# *McGirt v. Oklahoma*'s Potentially Sweeping Regulatory Implications for the Oil & Gas Industry in Eastern Oklahoma

*Shane Pennington*
Yetter Coleman LLP

On July 9, 2020, the U.S. Supreme Court held that lands in eastern Oklahoma originally reserved for the Creek Nation in the 19th century remain a reservation for the purpose of a federal statute that gives the federal government exclusive jurisdiction to try certain major crimes committed by "[a]ny Indian" in "the Indian country."[1] As a result, Oklahoma state courts had no jurisdiction to convict Petitioner Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, of three serious sexual offenses that took place on the reservation.

This decision, which commentators are describing as "stunning," will have regulatory consequences far beyond defining the criminal jurisdiction of state and federal courts. In addition to potentially important tax implications, the decision may give tribes significant new administrative authority over oil and gas production in the region. These regulatory consequences are sure to be the subject of extensive litigation before federal agencies and courts for years to come. In the discussion that follows, some key takeaways for companies with a stake in oil and gas development in the affected region are highlighted.

Since 1913, the Oklahoma Corporation Commission (OCC) has wielded "exclusive jurisdiction, power and authority" over oil and gas development in the state.[2] In addition to developing and administering "a comprehensive system of permit adjudication," the OCC has regulated environmental impacts associated with energy development in the state.[3] Under this finely calibrated regulatory regime, Oklahoma became the country's fifth highest crude oil-producing state and third highest natural gas producer.[4]

Underlying this longstanding arrangement was the widely accepted assumption that the land within the historic reservation boundaries did *not* qualify as a "reservation" or "Indian country" under federal law. This assumption mattered because reservation status often determines whether tribal (and federal) or state law applies to the land in question. The statutory definition of "Indian county" at issue in *McGirt*, for example, "generally applies to questions of civil jurisdiction" even though "by its terms [it] relates only to federal criminal jurisdiction."[5] As a result, reservation status will often support tribal assertions of regulatory authority over lands within reservation boundaries.[6]

Thus, without congressional intervention, the Supreme Court's recent designation of half of Oklahoma as "Indian Country" likely will upend Oklahoma's settled regulatory regime as

---

1 *McGirt v. Okla.*, No. 18-9526, 591 U.S. _ (2020).
2 Okla. Stat. tit. 52, §139(B)(1); *see also Republic Nat'l Gas Co. v. Oklahoma*, 334 U.S. 62, 63 (1948) ("[s]ince 1913," the OCC "has regulated the extraction of natural gas" in Oklahoma).
3 *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1200 (W.D. Okla. 2017).
4 *See Okla., U.S. Rankings*, U.S. Energy Info. Admin.
5 *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (discussing 18 U.S.C. § 1151).
6 *See Montana v. United States*, 450 U.S. 544, 565 (1981) ("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.").

administrative authority shifts from the OCC to tribal and federal control. In addition to new and potentially burdensome tax liabilities,[7] operators in the region may face challenges to their rights to operate wells on land that now lies within the boundaries of the "reservation."[8] It is possible that the Tribes also may assert authority to promulgate environmental regulations under various federal statutes. And, if they do, it is also possible that operators in the region could face a dizzying array of regulatory obligations emanating from various tribal and state administrative authorities.

The dissenting opinion in *McGirt* describes the challenges and uncertainties that may lie ahead for regulated parties in stark terms:

> State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.
>
> In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a "consensual relationship[] with the tribe or its members" or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." Tribes may also impose certain taxes on non-Indians on reservation land, and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens.[9]

Whether and to what extent this parade of horribles will come to pass remains to be seen. Until the open questions are resolved, regulated parties operating in eastern Oklahoma will face an especially complex tangle of regulatory challenges. But resolving those questions almost certainly will require extensive litigation both in federal courts and before federal agencies.

---

[7] *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982) (recognizing tribal authority to "impos[e] a severance tax on 'any oil and natural gas severed, saved and removed from Tribal lands'"); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198 (1985) (approving tribal tax on mineral production on reservation).

[8] *Cf. Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986) (where federal statute required governmental approval of Indian agreement with mineral developer, agreement was "simply … invalid absent the requisite approval").

[9] *McGirt*, No. 18-9526 at 36-37 (Roberts, C.J., dissenting) (cites and footnotes omitted).