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## The Impact of RCRA and *McGirt* on Tribal Solid Waste Regulations

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## THE IMPACT OF RCRA AND *McGIRT* ON TRIBAL SOLID WASTE REGULATIONS

JONATHAN W. REISWIG\*

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\* Jonathan W. Reiswig is entering his third year of studies at the University of Oklahoma College of Law. This article is dedicated to Fern Reiswig.

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*I. Introduction*

Tribal governments are an often-overlooked entity within the United States’ federal system. Tribes are sovereign entities that are free from much state interference. However, tribes have also historically been deemed dependent domestic nations over which Congress can exercise much authority. But Congress must usually designate when it uses this control.

Environmental law within Indian Country presents a unique aspect of federalism. Initially, the federal response to environmental law ignored the tribe’s role. However, tribal governments were given larger roles in national environmental policies as their sovereignty became increasingly recognized. Most federal environmental statutes now recognize tribes as states through treatment as state (“TAS”) provisions. However, the Resource Conservation and Recovery Act (“RCRA”) is the only major environmental statute that does not contain a TAS provision. As such, tribes are treated as municipalities, rendering tribal governments ineligible for many EPA-specific benefits of the RCRA. However, tribal governments are still subjected to the RCRA penalties for non-compliance. Not surprisingly, many tribal governments have implemented their own solid and hazardous waste regimes. These often either mimic the RCRA’s form or specifically adopt the RCRA and other federal requirements as a regulatory floor.

The Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), may have added another wrinkle to the tribal authority calculus. Specifically, it is possible that more former tribal land will be re-recognized as Indian Country. This could lead to more civil regulatory jurisdiction by tribal governments over non-Indians, particularly in the solid waste disposal field.

Congress should amend the RCRA to include a TAS provision. This would not, however, automatically extend TAS status to Oklahoma tribes, which Congress singled out for TAS exclusion. Perhaps, however, the specter of increased tribal civil regulatory jurisdiction over non-Indians in eastern Oklahoma will convince Congress to reexamine its prohibition on Oklahoma tribal TAS designation.

This paper will first provide the general background of tribal sovereignty and jurisdiction. Second, this paper will provide a background of environmental federalism, including the tribe's unique position within it. Third, this paper will discuss the RCRA and its application to tribes. Fourth, this paper will discuss some tribes' solid waste regulation programs. Fifth, this paper will discuss *McGirt* and its potential for re-recognizing more Indian Country and the possibility tribes could exert civil regulatory jurisdiction over this Indian Country. Finally, this paper makes policy recommendations, including that Congress should amend the RCRA to include a TAS provision and potential solid waste programs tribes could adopt.

## *II. Background*

### *A. Tribal Sovereignty and Jurisdiction*

There are two broad planks of federal Congressional authority over American Indian tribes. The first is the Indian Commerce Clause, stating "Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes."<sup>1</sup> The second is Congress's authority to act as a guardian of tribes.<sup>2</sup> Often, Congress will explicitly state both sets of authority in statutes concerning tribes.<sup>3</sup> Statutes of general applicability (such as environmental laws) can also apply to tribes and American Indians if Congress so

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1. U.S. Const. art. I, § 8.

2. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 & 13 (1831).

3. *See, e.g.*, The Indian Child Welfare Act of 1978, 25 U.S.C.A. § 1901 (Westlaw through P.L. 116-259) ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people").

intended.<sup>4</sup> Such statutes' application to American Indians is seen easiest when Congress explicitly states that it applies to tribes and American Indians.<sup>5</sup> Statutes of general applicability may also apply to tribes if Congressional intent is "clearly expressed in the legislative history or by the existence of a statutory scheme requiring national or uniform application."<sup>6</sup> The earliest federal environmental laws did not explicitly mention tribes.<sup>7</sup> However, courts have found that some of these earlier statutes apply to tribes, and more recent TAS amendments have explicitly extended environmental laws to tribes.<sup>8</sup>

Federal authority over tribes does not remove a tribe's inherent sovereignty.<sup>9</sup> Tribal powers are not delegated powers but "inherent powers of a limited sovereignty which has never been extinguished."<sup>10</sup> As Tsosie mentions, federal environmental laws "do not confer environmental regulatory authority upon the Indian nations; rather, the Indian nations' inherent sovereignty already enabled them to exercise such authority in most cases."<sup>11</sup> Such authority also enables tribes to adopt more stringent regulations than federal statutes require.<sup>12</sup> However, effective environmental regulation can likely occur only if tribes can regulate "non-Indians on the reservation as well."<sup>13</sup> This paper turns next to tribal jurisdiction.

Solid waste disposal is largely regulatory in nature, but certain tribal codes have implicated civil adjudicatory and criminal jurisdiction. Additionally, tribes located inside Public Law 280 ("P.L. 280") states are subjected to more state jurisdiction than tribes in non-P.L. 280 states.

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4. Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 Yale J. on Reg. 229, 232 (Winter 1993).

5. *Id.* at 232-33.

6. *Id.* at 233.

7. 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, 233 (Fall 1996).

8. *Id.* at 233-34.

9. Cohen's Handbook of Federal Indian Law § 4.01 (Nell Jessup Newton ed. 2017) (hereinafter, Cohen's Handbook).

10. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); see Cohen's Handbook, *supra*, § 4.01(1)(a).

11. Tsosie, *supra*, at 234 (emphasis original).

12. *Id.*

13. Walker, *supra*, at 233.

### 1. Tribal Civil Regulatory Jurisdiction

Tribal civil regulatory jurisdiction requires determining if the regulated area is Indian Country and whether the regulated persons are American Indians, tribal members, or non-Indians.<sup>14</sup> First, Indian Country means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>15</sup>

This definition of Indian Country applies to both civil and criminal jurisdiction despite its location in the federal criminal code<sup>16</sup> and determining if something occurred in Indian Country is often the first step in any legal question involving American Indian tribes. Additionally, by virtue of a tribe's sovereign status, tribal governments wield "exclusive tribal jurisdiction" over tribal members in Indian Country unless "there is a specific federal law stating otherwise."<sup>17</sup>

Tribal civil regulatory analysis becomes more difficult when the tribe is attempting to regulate non-Indians in Indian Country.<sup>18</sup> Specifically, "the Supreme Court has curtailed tribal civil jurisdiction over non-Indians, unless the interests of the tribe or member Indians are affected."<sup>19</sup> The *Montana* test is used to determine if a tribe has civil regulatory jurisdiction in Indian Country over non-Indians.<sup>20</sup>

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14. The Supreme Court has not clearly determined "whether the appropriate distinction for applying general jurisdictional rules in Indian country is the distinctions between tribal members and nonmembers or between Indians and non-Indians." Cohen's Handbook, *supra* note 9, § 6.01; *see also United States v. Lara*, 541 U.S. 193, 198 (2004) (applying a member/nonmember distinction).

15. 18 U.S.C.A. § 1151 (Westlaw through P.L. 116-259).

16. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (stating, "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction."); Jill Elise Grant, *The Navajo Nation EPA's Experience with "Treatment as a State" and Primacy*, 21 Nat. Res. & Env't 9, 10 (Winter 2007).

17. Cohen's Handbook, *supra* note 9, § 6.01.

18. *Id.*

19. *Id.*

20. The *Montana* test is only necessary "when a tribe asserts its inherent authority over non-Indians." Grant, *supra*, 13.

*Montana v. United States* involved the Crow Nation’s attempt to “prohibit all hunting and fishing by nonmembers of the tribe on non-Indian property within reservation boundaries.”<sup>21</sup> The Supreme Court stated there is a presumption that tribes do not have civil regulatory jurisdiction over non-members by relying on *Oliphant’s* rationale.<sup>22</sup> However, the Court also noted that “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands.”<sup>23</sup> Specifically, *Montana* established two ways for tribes to rebut the presumption that they lack civil regulatory jurisdiction and thus exert authority over non-Indians in Indian Country. First, “A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribes or its members through commercial dealing, contracts, leases, or other arrangements.”<sup>24</sup> Second, tribes can exert civil regulatory authority over non-Indians in Indian Country when the non-Indian’s conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>25</sup>

If a tribal government cannot establish civil regulatory jurisdiction over non-Indians in Indian Country, then state governments may be able to. However, there is a presumption against state environmental regulatory authority in Indian Country unless a state can refute this presumption, *e.g.*, if the federal government were to expressly authorize state jurisdiction over environmental regulation in Indian Country.<sup>26</sup>

## 2. Tribal Civil Adjudicatory Jurisdiction

While most tribal environmental laws likely fall under civil regulatory jurisdiction—encompassing permits, fines, and injunctions—it is also possible that civil adjudicatory jurisdiction applies.<sup>27</sup> *Montana’s* two-prong test is still used to determine whether a tribe can exert civil adjudicatory jurisdiction over a non-Indian. Additionally, *Strate v. A-1 Contractors* held

21. 450 U.S. 544, 547 (1981).

22. *Id.* at 565 (stating that “[t]hrough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”).

23. *Id.*

24. *Id.*

25. *Id.* at 566.

26. Richard A. Du Bey, et al., *Protection of the Reservation Environment*, 18 *Envtl. L.*, 449, 455 n. 25 (Spring 1988).

27. See Navajo Nation Solid Waste Regulations § 504 (making solid waste landfill permits conditional on the applicant being subject to Navajo Nation laws).

that the *Williams* test can be used to show that the tribe does not exert civil adjudicatory jurisdiction.<sup>28</sup> Under *Williams v. Lee*, 358 U.S. 217 (1959), there is a presumption of tribal authority in Indian Country that the state can rebut. The test is, “Essentially, absent governing Acts of Congress [specifically envisioning P.L. 280], the question has always been whether the state action [meaning the assertion of state civil adjudicatory jurisdiction] infringed on the right of reservation Indians to make their own laws and be ruled by them.”<sup>29</sup>

### 3. Tribal Criminal Jurisdiction

Likely, most tribal environmental laws involve civil regulatory or civil adjudicatory jurisdictions. However, some tribal environmental laws invoke criminal penalties.<sup>30</sup> As such, a brief survey of tribal criminal jurisdiction is warranted. First, under the *McBratney* line of cases, states exert criminal jurisdiction over non-Indian on non-Indian crime in Indian Country.<sup>31</sup> This is the only legal state criminal jurisdiction in Indian Country for non-P.L. 280 states. Second, the federal government exerts criminal jurisdiction in Indian Country under several statutes. One is the Indian Country Crimes Act, stating that federal criminal law of its enclaves (except the District of Columbia) applies in Indian Country.<sup>32</sup> There are three exceptions to this jurisdiction: (1) the crime is committed by an American Indian against another American Indian or another American Indian’s property; (2) the tribe has already punished the perpetrator; and (3) if treaty rights grant the tribe jurisdiction.<sup>33</sup> The second statute is the Assimilative Crimes Act that assimilates state crimes from the surrounding state that are not part of the federal code and applies that state code against American Indians in Indian Country.<sup>34</sup> The third is the Major Crimes Act (“MCA”) that subjects an American Indian committing any enumerated crime against anyone in Indian Country to federal criminal jurisdiction.<sup>35</sup> Finally, tribes exert

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28. 520 U.S. 438, 459 (1997).

29. *Williams* at 271.

30. See Navajo Nation Solid Waste Act § 503(B).

31. See *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); and *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

32. 18 U.S.C.A. § 1152 (Westlaw through P.L. 116-259).

33. *Id.*

34. 18 U.S.C.A. § 13 (Westlaw through P.L. 116-259); see *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977) (holding that only state crimes, not regulations, assimilate under the Act).

35. 18 U.S.C.A. § 1153 (Westlaw through P.L. 116-259) (enumerating, *inter alia*, murder, manslaughter, kidnapping, arson, burglary, and robbery).

criminal jurisdiction solely over American Indians.<sup>36</sup> However, many tribal courts are essentially limited to misdemeanor courts under the Indian Civil Rights Act, which limits tribal sentencing to one year for any one offense (not to exceed three years total) or fines of \$5,000 per offense (not to exceed \$15,000 total).<sup>37</sup> But tribes can elect to come under the Tribal Law and Order Act, 25 U.S.C. §§ 1302(b)-(d), allowing increased sentences of up to three years and consecutive sentences of up to nine years.<sup>38 39</sup>

#### 4. *Public Law 280*<sup>40</sup>

Under P.L. 280, certain states have “jurisdiction over offenses committed by or against Indians in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State.”<sup>41</sup> In full P.L. 280 states, the state exerts criminal and civil adjudicatory jurisdiction.<sup>42</sup> P.L. 280 applies to six mandatory states.<sup>43</sup> P.L. 280 is also available to any other state.<sup>44</sup> Ten optional states have accepted P.L. 280 jurisdiction and some have accepted less than full criminal and

36. *See Oliphant v. Suquamish Tribes*, 435 U.S. 191 (1978) (stating that tribes cannot exert criminal jurisdiction over non-Indians).

37. 25 U.S.C.A. § 1302(b) (Westlaw through P.L. 116-259).

38. Tribes must meet “certain procedural requirements” to qualify for the Act. David H. Getches, et. al., *Cases and Materials on Federal Indian Law*, 585-86 (7th ed. 2017).

39. Tribes exerting this enhanced sentencing authority are the Cherokee Nation, Confederated Tribes of the Umatilla Reservation, Eastern Band of Cherokee Indians, Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation, Hopi Tribe, Muscogee (Creek) Nation, Salt River Pima-Maricopa Indian Community, and Tulalip Tribes. National Congress of American Indians, *Tribal Law & Order Act* (last accessed Feb. 14, 2021) <https://www.ncai.org/tribal-vawa/resources/tribal-law-order-act>.

40. A detailed accounting of P.L. 280 is beyond the scope of this paper. For a more minute discussion of P.L. 280’s implications, *see generally* Cohen’s Handbook, *supra*, § 6.04(3); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535-594 (1974-1975).

41. 18 U.S.C.A. § 1162(a) (Westlaw through P.L. 116-259).

42. *See Bryan v. Itasca Cnty.*, 426 U.S. 373, 385 (1976) (holding that Congress intended for P.L. 280 states to exert criminal and civil adjudicatory jurisdiction, but not civil regulatory jurisdiction that remained with the tribe); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208-10 (1987) (reaffirming *Bryan*’s reading of P.L. 280 and implementing a prohibitory/regulatory distinction to determine whether a law is criminal or regulatory in nature).

43. The mandatory states are California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin (except the Menominee Reservation), and Alaska (also with some exceptions). Cohen’s Handbook, *supra*, § 6.04(3)(a) nn. 45 & 46.

44. *Id.* § 6.04(3)(a).

civil adjudicatory jurisdictions.<sup>45</sup> States are also permitted to retrocede all or part of their assumed jurisdiction to the federal government.<sup>46</sup> Additionally, P.L. 280 was amended to require tribal consent to any future P.L. 280 states.<sup>47</sup>

### *B. Environmental Federalism*

Tribal authority to regulate environmental concerns in Indian Country exists from two sources. “First, Indian tribes possess inherent powers to govern their territories,” and while federal law may limit tribal authority “in certain respects, tribes nonetheless retain substantial authority over matters affecting tribal health and welfare.”<sup>48</sup> This means that tribes can enact their own environmental laws.<sup>49</sup> “Second, Indian tribes may exercise powers authorized by Congress” including assuming “primary regulatory authority, or primacy, for administrating most of the federal environmental programs in Indian country.”<sup>50</sup>

Generally, federal environmental laws apply to Indian Country with either the federal government (usually the EPA) or tribal governments administrating or enforcing those laws.<sup>51</sup> This federal authority usually does not replace a tribe’s inherent authority to promulgate environmental laws.<sup>52</sup> Some federal statutes (like the Safe Drinking Water Act) expressly state the statute was not intended to waive tribal sovereignty, while other laws (like the Hazardous Materials Transportation Act) will preempt tribal authority if the laws are not “‘substantively the same’ as federal law.”<sup>53</sup> Many tribal governments regulate their environments through federal programs.<sup>54</sup> Programs that require EPA approval are then challenged based on “the federal administrative action rather than the tribal plans and standards.”<sup>55</sup>

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45. Optional states are Arizona (partial jurisdiction), Florida (full jurisdiction), Idaho (partial jurisdiction), Iowa (partial jurisdiction), Montana (partial after some retrocessions), Nevada (fully retroceded), North Dakota (partial jurisdiction), South Dakota (partial jurisdiction), Utah (jurisdiction contingent on tribal consent, which has not occurred), and Washington (partial jurisdiction over Indians in Indian Country). *Id.* § 6.04(3)(a) n. 47.

46. *Id.* § 6.04(3)(a).

47. *Id.*

48. *Id.* § 10.01(1).

49. *Id.*

50. *Id.*

51. *Id.* § 10.01(2)(a).

52. *Id.* § 10.01.

53. *Id.* § 10.01(2)(b).

54. *Id.*

55. *Id.*

Tribal governments are also subject to federal regulations and potential environmental liability if the tribe meets the statutory definition of a *person*.<sup>56</sup>

### *1. Federal Environmental Regulation Background*

The modern, national environmental regulation system took several decades to establish and occurred only because state governments failed to protect their environments.<sup>57</sup> Up to the 1960s, the federal government largely treated environmental regulation as a state concern.<sup>58</sup> Early federal environmental statutes (like the Clean Air Act of 1963 and the Solid Waste Disposal Act) used federal money to fund state environmental measures.<sup>59</sup> However, states were reluctant to pass stringent measures for fear that industries would relocate to other states.<sup>60</sup> Popular support for environmental regulation rose in the 1960s, primarily spurred by pesticide use and public works projects that affected the environment.<sup>61</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), further spurred popular support for environmental regulation by making suits against federal agencies a valid engine of environmental activism.<sup>62</sup> Percival suggests that environmental concern was linked to a more national consciousness, stating, “Like civil rights law, environmental law became federalized only after a long history of state failure to protect what had come to be viewed as nationally important interests.”<sup>63</sup>

The 1970s featured a major shift in federal involvement in environmental regulation. Federal environmental regulation in the early 1970s targeted federal agencies (and their projects), which were often the worst polluters.<sup>64</sup> President Nixon signed the National Environmental Policy Act in 1970, requiring “federal agencies to consider environmental impacts and alternative courses of action before taking any action likely to have a

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56. See, e.g., *Blue Legs v. BIA*, 867 F.2d 1094 (8th Cir. 1989) (finding the tribal government liable for environmental damages); Cohen’s Handbook, *supra*, § 10.01(2)(c).

57. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1146-47 (1995).

58. *Id.* at 1155-57.

59. *Id.* at 1157.

60. *Id.*

61. *Id.* at 1157-59.

62. *Id.* at 1159.

63. *Id.* at 1144.

64. *Id.* at 1158.

significant effect on the environment.”<sup>65</sup> The EPA was also created in 1970 and Congress “charged [it] with implementing the national regulatory legislation that followed.”<sup>66</sup>

Congress passed “more than twenty major federal environmental laws” in the 1970s, including the modern Clean Air Act and Clean Water Act.<sup>67</sup> These new laws were “comprehensive, national regulatory programs to control air and water pollution.”<sup>68</sup> The Clean Air Act of 1970 contained the first citizen suit provision, which was a model used in future environmental statutes to help ensure enforcement.<sup>69</sup> These programs also invoked federalism principles, giving states the flexibility to implement their own plans to reach the newly enacted federal minimums.<sup>70</sup> Consequently, most environmental statutes did not preempt state authority.<sup>71</sup> In 1974, *Pennsylvania v. EPA*, 500 F.2d 248 (3d Cir. 1974) held that federal environmental laws did not interfere with state sovereignty.<sup>72</sup>

The 1980s saw another switch in federal environmental regulation. The 1980 Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) is an example of the change. Specifically, CERCLA moved away from “a national regulatory program,” preferring instead to punish “hazardous substance releases” by imposing strict liability.<sup>73</sup> According to Percival, CERCLA also changed the “cooperative federalism model.”<sup>74</sup> Under CERCLA, the EPA could delegate cleanup decisions to states, but it refused to for over a decade and often administered state standards under CERCLA authority.<sup>75</sup> Additionally, the Reagan administration was less sympathetic to environmental concerns than its predecessors.<sup>76</sup> This caused Congress to seek more “prescriptive environmental standards” that forced the “EPA to implement . . . environmental laws in a more expeditious fashion.”<sup>77</sup> This move towards

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65. *Id.* at 1159.

66. *Id.* at 1160.

67. *Id.*

68. *Id.* at 1161.

69. *Id.*

70. *Id.*

71. The Toxic Substances Control Act of 1976 was one of the rare exemptions of a federal statute that did preempt state authority. *Id.* at 1163.

72. *Id.* at 1163.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

efficiency included establishing “new statutory deadlines for EPA action” and establishing “specific sanctions if deadlines were not met.”<sup>78</sup>

Trends in the 1990s further limited federal environmental regulation. *New York v. United States*, 505 U.S. 144 (1992), evidenced the Supreme Court’s greater willingness “to assert judicially enforceable limits on federal authority,” further seen in the *United States v. Lopez*, 514 U.S. 549 (1995) decision.<sup>79</sup> Additionally, the Clinton administration and Congress were concerned about unfunded mandates—environmental or other—to state or local governments. Executive Order 12,875 prohibited agencies from imposing unfunded mandates not required by the statute unless the agency informed the Office of Management and Budget of efforts to consult with state and local governments, and the agency justified the mandate.<sup>80</sup> In 1995, Congress passed the Unfunded Mandate Reform Act making it much more difficult to pass mandates that would cost state or local governments more than \$50 million annually.<sup>81</sup>

## 2. Tribes and Environmental Federalism

Federal environmental regulation largely ignored the role of Indian tribes prior to the 1980s. Tribal governments traditionally managed natural resources in Indian Country, but it was not until the 1980s that tribes helped develop and implement federal environmental programs.<sup>82</sup> This earlier disregard for tribal roles caused lands and waters in Indian Country to be less protected than those of adjacent, non-Indian areas.<sup>83</sup> Additionally, it meant tribes did not receive federal funding for environmental programs.<sup>84</sup>

This federal position began to change in 1983 when President Reagan announced that the federal government would work with tribes “on a government-to-government basis” and encourage tribal self-government as part of his philosophy that “responsibilities and resources should be restored to the governments which are closest to the people served.”<sup>85</sup> The

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78. *Id.* at 1163-64.

79. *Id.* at 1166-67.

80. *Id.* at 1167.

81. *Id.* at 1168.

82. Du Bey et al., *supra*, 450.

83. *Id.* at 451.

84. *Id.*

85. Ronald Reagan, *Statement in Indian Policy* (January 24, 1983), Ronald Reagan Presidential Library & Museum Archives (last accessed Oct. 17, 2020) <https://www.reaganlibrary.gov/archives/speech/statement-indian-policy>.

EPA had already adopted a policy of tribal self-determination in 1980, but it vigorously responded to Reagan's announcement in 1984.<sup>86</sup>

*The EPA's Treatment of Tribes*

On November 8, 1984, the EPA released the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* ("EPA Policy"). Its stated goal was to "set forth the principles that will guide the Agency" in working with tribal governments to address "environmental management" in Indian Country.<sup>87</sup> The EPA recognized that tribal environmental regulation in Indian Country "cannot be accomplished immediately," and would take "careful and conscientious work by EPA, the Tribes, and many others."<sup>88</sup> Additionally, it would require "changes in applicable statutory authorities and regulations."<sup>89</sup> The EPA wanted to "give special considerations to Tribal interests in making Agency policy, and to ensure the close involvement of Tribal Governments in making decision and managing environmental programs affecting reservation lands."<sup>90</sup> The *EPA Policy* set out nine principles to reach these goals that utilized Reagan's government-to-government policy favoring treating tribes like states.

The EPA first recognized tribal sovereignty and committed itself to working with tribes "on a one-to-one . . . government-to-government" basis.<sup>91</sup> Second, the EPA recognized "tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations."<sup>92</sup> This principle outlined the EPA's choice to treat tribes "as the appropriate non-Federal parties" for making environmental decisions in Indian Country.<sup>93</sup> The EPA was committing to treating tribal governments like state governments, the interests and participation of which were "traditionally" accounted for and encouraged by the EPA.<sup>94</sup>

Third, the EPA committed to taking "affirmative steps to encourage and assist tribes in assuming regulatory and program management

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86. Du Bey et al., *supra*, at 451 n. 1.

87. *EPA Policy for the Admin. of Env't Programs on Indian Reservations*.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (internal quotations and capitalization omitted).

92. *Id.* (capitalization omitted).

93. *Id.*

94. *Id.*

responsibilities for reservation lands.”<sup>95</sup> This included “providing grants and other assistance to Tribes similar to what we provide State Governments.” It also envisioned tribes assuming the same “responsibilities” for Indian Country that had been “traditionally delegated to State Governments for non-reservation lands” and under “similar terms.”<sup>96</sup> The EPA further committed to overseeing environmental programs in Indian Country until tribal governments were ready and capable of assuming those programs.

Fourth, the EPA committed to taking “appropriate steps to remove existing legal and procedural impediments” that prevented it from working directly with tribal governments.<sup>97</sup> Fifth, the EPA committed to maintaining the federal government’s trust role whenever policies might affect the environment of Indian Country.<sup>98</sup> Sixth, the EPA would “encourage cooperation between tribal, state and local governments,” recognizing that such cooperation “between equals and neighbors often serves the best interests of both,” especially in environmental regulation.<sup>99</sup> Seventh, the EPA would work with other federal agencies to delineate responsibilities “to protect human health and the environment on reservations.”<sup>100</sup>

Eighth, the EPA would “work cooperatively with Tribal leadership” to ensure compliance with regulations and to “provid[e] technical support and consultation as necessary” to ensure compliance.<sup>101</sup> The EPA once more recognized tribal sovereignty and stated it would only directly intervene, either administratively or judicially, if: (1) there was “a significant threat to human health or the environment,” (2) direct action could “reasonably be expected to achieve effective results in a timely manner,” and (3) other methods by the federal government would fail “to correct the problem in a timely fashion.” However, the EPA would still intervene as normal if “reservation facilities [were] clearly owned or managed by private parties and there is no substantial Tribal interest or control involved,” but would attempt to work cooperatively “with the affected Tribal Government.”<sup>102</sup> Lastly, the EPA committed to including these principles and goals into its

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95. *Id.* (capitalization omitted).

96. *Id.*

97. *Id.* (capitalization omitted).

98. *Id.*

99. *Id.* (capitalization omitted).

100. *Id.*

101. *Id.*

102. *Id.*

long-term plans, budget, policies, legislation initiatives, and regulation development.<sup>103</sup>

The EPA actively adhered to its policy, especially the fourth point of lobbying to amend current environmental statutes to enable the agency to directly work with tribal governments.<sup>104</sup> Beginning in 1986, Congress amended most federal environmental statutes to include TAS provisions.<sup>105</sup> Under these TAS provisions, tribal governments must generally apply to the EPA to determine if it is eligible to undertake primacy and administer the environmental programs to the federal minimum.<sup>106</sup> Some statutes do not require a tribe to seek primacy, and newer federal environmental statutes contain TAS provisions when passed.<sup>107</sup> Overall, most federal environmental statutes have some provision designating tribal TAS status or allowing them to apply for such status; however, the RCRA is the only major environmental statute that has not been amended to treat tribes as states.<sup>108</sup>

### III. The RCRA

Like other areas of environmental regulation, solid waste disposal was primarily a state concern before the RCRA.<sup>109</sup> The RCRA's Congressional findings showed that "the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action through financial and technical leadership" to develop new methods of solid and hazardous waste disposal.<sup>110</sup> The RCRA is "enforceable through civil, administrative, criminal, and citizen suit remedies."<sup>111</sup> The EPA may not bring a suit if a state with a federally authorized program has already brought suit.<sup>112</sup> Overall, the "RCRA dramatically increased the scope of federal authority over the regulation of hazardous waste."<sup>113</sup>

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103. *Id.*

104. Cohen's Handbook, *supra*, §10.02(1).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* §10.02(2).

109. Du Bey, et. al., *supra*, at 457-58.

110. *Id.* at 457 (quoting Congressional findings at 42 U.S.C.A. § 6901(a)(4)) (emphasis omitted).

111. Linda A. Malone, 1 *Envtl. Reg. of Land Use* § 9:11 (2020) (Westlaw).

112. *Id.*

113. Du Bey et. al., *supra*, at 457.

Consistent with federalism themes, states are still free to promulgate their own hazardous waste programs, but the programs must first receive EPA authorization.<sup>114</sup> A state's first program is an interim program designed to determine if it is "substantially equivalent" to federal standards.<sup>115</sup> The second, permanent program is authorized if the state's program is "equivalent to the federal program, enforceable, and consistent with other federal and state programs."<sup>116</sup> State approved plans can receive federal funding for implementation and management.<sup>117</sup>

The RCRA was intended to "protect groundwater from disposal of wastes," and it serves a dual role of protecting groundwater and regulating waste disposal.<sup>118</sup> The RCRA's solid waste disposal definition includes "what is commonly considered solid waste as well as liquids and contained gases."<sup>119</sup> States are required to create two plans under the RCRA: "one for solid waste disposal and another for hazardous waste."<sup>120</sup> The EPA must create guidelines for state solid waste disposal that considers the different "regional, geological, hydrologic, climatic, and other circumstances" necessary to protect "ground and surface waters from leachate contamination" and the reasonable protection of both surface waters from runoff and ambient air quality.<sup>121</sup> State plans "must distinguish between 'sanitary landfills' and open dumps" and these plans must "prohibit establishment of new open dumps."<sup>122</sup> Further, open dumps must be shut down or made into sanitary landfills.

Much of the RCRA is designed to prevent contamination.<sup>123</sup> Section 7003 concerns "remediating contamination that has already occurred" and applies only to solid or hazardous waste.<sup>124</sup> The Administrator of the EPA may sue "any past or present owners . . . of treatment, storage, or disposal facilit[ies], any past or present generator [of waste], and any past or present transporter" in federal district court if these activities "present an imminent and substantial endangerment to health or the environment."<sup>125</sup> Section

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114. *Id.* at 458.

115. *Id.* at 457 (punctuation and numbering omitted).

116. *Id.* (punctuation and numbering omitted).

117. Malone § 9:11, *supra*.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Linda A. Malone, 1 *Envtl. Reg. of Land Use* § 9:12 (2020) (Westlaw).

124. *Id.*

125. *Id.*

7003 also may require landfill facilities and perhaps some storage facilities “to take corrective actions beyond facility boundaries if necessary to protect health and the environment” contingent upon facilities receiving permission for such action.<sup>126</sup> Section 7003 applies strict liability and persons acting in corporate capacities can be “individually liable if personally involved in or directly responsible for conduct violating § 7003.”<sup>127</sup> Additionally, state and local governments, and possibly federal facilities, are subject to § 7003.<sup>128</sup>

#### A. *The RCRA and Tribes*

The RCRA treats tribes as municipalities, not states, and is the only major federal environmental statute without a TAS provision. The RCRA “neither specifically authorizes Indian tribes to develop their own hazardous waste management programs nor explicitly provides that federal authority extends to Indian lands.”<sup>129</sup>

The EPA interpreted the RCRA as excluding state regulatory jurisdiction over Indian Country.<sup>130</sup> Washington State challenged this reading in 1985.<sup>131</sup> However, the EPA’s reading was upheld, precluding Washington State’s enforcement of the RCRA in Indian Country.<sup>132</sup>

The EPA, likely adhering to its 1984 policy outlines, unilaterally attempted to treat the RCRA as if it had a TAS provision by stating the Campo Band of Mission Indian’s solid waste management plans were adequate in 1995.<sup>133</sup> The EPA’s approval was based on its belief that it had the authority to declare tribal waste management plans as *adequate*, notwithstanding that the tribes’ designation as a municipality under the RCRA did not allow the EPA to approve these plans.<sup>134</sup> The D.C. Circuit Court used *Chevron* to determine the extent of deference to the agency’s findings. It found that the EPA failed *Chevron*’s first step because the statute “directly [speaks] to the precise question at issue.”<sup>135</sup> The court found that the RCRA clearly identifies tribes as municipalities, not states, and that the EPA “rewrote” the RCRA itself by saying the RCRA “now

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126. *Id.*

127. *Id.*

128. *Id.*

129. Du Bey, et. al., *supra*, at 454.

130. *Id.* at 452.

131. *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985).

132. Du Bey, et. al., *supra*, at 452.

133. *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150 (D.C. Cir. 1996).

134. *Id.*

135. *Id.* (punctuation original).

reads: ‘States must, and Indian tribes may, but other local governments may not’ adopt permit programs and submit them to the agency for review and approval.”<sup>136</sup> The court further opined that if Congress had intended to treat tribes as states in the RCRA, it would have done so expressly, especially given explicit TAS provisions in the Clean Air Act, the Safe Drinking Water Act, and the Clean Water Act.<sup>137</sup>

The court also acknowledged that a lack of primacy did not “strip the tribe of its sovereign authority to govern its own affairs,” and only caused the tribe to lose “the ability to take advantage of the leeway built into the regulations, including the ability to take site-specific factors into account.”<sup>138</sup> The court further stated that while the RCRA’s tribal municipality designation might be “unfair as a policy matter, . . . the remedy lies with Congress, not with the EPA or the courts.”<sup>139 140</sup>

The lack of a TAS provision in the RCRA is significant to tribal governments because, notwithstanding lacking the benefits of primacy under the RCRA, tribal governments are still liable for compliance suits brought under it.<sup>141</sup> In *Blue Legs*, Oglala Sioux tribal members sued to bring the Pine Ridge Reservation dumps into compliance with federal law.<sup>142</sup> The Tribe argued it had sovereign immunity from the suit and that the Bureau of Indian Affairs (“BIA”) and Indian Health Service (“IHS”) were solely responsible for bringing the dump into compliance.<sup>143</sup> Alternatively, the tribe argued that if it was responsible for compliance, then remedies must be exhausted in tribal court before suing in federal court.<sup>144</sup>

The Eighth Circuit disagreed with the tribe. It held that the tribe was liable for bringing the dump into federal compliance because the RCRA’s definition of *person* includes municipalities and *municipalities*’ definition includes Indian tribes.<sup>145</sup> The court also found that there was sufficient Congressional intent to abrogate tribal sovereign immunity under the

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136. *Id.*

137. *Id.*

138. *Id.* at 151.

139. *Id.*

140. The court may have been more comfortable adopting a textual approach and suggesting a Congressional remedy because sight-specific regulations were available because the landfill at issue was in a seismic zone, and these facts gave “the tribe the flexibility it [sought].” *Id.* at 152.

141. *Blue Legs v. BIA*, 867 F.2d 1094, 1098 (8th Cir. 1989).

142. *Id.* at 1095.

143. *Id.*

144. *Id.*

145. *Id.* at 1097.

RCRA.<sup>146</sup> Additionally, the court held that the RCRA abrogated the general preference for exhaustion in tribal courts for federal question or diversity jurisdiction.<sup>147</sup> Finally, the court rejected the tribe's contention that the BIA and the IHS were solely responsible for bringing the dump into compliance because the tribe "established and operated" the dumps and also "generated waste dumped at these sites."<sup>148</sup>

### B. Oklahoma Tribal TAS Status

Oklahoma tribes have been rendered ineligible for TAS status under environmental laws. Specifically, Senator Inhofe's so-called Midnight Rider was attached to a 2005 statute and requires tribes to negotiate with the State of Oklahoma to gain primacy for environmental laws, including the Safe Drinking Water Act that was previously amended to include a TAS provision.<sup>149</sup> The Midnight Rider was slipped into the bill without Senate discussion and without consultation with Oklahoma tribes.<sup>150</sup>

### C. Tribal Solid Waste Programs

Many tribal governments have implemented their own solid waste regulatory programs by utilizing their sovereign authority and even without benefitting from the RCRA funding. The following examples from the Cherokee, Muscogee (Creek), and Navajo Nations are intended to act as surveys of tribal programs. They may also serve as templates for other tribal governments wishing to enact their own solid waste regulations. All three Nations articulate similar goals in their solid waste programs. Specifically, the Nations envision using solid waste regulations to protect public health, safety, and welfare, and to conserve natural resources and the beauty of tribal lands.<sup>151</sup>

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146. *Id.* at 1097 (citing (1) the tribe's municipality status, (2) *Washington Department of Ecology v. EPA's* finding that RCRA applied to Indian tribes, (3) and a House report detailing concern about American Indian children playing in reservation dumps).

147. *Blue Legs* at 1097-98; see also *Nat'l Farmer Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985) (concerning exhaustion requirements for federal question jurisdiction); *Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9, 16 (1987) (concerning exhaustion requirements for diversity jurisdiction).

148. *Blue Legs* at 1098.

149. Raymond Nolan, *The Midnight Rider: The EPA and Tribal Self-Determination*, 42 *American Indian Quarterly* 329, 329 (Summer 2018).

150. *Id.* at 334-35.

151. Cherokee Nation Code Annotated 63, Article 7 § 602 (encouraging recycling to reach these goals); Muscogee (Creek) Nation Green Government Initiative §§ 701(B)(3) &

### 1. Cherokee Nation

This paper will look at two Cherokee Nation waste codes, the Cherokee Nation Solid Waste Code and the Cherokee Nation Hazardous Waste Code.

#### a) Cherokee Nation Solid Waste Code

The Environmental Protection Commission (“EPC”) can create rules for “permitting, posting of security, construction, operation, closure, maintenance and remediation of solid waste disposal sites, borrow pits and dredge and fill areas.”<sup>152</sup> The program, at minimum, must include “the collection of waste paper.”<sup>153</sup> Solid waste transportation rules are to be at least as stringent as the Department of Transportation or the Interstate Commerce Commission rules.<sup>154</sup> The EPC and its Administrator are authorized to “implement and enforce” the RCRA and other federal laws associated with solid waste management.<sup>155</sup>

Persons<sup>156</sup> are not to dispose of solid waste at sites unpermitted by the EPC or operate sites unpermitted by the same.<sup>157</sup> Additionally, persons are not to “knowingly transport solid waste to an unpermitted site or facility.”<sup>158</sup> However, persons can dispose of household solid waste on their property if the disposal does not “create a nuisance or a hazard to the public health or environment” or break other laws.<sup>159</sup> However, this disposal is not to exceed “fifty tires, junk cars or similar waste” without a permit.<sup>160</sup>

The statute also includes restrictions on granting permits for solid waste disposal sites and facilities. Solid waste disposal sites cannot be “[w]ithin a locally fractured or cavernous limestone or cherry limestone bedrock,” cannot be within five miles of rural waste district wells that provide water to customers, cannot be locations that otherwise “present unacceptable risks to any water supply or any other beneficial use of surface water or groundwater,” and cannot be within one-hundred-year floodplains.<sup>161</sup>

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(B)(4), 101(A) (focusing heavily on recycling measures to reach these aims); and Navajo Solid Waste Act § 103(2).

152. Cherokee Nation Solid Waste Code § 605(A)(1).

153. *Id.* § 607(B).

154. *Id.* §605(A)(7).

155. *Id.* § 606.

156. *See Id.* § 603(14) (defining *person* to include individuals, business entities, and cities, towns, and municipalities).

157. *Id.* § 608(A)(1)-(2).

158. *Id.* § 608(A)(3).

159. *Id.* § 608(B).

160. *Id.*

161. *Id.* § 608(H).

Further, solid waste landfills cannot be located within five miles of earthquake epicenters of 4.0 or higher on the Richter Scale or V on the modified Mercalli Scale.<sup>162</sup> The EPC can also reject applications for sites presenting “an unacceptable risk to public health, safety or welfare, natural resources or the environment” with applicants being entitled to hearings to determine the same.<sup>163</sup>

The statute includes additional permitting restrictions for sites. Sites can only accept non-hazardous industrial solid waste in areas outside of “principal groundwater resources or recharge areas” or “on property owned or operated by a person who also owns or operates a hazardous waste facility.”<sup>164</sup> Alternatively, the site can comport to the Cherokee Nation’s hazardous waste requirements.<sup>165</sup> Or, finally, it can store industrial solid waste for noncommercial use by an industry or manufacturer.<sup>166</sup>

Finally, landfill owners or operators may need to submit vegetation plans. These plans are designed to control erosion and dust, and for “aesthetic enhancement.”<sup>167</sup> A vegetation plan is required if the landfill is “over fifty (50) feet in height above natural surface contours” and “accepts more than two-hundred (200) tons per day of solid waste,” or if the site “disturbs more than one acre of land.”<sup>168</sup>

*b) Cherokee Nation Hazardous Waste Code*

The Cherokee Nation Hazardous Waste Code was passed in December of 2005. It adopts federal minimums relating to “hazardous waste, hazardous materials and hazardous substances.”<sup>169</sup> This includes the RCRA minimums.<sup>170</sup> The act explicitly allows hazardous waste plans to be more stringent than federal standards.<sup>171</sup> It provides authority for Cherokee governmental entities to “take all actions necessary to develop, implement and enforce a comprehensive regulatory program for hazardous wastes and materials.”<sup>172</sup> The Administrator of the Cherokee Nation’s hazardous waste

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162. *Id.* § 612(B)(2).

163. *Id.* § 608(I).

164. *Id.* § 612(A).

165. *Id.*

166. *Id.*

167. *Id.* § 614.

168. *Id.*

169. Cherokee Nation Code Annotated 63, Article 13 § 1302(A)-(A)(1) (hereafter cited as Cherokee Nation Hazardous Waste Code).

170. *Id.*

171. *Id.* § 1302(C).

172. *Id.* § 1302(B).

programs is also empowered to work with the EPA regarding “programing activities.”<sup>173</sup>

The Cherokee Nation potentially claims authority outside of Cherokee Indian Country. Specifically, it claims authority over *Cherokee Communities*. These are defined as groups of people that are predominantly composed of Cherokee Nation members “who reside in the same geographic area and meet or work together on common goals.”<sup>174</sup> This claimed authority also includes the ability to “[r]equire and approve or disapprove disposal plans from *all persons* generating . . . or shipping hazardous waste within, from, or into the Cherokee Nation.”<sup>175</sup> Additionally, the EPC is given authority over potentially wide geographic areas to regulate “any existing” hazardous waste disposal site that threatens to “migrate into waters of the Nation or otherwise cause adverse impacts on public health, safety or the environment.”<sup>176</sup> This authority includes requiring “closure, cleanup, restoration, or such protective activities as double liners and leachate detection and collection measures.”<sup>177</sup>

The Commission can issue permits and create rules “relating to the construction, operation, closure, post-closure, maintenance and monitoring of hazardous waste facilities.”<sup>178</sup> However, new permits for hazardous waste sites cannot be approved after January 1, 2006,<sup>179</sup> and existing disposal sites are prohibited from receiving or incinerating hazardous waste in Cherokee Nation after January 1, 2006.<sup>180</sup> The EPC may also “[p]romulgate such rules as they deem necessary or appropriate” to implement this statute.<sup>181</sup> Specifically, the EPC may restrict or prohibit land disposal of hazardous waste, including “landfills, surface impoundments, waste piles, deep injection wells, land treatment facilities, salt dome and bed formations and underground mines or caves.”<sup>182</sup> The EPC is also

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173. *Id.* § 1304(B)(10).

174. *Id.* § 1303(2).

175. *Id.* § 1304(B)(5) (emphasis added); *see also* Cherokee Nation Solid Waste Code § 603(14) (defining *person* to include individuals, business entities, and cities, towns, & municipalities).

176. Cherokee Nation Hazardous Waste Code § 1305(1).

177. *Id.*

178. *Id.* § 1304(A)(1).

179. *Id.* § 1308(A).

180. *Id.* § 1308(B); *see also id.* § 1317 (exempting hazardous waste facilities that exclusively burn for recycling purposes and requiring any hazardous waste that is burned for fuel to have a heating value of more than 5,000 BTUs).

181. *Id.* § 1304(A)(8).

182. *Id.* § 1304(A)(7).

responsible for enforcing its own rules and the statute's requirements.<sup>183</sup> This responsibility includes determining and enforcing penalties for violating this statute and the EPC's rules.<sup>184</sup> Further, the EPC is the final arbitrator of administrative appeals relating to hazardous waste rules.<sup>185</sup>

The Administrator is to make "information obtained by the Nation regarding hazardous waste facilities and sites available to the public in . . . the same manner" as would occur if the EPA carried out the program.<sup>186</sup>

## 2. *Muscogee (Creek) Nation*

The Muscogee (Creek) Nation's solid waste plan involves several parts, including permitting, building codes, recycling, and solid waste collection, the latter two being the focus of this survey. The Muscogee (Creek) Nation potentially claims broad civil regulatory jurisdiction because the statute applies to "any person who generates refuse in Muscogee (Creek) Nation jurisdictional boundaries."<sup>187</sup>

### a) *Recycling Initiatives*

Recycling efforts are the foundational principal of the Muscogee (Creek) Nation's solid waste programs. Specifically, it requires "recycling of recyclable materials to the fullest extent possible by the government of the Muscogee (Creek) Nation and individuals or entities employed by the Nation and by the citizens of the Nation."<sup>188</sup> The statute requires governmental buildings to separate "designated recyclable materials from other refuse . . . without regard to whether the building's solid waste is collected by municipalities within the Muscogee (Creek) Nation's jurisdiction."<sup>189</sup> Those buildings that receive "city solid waste collection

183. *Id.* § 1304(A)(2).

184. *Id.* § 1304(A)(13).

185. *Id.* § 1304(A)(4).

186. *Id.* § 1304(B)(12).

187. Muscogee (Creek) Nation Green Government Initiative 40 § 5-103; *see also id.* § 5-102(L) (defining *person* as individuals and business entities organized or existing under Muscogee (Creek) law). Whether the Nation claims authority over non-Indians in its Indian Country would depend on how broadly *person* is read (*i.e.*, whether it extends only to entities created by the Nation's laws or if extends to entities recognized by the same). Given that the statute tends to speak of Nation governmental entities and members, the Nation likely does not intend to claim authority over non-Indians within its Indian Country. This could become a live issue after the *McGirt* decision, which specifically involved this Nation's Indian Country.

188. *Id.* § 5-101.

189. *Id.* § 5-202.

services” are required to separate recyclable materials from other refuse per the statute’s requirements.<sup>190</sup> Those that do not receive “city solid waste collection” are still required to separate recyclable materials from other refuse, and are required to develop a recycling plan to be approved by the Commissioner.<sup>191</sup> The Commission may request recycling plans from “[a]ll commercial or governmental entities.”<sup>192</sup>

The Nation reasoned that an effective recycling program requires access to recycling receptacles. The Nation planned on providing recycling receptacles for residential dwellings.<sup>193</sup> However, commercial owners are “responsible for the costs associated with separating recyclable materials.”<sup>194</sup> Recycling receptacles are also available from the Nation for special events, but the number of recycling receptacles must equal the number of solid waste receptacles, and the two must be placed next to each other.<sup>195</sup>

The Nation also focused on education to further its recycling goals. All the Nation’s “governmental establishments” are responsible for educating “employees and/or resident users and patrons” of the recycling program’s requirements.<sup>196</sup> This includes “written instructions” for materials to be recycled, how these materials are to be prepared, how to use the collection system, and updates to the programs.<sup>197</sup> This last educational requirement is especially important because the statute reserves the Commission’s right to amend the recyclable material list, even if it conflates with other statutes.<sup>198</sup> This likely requires governmental entities to stay abreast of changes in the Nation’s recycling code to remain within compliance.

*b) Solid Waste Regulations*

Of the three Nations surveyed, the Muscogee (Creek) Nation’s plan puts the most discretion in the hands of an administrative agency. The Office of Environment Services (“OES”) is authorized to “[e]stablish requirements for disposal, transfer, transport, treatment and storage of solid waste” to “ensure public safety and protection of the environment to the greatest

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190. *Id.* § 5-202(A).

191. *Id.* § 5-202(B).

192. *Id.* § 5-203(C).

193. *Id.* § 5-203(A)(1).

194. *Id.* § 5-203(B).

195. *Id.* §§ 5-204(1) and (2).

196. *Id.* § 5-205.

197. *Id.*

198. *Id.* § 5-203(D).

extent possible.”<sup>199</sup> It can also “[r]equire methods of pollution prevention, waste reduction, conservation, avoidance or mitigation of impacts,”<sup>200</sup> and establish “processes and procedures for the sampling and submission of environmental impact statements.”<sup>201</sup> Further, it can create rules for solid waste transportation that must be at least as stringent as those established by the United States Department of Transportation or the Interstate Commerce Commission.<sup>202</sup> Additionally, the OES can establish “comprehensive solid waste management rules and best management practices.”<sup>203</sup> It can further create standards for cleaning up “groundwater, surface waters, or contaminated soils resulting from releases, spills or other activities”<sup>204</sup> and it can enforce applicable federal laws and regulations.<sup>205</sup> Finally, the OES is required to “promulgat[e] rules and regulations” that “encourage and promote recycling and reuse of recoverable materials” because such efforts are “necessary for the public safety, health, interest and economic welfare” and these recycling efforts can “substantially reduce production and disposal costs, save tribal lands[,] conserve natural resources and protect the environment.”<sup>206</sup>

### 3. Navajo Nation

The Navajo Nation’s regulations are the most comprehensive of those surveyed. This paper looks at two statutes: the Navajo Nation Solid Waste Act (“Solid Waste Act”) and the Navajo Nation Solid Waste Regulations.

#### a) Navajo Nation Solid Waste Act

The Navajo Nation, like the other Nations surveyed, claims broad authority. The Solid Waste Act applies “to all persons and all property within the Navajo Nation,”<sup>207</sup> except those with whom there are covenants “not to regulate or otherwise exercise jurisdiction over such person or property.”<sup>208</sup>

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199. *Id.* § 7-102(A)(1).

200. *Id.* §7-102(A)(2).

201. *Id.* §7-102(A)(3).

202. *Id.* §7-102(A)(4).

203. *Id.* §7-102(A)(6).

204. *Id.* §7-102(A)(9).

205. *Id.* §§ 7-102(a)(9) and (10).

206. *Id.* § 7-104.

207. Navajo Nation Solid Waste Act § 104(A).

208. *Id.* § 104(B).

The Navajo Nation Environmental Protection Agency is the primary organ for enforcing this statute.<sup>209</sup> The Director of this agency is authorized to “prescribe such regulations as are necessary to carry out his/her functions” under the act; to enforce the provisions of the act; issue permits, assess fees, and conduct investigations, among other tasks; “accept, receive and administer grants or other funds” from groups to administer the act’s purposes; and “perform such other activities as the Director may find necessary to carry out his/her functions under this chapter.”<sup>210</sup> Specifically, the Director may create regulations for “solid waste landfills, transfer stations, composting facilities, collection and transportation of solid waste and recycling.”<sup>211</sup> But the Director’s promulgated rules must be at least as stringent as those under the RCRA.<sup>212</sup>

The statute allows variances to the Director’s rules under certain circumstances. Owners may petition the Director for variances if “hardships [are] caused by, but not limited to, isolation and extreme weather conditions,” but the variances cannot “endanger public health, safety, welfare or the environment” and cannot violate 40 C.F.R. Parts 257 or 258.<sup>213</sup> Variances are not intended to be permanent or a circumvention of the rules: owners/operators must create “a detailed plan for the completion of corrective steps needed to conform” to the statute and the Director’s rules, there must be a “fixed term for the variance,” and the Director may periodically inspect the facility.<sup>214</sup> Further, the Director may renew,<sup>215</sup> suspend,<sup>216</sup> or revoke<sup>217</sup> variances.

The statute establishes requirements and procedures for landfill permits. Permits for solid waste facilities are to be for fixed terms not exceeding thirty years.<sup>218</sup> If a facility does not comply with the statute or the Director’s rule, then the permit must specify when the facility must complete necessary modifications.<sup>219</sup> Additionally, the Director must allow

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209. *Id.* § 103(3).

210. *Id.* §§ 107(A)(1)-(2), (4)-(5), (7), and (11)-(12).

211. *Id.* § 301(A).

212. *Id.* § 107(A) (suggesting also that the Director should consider the factors established by RCRA Subtitle D).

213. Navajo Nation Solid Waste Act § 302(A) and Navajo Nation Solid Waste Regulations § 106(A).

214. Navajo Nation Solid Waste Act §§ 301(B)(1)-(3).

215. *Id.* § 301(C).

216. *Id.* § 301(D).

217. *Id.*

218. *Id.* § 403(A).

219. *Id.*

applicants time to remedy deficiencies in their application.<sup>220</sup> The Director may revoke permits for failure to comply with the permit's terms, failure to comply with the statute's regulations, or "fraud, deceit" or submitting "inaccurate information."<sup>221</sup> The Director is required to publicly disclose the "final determination regarding any permit under this chapter" and must schedule a public hearing if the Director receives a written request for one "within 15 days of publication" of the public disclosure.<sup>222</sup>

Additionally, the statute contains procedures for the Director's creation of rules. The Director must give public notice of proposed rules, including allowing the public to state its views orally or in writing.<sup>223</sup> The Director is also required to respond in writing to "each significant [public] comment."<sup>224</sup> The Director's rules are also subject to the Navajo Supreme Court's review.<sup>225</sup> This review has important implications. Judicial review for the Director's final actions are not available if the action could have been reviewed by the Navajo Supreme Court but was not.<sup>226</sup> This prohibition does not apply if the rule was objected to "with reasonable specificity" during the public comment period.<sup>227</sup> Further, if the objection was "impracticable to raise" within the public comment period, the Director must "convene a proceeding" to reconsider the regulation within the judicial review period.<sup>228</sup> If this proceeding does not occur, then the Navajo Supreme Court may hear the objection.<sup>229</sup> Courts may reverse a Director's final action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law"; "in excess of statutory jurisdiction, authority, or limitations or short of statutory right"; "outside of procedural requirements"; or "unsupported by substantial evidence."<sup>230</sup>

While this statute gives the Director wide discretion for creating rules, it also contains certain limitations. It is illegal to "dispose of any solid waste in a manner that will harm the environment, endanger the public health, safety and welfare or create a public nuisance" or somewhere "other than a

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220. *Id.*

221. Navajo Nation Solid Waste Act § 404 and Navajo Nation Solid Waste Regulations §§ 509(A)-(C).

222. Navajo Nation Solid Waste Act § 404(B).

223. *Id.* § 601(A)(1).

224. *Id.* § 601(A)(2).

225. *Id.* § 602(A).

226. *Id.* § 601 (B)(1).

227. *Id.* § 602(B)(2).

228. *Id.*

229. *Id.*

230. *Id.* § 602(C).

facility which is in compliance with these regulations.”<sup>231</sup> This prohibition excludes the “on-site disposal of on-site generated solid waste from a family ranch, camp or farm” if it does not “create a public health or environmental hazard or public nuisance.”<sup>232</sup> Further, one must have a permit to “construct, operate or modify a solid waste landfill facility” unless it meets the above § 201(B) exception of a family ranch, camp, or farm.<sup>233</sup> Additionally, “bulk or non-containerized liquids” cannot be disposed of in solid waste facilities.<sup>234</sup> It is also illegal to interfere with or prohibit “inspection, entry or monitoring[ ] activities.”<sup>235</sup> Owner/operators cannot openly burn solid waste at their facilities.<sup>236</sup> Owner/operators can be required to keep records regarding installation or monitoring of equipment, audit procedures, and emission samples,<sup>237</sup> and these records must be publicly available unless it qualifies as a trade secret.<sup>238</sup>

The Navajo Solid Waste Act invokes civil regulatory, civil adjudicatory, and criminal jurisdiction. The Director is authorized to issue and serve compliance orders, administrative penalty orders, or bring civil or criminal action on persons “conducting an activity that threatens human health or the environment” or who have violated the statute or the Director’s orders.<sup>239</sup> Civil actions include injunctions.<sup>240</sup> Criminal penalties require an intentional *mens rea* and invoke fines between \$500 and \$5,000 per day per violation and/or 180 days of imprisonment.<sup>241</sup> Administrative order penalties can be “up to \$10,000 per day per violation” but are not to exceed \$100,000 total.<sup>242</sup> Additionally, those who have “consistently violated any requirements or prohibitions” can be prohibited from operating solid waste

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231. *Id.* §§ 201(A)(1)-(2).

232. *Id.* § 201(B).

233. *Id.* § 202.

234. *Id.* § 201(A)(4).

235. Navajo Nation Solid Waste Act § 201(A)(6); *see* Navajo Nation Solid Waste Regulations § 201.

236. Navajo Nation Solid Waste Act § 203 and Navajo Nation Solid Waste Regulations § 203.

237. Navajo Solid Waste Act § 501(A).

238. *Id.* § 501(C). The statute does not define *trade secret*, but assuming it follows the general American legal meaning, it would be information that “has economic value, remains secret . . . and [for which] reasonable security measures are taken.” Stephen M. McJohn, *Intellectual Property: Examples & Explanations* 516 (6th ed. 2019).

239. Navajo Solid Waste Act § 502(A).

240. *Id.* § 502(E).

241. *Id.* § 503(B).

242. *Id.* § 504(A).

facilities or contracting for the same.<sup>243</sup> Cash penalties received from violations are to be used “to finance solid waste management compliance and enforcement activities.”<sup>244</sup>

Additionally, the statute authorizes citizen suits. They can be raised against anyone that violates the statute or Director-promulgated rules except the Navajo Nation or its instrumentalities, but tribal enterprises may be sued.<sup>245</sup> Citizen suits are permitted for “past or present handling, storage, treatment, transportation, or disposal of any solid waste . . . [that] present[s] an imminent and substantial endangerment to health or the environment” and violate the statute or the Director’s rules.<sup>246</sup> There are also limitations to citizen suits.<sup>247</sup>

*b) Navajo Nation Solid Waste Regulations*

The Navajo Nation Solid Waste Regulations (“Regulations”) were passed after the Navajo Nation Solid Waste Act. The Regulations re-codifies portions of the Act but also contains additional rules.

The Solid Waste Regulations prohibit landfills in certain areas. These include wetlands, flood plains, the habitats of threatened or endangered species, and prime farmland.<sup>248</sup> Additionally, landfills are prohibited in “[h]istorically, archeologically or culturally significant sites” unless the landfill complies with the Navajo Cultural Resources Protection Act and other tribal and federal laws.<sup>249</sup> Further, landfills are prohibited on seismic zones unless the owner/operator demonstrates that “all structures . . . are designed to resist maximum horizontal acceleration in lithified earth material for the site.”<sup>250</sup>

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243. *Id.* § 502(A).

244. *Id.* §§ 503(E)(3) and 505(E).

245. Navajo Nation Solid Waste Act § 505(A)(1).

246. *Id.*

247. *See* Navajo Nation Solid Waste Act § 505(B)(1) (requiring sixty days’ notice to the Director before filing a citizen suit for violations of the statute or the Director’s rules and preempting citizen suits if the Director is “diligently prosecuting an administrative or a civil action”); § 105(B)(2) (requiring ninety days’ notice for citizen suits for actions that do not violate the statute or rule but that allegedly harm health or the environment, and preempting the citizen suit if the Director is pursuing an administrative or civil action); and § 505(C)(2) (allowing the Director to intervene in citizen suits).

248. Navajo Nation Solid Waste Regulations § 402(A)(1).

249. *Id.* § 402(A)(5).

250. *Id.* § 402(A)(7).

Landfills are further restricted under the Regulations. First, open dumping is prohibited.<sup>251</sup> Next, solid waste landfills are required to use methane gas monitoring and control systems.<sup>252</sup> Landfills are to be located and operated to avoid “a public nuisance or potential hazard to public health, welfare or the environment and in a manner to control disease vectors and odors.”<sup>253</sup> All landfills must also have a contingency plan “designed to minimize hazards to human health or the environment from fires, explosions or any unplanned sudden or non-sudden release of contaminants or hazardous waste constituents to air, soil, surface water or ground water.”<sup>254</sup>

The Director is empowered to grant variances if they do not “endanger the public health or harm the environment.”<sup>255</sup> However, the Regulations provide an additional barrier to issuing variances: the owner/operator must establish that the variances do not harm public health or the environment by clear and convincing evidence.<sup>256</sup> Additionally, variances are not to be granted “until the Director has considered the relative interests of the owner/operator, and other users of property likely to be affected and the general public.”<sup>257</sup>

The Director is also given additional authority under the Regulations. Either the Director or Health Advisor can “enter any solid waste disposal, collection, transfer station or composting facility” to inspect or investigate (including the vehicles or equipment of solid waste transporters), take samples, inspect records, conduct studies, “take corrective action,” and enforce regulations.<sup>258</sup>

The Regulations also contain additional requirements for permits. Navajo Nation permits are granted conditionally on the Director’s right to inspect the facility and the facility’s records.<sup>259</sup> Permits are further conditioned on the owner/operator’s consent to Navajo jurisdiction.<sup>260</sup> Permit applications are also public record, with the public receiving the right to comment on the granting and modification of an application, and corrective actions against

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251. *Id.* § 206.

252. *Id.* § 403(E).

253. *Id.* § 404(A)(2)(a).

254. *Id.* § 404(C)(1).

255. *Id.* § 106(A).

256. *Id.* § 106(B)(2).

257. *Id.* § 106(B)(3).

258. *Id.* §§ 302(A)-(B).

259. *Id.* § 504.

260. *Id.*

owner/operators.<sup>261</sup> A permit is unnecessary to “own, operate or maintain a solid waste transfer station.”<sup>262</sup> A composting facility requires a permit unless it “occupies less than 5 acres, uses only water or an inoculant as an additive and utilizes no more than 50% manure in the final mix, and does not compost treated sewage sludge or solid waste.”<sup>263</sup>

Transporters of solid waste must use vehicle “covers or enclosures to prevent solid waste from being released during collection/transportation” and collection and transportation must satisfy the EPA Guideline for Solid Waste Storage and Collection.<sup>264</sup> Solid waste generators must provide containers for the waste unless it is “construction/demolition waste, yard waste and white goods.”<sup>265</sup> “Storage facilities shall be insect-, rodent- and leak-proof” and construction and yard waste and white goods must be stored “to prevent insect and rodent harborage, environmental and safety hazards and protect public health.”<sup>266</sup>

#### IV. McGirt

*McGirt* was a 5-4 Supreme Court decision that found a large section of eastern Oklahoma—the Muscogee (Creek) Nation—is still Indian Country because Congress failed to disestablish the reservation statutorily. It also limited the application of contemporaneous events and demographics to show disestablishment.<sup>267</sup> The re-recognition of Indian Country means the Muscogee (Creek) Nation could exert civil regulatory jurisdiction (including solid waste regulation) over non-Indians in eastern Oklahoma. It also raises the possibility that other tribes’ reservations were not disestablished via explicit Congressional statute.

##### A. Background

The Petitioner was convicted of “three serious sexual offenses” in an Oklahoma state court.<sup>268</sup> He argued that the state lacked jurisdiction because he was a tribal member of the Seminole Nation and because his

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261. *Id.* § 505.

262. *Id.* § 702.

263. *Id.* § 802.

264. *Id.* § 902 (citing to 40 C.F.R. 243).

265. Navajo Nation Solid Waste Regulations § 903(A).

266. *Id.* § 903(B).

267. *But cf. Solem v. Bartlett*, 465 U.S. 463 (1984) (suggesting that there could be situations where contemporaneous events and demographics could evidence disestablishment).

268. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

crimes took place in Indian Country, specifically on the Muscogee (Creek) Reservation in northeastern Oklahoma.<sup>269</sup> He argued, therefore, that the federal courts had jurisdiction under the MCA.<sup>270</sup> The MCA gives the federal government exclusive jurisdiction over certain enumerated crimes (including Petitioner's) committed in Indian Country by an American Indian.<sup>271</sup> The parties all agreed that Petitioner's "crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute."<sup>272</sup> The Petitioner argued this was still Indian Country.<sup>273</sup> Oklahoma argued that the land was no longer a reservation and had lost its Indian Country status.<sup>274</sup> The question before the Court was whether lands promised to the Creek Nation remained "an Indian reservation for purposes of federal criminal law."<sup>275</sup>

## *B. Discussion and Holding*

### *1. Disestablishment*

Oklahoma first argued that Congress created no reservation, but the Supreme Court held that Congress had established a Creek Reservation in what is now Oklahoma. It was established "[i]n a series of treaties" that "establish[ed] boundary lines" for the Creek's "permanent home."<sup>276</sup> Congress promised that the land "will forever" be secured and guaranteed to the Creeks.<sup>277</sup> The title to the land was guaranteed to the Creeks "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them."<sup>278</sup>

Oklahoma argued that Congress did not create a reservation because the treaty initially granting the land did not call it a reservation.<sup>279</sup> However, the Court previously found that similar contemporaneous treaty language had created reservations.<sup>280</sup> Further, a later 1866 treaty that reduced Muscogee (Creek) holdings explicitly called the remaining lands a reservation and

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269. *Id.*

270. *Id.*

271. *Id.* (citing 18 U.S.C. § 1153(a)).

272. *Id.* at 2460.

273. *Id.*

274. *Id.*

275. *Id.* at 2459.

276. *Id.* at 2460.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*; see *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968).

stated that this reservation “would ‘be forever set apart as a home for said Creek Nation.’”<sup>281</sup> Therefore, Congress did create a reservation for the Creek Nation because it was intended to be a permanent home and meant as a place where the Creek Nation was “assured a right to self-government” that lied “outside both the legal jurisdiction and geographic boundaries of any State.”<sup>282</sup> To the Court, this meant that “[u]nder any definition” the Muscogee (Creek) lands were established as a reservation.<sup>283</sup>

Oklahoma’s next argument was that if a reservation was created for the Muscogee (Creek) Nation, it no longer existed. The Court admitted that the land “once divided and held by the Tribe . . . is now fractured into pieces.”<sup>284</sup> Additionally, much of the land belongs “to persons unaffiliated with the Nation.”<sup>285</sup> However, to answer whether the Muscogee (Creek) Reservation still exists, the Court may look only to one place: “the acts of Congress.”<sup>286</sup> Under *Solem*, only Congress can disestablish reservations, and its intent to do so must be clear, even if disestablishment requires no “particular form of words.”<sup>287</sup> While Congress may “breach its own promises and treaties” vis-à-vis reservations, that power “belongs to Congress alone” and courts cannot “lightly . . . infer” disestablishment.<sup>288</sup>

The Court required disestablishment to be shown through a Congressional statute, and as such, several of Oklahoma’s arguments about non-statutory disestablishment were rejected. The Creek Allotment Act of 1901 did not disestablish the reservation because allotment lacked a “‘present and total surrender of all tribal interests’ in the affected land”; courts had previously rejected state claims that “allotments automatically ended reservations”; and Indian Country’s definition “expressly contemplates private land ownership within reservation boundaries” when it includes “‘land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.’”<sup>289</sup> Intrusions on the Creek’s self-

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281. *McGirt* at 2460.

282. *Id.* at 2462.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* (citation omitted).

288. *Id.* (citation omitted).

289. *Id.* at 2463-64 (quoting 18 U.S.C. § 1151(a)). The Court further rejected the claim that because allotment was often the first step towards disestablishment, it must have resulted in disestablishment, stating that equating “allotment with disestablishment would confuse the first step of a march with arrival at its destination.” *Id.* at 2465.

governance, including abolishing tribal courts, requiring Presidential approval for tribal ordinances affecting tribal land or tribal property, and the abolishment of the Creek tribal government in 1906 did not disestablish the reservation.<sup>290</sup> The tribe, in fact, maintained “significant sovereign functions over the lands in question,” including taxation, schooling, tribal ordinances not affecting land, and overseeing the allotment process.<sup>291</sup>

Oklahoma’s assertion that *Solem* allowed contemporary events or later events and demographics to evidence disestablishment was rejected by the Court. The Court only recognized one step in *Solem*: Congressional statutes stating there was disestablishment.<sup>292</sup> The only reason courts should consult “contemporaneous usages, customs, and practices” is to “shed light” on the ambiguous language used by Congress when disestablishing a reservation.<sup>293</sup> Those events and facts cannot show disestablishment facially because they have “limited interpretive value” and are the “least compelling form of evidence.”<sup>294</sup>

Oklahoma also argued that the Creek land constituted a dependent Indian community, not a reservation.<sup>295</sup> However, the Court remarked that this semantic argument did not change the law: Indian Country includes dependent Indian communities that would still preclude Oklahoma from exercising criminal jurisdiction in Indian Country.<sup>296</sup> Oklahoma then asked the Court not only to rule that Muscogee (Creek) Nation existed as a dependent Indian community, but that this status made the land easier to disestablish than if it was a reservation.<sup>297</sup> But the Court refused. The Muscogee (Creek) Nation had a reservation, in part because “a host of federal statutes” repeatedly referenced a “Creek Reservation,” while other statutes promised the Creeks a “permanent home” that would be “forever set apart” and where the Creeks would be “secured in the unrestricted rights of self-government.”<sup>298</sup> The Court further rejected Oklahoma’s contention that the Creeks did not have a reservation because they originally owned the land in fee. Owning the land in fee, according to the Court, still satisfied the

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290. *Id.* at 2465-66. The majority believed his latter event tended to show that Congress did not disestablish the reservation via allotment in 1901 and that Presidential review would suggest the tribe still had authority to legislate. *Id.* at 2466.

291. *Id.*

292. *Id.* at 2468.

293. *Id.*

294. *Id.* at 2469 (citation omitted).

295. *Id.* at 2474.

296. *Id.*

297. *Id.*

298. *Id.* at 2474-75.

condition “that a reservation must be land ‘reserved from sale’” because the fee land could still not be given to others without confiscating the land.<sup>299</sup> The Court also rejected the “scattered references” that called the Creek lands something besides a reservation because “the most authoritative evidence of the Creek’s relationship to the land” is “the treaties and statutes that promised the land to the Creeks in the first place.”<sup>300</sup> These laws pointed to a reservation, and the Court rejected “the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands [by granting the Creeks fee title], it really provided less.”<sup>301</sup> Overall, the Court maintained that certain words are not necessary to establish or disestablish a reservation.<sup>302</sup>

## 2. *Oklahoma’s Exemption from the Major Crimes Act*

Failing to prove that the Muscogee (Creek) reservation was already disestablished or non-existent, Oklahoma alternatively argued that it was exempt from the MCA. Oklahoma argued this exemption was based on the interplay between Oklahoma’s unique territorial history and its enabling act. The historical argument began with Oklahoma being composed of two territories: Indian Territory in the east and Oklahoma Territory in the west. In 1897, federal courts were given exclusive criminal jurisdiction over Indian Territory.<sup>303</sup> Additionally, the 1898 Curtis Act abolished tribal courts in Indian Territory.<sup>304</sup> According to Oklahoma, these facts had some sort of bearing on the intention behind the enabling act vis-à-vis criminal jurisdiction. Oklahoma argued that when its enabling act transferred all pending cases from federal territorial courts to state courts, it inherited “the federal territorial courts’ sweeping authority to try Indians for crimes committed on reservations.”<sup>305</sup> However, the Court stated the enabling act “sent state-law cases to state court and federal-law cases to federal court,” the latter including crimes arising under the MCA.<sup>306</sup> Oklahoma further contended that because it continued to try cases falling under the MCA, it inherited criminal jurisdiction in Indian Country; however, the Court asserted that Oklahoma’s “own courts have acknowledged that the State’s

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299. *Id.* at 2475.

300. *Id.* at 2476.

301. *Id.*

302. *Id.* at 2475.

303. *Id.* at 2476.

304. *Id.*

305. *Id.*

306. *Id.*

historic practices deviated in meaningful ways from the MCA's terms."<sup>307</sup> Oklahoma's unilateral assumption of criminal jurisdiction in Indian Country did not establish an MCA exemption for Oklahoma.<sup>308</sup>

The Court further rejected Oklahoma's policy concerns over re-recognizing a large swathe of Indian Country. Specifically, Oklahoma was concerned that the majority's ruling could overturn "an untold number of convictions."<sup>309</sup> However, the Court believed that its ruling would only disrupt a small number of convictions, and under *McBratney*, Oklahoma would still have criminal jurisdiction over non-Indian on non-Indian crime in Indian Country.<sup>310</sup> Additionally, Oklahoma's assertion that the MCA did not apply there could also overturn federal convictions secured under MCA authority.<sup>311</sup> The concern of overturned convictions was largely overlooked: "In any event, the magnitude of a legal wrong is no reason to perpetuate it."<sup>312</sup> The Court held that the MCA applies to Oklahoma, in large part because Congress never specifically expanded Oklahoma's criminal jurisdiction to include Indian Country.<sup>313</sup>

### 3. *McGirt's Applicability to Other Tribes and to Civil Jurisdiction*

Another of Oklahoma's rejected concerns was that the majority ruling would re-expand Indian Country. Specifically, Oklahoma was concerned that other courts could use this ruling and tribal treaties to find "that perhaps as much as half of its land and roughly 1.8 million residents could wind up within Indian country."<sup>314</sup> The Court did not reject that possibility out of hand, but stated that "[e]ach tribe's treaties must be considered on their own terms."<sup>315</sup> This raises the possibility that allotted areas that were not explicitly disestablished could be re-recognized as Indian Country. Future analysis relying on *McGirt* would need to look specifically at the laws to determine if disestablishment occurred.

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307. *Id.* at 2478.

308. *Id.*

309. *Id.* at 2479.

310. *Id.*

311. *Id.*

312. *Id.* at 2480.

313. *Id.* at 2478.

314. *Id.* at 2478-79.

315. *Id.* at 2479; *see also Berry v. Braggs*, 2020 WL 6205849, 4-5 (N.D. Okla.) (finding that *McGirt's* holding did not extend to federal jurisdiction in Cherokee Nation by relying on the Supreme Court's language that, "Each tribe's treaties must be considered on their own terms").

The Supreme Court refused to discuss *McGirt's* applicability to civil adjudicatory and regulatory law. The Supreme Court stated that the question before it was the MCA's definition of Indian Country.<sup>316</sup> However, the Court did not foreclose the possibility of using *McGirt* to expand civil jurisdiction into re-recognized Indian Country, because while "often nothing *requires* other civil statutes or regulations to rely on definitions found in the criminal law . . . many federal civil laws and regulations *do* currently borrow from § 1151 when defining the scope of Indian country."<sup>317</sup> But, in *dicta*, one district court judge has already expressed the belief that *McGirt* should be read narrowly, stating, "By its terms, *McGirt* only applies to defendants who commit certain crimes within the Muskogee (Creek) Nation Reservation."<sup>318</sup> Notwithstanding that opinion, applying criminal decisions to civil jurisdiction has been supported by the Supreme Court: "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction."<sup>319</sup>

#### V. *McGirt's Potential Impact and Policy Recommendations*

*McGirt* could be used to re-recognize Indian Country, but few tribes may have the Muskogee Creek's unique statutory history to support re-recognition. Tribes with re-recognized Indian Country could also expand their civil regulatory programs, including solid waste, into those areas. This possibility may be enough to encourage Congress to amend the RCRA to include a TAS provision. Congress should also revoke the Oklahoma TAS exemption. Finally, tribal governments should establish their own solid waste regulations, including efforts to cooperate with state and local governments to create more nationally comprehensive solid waste regulation.

#### A. *McGirt's Impact on Tribal Solid Waste Regulation*

*McGirt* poses a puzzle for tribal civil regulatory jurisdiction moving forward. First, one must wonder how much land will be re-recognized as

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316. *McGirt* at 2480.

317. *Id.* (emphasis added); see also *Salas v. Off. of Hawai'ian Aff. Bd. of Tr.*, 2020 WL 4590731, 1 (M.D. Ga.) (distinguishing *McGirt*: Plaintiff committed no crime but was denied benefits from a state agency and then attempted "to challenge the legitimacy of Hawai'i's state government by citing *McGirt*).

318. *Barnett v. Fed. Bureau of Prisons*, 2021 WL 325716, 3-5 (W.D. Okla.) (dismissing a habeas petition for procedural reasons).

319. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

Indian Country. *McGirt* clarified *Solem* and clearly stated that questions about disestablishment will be based on the legislation disestablishing a reservation. But Congress clearly disestablished many reservations other than the Muskogee Creek's, meaning there may be a small number of re-recognized reservations.

Second, tribal responses to *McGirt* will largely depend on how courts read it moving forward. Courts could take a literal view of *McGirt's* posed question: defining Indian Country under the MCA. Additionally, courts that are unfamiliar with the nuances of Indian law and tribal jurisdiction could assume that because *McGirt* is a criminal jurisdiction case and Indian Country is defined under the federal criminal code, *McGirt* is inapplicable to civil jurisdiction. Such a limited reading is not wholly clear from the case. The Supreme Court also has previously stated that while Indian Country is defined under the criminal code, it applies to civil contexts, as well. Finally, the death of Justice Ginsburg, a member of the *McGirt* majority, leads to some unpredictability about applying *McGirt* to the civil field moving forward.

Assuming more land is re-recognized as Indian Country and assuming there is a general acceptance that tribal civil regulatory jurisdiction (including solid waste programs) could be extended there, tribes should craft their programs under *Montana's* requirements. Specifically, *Montana's* second prong of protecting health could be a justification for expanding tribal solid waste programs, but likely only if the tribal program is more stringent than what is already in place. Additionally, the Muskogee (Creek) Nation and other nations possibly impacted by *McGirt* should be weary of potential RCRA liability traps. Specifically, tribes—already liable for failures to adhere to the RCRA standards—may face liability for areas without adequate solid waste programs that were not within tribal control before re-recognition. At the very least, a potential lawsuit along those lines could be costly. One possible response (discussed more fully below) is to create tribal solid waste management programs that establish federal standards as a minimum.

## *B. Policy Recommendations*

### *1. Congressional Recommendations*

First, Congress should amend the RCRA to include a TAS provision for tribal governments. This brings the RCRA into line with other federal environmental statutes that have TAS provisions. Specifically, both the Safe Drinking Water Act and the RCRA's purposes are to protect the

quality of water,<sup>320</sup> and there is little policy rationale for excluding the RCRA from having a TAS provision when the Safe Drinking Water Act includes a TAS provision.

Amending the RCRA better fulfills Congress's trust responsibility towards tribes, especially financially, and increases tribal self-determination. Tribes are put in a difficult position because they must maintain the RCRA-mandated protections to avoid liability but do not receive funding to do so. By stacking the financial deck against tribes, Congress has failed in its guardian role. Additionally, amending the RCRA also increases tribal sovereignty and self-determination. Specifically, it would enable tribes to work directly with the EPA to develop plans that meet a tribe's specific needs. It also better encourages tribes to develop expertise in the fields of solid and hazardous waste management.

Amending the RCRA to treat tribes like states also increases the likelihood of more comprehensive national environmental programs. This is because federal funding could allow more effective implementation of the RCRA requirements by tribes. It enables tribes to establish federal minimum standards and more effectively implement programs that fit the needs of their specific geographic locations and their members' needs. This, in turn, reduces the risk of gaps in environmental protection over substantial segments of the nation, especially if the gaps exist for financial reasons.

Second, Congress should repeal the Oklahoma tribal TAS prohibition. This is because it serves no real purpose. It hampers the EPA's ability "to continue [its] close relationship with tribal nations," specifically for statutes that already have TAS provisions.<sup>321</sup> It also hampers the EPA's core responsibility—upholding the nation's environmental laws—by removing its involvement among a sizable proportion of Oklahoma's population.<sup>322</sup> Further, it reduces tribal self-determination in Oklahoma by requiring tribes to negotiate directly with Oklahoma for primacy. This negotiation requirement runs contrary to how environmental statutes generally work. It is true that primacy often requires applying to the EPA, but this application process generally has specific metrics that the program must reach. Negotiating with the state raises the possibility that primacy is based on something besides the effectiveness of a tribe's environmental plan. This, in turn, increases the risk of regulatory gaps in Oklahoma's Indian Country. This possibility directly contradicts the purpose of federal environmental

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320. *See* Nolan, *supra*, 332-32.

321. *Id.* at 338.

322. *Id.*

laws and implicates the very reason the federal government became actively involved in environmental regulation: failures to regulate state environments. But in this case, the state could place external barriers on effective environmental regulation to the detriment of Oklahomans: American Indian and non-Indian alike.

Additionally, Oklahoma tribes would greatly benefit from TAS provisions. This is because Oklahoma has such a large American Indian population,<sup>323</sup> because Indian Country is such a substantial portion of the state,<sup>324</sup> and because of the strength of many of Oklahoma's tribes.

Finally, the Midnight Rider circumvented how Congress interacts with Oklahoma tribes.<sup>325</sup> By requiring Oklahoma tribes to negotiate for primacy with the state,<sup>326</sup> the Midnight Rider acts like a substitute for partial P.L. 280 jurisdiction, which was accomplished without tribal consent. This legislative gamesmanship is contrary to Congress's guardian role. The Midnight Rider is an attack on tribal self-determination and sovereignty. It does nothing to protect tribal environments in Oklahoma.

## 2. Tribal Recommendations

Tribes should actively seek to implement solid waste regulations and programs. First, tribes should carefully delineate their regulatory authority. While tribal sovereignty exists and many Supreme Court decisions have recognized it, tribes often face tension when dealing with state governments. By properly defining and claiming regulatory authority within legally recognized boundaries, tribal governments are more likely to ease tensions with state governments. Specifically, tribes should only claim authority over persons within *Montana's* test, likely relying on the second prong to protect the health of tribal members. This could ease tensions with state governments and, in the process, increase the effectiveness of tribal programs.

Tribal solid waste programs should also establish federal minimums as a floor. This should include implementing both a solid waste and hazardous waste program as required by the RCRA. Setting federal standards as the

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323. According to the CDC, Oklahoma had the largest population of American Indians in 2013. CDC, *Tribal Population* (last accessed Feb. 14, 2021), <https://www.cdc.gov/tribal/tribes-organizations-health/tribes/state-population.html>.

324. A map produced by the Oklahoma Department of Transportation in 2010 shows that most of Oklahoma is covered by various tribal nation land. (last accessed Feb. 13, 2021) [https://www.ok.gov/health2/documents/map\\_tribal\\_jurisdictions.pdf](https://www.ok.gov/health2/documents/map_tribal_jurisdictions.pdf).

325. Nolan, *supra*, at 337.

326. *Id.* at 329.

minimum would increase the likelihood of a comprehensive, national solid waste regulatory system. It could also ease transitions to EPA involvement if Congress amends the RCRA to include a tribal TAS provision. Perhaps in states with higher minimums, tribal governments could set those state standards as the floor. Tribes implementing state standards should perhaps copy the state minimums into their codes versus relying on cross-referencing to a state provision, especially because state standards can change more quickly than federal standards. Mostly, tribal governments should look closely at their abilities and tailor programs to the government's capability. Additionally, tribes with the ability, expertise, and history to establish administrative agencies may benefit from the dynamism and expertise such entities provide.

Further, tribal governments could focus on educational programs within their larger solid waste program, like the Muscogee (Creek) Nation does. This could be an opportunity to teach about the effects of climate change and perhaps be an opportunity to discuss landmarks and important sites within tribal land. Also, tribal governments might utilize public involvement in regulatory processes like the Navajo Nation does. This could lead to better-tailored programs and result in more compliance, especially if the populace feels they helped to create the program. Lastly, allowing citizen suits could increase the enforceability of environmental regulations.

## *VI. Conclusion*

Tribal governments are a key component of the United States' federal system, especially within environmental federalism. While many tribes have created their own solid waste management programs without the benefits of the RCRA primacy and funding, a TAS provision could improve these programs. TAS provisions would also better serve tribal governments by easing potential liability under RCRA's minimum requirements, specifically by enabling funding to reach federal minimums. Tribes without solid waste programs should establish their own programs based on the needs, expertise, and ability of the tribe. But these programs should also maintain federal minimums. Lastly, whether *McGirt* will drastically reshape Indian Country throughout the United States will largely depend on whether disestablishment of specific reservations was accomplished statutorily and whether courts are willing to continue extending Indian criminal definitions to civil jurisdiction.