

THIS LAND IS MY LAND, THIS LAND IS YOUR LAND, BUT WHERE IS THE ENVIRONMENTAL JUSTICE?

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INTRODUCTION

Throughout the United States' history, Native Americans have faced many broken promises, lies, deceit, and mistrust. This pattern arises in a variety of forms, including being embedded and structurally sustained via the application of laws and broken treaties.¹ When it comes to the environmental

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justice movement, it has not had the same impact or association with the Native American community as compared to the Black or Latino communities.²

Recently, the *McGirt v. Oklahoma*³ case made headlines regarding the ongoing negotiations between the government and the Native American Community.⁴ In *McGirt*, the Supreme Court held the State of Oklahoma lacked jurisdiction to prosecute McGirt and other members of federally recognized tribes.⁵ That said, the implications of the decision will ripple through all spheres of law, including environmental law. So, what does this decision have to do with environmental justice and environmental law? The answer is not so simple.

The Court decided *McGirt* with a textualist approach and expressed Congress's plenary power over tribes.⁶ The holding provides a platform for examining treaties between the United States and federally recognized tribes—specifically the rights the treaties grant, encompassing topics including environmental burdens and regulations.⁷

Parts I and II of this Note analyze the overall relationship between Native Americans and the United States as well as the relationship between Native Americans and the Environmental Justice Movement. Part III will examine *McGirt v. Oklahoma*—the Supreme Court's most recent Federal Indian Law case—and its environmental implications. Additionally, this Note will examine the way states have worked with tribes when it comes to environmental regulations under the scope of sovereignty. This Note will

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1. US COMM'N ON CIV. RTS., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 11 (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf> (stating "Our nation has broken its promises to Native Americans for too long.").

2. See generally Jamie Vickery & Lori M. Hunter, *Native Americans: Where in Environmental Justice Research?*, 29 SOC. NAT. RES. 1, 12 (Jan. 1, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4835033/pdf/nihms748858.pdf> (stating Native American EJ issues challenge traditional western conceptions of research collection and understanding and providing guidance on how to further broaden EJ scholarship).

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

4. See Hunter McEachern, *State, Local, Tribal Leaders Meet for McGirt Decision Discussion*, KFOR (Sept. 24, 2020), <https://kfor.com/digital-first/state-local-tribal-leaders-meet-for-mcgirt-decision-discussion/> (mentioning the meeting of leaders in the jurisdiction).

5. *McGirt*, 140 S. Ct. at 2482.

6. See Troy A. Eid, *McGirt v. Oklahoma: Understanding what the Supreme Court's Native American Treaty Rights Decision Is and Is Not*, GREENBERG TRAUIG LLP (Aug. 12, 2020), <https://www.gtlaw.com/en/insights/2020/8/mcgirt-v-oklahoma-understanding-what-the-supreme-courts-native-american-treaty-rights> (discussing the case and its implications arising in the jurisdictional and treaty context); see also David K. TeSelle, *Review of McGirt v. Oklahoma—How the Supreme Court and Justice Gorsuch's Revolutionary Textualism Brought America's "Trail of Tears" Promise to the Creek Nation Back from the Dead*, NAT'L L. REV. (Aug. 5, 2020), <https://www.natlawreview.com/article/review-mcgirt-v-oklahoma-how-supreme-court-and-justice-gorsuch-s-revolutionary> (analyzing Justice Gorsuch's textualist approach to the decision).

7. Eid, *supra* note 6.

argue that although the *McGirt* case is technically one of criminal law, the Court's decision to hold the Federal Government to its word has far-reaching consequences. The consequences of the decision will reach all levels of interaction between government, Native American lands, and individuals when it comes to how environmental justice may be advocated or accomplished. Part IV of this Note will examine how this decision by the Supreme Court not only affects that case and individuals but instead has far-reaching consequences that lead to further unequal distribution of environmental harms. This Note argues that the *McGirt* decision is significant in facing climate change as courts must decide whether holding the "government to its word" includes environmental protection and how environmental degradation should be distributed. Finally, Part V recommends tribal leaders and the government collaborate to protect and enforce *McGirt's* environmental implications. The Note looks to New Jersey's recently passed environmental justice law as an example of a new administration putting environmental justice in the forefront.

I. BACKGROUND

A. A History of Broken Promises

The United States has a long history when it comes to environmental oppression at the hands of a few.⁸ Throughout the last 500 years, the government has lied to, betrayed, prosecuted, and slaughtered Native Americans.⁹ Conflict arising from tribe efforts to maintain treaty rights and State sovereignty led to the rise of the Indigenous Environmental Movement (IEM).¹⁰ Thus, the fight in which Native Americans are still engaged in is not only one of law but of societal survival.¹¹ The Environmental Justice and Indigenous Environmental Movements fight to keep sovereignty and treaty promises while defending Native American culture, lifestyle, and survival as a nation and people in the United States.¹²

8. See Robert D. Bullard, *Environment and Morality Confronting Environmental Racism in the United States*, UNRISD (Oct. 1, 2004), [https://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/543B2B250E64745280256B6D005788F7/\\$file/bullard.pdf](https://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/543B2B250E64745280256B6D005788F7/$file/bullard.pdf) (mentioning the correlation between land and people exploitation to that of pollution distribution).

9. See generally Brett Clark, *The Indigenous Environmental Movement in the United State: Transcending Borders in Struggles Against Mining, Manufacturing, and the Capitalist State*, 5 *ORG. & ENV'T*, 410-442 (Dec. 1, 2002) (correlating the indigenous environmental movement to the economic dynamics of capitalism and abuse of Native American treaty rights).

10. *Id.*

11. *Id.* at 411.

12. *Id.* at 413.

The government and Native American's relationship is founded on conquest, internal colonialism, and capitalism.¹³ Within this relationship, the government should incorporate and respect tribes' existence as nations. In fact, the mere existence of tribes as sovereign nations grants a unique position when it comes to negotiations with the government—for control of lands, resources, and culture.¹⁴ However, that is not the case every time.

Racial oppression and degradation are longstanding traditions in the United States.¹⁵ This is a country where inequality is normalized and reinforced time and time again, whether it is through the economic sphere, the political sphere, educational sphere, or social sphere.¹⁶ This normalized and reinforced inequality has hit the Native American community hard. Native Americans have less than 4% of the land they once had before 1492.¹⁷ Native Americans have fought to preserve their land and culture while the Federal Government's acts—labeling them as savages and obstacles—threatened their mere existence.¹⁸ Moreover, even when there were times of agreement and treaties were signed guaranteeing land to the tribes, time and time again, the government ignored or betrayed the treaties for the benefit of White development.¹⁹ This conflict climaxed in the 19th century with the creation of the reservation system and laws created to strip and reassign Native American lands to White citizens.²⁰

As of today, governmental acts such as the breaking of treaty promises and allotment of land stripped from Native Americans have resulted in the oppression of the community. The judicial system has supplemented and directed these outcomes. For example, in the 1903 Supreme Court decision of *Lone Wolf v. Hitchcock*, the Court put Native Americans at the mercy of the government by making “the federal government the permanent trustee of indigenous lands and lives” despite any treaties that said otherwise.²¹ Furthermore, the discovery of natural resources on reservation land led the federal government to create programs that would depopulate the reservations. These programs encouraged migration to urban areas with the enticing offer of jobs and economic support.²² Nonetheless, these

13. *Id.* at 411.

14. *Id.* at 413.

15. See Clark, *supra* note 9, at 415 (listing four primary components of racial oppression).

16. *Id.* at 415; Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES (Jul. 11, 2020), <https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html>.

17. Clark, *supra* note 9, at 416.

18. *Id.* at 416.

19. *Id.* (citing the Dawes Act of 1887 which allotted plots of land to White individuals from land stripped from Native Americans).

20. *Id.*

21. *Id.* at 417.

22. *Id.* at 418.

governmental acts were fueled by ill-meaning motives to dissolve the reservation system but while permitting companies to prioritize profit over people.²³ Thus, the IEM was born and continues to guide negotiations between Native Americans and the government regarding environmental decision-making.

B. The Environmental Justice Movement

The Environmental Justice Movement focuses on acknowledging the systemic and institutional oppression that communities of color continually face throughout this country.²⁴ By extension, the movement attempts to correct the injustices resulting from environmental racism. The movement spearheads this by acknowledging structural, governmental, and legal oppression. It combats environmental harm and the unequal benefit and burden distribution resulting from environmental degradation at the hands of decision-makers—including the judicial system.

One lasting legal principle lies at the core of the Environmental Justice Movement—President Clinton’s Environmental Justice Executive Order (Order).²⁵ The Order governs actions by federal agencies and asks agencies to “identify . . . and address[,] . . . as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations” *without* creating a right of action.²⁶ Additionally, the Order urges agencies to address enforcement problems by encouraging program revisions that promote enforcement of all health and environmental statutes.²⁷ However, the Order lacks enforceability—specifically concerning agency decision-making by explicitly considering environmental justice with other factors such as profit.

The United States Environmental Protection Agency (EPA) defines *Environmental Justice* as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws,

23. *Id.* (stating the consequences of these actions to include poisoning from uranium).

24. *See generally, Principles of Environmental Justice*, LVEJO, <http://lvejo.org/wp-content/uploads/2015/04/ej-jemez-principles.pdf> (last visited: Apr. 17, 2022) (acknowledging the significant historical connections that people of color have with the environment while encouraging meaningful participation people of color combating the legal wrongs inflicted upon communities of color for centuries).

25. Exec. Order No. 12898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994).

26. ‘Big disparity’: 70% of Louisiana’s Coronavirus Deaths are African Americans, *Governor Says*, WDSU NEWS (Apr. 6, 2020), <https://www.wdsu.com/article/covid-19-impacts-in-louisiana-high-death-rate-among-african-americans/32058042#>; Willie G. Hernandez, *Environmental Justice: Looking Beyond Executive Order No. 12,898*, 14 UCLA J. ENV’T L. & POL’Y 181, 181-208 (1995), <https://escholarship.org/uc/item/9z4545x9>.

27. *Id.* at 203.

regulations and policies.”²⁸ Environmental Justice embraces the principle that all people and communities have a right to equal protection and enforcement of environmental laws and regulations.²⁹ But research supporting the movement highlights race as the single best statistical indicator—providing evidence of environmental racism.³⁰ Thus, indicating the extent to which society has denied indigenous communities and communities of color the rights and benefits that the majority enjoys—legal environmental protections.³¹

C. Native Americans and Tribal Interplay with the Environmental Justice Movement

The Environmental Justice Movement and associated scholars fail to examine and include the Native American perspective and struggle regarding the unequal distribution of environmental harm.³² For example, when speaking of the Environmental Justice Movement, racial groups are usually lumped into one category such as: “communities of color” or “people of color.”³³ What those labels fail to address is the unique political, cultural, and social distinctions among different races all while failing to illuminate the fact that race itself is a social construct created to highlight the pyramid of who has power.³⁴ Therefore, problems of environmental injustice will persist until more attention is paid to Native Americans and their different perspectives and attitudes towards nature.³⁵

28. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Apr. 17, 2022).

29. *About Environmental Justice*, DR. ROBERT BULLARD: FATHER ENV’T JUST., <https://drrobertbullard.com> (last visited Apr. 17, 2022).

30. Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENV’T. L.J. 495, 496 (1992); see also Richard Lazarus, *Environmental Racism? What’s That? What is it?*, 2000 UNIV. ILL. L. REV. 255, 255-74 (2000), <https://scholarship.law.georgetown.edu/facpub/160> (mentioning the term coined by civil-rights community organizer and activist, Reverend Ben Chavis, who first used it to encapsulate the issues associated with the landfill in Warren County, North Carolina).

31. Lazarus, *supra* note 30, at 255–74.

32. See Jana L. Walker et. al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. SOC. JUST. 379, 379 (2002) (stating Native American environmental views and concerns are often absent from the mainstream environmental justice dialogue and literature and therefore exacerbating environmental injustice further).

33. Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 COLO. L. REV. 311, 333 (2001).

34. *Id.* (citing to Richard Lazarus, *Distribution in Environmental Justice: Is there a Middle Ground?*, 9 ST. JOHN’S J. LEGAL COMMENT 481,485 (1994) and stating it is a flaw to treat all racial groups the same way and that decision makers often disregard cultural beliefs that “affect environmental protection standards”).

35. Yamamoto & Lyman, *supra* note 33, at 336; see also Walker et. al., *supra* note 32, at 379-401 (noting that it is “erroneous . . . to assume . . . [t]ribes and their members suffer environmental injustices of the same type . . . or in the same way as do other minority, ethnic, or low income communities.”).

Consequently, the Environmental Justice Movement is not without shortcomings. The biggest being that there has been no official adoption of a federal environmental justice law proposed thus far. Thus, communities and individuals impacted have resorted to alternative legal means to advocate on their behalf. For example, Black and Latino communities have traditionally relied on Civil Rights law when combating environmental harm because existing environmental discourse focuses on human impacts on the environment and not the people it may impact.³⁶ Accordingly, even a movement founded in justice, at times fails to fulfill its mission, at least when it comes to Native American communities. The reasoning behind why a movement, which focuses on justice fails this community, can be traced to three major reasons: “(1) standard EJ indicators may not apply to indigenous experiences of environmental injustice given cultural distinctiveness [both across Native American communities themselves and between them and the broader culture]; (2) challenging with defining ‘Native American’, [debates continue over who qualifies as a ‘member’ of a tribal population (carded members vs. those who claim Native American ancestry)]; (3) tribal sovereignty requires different research approaches and policy prescriptions.”³⁷

Simply put, the Environmental Justice Movement at times—as well as the government and laws—is unable to fully encompass the Native American communities’ connection and struggles with the environment. Because of the *McGirt* decision, tribal leaders and government decision-makers must collaborate to successfully protect each and every one of its citizens from an unequal distribution of environmental harm in the face of climate change, which does not discriminate.

36. See *Tile VI and Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Apr. 17, 2022); Kristen Lombardi et al., *Environmental Racism Persists, and the EPA is One Reason Why*, CTR. PUB. INTEGRITY (Aug. 3, 2015), <https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/> (stating “The U.S. Environmental Protection Agency’s Office of Civil Rights is charged with investigating complaints of discrimination filed against state and local agencies that receive EPA funds and, upon unearthing evidence of injustice, making things right.”).

37. Jamie Vickery & Lori M. Hunter, *Native Americans: Where in Environmental Justice Theory and Research?*, INST. BEHAV. SCI. UNIV. COLO. BOULDER (Mar. 2014) (working paper), <https://ibs.colorado.edu/pubs/pop/pop2014-0004.pdf>; see also Dian Gilio-Whitaker, *What Environmental Justice Means in Indian Country*, KCET (Mar. 6, 2017), <https://www.kcet.org/shows/earth-focus/what-environmental-justice-means-in-indian-country> (explaining the complications that arise for Native Americans such as being citizens of both lands and spirit in a way which collides with the Environmental Justice framework of distributive justice and capitalism as core American values leading to complicated relationships with agency and government due to political vulnerability and volatility).

II. LEGAL ANALYSIS

A. *The Landmark Decision: McGirt v. Oklahoma*

The Supreme Court issued its landmark 5-4 decision in *McGirt v. Oklahoma* on July 9, 2020. The Court held the Muscogee (Creek) Nation reservation boundaries stated in the 1886 treaty remained intact.³⁸ In the 1997 case, Jimcy McGirt, a Seminole Nation citizen, was convicted in Oklahoma state court for the rape of a child and sentenced to 1,000 years plus life in prison.³⁹ McGirt argued that the Major Crimes Act only permitted the federal government to prosecute a Native American for conduct occurring in *Indian Country*.⁴⁰ McGirt, therefore, alleged in post-conviction proceedings that the State of Oklahoma did not have jurisdiction over him as an Indian Citizen because the crime was committed in *Indian Country* on the Muscogee (Creek) Nation reservation.⁴¹ However, the state court rejected McGirt's argument and held the crime was committed on land where the State had jurisdiction.⁴² Therefore, the key issue facing the Court was whether McGirt committed his crimes in *Indian Country*.⁴³ Oklahoma argued the subject land was no longer a reservation due to disestablishing actions taken to join the Union.⁴⁴ The Court analyzed whether a reservation was ever created between the United States Government and the Muscogee (Creek) Nation through treaties and promises made.⁴⁵ The Court held that "[b]ecause Congress has not said otherwise, we hold the government to its word."⁴⁶ Thus, the Muscogee (Creek) Nation was never disestablished and continues to exist today, giving rise to a multitude of questions regarding the next steps in everything from criminal convictions and prosecution to environmental regulations and law.

38. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020); Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma* (August 10, 2020) (working paper), <https://ssrn.com/abstract=3670425>; Richard Wolf & Kevin Johnson, *Supreme Court Says Eastern Oklahoma Remains Native American Territory*, USA TODAY (Jul. 9, 2020), <https://www.usatoday.com/story/news/politics/2020/07/09/supreme-court-allows-native-american-jurisdiction-half-oklahoma/3208778001/>.

39. *McGirt*, 140 S. Ct. at 2482.

40. *See id.* at 2459 (citing *Inegonsott v. Samuels*, 507 U.S. 99, 102–03 (1993) "State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country.'").

41. *Id.* at 2459.

42. *Id.*

43. *Id.* at 2460.

44. *Id.*

45. *Id.* at 2460–63.

46. *Id.* at 2459.

Supreme Court jurisprudence has long held that Congress possesses the authority to abrogate Indian treaties.⁴⁷ Moreover, with that comes the authority to unilaterally diminish or disestablish an Indian reservation which may have been recognized or created as a result of those treaties.⁴⁸ Consequently, under the Fifth Amendment, the government must pay just compensation for taking treaty property rights.⁴⁹ Similarly, in *Solem v. Barlett* the Court established an analytical structure for cases dealing with disestablishing issues using a three-part test.⁵⁰ The test laid out what would guide the Court with the caveat that only Congress can diminish or disestablish a reservation and such actions “will not be lightly inferred.”⁵¹ First, under the test, only Congress can alter the terms of an Indian treaty by diminishing a reservation, but its “intent to do so must be clear and plain.”⁵² Second, the Court states the “explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment.”⁵³ Therefore, courts can also examine:

events surrounding the passage of a surplus land Act . . . [if it reveals a] widely held, contemporaneous understanding . . . the affected reservation would shrink as a result of the proposed legislation, [courts] have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remain unchanged.⁵⁴

Third, courts can additionally look to subsequent history and events when determining if Congress had specific intent to diminish a reservation when it enacted the statute in question—including the treatment of the land thereafter and what demographically inhabited the land.⁵⁵ Shockingly, the *McGirt* Court did not apply this three-step test when coming to its holding.⁵⁶

47. *Solem v. Barlett*, 465 U.S. 463, 470 (1984); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68 (1903).

48. *Solem*, 465 U.S. at 470; *Hitchcock*, 187 U.S. at 566-68.

49. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980); *see also* *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (expressing that if Congress breached treaty promises in relation to a tribe it would then “subject the United States to a claim for compensation by destroying property rights conferred by treaty.”).

50. *Solem*, 645 U.S. at 463.

51. *Solem*, 645 U.S. at 470.

52. *South Dakota v. Yankton Sioux*, 522 U.S. 329, 343 (1998).

53. *Solem*, 645 U.S. at 471.

54. *Id.*

55. *Id.*

56. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459-82 (2020).

The Court held that the creation of the Creek Reservation was in fact executed because “on the far end of the Trail of Tears was a promise,”⁵⁷ and the Oklahoma State illegally exceeded its authority and jurisdiction by applying laws inside the Creek Reservation and others for over one hundred years.⁵⁸ Further, the Court concluded that Congress not only established the reservation for the Creeks but had “guarantied” the Creek Nation the land west of the Mississippi as a “permanent home to the whole Creek Nation of Indians.”⁵⁹ But the lands granted to the Creeks were not free; it was payment for their agreement to sell its other lands to Alabama, to the United States, and move west.⁶⁰ Arguably, the Court reviewed various statutes under step two of *Solem*, looking for evidence that Congress disestablished the Creek Reservation.⁶¹ The State’s argument pointed to the 1901 Act, which allotted reservation land to individual tribe members as opposed to the Indian Nation as a whole in an effort to prove disestablishment of the Creek Nation.⁶² However, the argument failed as the Court stated that allotment of a reservation does not diminish or disestablish it.⁶³ In this case, Congress did not intend to disestablish the reservation by enacting the 1901 Creek Allotment Act because, instead of ceasing the land, Congress chose to proceed with allotment.⁶⁴ Thus, the 1901 Act did not have any bearing on the boundaries of the reservation. The Court also looked at other statutes cited by the State, where Congress attacked tribal sovereignty and governance in the Creek Nation after Oklahoma became a state.⁶⁵ However, the Court found no precedent nor any explicit or ambiguous statement from Congress relating to disestablishment of the Creek Nation’s reservation, and thus, it continues to exist, whole.⁶⁶ More importantly, the Court held that steps two and three

57. *Id.* at 2459.

58. Miller & Dolan, *supra* note 38.

59. *McGirt*, 140 S. Ct. at 2460; *see also* Treaty with the Creeks, 7 Stat. 417 (stating under article four: land in the Indian territory to be the permanent and comfortable home of the Nation).

60. *McGirt*, 140 S. Ct. at 2460.

61. *Id.*

62. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973).

63. *Id.* (looking at when the court confiscated gill nets owned by Yurok or Klamath River Indians in the area located within original reservation boundaries and held that the Act of 1892 provided that all lands embraced in what was the Klamath River Reservation were subject to settlement, entry, and purchase under homestead laws, and the Reservation was not terminated and remained ‘Indian country’ in which Indians could not be deprived of any right under federal treaty or statute with respect to hunting, trapping, or fishing).

64. *Id.*

65. *McGirt*, 140 S. Ct. at 2465–68 (stating that “in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.”); *see also McGirt*, 140 S. Ct. at 2487 (Roberts, C.J., dissenting) (noting in the dissent that “no one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation.”).

66. *McGirt*, 140 S. Ct. at 2459, 2482.

of *Solem* are only interpretative and are not an alternative way to prove disestablishment or diminishment.⁶⁷

The Court did not stop at the particulars of Mr. McGirt's case, which concerned criminal jurisdiction, as it argued and highlighted civil law and jurisdiction in the dissent.⁶⁸ The majority briefly disputed the issues as “dire warnings are just that and not a license for us to disregard the law” and “the magnitude of a legal wrong is no reason to perpetuate it.”⁶⁹ In other words, even though the federal government and Oklahoma State previously did not stay true to their word, they should not benefit from illegally applying jurisdiction in *Indian Country* for the past one hundred years and counting—a dramatic shift from past Court precedent and the highlight of this decision.

B. Indian Nation Post McGirt: Generally

The aftermath of the *McGirt* decision generated an immediate response from both the Oklahoma State government and the tribes.⁷⁰ One such response was the creation of the Oklahoma Commission on Cooperative Sovereignty to explore the effects of the decision by Governor Kevin Stitt, of Oklahoma.⁷¹ The Governor's reasoning behind the commission was to present recommendations that would be best for all Oklahoma citizens.⁷² Appropriately, the Commission stated that their recommendations arise from the idea that “if people don't know what the rules are that govern Oklahoma, people and commercial businesses will leave for other states . . . it hurts the [t]ribes and every Oklahoman the same.”⁷³

An important result of the Court's decision is that all lands within the boundaries litigated are *Indian Country*, including all Indian land and *non-Indian fee* lands.⁷⁴ Thus, the decision changed the geographic circumference of the jurisdiction. However, civil authority within *Indian Country* will

67. *Id.* at 2468–81.

68. *Id.* at 2482 (Roberts, C.J., dissenting) (stating: “The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs . . .”).

69. *Id.* at 2480.

70. See generally T.A. LeBrun, *Supreme Court Ruling Regarding Oklahoma Reservation*, MESSAGE MEDIA (Jul. 17, 2020), https://www.messagemedia.co/millelacs/news/supreme-court-ruling-regarding-oklahoma-reservation/article_794ce5a6-c5dd-11ea-99bd-ab5c1f71061f.html.

71. Garrett Giles, *Stitt Holds Press Conference on McGirt v. Oklahoma*, BARTLESVILLE RADIO (Oct. 22, 2020), <http://www.bartlesvillradio.com/pages/news/265652020/press-conference-on-mcgirt> (notably the commission is made up of industry leaders and no tribal leaders).

72. *Id.*

73. *Id.*

74. Dylan R. Hedden-Nicely & Monte Mills, *The Civil Jurisdiction Landscape in Eastern Oklahoma Post McGirt v. Oklahoma*, ROCKY MNT. MIN. L. FOUND. 1, 1, <https://www.rmmf.org/-/media/Files/natural-resources-law-network/august-2020/the-civil-jurisdiction-landscape-in-eastern-oklahoma.pdf?la=en> (last visited Apr. 17, 2022).

remain divided under the guise of tribal membership and land.⁷⁵ Thereby, under the Court's precedent in *Worcester v. Georgia*, tribes were recognized as sovereign nations—distinct political communities with authority within their jurisdiction.⁷⁶ The Court also established a general rule, containing two exceptions, for tribes that lack civil authority over non-Indian conduct on land that is not controlled by the Cherokee Nation.⁷⁷ The Court's first exception recognized tribal authority to regulate activities of nonmembers who are in “consensual relationships with the tribe or its members,” e.g., business dealings, contracts, and leases.⁷⁸ Second, the Court states that tribes may retain inherent authority of nonmembers where their conduct is seen to “threaten” or “effect [the] political integrity, economic security, or . . . health and welfare of the tribe.”⁷⁹ Thus, the Creek Nation can continue to regulate and exercise authority over its members anywhere on reservation land.⁸⁰ However, when it comes to nonmembers, even after *McGirt*, the Nation would need to show that the nonmember's conduct or the need to regulate them fits under either of the exceptions established in *Montana v. United States*.⁸¹

Conversely, throughout history, states have generally been free in controlling anything “to the point where tribal self-government would be affected.”⁸² However, after the *McGirt* decision, if a question of jurisdiction were to arise involving only Native Americans, “federal interest in encouraging tribal self-government [would] [be] at its strongest” and would preempt state law.⁸³ But the bottom line is that Oklahoma law applies unless preempted because it interferes with “traditional notions of Indian self-government” or extensive federal control.⁸⁴

75. *Id.*

76. *Worcester v. Georgia*, 31 U.S. 515, 530 (1832) (considering a White individual, Worcester, who was living on Cherokee Nation land and under law, was required to receive a permit and take an oath of allegiance to the State failed to do so and was convicted. The State then offered to pardon Worcester and in exchange, he would leave Cherokee Nation immediately—he refused, and the court held that Tribal Nations were sovereign, and the States have no authority to pass laws regarding said tribal nations).

77. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (holding tribal powers limited to that only what is necessary to protect tribal self-government).

78. *Id.*

79. *Id.* at 566.

80. *Id.*

81. Hedden-Nicely & Mills, *supra* note 74 at 2.

82. *Id.* at 3 (citing *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 179 (1973) where the Court analyzed Arizona trying to tax a non-Indian trucking company who was exclusively operating on a reservation by way of a contract).

83. *Id.*

84. *Id.*

C. Indian Nation Post McGirt: Environmental Law and Regulation

One must acknowledge cultural notions when creating environmental law and regulation in *Indian Country*. Tribal governments and lands are home to historically oppressed and disadvantaged racial minorities.⁸⁵ Consequently, federal environmental laws were extended to tribal lands in the late 1980s and 1990s, making tribes eligible to shoulder the implementation and exercise the authority of said laws—just like states.⁸⁶ The extension, therefore, provides tribes the opportunity to address concerns critical to their members and land.⁸⁷ But Tribal courts have faced obstacles when asserting their sovereign authority. For example, the federal government continues to fall short in letting go of control and authority over tribal lands and the valuable natural resources within tribal land.⁸⁸ Per a study that examines the relationship between tribal governments and the federal government, tribes continue to endure “systemic regulatory neglect of environmental implementation.”⁸⁹

Environmental law first came about in the 1970s under the notion of regulatory federalism, where the federal government and states share responsibility for environmental protection.⁹⁰ For example, historically, the United States EPA established environmental quality standards, and states could opt-in to share the responsibility for implementation and enforcement.⁹¹ However, when it comes to the unique relationship between tribal governments and the federal government—via the Constitution, treaties signed, statues, executive orders, and judicial decisions—environmental regulation and law, when first established, had no mention of tribal lands and tribal citizens.⁹² In fact, tribal governments and citizens were unsupported until the passage of Ronald Regan’s 1984 Federal Indian Policy (FIP).⁹³ FIP establishes two themes: (1) the federal government will follow the principle of self-government granted to tribes, and; (2) the federal government will work directly with tribal governments on a “government-to-government” basis.⁹⁴ The policy brought to light what is known as the trust

85. Mellie Haider & Manuel P. Teodoro, *Environmental Federalism in Indian Country: Sovereignty, Primacy, and Environmental Protection*, 49 POL’Y STUD. J. 887, 889 (May 29, 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/psj.12395>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 3.

90. *Id.* (highlighting the Clean Air Act and the Clean Water Act as examples of such laws).

91. *Id.* at 3.

92. *Id.*

93. *Id.* at 5.

94. *Id.*

doctrine and establishes the federal government's fiduciary responsibility to federally recognized tribes and citizens.⁹⁵

More telling, the 1987 amendments to environmental laws authorize the EPA to treat federally recognized tribes similar to states when implementing and managing environmental programs.⁹⁶ These amendments recognize tribal governments as lead authorities that set standards and manage programs consistent with federal standards.⁹⁷ Today, tribal authority is present in the context of the Clean Air Act and the Clean Water Act.⁹⁸ After 1987, tribes became the primary authority if the tribe is (1) federally recognized; (2) has the capacity to carry out substantial governmental duties and powers over the reservation; (3) possesses the requisite legal authority over reservation resources, and; (4) is deemed to be capable of carrying out the statutory requirements of the law.⁹⁹ One caveat is that the EPA retains authority over whether a tribe adequately meets the four requirements and managing programs until they are "willing and able to assume full responsibility."¹⁰⁰

The *McGirt* decision does not diminish state authority as feared by the Oklahoma governor and the oil sector.¹⁰¹ Almost immediately after the Court's July 9, 2020, decision, Governor Stitt went on the offensive. Stitt publicly stated that he must get Congress to pass legislation to override the decision.¹⁰² Stitt claimed the only acceptable solution was federal legislation that consolidated all criminal and civil issues that involve the five tribal reservations under State control.¹⁰³ In pursuit of this goal, Governor Stitt

95. *Id.* (pointing to the Supreme Courts' acknowledgment of the fiduciary duty in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), declaring tribes as domestic dependents and the federal government as a ward to its guardian).

96. *Id.* at 5-6.

97. *Id.*

98. See generally Haider & Teodoro, *supra* note 85, at 22 (doing an analysis of the CWA and tribal sovereignty leading to stricter standards and more accountability); see also Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 39 COLUM. J. GENDER & L. 31, 38 (2019) (stating that the CWA can authorize tribes to "implement federal programs within the scope of their inherent tribal powers" and further the CAA does delegate authority to tribes).

99. Haider & Teodoro, *supra* note 85, at 6.

100. *Id.*

101. Letter from Andrew R. Wheeler, *Approval of State of Oklahoma Request Under Section 10211(s) of the SAFATEA of 2005*, EPA (Oct. 1, 2020), <https://www.law360.com/articles/1316789/attachments/0>; Emma Whitford, *Okla. Gov. Gets EPA's Green Light to Regulate Tribal Lands*, LAW 360, <https://www.law360.com/articles/1316789>.

102. Ti-Hua Chang, *Oklahoma Governor Pushing to Undo Tribal Sovereignty Ruling*, TYT NETWORK (Sept. 3, 2020), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/48MFWZV1Nivr5yGCZW07Ao>.

103. *Id.*; Tim O'Donnell, *Controversial EPA Decision gives Oklahoma Governor Regulatory Power over Tribal Lands*, WEEK (Oct. 5, 2020), <https://theweek.com/speedreads/941823/controversial-epa-decision-gives-oklahoma-governor-regulatory-power-over-tribal-lands>; Chuck Hoskin Jr., *The Tribes and the State can Solve any Problems Created by the Supreme Court's McGirt Rulings . . . But*

requested the EPA to override tribal sovereignty over environmental issues.¹⁰⁴ The request was supported through a midnight rider clause attached to a 2005 transportation appropriations bill passed by Senator Inhofe.¹⁰⁵ However, the clause applies exclusively to Oklahoma tribes and grants the EPA—and Oklahoma, upon request—the right to assume regulatory control over certain environmental laws.¹⁰⁶

The EPA granted the request on October 5, 2020, under section 10211(a) of the 2005 Safe Accountable Flexible Efficient Transportation Equity Act (SAFETEA).¹⁰⁷ In justification of the decision the EPA noted:

[it] generally excludes Indian country from its approvals of state environmental regulatory programs. However, where a federal statute expressly provides for the state program administration in Indian country, the EPA must apply that law and approve a proper request for such state administration.¹⁰⁸

Notably, however, the EPA's statutory and regulatory authority over state program review remains even if SAFETEA requires first-instance approval.¹⁰⁹ Thus, this decision “continue[s] to regulate . . . areas where the state has consistently implemented these environmental programs under the steady oversight” of the EPA.¹¹⁰

D. Collaboration by Way of Example

Accordingly, the relationship struck between tribes and the EPA remains delicate when it comes to environmental protection. That said, in the months after the *McGirt* decision, both the EPA and the federal government have gone ahead with decisions rooted in fear of losing control in one sphere of regulatory authority.¹¹¹ In other words, just because the Court's decision now

Only if we Work Together, TULSA WORLD (Nov. 8, 2020), https://tulsa-world.com/community/skiatook/opinion/chuck-hoskin-jr-the-tribes-and-the-state-can-solve-any-problems-created-by-the/article_29649216-1eaf-11eb-a8c1-43388c12a4aa.html.

104. O'Donnell, *supra* note 103.

105. *Id.*

106. *Id.* (highlighting that the rider is one method in which Oklahoma can protect and control the regulation of fossil fuels a large industry in the state and its champion in Congress James Inhofe).

107. Letter to Gov. Stitt, *Re: Approval of State of Oklahoma Request Under Section 10211(a) of the Safe Accountable Flexible Efficient Transportation Equity Act of 2005*, EPA (Oct. 1, 2020), <https://www.law360.com/articles/1316789/attachments/0>; see also Ruth H. Hopkins, *The US is Undermining a Supreme Court Ruling on Native Rights*, ALJAZEERA (Oct. 27, 2020), <https://www.aljazeera.com/opinions/2020/10/27/us-is-already-defying-supreme-court-ruling-on-native-rights/> (motioning how the Trump administration used Public Law 109-59 in justifying its decision).

108. Letter to Gov. Stitt, *supra* note 107.

109. *Id.*

110. *Id.*

111. *Id.*

places non-Indian cities within reservation boundaries does not mean those cities will fail. Quite the opposite—data collection by the National Congress of American Indians represents that such communities flourish under their reservation status.¹¹²

1. Tacoma, Washington

Tacoma, Washington is one example of a non-Indian city that thrives within reservation boundaries. In 1990, a large portion of Tacoma became part of the Puyallup reservation following a long disagreement between the tribe and local government.¹¹³ Tacoma began to revitalize its downtown and marina area, which included the reservation after the designation.¹¹⁴ The revitalization continues to this day which makes Tacoma a center for investment, education, and artistic drive.¹¹⁵ While Tacoma's growth and prosperity was not the sole result of its inclusion within reservation boundaries, inclusion did not stifle growth as the government feared.¹¹⁶ Instead, reservation status enabled the building of a casino, a 400 slip-marina, cutting edge science centers, and many retail store fronts.¹¹⁷ Tacoma's inclusion within the reservation made the Puyallup Tribe the seventh largest employer in the country.¹¹⁸

Furthermore, the Puyallup tribe provides Tacoma (and the county) ample charitable giving from which every citizen benefits.¹¹⁹ The prosperity resulting from this collaboration is the University of Washington-Tacoma's (UW Tacoma) opening of convocations and launching of programs that serve to "infuse Native ways of knowing into UW Tacoma[s] teaching, learning, and research."¹²⁰ Furthermore, key signs of respectful collaboration have developed between the Puyallup tribe and the government. The developments include flying the Puyallup Nation flag at the City Council building and renaming the Puyallup River Bridge to the Fish Wars Memorial Bridge.¹²¹ Thus, inclusion of Tacoma into Puyallup territory and the resulting

112. Bethany R. Berger, *McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries*, 169 U. PENN. L. REV. 250, 286 (2020),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694051.

113. *Id.* at 287.

114. *Id.*

115. *Id.* at 287-88.

116. *Id.*

117. *Id.* at 287.

118. *Id.* at 287-88.

119. *Id.* at 288 (highlighting the fact that in 2019 alone, the tribe donated "nearly four million dollars to local charities: almost two million [] under its gaming compact with the state).

120. *Id.* (quoting UNIV. OF WASH.-TACOMA, REPORT TO THE PUYALLUP TRIBE OF INDIANS, BUILDING EXCELLENCE THROUGH SCIENCE AND TRADITION ACCOMPLISHMENTS THROUGH AUGUST, 2016 3 (2016).

121. *Id.* (recognizing treaty rights established between the tribe and the local government).

collaboration between the tribe and the local government is an example of where tribal and local governments work together to the benefit of a region. The Puyallup tribe's collaboration with the local government ultimately improved the protection of the rights of citizens, specifically, increased environmental protections.¹²²

2. Pender, Nebraska

Another example of tribal and local government collaboration is that of Pender, Nebraska. Collaboration between the parties was not a result of mere chance—it was a result of litigation in *Nebraska v. Parker*.¹²³ In *Parker*, the Court held Pender and its surrounding area were within the Omaha reservation boundary as “Congress did not intend to diminish [the] Omaha Indian Reservation when it enacted the 1882 [Allotment] Act.”¹²⁴ Although the Court held Pender was within reservation boundaries, the State argued inclusion would lead to serious disruption and consequences for the community.¹²⁵ Ultimately, the Court found that the State's concerns were compelling but irrelevant to Congress's actions in the 1882 Allotment Act.¹²⁶

To date, the State's concerns about Pender's inclusion within reservation boundaries are unfounded. The population and town are thriving, as evidenced by the opening of a new clinic, community center, and hospital, alongside many retail spaces.¹²⁷ Pender's success highlights that just because a town is set to be within reservation boundaries it does not mean it will fail. Collaboration between governments is not something to fear—but to desire. Thus, Pender proves yet again that tribal and local government collaboration leads to ample opportunity for prosperity in all spheres.

III. THE UNRECOGNIZED CONSEQUENCES

The Supreme Court decision in *McGirt* has far reaching consequences which result in further unequal distribution of environmental harm for Native Americans. Therefore, *McGirt* is of increased importance in the face of climate change. After *McGirt*, courts will have to hold the “government to its word” outside of the criminal context.¹²⁸ Ultimately, the courts will have

122. See *infra* Sect. II (D)(2).

123. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (examining the action brought by Village and retailers selling alcoholic beverages against the Omaha Tribal Council alleging that under the 1882 Act the tribe was barred from imposing its beverage control ordinance against them but the court held that “Congress did not intend to diminish Omaha Indian Reservation when it enacted 1882 Act.”).

124. *Id.* at 1080.

125. Brief for Petitioner at 20, 23, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406).

126. *Parker*, 136 S. Ct. at 1082.

127. Berger, *supra* note 112, at 38.

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

to answer two questions; who is worthy of environmental protection and how should environmental degradation be distributed?

In the Cherokee Nations' case, they will need to once again try and mend a bridge that was untied at the seams by the Governor's actions—especially, when the Oklahoma Attorney General Mike Hunter had originally agreed to a legislative proposal with the tribes.¹²⁹ The proposal would of given the Native Americans the right to collect taxes and exercise authority within all spheres to the extent that it may “threaten the welfare of [the] tribe.”¹³⁰ Since the day of the EPA's decision, the Cherokee Nation, along with five other tribes, reacted to Governor Stitt's letter and the EPA.¹³¹ Specifically, the tribe's expressed disappointment in the lack of consultation, as this decision provided all parties involved with an “immense opportunity . . . [to] step away from the disagreements of the past.”¹³² Meanwhile, others express the opinion that this regulatory power results from Stitt's relationship with Wheeler and is representative of how politicians take action to undermine the Court and local authorities when their desired result is lacking.¹³³

All of this to say that both the *McGirt* and EPA's decision have far-reaching, long-term implications in the environmental sphere, especially as each relates to regulation of oil and gas companies—a major industry in Oklahoma—which largely operates on tribal land.¹³⁴ Another aspect implicated is waters that lie inside reservation land. Initially, many feared *McGirt* granted general jurisdiction over the entire eastern part of the State, implicating the environmental regulation of a large portion of the State's

129. Fraser Wayne et. al., *Implications for the Energy Industry in Light of the U.S. Supreme Court Decision in McGirt v. Oklahoma*, KIRKLAND & ELLIS LLP (Aug. 13, 2020), <https://www.kirkland.com/publications/blog-post/2020/08/supreme-court-mcgirt-decision>.

130. *Id.*

131. *Id.*

132. Amre Proman, *NACC, Davenport Host Tea Discussing McGirt v. Oklahoma*, YALE DAILY NEWS (Nov. 6, 2020), <https://yaledailynews.com/blog/2020/11/06/nacc-davenport-host-tea-discussing-mcgirt-v-oklahoma/>; see also Sean Murphy, *EPA Grants Stitt Request for State Oversight on Tribal Lands*, SEATTLE TIMES (Oct. 5, 2020), <https://www.seattletimes.com/nation-world/nation/epa-grants-stitt-request-for-state-oversight-on-tribal-lands/> (mentioning that the Cherokee Nation Principal Chief was “disappointed that the EPA ignored his tribe's request to consult individually with the agency about the change.”).

133. Jeff Turrentine, *In Oklahoma, “Yet Another Broken Promise” to Native Americans*, NRDC PERSP. (Oct. 21, 2020), <https://www.nrdc.org/stories/oklahoma-yet-another-broken-promise-native-americans> (indicating that governor Stitt “teamed up with the head of EPA to keep tribes from regulating . . .”).

134. Proman, *supra* note 132 (stating that “roughly 25 percent of Oklahoma's Oil and Gas wells and sixty percent of its oil refineries are impacted” by the decision).

water.¹³⁵ But, since the EPA granted the State authority to enforce existing environmental law in Oklahoma, that fear has abated.¹³⁶

At the heart of Governor Stitt's request is the belief of outsiders that Native Americans "lack the intelligence to balance and protect adequately their own economic and environmental interests."¹³⁷ Why risk leaving those decisions to such individuals? After all, these decisions impact the country's overall wealth and values, especially those of White citizens.

So, what does this mean realistically? Well, it means that the EPA granted the state of Oklahoma:

permission to dump hazardous waste, including formaldehyde, mercury, lead, asbestos, toxic air pollutants and toxic pesticides, [alongside the ability to] oversee underground injection control for fracking, and [the] release [of] enormous amounts of urine and feces that contaminate land and water on tribal lands [from animal farms].¹³⁸

The EPA decision undermines the Courts' holding which authorizes the Creek Nation to regulate its own land. The decision permits the further poisoning of land and indigenous peoples—reverting back to the old days of broken promises.¹³⁹ Moreover, by justifying and approving this undermining of the Court's ruling, the Trump administration tried to "give the fossil fuel industry life support as it takes its last dying breath."¹⁴⁰ Further, "[w]ho benefits? [Climate change deniers like] Trump and his cronies . . . who are financially supported by big oil and gas."¹⁴¹

Another implication of the *McGirt* decision is future environmental legal claims rooted in tribal treaty rights. Although *McGirt* recognizes the importance of honoring government signed treaties, recent developments on the Court jeopardize *McGirt's* holding.¹⁴² Specifically, Amy Coney Barrett's replacement of Justice Ruth Bader Ginsburg increases the likelihood of a

135. Micah Goodwin, *Does McGirt Cede Oklahoma Waters to Native American Tribes?*, MITCHELL, WILLIAMS LLP (Jul. 21, 2020), <https://www.mitchellwilliamsllaw.com/does-mcgirt-cede-oklahoma-waters-to-native-american-tribes>.

136. Ti-Hua Chang, *EPA Grants Oklahoma Control Over Tribal Lands*, TYT (Oct. 5, 2020), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/65Oa5a0nY14rljnOqxhUto>; Wayne et. al., *supra* note 129.

137. Yamamoto, *supra* note 33, at 331.

138. Hopkins, *supra* note 107.

139. *Id.* (noting the EPA's decision will lead to "diminishing their quality of life and stealing potential tax revenue and resources such as fresh water, [as well as] pos[ing] a serious threat to . . . health and safety that is downright genocidal.").

140. *Id.*

141. *Id.*

142. *Id.*

completely different outcome if a state and tribe were to battle it out again on similar facts.¹⁴³

IV. RECOMMENDATION

A. It Takes a Village: What Collaboration Can Achieve

The EPA's approval of Governor Stitt's request for regulatory control over tribal lands does not indicate an end to a tribes' ability to achieve environmental justice. It is still possible to move forward instead of backwards, but only if all parties involved work together.¹⁴⁴ One example could be taxation of non-Indian individuals for their land by the tribes via an exception under *Montana v. United States*.¹⁴⁵ Another possibility could be enforcement of regulations on non-tribal citizens if "residents' consent . . . or [the regulated matter] creates a direct effect on the health or welfare of the tribe" by the tribes.¹⁴⁶ Ultimately, such collaboration would enable tribes to reflect their cultural and environmental perspectives in the current regulatory framework. To boot, collaboration would mean that policies and programs would be enforced and applied in a more unified manner as there would be several parties invested in a unified political force.¹⁴⁷

With successful collaboration between the tribes and government comes interaction, and the possible merger of environmental law and tribal preference. This merger is referred to as the "tribes-as-states" (TAS) framework.¹⁴⁸ Even after the EPA's decision in Oklahoma, the possibility for tribal environmental laws is still alive but success rests on communication, and a change in perspective from an individual approach to a *it takes a village* mindset.¹⁴⁹

143. Alex Brown, *Once-Ignored Promises to Tribes Could Change the Environmental Landscape*, PEW TRUST (Dec. 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/01/once-ignored-promises-to-tribes-could-change-the-environmental-landscape>.

144. See Grant D. Crawford, *Environmental Concerns Now Issue in Wake of Creek Ruling*, TAHLEQUAH DAILY PRESS (July 29, 2020), https://www.tahlequahdailypress.com/news/environmental-concerns-now-issue-in-wake-of-creek-ruling/article_ad980748-3e8b-5fde-bb9c-d33567036028.html (quoting Cherokee Nation Principal Chief Chuck Hoskin Jr. "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.").

145. Hedden-Nicely & Mills, *supra* note 74, at 2.

146. Proman, *supra* note 132.

147. Haider, *supra* note 85, at 9-10.

148. *Id.* at 22.

149. Alleen Brown, *Half of Oklahoma is "Indian Country" What If All Native Treaties Were Upheld?*, INTERCEPT (Jul. 17, 2020), <https://theintercept.com/2020/07/17/mcgirt-v-oklahoma-indian-native-treaties/> (noting the *McGirt* decision as one that "opens up a space to imagine a different kind of United States, where all treaties are upheld.").

The mindset that comes with environmental decisions needs to shift. Often, when it comes to environmental allegations and decisions, a balancing test of the potential harm and the potential good comes into play.¹⁵⁰ But, the rights reserved for tribes by treaty should not be left to a subjective balancing test under the eye of the party responsible for the continued harm and pollution of their land and people.¹⁵¹ Instead, treaty rights and overall environmental justice should be at the forefront of decision-makers' minds and conversations.

A successful example is the recent New Jersey Environmental Justice law, which resulted from collaboration between community groups and the government.¹⁵² The New Jersey Environmental Justice law mandates an "Environmental Justice Impact Statement" before a department may consider an application for a permit complete.¹⁵³ The law requires each permit applicant to conduct a valid public hearing in the overburdened community and provide a transcript to the New Jersey Department of Environmental Protection.¹⁵⁴ Departments must then consider application materials during their decision-making process.¹⁵⁵ If the department finds that the renewal or addition of a permit for that facility would "disproportionately impact overburdened communities . . . [they] *must* deny the permit application."¹⁵⁶ The biggest impact of the law is that it directs the New Jersey Department of Environmental Protection to create and enforce rules, regulations, and guidance that comply with the new law.¹⁵⁷ Just as New Jersey chose the path of collaboration and inclusivity in the name of environmental justice,

150. Brown, *supra* note 143.

151. *Id.* (stating: "But when you're dealing with the diminishment of a right reserved by tribes, there ought not to be that balancing test.")

152. See generally Brianna Baker, *He Helped Pass a Historic EJ bill. But He's Just Getting Started*, GRIST (Oct. 14, 2020), <https://grist.org/fix/he-helped-pass-a-historic-environmental-justice-bill-but-hes-just-getting-started/> (mentioning Nicky Sheats role in the passage of the current NJ Environmental Justice law as an "activist, lawyer and policy researcher.")

153. N.J. STAT. ANN. §13:1D-160 (2020).

154. Julius Redd et al., *New Jersey Governor Signs Landmark Environmental Justice Legislation into Law*, BEVERIDGE & DIAMOND PC (Sept. 23, 2020); EJ 2020 Glossary, *Overburdened Community*, EPA, <https://www.epa.gov/environmentaljustice/ej-2020-glossary#:~:text=Overburdened%20Community%20%2D%20Minority%2C%20low%2D,disproportionate%20environmental%20harms%20and%20risks> (defining an overburdened community as "Minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities.")

155. Redd et al., *supra* note 154.

156. *Id.* (emphasis added).

157. *Id.*

Oklahoma and the Creek Nation have time to do the same. They could look at the New Jersey law as a model and include the protection and requirement of an Environmental Justice Impact Statement for all environmental decisions on the reservation moving forward.

A light began gleaming at the start of the Biden Administration. It promises to put environmental justice at the forefront and highlights the need to do so to combat climate change successfully. Moving forward, it will be increasingly interesting to see how the Biden administration, with its actions such as Executive Order 13990, prioritizes environmental justice¹⁵⁸ and how the current conservative Supreme Court handles clashes between the government and tribes attempting to regulate the environment. However, tribes can at least count on a bit more support from the executive branch than they have in the past four years of the Trump administration.

CONCLUSION

Communities of color face an unequal distribution of environmental harm—that is no secret.¹⁵⁹ However, Native Americans have long been facing not only an unequal distribution of environmental harm, but blatant attacks on their society and culture at the hands of the United States since 1492.¹⁶⁰ That is until the judiciary stepped in. The Court in *McGirt* held it would make the government stick “to its word” regarding land signed to the Creek through treaties.¹⁶¹ This decision arises in the criminal jurisdiction context, but the impacts ripple all throughout—specifically, on how the government may regulate or enforce laws in the environmental context on land that is now part of the Creek Reservation, and thus, jurisdiction. The solution to relax some of the lasting historical tension and mistrust as well as to achieve a form of environmental justice is a trust fall; a collaboration in good faith on behalf of all parties involved. The government and tribes can look to New Jersey as an example in moving toward environmental justice

158. See Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (stating: “(e) In carrying out the actions directed in this section, heads of agencies shall seek input from the public and stakeholders, including State local, Tribal, and territorial officials, scientists, labor unions, environmental advocates, and environmental justice organizations.”).

159. See generally Aneesh Patnaik et al., *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change#:~:text=Environmental%20Racism,-Environmental%20racism%20refers&text=Communities%20of%20color%20are%20disproportionately,waste%20are%20people%20of%20color>.

160. DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* 146 (New York: Oxford University Press, 1992) (describing the harm as “The worst human holocaust the world had ever witnessed . . .”).

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

with the support of a new administration behind them who has placed environmental justice at the forefront.¹⁶²

162. See Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021); Rebecca Hersher, *Hope and Skepticism as Biden Promises to Address Environmental Racism*, NPR (Jan. 29, 2021), <https://www.npr.org/2021/01/29/956012329/hope-and-skepticism-as-biden-promises-to-address-environmental-racism> (stating “The Biden administration has pledged an aggressive, broad-based approach to achieve environmental justice. Among a raft of executive actions on the climate Biden signed on Wednesday was one creating a White House council on environmental justice and a pledge that 40% of the benefits from federal investments in clean energy and clean water would go to communities that bear disproportionate pollution.”).