CHAPTER 1

McGirt v. Oklahoma – Considerations for the Energy Industry

Graydon D. Luthey, Jr.
GableGotwals
Tulsa, Oklahoma

R. Trent Shores
GableGotwals
Tulsa, Oklahoma

SYNOPSIS
<LexisNexis will create the synopsis>

§ 1.01 Introduction

In *McGirt v. Oklahoma*, __ U.S. __, 140 S.Ct. 2452 (2020), the United States Supreme Court issued a landmark decision for Eastern Oklahoma and the Five Tribes[1] that have resided there since the mid-1800s. *McGirt*, which involved the federal Major Crimes Act, 18 U.S.C. § 1811 *et seq*. ("MCA"), did not create any new substantive rights for those Tribes. Rather, the decision, through a textualism-based analysis applying factors previously announced in *Solem v. Bartlett*, 465 U.S. 463 (1984), held that the post-Civil War treaty boundaries of the Muscogee (Creek) Reservation had not been diminished nor had the Reservation been disestablished. In reliance on *McGirt's* reasoning, the Oklahoma Court of Criminal Appeals held that the post-Civil War treaty boundaries of the other Five Tribes and the Quapaw Nation were also not diminished or disestablished.[2] As a practical result, a large portion of Eastern Oklahoma, including most of the City of Tulsa, was reminded for the first time since statehood in 1907 that it is within those Reservation boundaries.

In the aftermath of *McGirt*, the question arises as to who has civil and administrative jurisdiction within the reservation of a Five Tribe Nation. The answer, which is obviously important to an array of commercial interests, was not provided in *McGirt*. However, a well-developed body of Supreme Court common law, predating *McGirt*, provides general common law direction. Further, specific federal statutes, when applied, can answer the question in particular contexts. Examples of recent application of how the common law and statutes operate post-*McGirt*

---

[1] The Five Tribes are the Cherokee Nation, Chickasaw Nation, Choctaw Nation, Muscogee (Creek) Nation, and Seminole Nation. They were forcibly removed to what is now Oklahoma by the United States in the 1830s and 1840s.

[2] *Hogner v. State*, 2021 OK CR 4, 500 P.3d 629; *Bosse v. State*, 2021 OK CR 30, 499 P.3d 771; *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867; *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250; and *State v. Lawhorn*, 2021 OK CR 37, 499 P.3d 777.

provide valuable guidance when attempting to predict administrative agency action and judicial decisions concerning that question.

§ 1.02 Pre-*McGirt* Supreme Court Limits on Tribal Authority to Regulate Activity of Non-Indians on Non-Indian-Owned Fee Lands within a Reservation Boundary.

Well before *McGirt*, the Supreme Court addressed tribal jurisdiction over the activities of non-Indians on non-Indian-owned fee land located within the boundaries of a reservation. In *Montana v. U. S.*, 450 U.S. 544 (1981), the Court reviewed a Court of Appeals decision holding with respect to fee-patented land, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id*. at 557. The Court of Appeals further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Id*. The Court of Appeals found that such tribal regulatory power was based on "inherent" Indian sovereignty, as well as by treaties and 18 U.S.C. § 1165. *Id*.

After finding that the language of the treaty at issue provided no support for tribal authority to regulate hunting and fishing on land owned by non-Indians, the Supreme Court found that 18 U.S.C. § 1165 was limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians. *Id*. at 561.

The Supreme Court then turned to the much broader issue of whether inherent sovereignty conferred such tribal jurisdiction over non-Indians on their fee lands within a reservation. The Court relied on its earlier decisions in stating:

> But 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. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148; *Williams v. Lee*, 358 U.S. 217, 219-220; *United States v. Kagama*, 118 U.S. 375, 381-382; see *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171.

The Court continued by invoking the *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209, (1978) quotation of *Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 147 (1810), that Indian tribes have lost any "right of governing every person within their limits except themselves" for the general proposal that the inherent sovereign powers of an Indian tribe does not extend to the activities of non-members of the tribe. *Montana*, 450 U.S. 544 at 565.

Then the Court articulated two exceptions to that general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe 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. [citations omitted]
>
> A tribe may also retain 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. [citations omitted]

Id.

The *Montana* exceptions have been applied by the Supreme Court multiple times, including in *Montana*. In all instances, except one, the Supreme Court found against Tribes in their assertion of tribal jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 3116, 328-330 (2008); *Nevada v. Hicks*, 533 U.S. 353, 358-360 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 456-459 (1997); *South Dakota v. Bourland*, 508 U.S. 679, 694-696 (1993); *Duro v. Reina*, 495 U.S. 676, 687-688 (1990); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 426-430 (1989) (plurality opinion.)

In the case in which the tribe prevailed, *U.S. v. Cooley*, __ U.S. __, 141 S.Ct. 1638, 1642-1646 (2021), the Supreme Court unanimously held that a tribal police officer has authority to detain temporarily and to search non-Indian persons traversing on public right-of-ways running through a reservation for potential violations of state or federal law. The Court found that the second *Montana* exception fit the facts of the case "almost like a glove," recognizing that "[t]o deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats." *Id*. at 1643.

As *Montana's* use likely becomes more prolific in light of the expansive nature of reservation boundaries resulting from *McGirt*, the focus will likely be on *Montana's* second exception. That exception from a practical and procedural perspective is problematic, especially for those desiring the relative certainty of a bright-line legal test, since the second exception is factually driven.

Additionally, the factors showing the jurisdictional requirement of the conduct of non-Indians on fee lands within the reservation that "threatens or has some direct effect on the political integrity, the economic security, to the health or welfare of the tribe" has not been clearly delineated by the Supreme Court. Specifically, what constitutes a threat, how certain must the threat be, and how severe must the perceived future impact be? The lack of precision in *Montana* and its Supreme Court progeny clearly complicates any pre-activity guidance that counsel might provide to non-Indians contemplating activity on non-Indian-owned fee land within a tribal reservation.

The challenge for a successful *Montana* second exception application does not stop with the conclusions of counsel. The factually driven nature of that exception suggests that, in many circumstances, its application is not well suited for resolution by summary judgment, much less

on a motion to dismiss for failure to state a claim for which relief can be granted. Even if relief is given against a tribe in district court, under a *de novo* standard of review, reasonable inferences arising from the facts in many cases might be identified by an appellate court requiring resolution of the issue by a trial.

§ 1.03 *McGirt* did not Expand Tribal Jurisdiction as a Matter of Substantive Law.

In *McGirt*, in a 5-4 opinion, the Supreme Court decided that the reservation of the Muscogee Nation was not disestablished or diminished from its post-Civil War boundaries. The case involved the MCA provisions that within the "Indian Country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). "Indian Country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United State Government." 18 U.S.C. § 1151. The petitioner, who was convicted by an Oklahoma State court of three serious sexual offenses, claimed that the state lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes occurred on the Muscogee Reservation. Specifically, the petitioner argued that since only Congress can establish a reservation, only Congress can diminish or disestablish a reservation and that Congress did not do so as to the post-civil war boundaries of the Muscogee Reservation. Accordingly, petitioner asserted that the state courts lacked subject matter jurisdiction. In reversing the Oklahoma Court of Criminal Appeals, the United States Supreme Court agreed with the petitioner.

The Treaty of 1837 between the Creek Nation of Indians and the United States provided that the United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned to the Nation by the Treaty. Although the Treaty did not refer to the lands as a reservation, the Court determined that it was a reservation. The 1866 Treaty Between the United States and the Creek Nation of Indians reducing the size of the land set aside for the Nation expressly referred to that land as "the reduced Creek reservation." 140 S.Ct. at 2461. It is this reduced Creek Reservation that was at issue in *McGirt*.

The Court in *McGirt* engaged in a textualist analysis of the Acts of Congress which Oklahoma claimed evidenced disestablishment of that reservation. Invoking on its earlier decisions in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) and *Nebraska v. Parker*, 577 U.S. 481, 136 S.Ct. 1072, 1079 (2016), the Court found no congressional intent to disestablish the reservation or diminish its boundaries beyond those set in the 1866 Treaty. Accordingly, the Court found that the 1866 Treaty boundaries remain, that the crimes occurred in Indian Country, and that under the MCA, the Oklahoma state courts lacked jurisdiction to try the petitioner. Although the *McGirt* opinion was lengthy and materially destroyed each of the many arguments advanced by Oklahoma, its result is simple. Textualism controls. The Acts of Congress expressed no intention to disestablish or diminish. Nothing else matters.

Of potential interest to commercial entities, the *McGirt* opinion addressed concerns that its MCA decision will impact civil and regulatory law. After noting that many federal civil laws and regulations do utilize the Indian Country definition in the MCA, the Court precluded the concerns from directing the result.

> Finally, the State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.
>
> 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, roads, primary care clinics, housing assistance, nutritional programs, disability programs, and more. [citations omitted] But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

McGirt v. Oklahoma, __ U.S. __, 140 S.Ct. 2452, 2480 (2020).

Lastly, the Court seemingly threw civil litigants a life preserver in the form of reliance-based defenses:

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

Id. at 2481.

Even with the possibility that a reliance-based defense might prevent enforcement of non-diminishment/non-establishment in a civil or administrative matter, the Court did not retreat from its conclusion and gave no reason to expect that the issue of the occurrence of diminishment or disestablishment (as opposed to the legal effect of diminishment or disestablishment) would be different in such a civil or administrative case than in the criminal case *McGirt* decided.

Finally, of particular note, *McGirt* did not modify either *Montana's* general jurisdictional principals or the two *Montana* exceptions to that general principle. In the absence of an applicable treaty or federal statute, *Montana* remains controlling as to tribal authority, or the lack thereof, to regulate commercial activity on non-Indian fee land within a reservation.

§ 1.04 The Oklahoma Corporation Commission has determined that *McGirt* did not limit its subject matter jurisdiction to regulate the development of oil and gas with the boundaries of the Muscogee Reservation.

The Oklahoma Corporation Commission ("OCC"), Oklahoma's statutory directed regulator of the development of oil and gas,[3] has addressed the OCC's jurisdiction over oil and gas development on land within the boundaries of the Muscogee Reservation as recognized in *McGirt*.

Application of Calyx Energy III, LLC, No. 2020-1032-7 through 1042-7 (Oklahoma Corporation Commission), raised the OCC's subject matter jurisdiction to regulate oil and gas development on non-Indian land within the boundaries of the Muscogee Reservation recognized in *McGirt*. The OCC found that under *McGirt*, the reservation exists and would be considered Indian Country. The OCC noted that protestant Canaan Resources X, LLC ("Canaan") "now seeks to extend the findings of *McGirt* to include all civil jurisdiction, including oil and gas regulation withing the original boundaries of the Creek reservation to the Creek Tribe, and by extension, for application to all the reservation of the Five Tribes." Order No. 715548, Denying Protestant's Motion to Dismiss ("Order"). The OCC further noted that Canaan "justifies this extension on several other Supreme Court and Federal Court decisions." *Id*. After listing those decisions, the OCC then distinguished each of those. *Id*. pp.6 and 8. Of particular import, the OCC quoted at length from *Montana* and then concluded:

> *Montana* is clear; unless the lands are held in trust by the United States Government, regulation is governed by the State. In the captioned Causes, there is no tribal property involved, and only one restricted Indian lease is held in trust by the United States Government."

Order. p. 8.

As to that restricted lease, the OCC emphasized the importance of federal statute as to its acquisition and the resulting jurisdiction:

> This lease was properly acquired through the Hughes County District Court as required by 25 U.S. § 375 Section 3(b).

[3] 52 O.S. § 87.1 *et seq*., places in the Oklahoma Corporation Commission the sole authority to regulate the development of oil and gas in Oklahoma.

Significantly, for the oil and gas industry, the OCC then applied the *Montana* test in a way that indicated that oil and gas development does not *per se* sufficiently threaten the Tribe to allow tribal jurisdiction:

> IT IS THEREFORE THE ORDER OF THE OKLAHOMA CORPORATION COMMISSION that it does have jurisdiction over the subject Applications. The Oklahoma legislature has established jurisdiction of the Commission in 52 O.S. §87.1 *et seq*. In 25 U.S.C. 355, Section 11, Congress granted jurisdiction to the State of Oklahoma over restricted lands of the Five Tribes, stating "all restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma." The U.S. Supreme Court's decision in *McGirt* held that the MCA applies to its listed offenses within the historical boundary of the Creek Nation, based upon its finding that the Creek reservation had never been disestablished. The Court determined that its decision did not extend beyond application of the MCA. In *Montana*, the U.S. Supreme Court held that tribal jurisdiction to regulate affairs within a reservation does not extend to regulating the activity of non-tribal members on land that is not owned by the tribe.
>
> IT IS FURTHER ORDERED, as determined by *Montana*, that maintaining jurisdiction of the Commission over the regulation of oil and gas interests, to the extent permitted under Oklahoma law, does not involve a consensual relationship with the tribe or the regulation of commercial dealings or other arrangements involving the tribe which might justify tribal regulation. Likewise, it does not threaten or have a direct effect on the political integrity, economic security or health and welfare of the tribe, in this case the Creek Nation. Absent such threats or effects, no tribe has the sovereign right to intervene in the regulation of oil and gas property rights by the Commission. The continued existence of the Creek Nation reservation does not in any way diminish or abolish jurisdiction of the Commission over the subject applications.

The OCC order was appealed and on December 9, 2020 the Oklahoma Supreme Court, on its own motion, retained the appeal for decision rather than assigning it to the intermediate Court of Civil Appeals.[4] Before any briefing occurred, the appellant Canaan, moved to dismiss the appeal since the assets of Canaan in question had been acquired by the appellee Calyx Energy III, LLC. On December 30, 2021, the appeal was dismissed by order of the Supreme Court.

Although the question of regulatory jurisdiction over oil and gas development on fee land within a reservation was not judicially determined by the Oklahoma Supreme Court, the *Canaan* case is nevertheless instructive for multiple reasons. First, the OCC demonstrated the preeminence

[4] *Canaan Resources X v. Calyx Energy III, LLC*, Case No. CO-199,245 (Okla. S.Ct.)

of *Montana* in post-*McGirt* agency resolution of tribal jurisdiction. Second, the OCC noted that federal statutes can control certain jurisdictional issues post-*McGirt*. Third, the Oklahoma Supreme Court, by retaining the appeal, *su sponte*, implicitly acknowledged the importance of the jurisdictional question in light of *McGirt*.[5]

§ 1.05 Judicial Application of *McGirt* in the Federal Court Context.

The other noteworthy non-criminal action involving *McGirt* arose in the Western District of Oklahoma. In *State of Oklahoma v. United States Department of the Interior*, CIV-21-179-F (W.D. Okl.) the State sought an injunction prohibiting the federal government from regulating surface mining on the Muscogee (Creek) Reservation. The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq*. ("SMCRA") "is a comprehensive statute that regulates all surface coal mining operations."[6] To achieve its purposes, SMCRA relies on two major programs, Title V, 30 U.S.C. §§ 1251-1279 and Title IV, 30 U.S.C. §§ 1231-1244.[7] If certain regulatory programs are submitted by a state and the Secretary of the Interior then approves the programs, the state achieves regulatory "primacy" which includes "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within its boundaries." 30 U.S.C. § 1253 (a). Oklahoma has made such a submission that the Secretary approved.[8] Accordingly, under the approved program, Oklahoma may monitor "coal exploration and reclamation operations on non-Indian and non-Federal lands within Oklahoma." 47 Fed.Reg. 14, 152 (Apr. 2, 1982). See also, Okla. Adm. Code 460:20-3-5.

After the *McGirt* decision, the federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") which has primary responsibility for enforcing SMCRA determined that Oklahoma could no longer operate its state regulatory programs on the Muscogee Reservation, as recognized in *McGirt*, since that Reservation qualifies as "Indian land" under SMCRA. Accordingly, OSMRE notified the State that it is the SMCRA regulatory authority and will assume authority over Oklahoma's reclamation program within the boundaries of the Reservation.

The State informed the federal authorities that it will not comply. After further action by OSMRE to implement its decision, the State filed for declaratory and injunctive relief based on the allegation that *McGirt* does not apply to surface coal mining and therefore the State has jurisdiction under SMCRA.

---

[5] The Oklahoma Supreme Court might not have the last word on the jurisdictional issue since tribal jurisdiction is a federal question which could ultimately be decided, by the United States Supreme Court, as *Montana* and its progeny demonstrated.

[6] *State of Oklahoma v. U.S. Depart. Of Int.*, Slip Op. of 12/22/2021, p. 2, quoting *U.S. v. Navajo Nation*, 556 U.S. 287, 300 (2009).

[7] *Id*. Slip Op. p. 3

[8] *Id*.

In particular, the State argued that SMCRA does not give OSMRE exclusive jurisdiction over Indian land in the absence of a tribal regulatory claim. Using a textualist approach, the Court found that "SMCRA plainly precludes a state from administrating either a Title IV reclamation program or a Title V regulatory program on Indian land."[9] In so doing, the Court noted the statutory provision defining land within such statute that Secretarial approval could not result in state jurisdiction:

> Finally, and crucially, "lands within such State" is defined as "all lands within a State *other than Federal lands and Indian lands*." *Id*. at § 1291(11) (emphasis added). Reading these provisions together, then, Title IV authorizes a State to submit a reclamation plan pursuant to an approved State Program, which by definition excludes Indian lands.

The Court then applied the same textual analysis to Title V, with the same result as its Title IV analysis:

> Because the plain language of SMCRA excludes Indian lands from state regulatory and reclamation programs, Oklahoma lacks the authority to regulate surface mining or reclamation activities on Indian land, even in the absence of a tribal regulatory program.

The Court also rejected out of hand the State's argument based on a statement on a BIA website, "that it may regulate surface mining on the Creek Reservation because the land is not actually 'Indian land' at all."[10] In language applying *McGirt's* conclusion to the civil action at hand, the Court stated:

> First, Oklahoma fails to persuasively explain why an out-of-context statement from the BIA's website should inform the court's interpretation of SMCRA. Second, SMCRA's definition of Indian lands plainly encompasses land not held in trust because the definition includes fee-patented land within a reservation's borders. 30 U.S.C. § 1291(9). Last, *McGirt's* holding that the land at issue meets the definition of "Indian Country" under the Major Crimes Act compels a finding that the land also meets the definition of "Indian lands" under SMCRA. *McGirt*, 140 S.Ct at 2480. The Major Crimes Act defines "Indian Country" to include "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." 18 U.S.C.A. § 1151. If the land at issue qualifies as a "reservation under the jurisdiction of the United States" for purposes of the MCA, then it also qualifies as a "Federal Indian reservation" for purposes of

[9] Slip Op. p. 7.

[10] Slip Op. p. 10.

> SMCRA. *See Cayuga Nation v. Tanner*, 6 F.4th 361, 379 (2d Cir. 2021) ("Given that the MCA's definition of Indian country is largely identical to IGRA's definition of Indian lands, we can only conclude that IGRA applies to the Cayuga Reservation.").

Significantly, the Court went on to reject the State's assertion "that fundamental principle of equity precludes OSMRE from asserting regulatory jurisdiction over land that has long been regulated by Oklahoma under SMCRA." The Court used *McGirt* itself to reject the State's argument at Slip Op, p. 14:

> Here, like in *Tanner*, Oklahoma cannot rely on *Sherrill* or equitable principles to avoid the consequences of SMCRA. *McGirt* itself teaches as much. Although recognizing that legal doctrines such as laches may be deployed to protect individuals who have labored under a mistaken understanding of the law, *McGirt* squarely rejected any notion that reliance interests could undermine the enforcement a federal statute. *McGirt*, 140 S.Ct. at 2478 ("So, once more, it seems Oklahoma asks us to defer to its usual practices instead of federal law, something we will not and may never do."). *See also Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d1255,1263 (10th Cir. 2016) (applying MCA to Indian land and stating that "[s]urely, too, it is not for this court to override Congress's commands on the basis of claims of equity from either side.").

That result is significant for multiple reasons. Not only did the Order rely on *McGirt*, but it also applied textualism, the very judicial ideology on which *McGirt* was based. Further, the Court rejected the argument that long reliance on past legal error should result an outcome determination continuance of that erroneous reliance. Finally, and most significantly, the Order shows that at least one federal district judge with an expressed dislike of the effect of *McGirt* will nevertheless apply the criminal justice *McGirt* decision when the identical issue of reservation boundaries arise in a civil context.[11]

---

[11] The Order began with a dim view of the "results" of *McGirt*:

> The Supreme Court handed down its decision in *McGirt v. Oklahoma*, __ U.S. __, 140 S.Ct. 2452 (2020) on July 9, 2020, putting the State of Oklahoma, and millions of its citizens, in a uniquely disadvantaged position as compared to the other forty-nine states. Core functions of state government, relied upon by *all* Oklahomans for over a hundred years, are called into question even though only a very small portion of the land within the newly-recognized reservation is owned by tribes or individuals with a tribal affiliation. The result the court reaches in this order is a prime example of the havoc flowing from the *McGirt* decision. But the result the court reaches here is a legally unavoidable consequence of the application of federal statutory law in light of that decision.

Slip Op. p. 1.

§ 1.06 Impact of *McGirt* on Taxation.

The decision in *McGirt* has not been judicially or administratively recognized as having a substantive impact on the taxing authority of tribes. The principle effect recognized to date appears to be an expansion of the geographical limits on the state's taxation of tribal members in certain circumstances, as a recent publication of the Oklahoma Tax Commission confirms. See Oklahoma Tax Commission Report of Potential Impact of *McGirt v. Oklahoma* issued to Oklahoma Commission on Cooperative Sovereignty (Sept. 30, 2020).

However, at least one taxpayer has claimed, in a state court challenge to the assessment of state ad valorem taxes, that *McGirt's* expansion of reservation boundaries precludes state ad valorem taxation over non-Indian property within those boundaries. *Oneta Power, LLC v. Hodges* (Case No. CJ-2020-193 consolidated with Case No. CV-2021-193, Wagoner County Dist. Ct.) That case remains pending.

§ 1.07 The Future of *McGirt*.

In the criminal law context, *McGirt* remains significant. The Oklahoma Court of Criminal Appeals has determined that *McGirt* does not retroactively apply to criminal convictions that have become final by the exhaustion or time barring of direct appeal. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. The United States Supreme Court has denied a petition for certiorari in that case. *Parish v. Oklahoma*, U.S. S.Ct. No. 21-467, *cert. denied*, 1/10/2022.

The State of Oklahoma has sought the United States Supreme Court review of *McGirt* by way of petitions for certiorari concerning multiple decisions of the Oklahoma Court of Criminal Appeals. The thrust of the petitions is not that the law has changed or that intending Supreme Court authority since *McGirt* requires reversal. Rather, the petitions seem to be grounded on the premise that the results of the *McGirt* decision is practically problematic for law enforcement and the courts. The briefing on the petitions for certiorari is complete. The Court has not called for the views of the United States Solicitor General.

The Order concluded in the same vein:

> The majority opinion in *McGirt* candidly recognized that the Creek "reservation," as an Indian reservation in the commonly accepted sense, has been thoroughly hollowed out by more than a hundred years of legal, extra-legal, economic and demographic events. Thus, the Creek Reservation, even as found by the Supreme Court to exist, is essentially a perimeter, a line zig-zagging around a major swath of eastern Oklahoma (including most of Tulsa), within which Oklahomans of all races are born and live their lives, oblivious to any notion that the lands on which they live their lives are in a category apart from the lands on which their fellow citizens would live their lives in any other state (or in the western half of Oklahoma).

Slip Op. 18.

On January 21, 2022, the United States Supreme Court granted certiorari in *Oklahoma v. Castro-Huerta,* (U.S. S.Ct. 21-429) to address the single question of whether a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country under the Federal Crimes Act, 18 U.S.C. § 1152. The real significance in that grant of certiorari was the denial of certiorari on the second question presented – ("whether *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), should be overruled.) Accordingly, *McGirt* remains viable and is not subject to review pursuant to a current grant of certiorari. The other cases in which Oklahoma has sought certiorari to overrule *McGirt* have been distributed for action in conference on the petitions for certiorari, which remain undetermined.

Assuming that *McGirt* is not reversed or limited by the United States Supreme Court, the challenge will remain as to how those effected by the decision will operate. *McGirt's* impact will continue to develop. Those developments will not occur in a vacuum. Various branches of tribal, state and federal governments will likely be involved. A negotiated solution to concerns that will inevitably arise from the *McGirt* decision was strongly encouraged by the Court, in dicta:

> In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. 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. See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, *id*., at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. 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.

McGirt, 140 S.Ct. 2452 (2020).

In any event, entities and individuals engaged in commercial activities on non-tribal fee land within the boundaries of a reservation would be well served to avoid political rhetoric and develop a respectful, constructive and mutually beneficial relationship with the tribe within who's reservation boundaries they operate.

§ 1.08 Conclusion

[1] The Current Lessons of *McGirt*.

a) In civil or administrative actions involving the Five Tribes, disestablishment or diminishment of their post-Civil War reservation boundaries will not be found;
b) Reliance defenses may be available to prevent the legal effect of the finding of no reservation disestablishment or diminishment.
c) *Montana* and its two exceptions will be critical when determining the limits of tribal jurisdiction over the conduct of non-Indians on non-Indian-owned fee land within a reservation.
d) States, tribes and other interested parties should work together to address uncertainties or concerns arising from the continuance of reservation boundaries from the 1866-era treaties.