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REPORT OF POTENTIAL IMPACT EXECUTIVE ORDER 2020-24

On July 20, 2020, Oklahoma Governor J. Kevin Stitt issued Executive Order 2020-24, directing state agencies that might be impacted by the decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), to submit a Report of Potential Impact (“Report”). The Executive Order directed each agency to specify 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 Oklahoma Corporation Commission (“OCC” or “Corporation Commission”) submits this Report pursuant to the Executive Order.

Since *McGirt* was decided three months ago, numerous lectures, discussions and debates have occurred—with all involved trying to predict its impacts. The fact is no one knows. Legal challenges based on *McGirt* have been, and will presumably continue to be, raised for many years. Until those are decided, a sense of uncertainty exists. The OCC appreciates the opportunity to respond to the potential implications of this decision. For purposes of this Report, the Corporation Commission has addressed the requested information with the assumption that as a result of *McGirt*, its current regulatory jurisdiction in areas subject to treaties with the Five Civilized Tribes (“Tribes”) could be impacted.

I. OVERVIEW OF OCC REGULATION

The OCC’s regulatory responsibilities, pursuant to Constitutional and statutory authorities, *include* the following:

- Oil and gas drilling and production; underground injection control; surety requirements; pollution prevention, abatement and remediation; mineral owners escrow account; secondary and brine recovery units, and underground gas storage units
- Underground and above-ground petroleum storage tanks, facilities, dispensers, remediation funding and activities, and antifreeze
- Transportation—motor carrier requirements, ports of entry, pipeline safety, at-grade railroad crossings, taxis, limousines, for-hire buses, household goods movers, non-consensual towing, and transportation network companies
- Public utilities—electric, natural gas, wind, water, telecommunications, universal service, and cotton gins

As part of its regulatory efforts and participation in cooperative programs with federal authorities, the OCC administers and enforces certain federal environmental and other federal laws and compacts with multiple jurisdictions. For example, the OCC administers an Underground Injection Control (“UIC”) program under a Primacy Agreement with the EPA, the International Fuel Tax Agreement (“IFTA”) and the International Registration Plan (“IRP”), and enforces federal motor vehicle safety standards and federal pipeline safety standards.

II. AREAS IN WHICH THE OCC ANTICIPATES AN IMPACT AND THE NATURE AND EXTENT OF THE IMPACT, INCLUDING PROJECTED FISCAL IMPACT

As noted above, depending on the outcome of future Court rulings as a result of *McGirt* and any other applicable law, OCC’s regulation of the following could be impacted in areas subject to treaties with the Tribes. Additionally, while estimates of fiscal impact have been provided based on data from 2018 and 2019, factors other than *McGirt*, such as the COVID-19 emergency and the volatility of oil and gas activity in response to pricing, can impact and have impacted some of the numbers/statistics. Further, while some of the estimates below are based on general or statewide numbers not necessarily specific to geographic areas that could potentially be impacted by *McGirt*, upon request the OCC is willing to provide further information or more specificity to the extent possible. Additionally, a summary of OCC’s annual activity is set forth in its 2019 Annual Report accessible here: [OCC FY2019 Annual Report](#).

A. OIL AND GAS CONSERVATION

The Oil and Gas Conservation Division (“OGCD”) field staff are responsible for conducting well and site inspections, and overseeing testing, well plugging, and pollution prevention. Statewide, the staff typically conducts more than sixty thousand (60,000+) well and site inspections in a year. Further, the OGCD enforces surety requirements that require parties who drill or operate wells to show they have the financial ability to stay in compliance with plugging regulations and pollution prevention regulations.

Regulatory duties and oversight generally include:

- Secondary and brine recovery units
- Mineral Owners Escrow Accounts
- Gas transportation and gas gathering
- Natural gas seeps
- Investigation of complaints, enforcement actions, fines and penalties
- Soil farming
- Oil and gas drilling, production, surety, technical compliance and data analysis
- Reporting, maintenance of well records, records searches, well transfers
- Regulation of pipelines that transport oil, gas and related substances
- Mitigation of induced seismicity, earthquake tracking, geographic information systems
- Horizontal, vertical and directional wells

- Wastewater disposal (Class II waste)
- Oversight and administration of plugging fund for abandoned oil and gas wells
- Approval of permits and applications necessary for drilling and production of oil and gas wells
- Oil and gas unitization
- Pollution prevention and abatement including operators' removal of trash, debris and equipment, along with proper closure of non-commercial and commercial pits
- Surety compliance and enforcement

IMPACT

Based on data from 2019, fees collected by the OCC for oil and gas activity attributable to the eastern half of the state could potentially be reduced by more than \$1 million annually and collections for fines and penalties could potentially be reduced up to \$250,000 annually, if OCC's jurisdiction over such lands no longer existed. While collections from fees, fines, and penalties partly fund this division, it is further funded by legislative appropriations, which theoretically could be significantly reduced if the Corporation Commission ceased to regulate oil and gas on Indian lands. Further, the OCC administers the Mineral Owners Escrow Account that benefits unknown or unlocated persons entitled to bonuses, royalty payments and other payments arising under pooling orders, and which could experience a reduction to its 10% administration fee.

If OCC is jurisdictionally barred from certain lands in eastern Oklahoma, its inspections, oversight, documentation of the location, extent, and type of activity, and its enforcement activities in those areas would cease. Unless another regulatory entity has the legal authority, capability and resources to step in, orderly activity in the area would be in jeopardy.

B. PETROLEUM STORAGE TANKS

The Pesticides, Toxics and Underground Storage Tank Branch of the EPA works with the OCC and provides oversight for the Oklahoma Underground Storage Tank Program and Leaking Underground Storage Tank Program. The OCC Petroleum Storage Tank Division ("PSTD") regulates tanks that store antifreeze, motor oil, gasoline and other liquid petroleum products. Fuel inspectors check the calibration of gasoline pumps to ensure that customers are receiving the accurate amount of gasoline at each purchase. Inspectors also check octane levels and assist tank owners in proper release detection methods. The OCC inspects over 4,300 gas stations each year. The OCC brings enforcement actions for violations of state regulations, which must be at least as stringent as EPA's regulations.

The PSTD also administers the Petroleum Storage Tank Release Indemnity Fund ("Indemnity Fund"), created by the state legislature in 1989 to help fuel storage tank owners meet a need for environmental liability insurance. Since the mid-1980s, private insurance has been difficult to obtain for damage caused by leaking tanks. The Indemnity Fund is funded by an assessment on motor fuel, and provides funding for corrective action of polluted sites caused by releases of petroleum from tanks. This division also assists tank owners in making environmental corrective action decisions, and administers the reimbursement of corrective action costs from the fund. The Indemnity Fund staff administers over \$25 million worth of claims made on the fund in a typical year, which funding arises under state law and is only available to tank owners pursuant to state regulation.

Additional regulatory duties include:

- Regulation of antifreeze
- Inspection of storage tank facilities, calibration of dispensers, risk assessments
- Scheduling installations, removals, repairs and testing
- Investigation of leaks, corrective action plans, remediation and enforcement actions
- Administration of the Oklahoma Leaking Underground Storage Tank Trust Fund, and the Oklahoma Leaking Underground Storage Tank Revolving Fund
- Licensing and permitting, operator training
- Fuel quality
- Compliance, investigation of complaints and enforcement actions
- Database maintenance and reporting

IMPACT

PSTD could potentially collect approximately \$145,000 less each year in fees attributable to the eastern half of the State, if its jurisdiction over such lands no longer existed. Unless another regulatory entity has the legal authority, capability and resources to step in, the resources and services offered through these state programs would be unavailable outside OCC's jurisdiction.

C. TRANSPORTATION

The Transportation Division of the Corporation Commission operates the ports of entry and weigh stations in Oklahoma. It administers the IFTA (collection and sharing of fuel tax revenue among states), the IRP (cooperative registration of trucks operating in more than one state), and the Unified Carrier Registration Program that affects almost 8,000 for-hire and private carriers.

Additional regulatory duties include:

- Commercial vehicle overweight audits
- IFTA/IRP audits
- Licensing and regulation of Transportation Network Companies (*i.e.*, Uber, Lyft)
- Nonconsensual towing rate regulation
- Compliance checks (exceeding 1.1 million vehicle checks annually)
- Operation of Oklahoma's nine ports of entry and weigh stations
- CLEET-certified peace officer duties
- Issuance of citations and warnings
- Investigation of complaints and enforcement proceedings
- Electronic screening
- Oversize/overweight truck regulations enforcement
- Railroad and railway company fencing and crossings and safety of at-grade railroad crossings

IMPACT

Both IFTA and IRP serve the purpose of allowing states to collect revenues on behalf of the 48 contiguous states and 10 Canadian Provinces, and then allocate an apportioned share of that revenue to the other 57 members of the compact so that the trucking industry does not have to comply with potentially 58 different regulatory programs. IFTA and IRP membership is not open to tribal sovereigns, which do not bear the costs of fuel tax collection and road construction on the non-tribal highways crossing tribal lands. As a result, if the Commission were to lose the ability to regulate motor carriers over non-tribal highways within tribal jurisdictions, then motor carriers within those jurisdictions that are not registered and do not contribute to the funding for highways and bridges would most likely not be permitted to operate in other states.

In 2019, the dollar amount assessed for motor carrier citations issued in areas subject to treaties was approximately \$5.5 Million, and represents an estimate of the dollar amount by which the Corporation Commission's citation collections would be reduced if its jurisdiction ended in the eastern half of the State. The revenue collected from citations is distributed to the Corporation Commission, the Oklahoma Tax Commission and the Department of Public Safety, and those distributions would be reduced accordingly. It could also stand to lose approximately half of its wrecker assessments, in an amount of approximately \$70,000. Unless another regulatory entity has the legal authority, capability and resources to step in, the resources and services offered through these state programs would be unavailable outside OCC's jurisdiction.

D. PIPELINE SAFETY

The Pipeline Safety Department of the Transportation Division regulates safety in locations required by the USDOT Pipeline and Hazardous Materials Safety Administration program, including more than 40,864 miles of natural gas pipeline and 5,234 miles of hazardous liquid pipeline. The Corporation Commission conducts onsite inspections of facilities, enforces safety regulations, and maintains confidential records of the location, design and nature of pipeline assets.

Additional regulatory duties include:

- Onsite inspections of facilities and records
- Enforcement of construction, design, maintenance and operation requirements
- Damage prevention for underground facilities
- Investigation of safety complaints
- Training for small operators
- Investigate excavator strikes on pipelines and pipeline facilities
- Regulation of pipelines that transport oil, gas and related substances

IMPACT

If the Corporation Commission did not have the ability to access and review such records in a Tribe's geographic area, it could seriously thwart or prevent the Commission's ability to enforce safety regulations, assess the need for infrastructure improvements, develop vulnerability assessments, conduct emergency planning, and respond to disasters and acts of terrorism. If the Corporation Commission lost the ability to regulate pipeline operator safety in part of Oklahoma,

it could arguably lose approximately half of its federal funding for pipeline safety and an estimated additional \$725,000 in pipeline department assessments. Unless another regulatory entity has the legal authority, capability and resources to step in, safety is jeopardized.

E. PUBLIC UTILITIES

The Public Utility Division (“PUD”) provides technical support, analysis, research, and data to the Commission by monitoring regulated utilities and participating as a party in ratemaking and other cases involving regulated utilities, including electric, natural gas, and some water utilities, and making recommendations consistent with the public interest to ensure these utilities provide safe and reliable service at rates that are fair, just, and reasonable; and enforces compliance with applicable statutes and rules.

Other regulatory duties include:

- Regulation of telecommunications companies, including Certificates of Convenience and Necessity, Interconnection Agreements, approval of transactions, approval of telecommunications tariffs, approval of Eligible Telecommunications Carrier designations, and approval of new area codes
- Administration of the \$60 million Oklahoma Universal Service Fund, review of preapproval and funding requests for broadband services for public schools, public libraries, eligible telemedicine lines for healthcare facilities, and funding requests from eligible Oklahoma RLECs in support of primary universal services.
- Oklahoma Lifeline Program and funding to maintain universal service in rural Oklahoma
- Consumer services, call center and complaint investigation
- Protection of ratepayers and customers by enforcement of approved tariffs and terms of service
- Enforcement and show cause hearings
- Response to service interruptions, natural disasters and emergencies
- Regulation related to the Oklahoma Wind Act
- Regulation of cotton gins
- Enforcement of federal statutes and rules related to public safety for some regulated entities
- Participation in 14-state Regional Transmission Organization Southwest Power Pool and its Working Groups

IMPACT

PUD receives funding from annual assessments on public utilities and from entities that benefit from its administration of the Oklahoma Universal Services Fund. While it might appear that the amount of assessments to be collected could be reduced by half to reflect removal of lands subject to treaties from OCC regulation, the potential impact would not be so straightforward because elimination of such lands from OCC regulation would not reduce the costs of regulation or the workforce required. The regulated territory might become smaller, but the amount of labor and costs of regulation are not correlated to customer numbers or the size of the utilities affected. However, PUD could likely experience a negative financial impact of \$2.5 million.

III. ANY STEPS OCC HAS TAKEN TO MITIGATE THE POTENTIAL IMPACT

With respect to environmental programs and with the participation of the OCC, the State requested and on October 1, 2020, received EPA approval under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 to administer EPA-approved programs in certain areas of Indian Country. Specific to the OCC, such programs include:

- State Underground Storage Tank Prevention Detection and Compliance
- Leaking Underground Storage Tank Trust Fund Program (Corrective Action)
- State and Tribal Response Program
- State Underground Water Source Protections

With this approval, the OCC has been granted authority from the EPA to continue administering these environmental programs in certain areas of Indian Country, thereby mitigating some of the possible impacts outlined earlier in this document. Additionally, Section 11 of the Stigler Act [Act of August 4, 1947], should be considered in that it made all restricted lands of the Tribes subject to the oil and gas conservation laws of Oklahoma, provided that no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his/her representative.

IV. LEGAL OPINION AND RECOMMENDATIONS: SUGGESTIONS FOR ACTION TO MITIGATE THE POTENTIAL IMPACT

Action by Congress could most comprehensively alter the applicability of *McGirt*. The State could provide research, input, and recommendations to that body and its Oklahoma members. But in the absence of such Congressional action, the possibility and feasibility of compacts with the Tribes, in addition to any compacts already in place in the state, can be researched and explored.

Whatever the extent of any impact of *McGirt* might be, any reductions to the Corporation Commission's jurisdiction may lead to corresponding reductions in its revenue, budget, appropriations, workload, and workforce in some areas and none in others. The OCC attempts and will continue to attempt to plan for a variety of scenarios to ascertain the best methods by which to meet its responsibilities, maintain quality service and retain quality workers.

V. THE AUTHORITY VESTED IN THE AGENCY TO EXECUTE AND PERFORM THE RELEVANT ACTIONS

The OCC's authority is derived from, and its regulatory responsibilities are set forth in, Oklahoma Constitution Art. 9, §§ 18 through 35; and the Oklahoma Statutes, including primarily provisions of Titles, 17, 27A, 47, and 52.