INDIAN COUNTRY POST-*MCGIRT*: IMPLICATIONS FOR TRADITIONAL ENERGY DEVELOPMENT AND BEYOND

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The decision in McGirt v. Oklahoma *is being heralded as the most important Indian law decision of the last 100 years, as it affirmed the reservation boundaries of the Muscogee (Creek) Reservation—an area long considered by many to be under Oklahoma's jurisdiction. Following release of the U.S. Supreme Court's decision, the outcry from the oil and gas industry was almost instantaneous. Roughly twenty-five percent of Oklahoma's oil and gas wells and sixty percent of its oil refineries are located on land impacted by the Court's decision. The territory affected by the Court's decision also includes pipelines crucial to the successful operation of the nationwide Keystone XL pipeline. While the Court's holding addressed criminal jurisdiction under the Major Crimes Act, the decision has broader implications for Indian country, including natural resource development and the corresponding regulatory framework. Tribal communities generally have a special connection to their lands. Yet, they have historically suffered various inequities rooted in federal policies. Rich in natural resources, Indian country has been exploited at the expense of the local tribal community, raising issues of environmental injustice. By upholding treaty rights and obligations, the* McGirt *decision has the potential to further empower tribes in the protection of their lands and the important cultural values therein. Fearing that they will now have to work with tribes and the federal government instead of favorable state officials, oil and gas industry officials decry the Court's decision as being detrimental to the industry. But how exactly will the* McGirt *decision affect the oil and gas industry, and natural resources development in Indian country more broadly? While the full impacts of the Court's decision are only beginning to unfold, this Article seeks to answer the questions left hanging by the Court's decision as they relate to traditional energy development. This Article explores the impact of the* McGirt *decision on traditional energy development through an environmental justice lens. After a brief introduction, Part I of the Article summarizes the legal background that governs oil and gas development in Indian country. Part II provides an in-depth analysis of* McGirt*—first, describing its predecessor,* Sharp v. Murphy, *followed by an explanation of* McGirt *and its holding. The Article concludes by discussing future implications of* McGirt, *including what it means for oil and gas development going forward as well as collateral effects. The Article constitutes an important scholarly contribution as it answers important questions left open after the Court's decision and explains how the Court's decision has broader implications for Indian country and natural resource development generally.*

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Introduction

The decision in *McGirt v. Oklahoma*[1] is being heralded as the most important Indian law decision in the past fifty years, if not the past century. In *McGirt*, the U.S. Supreme Court upheld the Muscogee (Creek) Nation's treaty rights in determining that a portion of Oklahoma remained part of the Muscogee (Creek) Reservation.[2] While the Court's holding was limited to that specific tribal nation and criminal jurisdiction under the Major Crimes Act ("MCA"),[3] the decision nonetheless has broader implications for Indian country, including natural resource development and the corresponding regulatory framework. Moreover, the case addressed historic wrongs against the Creek Nation and upheld federal promises made to it, which could potentially be used to address environmental injustice on tribal lands through greater tribal involvement and control over those lands.

Indian country includes approximately 56.2 million acres of trust lands[4] and holds an abundance of mineral and energy resources. American Indian

1. 140 S. Ct. 2452 (2020).
2. *Id.* at 2459.
3. 18 U.S.C. § 1153. Although the *McGirt* decision was limited to the Muscogee (Creek) Nation's reservation, Oklahoma courts have extended the rationale of the *McGirt* decision to make similar findings related to other tribes located within Oklahoma. *See, e.g.*, Hogner v. Oklahoma, 2021 Okla. Crim. 4 (App. 2021) (Cherokee Nation of Oklahoma); Oklahoma v. Barker, No. CF-2019-92 (Dist. Ct. of Seminole Cnty., Okla. filed 2020) (Seminole Nation of Oklahoma).
4. Cohen's Handbook of Federal Indian Law § 17.02[1] (Nell Jessup Newton ed., 2012) [hereinafter Cohen Handbook 2012].

tribes are the third-largest owners of mineral resources in the United States.[5] Tribal lands contain approximately three to four percent of known U.S. oil and gas reserves, about thirty percent of western coal reserves, and a third or more of U.S. uranium deposits.[6] More than ten percent of federal on-shore energy production occurs on tribal lands.[7] With approximately 15 million acres of energy resources yet to be developed,[8] Indian country can help meet the energy demands of Americans into the foreseeable future.

However, tribal communities have not always benefited from conventional energy development. While in theory oil and gas royalty revenues should strengthen tribal economies, in the past, tribes have received below-market rates.[9] Further, like many other communities of color, tribes have born a disproportionate burden of harm resulting from such development. Fossil fuel production enterprises have been connected to increased violence against Native women[10] and environmental degradation.[11] Indeed, tribes still suffer negative health consequences from uranium mines long closed.[12]

To some extent, the federal government has recognized these inequities and attempted to address them through environmental justice initiatives. The Environmental Protection Agency ("EPA") defines environmental justice as:

> [T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a

5. *Id.* § 17.03[1].

6. *Id.*

7. *Id.*

8. *Id.*

9. *See, e.g.*, Navajo Nation v. United States, 501 F.3d 1327, 1336 (Fed. Cir. 2007) (where the United States "approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans"), *rev'd and remanded*, 556 U.S. 287 (2009).

10. *See, e.g.*, Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GENDER & L. 31, 32, 54 (2018); Summer Blaze Aubrey, *Violence Against the Earth Begets Violence Against Women: An Analysis of the Correlation Between Large Extraction Projects and Missing and Murdered Indigenous Women, and the Laws that Permit the Phenomenon Through an International Human Rights Lens*, 10 ARIZ. J. ENV'T L. & POL'Y 34 (2019); Victoria Sweet, *Extracting More than Resources: Human Security and Arctic Indigenous Women*, 37 SEATTLE U. L. REV. 1157, 1162 (2014) ("While extractive industry development projects are not created to victimize women, violence against women has been the by-product of numerous development projects.").

11. *See generally* Deer & Kronk Warner, *supra* note 10.

12. Mary Hudetz, *U.S. Official: Research Finds Uranium in Navajo Women, Babies*, ASSOCIATED PRESS (Oct. 7, 2019), https://perma.cc/4P96-KE6Q.

> disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.[13]

In 1994, President Clinton issued an executive order directing each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States."[14] While the executive order brought attention to the environmental justice movement, Indian country continues to be exploited for its abundant resources and tribal communities continue to suffer the consequences, including exposure to high levels of pollution and contamination.

However, unlike other communities, tribes are sovereigns possessing the right to self-governance. The *McGirt* decision reinforces tribal sovereignty and the ability of tribes to not only direct their own future, but also to hold other actors accountable. Given the extensive resources contained within Indian country, the *McGirt* decision has the potential to further position American Indian tribes as key players in energy development in the twenty-first century. In this strengthened role, tribes will also be better equipped to address pervasive environmental inequities by managing their resource development in a way that also protects their communities.

This Article explores the impact of the *McGirt* decision on traditional energy development through an environmental justice lens. Part I provides an introduction to the regulatory framework governing resource development in Indian country. It summarizes the main tenets of federal Indian law, the legal backdrop to any action in Indian country, as well as the specific laws regarding oil and gas development. Part II provides an in-depth analysis of *McGirt*—first, describing its predecessor, *Sharp v. Murphy*,[15] followed by an explanation of *McGirt* and its holding. The Article concludes by discussing future implications of *McGirt*, including what it means for oil and gas development going forward and the resulting, broader collateral effects. Perhaps most importantly, the decision confirms that tribes, equipped with their inherent sovereignty, are well poised not only to lead energy development into the foreseeable future, but also to do so in a manner that confronts historical inequities and promotes environmental justice.

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13. EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses § 1.1.1 (1998), https://perma.cc/TA8R-R359.

14. Exec. Order No. 12,898 § 1-101, 3 C.F.R. 859, 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321.

15. 140 S. Ct. 2412 (2020), *aff'g per curiam* Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017).

I. Resource Development in Indian Country

Natural resource development in Indian country occurs within the confines of federal Indian law. To understand the potential implications of *McGirt*, this Part sets the stage by introducing applicable Indian law principles and the regulatory framework in Indian country.

A. A Brief Exploration of Indian Law

Tribal sovereignty is at the heart of Indian law. Simply stated, tribal sovereignty is the inherent ability of tribes to govern their members and territory. It "provides a backdrop against which the applicable treaties and federal statutes must be read."[16] As sovereign nations, tribes interact with the federal government and states on a government-to-government basis. However, tribal sovereignty is not absolute. In a series of cases called the *Marshall* trilogy,[17] the U.S. Supreme Court set forth the basis for tribal sovereignty, while also limiting its reach. The Court defined tribes as "domestic dependent nations."[18] Specifically, tribes are "denominated domestic because they are within the United States and dependent because they are subject to federal power."[19] According to the Doctrine of Discovery, tribes retain the right to occupy their lands, but exclusive title of the land rests with the discoverer, i.e., the United States.[20] The result is the creation of a trust relationship between tribes and the United States. "This relation [is] that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[21] Under the trust doctrine, the United States has a duty to act in good faith in its dealings with tribes, much like the relationship between a trustee and beneficiary.[22]

Contact with foreign sovereigns certainly has influenced tribal governments.[23] Despite this contact, however, tribes retain the status of independent, sovereign governments today. As the U.S. Supreme Court acknowledged, tribes

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

17. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia 30 U.S. 1, 10 (1831); Worcester v. Georgia, 31 U.S. 515, 559–60 (1832).

18. *Cherokee Nation*, 30 U.S. at 17.

19. Cohen Handbook 2012, *supra* note 4, § 1.

20. Johnson v. M'Intosh, 21 U.S. at 543.

21. *Worcester*, 31 U.S. at 555.

22. *Cherokee Nation*, 30 U.S. at 17 (describing the tribal-federal relationship as resembling "a ward to his guardian").

23. For example, the Anglo court systems of the federal government and state governments influenced the development of tribal courts following first contact. *See generally* Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice (1983).

are "distinct, independent political communities."[24] Unless federal law divests a tribe of its inherent sovereignty, the tribe's sovereignty remains intact.[25] Tribes maintain sovereign authority over their members and territory to the extent not limited by federal law.[26]

Nonetheless, the nature of tribal sovereignty has changed over time, largely because of tribes' interactions with the federal government. Today, tribes maintain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[27] Accordingly, any examination of tribal authority should start with the presumption that the tribe in question possesses sovereignty, unless the tribe has been divested of its sovereignty by the federal government.[28]

Jurisdiction in Indian country is a fluid concept that has continued to evolve since the *Marshall* trilogy. Three distinct sovereigns—tribes, the federal government, and states—can potentially exercise civil jurisdiction and apply their laws in Indian country. To determine who has proper jurisdiction, courts require facts regarding who is involved and where the event took place. Indian country is statutorily defined as (a) all land within the limits of any Indian reservation; (b) all dependent Indian communities; and (c) all Indian allotments.[29] Reservations may be established by treaty, statute, executive order, or administrative proclamation. To qualify as a dependent Indian community, the land must (1) have been set aside by the federal government "for the use of the Indians as Indian land," and (2) be under federal superintendence.[30] Finally, Indian allotments are the result of the Allotment Era from approximately 1871 to 1928, during which the federal government allotted tribal lands to individual tribal members—in trust or in fee—in an attempt to assimilate Indians into mainstream society.[31] As a result of the various federal Indian policies, including the Allotment Era, the Indian country footprint has changed over time, with reservation boundaries being the subject of extensive litigation.[32] However,

24. As part of the *Marshall* trilogy, in *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), the Court explained that even though the tribes were coined as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), tribal sovereignty still existed, and tribes were not dependent on federal law. COHEN HANDBOOK 2012, *supra* note 4, § 4.01[1][a]. "Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice." *Id.* § 4.01[1][a].
25. COHEN HANDBOOK 2012, *supra* note 4, § 4.01[1][a].
26. *Id.* § 4.01[1][b] (citations omitted).
27. United States v. Wheeler, 435 U.S. 313, 323 (1978).
28. COHEN HANDBOOK 2012, *supra* note 4, § 4.01[1][a].
29. 18 U.S.C. § 1151.
30. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 521 (1998).
31. *See generally* JUSTIN BLAKE & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 82–101 (3d ed. 2016); COHEN HANDBOOK 2012, *supra* note 4, §§ 1.01–1.07 (summarizing the Indian federal policies).
32. *See, e.g.*, Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997).

determining the geographic boundaries of a reservation can be critical in determining proper jurisdiction.

As an initial matter, tribes generally cannot act outside of Indian country. Tribes retain inherent authority to exercise civil and regulatory control over non-Indians in Indian country. However, jurisdictional uncertainty sometimes arises in relation to a tribe's authority over the actions of non-Indians acting within the tribe's territory. This is particularly relevant to natural resource development, as it is not uncommon for the developer to be a non-Indian acting on land owned by a non-Indian. Tribal authority over non-Indians on non-Indian fee land located within a reservation is limited.[33] The U.S. Supreme Court set forth the conditions required to exercise such civil jurisdiction in *Montana v. United States*.[34]

In *Montana*, the Court considered the extent of the Crow Nation's inherent sovereignty over non-Indians.[35] Specifically, the Crow Nation wished to regulate the hunting and fishing of non-Indians on non-Indian land located within the Nation's territory.[36] Ultimately, the Court determined that the Tribe had been divested of certain attributes of sovereignty[37] and did not have authority to regulate the hunting and fishing of non-Indians on non-Indian fee land[38] within the Crow Nation's reservation boundaries.[39]

Despite the implicit divestiture of tribal inherent sovereignty over non-Indians on non-Indian fee land within reservation boundaries, the Court acknowledged that tribes may regulate the activities of such individuals under two

33. *See* Montana v. United States, 450 U.S. 544, 545–46 (1981). Tribes' criminal jurisdiction is generally limited to Indians. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978).

34. 450 U.S. 544 (1981).

35. *See id.*

36. *Id.* at 547.

37. *See id.* at 564; *see also* Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994). "According to this theory, courts can rule that, in addition to having lost certain aspects of their original sovereignty through the express language of treaties and acts of Congress, Tribes also may have been divested of aspects of sovereignty by implication of their dependent status." Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 NAT. RES. & ENV'T 35, 35 (1996).

38. *Montana*, 450 U.S. at 564–65. Since *Montana*, the U.S. Supreme Court has also considered the ability of tribes to regulate the conduct of non-members and non-Indians on other types of lands. For example, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court held that the Tribe did not possess the inherent sovereignty to adjudicate a civil complaint arising from an accident between two non-Indians on a state highway within the Tribe's reservation boundaries. *Id.* at 453. The *Strate* Court explained that "[a]s to nonmembers, we hold, a Tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.*

39. *See Montana*, 450 U.S. at 564–65 ("[The] exercise of Tribal power beyond what is necessary to protect Tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation.").

circumstances.[40] First, tribes "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[41] Second, a tribe retains the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[42]

Notably, the *Montana* decision involved the actions of non-Indians living on non-Indian land within the Nation's territory. It may appear, then, that tribes have more authority to regulate the activities of non-members and non-Indians on tribally controlled land within the tribe's territory. However, the U.S. Supreme Court's decision in *Nevada v. Hicks*[43] casts doubt on this assumption. In *Hicks*, the Court considered whether the Fallon Paiute-Shoshone Tribes had jurisdiction over Mr. Hicks' civil claim against Nevada game wardens in their individual capacities.[44] Mr. Hicks, a tribal citizen, alleged that the game wardens had violated certain tribal civil provisions (in addition to violating federal law) when searching his on-reservation property.[45] In concluding that the tribal court did not have jurisdiction to hear the tribal-law–based claims, the Court found that the *Montana* exceptions did not apply.[46] It may therefore be argued that the *Hicks* Court implicitly suggested that *Montana* applied to the actions of non-members and non-Indians within Indian country regardless of the status of land where the activity occurred.

The extent of tribal jurisdiction over non-Indians continues to be tested and shaped by case law today. As a result, it has been difficult for tribes to effectively regulate and protect their communities. So long as tribal jurisdiction continues to be challenged or diminished, fully achieving environmental justice in Indian country will be difficult.

B. Oil and Gas Leasing in Indian Country

Many tribes rely on natural resource development as a means of economic development: "In 2019, federally recognized Indian Tribes . . . and individual Indian mineral owners received $1.1 billion in energy and mineral revenue—

40. *Id.* at 565.

41. *Id.*

42. *Id.* at 566.

43. 533 U.S. 353 (2001).

44. *Id.*

45. *Id.* at 356–57.

46. *Id.* at 358–69, 374–75.

the largest source of revenue generated from natural resources on trust lands."[47] In Indian country, resource development can occur in three ways: (1) tribes may develop their resources directly; (2) tribes may assume administration of a federal Indian program through contracts and self-governance compacts;[48] and (3) non-tribal entities may enter into leases or other arrangements to develop the land.[49] Most development occurs through the third option[50] and will be discussed in more detail below.

In order to restore ancestral lands lost and to support tribal growth, many tribes have purchased land on the open market and hold such land in fee simple absolute.[51] Tribes have sole authority for leasing mineral rights on tribal lands owned in fee. However, trust lands—typically consisting of land set aside as a reservation for the tribe—generally require federal approval for leases with non-Indian entities. Stemming from the trust relationship established by the *Marshall* trilogy, the federal government has certain responsibilities with respect to trust lands.[52] The Department of the Interior, through the Bureau of Indian Affairs, holds title to trust lands for tribes. Consistent with the Doctrine of Discovery, the Indian Nonintercourse Act also prohibits the "purchase, grant, lease, or other conveyance" of Indian lands without federal approval.[53] Once the lease has been approved, the federal government continues to have a trust responsibility toward the tribe and trust allottees.[54]

Mineral rights are presumed to have passed to the tribe when a reservation is established, unless specifically excluded.[55] In some cases, the mineral rights may be separated from the surface rights, creating a split estate. In those instances, additional challenges may arise in determining what materials are in-

47. Tana Fitzpatrick, Cong. Rsch. Serv., R46446, Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress 1 (2020), https://perma.cc/D2W6-LWPF.

48. *See* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423).

49. *See* Cohen Handbook 2012, *supra* note 4, § 17.01.

50. *See, e.g.*, Harv. Project on Am. Indian Econ. Dev., The State of Native Nations: Conditions Under U.S. Policies of Self-Determination 163 (2008); Maura Grogan, Revenue Watch Inst., Native American Lands and Natural Resource Development 13 (2011), https://perma.cc/MV3C-8FVN.

51. In order for fee land to become part of Indian country, the federal government must take the land into trust on behalf of the tribe. This process is overseen by the Department of Interior and set forth in 25 C.F.R. § 151 (2020).

52. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324–25 (2011) ("The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.").

53. 25 U.S.C. § 177. Failure to obtain Secretarial approval renders the subject agreement void. 25 C.F.R. § 211.53(a) (2020).

54. United States v. Mason, 412 U.S. 391, 398 (1973).

55. United States v. Shoshone Tribe, 304 U.S. 111, 117–18 (1938).

cluded within the mineral reservation and to what extent the surface owner must accommodate the mineral owner. Although generally the surface owner must accommodate the mineral owner, under the Accommodations Doctrine, the mineral owner is required to show due regard for the interests of the surface owner and only occupy those portions that are reasonably necessary to develop the mineral estate.[56] Dealing with split estates in Indian country may be particularly challenging when the surface interests contain sacred religious or cultural sites.

Beyond these general principles governing development on tribal lands, Congress has passed several laws that dictate the process that must be followed. Congressional acts include the Indian Mineral Leasing Act of 1938 ("IMLA"),[57] Indian Mineral Development Act of 1982 ("IMDA"),[58] Indian Tribal Energy Development and Self-Determination Act of 2005 ("ITEDSA"),[59] and Indian Tribal Energy and Self-Determination Act Amendments of 2017 ("ITEDSA 2017").[60] Each of these statutes govern oil and gas leasing of Indian lands and deserve brief attention.

Initially, tribes were relegated to a passive role in the management of their lands. The IMLA sought to provide uniformity to leasing laws of Indian lands and to ensure Indians received the greatest return from their property.[61] The IMLA allowed Indian lands to be leased for an initial term of ten years, and then continuing thereafter subject to tribal consent and Secretary approval.[62] The Act also prohibited state taxation of tribal mineral royalty payments while providing greater transparency through a standardized system for rents and royalties.[63] Although tribes gained more control over their resources, tribal authority was more "on paper than in practice," with the federal government retaining "most of the practical decision-making about Indian natural resources development and use."[64] Additionally, "throughout most of the twentieth century the federal government consistently undervalued Indian resources and did a notoriously poor job of negotiating and collecting royalties."[65]

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56. The Accommodations Doctrine has been developed through case law and is also known as the "alternative means doctrine" and "due-regard" approach.

57. 25 U.S.C. §§ 396a–396g.

58. *Id.* §§ 2101–2108.

59. *Id.* §§ 3501–3506.

60. Pub. L. No. 115-325, 132 Stat. 4445 (2018) (codified as amended in scattered sections of 16, 25, and 42 U.S.C.).

61. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 767 n.5 (1985).

62. 25 U.S.C. §§ 396a, 415.

63. *Blackfeet Tribe*, 471 U.S. at 766–68 (1985); 25 U.S.C. § 398b.

64. Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065, 1074 (2008).

65. Grogan, *supra* note 50, at 13.

The IMDA sought to maximize the financial return for tribes, while also furthering tribal self-governance.[66] Subject to secretarial approval, tribes were authorized to enter into mineral agreements, including "any joint venture, operating, production sharing, service, managerial, lease or other agreement."[67] As a result, tribes are able to participate more meaningfully in the decision-making process and directly engage in negotiations. Beyond merely providing approval, the Secretary, upon request, also shall provide assistance to tribes during negotiations.[68]

ITEDSA further expanded tribal control over resource development and the leasing process.[69] Through Tribal Energy Resource Agreements ("TERAs"), tribes may enter into leases and business agreements.[70] While initial secretarial approval is required for TERAs, once it is obtained, no further approval is required for the specific lease or mineral agreement that follows. ITEDSA also includes provisions for scientific and technical assistance. Upon tribal request, the Secretary shall ensure the tribe has "available scientific and technical information and expertise, for use in the regulation, development, and management of energy resources of the Indian Tribe on Indian land."[71] While ITEDSA paved the way for greater tribal control, few tribes initiated the TERA process due to lack of capacity, uncertainty regarding the process, and concerns about the costs to tribes.[72] To date, no tribes have entered into a TERA with the Secretary.[73]

In December 2018, Congress enacted ITEDSA 2017 to address tribal concerns; the following year, the Department of Interior finalized amendments to its regulations.[74] ITEDSA 2017 amended the procedural requirements for TERAs, including the timeframe for funding agreements and processing a TERA.[75] Whether the amendments and regulations were sufficient to remove barriers to development remains to be seen.

While leasing can be lucrative, it can come with other costs. For example, "[s]ome leases may bring large numbers of non-Indians onto the reservation or may entice states to attempt to exercise regulatory and taxing powers over reservations."[76] The influx of non-Indians arriving as a result of oil and gas develop-

66. 25 U.S.C. §§ 2101–2108; S. REP. NO. 97-472, at 2 (1982).
67. 25 U.S.C. § 2102(a).
68. *Id.* § 2106.
69. *Id.* §§ 3501–3506.
70. *Id.* § 3504(a).
71. *Id.* § 3503(c).
72. *See* FITZPATRICK, *supra* note 47, at 1.
73. *See id.*
74. *See id.* at 2.
75. 25 U.S.C. § 3504(e).
76. Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1064 (1974).

ment has been connected with an increase in violent crimes in tribal communities.[77] And a state's assumption of regulatory control is an encroachment on tribal sovereignty and on a tribe's ability to protect its own lands and people. Both harms contribute to environmental injustice in Indian country.

For many tribes, their land has cultural and spiritual significance. For example, the traditional boundaries of the Navajo Nation are marked by four sacred mountains—a place that was given to them by the Holy People.[78] Therefore, while development can have many economic benefits, tribes often will balance economic benefits against the risk of irreparable harm to the land and its cultural value. To achieve environmental justice, tribes must be able to fully exercise their inherent civil and regulatory authority, taking into consideration all aspects of energy development on their lands—e.g., economic interests, impacts to the environment and human health, and social impacts to the community.

As discussed below, at its core, the *McGirt* case is about upholding the promises made to tribes. Many of these promises are rooted in the trust relationship between tribes and the federal government and include the protection of the tribes' members, land, and resources. Enforcement of these promises has the potential to remedy historic wrongs, including environmental injustice in Indian country, by strengthening tribal sovereignty and shifting the regulatory framework to include greater tribal involvement and control.

II. *Sharp v. Murphy*, *McGirt v. Oklahoma*, and the Emerging Epilogue: A Three-Part Saga

Having provided a background in the law as it currently exists in relation to natural resource development in Indian country, this Part now examines the U.S. Supreme Court cases that have the potential to disrupt the present scheme—*Sharp v. Murphy* and *McGirt v. Oklahoma*. Through a descriptive analysis of the cases, the parties' arguments are summarized and the reasoning behind the Court's ruling identified. Following the case discussion, this Part concludes with the Muscogee (Creek) Nation and State of Oklahoma's immediate response to the *McGirt* decision, setting the stage for Part III's exploration of potential impacts in Indian country more broadly.

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77. *See* Deer & Kronk Warner, *supra* note 10, at 38 ("Starting with the Gold Rush in California in the 1840s, actions to exploit the land have almost always been correlated with an increase in violent crime, much of which is perpetrated by non-Indian men against Native women."); *see also* Michelle Haefele & Pete Morton, *The Influence of the Pace and Scale of Energy Development on Communities: Lessons from the Natural Gas Drilling Boom in the Rocky Mountains*, 8 W. Econ. F. 1, 6 (2009), https://perma.cc/7L46-RMU4.

78. *See* Peter Iverson, Diné: A History of the Navajos 9–12 (2002) (discussing the connection between Diné identity and their land).

A. The Prequel: Sharp v. Murphy

The long and winding road leading to the U.S. Supreme Court's decision in *McGirt* begins with a previous case, *Sharp v. Murphy*. In *Sharp v. Murphy*, Patrick Murphy—a citizen of the Muscogee (Creek) Nation—was convicted of first-degree murder and sentenced to death in Oklahoma state court.[79] Following his conviction, Mr. Murphy filed a writ of habeas corpus, challenging the status of the land where the murder was allegedly committed.[80] He argued that the murder occurred within Indian country, on the Muscogee (Creek) Reservation; therefore, the MCA applied, giving the federal government jurisdiction in the matter—not the State of Oklahoma.[81] In order to determine proper jurisdiction, the Tenth Circuit focused on whether the land in question was Indian country, or in other words, whether the Muscogee (Creek) Reservation had been diminished or disestablished.[82]

As a starting point, the Tenth Circuit explained that the MCA applies to major crimes, including murder, committed within Indian country.[83] The MCA makes jurisdiction over such crimes concurrent between the federal government and tribe.[84] Jurisdiction does not depend on whether the victim is an Indian—only that the perpetrator is an Indian, and that the crime occurred in Indian country. "[A]ll lands within the boundaries of a reservation have Indian country status" for purposes of the MCA.[85] Accordingly, if the murder occurred within the boundaries of the Creek Reservation, then the federal government, and not the state, would have jurisdiction under the MCA.

The Tenth Circuit next focused on determining whether the land where the murder occurred was within the Creek Reservation. Only Congress can diminish or disestablish an Indian reservation and such diminishment will not be lightly inferred.[86] Combined with the Indian law canons of construction that treaties be liberally construed in favor of Indians and ambiguities resolved in their favor,[87] a presumption exists against diminishment or disestablishment absent clear congressional intent. Consequently, to determine the status of the land, the Tenth Circuit turned to the actions and intent of Congress. Looking

79. Murphy v. Royal, 875 F.3d 896, 905 (10th Cir. 2017), *aff'd per curiam sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020).

80. *Id.* at 906.

81. *Id.* at 907.

82. *Id.* at 914.

83. *Id.* at 915.

84. Under the MCA, "[a]ny Indian who commits" certain enumerated offenses within Indian country "against the person or property of another Indian or other person . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

85. *Murphy*, 875 F.3d at 917.

86. Solem v. Bartlett, 465 U.S. 463, 470 (1984).

87. *See* COHEN HANDBOOK 2012, *supra* note 4, § 2.02; *Murphy*, 875 F.3d at 920–21.

for clear and plain intent that Congress wanted to diminish or disestablish the Creek Reservation, the court applied[88] the three factors set forth in *Solem v. Bartlett*.[89] Under the first factor, courts examine the relevant statutory text to see if diminishment or disestablishment occurred.[90] Explicit reference to cessation will indicate that Congress intended to diminish or disestablish the reservation.[91] The second factor requires courts to consider events surrounding passage of the relevant congressional act.[92] The third factor, which is the least important, instructs courts to consider relevant subsequent historical events, such as how Congress treated the land in question and demographic changes of the area.[93]

Applying the three *Solem* factors to *Sharp v. Murphy*, the court explained that, as to the first factor, there are no "magic" words of cessation.[94] The court provided extensive detail related to the history of the Muscogee (Creek) Nation.[95] Ultimately, the court concluded that "[t]he most important evidence—the statutory text—fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders."[96] With respect to the second and third factors, the court found the evidence was "mixed" and did not clearly support or negate disestablishment or diminishment.[97] Since ambiguities are to be resolved in favor of tribes, the court concluded that there was no evidence to support a finding of diminishment or disestablishment under either the second or third *Solem* factors.[98] Overall, the Tenth Circuit held that the Creek Reservation had not been diminished or disestablished by clear congressional intent; therefore, the State did not have jurisdiction over the alleged crimes committed by Mr. Murphy.[99]

The State of Oklahoma sought review of the Tenth Circuit's decision. The sole question presented in the petition for writ of certiorari was "[w]hether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an 'Indian reservation' today under 18 U.S.C. § 1151(a)."[100] The U.S. Supreme Court granted the petition for writ of

88. Murphy, 875 F.3d at 820.
89. 465 U.S. 463 (1984).
90. *Id.* at 470.
91. *Id.*
92. *Id.* at 471
93. *Murphy*, 875 F.3d at 920–21.
94. *Id.* at 950.
95. *Id.*
96. *Id.* at 937.
97. *Id.* at 938.
98. *Id.* at 954–66.
99. *Id.* at 966.
100. Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, at i, Royal v. Murphy, 138 S. Ct. 2026 (2018) (No. 17-1107), https://perma.cc/PT5E-Q57E.

certiorari on May 21, 2018.[101] Because Justice Gorsuch sat on the Tenth Circuit at the time of its earlier decision in the case, he recused himself and took no part in the Court's decision.[102]

Following the Court's grant of certiorari, the case took a series of unique twists. On September 24, 2018, the U.S. Solicitor General filed a motion for leave to participate in oral argument as amicus curiae.[103] On November 27, 2018, the Court heard oral argument in the case, but, on December 4, 2018, in an unusual development, the Court requested supplemental briefing on two questions:

> (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a).[104]

Supplemental briefs were filed by the parties, the United States, and the Creek Nation.[105] However, the Court failed to reach a decision in the case and restored the case to the Court's calendar for rehearing on June 27, 2019.[106] The Court never heard rehearing in *Sharp v. Murphy*. Instead, the Court granted cert in *McGirt*.

B. The Saga Continues: McGirt v. Oklahoma

On April 17, 2019, the petition for a writ of certiorari and motion for leave to proceed in forma pauperis were filed from the Oklahoma Court of Criminal Appeals by Jimcy McGirt, a pro se defendant.[107] Jimcy McGirt was convicted of three sexual offenses by an Oklahoma state court.[108] As in *Sharp v. Murphy*, Mr. McGirt argued that the State of Oklahoma did not have jurisdiction to prosecute him because he is an enrolled citizen of the Seminole Nation

101. *Sharp v. Murphy*, SCOTUSBLOG, https://perma.cc/47PA-K2PH.

102. *See* Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020), *aff'g per curiam* Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017).

103. *Sharp v. Murphy*, *supra* note 101.

104. *Id.*

105. *Id.*

106. *Id.* Because Justice Gorsuch recused himself from decisions in the case, many have speculated that the Court's actions meant the Court was deadlocked, 4-4, on a decision in *Sharp v. Murphy*. *See, e.g.*, Adam Liptak, *Supreme Court to Rule on Whether Much of Oklahoma Is an Indian Reservation*, N.Y. TIMES (Dec. 13, 2019), https://perma.cc/SGN7-KS4G.

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

108. *McGirt*, 140 S. Ct. at 2456.

and the alleged crimes occurred within Indian country on the Creek Reservation.[109] Because this case raised essentially the same legal question as *Sharp v. Murphy*, one may assume that the Court opted to grant certiorari in this case—a case where Justice Gorsuch did not have to recuse himself—rather than rehear *Sharp v. Murphy*. Regardless of the reason, the U.S. Supreme Court granted the petition and motion on December 13, 2019, and oral argument was heard on May 11, 2020.[110] The Court released its decision, a 5-4 decision in favor of Mr. McGirt, on July 9, 2020.[111] The majority opinion was authored by Justice Gorsuch.

In reaching its decision, the Court focused on determining where the alleged crimes took place—within or outside the boundaries of the Creek Reservation.[112] To answer this question, the Court engaged in another detailed analysis of the Muscogee (Creek) Nation's history. The Court began with the Treaty With the Creeks,[113] which established the boundaries of the Creek Reservation, and then worked forward in time to determine if the Reservation had been diminished or disestablished by Congress. While there was no doubt that Mr. McGirt committed his crimes on land that was described as part of the Creek Nation's reservation in the Treaty Between the United States and the Creek Nation of Indians ("1866 Treaty"),[114] Oklahoma argued that this territory was no longer part of the Muscogee (Creek) Nation's reservation.[115] As a result, the Court spent a significant portion of its decision reviewing treaty language and determining whether congressional action had abrogated any of those treaty promises. The Court specifically focused on "whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law."[116]

As a primary matter, the Court confirmed the founding and continuation of the Creek Reservation in the nineteenth century.[117] In doing so, the Court detailed assurances made by the United States to the Muscogee (Creek) Nation that the land in question would remain theirs and be the "permanent home" to the Nation.[118] Although the treaties in question did not specifically use the term

109. *Id.*

110. *McGirt v. Oklahoma*, SCOTUSBLOG, https://perma.cc/2QB9-T79T.

111. *McGirt*, 140 S. Ct. at 2452.

112. *McGirt*, 140 S. Ct. at 2459 ("[T]he MCA defines [Indian country] to include, among other things, 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.'" (citing 25 U.S.C. § 1151(a))).

113. Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368.

114. Art. III, June 14, 1866, 14 Stat. 786.

115. *McGirt*, 140 S. Ct. at 2460.

116. *Id.*

117. *See id.*

118. *Id.* at 2460–62.

"reservation," similar treaty language had been used as establishing reservations in past decisions.[119] And, although the 1866 Treaty diminished the size of the reservation, Congress explicitly reaffirmed its commitment to maintaining the remaining land "as a home" for the Muscogee (Creek) Nation.[120]

The Court continued its analysis to determine the present-day boundaries of the Creek Reservation. The Court noted that the United States had broken its treaty promises to the Creek Nation, resulting in the breakup of tribal lands, with many non-Indians gaining ownership of land within the reservation borders.[121] Oklahoma attempted to use this breakup of tribal lands as a basis for one of its main arguments, arguing that Congress disestablished the Creek Reservation during the Allotment Era when it opened up tribal lands to allotment and settlement by non-Indians.[122] However, notwithstanding changes in land ownership, only Congress can diminish reservation boundaries.[123] Given that Congress knows how to use language to diminish or disestablish a reservation,[124] "the lack of a statute evincing anything like the 'present and total surrender of all Tribal interests' in the affected lands" indicated to the Court that Congress did not intend to disestablish the Creek Reservation.[125] Plainly stated, although Congress opened up the Creek Reservation to non-Indian settlement and purchase of lands, there is no congressional act specifically stating that Congress intended to disestablish the reservation.

Furthermore, Congress left the Muscogee (Creek) Nation with "significant sovereign functions" over the land in question, and congressional "intrusion" into some areas, such as tribal courts, did not equate to the diminishment or disestablishment of the reservation.[126] Although the Five Civilized Tribes Act of 1906 ("1906 Act")[127] resulted in significantly more federal intrusion into the Muscogee (Creek) Nation's activities, the Act did not disestablish the Creek Reservation or put an end to the tribal government.[128] To the contrary, the 1906 Act affirmed the Creek Nation's continued existence, and subsequent congressional actions never suggested that the tribal government ceased to exist.[129] Starting in the 1920s, federal policies toward tribal governments changed—shifting away from assimilation policies to greater support of

119. *Id.* at 2461.

120. *Id.* The Court also noted that several subsequent federal laws made mention of the Creek Reservation. *Id.*

121. *Id.* at 2462.

122. *Id.* at 2463.

123. Solem v. Bartlett, 465 U.S. 463 (1984).

124. *McGirt*, 140 S. Ct. at 2464.

125. *Id.* (citation omitted).

126. *Id.* at 2466.

127. Ch. 1876, 34 Stat. 137 (1906) (current version at 25 U.S.C. § 255).

128. *McGirt*, 140 S. Ct. at 2466.

129. *Id.*

tribes—and since that time, the Muscogee (Creek) Nation has only grown and prospered.[130]

Unable to identify any acts of Congress that explicitly disestablished the Creek Nation, Oklahoma next argued that historical practices and demographic data suggest that the Creek Reservation had been disestablished.[131] In support, Oklahoma argued that *Solem* should be read as creating a three-step test, requiring the court to go through all three steps: 1) congressional statements; 2) contemporary events; and, 3) *subsequent events and demographics*.[132] But the Court rejected this interpretation of *Solem*, explaining that only when an "ambiguous statutory term or phrase emerges" should a court turn to "contemporaneous usages, customs, and practices to . . . shed light on the meaning of the language in question at the time of enactment."[133] There is no reason to consult external sources when the congressional meaning is unambiguous. Because Oklahoma failed to cite an ambiguous term or phrase, the Court found that there was no ambiguity in any of the congressional actions taken regarding the Creek Reservation and declined to examine subsequent historical practices or demographic data.[134]

Oklahoma's other legal arguments asserted that the Creek Reservation was never established in the first place; at most, the Muscogee (Creek) Nation possessed a dependent Indian community.[135] Even accepting this argument at face value, dependent Indian communities are part of Indian country.[136] As a result, Oklahoma would lack jurisdiction to prosecute Mr. McGirt regardless of whether the territory is a reservation or a dependent Indian community, as both qualify as Indian country.[137] Alternatively, Oklahoma asserted that because the Muscogee (Creek) Nation owned the land in fee, it could not be reservation land, which must be withheld by the federal government from sale.[138] The Court, however, rejected this argument because, even though the Muscogee (Creek) Nation held the land in fee, the federal government still precluded the land from being sold.[139] Similarly, the Court rejected Oklahoma's argument that the MCA does not apply to the eastern portion of Oklahoma.[140] The State of Oklahoma was formed from two territories—the Oklahoma territory of the west and the Indian territory of the east—resulting in different court structures

130. *Id.* at 2467.
131. *Id.* at 2468.
132. *Id.*
133. *Id.* (citations omitted).
134. *Id.* at 2469–73.
135. *Id.* at 2474.
136. *Id.*
137. *Id.*
138. *Id.* at 2475.
139. *Id.*
140. *Id.* at 2476.

between the two territories.[141] Notwithstanding these differences, the Court found that the MCA applied equally across Oklahoma as soon as it became a state.[142]

After losing all of its legal arguments, Oklahoma turned to policy arguments. Oklahoma asserted that affirming the existence of the Creek Reservation would have far-reaching implications beyond the present case.[143] Oklahoma warned that the Court's holding "might be used by other Tribes to vindicate similar treaty promises."[144] With several other tribes located within the State, Oklahoma feared that "as much as half its land and roughly 1.8 million of its residents could wind up within Indian country."[145] However, the Court disregarded these concerns on procedural grounds. Specifically, the Court held that it could only focus on the limited issues before it—the Muscogee (Creek) Nation, relevant Creek treaties, and Creek Reservation—and it could not speculate as to other tribes, treaties, and tribal lands. Another concern raised by the State—the unsettling of numerous criminal prosecutions—was also dismissed because the MCA applies only to certain crimes.[146] Consequently, the impact of the Court's decision will be limited to those prosecutions falling under the MCA.[147]

Notwithstanding the limitations placed upon the ruling by the Court, the Court acknowledged that its decision may nonetheless have far reaching impacts:

> [T]he State worries that our decision will have significant consequences for civil and regulatory law. . . . [M]any 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. 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 for purposes of the MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, historical preservation, schools, highways, 23 U.S.C. § 120, roads, § 202, primary care clinics, housing assistance, § 4131, nutritional programs, disability programs, and more. But what are we to make of

141. *Id.*
142. *Id.* at 2476–78.
143. *Id.* at 2479.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 2480.

> this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.[148]

In the end, the Court explained that, should such fears become a reality, other legal remedies exist to protect established interests.[149] The Court reversed the Oklahoma Court of Criminal Appeals in *McGirt v. Oklahoma*,[150] and, at the same time, affirmed the Tenth Circuit in *Sharp v. Murphy*.[151]

C. The Epilogue

The full impact of the *McGirt* decision is only just beginning to play out. In response to dire warnings by the State of Oklahoma and the dissent in the case, Justice Gorsuch highlighted successful tribal-state cooperation in the past and opined that such comity would likely continue in the future:

> With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with Tribes, including many with the Creek. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions . . . No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements . . . will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.[152]

Overall, the majority recognized that the *McGirt* decision would likely have repercussions for the relationship between the Muscogee (Creek) Nation (and potentially other Oklahoma Tribes) and the State of Oklahoma, but they believed that the relevant parties have the capacity to work through such challenges in the spirit of "cooperative sovereignty."[153]

As predicted, the State and five Tribes within Oklahoma responded quickly, releasing a "Murphy/McGirt Agreement-in-Principle" on July 16, 2020—only one week after the Court released its decision.[154] For all intents and purposes, the proposed Agreement-in-Principle, which was a mere two pages, mirrored existing federal Indian law applicable to other parts of Indian country

148. *Id.* (internal citations omitted).

149. *Id.* at 2481.

150. *Id.* at 2482.

151. Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020) (per curiam).

152. *McGirt*, 140 S. Ct. at 2482.

153. *Id.*

154. Okla. Off. of the Att'y Gen., Attorney General and Five Tribes Release Agreement in Principle for Criminal, Civil Jurisdiction (2020), https://perma.cc/9A3U-7KML.

with regard to tribal civil regulatory and adjudicatory authority.[155] The same could not be said with regard to its criminal provisions. The Agreement was quickly criticized by many in Indian country, and especially Oklahoma tribal members, as surrendering tribal sovereignty because the Agreement would allow the state to prosecute crimes that have traditionally been under the exclusive sovereignty of the tribes or the federal government.[156] Both the Muscogee (Creek) Nation and Seminole Nation withdrew from the Agreement over concerns that it would surrender aspects of tribal sovereignty that had been affirmed in the Court's decision.[157] The Cherokee Nation of Oklahoma's position on the Agreement seems, at the time of writing, to be in flux, as the Principal Chief of the Nation originally signed on to the Agreement, but, after significant backlash from citizens of the Nation, seems to be open to different courses of action.[158] At best, it would seem that tribal support for the Agreement is waning.

State support for the Agreement is also suspect. On July 22, 2020, the Governor of the State of Oklahoma requested approval to administer the State's environmental regulatory programs in Indian country within the state.[159] The request was made under section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA").[160]

155. For example, the provision on civil regulatory and adjudicatory jurisdiction in Indian country largely mirrors the U.S. Supreme Court's decision in *Montana*, where the Court held that there is a general presumption against tribal civil regulatory authority over non-Indians on non-Indian land, unless the non-Indian consents to tribal jurisdiction or the actions of the non-Indian threaten the health, safety, and welfare of the tribe. *Compare* Montana v. United States, 450 U.S. 544, 545 (1981), *with* OKLA. OFF. OF THE ATT'Y GEN., *supra* note 154, at 2 ("Affirm the Five Tribes' civil jurisdiction throughout their respective treaty territories, to be exercised subject to Federal law that generally governs Tribal civil jurisdiction in Indian country. The Five Tribes would accordingly be affirmed in their civil jurisdiction over, for example, matters of self-government and their members but would remain subject to the Federal law that provides, as a general matter, that Tribes do not have civil jurisdiction over non-members outside Indian trust or restricted lands, as described above, *except for* (1) subject matters for which Federal law specifically grants Tribes jurisdiction; (2) activities of non-members that are part of a consensual relationship, such as contracts, with the Tribe; or (3) conduct of non-members that threatens Tribal self-governance or the economic security, health, or welfare of the Tribe." (emphasis in original)).

156. *See, e.g.*, Zac Russell, *Cherokee Nation Won't Surrender Its Sovereignty*, INDIANZ.COM (July 24, 2020), https://perma.cc/VS4P-KWG5.

157. Acee Agoyo, *No 'Surrender': Muscogee (Creek) Nation Stands Firm on Sovereignty After Historic Supreme Court Win*, INDIANZ.COM (July 20, 2020), https://perma.cc/K8HK-ZW58.

158. Chad Hunter, *Cherokee Nation Leaders Spar over* McGirt *Ruling Response*, CHEROKEE PHOENIX (July 22, 2020), https://perma.cc/J7EY-ADCK.

159. Sean Murphy, *EPA Grants Stitt Request for Oversight on Tribal Lands*, ABC NEWS (Oct. 5, 2020), https://perma.cc/LSE3-UXA8.

160. Pub. L. No. 109-59, § 10211, 199 Stat. 1144, 1937 (2005). ("Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the 'Administrator') determines that a regulatory program submitted by the

On October 22, 2020, EPA approved Oklahoma's request.[161] With EPA's approval, the State of Oklahoma now has the same regulatory authority over environmental matters that it had prior to the *McGirt* decision.[162] Notably, EPA actually granted Oklahoma more regulatory authority than the State requested in its July 22nd letter, including additional state regulatory control over underground storage, air pollution, pesticides, lead-based paints, and asbestos in schools.[163] There is concern that EPA's approval "establishes a legal and administrative pathway to potential environmental abuses on tribal land, including dumping hazardous chemicals like carcinogenic PCBs and petroleum spills, with no legal recourse by the tribes."[164] Tribal leaders shared this concern, expressing apprehension about the impact of this decision on their environments.[165] Although EPA's decision is limited to Oklahoma and the tribal territories located within the borders of Oklahoma, it has the potential to perpetuate environmental injustices within Indian country broadly. The burdens of environmental pollution continue to fall disproportionately on tribal communities across the country. Federally sanctioned state encroachments of tribal sovereignty further exacerbate these issues.

At the same time this was happening between the State of Oklahoma and tribes located within Oklahoma, a rumor has emerged suggesting that some in Congress are working on legislation that would terminate reservations in Oklahoma.[166] Given its plenary authority in Indian country,[167] Congress certainly possesses the ability to disestablish reservations in Oklahoma, as Justice

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State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets the applicable requirements of the law, and the Administrator approves the States to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.")

161. Letter from Andrew R. Wheeler, Adm'r, EPA, Approval of State of Oklahoma Request Under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, to Kevin Stitt, Governor, Okla. (Oct. 1, 2020), https://perma.cc/VLY2-UXFR. In his letter to Governor Stitt, EPA Administer Wheeler took the position that approval was mandatory if the statutory criteria are met. *Id.* at 2–3. However, some disagree that the statute fails to provide EPA discretion, as some EPA officials have treated the language as discretionary in the past. Ti-Hua Chang, *EPA Grants Oklahoma Control over Tribal Lands*, YOUNG TURKS (Oct. 5, 2020), https://perma.cc/MU8D-DJTE.

162. Chang, *supra* note 161.

163. *Id.*

164. *Id.*

165. *Id.*

166. Acee Agoyo, *National Congress of American Indians Stands Strong Against Efforts to Erode Tribal Sovereignty*, INDIANZ.COM (July 23, 2020), https://perma.cc/W3V8-JFGH.

167. *See* United States v. Kagama, 118 U.S. 375, 379–80 (1886).

Gorsuch hinted at in his opinion.[168] But, recognizing the political realities of Congress at the moment, whether such congressional action would actually manifest is a question unlikely to be answered in the immediate future.

The months following the Court's decision in *McGirt* have been a rollercoaster ride in terms of tribal-state, state-federal, and tribal-federal relations for the parties involved. While the Court's decision answered the immediate question of the status of the Creek Reservation's boundaries, it opened many other questions that remain to be answered. Some answers will be easier to come by than others.

III. Status Quo Meets *McGirt*: How the Court's Decision May Impact Natural Resource Development in Oklahoma and Beyond

With background on the existing law impacting natural resource development and an understanding of what and why the Court ruled in *McGirt*, this Part now examines how the Court's decision will likely (not) impact natural resource development, including oil and gas development, within the recognized reservation borders of the tribes impacted by the Court's decision. There are a couple of things that the *McGirt* decision clearly does not affect. First, anyone who currently owns title in land within the reaffirmed borders of the Creek Reservation will not lose their property because of this decision.[169] Following the Allotment Era, it is not uncommon for non-Indians and non-Indian entities to own land within tribal reservations; these property interests remain intact. Similarly, taxes based on land ownership or status will likely not be affected by this decision.[170] This Part, however, will address those aspects of the status quo that may be affected by the *McGirt* decision, such as criminal jurisdiction, environmental regulation, taxes not based on land ownership, oil and gas regulation, rights of way, and environmental justice. While environmental justice intersects with several of these aspects, such as environmental regulation and oil and gas regulation, it is helpful to examine environmental justice as a stand-alone issue, as we have done below. The Part ends with a section that

168. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2481–82 (2020) ("And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.").

169. Grant D. Crawford, *Former Tribal Justice, Law School Dean Says Supreme Court's* McGirt *Ruling Has No Affect [sic.] on Property Ownership, Taxation*, CNHI LLC (July 19, 2020), https://perma.cc/P6S4-9LVS ("[Former Cherokee Nation Supreme Court Justice Stacy] Leeds said the ruling in no way affects ownership and title of land. 'We're talking about reservation boundaries for jurisdictional purposes,' she said. 'So all of these pieces of land that are already on the county tax rolls, those aren't coming off. There's already federal legislation that says after the allotment—after restriction is lifted from those lands—those lands become fully taxable.'").

170. *Id.*

speculates on how the *McGirt* decision may impact other areas of federal Indian law, including the assertion of tribal treaty rights, advancement of tribal sovereignty, and the federal government's willingness to recognize broken promises.

A. Criminal Jurisdiction

As the above discussion of the events following the *McGirt* decision suggests, many have focused on the decision's impact on criminal jurisdiction within Indian country, particularly within the reservations impacted by the decision.[171] To understand the potential impact of the decision, it is helpful to briefly review criminal jurisdiction in Indian country. Exclusive tribal criminal authority began to fray in 1817 when Congress passed the General Crimes Act, which unilaterally imposed federal criminal jurisdiction on crimes committed by non-Indians against Indians in Indian country.[172] The intrusion continued with the passage of the MCA in 1885, which was the focus of the Court's analysis in the *McGirt* decision.[173] The MCA imposes federal criminal jurisdiction on crimes committed by Indians who are accused of felony-level crimes.[174] While tribal nations retain concurrent authority over such Indians, the imposition of the federal system has served to complicate and confuse the direct application of justice to those who commit violent acts.[175]

Tribal governments themselves are limited in the application of tribal criminal law. There are two major restrictions on tribal criminal authority pertinent to the discussion of natural resource development in Indian country. First, tribal governments are limited in the permissible length of incarceration and the imposition of fines as a result of the Indian Civil Rights Act of 1968.[176] Until the passage of the Tribal Law and Order Act (discussed below), the maximum penalties that could be imposed by a tribal court were one year and/or a $5,000-dollar fine—for any crime, including sexual assault and sex trafficking.[177]

Perhaps more pertinent to the question of energy extraction is the prohibition on the application of tribal criminal jurisdiction over non-Indians. In the

171. Although the decision was specific to the Muscogee (Creek) Reservation and the histories of the Tribes in Eastern Oklahoma are different, many believe that the histories of the "Five Civilized Tribes" in the area are similar enough that the *McGirt* decision will potentially impact the reservation boundaries of these other Tribes—such as the Cherokee Nation of Oklahoma. *See, e.g.*, *id.*

172. 18 U.S.C. § 1152.

173. *Id.* § 1153.

174. *Id.*

175. *See, e.g.*, Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 229 (2017).

176. 25 U.S.C. §§ 1301–1304.

177. *Id.*

1978 case *Oliphant v. Suquamish Indian Tribe*,[178] the U.S. Supreme Court stripped the authority of tribal nations to prosecute non-Indians—for any crime.[179] The *Oliphant* case involved the criminal actions of two non-Indians on the Suquamish Indian reservation.[180] When the Suquamish Tribe sought to prosecute the two non-Indians, the non-Indians protested tribal jurisdiction, arguing that, as non-Indians, they should not be subject to tribal jurisdiction (despite the fact that the crimes had been committed on the reservation).[181] In *Oliphant,* the U.S. Supreme Court ruled that tribes, by virtue of their dependence on the federal government, had lost certain attributes of inherent sovereignty, including the authority to prosecute non-Indians.[182] As a result, only the federal government (or a state government pursuant to special delegation) can prosecute non-Indians accused of a violent crime.

The federal government has released a variety of different crime reports that universally come to the same conclusion: Native people experience some of the highest rates of crime in the Nation, and most of that crime is being committed by non-Indians.[183] The 2016 federal report concluded that over eighty percent of Native women will experience some form of violent crime in their lives, and that over fifty-six percent of Native women will experience some form of sexual violence in their lives.[184] The 2016 report also concluded that over ninety percent of Native people report that they have been the victims of interracial violence—that is, a victim of a non-Indian perpetrator.[185]

This is relevant to natural resource development, because such development requires that significant numbers of non-Native people move (at least temporarily) to the lands in or near reservations to effectuate energy development.[186] Many studies have concluded that violence against Native women and children increases when the exploitation of land brings large numbers of non-Native men to tribal communities.[187]

178. 435 U.S. 191 (1978).

179. *Id.* at 195.

180. *Id.* at 194.

181. *Id.*

182. *Id.* at 199.

183. *See, e.g.*, Steven W. Perry, Bureau of Just. Stats., NCJ 203097, American Indians and Crime: A BJS Statistical Profile, 1992–2002 (2004); Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women (2000); Andre Rosay, Violence Against American Indian and Alaska Native Women and Men (2016).

184. Rosay, *supra* note 183.

185. *Id.*

186. *See* Sari Horwitz, *Dark Side of The Boom*, Wash. Post (Sept. 28, 2014), https://perma.cc/2RS6-XMAZ; Aura Bogado, *Fracking, Tribal Lands, and The Bureau of Land Management: What Happens Next?*, Grist (Mar. 2, 2016), https://perma.cc/DU4E-CLS7.

187. *See* Horwitz, *supra* note 186.

Two major pieces of legislation were adopted to address these concerns—the Tribal Law and Order Act ("TLOA") of 2010[188] and the 2013 reauthorization of the Violence Against Women Act ("VAWA 2013").[189] Both laws were intended to improve the response to violent crime in Indian country by enhancing the federal response to crime while also lifting some of the restrictions on tribal authority. VAWA 2013 was groundbreaking. For the first time since *Oliphant*, the federal government authorized tribal nations to exercise jurisdiction over non-Indians, but only in cases of domestic violence. While spouses and dating partners of Indians can be prosecuted, non-Indians who have *not* been in a relationship with their victims are still exempt from tribal criminal jurisdiction[190]—a category of people which would include those employed by energy companies that seek to exploit tribal lands for oil and gas, or other forms of natural resource development.

Following the *McGirt* decision, companies engaged in natural resource development in Indian country could experience a couple of changes related to criminal matters. First, any Indians employed by such companies who are accused of crimes could find themselves under tribal and/or federal criminal jurisdiction,[191] subject to the limitations discussed above. Second, because of VAWA, any non-Indians can fall under tribal criminal jurisdiction if they commit domestic violence against spouses or dating partners who are tribal members.[192] It is therefore possible that entities engaged in natural resource

188. Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 18 and 25 U.S.C.).

189. Pub. L. No. 113-4, 127 Stat. 54, 118–26 (codified as amended in scattered sections of 18 and 25 U.S.C.).

190. 25 U.S.C. § 1304(b)(4)(B).

191. United States v. Lara, 541 U.S. 193, 210 (2004) (holding that tribes possess criminal jurisdiction over all Indians regardless of whether or not the Indian is a citizen of the tribe at issue).

192. This is particularly relevant because many communities impacted by explosive natural resource development have seen "man camps" (temporary communities of transient workers who tend to be overwhelmingly male) pop up and instances of violence, including sexual assault and domestic violence, increase. Kathleen Finn et al., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1, 2 (2017) ("Rapid oil and gas development have brought an unprecedented rise of violent crime on and near the Fort Berthold reservation. Specifically, the influx of well-paid male oil and gas workers, living in temporary housing often referred to as 'man camps,' has coincided with a disturbing increase in sex trafficking of Native women."); *see also* Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on Her Mission to the United States of America*, ¶57, U.N. Doc. A/HRC/36/46/Add.1 (Aug. 9, 2017), https://perma.cc/JRL9-CXK2 ("Rapid development of the Bakken Formation since 2011 has attracted thousands of oil workers to North Dakota. One of the effects of the influx of oil and gas workers to the area has been a dramatic increase in violent crime, generally, and a notable increase in trafficking of Native women and children."). The U.S. Department of State has also acknowledged the problem, noting that "[s]ervice providers in

development within the territories affected by the Court's *McGirt* decision could find that their employees will have greater interactions with tribal and federal courts. While there are limitations to tribal authority over non-Indians, the Muscogee (Creek) Nation is nonetheless better poised post-*McGirt* to protect its community members against the increase in violence often associated with energy development.

B. Environmental Regulation

Having explained how the *McGirt* decision potentially impacts criminal jurisdiction within the affected territories, it is helpful to now examine how the decision may affect environmental regulation, as natural resource development in Indian country typically is subject to environmental regulation. As an initial starting point, tribes may enact laws because of their inherent tribal sovereignty,[193] including their own tribal environmental regulations. In addition to inherent tribal sovereignty, Congress may also delegate federal environmental authority to tribes through either a treaty or a statute.[194] Congress' ability to delegate authority to tribes is especially important in the context of environmental regulatory law. Because many federal environmental and energy laws are considered to be laws of general applicability, they apply in Indian country unless their application would directly interfere with tribal sovereignty.[195] As a result, EPA has the authority to implement federal environmental laws in Indian country.[196] However, EPA has interpreted some federal environmental statutes, such as the Clean Water Act,[197] "not as delegating or conferring federal power on Tribes, but as authorizing Tribes to implement federal programs within the scope of their inherent [Tribal] powers."[198] Conversely, under the

areas near camps surrounding large-scale oil extraction facilities, such as the Bakken oil fields in North Dakota in the United States, have reported that sex traffickers have exploited women in the area, including Native American women." OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, THE LINK BETWEEN EXTRACTIVE INDUSTRIES AND SEX TRAFFICKING (2017), https://perma.cc/V6CK-NCSZ.

193. COHEN HANDBOOK 2012, *supra* note 4, § 10.

194. *Id.* ("Whether such statutes actually delegate federal power, as opposed to affirming or recognizing inherent power, is a matter of congressional intent.").

195. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (explaining that federal laws of general application apply to Indian country); COHEN HANDBOOK 2012, *supra* note 4, § 10.01[2][a]. However, the application of federal environmental laws does not displace the ability of tribes to enact environmental laws. *Id.* § 10.01[2][b].

196. COHEN HANDBOOK 2012, *supra* note 4, § 10.01[2][a].

197. 33 U.S.C. §§ 1251–1387.

198. COHEN HANDBOOK 2012, *supra* note 4, § 10.01[2][a] (citing 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991)). Moreover, tribal inherent sovereignty to enact environmental laws is not displaced by federal environmental law. For example, the Safe Drinking Water Act states that nothing in the Act's 1977 Amendments "shall be construed to alter or affect the state of

Clean Air Act,[199] EPA interprets the Act as a delegation of authority to tribes.[200] Therefore, under several federal environmental statutes, tribes may choose to administer the federal environmental programs and standards through Tribes-as-States ("TAS") mechanisms.[201] The TAS provisions of major federal environmental statutes, such as the Clean Air Act,[202] Clean Water Act,[203] and Safe Drinking Water Act,[204] allow tribes to act as states for purposes of implementing the statute under the cooperative federalism scheme. Accordingly, in situations where a given federal environmental law may apply to natural resource development, the tribe could have a say in how the related regulations are applied within its territorial borders if it has TAS authority.

Following the *McGirt* decision, the civil regulatory framework discussed in Part I is now applicable to the affected territory and natural resource development therein. As a result, the affected tribes would generally have regulatory jurisdiction over their citizens within their territories, but not over non-citizens owning fee land within the same territory, unless one of the two *Montana* exceptions applies.[205] Through delegated authority, such as the TAS provisions of many federal environmental statutes, tribes may have jurisdictional authority over non-members and non-Indians. Depending on whether the affected tribe has enacted tribal environmental laws and whether it has TAS authority under

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American Indian lands or water rights nor to waive any sovereignty over Indian land guaranteed by treaty or statute." 42 U.S.C. § 300j-6(d)(1).

199. 42 U.S.C. §§ 7401–7671.

200. *See, e.g.*, Wayne Nastri, EPA Region 9, Eligibility Determination for the Navajo Nation for Treatment in the Same Manner as a State for Purposes of the Clean Air Act Title V, 40 CFR Part 71 Program, https://perma.cc/T6BU-SC7U.

201. Judith V. Royster, Michael C. Blumm, & Elizabeth Ann Kronk, Native American Natural Resources Law 227 (3d ed. 2013).

202. 42 U.S.C. § 7601(d)(1)(A).

203. 33 U.S.C. § 1377(e).

204. 42 U.S.C. § 300j-11(b)(1).

205. As support for this conclusion, the controversial *Murphy/McGirt* Agreement-in-Principle, discussed above, certainly appeared to contemplate the application of the *Montana* presumption and its two exceptions. *See* Okla. Off. of the Att'y Gen., *supra* note 154, at 2 ("Affirm the Five Tribes' civil jurisdiction throughout their respective treaty territories, to be exercised subject to Federal law that generally governs Tribal civil jurisdiction in Indian country. The Five Tribes would accordingly be affirmed in their civil jurisdiction over, for example, matters of self-government and their members but would remain subject to the Federal law that provides, as a general matter, that Tribes do not have civil jurisdiction over non-members outside Indian trust or restricted lands, as described above, *except for* (1) subject matters for which Federal law specifically grants Tribes jurisdiction; (2) activities of non-members that are part of a consensual relationship, such as contracts, with the Tribe; or (3) conduct of non-members that threatens Tribal self-governance or the economic security, health, or welfare of the Tribe." (emphasis in original)).

federal environmental laws,[206] an entity engaged in natural resource development within the affirmed tribal borders of the *McGirt* decision could find itself having significantly more interaction with tribal environmental law and federal law that incorporates tribal preferences through the TAS framework. However, immediate changes to environmental regulation are unlikely for now. As previously noted, within two weeks of the Court's decision in *McGirt*, the State of Oklahoma petitioned EPA to allow it to continue to regulate environmental programs across areas that were Indian territory prior to Oklahoma becoming a state.[207] Typically, states do not have the ability to engage in environmental regulation within Indian country, as either EPA or the tribes, through TAS status, maintain regulatory control.[208] In this case, however, EPA granted Oklahoma's request.[209] As a result, Oklahoma's environmental regulations continue to govern the affected territory, although tribal environmental laws could still apply where they are not preempted by federal environmental statutes.

C. Taxation

As mentioned above, the *McGirt* decision will not likely affect property taxes paid by non-Indians.[210] However, because the Muscogee (Creek) Nation—and other tribes impacted by the ruling—could have the ability to tax entities for the use of land or extraction of resources, there could be some impacts to the taxes applied to natural resource development within Indian country. It is therefore helpful to briefly review the existing taxation scheme. To start, a long-standing rule of construction of tax laws provides that "to be valid, exemptions to tax laws should be clearly expressed."[211] Accordingly, we start our examination of the tax implications by determining whether any such exemptions would now apply to the territory in question as a result of the *McGirt* decision. In some cases, Indian interests have been expressly exempted from

206. *See* Elizabeth Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENV'T. L. 42, 67–73 (2014) (discussing tribal environmental laws applicable in Oklahoma); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories"*, 86 U. COLO. L. REV. 789, 812–17 (2015) (discussing tribal innovations under the TAS framework).

207. Jack Money, *Oklahoma Seeks Continued Authority to Oversee Environmental Programs in State's Indian Territories*, OKLAHOMAN (July 24, 2020), https://perma.cc/6HWX-5WSU.

208. EPA, EPA-160S16001, EPA'S DIRECT IMPLEMENTATION OF FEDERAL ENVIRONMENTAL PROGRAMS IN INDIAN COUNTRY (2016), https://perma.cc/M8QD-A9DW; Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1466 (9th Cir. 1985) (holding that EPA's determination that state environmental regulations do not apply within Indian country was reasonable).

209. Safe, Accountable, Flexible, Efficient, Transportation Equity Act, Pub. L. No. 109-59, § 10211, 199 Stat. 1144, 1937 (2005); Letter from Andrew Wheeler to Kevin Stitt, *supra* note 161.

210. Crawford, *supra* note 169.

211. Squire v. Capoeman, 351 U.S. 1, 6 (1956).

general tax laws.[212] In other cases, such as *Squire v. Capoeman*,[213] the courts have been willing to find congressional intent to exempt Indian interests from taxation where the exemption is not express.[214] Accordingly, the *McGirt* decision could result in some tribal interests within the defined territory being exempt from general taxation by the federal or state government.

Specifically, under the test articulated in *Squire*, income derived directly from allotments held in trust is not subject to federal taxation.[215] As a result, the tribe should avoid income tax on directly derived income from allotments held in trust. Income is derived directly if it is generated principally from the use of reservation land and resources.[216] It is not derived directly if it is earned "primarily through a combination of taxpayers' labor, the sale of goods produced off the reservation and improvements constructed on the trust land."[217] Income is also not directly derived if it is attributable primarily to use of the capital improvements constructed on the land and the individual's management of those assets or business activities related to those assets.[218] Using these or similar formulations of the "derived directly" prong, courts have held that income that allottees earned from bonuses and royalties on minerals, from the rental or sale of crops, or from the sale or exchange of livestock, is tax exempt.[219] As a result, a tribal member who is engaging in natural resource development on their allotment will be exempt from federal taxes. But such an exception would have likely existed prior to the *McGirt* decision as the Indian allottee would still have been doing such development on their allotment. Post-*McGirt*, allottees who have income directly derived from allotments held in trust should continue to see that income exempted from taxation.

In terms of tribal taxation, tribes generally maintain the authority to tax their tribal members. For example, this could be in the form of income taxation for employees working for the tribe and property taxes for those living within the tribe's borders. As a result of the *McGirt* decision, the tribe's ability to tax those falling into this second category may be expanded with affirmation of the tribe's borders. These types of taxation, however, are not usually controversial. The controversies are more likely to come up in the context of tribes attempting to tax non-Indian entities doing business within their territories. This was exactly the issue in *Merrion v. Jicarilla Apache Tribe*.[220] In *Merrion*, 21 lessees of

212. *Id.*
213. *Id.*
214. *Id.* at 10.
215. *Id.* at 9.
216. *Id.* at 10.
217. Dillon v. United States, 792 F.2d 849, 856 (9th Cir. 1986).
218. *See* Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979).
219. *See* Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962); United States v. Daney, 370 F.2d 791, 795 (10th Cir. 1966); Rev. Rul. 62-16, 1962-1 C.B. 7.
220. 455 U.S. 130, 133 (1982).

tribal lands were engaged in natural resource development (primarily oil and gas) and challenged the Jicarilla Apache Tribe's application of a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands."[221] Following the revision of the Tribe's constitution, the Tribe sought to apply the severance tax against the lessees that were already engaged in development on the reservation.[222] The Court ultimately held that the Tribe could apply the severance tax, explaining that:

> In *Washington v. Confederated Tribes of Colville Indian Reservation* (*Colville*), we addressed the Indian Tribes' authority to impose taxes on non-Indians doing business on the reservation. We held that "[t]he power to tax transactions occurring on trust lands and significantly involving a Tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from Tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.
>
> The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. They benefit from the provision of police protection and other governmental services, as well as from "'the advantages of a civilized society'" that are assured by the existence of tribal government. Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.[223]

As a result of the *Merrion* decision,[224] it is highly likely that the tribes affected by the *McGirt* decision could enact a severance tax against any lessees

221. *Id.* at 133 (citation omitted).

222. *Id.* at 133–36.

223. *Id.* at 137 (internal citations omitted).

224. After the *Merrion* decision, some argued that the reason the Court held the way it did was because the Secretary of the Interior approved the Tribe's constitutional revision and therefore implicitly approved the taxation. The argument was then that this was a federal delegation to the Tribe and not truly a vestige of tribal sovereignty. However, the Court rejected

engaged in natural resource development within the recently affirmed reservation borders of the tribes. In terms of natural resource development, this would likely be the most significant tax impact of the *McGirt* decision. Imposition of a severance tax, however, would likely be limited to land that is held in trust status.[225] As a result, costs related to taxation could increase for natural resource development entities operating on trust lands, should tribes decide to apply severance taxes as the Jicarilla Apache Tribe did in *Merrion*. Interestingly, a tribe's application of a severance tax does not preclude the state from also taxing a non-tribal entity doing work within Indian country.[226] As a result, a natural resource development entity doing work on tribal trust land within a reservation could potentially find itself taxed by both the tribe and the state following the Court's holding in *McGirt*.[227]

D. Oil and Gas Leasing

The federal government plays a significant role related to energy development within Indian country. Federal regulatory statutes tend to be statutes of general applicability; in other words, the law broadly applies to all persons,

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this argument in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985). In *Kerr-McGee Corp.*, the Court was presented with facts very similar to those in *Merrion*, but there was an important factual difference because the Secretary of the Interior did not approve the Tribe's constitutional revision (there was no requirement for such approval in the prior constitution). Despite this factual difference, the Court still determined that the Tribe had the right to apply the taxes. *Id.*

225. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) (rejecting the ability of the Navajo Nation to require a hotel located on non-Indian fee land within the borders of the Reservation to collect a hotel occupancy tax).

226. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189 (1989). Notably, however, post-*Cotton Petroleum* cases in the lower federal courts have found state taxes on non-Indians doing business within Indian country preempted where there is a comprehensive federal scheme that leaves no room for state regulation or services. *See* Quinault Indian Nation v. Grays Harbor Cnty., 19 Indian L. Rep. 3176, 3179 (W.D. Wash. 1989) (finding that compensating tax on the sale of forest lands to a tax-exempt entity was preempted); *see also* Gila River Indian Cmty. v. Waddell, 967 F.2d 1404, 1413 (9th Cir. 1992) (reversing the trial court's dismissal of the Tribe's suit to enjoin state transaction privilege tax on ticket revenues); Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 435 (9th Cir. 1994) (preempting state tax on off-track betting activities on tribal lands by the Indian Gaming Regulatory Act). Although these lower court cases have adhered to the traditional preemption analysis, none of them has involved state taxation of mineral lessees.

227. Just because a tribe can tax, however, does not mean that it necessarily will tax. Tribes are constantly forced to balance the advantages and disadvantages of "dual taxation." On the one hand, a tribe would see increased revenue through this type of taxation. However, should a tribe tax when the state is already taxing, the tribe would risk business relocating off of the tribe's territory to avoid the dual taxation. Even though that tribe would now have the ability to tax following the *McGirt* decision, as explained above, it may therefore decline to do so because of the possibility that businesses would leave its territory.

property, or groups throughout the United States. In general, such laws also apply to tribes and activities in Indian country.[228] Several federal statutes of general applicability relate to energy development (e.g., the Energy Policy Act of 2005,[229] Rights of Way Act,[230] and Long-Term Leasing Act[231]), as well as federal statutes specific to Indian country (e.g., the IMLA and IMDA discussed in Part I). Leases for renewable energy projects must typically be approved under the Long-Term Leasing Act.[232] If transmission lines or pipelines are included in the project, then the Secretary must also approve the rights-of-way for those projects.[233] Under the Energy Policy Act of 2005 and the Helping Expedite and Advance Responsible Tribal Homeownership Act ("HEARTH Act"),[234] if tribes have the necessary agreement in place, they may approve other agreements related to energy development.[235] However, for a variety of reasons, few tribes have taken advantage of these provisions.[236] Finally, the federal government regulates energy services within Indian country under the Federal Power Act,[237] the Public Utility Regulatory Practices Act,[238] and the Natural Gas Act.[239] Under the Natural Gas Act, the Federal Energy Regulatory Commission has the sole jurisdiction to approve the siting, permitting, and operation of interstate natural gas pipelines.[240]

In addition to these statutes specific to energy, federal environmental statutes also impact the development of energy resources within Indian country. It is therefore notable that several federal environmental statutes also apply to Indian country as statutes of general applicability. Relevant federal environmental statutes include the National Environmental Policy Act,[241] National Historic

228. Two exceptions to this general rule exist: (1) application would adversely affect tribal rights, including the right to self-government; or (2) the statutory text, legislative history, or contemporary context indicates congressional intent to except tribes. COHEN HANDBOOK 2012, *supra* note 4, § 2.03.

229. 25 U.S.C. § 3502.

230. *Id.* §§ 311–28.

231. *Id.* § 415.

232. *Id.* § 415(a).

233. *Id.* §§ 321, 323.

234. *Id.* § 415.

235. *Id.* §§ 3504, 415(h).

236. *See* Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031, 1034 (2013); Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform*, 29 PACE ENV'T L. REV. 811, 816 (2012).

237. 16 U.S.C. § 791a.

238. *Id.* § 2601.

239. 15 U.S.C. § 717.

240. *Id.* § 717f.

241. 42 U.S.C. §§ 4321–4347.

Preservation Act,[242] Clean Water Act, Clean Air Act, and Endangered Species Act.[243]

E. Rights of Way

Another area of the law that could be impacted by the Court's holding in *McGirt* is the law applicable to rights-of-way, as rights-of-way are pervasive throughout Indian country. Rights-of-way through reservations, such as railroads and state highways, are trust land. In *Burlington Northern Railroad Co. v. Blackfeet Tribe*,[244] the Ninth Circuit upheld a tribe's right to impose a tax on a railroad's possessory interests within the reservation.[245] Six years later, however, in *Strate v. A-1 Contractors*,[246] the U.S. Supreme Court held that, for purposes of tribal jurisdiction over state highways, rights-of-way were the equivalent of fee land:

> Forming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude . . . . We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians.[247]

Based on *Strate*, the Ninth Circuit expressly overruled *Burlington Northern Railroad Co.*[248] In *Big Horn County Electric Coop. v. Adams*,[249] the Crow Tribe enacted a Railroad and Utility Tax Code, "assess[ing] a 3% tax on the full fair market value of all 'utility property' located on tribal or trust lands within the exterior boundaries of the [Crow] Reservation."[250] The utility objected, claiming that the Tribe had no authority to tax its property because the property was located on a congressionally granted right-of-way, the equivalent of fee land under *Strate*.[251] The Ninth Circuit agreed that *Strate* governed, even though the Tribe argued that the utility's rights-of-way were neither open to the public nor

242. 54 U.S.C. §§ 300101–307108.

243. 16 U.S.C. §§ 1531–1544.

244. 924 F.2d 899, 904 (9th Cir. 1991).

245. *Id.*

246. 520 U.S. 438 (1997).

247. *Id.* at 455–56.

248. Big Horn Cnty. Elec. Coop. v. Adams, 219 F.3d 944, 953 (9th Cir. 2000).

249. 219 F.3d 944 (9th Cir. 2000).

250. *Id.* at 948.

251. *Id.* at 949.

under the control of the state.[252] So, the Court's decision in *McGirt* does not change the fact that rights-of-way are the equivalent of fee land. However, as a result of the decision, the rights-of-way are now located within tribal land. Given this would now be non-Indian land within the tribal territory, the *Montana* holding applies.[253] Under *Montana*, the general presumption is that a tribe does not have the ability to regulate the activities of non-Indians on non-Indian land unless one of two exceptions apply: either the non-Indian entity has given consent to such regulation, or the non-Indian's activities will have a direct effect on the health, safety, or welfare of the tribe.[254]

In *Big Horn County Electric Coop.*, the facts related to land status were similar to those that would now be applicable to the Muscogee (Creek) Nation's efforts to regulate rights-of-way across the Creek Reservation following the *McGirt* decision. Applying the *Montana* test for tribal authority over nonmembers on fee lands, the Ninth Circuit held that neither exception permitted a tribal tax on utility property located on tribal trust lands.[255] The court dismissed the first exception, even though the utility had a consensual relationship with the Tribe.[256] Under that exception, the court determined that a tribe could tax the *activities* of nonmembers, but not the value of property owned by nonmembers.[257] In addition, the court determined that the second "direct effects" exception from *Montana* did not apply either because the tax was not necessary to protect tribal self-government or to control internal relations.[258] Should the federal courts apply the *Big Horn County Electric Coop.* holding to the territory impacted by the *McGirt* decision, it would seem that the Muscogee (Creek) Nation could not issue a general property tax against rights-of-way. Any new tribal tax of rights-of-way through the Nation's reservation would have to turn on the activities of non-Indians within those territories rather than the property itself.

F. Environmental Justice

The *McGirt* decision also has the potential to impact environmental justice considerations within Indian country. Admittedly, EPA's approval of Oklahoma's request to assume environmental regulatory control may hinder efforts to address environmental justice issues within the State. Indeed, tribal leaders have expressed concern that this decision will lead to increased contami-

252. *Id.* at 950, 953.

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

254. *Id.* at 561, 566.

255. *Big Horn Cnty. Electric Coop.*, 219 F.3d at 951–52.

256. *Id.* at 951.

257. *Id.*

258. *Id.*

nation in Indian country.[259] However, the impact of the *McGirt* decision is bigger than Oklahoma. The environmental justice movement calls on policymakers, regulators, advocates, and scholars to consider the negative impacts of environmental pollution on communities of color and lower socio-economic communities. To understand how the *McGirt* decision intersects with environmental justice, it is helpful to understand the contours of environmental justice considerations within Indian country.

Native communities are environmental justice communities. Although there are similarities,[260] environmental justice claims arising in Indian country differ from environmental justice claims arising elsewhere because they must be considered in light of tribal sovereignty and the unique connection between many tribal communities and their environment, among other factors.[261] These unique differences are further explored below.

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259. Chang, *supra* note 161. Interestingly, the provision that EPA cited to in its decision to approve Oklahoma's request, section 10211(a) of SAFETEA, does not mandate EPA's approval of requests like these from Oklahoma. In notable part, the provision states, "*[I]f* the Administrator of the Environmental Protection Agency . . . determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, *and* the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator *shall* approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State." (emphasis added). Before the requirement becomes mandatory, EPA must make these two discretionary decisions. Given the subsequent election of President Biden and his selection of Michael Regan as the new EPA Administrator, the question arises of whether Michael Regan will agree with Andrew Wheeler's determination on these two discretionary points. Letter from Andrew Wheeler to Kevin Stitt, *supra* note 161. Assuming they provide a reasoned explanation for the change, federal agencies may depart from prior agency pronouncements. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998); *see also* David H. Becker, *Changing Direction in Administrative Rulemaking: Reasoned Analysis, The Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS 65 (2006). Additionally, Congress would, of course, have the authority to revoke or revise the applicable provision of SAFETEA. Full discussion of this issue, however, is beyond the scope of this article, and we will more fully explore its contours in subsequent articles.

260. Like other environmental justice communities, tribes faced historical discrimination. Of particular relevance is the fact that federal courts often discriminated against tribal and individual Indian claimants, especially before 1934. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 216–18 (1984) (explaining in general reference to the nineteenth century that "[u]ndoubtedly, racial and cultural prejudice played no small role in federal actions toward Indians during this period."). Given this history of discrimination that Native nations and individual Indians faced in federal courts, access to the courts is of increased importance today.

261. *See generally* Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343 (2017).

First, tribes differ from other environmental justice communities because of their status as sovereign governments. While other environmental justice communities typically gather as informal groups whose legal rights flow from environmental laws, tribes' legal rights flow as an initial matter from their sovereignty and their related historical management of the land and resources.[262] Tribes exist as entities separate from state and federal governments. A myriad of historical legal developments led to this division. American Indian tribes are extra-constitutional, meaning that they exist apart from the American Constitution.[263] Today, the majority of matters handled by tribal courts include issues of property and family law.[264] This is consistent with the general policy of the federal government to leave issues related to tribal members solely within the inherent sovereignty of tribal governments.[265] Moreover, Congress indicated its recognition of tribal sovereignty through passage of the Indian Self-Determination and Educational Assistance Act[266] and by subsequently amending various federal statutes to allow for increased tribal governance.[267]

Accordingly, environmental justice claims arising in Indian country differ from claims arising elsewhere given the inherent sovereignty that tribes still possess. As can be seen from the brief description above, "[t]ribal sovereignty is thus a paradox. It transcends, and therefore requires no validation from, the U.S. government. At the same time, tribal sovereignty is vulnerable and requires vigilant and constant defense in our legal and political forums."[268] Moreover, unlike claims brought by other environmental justice communities, environmental justice claims raised by tribes "must be consistent with the promotion of tribal self-governance."[269] This is because environmental justice claims arising from within Indian country include not only racial considerations

262. *See generally supra* Part I.A (discussing the legal foundations of tribal sovereignty).

263. Ann Tweedy, *Connecting the Dots Between the Constitution, The Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 656 (2009) (citing Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 417 (2003)).

264. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 308 (1998).

265. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 520 (1932) (holding that the laws of Georgia did not have any effect within the Cherokee Nation's territory); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978) (holding that tribes have the power to determine tribal membership).

266. Pub. L. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423).

267. *See supra* notes 202–204 and accompanying text. The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9657, also contains a number of provisions allowing tribal control over federal programs on reservations.

268. Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 163 (Kathryn M. Mutz et al. eds., 2002).

269. *Id.*

but also political considerations, as tribes have a special government-to-government relationship with the federal government.[270] The additional consideration of tribal sovereignty is crucial to any discussion of environmental justice claims arising in Indian country. Specifically, an environmental injustice occurs if courts fail to consider tribal sovereignty, because tribes cannot meaningfully participate in the legal process if courts fail to consider something so essential as their sovereignty.[271]

The practical impact of tribal sovereignty in considerations of environmental justice is that issues affecting tribes cannot move forward without tribal governmental approval, which in and of itself requires government-to-government consultation.[272] Historically, tribes have not always been meaningfully included in these decisions.[273] An environmental injustice occurs if the tribal government is not given a meaningful and robust opportunity to be consulted and provide feedback. This, of course, also means that, should a tribe decline to participate, the relevant project should be halted or stopped entirely. Because of tribal sovereignty and the federal government's duty to consult tribes (in many instances), tribal environmental justice communities differ from other environmental justice communities because of the legal requirements that may increase the likelihood of tribal participation in decisions impacting their communities.

Additionally, claims raised by tribal communities differ from many other environmental claims because most Native cultures and traditions are tied to the environment and land in a manner that traditionally differs from that of the dominant society.[274] As Frank Pommersheim, an Indian law scholar, points out,

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270. Additionally, individual American Indians have political relationships with their tribal governments. *See* Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 27 (1997).

271. *See* Krakoff, *supra* note 268, at 163; *see also* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO L. REV. 1625, 1652 (2007) ("Such a notion of justice must incorporate an indigenous right to environmental self-determination that allows indigenous peoples to protect their traditional, land-based cultural practices regardless of whether they also possess the sovereign right to govern those lands or, in the case of climate change, prevent the practices that are jeopardizing those environments.").

272. *See* Elizabeth Kronk Warner, Kathy Lynn & Kyle Whyte, *Changing Consultation*, 54 U.C. DAVIS L. REV. 1127, 1178–83 (2020) (discussing the legal and moral requirements for effective tribal consultation and what such consultation should look like).

273. *See id.* at 1166 (explaining that despite these legal requirements, tribes are not always meaningfully included in these decisions; for example, the relevant Tribes were not adequately consulted before construction of the Dakota Access pipeline in North Dakota).

274. The authors recognize that each tribal nation has a different relationship with its environment and are hesitant to stereotype a common "Native experience," recognizing that there is a broad diversity of thought and experience related to one's relationship with land and the environment. In particular, the authors would like to avoid traditional stereotypes of American Indians as "Noble Savages" or "Bloodthirsty Savages." *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 270 (1996) ("The problems of cross-

"land is important to Indian people in a multitude of ways."[275] Beyond a means of subsistence, land "is the source of spiritual origin and sustaining myth which in turn provides a landscape of cultural and emotional means," and "[t]he land often determines the values of the human landscape."[276] Many tribal cultures and the practices of individuals are "land-based."[277] Many tribal communities "continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamilial identities. Through language, songs, and ceremonies, tribal people continue to honor sacred springs, ancestral burial places, and other places where ancestral communities remain alive."[278] The spiritual connection between many tribes and their surrounding environment is crucial to the sovereignty of these governments.[279]

In sum, although tribal communities are environmental justice communities, consideration of environmental justice concerns differs when viewing these considerations from a tribal perspective due to tribal sovereignty and the connection that many (although not all) tribes and individual Indians have with land and the environment. By affirming the continued existence of the treaty boundaries of the Creek Reservation, the *McGirt* Court affirmed tribal sovereignty, as well as the possibility of tribal environmental regulation as discussed above. The explicit affirmation of tribal sovereignty meets the first requirement, and an increased likelihood of tribal involvement in environmental regulation increases the chance that the tribal environment will be managed in a way that considers and even promotes tribal connections to land and the environment.

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cultural interpretation and the attempt to define 'traditional' indigenous beliefs raise a common issue: the tendency of non-Indians to glorify Native Americans as existing in 'perfect harmony' with nature (the 'Noble Savage' resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the 'Bloodthirsty Savage' resurrected)."); *see also* Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T L. 437, 465–68 (2010) (explaining the stereotype of Natives as environmental stewards and its likely origins). Both stereotypes are a form of mythology, although they are widely perpetuated by much of the literature on American Indian belief systems.

275. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989); *see also* National Congress of American Indians, Res. EWS-06-2004 – Supporting a National Mandatory Program to Reduce Climate Change Pollution and Promote Renewable Energy (2006 Mid Year Session) ("[C]limate-related changes to the weather, food sources, and local landscapes undermine the social identity and cultural survival of American Indians and Alaskan Natives . . . .").

276. Pommersheim, *supra* note 275, at 250.

277. Tsosie, *supra* note 274, at 274.

278. Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement,* 32 HARV. ENVTL. L. REV. 373, 381 (2008).

279. *See id.* at 424 ("Trust concepts therefore help to provide tribes with two essential tools of traditional Native self-determination: access to sacred lands and the ability to sustainably use the natural resources on those lands. These were, and remain today, vital tools of nation-building.").

Accordingly, the *McGirt* decision is very much consistent with notions of environmental justice as applied to tribal governments.

G. Other Future Implications of McGirt

Great nations, like great men, should keep their word. – Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting)

My ancestor . . . who signed the treaty . . . accepted the word of the United States—that this treaty would protect not only the Indian way of life for those then living, but also for all generations yet unborn. – Jerry Meninick, Citizen of the Yakama Nation[280]

Beyond natural resource development and environmental justice in Indian country, the *McGirt* decision possibly signals another important implication moving forward—the strength of legal claims based on tribal treaty rights. As explained above, the *McGirt* decision affirmed the Creek Reservation boundaries established by treaty,[281] as well as the importance of honoring treaties.[282]

Tribes have often turned to their treaties with the United States as a way of protecting valuable rights. For example, the Swinomish Indian Tribal Community successfully asserted its treaty rights to fish, a cultural "keystone" for the Tribe, in the 1970s.[283] Historically, federal courts have interpreted treaties in expansive and progressive ways given the time of such decisions. For example, in 1908, the U.S. Supreme Court determined that tribal treaties, which made no explicit mention of water rights, nonetheless reserved water rights sufficient for the primary purposes of a reservation.[284] Similarly, in 1974, the U.S. District Court for the Western District of Washington determined that tribal treaties provided for a reserved right of tribes to be co-managers of fisheries along with the states, despite the fact that the treaties involved did not explicitly reference such a right to co-management.[285] While these decisions are well-established and respected today, they were groundbreaking and novel in their time. These decisions and others demonstrate the capacity for federal courts to interpret treaties in broad ways to protect tribal resources. Moreover, such decisions also

280. Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 356 (2003) (citation omitted).

281. *See supra* Part II.B.

282. *Id.*

283. SWINOMISH INDIAN TRIBAL CMTY., SWINOMISH CLIMATE CHANGE INITIATIVE CLIMATE ADAPTATION ACTION PLAN 10 (2010), https://perma.cc/83HP-M7UH.

284. Winters v. United States, 207 U.S. 564, 574–78 (1908).

285. United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974).

demonstrate the courts' willingness to demand specific action from the federal government on the basis of implicit treaty provisions.

Recent U.S. Supreme Court decisions support this historical trend of upholding treaty provisions. Since Justice Gorsuch joined the Court in 2017, the Court has upheld tribal treaty rights in three cases prior to *McGirt*: *Washington v. United States*,[286] *Washington State Department of Licensing v. Cougar Den, Inc.*,[287] and *Herrera v. Wyoming*.[288]

In *Washington v. United States*, the U.S. Supreme Court issued a single sentence opinion stating that "[t]he judgment is affirmed by an equally divided Court."[289] At issue in this case was the interpretation of treaties entered into between certain tribes and the federal government in the nineteenth-century. In 1854 and 1855, tribes in the Pacific Northwest entered into a series of treaties, now known as the "Stevens Treaties," negotiated by Isaac I. Stevens, Superintendent of Indian Affairs and Governor of the Washington Territory.[290] Under the Stevens Treaties, the Tribes relinquished large swaths of land.[291] In exchange for their land, the Tribes were guaranteed a right to off-reservation fishing.[292]

The Tribes contended that Washington State had violated, and continued to violate, the Treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds, prevented smolt (juvenile salmon) from moving downstream and out to sea, and prevented very young salmon from moving freely to seek food and escape predators.[293] In 2007, the district court held that in building and maintaining these culverts, Washington had caused the size of salmon runs in the area to diminish and, therefore, Washington had violated its obligation under the Treaties.[294] In 2013, the court issued an injunction ordering Washington to correct its offending culverts.[295] The Ninth Circuit affirmed.[296]

The equally divided Supreme Court affirmed the Ninth Circuit's decision, finding that the culverts infringed on the Tribes' treaty right to take fish at

286. 138 S. Ct. 1832 (2018), *aff'g by an equally divided court* 853 F.3d 946 (9th Cir. 2017).

287. 139 S. Ct. 1000 (2019).

288. 139 S. Ct. 1686 (2019).

289. *Washington*, 138 S. Ct. at 1832.

290. United States v. Washington, 853 F.3d 946, 954 (2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

291. *Id.*

292. *Id.*

293. *Id.*

294. United States v. Washington, No. CV 70–9213, 2013 WL 1334391, at *1 (W.D. Wash. 2013), *aff'd*, 853 F.3d 946, 954 (2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

295. *Id.*

296. United States v. Washington, 853 F.3d at 980.

usual and accustomed places.[297] The State of Washington had also appealed 1) the lower court's decision dismissing Washington's equitable claims that the federal government told the State to design culverts a certain way and then brought suit challenging the culverts; and 2) the issuance of an injunction that allegedly violated federalism and comity principles.[298] Given the equally divided Court, the State of Washington's arguments on these two points failed.

In *Washington State Department of Licensing v. Cougar Den, Inc.*, Cougar Den, Inc.—a wholesale fuel importer, owned by a citizen of the Yakama Nation and incorporated under Yakama law—challenged the application of taxes by the Washington State Department of Licensing.[299] Cougar Den imported fuel from Oregon over Washington's public highways to the Yakama Reservation.[300] The State of Washington assessed Cougar Den a total of $3.6 million in taxes, penalties, and licensing fees for importing the fuel into Washington on its way for sale on the Yakama Reservation.[301] Cougar Den appealed, stating that the tax was preempted by an 1855 treaty that reserved the "right, in common with citizens of the U.S. to travel upon all public highways."[302] The Court ultimately agreed with the Yakama Nation, determining that application of the State's taxes and fees was not appropriate given the Yakama Nation's treaty right to travel upon all public highways in common with citizens of the United States.[303]

In an opinion authored by Justice Breyer, and joined by Justices Sotomayor and Kagan, the Court determined that the 1855 treaty between the Yakama Nation and the federal government preempted that application of the State of Washington's fuel tax to Cougar Den.[304] In reaching this decision, the Court explained that it had previously interpreted language similar to the language at issue in this treaty, and, in every instance, "has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have."[305] Further, the Court explained that treaty terms should be read according to how the tribe would have understood them at the time of execution.[306] There was evidence in the record to support the notion that the Yakama Nation would have understood the treaty provision as the right to

297. *See id.* at 966.

298. Brief for the Petitioner at ii, *Washington v. United States*, 138 S. Ct. 1832 (2018) (No. 17-269), 2018 WL 108374, at *ii.

299. Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1007 (2019).

300. *Id.*

301. *Id.*

302. *Id.* at 1011.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 1011–12.

travel far distances for the purpose of trade, and that taxes would burden this right to travel.[307]

The State of Washington argued that the provision meant that the Nation could use highways in the same manner as other citizens of the State, but Justice Gorsuch explained that "the consideration the Yakamas supplied—millions of acres desperately wanted by the United States to settle the Washington territory—was worth far more than an abject promise they would not be made prisoners on their reservation."[308] Finally, in a paragraph that has already been readily quoted by those working in Indian country, Justice Gorsuch explained:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The state is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.[309]

In *Herrera*, a Crow Tribal member appealed his state law conviction for hunting in Wyoming's Bighorn National Forest.[310] Justice Sotomayor, writing for the 5-4 majority, explained:

> The crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty.[311]

Accordingly, the majority wrote, "[*Herrera*] is not a hard case," because the rights reserved by the Crow Tribe in the 1868 Treaty were not abrogated by Wyoming's statehood.[312] The Court in *Herrera* therefore rejected arguments similar to those made in *McGirt*—that the admission of a state to the Union somehow abrogated a Tribe's treaty rights.

Given tribes' relatively low success rate in front of the U.S. Supreme Court,[313] it is remarkable that claims based on tribal treaties have been successful in all four of the recent cases decided by the Court. And, in all of these

307. *Id.* at 1013.

308. *Id.* at 1018. (Gorsuch, J., dissenting).

309. *Id.* at 1021.

310. Herrera v. Wyoming, 136 S. Ct. 1686, 1693 (2019).

311. *Id.* at 1696.

312. *Id.* at 1700.

313. *See, e.g.*, David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 273–87 (2001)

cases, Justice Gorsuch has been in the majority. These two trends suggest that claims based on tribal treaty rights continue to be relatively strong in the federal courts, and it also suggests Justice Gorsuch may be sympathetic to these types of claims. In terms of future implications, it is therefore likely that individual Indians and tribal parties will attempt to avail themselves of claims based on treaty rights, and this will likely be true in the natural resource development realm as well as other types of claims.

Conclusion

Tribes have significant natural resources at their disposal. The *McGirt* decision has the potential to further promote tribes as a key player in energy development in the United States. While there is always the possibility that courts will interpret the *McGirt* decision to only apply to the MCA and criminal jurisdiction, the decision has the potential for significant ramifications across Indian country.[314] The definition of "Indian country" in Indian criminal law has historically been used in numerous other contexts, including civil regulatory areas. Some case law suggests that this reliance may not be appropriate. For example, in *Atkinson Trading Company v. Shirley*,[315] the U.S. Supreme Court found the Ninth Circuit's reliance on that statute "misplaced," noting that section 1151 is "a statute conferring upon Indian Tribes jurisdiction over certain criminal acts."[316] The Court explained:

> Although § 1151 has been relied upon to demarcate state, federal, and Tribal jurisdiction over criminal and civil matters, we do not here deal with a claim of statutorily conferred power. Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land.[317]

Further, in his opinion, Justice Gorsuch tees up some legal arguments, such as procedural bars, res judicata, statutes of repose, and laches, as potential arguments to be used to curb a widespread upending of federal Indian law as a result of the *McGirt* decision.[318] Federal courts may end up accepting such arguments as limits on the Court's decision. Ultimately, the full implications of *McGirt* will take time to be revealed, but tribes and their interests will not easily

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(highlighting the major tribal decisions at the Court in the Rehnquist era through 2001), https://perma.cc/HAN3-8BTX.

314. *See supra* note 3 (explaining that Oklahoma courts have expanded the rational of *McGirt* to other tribal reservations, such as the Cherokee Nation of Oklahoma and the Seminole Nation of Oklahoma).

315. 532 U.S. 645 (2001).

316. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.5 (2001) (citations omitted).

317. *Id.* (citations omitted).

318. *See supra* note 1, at 2481.

be overlooked. "Far from being relics of a bygone era, Indian Tribal powers bear the fine burnish of everyday use."[319]

319. MacArthur v. San Juan County, 391 F. Supp. 2d 895, 940 (D. Utah 2005).