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Money, Money, Money: Revenue Is Funny in a *McGirt* World

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Money, Money, Money: Revenue Is Funny in a *McGirt* World

I. Introduction

Taxation is a vital instrument of government that provides funds for public services.¹ In general, tax is simple: the federal government taxes all American citizens through the Internal Revenue Code,² states tax persons within their boundaries, and “Indian”³ tribes do the same. Where there is overlap, the simplicity of the general principle evaporates, and conflicts arise.⁴ When it comes to conflict between federal tax law and tribes, generally, the federal law will win.⁵ Conflicts between the states and tribes, on the other hand, are much more nuanced.

Oklahoma and its tribes have been sorting through these nuances for years and have more or less achieved balance through compacts.⁶ Following the reestablishment of the Muscogee (Creek) Nation’s reservation boundaries in *McGirt v. Oklahoma*,⁷ however, the State faces a large potential impact on tax revenue, given that a large portion of Eastern Oklahoma is now Indian Country.⁸ The impact has extended beyond the

1. See *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152 (1980) (“The power to tax . . . is a fundamental attribute of sovereignty”); *id.* at 154 (describing the use of tax revenues for “essential governmental services, including programs to combat severe poverty and underdevelopment”).

2. See generally I.R.C. §§ 1–9834.

3. “Indian” is a legal term, reflected in how the persons and tribes are referred to in 18 U.S.C. §§ 1151–1153.

4. See, e.g., *Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. at 157 (holding that states may impose sales tax on a tribe if that tax does not impose a substantial burden on the tribe); *Okl. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458–59 (1995) (holding that states may not impose sales tax on a tribe if legal incidence of the tax falls on the tribe); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 179, 181 (1973) (holding that states may not tax income of a tribal member residing and working on a reservation).

5. See, e.g., *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (holding that tribal members are subject to federal income taxation).

6. See *Tribal Compacts and Agreements*, OKLA. SEC’Y STATE, <https://www.sos.ok.gov/gov/tribal.aspx> (last visited Nov. 5, 2020). Compacts are agreements between sovereign governments. See, e.g., 25 C.F.R. § 1000.2.

7. 140 S. Ct. 2452, 2482 (2020).

8. See generally OKLA. TAX COMM’N, REPORT OF POTENTIAL IMPACT OF MCGIRT V. OKLAHOMA (2020), <https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/reports/other/McGirt%20vs%20OK%20-%20Potential%20Impact%20Report.pdf> [hereinafter REPORT OF POTENTIAL IMPACT].

Muscogee (Creek) Nation, as well; the Chickasaw,⁹ Choctaw,¹⁰ Cherokee,¹¹ and Seminole¹² Nations (known as the Five Tribes, collectively with the Muscogee (Creek)) were granted reestablishment through the Oklahoma district courts and received confirmation from the Oklahoma Court of Criminal Appeals on the status of their individual reservations. Because Oklahoma courts have found each of those suits in favor of the tribes, a large portion of Oklahoma is once again classified as Indian Country.¹³

Understandably, this concerns the State because it stands to lose millions per year in tax revenue from the Muscogee (Creek) Nation alone.¹⁴ When the Muscogee (Creek) reservation was reestablished, the Oklahoma Tax Commission projected that the State would lose \$21,459,933 in income tax each year and \$38,138,906 in sales tax revenue from 2021.¹⁵ With the other four of the Five Tribes having been similarly successful in reaffirming their reservations, the State may lose up to \$72,722,944 in annual income tax revenue and \$132,233,289 in 2021 sales tax with the loss of tax jurisdiction in all Five Tribes' reservations.¹⁶ Now that courts are recognizing tribal treaty rights again, the State and the tribes must find a way to work together. A compromise should benefit both the State and the tribes or, at the very least, not leave the State without necessary funding and not infringe upon tribal sovereignty and governance.

Tribes are independent sovereigns.¹⁷ As far back as the 1800s, the Supreme Court recognized that tribes were “distinct communit[ies], occupying [their] own territory . . . in which the laws of [the state] can have no force . . . but with the assent of the [tribes] themselves, or in conformity

9. *Bosse v. State*, 2021 OK CR 30, 499 P.3d 771.

10. *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867; *State v. Ryder*, 2021 OK CR 11, 489 P.3d 528 (withdrawn), *denying post-conviction relief*, 2021 OK CR 36, 500 P.3d 647 (acknowledging petitioner's argument that the State of Oklahoma had no jurisdiction to prosecute him for the murders of Choctaw Nation citizens within the Choctaw Reservation but declining to find “that *McGirt* is retroactive to convictions already final when the ruling was announced” absent guidance from the Oklahoma Supreme Court to do so).

11. *Hogner v. State*, 2021 OK CR 4, 500 P.3d 629.

12. *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250.

13. See REPORT OF POTENTIAL IMPACT, *supra* note 8, at 13–14.

14. *Id.* at 16, 18.

15. *Id.*

16. *Id.*

17. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1) (Nell Jessup Newton et al. eds., Supp. 2017).

with treaties, and with the acts of [C]ongress.”¹⁸ The law has since evolved from this principle, and states retain some degree of regulatory authority over tribal land so long as the interests involved are not solely on-reservation interests implicating only tribal members.¹⁹ It remains true, however, that states cannot infringe upon a tribe’s ability to “make [its] own laws and be ruled by them” within its own land without an act of Congress.²⁰

As such, it is vital to first determine what land qualifies as tribal land. The most commonly used definition of Indian Country comes from the Major Crimes Act, which defines three categories of land qualifying as Indian Country.²¹ The first category includes “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and[] including rights-of-way running through the reservation.”²² The second category covers “all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state.”²³ Courts rarely find that land is Indian Country under this category since it can, for the most part, also qualify as a reservation.²⁴ The third category includes “all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”²⁵ The existing law on tax jurisdiction in Indian Country applies *only* in the categories listed above, not outside of them,²⁶ so ascertaining the status of the land on which the tax will apply is an imperative first step in determining whether a state has jurisdiction.

18. *See Worcester*, 31 U.S. at 561.

19. *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001).

20. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

21. 18 U.S.C. § 1151.

22. *Id.* § 1151(a).

23. *Id.* § 1151(b).

24. *See* Paul W. Shagen, Comment, *Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation*, 27 N.M. L. REV. 421, 427 (1997).

25. 18 U.S.C. § 1151(c).

26. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.”).

Once in Indian Country, the question remains: who has the authority to make and enforce laws? This Note addresses state tax jurisdiction in Indian Country, particularly how the Supreme Court's holding in *McGirt v. Oklahoma*²⁷ will impact Oklahoma's tax revenue and how to mitigate that impact in a way that respects both the State's need for revenue and the tribes' inherent sovereignty. Part II addresses tax jurisdiction in Indian Country, both in general and with a specific focus on income and sales tax. Part III assesses state taxation as it exists in Oklahoma, including the projected impact of *McGirt* on tax revenue, and examines some of the existing compacts between the State and the tribes. Part IV evaluates the changing landscape of Oklahoma, first analyzing *McGirt* and then focusing on the remaining four of the Five Tribes' efforts to reestablish the reservation boundaries. Part V contemplates possible solutions to mitigate the effects of tribal reestablishment on Oklahoma's income and sales tax revenue and potential downsides to those solutions. Finally, in Part VI, this Note summarizes the current legal environment.

II. Tax Jurisdiction in Indian Country

The three sovereigns that have power to tax in Indian Country are the federal government, the tribes themselves, and the states.²⁸ The federal government has taxing power in all areas of the United States, including in Indian Country, unless a tribe has negotiated otherwise via treaty.²⁹

The tribes themselves have jurisdiction as a matter of course pursuant to the Supreme Court's holding in *Williams v. Lee*, which acknowledged the right of tribes to make their own laws and be governed by them.³⁰ In *Williams*, a non-Indian who operated a store within Navajo Indian Country brought suit against two Navajo members in state court.³¹ The Court acknowledged that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians

27. 140 S. Ct. 2452 (2020).

28. *See, e.g.*, *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (holding that tribal members are subject to federal income taxation); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (noting that tribes have a right to make their own laws and be governed by them); *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 155 (1980) (holding that states may tax sales on reservation).

29. *See Squire*, 351 U.S. at 6.

30. *Williams*, 358 U.S. at 220.

31. *Id.* at 217–18.

on a reservation.”³² Therefore, the Court recognized that permitting the state to exercise jurisdiction over a transaction with members on Indian Country would “undermine the authority of the tribal courts over [r]eservation affairs and . . . infringe on the right of the Indians to govern themselves.”³³ As a result, a tribe may tax its own members within its own boundaries. However, there are limits to when a tribe may tax non-members³⁴ or non-Indians.³⁵

While federal and tribal jurisdiction are fairly straightforward, state tax jurisdiction can be convoluted. States have the most limited power in Indian Country since they generally have no jurisdiction over “on-reservation conduct involving only Indians.”³⁶ In such cases, states have very little regulatory interest within Indian Country, and the federal government has a very strong “interest in encouraging tribal self-government.”³⁷ When states attempt to regulate “the conduct of non-Indians engaging in activity” within Indian Country, however, the Supreme Court has looked to the “nature of the state, federal, and tribal interests at stake” to determine whether “the exercise of state authority would violate federal law.”³⁸ If a state’s proposed regulation would work against the underlying policy of a federal regulatory scheme, and the only state interest is a general interest in raising revenue, the state may not exercise regulatory jurisdiction.³⁹ When a state provides “substantial services” to a tribe, however, and does not place “a substantial burden on the [t]ribe,” the state’s tax is permissible.⁴⁰

While those general principles apply in all sectors, there are specific rules that apply to both income tax and sales tax, the two fiscal areas that

32. *Id.* at 220.

33. *Id.* at 223.

34. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141–42 (1982) (“[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax.”).

35. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (“Indian tribes retain inherent sovereign power to exercise some form of civil jurisdiction . . . over the conduct of non-Indians on fee lands within [their] reservation[s] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”).

36. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480–81 (1976)).

37. *Id.*

38. *Id.* at 144–45.

39. *Id.* at 151.

40. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185–86 (1989).

the reestablishment of the Muscogee (Creek) reservation impact most substantially.⁴¹

A. Income Tax

States may not impose income tax on tribal members who live and work in their own tribe's Indian Country.⁴² In *McClanahan v. State Tax Commission of Arizona*, the state taxed the income of a Navajo member who lived and worked within the bounds of her tribe's reservation.⁴³ The Supreme Court, in determining the state's jurisdiction, held that courts must analyze state exercises of power against a backdrop of tribal sovereignty, since tribes had always been separate and at least semi-independent.⁴⁴ The Court also noted that Congress had provided a method for states to assume civil jurisdiction over tribes in 25 U.S.C. § 1322(a), so long as the tribes consented and the state amended its constitution.⁴⁵ The state, however, had neither sought consent of the Navajo Nation nor made any attempt to revise its constitution, so it could not claim jurisdiction through those means.⁴⁶

While *McClanahan* seems to paint a broad stroke of exemptions, freeing most tribal members' income from state taxation, the Court's holding in *McClanahan* applies only in cases where the tribal member resides within the tribe's Indian Country.⁴⁷ Therefore, "the threshold question of a *McClanahan* analysis is whether relevant tribal members reside within [Indian Country]."⁴⁸ When the member does not live within Indian Country, then the principle holds that "a jurisdiction . . . may tax *all* the income of its residents, even income earned outside the taxing jurisdiction."⁴⁹ As a result, so long as a tribal member lives within the tribe's Indian Country, her income is exempt from state income taxation; if the member lives outside the tribe's Indian Country, however, her income is subject to state tax.

While the court can easily determine jurisdiction over tribal member income by ascertaining whether that member lives within their tribe's

41. See generally REPORT OF POTENTIAL IMPACT, *supra* note 8, at 16, 18.

42. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 181 (1973) ("[T]he State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.").

43. *Id.* at 165–66.

44. *Id.* at 172–73.

45. *Id.* at 177–78.

46. *Id.* at 178.

47. See, e.g., *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462–63 (1995).

48. *Sac & Fox Nation v. Okla. Tax Comm'n*, 7 F.3d 925, 926 (10th Cir. 1993).

49. *Chickasaw Nation*, 515 U.S. at 462–63.

Indian Country or on state land, what happens when a member of a federally recognized tribe lives on *another* tribe's Indian Country? While there are no Supreme Court cases on the subject, the trend in state court cases is that income of tribal members on other tribes' land is taxable by the state.⁵⁰ Minnesota,⁵¹ Montana,⁵² and New Mexico⁵³ held that the income of non-members is exempt from state tax; however, each state later amended that holding either through the courts⁵⁴ or through legislative action.⁵⁵

As a result, the primary principles of state jurisdiction in income tax are that states may not tax tribal members within their tribe's boundaries; states may tax tribal members who live either on another tribe's Indian Country, or outside Indian Country; and any member who lives outside Indian Country is firmly within the state's jurisdiction.

B. Sales Tax

When taxing transactions within Indian Country, the primary question is whether the legal incidence of the tax falls on a tribe or its members.⁵⁶ A determination of legal incidence requires finding which party bears the burden of the tax.⁵⁷ The Supreme Court has held that taxes in Indian Country are unenforceable when the legal incidence falls on tribal members within Indian Country or on the tribe itself.⁵⁸ When the burden falls on a non-Indian, however, there is no bar on the state's jurisdiction to impose a sales tax so long as it "imposes only an indirect burden on the [t]ribes."⁵⁹ Given these principles, the legal incidence of the tax is dispositive of how the Court will address jurisdiction.

50. See, e.g., N.M. Tax'n & Revenue Dep't v. Greaves, 864 P.2d 324, 326 (N.M. 1993); LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 917 (Wis. 2001); Mike v. Franchise Tax Bd., 106 Cal. Rptr. 3d 139, 150–51 (Cal. Ct. App. 2010).

51. Topash v. Comm'r of Revenue, 291 N.W.2d 679, 680–81 (Minn. 1980).

52. LaRoque v. Montana, 583 P.2d 1059, 1065 (Mont. 1978).

53. Fox v. Bureau of Revenue, 531 P.2d 1234, 1234–35 (N.M. 1975).

54. Minnesota v. R.M.H., 617 N.W.2d 55, 64 (Minn. 2000); Greaves, 864 P.2d at 325–26.

55. LaRock, 621 N.W.2d at 913 ("LaRoque was rendered invalid by the passage of Mont. Admin. Reg. § 42.15.121(1) . . ."). The state legislature did not explicitly state its reasoning, but given the circumstances, it is likely that it intended through § 42.15.121(1)—now codified at § 42.15.220—to capture the revenue it was unable to collect.

56. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458–59 (1995).

57. *Id.* at 461.

58. *Id.* at 458 (citing Bryan v. Itasca Cnty., 426 U.S. 373, (1976); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 165–66 (1973)).

59. Sac & Fox Nation of Mo. v. Pierce, 213 F.3d 566, 583 (10th Cir. 2000).

When the legal incidence falls on the tribe, it is rare for the courts to recognize a state's jurisdiction to impose a tax.⁶⁰ As U.S. Supreme Court Justice Ruth Bader Ginsburg stated in *Oklahoma Tax Commission v. Chickasaw Nation*, “[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, . . . a State is without power to tax” unless Congress has clearly authorized it to do so or the tribe has surrendered jurisdiction.⁶¹ In *Chickasaw Nation*, the State of Oklahoma sought to impose its motor fuels excise tax on fuel sold by a tribal retailer.⁶² Since the legal incidence fell on the tribal retailer, the tax itself was impermissible.⁶³ The Supreme Court did note, however, that the State was free to amend its statute to cause the legal incidence to fall on non-tribal parties, creating an easy way for states to maintain a flow of revenue without adverse impact on tribal autonomy.⁶⁴

The fact that a state lacks jurisdiction to impose a tax for which the legal incidence falls on tribes or tribal members in Indian Country does not automatically bar the state from all tax collection there; regardless, the state may only undertake collection efforts that do not place an undue burden on the tribal party.⁶⁵ In *Department of Taxation & Finance of New York v. Milhelm Attea & Bros.*, the Supreme Court indicated that “[s]tates may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.”⁶⁶ In this case, the state imposed quotas and reporting requirements on wholesalers selling to tribes in an effort to stem the tide of tax evasion.⁶⁷ Since the quotas and reporting requirements were not demanding, they were permissible burdens under the existing caselaw.⁶⁸

60. See *Chickasaw Nation*, 515 U.S. at 458–59.

61. *Id.* at 458 (quoting *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)).

62. *Id.* at 452–53.

63. *Id.* at 459, 462.

64. *Id.* at 460.

65. See *Dep’t of Tax’n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994) (“States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.”); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976) (acknowledging a minimal burden where a state’s requirement “is not, strictly speaking, a tax at all” and does not “frustrate[] tribal self-government”).

66. 512 U.S. at 73.

67. *Id.* at 64.

68. *Id.* at 76.

Even when dealing with situations where the legal incidence falls on non-tribal entities, the caselaw may still prohibit state taxes if those taxes act in opposition to federal policy.⁶⁹ In *White Mountain Apache Tribe v. Bracker*, the state imposed a motor vehicle licensing and fuel tax on non-tribal corporations operating solely within the bounds of the tribe's Indian Country.⁷⁰ The Supreme Court recognized two ways to invalidate a state tax within Indian Country, either of which was sufficient in and of itself to strip the state of jurisdiction: (1) federal law preemption and (2) infringement upon tribal self-government.⁷¹ To determine whether either factor precludes the tax, the Court determined that it must balance "the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law."⁷² Since the Bureau of Indian Affairs was heavily involved in the contracts between the tribe and the non-tribal corporations, and because the federal government had a strong interest in tribal economic development, the Court found that it would be contrary to federal policy to allow the state to impose its taxes.⁷³ As the "federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed," federal law precluded the tax, and the tax was invalid.⁷⁴

The *Bracker* preemption does not bar taxation in all circumstances that may impact tribal economic development, but a tribe must have generated some on-reservation value to justify it.⁷⁵ In *Washington v. Confederated Tribes of Colville Indian Reservation*, the state imposed a tax on sales of cigarettes to non-member residents within the reservation.⁷⁶ The Court stated that tribal interest in raising revenue for "essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation."⁷⁷ Even though the taxes the state wished to impose may have impacted tribal economic development, the Court

69. See, e.g., *Chickasaw Nation*, 515 U.S. at 459 (noting where the legal incidence of a tax falls on non-Indians, a state may assess the tax if the balance of interests weighs in favor of the state "and federal law is not to the contrary").

70. 448 U.S. 136, 137–38 (1980).

71. *Id.* at 142–43.

72. *Id.* at 145.

73. *Id.* at 147–48.

74. *Id.* at 148, 150.

75. See *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 156–57 (1980).

76. *Id.* at 160.

77. *Id.* at 156–57.

permitted those taxes since “the tax [was] directed at off-reservation value and . . . the taxpayer[s] [were] recipient[s] of state services.”⁷⁸ Therefore, where a product generates no value beyond simply being sold on the reservation (and providing a potential exemption from state tax), there is no significant burden on the tribe, and the tax is permissible.⁷⁹

As a result of the existing caselaw, states may not impose sales tax on either tribal members or the tribes themselves when the legal incidence of those taxes may fall on tribal entities.⁸⁰ Regardless, a state may impose a minimal burden on the tribe when it seeks to carry out a valid tax on non-Indians⁸¹ and when the tribe does not generate value within its Indian Country.⁸² Additionally, while states may generally tax non-tribal entities, they may not do so if the imposition of that tax would act in opposition to federal policy.⁸³

III. Taxes in Oklahoma

A. Income Tax

Oklahoma’s income tax statute provides revenue to several different initiatives, including education, public transportation, and tourism, among other general fund apportionments.⁸⁴ The tax affects both residents and non-residents who earn income in the state.⁸⁵ Due to the Supreme Court’s holding in *McClanahan v. State Tax Commission of Arizona*, it does not apply to member income earned from tribal entities in Indian Country.⁸⁶ Therefore, any tax on income earned within those parameters is impermissible, and the State must refund the tribal member taxpayer for any amount paid on that income.⁸⁷ Interestingly, the Oklahoma Income Tax Act does not explicitly state that income earned on land within Indian

78. *Id.*

79. *See id.* at 157.

80. *See, e.g.,* Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

81. *See, e.g.,* Dep’t of Tax’n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994).

82. *Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. at 156–57.

83. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147–48 (1980).

84. 68 OKLA. STAT. § 2352 (Westlaw through 1st Reg. Sess. of 58th Legis., 2021).

85. *Id.* § 2355.

86. *See* 411 U.S. 164, 181 (1973) (prohibiting collection of state income tax from an on-reservation tribal member).

87. 68 OKLA. STAT. § 2373.

Country is out of reach of the income tax statutes.⁸⁸ This omission may make the statutes unclear for readers who are unfamiliar with federal law in Indian Country. Regardless, federal law is binding and prevents the State from taking income tax from tribal members who live and work within their tribe's boundaries.⁸⁹

There is a three-year statute of limitations during which a taxpayer may request a refund for any overpayments—or any payments which the taxpayer disputes the legality of, such as those “derived from tax-exempt Indian land”—of Oklahoma income tax.⁹⁰ As such, the Oklahoma Tax Commission estimates that the only years for which members of Muscogee (Creek) Nation will be eligible to seek refunds pursuant to *McGirt v. Oklahoma*⁹¹ will be 2017 to 2019.⁹² Nevertheless, even with only three years available for refunds now that the State no longer has jurisdiction over the Muscogee (Creek) Nation reservation,⁹³ the estimated total of available refunds exceeds sixty-four million dollars.⁹⁴ The anticipated amount of refunded revenue is substantial, and the Oklahoma Tax Commission admits in its Report of Potential Impact that it is most likely a high estimate⁹⁵ and that at least some members of the Muscogee (Creek) Nation already claim this exemption and therefore will not seek a refund.⁹⁶

An exception to the general statute of limitations on income tax refunds exists specifically in Indian Country.⁹⁷ The limitations period simply does not apply to refunds for “claims filed by members of federally recognized Indian tribes or the United States on [their] behalf.”⁹⁸ When a tribal member (or the United States government) files “to recover taxes illegally collected

88. *See generally id.* §§ 2351–2355.

89. *See McClanahan*, 411 U.S. at 181.

90. 68 OKLA. STAT. § 2373.

91. 140 S. Ct. 2452, 2482 (2020) (reaffirming the existence of the Muscogee (Creek) reservation). Since the land in *McGirt* was Indian Country all along, any income tax that the state previously collected for income generated by tribal members who reside within the reservation is invalid. *See McClanahan*, 411 U.S. at 181.

92. REPORT OF POTENTIAL IMPACT, *supra* note 8, at 14.

93. *See generally McGirt*, 140 S. Ct. at 2461, 2482 (holding that Congress never revoked the tribe's treaty right to “full jurisdiction over enrolled Tribe members and their property” (internal quotation marks omitted)).

94. REPORT OF POTENTIAL IMPACT, *supra* note 8, at 16.

95. *Id.*

96. *Id.* at 17.

97. 68 OKLA. STAT. § 2373 (Westlaw through 1st Reg. Sess. of 58th Legis., 2021).

98. *Id.*

on bonus payments from oil and gas leases located on tax-exempt Indian lands,” the State additionally agrees to pay six-percent interest per year from the date of payment to the date of refund.⁹⁹

At present, the Oklahoma Tax Commission has not released data on how much this exception may impact total revenue.¹⁰⁰ As such, it is possible that there is no substantial projected impact on the State’s tax revenue due to bonus payments from oil and gas leases within the newly reestablished Muscogee (Creek) reservation. Compacts between the State and tribe may nevertheless help mitigate any possible impact the exemption from the statute of limitations and eligible refund payments may have on the State’s financial well-being.

B. Sales Tax

The presumption for sales tax in Oklahoma is that “all gross receipts are subject to tax until they are shown to be tax exempt.”¹⁰¹ Gross receipts include the total amount of consideration given for the object or service sold.¹⁰² Under Oklahoma law, the vendor bears the burden of collecting the tax¹⁰³ unless the vendor receives documentation certified by the Oklahoma Tax Commission that states the purchaser is exempt from that tax.¹⁰⁴ Though state sales tax in Indian Country is impermissible where the legal incidence falls on the tribe or one of its members,¹⁰⁵ Oklahoma’s sales tax code, like the income tax statute, does not specify generally that the burden of a tax may not fall on the tribe¹⁰⁶—instead, the code relies on judicial precedent to make that detail clear.¹⁰⁷

The Oklahoma Tax Commission report focuses on non-tribal vendors making sales to tribal members.¹⁰⁸ Those vendors bear the burden of

99. *Id.*

100. *See generally* REPORT OF POTENTIAL IMPACT, *supra* note 8.

101. OKLA. ADMIN. CODE § 710:65-1-4(a) (2021).

102. *Id.* § 710:65-1-9(a).

103. *Id.* § 710:65-7-2(a).

104. *Id.* § 710:65-7-6(b).

105. *Okl. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458–59 (1995).

106. *See generally* OKLA. ADMIN. CODE § 710:65.

107. *See* 68 OKLA. STAT. § 346(A)(1) (Westlaw through 1st Reg. Sess. of 58th Legis., 2021) (“Federal law recognizes the right of Indian tribes or nations to engage in sales of cigarettes and tobacco products to their members free of state taxation . . .”).

108. REPORT OF POTENTIAL IMPACT, *supra* note 8, at 19 (“Post-*McGirt*, vendors making exempt sales to members of the Creek Nation within the Creek Reservation will be required

collecting documentation from the tribal members proving their tribal citizenship and providing that documentation to the Tax Commission;¹⁰⁹ if the vendors do not provide the documentation proving exemption, the State may fine or imprison them.¹¹⁰

The Tax Commission report does not, however, address the more complicated issue of how tribal vendors and the State interact.¹¹¹ These interactions become increasingly complicated in transactions for cigarettes.¹¹² Fortunately, though neither the report nor the sales tax code addresses the tribe's relationship with the State in these situations, the tribes and state have found a mutually agreeable method of delineating rights: the compact.¹¹³ All Five Tribes have compacts with the State, but at present, the tobacco compact between Oklahoma and the Muscogee (Creek) Nation is most relevant, since the Muscogee (Creek) was the only tribe directly affected by *McGirt*; the remainder of the tribes are affected by the aftermath, but not directly implicated in the holding itself.¹¹⁴

Under Oklahoma's tobacco tax statutes, the governor has the power to enter into certain compacts with the tribes.¹¹⁵ The statutes also address beneficial exemptions specific to tribes that have entered into compacts with the State, such as the tobacco sales tax exemption for vendors making sales to compacting tribes.¹¹⁶ Compacting also makes the process for taxation less complicated, since the tribe and the State negotiate for mutually agreeable terms, and it does not require resorting to the more convoluted tobacco excise tax statute for non-compacting tribes.¹¹⁷

to verify eligibility for the exemption and maintain documentation showing the sale was made to a member of the Creek Nation, or risk facing liability for all uncollected taxes.”).

109. See OKLA. ADMIN. CODE § 710:65-7-6(b).

110. *Id.* § 710:65-7-2(a).

111. The report does not address the statute of limitations for tax other than income tax, either, but that statute of limitations extends for three years. 68 OKLA. STAT. § 227(b)(1). Likely the Oklahoma Tax Commission did not believe any refunds under this statute would be significant and, therefore, did not choose to include it.

112. See, e.g., Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 64 (1994); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 139 (1980).

113. See generally *Tribal Compacts and Agreements*, *supra* note 6.

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

115. 68 OKLA. STAT. § 346(C) (Westlaw through 1st Reg. Sess. of 58th Legis., 2021).

116. *Id.* § 419(2).

117. See generally *id.* § 349.1.

The most recent tobacco tax compact between the State and the Muscogee (Creek) Nation was revised by both parties in 2014.¹¹⁸ The compact begins by recognizing the tribe and the State as sovereign entities, each with power over its own domain, and reiterates that entry into that compact does not diminish the sovereignty of either.¹¹⁹ It then establishes the boundaries within which the compact will operate: all of “the Nation’s Indian Country as defined by federal law.”¹²⁰ The compact only governs sales made by Nation-owned businesses, the Nation’s members, or businesses that (1) are owned in majority by members and (2) have been licensed by the Nation.¹²¹ It places a variety of reporting requirements on the State and the Nation¹²² and allots the portion that each sovereign receives from the tax on tobacco transactions.¹²³ The tobacco transaction tax percentage initially favored the tribe, as it was set at thirty percent revenue apportionment to the State and seventy percent to the tribe.¹²⁴ But by the fourth year, the tax apportionment leveled to an even fifty percent for each party.¹²⁵ The compact will remain in effect until 2024, though the State and Nation may end or amend it at any time by mutual agreement.¹²⁶ The parties also confirm that the compact does not in any way authorize the State to “regulate the Nation’s government,” nor does it “alter tribal, federal, or state civil adjudicatory or criminal jurisdiction.”¹²⁷

Considering how complicated the Oklahoma tobacco taxation statutes are for non-compacting tribes,¹²⁸ it makes sense that the tribes would find benefit in compacting with the State to apportion tax revenues. Even so, there are benefits even beyond the obvious apportionment agreements from compacts—the State and the tribe may settle other disagreements as part of

118. *First Amended Tobacco Tax Compact Between the State of Oklahoma and the Muscogee (Creek) Nation of Oklahoma*, OKLA. SEC’Y STATE (Aug. 27, 2014) [hereinafter *First Amended Tobacco Tax Compact*], <https://www.sos.ok.gov/documents/filelog/90156.pdf>.

119. *Id.* at 1.

120. *Id.* at 2.

121. *Id.*

122. *Id.* at 3–4.

123. *Id.* at 4–5.

124. *Id.* at 5.

125. *Id.*

126. *Id.* at 10.

127. *Id.* at 11.

128. *See generally* 68 OKLA. STAT. § 349.1 (Westlaw through 1st Reg. Sess. of 58th Legis., 2021).

the compact.¹²⁹ In the 2014 amended compact between the Muscogee (Creek) Nation and the State of Oklahoma, an entire section is devoted solely to resolving a pending suit.¹³⁰ The Nation agreed to pay a settlement,¹³¹ and the State agreed both to drop its suit and to not file on the issue in the future.¹³² As this compact in particular shows, compacts between the tribes and the State are an effective vehicle for resolving disputes between the two sovereigns. Another such compact may be the best option for the State and tribes to resolve issues with refunds on tax in Indian Country moving forward.

IV. Oklahoma's Changing Landscape

A. McGirt and the Muscogee (Creek) Nation

In July 2020, the Supreme Court reaffirmed what indigenous people across the United States already knew: promises are made to be kept, and lands once granted to the Muscogee (Creek) Nation via treaty cannot be taken away without clear congressional intent.¹³³ When the Muscogee (Creek) moved to Oklahoma from their ancestral seat west of the Mississippi River, the United States signed a treaty for a “new and permanent home” that the Nation would “be allowed to govern themselves” without interference from states.¹³⁴ For many years, however, Oklahoma treated that new home as state territory, not Indian Country, and insisted that the Muscogee (Creek) reservation no longer existed.¹³⁵ Ultimately, states cannot make that call—only Congress has the authority to disestablish reservations, and if it “wishes to withdraw its promises, it must say so.”¹³⁶ The mere fact that keeping promises has become inconvenient is insufficient, and to allow a pattern of disregarded rights to amend the law would “elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”¹³⁷ As such, the Court

129. See, e.g., *First Amended Tobacco Tax Compact*, *supra* note 118, at 8 (settling “certain historical and legal disputes” between the Muscogee (Creek) Nation and the State of Oklahoma).

130. *Id.* at 8–9.

131. *Id.* at 8.

132. *Id.* at 9.

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

134. *Id.* (internal quotation marks omitted).

135. *Id.* at 2468–73.

136. *Id.* at 2482.

137. *Id.*

emphatically stated that the Muscogee (Creek) reservation still exists until Congress clearly disestablishes it.¹³⁸

While the issue in *McGirt* related solely to criminal, not civil jurisdiction,¹³⁹ the holding defined the Muskogee (Creek) territory as a reservation.¹⁴⁰ Therefore, the land clearly falls under the definition of Indian Country in the Major Crimes Act,¹⁴¹ on which many federal regulatory statutes rely to define boundaries.¹⁴² The State of Oklahoma was not the only one to express concerns over the possibility of repercussions based on this holding,¹⁴³ though; Chief Justice Roberts's dissenting opinion expressed similar sentiments as to the holding's scope.¹⁴⁴ Justice Gorsuch, writing for the majority, did not share those concerns.¹⁴⁵ While he recognized that the State's reliance interests are valid, he noted that "[m]any other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law."¹⁴⁶ Those doctrines have been used to great effect in cases like *City of Sherrill v. Oneida Indian Nation*, in which the Court held that laches barred the Oneida Nation from "reviv[ing] its ancient sovereignty" over the land.¹⁴⁷ There is no reason to believe that the State could not use laches to protect itself now if the Muscogee (Creek) Nation brought an unreasonable suit.

138. *Id.*

139. *Id.* at 2480 ("The only question before us . . . concerns the statutory definition of 'Indian [C]ountry' as it applies in federal criminal law under the [Major Crimes Act].").

140. *Id.* at 2482.

141. 18 U.S.C. § 1151 (including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and[] including rights-of-way running through the reservation" within the definition of Indian Country).

142. *McGirt*, 140 S. Ct. at 2480 (noting that a change in the definition of Indian Country within the Major Crimes Act "might potentially trigger a variety of federal civil statutes and rules" that make the region eligible for assistance with matters such as security, education, transportation, and health programs).

143. *Id.* at 2479.

144. *Id.* at 2482 ("The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.").

145. *Id.* at 2481.

146. *Id.*

147. 544 U.S. 197, 202–03, 221 (2005).

B. Beyond *McGirt*

McGirt has already inspired other tribes to seek reestablishment¹⁴⁸ and other inmates to file for release from their sentences.¹⁴⁹ In one such case, *Berry v. Braggs*, the petitioner sought immediate release from prison based on the Supreme Court's holding in *McGirt*.¹⁵⁰ Since "*McGirt* said nothing about whether major crimes committed within the boundaries of the Cherokee Nation Reservation must be prosecuted in federal court," the judge dismissed that portion of his claim.¹⁵¹ When its decision was issued, *McGirt* only directly applied to the Muscogee (Creek) Nation.¹⁵² As such, the other tribes' "treaties must be considered on their own terms."¹⁵³

Those other considerations have already occurred. Members of the other four of the Five Tribes—the Chickasaw,¹⁵⁴ Choctaw,¹⁵⁵ Cherokee,¹⁵⁶ and Seminole¹⁵⁷ Nations—have successfully filed suit to reestablish their own tribes' reservation boundaries, and the Oklahoma Criminal Appeals Court has affirmed the existence of each tribe's reservation.¹⁵⁸ The Supreme Court clearly mandated that unless Congress disestablishes a reservation, it

148. See *Bosse v. State*, 2021 OK CR 30, 499 P.3d 771 (Chickasaw Nation); *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867 (Choctaw Nation); *Hogner v. State*, 2021 OK CR 4, 500 P.3d 629 (Cherokee Nation); *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250 (Seminole Nation).

149. See *Berry v. Braggs*, No. 19-CV-0706-GKF-FHM, 2020 WL 6205849, at *5 (N.D. Okla. Oct. 22, 2020).

150. *Id.*

151. *Id.*

152. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2479 (2020).

153. *Id.*

154. *Bosse v. State*, 2021 OK CR 30, 499 P.3d 771.

155. *Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867.

156. *Hogner v. State*, 2021 OK CR 4, 500 P.3d 629.

157. *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250.

158. *Bosse*, 2021 OK CR 30, ¶ 12, 499 P.3d 771, 774 ("Applying the Supreme Court's analysis in *McGirt*, we . . . affirm the trial court's legal conclusion that the Chickasaw Reservation was never disestablished by Congress, and the lands within its historic boundaries are Indian Country."); *Sizemore*, 2021 OK CR 6, ¶¶ 15–16, 485 P.3d 867, 870–71 ("[T]he State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation . . ."); *Hogner*, 2021 OK CR 4, ¶ 18, 500 P.3d 629, 635 ("We also find the District Court appropriately applied *McGirt* to determine that Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Reservation . . ."); *Grayson*, 2021 OK CR 8, ¶¶ 11–12, 485 P.3d 250, 254 ("By using the analysis set out in *McGirt*, Congress has not explicitly erased the reservation boundaries and disestablished the Seminole Nation Reservation.").

remains extant.¹⁵⁹ As such, the State has, perhaps begrudgingly, been forced to recognize the reservations of each tribe because the treaties permit it.¹⁶⁰

V. Mitigating the Impact of McGirt on Oklahoma's Tax Revenue

The State has entered into hundreds of compacts with the tribes of Oklahoma, spanning a wide variety of topics from taxation to cross-deputization of law enforcement.¹⁶¹ The sheer volume of compacts already in existence makes it clear that the State and tribes are eminently capable of negotiating for an outcome agreeable to both parties, leading Justice Gorsuch to acknowledge that “Oklahoma and its Tribes have proven that they can work successfully together as partners.”¹⁶²

Oklahoma Attorney General Mike Hunter evidently agreed that a compact is the best way to deal with many of the issues arising under *McGirt*, from criminal to civil jurisdiction.¹⁶³ He acknowledged that “compacts on taxation have the possibility of easing the administration of state and tribal tax laws, increasing revenue to the tribe, and bringing certainty to state and local governments as to the revenue impact of *McGirt*.”¹⁶⁴ It is true that the State stands to lose millions in revenue from income and sales taxes in Muscogee (Creek) territory.¹⁶⁵ The State, however, has also received millions of dollars in revenue from compacts such as the tobacco compact with the Muscogee (Creek).¹⁶⁶ Therefore, though the State may lose revenue, that need not be the end—the State stands to gain other benefits in its stead.

The Chickasaw Nation, for example, already provides a variety of services to members, regardless of whether they live on or off tribal land.¹⁶⁷ Those services span a variety of areas, from housing and employment

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

160. *See id.* at 2479.

161. *See Tribal Compacts and Agreements*, *supra* note 6.

162. *McGirt*, 140 S. Ct. at 2481.

163. Letter from Mike Hunter, Oklahoma Att’y Gen., to Jim Inhofe, Sen., et al. (Oct. 21, 2020), https://www.oag.ok.gov/sites/g/files/gmc766/f/oag_letter_to_senate_house_tribes_october_2020_0.pdf.

164. *Id.* at 3.

165. REPORT OF POTENTIAL IMPACT, *supra* note 8, at 16, 18.

166. *Id.* at 21 (“During the last two fiscal years, the State received over \$73 million in cigarette and tobacco tax collections as a result of compact sales.”).

167. *See Services*, CHICKASAW NATION, <https://chickasaw.net/Services.aspx> (last visited June 17, 2022).

assistance to elder protection, and even to health services.¹⁶⁸ The Chickasaws are far from the only Oklahoman tribe to extend such services to members, either. During the COVID-19 pandemic, the Osage Nation used its allotted forty-five million dollars in Coronavirus Aid, Relief, and Economic Security (CARES) Act funding to build a meat-packing facility, a produce warehouse, and a fish farm to provide food for citizens not only in the short term, but also in the years to come.¹⁶⁹ Some tribes, including the Cherokee,¹⁷⁰ Chickasaw,¹⁷¹ and Choctaw¹⁷² Nations, even provided COVID-19 vaccines to the general public at no cost. Additionally, the Cherokee Nation donates “nearly half a million dollars to . . . rural fire departments”¹⁷³ at its annual volunteer firefighter ceremony.¹⁷⁴

This is only a snapshot of what a few of the tribes in Oklahoma are already doing to aid both their own members and citizens of the State. If tribes receive more funding, it is likely that they would only step up their efforts at helping the community at large. Even if the State loses revenue from taxes, if tribes gain more resources, they will have the capacity to expand services and take over areas that the State currently directs. If the State and tribes make compacts to clearly delineate how funds will be used,

168. *Id.*

169. Tony Russell, *Tribes in Oklahoma Using CARES Fund to Create Food Supply*, KJRH (Oct. 16, 2020, 12:32 PM), <https://www.kjrh.com/news/local-news/tribes-in-oklahoma-using-cares-fund-to-create-food-supply>.

170. *Health Services*, CHEROKEE NATION, <https://health.cherokee.org/covid-19/covid-19-vaccine/> (last visited Mar. 21, 2022) (“Any member of the public, 5 years and older, regardless of where they live, is eligible to receive the COVID-19 vaccine. Walk-ins are welcome at any of the tribe’s outpatient health centers . . .”).

171. *COVID-19 Vaccine*, CHICKASAW NATION, <https://chickasaw.net/OurNation/Community/COVID-19/COVID-19-Vaccine.aspx> (last visited Mar. 21, 2022) (“Vaccinations are available to the public at no cost. There are no citizenship, employment, or residency requirements to be eligible.”).

172. *COVID-19 Vaccine Information*, CHOCTAW NATION, <https://www.choctawnation.com/covid-19> (last visited Mar. 21, 2022) (“The COVID-19 vaccination is now available to anyone 5 years and older at any Choctaw Nation Clinic.”).

173. *Cherokee Nation Gives \$476K to Fire Departments*, TAHLEQUAH DAILY PRESS (May 17, 2019), https://www.tahlequahdailypress.com/news/tribal_news/cherokee-nation-gives-476k-to-fire-departments/article_af809f05-840c-5c8f-985e-b9948496ae1.html.

174. *Id.*; see also K. Query, *Cherokee Nation Donates to 136 Rural Oklahoma Fire Departments*, KFOR-TV (Jul. 2, 2020, 9:43 AM CDT), <https://kfor.com/news/local/cherokee-nation-donates-to-136-rural-oklahoma-fire-departments/>; *Cherokee Nation Donates More Than \$451,000 to Oklahoma Fire Departments*, CHEROKEE ONE FEATHER (July 1, 2014), <https://www.theonefeather.com/2014/07/cherokee-nation-donates-more-than-451000-to-oklahoma-fire-departments/>.

that can remove much of the uncertainty over how services will continue to exist and who will pay for them. States may no longer be able to tax the income of members living on their tribe's Indian Country,¹⁷⁵ but tribes will. With a compact, like the tobacco compact between the Muscogee (Creek) Nation and the State, the two sovereigns can negotiate what percentage of revenue each will receive and who will administer the taxes.¹⁷⁶ Such a compact would simplify the process while still ensuring that the governments each receive necessary funding for public services.

The most likely bar to the future of compacts between the State and tribes is an unwillingness to compromise. Before the end date of the existing gaming compact, Governor Stitt reached out to tribes to renegotiate the percentage of revenue that would go to the State, but negotiations stalled.¹⁷⁷ As a result, several of the tribes involved in the dispute filed suit in district court to determine whether the compact had automatically renewed, as the tribes believed, or had expired, as Governor Stitt alleged.¹⁷⁸ The court held that, given the terms of the compact, the tribes were correct that the State had already taken the necessary actions for the compact to renew.¹⁷⁹ As such, the tribes could continue with gaming operations as they had been up to that point.¹⁸⁰ A sovereign cannot unilaterally force another sovereign to the table. That is contrary to the very core of sovereignty, which recognizes that a sovereign must be able to govern and regulate itself.¹⁸¹

For compacts between the State and tribes to solve the revenue problem, the State and tribes must treat each other as equals and respect the needs of the other. It is understandably inconvenient for the State to face losses as a result of honoring the treaties between Congress and the tribes that were formed hundreds of years ago.¹⁸² The State did rely on its understanding that the reservations no longer existed and is facing a change in its landscape that it did not anticipate.¹⁸³ Even so, as Justice Gorsuch so

175. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 181 (1973).

176. *See generally First Amended Tobacco Tax Compact*, *supra* note 118, at 4–5.

177. K. Querry, *Federal Court: Oklahoma's Tribal Gaming Compacts Automatically Renewed Jan. 1*, KFOR-TV (Jul. 28, 2020, 4:22 PM CDT), <https://kfor.com/news/local/federal-court-oklahomas-tribal-gaming-compacts-automatically-renewed-jan-1/>.

178. *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277, 1278–79 (Okla. 2020).

179. *Id.* at 1283.

180. *See id.*

181. *See Williams v. Lee*, 358 U.S. 217, 220 (1959).

182. *See generally McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460–62 (2020).

183. *See id.* at 2478–79.

eloquently stated, “Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.”¹⁸⁴ The inconvenience does not overcome the legal truth. Therefore, the State must come to the tribes as an equal and work with them as equals to best serve all citizens within the state’s boundaries, both tribal and non-tribal. Compacts will enable the state and the tribes to come to a mutually beneficial agreement; now the leaders of each must come to the table prepared to work together to serve the communities that elected them.

VI. Conclusion

Following *McGirt*, Oklahoma faces uncertainty as to its tax revenue. It has understandable concerns about how it will continue to fund vital services for its residents and how it will traverse the complicated landscape of state tax within Indian Country. If the State and tribes can work together to make compacts, they can mitigate the impact of those concerns. With increased revenue, tribes can provide more services to people living on tribal land and citizens at-large, reducing the burden on states.

Given the sheer number of compacts, tribes have shown time and again that they are willing to work with the State to achieve an end that will benefit both parties. The State should meet that willingness to negotiate with equal alacrity and take advantage of the opportunity to compact. The State and the tribes are equal sovereigns and must meet as equals, without the obstinacy and infighting that heralded the suit over gaming compacts.¹⁸⁵

The State stands to gain much from working with the tribes over tax revenue; tribes may take over essential functions for which the State is currently expending resources so that the State may focus more on other matters. And though some revenue may be lost, the State may yet achieve overall gain by simply cooperating with tribes. Oklahoma’s Attorney General¹⁸⁶ and Tax Commission¹⁸⁷ have both recognized the value of compacts and urged them as the best method for dealing with the newly reestablished reservations. These compacts are the best way to respect the sovereignty of each party, as well as provide desperately needed resources. In the days to come, the tribes must be patient as they have always been while the system works to restore the sovereignty that has always been their

184. *Id.* at 2482.

185. *See generally Stitt*, 475 F. Supp. 3d at 1277.

186. *See* Letter from Mike Hunter to Jim Inhofe, *supra* note 163, at 3.

187. *See* REPORT OF POTENTIAL IMPACT, *supra* note 8, at 20–21.

own. The State must be patient as well as it navigates territory that it thought to be well settled but must remember that this jurisdiction was unfairly stripped from the tribes and is merely being returned to its rightful place. In a post-*McGirt* world, there is no need for concern on how the tribes and state will continue to function, both together and as separate entities, so long as they can respect each other and come to an accord.

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