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ATTORNEY GENERAL

October 21, 2020

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Principal Chief David Hill
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The Honorable Kevin J. Stitt
Governor, State of Oklahoma
2300 N. Lincoln Blvd.
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Speaker Charles McCall
House of Representatives
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Oklahoma City, OK 73105

Greg Treat
Senate President Pro Tempore
2300 N. Lincoln Blvd, Room 401
Oklahoma City, OK 73105

Re: A path forward for Oklahoma and the Five Tribes

Dear Colleagues,

It has now been three months since the Supreme Court decided *McGirt v. Oklahoma*. During this time, much has been said about the issues that the *McGirt* decision has raised and how best to address those issues—or whether to address them at all. I write in hopes of moving that conversation forward with specific proposals on how the federal, tribal, and state governments can work together in addressing the uncertainties, difficulties, and opportunities that *McGirt* has created.

I firmly believe we need to focus on consensus solutions to the most pressing issues, using progress on those issues to mark the path forward for greater intergovernmental cooperation.

A good example of this approach is on child welfare issues. When *McGirt* was decided, I was told that over 800 Indian children on the Creek Reservation were in the state's child welfare system. The State's jurisdiction to protect these children was called into question by *McGirt*. Unless something was done, these 800 children could have been sent back to possibly neglectful or abusive homes until the Creek Nation's child protective agency developed the capacity to look after all of them.

Faced with this pressing issue about the care of a vulnerable population, the state and the tribe worked together within a statutory framework created by Congress and the Oklahoma Legislature. The Creek Nation approved an agreement with Oklahoma's Department of Human Services and Office of Juvenile Affairs to allow the state to continue to care for these children unless and until the Tribe desires to take custody. The state has also signed similar agreements with the Cherokee, Chickasaw, and Choctaw Nations. These agreements were only possible because Congress explicitly allowed for such compacts in the federal Indian Child Welfare Act and the Oklahoma Legislature authorized them in the Oklahoma Indian Child Welfare Act. It is an example of how the federal government, the tribe, and the state can all work together to protect Oklahomans in need of protection.

I believe this approach is also needed in the area of criminal jurisdiction. As the *Tulsa World* reported, in the first couple of months following *McGirt*, already 850 criminal cases involving Indians have been referred to federal authorities.¹ This does not include the cases referred directly to tribal authorities or those that have simply gone unprosecuted. It also only includes crimes committed on the Creek Reservation. While we appreciate and acknowledge the great work being done by our federal and tribal partners to handle this wave of litigation, it is clear additional resources are needed. To put things in perspective, the U.S. Attorney for the Eastern District of Oklahoma indicted only 3 Indian country crimes in 2017; in the few months following *McGirt*, they have already been referred 571 such cases. The caseload is only expected to increase with each passing week, and to accelerate if and when there are final court determinations on the reservations of the other Five Tribes.

As with child welfare, state resources could help with this public safety situation—state district attorneys, state judges, and state correctional facilities are ready and able to assist to the extent federal and tribal resources are strained. But unlike with child welfare, federal law does not allow the state and the tribe to come to agreements on criminal jurisdiction. Only Congress can change the law to allow for state-tribal criminal jurisdiction compacts.

¹ Curtis Killman, *Supreme Court ruling affects more than 800 'Indian Country' criminal cases in Oklahoma so far*, TULSA WORLD (Sept. 22, 2020).

We already are familiar with federal legislation authorizing state-tribal compacts in the fields of child welfare and gaming. There is also a long history of state-tribal agreements on criminal justice in the area of policing through cross-deputization agreements. Similarly, criminal jurisdiction compacting with the state has been proposed by tribal constituencies in the wake of *McGirt*. For example, it is my understanding that the Chickasaw Nation told members of Oklahoma's Congressional delegation that if any legislation was to be considered, it should be legislation that empowers the tribes and the state to compact on criminal jurisdiction.

This requires Congress to act in a modest way that respects and enables decisions about criminal justice in Oklahoma to be made by Oklahomans, both tribal citizens and non-Indians. If a tribe does not want to compact with the state, it is not required to under legislation that authorizes compacts. But if a tribe wants to compact with the state to assist with criminal jurisdiction on their reservation, legislation would authorize it. This promotes both the tribe's sovereignty and the state's sovereignty by removing federal barriers to allow the tribe and the state to decide for themselves what best promotes public safety on the reservation. And if a tribe later wants to assume more criminal justice responsibility, it can always work with the state to amend the compact or choose to withdraw from the compact subject to a reasonable transition period. Congress would not be forcing anything on anyone—just enabling us to work together.

With this in mind, I hope to work with tribal leaders, state leaders, local officials, and members of Congress to address issues related to *McGirt* in a manner that encourages and builds on federal-state-tribal cooperation as follows:

First, I recommend that Congress, in consultation with state and tribal stakeholders, consider federal legislation that authorizes state-tribal compacts that would enable the state to exercise criminal jurisdiction on reservation land concurrently with federal and tribal authorities. Such legislation empowering any of the Five Tribes to enter into compacts with the State would allow concurrent jurisdiction based on terms upon which the tribe and the state can agree. This would build on the model we already pursued with respect to child welfare (where under federal statute the state can jointly exercise jurisdiction if it compacts with the tribe) and with respect to gaming (where under federal statute the tribe can conduct Class III gaming if it compacts with the state).

Second, I recommend state leaders begin developing a process for compacting with the Five Tribes concerning civil issues that have arisen after *McGirt*, as well as compacting on the criminal jurisdiction that I hope Congress authorizes. For example, compacts on taxation have the possibility of easing the administration of state and tribal tax laws, increasing revenue to the tribe, and bringing certainty to state and local governments as to the revenue impact of *McGirt*. The Governor should engage with the Legislature, through the Joint Committee on State-Tribal Relations, to develop compacting ideas, negotiate with tribal governments, and enact any legislation necessary to enter into compacts.² Private and governmental stakeholders from around the state should be engaged in these issues, and I stand ready to assist with compacts where my Office can be of help.

² See 74 O.S. § 1221. To the extent that the constitutionality of the role assigned to the Joint Committee by this statute was questioned by 2004 OK AG 27, I am withdrawing that opinion as inconsistent with the Oklahoma Supreme Court's continued recognition of the role of the Joint Committee in *Treat v. Stitt*, 2020 OK 64.

I propose these solutions as an idea for a path forward, not a mandate, realizing that this is a continuation of a conversation between the tribes, the state, and Congress that has been taking place since these issues were brought before the Supreme Court. I look forward to collaborating with all of you in the months ahead as we work towards intergovernmental cooperation that is respectful of tribal and state sovereignty and beneficial to all Oklahomans.

Respectfully,

A handwritten signature in black ink, appearing to read "Mike Hunter". The signature is stylized and cursive.

MIKE HUNTER
Oklahoma Attorney General

CC:

Brian Kuester
U.S. Attorney

R. Trent Shores
U.S. Attorney

Timothy J. Downing
U.S. Attorney