IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Civil Action Nos: CIV-21-719-F
CIV-21-805-F

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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INTRODUCTION

Congress' promise to Oklahoma in the Enabling Act, 34 Stat. 267 (1906)—that it joined the Union "on equal footing with the original States"—now threatens to ring hollow as a result of Defendants' actions at issue in this case. But existing precedent, including *McGirt v. Oklahoma*, makes clear that it need not and should not be so.

Two years ago, the U.S. Supreme Court decided in *McGirt* that for the purpose of prosecuting criminal offenses under the federal Major Crimes Act ("MCA") the historic lands of the Muscogee (Creek) Nation in eastern Oklahoma constitute "Indian country." 140 S. Ct. 2452, 2460–82 (2020). And as this Court has recognized, that narrow holding has led to numerous attempts to expand *McGirt* beyond the realm of federal criminal jurisdiction to call into question "[c]ore functions of state government," "putting the State of Oklahoma, and millions of its citizens, in a uniquely disadvantaged position as compared to the other forty-nine states." ECF No. 75 at 1.

But by its own terms, the holding of *McGirt* does not displace State authority in all contexts, *even when a federal statute such as the Surface Mining Control and Reclamation Act ("SMCRA") is at issue*. The Supreme Court recognized that its decision would not have broad reach because in future cases, equitable considerations would "protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, 140 S. Ct. at 2481. These are such cases.[1]

[1] The parties agreed to consolidate *Oklahoma v. U.S. Department of the Interior*, No. Civ-21-719-F ("*Oklahoma I*") and *Oklahoma v. U.S. Department of the Interior*, No. Civ-21-0805-F ("*Oklahoma II*") for purposes of summary judgment briefing. *See*

As this Court knows, the federal government seeks here to use *McGirt* to foreclose Oklahoma's ability to regulate surface coal mining and reclamation within its borders, something Oklahoma has done nearly continuously since statehood in 1907. For the first 70 years of the State's existence, Oklahoma acted as the exclusive regulator under state law. After Congress enacted the federal SMCRA in 1977, Oklahoma continued to act as the primary regulator by exercising "primacy" and relying on federal grants to operate its programs. Then, on May 18, 2021, and October 19, 2021, Defendants purported to strip Oklahoma of jurisdiction to regulate surface coal mining and reclamation operations within the historic lands of the Muscogee (Creek) Nation, the Cherokee Nation, and the Choctaw Nation of Oklahoma on the theory that *McGirt* mandated that result. Defendants also denied Oklahoma federal funding for its SMCRA programs.

For several reasons, Defendants are incorrect in their conclusion that *McGirt* forecloses Oklahoma's regulatory authority. First and foremost, *McGirt* was by its terms limited to federal criminal law, and Defendants' decision-making process entirely ignores *McGirt*'s express recognition that equitable principles limit relief in the area of Indian law where, as here, the relief sought is particularly disruptive and longstanding reliance interests are at stake. In denying Plaintiffs' motion for a preliminary injunction, this Court rightly recognized such equitable principles but did not apply them because of the presence of a federal statute. It is not the case that "claims of equity cannot undermine the enforcement of a federal statute," as this Court tentatively concluded, ECF No. 75 at 14.

Oklahoma I, ECF No. 89; *Oklahoma II*, ECF No. 34. Unless otherwise indicated, "ECF No." refers to the docket in *Oklahoma I*.

To the contrary, in decisions discussed in greater detail below than at the preliminary injunction stage, multiple courts, including the U.S. Supreme Court, have applied equitable principles in the face of a federal statute.

Second, even if Oklahoma cannot maintain a State SMCRA program on Indian lands, Defendants are incorrect that the State has no regulatory authority at all. SMCRA is a cooperative federalism statute that sets a federal floor above which States can regulate, and Oklahoma's laws are well above this federal minimum standard. The statutory provisions that support this holding were not addressed in this Court's prior decision.

Finally, in this administration's haste to seize Oklahoma's regulatory authority, Defendants also failed to follow the requirements of the Administrative Procedure Act ("APA"), including by failing to provide a reasoned explanation for their decision, consider the substantial reliance interests at issue, or engage in notice-and-comment rulemaking. While this Court previously indicated that these claims were not likely to succeed, Plaintiffs submit that a further review will demonstrate the merit of these claims.

The fact is that Defendants' actions are not driven by a real desire or bandwidth to administer the programs at issue. This is simply one of many inevitable steps the federal government has taken, and will continue to take, to federalize significant portions of Oklahoma under the guise of following *McGirt*. This Court can and should make clear that the law neither requires, nor permits, that wholesale federalization.

STATEMENT OF MATERIAL FACTS

I. The Surface Mining Control and Reclamation Act ("SMCRA")

1. Congress enacted SMCRA in 1977, 30 U.S.C. § 1202(d),(f), and established the Office of Surface Mining Reclamation and Enforcement ("OSMRE") in the Department of the Interior with responsibility to administer and implement SMCRA, *id.* § 1211(a).

2. SMCRA created two major programs: (1) an abandoned mine lands ("AML") reclamation program, funded by fees that operators pay on each ton of coal produced, to reclaim land and water resources adversely affected by coal mines abandoned before August 3, 1977, *id.* §§ 1231–1244 ("Title IV"), and (2) a regulatory program to ensure that surface coal mining operations initiated or in existence after the effective date of the Act are conducted and reclaimed in an environmentally sound manner, 30 U.S.C. §§ 1251–1279 ("Title V").

3. Title IV of SMCRA mandates that OSMRE provide AML grants to eligible States and Tribes that are funded from permanent (mandatory) appropriations. *See id*. § 1232.

4. Title V of SMCRA authorizes OSMRE to provide grants to States and Tribes to develop, administer, and enforce State and Tribal regulatory programs that address, among other things, the disturbances from coal mining operations. *See id*. § 1295.

A. State primacy

5. Although SMCRA establishes "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," *id*. § 1202(a), it assigns primary responsibility for administration of that program to the States:

> [B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States.

Id. § 1201(f).

6. To carry out its intent that States assume primary authority, Congress included within SMCRA a program of cooperative federalism that allows States to assume primary responsibility for the regulation of surface coal mining and reclamation within their borders, subject only to very limited oversight from OSMRE. This primary responsibility is commonly referred to as "primacy."

7. To obtain primacy, a State must show that it has, among other things: (1) "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with [the Act]"; (2) "a State law which provides sanctions for violations of State laws, regulations, or conditions of permits"; (3) "a State regulatory authority with sufficient administrative and technical personnel"; (4) "a State law which provides for the effective implementations, maintenance, and enforcement of a permit system"; (5) "a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations"; and (6) "rules and regulations consistent with

regulations issued by the Secretary pursuant to [the Act]." *Id*. § 1253(a) (footnote omitted). OSMRE must review and approve or not approve the State program. *Id*. § 1253(b).

8. Once the State has obtained approval of its program, State laws and regulations implementing SMCRA "become operative for the regulation of surface coal mining, and the State officials administer the program, . . . giving the State 'exclusive jurisdiction over the regulation of surface coal mining' within its borders." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001) (quoting 30 U.S.C. § 1253(a)).

9. If a State fails to obtain primacy, or "fails to implement, enforce, or maintain its approved State program as provided for in this [Act]," then OSMRE shall prepare a Federal program "for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this [Act]." 30 U.S.C. § 1254(a). "Prior to promulgation and implementation of any proposed Federal program, the Secretary shall give adequate public notice and hold a public hearing in the affected State." *Id*. § 1254(c).

10. "Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program" is subject to judicial review. *Id*. § 1276(a)(l).

B. Changing state programs

11. Once a State obtains primacy, any amendment to an approved State program, either under Title IV or Title V must follow the procedure set forth in 30 C.F.R. § 732.17.

12. SMCRA has no provision that allows OSMRE to disapprove, amend, or otherwise modify a State program by merely sending an unpublished letter to a State agency. 30 U.S.C. § 1254; 30 C.F.R. pts. 732, 733, 736.

13. Whenever the Director becomes aware of conditions or events that "change the implementation, administration or enforcement of the State program," or "indicate that the approved State program no longer meets the requirements of the Act," the Director must determine whether a State program amendment is required and notify the State regulatory authority. 30 C.F.R. § 732.17(c), (e). If an amendment is required, the State must submit a proposed written amendment. *Id*. § 732.17(f)(1). If the State does not submit a proposed amendment within 60 days, the Director must begin proceedings under 30 C.F.R. part 733.

14. 30 C.F.R. part 733 provides the procedure for substituting Federal enforcement of State programs or withdrawing approval of State programs. The procedure requires written notice to the State, the opportunity for an informal hearing, and public notice and hearing. *See id*. § 733.13(b), (c), (d). If the Director concludes that the State has failed to implement, administer, maintain or enforce effectively all or part of the approved program, then the Director may substitute Federal enforcement of the State program or withdrawal of approval of the State program. *Id*. § 733.13(e).

II. Oklahoma's Primacy Under SMCRA

15. After providing notice in the Federal Register, a public comment period, and a public hearing, OSMRE approved Oklahoma's Title V program on April 2, 1982. 47 Fed. Reg. 14,152 (Apr. 2, 1982). Oklahoma's Title V program has been amended twenty-eight times. 30 C.F.R. § 936.15.

16. Oklahoma subsequently entered a cooperative agreement with the federal government to allow the Oklahoma Department of Mines ("ODM") to also regulate mining

on federal lands. *See id.* § 936.30. ODM's oversight under the Title V program included issuing mining operation permits, inspecting the operations, prosecuting permit violations, and overseeing reclamation activities. ECF No. 17-1 ¶ 14.

17. Since January 21, 1982, Oklahoma also had an approved State program under Title IV for abandoned mine reclamation. *See* 30 C.F.R. § 936.20. The Oklahoma Conservation Commission ("OCC") was responsible for reclamation of abandoned surface and underground coal mine sites and responding to AML emergencies. ECF No. 17-2 ¶¶ 6, 33. The program was funded entirely by congressionally mandated grants. *Id.* ¶ 46.

III. *McGirt v. Oklahoma*

18. On July 9, 2020, the U.S. Supreme Court issued its decision in *McGirt v. Oklahoma* concerning whether Oklahoma state courts had jurisdiction to try McGirt for certain criminal offenses that took place on the Muscogee (Creek) Reservation. 140 S. Ct. 2452 (2020). The Court concluded that for the purpose of prosecuting criminal offenses under the federal Major Crimes Act ("MCA"), the historic lands of the Muscogee (Creek) Nation constituted "Indian country." *Id.* at 2460–82.

19. By its terms, the holding of *McGirt* was for "purposes of federal criminal law" only. *Id.* at 2459. *McGirt* was not about SMCRA, and the Court specifically declined to apply its ruling to any other area of state authority, stating that "[t]he only question before us . . . concerns the statutory definition of 'Indian country' as it applies in federal criminal law under the MCA," and explicitly dismissing concerns about its decision being applied to "civil and regulatory law." *Id.* at 2480–81.

20. Nevertheless, some have attempted to expand *McGirt* beyond criminal law, including through challenges to Oklahoma's power to regulate oil and gas matters, *Canaan Res. X v. Calyx Energy III, LLC*, No. CO-119245 (Okla. filed Dec. 8, 2020), and the jurisdiction of non-Indian municipal courts in eastern Oklahoma under the Curtis Act, Pub. L. No. 55-517, ch. 517, § 14, 30 Stat. 495, 499-500 (1898), *Hooper v. City of Tulsa*, No. 21-cv-165 (N.D. Okla. filed Apr. 9, 2021). Moreover, many businesses and individuals in eastern Oklahoma are refusing to pay income and sales taxes, and are seeking refunds of prior payments. *See* Okla. Tax Comm'n, *Report of Potential Impact of McGirt v. Oklahoma*, at 2 (Sept. 30, 2020).[2] Still others are attempting to expand *McGirt* to avoid state property taxes. *E.g., Oneta Power, LLC v. Hodges*, No. CJ-2020-193 (Wagoner Cty. Dist. Ct. filed Aug. 21, 2020).

IV. Extension of *McGirt* to other parts of the State

21. On March 11, 2021, the Oklahoma Court of Criminal Appeals ("OCCA") issued its decision in *Hogner v. State*, 500 P.3d 629 (Okla. Crim. App. 2021), in which the OCCA found the existence of the Cherokee Reservation for purposes of criminal jurisdiction only. *Id.* at 634–35; *see id.* at 638 (Rowland, J., concurring).

22. Less than one month after *Hogner*, on April 1, 2021, the OCCA issued its decision in *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021), *cert. denied sub nom. Oklahoma v. Sizemore*, 142 S. Ct. 935 (2022). There, the court held, "for purposes of

[2] https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/reports/other/McGirt%20vs%20OK%20-%20Potential%20Impact%20Report.pdf.

federal criminal law," that the historic lands within the Choctaw Nation are "Indian country." *Id.* at 871.

V. Procedural History

A. Muscogee (Creek) Lands

23. On April 2, 2021, OSMRE sent letters to ODM and OCC, AR 0638–42 (the "April 2 Letters"),[3] stating that, in light of *McGirt*, "OSMRE and the Secretary of the Interior lack the authority to confer on the State of Oklahoma jurisdiction over lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation." AR 0639; AR 0642. OSMRE asserted that "the State of Oklahoma may no longer administer a SMCRA regulatory program on lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation." AR 0639; AR 0642. It claimed instead that "[f]or lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation, OSMRE is now the SMCRA Title V regulatory authority," AR 0642, and "OSMRE will assume authority over Oklahoma's AML reclamation program," AR 0639.

24. In its April 2 Letters, OSMRE instructed ODM and OCC to continue operating their SMCRA programs, and unilaterally imposed a thirty-day transition period set to expire May 2, 2021. AR 0639; AR 0642.

25. The Oklahoma Attorney General responded to OSMRE's April 2 Letters on April 16, 2021, AR 0660–62, explaining that "OSMRE's assertion of sole and exclusive jurisdiction is not well-supported by the legal citations offered in your letters." AR 0660.

[3] "AR" refers to OSMRE's Certified Index to the Administrative Record.

He further explained that because OSMRE's "demand appears to have no adequate basis in law, I am advising that no state agency should comply with it without further discussion." AR 0662.

26. On May 2, 2021, the transition period expired without OSMRE taking control of Oklahoma's SMCRA programs. ECF No. 17-2 ¶ 63; ECF No. 17-3 ¶ 9.

27. Then on May 18, 2021, before responding to the Attorney General's letter, OSMRE purported to take control of Oklahoma's programs in a one-page "Notice of Decision" in the Federal Register, stating that pursuant to *McGirt*, OSMRE "is assuming jurisdiction over the SMCRA Title IV reclamation and Title V regulatory programs" with respect to the historic lands of the Muscogee (Creek) Nation. AR 0699 ("May 18 Notice").

B. Cherokee and Choctaw Lands

28. On June 17, 2021, OSMRE sent letters to ODM and OCC, AR 0756–61 (the "June 17 Letters"), stating that, following the OCCA's application of *McGirt* in *Hogner* and *Sizemore*, "SMCRA . . . prohibits the State of Oklahoma from exercising jurisdiction over surface coal mining and reclamation operations within [the historic lands within the Cherokee Nation and Choctaw Nation]." AR 0757; AR 0760. OSMRE asserted that "the State of Oklahoma may no longer administer a SMCRA regulatory program on lands within the exterior boundaries of the Cherokee Nation and Choctaw Nation Reservations." AR 0757; AR 0761. OSMRE further claimed that "[t]his determination also implicates Oklahoma's operation of its Title IV AML reclamation program," and, "[a]s a result, for lands within the exterior boundaries of the Choctaw Nation and Cherokee Nation

Reservations, OSMRE is now the SMCRA Title IV AML reclamation authority." AR 0757.

29. Despite OSMRE's assertion that Oklahoma no longer had jurisdiction over surface coal mining and reclamation operations within the historic lands of the Cherokee and Choctaw Nations, OSMRE instructed ODM to at the present "maintain its administrative, inspection, and enforcement responsibilities," AR 0760, and instructed OCC to "maintain its routine AML reclamation program activities," AR 0757.

30. Like in its April 2 Letters, OSMRE imposed in the June 17 Letters a thirty-day transition period, set to expire on July 17, 2021. AR 0757–58; AR 0760–61.

31. The thirty-day transition period then expired on July 17, 2021 without OSMRE taking control of Oklahoma's SMCRA programs. ECF No. 17-2 ¶ 63; ECF No. 17-3 ¶ 9.

32. On October 19, 2021, OSMRE published a Notice in the Federal Register stating that pursuant to *McGirt*, *Hogner*, and *Sizemore*, OSMRE is "the sole agency with jurisdiction over the SMCRA Title IV abandoned mine land (AML) reclamation and Title V regulatory programs" within the historic lands of the Cherokee Nation and Choctaw Nation of Oklahoma. 86 Fed. Reg. 57,854 (Oct. 19, 2021) ("Oct. 19 Notice"), AR 0810–11.

C. Grant Funding Denials

33. OSMRE denied ODM's and OCC's federal funding to operate Oklahoma's SMCRA programs on June 29, 2021, and July 8, 2021, respectively (the "Grant Funding Denials"). *See Oklahoma I*, ECF No. 77 ¶¶ 44–45; *Oklahoma II*, ECF 29 ¶¶ 51–52. The

Grant Funding Denials applied with equal force to Oklahoma's operation of its SMCRA programs within the historic lands of the Muscogee (Creek) Nation, Cherokee Nation, and Choctaw Nation of Oklahoma. *See id*.

34. On September 22, 2021, ODM discovered that OSMRE had deleted ODM's grant award account. ECF No. 42-1 ¶¶ 2–3.

VI. Disruption Resulting from Defendants' Unlawful Decision

35. As a result of Defendants' unlawful decision, ODM shut down its SMCRA Title V regulatory program on December 31, 2021. This involved terminating all employees who operated the program, closing its Tulsa Field Office, and ending its regulation of surface coal mining and reclamation in Oklahoma, including ceasing all actions with respect to bonds. *See* Declaration of Mary Ann Pritchard ¶ 4 attached as Exhibit ("Ex.") 1; ECF No. 86 at ¶ 3; *see also* ODM website, https://mines.ok.gov/ (last visited June 11, 2022). ODM has stopped conducting inspections, taking enforcement actions, or issuing notices of violation, nor is it accepting or processing applications for permit revisions or bond reduction, release, or forfeiture. Ex. 1 ¶ 5. ODM also instructed the public and regulated entities that all inquiries related to coal mining in Oklahoma be directed to OSMRE. *Id.* ¶ 6.

36. Likewise, without federal funding, OCC was forced to stop operating its SMCRA Title IV AML reclamation program, and instead is using State funds to pay contractors for work on AML reclamation projects that were initiated prior to the start of this litigation. *See* Second Supplemental Declaration of Robert Toole ¶ 2, attached as

Exhibit 2. OCC has also stopped responding to AML emergencies and is forwarding those emergencies to OSMRE. *Id.* ¶ 3.

37. As a result of Defendants' actions, ODM and OCC have started the process of transferring authority to OSMRE. This includes ODM asking OSMRE for its proposed process to effectuate the assignment of bonds and transfer of forfeited bond funds, but ODM has not yet received any proposed process from OSMRE. *See* Ex. 1 ¶ 9. ODM and OCC are in the process of transferring records, documentation, data, and other information related to the lands at issue to OSMRE. *Id*. ¶ 12; Ex. 2 ¶ 5.

STANDARD OF REVIEW

"Summary judgment is warranted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1187 (10th Cir. 2003) (quoting *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1108 (10th Cir. 2002)). The court will "construe all facts and make reasonable inferences in the light most favorable to the nonmoving party," but "[t]he nonmoving party may not . . . rely solely on its pleadings but must set forth specific facts showing that there is a genuine issue for trial." *Mincin*, 308 F.3d at 1108.

ARGUMENT

I. Plaintiffs are entitled to a declaratory judgment that Oklahoma has jurisdiction to regulate surface coal mining and reclamation operations within the historic lands of the Muscogee (Creek) Nation, Cherokee Nation, and Choctaw Nation of Oklahoma (Count One).

Defendants erroneously interpret *McGirt* to affect Oklahoma's jurisdiction under SMCRA within the historic lands of the Muscogee (Creek) Nation, the Cherokee Nation, and the Choctaw Nation of Oklahoma. OSMRE contends that two particular rulings in *McGirt* compel the ousting of Oklahoma's surface mining and reclamation authority: (1) that Congress had not disestablished the Muscogee (Creek) Nation reservation and (2) that the lands within the reservation meet the definition of "Indian country" under the Major Crimes Act. That is wrong.

It does not follow simply from either, or both, of these determinations that Oklahoma lacks authority to regulate surface mining and reclamation on the lands in question. The Supreme Court made clear in *McGirt* that the case would not necessarily foreclose Oklahoma's civil or regulatory authority in those lands. *McGirt*, 140 S. Ct. at 2480–81. Indeed, the Court specifically noted Oklahoma's concerns that parties might attempt to expand the Court's holding beyond the criminal context but explained that "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few"—might apply in those "later proceedings." *Id.* at 2481. This purposefully narrow

ruling tracks the Supreme Court's long-standing calibrated approach to authority on tribal lands.[4]

Here, there are at least two reasons why Oklahoma's regulatory jurisdiction should continue. And both are supported by authorities not addressed or discussed in this Court's decision denying Plaintiffs' motion for a preliminary injunction.

First, the Supreme Court has recognized that fundamental principles of equity can preclude disruptive incursions into long-exercised state authority over Indian lands, including where the federal government seeks to enforce a federal statute. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 (2005) ("*Sherrill*"). This Court preliminarily concluded those principles likely would not apply here because the federal government purports to enforce SMCRA, a federal statute. But *Sherrill* and subsequent cases applied those equitable principles even where the federal government sought to vindicate its interest in a federal statute.

Second, even if Oklahoma cannot continue a State SMCRA program on Indian lands, the statute does not prohibit Oklahoma from enforcing state laws and regulations consistent with SMCRA on Indian lands. The statutory provisions that support this holding were not addressed in this Court's prior decision.

[4] As the Supreme Court has previously acknowledged, "even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Organized Vill. Of Kake v. Egan*, 369 U.S. 60, 75 (1962). Similarly, because reservations are "part of the territory of the State," *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) (citation omitted), where "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Id.*

A. Fundamental principles of equity foreclose OSMRE's decision to strip Oklahoma of its long-exercised authority on the lands in question, even in the face of SMCRA.

The Supreme Court has recognized that fundamental principles of equity can preclude disruptive incursions into long-exercised state authority over Indian lands. *Sherrill*, 544 U.S. at 214; *see also Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 617 F.3d 114, 128 (2d Cir. 2010). In *Sherrill*, the Oneida Indian Nation ("Oneida") claimed "present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations" based on their rights under the Nonintercourse Act. 544 U.S. at 214. The Supreme Court concluded that the Oneida's claims were foreclosed under "'standards of federal Indian law and federal equity practice,'" *id.*, derived from the "doctrines of laches, acquiescence, and impossibility," *id.* at 221. Specifically, the court looked to the well-established doctrine of laches, which is "focused on one side's inaction and the other's legitimate reliance, [and] may bar long-dormant claims for equitable relief." *Id.* at 217. The Court also applied the doctrine of acquiescence, recognizing that "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." *Id.* at 218. The Court further explained that its decision was also based on "the impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *Id.* at 219. Those equitable principles apply equally here.

1. The *Sherrill* equitable principles apply against the federal government and where a federal statute is at issue.

Contrary to Defendants' assertion and this Court's preliminary determination, *Sherrill*'s equitable principles can apply to the federal government and federal statutes. ECF No. 34 at 24–26; ECF No. 75 at 11–14. A number of cases support the application of these equitable principles against the federal government and regardless of whether a federal statute is at issue. Conversely, the cases this Court viewed as precluding the application of those equitable principles do not, in fact, stand for that proposition.

a. As a threshold matter, *Sherrill* itself supports applying equitable principles against the federal government and where a federal statute is at issue. The tribe's argument in *Sherrill* was based on the contention that a federal statute, the Nonintercourse Act, had been violated. 544 U.S. at 207–08. And although the federal government was not involved in *Sherrill*, the Court's analysis relied specifically on cases in which a State's acquiescence had controlling effect on the exercise of dominion and sovereignty over territory. *Sherrill*, 544 U.S. at 218 (citing *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973); *Massachusetts v. New York*, 271 U.S. 65, 95 (1926); and *California v. Nevada*, 447 U.S. 125, 131 (1980)).[5] It did

[5] Even if the ordinary rules of laches apply, it is not categorically true that the federal government is not subject to laches. *See, e.g.*, *Clearfield Trust Co. v. United States,* 318 U.S. 363, 369 (1943) (holding that laches is a defense asserted against the United States in its capacity as holder of commercial paper); *Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 373 (1977); *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.,* 467 U.S. 51, 60–61 (1984); *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95–96 (1990). In fact, the Seventh Circuit has recognized that "laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties." *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990). And the Tenth Circuit has recognized "some relaxation of the[] strict rules [against application of laches against the federal government]." *Roberts v. Morton*, 549 F.2d 158, 163–64 (10th Cir. 1976).

so even though States, like the federal government, are traditionally not subject to laches, *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991). The Court thus showed that equitable principles in the area of Indian law apply even in the face of a federal statute and even against sovereigns that are not generally subject to laches.

Consistent with all of that, the Second Circuit has twice applied *Sherrill* where the federal government sought to enforce a federal statute—specifically, the Nonintercourse Act. *See Oneida Indian Nation*, 617 F.3d at 129; *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005) ("*Pataki*"). As the court explained in responding to the dissent in *Oneida*, the fact that the United States seeks to vindicate a statute "cannot serve as a basis for declining to find *Sherrill*'s equitable defense applicable to the United States." *Oneida Indian Nation*, 617 F.3d at 129 n.7.

In determining that *Sherrill* applied, the Second Circuit held that equitable defenses may apply against the United States in the Indian law context in three situations: (1) "'the most egregious instances of laches'"; (2) where "'there is no statute of limitations'"; and (3) where "'the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights'" rather than "'to enforce sovereign rights.'" *Pataki*, 413 F.3d at 279 (quoting *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995)). The Court explained that it "need not decide which of these three possibilities might govern because this case falls within all three." *Id.* In fact, the Seventh Circuit's opinion in *Administrative Enterprises*—on which the Second Circuit relied—was clear that only one of the three "possibilities" must exist for laches to apply against the

federal government. 46 F.3d at 673 (gathering cases that each represent a separate "possibility" and finding laches appropriate in each).

The distinction between public and private rights, in the last category, recognizes that some cases involving federal statutes will be stronger than others. But it is the nature of the right that the government is purporting to vindicate, not whether there is a statute at issue, that is relevant to whether equitable principles may apply against the federal government. In *Pataki*, the Second Circuit held that although the United States was seeking to enforce the Nonintercourse Act, it was ultimately seeking to vindicate the interests of the Tribe, rather than any public interest or public right. 413 F.3d at 279 & n.8. The Nonintercourse Act prohibited sales of tribal land without the federal government's acquiescence, and the federal government acknowledged the Oneidas' reservation and right to the reserved territory in the 1794 Treaty of Canandaigua. *Id.* at 268–69. The United States contended New York nevertheless continued to purchase reservation land from the Oneidas in violation of the Nonintercourse Act and the interests of the Tribe. *Id.*

In contrast, "[t]here is no better illustration of the enforcement of a sovereign right than the use of compulsory process to determine liability for unpaid taxes." *Admin. Enters.,* 46 F.3d at 673. Similarly, where the government "is clearly acting in its sovereign capacity to enforce and protect the public interest in a clean environment," it is enforcing a public interest. *United States v. Louisiana-Pac. Corp.*, 682 F. Supp. 1122, 1138 (D. Colo. 1987). Further, an adverse possession claim to public lands constituted enforcement of a public right for purposes of laches. *Bd. of Cty. Comm'rs for Garfield Cty., Colo. v. W.H.I., Inc.*, 992 F.2d 1061 (10th Cir. 1993).

b. All three of the *Pataki* circumstances are met here. First, this is a case of "egregious" laches. OSMRE not only acquiesced in, *but affirmatively approved of*, Oklahoma's exercise of SMCRA regulatory authority for the past forty years, even for nearly a year after the issuance of *McGirt*. The federal government approved twenty-eight amendments to the program over that time, 30 C.F.R. § 936.15, but now claims that the state actually never had any SMCRA authority at all. Second, there is no statute of limitations that would otherwise limit OSMRE's actions.

Finally, though OSMRE is purporting to apply a statute, it is not seeking to enforce a public right, but rather exercising something "in the nature of private rights," *Pataki*, 413 F.3d at 278–79. OSMRE is not asserting that Oklahoma's state program must be amended or revoked because it is being inadequately enforced or carried out, and is thus not seeking to vindicate the public interest that underlies SMCRA. This is particularly so given that "SMCRA exhibits extraordinary deference to the States." *Bragg*, 248 F.3d at 293. Congress recognized that the environmental interests protected by SMCRA warranted placing "primary governmental responsibility . . . with the States." 30 U.S.C. § 1201(f).

Instead, OSMRE is seeking to displace state authority with federal authority to vindicate the purported interest of the Tribes. ECF No. 44 at 8 ("as a practical matter, the agency's interest in defending its determinations is virtually identical to the interests of the [Tribe]") (alterations, internal quotation marks, and citation omitted). This is not a sovereign or public right, but more akin to the private interest asserted by the United States in *Pataki* on behalf of the tribe there.

c. The cases this Court viewed as precluding the application of *Sherrill* do not, on closer review, stand for that proposition. In *Cayuga Nation v. Tanner*, 6 F.4th 361 (2d Cir. 2021), the Village of Union Springs asked the court to apply *Sherrill* to conclude that the Cayuga Reservation is a "'de facto *former* reservation[]'" that "'[does not] exist today in any real world sense.'" *Id.* at 379. The Second Circuit rejected the argument not because there was a statute at issue but rather because the assertion that *Sherrill* can effectively disestablish a reservation is "hard to square with the actual holding of [*Sherrill*.]" *Id.* at 380 n.13.

That is because *Sherrill* focused on the type of relief that is available, not the antecedent question whether Congress disestablished the reservation. *Sherrill* drew its principles from *Oneida II*. 544 U.S. at 213 (citing *Cty. of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 236 (1985) ("*Oneida II*")). In *Oneida II*, the Court had "reserved for another day the question whether 'equitable considerations' should limit the relief available to the present-day Oneidas." *Id.* (quoting *Oneida II*, 470 U.S. at 253, n.27). In doing so, the Court noted "'a sharp distinction between the existence of a federal common law right to Indian homelands and how to *vindicate* that right.'" *Id.* (quoting *Oneida Indian Nation of N.Y. State v. Cty. of Oneida, N.Y.*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000)). Following that distinction, the Supreme Court in *Sherrill* expressly declined to reach the question whether "the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation" because "[t]he relief [the Oneidas] seek[] . . . [was] unavailable" for equitable reasons. *Id.* at 215 n.9.

The Supreme Court recognized the same distinction eleven years later in *Nebraska v. Parker*, 577 U.S. 481, 494 (2016). There, the Court concluded that although Congress did not diminish the Omaha Indian Reservation, equitable considerations might still foreclose certain types of relief in future cases. *Id.* at 483–84. As the Court explained, "[b]ecause petitioners have raised only the single question of diminishment [of the reservation], we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax . . . in light of the Tribe's century-long absence from the disputed lands." *Parker*, 577 U.S. at 494 (footnote omitted) (citing *Sherrill*, 544 U.S. at 217–21). The Court thus reaffirmed that the question whether equitable considerations foreclose a particular type of relief is separate from the status of the reservation.

Consistent with these prior cases, the Court in *McGirt* also separated equitable considerations from its determination of whether Congress disestablished the reservation. Far from rejecting the application of equitable principles, the Court simply found them irrelevant to deciding the issue at hand and reserved the question for future cases. In rejecting as "misplaced" the dissent's concern about reliance interests, the Court explained that legal doctrines such as "laches" would "protect those who have reasonably labored under a mistaken understanding of the law" in future cases. *McGirt*, 140 S. Ct. at 2481. The Court explained that it was precisely because those doctrines could be applied in future cases that the Court could "'say what [it knew] to be true . . . today'"—i.e., that Congress did not disestablish the Muscogee (Creek) Nation reservation— and "leav[e] questions about . . . reliance interest[s] for later proceedings." *Id.*

This Court previously suggested that *McGirt* "squarely rejected any notion that reliance interests could undermine the enforcement [of] a federal statute." ECF No. 75 at 14. Not so. The discussion cited by this Court related not to the application of equitable principles but rather to the state's argument that eastern Oklahoma "is and has always been exempt" from the MCA. *McGirt*, 140 S. Ct. at 2476. And in any event, there is a far stronger argument that the federal government is vindicating a public right when it seeks to enforce a federal criminal statute. *See Schenck v. Pro-Choice Network Of W. N.Y.*, 519 U.S. 357, 376 (1997) (government protects public rights in enforcing criminal laws).

Finally, this Court also looked to *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255 (10th Cir. 2016), in declining to grant Plaintiffs preliminary relief. But in *Myton*, the court did not reject application of *Sherrill* because there was a statute at issue. Instead, the court explained that the town failed to show justifiable reliance and thus to meet the required elements of a *Sherrill* defense. 835 F.3d at 1263. The record here, by contrast, satisfied all of the required elements of an equitable defense under *Sherrill* and cases applying *Sherrill*.

2. Equitable considerations foreclose OSMRE's decision to revoke Oklahoma's SMCRA authority here.

The *Sherrill* equitable defenses fall into three general categories: (1) the length of time between the injustice and the present; (2) the disruptiveness of the claims; and (3) "the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Oneida*, 617 F.3d at 127.

All three of these considerations are plainly satisfied.

First, there has been a "long lapse of time[] during which [Oklahoma's] governance remained undisturbed." *Sherrill*, 544 U.S. at 215 n.9. Oklahoma has regulated surface coal mining and reclamation within its borders since statehood in 1907. And since 1981, OSMRE had recognized Oklahoma's "exclusive" jurisdiction to continue regulating surface coal mining and reclamation within its borders, including on all the lands in question. 47 Fed. Reg. at 14,152 (approving Title V program); 47 Fed. Reg. 2,989, 2,989 (Jan. 21, 1982) (approving Title IV program).

Second, OSMRE's decision has caused and will continue to cause "disruptive practical consequences," *Sherrill*, 544 U.S. at 219, for Oklahoma, its regulatory agencies, and the public. OSMRE's Grant Funding Denials forced ODM and OCC to cease operating their SMCRA programs, and to either eliminate employees' positions or transition employees to other tasks. Ex. 1 ¶ 4; Ex. 2 ¶ 4. Barring this Court's appropriate intervention, ODM and OCC will continue to work on transferring to OSMRE programs that they have run for forty years, a disruptive, unjust, and unnecessary outcome.

Third, as this Court observed, OSMRE's decision has upset "the justifiable expectations of millions of Oklahomans, expectations which go back over a hundred years and are rooted in the very existence of Oklahoma as a state." ECF No. 75 at 12. Oklahoma and the public's justifiable expectations are frustrated by OSMRE's severe delay in taking up the SMCRA programs, *see* ECF No. 17-3 ¶ 9; ECF No. 17-2 ¶ 63, and the numerous practical hurdles to OSMRE administration, *see, e.g.*, ECF No. 17-2 ¶ 70.

The Tenth Circuit's decision in *Myton* is illustrative. In that case, the defendants argued *Sherrill* foreclosed relief because the town had long ago come to fairly expect that

it contained no tribal lands qualifying as Indian country. 835 F.3d at 1263. The court rejected that argument, finding the town could not have justifiably thought that it contained no lands qualifying as Indian country based on the Department of the Interior's long-established view that the Tribe had jurisdiction and the Tribe's timely and consistent assertion of its rights. *Id.* The court distinguished that record from *Sherrill*, explaining that *Sherrill* "approv[ed] laches on a very different record where the land was sold to nontribal members and neither the tribe nor the federal government did anything to assert their rights '[f]rom the early 1800's into the 1970's.'" *Id.* Unlike in *Myton*, OSMRE never indicated that it believed Oklahoma did not have SMCRA regulatory authority on the lands at issue or asserted its right to regulate. The record here is thus more analogous to that in *Sherrill* where the parties against whom equitable defenses were asserted did nothing "to assert their rights." *Id.* In fact, OSMRE not only acquiesced in Oklahoma's authority but affirmatively recognized that authority, approving twenty-eight amendments to Oklahoma's programs. *See* 30 C.F.R. § 936.15. Further, until the Grant Funding Denials, OSMRE approved each of Oklahoma's annual grant requests. ECF No. 17-2 ¶ 51.

B. Even if Oklahoma cannot continue a State SMCRA program on Indian lands, the statute does not prohibit entirely States from regulating on Indian lands.

Even if Oklahoma cannot continue a State SMCRA program on the lands at issue, OSMRE is wrong that Oklahoma cannot regulate surface coal mining at all. Section 1300 requires that with respect to Indian lands, at a minimum, "all surface coal mining operations on Indian lands shall comply with requirements *at least as stringent as* those imposed by [SMCRA]," 30 U.S.C. § 1300(d) (emphasis added). But the provision says nothing of who

shall enforce those requirements. Further, SMCRA allows States to administer State laws that are not inconsistent with SMCRA, including laws and regulations that may be more stringent than the federal standards required by Section 1300(d). *Id.* § 1254(g) (When a federal program is promulgated for a State, State regulations are preempted only "insofar as they interfere with the achievement of the purposes and the requirements of this chapter"); *id.* § 1255(a) ("No State law . . . shall be superseded by any provision of this chapter or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter."). In short, SMCRA merely creates minimum standards on Indian lands that Oklahoma's State laws and regulations satisfy, and far exceed.

In addition to the language of the Act itself, Congress' intent that States serve as the primary regulators under SMCRA is reflected in the legislative history. In the House Report on the bill that became SMCRA, Congress explained that SMCRA "provide[s] for a cooperative surface coal mining regulatory program with responsibility for implementation being shared between the States and the Secretary of the Interior." H.R. Rep. No. 95-218, at 151–52 (1977). To do this, the bill proposed to "enact a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with backup authority in the Department of the Interior." *Id.* at 57. Also, the original version of the bill, developed several years before the bill that became SMCRA, initially directed the Secretary to regulate surface mining on Indian lands, as well as Federal lands. *See* S. Rep. No. 93-402, at 74 (1973). But Congress struck that provision

from the bill. The legislative history thus bolsters the conclusion from the text of SMCRA that Oklahoma may still regulate on Indian lands.

This alternative ground, which was not addressed or discussed in this Court's prior decision, provides a sufficient independent basis for declaratory relief that Oklahoma retains authority to regulate surface mining.

II. Plaintiffs are entitled to summary judgment on their APA and SMCRA claims (Counts 2 through 5).

"The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) ("*DHS*") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)). It requires agencies to engage in "'reasoned decisionmaking,'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015), and directs that final agency actions be "[held] unlawful and set aside" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or if they are made "without observance of procedure required by law," *id.* § 706(2)(D). SMCRA mirrors these requirements for actions taken under that statute. *See* 30 U.S.C. § 1276(a)(1) (adopting the "arbitrary, capricious, or otherwise inconsistent with law" standard).

OSMRE's actions violate the APA for three reasons. *First*, OSMRE's actions are not in accordance with law because they rely on the erroneous legal argument that *McGirt* "necessarily forecloses," AR 0699; AR 0810, Oklahoma's SMCRA regulatory authority on the lands at issue. *Second*, OSMRE's decisions are arbitrary and capricious because OSMRE failed to reasonably explain its decisions and ignored contrary evidence and

important reliance interests. *Third*, OSMRE failed to follow the APA's required rulemaking procedures for the May 18 Notice and Oct. 19 Notice.

In its prior decision, this Court primarily rejected these arguments on timeliness grounds. But that timeliness concern is limited just to certain of the APA claims in *Oklahoma I* and, as discussed below, is also misplaced. To the extent this Court previously concluded that OSMRE's explanations and process were adequate, Plaintiffs submit that a further review will reveal they were not.

A. Oklahoma's APA and SMCRA claims are timely.

Defendants previously contested the timeliness of Oklahoma's claims in *Oklahoma I*.[6] They argued that OSMRE's April letters triggered application of the sixty-day time limit under SMCRA, and thus, Oklahoma's claims with respect to the Creek lands are untimely. ECF No. 34 at 30–31. In denying Plaintiffs' motion for a preliminary injunction, this Court agreed. ECF No. 75 at 15–17. That conclusion is wrong for two independent reasons.

First, if OSMRE's action disapproved Oklahoma's program, timeliness is determined under 30 U.S.C. § 1276, and Oklahoma's claims are timely because they were filed within sixty days of publication in the Federal Register. SMCRA provides that "[a] petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from *the date of such action*." 30 U.S.C. § 1276 (emphasis added). Actions subject to judicial review under that provision include "[a]ny action . . . to approve or disapprove a State program" and "[a]ny other action

[6] Defendants do not challenge the timeliness of the claims in *Oklahoma II*. And for good reason. Those claims were filed within sixty-days under any starting date.

constituting rulemaking." *Id.* Thus, the limitations period is triggered by "the date of" the agency's rulemaking action.

For several reasons, that date is the date of publication in the Federal Register, which represents the consummation of *the rulemaking*. In general, all rulemakings must be published in the Federal Register. *See United States v. Simon*, 727 F.3d 682, 688 n.7 (7th Cir. 2013) (final regulations are generally published in the Federal Register). Moreover, in the case of approval or disapproval of a state program under SMRCRA, there is a particular process that requires publication in the Federal Register. *See Ohio River Valley Envtl. Coal. v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006). OSMRE's regulations provide that "[a]ll decisions approving or disapproving a program, in whole or in part, shall be published in the Federal Register." 30 C.F.R. § 732.13(e). In other words, disapproval of a state program cannot be accomplished by unpublished letters, but is only complete upon OSMRE's publication of its decision in the Federal Register.

This Court's preliminary injunction ruling instead found the April 2 letters likely triggered the sixty-day period because the letters informed Oklahoma that OSMRE was revoking its program, ECF No. 75 at 16, but section 1276's limitation is not triggered by the date of notice but by "the date of" such action. Because the agency's action to disapprove Oklahoma's program was not completed until May 18, 2021, that is "the date of" such action for purposes of section 1276.

Even if notice were the standard, the letters were ineffective to provide notice to Oklahoma because OSMRE did not do what it said it would in the April 2 letters—transition Oklahoma to a federal program within 30 days. Oklahoma thus had no reason to

know that OSMRE considered its decision final until it was published in the Federal Register. Holding to the contrary unfairly penalizes Oklahoma for not rushing into court based on an agency letter that was not published in the Federal Register and by which the agency did not even consider itself bound.

Second, and alternatively, if the Court determines that the *Oklahoma I* decision is not the disapproval of a state program or "any other action constituting rulemaking" under Section 1276, then Plaintiffs' claims are timely because Section 1276's sixty-day filing requirement does not apply. Instead, Oklahoma's claims are subject to, and plainly satisfy, the APA's six-year statute of limitations. *See* 28 U.S.C. § 2401(a); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 626–27 (2018). That is true whether the decision is considered to have been made on April 2 or May 18.

B. OSMRE's decisions are not in accordance with law.

OSMRE's actions were not in accordance with law in several independent ways.

First, OSMRE erroneously interpreted *McGirt* to "necessarily foreclose" Oklahoma's SMCRA regulatory authority within the lands at issue. As described above, *McGirt* says nothing about SMCRA, and OSMRE's analysis entirely ignores the applicability of *Sherrill*. Indeed, even if this Court is ultimately unpersuaded that *Sherrill* bars OSMRE's effort to oust Oklahoma, OSMRE is still wrong to have concluded that *McGirt* "*necessarily* foreclose[s]" Oklahoma's SMCRA authority. *See supra* Part I.A.

Second, Congress established numerous processes for evaluating, amending, disapproving, or otherwise changing a State program, all of which require notice and comment, and in certain circumstances, public hearings. *See* 30 U.S.C. § 1254(c); 30

C.F.R. §§ 732.17(h), 733.13(d). OSMRE did not go through any part of this process before asserting authority to implement a Federal program in the State. Rather, OSMRE simply issued the one-page May 18 Notice and the Oct. 19 Notice, neither of which provided an opportunity for Oklahoma or the public to comment, and which allegedly took effect immediately upon publication. Agency action is not in accordance with law when the agency fails to engage in statutorily required notice-and-comment rulemaking. *Michigan v. EPA*, 268 F.3d 1075, 1087–89 (D.C. Cir. 2001) (holding that EPA's failure to use notice-and-comment rulemaking as required by the Clean Air Act when determining a State's jurisdiction to operate a State program was contrary to law).

Third, OSMRE's actions are not in accordance with law because, as described above, OSMRE has no statutory authority to exercise *exclusive* jurisdiction over lands at issue even assuming those lands constitute Indian lands under SMCRA. *See supra* Part I.B..

C. OSMRE's decisions are arbitrary and capricious.

Agency action is arbitrary and capricious if an agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgment." *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017) (internal quotation marks omitted). And courts may "'not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Motor Vehicle Mfrs. Ass'n of the*

U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation omitted). Also, "[w]hen an agency changes course, . . . it must 'be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."'" *DHS*, 140 S. Ct. at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). The agency must consider these reliance interests even if its change in policy is ostensibly designed to conform with the law. *Id.* at 1915.

i. OSMRE failed to provide a reasonable explanation for its actions.

The one-page May 18 Notice contains no reasoned explanation for OSMRE's decision to strip Oklahoma of the SMCRA programs it has successfully administered for roughly forty years, let alone an explanation that adequately addresses the relevant factors and evidence before the agency. The sum total of the reasoning in the notice is that:

> [the Court's decision in *McGirt*], which legally recognized the on-going existence of the historic Muscogee (Creek) Nation Reservation in the State of Oklahoma, necessarily forecloses the State of Oklahoma's authority to implement [SMCRA] on Indian Lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation. SMCRA designated OSMRE as the regulatory authority over surface coal mining and reclamation operations on Indian lands where a tribe has not obtained primacy. OSMRE has thus determined that Oklahoma cannot exercise its State program regulatory authority over surface coal mining and reclamation operations within the exterior boundaries of the Muscogee (Creek) Nation Reservation.

AR 0699.

OSMRE provides no justification for its conclusion that *McGirt* "necessarily" requires the action it has taken, particularly in light of *Sherrill* and reliance interests. *See Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 388 (D.C. Cir. 2006) (the agency's "failure to explain itself renders its decision in this case arbitrary and capricious").

The agency "has not provided even one sentence" addressing *Sherrill*—even though *McGirt* itself flagged the importance of equitable considerations in future cases. *Erwin v. Fed. Aviation Admin.*, 21 F.4th 154, 161 (D.C. Cir. 2021); *CSI Aviation Servs, Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 416 (D.C. Cir. 2011) ("Given DOT's complete failure to explain its reading of the statute, we find it impossible to conclude that the agency's cease-and-desist order was anything other than arbitrary and capricious, and hence unlawful."). Even where the agency provides more than a few sentences, mere "'conclusory statements' that such factors are being considered 'cannot substitute for the reasoned explanation that is wanting in this decision.'" *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304–05 (D.C. Cir. 2009) (quoting *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001)).

What is more, the May 18 Notice does not address contrary evidence before the agency. In its April 16 letter, Oklahoma disputed OSMRE's expansion of *McGirt*. *See* AR 0660–62. The State explained in detail why that position has "no adequate basis in law." AR 0662. But the May 18 Notice does not even acknowledge Oklahoma's opposition, much less respond to Oklahoma's arguments. This, too, is an APA violation. *See State Farm*, 463 U.S. at 43 (an agency rule will be arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency"); *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action. . . ."); *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005) ("[The agency's] decision does not withstand review because the agency decisionmaker *entirely ignored* relevant evidence."); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 558 (D.C. Cir. 1988) ("[T]he Commission must do more than

simply ignore comments that challenge its assumptions and must come forward with some explanation that its view is based on some reasonable analysis.").

In fact, the government does not deny that it should have addressed the April 16 letter, but rather contends that it did so by response letter on June 2. ECF No. 34 at 29 n.12. But that letter came after OSMRE had already published its May 18 Notice disapproving Oklahoma's SMCRA state programs. The June 2 response cannot justify OSMRE's decision because "[i]t is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *DHS*, 140 S. Ct. at 1907 (quoting *Michigan*, 576 U.S. at 758).

Similarly, the Oct. 19 Notice fails to explain the reasons for the agency's decision and does not address contrary evidence. It simply states that based on *McGirt*, *Hogner*, and *Sizemore,* OSMRE concluded that the Cherokee Nation and Choctaw Nation of Oklahoma Reservations had not been disestablished, and thus, constitute "Indian lands." AR 0810. But this minimal explanation is insufficient to explain why those decisions necessarily foreclose Oklahoma's authority, particularly in light of the *Sherrill* equitable considerations.

The Grant Funding Denials contain even less explanation of the reasons for OSMRE's decision. The denials simply state that funding is denied, with no factual or legal support whatsoever. And even if the few statements included in the April 2 Letters, May 18 Notice, or June 17 Letters were intended to support the Grant Funding Denials, the Grant Funding Denials were issued without any reference whatsoever to those documents.

A "reasoned explanation" for a decision cannot be inferred from other sources; it must be "'the grounds that the agency invoked when it took the action.'" *DHS*, 140 S. Ct. at 1907.

Further, in taking this set of actions, OSMRE failed to consider or even recognize an important aspect of the problem—the many serious practical implications of stripping Oklahoma of its SMCRA authority on lands within the lands at issue. Although the notices contain a section entitled "Potential Implications of Substitution of Federal Authority," the substance of that section does not match the title. AR 0699; AR 0811. The short section consists of two paragraphs describing the purposes of Title IV and V of SMCRA. *Id.* It does not mention any potential consequences of Defendants' actions, including any of the harms OSMRE's actions will cause the State, its residents, the land, and the environment. *See, e.g.*, *Catholic Legal Immigration Network, Inc. v. Exec. Office for Immigration Rev.*, 513 F. Supp. 3d 154, 173 (D.D.C. 2021) (Executive Office for Immigration Review "utterly failed to consider an important aspect of the problem . . . when it ignored the impact that the Final Rule would have on legal service providers and their capacity to provide representation."); *see also Michigan*, 576 U.S. at 753 (noting agencies are required to "pay[] attention to the advantages *and* the disadvantages of agency decisions."). Because OSMRE thus "'entirely failed to consider an important aspect of the problem,'" its actions are arbitrary and capricious. *WildEarth*, 870 F.3d at 1233.

ii. OSMRE failed to consider reliance interests.

OSMRE's actions were also arbitrary and capricious because it failed to consider the "serious reliance interests" of Oklahoma and the public. *DHS*, 140 S. Ct. at 1913. As the Supreme Court has explained, "[w]hen an agency changes course . . . it must be

cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account," and "[i]t would be arbitrary and capricious to ignore such matters." *Id.* (internal quotation marks and citation omitted). In *DHS*, the Supreme Court considered the agency's decision to repeal the Deferred Action for Childhood Arrivals ("DACA") program that allowed certain unauthorized aliens to apply for a two-year forbearance of removal because the program was unlawful. *Id.* at 1901. The Court found the agency's decision arbitrary and capricious in part because it failed to consider substantial reliance interests, including that DACA recipients had embarked on careers, started businesses, and purchased homes in reliance on the DACA program. *Id.* at 1914. The government argued it did not need to consider reliance interests because the program provided benefits only in two-year increments and authorized DHS to process two-year renewals for DACA recipients whose benefits were set to expire within six months. *Id.* The Court rejected that argument because the agency considered those transition measures "solely for the purpose of assisting the agency," and should have considered whether similar transition measures could have addressed reliance interests. *Id*. at 1913–14. The Supreme Court also rejected the argument that because DACA is illegal, the agency was not required to consider reliance interests in determining *how* to wind down the program. *Id.* at 1915.

As in *DHS*, there are significant reliance interests here. OSMRE's decision to upend Oklahoma's programmatic operations will adversely affect not only the State but also: (1) mine operators who rely on Oklahoma's SMCRA programs to conduct their operations; (2) OCC and ODM employees; (3) local contractors employed by Oklahoma for AML

projects; (4) conservation districts, who were employed by and work collaboratively with OCC to eliminate AML threats; and (5) the public, who relied on Oklahoma to ensure that coal mining is conducted safely and that AML hazards that pose a threat to public health and safety are eliminated. The government claims, and this Court in its preliminary injunction ruling agreed, that OSMRE was not required to consider these reliance interests because it was following the statute. ECF No. 34 at 29; ECF No. 75 at 18. But that argument was squarely rejected in *DHS*. 140 S. Ct. at 1915.

That OSMRE provided for a transition period, ECF No. 75 at 18; AR 0761; AR 0758, is insufficient to show consideration of reliance interests under the Supreme Court's decision in *DHS*. In *DHS*, the government also provided for a transition period, but the Supreme Court found that insufficient because the transition period was designed for the government's benefit and failed to account for how similar measures could address the public's reliance interests. *DHS*, 140 S. Ct. at 1913–14. The same is true here. OSMRE failed to consider specifically how the thirty-day transition or other measures could address reliance interests. For example, OSMRE could have considered a longer transition period in light of reliance interests. Or OSMRE could have considered allowing local contractors or conservation districts to continue their work on AML projects for a certain period of time. OSMRE could have allowed for Oklahoma to continue overseeing existing reclamation projects or enforcing existing permits until those permits must be renewed. To be clear, as the Supreme Court explained in *DHS*, OSMRE "was not required to do any of this or to 'consider all policy alternatives,'" but it was required to consider "whether there were reliance interests, determine whether they were significant, and weigh any such

interests against competing policy concerns." *Id.* at 1914–15. OSMRE's failure to consider any of these factors is arbitrary and capricious.

OSMRE cannot escape its failure to consider reliance interests on grounds that such transition measures were not authorized by statute. SMCRA has a robust savings clause, which provides that "[n]o State law or regulation in effect on August 3, 1977, or which may become effective thereafter, shall be superseded by any provision of this chapter or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter." 30 U.S.C. § 1255(a). Any provision of State law that "provides for more stringent land use and environmental controls and regulations . . . than do the provisions of [SMCRA] . . . shall not be construed to be inconsistent with [SMCRA]." *Id.* § 1255(b). Also, "[t]he Secretary shall set forth any State law or regulation which is construed to be inconsistent with [SMCRA]." *Id.* And the only SMCRA provision that speaks directly to regulation on Indian Lands, *id.* § 1300, does not bar States from regulating independently or give the federal government exclusive authority to do so. It provides for the substitution of the term "State" for the term "tribe" only with respect to "the implementation and administration of a tribal program under subchapter V," not for purposes of state laws outside a SMCRA program. *Id.* 1300(j)(1)(B).

Moreover, even in the analogous context where the federal government disapproves an existing state program and implements a federal program, SMCRA makes clear that there may still be state regulation. In those cases, state statutes and regulations are "preempted and superseded" only "insofar as they interfere with the achievement of the purposes of the requirements of [SMCRA] and the Federal program." *Id.* § 1254(g). The

Secretary must "set forth any State law or regulation which is preempted and superseded by the Federal program." *Id.* OSMRE has done nothing remotely similar here, let alone fully assessed how allowing Oklahoma to continue aspects of its program without interfering with the achievement of the purposes of SMCRA or the Federal program could mitigate serious reliance concerns. Under the Supreme Court's decision in *DHS*, OSMRE's failure to consider these options is arbitrary and capricious.

D. OSMRE's actions also failed to comply with the APA's rulemaking procedures.

The APA provides that agencies must follow certain procedures when conducting rulemaking. That process requires that an agency publish in the Federal Register a notice of a proposed rulemaking that includes the rule's effective date, the legal authority for the rule, and the substance of the rule. 5 U.S.C. § 553(b). The agency must solicit public comments on the proposed rule. *Id.* § 553(c). And finally, the agency must consider all submitted comments and include a "general statement of [the rule's] basis and purpose." *Id.* These requirements safeguard regulated parties from unfair and unlawful agency action. *See, e.g., Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). In short, an agency creates a rule when it seeks to "implement, interpret, or prescribe law or policy." *Id.* Thus, agency action is a "rule" if it "supplements

a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

The May 18 Notice and Oct. 19 Notice are "rules." They are statements of "particular applicability and future effect" which are "designed to implement, interpret, or prescribe" OSMRE's position on Oklahoma's SMCRA programs. 5 U.S.C. § 551(4). They also clearly "adopt[] a new position inconsistent with existing regulations" regarding the Oklahoma SMCRA programs, 30 C.F.R. pt. 936 (Oklahoma SMCRA program approvals), and thereby "effect[] a substantive change in existing law or policy," *Mendoza*, 754 F.3d at 1021.

The Fourth Circuit's decision in *Kempthorne* is instructive. In *Kempthorne*, environmental groups alleged that the Secretary's decision to approve an amendment to West Virginia's Title V SMCRA program violated the APA and SMCRA because the decision was arbitrary and capricious. 473 F.3d at 97. The Secretary argued that the decision to approve a state program amendment "does not constitute rulemaking for purposes of judicial review because it does not involve the promulgation of national rules and regulations." *Id.* at 101. The Fourth Circuit disagreed, finding that the APA's definition of "rulemaking" "compels the conclusion that rulemaking within the meaning of [§ 553] is not limited to the promulgation of national standards." *Id.* at 102. The court also explained that OSMRE followed a process including notice and comment when issuing its decision to approve the state program amendment. *Id.* Accordingly, the court held that the decision to approve a state program amendment constitutes rulemaking under the APA, 5 U.S.C.

§ 553. *Id.*; *see also Ohio River Valley Envt'l Coal., Inc. v. Norton*, No. Civ. A. 3:04-0084, 2005 WL 2428159, *1 (S.D. W.Va. Sept. 30, 2005) ("Following public notice and comment periods, the Secretary approved the state's changes in its regulatory program."). The same must be true here, where OSMRE's action disapproves part of Oklahoma's State program and imposes a Federal program in its place.

Because the May 18 Notice and Oct. 19 Notice are rules, OSMRE was required to follow the APA's rulemaking processes, just as it did in *Kempthorne*. But OSMRE failed to do so. It did not publish a notice of proposed rulemaking or solicit, and thus could not respond to, public comments. Instead, OSMRE merely issued the short May 18 Notice and Oct. 19 Notice that provided little to no analysis of the reasons for the decisions. That procedural failure renders OSMRE's decisions unlawful. *See Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) ("If an agency attempts to issue a legislative rule without abiding by the APA's procedural requirements, the rule is invalid."); *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) ("A rule which is subject to the APA's procedural requirements, but was adopted without them, is invalid.").

Any doubt about the applicability of the rulemaking requirements is dispelled by the fact that OSMRE followed notice-and-comment rulemaking to approve Oklahoma's SMCRA programs in the first place. OSMRE published notices of the proposed programs in the Federal Register, invited and accepted public comments, and held public hearings. The agency then based its decision to approve the programs on a full administrative record that included the public comments, transcripts of hearings, exhibits, presentations, and

other documents. And the programs were ultimately approved in "Final Rules" published in the Federal Register.

It is well-settled that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("the APA 'make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also Zirkle Fruit Co. v. U.S. Dep't of Labor*, 442 F. Supp. 3d 1366, 1375 (E.D. Wash. 2020) ("An agency may not amend or revoke a legislative rule without public notice and comment."). A rule promulgated through notice-and-comment rulemaking thus must also be revised or rescinded with notice and comment. For this reason as well, OSMRE's failure to comply with the rulemaking process renders the May 18 Notice and the Oct. 19 Notice unlawful.[7]

E. The May 18 Notice, Oct. 19 Notice, and Grant Funding Denials are final agency actions subject to this Court's review under the APA.

Lastly, as this Court determined, there can be no serious dispute that all the challenged actions are final agency action. ECF No. 75 at 16. There are four agency actions at issue in this case: the revocation of Oklahoma's authority to regulate surface coal mining and reclamation on lands within the Muscogee (Creek) Nation in the May 18 Notice; the revocation of Oklahoma's authority with respect to the Cherokee and Choctaw Nations in

[7] For the same reasons, Plaintiffs are entitled to summary judgment on their claim that OSMRE violated Plaintiffs' rights to fundamental fairness by failing to provide appropriate notice.

the Oct. 19 Notice; and the two Grant Funding Denials. Those actions are final if they "'mark[s] the consummation of the agency's decisionmaking process, and . . . either determine[s] rights or obligations or occasion[s] legal consequences.'" *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004)).

Defendants contend that the Grant Funding Denials are not final "because OSMRE has not denied any grant application or amendment." ECF No. 34 at 28–29. But Defendants' own declarations confirm that OSMRE was "legally prevented from approving such grant awards and disbursing additional [Administration and Enforcement] grant funds to ODM" and "disbursing additional AML grants to OCC." ECF No. 34-8 ¶¶ 28, 47. That OSMRE deleted ODM's grant account further shows finality. ECF No. 42-1 ¶¶ 2–3. As for Defendants' assertion that its actions are not subject to review, this Court has rightly rejected that argument as "an absurd result" and foreclosed by Tenth Circuit precedent. ECF No. 75 at 16 n.6.

CONCLUSION

This Court should grant summary judgment in favor of Plaintiffs.

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Respectfully submitted,

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