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# *Resurfacing Sovereignty: Who Regulates Surface Mining In Indian Country After* McGirt*?*

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# RESURFACING SOVEREIGNTY: WHO REGULATES SURFACE MINING IN INDIAN COUNTRY AFTER *MCGIRT*?

**Sam J. Carter* and Robin M. Rotman****

## I. INTRODUCTION[1]

"With that one ruling, what we thought that's happened over the last 114 years since statehood was that we were able to regulate industry, we were able to tax, we were able to prosecute crimes. And that's all kind of thrown up into question."[2] This is the concern that Governor Kevin Stitt voiced to the press following the decision in *McGirt v. Oklahoma*,[3] the groundbreaking federal Indian[4] law case that defined much of eastern Oklahoma to be Muscogee (Creek) reservation land for the purposes of the Major Crimes Act ("MCA") after more than a century of being treated as state land.[5] Following the decision in *McGirt*, there has been a surge of litigation from the State of Oklahoma seeking to clarify the scope of the *McGirt* holding. While the Supreme Court of the United States was clear that the holding in *McGirt* was limited to criminal jurisdiction under the MCA, the case has raised further questions regarding the scope of tribal authority.

One such case that is being litigated is *State of Oklahoma v. United States Department of the Interior*,[6] which concerns surface mining regulation in the State of Oklahoma. This case leads us to make three recommendations: (1) in litigation concerning tribal lands, tribes should be a necessary party for litigation to proceed; (2) Congress should invest in pathways for tribes to build the capacity to create and manage their own programs and

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1. *Editor's Note:* As this issue was going to press, the United States Supreme Court issued its opinion in Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022). This article does not include an analysis of that opinion.

2. Clark Merrefield, McGirt v. Oklahoma*: The Ongoing Importance of a Landmark Tribal Sovereignty Case*, JOURNALIST'S RES. (July 20, 2021), https://perma.cc/C245-YDMA.

3. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

4. This paper uses the terms "Indian," "American Indian," and "Native American" interchangeably, to refer to the indigenous peoples of the mainland United States at the time of European colonization. Given the complex and ongoing narratives around indigenous identity and terminology, we chose to utilize the terms found in United States federal Indian law for simplicity.

5. *See generally McGirt*, 140 S. Ct. 2452; Merrefield, *supra* note 2.

6. No. CIV-21-719-F, 2021 WL 6064000 (W.D. Okla. Dec. 22, 2021).

achieve primacy under laws such as the Surface Mining and Reclamation Act; and (3) when tribal self-determination is encouraged and jurisdictional boundaries are clear, tribes can retain agency over their energy future and are less susceptible to the social harms that have been associated with the development of energy projects.

This article examines disputes over surface mining jurisdiction on the Muscogee (Creek) Nation Reservation post-*McGirt* and the larger implications for sovereignty and environmental justice in Indian Country that follow. Part II summarizes the history of federal, state, and tribal relations and provides an analysis of the *McGirt* decision and its potential impacts on natural resource issues. Part III offers an examination of jurisdictional uncertainties post-*McGirt* through an in-depth discussion of the Surface Mining Control and Reclamation Act and the *State of Oklahoma v. United States Department of the Interior* case. Drawing from the examination of surface mining regulation, Part IV looks more broadly at the implications for sovereignty and environmental justice in Indian Country. This article concludes by advocating approaches for strengthening tribal sovereignty and promoting tribes as producers of extractive and energy resources.[7]

## II. A Brief Exploration of Federal Indian Law

### *A. History and Overview of Federal, State, and Tribal Relations*

Long before the colonization of the land we now know as the United States of America, American Indian tribes existed as independent nations that governed themselves and their territories. In the formation of early United States laws and policies toward tribes, the federal government recognized tribal autonomy.[8] The United States Constitution, two centuries of Supreme Court rulings, treaties between tribes and the federal government, and generations of interactions with federal and state governments on a na-

7. Before continuing, let us, as authors, explain our interest in this Native American sovereignty and economic development. We do not have a tribal affiliation. We do not purport to speak for any tribe or group. We felt drawn to write this article because we are American citizens and, as such, we have an interest in seeing the United States uphold the constitutional and contractual commitments that it made on behalf of all Americans when entering treaties with Native peoples.

8. In a series of decisions known as the Marshall Trilogy, three key principles of federal Indian law were established: (1) tribal sovereignty existed before the foundation of what we now know as the United States, and with the creation of the new nation it was not extinguished, but needed to be reinterpreted, with the federal government holding the power to interpret this relationship; (2) tribes occupy a unique status within the federal structure as domestic dependent nations; and (3) the status of tribes as domestic dependent nations creates a protectorate relationship in which the tribes' powers of self-government are limited and thus, the United States has a fiduciary duty to them. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

tion-to-nation basis have all confirmed tribes' status as sovereign, domestic dependent nations within the federal system.[9]

This inherent sovereignty "provides a backdrop against which the applicable treaties and federal statutes must be read" and is at the heart of federal Indian law.[10] As sovereign, domestic dependent nations, tribes have rights to self-governance, to manage tribal lands, to own and operate tribal businesses, and in many instances, to regulate non-tribal individuals and businesses operating on their lands.[11]

Further, American Indian tribes retain a right to immunity from suit traditionally provided to sovereign entities.[12] This immunity from suit was initially recognized by Congress as a necessity to protect Indian tribes from encroachment by individual states.[13] In the modern era, it has continued to legitimize the tribes' rights to self-determination and governance. Tribal sovereign immunity is powerful, as it can only be waived by the tribe itself or by an act of Congress.[14]

Treaties are one mechanism through which tribal sovereignty has been acknowledged. Treaties were used to delineate land borders and define the political relationship between tribes and the federal government, and they have had lasting implications in the modern era.[15] Article II, Section II of the United States Constitution, the Treaty Clause, gives the President power to enter treaties with Indian tribes and foreign nations.[16] Under this provision, all treaties between the federal government and an Indian tribe must be signed by all parties and then ratified by Congress to have effect. Article VI, Section II established that treaties carry the same force and effect as an act of Congress and are deemed the "supreme Law of the Land."[17]

9. *See generally* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS. 3, 3–6 (2015).

10. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

11. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978); Turner v. United States, 248 U.S. 354, 357–58 (1919); *Cherokee Nation*, 30 U.S. at 17; S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know,* 49 WASHBURN L.J. 661, 664 (2010).

12. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); *see* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940); *see also* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1594 (2013).

13. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

14. *Id.* at 754 (stating that an Indian tribe can only be sued under federal law if the tribe has waived its tribal immunity or if Congress has taken an action to authorize the suit); Thebo v. Choctaw Tribe of Indians, 66 F. 372, 373–74 (8th Cir. 1895) (explaining that Congress's power to pass acts that authorize lawsuits against Indian tribes has never been in doubt and that Congress has done so numerous times in the past).

15. Frank Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L. REV. 239, 242 (1991).

16. U.S. CONST. art. II, § 2, cl. 2.

17. U.S. CONST. art. VI, cl. 2.

However, not all treaties were entered into fairly. In 1830, the Indian Removal Act was passed by Congress and authorized President Andrew Jackson to negotiate treaties with Indian tribes to remove them from their homelands and relocate them to territories west of the Mississippi.[18] These "treaties" were often entered into by tribes under duress.[19] Throughout the 1830s and 1840s, large numbers of Indians were forced to migrate west, leading to over one hundred thousand deaths.[20] This forced removal has come to be regarded as an act of systematic genocide.[21]

Pursuant to the Indian Removal Act, the federal government negotiated a series of treaties with the Muscogee (Creek) Indians. The 1832 Treaty required the Creek to cede their homelands in Alabama in exchange for receiving lands in the west and a pledge of assistance by the United States in removing intruding settlers from Creek lands.[22] Further, this treaty promised "[t]he Creek Country west of the Mississippi shall be solemnly guarant[e]ed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians . . . ."[23] The 1833 Treaty was notable for "establish[ing] boundary lines which will secure a country and permanent home to the whole Creek nation of Indians."[24] While the Creek lands in Alabama were ceded, the members believed they would have the opportunity to remain in the territory.[25] However, the federal government did not uphold their agreement and "their lands were quickly overrun" by intruders.[26] The Creeks who chose to stay during that time faced violent conditions.[27] Finally, in 1836—in violation of the promises of the 1832 Treaty—the Creeks were forcibly removed to the west

18. Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 564 (2021) ("Elected in 1828, President Jackson actively worked to ensure the passage of the Indian Removal Act of 1830 which empowered the president to negotiate the removal of tribes from the Eastern United States.").

19. ROBERT J. MILLER, THE HISTORY OF FEDERAL INDIAN POLICIES 11 (Mar. 17, 2010) (unpublished manuscript), https://perma.cc/P7P2-JFXP.

20. *Id.*

21. *Id.*

22. Treaty with the Creeks, 1832, art. XIV, Creek Tribe of Indians-U.S., Mar. 24, 1832, 7 Stat. 366.

23. *Id.*

24. Treaty with the Creeks, 1833, pmbl., Muscogee or Creek Nation of Indians-U.S., Feb. 14, 1833, 7 Stat. 417.

25. 7 Stat. at 366.

26. Brief for the Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner at 10, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526) [hereinafter Muscogee (Creek) Nation Amicus Curiae Brief].

27. *Id.* ("The intruders took Creek land, shot their livestock, 'burnt and destroyed their houses and corn,' and 'used violence to their persons.'") (citing GRANT FOREMAN, INDIAN REMOVAL 114 (1974)).

by federal troops.[28] The Muscogee (Creek) Nation called this removal from their eastern homelands *Nene 'Stemerktv*, The Road of Suffering.[29]

The forced exodus of indigenous people, like the Muscogee, became impractical in the subsequent decades, as droves of non-indigenous people migrated to the western United States to claim lands designated as public land by the Homestead Act.[30] This led to the passage of the 1851 Indian Appropriations Act, which introduced the concept of Indian reservations—lands secured by treaties like with the Muscogee, to be in Oklahoma and other locations primarily in the American West.[31] Federal Indian reservations are areas reserved for a tribe or tribes as a permanent homeland, either through treaties, executive orders, acts of Congress, or administrative actions.[32] In the "Reservation Era" between 1850 and 1887, nearly 300 reservations were established by tribal governments and the United States.[33] These reservations were significantly smaller than the lands that tribes had originally held, and acclimation to these new environments caused a staggering number of deaths of indigenous people.[34]

Members of the United States House of Representatives began to voice opposition to the United States entering into treaties with American Indian tribes. The opposition was not grounded in ethical concerns, but paradoxically, in the notion that after decades of conflicts with settlers, forced migration, and the rampant spread of new disease, the Native American populations had dwindled too much for any to be called a "nation."[35] Finally, in 1871, after entering into 368 treaties with American Indian tribes, Congress ceased the tradition of treaty-making.[36] Notably, Congress agreed to continue to honor all existing treaties.[37]

With the passage of the 1887 Dawes Act, Congress began dividing tribal lands among individual tribal citizens into holdings called allotments.[38] Land that was allotted could be purchased, taxed, or seized after an

28. *Id.*

29. Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. 250, 255 (2021).

30. Miller, *supra* note 19, at 13.

31. *Id.* at 11; JAMES J. LOPACH, TRIBAL GOVERNMENT TODAY: POLITICS ON MONTANA INDIAN RESERVATIONS 1, 1–2 (2019).

32. Tana Fitzpatrick, Cong. Research Serv., IF11944, TRIBAL LANDS: AN OVERVIEW 1 (Oct. 14, 2021), https://perma.cc/C4ZJ-FFTY.

33. Miller, *supra* note 19, at 13.

34. *Id.* at 2.

35. Mark Hirsch, *1871: The End of Indian Treaty Making*, 15 MAG. OF SMITHSONIAN'S NAT'L MUSEUM OF THE AM. INDIAN, Summer/Fall 2014, https://perma.cc/4DEY-UC46.

36. *Id.*

37. Indian Appropriations Act of 1871, 25 U.S.C. § 71 (2018).

38. Paul W. Gates, *Indian Allotments Preceding the Dawes Act*, *in* THE FRONTIER CHALLENGE: RESPONSES TO THE TRANS-MISSISSIPPI WEST 141, 141 (John G. Clark ed., 2021), https://perma.cc/7RSA-RRD2.

initial period of trust status and then the surplus sold to non-Indians.[39] Between 1887 and 1934, nearly 100 million acres, or two-thirds of lands originally held by Native Americans, were turned over because of the Dawes Act.[40] As a result, parts of Indian Country are checkerboarded—divided in ownership between indigenous and non-indigenous peoples.[41]

Such is the case in Oklahoma. In 1893, Congress created the Dawes Commission to negotiate either the cession or allotment of the land of the Five Civilized Tribes—Cherokee, Chickasaw, Choctaw, Creek, and Seminole.[42] The term "Five Civilized Tribes" was used to refer to tribes that more readily adopted Anglo-American norms, as opposed to the so-called "wild" Indians.[43] Still, these tribes were incredibly resistant to the allotment.[44] In an effort to coerce them into allotment, the United States stripped the tribes of their sovereignty by extending federal jurisdiction across Indian Country, abolishing tribal courts, and preventing enforcement of tribal law.[45] "The tribes finally approved . . . agreements" beginning in 1901, and by 1906, "the Five Tribes Act authorized non-Indian purchase of all lands not allotted, and the Oklahoma Enabling Act was" passed by Congress later that year, admitting Oklahoma as a state.[46]

The 1934 passage of the Indian Reorganization Act prohibited further allotment and restored the rights of American Indians to manage their assets—including land and minerals.[47] However, in the modern era, land classifications in Indian Country remain complicated and fall under different designations.[48] Trust lands are lands owned by the federal government and

39. Berger, *supra* note 29, at 257.

40. 2 ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS: HISPANIC AMERICANS AND NATIVE AMERICANS 608 (Jeffrey Schultz et al. eds., 2000).

41. Indian Country is the legal term that, for the purposes of determining criminal jurisdiction, generally refers to all lands within a federal Indian reservation, all dependent Indian communities, and all tribal member allotments. 18 U.S.C. § 1151 (2018).

42. Berger, *supra* note 29, at 253, 257; ANDREW K. FRANK, *Five Civilized Tribes*, *in* THE ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE, https://perma.cc/852N-DQCE.

43. FRANK, *supra* note 42.

44. "When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment . . . ." Annual Report from Comm'n to the Five Civilized Tribes, to the Sec'y of the Interior, *Seventh Annual Report of the Comm'n to the Five Civilized Tribes to the Sec'y of the Interior for the Fiscal Year Ended June 30, 1900*, 9 (Sept. 1, 1900), *available at* https://perma.cc/8UU4-ULRY.

45. Berger, *supra* note 29, at 257.

46. *Id.* at 257–58.

47. Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 1, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461) (transferred to 25 U.S.C. § 5101 (2018)). Tribes in Oklahoma were a notable exception to this and were not subject to these provisions until the passage of the Oklahoma Indian Welfare Act in 1936.

48. Fitzpatrick, *supra* note 32, at 1.

held in trust for tribes communally or tribe members individually.[49] Fee lands are owned outright by tribes, individual tribal members, or non-tribal members.[50] The power of tribes as sovereign entities hinges on a clear understanding of their jurisdictional authority, which is inherently tied to the land.

### *B.* McGirt v. Oklahoma

The following section will offer a description of the Supreme Court of the United States' case *McGirt v. Oklahoma*. The Court in *McGirt* ruled that much of eastern Oklahoma is Muscogee (Creek) Nation reservation land for the purposes of the MCA, upholding the promises in 19th century treaties that the United States entered into with the Muscogee (Creek) Nation.[51] Proponents have called it "a landmark case and probably the most important Indian law case in the last half a century to come down from the court."[52] But opponents have decried the decision. The Oklahoma Governor Kevin Stitt in his 2022 State of Address challenged the decision, saying, "Put simply, McGirt jeopardizes justice."[53]

Although the holding in *McGirt* is narrowly applied to criminal jurisdiction, it leaves open serious questions about the jurisdictional authority of the Muscogee (Creek) Nation and the State of Oklahoma within the reservation borders. The issues of federal, state, and tribal jurisdiction are ones that exist nationwide and "the language of the decision itself goes far beyond Oklahoma."[54] Because of the decision's potential to impact other areas of federal Indian law, from the interpretation of treaty rights to the recognition of tribal sovereignty to the development of natural resources on tribal lands, we offer here a brief examination of the *McGirt* decision.

In 1997, Jimcy McGirt, a member of the Seminole Nation of Oklahoma, was convicted in a state court for sexual offenses committed in a part of Oklahoma that he claimed was within the Creek reservation.[55] In post-conviction proceedings, McGirt alleged that Oklahoma did not have criminal jurisdiction over him because he is an Indian and because his

49. *Id.*

50. *Id.*

51. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

52. Quote of Sarah Deer, citizen of the Muscogee (Creek) Nation of Oklahoma and professor at the University of Kansas. *"Most Important Indian Law Case in Half a Century": Supreme Court Upholds Tribal Sovereignty in OK* (Democracy Now! media broadcast July 10, 2020), https://perma.cc/RNW7-TVFU [hereinafter Sarah Deer].

53. Sean Rowley, *Oklahoma Governor Knocks McGirt Ruling*, Cherokee Phoenix, Feb. 11, 2022, https://perma.cc/43MW-FCYY.

54. Sarah Deer, *supra* note 52.

55. *McGirt*, 140 S. Ct. at 2459 (Gorsuch, J., majority), 2482 (Roberts, J., dissenting).

crimes took place on reservation land.[56] Under the MCA, Indians who allegedly commit certain crimes in Indian Country are subject to federal, and sometimes tribal, prosecution, but not state jurisdiction.[57] The Oklahoma courts rejected his argument that the reservation continued to exist and held that the State possessed criminal jurisdiction over his actions.[58]

In the 2019 term, the Court granted certiorari in McGirt's case to address "whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law."[59] The MCA defines "Indian Country" as (1) all lands within an Indian reservation, (2) all dependent Indian communities, and (3) all Indian allotments that still have Indian titles.[60] In order to meet this definition an area may meet any one of these three categories.[61] Accordingly, the Court examined whether the Creek lands met the definition of Indian Country.[62]

The State of Oklahoma argued in its brief that the Creek lands were never a reservation at all, because the treaties signed by the Muscogee did not contain the term "reservation."[63] The Court found this argument unconvincing, however, noting that many of the treaties signed by the Muscogee predated the widespread use of the term.[64] Writing for the Court, Justice Neil Gorsuch wrote that it "should be obvious" that "Congress established a reservation for the Creeks" because of the similarity of the nature of the promises in the treaty as with later treaties which did use the word "reservation."[65]

The next question before the Court was whether the Creek reservation had been disestablished. In its brief, Oklahoma argued that even if the treaties had created a reservation, it had since been disestablished.[66] Oklahoma also argued that disestablishment could have occurred in several manners.

56. Petition for Writ of Certiorari at *13, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

57. 18 U.S.C. § 1153(a) (2018).

58. *McGirt*, 140 S. Ct. at 2459.

59. *Id.*

60. 18 U.S.C. § 1151.

61. *Id.*

62. Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post-McGirt: Implications for Traditional Energy Development and Beyond*, 45 HARV. ENVTL. L. REV. 249, 263–64 (2021).

63. "The Creek Nation's former territory was not established as a reservation. When Congress removed the Creeks to present-day Oklahoma, it did not confine them to reservations, but instead granted them land in communal fee simple." Brief for Respondent at 5, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

64. "These early treaties did not refer to the Creek lands as a 'reservation'—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation." *McGirt*, 140 S. Ct. at 2461 (citing Menominee Tribe v. United States, 391 U.S. 404, 405 (1968)).

65. *Id.* at 2460–61.

66. Brief for Respondent, *supra* note 63, at 1.

The first is that the Creek Nation Reservation lost its reservation status through allotment.[67] However, the Court rejected this argument, relying on the precedent set in *Mattz v. Arnett*,[68] which states that "[A]llotment under the . . . Act is completely consistent with continued reservation status."[69] Oklahoma in its brief further sought to prove disestablishment by pointing out ways in which Congress has intruded on the Creek's promised right to self-governance in Indian Country.[70]

The Court recognized that "[p]lainly, these laws represented serious blows to the Creek," but found that no Act of Congress has dissolved or disestablished the reservation[71]—including the Act recognizing Oklahoma's statehood in 1907.[72] Relying on the precedent set in *Solem v. Bartlett*,[73] which states that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise," the Court found that there was no clear evidence of Congress explicitly disestablishing the reservation.[74]

The Court also found unconvincing the argument advanced in Oklahoma's brief that asked the Court to consider the historical practices and demographics as proof of disestablishment.[75] The State read the precedent in *Solem* as requiring the Court to examine contemporary events as a second step of three steps in determining if a reservation has been disestablished.[76] However, the Court found that since Congress had not expressed clear intent to disestablish the Muscogee Reservation, the first of the *Solem* steps, that it would be unnecessary to examine the remaining steps.[77]

As a final move, the State, in its brief, called upon the Court to consider the potential negative effects that "turning" eastern Oklahoma into reservation would have on the State, "abandon[ing] any pretense of law."[78] In rejecting this argument, the Court remarked that "neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today."[79] Further, it rejected the idea that the magnitude of a legal

67. *Id.* at 14.
68. 412 U.S. 481 (1973).
69. *McGirt*, 140 S. Ct. at 2464 (quoting *Mattz*, 412 U.S. at 497).
70. *Id.* at 2465.
71. *Id.* at 2465–66.
72. *Id.* at 2477.
73. 465 U.S. 463 (1984).
74. *McGirt*, 140 S. Ct. at 2468 (citing *Solem*, 465 U.S. at 470).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 2478.
79. *Id.* at 2479.

wrong is any reason to continue to perpetuate it.[80] In response to the State of Oklahoma's argument, the opinion emphasized that the holding is only to be applied to criminal law in this instance and noted that although there are many statutes that borrow from the language of the MCA which may cause the holding to be applied to civil jurisdiction and alter the current regulatory scheme, that is not a sufficient reason to skew the Court's interpretation.

> The only question before us, however, concerns the statutory definition of "Indian Country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian Country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.[81]

At the conclusion of the opinion, the majority remarked that there are many instances of Oklahoma and tribes working successfully as partners through intergovernmental agreements relating to regulatory questions.[82]

The holding in *McGirt* has already had profound impacts. More than 30 petitions have been filed by the State of Oklahoma asking the Supreme Court of the United States to overrule its decision.[83] Yet, despite opposition to the holding from the State, the Oklahoma courts have followed *McGirt* by applying its ruling in the limited scope of the MCA to all Five Civilized Tribes (Choctaw, Cherokee, Seminole, Muscogee (Creek), and Chickasaw), finding that the historic boundaries of their reservations were also never disestablished for the purposes of the MCA.[84]

## III. A Study of Jurisdictional Uncertainties: Surface Mining on the Muscogee (Creek) Nation Reservation

There is still a long road ahead before the implications of *McGirt* will be fully revealed. As the Court pointed out at the end of its decision, the State of Oklahoma has a long history of intergovernmental cooperation with

80. "In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. And if the threat of unsettling convictions cannot save a precedent of this Court, see Ramos v. Louisiana, 140 S. Ct. 1390, 1406–08 (2020) (plurality opinion), it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all." *Id.* at 2480 (italics omitted).

81. *Id.*

82. *Id.* at 2481.

83. Andrew Westney, *Justices Sink Many Okla. Petitions Seeking to Upend McGirt*, Law 360 (Jan. 24, 2022), https://perma.cc/HMN8-QG5J.

84. *See generally* Bosse v. Oklahoma, 484 P.3d 286 (Okla. Crim. App. 2021); Hogner v. Oklahoma, 500 P.3d 629 (Okla. Crim. App. 2021); Sizemore v. Oklahoma, 485 P.3d 867 (Okla. Crim. App. 2021); Grayson v. Oklahoma, 485 P.3d 250 (Okla. Crim. App. 2021).

tribes.[85] Yet, in the time since the decision was issued, there has been little evidence of this cooperation. Instead, issues of civil jurisdiction have come to a head between the federal, state, and tribal governments. One example is the ongoing dispute for regulatory authority over surface mining on Muscogee (Creek) Nation reservation lands in *State of Oklahoma v. United States Department of the Interior*.[86] In this section, we examine the Surface Mining Control and Reclamation Act and the ongoing litigation.

### *A. Just Scratching the Surface: Provisions of the Surface Mining Control and Reclamation Act*

The case of *State of Oklahoma v. United States Department of the Interior* involves a battle for regulatory authority between the State of Oklahoma and the United States Department of the Interior ("DOI") under the Surface Mining and Reclamation Act on the Muscogee (Creek) Nation Reservation.[87] Surface mining is a method of extraction in which soil and rock covering a shallow ore deposit are removed to access the ore.[88] The techniques utilized in surface mining are often invasive and create environmental and public health concerns, and the effects of surface mining often linger long after the operations themselves have ended.[89] Environmental policies have attempted to account for the long-term effects of mining by including provisions that require remediation, reclamation, rehabilitation, restoration, or a combination thereof, following the completion of a mining operation.[90] One controlling federal law is the Surface Mining Control and Reclamation Act ("SMCRA").[91]

The SMCRA was passed on August 3, 1977, as the primary federal law to regulate all surface coal mining operations.[92] The SMCRA established federal regulations for active coal mines and created the Abandoned Mine Land ("AML") fund to fund the cleanup of mines that were aban-

85. McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020).

86. No. CIV-21-719-F, 2021 WL 6064000 (W.D. Okla., Dec. 22, 2021).

87. *Id.* at *1.

88. *See generally* Ana T. Lima et al., *The Legacy of Surface Mining: Remediation, Restoration, Reclamation and Rehabilitation*, 66 ENVTL. SCI. & POL'Y 227 (2016).

89. *See generally id.* at 227.

90. *See generally id.*; *What Are Environmental Regulations on Mining Activities?* AM. GEOSCIENCES INST., https://perma.cc/7339-WZEW (some important federal laws guiding environmental regulation of mining in the United States include: the National Environmental Policy Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Clean Water Act, the Toxic Substances Control Act, and the Comprehensive Environmental Response and Liability Act.).

91. 30 U.S.C. § 1202 (2018).

92. United States v. Navajo Nation, 556 U.S. 287, 300 (2009).

doned prior to 1977.[93] The SMCRA created the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), a federal agency housed within DOI, tasked with promulgating regulations, funding state regulatory and reclamation efforts, and ensuring consistency amongst state regulatory programs.[94]

The OSMRE enforces the SMCRA requirements through two major programs: Title IV and Title V.[95] Title IV in essence balances federal interest in coal production with the need to protect the environment from the adverse effects of surface coal mining.[96] Title IV addresses lands that were previously mined and abandoned prior to the enactment of the SMCRA.[97] It administers funds to reclaim the land and water resources that were adversely affected by the mining that occurred.[98] Title IV created the AML fund, which is administered by DOI to states and tribes to pay for local cleanup efforts.[99] In 2016, the OSMRE implemented the AML Economic Revitalization pilot program, which has provided grants to multiple states and three tribes that exhibited the highest amount of unfunded AML sites.[100] These funds are intended to accelerate economic revitalization and community development in conjunction with mine reclamation.[101]

Title V requires the implementation of programs to regulate ongoing surface mining operations in a way that is environmentally responsible.[102] Until a state or tribe demonstrates the ability to manage a regulatory program that complies with all the SMCRA requirements, the OSMRE acts as the primary regulator for that area.[103] When a state or tribe submits and receives approval on a proposed regulatory program, it can obtain "pri-

93. 30 U.S.C. § 1231 (2018); Daniel Raimi, *Environmental Remediation and Infrastructure Policies Supporting Workers and Communities in Transition*, RES. FOR THE FUTURE and ENVTL. DEF. FUND 21 (Sept. 2020), https://perma.cc/F6G9-8CSH.

94. 30 U.S.C. § 1211 (2018); *History of OSMRE*, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, https://perma.cc/JS88-DC6V.

95. *See State and Tribal Contacts*, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, https://perma.cc/7R9V-6W6K.

96. 30 U.S.C. §§ 1251–1279 (2018).

97. 30 U.S.C. §§ 1232(g), 1234 (2018); Hamlet J. Barry, III, "*The Surface Mining Control and Reclamation Act of 1977*," *in* FEDERAL LANDS, LAWS AND POLICIES AND THE DEVELOPMENT OF NATURAL RESOURCES: A SHORT COURSE, Q-4 (1980), https://perma.cc/8Y4U-53MA; *Reclaiming Abandoned Mine Lands: Restoring the Environment*, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, https://perma.cc/7SLT-4HZZ.

98. Barry, *supra* note 97. *Reclaiming Abandoned Mine Lands: Restoring the Environment*, *supra* note 97 (Prior to the enactment of the SMCRA, there was very little regulatory oversight of coal mining operations, mine closure, or reclamation.).

99. Raimi, *supra* note 93, at 21.

100. *Reclaiming Abandoned Mine Lands: Restoring the Environment*, *supra* note 97.

101. *Id.*

102. *See* 30 U.S.C. § 1265 (2018).

103. *Regulating Active Coal Mines: Title V of the Surface Mining Control and Reclamation Act*, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, https://perma.cc/2SW8-VZEY.

macy."[104] Primacy states have "exclusive jurisdiction over the regulation of surface coal mining and reclamation."[105] Of note, currently 24 states have obtained primacy, but at the time of writing, no Indian tribe has obtained primacy.[106] Later in this article, we examine why tribes have not obtained primacy and what barriers may be obstructing them from doing so.

In the following section, we will examine a case in the United States District Court for the Western District of Oklahoma that attempts to answer who holds primacy on lands that have newly been reaffirmed as Muscogee (Creek) Nation lands.

### *B.* State of Oklahoma v. United States Department of the Interior

Oklahoma is a primacy state with approved Title IV and Title V regulatory programs.[107] These programs have operated on state lands and lands that fall within the newly defined Muscogee (Creek) Nation Reservation.[108] Upon the holding in *McGirt*, the OSMRE sent letters to the Oklahoma Department of Mines and the Oklahoma Conservation Commission notifying them that the state regulatory program could no longer be administered "on lands within the exterior boundary of the Muscogee (Creek) Nation Reservation."[109] In the letters, the OSMRE explained that it would now assume authority over the Title IV AML reclamation program on the newly defined Muscogee (Creek) Nation lands and act as the SMCRA Title V regulatory authority.[110] Further, in the letter, the OSMRE ordered that the transition occur within approximately 30 days.[111]

The State of Oklahoma responded to the OSMRE on April 16, 2021, challenging its interpretation of the *McGirt* decision as having "no adequate basis in law" and advising that the State would not comply.[112] On May 18, 2021, the OSMRE filed a Notice of Decision in the *Federal Register* stating that the agency had the sole jurisdiction to administer the SMCRA within

104. *Id.*

105. 30 U.S.C. § 1253(a) (2018).

106. *Regulating Active Coal Mines: Title V of the Surface Mining Control and Reclamation Act*, *supra* note 103 (States with primacy include Alabama, Alaska, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wyoming.).

107. Oklahoma v. U.S. Dep't of the Interior, No. CIV-21-719-F, ___ F. Supp. 3d ___, 2021 WL 6064000 at *2 (W.D. Okla., Dec. 22, 2021); *see generally Regulating Active Coal Mines: Title V of the Surface Mining Control and Reclamation Act*, *supra* note 103.

108. *Oklahoma*, ___ F. Supp. 3d at ___, 2021 WL 6064000 at *2 (explaining that Oklahoma "could no longer operate its state regulatory program on the (newly confirmed) Creek Reservation because it qualifies as 'Indian land' under SMCRA").

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

the exterior boundaries of the Muscogee Reservation.[113] In effect, the Notice foreclosed Oklahoma's SMCRA authority over the newly defined reservation land and initiated the transfer of the SMCRA Title IV and Title V programs to the OSMRE.[114] The OSMRE also denied Oklahoma's funding request for its Title IV program.[115] Further, the OSMRE advised the State that it would not release any remaining federal funds for the Title V program on the newly defined reservation land.[116] It is also worthwhile noting that later in 2021, the OSMRE issued a notice reclaiming regulatory authority over the Cherokee Nation Reservation and the Choctaw Nation Reservation.[117]

The State of Oklahoma then filed a complaint for declaratory and injunctive relief against DOI in the United States District Court for the Western District of Oklahoma.[118] The case is before Judge Stephen Friot, an outspoken critic of the *McGirt* decision.[119] The State of Oklahoma challenged the OSMRE's interpretation of the SMCRA and contended that the *McGirt* holding does not apply to matters unrelated to criminal jurisdiction.[120] The State based this argument on a 2005 ruling in *City of Sherrill v. Oneida Indian Nation of New York*,[121] in which the Court held that the repurchase of traditional tribal lands did not restore tribal sovereignty to the lands. The *City of Sherrill* Court also invoked the doctrine of laches to limit land claims through laches, particularly on land operated for 200 years not as a reservation.[122] The State argued that a similar logic could be applied to the lands confirmed in *McGirt* and advanced reliance arguments that it would be forced to substantially alter its operations with respect to surface mining.[123]

113. Loss of State Jurisdiction to Administer the Surface Mining Control and Reclamation Act of 1977 Within the Exterior Boundaries of the Muscogee (Creek) Nation Reservation in the State of Oklahoma, 86 Fed. Reg. at 26941 (May 18, 2021).

114. *Id.*

115. *Oklahoma*, ___ F. Supp. 3d. at ___, 2021 WL 6064000 at *2.

116. *Id.*

117. OSMRE Jurisdiction to Administer the Surface Mining Control and Reclamation Act of 1977 Within the Exterior Boundaries of the Cherokee Nation Reservation and the Choctaw Nation Reservation in the State of Oklahoma, 86 Fed. Reg. at 57854 (Oct. 19, 2021).

118. *Oklahoma*, ___ F. Supp. 3d. at ___, 2021 WL 6064000 at *3.

119. Transcript of Motion for Preliminary Injunction Before the Honorable Stephen P. Friot, United States District Judge, December 2, 2021 1:30 P.M. at 7–8, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Dec. 7, 2021) [hereinafter Transcript].

120. The state of Oklahoma also claims that the DOI's action violated the Administrative Procedure Act ("APA") when it disapproved the state reclamation program, arbitrarily and capriciously denied OSMRE funds to the state, and failed to satisfy APA procedural requirements in its notice of decision. The DOI denies these arbitrary and capricious violations, arguing that jurisdiction was conferred as a matter of law in McGirt. *Oklahoma*, ___ F. Supp. 3d. at ___, 2021 WL 6064000 at *3.

121. 544 U.S. 197 (2005).

122. *Id.* at 221.

123. *Id.*

In its response, the DOI argued that the State of Oklahoma was wrong to suggest that the *McGirt* decision would only be applicable to the MCA, as it would logically follow that if the Muscogee (Creek) Nation Reservation would be classified as tribal land for the purposes of the one act, it would also be classified as tribal land for the purposes of another.[124] It asserted that once *McGirt* confirmed the land as a reservation it became a matter of law and reliance arguments were unpersuasive.[125]

The State did not name the Muscogee (Creek) Nation as a party in the litigation, even though the case concerns jurisdiction over Muscogee lands. In an effort to protect its sovereign rights and the status of its lands, the Muscogee (Creek) Nation filed a motion to intervene as a defendant.[126] The Nation moved to intervene for the special and limited purpose of seeking dismissal under Federal Rules of Civil Procedure 12(b)(7) and 19 for failure to join the Nation, a required party who cannot be joined due to sovereign immunity.[127] Both the plaintiffs and the defendants filed responses in opposition to the Muscogee (Creek) Nation's motion for intervention.[128] On November 1, 2021, Judge Friot issued an order denying intervention for the Muscogee (Creek) Nation.[129] It was clear that he wanted to be able to reach

124. Federal Defendants' Answer to Plaintiffs' Amended Complaint and Counterclaims at 14, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Jan. 24, 2022) https://perma.cc/S4D9-ZRW9.

125. *Id.*

126. Motion of the Muscogee (Creek) Nation for Limited Intervention and Brief in Support at 7, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Sept. 10, 2021) https://perma.cc/5SY2-XKYP [hereinafter Motion for Intervention]; FED. R. CIV. P. 24 ("(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. (b) Permissive Intervention. (1) *In General.* On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact. (2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order. (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.").

127. Motion for Intervention, *supra* note 126, at 7; FED. R. CIV. P. 12(b)(7) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (7) failure to join a party under Rule 19.").

128. Plaintiffs' Response in Opposition to Motion of the Muscogee (Creek) Nation for Limited Intervention and Brief in Support, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Oct. 1, 2021) https://perma.cc/3387-X2PT [hereinafter Plaintiffs' Opposition]; Federal Defendants' Response in Opposition to Motion of the Muscogee (Creek) Nation for Limited Intervention, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Oct. 1, 2021), https://perma.cc/JX87-2TYG [hereinafter Defendants' Opposition].

129. Order, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Nov. 1, 2021), https://perma.cc/QS97-PM5A.

the merits of the case.[130] His order denying the motion stated that a dismissal would have meant that the federal courts lack the power to adjudicate issues of authority of a federal agency, charged with the responsibility for administration of a program created by a federal statute and funded predominantly by federal funds.[131]

At the time of writing, the United States District Court for the Western District of Oklahoma has yet to issue a ruling in the case. In a hearing in this proceeding on December 2, 2021, Judge Friot said that *McGirt* "compels a finding" on surface mining reclamation that is in accordance with the holding that reservations exist under criminal law and that he "plan[ned] to rule without delay."[132] But Judge Friot has freely admitted that he does not think *McGirt* is good for the State of Oklahoma.[133] During the hearing, in response to challenges to the *McGirt* ruling, Judge Friot interjected the comment, "Have you ever known a federal district judge to overrule the United States Supreme Court?"[134] He further remarked in the hearing:

> I think the McGirt decision is a disaster for the State of Oklahoma . . . [t]his is a complex matter, and it would be foolish to try to read anything into my questions or comments one way or the other. And I've already cleared the air with one comment on the McGirt decision, as such, but that's really irrelevant to where this matter goes on the merits. And I want everyone to clearly understand that. It really is irrelevant to where this matter goes on the merits. If McGirt is going to be reviewed and revisited, it's going to have to be by the Supreme Court or by Congress. And certainly not by this court.[135]

Judge Friot has revealed that he is not poised to decide the OSMRE case with impartiality. In his order denying preliminary relief, he calls this case "a prime example of the havoc flowing from the *McGirt* decision."[136] Judge Friot lamented that the Supreme Court's decision has, in his opinion, put Oklahoma "in a uniquely disadvantaged position as compared to the other forty-nine states."[137] In any event, the case of *State of Oklahoma vs. United States Department of the Interior* is unlikely to stop at the district court. But until the time the Supreme Court should decide to accept certiorari in a case that would clarify *McGirt*'s scope, it is necessary to consider

130. *See id.* at 3–4.
131. *Id.*
132. Transcript, *supra* note 119, at 4.
133. *Id.* at 7–8.
134. *Id.* at 7.
135. *Id.* at 7–8, 69–70.
136. Oklahoma v. U.S. Dep't of the Interior, No. CIV-21-719-F, ___ Fed. Supp. 3d ___, 2021 WL 6064000 at *1 (W.D. Okla. Dec. 22, 2021).
137. *Id.*

the implications of judicial proceedings that are colored by disdain for the *McGirt* decision.[138]

## IV. Implications for Sovereignty and Environmental Justice

### *A. Tribes should be necessary parties in litigation involving their land and sovereignty*

As noted above, the State did not name the Muscogee (Creek) Nation as a party in the litigation when it filed its complaint in *State of Oklahoma v. United States Department of the Interior*. The decision of the State not to name the Muscogee (Creek) Nation as a party in the litigation in a case that squarely concerns Muscogee Creek lands, as well as the decision of the court not to grant intervention to the Nation, is concerning. The implications of this choice extend far beyond surface mining regulation and could have far-reaching effects on tribal sovereignty.

On September 10, 2021, two months after the complaint was filed by the State of Oklahoma, the Muscogee (Creek) Nation moved to intervene both as a right and permissively pursuant to Federal Rule of Civil Procedure 24.[139] The Muscogee Creek Nation sought to join the case, as noted above, on the basis that the case could impact the Muscogee (Creek) Nation's sovereign rights and regulatory jurisdiction under the SMCRA on its lands. The Nation moved to intervene for the special and limited purpose of seeking dismissal under Federal Rules of Civil Procedure 12(b)(7) and 19 for failure to join the Nation, a necessary party who cannot be joined due to sovereign immunity.[140] Under Federal Rule of Civil Procedure 19, persons needed for just adjudication must be joined if feasible.[141] As an American Indian tribe, the Muscogee (Creek) Nation retains a right to immunity from suit.[142] The

138. *See* Editorial Board, *The McGirt Ruling Breaches Its Levee*, Wall St. J., Dec. 26, 2021, at A18.

139. Motion for Intervention, *supra* note 126, at 1; Fed. R. Civ. P. 24.

140. Motion for Intervention, *supra* note 126, at 1; Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19.

141. Fed. R. Civ. P. 19(a) ("Persons Required to be Joined if Feasible. (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties, or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. (2) *Joinder by Court Order*. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.").

142. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940) (holding that an Indian tribe should retain the same level of immunity that it possessed when it was considered a separate sovereign); *see also* Wood, *supra* note 12, at 1594; Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375 (8th Cir. 1895) ("It has been the policy of the United

Nation chose not to waive its sovereign immunity or consent to the suit.[143] When joinder of a necessary party is not feasible, such as in this case, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or be dismissed.[144] Thus, the federal district court sought to determine if, or perhaps chose to construct a way in which, the action could continue without the Muscogee (Creek) Nation as a party.

In its motion to intervene, the Muscogee (Creek) Nation stated that it met the requirements to intervene as a matter of right because the Nation's core sovereign interests in its reservation status and its interest in the regulatory jurisdiction on its reservation under the SMCRA are at stake in the case.[145] The Nation also contended that the DOI would not adequately represent the interests of the Tribe. The Nation pointed out that the DOI has a duty to serve the federal government's interests and those of the broader public, whereas the Nation has unique interests specific to the Tribe and its citizens.[146] To demonstrate that the federal government does not have an unwavering interest in protecting its lands, the Nation referenced the United States' amicus brief in the *McGirt* case, which took the position that the Muscogee (Creek) Nation Reservation had been disestablished.[147]

In its motion to intervene, the Nation explained that its interest in the case went beyond that of the federal government and it wished to join the case as means of protecting its reservation status and protecting its right to self-governance.[148] The Nation explained that it was not seeking to join the litigation to defend federal authority under the SMCRA; rather, it has an interest in defending *tribal* jurisdiction within the reservation.[149]

States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual.").

143. Motion for Intervention, *supra* note 126, at 7.

144. FED. R. CIV. P. 19(b) ("When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.").

145. Motion for Intervention, *supra* note 126, at 7. *See* United States v. Questar Gas Mgmt. Co., No. 2:08-CV-167-DAK, 2010 WL187227, at *2 (D. Utah Jan. 13, 2010).

146. Motion for Intervention, *supra* note 126, at 16.

147. *Id.* at 7.

148. *Id.* at 16–17.

149. Reply of Muscogee (Creek) Nation in Support of Motion for Limited Intervention at 11–12, *Oklahoma v. U.S. Dep't of the Interior*, No. CIV-21-719-F (W.D. Okla. Oct. 8, 2021), https://perma.cc/5B9C-XLZU [hereinafter Intervention Reply].

The Nation cited to *Kane County v. United States*,[150] a case in which an environmental group was permitted to intervene as a matter of right in a suit regarding the scope of a right of way because the federal government's interests were not fully consistent with the environmental group's interests, as the government supported a far more expansive right of way than the environmental group did.[151] The Nation argued that, as in *Kane County*, while the government and the Nation may have the same objective in this proceeding, their interests are not coextensive.[152]

The plaintiffs and defendants each filed a response opposing intervention.[153] The State argued that the Nation's concerns were misplaced, because the action did not seek to overturn *McGirt* or directly attack the Nation's reservation status.[154] The DOI argued that because, unlike in *Kane*, here the objective of the Muscogee (Creek) Nation was identical to that of the federal government, the DOI would provide adequate representation and the Nation's interests were not at risk of impairment.[155] Opposing the intervention of the Muscogee (Creek) Nation allowed for the parties to continue to advance their interests in reaching the merits of the case. While the State and the DOI have opposing positions on the merits, they both shared a desire for the court to reach the merits and saw the Nation's participation as an impediment to doing so—as did, obviously, the court.

On November 1, 2021, the United States District Court for the Western District of Oklahoma issued an order denying the Nation's motion for intervention. In the order's discussion of the Nation's motion to intervene as a matter of right under Rule 24, the court considered two conditions: (1) whether the Nation had an interest that may, as a practical matter, be impaired or impeded by the disposition of the litigation, and (2) whether the existing parties would adequately represent its interests.[156] The court found that the Nation met the first condition for intervention, as it has a sovereign interest related to the action, "even if the particular legal issues raised by the plaintiff's Complaint do not require the court to make a reservation status determination."[157]

The court denied the motion for intervention on the basis that the Nation was adequately represented by the existing parties.[158] Applying the

150. 928 F.3d 877 (10th Cir. 2019).

151. *See id.* at 894–95.

152. Motion for Intervention, *supra* note 126, at 9–10.

153. *See* Plaintiffs' Opposition, *supra* note 128; Defendants' Opposition, *supra* note 128; Intervention Reply, *supra* note 149.

154. Order, *supra* note 129, at 6.

155. Defendants' Opposition, *supra* note 128.

156. Order, *supra* note 129, at 3.

157. *Id.* at 6–7.

158. *Id.* at 1.

precedent set in *Tri-State Generation & Transmission Association, Inc. v. New Mexico Public Regulation Commission*,[159] a case concerning a power supplier and the New Mexico Public Regulation Commission, the order stated that joinder is not necessary when the "objective of the applicant for intervention is identical to that of one of the parties."[160] The court also applied the precedent set in *San Juan County, Utah v. United States*,[161] in which the motion to intervene of an environmental group was denied on the basis that the interest of the party was identical to that of the federal government and the federal government adequately represented the group's interest. (Notably, neither of these cases relied on by the court involved sovereign governments attempting to join cases adjudicating the limits of their own sovereignty.)

In the case at hand, the key issue is whether the OSMRE has jurisdiction over the lands recognized by *McGirt* to be within the boundaries of the Muscogee (Creek) Nation Reservation. The court echoed that the DOI's "assertion that they will adequately represent [the applicant's] interest in this case is entitled to respect."[162] In other words, the court based its denial on the presumption that the DOI will necessarily argue the Nation's lands constituted "Indian lands" under the SMCRA in advocating for its *own* jurisdiction.[163]

We question why the court apparently did not attend to the fact that the tribe is a sovereign government, and as such, it is impossible for any other litigant to fully represent the tribe's interests. The unique status of tribes within the federal system should warrant special consideration in its motion to intervene as a domestic dependent nation. As the court acknowledges in its order, Rule 24 "is not a mechanical rule" but instead "requires courts to exercise judgment based on the specific circumstances of the case."[164] One might wonder why the court did not find the tribe's sovereign status to be relevant in the analysis. This is particularly surprising given that this court sits in a jurisdiction with an extensive history of dealing with tribal governments and with a large Native American population.

The district court stated, in its order, that granting intervention to the Muscogee would mean that the State had no forum to seek adjudication of the legality of the federal agency's actions.[165] But in a case that hinges on whether the definition of "Indian lands" has been met, why not start on Indian lands and litigate the matter beginning in the tribal court system?

159. 787 F.3d 1068 (10th Cir. 2015).
160. *Id.* at 1072.
161. 505 F.3d 1163 (10th Cir. 2007).
162. *Id.* at 1206.
163. Order, *supra* note 129, at 5.
164. *Id.* at 4 (quoting *San Juan Cty.*, 503 F.3d at 1199).
165. *Id.* at 2.

Tribal courts are perhaps the best poised to make determinations on their own jurisdiction. Exhaustion of tribal court remedies allows tribal courts to "explain to the parties the precise basis for accepting jurisdiction, and . . . also provide[s] other courts with the benefit of their expertise in such matters in the event of further judicial review."[166] And litigants still preserve their right to seek review of tribal court decisions by the federal courts.[167]

As similar litigation is advanced in Oklahoma and other jurisdictions, we argue that the dismissal of the Muscogee (Creek) Nation's motion to intervene should be overturned. It is fundamentally bizarre that a sovereign nation would be denied intervention in litigation over jurisdiction on its own lands. A series of broken promises and attempts to dissolve the Muscogee (Creek) Nation have demonstrated how the federal government has failed to act as a representative for the Tribe.[168] Considering the ongoing and pervasive difficulty of tribes to be recognized by state agencies, businesses, and the general public as legitimate sovereign governments, failure to join it in this case only advances inherently incorrect, archaic narratives of tribes as powerless wards of the federal government.

### *B. Regulatory Capacity Building*

Environmental regulation in the United States is based on a cooperative federalism model, where states and, more recently, tribes, can play a leading role, while the federal government retains ultimate oversight.[169] Under the major environmental statutes such as the Clean Air Act, Clean Water Act, and Safe Drinking Water Act, states and tribes can apply to the Environmental Protection Agency ("EPA") for delegated authority to implement regulatory programs within their borders.[170] For tribes, this author-

166. Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1990) (quoting National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985)).

167. Brown v. Washoe Hous. Auth., 835 F.2d 1327 (10th Cir. 1988).

168. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2460–62 (2020) (examining the history of broken treaty promises to the Muscogee (Creek) Nation); Harjo v. Kleppe, 410 F. Supp. 1110, 1119–36 (D.D.C. 1976) (describing the unsuccessful efforts of the federal government to dissolve the Muscogee (Creek) Nation).

169. Mellie Haider & Manuel P. Teodoro, *Environmental Federalism in Indian Country: Sovereignty, Primacy, and Environmental Protection*, 49 POL'Y STUD. J. 887, 890 (2020).

170. When first passed in the 1970s or early 1980s, as applicable, the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation, and Liability Act envisioned that states, but not tribes, could apply for delegated authority. As a result, tribal land, air, and water were outside of the scope of state jurisdiction, and were largely ignored by the federal government as a trustee for the tribes. *Id.* at 887. In subsequent decades, the Acts were amended to allow tribes to play essentially the same role in Indian Country that states do within state lands if they receive the approval of the EPA to do so. Darren J. Ranco, *Power and Knowledge in Regulating American Indian Environments: The Trust Responsibility, Limited Sovereignty, and the Problem of Difference in* ENVIRONMENTAL CRISIS OR CRISIS OF EPISTEMOLOGY? WORKING FOR SUSTAINABLE KNOWLEDGE AND ENVIRONMENTAL JUSTICE 107 (Bunyan Bryant ed., 2011).

ization is referred to as "Treatment as a State" status ("TAS").[171] As of this writing, the EPA has granted TAS status to 103 of the 566 federally recognized tribal nations for implementing at least one environmental regulatory function.[172] The SMCRA similarly allows for tribes to apply to the OSMRE for delegated authority to implement the SMCRA on their lands,[173] but as of yet, no tribes have obtained this authorization.[174] Therefore, the OSMRE implements the SMCRA on all tribal lands today.

The stark contrast between tribal authorities under the major environmental statutes as compared to the SMCRA can be attributed, in large part, to different approaches taken by the EPA and the OSMRE when working with tribes. The EPA has for quite some time provided grants and technical assistance to tribes seeking to build regulatory capacity and ultimately obtain primacy,[175] whereas the OSMRE does not appear to offer any material support to tribes seeking to develop the capacity to implement the SMCRA programs.[176]

Applying for TAS status is often a lengthy and complicated process. In order to be eligible for TAS status, a tribal nation must demonstrate to the EPA that: (i) it is federally recognized; (ii) it has a governing body that carries out substantial governmental duties and powers; (iii) it has jurisdiction and authority to govern the lands and resources in question; and (iv) it has a qualified and adequately sized staff to effectively implement the regulatory program.[177] Substantive hurdles reported by tribes in association with obtaining TAS status include jurisdictional complications from checkerboarded lands, lack of trained workers, and increased risk of conflict with the federal government.[178] Highly technical application requirements and limited resources for preparing the application are cited as procedural barriers.[179] To overcome these challenges, the EPA provides grant funding to

171. *Tribes Approved for Treatment as a State (TAS)*, U.S. ENVTL. PROT. AGENCY, https://perma.cc/V77K-25AB.

172. *Id.*

173. *Regulating Active Coal Mines: Title V of the Surface Mining Control and Reclamation Act*, *supra* note 103.

174. *Id.*

175. *See Indian Environmental General Assistance Program: Guidance on the Award and Management of General Assistance Agreements for Tribes and Intertribal Consortia*, U.S. ENVTL. PROT. AGENCY: OFFICE OF INT'L & TRIBAL AFFAIRS & AM. INDIAN ENVTL. OFFICE (May 15, 2013), https://perma.cc/B549-NE4V.

176. *See Regulating Active Coal Mines: Title V of the Surface Mining Control and Reclamation Act*, *supra* note 103.

177. *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Authority*, U.S. ENVTL. PROT. AGENCY (Jan. 23, 2008), https://perma.cc/U6W8-FKRX.

178. Sibyl Driver, *Native Water Protection Flows Through Self-Determination: Understanding Tribal Water Quality Standards and "Treatment as a State*," 163 J. CONTEMP. WATER RES. & EDUC. 6, 15 (2018).

179. *Id.* at 16.

tribes to develop their capacity to apply for TAS status; these funds are awarded to tribes on a competitive basis.[180] For example, the Clean Water Act ("CWA") provides that tribes can obtain TAS status,[181] and the EPA provides technical support and funding to tribes who wish to develop or continue to build their tribal water programs.[182]

While TAS provisions create a highly contingent form of tribal self-determination, given that the EPA has extensive authority over everything from tribal eligibility for TAS to the design and operation of tribal regulatory programs, they provide a starting point for meaningful tribal involvement and self-determination in environmental policy on their sovereign lands. Tribes with TAS status can incorporate their own traditional ecological knowledge into the regulatory process, subject to federal minimum standards and federal oversight.[183] Further, tribes with approved regulatory programs have the ability to inform policies with their own values and goals, such as using their own classification systems for resources.[184] Tribes with TAS status have heightened authority over non-Indians living within reservation boundaries.[185] Additionally, tribes with approved regulatory programs may see an increase in enforcement ability both on and off reservation, as they can in some instances challenge or veto federal permits on proximal resources.[186]

We recommend that the budget of the OSMRE be increased to provide funds for financial assistance and trainings for tribal capacity building, in much the same manner as the EPA supports capacity building under the major environmental laws. The DOI already administers funds for three tribes through AML grants and has a legacy of consulting with tribes regarding surface mining reclamation.[187] It is uniquely poised to offer additional assistance to tribes through capacity building. When tribes obtain primacy, they are empowered to make decisions about surface mining that resonate politically, culturally, and environmentally. Further, primacy may also help to alleviate socio-cultural problems that are sometimes tied to extractive industries, which we will examine below.

180. *Id.* at 15.

181. 33 U.S.C. § 1377(e) (2018).

182. Driver, *supra* note 178, at 39–40.

183. Elizabeth Kronk Warner, *Complicated Environmental Regulation in Indian Country*, REG. REV. (Mar. 15, 2021), https://perma.cc/9YYP-2YZV.

184. Driver, *supra* note 178, at 17.

185. *Id.*

186. *Id.*

187. *Reclaiming Abandoned Mine Lands: Restoring the Environment*, *supra* note 97.

### *C. Socio-Cultural Impacts of Extractive Industries in Indian Country*

This article focuses on issues of sovereignty and regulatory jurisdiction in Indian Country post-*McGirt*. We would be remiss, however, not to take a step back and consider for a moment some broader issues associated with extractive industries and energy development in Indian Country.

The continental United States contains approximately 56 million acres of Indian reservation land, located predominantly in the Great Plains and Southwest regions.[188] DOI estimates that these lands contain 15 million acres of untapped energy and mineral resources, in addition to the 2.1 million acres in Indian country already being developed for this purpose.[189] Development of these resources can—or cannot, depending on the terms of the transaction—boost tribal economies.[190]

But there is also a very real social and cultural cost to mineral, fossil fuel, or even renewable energy production on tribal lands. The violent effect of resource extraction on American Indian populations is a subject that deserves considerable attention and advocacy. Extractive industries have been called a "contemporary manifestation of settler colonialism" in which land and communities are exploited for profit.[191] The behavior of some extractive industry workers living in temporary housing on or near reservation lands have perpetuated this notion.[192] The "man camps" that pop up to house these workers are often a hotbed for "increased rates of violence, sexual assault, sexually transmitted infections, prostitution, sex trafficking, and increased presence of illicit drugs."[193] Lax standards for the hiring of sex offenders and the perceived lack of consequences for violence against Indigenous women contribute to this problem.[194]

This problem of sexual violence in Indian Country has been labeled an "epidemic," but this word does not capture the full extent of the severity of this devastating pattern of violence.[195] Violent crime victimization occurs at 2.5 times the national rate for Indigenous women, and one in three Indigenous women will be raped during her lifetime.[196] Moreover, "American In-

188. Maura Grogan et al., *Native American Lands and Natural Resource Development*, REVENUE WATCH INST. 6 (2011), https://perma.cc/5RHK-FWUF.

189. *Id.*

190. *See* Michael Maruca, *From Exploitation to Equity: Building Native-Owned Renewable Energy Generation in Indian Country*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 391 (2019).

191. A. Skylar Joseph, *A Modern Trail of Tears: The Missing and Murdered Indigenous Women (MMIW) Crisis in the U.S.*, 79 J. FORENSIC & LEGAL MED. 1, 5 (Apr. 2021).

192. Ana Condes, *Man Camps and Bad Men: Litigating Violence Against American Indian Women*, 116 NW. U. L. REV. 515, 558 (2021).

193. Joseph, *supra* note 191.

194. Condes, *supra* note 192, at 518.

195. *Id.* at 521.

196. *Id.*

dian women are more likely to be victimized by members of another race than by members of their own race" and are exceedingly more likely to be victimized by someone who is a stranger to the victim than are women from other racial groups.[197] The gendered violence and possession of the bodies of American Indian women mirrors that of the land seizure by settler colonialists, predicated on notions of inherent ownership and exploitation.[198]

When jurisdictional uncertainties persist in Indian Country, as in the *McGirt* case, it can impede the justice system and allow for violent crimes against Indigenous women to go unpunished. *McGirt* is the shorthand that has been adopted by legal practitioners and the media for *McGirt v. Oklahoma*. Consequently, the name *McGirt* has become synonymous with notions of Indigenous sovereignty. However, we feel it is important to acknowledge that the shorthand is derived from the surname of Jimcy McGirt, who was convicted in an Oklahoma state court for three serious sexual offenses against a four-year-old child. Mr. McGirt was ultimately sentenced to jail for life.[199] His case was merely an instrument for a larger cause and while his name will inextricably be tied to it, the victory and praise should lie with the attorneys and amici who advocated for the promises of the treaties to be upheld and to the brave victim who came forward to testify against Mr. McGirt almost twenty years after suffering the assault.[200]

As illustrated by the *McGirt* case, because of jurisdictional uncertainties, there is often little recourse for American Indian women who become victims of extractive industry workers. Federal, state, and tribal jurisdiction to prosecute the rape or murder of an Indigenous woman are dependent on where the crime occurred, the identity of the defendant, and a host of other factors.[201] This creates problems when a violent crime does occur, as victims may be uncertain which law enforcement body to report the crime to, law enforcement may be unsure whether they have authority, and prosecutors may be unsure who should bring charges against the alleged of-

197. *Id.*

198. *Id.* at 523.

199. Chris Casteel, *Victim in McGirt Case 'Plunged Back Into a Black Hole,' Federal Prosecutors Say*, Oklahoman (Jul. 26, 2021), https://perma.cc/FU8M-S7RP; *Jimcy McGirt Sentenced to Life Imprisonment*, U.S. Dep't of Justice (Aug. 25, 2021), https://perma.cc/8C97-C9F4.

200. *Id.*

201. Under the Major Crimes Act, federal courts—and in some instances, tribal courts—have jurisdiction over enumerated felonies committed on Indian lands, regardless of the victim's race, including sexual abuse, rape, and murder, regardless of the purported victim's race. Major Crimes Act of Mar. 3, 1885, 18 U.S.C. § 1153 (2018). Further, in six states, Public Law 280 confers to six states extensive criminal jurisdiction over Indian Country located within the state borders. *See* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2018), 25 U.S.C. §§ 1321–1326 (2018), 28 U.S.C. § 1360 (2018)). The six states include: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. The overlap of jurisdiction may mean that the same crime is be subject to federal jurisdiction or state jurisdiction as well as tribal jurisdiction.

fender.[202] These factors can cause delays that result in the loss of evidence and prolong the victim's suffering.[203]

Compounding this problem is the fact that tribes do not have the authority to try non-Indians who commit crimes against tribal members.[204] Congress attempted to address this problem in the 2013 Violence Against Women Act, which granted tribes the authority to prosecute certain domestic offenses committed against tribal members by non-Indians, which include, but are of course not limited to, sexual assaults on Native women committed by extractive industry workers.[205] However, the Act is limited in scope, as the alleged offender must have sufficient ties to the reservation for tribal jurisdiction to be conferred.[206]

Even in instances where the tribe has clear authority to prosecute a serious crime, it may choose not to do so for fear of rendering the perpetrator immune from state or federal prosecution.[207] Under the Indian Civil Rights Act of 1968, tribal courts can only impose maximum penalties of three years' incarceration and a $15,000 fine—even for serious crimes.[208]

Current efforts are being made toward addressing the crisis of Missing and Murdered Indigenous Women ("MMIW")—the name given to the epidemic of Indigenous women who disappear from reservations.[209] Exacerbation of the MMIW crisis can in part be attributed to the large influxes of extractive industry workers who temporarily move into Indigenous communities and engage in human trafficking, sex trafficking, or sexual and violent crimes.[210] In 2020, the Savanna Act was signed into law by Congress, as a means of addressing core issues associated with the MMIW crisis.[211] Some of the main provisions of the Act include clarifying the responsibilities of federal, state, and tribal governments, increasing coordination and communication between agencies, empowering tribal governments with the resources and information for responding to cases, and increasing the collection of data relating to missing and murdered Indigenous women.[212]

While a full discussion of these serious issues is beyond the scope of this article, we feel that any legal or policy approach to mining in Indian

202. Condes, *supra* note 192, at 536.

203. *Id.*

204. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193–95 (1978).

205. 25 U.S.C. § 1304.

206. Condes, *supra* note 192, at 535.

207. *Id.*

208. Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301–1304 (2018).

209. Joseph, *supra* note 191, at 1. **R**

210. A study of U.S. MMIW hotspots found that they were all the sites of previous or ongoing resource extraction projects. *Id.* at 14.

211. Savanna's Act, Pub. L. 116-65, 134 Stat. 760 (2010).

212. *Id.*

Country must acknowledge, and attempt to address, the effects of extractive industries on Indigenous women in these communities.

## V. Conclusion

Tribal nations have resource bases and business acumen to become major mineral and energy developers, but jurisdictional uncertainties and limitations of tribal self-determination in the United States create barriers for them to realize this potential. Following the *McGirt* decision, there has been significant attention drawn to the question of what the scope of tribal authority will be. To this end, we have used the surface mining case *State of Oklahoma v. United States Department of the Interior* to illustrate three important areas for consideration. First, in litigation concerning tribal lands, tribes should be a necessary party for litigation to proceed. Second, Congress should invest in pathways for tribes to build the capacity to create and manage their own programs and achieve primacy under laws such as the SMCRA. Third, when tribal self-determination is encouraged and jurisdictional boundaries are clear, tribes can retain agency over their energy future and are less susceptible to the social harms that have been associated with the development of energy projects. As federal Indian law has wavered between principles that view tribes as "independent and sovereign nations . . . [whose] claim to sovereignty long predates that of our own Government,"[213] and "ward[s] to [the federal government's] guardian,"[214] it is time to capitalize on the momentum from *McGirt* as a means to resurface and reclaim sovereignty.

213. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).
214. Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831).

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