- The tribe was not awarded land in fee as a result of the decision.
 - Regardless of who holds the fee ownership the underlying lands are within the boundaries of a reservation.
- The Muscogee Reservation includes about three million acres in eastern Oklahoma, including most of the city of Tulsa.

McGirt v. Oklahoma

- What about the rest of the “Five Civilized Tribes”?



McGirt v. Oklahoma

- Criminal jurisdiction only?
- If not...
 - What land will the tribe assert jurisdiction over?
 - Will the tribe impose taxes inside the reservation?
 - Are tribal compacts an option?
 - What impact does the *Montana* case have on jurisdiction?

Tribal Laws & Governments

Inherent Tribal Powers

- Form their own government.
 - Examples: Constitutions, Tribal Chairperson, Tribal Council
- Make and enforce laws, both civil and criminal.
- Tax.
- Establish and determine tribal membership/citizenship.
- License and regulate activities within their jurisdiction.
 - Includes land use regulations.
- Tribal court system.

Jurisdiction Within a Reservation

- Vesting: Fee, Restricted Fee and Trust
- Tribes have jurisdiction (regulatory and judicial) over property vested in trust and restricted fee inside the boundaries of a reservation.
- Tribes may or may not assert jurisdiction over land owned in unrestricted fee inside the reservation.
- In the case of ambiguity, a tribe and a state or local government may enter into a tribal compact to provide clarity.

Montana vs. United States

Regulation of Non-Indians on Fee Land Within the Reservation

- Consider treaties or federal statutes that may affirm/vest jurisdiction.
- If none, presumption is *against* tribal regulatory authority **unless**:
 1. The non-Indian has consensual relations with the tribe or its members, through commercial dealing, contracts, leases or other arrangements; or
 2. A non-Indian's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The application of either 1 or 2 is referred to as the “Montana Exception.”

What Law Applies?

- It is important to understand what law applies to the land being insured in order to underwrite the risk being assumed.
- For example:
 - Does the tribe have mechanic's lien law?
 - A foreclosure law?
 - Can you issue a zoning endorsement?
 - What about subdivision laws?

Cases Citing *McGirt v. Oklahoma*

- *Confederated Bands and Tribes of Yakama v. Klickitat County* (Washington State, 9th Cir);
- *Little Traverse Bay Bands of Odawa Indians* (Michigan, 6th Cir.)
- *Mille Lac Band of Ojibwe v. City of Mille Lacs* (Minnesota, 8th Cir.)
- *Village of Hobart v. Oneida Nation* (Wisconsin, 7th Cir.)

Recent Updates

- *Yakama Nation v. Klickitat County*
- *Bosse v. Oklahoma*
- *Oklahoma v. DOI*
- *State v. Wallace*

Poll Question

- How many transactions have you handled that involved Native American land?
 - Zero
 - Less than five
 - 5-10
 - More than 10

ALTA 47 OPERATIVE LAW ENDORSEMENTS & POLICY ADDENDUMS



Our Policies Say What?

- (Owner Policy) Condition 17(a):
- Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of **the jurisdiction where the Land is located.**
- Therefore, the court or an arbitrator shall apply **the law of the jurisdiction where the Land is located** to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

ALTA Forms

- Creates Operative Law subcommittee
- First task – manage risk under current 2006 policies
- Result is the ALTA 47 series
- Also addressed new policies and other endorsements

ALTA 47 Series

- New defined terms
- Revised Choice of Law/Forum
- Added Exclusions

Defined Terms

- **“State” and “state”**: The state or commonwealth of the United States within whose exterior boundaries the Land is located. The terms “State” and “state” also include the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.
- **“Tribe”**: Any federally or State recognized Indian tribe, band, nation, community, or other organized group having a government-to-government relationship with the United States or a State.

Choice of Law; Forum

- a) Choice of Law: The Insured acknowledges that the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property under **the law of the State** and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance **of the State**. Therefore, the court or an arbitrator **shall apply the law of the State, or to the extent it controls, federal law,** to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In no case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law, **nor shall the court or arbitrator apply the law of a Tribe.**
- b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be **filed only in a State court or a United States federal court** having appropriate jurisdiction.

Governmental Exclusions

- Original version included the following:
 - “Exclusions 1 and 2 apply to a Tribe’s (i) law, ordinance, permit, or governmental regulation; (ii) governmental police power; and (iii) rights of eminent domain to the same extent Exclusions 1 and 2 apply to any other governmental entity.”
- The current version deletes this provision as unnecessary.

Added Exclusions

- Tribal Records
 - Defects, liens, encumbrances, adverse claims, notices, or other matters not appearing in the Public Records but that would be disclosed by an examination of any records maintained by or on behalf of a Tribe or on behalf of its members.

Added Exclusions, cont.

- Choice of Law (Loan Policies)
 - Any claim of invalidity, unenforceability, or lack of priority of the lien of the Insured Mortgage based on the application of a Tribe's law resulting from the failure of the Insured Mortgage to specify State law as the governing law with respect to the lien of the Insured Mortgage.

Added Exclusions, cont.

- Added Exclusions in section 3 of the ALTA 47 endorsements are created in brackets:
- [3. The following [are][is] added as [an] Exclusion[s] from Coverage:
 - 8. [Defects, liens, encumbrances, adverse claims, notices, or other matters not appearing in the Public Records but that would be disclosed by an examination of any records maintained by or on behalf of a Tribe or on behalf of its members.]
 - [9. Any claim of invalidity, unenforceability, or lack of priority of the lien of the Insured Mortgage based on the application of a Tribe's law resulting from the failure of the Insured Mortgage to specify State law as the governing law with respect to the lien of the Insured Mortgage.]]
- Allows for deletion if the risk can be underwritten.



Intended For Use With 2006 Policy Forms

- Separate endorsements for each form of existing policy
 - Accounts for the different numbering of Conditions and Exclusions that are being amended or added.
- For the HOP, the language is more consistent with the “plain language” of that policy.
- For the Short Form policies, there are Addendum rather than an endorsement.

2021 Policy Forms

- Concepts carried forward
 - Definition of “State”
 - Revised Choice of Law and Forum
- Provisions not carried forward
 - No references to “Tribes”
 - No added Exclusions

Endorsements Modified for 2021 Policies

- Conforming changes
 - Capitalization of State, where appropriate
 - Inserting “State” to references to laws
- Substantive Changes
 - Adjusting language of various endorsements to ensure state, county or city laws and regulations apply

Poll Question

- Did you know that ALTA recently published new 2021 Policy Forms?
 - Yes
 - No

QUESTIONS

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UPCOMING EVENTS

- 2021 ALTA ONE | Oct. 12-15 | New Orleans
– [MEETINGS.ALTA.ORG/ONE](https://meetings.alta.org/one)
- 2022 ALTA Commercial Network | TBD