

TOWARD TRIBAL SOVEREIGNTY: ENVIRONMENTAL
REGULATION IN OKLAHOMA AFTER *MCGIRT*

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INTRODUCTION

In the landmark decision *McGirt v. Oklahoma*, the Supreme Court held that the Muscogee (Creek) Nation’s reservation in eastern Oklahoma had never been disestablished by Congress, and it thus remained “Indian country” under federal law for purposes of criminal jurisdiction.¹ This decision also carried the potential to alter the regulatory landscape of Oklahoma in a number of substantive areas.² This Comment focuses on the implications of *McGirt* for environmental regulation.

A number of key federal environmental laws require that state agencies administer and implement certain programs.³ Thus, prior to *McGirt*, when eastern Oklahoma was thought to be land over which the state had jurisdiction, the State of Oklahoma maintained these environmental programs.⁴ But *McGirt* raised the opportunity to rethink jurisdiction, and who is responsible for administering federal environmental programs is an open question.

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1. 140 S. Ct. 2452, 2459 (2020). “Indian country” is a legal term that refers to (a) 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, (b) 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, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2018). “Indian Country,” with both words capitalized, is a broader colloquial term that “refer[s] more generally to tribal governments, Native communities, cultures, and peoples.” Nat’l Cong. of Am. Indians, Tribal Nations and the United States: An Introduction 26 (2020), https://www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web.pdf [<https://perma.cc/5DGP-VUBE>]. This Comment uses both terms, as appropriate.

2. See *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) (“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.”).

3. See *infra* section I.A.

4. See *infra* section I.C.

Or rather, it *was* an open question. On October 1, 2020, the Administrator of the Environmental Protection Agency (EPA) granted a request from the State of Oklahoma to continue administering its environmental programs in Indian country, pursuant to an obscure provision secretly slipped into a 2005 statute.⁵ This decision appears to keep “business as usual,” but viewed through a different lens, it is an abrogation of tribal sovereignty with serious implications for both the tribal nations and the environment.

This Comment proceeds in three parts. Part I describes the regulatory programs under federal environmental statutes and the involvement of states and tribal nations. It also presents the landscape of environmental regulation in Oklahoma specifically. Part II discusses *McGirt v. Oklahoma*, its potential to allow for environmental regulation by tribal nations in Oklahoma, and the actions subsequently taken by the state to curtail tribal authority. It then contemplates what environmental regulation is likely to look like under the current jurisdictional boundaries. Finally, finding this outlook grim, Part III argues for the use of cooperative agreements between the state and tribal nations in environmental regulation, asserting that this arrangement benefits the tribal nations, the State of Oklahoma, and the environment.⁶

I. THE FRAMEWORK OF ENVIRONMENTAL REGULATION IN INDIAN COUNTRY

This Part provides background on environmental regulation. Section I.A explains the basic structure of many federal environmental laws, in which the federal government delegates administration of programs to the states. Section I.B describes two ways in which tribal nations are directly involved in environmental regulation. Section I.C narrows in on Oklahoma, detailing the environmental regulation by state agencies and the Five Tribes of Oklahoma,⁷ whose lands are impacted by the decision in *McGirt*.

5. See *infra* sections II.A, II.C.

6. A note on the terminology: Although “Indian tribe” is the term used in most of federal Indian law, this Comment uses “tribal nations” as a means of linguistically undergirding the principle of tribal sovereignty. See Steven Newcomb, *On the Words ‘Tribe’ and ‘Nation’*, *Indian Country Today* (Dec. 8, 2004), <https://indiancountrytoday.com/archive/on-the-words-tribe-and-nation-NUTfP-tyU0uqza8cle2BSg> [<https://perma.cc/WG3W-RZNV>] (last updated Sept. 12, 2018). The two exceptions to this are when referencing the Five Tribes of Oklahoma and when “tribe” is used in direct quotations.

7. These five tribal nations—the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations—were traditionally referred to as the “Five Civilized Tribes,” see *McGirt*, 140 S. Ct. at 2483 (Roberts, C.J., dissenting), but this term has been criticized for its Eurocentric understanding of “civilization,” see, e.g., Michael D. Green, *The Five Tribes of the Southeastern United States*, in *Historical Atlas of Oklahoma* 52, 52 (Charles Robert Goins & Danney Goble eds., 4th ed. 2006) (arguing that the “concept of the ‘Five Civilized Tribes’ . . . is an ethnocentric idea that is no longer meaningful”). This Comment uses “Five Tribes” or “Five Tribes of Oklahoma.”

A. *State Authority Under Federal Environmental Statutes*

Many federal environmental statutes delegate a significant regulatory role to the states, requiring them to administer regulatory programs pursuant to federal standards or approval.⁸ For example, under the Clean Water Act (CWA), states must set water quality standards for navigable waters, subject to federal approval.⁹ Under the Clean Air Act (CAA), the EPA sets air quality standards for certain pollutants,¹⁰ and each state must develop a State Implementation Plan showing how the state will achieve compliance with the federal standards.¹¹

In addition to being an effective means of mitigating environmental problems like water and air pollution,¹² this model also serves to promote state authority. By creating a regulatory role for states, these statutes enable the growth of state environmental bureaucracies, which are then able to set their own regulatory agendas and priorities as they develop expertise.¹³

B. *Tribal Authority for Environmental Regulation*

Tribal authority to enact environmental regulations can come from one of two sources: inherent sovereignty¹⁴ or delegation of federal authority to tribal nations by Congress through a treaty or statute.¹⁵ The latter—the ability to delegate federal authority to tribal nations—comes

8. See *New York v. United States*, 505 U.S. 144, 167–68 (1992) (listing examples of federal environmental laws with this regulatory scheme).

9. CWA § 303(c), 33 U.S.C. § 1313(c) (2018). “Navigable waters” is the jurisdictional hook for federal jurisdiction. See *id.* § 1362(7).

10. CAA § 109, 42 U.S.C. § 7409 (2018).

11. *Id.* § 7410.

12. See, e.g., *Benefits and Costs of the Clean Air Act 1990–2020, the Second Prospective Study*, EPA, <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study> [<https://perma.cc/PMF9-5A5K>] (last updated Dec. 15, 2020).

13. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 *Md. L. Rev.* 1183, 1224 (1995).

14. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 *Colum. J. Env’t L.* 42, 54 (2014) [hereinafter *Kronk Warner, Examining Tribal Environmental Law*]; see also *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that the Cherokee Nation’s sovereignty is inherent and thus not “operated upon” by the Fifth Amendment); Cohen’s *Handbook of Federal Indian Law* § 4.01[1][a], at 207 (Nell Jessup Newton, Robert T. Anderson, Bethany R. Berger, Carole E. Goldberg, John P. LaVelle, Judith V. Royster, Joseph William Singer & Kevin Washburn eds., 2012) (“Perhaps the most basic principle of all Indian law . . . is that those powers lawfully vested in an Indian nation are . . . ‘inherent powers of a limited sovereignty which has never been extinguished’” (quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978))).

15. Kronk Warner, *Examining Tribal Environmental Law*, *supra* note 14, at 56. While some statutes delegate federal power, others affirm or recognize inherent power. Cohen’s *Handbook of Federal Indian Law* § 4.01[1][a], *supra* note 14, at 211.

from the Indian Commerce Clause¹⁶ and Congress's plenary power over Indian affairs.¹⁷

One way the EPA has delegated its authority to tribal nations is through "treatment in a similar manner as a state" (TAS)¹⁸ provisions in the CAA, CWA, and Safe Drinking Water Act (SDWA).¹⁹ If a tribal nation meets certain requirements,²⁰ it can obtain TAS status and authorization to develop environmental regulatory programs.²¹ For example, a tribal nation with TAS status under the CAA can develop a Tribal Implementation Plan,²² which is akin to a State Implementation Plan.²³ Similarly, a tribal

16. U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

17. See *United States v. Kagama*, 118 U.S. 375, 380 (1886) ("[T]his power of Congress to organize territorial governments [of Indian nations], and make laws for their inhabitants, arises . . . from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else." (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885))).

18. These provisions were originally called "treatment as a state" and were changed to "treatment in a similar manner as a state" upon assertions that the former term insinuated that tribal sovereignty was lesser than state sovereignty. Lane R. Neal, Note, Highway Appropriations Bill Shapes Tribal Sovereignty: A Look at Oklahoma Tribes' Ability to Set Environmental Standards in Light of Recent Federal Legislation, 32 *Am. Indian L. Rev.* 219, 222 n.19 (2007); see also Tribal Assumption of Federal Laws—Treatment as a State (TAS), EPA, <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas> [<https://perma.cc/XLE6-PAV2>] [hereinafter Treatment as a State] (last updated Mar. 17, 2021).

19. Treatment as a State, *supra* note 18. Two other major environmental statutes, the Toxic Substances Control Act and the Emergency Planning and Community Right-to-Know Act, are silent on the role of tribal nations, which the EPA has interpreted to authorize tribal participation. *Id.* Still other environmental laws—including the Comprehensive Environmental Response, Compensation, and Liability Act and the Federal Insecticide, Fungicide, and Rodenticide Act—allow tribal nations to enter into cooperative agreements with the EPA. *Id.*

20. The exact requirements for TAS under each of the three statutes vary, but the basic criteria for eligibility are that the tribal nation must be federally recognized, have a governing body carrying out substantial governmental duties and powers, have appropriate authority, and be capable of carrying out the functions of the program. Treatment as a State, *supra* note 18; see also CWA § 518(e), 33 U.S.C. § 1377(e) (2018); SDWA § 1451, 42 U.S.C. § 300j-11 (2018); CAA § 301(d), *id.* § 7601(d). To determine whether a tribal nation has "appropriate authority," courts often apply the test from *Montana v. United States*, 450 U.S. 544, 565–66 (1981). See *infra* note 38.

21. See, e.g., 33 U.S.C. § 1377(e) ("The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 . . .").

22. See 42 U.S.C. § 7601(d)(3) ("The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof."). The regulations are codified at 40 C.F.R. § 49.1–11 (2019).

23. See *supra* notes 10–11 and accompanying text.

nation with TAS status under the CWA can be authorized to develop its own water quality standards.²⁴

Out of the 574 federally recognized tribal nations,²⁵ approximately one hundred have TAS status and operate an environmental regulatory program.²⁶ One reason TAS is not more widespread may be that historical federal Indian policy has often made tribal nations dependent on the federal government, which in turn means that they do not have the infrastructure or capacity to meet the requirements for TAS status.²⁷ Similarly, TAS has been criticized for “appear[ing] to augment the authority of tribes but in fact diminish[ing] tribal sovereignty.”²⁸ That is, although TAS gives the impression of promoting tribal autonomy, by requiring tribal nations to act within the framework of federal law, it might actually impede it.²⁹

Tribal nations also have authority to regulate the environment stemming from inherent tribal sovereignty.³⁰ Since “the powers of local self government enjoyed by [tribal nations] existed prior to the Constitution,”³¹ tribal nations retain these powers unless Congress divests tribal nations of them.³² The EPA expressly affirmed this in a policy statement, its 1984 Indian Policy, declaring that it would pursue principles of working with tribal nations in government-to-government relationships

24. See EPA Off. of Sci. & Tech., *TAS for the Water Quality Standards Program* (2017), <https://www.epa.gov/sites/production/files/2017-07/documents/tas-overview-wqs.pdf> [<https://perma.cc/2GCN-9X4K>]; cf. *supra* note 9.

25. *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5462, 5462–67 (Jan. 30, 2020).

26. *Tribes Approved for Treatment as a State (TAS)*, EPA, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas> [<https://perma.cc/L75S-RH75>] [hereinafter *Tribes Approved for TAS*] (last updated May 11, 2021).

27. See Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 *Wm. Mitchell L. Rev.* 533, 557–59 (2010).

28. Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 *J. Nat. Res. & Env't L.* 35, 45 (2004).

29. *Id.*; see also Hillary M. Hoffman, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 *Or. L. Rev.* 353, 357 (2019) (arguing that congressional plenary power and TAS status is “anathema to true tribal environmental sovereignty”).

30. Kronk Warner, *Examining Tribal Environmental Law*, *supra* note 14, at 54.

31. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581–82 (1832) (“By various treaties, the Cherokees have placed themselves under the protection of the United States But such engagements do not divest them of the right of self government, nor destroy their capacity to enter into treaties or compacts.”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (recognizing Indian tribes as “domestic dependent *nations*” (emphasis added)).

32. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (“In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos’ primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.”).

and recognizing them as the primary parties for regulatory responsibilities.³³ In 2019, the EPA formally reaffirmed this policy, “recogniz[ing] the right of tribes as sovereign governments to self-determination.”³⁴

Pursuant to their inherent sovereignty, tribal nations have enacted environmental codes to regulate air and water pollution, solid waste, and environmental quality.³⁵ “[S]ome tribes [have also moved] entirely beyond the federal scheme to regulate in new arenas—such as in response to climate change”³⁶ Thus, tribal nations have used their inherent sovereignty not only to regulate the environment in familiar ways but also to address new problems that have arisen.

An important difference between regulation via tribal sovereignty and regulation via federal delegation is over whom the tribal nation has jurisdiction. Within Indian reservations, nonmembers and non-Indians may own fee land.³⁷ Tribal nations have been divested of their inherent sovereignty over nonmembers on such land, unless one of the two exceptions described in *Montana v. United States* is applicable.³⁸ Thus, a

33. William D. Ruckelshaus, EPA, EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984), <https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf> [<https://perma.cc/3K7J-ZYL2>].

34. Andrew R. Wheeler, EPA, Reaffirmation of the U.S. Environmental Protection Agency’s Indian Policy (2019), https://www.epa.gov/sites/production/files/2019-04/documents/10apr19memo_reaffirming_epas_1984_indian_policy.pdf [<https://perma.cc/T75T-R4L5>].

35. See Kronk Warner, Examining Tribal Environmental Law, *supra* note 14, at 63–73 (finding, from a survey of seventy-four federally recognized tribal nations, that four had enacted laws for regulating air pollution, twenty-three for water pollution, twenty-seven for solid waste management or disposal, and nine for environmental quality); see also Elizabeth Ann Kronk Warner, Tribes as Innovative Environmental Laboratories, 86 U. Colo. L. Rev. 789, 837–38 (2015) [hereinafter Kronk Warner, Tribes as Laboratories] (finding from the same survey that half of those who regulated water pollution did so on the basis of inherent tribal sovereignty).

36. Kronk Warner, Tribes as Laboratories, *supra* note 35, at 838–39. For example, the Confederated Salish & Kootenai Tribes have adopted a Climate Change Strategic Plan that “includes a discussion of the characteristics and history of the Tribes, the climate impacts addressed by the Plan, the planning focus, a vulnerability and risk assessment, goals and actions, and an implementation plan.” *Id.* at 841. For more on tribal climate change regulation, see generally Morgan Hepler & Elizabeth Ann Kronk Warner, Learning from Tribal Innovations: Lessons in Climate Change Adaptation, 49 *Env’t L. Rep.* 11,130 (2019) (discussing the climate change adaptation plans and innovations of several tribal nations); Dylan R. Hedden-Nicely, Opinion, Tribal Regulatory Authority to Combat Climate Change, *Regul. Rev.* (Mar. 22, 2021), <https://www.theregreview.org/2021/03/22/hedden-nicely-tribal-regulatory-authority-climate-change> [<https://perma.cc/XEX4-DUVM>] (noting recent examples of the effects of climate change on tribal nations and the legal barriers confronting tribal nations seeking to regulate climate change).

37. See Kronk Warner, Examining Tribal Environmental Law, *supra* note 14, at 57.

38. 450 U.S. 544 (1981). Under *Montana*, tribal nations do not have civil regulatory authority over nonmembers on their reservations, with two exceptions: (1) Tribal nations may regulate a nonmember who has entered into a consensual relationship with the tribal nation or its members, such as through contracts or leases, and (2) tribal nations may

tribal environmental code enacted pursuant to inherent sovereignty generally only applies to members of the tribal nation.³⁹ Acting through delegated federal authority, however, tribal nations may have jurisdiction over nonmembers and non-Indians, even on fee land.⁴⁰ Thus, the reach of environmental regulation through TAS status is greater than that of regulation through inherent sovereignty, particularly where many non-Indians own fee land within reservation boundaries, as is now true of much of eastern Oklahoma.⁴¹

C. *Environmental Regulation in Oklahoma Before McGirt*

Oklahoma is home to thirty-nine federally recognized tribal nations,⁴² but the state is responsible for much of the environmental regulation, with a number of departments administering programs under federal statutes.⁴³ The state's regulatory jurisdiction has long included eastern Oklahoma, which is the land that was promised by Congress to the Five Tribes—the Cherokee, Choctaw, Muscogee (Creek), Seminole, and Chickasaw Nations—and that is implicated by the decision in *McGirt*.⁴⁴

Tribal nations in Oklahoma have, however, still regulated the environment. Only one of the Five Tribes has TAS status—the Cherokee Nation, for lead abatement and CAA permitting programs.⁴⁵ Some of the Five Tribes have also adopted their own environmental laws: For example, the Cherokee Nation has its own Clean Air Act, Solid Waste Code, Water

regulate nonmembers to the extent that their conduct threatens or affects the political integrity, economic security, or health or welfare of the tribal nation. *Id.* at 565–66.

39. Kronk Warner, Examining Tribal Environmental Law, *supra* note 14, at 58–59.

40. *Id.*

41. Rhett Morgan, *McGirt* Decision Impact on State Oil and Gas Industry Examined During OEPA Briefing with State Legislators, *Tulsa World* (Jan. 28, 2021), https://tulsa-world.com/business/local/mcgirt-decision-impact-on-state-oil-and-gas-industry-examined-during-oepe-briefing-with-state/article_4ea1963a-60ab-11eb-aed8-3364c5c809c1.html [<https://perma.cc/CD83-Q7LS>] (last updated Mar. 6, 2021) (“The Oklahoma lands, which are . . . reservations, 90 percent of those who reside on these lands are non-Indians.” (quoting Mike Hunter, Okla. Att’y Gen.)).

42. Oklahoma’s Native Nations, Univ. of Okla., <https://www.ou.edu/cas/nas/resources/tribal-information> [<https://perma.cc/73MH-T7PR>] (last updated Sept. 18, 2020).

43. See Letter from J. Kevin Stitt, Governor, State of Okla., to Andrew Wheeler, Adm’r, EPA, at 2–3 (July 22, 2020) (on file with the *Columbia Law Review*) [hereinafter Stitt Letter].

44. See Letter from Andrew R. Wheeler, Adm’r, EPA, to J. Kevin Stitt, Governor, State of Okla., at 3 (Oct. 1, 2020) (on file with the *Columbia Law Review*) [hereinafter Wheeler Letter] (“Prior to *McGirt*, the State had, as a practical matter, implemented environmental programs in much of the area that was held by the Supreme Court to be Indian country.”).

45. See Tribes Approved for TAS, *supra* note 26. Indeed, only five of Oklahoma’s thirty-nine federally recognized tribal nations have TAS status at all. See *id.*

Quality Code, and Hazardous Waste Code.⁴⁶ Regulation under the federal statutes, however, has rested primarily with the state agencies.⁴⁷

These overlapping, crisscrossing authorities of tribal nations, states, and the federal government have created many layers of environmental regulation in Oklahoma. In turn, they have created opportunity for the state to intrude upon tribal authority.

II. THE RISE AND FALL, AND RISE, AND FALL OF TRIBAL AUTHORITY

This Part describes how the State of Oklahoma has claimed and maintained environmental regulatory authority at the expense of the tribal nations. Section II.A describes the events that led to the enactment of “the SAFETEA midnight rider” in 2005. Section II.B then explains the details of *McGirt* and its potential implications for environmental regulation. While some feared that the outcome in *McGirt* would lead to destabilization and “chaos,”⁴⁸ any imagined chaos or changes to the environmental regulatory system were promptly shut down by the governor of Oklahoma and the EPA Administrator’s subsequent use of the midnight rider, as described in section II.C. Section II.D then contemplates what may happen in the realm of environmental regulation in the aftermath of *McGirt* and the use of the midnight rider.

A. *The Midnight Rider*

A series of events in 2004 and 2005 effectively denied any tribal nations in Oklahoma the ability to assume regulatory authority under federal law. In November 2004, in response to the Pawnee Nation of Oklahoma gaining TAS status,⁴⁹ the State of Oklahoma filed a lawsuit challenging this decision, citing a “fear[] that the other tribes in the state might seek the same status, resulting in dozens of different, and possibly competing, standards.”⁵⁰ Senator Jim Inhofe of Oklahoma requested an investigation into the EPA’s handling of TAS applications in the state.⁵¹

But Inhofe also went a step further. In 2005, Congress was working toward passing a highway transportation bill, the Safe, Accountable,

46. See Cherokee Nation Code tit. 27, §§ 401, 601, 900, 1301 (2020), <https://attorneygeneral.cherokee.org/media/5upcrg3j/word-searchable-full-code.pdf> [<https://perma.cc/S9UG-BLVC>].

47. See *supra* note 44.

48. Niina H. Farah, Tribal Lands Ruling: ‘Total Chaos’ for Oil?, E&E News: Energywire (July 10, 2020), <https://www.eenews.net/stories/1063536563> [<https://perma.cc/W6AG-H46S>].

49. See Letter from Richard E. Greene, Reg’l Adm’r, EPA, to George Elton Howell, President, Pawnee Nation of Okla. (Nov. 4, 2004) (on file with the *Columbia Law Review*).

50. EPA Case on Tribal Sovereignty Attracts Attention, Indianz.com (June 7, 2005), <https://www.indianz.com/News/2005/008611.asp> [<https://perma.cc/WC5H-9LFQ>].

51. *Id.*

Flexible, Efficient Transportation Equity Act (SAFETEA).⁵² After the Senate and House of Representatives agreed on the final version of the bill, Inhofe tacked in a midnight rider,⁵³ unbeknownst to tribal leaders or, indeed, really anyone.⁵⁴

The rider effectively prevents any tribal nations in Oklahoma from participating in environmental regulation under the federal statutes without approval from the state.⁵⁵ Section 10211(a) allows Oklahoma to administer EPA programs across the entire state, including in Indian country, should the state request to do so.⁵⁶ Section 10211(b) requires any tribal nations in Oklahoma seeking TAS status to first obtain a cooperative agreement with the state.⁵⁷

52. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA), Pub. L. 109-59, 119 Stat. 1144 (2005).

53. Sanders, *supra* note 27, at 552.

54. Tony Thornton, Indian Leaders Hear Complaints About Legislation, *Oklahoman* (Nov. 2, 2005), <https://oklahoman.com/article/2918130/indian-leaders-hear-complaints-about-legislation> (on file with the *Columbia Law Review*) [hereinafter Thornton, Indian Leaders Hear Complaints About Legislation] (“The only people who knew about it were Senator Inhofe and the Oklahoma Independent Petroleum Association . . .” (quoting Chad Smith, then-Principal Chief of the Cherokee Nation)). Discussing the bill on the Senate floor, Senator John McCain asked, “[W]hat in the world is [this provision] doing on a highway bill?” and stated, “No one has ever brought [this rider] to my attention as chairman of the Indian Affairs Committee.” 151 Cong. Rec. 19,140 (2005).

55. The entire rider, section 10211 of SAFETEA, reads:

(a) OKLAHOMA.—Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the “Administrator”) determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.

(b) TREATMENT AS STATE.—Notwithstanding any other provision of law, the Administrator may treat an Indian tribe in the State of Oklahoma as a State under a law administered by the Administrator only if—

(1) the Indian tribe meets requirements under the law to be treated as a State; and

(2) the Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.

SAFETEA § 10211, 119 Stat. at 1937.

56. *Id.* § 10211(a), 119 Stat. at 1937; see also Neal, *supra* note 18, at 225.

57. § 10211(b), 119 Stat. at 1937; Rider Against Oklahoma Tribes Blamed on Inhofe, *Indianz.com* (Aug. 9, 2005), <https://www.indianz.com/News/2005/009716.asp> [<https://perma.cc/E57Z-AZSH>].

Once word of the midnight rider escaped—too late to stop the passage of the bill—criticism was swift. An attorney for Pawnee Nation labeled it as “the most scary, direct, take-the-gloves-off-and-go[-]for-the-jugular attack on tribal sovereignty I have ever seen.”⁵⁸ Even an opinion piece supporting the rider remarked that Inhofe’s “11th hour . . . maneuver to ban Indians from regulating the environment on tribal lands . . . [was] unsavory.”⁵⁹

The EPA did not lobby against the provision, despite its contravention of the agency’s 1984 Indian Policy,⁶⁰ but instead proceeded to work within the provisions of the rider.⁶¹ Since 2005, only one tribal nation, the Citizen Potawatomi Nation, has entered into a cooperative agreement with Oklahoma that the EPA approved pursuant to section 10211(b).⁶² But when the Citizen Potawatomi Nation subsequently applied for TAS status for the water quality standards program, Oklahoma opted not to renew the cooperative agreement, thus precluding the EPA’s ability to approve the Nation for TAS status.⁶³ Ultimately, as a result of the rider, the State of Oklahoma retains most regulatory authority under federal environmental laws.⁶⁴

B. *McGirt and “Profound Destabilization”*

The environmental regulatory structure in Oklahoma had the potential to be turned on its head by the Supreme Court’s landmark ruling in *McGirt v. Oklahoma*.⁶⁵ In 1997, Jimcy McGirt was convicted by the State of Oklahoma for three serious sexual offenses and sentenced to 1,000 years plus life in prison without the possibility of parole.⁶⁶ In 2017, after the Tenth Circuit held in *Murphy v. Royal* that Congress had not disestablished the Muscogee (Creek) Nation’s reservation,⁶⁷ McGirt filed

58. Thornton, Indian Leaders Hear Complaints About Legislation, *supra* note 54 (quoting Lee Price, Att’y for the Pawnee Nation).

59. Opinion, Filling the Bill: Inhofe’s Sage Rider Targets Tribes, *Oklahoman* (Aug. 11, 2005), <https://oklahoman.com/article/2907126/filling-the-bill-br-inhofes-sage-rider-targets-tribes> (on file with the *Columbia Law Review*).

60. See *supra* note 33 and accompanying text.

61. Raymond Nolan, The Midnight Rider: The EPA and Tribal Self-Determination, 42 *Am. Indian Q.* 329, 335–36 (2018).

62. EPA, Summary Report of Tribal Consultation and Engagement Related to the State of Oklahoma’s Request to Implement Regulatory Programs in Certain Areas of Indian Country in Accordance with Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA) 13 (2020) (on file with the *Columbia Law Review*) [hereinafter EPA, Summary Report].

63. *Id.*

64. See *supra* note 44 and accompanying text.

65. 140 S. Ct. 2452 (2020).

66. *Id.* at 2482 (Roberts, C.J., dissenting); Leading Case, *McGirt v. Oklahoma*, 134 *Harv. L. Rev.* 600, 600 (2020).

67. 866 F.3d 1164, 1233 (10th Cir. 2017).

for a writ of habeas corpus, arguing that under the Major Crimes Act,⁶⁸ which gives federal courts exclusive jurisdiction over certain enumerated crimes committed by “[a]ny Indian” in Indian country,⁶⁹ the state lacked jurisdiction to prosecute his crimes.⁷⁰ McGirt’s appeal from the denial of habeas made its way up to the Supreme Court, with the Court ultimately left to decide the same question that was raised in *Murphy*: Did Congress disestablish the Muscogee (Creek) Nation’s reservation?⁷¹ Writing for the Court, Justice Gorsuch held emphatically that it did not.⁷²

Justice Gorsuch examined the language of the Muscogee (Creek) Nation’s 1832 and 1833 treaties with Congress and subsequent history to find that Congress had established—and then had never disestablished—the Muscogee (Creek) Nation’s reservation.⁷³ The other four of the Five Tribes have similar treaties and dealings with Congress, such that the holding of *McGirt* also likely applies to their lands.⁷⁴

Chief Justice Roberts, in dissent, contended that the majority’s decision “has profoundly destabilized the governance of eastern Oklahoma. The decision . . . 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.”⁷⁵

68. 18 U.S.C. § 1153 (2018).

69. *Id.* § 1153(a).

70. Leading Case, *supra* note 66, at 600–01.

71. The Court granted certiorari and heard oral arguments for *Murphy* in the October Term 2018. *Royal v. Murphy*, 138 S. Ct. 2026, 2026 (2018) (mem.). It did not issue an opinion on *Murphy* until 2020, when it issued a companion per curiam opinion to *McGirt*. See *Sharp v. Murphy*, 140 S. Ct. 2412, 2412 (2020) (mem.). Justice Gorsuch took no part in the consideration or decision of the case.

72. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”).

73. *Id.* at 2460–74.

74. Bethany R. Berger, *McGirt v. Oklahoma* and the Past, Present, and Future of Reservation Boundaries, U. Pa. L. Rev. Online (forthcoming) (manuscript at 3), <https://ssrn.com/abstract=3694051> (on file with the *Columbia Law Review*).

75. See *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting). Indeed, as of June 2021, there have been changes in the wake of *McGirt*. On the criminal side, *McGirt*, *Murphy*, and other Native people who have been prosecuted by the state for crimes on the Muscogee (Creek) reservation will likely have their cases retried in federal court. Jack Healy & Adam Liptak, Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma, N.Y. Times (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html> (on file with the *Columbia Law Review*) (last updated July 11, 2020). The Cherokee Nation has updated its criminal code, in part to ensure that it will have jurisdiction over cases that state courts may no longer hear. Grant D. Crawford, CN Takes Steps to Move Forward on *McGirt* Issues, *Tahlequah Daily Press* (Dec. 15, 2020), https://www.tahlequahdailypress.com/news/cn-takes-steps-to-move-forward-on-mcgirt-issues/article_c9271608-ebc2-52d9-b2f2-73c476d9bb2d.html (on file with the *Columbia Law Review*). For an example of disruptions on the civil side, see *infra* notes 110–112 and accompanying text.

C. *The EPA Grants Oklahoma Regulatory Authority in Indian Country*

On one issue, though—environmental regulation—the opening for potential changes to the regulatory structure was promptly shut down with the aid of Inhofe’s midnight rider.⁷⁶ In July 2020, just two weeks after the Court issued its decision in *McGirt*, Governor Kevin Stitt of Oklahoma wrote to EPA Administrator Andrew Wheeler requesting approval under SAFETEA section 10211(a) to administer Oklahoma’s environmental programs in Indian country.⁷⁷

Stitt’s request covered several programs that were in place before *McGirt*.⁷⁸ It did not, however, seek to extend the state’s jurisdiction where there were not already environmental regulatory programs in place, thus presumably preserving the pre-*McGirt* regulatory landscape.⁷⁹

After Governor Stitt sent this letter, the Muscogee (Creek) Nation requested tribal consultation with and sent written comments to the EPA.⁸⁰ The EPA also held consultations with or received comments from a number of other tribal nations in Oklahoma.⁸¹ In these consultations, tribal nations raised various concerns,⁸² including that granting the SAFETEA request would contravene the EPA’s recently reaffirmed 1984 Indian Policy.⁸³ In response, the EPA said that it “continues to be guided by the 1984 Indian Policy, [but] . . . derives its mandates and authorities

76. See *supra* section II.A.

77. Stitt Letter, *supra* note 43, at 1.

78. See *id.* at 1–4.

79. See Rebecca Beitsch, EPA Gives Oklahoma Authority over Many Tribal Environmental Issues, Hill (Oct. 5, 2020), <https://thehill.com/policy/energy-environment/519695-epa-gives-oklahoma-authority-over-many-tribal-environmental-issues> [<https://perma.cc/4YVP-F3PJ>] (“Oklahoma did not seek to expand or increase its regulation over new areas of the state, but rather to continue to regulate those areas where the state has consistently implemented these environmental programs under the steady oversight of the U.S. EPA.” (quoting Kevin Stitt, Governor of Okla.)).

80. EPA, Summary Report, *supra* note 62, at 2. The Muscogee (Creek) Nation requested tribal consultation pursuant to the EPA Policy on Consultation and Coordination with Indian Tribes (Consultation Policy), under which the EPA is meant “to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests.” See EPA, EPA Policy on Consultation and Coordination with Indian Tribes 1, 4–5 (2011), <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf> [<https://perma.cc/4G2Q-BGWR>] [hereinafter EPA Consultation Policy] (explaining the consultation process); see also Elizabeth Kronk Warner, Opinion, Complicated Environmental Regulation in Indian Country, Regul. Rev. (Mar. 15, 2021), <https://www.theregreview.org/2021/03/15/kronk-warner-environmental-regulation-indian-country> [<https://perma.cc/Z3HF-2TVB>] (describing problems with tribal consultation practices, including that it “is, at best, ineffective and, at worst, violative of tribal sovereignty and the international obligation that Indigenous communities give free and informed consent prior to government actions on their territories”).

81. EPA, Summary Report, *supra* note 62, at 2–3.

82. *Id.* at 3–13.

83. *Id.* at 4–5.

from federal law, including SAFETEA.”⁸⁴ Because section 10211(a) “imposed express legal obligations on EPA,” the EPA explained, it was required “to approve a request that [met] the basic elements of the statute.”⁸⁵

On October 1, 2020, the EPA Administrator endorsed this reasoning when he granted the SAFETEA request, finding that the statute gave the EPA no discretion in rendering its decision.⁸⁶ That is, because the basic elements of SAFETEA section 10211(a) were met,⁸⁷ the EPA was obligated to grant the request.⁸⁸ This decision affirmed the State of Oklahoma’s continued environmental regulatory authority in eastern Oklahoma.⁸⁹

D. *Consequences of Granting the SAFETEA Request*

The effect of granting the SAFETEA request might be to keep environmental regulatory authority structured as it was before *McGirt*.⁹⁰ After all, so long as the decision of the EPA Administrator to grant the SAFETEA request is good law, environmental regulation in Oklahoma pre- and post-*McGirt* is structurally identical.⁹¹ Additionally, this position—that the effect

84. *Id.* at 5.

85. *Id.*

86. See Wheeler Letter, *supra* note 44, at 2.

87. See *supra* note 56 and accompanying text.

88. Admittedly, it is not clear what, if any, purpose the tribal consultations thus served. It may be that the EPA thought it was important to follow procedures of the Consultation Policy and engage in consultations, regardless of its degree of discretion. See Wheeler Letter, *supra* note 44, at 6 (“Section 10211(a) of SAFETEA includes no procedural requirements to govern EPA’s mandatory decision. However, consistent with longstanding Agency policy, EPA invited Indian tribes located in Oklahoma to consult with the Agency and to provide their views regarding the State’s July 2020 request.” (footnote omitted)). Confusingly, the EPA also seems to imply that the consultations did factor into its final decision. See *id.* (“EPA has carefully reviewed and considered input provided by the tribes in developing this decision.”).

89. The EPA Administrator also noted that nothing in the decision was “intended to change or address tribal authority under tribal law outside the scope of a program under a statute administered by EPA.” *Id.* at 4. That is, the EPA’s decision here was not meant to affect anything outside of the EPA’s jurisdiction.

90. Indeed, given that *McGirt* only addressed criminal jurisdiction, it is not necessarily the case that tribal nations would have had environmental regulatory authority anyway, even absent the midnight rider. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020) (“The only question before us . . . concerns the statutory definition of ‘Indian country’ as it applies in federal criminal law under the [Major Crimes Act] . . .”). But much of the discussion surrounding *McGirt* contemplated whether the case could nevertheless affect civil and regulatory law. See *id.* (acknowledging that the decision in *McGirt* might make the region eligible for assistance with homeland security, historical preservation, schools, highways, roads, primary care clinics, housing assistance, nutritional programs, and disability programs and that some “may celebrate” these developments). The SAFETEA request, then, is significant insofar as it forecloses *any* possibility of change with respect to environmental regulation.

91. See Wheeler Letter, *supra* note 44, at 3 (“EPA understands the State’s reference to *McGirt* as an explanation of the State’s intent substantially to reestablish the geographic

of granting the SAFETEA request was to keep “business as usual”—was the argument employed by Oklahoma in the *McGirt* litigation⁹² and cited by the governor after the SAFETEA request was granted.⁹³ Thus, perhaps there is reason to believe this will be the case.⁹⁴

But granting the State of Oklahoma regulatory authority denies tribal nations the opportunity to exercise their sovereignty⁹⁵ and work with the state. This was the sentiment underlying the reactions of tribal nations when the EPA granted the SAFETEA request. Cherokee Nation Principal Chief Chuck Hoskin, Jr., for example, stated: “[T]he governor’s decision to invoke a 2005 federal law ignores the longstanding relationships between state agencies and the Cherokee Nation. All Oklahomans benefit when the Tribes and state work together in the spirit of mutual respect and this knee-jerk reaction to curtail tribal jurisdiction is not productive.”⁹⁶

In addition, regulation by the state is likely detrimental to the environment. As an oil and gas state, Oklahoma has seen an increase in hydraulic fracturing (fracking) and related practices, which in turn have

scope of the State’s environmental programs as implemented prior to the Supreme Court’s decision . . .”).

92. Brief for Respondent at 46, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478582 (“Affirmance will not . . . undermine collaborations between tribal and state officials that exist now.”).

93. See *supra* note 79 and accompanying text.

94. On the other hand, there might be reason to believe that the State of Oklahoma will expand its regulatory authority: In its July request, the state deviated from its pre-*McGirt* regulatory scope in two instances: First, the state sought to expand its SDWA Underground Injection Control Program into Osage County, where activities had previously been overseen by the EPA. Wheeler Letter, *supra* note 44, at 3 n.3. Second, although the state previously implemented its State Implementation Plan on nonreservation areas of Indian country—namely Indian allotments—after *McGirt*, those allotments are understood as being within the reservation, and the state thus chose to exclude those allotments from the State Implementation Plan. *Id.*

95. See Beitsch, *supra* note 79 (noting that granting the SAFETEA request created “the potential for a loss of tribal sovereignty”).

96. Cherokee Nation (@CherokeeNation), Twitter (Oct. 5, 2020), <https://twitter.com/CherokeeNation/status/1313173663747842049> (on file with the *Columbia Law Review*); see also Indianz.com (@indianz), Twitter (Oct. 5, 2020), <https://twitter.com/indianz/status/1313247058791456769> (on file with the *Columbia Law Review*) (retweeted by the Muscogee (Creek) Nation (@MvskokeRez)) (“The Muscogee (Creek) Nation is disappointed in the decision of the EPA to grant Governor Stitt’s [SAFETEA] request . . . Like the SAFETEA Act itself, this was a swift move meant to circumvent the appropriate time and available information to adequately respond.”).

led to a surge in earthquakes⁹⁷ and increased water and air pollution.⁹⁸ Moreover, “[m]uch of these oil and gas activities are placed on or near tribal land, contaminating soil, rivers, aquifers and air while adding to the climate crisis and directly impacting community health.”⁹⁹ This also suggests why the State of Oklahoma is so intent on maintaining its environmental regulatory authority. Approximately twenty-five percent of the state’s recent oil and gas wells and sixty percent of its refinery capacity are located on the lands affected by *McGirt*.¹⁰⁰ As commentators noticed even back in 2005, “the state has protected oil and gas producers by letting environmental violations slide, something tribes would be unwilling to do.”¹⁰¹

Indeed, tribal nations exercising regulatory authority have not been conciliatory toward the oil and gas industry. For example, pursuant to inherent tribal sovereignty, the Ponca Tribe of Oklahoma has banned fracking and injection wells within its jurisdictional areas after years of poisoned water and health issues.¹⁰² It has also passed a statute recognizing the rights of nature, thus giving nature legal standing.¹⁰³ The Cherokee Nation has enacted its own environmental laws regulating air and water

97. Oklahoma Has Had a Surge of Earthquakes Since 2009. Are They Due to Fracking?, U.S. Geological Surv., <https://www.usgs.gov/faqs/oklahoma-has-had-a-surge-earthquakes-2009-are-they-due-fracking> [<https://perma.cc/JMW4-L4J2>] (last visited Feb. 12, 2021); see also Chacour Koop, Swarm of Earthquakes, Including 4.2-Magnitude Quake, Rattle Oklahoma, Geologists Say, Kan. City Star (Feb. 5, 2021), <https://www.kansascity.com/news/nation-world/national/article249045035.html> (on file with the *Columbia Law Review*).

98. What Environmental Issues Are Associated with Hydraulic Fracturing?, U.S. Geological Surv., <https://www.usgs.gov/faqs/what-environmental-issues-are-associated-hydraulic-fracturing> [<https://perma.cc/Y26E-W7T9>] (last visited Feb. 12, 2021).

99. Shannon Biggs, Media Advisory: Oklahoma Tribes Under Attack from State, Movement Rts. (Sept. 7, 2020), <https://www.movementrights.org/media-release-oklahoma-tribes-under-attack-from-state> [<https://perma.cc/V99C-V7F3>].

100. Brandon Evans, U.S. Supreme Court Decision Looks to Affect Regulatory Future Across Much of Oklahoma, S&P Glob. (July 23, 2020), <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/072320-us-supreme-court-decision-looks-to-affect-regulatory-future-across-much-of-oklahoma> [<https://perma.cc/A2SY-XKfy>].

101. Tony Thornton, Bill Targets Tribes’ Environment Rules, Oklahoman (Aug. 9, 2005), <https://oklahoman.com/article/2906884/bill-targets-tribes-environment-rules> (on file with the *Columbia Law Review*) [hereinafter Thornton, Bill Targets Tribes’ Environment Rules] (quoting Charles Tripp, Att’y for the Pawnee Nation); see also Beitsch, *supra* note 79 (noting that granting the SAFETEA request created “the potential . . . for the state [to continue] to greenlight polluting projects on tribal lands over objections from Natives”).

102. Jack Money, Ponca Nation of Oklahoma to Host Environmental Summit May 17–18, Oklahoman (May 17, 2019), <https://oklahoman.com/article/5631565/ponca-nation-of-oklahoma-to-host-environmental-summit-may-17-18> (on file with the *Columbia Law Review*); see also Ponca Nation of Oklahoma to Recognize the Rights of Nature to Stop Fracking, Intercontinental Cry (Oct. 31, 2017), <https://intercontinentalcry.org/ponca-nation-oklahoma-recognize-rights-nature-stop-fracking> [<https://perma.cc/P5EX-J9XT>].

103. Money, *supra* note 102; cf. *Sierra Club v. Morton*, 405 U.S. 727, 741–43 (1972) (Douglas, J., dissenting) (arguing that environmental objects, such as valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, air, and the like, should have standing).

pollution and solid and hazardous waste disposal.¹⁰⁴ Ultimately, as commentators have implied and as state bureaucrats and the oil and gas industry have feared, further regulation by tribal nations could mean more stringent standards for and curtailment of the oil and gas industry to improve health and environmental conditions.¹⁰⁵

These examples of regulations were enacted pursuant to inherent sovereignty, and they are thus limited in scope.¹⁰⁶ Regulation taken pursuant to delegated federal authority, however, could have greater reach.¹⁰⁷ The granting of the SAFETEA request technically foreclosed this latter type of regulation, but even absent further EPA or congressional action in their favor,¹⁰⁸ tribal nations may nevertheless be able to leverage *McGirt* to gain some voice in environmental regulation.

III. COOPERATIVE AGREEMENTS FOR ENVIRONMENTAL REGULATION

The main barrier to greater oversight of environmental regulation by the tribal nations is that the State of Oklahoma lacks reason to give up the authority it was granted by the SAFETEA request. But, as section III.A explains, *McGirt* has created some leverage that may enable the tribal nations to volley for greater authority. Section III.B then charts what cooperation between tribal nations and the state on environmental regulation may look like.

A. Leveraging *McGirt*

Although it has not upset the status quo in the environmental regulatory context, *McGirt* has created disruptions in other areas.¹⁰⁹ For example, in December 2020, the Seminole Nation sought to tax oil and gas companies operating within its jurisdictional area.¹¹⁰ Although it later

104. See *supra* note 46 and accompanying text.

105. See *supra* note 101 and accompanying text.

106. See *supra* notes 37–40 and accompanying text.

107. See *supra* notes 37–40 and accompanying text.

108. See, e.g., Ann E. Tweedy, Opinion, Congressional Restoration of Tribal Civil Jurisdiction, *Regul. Rev.* (Mar. 31, 2021), <https://www.theregreview.org/2021/03/31/tweedy-congressional-restoration-tribal-civil-jurisdiction> [<https://perma.cc/9SRC-6Q6Q>] (“Congress should pass a statute restoring tribal civil regulatory and adjudicatory jurisdiction . . .”).

109. See, e.g., Sarah Roubidoux Lawson & Megan Powell, Opinion, Unsettled Consequences of the *McGirt* Decision, *Regul. Rev.* (Apr. 1, 2021), <https://www.theregreview.org/2021/04/01/lawson-powell-unsettled-consequences-mcgirt> [<https://perma.cc/BQT2-UUH7>] (“*McGirt* is likely to have far-reaching implications for title and land use issues, including forum for bringing and disputing claims.”).

110. Chris Casteel, Seminole Nation’s Attempt to Tax Oil Companies Prompts Swift Response from Hunter, *Stitt, Oklahoman* (Dec. 16, 2020), <https://www.oklahoman.com/story/news/columns/2020/12/16/seminole-nations-attempt-to-tax-oil-companies-prompts-swift-response-from-hunter-stitt/316814007> (on file with the *Columbia Law Review*).

clarified that this was just a continuation of existing policy,¹¹¹ the initial announcement created uncertainty and concern among state officials, leading them to acknowledge the value of cooperation with the tribal nations in order to avoid further confusion.¹¹² More broadly, some have posited that the Five Tribes may impose new taxes in light of *McGirt*, which could in turn reduce state and local tax revenues.¹¹³ In this way, *McGirt* has created some leverage for the tribal nations, enabling them—if they wish—to employ “hardball” tactics and demand greater authority over issues like environmental regulation.

B. *Cooperating with the State of Oklahoma*

If the tribal nations can leverage *McGirt*, then the question here becomes *how* to allocate environmental regulatory authority. To this end, one solution is to use cooperative agreements, also called compacts.¹¹⁴ These are agreements that resolve jurisdictional or substantive disputes and recognize the sovereignty of both parties.¹¹⁵ As the product of negotiation, they can “reduce intergovernmental tensions and encourage cooperation.”¹¹⁶ While compacts have often been developed upon mandates by federal legislation,¹¹⁷ tribal nations and states have also developed them without such mandates.¹¹⁸

111. Seminole Chief: No New Oil, Gas Tax Within Tribal Boundaries, E&E News: Energywire (Jan. 21, 2021), <https://www.eenews.net/energywire/2021/01/21/stories/1063723083> (on file with the *Columbia Law Review*).

112. See Morgan, *supra* note 41 (“[Oklahoma Attorney General Mike] Hunter said . . . that the state needs to pursue compacts with the tribes regarding regulation and taxation on reservation lands.”).

113. Stacy L. Leeds & Lonnie R. Beard, A Wealth of Sovereign Choices: Tax Implications of *McGirt v. Oklahoma* and the Promise of Tribal Economic Development, 56 *Tulsa L. Rev.* 417, 465 (2021) (“[M]ost nonmembers will generally continue to be subject to the same federal, state, and local taxes as before *McGirt*, except to the extent that the state and local governments may feel it necessary to increase taxes on nonmembers to compensate for any reductions in tax collections from tribal members.”).

114. Cf. Randy Krehbiel, Oklahoma Governor Urges Tribes to Begin Negotiating Issues Arising from *McGirt* Ruling, *Tulsa World* (Jan. 23, 2021), https://tulsaworld.com/news/state-and-regional/govt-and-politics/oklahoma-governor-urges-tribes-to-begin-negotiating-issues-arising-from-mcgirt-ruling/article_9cdfa764-5cf6-11eb-9cf0-db99ec7c5cb0.html [<https://perma.cc/7VDP-7CGJ>] (last updated Mar. 1, 2021) (noting that some of the leaders of the Five Tribes expressed willingness to compact with the state on issues of criminal jurisdiction).

115. Note, Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 *Harv. L. Rev.* 922, 922 (1999).

116. *Id.* at 930.

117. See, e.g., Rebecca Tsosie, Negotiating Economic Survival: The Consent Principle and Tribal-State Gaming Compacts Under the Indian Gaming Regulatory Act, 29 *Ariz. St. L.J.* 25, 49 (1997) (“[The Indian Gaming Regulatory Act] mandated a compact procedure for . . . gaming and prohibited tribes from running . . . games in the absence of a valid compact with the state.”).

118. Without a federal mandate, compacts are most likely to emerge where both parties perceive mutual benefits. See Tsosie, *supra* note 117, at 72 (“Relevant factors used in assessing the likelihood of an agreement include the historical relationship of Indian tribes

Cooperative agreements have been used in Oklahoma outside the environmental context. For example, after the Supreme Court held that the state could not tax motor fuel sales in Indian country,¹¹⁹ Oklahoma enacted a law that allowed tribal nations to enter agreements with the state.¹²⁰ A tribal nation that entered an agreement agreed to include state taxes in its motor fuel sales; in exchange, the tribal nation would receive a portion of those taxes to use for certain governmental purposes.¹²¹

In the environmental context, cooperative agreements would enable tribal nations to define for themselves a greater regulatory role. For example, a tribal nation and the state might agree to have the tribal nation obtain TAS status under the CWA for administrative purposes, while also agreeing to jointly develop the actual water quality standards. Another possibility could be to allocate certain regulatory programs to each entity: For example, the tribal nation could have authority over underground injections, while the state would be responsible for air pollution programs. The exact content of these agreements would likely vary, depending on the capacity of the parties and the relevant environmental interests at play.

This arrangement is beneficial for tribal nations on two fronts. First, tribal nations would likely set stronger environmental standards that are better for health and the environment.¹²² Second, having a greater role leads to the development of bureaucracies and expertise, two critical components of effective self-governance.¹²³ Thus, cooperative agreements enable tribal nations to develop a greater capacity to regulate,¹²⁴ in turn promoting tribal sovereignty and self-determination.¹²⁵

This solution would also benefit the environment. The contrast between regulation under the State of Oklahoma¹²⁶ and regulation under tribal nations¹²⁷ is stark, with the former likely promoting and enabling harmful fracking practices and the latter likely enacting stricter standards to curtail the harm. Beyond this, “many, if not most, tribal communities possess . . . Traditional Ecological Knowledge” (TEK) that may inform

and states, the parties’ perception of the agreement as mutually beneficial, and whether the agreement is perceived to be voluntary or coerced.”).

119. See *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 455–56 (1995).

120. Okla. Stat. tit. 68, § 500.63(A)(4) (2020).

121. *Id.* § 500.63(C). Cooperative agreements are also in line with Oklahoma state policy: “[T]he State of Oklahoma recognizes the unique status of Indian tribes within the federal government and shall work in a spirit of cooperation . . . for the benefit of both the State of Oklahoma and tribal governments.” Okla. Stat. tit. 74, § 1221(C) (2020). The governor and political subdivisions have authority to enter into cooperative agreements with tribal nations “to address issues of mutual interest.” *Id.* § 1221(C)–(D).

122. See *supra* text accompanying notes 102–105.

123. Cf. *supra* text accompanying note 13.

124. *Contra supra* text accompanying note 27.

125. See *supra* notes 31–34 and accompanying text.

126. See *supra* notes 97–101 and accompanying text.

127. See *supra* notes 102–105 and accompanying text.

their approach to environmental regulation.¹²⁸ Commentators have acknowledged that the incorporation of TEK into environmental management would be valuable,¹²⁹ and thus, to the extent that this could be a component of regulation in Oklahoma, there is potential for greater benefit.

This also highlights some of the benefits that cooperative agreements hold for the State of Oklahoma: With tribal nations each incorporating their own methods and values into environmental regulation, they act as “laboratories” that can innovate.¹³⁰ This innovation benefits the state, which could theoretically transplant successful programs or policies from a compact with one tribal nation into a compact with another.¹³¹ Additionally, successful cooperation inherently strengthens the relationship between the state and tribal nations.¹³² But perhaps more convincing than any of these “carrots” is simply the tribal nations’ new *McGirt*-shaped taxation “stick.”¹³³

Additionally, the perceived harms that greater tribal authority would impose on the State of Oklahoma¹³⁴ are likely exaggerated. Tribal nations—specifically, the Muscogee (Creek), Chickasaw, and Choctaw Nations—have shown that they have an “interest . . . in providing an economic environment that will attract and keep industry to the region, i.e., the oil and gas industry in eastern Oklahoma, . . . [by] declin[ing] to regulate or tax.”¹³⁵ Thus, it is not entirely reasonable to assume that tribal

128. Kronk Warner, Tribes as Laboratories, *supra* note 35, at 794.

129. See, e.g., Anthony Moffa, Traditional Ecological Rulemaking, 35 *Stan. Env't L.J.* 101, 102–05 (2016) (“The Traditional Ecological Knowledge (TEK) of indigenous peoples represents at once the past and the future of environmental management.”).

130. See Kronk Warner, Tribes as Laboratories, *supra* note 35, at 844–45.

131. See Katherine Florey, Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories, 92 *Wash. L. Rev.* 713, 746–52 (2017) (envisioning how tribal nations might act as laboratories, creating benefits that devolve on states); cf. Nestor M. Davidson & Timothy M. Mulvaney, Takings Localism, 121 *Colum. L. Rev.* 215, 267 (2021) (“These localities not only conduct policy experiments but also serve as testing grounds for the results, with the extent to which other localities import policies initiated elsewhere substantiating the value of those experiments.”).

132. Cf. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner at 44, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 774430 (describing how other states “have employed [the Indian Child Welfare Act and its collaborative framework] as a means of strengthening and deepening their important, government-to-government relationships with tribes”).

133. See *supra* section III.A.

134. See *supra* text accompanying note 101.

135. Brief of Amici Curiae Tom Cole et al. in Support of Petitioner at 20, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 703876. This is true, notwithstanding the Seminole Nation’s recent efforts to tax oil and gas companies. See *supra* notes 110–112 and accompanying text. Additionally, insofar as taxation is being used as a form of regulation, one could speculate that, if the Seminole Nation had had other means to regulate the environment, it might not have sought to exact this tax. In any case, if the Seminole Nation and Oklahoma had entered into a cooperative agreement about matters relating to oil and gas, they would have likely avoided the current dispute. See *supra* notes 110–112 and accompanying text.

nations would impose high regulatory burdens so as to completely drive out the oil and gas industry: They, like the state, must balance competing priorities of environmental protection and economic development.

Lastly, built into cooperative agreements is the ability for the state to mitigate the “patchwork regulatory system” that opponents of tribal regulation seem to fear.¹³⁶ Because the state would still be involved in environmental regulation, it could avoid outcomes in which regulations were highly variable and thus burdensome. In this way, the state continues to oversee and ensure a workable landscape of environmental regulation across Oklahoma.

CONCLUSION

In his dissent in *McGirt*, Chief Justice Roberts rightfully observed that the majority’s decision had the potential to upend environmental regulation in Oklahoma. But that is not necessarily a bad thing: Rethinking the regulatory structure could have been a strong endorsement of tribal sovereignty, with benefits to Oklahoma and the environment as well. And although the EPA’s approval of Oklahoma’s SAFETEA request foreclosed any immediate changes, in the wake of *McGirt*, the state and the tribal nations are nevertheless at a turning point. They should take this opportunity to rethink their approach to environmental regulation and consider the use of cooperative agreements. It is an arrangement that involves making tradeoffs, but at bottom, it empowers tribal nations, strengthens the tribal-state relationship, and creates the best opportunity for all parties to regulate in the interests of themselves, their citizens, and the environment.

136. See Thornton, *Bill Targets Tribes’ Environment Rules*, *supra* note 101; see also *supra* text accompanying note 50 (describing a concern the state had expressed about having conflicting or competing standards).