



OKLAHOMA
Tax Commission

**REPORT OF POTENTIAL IMPACT
OF MCGIRT V. OKLAHOMA**



OKLAHOMA Tax Commission

OFFICE OF THE EXECUTIVE DIRECTOR

September 30, 2020

To the Honorable Members of the Oklahoma Commission on Cooperative Sovereignty:

On behalf of the Oklahoma Tax Commission, I am pleased to submit our report of the potential impact of the United States Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. ___ (2020).

The Oklahoma Tax Commission anticipates a significant immediate and ongoing fiscal impact resulting from the expanded boundaries of the Muscogee (Creek) Nation under *McGirt*. The report primarily addresses the Muscogee (Creek) Nation, but includes applicable analysis and fiscal impact estimates should the reasoning in *McGirt* be extended to apply to all Five Civilized Tribes in Oklahoma.

The report is based on the Oklahoma Tax Commission's interpretation of *McGirt*, the existing statutes and case law as of September 30, 2020, and is submitted with the understanding that Congress has exclusive authority to modify the boundaries of the Creek Reservation at any time.

The Oklahoma Tax Commission remains committed to its mission of serving the people of Oklahoma by promoting tax compliance through quality service and fair administration.

Respectfully submitted,

Jay Doyle, Executive Director





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I. EXECUTIVE SUMMARY

The United States Supreme Court decision in *McGirt v. Oklahoma* clarified the boundaries of the Muscogee (Creek) Nation (“Creek Nation”) by defining the Creek Nation’s “Indian country” for purposes of 18 U.S.C. § 1151(a) of the Major Crimes Act. Although *McGirt* arose from a criminal proceeding, the implications of the decision extend to many other areas of Oklahoma law, including the taxes and fees administered by the Oklahoma Tax Commission (“OTC”). The decision changes the geographical area in which the OTC has jurisdiction to levy and enforce the State’s taxes, but it does not directly affect the procedures already in place to administer those taxes. The OTC anticipates the primary fiscal impact of *McGirt* will be reflected in reduced collections for individual income tax and sales/use tax, due to increased numbers of Creek Nation tribal members eligible to earn exempt income and make purchases exempt from sales/use tax.

United States Supreme Court precedent establishes that the State of Oklahoma (“State”) is without jurisdiction to tax certain income earned by tribal citizens while residing in their tribe’s Indian country. The exclusion from income tax is currently administered by the OTC, and codified in Oklahoma Administrative Code § 710:50-15-2. *McGirt* does not change the procedures in place to verify claims for the exclusion, but rather expands the area in which Creek Nation tribal members may live and work to qualify for the exclusion. The OTC estimates a potential per-year revenue impact of \$21.5 million, resulting from an increased use of the tribal income exclusion in Oklahoma Administrative Code § 710:50-15-2 by members of the Creek Nation. Further, there is a potential additional revenue impact of \$64.5 million, reflecting possible Creek Nation tribal member refund claims for the 2017–2019 tax years, for which the statute of limitations is still open. If *McGirt* is expanded to apply to all Five Civilized Tribes, there is a potential per-year revenue impact of \$72.7 million, with an additional \$218.1 million estimated impact for potential refund claims for the 2017–2019 tax years.

For sales and use tax purposes, *McGirt* expands the area in which businesses and tribes may make tax-exempt sales to Creek Nation tribal members. Tribal and non-tribal businesses operating in the Creek Nation’s Indian country are not required to collect taxes on sales to Creek Nation tribal members. Although businesses *are* required to collect and remit the appropriate sales taxes from non-tribal members, there remains an issue with enforcement against tribal businesses that may successfully claim sovereign immunity. The OTC estimates reduced sales/use tax collections resulting from exempt purchases made by Creek Nation tribal members in Creek Nation Indian country could have a per-year revenue impact of \$38.1 million. If *McGirt* is expanded to apply to all Five Civilized Tribes, there is a potential per-year impact of \$132.2 million.



The United States Supreme Court has previously held that the OTC cannot impose motor vehicle excise taxes and registration fees on tribal members residing in their tribe's Indian country. Creek Nation tribal members residing on Creek Nation tribal lands were not required to pay Oklahoma's motor vehicle excise tax or register their vehicles with the State of Oklahoma prior to *McGirt*. The OTC reviewed both OTC and Creek Nation licensing practices, and anticipates a minimal fiscal impact resulting from reduced motor vehicle excise tax and registration fee collections.

Similarly, there is little to no fiscal impact expected with respect to collections from gross production and petroleum excise taxes or ad valorem taxes. The OTC continues to evaluate the potential impact of other tax types not discussed in detail herein, including excise taxes imposed on various transactions, but expects the impact will be fairly limited for most other tax types as compared to income and sales/use taxes.

Although the State generally lacks authority to expand its state taxing jurisdiction within Indian country through state legislation, there are other potential avenues to mitigate the impact of *McGirt*. Congress may explicitly authorize a state to exercise its power of taxation within the boundaries of Indian country. In addition, the State has the ability to enter into compacts with the tribes which would benefit both the State and tribal governments. Historically, tribal compacts have been a powerful tool for facilitating cooperation and revenue-sharing between tribal and state governments, allowing the State to avoid the otherwise difficult task of administering and enforcing state taxes on tribal lands.

II. OVERVIEW

On July 20, 2020, Governor Kevin Stitt issued Executive Order 2020-24, creating the Oklahoma Commission on Cooperative Sovereignty (the "Commission") to address concerns and make recommendations to the State and the United States Congress in light of the United States Supreme Court's Opinion *McGirt v. Oklahoma*, 591 U.S. __ (2020). In furtherance of the Commission's objectives, Governor Stitt directed any agency, board, or commission that believes it may be impacted by the *McGirt* decision to submit a Report of Potential Impact to the Commission specifying the area(s) in which the agency anticipates an impact, the nature and extent of the impact, including fiscal impact, and what, if any, steps it has taken, or suggests be taken, to mitigate the potential impact. The OTC submitted a Notice of Potential Impact to the Commission on August 28, 2020, and now submits the following detailed analysis of the potential impact on the OTC's administration of Oklahoma tax laws.



The Supreme Court’s decision in *McGirt* has necessitated a review of the State’s authority to regulate activity in Indian country. “Indian country” is defined in 18 U.S.C. § 1151(a) as “all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” *McGirt* held that the Creek Reservation was never disestablished by Congress, and the land reserved for the Creek Nation since the 19th century remains Indian country. *McGirt*, p. 1 (syllabus).

Although the *McGirt* Court limited its holding to defining the Creek Nation’s “Indian country” for purposes of the Major Crimes Act, the OTC cannot ignore the Court’s clarification of the boundaries of “Indian country,” as defined in 18 U.S.C. § 1151(a), because Oklahoma law relies heavily on Section 1151 to define “Indian country” for state purposes. Moreover, because the State’s taxing power falls within its civil regulatory jurisdiction, the OTC must be cognizant of the federal limitations on such jurisdiction within Indian country.

In the United States Supreme Court’s 1832 decision in *Worcester v. Georgia*, the Court held that states lack the power to exercise their civil regulatory jurisdiction within the territorial limits of Indian nations. The Court described such nations as “distinct political communities, having territorial boundaries, within which their authority is exclusive. . . .” *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). Over the ensuing years, the Court modified its holding in *Worcester* “in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . .” *Williams v. Lee*, 358 U.S. 217, 219 (1959). The Court has recognized a limited state taxing jurisdiction over certain persons and transactions in “Indian country” as that term is defined in 18 U.S.C. § 1151, as discussed below.

III. AREAS OF ANTICIPATED IMPACT

The OTC is responsible for the administration and enforcement of state tax laws and the collection of a majority of all state-levied taxes and fees. Although there is a potential impact on the OTC’s ability to administer and collect all tax types within the Creek Reservation boundary, the primary revenue impact will likely derive from individual income taxes and sales/use taxes. The OTC anticipates that the analysis related to those tax types will be applicable to many of OTC’s other areas of regulatory authority.



Individual Income Taxes

The State is prohibited from imposing tax upon the income of individual members of federally recognized Indian tribes as long as the individual tribal member lives and earns the income from sources within Indian country under the jurisdiction of the tribe to which the member belongs. Oklahoma Administrative Code § 710:50-15-2, which governs the application of Oklahoma individual income tax to Native Americans, provides:

710:50-15-2. Application of the Oklahoma Individual Income Tax to Native Americans

(a) Definitions. The following words and terms, when used in this Section, shall have the following meaning, unless the context clearly indicates otherwise:

(1) "Indian Country" means and includes formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States. [See: 18 U.S.C. § 1151]

(2) "Informal reservations" means and includes lands held in trust for a tribe by the United States and those portions of a tribe's original reservation which were neither allotted to individual Indians, nor ceded to the United States as surplus land, but were retained by the tribe for use as tribal lands.

(3) "Dependent Indian communities" means and refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy the following two requirements:

(A) They have been set aside by the federal government for the use of the Indians as Indian land; and,

(B) They are under federal superintendence.

(b) Instances in which income is exempt. The income of an enrolled member of a federally recognized Indian tribe shall be exempt from Oklahoma individual income tax when:

(1) The member is living within "Indian Country" under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within "Indian Country" under the jurisdiction of the tribe to which the member belongs; or,

(2) The income is compensation paid to an active member of the Armed Forces of the United States, if the member was residing within his tribe's "Indian Country" at the time of entering the Armed Forces of the United States, and the member has not elected to abandon such residence.

(c) Instances in which income is not exempt. The income of an enrolled member of a federally recognized Indian tribe shall not be exempt from Oklahoma individual income tax when:

(1) The income is derived from sources outside of "Indian Country", regardless of the taxpayer's residence.



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(2) The member resides in Oklahoma, but not within "Indian Country", regardless of the source of the income.

(3) Either the source of the income or the place of residence is under the jurisdiction of a tribe of which the taxpayer is not a member.

(4) The member claims residence within "Indian Country" primarily by virtue of various Indian health, social, educational, welfare and financial programs. Even though administered by the Tribe within its own service area, these are merely forms of general federal aid, and are not sufficient to support a finding of "Indian Country" for purposes of this Section.

(5) The member claims residence on unrestricted, non-trust property, owned by an Indian Housing Authority. Such property does not fall within the definition of "Indian Country," nor does residence thereon constitute residence within a dependent Indian community.

(d) Part-time residency. If an enrolled member of a federally recognized Indian tribe resides within "Indian Country" for a portion of the year, and resides outside "Indian Country" for a portion of the year, such enrolled member shall be taxed based upon where such enrolled member resided when the income in question was earned.

OKLA. ADMIN. CODE § 710:50-15-2.

The provisions of Section 710:50-15-2 accurately reflect existing United States Supreme Court precedent relating to a state's jurisdiction to impose state income taxes on a member of a federally recognized Indian tribe. The Court has long articulated two grounds for holding that a state lacks the power to tax a tribal member living on tribal land and deriving income from tribal land: (1) the "Indian sovereignty" doctrine and (2) federal preemption.

The "Indian sovereignty" doctrine, known as the *Williams* test, was articulated by the Court in 1959: in cases where a state attempts to exercise its civil jurisdiction over a tribal citizen for acts occurring in Indian country, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

The second barrier, federal preemption, results from the Supremacy Clause in Article VI of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Art. VI, para. 2. Pursuant to the Supremacy



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Clause, state laws (including tax laws) that conflict with federal laws are preempted and cannot be enforced.

In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), the United States Supreme Court held that the State of Arizona had no power to tax the income of a Navajo citizen who resided on the Navajo Reservation and whose income was wholly derived from on-reservation sources. The Court also held the state income tax at issue to be barred both by the *Williams* test and by federal preemption.

Two decades later, in *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993), the Court affirmed that the *McClanahan* holding was not confined to state taxation of income earned by tribal citizens on their tribe's *reservation* but extended to such income earned in their tribe's *Indian country*. The Court held that "a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. §1151." *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. at 123.

The *McClanahan* rule does not, however, apply to income earned *outside* Indian country, even if the taxpayer is the tribe itself. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws." *Mescalero Apache Tribe*, 411 U.S. at 148–49 (internal citations omitted). Likewise, the *McClanahan* rule does not apply to income earned by tribal members who reside outside of their tribe's Indian country. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court considered this question and held such income was within the state's taxing jurisdiction, even if the income was derived directly from the tribe. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 462–67.

Further, the State may impose income tax on income of a tribal citizen who lives and earns income in the Indian country of *another tribe* (e.g., a Chickasaw citizen who lives and works in Creek Nation Indian country). See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991) (upholding the state's right to collect state *sales tax* on tribal sales to non-members); *Duro v. Reina*, 495 U.S. 676, 686–87 (1990) (noting that "[e]xemption from state taxation for residents of a reservation . . . is determined by tribal membership, not by reference to Indians as a general class"). As the *Duro* Court explained, taxation of certain transactions of tribal members on the reservation is prohibited "because this



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would interfere with internal governance and self-determination. But this rationale does not apply to taxation of nonmembers, even where they are Indians . . .” because the nonmembers are not constituents of the governing tribe. *Duro*, 495 U.S. at 686–87, citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

As the above-cited cases make clear, the geographic area relevant in determining whether a state’s taxing power is limited is a tribe’s Indian country. In *Oklahoma Tax Commission v. Sac and Fox Nation*, the Court applied the definition of “Indian country” in 18 U.S.C. § 1151 for state tax purposes; Section 1151 provides, in relevant part:

the term “Indian country” . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

McGirt plainly held that the Creek Reservation survived allotment and remains intact today. *McGirt v. Oklahoma*, 591 U.S. ____ (2020). Therefore, the provisions of Oklahoma Administrative Code § 710:50-15-2 now apply in all lands within the Reservation boundaries described in the Muscogee (Creek) Treaty of 1866. Consequently, the State may not tax the income of individual Creek Nation citizens who reside within the Reservation boundaries, to the extent that the income is generated within those boundaries. If the tribal citizen is a part-year resident of the area, the exemption is limited to income generated in the area during the time of residence. Income of individual Creek Nation citizens who reside outside of Creek Nation Indian country remains subject to Oklahoma income tax, even if the income is derived from working for the tribe.

The OTC currently has procedures in place to verify claims for the exclusion pursuant to Oklahoma Administrative Code § 710:50-15-2, and does not anticipate significant changes to the verification process will be necessary.



Sales and Use Taxes

In evaluating the State's authority to impose sales taxes in Indian country, it is necessary to consider the citizenship of both the purchaser and the retailer.

Sales by a Tribal Entity

The State lacks the power to impose its sales tax on sales made by a tribal entity to a tribal member on tribal land. Imposition of such a tax would be barred either under the *Williams* test or by federal preemption. See also, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 158 (noting that members of the tribes "are immune from any state tax"). Case law, however, indicates the State may impose its sales tax on sales made by a tribal entity to a non-tribal member, although the tax may be held to be barred in certain scenarios, and tribes may successfully defend against the State's collection actions by invoking sovereign immunity, making collection difficult even where appropriate. In addition, the State may impose a minimal burden on tribal businesses for collection and enforcement of the state sales tax validly imposed on non-tribal member purchasers. See *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976).

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the United States Supreme Court considered state taxation of sales of tobacco products to non-tribal members. Although the issue in *Citizen Band Potawatomi* involved tax on cigarette purchases, the Court's holding applies generally to sales taxes imposed on purchases occurring on tribal lands. The Court affirmed the State's right to impose sales taxes on tribal sales of tobacco products to non-tribal members, but denied the State's requested relief based on the tribe's successful assertion of sovereign immunity. The State's authority to tax non-tribal members on tribal lands extends to purchases made by Indians who are not members of the tribe in question. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 160–61.

It should be noted that the potential exists for purchasers to be subject to double taxation on sales occurring on tribal land. "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 152. Unless Congress has provided otherwise, the power of taxation by the tribe "may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." *Id.* Imposition



of the tribal sales tax does not prohibit the State from imposing its sales tax on transactions where such tax is otherwise authorized.

Sales by a Non-Tribal Entity

Sales by a non-tribal entity to a non-tribal member are subject to sales tax. If the State has the power to tax sales to a non-tribal member by a *tribal* entity, it certainly has the power to tax such sales by a *non-tribal* entity. Neither federal preemption nor the *Williams* test provides grounds for exemption.

The State does not have jurisdiction to impose sales tax on sales made by a non-tribal entity to a tribal member within the boundaries of that member's tribal land. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, the Court disallowed Oklahoma's collection of the state motor fuels tax from a tribal retailer because the legal incidence of the tax fell on the retailer. As the Court noted: "a State is without power to tax reservation lands and reservation Indians. Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country." *Chickasaw Nation*, 515 U.S. at 458 (internal citations omitted). Under Oklahoma law, the legal incidence of the sales tax falls on the purchaser. 68 O.S. §1361. In consequence, the State may not tax sales of goods by non-tribal members to tribal members in their tribe's Indian country.

Levy of Use Tax in Indian Country

The Oklahoma Use Tax Code, 68 O.S. § 1401 *et seq.*, requires use tax to be paid on purchases of tangible personal property which are purchased in a manner such that, pursuant to Oklahoma Administrative Code § 710:65-15-1, sales tax is not due, but which are brought into the State for storage, use, or other consumption. 68 O.S. § 1402; OKLA. ADMIN. CODE § 710:65-21-3. The use tax is levied "at the time of importation or storage of the property within the state." 68 O.S. § 1402. The State does not have jurisdiction to impose use tax on Creek Nation tribal members for purchases of tangible personal property stored, used or consumed within the boundaries of the Creek Reservation, for the reasons outlined above.

Enforcement

As discussed above, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, the United States Supreme Court affirmed the State's right to impose sales taxes on sales by the tribe to non-tribal members, but denied relief based on the tribe's assertion of sovereign immunity. Because of the State's limited regulatory authority within



Indian country, the OTC's ability to audit and collect taxes against tribal businesses is significantly hampered.

Motor Vehicle Excise Taxes and Registration Fees

The State imposes a vehicle registration fee “at the time of initial registration by the owner and annually thereafter” for all vehicles. 47 O.S. § 1132(A). The Oklahoma Vehicle License and Registration Act, 47 O.S. § 1101 *et seq.*, provides for various exemptions from registration fees, but there is not a specific statutory exemption for tribal members. In addition, an excise tax is imposed “upon the transfer of legal ownership of any vehicle registered in this state and upon the use of any vehicle registered in this state and upon the use of any vehicle registered for the first time in this state.” 68 O.S. § 2103(A)(1). Various exemptions from the motor vehicle excise tax are set forth in 68 O.S. § 2105, but there is not a specific statutory exemption for tribal members.

In *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993), the Court held that the OTC could not impose motor vehicle excise taxes and registration fees on Sac and Fox tribal members residing in Sac and Fox Indian country. The Sac and Fox opinion establishes that the OTC cannot require tribal members residing in their tribe's Indian country to register their vehicles with the State.¹

The Supreme Court in *McGirt* held that for purposes of the Creek Nation, the term “Indian country” includes all the lands within the Creek Reservation in the tribe's 1866 treaty with the United States. The OTC is prohibited from imposing motor vehicle excise taxes and motor vehicle registration fees upon Creek Nation citizens residing within the Creek Reservation.

Gross Production and Petroleum Excise Taxes

The OTC does not anticipate an impact on gross production collections as a result of *McGirt*. The Gross Production Tax Code levies a tax on the production of oil unless specifically exempted. 68 O.S. § 1001 *et seq.* In addition, an excise tax is levied upon the production of petroleum oil pursuant to 68 O.S. § 1101. Royalty interest income is specifically subject to the

¹ Certain tribes have motor vehicle registration and license tag compacts with the State, including the Chickasaw Nation, Choctaw Nation, and Cherokee Nation, which allow the OTC to license and register vehicles owned by tribal members, and to issue license plates designed by the Nations. Pursuant to the compacts, a portion of funds collected, which otherwise would be apportioned to the State's General Revenue Fund, is remitted to the Nation. A search of the Oklahoma Secretary of State's website indicates that no such compact is currently in place for the Creek Nation.



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gross production and petroleum excise taxes. 68 O.S. § 1001(C); 68 O.S. § 1101(A). The Oklahoma Court of Civil Appeals addressed the issue of whether the State is entitled to levy gross production and petroleum excise taxes on oil and gas produced from restricted allotted Indian land in *In the Matter of the Gross Production and Petroleum Excise Tax Protest of Rudolph Bruner*, 2006 OK CIV APP 21, 130 P.3d 767. The *Bruner* Court held that the Congressional Act of May 10, 1928, C 517, 45 Stat. 495 provided authority for levy of these two specific taxes, and the Act was a constitutional exercise of Congress' power because it did not constitute an illegal breach of prior agreements between the Creek Nation and the United States. *Id.*, 2006 OK CIV APP 21, ¶¶ 9, 14, 130 P.3d at 770–71.

Although the State may constitutionally impose gross production and petroleum excise taxes on allotted lands, the State may not impose a tax on unallotted lands owned by the tribe without clear Congressional authority. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). The Gross Production Tax Code recognizes this exemption in 68 O.S. § 1008, which notes “the interest in such production owned by the restricted Indian or exempt governmental entity” is exempt from tax. 68 O.S. § 1008(A). Pursuant to this section, only land held by a tribe itself is eligible for an exemption from gross production tax, not land held by individual tribal members.

McGirt clarified the current boundaries of the Indian country over which the Creek Nation has jurisdiction, but it did not restore ownership of previously allotted or alienated lands back to the tribe. Therefore, lands owned by the Creek Nation itself remain exempt from gross production and petroleum excise taxes, and allotted lands, whether owned by a tribal member or a non-tribal member, remain subject to such taxes.

Ad Valorem Taxes

The OTC does not anticipate an impact on collection of ad valorem taxes as a result of *McGirt*. “All property in this state, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation.” 68 O.S. § 2804. Ad valorem taxes are not imposed upon lands owned by Indian tribes or held in trust by the United States. Article 1, Section 3 of the Oklahoma Constitution provides:

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been



extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the State shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Oklahoma Constitution, Article 1, § 3.

Once title of the government or the tribe is extinguished, through sale or an act of Congress, lands become subject to ad valorem taxation under the laws of the State. See generally, *Hoskins v. Abbott*, 1942 OK 465, 127 P.2d 815. As noted above, *McGirt* clarified the current boundaries of the Indian country over which the Creek Nation has jurisdiction, but it did not restore ownership of previously allotted or alienated lands back to the Tribe. Therefore, the OTC does not expect any significant changes to the administration or collection of ad valorem taxes.

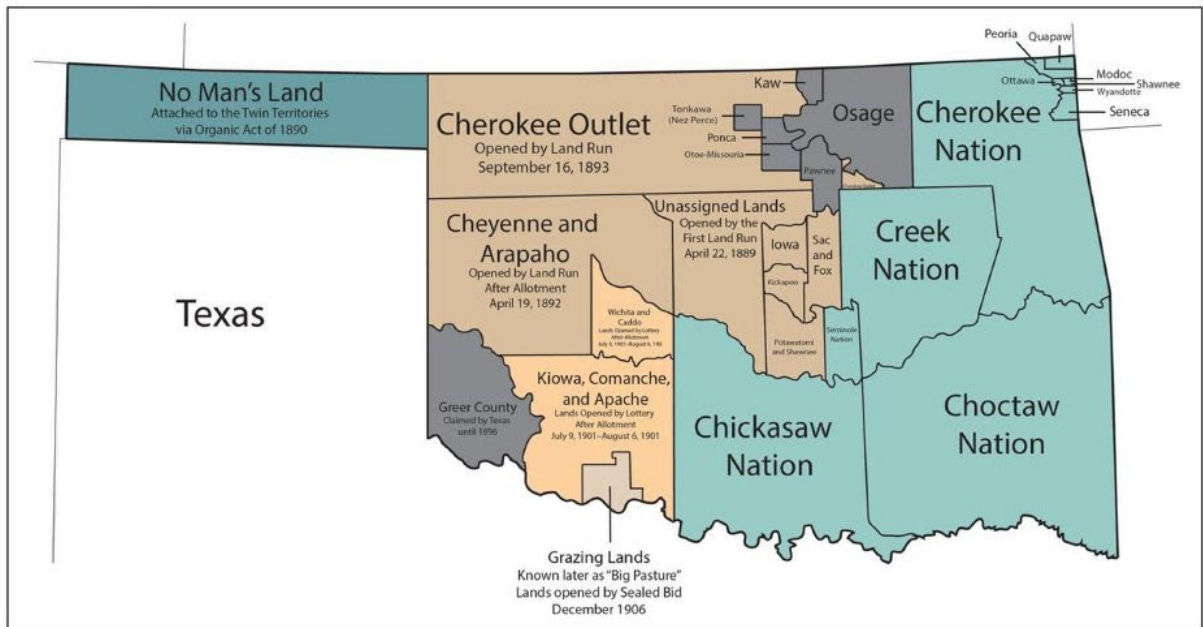
IV. NATURE AND EXTENT OF IMPACT

As discussed above, *McGirt* significantly expanded the area qualifying as Creek Nation Indian country. The holding in *McGirt* was limited to defining only the Creek Nation's Indian country, stating that "[e]ach tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek," *McGirt*, p. 37; however, the OTC recognizes the potential for broader impact of the decision and a similar analysis may be applied to other tribes in the future.² The boundaries generally utilized in the OTC's estimates of potential revenue impact are reflected in the map below.

² The Chickasaw and Cherokee tribes are currently involved in litigation in McClain County and Craig County, respectively, in which they are seeking to present evidence to the Courts regarding their respective tribes' reservation boundaries, and to prove to the Courts that their tribal reservations have not been disestablished by Congress.



Indian Territory Boundaries, 1889
(Pre-Organic Act)



Individual Income Taxes

The OTC performed a detailed analysis to estimate the potential income tax revenue impact of the expanded land area within which exempt tribal income may be earned post-*McGirt*, with the following considerations and limitations:

1. Claims for income tax refunds generally must be filed within three years from the date the income taxes were paid, 68 O.S. § 2373. For this reason, most taxpayers claiming refunds of income taxes paid on exempt tribal income will only be eligible to receive refunds for tax years 2017–2019.
2. Although *McGirt* only applies to the Creek Nation, current population estimates for each of the Five Civilized Tribes were analyzed based on Indian Territory boundaries from 1889.
3. Data limitations do not allow for a granular analysis linking (a) the jurisdiction of the tribe to which the member belongs and (b) that the tribal member lives within



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Indian country governed by that member's tribe. The data available to the OTC consists of current estimates of the total Native American population of the Five Civilized Tribes within each of the Indian Territory boundaries from 1889. With the required linkage between tribal member and tribal jurisdiction not available, these estimates are likely high.

Census data was used to estimate the Native American population in the land area of the Five Civilized Tribes (the "Oklahoma tribal sovereignty areas" or "OTSAs"). Note that the Census data does not distinguish between tribes, only identifies residents as American Indian or Alaska Native (Census Bureau naming conventions). Housing demographics were then reviewed in an effort to determine the number of Native American households within the tribal boundaries based on population estimates. The total estimated number of Native American households was used as a proxy for income tax returns filed.

An analysis was performed, as shown in Table 1 below (Creek area highlighted), calculating the estimated income tax impact of expanding the boundaries within which the tribal income exclusion may be claimed. The estimated number of Native American households was multiplied by the estimated cost per return (tax expenditure) of the tribal income exclusion pre-*McGirt*. Table 1 reflects a single year tax estimate as well as an additional three-year total to reflect the potential prior year refund claims for periods for which the statute of limitations is still open (2017–2019). This cost has not previously been calculated for the Oklahoma Tax Commission Tax Expenditure Report because, unlike other state tax incentives, the tribal income exclusion is mandated by federal law. The average tax expenditure was estimated by using the Oklahoma Individual Income Tax Micro Simulation Model utilizing data for tax years 2016–2018.



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Table 1
Income Tax Impact Using Estimated Cost Per Return of Tribal Exemption Pre-McGirt

	Census Tribal Area ¹						Total
	Cherokee OTSA	Chickasaw OTSA	Choctaw OTSA	Creek OTSA	Seminole OTSA	Creek / Seminole Joint OTSA	
Total Population	517,039	312,615	231,451	792,241	23,008	2,065	1,878,419
Native American Population	87,352	21,972	28,150	57,716	4,490	430	200,110
% Native American	17%	7%	12%	7%	20%	21%	11%
Occupied housing units	193,358	116,803	89,000	307,485	8,487	735	715,868
Estimated Native American Housing Units ²	32,667	8,209	10,825	22,401	1,656	153	75,911
Estimated average net tax per return	958	958	958	958	958	958	958
Per year	31,295,162	7,864,648	10,369,907	21,459,933	1,586,672	146,623	72,722,944
2017-2019	93,885,486	23,593,944	31,109,720	64,379,798	4,760,016	439,868	218,168,832

¹Total Population, Native American Population and Housing Units - My Tribal Area U.S. Census Bureau; Source: 2014-2018 American Community Survey 5-Year Estimates <https://www.census.gov/tribal/index.html>

The Census Bureau collects data for the American Indian and Alaska Native (AIAN) population and publishes specific counts, estimates, and statistics. My Tribal Area gives you quick and easy access to selected statistics from the American Community Survey (ACS). The ACS provides detailed demographic, social, economic, and housing statistics every year for the nation's communities. My Tribal Area is powered by the Census Application Programming Interface (API).

² Estimated Native American Housing Units are a proxy for income tax returns.

For the Creek Nation only, there is a potential per-year revenue impact of \$21,459,933, and an additional estimated revenue impact of \$64,379,798 reflecting potential prior year refund claims. If *McGirt* is expanded to apply to all Five Civilized Tribes, this analysis results in a potential impact of \$72,722,944 per tax year, and an additional \$218,168,832 for three previous tax years. This calculation assumes that one hundred percent (100%) of the Native American population within the Creek Nation OTSA consists of members of the Creek Nation, and that all such members work within the Reservation boundaries. The OTC believes the estimated tax expenditure per return is the best approximation of the actual cost per return; however, the estimate is likely high.



The revenue impact estimates above reflect total possible claims for the exclusion from individual income tax, and do not take into account those Creek Nation tribal members who are already claiming the exclusion. Table 2 below reflects the total tax expenditure related to the tribal income exclusion, for all tribes, for tax years 2016–2018.

Table 2
Income Tax Impact of Tribal Income Tax Exclusion for 2016–2018

Tax Expenditure Amount for Exempt Tribal Income	
2016	\$1,574,000
2017	\$1,212,000
2018	\$1,334,000

The OTC does not capture data identifying the tribe to which taxpayers claiming the exclusion belong; however, the OTC estimates that approximately 17.5 percent of the pre-*McGirt* claims for exclusion may be attributed to members of the Creek Nation. The Creek Nation’s website reported 65,070 enrolled Creek Nation tribal members in Oklahoma for 2019, which is approximately 17.5 percent of Oklahoma’s estimated 371,104 Native American residents for 2019 (according to Census Population Estimates).

It is reasonable to conclude that an average of recent tax expenditures for exempt tribal income can be subtracted from the projections in Table 1 above to arrive at a possible future impact amount. The average expenditure over the 2016–2018 periods totals \$1,373,333, which can be subtracted from the estimated total per-year impact of \$72,722,944. For the Creek Nation only, an average of \$240,333 can be subtracted from an estimated per-year impact of \$21,459,933.

Sales and Use Taxes

The OTC also conducted an analysis of the potential impact on sales and use tax revenue using a methodology similar to that used for income tax. Based upon Oklahoma’s current population of 3,956,571, and the total state sales and use taxes of \$2,614,514,000 projected to be collected in FY21, an average sales/use tax expenditure of \$661 is estimated per person. Table 3 below (Creek area highlighted) provides an estimate of the impact for FY21 calculated by multiplying the total Native American population by the estimated Oklahoma per capita sales and use tax expenditure (\$661).



Table 3
Sales and Use Tax Impact Using Estimated Oklahoma Per Capita Sales and Use Tax Expenditure

Sales and Use Tax Analysis by Census Tribal Area ¹								
	Oklahoma Total	Cherokee OTSA	Chickasaw OTSA	Choctaw OTSA	Creek OTSA	Seminole OTSA	Creek / Seminole Joint OTSA	Total 5 Civilized Tribe Boundaries
Total Population ²	3,956,571	517,039	312,615	231,451	792,241	23,008	2,065	1,878,419
Native American Population		87,352	21,972	28,150	57,716	4,490	430	200,110
% Native American		17%	7%	12%	7%	20%	21%	11%
State Sales Tax Estimate FY 21	\$ 2,291,367,000							
State Use Tax Estimate FY 21	\$ 323,147,000							
Total	\$ 2,614,514,000							
Per Capita Sales and Use Tax	\$ 661	\$ 661	\$ 661	\$ 661	\$ 661	\$ 661	\$ 661	\$ 661
Estimate Within Tribal Areas		\$ 57,722,464	\$ 14,519,164	\$ 18,601,605	\$ 38,138,906	\$ 2,967,005	\$ 284,145	\$ 132,233,289

¹Total Population, Native American Population - My Tribal Area U.S. Census Bureau; Source: 2014-2018 American Community Survey 5-Year Estimates <https://www.census.gov/tribal/index.html>
The Census Bureau collects data for the American Indian and Alaska Native (AIAN) population and publishes specific counts, estimates, and statistics. My Tribal Area gives you quick and easy access to selected statistics from the American Community Survey (ACS). The ACS provides detailed demographic, social, economic, and housing statistics every year for the nation's communities. My Tribal Area is powered by the Census Application Programming Interface (API).

²Quick Facts - Oklahoma U.S. Census Bureau <https://www.census.gov/quickfacts/facttable/OK/PST045219>

For the Creek Nation only, this analysis results in an estimated impact on sales/use tax collections of \$38,138,906 for FY21. If *McGirt* is expanded to apply to all Five Civilized Tribes, this analysis results in a potential impact of \$132,233,289 for FY21.

As noted for the income tax analysis above, the estimated sales and use tax impact is likely high because data limitations do not allow for a granular analysis linking (a) the jurisdiction of the tribe to which the member belongs and (b) that purchases are being made within Indian country governed by that member's tribe. Further, the estimate does not account for Creek Nation tribal members presently making some or all purchases exempt from sales and use taxes as a result of other exemptions, nor does it account for persons who do not purchase goods or taxable services due to age or other factors.

In addition to the estimated fiscal impact to the State, expansion of the Creek Reservation boundaries will have a significant administrative impact on businesses making sales to customers within the Reservation. While the levy of tax is upon the purchaser, the "primary burden for operation of the sales tax system is upon the vendor of merchandise, the performer of taxable services, and the renter or lessor of property, and requires that they collect the tax from the purchaser, user or consumer." OKLA. ADMIN. CODE § 710:65-7-2(a). Liability for such taxes is on the vendor, unless properly completed documentation is maintained showing such purchaser is



exempt from imposition of the tax. See *generally*, OKLA. ADMIN. CODE § 710:65-7-6. Post-*McGirt*, vendors making exempt sales to members of the Creek Nation within the Creek Reservation will be required to verify eligibility for the exemption and maintain documentation showing the sale was made to a member of the Creek Nation, or risk facing liability for all uncollected taxes.

Motor Vehicle Excise Taxes and Registration Fees

The OTC has reviewed and considered the following factors in evaluating the potential impact of *McGirt* on collection of motor vehicle excise taxes and registration fees:

- The Court in *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, held that the OTC could not impose motor vehicle taxes on tribal members residing in their tribe's Indian country.
- The Creek Nation Tax Commission currently issues tribal license plates to its eligible members.
- According to its website, the Creek Nation Tax Commission primarily titles and registers personal vehicles, commercial vehicles, motorcycles, recreational vehicles, trailers, farm trucks and trailers, and all-terrain vehicles. It does not currently register boats or manufactured homes. To be eligible for a tribal license plate issued by the Creek Nation Tax Commission, the vehicle owner must be an enrolled member of the Creek Nation and reside within the jurisdictional boundaries of the Creek Nation.
- The current licensing practice of the Creek Nation is consistent with *McGirt's* expansion of what constitutes Indian country for such purposes.

Based on the foregoing, the OTC estimates that *McGirt* will result in a minimal reduction in motor vehicle collections.



V. SUGGESTIONS FOR MITIGATION OF POTENTIAL IMPACT

Authority for a state to exercise its civil regulatory jurisdiction within the territorial limits of Indian nations is controlled by federal law, and Oklahoma has limited state taxing jurisdiction over certain persons and transactions within “Indian country,” as that term is defined in 18 U.S.C. § 1151. The State generally lacks authority to modify those limitations through state legislation. However, the State’s jurisdiction could be expanded through an Act of Congress specifically subjecting citizens of the Indian nations located within the State’s borders to state taxes. Such legislation could take a variety of forms—from a very broad possibility of eliminating all restrictions on state taxation, to a more narrow approach of authorizing only certain state taxes or taxation of certain types of transactions.

In the absence of federal legislation which may mitigate the impact of *McGirt*, the State could enter one or more compacts with the tribes for collection and apportionment of various tax types. Historically, the State and the tribes have engaged in compacts for cigarette and tobacco taxes, motor fuel taxes, and license tags.

In 1992, as a result of the United States Supreme Court ruling in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991), the Oklahoma Legislature enacted 68 O.S. § 346, authorizing the Governor to enter into cigarette and tobacco products tax compacts on behalf of the State with federally recognized Indian tribes or nations of this State. A few years later, in 1996, as a result of the United States Supreme Court ruling in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Oklahoma Legislature enacted 68 O.S. § 500.63, recognizing the “interest of this state to resolve disputes between the state and federally recognized Indian tribes on [the issue of state government taxation of motor fuel sales made by Indian tribes] by entering into contracts” under which the Indian tribes would be compensated for any lost tribal motor fuel tax revenues, while also allowing “both the State and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country.” The Creek Nation has entered a motor fuel compact and a tobacco compact with the State, both of which are currently still in effect.

Although the Oklahoma Legislature defined the provisions of the tobacco and motor fuel compacts by statute, such legislation is not required for further compact negotiations. The State has entered multiple motor vehicle and license tag compacts with Indian tribes without a statutory guideline for the terms of the compact. The Executive Branch of the State is well positioned to



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evaluate its authority to enter into any new compacts, and to negotiate the terms of the compacts in the best interest of the State.

The benefit of tribal compacts should not be discounted. During the last two fiscal years, the State received over \$73 million in cigarette and tobacco tax collections as a result of compact sales. While a portion of the compact sales would be subject to tax even in the absence of the compact, collection of those tax amounts may have been difficult due to claims of sovereign immunity and the State's limited enforcement authority on tribal land. Engaging in a compact for sales tax collections, for example, could significantly mitigate the impact of the expanded Creek Reservation boundaries under *McGirt*.

The OTC anticipates an immediate impact on tax collections as a result of *McGirt*, with the bulk of the initial potential impact occurring during FY21. Income tax collections are a primary area of concern, as qualifying individual tribal members may (1) immediately halt income tax withholding from their wages, (2) begin claiming the income tax exclusion on 2020 individual income tax returns, or 2019 individual income tax returns for which a valid extension has been filed, and (3) file amended income tax returns claiming refunds for prior years within the statute of limitations. Because *McGirt* held that the Creek Reservation was never disestablished, the decision applies retroactively, and allows taxpayers to claim tax refunds for prior years. The OTC will continue to administer the tax laws of the State using the processes and procedures currently in place, and is prepared to assist in implementation of any statutory or other changes which may impact the above analysis.