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Blog Post

Implications for the Energy Industry in Light of the U.S. Supreme Court Decision in *McGirt v. Oklahoma*

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On July 9, 2020, the U.S. Supreme Court, in a 5-4 decision, held that land Congress had reserved for the Creek Nation in the 19th century remains "Indian country" for purposes of the Major Crimes Act.[1] While many commentators within the oil and gas industry have paid close attention to the *McGirt* decision, the opinion is, on its face, narrow in scope as it only relates to the Major Crimes Act ("MCA"). However, the eventual implications of this decision could have a significant impact on taxation and regulation of energy companies operating on the land at issue — a portion of Northeastern Oklahoma that includes most of the city of Tulsa.

Background

In 1996, an Oklahoma state court convicted Jimcy McGirt of three sexual offenses. As part of his post-conviction proceedings, McGirt argued that, under the MCA, Oklahoma lacked jurisdiction to prosecute him. Specifically, McGirt argued that, because he is an enrolled member of the Seminole Nation, and because his crimes took place on the Creek reservation, he was entitled to a new trial in federal court.

The MCA provides that "[a]ny Indian who commits" certain enumerated offenses "within the Indian country … against the person or property of another Indian or any other person … shall be subject to the same law and penalties as all other persons committing any of [these] offenses, within the exclusive jurisdiction of the United States."

The key issue on appeal, then, was whether McGirt had committed his offenses within "Indian country" — a term the MCA defines to include, among other things, "all land

within the limits of any Indian reservation under the jurisdiction of the United States Government." The Oklahoma state courts hearing McGirt's appeal held that McGirt had not, in fact, committed his offenses within Indian country, and McGirt petitioned the Supreme Court for writ of certiorari. The Supreme Court granted certiorari and reversed the decision of the Oklahoma state courts.

In doing so, the Supreme Court held that first, once Congress establishes a federal reservation, only Congress can diminish or disestablish it, which requires a "clear expression" of congressional intent (and Oklahoma did not satisfy the burden of showing that Congress had clearly expressed its intent to disestablish the Creek reservation) and second, McGirt committed his offenses within the Creek reservation, such that the MCA applies, and the Oklahoma state courts lacked jurisdiction to prosecute McGirt.

Aftermath of Decision

As noted, the Supreme Court's decision only implicates criminal law by prohibiting Oklahoma from prosecuting Indians for crimes committed in a portion of Northeastern Oklahoma associated with the 1833 Treaty With the Creeks. But the pragmatic realities could be far reaching; the decision does not affect title to the land within the Creek reservation, but it might enable the Creek Nation to tax, regulate or otherwise exercise jurisdiction over individuals or businesses on that land.

The Creek Nation can now ostensibly exercise "civil jurisdiction" over non-Indians within the tribe's reservation if there is a consensual relationship with the non-Indians or if the activities of such non-Indians threaten the tribe. Though much remains uncertain in the wake of the Supreme Court's decision, the Creek Nation might be able to exercise its civil jurisdiction in at least the following ways:

- **Taxation:** The Creek Nation might be able to tax non-Indians engaging in certain activities on Creek land. This might subject non-Indians to dual taxation. It might also divest the State and its counties or municipalities of taxing authority over Creek members living or doing business on fee lands within the area.
- **Jurisdiction:** The Creek Nation might be able to assert tribal adjudicatory jurisdiction over non-Indian activities or otherwise divest the state courts of jurisdiction.
- **Regulations:** The Creek Nation might be able to impose certain Creek Nation-specific regulations, including environmental (to the extent not preempted by federal law), employment and health regulations, on non-Indian activities. This might

include regulations concerning non-Indian access to and use of water lying within the boundaries of the Creek reservation.[2]

- **Federal environmental programs:** The Creek Nation may seek to establish that federal environmental regulations control rather than Oklahoma environmental regulations. The Creek Nation may also be able to directly implement certain federal environmental regulations, including the Clean Water Act, the Safe Drinking Water Act and the Clean Air Act, by applying to the U.S. Environmental Protection Agency for Treatment as a State ("TAS") status.[3] In addition to allowing the Creek Nation to directly implement these programs, TAS status would also enable the Creek Nation to set quality standards that are more stringent than federal standards as entities operating under federally delegated authority are permitted to adopt standards that are stricter than those imposed by federal law.[4]

This newfound jurisdiction is particularly relevant to the energy industry in Oklahoma, given that many oil and gas drillers are now operating within the Creek reservation and might soon be operating within other tribal reservations if other tribes pursue and secure a similar outcome to the Creek Nation.

As a threshold matter, energy companies may have to work with tribes and the federal government (which often manages land and regulatory programs for Native Americans) instead of familiar state regulators at the Oklahoma Corporation Commission.[5] Moreover, and as set forth above, the Creek Nation (and the federal government) will ostensibly be able to regulate and tax companies operating on what is now Creek land. This could result in multiple tax layers: one from the state and another from the tribes. The Creek Nation may also be able to administer federal programs, including federal environmental programs, or regulate any activities that "threaten" the health or welfare of the tribe, which could include energy companies' access to or use of tribal water. Some commentators have also suggested that current mineral leaseholders might have to obtain certain permits from the federal government to continue developing oil and gas on Creek land. Others have suggested that the Bureau of Indian Affairs and other federal agencies may end up with the right to renew (or not renew) rights of way granted for existing and future pipelines.

These are just some of the effects that the Supreme Court's decision could have on energy companies operating in Oklahoma, but much remains to be seen. Congress still has the authority to disestablish the Creek reservation, and the court's decision could goad Congress into doing just that. It is also possible that the Creek Nation might work with state officials on a path forward that would include some, but not all, of the regulatory authority cited above.[6]

At this point, the dust is still settling, and much remains to play out in the coming months. It is, however, imperative for energy industry members to pay close attention to the developments that flow from this decision to garner a true understanding of how exactly their business operations may be affected.

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1. *See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).↩

2. It is unclear whether the Creek Nation has a claim to all of the water within Creek reservation. At the very least, the Creek Nation should have a claim to water sufficient to fulfill the purposes of the reservation. *See generally Winters v. United States*, 207 U.S. 564 (1908) (Congress impliedly reserved water to reservation for irrigation purposes). The Creek Nation might also have a claim to all of the reservation's water, given the nature of its treaty with Congress. *See Montana*, 450 U.S. at 550-54 (holding that the Crow Tribe did not have title to a certain riverbed, and distinguishing *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) because of the "special origins of the Choctaw and Cherokee treaties" and "the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction"); Art. IV, 11 Stat. 700, 704 (1856 treaty with Creek nation promising that "no portion" of Creek lands "would ever be embraced or included within, or annexed to, any Territory or State," and that the Creeks would have the "unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property."↩

3. *See, e.g.*, 42 U.S.C. 7601(d) (Indian tribes eligible for treatment as States under the Clean Air Act). ↩

4. *See City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996).↩

5. Pursuant to Section 11 of the Act of August 4, 1947 (61 Stat. 731), the Oklahoma Corporation Commission may, with the approval of the Secretary of the Interior, issue orders concerning oil and gas development on restricted Indian land. Still, only some of the land within the Creek reservation is restricted; other Creek reservation land is fee or trust land.↩

6. Indeed, it appears that earlier this month, Oklahoma Attorney General Mike Hunter agreed to a legislative proposal with the five tribes (Cherokee, Chickasaw, Choctaw, Creek and Seminole) that lie within Oklahoma. This proposal would give the Native American groups the right to collect taxes and grant them some authority over anything deemed to threaten the welfare of a tribe. *See* https://www.washingtonpost.com/business/2020/07/17/supreme-court-oklahoma-oil-/.↩

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