

Does McGirt Cede Oklahoma Waters to Native American Tribes?

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On July 9, the U.S. Supreme Court made waves in [McGirt v. Oklahoma](#) by overturning a criminal conviction imposed upon a Native American defendant under Oklahoma law. The primary reasons for overturning the conviction were that (i) the defendant had allegedly committed the crime on land Congress had reserved for the Muscogee (Creek) Nation over a century beforehand and (ii) Congress had never disestablished the reservation. According to the Court, this divested the State of Oklahoma of jurisdiction to prosecute McGirt originally because Congress had granted the land to the Muscogee (Creek) Nation “in perpetuity.” No. 18–9526, 591 U.S. — (2020) (slip op., at 42). I have already walked through some of the [highlights of the case](#), but there may be significant ramifications from *McGirt* for Eastern Oklahoma and Western Arkansas.

A lot is being written about the case and rightfully so. The opinion appears to grant general jurisdiction over the *entire* eastern half of Oklahoma to five Native American tribes. Several have argued that the case is limited to criminal law. Others (including Chief Justice Roberts) think the holding applies in far broader contexts like environmental law. The issue is very much up in the air and, unless Congress acts, will be unresolved for years as issues are adjudicated piecemeal. The U.S. Court of Appeals for the Tenth Circuit seems to have a busy decade ahead.

The *McGirt* majority made no meaningful comment on the case’s impact, if any, on natural resources; however, when *McGirt* is taken at face value and read in tandem with the Court’s Reserved Waters Doctrine, it appears as though the five Native American tribes within Oklahoma may now have colorable claims to control the waters within their historic reservations. Few practitioners will have heard of the Reserved Waters Doctrine; it is a niche line of cases in the already-niche area of water law. Commonly referred to as the *Winters* Doctrine, the jurisprudence centers on a judicially-created concept: when Congress creates Native American reservations (or federal projects), it also reserved the water resources necessary to sustain the reservation by implication. See *Winters v. United States*, 207 U.S. 564 (1908). The doctrine’s premise is that if Congress intends to give land to a Native American tribe, it also intended to grant the waters necessary for agriculture and self-sustenance. A full dissection of the doctrine is well beyond the scope of this article, although it is worth noting that the doctrine has been expanded to include groundwater and has some application outside of the Native American context. See *Cappaert v. United States*, 426 U.S. 128 (1976) (groundwater); *United States v. New Mexico*, 438 U.S. 696 (1978) (national forests).

In the water law context, *McGirt* only seems to produce questions with no obvious answers. Does it, for instance, cede title over Oklahoma waters to the five Native American tribes or is their jurisdiction limited to only those waters they have continued to use? Could the tribes adopt a different water rights regime (i.e., regulated riparianism or a pure prior appropriation model) than Oklahoma’s current hybrid system?

Do the tribes now have some jurisdiction over existing water reservoirs, such as those constructed by the U.S. Army Corps of Engineers? Could they opt to reverse the policy decisions of the federal government and actually remove dams built by the Corps? Can they tax water consumption or use? What impact would this have on Oklahoma's river compacts with Texas, Arkansas, and Louisiana? Do water utilities in eastern Oklahoma now fall under tribal jurisdiction? If tribes do have jurisdiction, can private lakes be exempt? Does the rule of capture have any application?

These questions can only be answered through incredibly complex adjudications analyzing the pertinent treaties, federal law, Native American law, and the Reserved Waters Doctrine. It seems possible that Congress could wade into this issue and equally possible the Court could walk back *McGirt* in subsequent cases. Tribal leaders have issued a [joint statement](#) with the State of Oklahoma indicating a willingness to work together in the post-*McGirt* world, potentially because the tribes may lack sufficient resources to police all of the activity that has so suddenly returned to their jurisdiction. While this is the current state of play, it does not seem far-fetched that an individual tribe will begin to assert jurisdictional claims outside of the criminal context. As the law now exists, the Reserved Waters Doctrine could be a potential avenue to do just that.