

**AS LONG AS THE WATERS FLOW:
NATIVE AMERICAN WATER POLICY IN OKLAHOMA**

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Native American tribes in Oklahoma have developed a variety of approaches to watershed management and water policy in their national lands. Over half of the land in Oklahoma falls within tribal national boundaries and approximately 7% of the population has a tribal affiliation. Therefore, tribal approaches to water policy, especially in the water-rich Eastern portion of the state, influence the choices for the entire state. This research draws on semi-structured interviews with tribal water policymaking elites in Oklahoma including officials from the Caddo, Cherokee, Chickasaw, Choctaw, Citizen Potawatomi, Muscogee Creek, Pawnee, and Seminole Nations. We analyze tribes' approaches to water policy in contrast with non-tribal stakeholders. We analyzed water as a cultural resource, future use of the land, toleration of pollution, and motivations for sustainability. We also found a variety of different approaches to creating and enforcing water policy among the tribes. These approaches include writing a Water Atlas to protect culturally important sites, cooperating with state and federal agencies on water quality programs, seeking Treatment as a State under the Clean Water Act, and permitting oil and gas activity on tribal lands. The U.S. Supreme Court jurisdiction case *McGirt v. Oklahoma* (2020) makes this research

all the more relevant because tribes may have more jurisdiction to direct environmental regulation in their lands, although the 2005 Midnight Rider puts this jurisdiction into jeopardy.

“Our nations are built on ceremonies, and our nations are built on understanding our relationships with the earth. I always give credit to the drummer for keeping the traditions, keeping the dances, keeping the languages, keeping the cultures, because that is who we are” (Lyons 2007, vii).

-- Oren Lyons, *Faithkeeper, Onondaga Indian Nation*

INTRODUCTION¹

Justice Gorsuch wrote, “On the far end of the Trail of Tears was a promise” (*McGirt v. Oklahoma* 2020, 1). The *McGirt v. Oklahoma* opinion continued to quote an 1832 treaty with the Muscogee Creek Nation: “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves” (*McGirt v. Oklahoma*, 2020, 1). Justice Gorsuch’s opinion in *McGirt* feels like hope. Few would say that the US Supreme Court or the federal government in general delivers much good news to Indian Country.

Jurisdiction is the authority to act. When jurisdiction is in question, uncertainty is interjected into the decision to act. Indeed, some actors take advantage of the ambiguity in jurisdiction. Such has been the case for water policy in Oklahoma. This paper explores the water policy created for and by the federally recognized tribes of Oklahoma. We began this project probing some basic questions relating to tribes and how they viewed and created water policy. We were specifically interested in whether tribes in Oklahoma viewed water as a cultural resource and if this differed from how

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non-native people viewed water. Additionally, we wanted to learn how tribes sought to protect their water. This question led to the development of a typology of different ways that tribes affect water and environmental policy.

LITERATURE REVIEW

The presidency of Richard Nixon – specifically the year 1970 – marked an important turning point in both environmental protection and the reassertion of self-determination by Native American tribes in the United States. The Environmental Protection Agency (EPA) was created in 1970 and the Clean Water Act (CWA) was passed; Earth Day was celebrated for the first time.

In 1970, the Termination policy put forward by President Truman in the 1950s remained the US government’s official Indian Policy. Federal recognition of tribes such as the Choctaw Nation was nearly ended in 1970 except Choctaw youth urged Congress to repeal the legislation (Debo 1970; Lambert 2007). On July 8, 1970, President Nixon shifted the policy by telling Congress, “As a matter of justice and as a matter of enlightened social policy, we must break decisively with the past and create conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions” (quoted in Trafzer 2009, 178). The era of self-determination was born as tribes were invested with the authority to administer many federal programs.

Ironically, tribes were not consulted at all in the creation of the EPA or early environmental policy (Rodgers 2004). Lefthand-Begay (2014) calls the relationship “undefined” – a condition that sometimes works to the benefit of tribes. Tribal land would be subject to the decisions of the federal government – and in some cases the states – without having a voice despite the new era of self-determination and tribes’ dormant “inherent sovereignty.” Native

lands require more environmental remediation than other places after decades of neglect, active environmental injustice through deliberate dumping, and because of jurisdictional conflicts (Diver 2018).

As tribes, states, and the federal government grappled with how to enforce environmental regulations, it became clear that a gap in jurisdiction existed. Tribal governments have “inherent sovereignty” over their lands, which exists because of the sovereign-to-sovereign treaty relationship that tribes have with the U.S. federal government. This inherent sovereignty cannot be breached by state law or even the plenary power of Congress. In 1987, Congress passed the “Treatment as a State” or TAS provisions to the Clean Water Act, Section 518(e).² Under TAS, tribes could apply to be recognized by the EPA to regulate water quality throughout the borders of reservations. To qualify, tribes must be able to 1) carry out substantial governmental duties and powers, 2) target tribal land with their program, and 3) have the capacity to administer its program consistent with applicable law (Galloway 1995). TAS is an attractive policy and tribes have the ability to carry out environmental policy because they have established governments, fixed territories, and a longstanding commitment to protecting the environment (Rodgers 2004). In 1992, Pueblo of Isleta was the first tribe to receive TAS status and then became the first tribe to create Water Quality Standards (WQS) that were higher than the adjoining state, New Mexico.

Unsurprisingly, there was a legal challenge. Albuquerque, New Mexico, challenged the higher WQS imposed by the Pueblo of Isleta. The case *City of Albuquerque v. Browner* (1996) upheld Pueblo of Isleta’s WQS. This case established the important rule that tribes can set more stringent WQS than the federal minimum.

² TAS now is said to mean “Treatment Similar to that as a State” in order to highlight the fact that tribes are not states and should not be treated as such.

When tribes consider how to set their WQS, they might consider matching the adjoining states, matching federal EPA requirements, or they may seek to set an independent WQS (Galloway 1995). Tribes may have cultural reasons for setting higher WQS; “Tribes identify with their lands in ways that non-Indian society is only beginning to understand” (Galloway 1995, 202). Is it possible that tribes could set their WQS independent of the state or federal WQS for the sole purpose of protecting cultural resources? “Water is life,” writes Diver (2018, 5). Indigenous water protection is based on human health concerns, access to clean water, and something else: “Indigenous knowledge regarding mutual responsibilities or reciprocal relations between indigenous people and the waters that have long sustained them” (Diver 2018, 6). When indigenous people protect water it will look different than when a non-indigenous person protects water.

Weaver (2015, 325) asks, “What happens to a sacred place when it loses its personality?” He describes the Glass Mountains in Oklahoma and Blue Hole Springs in Tennessee. Both of these locations are sacred because of the flora that exists in them. “Indigenous religious traditions are often site-specific” (Weaver 2015, 333). When the site is lost to contamination or rising sea levels, there is a loss of cultural practice and religion. *City of Albuquerque v. Browner* (1996) also addresses the question of whether a tribe can base its WQS on cultural considerations. The answer is yes. The “Primary Contact Ceremonial Use” standard was upheld (Rodgers 2004). For all living beings, water is life. Deciding how to steward water is a part of every community. When tribes set their own WQS, the incorporation of tribal cultural knowledge should be assumed; “Traditional knowledge is the foundation for how tribes have made decisions about how to manage their land” (Lefthand-Begay 2014, 59).³

³ Cole (2015) makes a similar argument regarding groundwater. She examines the Agua Caliente Reservation under the *Winters* Doctrine and concludes that there may be a right to groundwater as a cultural resource. This argument made regarding water quantity is governed by different legal authority than arguments relating to water quality.

The TAS framework joins other laws such as the Indian Gaming Regulatory Act of 1988 that force tribes into a “dangerous” relationship with states, as Corntassle and Witmer (2008, 5) would characterize it. These relationships threaten the tribes’ culture and nationhood status. Tribes might come to be viewed by state and local officials not as sovereign entities but rather another part of the service population or as an interest group. However, Corntassle and Witmer (2008, 54) note that “environmental, land management, and natural resource issues appear to be areas most likely to generate indigenous-state cooperation and nation-building policies.” There is no place where the politics surrounding TAS is more dangerous than Oklahoma.

Two tribes were on the vanguard of seeking treatment as a state: the Osage Nation and the Pawnee Nation. The plentitude of oil in the Osage Nation is well known. The Osage Nation is unique because the tribe owns the subsurface oil and mineral rights for all of Osage County which was formerly the Osage Reservation (Clark 2009). As the tribe produced oil and gas through fracking, it also was forced to handle a large amount of wastewater that is typically injected back into wells in the earth. Injection wells are regulated under the Safe Drinking Water Act which brought them into contact with the EPA in 2004. They wanted to get TAS to handle this issue on their own. Additionally, the Pawnee Nation sought TAS and was the only tribe in the State of Oklahoma to gain this recognition, which it earned in 2004. These activities also demonstrate the rapid increase in administrative capacity and political clout achieved by tribes in the period between 1970 and 2004. No longer were tribes impoverished relics of the past that just happened to live in Oklahoma. They had become politically powerful governments adept at asserting and protecting their sovereignty.

Tribal regulatory activities were alarming to U.S. Senator James Inhofe of Oklahoma who is known to be a friend to the oil and gas industry. Recognizing the ability of tribes to enforce environmental

regulations as a threat to oil and gas extraction and pipelines, he inserted a “Midnight Rider” into the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) on August 10, 2005, that required tribes to get approval from the Oklahoma government before they could be granted TAS. Congress approved the bill the next day without knowing the rider had been added (Nolan 2018). Oklahoma tribes immediately sought support from EPA Region VI officials but they were not successful in repealing the rider. It continues to this day. Thus, although the Pawnee Nation was granted TAS in 2004, the State of Oklahoma has never worked with the nation to finish the process that would allow the Pawnee Nation to set its WQS. Another tribe we interviewed for this project has been pursuing TAS aggressively for more than 10 years to no avail. Secret late-night action on the part of Senator Inhofe to the benefit of oil and gas and the detriment of tribes continues to be a concern.

On July 22, 2020, Governor Kevin Stitt asked the EPA to strip tribes of environmental authority in a speech to the Oklahoma Farm Bureau. He said, “The EPA will regulate environmental issues. That’s good and bad. It’s good right now with President Trump’s environmental folks at the helm. And it could be bad if there’s a switch in the administration” (Murphy 2020, n.p.). By placing regulatory control with the EPA, the status quo will continue with EPA and the State of Oklahoma collaborating to set WQS.

Despite the exclusion of Oklahoma from the benefits of the TAS policy, how has it worked out for other tribes? Diver (2018) analyzes the 330 federally recognized tribes that can take advantage of the policy. She determined that 54 have received TAS status but that only 44 have had their WQS approved. Only about 10% of tribes, then, are affected by the TAS innovation. On the other hand, she notes that fully 75% of tribes have applied and been recognized for TAS under section 106 of the Clean Water Act for a program that monitors water pollution.

Against this regulatory background, let's examine our hypotheses.

HYPOTHESES

H1: Native American Tribes view water as a cultural resource.

H2: Tribes seek more authority to protect their water.

METHODOLOGY

We received East Central University Institutional Review Board approval to interview Native American leaders of federally recognized tribes during the summers of 2018 and 2019. Our script included assuring each person we interviewed that we would not reveal any identifying markers. Indeed, we pretested our interview questions with various tribal officials to make sure that our questions were not offensive. We never asked for specific information that might jeopardize a tribe's sensitive cultural information or the location of sites. Each person was free to answer our questions or not. In this analysis, if a tribe's name is used, it is not based on our interviews but based on publically available information.

We tested our hypotheses using qualitative research techniques, specifically using interviews with tribal elites (N=12). We also visited tribal cultural sites and attended two conferences with significant information about Native American water issues. These are the Sovereignty Symposium, which is hosted by the Oklahoma Supreme Court and the Inter-Tribal Environmental Council (ITEC). We recorded and transcribed the interviews and we made careful notes of the sessions we attended at the two conferences. We studied the Caddo, Cherokee, Chickasaw, Choctaw, Citizen Potawatomi, Muscogee Creek, Pawnee, and Seminole Nations.⁴ These tribes represent all of the Five Tribes

4 They are not numbered in this order throughout the article.

as well as a geographical distribution around the state. Several different cultures are represented, including Southeastern, Plains, and Great Lakes tribes.

We used qualitative research techniques including visiting tribal cultural sites and conducting semi-structured interviews with tribal elites. These elites can be divided into two groups: water policy experts and technicians and cultural experts and storytellers. We conducted 12 interviews with members of 8 different tribes.

ANALYSIS OF HYPOTHESES

H1: NATIVE AMERICAN TRIBES VIEW WATER AS A CULTURAL RESOURCE.

Thirty-nine tribes have been removed to Oklahoma. Much of the cultural information tribes retain regarding water relates to their ancient homeland and not Oklahoma geography. For example, the seal of the Seminole Nation depicts a man in a canoe traversing the Everglades in Florida. Seminole, Oklahoma, could not be more different than Florida. Citizen Potawatomi Nation stories relate to food growing on water. While wild rice is commonly grown in the Great Lakes region, it is impossible to replicate this culturally important practice in Oklahoma. Tribe 7 has ceremonies where tribal members walk into the water. These ceremonies were developed on the gentle slopes of a river in another state. Tribe 7 in Oklahoma abuts a creek, but the water is not the same. The slope is not gentle and the river is not wide.

Weaver (2015) estimates that when the 5 Tribes were removed to Oklahoma, one-third of the plants upon which they depended did not grow in their new land. Tribes were forced to adapt. During one interview with Tribe 1, a storyteller came into the room and began telling us stories relating to water. Some of his stories were about his life and his own experiences, but others are stories relating

to both Oklahoma lands and historic homelands. He mentioned specific spiritually significant practices, such as bathing when the sun is rising or when a hunter might fill or empty his canteen. The Blue River is known as “Mr. Blue” to some people and they pray and talk to the water by bringing it up to their faces in their hands:

One of the stories developed here is Blue River. We know some people call it Mr. Blue because of how old he is. So when we go along the rivers, they’ll actually talk to the rivers and we still kind of see it as that being. They’ll go and pick [it] up. Sometimes you will see a lot of elders pick up the water and they will talk to it. Then they may not drink it, but put it up to their mouth, just so they can feel the coolness. They say that they believe that that’s maybe how they feel the speaking or sometimes they’ll put it up to their face. They can feel that connection with water. That and also Pennington Creek is also part of the Blue River, but when they had Good Springs, they would go to Good Springs for the same reason, for the healing purposes. Here in Sulphur there’s a lot of stories whenever we came here. The very first [tribal] area that the [tribe] came here to make Sulphur its home, it actually in the middle of our park here. Where the headquarters is that was the very first [tribal] home. He would go and get the Sulphur water and bathe in it, drink it, and use it for healing purposes and mineral purposes. That was one main reason they went to Tishomingo because of Good Springs and Blue River. It is also one reason they came here to Sulphur because of the springs here too. So we still have that connection with homelands, but we brought everything with us, all our home times, all our history, all of our culture, all of our stories, we brought everything with us. Everything that we could call ours, it came with us. That is why we pay for our own removal because we made it ours, we made it a significant movement for us. So all the stories, all the culture, history, and medicine, it came here to Oklahoma, so you still see that significant importance too.

Each tribe has a different removal story. The Choctaw Nation specifically scouted for the best land and water they could locate

in Oklahoma. The Chickasaw Nation joined the Choctaw Nation and was able to settle near fine rivers and streams. Other tribes such as the Seminole Nation and the Citizen Potawatomi Nation faced difficult removals with little successful negotiation. Each of these tribes faced shifting boundaries and additional removals that decimated and demoralized the tribes. During each removal, the goal was to settle near good water. The removal treaties continue to shape water rights today.

Tribe 2: “We monitor other federal state and local water policies that get implemented and we try to assist or... guide those in a way that is in accordance with our water settlement as well as... things that we view are good water resource management.”

How is water used culturally? To wash, to use as medicine, to purify the ground, to communicate with, to group important plants, to sustain important animals and insects, trade and transportation, and as a place to locate churches. One tribal official said, “Water is foundationally important to [Tribe 3] culture and you can’t really overstate its importance.”

Zogry (2010) discusses “going to water” which is part of every important ritual in the Cherokee culture, including hunting, warfare, the Cherokee ball game, and the formal transmission of cultural narratives. There is cultural and ceremonial significance in water beyond the life-giving function. Tribe 7 traditionally relied on a year-round water supply with water running out of a cave. Removal to Oklahoma interrupted this cultural practice. A tribal elite at Tribe 1 explained how the tribe regulates water on tribal land and how conflicts are managed. We talked about how tribal cultural knowledge is being used to direct water policy to a greater degree now and that a team is being developed to work with this information. Tribe 1 has a deep connection to water and holds it in high regard beyond just acknowledging its life-sustaining properties. Most interestingly, the official told us that Tribe 1 is compiling a “Tribal Water Atlas” that will mark the

nation's most culturally sensitive areas. This atlas is not for public view – perhaps ever - and she would not share it with us.

Every tribe that we studied confirmed that tribes view water as a cultural resource. Tribe 1 stated that water is valued for culturally relevant plants and animals, water is used for trade and transportation, water is used for ceremonies, churches are built near water, and different forms of water (running versus still, for example) are necessary. Tribe 2 added that water-based stories are critical for teaching children about tribal culture. Also, settling near springs was prized during the days of removal. Tribe 3 confirmed that water is foundationally important; “Clean water is not *like* your blood, it is your blood” one official told us. Tribe 4 emphasized the role of water in stories, including the tribal creation story, and using water to grow food. A water official with Tribe 5 told us that “People can’t drink contaminated water or live on a chat pile. It affects human health . . . culture is important by if there is no one left, the culture dies. She expanded on the importance of a well-regulated environment: “clean water is life. Tribe 1 has a deep connection to water and hold. My tribal council worries about Culture. And sovereignty.”

The Citizen Potawatomi Cultural Heritage Center in Shawnee, Oklahoma, is an excellent place to learn about the tribe. The Citizen Potawatomi tribe is originally from the New York State region but they moved first to the Great Lakes region during the 19th Century and then to Kansas on what they refer to as the “Trail of Death.” They were removed to Oklahoma near Shawnee in 1870-1. The Citizen Potawatomi Nation has 25,000 members. They are known as a “Fire Tribe” but several of their important stories involve water. For example, the homeland they sought in the early days was “the place where food grows on water” (wild rice).

There is support for hypothesis 1, that Native American Tribes view water as a cultural resource. For example, one tribal official

said, “Water is foundationally important to Tribe 3 culture and you can’t really overstate its importance.” Water is used for many different cultural uses including purification, medicine, and communication.

H2: TRIBES SEEK MORE AUTHORITY TO PROTECT THEIR WATER.

It is clear that tribes seek more authority to protect their water. This sentiment was woven through each of our interviews and during many of the sessions of the conferences we attended. For example, a Tribe 1 official – said, “Tribes are here and we’re here to stay.” The strongest example of tribes seeking greater sovereignty is what the Pawnee Nation is doing. It passed the Energy Resource Protection Act in 2017 which created a permitting framework for any company extracting natural resources within the Pawnee Nation. Currently, there are 20 such companies and 19 are complying with the Pawnee Nation’s regulation. Their program might provide a model for how other tribes could seek greater sovereignty over their water. Another interesting strategy is that tribes are working with the Environmental Protection Agency (EPA) to provide water data under section 106 of the Clean Water Act. They are working under a program that designates “treatment as a state.” Many examples of tribes seeking increased sovereignty were on display at the Intertribal Environmental Council meeting that we attended. Dozens of tribes sat on panels and presented information on their environmental programs that included recycling, fish surveys, water monitoring, mapping, cultural preservation of churches near springs, and educational programs for children—Further support of H2, Tribes seek water policy that protects water as a cultural resource.

Tribe 3 has a group of people known as the “Medicine Keepers” who inform policymaking with their cultural knowledge. Tribes employ various strategies to gain and maintain power over their waters. Section 106 of the Clean Water Act allows tribes to apply for “Treatment as a State” (TAS) for grants to administer programs

for prevention, reduction, and elimination of water pollution. Oklahoma tribes face an additional hurdle in attaining TAS because of a “Midnight Rider” that Senator James Inhofe inserted into a transportation bill in 2006. The State of Oklahoma must agree that tribes may receive TAS, which is an unusual diminishment of tribal sovereignty because, in every other state, the tribes and the federal government enjoy a sovereign-to-sovereign relationship without requiring the stamp of approval from the state. It is generally assumed the Senator Inhofe’s close relationship with oil and gas companies led to his sponsorship of the Midnight Rider. TAS is an important tool that tribes can use to protect water quality (although not water quantity) in their nations.

Tribes may seek to permit corporations to do business in their tribal nations. In 2017, the Pawnee Nation passed the Energy Resource Protection Act. All operations doing business in the Pawnee Nation must apply for permits. The Pawnee Nation Department of Environmental Conservation monitors activities under 13 types of permits that may affect water quality. Permit types include extraction of oil and natural gas, pipelines, transport, and easements. If a corporation is found to be out of compliance, the Pawnee Nation may levy fines or file a criminal suit in tribal court. According to our interview with the Pawnee Nation, if the Oklahoma Water Resources Board determined a corporation to be illegally pumping water, the fine is only \$50. In 2019, 19 of 20 corporations operating in the Pawnee Nation complied with the Energy Resource Protection Act.

Tribe 1 has an Environmental Health and Safety Office that was pursuing knowledge to designate culturally important plants and water. This tribe was compiling a “Water Atlas” so the tribal government would know where they should and should not encourage development. The Water Atlas is not a secret as a project, but the contents of the Water Atlas are closely held by tribal officials.

We talked at length with tribes regarding how water policymakers would be made aware of culturally relevant information. In some tribes, this information is common knowledge. Tribe 2 asserted that cultural knowledge is “communal knowledge.” Or perhaps the tribe is so small that the water technician is or knows the people with the relevant cultural knowledge. In Tribe 4, Tribe 5, and Tribe 7 the water person knew the culture person well and they were in constant contact. Thus, the relationship was less bureaucratic and more reliant on personal relationships. In Tribe 3, the person who made the water policy knew that there was a group of elders who would advise her on important water decisions. She would let it be known that she was ready to talk and they would come to her on their timetable. Tribe 1 demonstrated the most formal structures and it actively managed the relationships between the cultural experts and the water experts through formal committees and offices.

What would tribes do if given more regulatory power? Would tribes insist on higher standards in terms of water quality or water quantity? Our research suggests that they would. Tribes view water differently than does the State of Oklahoma or the U.S. Government. Tribes value non-consumptive use and conservation. The State of Oklahoma does not recognize non-consumptive use and conservation as a beneficial use under current water law. When it comes to water quantity, tribes seek sustainable use. Sustainable use and a constant supply of water may be necessary for cultural purposes, or to sustain certain plant and aquatic life, and sustain animal life. When it comes to water quality, non-tribal governmental policy is to pollute until harm is proven. Non-tribal governments see this decision in the opposite way: they would prefer no pollution.

In reviewing the transcripts as well as other background sources, we compiled a typology of water policy and actions that tribes are undertaking to preserve their natural resources (Table). Not all of these strategies are discussed in the paper. However, the variety

of activities illustrated shows what a robust and important policy area this is for tribes.

Table: Typology of Water and Environmental Policy Approaches

	Description	Examples
Intratribal	Collaborations among departments within Tribes	Writing water quality and quantity standards based on tribal cultural knowledge Creating a Water Atlas to guide construction and preservation decisions; Creating a channel of communication between water planners and cultural experts/medicine keepers
Tribal	Collaborations among Tribes	Participating in Intertribal Environmental Council (ITEC) Sharing Technical knowledge; Working together on recycling or pollution program Membership in National Congress of American Indians Participating in water protests such as Dakota Access Pipeline
Forced Federalism with the State	Collaboration between the State of Oklahoma and Tribes	Issuing permits to use water Participating in watershed management Participating in water quantity permitting Participating in water planning Providing data to Department of Environmental Quality (DEQ) for Integrated Report Working with small towns and rural water districts to make sure they have the technical capacity to provide good water to tribal members Providing water tanks to cities with poor water Negotiating settlements such as the Chickasaw-Choctaw-Oklahoma-Oklahoma City Water Settlement
Sovereign-to-Sovereign Relationship with the Federal Government	Collaboration between the US Federal Government and Tribes	Providing water monitoring data to the Environmental Protection Agency Treatment as a State under the Clean Water Act
International	Relationships with governments other than the U.S.; Engagement with superstate actors such as the United Nations	Attending global environmental conferences such as on Climate Change issues Monitoring passage of treaties such as the Declaration of the Rights of Indigenous Peoples

CONCLUSION

“How, in our modern world, can we find our way to understand the earth as a gift again, to make our relations with the world sacred again Water is a gift for all, not meant to be bought and sold. Don’t buy it” (Kimmerer 2013, 31).

Tribal cultural practice will not be truly safe until both the federal government and the states recognize tribes’ inherent sovereignty. It is not enough to force tribes into a coercive federal relationship with the state and the federal government.

In Oklahoma, the state has proven to be faithless vis-à-vis tribal interests. The current governor, Kevin Stitt, is a Cherokee Citizen, but his political actions prove that he neither understands nor respects tribal sovereignty. Under the Indian Gaming Regulatory Act, tribes must compact with states to offer gaming. Governor Stitt has lawlessly ignored the gaming compact passed by the people of Oklahoma in 2004 and has attempted to negotiate other illegal compacts. The chaotic situation is a worst-case-scenario that President Reagan and Congress could not have envisioned in 1988 when the IGRA was passed.

It is against this backdrop that the State of Oklahoma must reckon with the revolutionary case *McGirt v. Oklahoma*. On its face, *McGirt* which is a murder case may not seem to have any application to environmental regulation. However, in his incredible majority opinion, Justice Neil Gorsuch wrote for a 5-4 court that because Congress did not disestablish the Creek Nation’s reservation at the time of statehood in 1907, the Creek Nation reservation continued to exist. Under the Major Crimes Act, states do not have jurisdiction over tribal lands – only the tribes and the federal government do. Therefore, the conviction

for the murder of Jimcy McGirt and any other Indian who had committed a crime against another Indian on Indian land had been prosecuted without proper jurisdiction.⁵

Tribes in Oklahoma are good and willing partners to the State of Oklahoma, the U.S. federal government, and to each other. Tribal leaders wrote an interesting *Amicus Curiae* brief supporting Jimcy McGirt where they stated, “For more than two decades, the Nations’ sovereign authority within their

Reservations and commitment to the cooperative exercise of that authority have provided the framework for the negotiation of agreements that provide legal certainty, economic stability, and a better quality of life for all Oklahomans. For that record of success to continue, the framework on which it relies must also endure” (Cole Brief 2019, 5). The authors are referring specifically to the tribal gaming compact which was approved in 2004, but they are also referring more broadly to the long list of other compacts the tribes and the State of Oklahoma have entered into. These compacts are of mutual benefit and are built on trust. The most notable such agreement is the historical settlement among the State of Oklahoma, Oklahoma City, the Chickasaw Nation, and the Choctaw Nation. Under this innovative agreement, the tribes asserted their rights under the Treaty of Dancing Rabbit Creek to monitor water quantity in Southeast Oklahoma and Sardis Lake to ensure that both they and water consumers in Oklahoma City would be protected.

5 This characterization is broad. It is clearly true that any Indian committing a crime against another Indian on Creek land would be covered. Most legal scholars conclude that the Court’s reasoning would also be extended to the other 5 Tribes, which includes the territory of almost all of the Eastern half of Oklahoma, including the City of Tulsa. It probably includes Osage Country. It might also extend more broadly to other Oklahoma tribes that possess less perfect legal title to their land.

Regulating natural resources in the context of overlapping jurisdictions is difficult. Watersheds do not follow political boundaries such as tribal, county, state, or even national boundaries. Cooperation among different political actors is difficult to achieve especially when trust is broken among them. These various governmental actors do not have the same goals regarding environmental regulation or the resources with which to enforce those resources. With sufficient resources, the policy of tribal governments would most likely seek the highest level of environmental protection. The strength of a tribal government is greatest when it revitalizes its cultural and political forms of government and not when they emulate non-natives (Corntassle and Witmer 2008).

Can tribal self-determination strategies be successful when they exist in a dominant regulatory structure? The entire EPA and Clean Water Act framework was created with no input from tribes. The TAS plan was created without tribal input. At what point will tribes be recognized as the sovereigns that they are? Diver (2018) discusses the challenges of making policy outside of the dominant model and reinventing tribal governance versus working inside existing structures. There is usually tension between the actors but both approaches may be necessary.

As Pappas (2020) argues elsewhere, there are multiple reasons that tribes would be more able to affect sound policy than state governments. For example, tribes plan for the seventh generation rather than the extremely short term, tribes are more unified than the state government is in seeking a goal, and tribes are certainly more insulated against interest group pressure than is the state government (Pappas 2020). Federal regulation and tribal policies are bound together. The effects of colonialism cannot be ignored. The only way to free tribes from this pressure is to maximize tribal sovereignty and tribal citizen self-determination. As a leader from Tribe 5 told us, “Clean water is life.”

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