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 No: CIV-21-719-F

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

INTRODUCTION

In addition to Plaintiffs' standalone dispositive arguments that the *McGirt* decision is explicitly limited and inapplicable to this case and that Defendants failed to comply with the Administrative Procedure Act ("APA"), the meaning of the term "Federal Indian Reservation" may be dispositive in this case. Defendants' decision to bar Oklahoma from regulating surface mining and reclamation is premised on the notion that the lands at issue constitute "Indian lands" under the Surface Mining Control and Reclamation Act ("SMCRA") and, specifically, that they are "within the exterior boundaries of any Federal Indian reservation." 30 U.S.C. § 1291(9). Neither SMCRA nor its implementing regulations define the term "Federal Indian reservation." But one agency within Defendant U.S. Department of the Interior ("DOI")—namely, the Bureau of Indian Affairs ("BIA")—defines the term "Federal Indian reservation" on its public website as Indian reservations that are *also* held in trust by the United States. Even accepting for argument that the historic

lands of the Muscogee (Creek) Nation continue to be an Indian reservation under 18 U.S.C. § 1151, they are indisputably and overwhelmingly *not* held in trust by the United States. So if the BIA's definition of "Federal Indian reservation" controls, Defendants' decision is clearly wrong.

But even if this Court finds the BIA definition inapplicable to SMCRA, its existence bolsters several of Plaintiffs' other arguments. At a minimum, the relevance of the BIA's definition is precisely the kind of question the APA is designed to ensure an agency has considered in making a decision. And Defendants' failure to consider this question cannot simply be corrected now with a post-hoc, litigation explanation by counsel. Moreover, the BIA's definition strengthens Plaintiffs' equitable case under *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) against Defendants' belated attack on long-exercised State authority.

ARGUMENT

I. Defendants' premise their decision on the erroneous conclusion that the historic lands of the Muscogee (Creek) Nation constitute "Indian lands" under SMCRA.

As Defendants have explained, their decision to bar Plaintiffs from regulating surface mining and reclamation is premised on Defendants' conclusion that the lands at issue constitute "Indian lands" under SMCRA. Under SMCRA and its implementing regulations, "Indian lands" are defined as "all lands, including mineral interests, *within the exterior boundaries of any Federal Indian reservation*, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by any Indian tribe." 30 U.S.C. § 1291(9); 30 C.F.R. § 700.5 (emphasis

added). According to Defendants, the lands at issue meet the first part of that definition. "[T]he Muscogee Reservation constitutes 'Indian lands' as SMCRA defines them" because "'Indian lands' constitute 'all lands . . . within the exterior boundaries of any Federal Indian reservation.'" Defs.' Resp. at 17; *see also id.* at 9 (the lands are "in actuality lands 'within the exterior boundaries of any Federal Indian reservation,' and thus 'Indian lands'").

The problem for Defendants is the meaning of the critical term "Federal Indian reservation." Congress left the term undefined in SMCRA, and OSMRE's regulations implementing SMCRA likewise fail to define it. But the BIA—OSMRE's sister agency within DOI—defines the term on its publicly accessible website. On its "Frequently Asked Questions" page, the BIA explains that a "federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, *and where the federal government holds title to the land in trust on behalf of the tribe*."[1] Put more simply, a "Federal Indian reservation" consists of land that the United States *both* reserved for a tribe *and* holds in trust on behalf of the tribe. This two-part definition appears designed to make sense of both the words "Indian reservation" and the word "Federal."

The lands in question indisputably do not satisfy the BIA's definition of "Federal Indian reservation." As the Supreme Court recognized in *McGirt*, the historic Muscogee (Creek) Nation reservation consists of 3 million total acres of land. 140 S. Ct. 2452, 2482

[1] U.S. Department of the Interior - Indian Affairs, "Frequently Asked Questions," https://www.bia.gov/frequently-asked-questions (last visited Dec. 6, 2021) (emphasis added), attached as Exhibit 1.

(2020) (Roberts, C.J., dissenting). Of those 3 million acres, as of 2019, the United States holds approximately 8,148.63 in trust, or just 0.27 percent. *See* Letter from the BIA to the Hon. J. Floyd, Principal Chief, Muscogee (Creek) Nation, at 4 (Oct. 10, 2019), attached as Exhibit 2. Indeed, all members of the Supreme Court acknowledged as much in *McGirt*. 140 S. Ct. at 2475, 2497 (Roberts, C.J., dissenting), 2504 (Thomas, J., dissenting) (agreeing with Chief Justice Roberts' dissent). Accordingly, if the BIA definition is controlling, Defendants' decision is wrong. And nothing in the BIA definition is limited to a particular regulatory program or excludes SMCRA from its interpretation of "Federal Indian reservation."

Nor can the BIA definition be ignored. The BIA is the oldest agency of the DOI, responsible for "manag[ing] all Indian affairs and [] all matters arising out of Indian relations." *See* 25 U.S.C. § 2.[2] Unlike OSMRE, which was created for the limited purpose of managing surface coal mining operations and reclamation, 30 U.S.C. § 1211, the BIA is the federal agency with subject matter expertise on all Indian issues. It thus seems unlikely that the BIA would set forth publicly an unreliable explanation of what constitutes a "Federal Indian reservation." As the primary agency charged with managing all Indian affairs, the BIA's position on the definition of "Federal Indian reservation" should carry more weight than that of OSMRE.

And while it may not have the force of law, the Court may consider the BIA website as persuasive authority for the definition of "Federal Indian reservation." "[W]ebsites run

[2] *See also* U.S. Department of the Interior - Indian Affairs, "About Us," https://www.bia.gov/about-us (last visited Dec. 6, 2021).

by governmental agencies" are "reliable sources on the Internet," *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015), that are widely accessible and provide important guidance on which the public often relies, *see Ellenberg v. New Mexico Mil. Inst.*, 572 F.3d 815, 822 (10th Cir. 2009) (identifying guidance manual—including FAQ section—posted on U.S. Department of Education's website as "agency authority"). *See generally United States v. Iverson*, 818 F.3d 1015, 1021–22 (10th Cir.) ("Several courts have ruled that government websites fall within the [hearsay] exception for public records. . . . Government records, statements, and reports are continually being placed on the internet to allow easy access to the general public. Their electronic format does not, by itself, prevent them from qualifying as public records.") *cert. denied*, 137 S. Ct. 217 (2016). Courts have repeatedly taken judicial notice of such websites and their content. *See, e.g.*, *George v. Diaz*, No. 20-CV-03244-SI, 2020 WL 5073996, at *3 (N.D. Cal. Aug. 24, 2020) (taking judicial notice of content on California Department of Corrections and Rehabilitation's (CDCR) website contradicting allegations regarding CDCR's Covid-19 response); *Pharm. Rsch. & Mfrs. of Am. v. U.S. Dep't of Health & Hum. Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014) ("Courts in this jurisdiction have frequently taken judicial notice of information posted on official public websites of government agencies.").

Moreover, the public and other state and federal government agencies have repeatedly relied on the BIA's definition of "Federal Indian reservation" outside the SMCRA context. For example, the U.S. Government Accountability Office ("GAO") cited the definition in a 2010 Report to Congress on the Native American Housing Assistance

and Self-Determination Act of 1996.[3] The Office of the Comptroller of the Currency, an independent bureau of the U.S. Department of the Treasury, cited the definition in a 2016 publication on housing financing in Indian Country.[4] The Minnesota Indian Affairs Council cited the definition in its 2007-2009 Annual Report.[5] And, the New Mexico Indian Affairs Department incorporated the definition in its 2021 Definitions Guide.[6]

II. The BIA's definition of "Federal Indian reservation" bolsters several of Plaintiffs' other arguments.

Even if this Court concludes that the BIA definition is not controlling, its existence bolsters Plaintiffs' APA claim that Defendants failed to follow the required process for taking final agency actions. The definition raises at least an important question about the meaning of "Indian lands" under SMCRA, and Defendants have presented no evidence that they considered the definition when they concluded that the lands in question constitute "Indian lands" under SMCRA. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017) (agency action is arbitrary and capricious if an agency "entirely failed to consider an important aspect of the problem"). Nor have Defendants presented any evidence that they considered whether there has been reliance on this

[3] GAO, "Tribes Generally View Block Grant Program as Effective, but Tracking of Infrastructure Plans and Investments Needs Improvements," https://www.gao.gov/assets/a301163.html (last visited Dec. 6, 2021).

[4] Barry Wides, "A Look Inside," *Community Developments Investments* (Sept. 2016), https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-investments/sep-2016/pub-cdi-sep-2016.pdf.

[5] Minnesota Indian Affairs Counsel, "2007-2009 Minnesota Indian Affairs Council Annual Report," https://www.ihs.gov/sites/bemidji/themes/responsive2017/display_objects/documents /resources/minnesota/Am_Indian_People_Tribes.doc.

[6] New Mexico Indian Affairs Dep't, "Definitions Guide," (Jan. 2021), https://www.iad.state.nm.us/wp-content/uploads/2021/01/Copy-of-Definitions-1.docx.

definition. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). Defendants cannot now provide that explanation, post-hoc, in this litigation. "It 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.'" *Id*. at 1907; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (courts may "not supply a reasoned basis for the agency's action that the agency itself has not given").

The existence of the BIA definition also strengthens the applicability of the "fundamental principles of equity" articulated in *City of Sherrill* and its progeny. For years, the public, other government agencies, and even tribes have operated under the justifiable expectation created by the BIA's definition of "Federal Indian reservation." That definition now appears to be at odds with OSMRE's recent interpretation of the term "Federal Indian reservation" in the final agency actions at issue in this case. This abrupt change in guidance from Defendants, without any justification or explanation, weighs against Defendants' efforts to upend more than a century of State jurisdiction over mines in eastern Oklahoma.

Dated: December 9, 2021

Respectfully submitted,

s/ Elbert Lin

Mithun Mansinghani
Solicitor General
Bryan Cleveland
Assistant Solicitor General
Jennifer Lewis
Assistant Attorney General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL

Ryan Leonard
EDINGER, LEONARD & BLAKLEY, PLLC
6301 North Western Avenue, Suite 250
Oklahoma City, OK 73118
Phone: (405) 367-0555
Rleonard@elbattorneys.com

Counsel for Kevin Stitt, in his official capacity as Governor of Oklahoma

313 NE 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Mithun.mansinghani@oag.ok.gov

Elbert Lin (*Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Building
951 East Byrd Street
Richmond, VA 23219
Phone: (804) 788-7202
elin@HuntonAK.com

Matthew Z. Leopold (*Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
Phone: (808) 955-1500
mleopold@HuntonAK.com

David C. McSweeney
(OK Bar No. 31320)
(*Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
60 State Street, Suite 2400
Boston, MA 02109
Phone: (617) 648-2800
dmcsweeney@HuntonAK.com

Melissa A. Romanzo (*Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
One South at the Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
Phone: (704) 378-4700
mromanzo@HuntonAK.com

Counsel for Plaintiffs