



National Tribal Air Association's
White Paper
on The U.S. Environmental Protection Agency's
Response to the State of Oklahoma in Regard to the
Supreme Court's McGirt Decision and Potential
Impacts to Indian Country

By

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NTAA's Policy Advisory Committee

October, 2020

I. The McGirt Decision and its potential impact for Indian Country in terms of environmental management

In *McGirt v. Oklahoma*, the United States Supreme Court ruled that the Muscogee (Creek) Nation's Reservation (Creek Reservation) in Oklahoma has not been disestablished, continues to exist, and for purposes of federal criminal jurisdiction, the Reservation is Indian Country pursuant to federal law. While the case was limited to the Creek Reservation and federal jurisdiction over crimes committed on the Creek Reservation, the ramifications of the decision are destined to be wide-ranging. For example, in *Oneida Nation v. Village of Hobarth*, the 7th Circuit Court of Appeals – relying on *McGirt* – determined that the Oneida Reservation in Wisconsin had not been disestablished, and thus the Village lacked authority over the Oneida Nation's use of its own land within its reservation.

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Most importantly, the McGirt decision – as general matter – has not displaced any other jurisdictional principles of Indian law. At its heart, McGirt was a question of whether the Creek Reservation continues to exist. But, McGirt doesn't change any underlying jurisdictional principles, such as whether the Muscogee (Creek) Nation, the federal government, or the state government has jurisdiction over the lands within the Creek Reservation. Nor does McGirt affect the ownership status, and thus the jurisdictional implications, of lands within the Creek Reservation. Thus, the Muscogee (Creek) Nation must still be able to show jurisdiction over the non-Indian fee land under the Montana test. The state must show jurisdiction over Indian lands (allottee lands, trust lands) under the Bracker test. And, still other governmental jurisdiction may have to be shown under the Brendale test. In short, much more thought must be involved and work shown before such a far reaching decision can be conscientiously considered. This latest decision by EPA clearly indicates that the impact upon Indian Country has not been considered in its making. If it has, then that indicates something else.

With respect to federal environmental laws and tribal environmental management, the McGirt decision could be read to authorize the EPA to administer federal environmental programs on all lands within the Creek Reservation. This results because the EPA takes the position that states lack authority to administer state programs in Indian Country, and where the Tribe does not assert or exercise its jurisdiction or authority over federal environmental programs, the EPA will assert federal jurisdiction. However, typically the EPA does not delegate its jurisdiction to a state, unless there is federal legislation, such as land claims settlements, that authorizes such a delegation. Furthermore, if the Muscogee (Creek) Nation applied for, and received, Treatment as State status under the Clean Air Act, Clean Water Act, and/or Safe Drinking Water Act, then the Muscogee (Creek) Nation would have primary jurisdiction to administer programs on all lands within the Creek Reservation. In short, the McGirt decision likely resulted in the state being ousted from jurisdiction over the non-Indian lands within the Muscogee (Creek) Nation, to be replaced by the EPA and/or the Muscogee (Creek) Nation.

II. A Summary of the request by Oklahoma's Governor to EPA

Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: Legacy for Users (SAFETEA-LU) in 2005. SAFETEA-LU is a transportation program authorization statute. But, stuck within it, in Sec. 10211 of the Act, is a provision unrelated to transportation but specific to federal environmental programs in Oklahoma. Pursuant to Sec. 10211(a), the State of Oklahoma can petition the EPA Administrator to authorize the state to administer federal environmental programs that have been delegated to the state in Indian Country. For example, the State has developed SIPs and Title I and V permitting under the Clean Air Act. The State, under Sec. 10211 can petition the EPA to administer these programs on Indian Country in Oklahoma. If State submits such petition, the EPA Administrator "shall approve the State to administer the state program in the areas of the state that are Indian Country."

In July 2020, Governor Stitt submitted a request to EPA pursuant to Sec. 10211(a), seeking EPA approval to administer federal environmental programs for all of Indian Country within Oklahoma. This request was triggered by McGirt, which, as shown above, would have resulted in EPA and/or the Muscogee (Creek) Nation having jurisdiction – and not the state – to

administer federal environmental programs within the Creek Reservation. The Governor, in his request, intended to limit the geographic scope of the state's request to those lands that were previously thought to be under state jurisdiction – i.e., the non-Indian owned fee land – and not those lands already under the jurisdiction of the EPA and Tribes – i.e., tribal trust lands and allotted lands.

III. A Summary of the EPA response to the OK Governor

The EPA granted the State's request to administer the state's programs on Indian Country lands. However, in an acknowledgment to the Governor's stated intention to only administer programs on those lands over which the state was – prior to McGirt – exercising jurisdiction, the EPA limited the geographic scope of the State's jurisdiction. The lands within Indian Country that are not covered by the Governor's request, and the EPA's approval, are lands that:

(A) Qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. § 1151(c);

(B) Are held in trust by the United States on behalf of an individual Indian or Tribe; or

(C) Are owned in fee by a Tribe, if the Tribe (i) acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party; and (ii) never allotted the land to a member or citizen of the Tribe.

IV. A Summary of the impacts to Tribal sovereignty to Tribes in OK and the potential impact to Tribes in Indian Country.

Because of the intended limitation in the Governor's request to administer state programs on non-Indian lands within Indian Country, there is arguably no practical impact on the Oklahoma Tribes' exercise of tribal sovereignty over non-Indian lands. Before McGirt, when the assumption was that the Creek Reservation did not exist, the Oklahoma Tribes were not asserting jurisdiction over "former reservation" or non-Indian fee lands, and the state was exercising jurisdiction. While there was likely a jurisdictional shift that occurred due to McGirt, the practical import of the EPA decision is minimal.

Furthermore, this decision does not affect the Oklahoma Tribes' ability to obtain "treatment as state" status under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, among others. However, in the little known provision in SAFETEA-LU Sec. 10211(b) does require the Oklahoma Tribes to enter into cooperative agreements with the state to jointly plan and implement federal environmental regulatory programs.

SAFETEA-LU Sec. 10211 – with its express limitations on Oklahoma Tribal authority to implement federal regulatory programs on Indian Country in Oklahoma – is expressly limited to Oklahoma. So, while McGirt may have resulted in a jurisdictional shift for several Oklahoma Tribes, the practical import is limited. If McGirt results in additional reservation confirmation decisions, in the absence of specific facts it is difficult to predict what, if any, impacts those future decisions may have on federal environmental regulatory jurisdiction on Indian lands.