Congressional Action On McGirt May Prove Risky For Tribes

By [HYPERLINK "https://www.law360.com/nativeamerican/articles/1294574/congressional-action-on-mcgirt-may-prove-risky-for-tribes?nl_pk=894dd615-1d89-41ce-b438-7f19a35e0818&utm_source=newsletter&utm_medium=email&utm_campaign=nativeamerican"]

Law360 (July 24, 2020, 6:21 PM EDT) -- A plan to enlist Congress to help settle the jurisdiction questions raised by the Muscogee (Creek) Nation's recent [HYPERLINK "https://www.law360.com/agencies/u-s-supreme-court"] win risks weakening tribes' authority over their newly affirmed reservation lands in Oklahoma, and federal legislation might not be needed at all if tribes and the state take the time to hash things out themselves, experts say.

Oklahoma Attorney General Mike Hunter proposed a framework on July 16 for federal lawmakers to follow to resolve criminal and civil jurisdiction questions in the wake of the [HYPERLINK "https://www.law360.com/articles/1285273/justices-back-toss-of-state-convictions-on-okla-reservation"] in [HYPERLINK "https://advance.lexis.com/api/search?q=2020%20U.S.%20LEXIS%203554&qlang=bool&origination=law360&internalOrigination=article_id%3D1294574%3Bcitation%3D2020%20U.S.%20LEXIS%203554&originationDetail=headline%3DCongressional%20Action%20On%20McGirt%20May%20Prove%20Risky%20For%20Tribes&" \t "_blank"] that the Creek reservation still exists and that state courts don't have criminal jurisdiction there. That ruling is also expected to extend to the rest of the so-called Five Tribes in Oklahoma: the Cherokee, Chickasaw, Choctaw and Seminole nations.

But the framework as structured — which has already [HYPERLINK "https://www.law360.com/articles/1293005/creek-chief-opposes-federal-law-on-okla-jurisdiction"] of the leaders of the Muscogee (Creek) and Seminole nations — could hamstring tribes just when the McGirt decision promised them more authority, experts say.

"This agreement says you get your reservation, but the legal realities that come with having the reservation are going away," said [HYPERLINK "https://www.law360.com/firms/pipestem-law"] partner Mary Kathryn Nagle, an enrolled citizen of the [HYPERLINK "https://www.law360.com/agencies/cherokee-nation"].

And while the energy industry in Oklahoma as well as the state and tribes have an interest

in getting greater clarity on jurisdiction, putting together such a plan so soon after the McGirt ruling is "absolutely premature," said Troy A. Eid, co-chair of [HYPERLINK "https://www.law360.com/firms/greenberg-traurig"] practice group, who took part in an amicus brief by former U.S. attorneys backing the Creek tribe.

"The idea of legislation right now is a hammer in search of a nail," Eid said. "To me, it makes no sense because there's already a remedy, which is to enter into intergovernmental agreements. The mechanism's already in place."

The high court's McGirt ruling focused on federal criminal jurisdiction under the Major Crimes Act for lands within the Creek reservation, but the "agreement-in-principle" backed by Hunter tackles a wide array of civil as well as criminal jurisdiction questions.

The plan was announced as having the support of all Five Tribes, but that fell apart when Muscogee (Creek) Nation Principal Chief David W. Hill and [HYPERLINK "https://www.law360.com/agencies/seminole-nation"] said the next day that they didn't support the deal.

The agreement's provisions for criminal jurisdiction would in some ways replicate the current division of jurisdiction among the tribes, the state and the federal government, but would "provide and affirm" the state's jurisdiction on the tribes' treaty territories except for crimes by Indians on trust or restricted land.

"That 'provide' part is key," said Sarah Krakoff of the University of Colorado Law School, because by giving back jurisdiction the state lost in the McGirt ruling, it would mark "an expansion of what the state's criminal jurisdiction is now."

The agreement would also acknowledge the tribes' jurisdiction over non-Indians for domestic violence crimes under the Violence Against Women Reauthorization Act of 2013 as well as certain other federal laws, but that could be an issue if VAWA is revised in future, according to Nagle, who was counsel of record on an amicus brief for the National Indigenous Women's Resource Center and other organizations and tribal nations in the case.

"The problem is: Do we really want to be separate from the rest of Indian Country?" Nagle said, as a law specific to the Five Tribes naming the 2013 revision of VAWA might mean the

tribes have to lobby for new versions of the law — potentially including more categories of crime subject to tribal authority — to apply to them too.

"Any time we separate ourselves out from the norm in national Indian law, it's just dangerous and has unintended consequences," Nagle said.

Some kind of deal on criminal jurisdiction is needed, experts say, as there's a risk of certain types of crimes not being taken on by the federal government if Oklahoma isn't dealing with them.

The worst crimes are still likely to be handled by the federal government, but other crimes by non-Indians against tribal members could fall through the cracks, according to Colette Routel of [HYPERLINK "https://www.law360.com/companies/hamline-university"] of Law, who co-authored an amicus brief backing McGirt for the [HYPERLINK "https://www.law360.com/companies/national-congress-of-american-indians"].

"That's a problem nationwide, that only the feds would have the authority to prosecute those crimes usually," and "a whole host of lower level offenses don't get prosecuted," Routel said.

More potential problems lurk in the civil jurisdiction provisions of the agreement, experts say, particularly its echoes of the Supreme Court's 1981 ruling in [HYPERLINK "https://advance.lexis.com/api/search?q=1981%20U.S.%20LEXIS%209&qlang=bool&origination=law360&internalOrigination=article_id%3D1294574%3Bcitation%3D1981%20U.S.%20LEXIS%209&originationDetail=headline%3DCongressional%20Action%20On%20McGirt%20May%20Prove%20Risky%20For%20Tribes&" \t "_blank"] limiting tribes' authority over nonmembers on tribal lands.

Under the agreement, tribes would generally lack civil jurisdiction over nonmembers, except for "activities of non-members that are part of a consensual relationship, such as contracts, with the tribe" and "conduct of non-members that threatens tribal self-governance or the economic security, health, or welfare of the tribe" — language closely following the two exceptions to tribes' lack of civil jurisdiction specified in the Montana ruling.

While tribes have long dealt with the constraints of the Montana ruling, putting its framework into a law would make it even more difficult to deal with, experts say.

"Tribes don't gain anything from having Congress say their civil jurisdiction is limited in the way the Supreme Court has said," according to the University of Colorado Law School's Krakoff. "That just cements what in my view is the very cloudy, confusing and excessively limiting landscape of tribal civil jurisdiction."

Another section of the proposal would "provide and affirm the state's civil jurisdiction over all persons throughout the treaty territories, except on Indian trust or restricted lands," but exactly what authority that would hand the state is "very unclear," Routel said.

"This could be read as giving the state board civil adjudicatory and regulatory jurisdiction over tribal land," Routel said, bringing into question whether the state could tax tribal members within the reservation or regulate housing on member-owned property.

Establishing state jurisdiction in civil matters outside trust or restricted land "seems to obviate" the balancing test created under the U.S. Supreme Court's 1980 decision in [HYPERLINK "https://advance.lexis.com/api/search?q=1980%20U.S.%20LEXIS%2052&qlang=bool&origination=law360&internalOrigination=article_id%3D1294574%3Bcitation%3D1980%20U.S.%20LEXIS%2052&originationDetail=headline%3DCongressional%20Action%20On%20McGirt%20May%20Prove%20Risky%20For%20Tribes&" \t "_blank"], which weighs state interests against federal and tribal interests to determine if a state may apply a particular tax.

Although Bracker often hasn't been applied favorably for tribes by federal courts, the Oklahoma agreement's language appears to drop it altogether and "limit the scope of tribes' ability to challenge state jurisdiction on fee land," said Stanford Law School professor Gregory Ablavsky, who took part in an amicus brief from historians, legal scholars and the Cherokee Nation backing McGirt.

The difficulty of the issues involved and the risk of enshrining in federal legislation provisions that could hamper tribes are compounded by the speed with which the agreement was produced, after having been initially announced on the day of the McGirt decision, experts say.

There doesn't seem to be "any need for legislation" at this point, Eid said, in part because the McGirt decision is fairly narrow in targeting criminal jurisdiction under the Major Crimes Act.

A desire for clarity and stability on the part of energy interests may be driving the agreement — as well as Oklahoma Gov. Kevin Stitt's subsequent move [HYPERLINK "https://www.law360.com/articles/1294052/okla-gov-forms-panel-to-handle-tribal-reservation-ruling"] to weigh jurisdiction issues — but there's no hurry to determine how the limits to tribal authority in the Montana decision will apply to energy development or answer companies' concerns that they may have to exhaust tribal court remedies, said Eid.

"That hasn't happened yet, and if does, let that process work itself out," Eid said. "Eventually, it will go to federal court, and McGirt will have to be analyzed for breadth."

Still, there could be an upside to Congress stepping in, Ablavsky said.

"One of the advantages of legislation is it would take the ball out of the Supreme Court's court, so to speak, and give it to Congress," he said. "Even if you codified the Montana test, there would be an important change potentially in having to look at what Congress meant when it enacted those terms, rather than the court just interpreting its own precedent."

In particular, Congress could give more guidance on the Montana exceptions that could overturn the courts' narrower readings of that case, he said.

Still, in past federal settlement acts with states, tribes have "traded away things that they've come to regret," and since mounting a challenge against a federal law incorporating those terms then becomes challenging, "there's good reason to be cautious," he added.

And in the wake of the majority opinion in McGirt from Justice Neil Gorsuch, if Montana does remain the courts' exclusive province rather than become framed in a federal law, there's reason for more optimism for tribes if the case does arise again in federal court, experts say.

However, the three tribes that have committed to the agreement, the Cherokee, Choctaw, and Chickasaw nations, have said that a major reason for their immediate involvement is that they believe federal legislation is coming whether the tribes like it or not.

"Since it's a given that there's going to be legislation, it's best that tribes have a seat at the table," said [HYPERLINK "https://www.law360.com/agencies/choctaw-nation-of-oklahoma"] general

counsel Michael Burrage.

But it's not clear that federal legislation really is inevitable, Pipestem Law's Nagle said.

"I think it is shortsighted and wrong to assume that unless we voluntarily surrender our sovereignty, we're going to automatically lose the victory we just had in court," and tribes outside Oklahoma would likely work with their congressional allies to address any broader implications of any Oklahoma-specific law, she said.

Whether or not federal legislation will come at some point, now — amid the coronavirus pandemic and with a presidential election approaching — may not be the right time, according to Eid.

"This is a time to tread lightly," he said. "It's not a time to be making a lot of grand decisions."

--Editing by Jill Coffey and Kelly Duncan.