July 21, 2020

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Assistant Chief Jack Austin, Jr.
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Speaker Thomas Williston
Choctaw Nation Tribal Council
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Choctaw Nation Tribal Council Members
Council House Rd.
Tuskahoma, OK 74574

Re: Oklahoma's Agreement-In-Principle and Future Federal Legislation

Dear Chief Batton, Assistant Chief Austin, Speaker Williston, and Choctaw Nation Tribal Council Members:

This letter is on behalf of the undersigned citizens of the Choctaw Nation of Oklahoma that are practitioners, advocates, and scholars in the field of Federal Indian Law. We write this letter to you in our personal capacities as concerned Choctaw citizens. We respectfully ask that you reconsider joining Oklahoma's Agreement-In-Principle and pursuing any federal legislation in line with the Agreement, as federal legislation is certainly not needed. If the tribes and the state have concerns regarding jurisdiction, those can easily be addressed through a compact or other Memoranda of Understanding (MOUs). We have attached a few proposed solutions in Appendix 2 for your consideration.

I. What *McGirt* Means for the Nation and Her Citizens in Southeastern Oklahoma

On July 9, 2020, the United States Supreme Court in *McGirt v. Oklahoma* recognized that "[o]n the far end of the Trail of Tears was a promise."[1] The United States was held to the promise it made to the Muscogee (Creek) Nation enshrined in the Treaty of Cusseta. The case itself, while complex in its facts, was simple. Did Congress disestablish the Muscogee (Creek) Nation's reservation? The Court after much analysis answered, no. The impact of the Court's answer means that the Muscogee (Creek) Nation's reservation status has been reaffirmed. This provides the Tribal Nation with the opportunity to decide how it will exercise criminal and civil jurisdiction within its boundaries. The question of which sovereign has criminal and civil jurisdiction over Indians and non-Indians inside of a reservation has been well-established through two hundred years of Federal Indian Law.[2]

The *McGirt* decision has not changed anything in Southeastern Oklahoma for Indians and non-Indians living within our twelve districts. However, it does open the door to reaffirm our own

[1] *McGirt v. Oklahoma*, 591 U.S. _ (2020).

[2] We have attached Appendix 1 with a chart showing what government has criminal jurisdiction over Indians and non-Indians inside of a reservation under current Federal Indian Law.

reservation boundaries. Because the Five Civilized Tribes share a common history regarding their relationship to the federal government in terms of removal treaties and the laws that followed, there is a strong legal basis in presuming that this decision would apply to the other Five Tribes as well.

A further affirmation of the Choctaw reservation would present our Nation with greater control over decisions within our borders. This control would translate to enhanced protection for Choctaw children in the child welfare system.[3] No longer would Tribal advocates need to argue for Choctaw children in Oklahoma courts. The cases where Indian children are removed from their families would then automatically go to our Nation's courts. Similarly those protections would extend to Choctaw women who are abused by both Indians and non-Indians regardless of where the abuse occurs.[4] Control would also manifest in the form of increased taxation and greater decision-making authority for the Nation to direct funds to public schools, roads, and Tribal services. Our Nation may generate necessary funding for assuming this role outside of existing federal and Tribal gaming revenue through taxes. The options presented under a Tribal tax framework can help expand our Nation's budget to continue building upon our current Tribal departments and services. There are several other opportunities for enhanced Tribal control and protections, which have already been established throughout previously enacted federal legislation and federal case law.[5]

II. <u>What Our Nation Would Give Up if the Agreement-in-Principle Became Federal Law</u>

The opportunity to reaffirm the Choctaw reservation is now threatened by inviting Congress to intervene and undermine the sovereignty of the Muscogee (Creek) Nation, the Cherokee Nation, the Chickasaw Nation, the Seminole Nation, and most concerning to us as Choctaw citizens, the Choctaw Nation. If the Agreement-in-Principle (hereinafter "the Agreement")[6] was adopted as-proposed and translated into federal legislation, it would impact our Nation's criminal and civil jurisdiction in the following ways.

Under the combined effect of 1(a) and (b) of the Agreement, our Nation would surrender criminal jurisdiction over Choctaw citizens, Indians, and non-Indians on approximately 97 percent of the lands within our borders. The majority of our fellow citizens do not live on Indian trust or restricted lands within our reservation. The presumptive extension of the *McGirt* decision to our Nation allows concurrent Tribal and federal jurisdiction over Indians and non-Indians on all land types within our reservation boundaries. Additionally, the state still has exclusive jurisdiction on all

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[3] 25 U.S.C. § 1911. *The Indian Child Welfare Act gives the Tribal courts exclusive authority over cases where the Indian child lives on a reservation.*

[4] *See* National Congress of American Indians, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five Year Report*, pg. 11 and 50, http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf, 2018. *Our Nation has already successfully prosecuted non-Indians that abuse Choctaw citizens on Tribal trust land. We only need to expand our current court framework to incorporate prosecutions on non-Tribal land within a reservation.*

[5] We will provide leadership with a third appendix at a later date. The document will provide a more in depth analysis of our Nation's history, current Indian law, and the Choctaw treaty rights that would be extinguished.

[6] As of this writing, the drafters of this letter are aware that no "formal" agreement has been signed and executed by Tribal Leadership. However, for the sake of brevity, we refer to the proposed framework, or "Agreement-in-Principle," throughout this letter as "the Agreement."

crimes committed by non-Indians against non-Indians within the reservation.[7] ***While our Nation does not technically "lose" sovereignty under the Agreement in terms of the criminal jurisdiction it had before McGirt, it would effectively lose the majority of the sovereignty "gains" that it now presumptively enjoys due to McGirt by inviting state prosecutorial authority back into our Nation's reservation.*** This is because the Agreement would have Congress enact legislation similar to Public Law 280,[8] which would in effect strip the Nation of its presumptive post-*McGirt* jurisdiction over its own citizens and those who harm them.

Under 2 (a) of the Agreement, the Nation would ask Congress to codify the harmful *Montana* line of federal case law that already applies to all Tribal nations.[9] The *Montana* line of case law currently limits Tribal nations' civil jurisdiction in the ability to bring non-Indians into Tribal Courts and make them comply with applicable Tribal Laws. Tribal nations and advocates hope that this case law will either be overturned by the courts, or that Congress will pass legislation to fix the limitations, because they are so damaging to Tribal sovereignty. In fact opponents of tribal nations have tried to use the *Montana* case law to shrink Tribal sovereignty even further. For example, in 2014, Dollar General argued that under the *Montana* case law the Mississippi Band of Choctaw Indians (MBCI) had no jurisdiction over an on-reservation civil case brought by a Mississippi Choctaw youth in Tribal court.[10] The youth, while working for Dollar General under the MBCI Youth Opportunity Program similar to the Summer Youth/WIOA Program offered by our Nation, was sexually molested by his boss. Additionally, opponents of the Tribal civil jurisdiction under the Violence Against Women Act continue to argue that Tribal courts do not have the authority to issue civil protective orders against non-Indian abusers. The *Montana* line of case law has damaged Tribal sovereignty across the United States. If Congress were to pass legislation to permanently apply the standard to our Nation, it would only strengthen the argument of those who want our Nation extinguished.

Under 2 (b) of the Agreement, our Nation would ask Congress to strip it of its right to civil jurisdiction over Indians within the reservation boundaries, except on land that is held in trust or restricted status by the tribe or individual Indians. Line 2 (b) states that future legislation would "(p)rovide and affirm the State's civil jurisdiction over all persons throughout the treaty territories . . ." Line 2 (b) is in effect Public Law 280, which currently does not apply to our Nation and, as a result, allows state civil jurisdiction not found throughout the majority Tribal communities throughout the country. In the absence of clear federal legislation, States generally have no civil jurisdiction over any Indian while within the boundaries of an Indian reservation, regardless of them being on Indian or non-Indian land within that reservation. This has been well-established for some time.[11] ***While our Nation again does not technically "lose" sovereignty under the Agreement in terms of the civil jurisdiction it had before McGirt, it would effectively give up the majority of the sovereignty "gains" that it now presumptively enjoys due to McGirt by inviting Congress to authorize state civil authority back into our Nation's reservation.*** Currently, our Nation is only exercising civil jurisdiction over trust and restricted parcels, and

[7] *See* attached Appendix 1.

[8] *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360.

[9] *See Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981).

[10] *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014).

[11] *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993).

would continue to do only that. Section 2 (b) of the Agreement is very problematic because it greatly limits our Nation's ability to exercise civil jurisdiction as a means for economic and business development for itself and its Tribal citizens. Instead of restricting the state's civil jurisdiction over Tribal citizens, this provision actually broadens its reach.

III. Proposed Alternative Paths Forward Toward Thoughtful Choctaw Sovereignty

We recognized that the Nation may need additional time to work out details of how its full sovereignty can be implemented and access impacts on our non-Indian neighbors. In light of this, we have attached a second Appendix ("Appendix 2") with a few solutions for you to consider. The proposed solutions include an assortment of options that both assert our sovereignty while also working collaboratively with our state partners.

IV. Conclusion

During the time of our forced removal Chief George W. Harkins wrote that "[w]e as Choctaws rather chose to suffer and be free, than live under degrading influence of laws, which our voice could not be heard in their formation."[12] We respectfully request that as our Tribal leaders you take the time to engage with your fellow citizens in a more expansive manner to see the full picture of what *McGirt* could mean for our people. Thank you for your consideration of our concerns and recommendations outlined in this letter and the attached appendices. We look forward to working with you to ensure that the sovereignty of our Nation is strengthened, protected, and preserved for future generations of Choctaws.

Respectfully,

The below signed lawyers, legal scholars, and law students that are citizens of the Choctaw Nation of Oklahoma.

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[12]Choctaw Chief George W. Harkins, *Letters to the American People*, Feb. 25, 1832.

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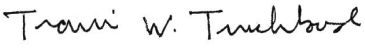

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Appendix 1

Tribal Criminal Jurisdiction on Reservations

	Indian v. Indian	Indian v. Non-Indian	Non-Indian v. Indian	Non-Indian v. Non-Indian
Major Crime	**Major Crimes Act**: Federal Jurisdiction The **Tribal Nation** has concurrent jurisdiction over the case.	**Major Crimes Act**: Federal Jurisdiction **ICCA & (ACA)**:Federal Jurisdiction The **Tribal Nation** has concurrent jurisdiction over the case.	**ICCA & (ACA):** Federal Jurisdiction **Some** concurrent **Tribal Nation jurisdiction** under the Violence Against Women Act (25 U.S.C. §1304).	The **State** has exclusive jurisdiction over the case. *U.S. v. McBratney rule*
Minor Crime	The **Tribal Nation** has exclusive jurisdiction over the case.	**ICCA & (ACA):** Federal Jurisdiction The **Tribal Nation** has concurrent jurisdiction over the case.	**ICCA & (ACA):** Federal Jurisdiction **Some** concurrent **Tribal Nation jurisdiction** under the Violence Against Women Act (25 U.S.C. §1304).	The **State** has exclusive jurisdiction over the case. *U.S. v. McBratney rule*

- Major Crimes Act: 18 U.S.C. § 1153
- Indian Country Crimes Act (ICCA): 18 U.S.C. § 1151
- Assimilative Crimes Act (ACA): 18 U.S.C § 13

Disclaimer: This document does not create an attorney/client relationship nor constitutes legal advice. It is for informative purposes only as the undersigned individuals are writing this in their personal Tribal citizen capacity.

Appendix 2: Proposed Solutions

- **Asserting Presumptive Jurisdiction Arising from *McGirt* Decision**
    - **Defaults to Current Federal Indian Law In Place**
        - Current Concern: Many of existing public concerns created by the shifting legal landscape after *McGirt*, which has brought the discussion of congressional legislation to the forefront, are unnecessary in light of our existing compacts and Tribal resources. Selected examples of these items are discussed below.
        - Law Enforcement Compacts: Our Nation has extensive compacts executed with state and local law enforcement to cross-deputize their officers under Tribal law. The practical landscape for arrests and investigations can remain the same in many senses because the same individuals would still be conducting these duties but under a different legal authority. The only difference would arise when it came time for prosecution, which would occur in Tribal court instead of state court for misdemeanors involving Indian defendants. Nothing changes in instances where both parties are non-Indians as they remain subject to state criminal prosecution. There is an additional layer of federal jurisdiction for felonies and when crimes involve Indians and non-Indians. *See* Appendix 1.
        - Prisons: Many tribal nations across Oklahoma have existing agreements with local counties and municipalities to house their criminal defendants in exchange for Tribal payment. Because the population in our Nation's geographic area remains the same, this existing infrastructure would alleviate the immediate need for a Tribal jail as the same facilities can be utilized as they were before *McGirt*.
        - Court Infrastructure: The increased civil jurisdiction will necessitate the need for increased use of our Tribal courts. However, the presence of these institutions can be extended throughout our reservation without expending new resources. One solution is holding virtual court dockets throughout the Nation in our existing community centers, which are already geographically disbursed and familiar to our citizens. Continuing current business operations in a virtual format throughout the COVID-19 pandemic has revealed existing capacity for this manner of communication, which can easily translate to this context. Additionally, there will not be a great manner of uncertainty to sort out with enforcing Tribal court judgments as our Nation already enjoys a reciprocal arrangement with Oklahoma state courts.
- **Transitional, Time-Limited Compact to Allow for Choctaw Citizen Input**
        - Our Nation enters into a three to five year compact with the state for criminal and civil jurisdiction within the Choctaw reservation boundaries.
        - The Compact should have a clear sunset provision with *no automatic renewal* option to provide a clear timeline for our Nation to make a final decision.
    - **Establish a Choctaw Nation Sovereignty Commission (the Commission)**
        - Commission Reports: The Commission will provide recommendations as to whether and how the Nation can seamlessly transition into its role of increased

criminal and civil jurisdiction. The Commission should report to the Council, Chief, and Assistant Chief (Tribal leadership) on a monthly basis. The Commission should issue an annual report to all Choctaw citizens regarding their accomplishments, progress, and status of its recommendations for transparency. At the end of the compact period, the Commission should issue a cumulative report to the Tribal leadership and all Choctaw citizens with their recommendations on how the Nation should go forward with its increased criminal and civil jurisdictional authority.

- Commission Membership: The Commission should be established for the length of the compact and be composed of twenty-eight Choctaw citizen members. Each of the twelve districts will have two seats on the Commission. In accordance with Article VII, Section 2 of the Choctaw Constitution, Commission members should be appointed by the Chief and approved by the Council. There should be four at-large seats for citizens living outside of the 10 ½ counties of our Nation. The Commission should have both employees and non-employees of the Nation.
- Assure Gender Balance and Youth Input: The two seats for each district should be filled by one female and one male in recognition of our matriarchal culture and to assure balanced decision making. The full Commission should elect a female co-chair and a male co-chair from within its ranks. At least two members of the Commission should be below the age of twenty five.
- Member Backgrounds: The Commission members should come from a variety of backgrounds to include but not be limited to: federal Indian law; child welfare; domestic violence and sexual assault; victim services; Tribal judicial systems; police and first responders; emergency management; public education; Tribal taxation; financial management; environmental management; agricultural production; Choctaw culture; Tribal regulatory systems; healthcare; mental health; elder care; and youth issues.
- Digital Meetings: The Commission should be allowed to meet digitally during the time of the COVID-19 pandemic to allow for safe meetings.

- **Hold Listening Sessions to Receive Choctaw Citizen Input on Next Steps**
  - District Listening Sessions: Tribal leadership should host listening sessions in each of the twelve districts to hear from their fellow citizens and constituents, streamed virtually to allow for maximum citizen input and transparency.
  - Labor Day Listening Sessions: Tribal leadership should host in person listening sessions with citizens during labor day. The listening session for this year should be held virtually due to COVID-19.
  - To ensure that only Tribal citizens have access to virtual listening sessions, the Chahta Achvffa Member Portal can facilitate this registration and access.