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# ONE J

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## THE STATE OF THE OIL AND NATURAL GAS INDUSTRY IN OKLAHOMA: THE OIL AND GAS INDUSTRY MOVING FORWARD POST *MCGIRT/MURPHY*

KALLEN BURTON SNODGRASS\*

### *I. Introduction*

Historically, the oil and natural gas industry has solidified a predominate presence in the state of Oklahoma, along with the nation. In the years between 1900 and 1935 Oklahoma ranked first among the Mid-Continent states in oil production; and for nine additional years ranked second.<sup>1</sup> In the course of that period Oklahoma produced 906,012,375 barrels of oil worth around \$5.28 billion dollars.<sup>2</sup> During the outset of the 21<sup>st</sup> Century, Oklahoma was the fourth-largest crude oil producer among the states in 2019, accounting for nearly five percent of the nation's crude oil production.<sup>3</sup> Correspondingly, Oklahoma had five operable petroleum refineries with a combined daily processing capacity of almost 523,000 barrels per day; nearly three percent of the total United States capacity.<sup>4</sup> Oklahoma does not lack either when it comes to natural gas, exemplifying

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1. Kerry A. Franks, *Petroleum Industry*, The Encyclopedia of Oklahoma History and Culture, <https://www.okhistory.org/publications/enc/entry.php?entry=PE023>.

2. *Id.*

3. U.S. EIA, Crude Oil Production, Monthly-Thousand Barrels, Jan-Dec 2019., <https://www.eia.gov/beta/states/states/ok/analysis>.

4. U.S. EIA, Number and Capacity of Petroleum Refineries, Total Number of Operable Refineries, Annual (as of January 1), 2019, <https://www.eia.gov/beta/states/states/ok/analysis>.

the fourth-largest gross withdrawals of natural gas among the states in 2019; accounting for about 9% of the nation's marketed production.<sup>5</sup> The production figures connected to Oklahoma are not attributed just to state land, but a majority is due to energy production on tribal lands. Oklahoma has the nation's second-largest Native American population, with tribal areas spreading across three-fourths of the state.<sup>6</sup> In addition to fossil energy resources, Oklahoma's tribal areas share in many of the state's renewable resources. Federal legislation enacted at the end of the 19<sup>th</sup> century stripped reservation status from most of the tribal lands – now Oklahoma tribes govern and provide services within tribal jurisdictional areas.<sup>7</sup>

The Oklahoma Corporation Commission (“Commission”) is the prevailing regulatory body governing the oil and gas industry within the state of Oklahoma. The Commission was established in 1907 by the Oklahoma Constitution, and the First Legislature gave the Commission authority to regulate public service corporations – those businesses offering services which are considered essential to the public welfare.<sup>8</sup> Prior to the adoption of the Commission, the United States Supreme Court established a legal principle for regulation concerning certain entities. When a private company's business affects the community at large, it becomes a public entity subject to state regulation.<sup>9</sup> The Commission commenced regulation of oil and gas in 1914 when its restricted oil and gas production in the several fields across Oklahoma, to prevent waste in instances where production exceeded pipeline transport capacity. In 1915, the Legislature passed the Oil and Gas Conservation Act, expanding oil and gas regulation to include protection for all rights of all parties entitled to share in the benefits of oil and gas production.<sup>10</sup> Whether producers of oil and gas, or beneficiaries of such production, can be seen to be affected by which regulatory body governs such activities.

This comment rests on recent decisions handed down in the United States Supreme Court, commonly known as *McGirt* and *Murphy*. Although

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5. U.S. EIA, Coalbed Methane, Proved Reserves as of December 31, 2017, <https://www.eia.gov/beta/states/states/ok/analysis>.

6. U.S. Census Bureau, The American Indian and Alaska Native Population: 2010, p.7 (January 2010), <https://www.eia.gov/beta/states/states/ok/analysis>.

7. Oklahoma Department of Transportation, Planning and Research Division, Tribal Jurisdictions in Oklahoma (2010), <https://www.eia.gov/beta/states/states/ok/analysis>.

8. Okla. Const. art. 9.

9. *Munn v. Illinois*, 94 U.S. 113, 135 (1876).

10. 52 Okla. St. Ann. § 81 (repealed by laws 1997, c. 275, § 15, eff. July 1, 1997).

not connected specifically with the oil and gas industry, the above stated decisions could alter the industry staggeringly moving forward. *McGirt* centers on a defendant who was an enrolled member of an American Indian Tribe, who was convicted of sexual offenses in an Oklahoma state court. The defendant applied for postconviction relief, arguing that only federal courts had jurisdiction under the Major Crimes Act – stating offenses committed by an Indian within the jurisdictional boundaries of an Indian reservation are subject to those exclusive jurisdictions, not the state.<sup>11</sup> “Indian country” is defined as “all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and all Indian allotments, the Indian titles to which have not been extinguished.”<sup>12</sup> The Court held that since the defendant was an enrolled member of the Seminole Nation, along with the crimes taken place within the boundaries of an established Indian (Creek) reservation, the state of Oklahoma lacked jurisdiction to prosecute the defendant.<sup>13</sup> Subsequently in *Murphy*, the defendant was convicted of first-degree murder and challenged the jurisdiction of the Oklahoma state court in which he was convicted. The defendant contended that he should have been tried in a federal court because he was an enrolled member of an Indian tribe along with the offense occurring in Indian country.<sup>14</sup> The case was decided in a per curiam decision following the *McGirt* holding that, for purposes of the Major Crimes Act, the reservations were never “disestablished” and remained Native American country. Thus, Congress “established a reservation for Creek Nation, as relevant to determining whether area of land was Indian Country under federal Major Crimes Act.”<sup>15</sup>

In coming to their conclusions in *McGirt/Murphy*, the Supreme Court analyzed a series of 19<sup>th</sup>-century treaties and adjudged that “the eastern half of Oklahoma never ceased to be land reserved as “Indian County” – land that was granted by the United States to the Creek Nation in fee simple”<sup>16</sup> How will the previously declared decisions affect the oil and gas industry? While the federal, state, and tribal authorities will ultimately negotiate how

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11. 18 U.S.C. § 1153(a).

12. 18 U.S.C. § 1151.

13. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2456 (2020).

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

15. James L. Buchwalter, J.D., *Treaties Between United States and Indian Tribes – Supreme Court Jurisprudence*, 51 A.L.R. Fed. 3d Art. 4 (2020).

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

the oil and gas industry is to be regulated moving forward, the issues raise added uncertainty, dueling requirements, and the prospect of increased litigation.<sup>17</sup> The Commission has broad regulatory authoritative powers: (1) exercising exclusive jurisdiction over oil and gas wells, (2) regulating the waste and pollution generated by energy development and (3) has sole jurisdiction to resolve complaints by private citizens alleging that an oil or gas project violates environmental law.<sup>18</sup> What powers will we see moving forward from the federal government and Indian tribal reservations pertaining to oil and gas development on Indian Country post-*McGirt/Murphy*? Will the rest of the Indian nations follow suit from the Muskogee (Creek) Nation? Who will govern the environmental regulations governing oil and gas production? Will the process of leasing Indian tribal lands be altered? Who will be the adequate entity to collect tax from oil and gas activities? All these questions are concerns that will be covered throughout this comment.

## *II. Description of the General Area to Be Discussed*

The following subchapters will address a series of issues that are presently uncertain succeeding the *McGirt/Murphy* decisions, affecting the oil and gas industry in Oklahoma. The issues to be discussed all have applicability to the oil and gas industry and will be discussed at length with an analysis of past precedent along with supportive arguments from common practitioners in the industry discussing the future state of the industry. The first issue to be addressed is the impact of the *McGirt/Murphy* decisions and how they will affect the rest of the “5 Civilized Tribes” in Oklahoma, along with all the other tribes in Oklahoma. Secondly, will Oklahoma see increased or decreased federal and/or tribal regulations on tribal lands governing the development of oil and gas? Thirdly, will the process affecting the validity of leasing oil and gas rights in Indian county moving forward after the decisions be altered? Lastly, how the decisions will affect oil and gas taxation in Oklahoma.

### *A. The “5 Civilized Tribes” and Other Indian Nations in Oklahoma*

Albeit the “disestablishment” conclusion was ruled on specifically to the Muskogee (Creek) Nation in *McGirt/Murphy*, the decision could

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17. Brief for Petitioner at 4, *Carpenter v. Murphy*, 139 S. Ct. 626 (2018), (No. 17-1107), 2018 WL 36229636.

18. *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1200 (W.D. Okla. 2017).

undoubtedly impact all the Indian tribes in Oklahoma, including the “5 Civilized Tribes.” While Oklahoma seeks to maintain its sovereignty over half of the state, “these nations desire a declaration that their homeland reservation boundaries within Oklahoma still exist intact.”<sup>19</sup> The “5 Civilized Tribes” consists of the following Indian tribes: (1) Muskogee (Creek), (2) Cherokee, (3) Choctaw, (4) Chickasaw, and (5) Seminole Nations. The tribes gained their distinction as the “5 Civilized Tribes” through the Indian Removal Act of 1830 among many other statutes, treaties, and regulations. The Indian Removal Act of 1830 authorized President Andrew Jackson to accelerate the westward movement of Europeans to unsettled lands west of the Mississippi river. Although the movement was “voluntary” by the tribes, assurances were made by the federal government such as “to assure the tribe...that the United States will forever secure and guaranty to them...the country so exchanged with them.”<sup>20</sup> Each tribe organized as a “Nation,” with a written constitution and laws, a republican government modeled on that of the United States, consisting of an executive department, a bicameral legislature, and a judiciary with elected judges and trial by jury.<sup>21</sup> The Oklahoma Organic Act of 1890 divided Indian and Oklahoma territories and permitted “all Indians to participate in the territorial government as citizens of the United States, while still retaining their right to tribal government.”<sup>22</sup> Past history shows us that the tribal nations were guaranteed their right to land, and operated as their own nations. Although, most Oklahoma citizens have had a settled belief for more than a century that Indian reservations ended at statehood.<sup>23</sup>

As stated earlier, the decisions rendered in *McGirt/Murphy* correlated only to the Muskogee (Creek) Nation. The other “5 Civilized Tribes” including other Oklahoma tribal nations will likely want the decisions to further apply to them. Oklahoma’s main argument in the *McGirt/Murphy* cases was that Congress ended the Muskogee (Creek) Reservation during the “allotment era.”<sup>24</sup> Described as “a period when Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their

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19. Mike McBride III, *Leveraging Tribal Court Judgements in Your Practice*, *The Federal Lawyer* 67(2), at 69 (2020).

20. Indian Removal Act of 1830 § 3, 4 Stat. 412.

21. Michael Ray, *Five Civilized Tribes*, Britannica (2020), <https://www.britannica.com/topic/Five-Civilized-Tribes>.

22. Felix Cohen, *Handbook of Federal Indian Law*, 427-34 (Univ. of N.M. Press 1971) (1942).

23. Mike McBride III, *The Federal Lawyer* 67(2), at 69.

24. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020).

lands into smaller lots owned by individual tribe members.”<sup>25</sup> The Court indicated that there was no statute in the allotment-era agreement with the Muskogee (Creek) evincing anything indicating the “present and total surrender of all tribal interests” in the affected lands.<sup>26</sup> Previously noted, “Indian Country” is characterized as “all lands within the limits of any Indian reservation under the jurisdiction of the United States Government.”<sup>27</sup> There have been early decisions rendered affecting tribes in Oklahoma, that have ruled that their tribal reservations were de facto “disestablished.” In *Murphy*, the court ruled that the Osage Nation reservation had been “disestablished” and that “Oklahoma’s longstanding reliance counsels against now establishing Osage country as a reservation.”<sup>28</sup> Correspondingly, in *Sirmons*, the court ruled similarly pertaining to the Muskogee (Creek) Nation stating “There is no question, based on the history of Creek Nation, that Indian reservations do not exist in Oklahoma...”<sup>29</sup> Both of the courts’ decisions concluded without pointing to any statutory text or specific legislative history.<sup>30</sup>

Courts have gradually started to realize that certain Indian reservations have, in fact, never been “disestablished.” In *Little Chief*, the Oklahoma Court of Criminal Appeals acknowledged that a federal district court ruled that the state lacked jurisdiction to prosecute a murder occurring on Indian land.<sup>31</sup> Supreme Court precedent also provides that Indian tribes lack civil jurisdiction over non-Indians except in limited circumstances involving consensual relationships.<sup>32</sup> Being a significant constraint on tribal powers over non-Indians, the existence of a reservation increases the possibility of tribal jurisdiction over non-Indians. Hence, one can conceptualize that the rest of the Indian tribes in the state of Oklahoma will argue that their tribal reservations were never “disestablished.” Leading to uncertainty about who could exhibit civil regulatory and civil jurisdictional pertaining to oil and gas development in Oklahoma on Indian lands.

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25. See F. Cohen, *Handbook of Federal Indian Law* § 1.04 (2012) (Cohen), discussing General Allotment Act of 1887, ch. 119, 24 Stat. 388.

26. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016).

27. 18 U.S.C. § 1151.

28. *Osage Nation v. Irby*, 597 F. 3d 1117, 1120 (10th Cir. 2010), *cert denied*, 131 S. Ct. 3056 (2011).

29. *Murphy v. Simmons*, 497 F. Supp. 2d 1257, 1291-1292 (E.D. Okla. 2007).

30. Mike McBride III, *Leveraging Tribal Court Judgements in Your Practice*, *The Federal Lawyer* 67(2) at 70, (2020).

31. *Oklahoma v. Little Chief*, 573 P. 2d 263, 265 (Okla. Ct. Crim. App. 1978).

32. *Montana v. United States*, 450 U.S. 544, 566 (1981).

*B. Federal, State, and Tribal Regulation of Oil & Gas Activities on Tribal Land*

Oklahoma may further face additional and/or expansive regulations governing the oil and gas industry by either the federal and/or tribal governmental authority. The dueling regulation may pose difficulties such as the entrance of overlapping or conflicting regulations.<sup>33</sup> Formerly noted, the Oklahoma Corporation Commission (“Commission”) regulates oil and gas drilling within the state of Oklahoma and enforces environmental laws with oil and gas conservation rules.<sup>34</sup> One implication is because this area must now be treated as “reservation,” the Commission specifically lacks regulatory jurisdiction over various “allotments of individual citizens, which include “Indian County within the express terms of 25 U.S.C. § 1151(c).”<sup>35</sup>

The traditional role of the Commission as the primary oil and gas regulator could be undermined by tribal authority. For instance, “Tribes in this area could assert their authority over the reservation lands by imposing their own wildlife protection clauses, land-use restrictions, and prohibitions against water contamination.”<sup>36</sup> Additionally, “tribes could also implement their own oil and gas permitting process, drilling plan requirements, and zoning restrictions – impacting everything from high-level planning to day-to-day operations.”<sup>37</sup> A prime example of this difficulty was seen in the wake of the construction of the Keystone Pipeline. Even if portrayed as a successful operation, there were still overall challenges, “Tribal and non-tribal opposition to the new pipeline infrastructure, motivated by concerns about greenhouse gas emissions, land use, and tribal rights, has already created longer timelines for fossil fuel pipeline project approvals.”<sup>38</sup> We might see that tribal authority may not be able to approve or deny certain oil and gas activities, but they can make it more difficult for such activities to be obtainable.

What regulatory body has the authority to impose environmental regulations depends on whether the land is a reservation in terms of “Indian

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33. Mike McBride III, *The Federal Lawyer* 67(2), at 71.

34. 52 O.S. § 139(B)(1).

35. Adam Dinnell, Andrew Hicks, *Oklahoma Oil and Gas Business Braces for Change*, JDSupra, (2020), [https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#\\_edn6](https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#_edn6).

36. *See id.*

37. *See id.*

38. Lauren P. Phillips, *Killing the Black Snake*, 30 GEOELR 731, 746 (2018) (discussing the difficulties of pipeline construction on tribal lands).



country.” In *Yankton Sioux Tribe*, the Court dealt with the issue on deciding whether a landfill constructed on non-Indian fee land that falls within the boundaries of the original Yankton Reservation remains subject to federal environmental regulations.<sup>39</sup> The Court held that since the landfill’s location was no longer considered “Indian Country” as described by 18 U.S.C. § 1151(a), the state rather than the federal government would have primary regulatory jurisdiction.<sup>40</sup> The issue posed for Oklahoma is the opposite of the Yankton Reservation. The lands pursuant to the decisions rendered in the *McGirt/Murphy* decisions overruled the idea that the tribal lands are not considered “Indian Country,” but rather that they are established “Indian Country.”

Oklahoma may now face additional federal and/or tribal regulations when it comes to oil and gas development. For example, Oklahoma has used the Commission as its primary authority to implement “a state-wide regulatory regime for underground injection necessary for hydraulic fracking.”<sup>41</sup> Indian tribes have the authority to regulate themselves, without the corroboration of the state, “An Indian tribe may assume primary enforcement responsibility for underground injection control – until an Indian Tribe assumes enforcement responsibility, the currently applicable underground injection control program shall continue to apply.”<sup>42</sup> Equivalently, tribes can also regulate the air over which it has jurisdictional bounds. In *Arizona Public Service Corporation*, the court found that Congress expressly delegated authority to tribes to regulate air quality on privately owned fee land located within a reservation.<sup>43</sup> However, if the EPA “determines that the treatment of Indian tribes as identical to states is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.”<sup>44</sup> Since we know that tribes have authority over the water and air on tribal lands, further regulation by the Indian tribes over oil and gas activities might be seen on “established” tribal reservations. Consequently, if established that the tribes have not demonstrated adequate standards to meet the requirements of federal environmental laws, the federal government

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39. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998).

40. *See id.* at 330.

41. 42 U.S.C. § 300(h)(1).

42. Safe Water Drinking Act, Pub. L. No. 99-339, § 302, 100 Stat. 666.

43. *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F. 3d 1280, 1284 (D.C. Cir. 2000) (citing Tribal Authority Rule, 59 Fed. Reg. 43, 956 (1994)).

44. 42 U.S.C. § 7601(d)(4).

may intervene to make sure that the laws adequately respond to their requirements set forth.

### *C. Tribal Land Division and Leasing*

Although the Supreme Court has referred to Indian tribes as “domestic dependent nations,” their sovereignty is limited by the federal government and the Indian Civil Rights Act. Obtaining leases either by tribal members or on tribal reservations possess more difficulty than on non-Indian land. Two defining Acts could pose challenges to oil and gas producers who seek to conduct activity on tribal reservations regarding the leasing process: (1) Indian Mineral Leasing Act of 1938 and (2) Indian Mineral Development Act of 1982. Due to the character of both Acts, “oil and gas producers operating in eastern Oklahoma should prepare to face tribal arguments that their leasehold rights are invalid because they were never approved under IMLA or IMDA.”<sup>45</sup> The Indian Mineral Leasing Act of 1938 (“IMLA”) provides “unallotted lands within any Indian reservation...may, with the Secretary of the Interior...be leased for mining purposes, by authority of the tribal council or other authorized spokesmen of such Indians.”<sup>46</sup> The Act is provided in part to give the Indian tribes profitable sources of revenue, self-determination, and a greater say in the use of the resources on their lands. The Indian Mineral Development Act of 1982 (“IMDA”) was “a bill to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes.”<sup>47</sup> This Act was promulgated also to develop self-determination and maximize the financial return tribes could gain from their mineral resources. If the said tribal reservations are considered “established,” then there are going to be more barriers to overcome when leasing tribal land.

The division of Indian lands also possess added stringent difficulties. The land deeded to the “5 Civilized Tribes” was considered “restricted Indian land.” The Stigler Act was passed on August 4<sup>th</sup>, 1947, which governed the restrictions upon alienation of surface and mineral interests in lands inherited by lineal decedents by blood of allottees of the “5 Civilized Tribes.”<sup>48</sup> The 2018 Amendments to the Act removed “all restrictions upon all lands in Oklahoma belonging to members of the 5 Civilized Tribes,

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45. Adam Dinnell, Andrew Hicks, *Oklahoma Oil and Gas Business Braces for Change*, JDSupra, (2020) [https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#\\_edn6](https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#_edn6).

46. 25 U.S.C. § 396(a).

47. 25 U.S.C. § 2101-2108.

48. 25 U.S.C. § 355.

whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, or whatever degree of Indian blood, and whether enrolled or unenrolled...upon his or her death...”<sup>49</sup> The Act also gave exclusive jurisdiction over guardianship, probate, and heirship matters to the state courts in Oklahoma. After the decisions rendered in *McGirt/Murphy*, will the Oklahoma state courts still have the exclusive jurisdiction over the guardianship, probate, and heirship matters? This is an issue presented that could alter the process of land division/leasing oil and gas minerals going forward in Oklahoma.

There is also a cognizable difference between Indian land held in “restriction” as stated above and Indian land “held-in-trust.” The 1887 Dawes Act or the “General Allotment Act” allotted Indians land on their reservations in amounts not to exceed 160 acres. Further, “25 years after the allotment the allottees were to receive the lands discharged of the trust under which the United States held...and obtain a patent in fee.”<sup>50</sup> Certain restrictions were required on sales and leases of the Indian lands, in which the federal government was vested with jurisdiction to resolve disputes among the lands.<sup>51</sup> The federal government further served as oversight to ensure that all conveyances before the 25-year period were properly completed – the court indicated the following criteria to be met for a valid conveyance: “Conveyances ade on the terms prescribed by the Secretary of the Interior, made under the supervision of the Commissioner of Indian Affairs, and approved by the Secretary of the Interior.”<sup>52</sup>

The discrepancy that resulted from the *McGirt/Murphy* decisions could affect the leasing and division process of tribal members and Indian lands. Considering that the state district courts only have jurisdiction regarding disputes with restricted Indian land,<sup>53</sup> will we see a change in jurisdiction away from the state courts? Although, there likely will not be a change in jurisdiction over lands “held-in-trust” since the federal government already acts as a “guardian” and divests no jurisdiction to the state courts regarding disputes on the said lands.

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49. Stigler Act Amendments of 2018, H.R. 2606, PL 115-399, 132 Stat. 5331 (Dec. 31, 2018).

50. 25 U.S.C. § 311.

51. *See id.*

52. *Estoril Producing Corp. v. Murdock*, 1991 OK CIV APP 122, 822 P. 2d 129, 131 (Okla. Civ. App. 1991).

53. 25 U.S.C. § 355.

*D. Taxation of Oil & Gas Activities on Tribal Lands*

The final issue to be discussed deals with taxation, which could also affect the oil and gas industry in Oklahoma. Who gets to collect tax on oil and gas activities on tribal land, the state, the tribe, or both? Tribes may assess a tax on tribal lands through certain activities: “A Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>54</sup> Further, “a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation where that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>55</sup> There are several court decisions that are predicated on the idea that it is within “tribal sovereignty” for the tribe to be able to tax activities conducted on their lands. The implications of *McGirt/Murphy* fall on the premise that is the tribal lands are constituted “established,” what rights will Oklahoma have to tax oil and gas activities? Tribes can tax activities on their tribal reservations, but what about oil and gas activities by non-Indians?

In *Kerr-McGee Corporation*, the Court “upheld the authority of the Navajo to “tax business activities conducted on its land,” even when those activities were conducted by non-Indian mineral producers.”<sup>56</sup> The Court indicated, “The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.”<sup>57</sup> In addition, in *Merrion*, the Court upheld the tax imposed by the Jicarilla Apache Tribe to impose a severance tax on any oil and gas severed from the Tribal lands.<sup>58</sup> The Court reasoned that, “Even if the Tribe’s power to tax were derived solely from its power to exclude non-Indians from the reservation, the Tribe has the authority to impose the severance tax.”<sup>59</sup> Subsequently, the Court found “It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe

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54. *Montana v. U.S.*, 450 U.S. 544, 566 (1981).

55. *See id.*

56. Adam Dinnell, Andrew Hicks, *Oklahoma Oil and Gas Business Braces for Change*, JDSupra, (July 16, 2020) [https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#\\_edn6](https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#_edn6).

57. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985).

58. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 175 (1982).

59. *See id.* at 898.

has abandoned its sovereign powers simply because it has not expressly reserved them through contract.”<sup>60</sup> Therefore, there is already settled caselaw that the tribes have the power to tax oil and gas activities on their lands. The next question is, “What rights does Oklahoma have to tax oil and gas activities that occur on tribal reservations?”

Oklahoma assesses taxes on oil and gas activity through the Oklahoma Tax Commission who holds the responsibility of the collection and administration of taxes, licenses, and fees. The tax on gross production based on monthly average crude oil and gas prices were: (1) seven percent for gross value of oil and gas production and (2) two percent levy on oil and gas wells drilled after July 2015 for 36 months then increased to 7 percent.<sup>61</sup> It is foundationally laid out that the Oklahoma Tax Commission has the authority to tax oil and gas activities through the state, but it is unclear whether the Commission has the power to tax Indian tribes on tribal reservations. Broadly speaking, under the Indian Reorganization Act of 1934, if the land is held as Indian trust land, then it is not liable for state real property taxes.<sup>62</sup> That is only pertaining to state property taxes, but there is prior case law that suggest different approaches to the state’s ability to tax activities.

Historically, in determining whether a state may impose a tax on sovereign Indian county, has been very murky and not clear. Typically, states cannot tax tribes or tribal members engaging in business on tribal reservations.<sup>63</sup> States can tax on tribal reservations either through congressional approval or judicial decisions. The Court developed a balancing test in *Bracker*, which assessed the overall question of whether the state can tax a non-Indian conducting business on tribal reservations. The Court’s test “weighs the state, federal, and tribal interests at stake by considering three factors.”<sup>64</sup> First, “courts consider the extent of the federal and tribal regulations governing the taxed activities.”<sup>65</sup> Second, “courts consider whether the economic burden of the tax falls on the non-Indian

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60. *See id.*

61. Anne Kolesnikoff, Cassarah Brown, *State Oil and Gas Severance Taxes*, NCSL, (2018), <https://www.ncsl.org/research/energy/oil-and-gas-severance-taxes.aspx>.

62. 25 U.S.C. § 25.

63. Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 *Pittsburg Tax. Rev.* 93, 108 (2005).

64. Erin Marie Erhardt, *State Versus Tribes: The Problem of Multiple Taxation of Non-Indian Oil and Gas Leases on Indian Reservations*, 38 *Am. Indian L. Rev.* (2014).

65. *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136, 148 (1980).

individual or entity or on the tribe or tribal members.”<sup>66</sup> Third, “courts consider the extent of the state interests in the taxation.”<sup>67</sup> Lastly, “courts must consider on whom the legal incidence of the tax falls and where the taxable event occurs.”<sup>68</sup> The Court relied heavily on the precedent set by *Cotton* to determine whether the state taxation was valid.<sup>69</sup> The Court considered the relevant Congressional legislation, specifically the Indian Mineral Leasing Act and the Indian Mineral Development Act as discussed earlier. Both statutes are silent on the issue of state taxation. The courts then look to the specific history of the specific tribe’s sovereign immunity. Finally, the courts consider the extent of the state interest in the proposed taxes. Where does Oklahoma then fall on the spectrum of taxation on oil and gas activities if the reservations throughout the state are considered still “established?”

### *III. Analysis of Each Particular Issue & How They Have Been Treated*

#### *A. Why the Rest of the Oklahoma Tribes Will Follow the Muskogee (Creek) Nation?*

There is an opportunity to see the rest of the “5 Civilized Tribes” along with other Oklahoma tribes follow in the footsteps of the Muskogee (Creek) Nation. In *McGirt/Murphy*, the Court ruled that the Muskogee (Creek) reservation was never “disestablished.”<sup>70</sup> Finding “The federal government promised the Creek a reservation in perpetuity...But Congress had never withdrawn the promised reservation.”<sup>71</sup> The decision did not apply to other Oklahoma tribes, including the rest of the “5 Civilized Tribes.” The decisions handed down in the *McGirt/Murphy* cases could lead an introductory understanding that the reservations are still established for various Oklahoma tribes. Courts tend to look at the history of the tribe to determine their reservation status, and it is clear “the history of the U.S. policy toward all of the Five Civilized Tribes (Cherokee, Chickasaw, Choctaw, Creek, and Seminole) is similar.”<sup>72</sup> There are agreements being

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66. *See id.* at 151.

67. *See id.* at 150.

68. *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 105-106 (2005).

69. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989).

70. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

71. *See id.*

72. Kyle Persaud, *McGirt v. Oklahoma and What It Means for Bartlesville*, Persaud Law Office, (2020), <https://www.persaudlawoffice.com/post/mcgirt-v-oklahoma-and-what->

made to react to the decisions between various tribes and the state of Oklahoma such as the “*McGirt/Murphy* Agreement-in-Principle.” Lastly, there is various case law in Oklahoma that tends to illustrate how courts are treating different tribal reservation status arguments after the *McGirt/Murphy* decisions.

### 1. *History of United States Policy Toward Oklahoma Tribes*

The expansion of the “5 Civilized Tribes” was in large part due to the Five Civilized Tribes Act which “began the process of breaking up the land of the peoples of the Indian Territory and was officially entitled “An act to provide for the final disposition of the affairs of the Five Civilized Tribes.”<sup>73</sup> As to the other tribes, the United States held the land in trust for the native tribes, acting as a fiduciary to their interest. Many opinions have held the idea that “the United States had breached its duties regarding their lands in Oklahoma, and in doing so embraced a view of the federal trust responsibility that one prominent commentator has termed ‘parsimonious.’”<sup>74</sup> The idea that the United States government had breached its fiduciary responsibilities was outlined in the *McGirt/Murphy* decisions, arguably being one of the deciding factors that the Muskogee (Creek) Nation remained “established.” Justice Gorsuch stated, “While there can be no question that Congress established a reservation for the Creek Nation, it’s equally clear that Congress has since broken more than a few of its promises to the Tribe.”<sup>75</sup> This is just an example for the Muskogee (Creek) Nation, but since it is opined that each tribe had assurances broken, the court’s may look to this same reasoning to believe that several reservations are still “established.”

### 2. *McGirt/Murphy Agreement-in-Principle*

Following the *McGirt/Murphy* decisions, the Oklahoma Attorney General reached an agreement with the other “5 Civilized Tribes” that addressed how criminal and civil legal matters would be handled in

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it-means-for-bartlesville#:~:text=Because%20the%20history%20of%20U.S.,is%20still%20within%20Indian%20Country.

73. Act of Apr. 26, 1906, § 1, 34 Stat. at 137. See generally Angie Debo, *And Still the Waters Run*, *supra* note 145, at 31-91.

74. Steven Paul McSloy, *Revisiting the “Courts of the Conqueror”*: *American Indian Claims Against the United States*, 44 AMULR 537, 562 (1994).

75. *McGirt*, 140 S. Ct. at 2462.

Oklahoma.<sup>76</sup> The agreement is titled, “*Murphy/McGirt Agreement-in-Principle*.” The agreement has two major components:

(1) recognizes tribal sovereignty, jurisdiction, and the continued importance of the Five Tribes’ respective boundaries set out in treaties and statutes, and (2) affirming continuity of the State of Oklahoma’s jurisdiction within Eastern Oklahoma but outside of Indian trust or restricted lands, subject to limitations concerning tribes and tribal hunting, fishing, or water rights protected by treaty or other Federal Law.”<sup>77</sup>

The goal of the agreement is “to see these principles implemented in appropriate Federal law for purposes of enhancing and clarifying respective State and Tribal jurisdiction, both criminal and civil, without limiting the jurisdiction or immunities of either the State or any Nation.”<sup>78</sup>

With respect to criminal jurisdiction, the agreement recommends the legislation should: (1) affirm the five tribes criminal jurisdiction throughout their respective treaty territories over Indian offenders, as well as those non-Indian offenders over which federally-recognized tribes generally have jurisdiction in Indian country, (2) provide and affirm the state’s criminal jurisdiction over all offenders throughout that same area, including appropriate and legal mechanisms to address matters concerning existing convictions, with the exception of crimes involving Indians committed on Indian trust or restricted lands, and (3) authorize and direct the U.S. Department of Justice to coordinate with the state and nations concerning development of law enforcement resources and respective authorities under the law.<sup>79</sup>

With respect to civil jurisdiction, including the ability to legislate, regulate, tax, and adjudicate on non-criminal matters, the agreement recommends the legislation should: (1) affirm the five tribes’ civil jurisdiction throughout their respective treaty territories, to be exercised subject to federal law that generally governs tribal civil jurisdiction in Indian country, and (2) provide and affirm that state’s civil jurisdiction over all persons throughout the treaty territories, except on Indian trust or restricted lands, but legislation would not grant the state jurisdiction to

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76. Both the July 9th Joint Statement and the July 16th Agreement-in-Principle are available at the Oklahoma Attorney General’s website: [www.oag.ok.gov](http://www.oag.ok.gov).

77. *See id.*

78. *See id.*

79. *See id.*



regulate or tax, directly or indirectly, any tribe, tribal official, or entities owned or operated by one of the five tribes.<sup>80</sup>

The five tribes would accordingly be affirmed in their civil jurisdiction over matters of self-government and their members but would remain subject to the federal law that provides, as a general matter, that tribes do not have civil jurisdiction over non-members outside Indian trust or restricted lands, except for: (1) subject matters for which federal law specifically grants tribes jurisdiction, (2) activities of non-members that are part of a consensual relationship, such as contracts, with the tribe, and (3) conduct of non-members that threatens tribal self-governance or the economic security, health, or welfare of the tribe.<sup>81</sup> This agreement would grant the state jurisdiction in conjunction with the “5 Civilized Tribes” and the federal government. It must be approved by Congress, and until then, the federal government has legal jurisdiction over major crimes committed by American Indians in the five tribal territories. The tribes are not receptive to the agreement, as they see it as proposed legislation that diminishes the tribal nation’s sovereignty. On July 17<sup>th</sup>, 2020, David W. Hill, Principal Chief for the Muskogee (Creek) Nation wrote a letter to his fellow Muskogee (Creek) Nation citizens stating his opposition to the agreement.<sup>82</sup>

### 3. *Oklahoma Court’s Current Rulings Over “Establishment”*

There are many pending cases amongst different tribal reservations arguing that the courts should follow the ruling in *McGirt/Murphy* decisions. Each court is treating each tribal nation differently based on history, which seems to be the overarching analysis. In *Ryder*, the defendant was convicted of two counts of First-Degree Murder in the District Court of Pittsburg County located in the Choctaw Reservation.<sup>83</sup> The defendant offered the following argument post-conviction, “...Oklahoma lacked jurisdiction to convict and sentence him...because the offenses occurred within the reservation...of the Choctaw Nation, boundaries never disestablished by Congress...criminal jurisdiction in Indian country was never conferred on the state of Oklahoma by any congressional action.”<sup>84</sup>

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80. *See id.*

81. *See id.*

82. The Letter from David W. Hill, Principal Chief for the Muskogee (Creek) Nation can be available at the Muskogee Creek Nation website: <https://www.mcn-nsn.gov/wp-content/uploads/2020/07/Letter-proposed-agreement-in-principal-with-State.pdf>.

83. *Ryder v. Sharp*, 2020 WL 5038520, 1 (E.D. Okla. 2020).

84. *See id.* at 2.

The main point of this case was to demonstrate that the United States District Court for the Eastern District of Oklahoma acknowledged the *McGirt/Murphy* decision applicable to the Choctaw Nation.<sup>85</sup>

In *Berry*, the defendant argued that the trial court lacked jurisdiction to prosecute him for major crimes committed by an enrolled member of the Cherokee Nation occurring in Indian country.<sup>86</sup> The court held that the *McGirt/Murphy* decisions did not affect the other “5 Civilized Tribes” in the state of Oklahoma. The court noted, “...*McGirt* said nothing about whether major crimes committed within the boundaries of the Cherokee Nation Reservation must be prosecuted in federal court.”<sup>87</sup> The court referred to the dissent in *McGirt* written by Chief Justice Roberts, who warned that the holding might be used by other tribes to vindicate their similar treaty promises.<sup>88</sup> The *Berry* court furthered their conclusion that the *McGirt* ruling did not grant any new constitutional rights to members of the Cherokee Reservation.<sup>89</sup> The compelling language in each case is that each tribe’s treaties must be considered on their own terms do determine whether or not the court’s will consider the tribal reservations still “established.”

#### *B. Will Oklahoma See More Federal & Tribal Oil & Gas Regulations?*

After the *McGirt/Murphy* decisions, Oklahoma might see an overlap of regulatory authority between the federal, state, and tribal jurisdictions. The rulings could significantly alter the relationships between the “Five Civilized Tribes” and Oklahoma, potentially resulting in dual regulation. Increased regulation may also affect businesses located and/or doing business within Oklahoma, “Energy companies might have additional regulatory and tax issues regarding natural resource development...Businesses might enjoy greater opportunities for tax credits and loans within this area.”<sup>90</sup> The Oklahoma’s Corporation Commission’s (“Commission”) role could be transformed since the Commission lacks regulatory jurisdiction over “Indian Country.”<sup>91</sup> An increase in tribal

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85. See *id.* at 3.

86. *Berry v. Braggs*, 2020 WL 6205849, 3 (N.D. Okla. 2020).

87. See *id.* at 5.

88. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478-2479 (2020).

89. *Berry*, 2020 WL 6205849 at 7.

90. Mike McBride III, *Leveraging Tribal Court Judgements in Your Practice*, *The Federal Lawyer* 67(2) at 70, (2020).

91. Adam Dinnell, Andrew Hicks, *Oklahoma Oil and Gas Business Braces for Change*, *JDSupra*, (2020), [https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#\\_edn6](https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#_edn6).

reservations being acknowledged as “established” could impose several new federal and tribal oil and gas regulations. Though the future is unclear, there are pending cases appealed to the Supreme Court that address this exact issue such as *Calyx Energy III v. Canaan Resources X*.

### 1. *The Future of The Oklahoma Corporation Commission*

Originally, the Oklahoma Corporation Commission (“Commission”) was vested with exclusive jurisdiction, power and authority, with the duty to promulgate and enforce rules governing and regulating oil and gas activities in Oklahoma.<sup>92</sup> Further, “Since its creation in 1907, the Oklahoma Corporation Commission has developed extensive regulatory powers over the state’s energy industry.”<sup>93</sup> The power of the Commission is not absolute, “The [Oklahoma] constitution sets out the extent of jurisdiction, power, and responsibility which can be assumed by the Commission.”<sup>94</sup> The Commission acts as a quasi-administrative branch, “The Commission has been granted legislative, administrative, and quasi-judicial powers.”<sup>95</sup> What powers does the Commission have now on tribal land? If any at all, the further implication post *McGirt/Murphy* is whether these tribal lands will be considered “established” or “disestablished.”

Stated previously, the Commission’s powers and jurisdiction are not absolute. The Commission’s powers do not extend into Indian country, “the Commission specifically lacks regulatory jurisdiction over various “allotments of individual citizens, which include Indian Country” within the express terms of 25 U.S.C. § 1151(c).”<sup>96</sup> Indian country is defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government...”<sup>97</sup> State and local regulation of oil and gas development cannot also be enforced if it conflicts with federal law.<sup>98</sup> The philosophy behind the preemption of state law is that “The doctrine was grounded in Chief Justice Marshall’s early cases, which held Tribes, their

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92. 52 O.S. § 139(b)(1).

93. Joseph R. Dancy, & Victoria A. Dancy, *Regulation of the Oil and Gas Industry by the Oklahoma Corporation Commission*, 21 Tulsa L. J. 613, 613 (2013).

94. *See id.* at 617.

95. *Patterson v. Stanolind Oil & Gas Co.*, 1938 OK 138, 182 Okla. 155, 161, (Okla. 1938).

96. Adam Dinnell, Andrew Hicks, *Oklahoma Oil and Gas Business Braces for Change*, JDSupra, (2020), [https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#\\_edn6](https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#_edn6).

97. 18 U.S.C. § 1151.

98. Thomas H. Shipps, & Lynn H. Slade, *Tribal Energy and Mineral Resource Development*, 2017 NO. 4 RMMLF-INST 7, 39 (2017).

members, and nonmembers within tribal lands, are subject broadly to federal and tribal, not state, law.”<sup>99</sup> A future result being, “The practical impact is that the traditional role of the O.C.C. as primary oil and gas regulator could be supplanted in Eastern Oklahoma...Some tribes could also implement their own oil and gas permitting processes, drilling plan requirements, and zoning restrictions – impacting everything from high-level planning to day-to-day operations.”<sup>100</sup> How much power we will see the Commission have to regulate oil and gas activities on tribal reservations and/or tribal members not on tribal reservations?

A leading case on whether state action is authorized on tribal reservations is *Williams*. There the Court found that “essentially absent governing acts of Congress, the questions have always been whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”<sup>101</sup> The question is whether state action (attempted assertion jurisdiction) would infringe on the right of reservation Indians to make their own laws and be ruled by such laws?<sup>102</sup> There could be a more expansive shield of preemption over state laws governing civil regulatory jurisdiction after the *McGirt/Murphy* decisions regarding the oil and gas industry. The next question is then, will there be additional oil and gas regulations imposed on Oklahoma by either the federal or tribal level?

## 2. Increased Federal & Tribal Regulation

Once an area has been established as a “reservation,” it creates implications on which governing body has the authority to impose regulations. The main federal regulatory body governing environmental law is the EPA, which was designed to “achieve through effective management of energy functions...to encourage to establish and observe policies consistent with a coordinated energy policy, and to promote maximum possible energy conservation measures in connection with the activities within their respective jurisdictions.”<sup>103</sup> Since Oklahoma’s ability to regulate on tribal reservations is less authoritative than on non-tribal lands, who will then impose environmental regulations regarding oil and gas activities?

*Montana* is the foundational framework for tribal civil jurisdiction, where the Court carved out exceptions giving tribes an inherent sovereign

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99. *Worcester v. Georgia*, 31 U.S. 515, 527 (1832).

100. Adam Dinnell, *JDSupra* (2020).

101. *Williams v. Lee*, 358 U.S. 217, 271 (1959).

102. *See id.*

103. 42 U.S.C. § 7112(2).

power to exercise forms of civil jurisdiction over non-Indians on reservations, even on non-Indian fee lands.<sup>104</sup> One exception that applies to governing environmental law in the context of oil and gas is, “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>105</sup> Another theory that tribes retain civil regulatory jurisdiction is included in the Tribes as States (“TAS”) Provision.<sup>106</sup> The provision “authorizes the EPA to treat eligible recognized Indian tribes as a state (TAS) for the purpose of implementing and managing certain environmental programs and functions...”<sup>107</sup>

The federal government provides extensive oversight by noting, “The EPA will directly administer such provisions so as to achieve the appropriate purpose.”<sup>108</sup> Seen in *Arizona Public Service Co.*, where the court found that “Tribes may choose, but are not required, to adopt tribal implementation plans for their reservations...the TAR authorizes the EPA to promulgate federal plans to fill any regulatory gaps.”<sup>109</sup> The federal government makes sure that the Indian nations are abiding by current federal energy regulations through the Office of Indian Energy Policy and Programs as well.<sup>110</sup> Post *McGirt/Murphy*, Oklahoma might not see change relating to how the federal government regulates Indian reservations regarding environmental regulation. The issue primarily deals with whether the tribal reservation will enact additional or new laws.

### 3. *Calyx Energy III v. Canaan Resources X*

A leading case concerning state and tribal authority over oil and gas regulation on tribal lands is discussed in *Calyx Energy III*, “A question of whether Oklahoma can regulate oil and gas activities inside Indian Country is working its way through the Oklahoma Corporation Commission’s

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104. *Montana v. U.S.*, 450 U.S. 544, 566 (1981).

105. *See Id.*

106. 42 U.S.C. § 7601(d).

107. *See* <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas#:~:text=Several%20federal%20environmental%20laws%20authorize,functions%2C%20and%20for%20grant%20funding.&text=Tribes%20must%20apply%20for%20and,each%20specific%20program%20or%20function.>

108. 42 U.S.C. § 7604(d)(4).

109. *Arizona Public Service Co. v. U.S. E.P.A.*, 562 F.3d 1116, 1119 (10th Cir. 2009).

110. 42 U.S.C. § 7144(e)(b).

administrative judicial process.”<sup>111</sup> *Montana* was cited by the Canaan Resources, also *Alaska*, stating “civil jurisdiction in Indian Country follows criminal jurisdiction. The counsel further argued that since part of a reservation was never “disestablished” by Congress, a municipality could not require a tribe to obtain permits – leading to the conclusion the tribes retain inherent tribal sovereignty.”<sup>112</sup>

The attorney’s for Calayx argued “that tribes have legal authority to regulate business activities on properties they own, Indian land held in trust, or otherwise restricted lands.”<sup>113</sup> This was countered by there being many legislative statutes that indicate that reservation status is still alive. The administrative law judge “recommended a finding that a tribe has no authority to regulate non-Indian activity on land that is not owned by the tribe and, that any land owned by the tribe or a restricted Indian is subject to the jurisdiction of the Oklahoma Corporation Commission under a federal law known as the Stigler Act.”<sup>114</sup> The chief concern being “creating a presumption that all commission orders in Eastern Oklahoma could be void...millions of dollars in leases, contracts, salaries which could be at risk...in addition, thousands of mineral owners.”<sup>115</sup> Therefore, there is a lot at stake post *McGirt/Murphy*.

### *C. Will Tribal Land Leasing and Land Division Be Altered?*

Leasing tribal land is far more complex than leasing for oil and gas rights of non-Indian owners, including the land division of tribal land rights. Treaties and acts are an important place to start, as the United States initially adopted the colonial and state policy of negotiating treaties with tribes as sovereign political entities for various purposes.<sup>116</sup> Starting with the Indian Removal Act of 1830, which authorized Andrew Jackson to grant Indian tribes unsettled western prairie lands in exchange for their territories sought out by the United States within states borders, for which

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111. Jack Money, *Oklahoma’s Authority to Regulate Oil and Gas Activity Is in Question After McGirt Decision*, *The Oklahoman*, (Oct. 15, 2020), <https://oklahoman.com/article/5673962/oklahomas-authority-to-regulate-oil-and-gas-activity-is-in-question-after-mcgirt-decision>.

112. *Oneida Nation v. Village of Hobart*, 968 F. 3d. 664, 689 (7th Cir. 2020).

113. Jack Money, *Oklahoma’s Authority to Regulate Oil and Gas Activity Is in Question After McGirt Decision* (2020).

114. *See id.*

115. *See id.*

116. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law*, 51 *SLDR* 1, 9 (2006).

the tribes would be relocated from.<sup>117</sup> Subsequently, the General Allotment Act of 1887 reduced the reservation lands the Indian's owned into smaller parcels,<sup>118</sup> portrayed as "Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members."<sup>119</sup> A dispositive factor is whether or not their land was considered "restricted" or "held-in-trust" for purposes of commercializing their lands, which affects the leasing/division process tying into how *McGirt/Murphy* could affect the oil and gas industry in Oklahoma.

### *1. Restricted Indian Lands*

"Restricted" lands apply to the "5 Civilized Tribes," being the Cherokee, Muscogee (Creek), Chickasaw, Choctaw, and the Seminole Nations in Oklahoma. In 1890, the Dawes Commission was established, creating tribal census and tribal rolls. The Curtis Bill further established a plan for the restricted status of the Indian land. The Dawes Commission "used a eugenics-based methodology to determine the racial identity of mixed-race individuals: anyone of exclusively Indian ancestry – or both European and Indian ancestry – was considered "Indian" and consequently placed on the blood roll."<sup>120</sup> The Stigler Act of 1947 governed restrictions upon alienation of surface and mineral interests in lands inherited by lineal descendants by blood of allottees of the "5 Civilized Tribes."<sup>121</sup> Originally, the restriction from the Act applied to Indian heirs with a blood quantum of ½ of more.<sup>122</sup> In 2018, the Act was amended to modify that when an owner of restricted lands dies, the restrictions on the lands "belonging to a lineal descendant by blood of an original enrollee whose name appears on the Final Indian Rolls of the 5 Civilized Tribes in Indian Territory" will remain, even if the heir or devisee has a blood quantum of less than ½.<sup>123</sup>

The main point in providing these Acts is that the district courts of Oklahoma were vested with jurisdiction over the "restricted" status of Indian lands. In *Milam*, the appellants "sought removal of the probate proceedings to the United States District Court...alleging that the federal

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117. Indian Removal Act of 1830, § 3, 4 Stat. 412.

118. General Allotment Act of 1887, ch. 119, 24 Stat. 388.

119. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020).

120. Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste*, 2007 WILR 409, 456 (2007).

121. The Stigler Act of 1947, 61 Stat. 731.

122. *See id.*

123. The Stigler Act Amendments of 2018, Pub. L. No: 115-339 (Dec. 31st, 2018).

court had exclusive jurisdiction.”<sup>124</sup> The court found that “relying on Section 3(a) of the Stigler Act...which grants the Oklahoma state courts the “exclusive jurisdiction” to probate the wills of deceased Indians and to determine their heirs.”<sup>125</sup> Oklahoma state courts having exclusive jurisdiction over “restricted” lands was also seen in *In Re Cully’s Estate*, where “no conveyances...shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated.”<sup>126</sup> Post *McGirt/Murphy* poses the question of whether the state district courts of Oklahoma will retain such power, which could affect the validity of many oil and gas conveyances previously verified.

## 2. Indian Lands Held In-Trust

Many other Indian tribes not included with the ‘5 Civilized Tribes’ were subject to lands being “held-in-trust” by the United States government. The General Allotment Act divided reservations and (instead) issued each tribal member with a 160-acre homestead, the remaining land was deemed surplus and opened to homesteaders, subject to the regulations of the 1862 Homestead Act.<sup>127</sup> The Act was designed to accomplish two purposes: “divide the reservations up into parcels of land that would be privately held by some of the Indians and to allow whites to acquire more lands from the Indians.”<sup>128</sup> In *County of Yakima*, the Court found the Act applicable for the reason, “The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”<sup>129</sup>

The difference between “restricted” lands and land “held-in-trust” was that the United States government would hold title to the land for the benefit of the individual Indians. The United States acted as a fiduciary to the tribal nations in this capacity. Section 5 of the Act states that after the land is allotted, it will be held in trust for the allottee by the United States for a period of 25 years. After, the United States will convey the same by patent to said Indian or his heirs (if he has died during the 25 years) in fee, discharged of said trust and free of all charge or encumbrance

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124. *Milam v. State of Okla.*, 999 F. 2d 547, 1993 WL 261927, at 1 (10th Cir. 1993).

125. *See id.*

126. *In Re Cully’s Estate*, 1954 OK 304, 276 P. 2d 250, 253, (Okla. 1954).

127. General Allotment Act of 1887, Section 5, ch. 119, 24 Stat. 388.

128. Richard A. Eppink, *Allotment and Survivance: War Abroad and Collective Resistance at Home on Idaho’s Reservations*, 61-DEC ADVOC 37, 37 (2018).

129. *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992).



whatsoever.<sup>130</sup> Rather than Oklahoma district courts being vested with jurisdiction, approval of the Secretary of the Interior was needed to sell, convey, or lease the property held in trust. Therefore, post *McGirt/Murphy* there might not be much change in the land division regarding to land held in trust.

### 3. Leasing Tribal Lands

The Stigler Act of 1947 conveyed limited jurisdiction to Oklahoma state courts to approve conveyances of restricted Indian lands. The lands of full-blooded members of any of the “5 Civilized Tribes” are made subject to the laws of the State of Oklahoma, providing for the partition of real estate.<sup>131</sup> Leases are executed by the individual Indian owner, but approved by the district court in the county where the land is located. In *Federal Land Bank of Wichita*, the court found that “Congress has seen fit to allow the states to decide controversies involving Indian land.”<sup>132</sup> Further in *Armstrong*, the court found that when dealing with the “5 Civilized Tribes,” “the decisions which concerns Indians who are under the General Allotment Act are not helpful nor are they applicable...thus we must apply the 1947 Act so as to attain its purpose...”<sup>133</sup> Therefore, case history has shown us that when dealing with the “5 Civilized Tribes,” Oklahoma state courts have jurisdiction concerning matters of real estate conveyances. District court approval is only needed in cases where an Indian owner has a blood quantum of ½ or more.

Under Indian land “held-in-trust,” the allottee has an “equitable and present usable estate” in the allotted land, but the federal government maintains legal title. Title “does not pass to the allottee or his heirs until the issuance of a fee patent.”<sup>134</sup> Oklahoma state courts have no jurisdiction here; leases are approved by the appropriate agency within the Bureau of Indian Affairs. Federal law will control aspects of ownership, “unless restrictions are removed, or federal law or regulation specifically refers to state law.”<sup>135</sup> In *Estoril Producing Corp.*, stated the requirements for a conveyance: “The conveyance must be...under such rules and regulations

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130. General Allotment Act of 1887 § 5.

131. 25 U.S.C. § 355.

132. *Federal Land Bank of Wichita v. Burris*, 1990 OK 11, 790 P.2d 534, 538 (Okla. 1990).

133. *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466, 471-472 (10th Cir. 1979).

134. *See id.*

135. D. Faith Orłowski, Robbie Emery Burke, *Oklahoma Indian Titles*, 29 TLSLJ 361, 369 (1993).

as the Secretary may prescribe...The conveyance must be under the supervision of the Commissioner of Indian Affairs... Approval of the conveyance must be made by the Secretary of the Interior.”<sup>136</sup> The court found that the absence of approval from the Secretary invalidates the conveyance from the original allottee.<sup>137</sup> In negotiating for oil and gas leases, “the allottee may negotiate a lease if deemed advisable by the Secretary of the Interior or the Superintendent of the Bureau of Indian Affairs Agency as the Secretary’s authorized representative, subject to certain rules and regulations.”<sup>138</sup> The Secretary of the Interior in this role acts as a fiduciary to the tribal nations. When the government controls tribal monies or properties, a fiduciary relationship normally exists with respect to those monies or properties.<sup>139</sup> In *Cheyenne Arapaho Tribes of Oklahoma*, the court found that the action of not considering appropriate market values for the oil and gas, the “Secretary and his delegates acted inconsistently with fiduciary responsibilities owed to Indian mineral interests’ owners.”<sup>140</sup> Though there might not be much change post *McGirt/Murphy* when leasing lands held in-trust for the sake of Oklahoma, there might be more tribal arguments that the federal government breached their fiduciary duty to the tribes when dealing with their rights.

#### *D. Who Will Impose Oil & Gas Taxes on Tribal Land?*

Whether Oklahoma or tribal nations will have the authority and/or ability to tax oil and gas activities on tribal lands is a question left with an ambiguous answer. One scholar noted, “The uncertainty pertains both to federal common law rulings as to the enforceability of state and tribal taxes and to inconclusive regulatory pronouncements addressing taxation.”<sup>141</sup> The result casting “a shadow of uncertainty as to the risk of “double” state and tribal taxation of resources development in Indian Country.”<sup>142</sup> First, addressing and understanding Oklahoma’s taxing authority on tribal lands is necessary. Secondly, addressing the tribal nation’s authority to tax on

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136. *Estoril Producing Corp. v. Murdock*, 1991 OK CIV APP 122, 822 P. 2d 129, 131 (Okla. Civ. App. 1991).

137. *See id.*

138. 25 U.S.C. § 396.

139. *Navajo Tribe v. United States*, 364 F. 2d 320, 322-324 (Ct. Cl. 1966).

140. *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 966 F. 2d 583, 590 (10th Cir. 1992).

141. Thomas H. Shipps, Lynn H. Slade, *Tribal Energy and Mineral Resources Development*, 2017 No. 4 RMMLF-INST 7, 48 (2017).

142. *See id.*

their reservation's is imperative to the analysis. Lastly, the question of whether there will be "double" taxation is an acute concern for every oil and gas operator. The *McGirt/Murphy* decisions brings light to all these questions with ruling that the majority of Oklahoma could potentially be subject to tribal sovereignty which could mean tribal taxation on oil and gas activity.

### *1. Oklahoma's Authority to Tax Tribal Lands*

There has been a longstanding acknowledgement that a state may tax the severance of minerals occurring on federal lands.<sup>143</sup> This power wielded by the state is subject to many limitations. The Commerce Clause is one limitation, granting Congress "the power to regulate Commerce with Foreign Nations...and with the Indian Tribes..."<sup>144</sup> Congress has the ability to authorize state taxation that would be an "unconstitutional burden," subject to being consistent with other provisions in the Constitution.<sup>145</sup> In determining whether the authorized tax runs afoul of the Commerce Clause, the Court has developed a four-pronged test.<sup>146</sup> The analysis must look at: (1) whether the activity taxed has a substantial nexus with the state, (2) whether the tax is apportioned to reflect the degree of activity that occurs within the state, (3) whether the tax discriminates against interstate commerce, and (4) whether the tax is related to the benefits provided by the state.<sup>147</sup>

There is case law that suggests different approaches to whether a state's taxation of oil and gas activity on tribal lands is constitutional. Courts will look to either congressional or judicial approval of a state's tax.<sup>148</sup> One court finding that "oil and gas leases on statutory and treaty reservations were expressly subject to state taxation...in complete contrast to the previous era of tax immunity, oil and gas operations...were wholly exposed to state taxation."<sup>149</sup> Another court "refused to accept the assertion that the IMLA's silence on the issues of taxation repealed the 1924 Act's authorization of state taxes."<sup>150</sup> In determining congressional approval,

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143. *Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 50 (1925).

144. U.S. Const. Art. 1, § 8 cl. 3.

145. *Quill v. North Dakota*, 504 U.S. 298, 318 (1992).

146. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

147. *See id.*

148. *Williams v. Lee*, 358 U.S. 217, 271 (1959).

149. *Ute Mountain Tribe v. Rodriquez*, 660 F. 3d 1177, 1193 (10th Cir. 2011).

150. Erin Marie Erhardt, *States Versus Tribes: The Problem of Multiple Taxation of Non-Indian Oil and Gas Leases on Indian Reservations*, 38 AMINDLR 533, 536 (2013-2014).

courts look at: (1) the federal interest in on-reservation activity, (2) the tribal interest in the operation, and (3) the state's interest in taxing the operation.<sup>151</sup>

There is also precedent against a state having the ability to tax oil and gas activities in Indian country. Courts will look to the specific treaty provisions agreed upon with the tribe, legislative history, and judicial decisions which could preclude the state's ability to tax oil and gas activities. In *Blackfeet Tribe*, the Court held that "Nothing in either the text or legislative history of the [Indian Mineral Development Act] 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to the Act."<sup>152</sup> In *Sac & Fox Nation*, the Court found "absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country..."<sup>153</sup> The analysis used to decide whether a state tax is valid, depends on the specific facts of the present case presented to the court.<sup>154</sup>

## 2. Tribal Authority to Tax Non-Members on Tribal Lands

The next question is whether Indian tribes can tax oil and gas activity on their reservations, specifically non-members. *Montana* showed us that tribes may regulate taxation over activities of non-members who enter "consensual commercial relationships" with tribes or their members, or when that specific conduct "threatens or has some direct effect on the political integrity, economic security, health, or welfare of the tribe."<sup>155</sup> The decision could be thought to centralize around the doctrine of tribal sovereignty, of "leaving Indians free from state jurisdiction and control."<sup>156</sup> Additionally, the overarching goal of the Indian Mineral Development Act and the Indian Mineral Leasing Act was to "maximize the economic return to a tribe for its oil and gas."<sup>157</sup>

*Merrion* illustrated that the power to tax is an essential attribute of Indian sovereignty and is fundamental for the tribes to retain unless it was divested

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151. *Ute Mountain Tribe*, 660 F. 3d at 1201.

152. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S. Ct. 2399, 2403-2404 (1985).

153. *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993).

154. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183-184 (1989).

155. *Montana v. U.S.*, 450 U.S. 565, 101 S. Ct. 1245 (1981).

156. *McClanahan v. State Tax Com'n of Arizona*, 411 U.S. 164, 167 (1973).

157. Thomas W. Fredericks, *Freeing Indian Energy Development from the Grips of Cotton: Advancing Energy Independence for Tribal Nations*, 60-APR Fed. Law. 57, 58 (2013).

by the federal government.<sup>158</sup> The Court “rejected nonmember companies’ challenges to a tribal oil and gas severance tax, affirming the inherent power of Indian tribes to tax activities on Indian lands.”<sup>159</sup> In reaching their conclusion, the Court indicated many authoritative factors but the one pertaining to oil and gas was “the tribe has the inherent power to impose a severance tax on mining activities as part of its power to govern and pay for the costs of self-government.”<sup>160</sup> In *Kerr-McGee*, “The Supreme Court reaffirmed and clarified *Merrion*...holding that the federal government need not authorize a tribal tax on nonmember operators...and that the Tribe’s inherent power to tax is a sufficient source of taxing power.”<sup>161</sup> Notably, the “Court has applied the *Montana* doctrine to curb tribal taxation of nonmembers on nonmember fee lands within reservation boundaries.”<sup>162</sup>

Whether tribes may impose a severance tax on tribal land has been discussed in Oklahoma. In *Mustang*, the issue was “whether the Cheyenne-Arapaho Tribes of Oklahoma may impose a severance tax on oil and gas production on allotted lands.”<sup>163</sup> The district court held that allotted lands are subject to taxation by the tribes.<sup>164</sup> Mustang argued “the tribes lost jurisdiction over all of the lands in the 1869 reservation...when the 1890 Agreement disestablished the reservation.”<sup>165</sup> Mustang further argued that the tribes would have authority over allotted lands only if Congress passed an act specifically granting them jurisdiction, and that the Indian country statute grants criminal but not civil jurisdiction over allotted lands.<sup>166</sup> The court cited two cases that ruled “the principle that § 1151 defines Indian country for both civil and criminal jurisdiction purposes is firmly established. Any suggestion to the contrary...is simply erroneous.”<sup>167</sup>

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158. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982).

159. *See id.* at 130.

160. *See id.*

161. Thomas H. Shipps, Lynn H. Slade, *Tribal Energy and Mineral Resources Development*, 2017 No. 4 RMMLF-INST 7, 48 (2017).

162. *See id.* (citing *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 654-6600 (2001)).

163. *Mustang Production Co. v. Harrison*, 94 F. 3d 1382, 1383 (10th Cir. 1996).

164. *See id.*

165. *See id.* at 1384.

166. 18 U.S.C. § 1151 et. seq.

167. *DeCoteau v. District Court for 10th Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975); *see also Pittsburg & Midway Coal Mining v. Watchman*, 52 F.3d 1531, n.10 (10th Cir. 1995).

### 3. Double-Taxation

With the finding of authority for both the state and tribal nations to tax oil and gas activities, will oil and gas operators be subject to “double” taxation? In *Cotton Petroleum*, the Court “reinforced an economic hurdle to Indian country oil and gas development when it approved a state severance tax, a tax imposed on the same production held in *Merrion* to be subject to tribal severance tax.”<sup>168</sup> Double taxation could pose many difficulties in cultivating the oil and gas industry in Oklahoma, “...double taxation discourages energy and mineral development of Indian lands, and its punitive effect is compounded in situations which one sovereign’s taxing system does not accord credit or deduction treatment for taxes imposed by other sovereigns.”<sup>169</sup> Therefore, “double” taxation has detriments on both sides of the argument.

New Mexico has experienced the incident of “double” taxation resulting from coal production. In *Ute Mountain Indian Tribe*, the court upheld a “New Mexico taxation of tribal oil and gas development receiving minimal state services.”<sup>170</sup> The court noted three dispositive factors in concluding that both taxes were adequate. First, the court found that “the federal regulatory scheme is not “exclusive,” although it is indeed “extensive.””<sup>171</sup> Secondly, the economic burden falls on the non-Indian operators, not on the tribe.<sup>172</sup> Lastly, the court acknowledged that the state has a sufficient justification for imposing the taxes.<sup>173</sup> The court finally concluded that when considered in light of relevant legislation and tribal sovereignty, “under the flexible preemption analysis applied in *Bracker*, *Ramah*, and *Cotton Petroleum*, we hold that the five state taxes are not preempted by federal law.”<sup>174</sup> In another case, the Court “affirmed a decision invalidating an ‘extraordinarily high,’ 32.9% State severance tax on coal produced under tribal leases found to have adversely affected the marketability of tribal coal.”<sup>175</sup>

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168. Thomas H. Shipps, Lynn H. Slade, *Tribal Energy and Mineral Resources Development*, 2017 No. 4 RMMLF-INST 7, 49 (2017).

169. *Westmoreland Res. Inc. v. Dep’t of Revenue*, 376 Mont. 180, 330 P. 3d 1188, 1193 (2014).

170. Thomas H. Shipps, 2017 No. 4 RMMLF-INST at 49.

171. *Ute Mountain Ute Tribe v. Rodriguez*, 660 F. 3d 1177, 1202 (2011).

172. *See id.*

173. *See id.*

174. *See id.*

175. Thomas H. Shipps, 2017 No. 4 RMMLF-INST at 49 (citing *Montana v. Crow Tribe*, 484 U.S. 997 (1988)).

In determining whether both taxes should stand, the courts suggest that there is a balancing test as previously stated in *Crow Tribe*. There cannot be such a disservice on either side, particularly the tribal nation's side. There have been many revisions to regulations by the Interior Department, being "aware of the detrimental impact that double taxation has on Indian economic development."<sup>176</sup> Such as, in its revisions to the Long-Term Leasing Act and the General Right-of-Way Act, the BIA provisioned "the interest leased or right-of-way granted, and activities on such lands, "are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State...[but] may be subject to taxation by the Indian tribe with jurisdiction."<sup>177</sup> In light of *McGirt/Murphy*, the courts could be more reluctant to impose state severance taxes if they deem the lands to be "established" tribal nations.

#### *IV. Alternative or Suggested Approaches*

Each of the previous sections offered different approaches and rationales to the various issues brought to life by the decisions rendered in *McGirt/Murphy*. Although we do not know how Oklahoma and the courts will move forward on the various issues, there are some arguments that have more merit than others. The following sections will analyze each problem, with my own opinion as to which argument will prevail on the previously stated issues. In developing my conclusions, I am basing my opinions on the arguments that have the strongest dispositive factors.

##### *A. Each Oklahoma Indian Nation Will Argue "Establishment" for Tribal Sovereignty*

Why the other Oklahoma Indian nations will argue that their tribal reservations were never "disestablished," rests plainly on tribal sovereignty. The three main principles to tribal sovereignty are: (1) Indian tribes had an inherent sovereignty that preceded the arrival of Europeans on the American continent, (2) conquest resulted in the loss of external but did not affect the internal sovereignty of the tribes, (3) and tribes retain internal sovereign power, unless it has been qualified either by treaty or by explicit congressional action.<sup>178</sup> The concept of tribal sovereignty, "is thus most

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176. Thomas H. Shipps, 2017 No. 4 RMMLF-INST at 49.

177. See 25 C.F.R. § 162.017 (leasing regulations); 80 Fed. Reg. 72506-72507 (right-of-way regulations).

178. Felix S. Cohen's Handbook of Federal Indian Law § 4.02 (Nell Jessup Newton et al. eds., 2005).

significant as a guide to interpreting federal statutes and limiting the scope of state authority.”<sup>179</sup> It is in the best interest of the tribes to argue for tribal sovereignty. The question is, how will the tribes argue that they still retain this tribal sovereignty?

The analysis used by the Supreme Court in concluding that the Muskogee (Creek) Nation was never “disestablished,” exemplified an explanation of unbroken promises laid out by the United States. In *M’Intosh*, “the Supreme Court considered the legal question of whether Tribal Nations could claim legal title to their own lands and decided [we] could not.”<sup>180</sup> Further, “the truth is that the Indian Removal Act was passed to secure additional resources for the cotton and slavery industries, who wanted to expand and viewed the Tribal Nations as obstacles.”<sup>181</sup> Lastly, the Allotment Acts, “pursuant to which millions of acres of tribal lands were distributed to white settlers, under the pretext that without individual ownership of land, Indians...did not know how to cultivate or farm land.”<sup>182</sup>

Members of the Supreme Court “have been highly protective of tribal rights, while others show minimal concerns for such principles.”<sup>183</sup> Oklahoma courts have ruled differently as to Indian tribes regarding the “establishment” question. *Ryder* showed us that an Oklahoma court acknowledged that the *McGirt/Murphy* decision was applicable to the Choctaw Nation.<sup>184</sup> *Berry* illustrated the opposite, finding that the *McGirt/Murphy* decisions did not affect the other “5 Civilized Tribes” in Oklahoma.<sup>185</sup> The main concluding point in determining whether or not courts will find that each tribal reservation is “established” will be determined by examining the treaties between each tribe. The Supreme Court showed this in *McGirt*, where the Court determined the tribe’s boundaries by “looking at boundaries set in an 1833 treaty between the United States and the Creek tribe as a precursor to the Trail of Tears.”<sup>186</sup>

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179. William J. Rich, *Modern Constitutional Law*, MODCONLAW § 36:2, (2020).

180. Jonodev Chaudhuri, *Reflection on McGirt v. Oklahoma*, 134 HVLRF 82, 83 (2020).

181. Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South*, 221-22 (2005).

182. Jonodev Chaudhuri, 134 HVLRF at 84 (2020) (citing D.S. Otis, *The Dawes Act, and the Allotment of Indians Lands*, 11 (1973)).

183. William J. Rich, *Modern Constitutional Law*, MODCONLAW § 36:2, (2020).

184. *Ryder v. Sharp*, 2020 WL 5038520, 3 (E.D. Okla. 2020).

185. *Berry v. Braggs*, 2020 WL 6205849, 5 (N.D. Okla. 2020).

186. Timothy Cook, *Half of Oklahoma is Now Likely Within a Native American Reservation*, JDSUPRA (2020), <https://www.jdsupra.com/legalnews/half-of-oklahoma-is-now-likely-within-a-93563/>.



This analysis will likely impact the oil and gas industry in Oklahoma in that “almost a quarter of Oklahoma’s recent oil and gas wells and around 60 percent of its refinery capacity now lie within the territory of the five tribes.”<sup>187</sup> The future of oil and gas rights/taxation on tribal nations is uncertain at this point, as agreements have been offered by Oklahoma such as the “*McGirt/Murphy* Agreement-in-Principle.” Each Oklahoma tribe will use the court system to argue that their tribal reservations were never “disestablished.” Whether or not the courts will grant this request of “establishment,” is still uncertain, but “If you are one of the many people who may have been...planning or constructing a project or operating...on what is now potentially a Native American Reservation, then you need to prepare for several potential uncertainties.”<sup>188</sup>

#### *B. Oklahoma’s Arm to Regulate Oil & Gas Activity Will Shorten*

How the oil and gas industry in Oklahoma will be regulated and governed moving forward is also uncertain after the decisions in *McGirt/Murphy*. Traditionally, the Oklahoma Corporation Commission (“Commission”) was the regulator of oil and gas drilling who further enforced environmental laws and other oil and gas conservation rules.<sup>189</sup> The caveat is that the Commission does not have that authority of regulation over “allotments of individual citizens, which include Indian Country within the express terms of 25 U.S.C. § 1151(c).”<sup>190</sup> If there is a finding that many Oklahoma tribal reservations are still “established,” Oklahoma will be limited to regulating oil and gas activity over a substantial part of the state. The question posed is whether, the tribes will impose and enforce further oil and gas regulations?

*Montana* could be the leading case in deciding whether the tribes will retain this inherent power of civil regulatory jurisdiction. The case demonstrates that tribes may regulate “the activities of nonmembers who enter consensual relationships with the tribe...through commercial dealing, contracts, leases...and to exercise civil authority over the conduct of non-Indians...when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the

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187. *See id.*

188. *See id.*

189. 52 O.S. § 139(B)(1).

190. Adam Dinnell, Andrew Hicks, *Oklahoma Oil and Gas Business Braces for Change*, JDSupra, (2020), [https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#\\_edn6](https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/#_edn6).

tribe.”<sup>191</sup> There is no question that when conducting oil and gas operations on tribal reservations, there are consensual relationships that fit the criteria of “commercial dealing, contracts, and leases.” A further question posed whether the courts would conclude that oil and gas activity affect the latter point in the *Montana* analysis. This will likely be governed by the Tribes as States Provision, which “authorizes the EPA to treat recognized Indian tribes as a state (TAS) for the purpose of implementing and managing certain environmental programs and functions.”

The tribes will not be on their own when it comes to regulating oil and gas activity if they so choose to do. There will be federal oversight on the tribe’s regulations, in which Oklahoma could see more extensive oil and gas regulation by the federal government. The Environmental Protection Agency will ensure that the Indian tribes are administratively feasible to achieve the appropriate purpose of their function.<sup>192</sup> Further, through the Office of Indian Energy Policy and Programs, the federal government will make sure that the Indian nations are abiding by the current federal energy regulations.<sup>193</sup> The result being, in the event the tribes choose to regulate, the federal government will be a shadow of that regulation.

Each issue possess uncertainty for the oil and gas industry, but this topic has been spoken on by Oklahoma courts. In *Calayx*, the administrative law judge found that a tribe has no authority to regulate non-Indian activity on land that is not owned by the tribe, and any land owned by the tribe is subject to the jurisdiction of the Oklahoma Corporation Commission.<sup>194</sup> This case being appealed to the Oklahoma Supreme Court could offer guidance to the uncertainty the oil and gas industry in Oklahoma faces. Moving forward, in the event of a ruling that the Commission retains jurisdiction over tribal reservations, be prepared to face additional regulations imposed either by the tribes or the federal government. The dual regulation will pose many difficulties such as overlapping or conflicting regulations for the oil and gas industry.<sup>195</sup> Although, dual regulation is uncertain.

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191. *Montana v. U.S.*, 450 U.S. 544, 565-566 (1981).

192. 42 U.S.C. § 7601(d)(4).

193. 42 U.S.C. § 7144(e)(b).

194. Jack Money, *Oklahoma’s Authority to Regulate Oil and Gas Activity Is in Question After McGirt Decision* (2020).

195. Mike McBride III, *Leveraging Tribal Court Judgements in Your Practice*, *The Federal Lawyer* 67(2) at 69, (2020).

*C. Tribal Nations Might Regulate Tribal Land Division and/or Tribal Land Leasing*

Which authoritative body governs land division/leasing depends on whether the Indian land is “restricted” or “held-in-trust.” With the added uncertainty to the oil and gas industry moving forward after *McGirt/Murphy*, this issue could be more “certain” compared to others. “Restricted” land applies to the “5 Civilized Tribes,” and is governed by the Stigler Act of 1847.<sup>196</sup> The Act was amended in 2018, with “the single objective of the Stigler Act Amendment’s is to eliminate the blood quantum requirement to own land in restricted status.”<sup>197</sup> The Act further gave exclusive jurisdiction over guardianship, probate, and heirship matters to the state courts in Oklahoma. The tribes will likely argue that the state will not have jurisdiction over the “5 Civilized Tribes,” concerning land division.

Leasing tribal interests that are “restricted” could also be altered by the decisions rendered in *McGirt/Murphy*. The Stigler Act conveyed limited authority to Oklahoma state courts to approve the conveyances of “restricted” Indian lands. Through this process, leases are executed by the individual Indian owner pending approval by the district court in the county where the land is located. *Armstrong* showed us that the Stigler Act applies exclusively to the “5 Civilized Tribes” and that decisions which concern Indians who are under the General Allotment Act are not applicable.<sup>198</sup> Noted though, “the Stigler Act does not prohibit a lessee from seeking approval of leases through the BIA procedures set forth at 25 C.F.R. Part 213.”<sup>199</sup> The tribes will likely argue then that the approval of leases have to go through the Bureau of Indian Affairs such as lands “held-in-trust,” because that entity will likely serve the tribal interests more than the state.

The decisions rendered in *McGirt/Murphy* will likely not affect land that is “held-in-trust” either. The remaining Oklahoma tribes are subject to land “held-in-trust” by the United States, which was granted through the General Allotment Act. The Act allotted Indians land on their reservations in 160-acre parcels and were able to receive the lands discharged of the trust under

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196. 25 U.S.C. § 355.

197. Conor P. Cleary, *The Stigler Act Amendments of 2018*, OBJ 91 pg. 50 (January 2020).

198. *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F. 2d 466, 471-472 (10th Cir. 1979).

199. *Curry v. Corporation Commission v. Oklahoma*, 1979 OK 89, 617 P. 2d 177 (Okla. 1979).

which the United States held with a patent in fee.<sup>200</sup> During the time that the land was held in trust by the United States, the federal government acted as a fiduciary capacity to the tribal nations. Certain restrictions were imposed on the land “held-in-trust,” which the federal government was vested with jurisdiction to resolve any disputes among the lands.<sup>201</sup> Concerning the division of land “held-in-trust,” there likely will not be much change after the decisions rendered in *McGirt/Murphy*.

Leasing land “held-in-trust” is also regulated through the federal government. Stated previously, the title of land “held-in-trust” is maintained by the federal government and does not pass until the issuance of a fee patent.<sup>202</sup> State courts have no jurisdiction, as leases are approved by the appropriate agency within the Bureau of Indian Affairs. The conveyance must be under the supervision of the Commissioner of Indian Affairs and the approval of the conveyance must be made by the Secretary of the Interior.<sup>203</sup> The Oklahoma oil and gas industry likely will not see much change regarding the leasing process of land that is “held-in-trust.” There have been prescribed laws intended to address this, and nothing in the decisions in *McGirt/Murphy* seem to counter any of those laws. Claims by tribal nations, if any, will likely be directed at the federal government arguing that they breached their fiduciary duty when dealing with their rights.

#### *D. Tribes Might Impose Taxes on Oil & Gas Activities*

It is already settled that tribes may regulate through taxation, the activities of non-members who enter consensual relationships with the tribe through commercial dealing, contracts, leases, or other arrangements.<sup>204</sup> The idea is that of “tribal sovereignty,” that taxing activities on their reservations is included in the idea of being one’s own nation. This power to tax has extended to oil and gas activity, where the Supreme Court has upheld the authority of tribal nations to tax the activities of non-Indian mineral producers.<sup>205</sup> Even further, the Court has also extended the taxing authority to include a severance tax on any oil and gas produced from

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200. 25 U.S.C. § 311.

201. *See id.*

202. General Allotment Act of 1887 § 5.

203. *Estoril Producing Corp. v. Murdock*, 1991 OK CIV APP 122, 822 P.2d 129, 132 (Okla. Civ. App. 1991).

204. *Montana v. U.S.*, 450 U.S. 544, 566 (1981).

205. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985).

Tribal lands.<sup>206</sup> The Court found that “the tribes’ inherent authority to tax non-Indians doing business on the reservation as ‘a fundamental attribute of sovereignty’ enabling a tribe to fund its governmental services.”<sup>207</sup> The tribes moving forward will have the power to tax oil and gas activities on their reservations, but will the State?

Typically states cannot tax tribes engaging in business on their own tribal reservations, even if those reservations are within the state.<sup>208</sup> Consequently, “all minerals...produced after April 26, 1931, from restricted allotted lands...subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma.”<sup>209</sup> Pertaining to lands “held-in-trust” the tribes were free from state taxes, except for an authorized gross production state tax.<sup>210</sup> The state also has the authority to tax oil and gas on tribal lands when the incidence of the tax falls on the non-Indian lessees.<sup>211</sup> The decisions in *McGirt/Murphy* pertained to the Muskogee (Creek) Nation, which includes both land “restricted” and “held-in-trust.” The resulting question is, will the state be able to levy a tax on oil and gas activity on tribal reservations?

The courts moving forward will likely validate tribal taxation of oil and gas activities on their reservations. Being an attribute acknowledged historically that is imbedded in the idea of “tribal sovereignty.” They will likely also look to the Indian Mineral Development Act and the Indian Mineral Leasing Act which are alive to maximize the economic profit from minerals developed from tribal reservations. Tribes are also not subject to control or preemption by the State legislature, unlike non-tribal entities. The issue of state taxation is less conclusive, but there is a possibility that states will also be able to impose taxes on oil and gas activities moving forward. Moving forward, “energy companies who fail to develop tribal partnerships will be left behind...The industry cannot afford to alienate the Nation or its allies.”<sup>212</sup>

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206. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 175 (1982).

207. Stephanie Moser Goins *Don't Panic: The Implications of McGirt v. Oklahoma for the Oil and Gas Industry in Oklahoma*, (2020), <https://www.ballmorselow.com/blog/dont-panic-the-implications-of-mcgirt-v.-oklahoma-for-the-oil-and-gas-industry-in-oklahoma>.

208. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

209. H.R. Rep. No. 658, Ch. 179, at 1109 (1931).

210. 25 U.S.C. § 5201.

211. *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 171-172 (1989).

212. Stephanie Moser Goins, (Jul. 15, 2020).

Oil and gas operators in Oklahoma could be subject to taxation by both the tribe and the state. Though there is no present Oklahoma case law suggesting such an approach, other states such as New Mexico have approved taxing by both authorities on mineral development. In determining the validity of “double” taxation, the courts will likely use a balancing test. If one tax severely impacts or disadvantages another, it will likely be voided.<sup>213</sup> As an oil and gas operator moving forward in Oklahoma, one should be readily mindful of the applicable state tax laws as well as those of the tribal nations if the development is to be conducted on tribal reservations,

#### *V. Conclusion*

The oil and gas industry in the state of Oklahoma is bound to face many uncertainties after the Supreme Court rulings in *McGirt/Murphy*, a case that concluded that a tribal reservation, once considered “disestablished,” is not “established” for purposes of the Major Crimes Act. With the world watching the case unfold, it is imperative to understand and recognize the implications of the case do not rest at criminal matters for jurisdictional purposes. Many courts are adopting the philosophy that the definition of “Indian Country” for both civil and criminal jurisdiction is firmly established, resulting in the possibility that tribes could have civil regulatory authority over conduct on their reservations.

*McGirt* and *Murphy* only applied to the Muskogee (Creek) Nation, which is one tribe out of many that call the state of Oklahoma their home. It is apparent that the balance of the tribes in Oklahoma, including the other “5 Civilized Tribes,” will follow this ruling and fight that their reservations once “disestablished” are still “established.” The tribes will ultimately want to glean the most power they can to affirm that their reservations were never “disestablished.” In doing so, they will have the possibility of attaining criminal as well as civil regulatory jurisdiction over their tribal reservations. The potential result being that almost half of Oklahoma could fall into the hands of regulation by the tribes, once held on by the State.

With the possibility that half of the state of Oklahoma could potentially fall into the regulatory hands of the tribes, the oil and gas industry will be facing monumental change. Once fully regulated by the Oklahoma Corporation Commission, oil and gas companies could potentially see regulation by the state, tribes, and federal government. Although it is not

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213. *Montana v. Crow Tribe*, 484 U.S. 997, 108 S. Ct. 685 (Mem) (1988).

conclusive whether the Commission will lack authority on the tribal reservations, there will have to be some sort of regulation, and the question of who that will be is currently unanswered. If the tribes choose to regulate, how much regulation will the oil and gas industry see? The potential consequence of tribal regulation also provides the conceivable shadow of federal oversight. Consequently, dual, and conflicting regulation could be in the future of the oil and gas industry.

Land division and leasing tribal mineral interests could either be further complicated or remain the same. Historically, the state was the governing body of land division for the “5 Civilized Tribes,” but they could push the state authority out. Although this has been a grounded doctrine in the past, there is potential for change after the decisions we have seen passed down by the Supreme Court. The oil and gas industry relies heavily on leasing mineral rights for the exploration and extraction of oil and gas. The industry, moving forward could be challenged with another hurdle, that could be a more extensive regarding the leasing process as seen with Indian lands “held-in-trust.” The decisions rendered could impact leases dating back years, impacting the oil and gas industry.

Lastly, who can tax oil and gas activities and at what amount is looming in every oil and gas company’s mind. Although there is authority for both the state and tribe to tax, how is the court going to rule moving forward? Tribes ultimately want to generate revenue from their lands, but the state of Oklahoma also has an interest with a good amount of its oil production being conducted on tribal reservations. There is also the possibility of “double taxation,” which could push many oil and gas companies from wanting to do business in Oklahoma, overall, negatively affecting the state’s economy.

As the famous saying goes, “with great power, comes greater responsibility.” Tribes could fully govern civil regulatory jurisdiction on Indian reservations, including oil and gas activity post *McGirt/Murphy*. However, the question is will they want to? The cases bring so much uncertainty for the oil and gas industry in Oklahoma, with so few answers.