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

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The U.S. Supreme Court's recent decision in *McGirt v. Oklahoma* held that land in eastern Oklahoma reserved for the Creek Nation since the 19th century remains a reservation for the purpose of a federal statute that gives the federal government exclusive jurisdiction to try certain major crimes committed by "[a]ny Indian" in "the Indian country." As a result, Oklahoma state courts had no jurisdiction to convict petitioner Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, of three serious sexual offenses that took place on the reservation.

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

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

Underlying this longstanding arrangement was the widely accepted assumption that the Indian lands at issue did not qualify as a "reservation" or "Indian country" under federal law. That assumption mattered because reservation status often determines whether tribal (and federal) or state law applies on the land in question. The statutory definition of "Indian county" at issue in *McGirt*, for example, "generally applies to questions of civil jurisdiction" even though "by its terms [it] relates only to federal criminal jurisdiction," as stated in *Alaska v. Native Village of Venetie Tribal Government*. As a result, reservation status will often support tribal assertions of regulatory authority over lands within reservation boundaries. For example, the Supreme Court held in *Montana v. United States* that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

Thus, without congressional intervention, the Supreme Court's recent designation of half of Oklahoma as "Indian Country" likely will upend Oklahoma's settled regulatory regime as administrative authority shifts from the OCC to tribal and federal control. In addition to new and potentially burdensome tax liabilities, operators in the region may face challenges to their rights to operate wells on land that now lies within the boundaries of the reservation. The tribes also may assert authority to promulgate environmental regulations under various federal statutes. If they do, operators in the region could face a dizzying array of regulatory obligations emanating from various tribal and state administrative authorities.

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

State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." This test mires state efforts to regulate on reservation

lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.

In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a "consensual relationship[] with the tribe or its members" or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." Tribes may also impose certain taxes on non-Indians on reservation land, and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens. (Citations and footnotes were omitted from quote).

Whether and to what extent this parade of horribles will come to pass remains to be seen. Two things do seem clear, though:

- Until the open questions are resolved, regulated parties operating in eastern Oklahoma will face an especially complex tangle of regulatory challenges, and

- Resolving those questions almost certainly will require extensive litigation both in federal courts and before federal agencies.

You can read the full text of the opinion at *McGirt v. Okla., No. 18-9526* (U.S. Jul. 9, 2020).

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