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NOTE

# THE LAW OF UNINTENDED CONSEQUENCES: THE EFFECTS OF *MCGIRT* AND *CASTRO-HUERTA* ON OKLAHOMA'S ENERGY LANDSCAPE

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## I. Introduction

Oklahoma produces over three times more energy than it consumes.[1] The energy comes from numerous different sources.[2] Energy production predates Oklahoma's statehood, and when Oklahoma became a state in 1907, it led the Nation in crude oil production.[3] Today, the State is consistently one of the top producers in the Nation.[4] In 2021, Oklahoma

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* The research supporting this Note was current as of the time of writing.

1. *State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN (June 15, 2023), https://www.eia.gov/state/analysis.php?sid=OK.

2. *Id.*

3. *Id.*

4. *Id.*

was the sixth-largest crude oil producer in the Nation, third in the Nation for wind generation, had the sixth-largest natural gas reserves, and the energy sector employed over 84,000 people.[5] Because of the prevalence of natural resources, Oklahoma has long been home to large oil and gas companies such as Oklahoma Natural Gas, Chesapeake Energy, Continental Resources, and Devon Energy. However, the industry is not limited to a few key players. The Oklahoma Corporation Commission's "Operator Directory Listing" contains over 400 pages of registered operators.[6] While oil and gas are still strong in Oklahoma, new forces have entered the energy field over the last decade.

There has been a significant increase in renewable energy in the State. In 2022, forty-seven percent of Oklahoma's total in-state electricity generation came from renewable resources, which was a ten percent increase from 2011.[7] Also in 2022, north-central Oklahoma became home to North America's single-largest wind farm built at one time.[8] Oklahoma has hardly reached its potential. The State ranks seventh in the Nation for solar potential and may have the second-greatest wind capacity in 2023.[9] Tribal land is rich in renewable resources; three of the top fifteen tribes with hydropower potential are in Oklahoma.[10] The largest wind farm in the Nation that is entirely on Indian land will be in Oklahoma.[11] From Cimmaron County in the Oklahoma Panhandle to McCurtain County in the hilly southeast corner, the potential is endless.

The Oklahoma Corporation Commission governs the regulation of the energy sector. Article Nine of the Oklahoma Constitution established the

5. *Id.*; *Press Releases*, OKLA. CAREERTECH (Oct. 17, 2022), https://oklahoma.gov/careertech/media-center/press-releases/2022/oklahoma-celebrates-careers-in-energy-week.html#:~:text=Energy%20is%20the%20highest%2Dpaying,than%2084%2C000%20Oklahomans%20in%202021.

6. *See Form 1006B Report - Operators Directory Sorted by Operator's Name*, OKLA. CORP. COMM'N (Aug. 29, 2023, 10:54 AM), https://oklahoma.gov/content/dam/ok/en/occ/documents/og/ogdatafiles/operator-directory-listing.pdf.

7. *State Profile and Energy Estimates*, *supra* note 1.

8. *One of the largest wind farms in the United States was completed in Oklahoma last spring*, U.S. ENERGY INFO. ADMIN. (Nov. 21, 2022), https://www.eia.gov/todayinenergy/detail.php?id=54739#:~:text=In%20April%202022%2C%20the%20Traverse,one%20phase%20in%20North%20America.

9. *State Profile and Energy Estimates*, *supra* note 1.; *One of the largest wind farms in the United States was completed in Oklahoma last spring*, *supra* note 8.

10. *State Profile and Energy Estimates*, *supra* note 1.

11. *Id.*

Oklahoma Corporation Commission in 1907, and the first legislature granted it authority to regulate public service corporations.[12] In its early years, it mainly regulated railroads, telephones, and telegraphs. Nevertheless, as the State expanded, so did the Corporation Commission's authority. It began regulating water, heat, light, and power rates starting in 1913, and in 1914 it also started regulating oil and gas. However, in its current form, the Corporation Commission regulates "public utilities [including utility holdings of solar, wind, and water] . . . oil and gas drilling, production, and environmental protection, [and other commodities.]"[13]

The Corporation Commission has judicial, legislative, and administrative authority. Its "orders are appealable only to the Oklahoma Supreme Court."[14] Undoubtedly powerful, the Commission is one of limited jurisdiction, and the State has limited its authority by constitutional or statutory constraints.[15] The United States Supreme Court's recent determination that portions of Oklahoma are still Indian Country is an example of a constraint on the Corporation Commission's jurisdiction. So, while Oklahoma's energy sector is strong, the Supreme Court's recent decisions could impact and may even halt the growth of energy development and affect regulatory authority.

Over the last few years, the United States Supreme Court has decided two cases that could affect Oklahoma's energy production. Despite a century of understanding that the reservations in Oklahoma had been disestablished, in 2020 the Supreme Court held that part of Oklahoma was Indian Country.[16] The Court decided *McGirt v. Oklahoma*, which was the first such case in decades affecting the State's sovereignty. The majority found that the eastern portion of Oklahoma is Indian Country for purposes of the Major Crimes Act and encouraged the State and the Tribes to work together as partners.[17] While declaring a portion of Oklahoma Indian Country, Justice Gorsuch's majority opinion downplayed the risk the decision would have to other areas of law: "It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation . . . might potentially

12. *Oklahoma Corporation Commission History*, OKLA. CORP. COMM'N (Jan. 10, 2023), https://oklahoma.gov/occ/about/history.html.
13. *Id.*
14. *Id.*
15. Morgan v. Oklahoma Corp. Comm'n, 2012 OK 31, ¶10, 274 P.3d 832, 836.
16. McGirt v. Oklahoma, 140 S. Ct. 2452, 2457 (2020).
17. *Id.* at 2480-82.

trigger a variety of federal civil statutes and rules."[18] Those statutes would affect assistance with primary care clinics, highways, roads, and more.[19] Justice Gorsuch says these changes are "unwelcome" developments by some, while "others may celebrate them."[20] One of the unintended consequences could mean that the Bureau of Indian Affairs now has the primary responsibility for road maintenance programs in Indian Country that were previously under State or local jurisdiction.[21]

Two years later, in *Oklahoma v. Castro-Huerta*, the United States Supreme Court held that Oklahoma is not a reservation; instead, Indian Country is "part of the territory of Oklahoma."[22] *Castro-Huerta* attempted to narrow the reach of *McGirt* and held that "a State's jurisdiction in Indian [C]ountry may be preempted (i) by federal law . . . or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."[23] It also reinforced that Indian Country is part of the state it is within.[24] It went as far as saying that since the early 1900s, Indian Country was part of Oklahoma.[25] That is because the admission of Oklahoma into the Union supplanted the treaties, and there were no exceptions in the Enabling Act that would have displaced Oklahoma's jurisdiction.[26]

Despite *Castro-Huerta*'s attempt to clarify and *McGirt*'s focus on the Major Crimes Act, a local federal court decision in late 2022 shows that combining the two opinions can hurt Oklahoma's energy production. Judge Stephen Friot, from the Western District of Oklahoma, applied both cases in *Oklahoma v. United States DOI*.[27] Comparing the present case to *McGirt*, he found that since the Creek, Choctaw, and Cherokee Reservations "were not disestablished," they are Indian Reservations under the Surface Mining Control and Reclamation Act.[28] After using *McGirt* to determine the land was Indian Country, he turned to the preemption aspect of *Castro-Huerta*.[29] Because this land is now a

18. *Id.* at 2480.
19. *Id.*
20. *Id.*
21. *Id.*
22. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022).
23. *Id.* at 2494.
24. *Id.*
25. *Id.* at 2503.
26. *Id*.
27. Oklahoma v. United States DOI, 640 F.Supp.3d 1130 (W.D. Okla. 2022).
28. *Id*. at 1139.
29. *Id.* at 1139-40.

reservation under the statute's definition, the Surface Mining Control and Reclamation Act's text preempts Oklahoma's authority.[30] Since the only land in the State that this law applies to is now considered different reservations, Oklahoma has lost regulatory authority over "all surface coal mining and reclamation activities in the [S]tate."[31]

These cases left uncertainty in the Oklahoma energy sector. In *McGirt*, the dissent noted that "[t]he decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs."[32] As time passes, it appears the dissenters in *McGirt* knew what uncertainty the decision would cause. Native Americans have raised jurisdictional issues for the following types of cases: civil asset forfeiture, speeding tickets while in Tulsa, civil protection orders, child custody cases, and wildlife crimes.[33] But in a more recent legal development, the Oklahoma Criminal Court of Appeals held that the Kickapoo Reservation was disestablished and no longer exists.[34]

These instances are a few examples of the issues that remain in the wake of those decisions. It is only a matter of time before a Native American, not the Federal Government, raises a jurisdictional issue regarding the energy sector. *McGirt* and *Castro-Huerta* disrupted what was long established and understood. Those decisions raise serious questions regarding Oklahoma's ability to regulate energy production and could convolute future development, as seen in *Oklahoma v. United States DOI*. This Note will focus on the likely impact, or lack thereof, of *McGirt* and *Castro-Huerta* on Oklahoma's energy sector.

30. *Id.* at 1146.

31. *Id.* at 1142.

32. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting).

33. Allison Herrera, *Could civil forfeiture be the next battleground in Oklahoma Governor's fight over tribal sovereignty*, KOSU (Jan. 3, 2023, 6:00 AM), https://www.kosu.org/politics/2023-01-03/could-civil-forfeiture-be-the-next-battleground-in-oklahoma-governors-fight-over-tribal-sovereignty; Hooper v. City of Tulsa, 2022 U.S. Dist. Lexis 68640 (N.D. Okla. 2022); Milne v. Hudson, 2022 OK 84, 519 P.3d 511; Wren v. Yates, 2022 OK 88, 520 P.3d 383; Adolfo Flores, *Deer Hunting Violation Leads to Legal Skirmish Between Oklahoma, Native Tribes*, THE WALL ST. J. (Jan. 14 2023, 9:02 AM), https://www.wsj.com/articles/deer-hunting-violation-leads-to-legal-skirmish-between-oklahoma-native-tribes-11673702994.

34. Curtis Killman, *Appellate court: Kickapoo tribal reservation disestablished over 100 years ago*, TULSA WORLD (May 10, 2023), https://tulsaworld.com/news/state-and-regional/crime-and-courts/appellate-court-kickapoo-tribal-reservation-disestablished-over-100-years-ago/article_129e7fd0-9822-11ed-a200-f340b5d17c90.html.

## II. Analysis of *McGirt* and *Castro-Huerta*

The current issues originated when Jimmy McGirt, a member of the Seminole Nation, challenged his convictions by the State of Oklahoma.[35] He reasoned that because Congress never disestablished the Creek Reservation and that he was an Indian who committed crimes on the Reservation, that Oklahoma lacked jurisdiction.[36] The Major Crimes Act provides that among other things, "the term 'Indian [C]ountry' as used in this chapter, means (a) all land within the limits of any Indian reservation."[37] Mr. McGirt's appeal sought to establish that the Creek Reservation from the nineteenth century fell into that category.[38] While forgoing any procedural defenses, Oklahoma asked for the Court to confirm that the "land once given to the Creeks is no longer a reservation today."[39] The Court decided it was going to "hold the government to its word."[40]

When deciding that the Reservation still existed, the Court looked to acts of Congress.[41] Congress has significant authority for tribal relations, and only Congress can breach its assurances and treaties.[42] The only way for Congress to abolish a reservation is to "clearly express its intent to do so."[43] The Court then looks to allotments to see if this era is proof of Congressional disestablishment.[44] The Dawes Commission's work led to allotments of specific parcels to individual Native Americans with restrictions in 1901; over the years, the alienation restrictions were relaxed or waived and tribal members could sell the land to Indians or non-Indians.[45] Despite the ability to transfer the land in fee, and no statute saying, "anything like 'the present and total surrender of all tribal interests' in the affected lands," the Creek Reservation persevered through allotment.[46]

After further disproving Oklahoma's arguments, the Court explained

35. *McGirt*, 140 S. Ct. at 2459-60.
36. *Id.* at 2460.
37. 18 U.S.C. § 1151.
38. *McGirt*, 140 S. Ct. at 2460.
39. *Id.*
40. *Id*. at 2459.
41. *Id*. at 2462.
42. *Id.*
43. *Id.* at 2463.
44. *See id.* at 2464.
45. *Id.* at 2463.
46. *Id.* at 2464.

that there are many instances where non-Indians successfully live in reservations.[47] It also downplayed Oklahoma's worry that the decision will impact civil and regulatory law. Poorly attempting to limit this application to the Major Crimes Act, Justice Gorsuch said, "[t]he only question before us, however, concerns the statutory definition of 'Indian [C]ountry' as it applies in federal criminal law under the MCA[.]"[48] The Court limited this holding to the Creek Reservation, and downplayed Oklahoma's claim that Indians were waiting to challenge the jurisdiction, calling it "speculative."[49] But since the *McGirt* decision, courts have consistently dealt with jurisdictional challenges from Native Americans.[50] Over the last three years, Oklahoma Courts have recognized the Seminole, Cherokee, Choctaw, and Chickasaw Reservations as some which Congress never disestablished.[51] Oklahoma Courts have also found that Congress disestablished the Cheyenne-Arapaho, Kiowa Comanche Apache, and the Kickapoo Reservations.[52]

Two summers after *McGirt*, aiming to provide clarity to the states, the Supreme Court decided *Castro-Huerta*. *Castro-Huerta* arose because Oklahoma charged Victor Manuel Castro-Huerta with child neglect.[53] His daughter was a Cherokee Indian, and Castro-Huerta claimed that her ethnicity prevented State prosecution against him because of the *McGirt* decision.[54] The Supreme Court overturned the lower courts and held that the State had concurrent jurisdiction with the federal government.[55]

*Castro-Huerta* attempted to narrow *McGirt*. While attempting to do so, the Court reaffirmed that "Indian [C]ountry is part of the [S]tate, not separate from it."[56] But there are instances where the State would lack jurisdiction. Absent one of those few instances, the "State has jurisdiction over all of its territory, including Indian [C]ountry."[57] In the early republic,

47. *Id.* at 2479.
48. *Id.* at 2480.
49. *Id.* at 2479.
50. *See* Herrera, *supra* note 33.
51. Chris Casteel, *Choctaw, Seminole reservations recognized by Oklahoma appeals court*, THE OKLAHOMAN (Apr. 1, 2021, 4:27 PM), https://www.oklahoman.com/story/news/2021/04/01/choctaw-seminole-reservations-oklahoma-appeals-court-recognizes/4835019001/.
52. *See* Killman, *supra* note 34.
53. *Castro-Huerta*, 142 S. Ct. at 2491.
54. *Id.* at 2492.
55. *Id.* at 2491.
56. *Id.* at 2493.
57. *Id.*

Indian Country and a state were viewed as separate nations. However, since 1880, the Court had no longer viewed reservations as distinct nations.[58] The Supreme Court treated the two as one as recently as 2001.[59] So, over the last 143 years, absent preemption, states have exercised jurisdiction in Indian Country.

There are two ways that a state's jurisdiction can be preempted: "by federal law under ordinary principles . . . [or if] the exercise of state jurisdiction would unlawfully infringe on tribal self-government."[60] The first step of the analysis looks to a statute to see if there is, or were, any text which would indicate preemption.[61] One indication of preemption is whether the act equates Indian Country to a federal enclave. Its language must be explicit; Congress cannot implicitly intend to treat Indian Country as a federal enclave.[62] Because of this requirement, the Court cannot replace the law's text with its assumptions of Congress' intent when it authorized the bill. Instead, the Court presumes that "the legislature says what it means and means what it says."[63] A court can also look to the legislative history to determine if it was meant to divest a state's pre-existing jurisdiction.[64] Although the Court analyzes criminal law in this case, Judge Friot applied *Castro-Huerta* in the civil regulatory realm.

The other way preemption occurs is if the exercise of state jurisdiction infringes upon a tribe's ability to self-govern.[65] The Court applied the *Bracker* balancing test, which looks at tribal, national, and state interests. In *Castro-Huerta*, the Court determined that since the case was between the State and a non-Indian, there was no justification for the infringement on tribal self-governance.[66] The Court also determined that the prosecution would not harm national interests. Lastly, "the State has a strong sovereign interest in ensuring public safety."[67] In a state so reliant on energy, an attorney could argue that Oklahoma has a strong sovereign interest in protecting its natural resources due to the economy's reliance

58. *Id.*
59. *Id.* at 2494.
60. *Id.*
61. *Id.* at 2495.
62. *Id.*
63. *Id.* at 2496 (quoting Henson v. Santander Consumer USA Inc., 582 U.S. 79, 89 (2017)).
64. *Id.* at 2499-2500.
65. *Id.* at 2494.
66. *Id.* at 2501.
67. *Id.*

on the sector. After analyzing the three factors, the United States Supreme Court held that Oklahoma could prosecute crimes by non-Indians against Indians that occur in Indian Country.[68]

After its *Bracker* analysis, the Court rejected the argument that a state can only authorize jurisdiction in Indian Country when Congress has affirmatively authorized it.[69] A state does not need to seek permission from Congress to exercise its sovereign authority.[70] A state's authority includes its ability to regulate the production and conservation of natural resources. Holding otherwise is incompatible with the Constitution, precedent, and state sovereignty.[71] Opponents of this position claim that the *Worcester*-era precedent should control. However, the Oklahoma Enabling Act nullifies any prior agreement unless the Act provides otherwise. Since the Oklahoma Enabling Act lacks that requirement, Indian Country has been part of Oklahoma since at least 1907.[72] Determining otherwise divests Oklahoma of the equality given to states on their admission into the Union.

In its conclusory remarks, the Court rejected the idea that *Castro-Huerta* is dicta.[73] Justice Kavanaugh reiterated that "Indian [C]ountry within a State's territory is part of a State, not separate from a State."[74] While the dissent gives historical examples of attempts to seize Indian lands and minerals, encroach on tribal sovereignty, and draft a potential statute, it disregards Court precedent.[75] While the arguments are sympathetic, it is precedent that ultimately binds the Court's decisions. However, the Court reminds us that its "role under Article III is to declare what the law is, not what we think the law should be."[76] Therefore, absent preemption, a state can regulate Indian Country within its boundaries.

## III. History and Background of Indian Law

In the 1800s, population growth fueled the need for Americans to occupy more lands.[77] Because of this, the United States forced Indians to

68. *Id.* at 2502-05.
69. *Id.* at 2503.
70. *Id.*
71. *Id.*
72. *Id.* at 2503-04.
73. *Id.* at 2504.
74. *Id.*
75. *See Castro-Huerta*, 142 S. Ct. at 2505-23 (Gorsuch, J., dissenting).
76. *Id.* at 2504.
77. Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

leave their homes and move to Indian Country, and in exchange for the removal, Congress guaranteed that "[no] State or [T]erritory ever have a right to pass laws for the government of such Indians, but they should be allowed to govern themselves."[78] These promises indicate that in the early Republic, the Nation viewed the Indians as separate and distinct people.[79] The United States Supreme Court echoed these ideas in 1832: "we have admitted . . . the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community . . . not as belonging to the confederacy, but as existing within it."[80] The Court said that state laws have no force, and the federal government has authority.[81] While this idea was accurate in the 1830s, the Court's understanding changed as the country grew and expanded.

Only years later did the Court begin to change its stance. In 1845, the Court recognized that a state is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits."[82] When speaking directly about a state law's effect on the Indians, the Court said that "the State . . . had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth."[83] This case shows that a few years after *Worcester*, the Court's stance appeared to have changed entirely. Countless other examples after *Worcester* indicate that the Tribes were a part of the State's jurisdiction. This understanding of tribal relations continued after the Civil War. Regarding a railroad in Utah through a reservation in 1885, the Court said, "the authority of the Territory may rightfully extend to all matters not interfering with that [treaty] protection."[84]

The influx of people into the United States shifted the relationship between tribes and Americans. The Americans needed to move westward into more lands for the developing country.[85] There was a realization in the nineteenth century that there was no place where "the Indians could be forever isolated."[86] Moreover, because of this realization, "the United States began to consider the Indians less as a foreign nation and more as a

78. Treaty with the Creeks, art. XIV, Mar. 24, 1832.
79. *See id.*
80. Worcester v. Georgia, 31 U.S. 515, 583 (1832).
81. *Id.* at 594 (M'Lean J., concurring).
82. Pollard v. Hagan, 44 U.S. 212, 228 (1845).
83. New York *ex rel.* Cutler v. Dibble, 62 U.S. 366, 370 (1858).
84. Utah & N. Railway v. Fisher, 116 U.S. 28, 31 (1885).
85. *Egan*, 369 U.S. at 72.
86. *Id.*

part of our country."[87] These realizations were not isolated to the nineteenth century, as recent courts have also acknowledged the shift: "by 1880, the Court no longer viewed reservations as distinct nations."[88]

These newer ideas persisted throughout the twentieth and twenty-first centuries. In the twentieth century, the Supreme Court determined that Indian tribes could not regulate non-Indians that had fee title on land within a reservation.[89] In addition to state law controlling non-Indians on reservations, a state can tax lands owned by Indians if Congress made those lands freely alienable.[90] However, on an Indian reservation within its boundaries, a state may exercise jurisdiction absent a treaty or federal statute providing otherwise.[91] In the second half of the century, the Court convoluted its laws. The Court has said in other cases that jurisdiction for nonmembers requires a lower threshold. In contrast, a state has jurisdiction over tribal members on a reservation in "exceptional circumstances[.]"[92]

One of the exceptional circumstances required a tribal smoke shop to levy the State sales tax on nonmembers' purchases.[93] In contrast, there is a presumption against a state's ability to exert tax jurisdiction over a tribe or tribal member living and working in Indian Country.[94] The Court further determined that non-Indians in Indian Country lack the protections that tribal members have, writing, "recent cases have recognized the rights of States, [absent preemption] . . . to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands."[95] Because of this ruling, Oklahoma can regulate non-Indian energy operations in Indian Country.

However, that is not to say that a state can regulate an Indian *reservation*. A *reservation* is "land that has been set aside by the federal government for the use, possession, and benefit of an Indian tribe or group of Indians."[96] In contrast, Indian Country is a broader definition

87. *Id.*

88. *Id.*

89. Montana v. United States, 450 U.S. 544, 550 (1981).

90. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110-11 (1998).

91. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499 (1946).

92. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332-32 (1983).

93. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 162 (1980).

94. Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 126 (1993).

95. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 257-58 (1992).

96. ADMIN. FOR NATIVE AMERICANS, *American Indians and Alaska Natives - Indian*

that includes reservations in its statutory definition.[97] State regulatory interest will be at its lowest for on-reservation activities while tribal self-government interest is at its strongest.[98] However, if state interest outside the reservation is implicated, a state may regulate reservations.[99] Oklahoma is unlikely to regulate on-reservation energy production. Despite energy production being Oklahoma's leading industry, this claim alone is insufficient to regulate tribal reservations. Nevertheless, Oklahoma can continue to regulate in Indian Country absent preemption (which occurred in *Oklahoma v. DOI*).[100]

The most recent cases continue to stray from the *Worcester*-era opinions. There, the Court reinforced that "state sovereignty does not end at a reservation's border."[101] Despite calling federal Indian policy schizophrenic and confusing, the Court reaffirmed that the Nation no longer believed the tribes to be in the same category as foreign nations since 1871.[102] Over twenty years ago, the Court acknowledged that it was "at least arguable that the United States no longer considered the tribes to be sovereigns."[103] A few years before *McGirt*, the Court laid out what was a well-settled approach to determine if Congress had disestablished a reservation. It begins with the text of the act, the surrounding circumstances, and the "subsequent demographic history and subsequent treatment of the land by government officials."[104] Each category would indicate that the Reservations were disestablished and that all of Oklahoma is under the State's jurisdiction. However, in *McGirt*, the Court ignored the approach required by precedent and found that nearly half of Oklahoma is Indian Country.

Despite *McGirt*, the precedent is clear. Oklahoma has jurisdiction to regulate energy in Indian Country. While the State cannot infringe on a

*Country and Reservations*: *Fact Sheet,* U.S. DEP'T OF HEALTH AND HUMAN SERVICES https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-indian-country-and-reservations#:~:text=An%20Indian%20reservation%20is%20land,tribe%20or%20group%20of%20Indians (last visited Dec. 14, 2023).

97. *See id.*
98. White Mountain Apache Tribe v. Bracker*,* 448 U.S. 136, 144 (1980).
99. Nevada v. Hicks, 533 U.S. 353, 362 (2001).
100. *See generally Castro-Huerta* 142 S. Ct. 2486; *United States DOI*, 640 F.Supp.3d 1130.
101. *Hicks,* 533 U.S. at 361.
102. United States v. Lara, 541 U.S. 193, 219 (2004).
103. *Id*.
104. Nebraska v. Parker, 577 U.S. 481, 482 (2016).

reservation to regulate, not all Indian Country is a reservation. The State has substantial interests in regulating its most significant sector. The State can regulate and continue to oversee all lands owned by non-Indians in the rediscovered Indian Country. However, in the rare instances of preemption, Congress should step in and protect the rights of Oklahoma. Because of its century of expertise, Oklahoma is in the best position to regulate its natural resources. The State should not have its authority stripped through preemption statutes just because the Court found half the State is Indian Country. There is no reason that Oklahoma and the tribes cannot work together to further their goals and maximize the use of natural resources. The rest of this Note will explore how Oklahoma retains regulatory authority.

## IV. Ways Natives Can Own Land and Impacts on Authority

Tribes and individual tribal members can own land in a variety of ways. Tribes can obtain real property interest "in at least six ways: (1) by possession and exercise of sovereignty; (2) by action of a prior government; (3) by treaty; (4) by act of Congress; (5) by executive action; or (6) by purchase."[105] If the event occurs on one of these types of land and has an Indian defendant, the State is unlikely to be able to hear the case.[106] But the exception in that scenario is if there is a federal statute authorizing the state court to hear that type of claim.[107] If the defendant was a non-Indian and the plaintiff was an Indian, then a state court could probably hear the case without a jurisdictional dispute arising.[108] Despite the tribes acquiring the lands through a variety of ways, the lands will be treated similarly for the applicability of laws.[109] In addition to the previous example, it is federal rather than state law that applies to the various types of land owned by Indians and tribes.[110] However, despite *McGirt* and *Castro-Huerta*, states have jurisdiction in disputes involving Indians arising outside Indian Country.[111]

An individual tribal member can own an interest in a restricted or trust

105. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §15.04 (2023).
106. *Id.* at §7.03.
107. *Id.*
108. *Id.*
109. *Id.* at §15.04.
110. *Id.*
111. *Id.* at § 6.01.

allotment and in fee simple.[112] If the land is within Indian Country, the State lacks jurisdiction; the tribal or federal government would have jurisdiction instead. If the land is fee land owned by a Native outside of Indian Country, the State's laws will apply.[113] With that said, a non-Indian can own land in fee within Indian Country; the non-Indian fee land in Indian Country is typically not subject to tribal jurisdiction.[114] The Court held that "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation."[115] The two exceptions to this rule are if the nonmembers enter a consensual relationship with the tribe or its members, or the activity "affects the tribe's political integrity, economic security, health, or welfare."[116] Absent one of those exceptions, Oklahoma can continue to regulate fee lands owned by non-tribal members inside of Indian Country.

Because many of the residents in Indian Country are non-Indian, the tribes lack civil jurisdiction over nonmembers who own land. That is because the State satisfies the three elements to continue to regulate nonmembers' land in Indian Country. For the aforementioned reasons, the State can continue to regulate the acts of Natives with neutrally applicable, nondiscriminatory laws. The location and owner of the land will be one of, if not the most important, factor in determining where the regulation authority lies.

## V. Stigler Act

In 1947, the United States Congress passed the Stigler Act. The Act provides that the oil and gas conservation laws and orders of the Corporation Commission apply to the Five Civilized Tribes.[117] Currently, those five are the only tribes that the Oklahoma Supreme Court has recognized were never disestablished; the court has rejected other claims since the *McGirt* decision.[118] The Oklahoma Supreme Court has previously addressed this portion of the Act and held that federal jurisdiction had not preempted the State's authority to regulate restricted

112. *Id.* at § 15.04 n. 1.
113. Indian Country, USA Inc. v. Oklahoma *ex rel.*, 829 F.2d 967, 973 (10th Cir. 1987).
114. Strate v. A-1 Contractors, 520 U.S. 438, 446 (1977).
115. *Id.*
116. *Id.*
117. Stigler Act of 1947, Pub. L. No. 80-336, 61 Stat. 731.
118. *See* Casteel, *supra* note 51.

Indian lands.[119] But neither the Oklahoma Supreme Court nor the United States Supreme Court has addressed it since the 2020 decision.

The Oklahoma Supreme Court has declined to readdress the issue.[120] The most recent update to the Stigler Act came in 2018 to lower the blood percentage for restrictions on alienation.[121] With that said, Congress passed the Act seventy-six years ago. Since then, the development of energy has evolved. The State is now less reliant on hydrocarbons and has seen an increase in renewable resources.[122] However, the Act only references "oil and gas conservation laws," so its effect on solar, hydro, or wind is unclear.[123] With that increase and shift, Congress must pass additional amendments to ensure the Corporation Commission has the same authority structure to accommodate new technology.

A Court is unlikely to apply typical statutory interpretation tools and find renewable energy included.[124] The Court has hesitated to apply ordinary interpretation principles to Indian law because of the unique relationships. This precedent could constrain the courts and prevent them from applying this Act in a modern setting. If that occurred, it may lead to confusion and inconsistency depending on location or production type. At least one of the tribes would have to create laws and regulations from nothing if they decided to exert control.[125]

## VI. Applying the Acts

The United States Supreme Court established two tests to determine whether a state can assert authority over conduct within Indian Country. The *Bracker* balancing test applies to determine if preemption may occur in the absence of federal law.[126] This preemption occurs if the exercise of state jurisdiction infringes on tribal self-governance. When applying this test, the court should consider state, federal, and tribal interests. After

119. Currey v. Corp. Com'n of Okla., 1979 OK 89, 617 P.2d 177, 180.

120. Drew Rader, *'This Land is Whose Land?': An Update on McGirt and the Energy Sector in Oklahoma*, OKLA. BAR J., Mar. 2022, at 20.

121. Conor Cleary, *The Stigler Act Amendments of 2018*, OKLA. BAR J., Jan. 2020, at 50-51.

122. *State Profile and Energy Estimates*, *supra* note 1.

123. Stigler Act of 1947, Pub. L. No. 80-336, 61 Stat. 731.

124. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

125. CHICKASAW NATION CODE, tit. 15 (Nov. 16, 2012), https://code.chickasaw.net/Title-15.

126. *Bracker*, 448 U.S. at 145.

reviewing those interests, the court should determine if the State's conduct would unlawfully interfere.[127] The other test is found in *Montana v. United States*, which gives a presumption for State authority to regulate nonmembers' conduct in Indian Country.[128]

While the Supreme Court established those two tests, the Restatements also gave a test. Under the Restatements, "[a state has] civil regulatory authority over nonmembers in Indian Country, except when the state regulation: (a) conflicts with an express federal statutory prohibition, (b) is impliedly preempted by federal law, or (c) infringes on tribal self-governance."[129] The Restatements' test combines the *Montana* and *Bracker* tests into one, and thus will not receive an analysis.

In *White Mountain Apache Tribe v. Bracker*, there was no rigid rule given. Instead, a court looks to see if there is federal preemption. If there is not, it should look to the tribal, state, and federal interests.[130] While looking at those interests, the Court then determines if the exercise of state jurisdiction unlawfully infringes on tribal self-governance.[131] Instances of preemption *could* occur anytime the definition of Indian Country is used in a federal statute. Congress has previously given authority to the Oklahoma Corporation Commission to regulate oil and gas production as it relates to the Five Civilized Tribes.[132] The issue of preemption will not be explored, and instead, this section focuses on the balancing test and infringement on tribal self-governance.

First, look at the federal interests. The federal government already oversees oil and gas production in the Osage Nation.[133] It also regulates oil and gas production of land held in trust and on restricted lands through the Federal Bureau of Indian Affairs.[134] It can continue to do so post-*McGirt* on trust and restricted lands. It is unlikely the federal government will want to, or can expand its reach to non-trust lands within Indian Country. If the federal government could regulate, it would also have to regulate the collection of royalty payments.[135] If the Bureau of Indian Affairs decided it wanted to regulate, the federal government would likely

127. *Id.*
128. *See Montana*, 450 U.S. at 552.
129. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS §29 (Am. L. Inst. 2021).
130. *Bracker*, 448 U.S. at 145.
131. *Id.* at 141.
132. Stigler Act of 1947, Pub. L. No. 80-336, 61 Stat. 731.
133. *See* 25 C.F.R. §226 (2023).
134. *Id.*
135. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §15.04 (2023).

assume control over millions of acres.[136] That increase would be an immeasurable burden on the federal government. Currently, not including Indian reservations, it only regulates 1.6% of the State.[137] It is unlikely the federal government wants to assume this burden and thus has minimal interest in exerting more control than it currently does.

Looking at the tribal interest, even if they proved they have a substantial government interest, it is unlikely they have the authority to regulate.[138] A tribe typically cannot regulate the conduct of nonmembers on land owned in fee by non-Indians even if that land is within Indian Country.[139] This limitation is due to their incorporation to the United States, which stripped them of governing authority with limited exceptions.[140] The tribe's best claim would be under *Montana*, arguing these affected the health and safety of the tribe; or if the operator wanted to enter into a commercial agreement with a tribe, regulation could be permissible.[141] If a tribe wanted to regulate the energy production on their land, having laws surrounding the subject would indicate an interest.[142] But at least one of the tribes with reservations lack any such laws.[143] It would unduly burden the energy industry to wait for the tribes to pass laws, and absent additional evidence, the tribes' interests thus appear to remain insignificant.

Lastly, the state interest is the greatest. Over one half of the State's ten highest producing oil and natural gas counties are in Indian Country.[144] And of the total production, forty percent of the State's total monthly oil

136. *See Inventoried Roadlesss Area Acreage Categories of NFS Lands Summarized by State*, U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_037652.htm (last visited Sept. 29, 2023).

136. *Natural Resources Revenue Data*, U.S. DEP'T OF THE INTERIOR, https://archive.revenuedata.doi.gov/explore/OK/ (last visited Dec. 14, 2023).

137. *Natural Resources Revenue Data*, U.S. DEP'T OF THE INTERIOR, https://archive.revenuedata.doi.gov/explore/OK/ (last visited Dec. 14, 2023).

138. Plains Com. Bank v. Long Fam. Land & Cattle Co, 554 U.S. 316, 333-34 (2008).

139. *Id.*

140. *Id.*

141. *Id.* at 334-35.

142. *See* CHICKASAW NATION CODE *supra*, note 125.

143. *Id.*

144. *Compare Geographic Information*, THE CHICKASAW NATION, https://www.chickasaw.net/our-nation/government/geographic-information.aspx (last visited Sept. 29, 2023), *with Oil and Gas Activity in Oklahoma*, SHALE XP, https://www.shalexp.com/oklahoma (last visited Dec. 14, 2023).

and gas production is now included in Indian Country.[145] Within those production numbers, at least one quarter of the wells in the State are operating on at least five different reservations.[146] That number is even higher for the State's refinery capacity, with an alarming sixty percent remaining in Indian Country.[147] Cushing, Oklahoma, is the site of a "crucial oil terminal for the Keystone XL" pipeline; there are countless miles of pipelines there that flow through Indian Country and could affect the transportation of oil through the State if the tribe attempted to regulate it.[148] When the *McGirt* decision was first announced, numerous oil and gas producers raised concerns about the ramifications on their operations.[149] The State received over $1,000,000,000 in oil and gas tax revenue in 2021.[150] Because of this revenue, Oklahoma has a "highly specialized oil and natural gas economy."[151] Due to the State's reliance on production, stripping the State of authority would unduly burden its entire population.

In addition to the financial aspect, the State is interested in ensuring consistent policy so that it can continue to foster innovative renewable projects statewide. Oklahoma is already the third-largest producer of renewable energy and is home to the second-most jobs in wind energy.[152] Those numbers are likely going to increase; the State is expected to have an increase of twenty-five percent from its 2021 numbers in 2024.[153] The

145. Alleen Brown*, Inside the Oil Industry's Fight to roll Back tribal Sovereignty After Supreme Court Decision*, THE INTERCEPT (Mar. 10, 2021, 9:51 AM), https://theintercept.com/2021/03/10/oklahoma-mcgirt-oil-industry-kevin-stitt/.

146. Dino Grandoni, *Now that half of Oklahoma is officially Indian land, oil industry could face new costs and environmental hurdles*, THE WASHINGTON POST (July 17, 2020, 2:33 PM), https://www.washingtonpost.com/business/2020/07/17/supreme-court-oklahoma-oil-/.

147. *Id.*

148. *Id.*

149. *Id.*

150. Janelle Stecklein, *Oklahoma reports record-breaking tax revenue from oil and gas prices*, CLAREMORE PROGRESS (Jul. 7, 2022), https://www.claremoreprogress.com/news/oklahoma-reports-record-breaking-tax-revenue-from-oil-and-gas-prices/article_285b65aa-fe43-11ec-8db7-0fadc3799275.html.

151. *Id.*

152. *Oklahoma Renewable Energy Guide*, OKLA. DEP'T OF COM., https://www.okcommerce.gov/doing-business/business-relocation-expansion/industry-sectors/renewable-energy/ (last visited Dec. 14, 2023).

153. Chad Wilkerson & Courtney Shupert, *Oklahoma's Evolving Energy Landscape*, FED. RSRV. BANK OF KAN. CITY (Dec. 17, 2021), https://www.kansascityfed.org/oklahomacity/oklahoma-economist/oklahomas-evolving-energy-landscape/.

Federal Reserve expects this outlook to outpace the rest of the United States in the future.[154] While a large portion of that growth will be the output from Oklahoma wind farms, other sources are on the rise as well.[155] An Italian solar panel maker, Enel, recently pledged a billion-dollar investment in a solar power plant near Tulsa, in the heart of Indian Country.[156] In order to continue to attract these investments, the State needs to display consistency and unity. The power to regulate energy production within Indian Country best lies with the State and does not unlawfully infringe on tribal self-governance. However, the tribes and the federal government can continue to regulate trust and restricted lands.

Looking at the *Montana* factors establishes that the tribes do not have the authority to regulate non-Indians on non-Indian land within Indian Country. The Court laid out two prongs. First, a tribe can regulate "through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings."[157] The second way a tribe can regulate is "when [the] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[158] If an operator or company wanted to contract with a tribe, then under *Montana*, the tribe would rightfully have jurisdiction to regulate their conduct.

For the second factor, it is unlikely that the operation of energy production threatens political integrity or economic security. The tribes were not dependent on the production taxes before *McGirt* because they were not receiving them. The productions were also not under tribal jurisdiction, so it is not as if the State's authority would undermine hundreds of tribal regulators. The tribe's best claim is the effect on the health and welfare of the tribe. Pollution, improperly abandoned wells, and injection wells would likely be the biggest threat to tribal health and safety. The State has already addressed the issues surrounding injection wells and

154. *Id.*

155. *Id.*

156. Daniel Tyson, *Italy's Enel Announces Oklahoma Site for $1B Solar Panel Plant*, ENG'G NEWS-REC. (May 30, 2023), https://www.enr.com/articles/56545-italys-enel-announces-oklahoma-site-for-1b-us-solar-panel-plant#:~:text=Italian%20solar%20panel%20maker%20Enel,the%20American%20renewable%20energy%20market; Carmen Forman, *Enel to build $1 billion solar panel plant at Tulsa Port of Inola*, TULSA WORLD (May 22, 2023), https://tulsaworld.com/news/local/enel-to-build-1-billion-solar-panel-plant-at-tulsa-port-of-inola/article_05ea9a06-f675-11ed-a564-4f503f10ca71.html.

157. *Montana,* 450 U.S. at 565.

158. *Id.* at 566.

responds quickly when an earthquake occurs near one.[159] The State and tribes have taken joint action to plug abandoned wells in Indian Country.[160] These joint efforts should quell fears that the State would leave wells in disarray that could cause pollution. Lastly, while spills are going to happen, the State has ample resources to use to hold operators accountable.[161] Industry members also take these issues seriously, with one of the larger operators managing to keep its spill percentage to .009.[162] While not perfect, it shows that the risk to the health and safety of the tribes is minimal.

While referring to hunting and fishing regulations, the United States Supreme Court said, "the [S]tate must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interest of conservation."[163] In that case, the parties were Indians; the land was no longer Indian Country but was once part of a reservation.[164] It is not entirely similar to regulations of energy, but there are parallels when looking at it from the perspective of the depletion of natural resources. There is a limited population of wildlife just as there are nonrenewable resources. And if the application does not discriminate against Indians, Oklahoma could point to this case and show the similarities between the regulation of game and natural resources.

Despite showing Oklahoma's strong interest in retaining regulatory power over energy in Indian Country, there is no guarantee that a judge will find the same. Companies could find this uncertainty frightening and chill the continued growth in Oklahoma energy. There is a way for the courts to avoid determining if Oklahoma can exert jurisdiction in Indian Country. Congress can pass a law that allows Oklahoma to retain

159. Curtis Killman, *Disposal well operations reduced following earthquakes*, TULSA WORLD (Apr. 7, 2023), https://tulsaworld.com/news/local/govt-and-politics/disposal-well-operations-reduced-following-earthquakes/article_eba8039a-d577-11ed-983d-4f0598e988ed.html.

160. *Oklahoma to Begin Work Plugging Nearly 1,200 Orphaned Wells Through President Biden's Bipartisan Infrastructure Law*, U.S. DEP'T OF THE INTERIOR (Aug. 26, 2022), https://www.doi.gov/pressreleases/oklahoma-begin-work-plugging-nearly-1200-orphaned-wells-through-president-bidens.

161. *See Pollution Abatement Department*, OKLA. CORP. COM., https://oklahoma.gov/occ/divisions/oil-gas/pollution-abatement-department.html (last visited Dec. 14, 2023).

162. *2022 Chesapeake Energy Sustainability Report*, CHESAPEAKE ENERGY, https://sustainability.chk.com/environment/spill-prevention/ (last visited May 31, 2023).

163. Antoine v. Washington, 420 U.S. 194, 207 (1975).

164. *Id.* at 195-96.

regulatory authority. In *Currey v. Corporation Commission of Oklahoma*, the Oklahoma Supreme Court stated that the Stigler Act provides that

> [a]ll restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of [the State of] Oklahoma. Provided, That no order of the Corporation Commission . . . . shall be valid as to such land until submitted to and approved by the Secretary of the Interior. . . .[165]

However, as mentioned above, this Act only applies to the conservation of oil and gas.[166] The limit is not shocking because this Act was passed in the 1940s. Any new legislation must address the regulatory authority for renewable resources and include more than the Five Civilized Tribes.

Congress can pass a less restrictive law to avoid any analysis and grant authority to Oklahoma. A hypothetically updated Stigler Act could read:

> (1) All lands within Indian Country not owned by a tribe or tribal member or held in trust by the United States are subject to the laws and regulations of the State of Oklahoma; (2) and the laws of the tribes in Oklahoma shall only be binding on land in Indian Country owned by a tribe or tribal member or held in trust by the United States.

The passing of such a statute would allow Oklahoma, companies, and the tribes a sense of certainty that was so familiar three years ago. It would again prevent people from challenging Oklahoma's ability to function like any other state. The congressional authority would allow the Corporation Commission to continue to conserve Oklahoma's natural resources across the State consistently. That authority would not be confined to oil and gas or the Five Tribes. Whereas, if the Corporation Commission's authority were stripped or remained limited, it would hinder development.

## VII. Diminishment

While the previous section demonstrates that Oklahoma has

165. *Currey*, 617 P.2d at 180.
166. *Id.*

jurisdiction in Indian Country for civil regulation, there is another aspect of Indian law worth discussing. Instead of proving that Oklahoma has jurisdiction, this section will analyze how the Reservations diminished over the decades, which a court could use in the cases succeeding *Castro-Huerta* and *McGirt* to show Oklahoma has civil authority. Diminishment is not lightly inferred.[167] Courts will look to congressional intent, statutory language, the passage of posterior events, Congressional treatment of the land, and demographics of residents thereafter to infer diminishment.[168] The Court has recognized "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character . . . that *de facto*, if not *de jure*, diminishment may have occurred."[169] In previous decisions, the Court has used this framework to determine that a reservation no longer exists.[170]

Looking to the Oklahoma Enabling Act is an example of congressional intent and treating the land as part of the State. The Act states that "Oklahoma and the Indian Territory . . . may adopt a constitution and become the State of Oklahoma."[171] The Enabling Act also extends the laws of the State to Indian Territory.[172] When the Act was passed, any case not transferred to the district court was deemed acceptable to be heard in state court, including those in Indian Country.[173] The Act does reserve the title of lands held or owned by Indians.[174] But "owned or held" indicates only land possessed by Indians in 1906.[175] Further, an enabling act repeals any conflicting treaties absent express words. Unless Congress reserves it expressly as an Indian reservation, the land does not survive the state's formation.[176] Oklahoma's Act lacks such language.[177] Thus, the Act serves as proof of Congressional intent and its statutory language shows there was no intention for reservations to survive into statehood.

Non-Indian settlers flooded the lands after the passing of the Enabling Act. In the 1890 census, the population of the Oklahoma Territory was

167. Solem v. Bartlett, 465 U.S. 463, 470 (1984).
168. *Id.*
169. *Id.* at 471.
170. Hagen v. Utah, 510 U.S. 399, 410-11 (1994).
171. Oklahoma Enabling Act of 1906, Pub. L. No. 59-234, 34 Stat. 267.
172. *Id.* at 275.
173. *Id.* at 277.
174. *Id.* at 270.
175. *Id.*
176. *Id.* at 267-68.
177. *But see* Oklahoma Enabling Act of 1906, Pub. L. No. 59-234, 34 Stat. 267.

398,331, while the Indian Territory's population was 180,182.[178] Twenty years later, the population in Oklahoma was over 1,600,000 people.[179] Oil and gas production drove the population to 2,300,000 people in the 1930 census. Certainly, an increase of roughly 2,000,000 individuals over forty years qualifies as a "flood of people."[180] Additionally, only 4.5% of the population was Native American in the 1910 census.[181] This dropped to 2.8% of the population in 1920, from its peak of 8.2% in 1900.[182] However, the population of White Americans increased from 87.2% to 89.8% over the same period.[183] About half of Oklahoma consisted of reservations. Per the Supreme Court's framework laid out in *Solem v. Bartlett*, this data likely shows that the reservations in Oklahoma were subject to *de facto* diminishment during the decades after the Enabling Act because of the influx of settlers. That influx would contribute to the decline in Indian character, and it would have continued through even more non-Native immigration throughout the twentieth century.

The Court acknowledges that this method is unorthodox.[184] Despite that, it is another example of how the State can prove its retained authority. For over 100 years, many treated the counties that are now Indian Country as part of the State. Determining that these lands are not under Oklahoma's jurisdiction is impracticable. Doing so directly contradicts decades of the State's authority.

## VIII. Treatment as a State

Tribes can pursue implementation of environmental policies through seeking treatment as a state status. It authorizes the Environmental Protection Agency to treat certain eligible tribes as a state for certain programs and funding.[185] However, Oklahoma tribes are required to enter

178. MONTY EVANS, OKLA. EMP. SEC. COMM'N, OKLAHOMA ECONOMIC INDICATORS (2012).

179. *Id.*

180. *Id.*

181. Donald N. Brown, *Immigration: The Encyclopedia of Oklahoma History and Culture*, OKLAHOMA HISTORY SOCIETY.

182. *Population—Oklahoma*, http://www.lib.utulsa.edu/govdocs/census/1920/tables/vol3/table01.pdf (last visited Dec. 14, 2023).

183. *Id.*

184. *Solem*, 465 U.S. at n. 13.

185. *Tribes Approved for Treatment as a State (TAS)*, U.S. ENV'T PROT. AGENCY (Apr. 19, 2023), https://www.epa.gov/tribal/tribes-approved-treatment-state-

into a cooperative agreement with the State and its relevant agency.[186] This distinction is due to a portion of the Safe, Accountable, Flexible, Efficient Transportation Equity Act. Then-Senator Jim Inhofe snuck this requirement into the Act to protect Oklahoma's interests in the energy industry.[187] Tribes in other states are not required to enter into these cooperative agreements.[188] The EPA's website shows there are currently five tribes in Oklahoma that have this status.[189] And depending on the tribe, the authorization is for portions of the Clean Air Act, the Water Quality Standards Program of the Clean Water Act, and the Toxic Substance Control Act.[190]

This was settled law for fifteen years. After the decision in *McGirt* and *Castro-Huerta*, it is yet another example of uncertainty caused by the Supreme Court. In an October 2020 letter from the EPA to Governor Kevin Stitt, the EPA granted Oklahoma's request to administer the State's environmental programs in certain areas of Indian Country.[191] This delegation was limited to portions of certain acts.[192] But since that letter was sent, there was a federal election and policy shift in the new administration. Those changes included a notice of withdrawal and reconsideration of the October 2020 delegation.[193] The October 2020 delegation remains effective until the final agency decision.[194] Comments were due to the EPA over a year ago, but no final decision was made as of

tas#:~:text=Several%20federal%20environmental%20laws%20authorize,functions%2C%20and%20for%20grant%20funding.

186. Laura E. Jones & Dana J. Stotsky, *EPA Approves regulatory Control over 'restored' tribal land*, VAN NESS FELDMAN LLP (Oct. 9, 2020), https://www.vnf.com/epa-approves-oklahoma-regulatory-control-over-restored-tribal-land#:~:text=Under%20the%20SAFETEA%20Act%20of,State%20of%20Oklahoma%20and%20its.

187. Raymond Nolan, *The Midnight Rider: The EPA and Tribal Self-Determination*, 42 AM. INDIAN QUARTERLY 329, 335 (2018).

188. Jones & Stotsky, *supra* note 186.

189. *See Tribes Approved for Treatment as a State (TAS)*, *supra* note 185.

190. *Id.*

191. Letter from Andrew R. Wheeler, Administrator of the U.S. Env't Prot. Agency, to J. Kevin Stitt Governor of the State of Oklahoma (Oct. 1, 2020), https://www.epa.gov/system/files/documents/2021-12/epa-october-2020-decision.pdf.

192. *Id.*

193. *Notice of Proposed Withdrawal and Reconsideration of October 1, 2020 SAFETEA Decision and Opportunity for Comment*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/system/files/documents/2021-12/notice-of-proposed-withdrawal-and-reconsideration_0.pdf (last visited Sept. 29, 2023).

194. *Id.*

May 2023.[195]

While Senator Inhofe attempted to preserve Oklahoma's interests, it is unlikely he was able to foreshadow the decisions in 2020 and 2022. The back and forth on the policy from the federal government started almost as soon as these decisions were announced. This policy uncertainty is unsustainable. It should not change anytime there is a new president. Nor should the State and tribes constantly shift jurisdiction between one another. Instead of this tug of war, there needs to be a more concrete and uniform solution. There are thirty-eight federally recognized tribes in Oklahoma.[196] Requiring the courts to determine how many of those in Indian Country are outside of Oklahoma's jurisdiction would be unduly burdensome. The State should not have to enter into agreements with each tribe to implement its policies within its border. It could result in different policies for each tribe and increase overall uncertainty.

The last issue with the status of treatment as a state is that it does not cover all aspects of energy and environmental law.[197] It is limited to a handful of programs.[198] Despite its limit to a handful of programs, it lets the tribes adopt more stringent policies than the federal government does.[199] The Tenth Circuit has previously sided with a tribe's implementation of regulation over a city's policies.[200] In that case, the tribe's regulations were more stringent than the State of New Mexico's.[201] While New Mexico does not have to approve of the tribe's agreement like Oklahoma's regulation does, it is concerning that the tribes could further hinder the authority of the State of New Mexico to regulate through the treatment as a state process. A similar scenario could happen in Oklahoma if tribes wanted stricter regulations on injection wells, which would hinder Oklahoma's enhanced recovery methods.

195. *See id.* at 2.

196. *Indian Country*, U.S. ATTY'S OFF. N. DIST. OF OKLA. (July 19, 2022), https://www.justice.gov/usao-ndok/indian-country#:~:text=There%20are%2038%20federally%20recognized,the%20Northern%20District%20of%20Oklahoma.

197. *See Tribes Approved for Treatment as a State (TAS)*, *supra* note 185.

198. *Id.*

199. City of Albuquerque v. Browner, 97 F.3d 415, 420 (10th Cir. App. 1996).

200. *Id.* at 423.

201. *Id.*

## IX. Gorsuch's Analysis and Its Impact on Energy Policy

Justice Gorsuch's statutory interpretation can potentially cause many issues for civil law going forward. He took the textualist approach to its limit. Since there was no evidence that the Reservation was disestablished, it reappeared.[202] He acknowledges that many statutes include the same definition of Indian Country as the Major Crimes Act.[203] Other cases have said that the definition of Indian Country generally applies to civil law as well.[204] Since 2020, other circuit courts have applied *McGirt*'s interpretation to aspects of federal law.[205] In 2021, the Second Circuit applied *McGirt*'s interpretation to determine that a parcel of land was Indian Country,[206] which Judge Friot relied on when stripping Oklahoma of its authority to regulate mines.[207] Had he confined his interpretation to the Major Crimes Act and clearly stated his intent to do so, many of these issues would not be relevant today. While he hinted that the "only question before us . . . concerns the MCA," his failure to hold so expressly led to numerous civil challenges.[208] Lower courts have not hesitated to apply it to energy production.[209]

The reliance on *McGirt* allows judges to determine that long-settled law is no longer relevant. Another issue with Justice Gorsuch's opinion in *McGirt* is that it seems to disallow reliance on *City of Sherrill v. Oneida Indian Nation*.[210] Neither the *McGirt* or *Castro-Huerta* opinions mention *City of Sherril*. In that case, the Court held that "when a party belatedly asserts a right to present future sovereign control over territory, longstanding observances and settled expectations are prime considerations . . . . [and] this Court has recognized the impracticability of returning to Indian control of land that generations earlier passed into numerous private hands."[211] It is unclear why both cases failed to consider

202. *Historical Facts led to Supreme Court Ruling in McGirt Case*, THE CHOCTAW NATION (Aug. 12, 2020), https://www.choctawnation.com/news/news-releases/historical-facts-led-to-supreme-court-ruling-in-mcgirt-case/.

203. *McGirt,* 140 S. Ct. at 2480.

204. DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist., 420 U.S. 425, 425 (1975).

205. *E.g.*, Cayuga Nation v. Tanner, 6 F.4th 361 (2d Cir. 2021).

206. *Id.* at 379-80.

207. *United States DOI*, 640 F.Supp.3d at 1143-44.

208. *McGirt*, 140 S. Ct. at 2480.

209. *United States DOI*, 640 F.Supp.3d 1130.

210. *Id.* at 1143-44 (citing City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005)).

211. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 218-19 (2005).

this case. Nevertheless, it supports Oklahoma's position and the idea that the regulatory aspects remain unchanged. Oklahoma's authority went unchallenged for decades, and now at least forty-three percent of the State is Indian Country.[212] Relying on the longstanding tradition of state authority and the general expectation that the state is in control still probably would not have been enough to sway the Court.

The second half of the above-mentioned quote from *City of Sherril* would be more persuasive and a better counterargument to Justice Gorsuch's decision. Tulsa County, which is now Indian Country, had a population of almost 700,000 in the 2020 census.[213] Meanwhile, the entire State only reported having a Native American population of about ten percent.[214] With a state population of roughly 4,000,000, that means there are about 400,000 Native Americans in Oklahoma.[215] These numbers show the impracticability of overhauling decades of settled tradition. While it was once Indian Country and reservations, it has since "passed into numerous private hands."[216] Another unfeasible aspect is that some of Oklahoma's highest-producing counties are now on the Chickasaw Reservation.[217] Six of the ten counties with the highest production in February 2023 were within the Reservation.[218]

Justice Gorsuch's analysis also fails to consider the current tribal relations with the Governor. While they have worked together in the past, "Kevin Stitt . . . feud[ed] with the tribes for nearly his entire first term."[219] And because of that, three years later there have been no major agreements. Many, if not all of the agreements between tribes and state

212. *Castro-Huerta,* 142 S. Ct. at 2499.

213. *2020 Census: Population by County in Oklahoma*, https://www.ok.gov/abstractor/documents/2010%20Census%20in%20Excel.pdf (last visited Sept. 29, 2023).

214. *Quick Facts Oklahoma*, U.S. CENSUS BUREAU (July 1, 2022), https://www.census.gov/quickfacts/fact/table/OK/PST045222.

215. *Id.*

216. *City of Sherrill*, 544 U.S. at 219 (2005).

217. *See Geographic Information*, THE CHICKASAW NATION, https://www.chickasaw.net/our-nation/government/geographic-information.aspx (last visited Dec. 14, 2023).

218. *See Oil and Gas Activity in Oklahoma*, SHALE XP, https://www.shalexp.com/oklahoma (last visited Dec. 14, 2023).

219. Sean Murphy, *Feud with tribes threatens Oklahoma governor's reelection*, AP NEWS (Oct. 20, 2022, 4:47 PM), https://apnews.com/article/2022-midterm-elections-health-oklahoma-ada-government-and-politics-d60b59597942c488d38df2d159b64b7f.

governments have been law enforcement deputizations.[220] That is not to say an agreement will never happen, but it looks gloomy with current relations.[221] If those tensions were relieved, the State and tribes *could* enter into agreements surrounding energy regulation. With a new Attorney General looking to mitigate these tensions, his office could repair the State and tribal relations.[222] The last issue with the Court's analysis is that it failed to look at the other circumstances surrounding the Reservation's status.[223] That includes demographic history, how tribal members and non-Natives understood the status, and how the State and the United States viewed it.[224] All of these would further indicate that it is not Indian Country.

## X. Issues for the Future

While uncertainty remains, some items remain unchanged. Traditional preemption laws and express delegations still apply to the State's jurisdictional power.[225] Because of that, the Corporation Commission will still have the authority to regulate oil and gas laws on restricted lands of the Five Civilized Tribes.[226] However, that express grant does not apply to renewables.[227] It is uncertain if the Corporation Commission can regulate solar or wind farms that are built on restricted Indian land of the Five Civilized Tribes in a way that is similar to oil and gas developments. If courts determine that more reservations exist in Oklahoma outside of the Five Civilized Tribes, will those be exempt from Oklahoma's authority?

Another issue that is now uncertain is the effect these decisions have on oil and gas taxes. Oklahoma taxes oil and gas companies at seven percent of the gross value of production, but it is unclear if Oklahoma can

220. *See Tribal Compacts and Agreements*, OKLA. SEC'Y OF STATE, https://www.sos.ok.gov/gov/tribal.aspx (last visited Dec. 14, 2023).

221. *See* Mike McBride*, Column: How Oklahoma and tribal governments can get along*, TULSA WORLD (Jan. 26, 2023), https://tulsaworld.com/opinion/columnists/column-how-oklahoma-and-tribal-governments-can-get-along/article_fe0405e4-9aa7-11ed-b8b9-d7a5788521fc.html.

222. *New Attorney General Gentner Drummond outlines priorities upon taking office*, OFF. OF THE OKLA. ATTORNEY GEN. (Jan. 9, 2023), https://oag.ok.gov/articles/new-attorney-general-gentner-drummond-outlines-priorities-upon-taking-office.

223. *McGirt*, 140 S. Ct. at 2502.

224. *Parker*, 577 U.S. at 492.

225. *Castro-Huerta*, 142 S. Ct. at 2494.

226. *Currey*, 617 P.2d at 180.

227. *See* Stigler Act of 1947, Pub. L. No. 80-336, 61 Stat. 731.

tax lands within Indian Country.[228] Currently, the Oklahoma Tax Commission still has production reports for wells residing in counties within Indian Country.[229] However, the State is one challenge away from potentially losing that revenue. Typically, a state cannot tax a company doing business within a reservation.[230] But will those oil and gas leases within Indian Country face an additional tax from a tribe? The Court has already determined that the State and a tribe can tax wells on reservations.[231] The Creek Nation says it retains the right to tax in its *McGirt* brief.[232] Nothing prevents the tribes from taxing those wells. This extra tax could harm mineral development in the eastern portion of Oklahoma. It could come from an entirely new tax, or a portion of the tax that the State is already collecting.

Another issue that remains uncertain for the future is how much litigation this will require. The Tenth Circuit recently heard an appeal about the City of Tulsa's authority to ticket tribal members and ruled in favor of Native Americans.[233] This case further stripped the State of authority, and Oklahoma has announced its decision to appeal to the United States Supreme Court.[234] Yet to be heard by the Tenth Circuit is *United States v. DOI* from Oklahoma's Western District. That decision could shape the definitional contours of Indian Country, or it could lead to other preemption challenges. Regardless of the Tenth Circuit's decision, the losing party will likely appeal it. However, the Supreme Court appears to be tired of answering these questions.[235] It has punted on the matter for

228. OKLA. STAT. tit. 68, §1001 (2022).

229. Production History Records from the Oklahoma Tax Commission, (May 31, 2023) (on file with author).

230. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 180-81.

231. Merrion v. Jicarilla Apache Tribe*,* 455 U.S. 130, 150-51 (1982); Cotton Petroleum Corp. v. New Mexico*,* 490 U.S. 163, 168 (1989).

232. *McGirt*, 140 S. Ct. at 2502.

233. Hooper v. City of Tulsa*,* 71 F.4th 1270, 1272 (10th Cir. 2023); Curtis Killman, *Can city issue traffic tickets to Native drivers? Appellate court hears arguments in jurisdiction case*, TULSA WORLD (May 10, 2023), https://tulsaworld.com/news/local/crime-and-courts/can-city-issue-traffic-tickets-to-native-drivers-appellate-court-hears-arguments-in-jurisdiction-case/article_db8fe654-c8bf-11ed-93b8-47ddb66a7dbf.html.

234. Braden Bates, *City of Tulsa to appeal Hooper v. Tulsa case to the U.S. Supreme Court*, 2 NEWS OKLAHOMA (Jun. 30, 2023, 12:56 PM), https://www.kjrh.com/news/local-news/the-city-of-tulsa-to-request-us-supreme-court-to-hear-hooper-v-tulsa.

235. Chris Casteel, *Will U.S. Supreme Court hear another case from Oklahoma linked to McGirt ruling?*, THE OKLAHOMAN (Sep. 26, 2022, 8:00 AM), https://www.oklahoman.com/story/news/2022/09/26/will-supreme-courts-new-term-include-an-oklahoma-case-tied-to-mcgirt/69493093007/.

now.[236] If it leads to other challenges, it could be years more of litigation before these disputes are resolved. And that is if the Supreme Court decides it is ready to hear another case about tribal sovereignty.[237]

While Justice Gorsuch dismissed these issues as speculative, Justice Roberts predicted them in his dissent.[238] Chief Justice Roberts' concerns were broad, and he said uncertainty arises in "any area that touches Indian affairs."[239] History has sided with Justice Roberts and shown the majority's decision caused uncertainty.[240] Unfortunately, the majority's opinion in *Castro-Huerta* did little to guide the confusion in civil law. The most promising aspect of *Castro-Huerta* for civil law is that the Court repeatedly stressed the State's jurisdiction does not end at reservation borders.[241] Because of that, Indian Country has been within Oklahoma's jurisdiction since statehood.[242] While *Castro-Huerta* does not give much certainty, it gives enough to signal that Oklahoma should continue to regulate until it loses to a challenger.

## XI. Conclusion

While it once seemed certain that Oklahoma was under the State's authority, the Supreme Court has shown how one decision can change that. Instead of the State continuing to function like the other forty-nine, many routine functions are now subject to jurisdictional challenges.[243] Oklahoma should not expect these to go away soon. Since 2020, there have been numerous different challenges.[244] There are also countless more that individuals could file. Oklahoma should not have to wonder if a court will strip them of its once-obvious power. While the federal government or tribes could obtain jurisdiction in those areas without the State's authority, there need to be uniform policies across the State. The authority to determine those policies should remain with the Oklahoma voters, legislature, and executive branches. There should not have to be an agreement with every tribe to continue to exert State regulatory authority.

236. *Id*.
237. *Id*.
238. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting).
239. *Id.*
240. *Id.*; *see also* companion cases and articles in n. 32.
241. *Castro-Huerta*, 142 S. Ct. at 2503.
242. *Id.*
243. Herrera, *supra* note 33; *see also* companion cases.
244. Herrera, *supra* note 33; *see also* companion cases.

Nor should the State rely on the federal government to enforce laws. The policies of federal agencies and Oklahoma agencies can contradict themselves. East and west of I-35 should have the same uniform policy under Oklahoma jurisdiction.

While attempting to show how Oklahoma retains jurisdiction throughout this Note, there is no guarantee that a judge will understand it similarly. *Oklahoma v. United States DOI* is an example of this issue.[245] Despite Justice Gorsuch's dismissal of the effects of his opinion in *McGirt*, this case shows that at least one of the district courts has determined the opposite.[246] It is likely that other judges will follow suit and determine that Indian Country under the Major Crimes Act is Indian Country under other statutes that use that definition. The State should not have to wait for courts to chip away at its jurisdiction before Congress enacts a law or the State quickly compiles agreements with each different tribe.

Oklahoma should be proactive with this issue. Certainty must return. With certainty, energy developers will not have to wonder whose laws they follow, to whom they pay taxes, and who regulates their conduct. Without that certainty that has existed for over a century, hesitancy will remain. Oklahoma's federal legislators and senators should introduce laws that delegate civil and regulatory authority to the State. Doing so would ensure there is no other decision like *Oklahoma v. United States DOI*.[247] If a law broader than the Sigler Act was passed, it could authorize the Oklahoma Corporation Commission to regulate all energy production in Indian Country. With the passage of an act like that, it would be challenging for a court to determine that Oklahoma lacks jurisdiction or is preempted. However, without such a law, the State can expect to face more challenges.

245. *United States DOI*, 640 F.Supp.3d 1130.
246. *Id.* at 1144-45.
247. Herrera, *supra* note 33.