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A Wealth of Sovereign Choices: Tax Implications of McGirt v. Oklahoma and the Promise of Tribal Economic Development

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**A WEALTH OF SOVEREIGN CHOICES: TAX
IMPLICATIONS OF *MCGIRT V. OKLAHOMA*
AND THE PROMISE OF TRIBAL ECONOMIC
DEVELOPMENT**

Stacy Leeds* & Lonnie Beard**

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I. INTRODUCTION

Justice Neil Gorsuch’s now famous opening line in *McGirt v. Oklahoma*¹ will long

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be remembered by Indigenous Nations as one of the most powerful judicial statements in the history of federal Indian law: “On the far end of the Trail of Tears was a promise.”²

McGirt is a landmark United States Supreme Court decision that rejects Oklahoma’s century-long presumption that no Indian reservations remained in present-day Oklahoma. Acting on that presumption, Oklahoma had long exercised civil and criminal jurisdiction over most of the State, including Indians and non-Indians alike.

In reaffirming the reservation boundaries of the Muscogee (Creek) Nation, the Court rejected Oklahoma’s exercise of criminal jurisdiction over a major crime committed by an Indian within Indian country.³ The implications of the *McGirt* decision are potentially far-reaching and will likely extend to both criminal and civil jurisdiction of federal, state, local, and tribal governments. The reaffirmed reservations of the similarly situated “Five Tribes”⁴ collectively span half of the state of Oklahoma.

This article explores one aspect of the potential civil jurisdictional implications of *McGirt*: the sovereign power of taxation. We include a detailed analysis of what has changed, and what remains the same for purposes of federal, tribal, state, and local taxing authority.

McGirt is heralded as ushering in substantial changes for the eastern half of Oklahoma.⁵ However, in order for the Five Tribes to fully realize all treaty-based promises, the *McGirt* decision must lead to more than just increased criminal justice system responsibilities for the federal and tribal governments.

The “promise” Justice Gorsuch highlights was not simply an empty promise of geographic boundaries, it also included a permanent homeland with fully functioning tribal governments, including the power of taxation. With the reaffirmation of reservation boundaries and the reassumption of many governmental responsibilities, the Five Tribes

special thanks to Dean Margaret Sova McCabe for the exceptional research support provided by the Law School for this and related research projects. The authors also extend thanks to Louis Laski (LL.M. New York University (2014), J.D. University of Arkansas (2013)) for his research assistance on the very early stages of this article. Thanks also goes to Mariah Black Bird (Sandra Day O’Connor College of Law, Arizona State University, J.D. (anticipated 2021)) for her research assistance.

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

2. *Id.* at 2459.

3. The *McGirt* decision was narrowly focused on whether Oklahoma lacked criminal jurisdiction over felonies that should, instead, be prosecuted by the United States Attorney under the federal Major Crimes Act. However, since the case determined that the Muscogee (Creek) Nation reservation boundaries remain intact, the Muscogee (Creek) Nation will be treated like any other Indian reservation in the United States, absent express federal language to the contrary. In the months immediately following the *McGirt* decision, the United States District Courts for the Eastern and Northern Districts of Oklahoma saw substantial increases in the number of criminal cases filed. Likewise, Muscogee (Creek) Nation expanded tribal law enforcement and tribal court criminal dockets increased thirty-fold at the Muscogee (Creek) Nation in the first six months after the *McGirt* decision. Matt Trotter, *Muscogee (Creek) Nation Court Has Seen Criminal Filing Increase Thirtyfold Since McGirt Ruling*, PUB. RADIO TULSA (Jan. 27, 2021), <https://www.publicradiotulsa.org/post/muscogee-creek-nation-court-has-seen-criminal-filings-increase-thirtyfold-mcgirt-ruling#stream/0>.

4. Muscogee (Creek) Nation, Cherokee Nation, Chickasaw Nation, Choctaw Nation, Seminole Nation are the Five Tribes. They are unique and diverse in terms of language, culture and political status, but share a common legal history as it relates to the United States and the eventual State of Oklahoma. The term “Five Civilized Tribes” appears in historical and legal documents and although it has declined in use based on its antiquated origins, it continues to be used for some purposes today, such as organizations with long histories like the Inter-Tribal Council of the Five Civilized Tribes which predates Oklahoma.

5. See Robert Miller & Torey Dolay, *The Indian Law Bombshell: McGirt v. Oklahoma* (forthcoming B.C. L. REV. 2021) (draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3670425).

must necessarily have the power to raise meaningful revenue to govern.

If the Five Tribes and Oklahoma play their collective economic cards right, big change *could* come in the form of positive economic outcomes. Economists predict, or at least hope for, a post-COVID economic revival for rural communities in America's heartland.⁶ To assist in this economic revival, the Five Tribes' reservations could serve as laboratories for the formulation of economic development strategies that could serve as blueprints for other parts of rural America. For that to happen in eastern Oklahoma, *McGirt* will need to live up to its full potential, becoming much more than an overturned criminal conviction from inside Indian country.

This article suggests several law and policy choices available to the Five Tribes, including how to maximize tax incentives to grow the reservation population base and support a diverse economy through small business and enterprise scale development. The article includes a call to action for tribal governments to formulate long-term economic strategies that will take advantage of tax attributes that attach to the various reaffirmed reservations. In conclusion, the article suggests possible compact arrangements with other Indigenous nations and with Oklahoma's state and local governments.

If the challenge of sovereignty is accepted, the Five Tribes have an opportunity to reconfirm and expand government powers that have been denied them for over a century, including the power to make the same sovereign tax choices afforded other sovereigns worldwide.

A. Overview of McGirt's Tax Implications for the Five Tribes and Oklahoma

In a 5-4 decision issued in July 2020, the United States Supreme Court concluded that the boundaries of the Muscogee (Creek) Nation reservation, established in an 1832 Treaty⁷ that provided for removal and relocation to a distinct new and "permanent home," remain intact.⁸ The Muscogee (Creek) Nation reservation boundaries were never disestablished by virtue of Oklahoma statehood, nor any other legal document. As a result, the political and territorial boundaries of the reservation still exist, despite Oklahoma's century-long presumption and actions to the contrary.⁹

Although the *McGirt* majority opinion makes it clear that the reservation boundary determination applies to the Muscogee (Creek) Nation only,¹⁰ the dissenting opinion of Chief Justice John Roberts notes that under the same reasoning, the reservations of the Cherokee, Choctaw, Chickasaw, and Seminole nations would also still exist, with the five reservations in the aggregate encompassing an area in Oklahoma equal to almost "the

6. Particularly during the pandemic, small cities have seen an uptick in remote workers. *Small Cities Are A Big Draw For Remote Workers During The Pandemic*, NPR (Nov. 16, 2020, 5:00 AM), <https://www.npr.org/2020/11/16/931400786/small-cities-are-a-big-draw-for-remote-workers-during-the-pandemic>; see also Chris Harris, *After generations of disinvestment, rural America might be the most innovative place in the U.S.*, KAUFFMAN FOUND. (Dec. 14, 2020), <https://www.kauffman.org/currents/rural-america-most-innovative-place-in-united-states/>.

7. Treaty with the Creeks, arts. I, XIV, Mar. 24, 1932, 7 Stat. 366, 368.

8. *Id.* Following the Treaty of 1832, the Muscogee (Creek) Nation boundaries were subsequently memorialized in a federal land patent conveying the land inside the territory to the tribe in fee simple. The boundaries were later reaffirmed in the Treaty of 1866.

9. *McGirt*, 140 S. Ct. 2452, 2459.

10. *Id.* at 2479.

entire eastern half of the State—nineteen million acres that are home to 1.8 million people, only 10%–15% of who are Indians.”¹¹ The *McGirt* decision narrowly applies to Oklahoma’s lack of criminal jurisdiction over a major crime committed by an Indian within the still-existent Muscogee (Creek) Nation reservation, but it has significant implications for a host of potential powers a sovereign typically has.

Chief Justice Roberts’ dissent predicted the potentially broader implications this article addresses: “The decision today creates significant uncertainty for the State’s continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.”¹²

As to potential tax implications, Roberts’ dissent noted that “[t]ribes may . . . impose certain taxes on non-Indians on reservation land [citations omitted], and in this litigation, the Creek Nation contends that it retains the *power to tax nonmembers doing business within its borders*.”¹³

The Respondent’s brief filed by the State of Oklahoma seemed to assume that any reasoning upholding the boundaries of the Muscogee (Creek) Nation would also support similar findings with respect to the other four tribes, and was more specific in terms of some of the potential tax consequences:

On the civil side, effects will extend from taxation to family law. The State generally lacks the authority to tax Indians in Indian country, . . . so turning half the State into Indian country would decimate state and local budgets. Thus, like criminal law, civil implications have their own retroactivity problems: [including] tribal members seeking millions in tax refunds In short, Indian country status creates two societies: State law generally applies to non-Indians (though even this has exceptions subject to a multifactor balancing test), while Indians are generally immune from state law.¹⁴

The City of Tulsa filed an amicus brief supporting Oklahoma’s contention that no reservation existed, noting that the “overwhelming majority of Tulsa’s landmass and population lies within the former territory of the Creek and Cherokee Nations.”¹⁵ It predicted dire consequences for the City of Tulsa if those reservations were determined to still exist, warning that Tulsa’s “taxing and regulatory authority could be subject to numerous challenges and endless litigation,”¹⁶ that any “land owned or rented by a tribe could become a tax haven,”¹⁷ that the city would suffer “the loss of a tax base to support Tulsa’s Police and government,”¹⁸ and that more generally:

[A] new two-tiered taxation regime would spring into existence overnight, even creating new Indian tax shelters. Although non-Indians would continue to owe taxes to the City and state, a tribal member might not. And the Creek and Cherokee Nations could even impose their

11. *Id.* at 2482.

12. *Id.* (emphasis added).

13. *Id.* at 2502 (emphasis added).

14. Brief for Respondent at 45, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (citations omitted).

15. Brief of the City of Tulsa as *Amicus Curiae* in Support of Respondent at 7, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

16. *Id.* at 8.

17. *Id.* at 10.

18. *Id.* at 22.

own taxes and regulations on non-Indian Tulsans.¹⁹

The Oklahoma Tax Commission, which serves as Oklahoma's version of the federal Internal Revenue Service,²⁰ issued a report dated September 30, 2020²¹ (OTC Report) quantifying the possible impact of *McGirt* on state tax revenues. The OTC Report predicts that "the primary fiscal impact of *McGirt* will be reflected in reduced collections for individual income tax and sales/use tax, due to increased numbers of Creek Nation tribal members eligible to earn exempt income and make purchases exempt from sales/use tax."²² If all Five Tribes share in the same *McGirt* outcome, "there is a potential per-year revenue impact on state income taxes of \$72.7 million, with an additional \$218.1 million estimated impact for potential refund claims for the 2017-2019 tax years."²³ The OTC Report anticipates a possible reduction in sales and use taxes of as much as \$132.2 million annually.²⁴ Although the OTC report concedes that these estimates are likely on the high side due to limitations on the data available,²⁵ the OTC report nevertheless indicates a potentially significant decline in state tax revenues.

B. Possible Tax Impact for other Indigenous Nations

In *McGirt*, Oklahoma argued in the alternative that either (1) a reservation was never established for the Muscogee (Creek) Nation,²⁶ or (2) the reservation had been subsequently disestablished before Oklahoma became a state in 1907.²⁷ The *McGirt* decision rejected both arguments. The Muscogee (Creek) Nation reservation was established and continues today.

Because much of the relevant history involving the Muscogee (Creek) Nation was very similar to that of the Cherokee, Choctaw, Chickasaw, and Seminole nations that make up the neighboring tribal jurisdictions in eastern Oklahoma, there was a strong implication at the time *McGirt* was decided that each reservation would eventually be legally reaffirmed, given the similarities in the political and legal history and status of the Five Tribes. Indeed, within the first ninety days after the *McGirt* judgment and mandate issued, various Oklahoma district courts ruled, in the context of individual criminal jurisdiction challenges, that the reservations of all Five Tribes remain intact.²⁸ The Oklahoma Court

19. *Id.* at 23 (internal citations omitted).

20. Uniform Tax Procedure, 68 OKLA. STAT. ANN. § 203, authorized the Oklahoma Tax Commission "to enforce the provisions" of the State tax code and "to promulgate and enforce any reasonable rules with respect thereto."

21. See generally OKLAHOMA TAX COMM'N, REPORT OF POTENTIAL IMPACT OF MCGIRT V. OKLAHOMA (Sept. 30, 2020).

22. *Id.* at 2.

23. *Id.*

24. *Id.*

25. *Id.* at 16–19.

26. Brief for Respondent, *supra* note 14, at 19–20.

27. *Id.* at 20–21.

28. *Oklahoma v. Hogner* (Craig County, CF 2015-263) (Order on Remand after evidentiary hearing on remand from the Oklahoma Court of Criminal Appeals (OCCA) August 2020 Order) (finding the Cherokee Nation boundaries have never been disestablished); *Oklahoma v. Bosse* (McClain County CF 2010-213) (Order for Remand after evidentiary hearing on remand from OCCA August 2020 Order) (finding the Chickasaw Nation boundaries have never been disestablished); *Oklahoma v. Barker* (Seminole County, CF-2019-92) (finding the Seminole Nation boundaries have never been disestablished); *Oklahoma v. Sizemore* (Pittsburg County, OCCA

of Criminal Appeals has now acknowledged the Cherokee Nation and Chickasaw Nation reservation boundaries serve as jurisdictional markers to prohibit Oklahoma criminal prosecutions over crimes involving Indians.²⁹

The *McGirt* analysis, both as to whether a reservation was initially established and as to whether disestablishment has subsequently occurred, now applies to other reservations in Oklahoma and in other states.³⁰ To date, every post-*McGirt* boundaries case has reaffirmed the reservation boundaries in question.

In *Oklahoma v. Leppard*,³¹ the boundaries of the Miami Nation in northeastern Oklahoma were reaffirmed. In *Bosse v. Oklahoma*,³² the boundaries of the Chickasaw Nation were reaffirmed. In *Hogner v. Oklahoma*,³³ the boundaries of the Cherokee Nation were reaffirmed. In *Oneida Nation v. Village of Hobart*,³⁴ the Seventh Circuit held that a Wisconsin municipality lacked civil regulatory jurisdiction over the tribal activities within an Indian reservation based on the *McGirt* decision framework.

When reservation boundaries are reaffirmed on the basis of *McGirt*, corresponding tax consequences will likely result from (1) expanded tribal taxing jurisdiction, and (2) reduced state and local taxing jurisdiction.

For example, a previous case involving Osage Nation, with headquarters in Pawhuska, Oklahoma, held that the Osage Nation's reservation was disestablished and that, consequently, the income of resident Osage tribal members/citizens derived inside the now "former" reservation was not exempt from Oklahoma income taxes.³⁵ The arguments made by Oklahoma in the *Osage* case as to why the reservation no longer existed were similar to the arguments that were subsequently rejected in *McGirt* after changes in the makeup of the Court. *McGirt* could conceivably support a reconsideration of the Osage reservation status, and a contrary ruling in light of *McGirt* could present tax issues very similar to those that exist with respect to the reservations of the Five Tribes post-*McGirt*.

In a broader context, the *McGirt* decision, in sequence with other recent treaty interpretation cases, may reflect a shift in United States Supreme Court Indian jurisprudence. Recent cases suggest a more consistent reliance on the plain language of treaties and statutes and a rejection of the Court's prior pronouncements on the implicit divestiture of tribal governmental powers. In the tax context, this could be particularly relevant as to the tribes' power to impose taxes on activities occurring within a reservation, whether those are activities attributable to tribal citizens or noncitizens. However, the

F-2018-1140 and CF-2016-593 Oct 28, 2020) (evidentiary hearing on remand from OCCA August 2020 Order) (finding the Choctaw Nation boundaries have never been disestablished).

29. Chris Casteel, *Oklahoma court says Cherokee, Chickasaw reservations still exist*, OKLAHOMAN (Mar. 11, 2021), <https://www.oklahoman.com/story/news/2021/03/11/oklahoma-court-says-choerokee-chickasaw-reservations-still-exist/6947830002/>.

30. See generally *McGirt*, 140 S. Ct. 2452; Chance Fletcher, Note, *McGirt v. Oklahoma*, 134 HARV. L. REV. 600 (2020).

31. *Oklahoma v. Leppard*, CF-2019-00194 (Nov. 12, 2020), available at <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=ottawa&number=CF-2019-00194&cmid=11481>.

32. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016).

33. *Hogner v. State*, 2021 OK CR 4, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021).

34. *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) (No. 19-1981).

35. *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010); *cert. denied*, 564 U.S. 1046 (2011).

death of Justice Ruth Bader Ginsburg, one of the five justices who supported the majority opinion in *McGirt*, and her replacement by Justice Amy Coney Barrett, who has little judicial track record with respect to Indian law issues, makes predictions about the future of the Court on Indian Law issues more speculative. A post-*McGirt* exploration of United States Supreme Court Indian law jurisprudence and the canons of Indian treaty construction is undertaken in a companion piece by Dylan Hedden-Nicely and Stacy L. Leeds in the *New Mexico Law Review*.³⁶

C. Scope of This Article

Assuming the reservation boundaries of all Five Tribes will be reaffirmed in light of *McGirt*, then all Five Tribes will have the recognized authority to exercise their inherent sovereign powers inside their own borders. Neither the majority nor dissenting opinions in *McGirt* addressed in any detail the potential tax implications of the reaffirmed tribal power and contrasting constriction of state and local jurisdiction, so those questions must be resolved by future cases and/or in some other manner, such as by voluntary agreements among relevant parties.

We do not attempt a general Indian law primer or a detailed discussion of all tax issues associated with Indigenous Nations within the United States. Rather, our primary focus is on how the tax status of any persons (including legal entities), activities, or property falling within the significant portion of Oklahoma included within the expressly or implicitly reaffirmed reservations of the Five Tribes may have *changed* because of *McGirt*. Much of this will involve an Oklahoma-specific focus because this was the factual context of *McGirt*. However, our identification and discussion of possible tax implications will also generally be relevant to other reservations, whether in Oklahoma or other states.

D. Summary of Technical Tax Issues Arising from McGirt

Within Oklahoma, the primary tax issues that will be the subject of much discussion post-*McGirt* include several technical issues: (1) the extent to which new sources of tax revenues may be opened up for the Five Tribes through the recognition that millions of acres of land and almost two million individuals fall within the reservations of the Five Tribes; (2) the extent to which Oklahoma state and local governments may see a reduction in their tax base for the same reasons; and (3) the extent to which any increase in tribal taxing powers may be effectively limited by the retention by the state and local governments of concurrent taxing jurisdictions over the *same persons, property, and activities*.

II. STATES, LOCAL GOVERNMENTS, AND TRIBES AS TAXING SOVEREIGNS

A. An Overview

A national governing entity, such as the government of the United States, has broad

36. Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. __ (forthcoming 2021) (discussing the evolution of United States Supreme Court Indian Law jurisprudence including the uncertainty for tribal interest after the appointment of Justice Amy Coney Barrett).

powers as a sovereign over both its external and internal relations. More localized governing entities, such as state or counties within states, will generally have powers that are more circumscribed in scope, particularly as to external relations. The taxing power of a sovereign is one of its most important powers. The government of the United States, for example, has very broad taxing powers,³⁷ those of states within the U.S. are more limited in scope, and those of local governments within states are more limited still.

A federally recognized tribe within the United States is a unique sovereign, and its sovereign powers include taxation powers that may differ in scope from those of the federal, state, or local governments.

Relative to the United States, tribal governments are pre-constitutional and extra-constitutional sovereigns that derive their governmental power from inherent tribal power and not from delegated federal or state power.³⁸ As such, it may be important to look at what tribal law says about tribal taxing power in addition to what federal law says about tribal taxing power. Even if a tribe has the power to tax, it may have elected not to do so or may be reserving the exercise of such power for a future date.

For example, the Muscogee (Creek) Nation tax powers are governed by Title 36 of the Muscogee (Creek) Nation Code, enacted long before *McGirt*. Muscogee (Creek) Nation maintains a Tax Commission that largely mirrors the structure of the Oklahoma Tax Commission, a body charged with the development, regulation, administration, and collection of taxes.³⁹

The federal Internal Revenue Code expressly treats tribes as states for some tax purposes,⁴⁰ but leaves their tribal tax status undefined for other purposes. Since the federal, state, local, and tribal governments all have various levels of taxing powers, there are necessarily questions as to the extent these powers may overlap and to what extent the powers of one may be exclusive as to the others.

The taxing powers of a sovereign generally depend on either (1) territorial jurisdiction over those activities and persons taxed, and/or (2) personal jurisdiction over persons taxed. Even though the United States treats tribes as states for some taxing purposes, a tribe's taxing jurisdiction may differ substantially in scope based on treaty or federal court decisions, and tribes and states may differ in the extent to which they choose to exercise their respective tax powers.

37. The U.S. Constitution broadly provides that Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States . . ." U.S. CONST. art. I, § 8, cl 1. This power to tax is expressly limited by the requirement that "direct taxes" must be apportioned among the States in accordance with their relative populations (art. I, § 2, cl. 3, with this limitation repeated in art. I, § 9, cl. 4), and that "No Tax or Duty shall be laid on Articles exported from any State." I.R.C. § 7871 expressly provides that an "Indian tribal government" will be treated as a State for certain specifically enumerated tax purposes, it does not directly address the extent tribes will be treated as States for tax purposes not specifically addressed.

38. *Talton v. Mayes*, 163 U.S. 376 (1896).

39. MUSCOGEE (CREEK) NATION CODE ANN. 36 §§ 1-101-8-118 (2010).

40. The Internal Revenue Code at 26 U.S.C. § 7871 expressly provides that an "Indian tribal government" will be treated as a State for certain specifically enumerated tax purposes, but it does not directly address the extent tribes will be treated as States for tax purposes not specifically addressed.

B. Territorial Jurisdiction to Tax—Summary Overview

To the extent taxing powers are based on territorial jurisdiction, state taxing powers extend beyond activities occurring within the typically very small portion of the state's territory actually owned by the state. Rather, the state's powers as a sovereign may be much broader than its rights as a landowner. For example, a state may tax the income of a resident of the state even if that person resides on privately owned property. By comparison, however, federal courts have sometimes diminished the tribe's territorial taxing powers, particularly when non-tribal citizens/members are involved. Federal courts have tended to equate tribal power with the right of a landowner to exclude others from the landowner's property, rather than with sovereign tax authority that includes retained powers over all matters within a territorial boundary.

When federal law limits tribal taxing activities on only the portions of the reservation owned by the tribe and its citizens or held in trust by the United States for the benefit of the tribe and its citizens, the tribal tax base will be much smaller than a state's tax base. Since the majority of the lands within the Five Tribes' reservations are owned by non-tribal citizens, this may result in a crucial limitation on the territorial taxing jurisdiction of each tribe.

At the time the lands inside each of the Five Tribes' reservations were allotted, tribal citizens/members owned their allotment lands in fee simple and many families still retain an unbroken chain of title, where all the owners of the land have remained tribal citizens transaction after transaction. Where such an unbroken chain of title continues, and all grantors and grantees are tribal citizens, there may be a new estate in Indian law land tenure to consider for some jurisdictional purposes. In those instances, Congress gave Oklahoma the authority to collect ad valorem property taxes on the land only, but otherwise, Oklahoma is without inherent authority and congressionally delegated authority to collect any other types of taxes from the tribal citizens inside their tribe's reservation boundaries.

C. Taxing Power Based on Personal Jurisdiction—Summary Overview

There are also significant differences between states and tribes as to personal taxing jurisdiction. For example, a state may tax the income earned by a resident of that state, based on that resident status, even if the income is earned outside the state. A state's taxing power is greatest with respect to those who are considered state residents for tax purposes, with a state typically defining tax residence in a way that will include almost all of those who live in the state during a given year.⁴¹

By contrast, the recognized taxing powers of a tribe over those who live within its boundaries are much narrower. Tribes generally have much greater power over tribal citizens/members, than over non-citizens within tribal territories. Absent a treaty or statute to the contrary, tribes retain the inherent power to pass citizenship laws. Because most of the people inside the Five Tribes' reservations are not tribal citizens/members of that tribe,

41. For example, Oklahoma defines a "[r]esident individual" for Oklahoma income tax purposes as "a natural person who is domiciled in this state" and presumes that any natural person "who spends in the aggregate more than seven (7) months of the taxable year within this state" is a resident for this purpose. 68 OKLA. STAT. ANN. § 2353(4).

tribes face substantial limitations on tribal taxing powers that arise from personal jurisdiction.

D. Summary Distinctions Between Taxing Powers of States and Tribes

Most people living within Five Tribes' reservations are not citizens/members of that particular tribe. As a result of the differences in the ways that both territorial and personal taxing jurisdictions of states and tribes are defined and recognized, it is likely that non-tribal citizens will continue to be taxed as before *McGirt*. In contrast, the tax status of tribal citizens/members who live and work within their tribe's reservation may change significantly, with such members now potentially subject to new tribal taxes but reduced state and local taxes.

The tax status of tribal employees and vendors who engage in business with tribes may also be impacted if the tribes choose to tax employees and vendors on the basis of those consensual business relationships. However, to the extent tribes lack exclusive jurisdiction as against the state and local governments to impose such taxes, tribes are unlikely to do so, because imposing tribal taxes that overlap state and local taxes could place tribes at a competitive disadvantage in the workplace and the marketplace. As a practical matter, such dual taxation considerations often drive tribal tax policy decisions and result in a smaller universe of tax revenue available to tribes.

III. TRIBAL REGULATORY AUTHORITY, INCLUDING TAXING AUTHORITY, OVER NON-CITIZENS/MEMBERS

A. Overview

Tribal powers are generally defined as retained inherent tribal power, often guaranteed by treaties, but subject to limitations in federal statutes. Inherent sovereignty, as the source of tribal power, is generally viewed in caselaw as a default category, deemed to include the types of powers generally associated with governments, including taxing powers:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.⁴²

It is important to note that tribal civil and criminal jurisdiction differ in some important respects because tribal criminal jurisdiction has been subject to more detailed federal statutory regulation, such as the 18 U.S.C. § 1151 Indian country statute that was at issue in *McGirt*.

In contrast, tribal civil regulatory authority, which includes the power to tax and civil adjudicatory authority, pertaining to tribal court jurisdiction over civil matters, has been less targeted by federal legislation, and therefore tribes may have more leeway to exercise residual sovereign powers. Since this default category is necessarily the most amorphous

42. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

of the three main sources of authority, its parameters have undergone continual review and redefinition by caselaw.⁴³

To the extent tribal jurisdiction over non-citizens/members is based on residual sovereign authority, it is tied very closely to territorial jurisdiction. As the United States Supreme Court has indicated, “[w]e do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.”⁴⁴

Immediately before *McGirt*, Oklahoma recognized Five Tribes jurisdiction as generally extending over only lands still held in trust by the federal government for the benefit of the tribes, or lands that are restricted against alienation by federal statute, known as restricted fee lands.

The express and implicit reaffirmation by *McGirt* of the Five Tribes’ reservations means that millions of acres of land and almost two million Oklahoma residents are now included within the Five Tribes’ boundaries. The majority of the post-*McGirt* reservation population consists of non-Indians and non-member tribal citizens that reside inside another tribe’s boundaries.

Will everyone who lives and works on the newly reaffirmed reservations be subject to tribal territorial jurisdiction? The answer is “theoretically, yes,” but this potential expansion of tribal jurisdiction over nonmembers will likely fail to be realized based on federal caselaw that has narrowed or divested many tribal governance powers.

Since *McGirt* addressed criminal jurisdiction and not taxing powers, *McGirt*, as a matter of legal precedent, neither expands nor contracts the power of a tribe to tax within reservation boundaries. Thus, the issue of whether the Five Tribes can tax persons, activities, or properties within their reservation boundaries would have to be determined under other applicable law, cases, or administrative practice.

Most of the lands within the Five Tribes’ reservations are no longer fully alienable. Many tracts of land, yet to be quantified, are fee lands owned by tribal citizens with an unbroken chain of title in lands that were conveyed from the tribe itself (as grantor) to a tribal citizen allottee (as grantee) with all subsequent grantees also being tribal citizens. Neither the federal nor the state government appears within this chain of title. Therefore, tribal citizen-owned fee lands inside the Five Tribes reservations represent a possible new estate in Indian land tenure unique to the Five Tribes that should be fully explored for all civil jurisdictional purposes in a post-*McGirt* world.

These lands have been owned by no other grantees besides the tribes and its tribal citizens since these reservations were established. This category of lands is distinct from non-Indian owned fee lands because the tribe and its citizens have always maintained the right to exclude, and therefore the corresponding right to condition entry or regulate. These are issues important to federal courts in various cases from civil adjudicatory jurisdiction

43. It has been suggested that tribal residual sovereign powers include (1) the power to tax, (2) the power to determine the form of tribal government, (3) the power to define the requirements for tribal membership, (4) the power to administer justice and enforce laws, (5) the power to the domestic relations of its members, and (6) the power to regulate property use. Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective State*, 78 OR. L. REV. 501, 502 n.7 (1999).

44. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140–41 (1980).

to civil regulatory jurisdiction. These lands have never fallen within Oklahoma's ownership or domain, and the only powers Congress has afforded Oklahoma over these lands is the power to collect ad valorem taxes on the value of the real property.

Most individuals who live in and engage in commercial activities on the Five Tribes' reservations are not tribal citizens. An issue of special concern for these non-tribal citizens is the extent to which the authority of federal, state, local, or tribal governments to tax them has changed. In most instances, it has not.

Assuming that any particular tax that might be imposed by any one of the Five Tribes within its reservation is not expressly authorized by a relevant statute or treaty, the validity of such tax would depend on whether it falls within the residual sovereign civil regulatory powers of the Tribe.

B. Limitation of Tribal Civil Regulatory Authority Over Non-members—The Montana Test

McGirt dealt with an issue of criminal jurisdiction over crimes committed by an Indian defendant inside the Muscogee (Creek) Nation reservation. It represented one of the many times where tribal criminal jurisdiction has been either expanded or constricted over time. In the 1890s, all of the Five Tribes were exercising full criminal jurisdiction, including over capital murder cases where tribal laws provided for the death penalty. But by the time of *McGirt*, the criminal jurisdiction of the Five Tribes seemed to have been reduced to jurisdiction over those Indians who commit crimes on the small percentage of lands within each jurisdiction that remain inalienable, in federal trust, or restricted fee status. *McGirt* was, in a small sense, a case about decolonization, where the tribal authority was restored to how the tribes would define their own territorial jurisdiction based on treaty guarantees. Federal law still severely restricts tribal sentencing capability and tribal authority over non-Indians who commit crimes inside the Five Tribes' reservations.

The scope of tribal civil regulatory and civil adjudicatory authority over non-citizens has also undergone a long process of contraction. The most prominent case reflecting the approximate current status of this contraction is *Montana v. United States*. This case did not deal directly with taxing powers but rather the extent of tribal power to prohibit hunting and fishing within its reservation by those who were not citizens/members of the tribe.

The tribal prohibition by its terms extended to all lands within the reservation boundary, including to land, about 28 percent of the total reservation land, that was owned by "non-Indians".⁴⁵ The tribe argued that it retained inherent sovereignty to regulate conduct throughout its reservation, including conduct by those who were not members of the tribe. However, the United States Supreme Court ruled that tribal sovereignty had necessarily been diminished as tribes were geographically incorporated into the United States and that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."⁴⁶

In *Montana*, the Court relied on "implicit divestiture," rather than treaty or statutory

45. *Montana v. United States*, 450 U.S. 544, 548 (1981).

46. *Id.* at 564–65.

language, to conclude that, as a result of the dependent status, tribal sovereign powers are generally limited to regulating “*only the relations among members of a tribe.*”⁴⁷ Since “regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize” the tribal regulation at issue.⁴⁸

Thus, *Montana* created a general rule that tribes cannot exercise civil regulatory authority over the activities of nonmembers within their reservations. This general rule seems to equate tribal civil regulatory jurisdiction over nonmembers as essentially an attribute of land ownership, generally limited to the territory over which the tribe maintains a landowner’s right to exclude nonmembers.⁴⁹

The Court, however, recognized that the *Montana* general rule was not exclusive when it stated, “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.”⁵⁰

The Court posited two possible exceptions to the general rule, although neither were found applicable in the case.⁵¹

First, “[a] tribe may regulate, through *taxation*, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”⁵²

Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or [the health or welfare of the tribe.]”

This general rule and the two exceptions are now commonly referred to as the “*Montana*” rule and exceptions, or *Montana* tests. Subsequent cases have generally broadened the application of the general rule and have narrowly construed the exceptions.

C. *Certain Rights-of-way Through Tribal Lands Subject to Montana Rules*

It seemed initially that the *Montana* general rule could apply only with respect to tribal attempts to assert civil authority over the activities of nonmembers occurring with respect to lands no longer owned by a tribe or its members. However, in a subsequent case, *Strate v. A-1 Contractors*,⁵³ the Court held that a tribe had no civil adjudicatory jurisdiction with respect to personal injury claims arising from a traffic accident involving nonmembers that occurred on a stretch of highway through a part of the reservation held in trust for three tribes.

From a property law standpoint, granting an easement over a tract of land does not fundamentally alter the underlying type of estate. An easement over fee land does not

47. *Id.* at 563–64 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (emphasis in original)).

48. *Id.* at 564–65.

49. *Id.* at 558–59.

50. *Montana*, 450 U.S. at 565.

51. *Id.* at 565–66.

52. *Id.* at 565 (italics added).

53. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

deprive the fee owner of fee title to the land, it simply burdens the estate with a new use right. Jurisdiction over what occurs on that land should not be altered.

However, in *Strate*, the portion of the highway where the accident occurred, although on tribal trust land, was subject to a right-of-way granted by the United States to the State's highway department. The state maintained the easement for purposes of use by the public.⁵⁴ As to the scope of tribal civil jurisdiction, the Court deemed the easement a turning point for the allocation of jurisdiction. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."⁵⁵

The key for the Court seemed to be that "[s]o long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude."⁵⁶ As a result, the Court treated that stretch of the highway as if it were owned by nonmembers for purposes of *Montana* and concluded that "[o]ur decision in *Montana*, accordingly, governs this case."⁵⁷

Subsequent cases have expanded the areas in a reservation over which the *Montana* general rule could extend to include a right-of-way through tribal lands granted by a tribe to the nonmember over which the tribe seeks to exercise civil authority even though the right-of-way was not open to the general public.⁵⁸

D. *Merrion v. Jicarilla Apache Tribe: The Modern Peak of Judicially-Recognized Tribal Taxing Power*

Since *Montana* did not deal directly with residual taxing powers, there was an initial question of whether such powers would be limited by the *Montana* general rule and the *Montana* exceptions. Although *Montana* was decided in 1981, a subsequent case decided in 1982, *Merrion v. Jicarilla Apache*,⁵⁹ probably represents the most recent highpoint of a more expansive view by the Supreme Court as it relates to tribal sovereign taxing powers over nonmembers. The majority opinion in the case did not cite or discuss the 1981 *Montana* decision in upholding severance taxes imposed by the Jicarilla Apache Tribe on oil and gas produced on lands held in trust for the Tribe under leases between the Tribe and non-Indian lessees.

Merrion recognized the limitations on a tribe's power to tax nonmembers: "We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe."⁶⁰

The *Merrion* majority justified the tribal tax on two independent grounds: (1) the activity subject to the tribal tax occurred on land held in trust by the United States for the

54. *Id.* at 442–43.

55. *Id.* at 453.

56. *Id.* at 456.

57. *Id.*

58. See *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (nonmember was a railroad with a right-of-way through tribal property); *Big Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (2000) (nonmember was a public utility with a right-of-way through tribal lands).

59. 455 U.S. 130 (1982).

60. *Id.* at 140–44.

benefit of the tribe and the tribe therefore retained the right to exclude nonmembers;⁶¹ and (2) the tribe retained the power as a sovereign to impose the taxes independently of any right to exclude nonmembers from the areas of the reservation where the taxed activity occurred.⁶²

As to this second basis for upholding the tax, that it was a valid exercise of tribal sovereignty, the majority in *Merrion* used broad language to describe a tribe's taxing power over territory within its potential jurisdiction:

“Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations.’” They “are unique aggregations possessing attributes of sovereignty over both their members and their territory.” Adhering to this understanding, we conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management.⁶³

Taken literally, this language suggests that a tribe's sovereign power to tax can potentially extend to activities occurring throughout the reservation, whether engaged in by members or nonmembers. In the case of the reservations reaffirmed expressly or by implication by *McGirt*, this potentially means that the taxing power of each of the Five Tribes could extend to the nonmember populations and non-tribal lands included within the reaffirmed boundaries. However, as discussed below, an important aspect of the factual context in *Merrion* was that the reservation of the Jicarilla Apache Tribe consisted solely of lands held in trust for the Tribe.⁶⁴

The majority of the lands inside the Five Tribes' reservation are non-Indian owned fee lands. That being said, the Five Tribes' lands have been held in fee since the beginning of the reservations. Thus, the important question is whether the fee lands are controlled by non-tribal citizens, since the precise issue in Montana was whether the tribe could regulate the activities of nonmembers on land held in fee by nonmembers.

It should also be noted that in a follow-up case to *Merrion*, *Cotton Petroleum Corp. v. New Mexico*,⁶⁵ the United States Supreme Court held that the state had concurrent jurisdiction to impose its own severance taxes on the same oil and gas production occurring on tribal lands, even though this meant the total tax burden imposed on such oil and gas production on tribal lands exceeded the tax burden on such production occurring outside tribal lands.⁶⁶

The Court also held that the tribe was not a state for purposes of determining whether the severance taxes must be apportioned to insure that each state's taxing burden, where multiple states impose taxes on the same activity, is limited to the portion of the activity occurring within each state's borders.⁶⁷ As a practical matter, concurrent taxing jurisdiction may serve as an effective limitation on tribal taxing jurisdiction, since a tribe

61. *Id.* at 144.

62. *Id.* at 141.

63. *Id.* at 142 (citations omitted).

64. *Merrion*, 455 U.S. at 133.

65. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

66. *Id.*

67. *Id.* at 188, 192–93.

may be reluctant to impose taxes that duplicate those of state and local governments for fear that the aggregate tax burden of multiple taxes may discourage economic activity within tribal territory.

E. Expansion of Montana Rules to Include Tribal Taxing Powers: Atkinson Trading Co., Inc.

Despite the seemingly expansive view of the majority opinion in *Merrion* as to tribal sovereign taxing power over nonmembers, this view does not represent the most current state of the caselaw. The primary starting point for the current view would be a 2001 decision, *Atkinson Trading Co., Inc. v. Shirley*.⁶⁸

This case involved the imposition by the Navajo Nation of an occupancy tax that was effectively imposed on guests at a hotel located within the Navajo reservation but on land that was privately owned by non-Indians. The Court indicated that powers, such as taxing powers, not expressly granted to a tribe by federal statute or by treaty were limited to the tribe's residual sovereign powers, and that as to the activities of nonmembers occurring with respect to nonmember fee lands, such residual powers are significantly limited.⁶⁹ More specifically, the Court held that a tribe's power to tax nonmembers with respect to activities occurring on nonmember fee lands was subject to the *Montana* rules.⁷⁰ "Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana's* exceptions."⁷¹

This meant that the tax was presumptively invalid and could be upheld only if the tribe could establish that the tax fitted within one of the *Montana* exceptions.⁷² Rather than viewing the broad language used in *Merrion* in describing tribal sovereign taxing powers as establishing a precedent that must be overruled, the *Atkinson* majority opinion distinguished it:

Merrion, however, was careful to note that an Indian tribe's inherent power to tax only extended to "transactions occurring on *trust lands* and significantly involving a tribe or its members." There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above. But *Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling.⁷³

In other words, the majority opinion distinguished the broader language used in *Merrion* as essentially superfluous since the taxed activity in that case occurred on a reservation which consisted entirely of tribal trust lands.⁷⁴ Thus, the two "independent" grounds for upholding the tax in *Merrion* could effectively be collapsed into one, that the

68. 532 U.S. 645 (2001).

69. *Id.* at 649–50.

70. *Id.* at 654.

71. *Id.*

72. *Id.* at 659.

73. *Atkinson*, 532 U.S. at 653 (emphasis added).

74. *Id.* at 652–53.

tribe in *Merrion* had the sovereign power to impose the tax because it was with respect to activities of nonmembers that occurred on land held in trust for the tribe, which included the entire reservation. As such, there was no conflict with *Montana*.

In contrast, in *Atkinson* since the tax was imposed on nonmembers with respect to activities occurring on property privately owned by nonmembers, the *Montana* general rule that the tax was presumptively invalid was applicable and the validity of the tax was contingent on establishing that at least one of the *Montana* exceptions applied, neither of which was found to be applicable in the case.

F. Possible Expansion of Montana Rules to Tribal Trust Lands: Nevada v. Hicks

A fair reading of the majority opinion in *Atkinson* would seem to indicate that the *Montana* rules would only apply as to nonmember activities occurring with respect to nonmember fee lands. However, a subsequent case, *Nevada v. Hicks*,⁷⁵ arguably reads *Montana* more broadly. This case was specifically concerned with “whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside a reservation.”⁷⁶

The opinion by Justice Scalia seemed to indicate that the *Montana* rules could apply regardless of whether a tribe owned the land over which it seeks to exercise civil authority:

And *Montana*, after announcing the general rule of no jurisdiction over nonmembers, cautioned that “[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,” [citation omitted]—clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is “necessary to protect tribal self-government or to control internal relations.”⁷⁷

The case seems to make it clear that the ultimate issue in assessing the validity of an exercise of civil regulatory authority, based exclusively on sovereign power, over nonmember activity is the same regardless of whether the activity occurs with respect to nonmember fee lands or lands considered owned by the tribe: “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe except to the extent necessary to protect tribal self-government or to control internal relations.”⁷⁸

The case goes on to point out that the ownership status of the land over which a tribe seeks to exercise civil regulatory jurisdiction remains such a significant factor in a *Montana* analysis that it “may sometimes be a dispositive factor.”⁷⁹ It notes that the exercise by a tribe of civil regulatory authority over nonmembers with respect to activities occurring on land not owned by or held in trust for the tribe will almost always be invalid. “Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana*

75. 533 U.S. 353 (2001).

76. *Id.* at 355.

77. *Id.* at 359–60.

78. *Id.* at 359 (internal quotations omitted).

79. *Id.* at 360, 370.

the extension of tribal civil authority over nonmembers on non-Indian land.”⁸⁰

By way of contrast, the Court singles out two cases involving taxes that reached opposite conclusions as to the power of a tribe to tax nonmembers, with the obvious distinction being that the tax upheld was with respect to tribal trust lands while the tax that was invalidated was with respect to nonmember fee lands:

Compare, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 142, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (tribe has taxing authority over tribal lands leased by nonmembers), with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) (tribe has no taxing authority over nonmembers’ activities on land held by nonmembers in fee); . . .⁸¹

On the other hand, in a footnote, Justice Scalia seems to limit the potential scope of the opinion, explaining that “[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”⁸²

Whether *Nevada v. Hicks* automatically makes a *Montana* analysis necessary whenever a tribe seeks to extend civil jurisdiction over the activities of nonmembers on lands owned by or held in trust for the tribe is somewhat unclear, with multiple interpretations possible.⁸³ The Ninth Circuit takes the position that the *Montana* analysis is generally required with respect to tribal regulation of activities on territory over which it retains a right to exclude only where the specific concerns at issue in *Hicks* exist, those “related to enabling state officers to enforce state criminal laws for crimes that occurred off the reservation.”⁸⁴ However, both the Seventh⁸⁵ and Eighth Circuits⁸⁶ apparently take the position that the *Montana* analysis is required whenever a tribe seeks to exercise civil regulatory or adjudicatory authority over an activity, whether or not the activity occurs with respect to land owned or held in trust for the tribe.

Even if a *Montana* analysis is required under both circumstances, it seems clear that the potential authority of a tribe to tax an activity of a nonmember is strongest where the activity occurs with respect to tribal trust lands and is weakest where the activity involves only nonmembers and unrestricted non-tribal fee lands. However, even if a tribe has the authority to tax a nonmember activity occurring with respect to tribal trust lands, there is no guarantee that the State will not also have concurrent jurisdiction under the so-called “*Bracker*” analysis that may be used to determine whether state exercise of civil, including taxing, authority over nonmember activity occurring within Indian country is permissible

80. *Hicks*, 533 U.S. at 360.

81. *Id.*

82. *Id.* at 353 n.2.

83. See Alex Tallchief Skibine, *The Tribal Right to Exclude Non-Tribal Members from Indian-Owned Lands*, AM. INDIAN L. REV. (forthcoming) (discussing the inapplicability of *Montana*, where the tribe or its members maintain the right to exclude).

84. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 898–99 (9th Cir. 2017), amended (August 3, 2017).

85. See *Stifel, Nicolaus & Co., Inc. v. Lac DU Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 206 (7th Cir. 2015).

86. See *Attorney’s Process & Investigation Serv., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 938 (8th Cir. 2010).

or has been preempted by federal law.⁸⁷ This preemption analysis requires a “particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”⁸⁸

Where this analysis is required, it contains no clear ground rules that would allow a tribe to determine for certain in advance that it will have exclusive taxing jurisdiction against state and local authorities to impose a tax on nonmember activity occurring on the reservation. Where concurrent taxing jurisdiction is a possibility, it will be more difficult, as a practical matter, for a tribe to fully utilize its taxing power for fear that duplicate layers of tribal, state, and local taxes will deter economic activity within the reservation. If for example, the activity can be located off-reservation and be subject to only state and local taxes while subject to state and local *and* tribal taxes if located on the reservation, there would certainly be a disincentive to locate the activity on the reservation.

In any event, an assertion of taxing jurisdiction by any one of the Five Tribes over the property or activities of nonmembers solely based on their inclusion in a reservation reaffirmed on the basis of *McGirt* would likely be unsuccessful because of the difficulty in establishing that either *Montana* exception applies. Federal courts have, for example, used the *Montana* limitations to invalidate a hotel occupancy tax imposed on nonmember guests of a hotel privately owned by a nonmember,⁸⁹ “a 4% tax on the gross receipts from all goods and services sold or used in connection with a nonmember-owned business located on nonmember fee land” within a reservation,⁹⁰ and an ad valorem tax on a nonmember electric cooperative’s “utility property” that was located within the reservation.⁹¹

As discussed below, there is very little post-*Montana* federal caselaw support for tribal taxes on nonmembers with respect to unrestricted non-tribal fee lands because of the difficulty of satisfying either *Montana* exception. One could presume that either tribal employment or tribal vendor contracts could be conditioned on the payment of taxes, but as noted throughout, the Five Tribes would be unlikely to do that if dual taxation priced them out of the market for talent and goods.

G. The First Montana Exception as Applied to Tribal Taxes on Nonmember Activities Occurring on Fee Lands

The first exception, that a tribe “may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships *with the tribe or its members*, through commercial dealing, contracts, leases, or other arrangements,⁹² seems to contemplate that the necessary consensual relationship could be between the nonmember and the tribe *or* tribal members. However, the scope of the first *Montana*

87. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); see, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (holding that a State had concurrent jurisdiction with the tribe to impose severance taxes imposed with respect to oil and gas produced under leases of tribal trust lands by non-Indians).

88. *Bracker*, 448 U.S. at 145.

89. See *Atkinson*, 532 U.S. 645.

90. *In re Haines*, 245 B.R. 401, 403 (D. Mont. 2000).

91. *Big Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 947 (9th Cir. 2000).

92. *Montana*, 450 U.S. at 565 (italics added).

exception is limited to

the regulation of “the *activities* of nonmembers who enter [into] consensual relationships.” An ad valorem tax on the value of . . . property is not a tax on the *activities* of a nonmember, but is instead a tax on the value of property owned by a nonmember, a tax that is not included within *Montana*’s first exception.⁹³

The clearest application of the first *Montana* exception would be where the imposition of a tribal tax or fee on an activity is an explicit part of a consensual relationship between nonmembers and the tribe, such as employment or a contract for goods or services.⁹⁴ In practice, an explicit consensual relationship of this sort would likely be a possibility only where the tribe is a formal party to the relationship. As a practical matter, if the nonmember who enters a commercial relationship with the tribe knows that a tribal tax will be part of the cost of doing business with the tribe or its members, that cost may be priced into the relationship by the nonmember, meaning the tribe or its members may pay more for products or services provided by the nonmember.

If the tribe is not a formal party to a relationship between nonmember(s) and tribal citizen/member(s), finding by implication the necessary consensual relationship with the tribe to support the validity of a tribal tax on the nonmember activity would obviously be more difficult under existing caselaw. The mere acceptance by a nonmember of customary services provided by a tribe, such as emergency police, fire, or medical services, would generally not be sufficient to establish implied consent to the application of the tribe’s taxing powers, although the tribe would certainly have the power to impose “an appropriate fee for a particular service actually rendered”⁹⁵

Some post-*Montana* cases suggest commercial dealings between a nonmember and tribal members within a reservation may be sufficient to imply a consensual relationship between the nonmember and the tribe for purposes of analysis under the first *Montana* exception.⁹⁶ However, even if a consensual relationship between a nonmember and a tribe is established by implication, that is only a first step in the required analysis under the first exception.⁹⁷ If the consensual relationship does not clearly contemplate tribal taxes or regulation, the first exception “requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself” and that a “nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another—

93. *Big Horn*, 219 F.3d at 951 (internal citations omitted; italics added).

94. *See, e.g.*, *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 933 (9th Cir. 2019), *cert. denied*, 2021 WL 78077 (Jan. 11, 2021), in which an annual fee imposed by a tribe for the storage by a nonmember of hazardous wastes on the reservation was an explicit part of a negotiated agreement between the tribe and the nonmember that permitted such storage.

95. *Atkinson*, 532 U.S. at 655.

96. *See, e.g.*, *Big Horn*, 219 F.3d at 951 (the provision by a nonmember electric cooperative of electrical services to tribal members who resided within their tribe’s reservation); *see also* *Dish Network Corp. v. Tewa*, No. CV 12-8077-PCT-JAT, 2012 WL 5381437, at *7 (D. Ariz. Nov. 1, 2012), in which the provision of tv satellite services to tribal members on the reservation was found sufficient to constitute “a plausible, colorable argument” that the first *Montana* exception was satisfied. However, this finding did not go to the merits of whether the tribal regulation and taxation of the satellite services provided to members was valid but rather to whether the satellite company, which was resisting such regulation and taxation by the tribe, would be required to exhaust tribal court remedies before bringing the challenge to federal court.

97. *Tewa*, 2012 WL 5381437, at *8.

it is not “in for a penny, in for a Pound.”⁹⁸

Some post-*Montana* cases have indicated that the consent of the nonmember to tribal regulatory authority may be established “expressly or by [the nonmember’s] actions” and that the test is whether the nonmember “should have reasonably anticipated that [its] interactions might ‘trigger’ tribal authority.”⁹⁹

H. *The Second Montana Exception*

The second exception recognizes that the tribe may “retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe....”¹⁰⁰

This exception has also been narrowly interpreted:

The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered “necessary” to self-government. Thus, unless the drain of the nonmember’s conduct upon tribal services and resources is so severe that it actually “imperil[s]” the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.¹⁰¹

Based on this narrow reading, the Supreme Court in *Atkinson* concluded that the hotel occupancy tax imposed on nonmember guests on fee lands owned by a nonmember could not be justified on the basis of the second *Montana* exception: “[W]e fail to see how petitioner’s operation of a hotel on non-Indian fee land threatens or has some direct effect on the political integrity, the economic security, or the health of the tribe.”¹⁰²

This conclusion was reached despite apparent agreement that the business property at issue possessed an “overwhelming Indian character” by reason of employing almost 100 Navajo citizens, deriving business from tourists visiting the reservation, and being located on an isolated property surrounded by large amounts of tribal lands.¹⁰³

The most promising route to satisfying the second *Montana* exception may be where the nonmember activity can be said to threaten “the health or welfare of the tribe” by posing an unusual risk of harm to tribal members or property. For example, a challenge to a tribal tax on property of a railroad used with respect to a right-of-way across tribal trust lands survived a motion for summary judgment in order to permit the tribe to engage in discovery:

Because the Tribes have shown some basis for believing that BN’s use of its right-of-way threatens serious harm to the Reservation and also had no fair opportunity to develop the record concerning the extent of that threatened harm, it was an abuse of discretion for the district court to decide the summary judgment motion before granting the Tribes’ Rule 56(f) motion.¹⁰⁴

98. *Atkinson*, 532 U.S. at 656.

99. *FMC Corp.*, 942 F.3d 916, 932.

100. *Montana*, 450 U.S. at 566.

101. *Atkinson*, 532 U.S. at 645 n.12 (italics in original).

102. *Id.* at 657 (internal quotations omitted).

103. *Id.*

104. *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767,

Tribal regulatory and adjudicatory jurisdiction to enforce a permit and fee requirement imposed by a tribe with respect to the storage of hazardous wastes on the reservation was justified by the second *Montana* exception:

We conclude that FMC's storage of millions of tons of hazardous waste on the Reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare" of the Tribes to the extent that it "imperil[s] the subsistence or welfare" of the Tribes. *Montana*, 450 U.S. at 566, 101 S.Ct. 1245. We base our conclusion on the factual findings of the Tribal Court of Appeals, the factual findings and conclusions of the EPA, expert testimony presented in the Tribal Court of Appeals, and the record as a whole. The record contains extensive evidence of toxic, carcinogenic, and radioactive substances at the FMC site.¹⁰⁵

I. Summary as to Tax Impact of McGirt on Nonmember Activities with Respect to Fee Lands within the Reaffirmed Reservations

Despite *McGirt*, it is unlikely, because of the difficulty in satisfying the *Montana* exceptions, that the Five Tribes will be considered to have acquired significant new taxing powers over nonmember activities that occur within areas of newly reaffirmed reservations owned in fee by nonmembers, which would likely encompass most of the areas with the reservations. As an example, Chief Justice Roberts noted in *McGirt* that "the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders."¹⁰⁶ This comment is based on note 6 of the Amicus Brief submitted in that case on behalf of the Creek Nation:

Since *Buster*, this Court has recognized limitations on a tribe's exercise of authority over non-Indians within its jurisdiction. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328-29 (2008). But this Court continues to recognize *Buster's* core holding that the Nation retained its power to tax "nonmembers for the privilege of doing business within the reservation." *Id.* at 332-33.¹⁰⁷

*Buster*¹⁰⁸ was an Eighth Circuit opinion issued two years before Oklahoma statehood, long predating *Montana* and *Atkinson*. To be fair, the *Montana* analysis is qualified in that it applies absent treaty language or federal statutory language to the contrary. These would include the same treaties, allotment agreements and statutes at issue in *McGirt* and the treaties and allotment agreements must be very closely examined.

Generally speaking, *Atkinson* directly implies that a *Montana* analysis would now be required for the type of tax involved in *Buster*:

[W]e have never endorsed *Buster's* statement that an Indian tribe's "jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Id.*, at 951. Accordingly, beyond any guidance it might provide as to the type of consensual relationship contemplated by the first exception of *Montana v. United States*,

774-75 (9th Cir. 2003).

105. *FMC Corp.*, 942 F.3d 916, 932.

106. *McGirt*, 140 S. Ct. at 2502.

107. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner at n.6, *McGirt*, 140 S. Ct. 2453 (2020) (No. 18-9526).

108. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905).

450 U.S. 544, 566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), *Buster* is not an authoritative precedent.¹⁰⁹

Assuming a business activity is conducted by nonmembers on their privately owned lands, to what extent may *Buster* provide “guidance . . . as to the type of consensual relationship contemplated by the first exception of *Montana*”?

The only potential guidance is the possibility that merely doing business within a reservation, even if on private non-Indian controlled lands, creates a consensual relationship sufficient to justify taxation under the first *Montana* exception. However, that would be very similar to the type of circumstance the Court held insufficient to justify the hotel occupancy tax in *Atkinson*. There are certainly good policy arguments in favor of tribal regulation, including taxation, of nonmember activity occurring within a reservation even if with respect to privately owned property.¹¹⁰

Unfortunately, however, in the post-*Montana* world, any such regulation or tax must now contend with the presumption of invalidity under *Montana* and *Atkinson* absent specific treaty language or a statute that warrants deviation from general caselaw. Moreover, *Atkinson* expressly rejected the notion that simply being located on a reservation and accepting the ordinary benefits of residency would be sufficient to satisfy the first exception, because “[i]f it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the ‘advantages of a civilized society’ offered by the Indian tribe.”¹¹¹

While it is always possible that a Supreme Court newly configured after the death of Justice Ginsburg and her replacement by Justice Barrett could begin to broaden the *Montana* exceptions, it is premature at this early stage to predict that any such broadening will occur.

An additional practical limitation on any expansion of tribal taxing power over nonmember activity occurring on non-Indian controlled fee lands within the reservation is that any such expanded taxing jurisdiction would likely be concurrent with state and local taxing jurisdictions under the “*Bracker*” analysis.¹¹² To the extent that such concurrent tax jurisdiction exists, the Five Tribes will likely consider whether any new tribal taxes that may simply add to the tax burdens of those living and working within the reservation risk discouraging economic investment and enterprise by nonmembers within the reservation.

IV. TRIBAL TAXATION OF TRIBAL CITIZENS

A tribe’s sovereign power over its citizens/members is broad, at least as to activities occurring within the tribe’s reservation. *Montana* does not apply to restrict tribal power over tribal members. Although Justice Stevens dissented in *Merrion v. Jicarilla Apache Tribe* from the Court’s holding that a tribe had the power to tax a nonmember, his dissent was careful to point out his view that a tribe’s sovereign powers over its *members* was

109. *Atkinson*, 532 U.S. 645 n.4.

110. See, e.g., Angelique A. EagleWoman & Wambi A. Wastewin, *Tribal Values of Taxation Within the Tribal Economic Theory*, 18 KAN. J.L. & PUB. POL’Y 1 (2008).

111. *Atkinson*, 532 U.S. at 655.

112. See generally *White Mountain Apache*, 448 U.S. 136.

much more extensive: “Over its own members, an Indian tribe’s sovereign powers are virtually unlimited; the incorporation of the tribe into the United States has done little to change internal tribal relations.”¹¹³

An issue that does not seem to have been clearly resolved is whether a Tribe’s residual sovereign powers over its citizens are subject to a territorial limitation like that which limits tribal powers over nonmembers.¹¹⁴ That is, does the taxing jurisdiction of a tribe extend over only tribal citizen activity that occurs within areas under the territorial jurisdiction of the tribe, or does it extend also to tribal citizen activities that occur elsewhere?

The Sixth Circuit, in *Kelsey v. Pope*, has recently recognized the possibility of tribal residual sovereign powers permitting tribal criminal jurisdiction on the basis of *either* territorial jurisdiction or tribal membership, so that a tribe had criminal jurisdiction to prosecute a tribal member for off-reservation conduct where such jurisdiction was “necessary to protect tribal self-government or control internal relations....”¹¹⁵ The court relied primarily on *Duro v. Reina* and invoked an implied consent theory for such jurisdiction, in that

the reasoning behind tribal criminal jurisdiction in *Duro*—that a tribe’s authority to prosecute its members is “justified by the *voluntary character of tribal membership* and the concomitant right of participation in a tribal government”—provides ample basis to validate the exercise of tribal criminal jurisdiction on the basis of membership.¹¹⁶

Although *Kelsey v. Pope* involved the question of citizenship-based criminal jurisdiction, there are statements in other cases that seem broad enough to suggest that citizenship-based jurisdiction may extend to matters other than criminal jurisdiction. For example, in the tax case *Merrion v. Jicarilla Apache Tribe*, the United States Supreme Court expressly recognized a territorial limitation only with respect to tribal jurisdiction over nonmembers: “We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a *nonmember* until the *nonmember* enters tribal lands or conducts business with the tribe.”¹¹⁷

The majority opinion in *Merrion* went on to indicate that “Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations.’ They ‘are unique aggregations possessing attributes of sovereignty over *both* their members *and* their territory.”¹¹⁸

However, as a practical matter, tribes are unlikely to attempt to impose their full taxing powers on tribal citizens/members who do not reside within their tribe’s reservation boundaries, unless significant extraterritorial benefits are offered to such members/citizens.

As one example of extraterritorial benefits which may be taken by the consent of the

113. *Merrion*, 455 U.S. at 160.

114. *Id.* at 140–41

115. *Kelsey v. Pope*, 809 F.3d 863, 856 (6th Cir. 2016), *cert. denied sub nom.*, *Kelsey v. Bailey*, 137 S. Ct. 183 (2016); *see also* Greg S. Keogh, *Extending Tribal Criminal Jurisdiction Outside of Indian Country: Kelsey v. Pope*, 43 AM. INDIAN L. REV. 223 (2018).

116. 495 U.S. 676 (1990).

117. *Merrion*, 455 U.S. at 140–41 (italics added).

118. *Id.* at 142 (italics added).

tribal member is reduced fee registrations. As the result of an intergovernmental compact with Oklahoma, Cherokee Nation provides for off-reservation automobile registration and car tags that can be purchased from the Cherokee Nation Tax Commission by Cherokee citizens that live inside Oklahoma, but beyond the Cherokee reservation boundaries.¹¹⁹ The nonresident Cherokee citizens that purchase tribal tags are thereby taxed by the Cherokee Nation for that activity, even though they may not otherwise be subject to other Cherokee or federal laws that require residency within the Cherokee Nation. Other instances of tribal jurisdiction based on tribal citizenship rather than residency might include the regulation by a tribe of the off-reservation hunting and fishing rights and gathering activities of its citizens, extraterritorial criminal jurisdiction for voter fraud, and concurrent jurisdiction over all Cherokee Nation children in adoption and foster care placements pursuant to the federal Indian Child Welfare Act.¹²⁰

Since formal tribal citizenship is generally based on affirmative steps taken by an eligible individual, imposing a tax on tribal citizens without regard to residency might create an opportunity for new revenue streams for the tribes, with or without a *McGirt* ruling. However, if tribal taxes were imposed on nonresident citizens without providing concomitant benefits, this could provide a strong incentive for some nonresident tribal citizens to disengage by renouncing tribal citizenship. A detailed discussion as to whether a tribe may wish to assert extraterritorial taxing authority over tribal citizens is beyond the scope of this article.

Further, the existence or not of extraterritorial tribal jurisdiction is no longer an issue with respect to any citizens who live or work within their tribe's reaffirmed reservation boundaries after *McGirt*. Nevertheless, a tribe will likely be reluctant to impose new taxes on tribal citizens unless they are assured that state and local governments will not retain concurrent taxing jurisdiction over the same tribal citizens.

V. POTENTIAL IMPACT OF *MCGIRT* ON FEDERAL TAXES

A. Overview

In light of *Montana*, it is unlikely that *McGirt* will lead to the Five Tribes being able to impose significant new tribal taxes on non-Indians, or on non-member Indians, based solely on their geographic inclusion in one of the Five Tribes' reaffirmed reservations post-*McGirt*. Non-Indians and non-member Indians will remain subject to state and local taxation to a similar extent as before *McGirt* and there will be no significant changes in their federal or state tax status.

There may be, however, some expanded opportunities to take advantage of federal income tax exclusions, deductions, or credits, as this article highlights below. Overall, the largest potential changes in tax status will be with respect to tribal citizens/members who live and work within their tribe's reservation.

Even where there may be a tax impact after *McGirt*, not all taxes will be affected to the same extent. This article serves not as a general primer on the tax status of tribes or

119. *At-Large Vehicle Registration*, CHEROKEE NATION (last updated July 1, 2019), <https://tagoffice.cherokee.org/registration/at-large-vehicle-registration/>.

120. Indian Child Welfare Act, 25 U.S.C. § 1911(b), (c).

tribal citizens. Rather, this article addresses the extent of change, if any, in tax status for those living, working, or doing business in areas now reaffirmed as reservations after *McGirt*.

B. Federal Income Taxes: Tribes

The doctrine of intergovernmental tax immunity generally prohibits one sovereign from taxing another sovereign.¹²¹ Perhaps with this doctrine in mind, the Internal Revenue Code does not expressly make federal income taxes applicable to Indian tribes. As a result, the Internal Revenue Service takes the general position that federally recognized Indian tribes are not considered taxable entities for federal income tax purposes.¹²² This is not a territory-based exemption, which generally means that the income of such tribes is exempt from federal income taxes whether derived from sources on or off a reservation.¹²³ However, a federal income tax on income earned by individuals from employment by the tribes is not considered a tax on the tribe and thus does not violate the general rule that the tribes are not subject to federal income taxes.¹²⁴

While tribes themselves are generally exempt from federal income taxes, that may not be true with respect to all tribal business entities. Per current administrative regulations and rulings,¹²⁵ the tribe is not considered a taxable entity whether it is unincorporated, or is incorporated under section 17 of the Indian Reorganization Act of 1934, as amended,¹²⁶ or section 3 of the Oklahoma Indian Welfare Act, as amended.¹²⁷ In contrast, if a tribe does business through a corporation organized under State law, the corporation's income is taxable.¹²⁸ If the tribe does business through other business forms, such as corporations or LLCs created under tribal law, the federal income tax status of entity earnings is less certain and may vary.¹²⁹

Since a tribe's federal income tax exemption is not territory based, income of the Five Tribes that was exempt from federal income taxes before the express and implied reaffirmation of the five reservations by *McGirt* should remain exempt. *McGirt* is important to the extent it strengthens the treaty guaranties of Five Tribes self-governance, but it does not change the prior federal income tax exemptions already enjoyed by the Five Tribes and does not clarify the federal income tax status of tribal business entities organized under state or tribal law.

Likewise, income that was subject to federal income taxes before *McGirt* will generally not be rendered exempt from such taxes solely as a result of the source of tribal income now being included within a reaffirmed reservation.

121. See generally Craig M. LaChance, *Doctrine of "Intergovernmental Tax Immunity" as Codified in 4 U.S.C.A. § 411*, 37 A.L.R. 3d Art. 10 (2018).

122. Rev. Rul. 67-284, 1967-2 C.B. 55, modified on another issue by Rev. Rul. 74-13, 1974-1 C.B. 14.

123. Rev. Rul. 94-16, 1994-1 C.B. 19.

124. See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995).

125. See Treasury Reg., 26 C.F.R. § 301.7701-1(a)(3); see also Rev. Rul. 94-16, 1994-1 C.B. 19; Rev. Rul. 94-65, 1994-2 C.B. 14.

126. 25 U.S.C. § 477, transferred to 25 U.S.C. § 5124.

127. 25 U.S.C. § 503, transferred to 25 U.S.C. § 5203.

128. Rev. Rul. 94-16, 1994-1 C.B. 19.

129. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 8.02[2][a].

C. Federal Income Taxes: Tribal Members and Nonmembers

Almost all of those who live within the reaffirmed reservations of the Five Tribes are U.S. citizens.¹³⁰ As the U.S. Supreme Court has indicated, U.S. citizens, Indian and non-Indian alike, are generally subject to federal income tax on their earnings: “We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens.”¹³¹

Thus, absent treaty or statutory exemptions for specific types of income,¹³² the earnings of tribal citizens and all other individuals living and working in the Five Tribes’ reaffirmed reservations will generally remain subject to federal income taxes. *McGirt* should thus not have a significant impact on the overall federal income status of tribal citizens or anyone else who lives and/or works within a reservation.

D. Federal Employment/Self-employment Taxes

Where an employer/employee relationship exists, the Federal Insurance Contributions Act¹³³ (FICA) provides the primary tax revenue to support Social Security and Medicare benefits by imposing taxes on “wages . . . with respect to employment.”¹³⁴ Both the employer and the employee pay a portion of this tax.¹³⁵

For those who are considered self-employed rather than employees, the parallel to the FICA taxes are taxes imposed by the Self-Employment Contributions Act.¹³⁶ Self-employment taxes are generally imposed on “self-employment” income,¹³⁷ and the taxpayer must pay the entire amount because there is no employer with which to split the tax.

The Federal Unemployment Tax Act¹³⁸ (FUTA) provides some tax funding for unemployment insurance in coordination with state unemployment insurance plans. The FUTA tax is also imposed on “wages . . . with respect to employment,”¹³⁹ but it is only paid by the employer.¹⁴⁰

For many, the FICA taxes or self-employment taxes may exceed the federal income taxes they pay. Although tribal income may be exempt from federal income taxes, that of tribal employees generally is not, even if paid out of income that was exempt when received by the tribe.¹⁴¹ Compensation paid to qualifying members of Indian tribal

130. See 8 U.S.C. § 1401(b), which provides for citizenship at birth to “a member of an Indian, Aleutian, or other aboriginal tribe . . .” Further, many allotment agreements provided for United States citizenship for tribal citizens that received land allotments.

131. *Squire v. Capoeman*, 351 U.S. 1, 4 (1956).

132. For example, 26 U.S.C. § 102(a) provides an exclusion from gross income for federal income tax purposes for “the value of property acquired by gift, bequest, devise or inheritance.”

133. 26 U.S.C. §§ 3101–28.

134. 26 U.S.C. 3121(a) provides the general definition of “wages” for this purpose.

135. See 26 U.S.C. § 3101 as to the employee portion and 26 U.S.C. § 3111 as to the employer portion.

136. 26 U.S.C. § 1401–03.

137. 26 U.S.C. § 1401(a)–(b).

138. 26 U.S.C. §§ 3301–11.

139. “Wages” are defined for FUTA purposes by 26 U.S.C. § 3306(b).

140. 26 U.S.C. § 3301.

141. See, e.g., *C.I.R. v. Walker*, 326 F.2d 261, 264 (9th Cir. 1964). For a critique of this general approach, see

councils constitutes income for federal income tax purposes, but does not constitute “wages” for purposes of FICA.¹⁴² Compensation received by employees who are not qualifying members of Indian tribal councils is generally subject to federal income and FICA taxes unless otherwise specifically exempted.¹⁴³ However, tribes are generally not subject to FUTA taxes if they make qualifying state employment tax contributions.¹⁴⁴

There seems to be some uncertainty as to whether the compensation received by tribal council members that is not considered “wages” for FICA purposes would also be exempt from self-employment taxes.¹⁴⁵ However, self-employment income earned in other capacities with the tribe or from other sources is generally subject to self-employment taxes unless a specific exception applies.¹⁴⁶

The FICA, FUTA, and self-employment taxes are generally not dependent on whether “wages” or “self-employment” income is earned on or off territory under tribal jurisdiction. As a consequence, their imposition should generally not change solely as a result of the location of a job, business or residence now being included in a reaffirmed reservation post-*McGirt*.

E. Specific Reservation-relevant Federal Tax Provisions—In General

Although the overall federal income tax status of tribal citizens/members and nonmembers may not have changed significantly as a result of *McGirt*, there could be some changes in the application of specific tax provisions. There are many specific federal tax provisions that may influence the amount of federal income taxes a particular taxpayer may have to pay. These provisions generally relate to possible exclusions from otherwise taxable income, income tax deductions that can reduce the amount of otherwise taxable income, or tax credits which may directly reduce the amount of tax that is otherwise owed.

John Lentz, *When Canons Go to War in Indian Country, Guess Who Wins? Barrett v. United States: Tax Canons and Canons of Construction in the Federal Taxation of American Indians*, 35 AM. INDIAN L. REV. 211, 212 (2010), concluding that “courts are quite hesitant to allow American Indians to claim tax exemptions, even where there are valid arguments that Congress intended to exempt certain income.” Note that even though there is no general exemption for Indians from federal income taxes, specific exemptions may be available. For example, 26 U.S.C. § 7873 exempts from federal income, employment, and self-employment taxes income derived by a member of an Indian tribe or a qualified Indian entity from recognized fishing rights-related activities of such tribe.

142. Rev. Rul. 59-354, 1959-2 CB 24.

143. Rev. Rul. 59-354, 1959-2 CB 24.

144. See 26 U.S.C. §§ 3306(c)(7), 3309(a), (b).

145. In *Allen v. C.I.R.*, T.C. Memo. 2005-118, the IRS treated the income received by an elected tribal council member as exempt from both employment and self-employment taxes, while income received by the same person in the capacity as an executive assistant to the tribal president as not qualifying for those exemptions. The Tax Court agreed with the IRS that the amounts received as executive assistant were subject to self-employment taxes but was not required to reach a holding on the merits as to whether the income received as a tribal council member was exempt from self-employment taxes, since that issue was not before the court. However, a subsequent Tax Court decision may have misread the distinction between the taxpayer’s separate roles as council member and executive assistant to the tribal president, when it cited *Allen* as “rejecting taxpayer’s claim that income received as a member of a tribal council was exempt from employment tax for both wage withholding and self-employment tax purposes and holding that taxpayer’s income was to be treated as self-employment income subject to Federal self-employment tax under sec. 1401 . . .” *Indep. Staffing Sols. v. C.I.R.*, T.C. Memo. 2010-102, n.4 (2010).

146. *Allen*, T.C. Memo. 2005-118; see also *Doxtator v. C.I.R.*, T.C. Memo. 2005-113 (2005), concluding that the statutory exemption in 26 U.S.C. § 1401(c)(1) from self-employment taxes for “the performance of the functions of a public office” does not apply to tribal officials.

There are only a few of these provisions, however, that expressly make it relevant to the availability of a particular exclusion, deduction, or tax credit that some relevant activity have a connection with an “Indian reservation.” To the extent a connection with a reservation is required, the reaffirmation based on *McGirt* of a tribe’s reservation could satisfy that requirement.

This article will explore below some of the specific tax provisions that could be impacted by the reaffirmation, based on *McGirt*, of an Indian reservation. An in-depth analysis of all of these provisions is beyond the scope of this article, but a few examples will be incorporated into this article in order to illustrate how the reaffirmation of a reservation under the *McGirt* analysis could influence the possible application of particular tax provisions.

It should also be kept in mind that as a result of the 2020 United States elections, there will likely be new tax legislation enacted, or at least attempted, in the Biden administration, and it is possible that any such new legislation could make the existence of reaffirmed reservations more relevant. Some of the provisions discussed below will illustrate opportunities for additional legislation.

F. Provisions Designed to Encourage Economic Development in Economically Distressed Areas—In General

A report prepared by the Joint Committee on Taxation in early 2020 points out that according to 2017 census data, “the per capita income of the Native American population was \$17,584, compared to \$31,106 for the U.S. population as a whole. Overall, 25.4 percent of Native Americans lived in poverty in 2017, compared to 13.4 percent for the U.S. general population.”¹⁴⁷

A number of tax provisions have been enacted over the years with the goal of assisting, through various tax benefits, economic development in areas that were specially designated as in need of such assistance.¹⁴⁸ Some of these provisions contained special rules with respect to “Indian reservations” that have now effectively expired because the dates for making such designations have now expired¹⁴⁹ and should not be impacted by *McGirt* unless expanded by new tax legislation.

Other provisions were not expressly directed at Indian country but were instead designed to encourage investments in low-income areas, with Native American communities often targeted as falling within the qualifying low-income community

147. OVERVIEW OF FEDERAL TAX PROVISIONS AND ANALYSIS OF SELECTED ISSUES RELATING TO NATIVE AMERICAN TRIBES AND THEIR MEMBERS SCHEDULED FOR A PUBLIC HEARING BEFORE THE SUBCOMMITTEE ON SELECT REVENUE MEASURES OF THE HOUSE COMMITTEE ON WAYS AND MEANS ON MARCH 4, 2020, JCX-8-20 (IRS), 2020 WL 1237577.

148. See generally James E. Maule, *Tax Incentives for Economically Distressed Areas*, 597-2ND TAX MGMT. PORTFOLIO, sec. IA (2005).

149. E.g., 26 U.S.C. § 1391(a) provides for the designation of “empowerment zones and enterprise communities” that can qualify for special tax benefits, but § 1391(c) required that most such designations be made before 1996. § 1394(a)(4) then provides that these cannot include any area “within an Indian reservation,” but then § 1391(g)(3)(E) provides a special rule that allowed “Indian reservations” to be included in “empowerment zone” designations if such designation, per § 1391(g)(2), were made before January 1, 1999, and in some cases, per § 1391(h)(2), before January 1, 2002.

designations. For example, the “new markets tax credit”¹⁵⁰ program is designed to spur investments in qualifying low-income areas, and approximately 2.1% of the \$48.3 billion in investments made as a part of this program have been to businesses operating in Native American areas, with over half of that 2.1% directed to projects in Oklahoma, Alaska, and Arizona.¹⁵¹

As a part of an expanded civil jurisdiction for those tribes with reservations reaffirmed on the basis of *McGirt*, a more aggressive use of tax incentives to foster economic development throughout their reservations would seem a logical component of an expanded jurisdiction. The enactment of new and the extension of old tax provisions that encourage these efforts could be a significant focus of tribal lobbying efforts with respect to the Biden Administration. However, it would be important from the tribes’ standpoints that any new or extended tax incentives be structured in a way to make it more likely that they would encourage economic development that actually provides significant economic benefits to tribal citizens. Non-targeted incentives may result in benefits going primarily to non-Indians who happen to be doing business on a reservation.

G. Tax Exempt Interest with Respect to Tribal Debt Obligations—In General

If applicable requirements are met, § 103 of the Internal Revenue Code provides that gross income for federal income tax purposes does not include interest received with respect to state and local bonds.¹⁵² This allows state and local governments to borrow money at a lower cost for qualifying purposes because the interest received by the lenders will be tax exempt.

Section 7871(a) provides a general rule that an Indian tribal government will be treated as a State for purposes of the tax exemption under § 103 with respect to the interest on state and local bonds.¹⁵³ However, tribally issued obligations are subject to additional requirements, not generally applicable to state and local governments, that must be satisfied before the interest on the tribal obligations will be tax exempt.¹⁵⁴

A major limitation is that interest on most tribal obligations will be tax exempt only if “substantially all of the proceeds” received with respect to the issuance of the tribal obligations “are to be used in the exercise of any essential governmental function.”¹⁵⁵ An “essential governmental function” for this purpose is defined negatively as not including “any function which is not customarily performed by State and local governments with general taxing powers.”¹⁵⁶

150. *See generally* 26 U.S.C. § 45D. Note that § 45D(f) limits the investment amounts each year that can qualify for the credit. Prior to recent legislation, no qualifying amounts were provided for years after 2020. However, the Consolidated Appropriations Act, 2021 (P.L. 116-260), signed by the President on December 27, 2020, extends the qualifying investment limitations through 2025. *See* 26 U.S.C. § 45D(f)(1)(H) as amended.

151. OVERVIEW OF FEDERAL TAX PROVISIONS AND ANALYSIS OF SELECTED ISSUES RELATING TO NATIVE AMERICAN TRIBES AND THEIR MEMBERS SCHEDULED FOR A PUBLIC HEARING BEFORE THE SUBCOMMITTEE ON SELECT REVENUE MEASURES OF THE HOUSE COMMITTEE ON WAYS AND MEANS ON MARCH 4, 2020, JCX-8-20 (IRS), 2020 WL 1237577, at 25.

152. 26 U.S.C. § 103(a), (b).

153. *Id.* § 7871(a)(4).

154. *Id.* § 7871(c).

155. *Id.* § 7871(c)(1).

156. *Id.* § 7871(e).

Using tribal obligation proceeds to finance commercial or industrial activities would generally not be seen as within the exercise of an essential governmental function for this purpose.¹⁵⁷ The legislative history of the provision indicates “that only those activities that are customarily financed with governmental bonds (e.g., schools, roads, governmental buildings, etc.) are intended to be within the scope of this exception”¹⁵⁸

To the extent tax exempt bonds issued by the tribes are subject to the limitation that substantially all of the proceeds be used for essential governmental functions, the potential relevance of *McGirt* is in reaffirming that tribal territorial jurisdiction covers a much larger geographic area than previously recognized. To the extent a tribe may take on some governmental responsibilities over areas that before *McGirt* were not considered part of its territorial jurisdiction, there may be opportunities to support those expanded jurisdictional responsibilities with proceeds from tax exempt obligations issued by the tribes. For example, since *McGirt* may result in expanded tribal criminal jurisdiction, financing needed new court facilities with the proceeds from tribally issued obligations may satisfy the “essential government function” requirement. To the extent the tribes may have expanded opportunities to issue tax exempt obligations as a result of *McGirt*, that means that the “lenders,” whether tribal citizens or not, may have additional opportunities to earn tax exempt interest.

H. Tribal Economic Activity Bonds

Despite the general limitations discussed above on the use of proceeds to finance commercial or industrial activities, more flexibility is provided for a separate category of tribally issued bonds. “Indian tribal governments” are permitted to issue tax-free “tribal economic development bonds” for certain economic development projects.¹⁵⁹

All Five Tribes constitute qualifying “Indian tribal governments” for these purposes. However, these bonds can’t be used to finance class II or class III gaming facilities,¹⁶⁰ and can’t be used to finance any facility located outside “the Indian reservation.”¹⁶¹

An “Indian reservation” is defined for this purpose as including reservations and “former Indian reservations in Oklahoma.”¹⁶² “Former Indian reservations in Oklahoma” include “lands that are within the jurisdictional area of an Oklahoma Indian tribe,” which includes “those lands within the boundaries of the last treaties, Executive Orders, federal agreements, federal statutes, and Secretarial Orders with the Oklahoma tribes.”¹⁶³

The IRS has more specifically described the areas that would have fallen outside the “former Indian reservations in Oklahoma” pre-*McGirt* as

in terms of entire present-day counties that are ineligible (Alfalfa, Beaver, Cimarron, Garfield, Grant, Greer, Harmon, Harper, Jackson, Major, Texas, Woods, and Woodward)

157. PLR 200911001; *see generally* Bruce N. Edwards, *Income Taxation of American Indians (Including Alaska Natives)*, 615 TAX MGMT. PORTFOLIO, sec. II.B.2 (2019).

158. H.R. Rep. No. 100-391, at 1028–29 (1987).

159. 26 U.S.C. § 7871(f); *see generally* Edwards, *supra* note 157, at sec. II.B.5.

160. 26 U.S.C. § 7871(f)(3)(B)(i).

161. *Id.* § 7871(f)(3)(B)(ii).

162. *Id.* § 168(j)(6); 25 U.S.C. 1452(d).

163. 26 U.S.C. 168(j)(6); Notice 98-45, 1998-2 C.B. 257.

and present-day counties that are split by the boundaries, that is, part of the county is eligible and part of the county is not eligible (Beckham, Canadian, Cleveland, Ellis, Kay, Kingfisher, Logan, Noble, Oklahoma, Pawnee and Payne).¹⁶⁴

Thus, the pre-*McGirt* “former Indian reservations in Oklahoma” for these purposes generally would include the reservations of the Five Tribes but would also include other tribes. To the extent these reservations are or will be reaffirmed as a result of *McGirt*, their inclusion in the “former Indian reservations of Oklahoma” would be replaced by their status as current recognized reservations.

An overall cap of \$2 billion was placed on the aggregate amount of bonds that could be issued by all qualified tribes for this purpose, and each qualifying tribe could apply for a portion of this cap.¹⁶⁵ The portion allocated to a particular tribe set the maximum limit on the amount of bonds that could be issued by that tribe. Some or all of the Five Tribes apparently qualified for allocations to finance projects within their (pre-*McGirt*) “former Indian reservations in Oklahoma” boundaries.

Thus, as to the Five Tribes, there may be little or no change between the areas before and after *McGirt* in which economic development projects financed by these bonds could be used. Moreover, of the \$2 billion overall cap on such bonds, only \$92,464,763.39 of the overall cap remained unallocated as of October 1, 2020.¹⁶⁶

However, it is possible that the reservations of other tribes, such as the Miami Nation and Osage Nation, could be reaffirmed as a result of *McGirt*, which would expand the areas in which the funds from the issuance of these bonds could be utilized. Since there is no requirement that these bonds be issued only to tribal citizens, the benefit of increased opportunities to earn tax exempt interest could be available to both tribal citizens and other types of investors, including non-Indian individuals and entities.

It is possible that, post-*McGirt*, the Five Tribes will seek to take on more responsibilities throughout their reaffirmed reservations. Increasing economic opportunities for tribal citizens throughout the reservations would certainly be among the likely goals. Advocating for new legislation that would provide additional funding for the issuance of tribal economic activity bonds would be one possible result.

I. Accelerated Depreciation for “qualified Indian reservation property”

Section 168(j) of the Internal Revenue Code offers the option of shorter (than the regular) periods over which federal income tax deductions can be taken with respect to the cost of “qualified Indian reservation property”¹⁶⁷ used within “an Indian reservation.”¹⁶⁸ Since § 168(j) may provide increased income tax deductions that could reduce otherwise taxable income, it will generally have no benefit with respect to the income from businesses operated by the tribes in a fashion that qualifies for the exemption from federal income taxes. However, it could benefit businesses which are not exempt from federal

164. Notice 98-45, *supra* note 163.

165. See generally Edwards, *supra* note 157, at sec. II.B.5.

166. *Published Volume Cap Limit for Tribal Economic Development Bonds*, IRS (last updated Mar. 31, 2021), <https://www.irs.gov/tax-exempt-bonds/published-volume-cap-limit-for-tribal-economic-development-bonds>.

167. 26 U.S.C. § 168(j)(1).

168. *Id.* § 168(j)(4)(A).

income taxes, whether operated by the tribes,¹⁶⁹ tribal citizens, or others.

An “Indian reservation” for these purposes is defined in the same manner as discussed above with respect to tribal economic development bonds and includes “former Indian reservations in Oklahoma,”¹⁷⁰ which apparently included most or all of the areas that *McGirt* expressly or impliedly reaffirmed with respect to the reservations of all Five Tribes.¹⁷¹ Thus, as to the Five Tribes it is doubtful that *McGirt* significantly expands the areas in which qualifying property could be used, but the reservations of other tribes reaffirmed on the basis of a *McGirt* analysis could expand the areas in which “qualified reservation property” could be found.

A primary limitation of this provision is that it is currently limited to property placed in service by no later than December 31, 2021,¹⁷² but, based on past history, it may be extended.¹⁷³

On the other hand, even if the provision is extended beyond 2021, other provisions in the Internal Revenue Code may currently give faster tax deductions with respect to some of these same properties regardless of their connection to an Indian reservation. For example, § 179(b) currently allows a deduction for the aggregate cost of many of the same properties for the year they are placed in service, as long as that aggregate cost for a particular year does not exceed an inflation-adjusted maximum for the year,¹⁷⁴ \$1,050,000 for properties placed in service in 2021.¹⁷⁵ A separate provision, § 168(k), currently allows a deduction for many of the same properties¹⁷⁶ in an amount equal to 100% of the cost if placed in service before January 1, 2023.¹⁷⁷

Probably the greatest potential current benefit of this provision is with respect to “nonresidential real property,” which would include most commercial buildings other than residential rental properties such as apartment complexes.¹⁷⁸ The cost of buying or constructing a commercial building that constitutes “nonresidential real property” generally cannot be fully deducted under either of §§ 179¹⁷⁹ or 168(k),¹⁸⁰ and would instead be deducted incrementally over its “recovery period,” which is generally currently

169. Such as through a corporation organized under state law. *See* Rev. Rul. 94-16, 1994-1 C.B. 19.

170. 26 U.S.C. § 168(j)(6)(A); 25 U.S.C. § 1452(d).

171. *See supra* notes 157–59 and accompanying text.

172. 26 U.S.C. § 168(j)(9).

173. This provision dates back to 1993 legislation and was originally scheduled to expire with respect to property placed in service after December 31, 2003. *See* section 13321 of Part II of the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66). It has been extended multiple times in the past, most recently by the Consolidated Appropriations Act, 2021 (P.L. 116-260), signed by the President on December 27, 2020.

174. 26 U.S.C. 179(b)(1) sets an aggregate limit for the year of \$1,000,000, but that is adjusted for inflation beginning in 2019.

175. Revenue Procedure 2020-45, 2020-46 I.R.B., section 3.26.

176. *See* 26 U.S.C. § 168(k)(2)(A).

177. *Id.* § 168(k)(6)(A).

178. *See* definitions in 26 U.S.C. § 168(e)(2)(A), (B).

179. 26 U.S.C. § 179(d) and (e) permit the deduction under that provision to be taken with respect to certain “qualified real property,” generally defined as limited to certain improvements to real property rather than the cost of purchasing or constructing a building.

180. 26 U.S.C. § 168(k)(2) generally limits deductions under that subsection to properties with a recovery period of twenty years or less, which would exclude nonresidential real property because of its standard thirty-nine-year recovery period.

set at thirty-nine years.¹⁸¹ However, if it constitutes “qualified Indian reservation property” its recovery period is reduced to twenty-two years,¹⁸² which would significantly shorten the period over which these costs can be deducted.

J. Exclusion of “social welfare” Benefits from Income for Federal Income Tax Purposes

Without express statutory authority, the Internal Revenue Service has long recognized a “general welfare exclusion” under which certain payments made from governmental units pursuant to certain social benefit programs can be excluded from the income for federal income tax purposes of those who receive such payments.¹⁸³ For the recipients to qualify for the exclusion under this administrative exception, payments received generally have to meet four requirements: (1) they must be made from a governmental fund; (2) they must be made “for the promotion of the general welfare (*i.e.*, generally based on individual or family needs);” (3) they must not constitute compensation for services; and (4) they generally must not constitute payments to businesses since such “payments are not based on individual or family needs.”¹⁸⁴ A very limited statutory version of the exclusion was enacted as § 139 of the Internal Revenue Code in 2002¹⁸⁵ but did not preempt the broader administrative version of the exclusion.¹⁸⁶

The IRS in 2014 issued Revenue Procedure 2014-35¹⁸⁷ to be specifically applicable to certain tribal government programs, and it described with greater certainty which tribal government program benefits could qualify for the administrative social welfare exclusion. The Tribal General Welfare Exclusion Act of 2014¹⁸⁸ added an Indian-specific statutory provision to the Internal Revenue Code, § 139E, entitled “Indian general welfare benefits.” However, this statutory provision did not supplant the administrative exception as described in Revenue Procedure 2014-35, because the latter was broader in some circumstances.¹⁸⁹ This was important because § 139E merely sets out general rules for exclusion without addressing which specific programs may qualify, and limits the exclusion to benefits received from their tribes by tribal members or their spouses or dependents.¹⁹⁰

By contrast, Revenue Procedure 2014-35 is more specific as to what types of tribal benefits may qualify for the exclusion and broader as to who can receive excludible benefits. It addresses with greater particularity how benefits received under certain housing, educational, and elder and disabled programs may qualify, but also addresses a variety of other potentially excludible benefits.¹⁹¹ The Revenue Procedure also broadens the category of those who can claim the exclusions for otherwise qualifying benefits

181. 26 U.S.C. § 168(c).

182. *Id.* § 168(j)(2).

183. *See, e.g.*, Rev. Rul. 2005-46, 2005-2 C.B. 120.

184. *Id.*

185. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 111.

186. Rev. Rul. 2003-12, 2003-1 C.B. 283.

187. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110.

188. Pub. L. No. 113-168, 128 Stat. 1883.

189. Notice 2015-18, 2015-18 I.R.B. 942.

190. 26 U.S.C. § 139E(b).

191. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110, § 5.02(2).

beyond the tribal members or their dependents to also include tribal members' spouses or former spouses, legally recognized domestic partners or former domestic partners, ancestors, or descendants.¹⁹²

The Revenue Procedure makes it expressly relevant in some circumstances whether any benefits provided have a connection to an "Indian reservation."¹⁹³ Of particular importance may be the recognition in the Revenue Procedure that "programs of Indian tribal governments to help establish Indian-owned economic enterprises on or near a reservation and based on need qualify under the general welfare exclusion regardless of whether the programs receive any federal funding."¹⁹⁴

"Indian reservation" is defined for these purposes as including both recognized reservations and certain "former Indian reservations in Oklahoma" that generally included the reservations of the Five Tribes as "former" reservations.¹⁹⁵ To the extent these reservations are or will be reaffirmed as a result of *McGirt*, their inclusion in the "former Indian reservations of Oklahoma" would be replaced by their status as current recognized reservations. Other reservations reaffirmed as a result of *McGirt*, and which would not have qualified under the "former Indian reservation in Oklahoma" definition, could now generally qualify.

Moreover, while several of the programs described in the Revenue Procedure do not require an express link to an "Indian reservation," it is certainly possible that they could become more relevant after *McGirt* if the Five Tribes engage in an active expansion of tribal civil and criminal jurisdiction throughout their reaffirmed reservations. Providing increased tribal governmental support of various sorts to members throughout the reservations may justify increased reliance on both the administrative and statutory "Indian general welfare exclusion" in structuring benefits that could qualify for this exclusion.

K. Indian Employment Tax Credit (26 U.S.C. § 45A)

The "Indian employment credit" is authorized by section 45A of the Internal Revenue Code, which provides a federal income tax credit of 20% of qualifying wages and employee health insurance costs incurred by an employer with respect to services performed by a "qualified employee"¹⁹⁶ but is limited to a maximum credit of \$4,000 per qualified employee.¹⁹⁷ No deduction is allowed for the portion of the wages equal to the amount of the credit.¹⁹⁸ This credit is currently scheduled to expire at the end of 2021, but, based on past history, it may be extended.¹⁹⁹

Although there are additional limitations, to constitute a "qualified employee," the

192. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110, § 4.05.

193. Section 5.02(2)(d)(i) addresses transportation costs paid "between an Indian reservation" and "facilities that provide essential services to the public (such as medical facilities and grocery stores)."

194. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110, § 2.02.

195. See *supra* notes 157–59 and accompanying text.

196. 26 U.S.C. § 45A(a), (b)(1).

197. 26 U.S.C. § 45(b)(3) limits the wages of a qualified employee that can be taken into account for these purposes to no more than \$20,000, and 20% of that maximum would be \$4,000.

198. *Id.* § 280C(a).

199. This credit was originally enacted as part of the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66 (1993) and has been extended multiple times, most recently by the Consolidated Appropriations Act, 2021 (P.L. 116-260), signed by the President on December 27, 2020. See *id.* § 45A(f), as amended.

employee must be an enrolled citizen or member of an Indian tribe or be the spouse of an enrolled member; substantially all of the employee's services for the employer who will claim the credit must be "performed within an Indian reservation," and the employee's principal place of abode while performing such services must be "on or near the reservation in which the services are performed."²⁰⁰

An "Indian reservation" for these purposes includes "former Indian reservations in Oklahoma,"²⁰¹ which apparently included substantially the same areas as those expressly or impliedly reaffirmed by *McGirt* as constituting the reservations of the Five Tribes.²⁰² Thus, as the reservations of the Five Tribes are reaffirmed on the basis of *McGirt*, the "reservation" limitation under section 45A could now be satisfied with respect to their actual reservations rather than with respect to the areas that may have qualified as "former Indian reservations in Oklahoma." However, as to other reservations that may be reaffirmed under a *McGirt* analysis, there may be an expansion of the areas in which services qualifying for the "Indian employment credit" can be performed.

L. Federal Excise Taxes

Federal excise taxes are imposed on a variety of transactional activities. State and local governments are generally exempt from these taxes, but the Internal Revenue Service has taken the position that "Indian tribal governments have no inherent exemption from federal excise taxes."²⁰³ In order to clarify the status of tribal governments with respect to these taxes, the Internal Revenue Code expressly treats certain qualified Indian tribal governments as "States" for these purposes as to some, but not all, of these excise taxes.²⁰⁴

All Five Tribes should be "Indian tribal governments" for this purpose.²⁰⁵ However, the exemption only applies if the transaction being taxed "involves the exercise of an essential governmental function of the Indian tribal government,"²⁰⁶ which "shall not include any function which is not customarily performed by State and local governments with general taxing powers."²⁰⁷ The Internal Revenue Service indicates that essential governmental functions for this purpose would generally be limited to providing customary governmental services such as schools, police, and firefighting services.²⁰⁸

Thus, the availability of a tribal exemption from federal excise taxes by reason of being a "State" is not based on the size of a tribe's territorial jurisdiction. The expansion of the recognized area of a tribe's jurisdiction on the basis of *McGirt* should generally not directly change either the exempt or nonexempt status of a tribe with respect to particular

200. *Id.* § 45A(c)(1).

201. *Id.* § 45A(c)(7); *id.* § 168(j)(6)(A); 25 U.S.C. § 1452(d).

202. *See supra* notes 157–59 and accompanying text.

203. Rev. Rul. 94-81, 1994-2 C.B. 412 (citing *Confederated Tribes of the Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983)); *see also* *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (holding that tribes are subject to certain excise and occupational taxes related to gaming because Congress did not exempt them in a sufficiently unambiguous manner).

204. 26 U.S.C. § 7871(a)(2). The excise taxes addressed are generally designated taxes imposed on fuels, manufacturers, communications, and highway vehicles.

205. *See id.* § 7701(a)(40)(A); Rev. Proc. 2008-55, 2008-39 I.R.B. 768.

206. 26 U.S.C. § 7871(b).

207. *Id.* § 7871(e).

208. *See* Rev. Rul. 94-81, 1994-2 C.B. 412.

types of federal excise taxes. However, there could be an indirect impact in that a tribe with a newly reaffirmed reservation on the basis of *McGirt* may seek to exercise governmental functions throughout the larger geographical area encompassed by the reaffirmed reservation. To the extent these expanded governmental functions constitute “essential governmental functions,” the exemptions for the designated federal excise taxes would seem to be available.

However, a separate express exemption, from the federal manufacturer’s excise taxes, is in part a territory-based exemption in that it exempts from such taxes “any article of native Indian handicraft manufactured or produced by Indians on *Indian reservations*, or in Indian schools, or by Indians under the jurisdiction of the United States Government in Alaska.”²⁰⁹ Activities that otherwise qualify could be conducted in a much larger geographical area as the *McGirt* decision reaffirmed reservations of all Five Tribes.

VI. POTENTIAL IMPACT OF *MCGIRT* ON STATE AND LOCAL TAXES

A. Overview

A state can generally impose taxes of various sorts on those who reside within the state, including as to income a resident may earn outside the state.²¹⁰ A state can also generally impose taxes on property and activities located within the state, even if the person who owns the property or engages in the activity is not considered a resident of the state. On the other hand, a state can generally not tax persons, property or activities that have no connection to the state.

If tribal governments were treated as at least on a par with state governments, that would generally mean that a tribe would have the same taxing powers over persons, property, and activities located within the reservation as states generally do with respect to persons, property, and activities located within a state. Moreover, if a tribe’s reservation was treated as a separate state for tax purposes, that would generally mean that the state in which the reservation is located would have very limited powers to exercise its taxing jurisdiction over the tribe, or over persons, property, and activities located within that reservation.

Alas, however, although treated as a state for some tax purposes, federal statutes and caselaw impose significant limitations on a tribe’s and its reservation’s “state” status for taxing purposes, just as they do for purposes of other civil and criminal jurisdiction. This article previously discussed the general, and severe, limitations imposed by the *Montana* rules on a tribe’s ability to tax nonmember activity occurring within the reservation.²¹¹ Additional similarities and differences between full state status are discussed below.

209. 26 U.S.C. § 4225 (italics added).

210. See, e.g., 68 OKLA. STAT. ANN. § 2355, which generally imposes the Oklahoma income tax on the “Oklahoma taxable income” of residents and nonresidents alike. However, as to residents, 68 OKLA. STAT. ANN. § 2353 generally defines Oklahoma taxable income as all income reported for federal income tax purposes while 68 OKLA. STAT. ANN. § 2362 generally allows nonresidents to exclude income earned outside the state.

211. See *supra* Section III.

B. State Taxation of Tribes—In General

As a general rule, Indian tribes are exempt from state taxation unless Congress has consented to such taxation. The Supreme Court, in *Montana v. Blackfeet Tribe of Indians*,²¹² held invalid a state tax on a tribe's royalties received from mineral leases to non-Indians with respect to tribal lands: "Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . ." ²¹³

However, in contrast to the view of the Internal Revenue Service that a tribe's activities are generally exempt from federal income taxes whether the activities occur on or off the reservation,²¹⁴ there may be more of a territorial limitation with respect to exemptions from some state taxes. In *Mescalero Apache Tribe v. Jones*,²¹⁵ the Supreme Court held that a state gross receipts tax imposed on the sale by a tribe of services and tangible property at a ski resort it operated in an off-reservation area was valid:

Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws, and applies as much to tribal ski resorts as it does to fishing enterprises.²¹⁶

Thus, for state tax purposes, the Court seemed generally to treat off-reservation activities engaged in by a tribe the same as activities engaged in by non-Indians. Although the gross receipts tax in question operated more as a sales tax than an income tax, the majority opinion at times referred to it as an "income tax", and concluded that "we will not imply an expansive immunity from ordinary income taxes that businesses throughout the state are subject to."²¹⁷

Although few rules developed from caselaw with respect to Indian law issues can be stated with absolute clarity, there may be a general rule that (1) a state tax on a tribal activity occurring within a reservation is presumptively invalid absent federal consent in some fashion to such tax, while (2) a state tax on tribal activities occurring outside the reservation is presumptively valid absent an express or implied federal law prohibition on such tax.

The possible income tax implications for any one of the Five Tribes with a *McGirt* reaffirmed reservation that may encompass an area fifty times or more greater than the area previously recognized by Oklahoma as coming under tribal jurisdiction is obvious. Any such tribe can arguably engage in activities within a much larger geographical area than previously recognized, with such activities still being conducted within the reaffirmed reservation, thus arguably preserving the general exemption from state income taxes.

212. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

213. *See, e.g., Montana*, 471 U.S. 759, 766.

214. Rev. Rul. 67-284, 1967-2 C.B. 55, modified on another issue by Rev. Rul. 74-13, 1974-1 C.B. 14.

215. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

216. *Id.* at 148-49 (internal citations omitted).

217. *Id.* at 157.

C. Possible Exemption from State Income Taxes for Certain Tribal Members

Although a population of almost two million resides within the reservations of the Five Tribes that may have been explicitly or implicitly reaffirmed by *McGirt*,²¹⁸ most are also Oklahoma residents. A much smaller portion of that population consists of tribal citizens and perhaps a smaller portion still consists of tribal citizens residing within the reservation of their own tribes. This article first focuses on the extent to which a state can tax the earnings of tribal citizens/members.

Oklahoma's respondent's brief filed in *McGirt* assumes that reaffirmation of the expanded territorial boundaries of the reservations of the Five Tribes could mean that a significant number of tribal citizens might become exempt from State income taxes. This exemption would result from the reaffirmation of a reservation because the "State generally lacks the authority to tax Indians in Indian country, *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993), so turning half the State into Indian country would decimate state and local budgets" and the revenue impact on the State could be compounded by "tribal members seeking millions in tax refunds..."²¹⁹ The only case cited in this passage involves the exemption from Oklahoma income taxes.

The OTC Report, which addresses state tax implications of *McGirt*, indicates that "[t]he State is prohibited from imposing tax upon the income of individual members of federally recognized Indian tribes as long as the individual tribal member lives and earns the income from sources within Indian country under the jurisdiction of the tribe to which the member belongs."²²⁰

The OTC Report predicts that revenue losses from reduced income tax collections could be as high as \$72,722,944 per year if the reservations of all Five Tribes were reaffirmed, plus potential tax refund claims by tribal members totaling up to \$218,168,832 for the three prior years with respect to which, at the time the Commission's report was issued, the statute of limitations on refunds had not yet expired.²²¹ As a basis for this predicted reduction in state income tax revenues, the Commission report cites Oklahoma Administrative Code § 710:50-15-2(b), which provides for an exemption from State income taxes for "an enrolled member of a federally recognized Indian tribe" to the extent "the member is living within 'Indian Country' under the jurisdiction of the tribe to which the member belongs; and the income is earned from sources within 'Indian Country' under the jurisdiction of the tribe to which the member belongs"²²²

"Indian Country" for purposes of this exemption is defined in Oklahoma Administrative Code § 710:50-15-2(a)(1) as including "formal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States."

Thus, to qualify for the exemption under the Administrative Code, a tribal member would have to reside in an area that would constitute "Indian Country" with respect to that member's tribe, and the exemption would only apply to the extent the member's income

218. See the figures cited in the dissent of Chief Justice Roberts. *McGirt*, 140 S. Ct. at 2482.

219. Brief for the Respondent at 45, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

220. OKLAHOMA TAX COMM'N, *supra* note 21, at 5.

221. *Id.* at 16.

222. *Id.* at 5 (citing OKLA. ADMIN. CODE § 710:50-15-2(b)).

is derived from sources within the tribe's "Indian Country." However, since before *McGirt* the state took the position that their reservations did not exist, "Indian Country" with respect to each of the Five Tribes was only a very small fraction of what it would be considered after *McGirt* if the reservations of all Five Tribes are reaffirmed as a result. The reaffirmation of all Five Tribes' reservations could mean that a substantially larger number of tribal citizens could qualify for the exemption because they live on and earn income from within their own reservations.

The OTC Report acknowledges that the exemption for those who live in and receive earnings from sources within the reservations of their own tribes can't be limited by simply changing the Administrative Code since "the provisions of Section 710:50-15-2 accurately reflect existing United States Supreme Court precedent relating to a State's jurisdiction to impose state income taxes on a member of a federal recognized Indian tribe."²²³ In other words, although expressly incorporated into the Oklahoma Administrative Code, the exemption is intended to reflect what is required by applicable U.S. Supreme Court precedents, and the exemption could not be eliminated by a change in the Code alone. Thus, there is sufficient reason to explore the cases that serve as a basis for the administrative exemption.

There are in fact Supreme Court cases containing very broad language that seem to endorse an exemption from state income taxes for all tribal citizens/members who live and work on their reservations. In *McClanahan v. State Tax Comm'n of Oklahoma*,²²⁴ with Justice Marshall's unanimous opinion describing the issue as "apparently of first impression in this Court," the Court considered whether the State of Arizona could "impose its personal income tax on a reservation Indian whose entire income derives from reservation sources."²²⁵ In what seemed plain language setting out a clear rule, the Court concluded that the income tax the State sought to impose was "unlawful as applied to reservation Indians with income derived wholly from reservation sources."²²⁶

It is important to note that the statement of facts in the case did not identify where within the reservation the taxpayer lived or the income was earned, and did not identify whether the source of income was directly related to the tribe or from private business activities or other sources. Moreover, the Court made a point of clarifying what it was *not* deciding: "We are not here dealing with Indians who have left or never inhabited reservations *set aside for their exclusive use* or who do not possess the usual accoutrements of tribal self-government."²²⁷

The italicized language above in a case that precedes *Montana* arguably suggests a potentially limiting criterion for the state income tax exemption by making a distinction within a reservation between areas over which a tribe has retained a right to exclude nonmembers and areas where no such right has been retained. In assessing tribal civil regulatory powers, including taxing powers, over nonmember activities occurring within a reservation, the *Montana* line of cases has elevated the location of the nonmember

223. *Id.* at 6.

224. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973).

225. *Id.* at 165.

226. *Id.*

227. *Id.* at 167 (emphasis added).

activities subject to the regulation or tax to that of a critical element of the analysis, with any such regulation or tax presumptively invalid with respect to activities occurring on parts of the reservation over which the tribe lacks the power to exclude the nonmembers subject to the regulation or tax. On the other hand, the *Montana* analysis in tax cases has been applied to *tribal taxes* imposed on *nonmembers*, and in contrast

[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, “a more categorical approach: ‘[A]bsent cession of jurisdiction or other federal statutes permitting it,’ we have held, a State is without power to tax reservation lands and reservation Indians.”²²⁸

While it was clear in *McClanahan* that the taxpayer at issue was a member of the Navajo Nation who lived and worked on the reservation, Justice Marshall’s broad language that “[t]he tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources”²²⁹ raises some questions as to the meaning of “reservation Indians.” It has been argued that the language used should be read to mean that the same result should follow where a member of one tribe lives and works on the reservation of another tribe. “A careful reading of his opinion shows that Justice Thurgood Marshall’s use of the phrase ‘reservation Indians’ refers to Indians who were within Indian Country whether or not they were members of a particular tribe The specific tribal membership of the Indian was unimportant.”²³⁰

This is an important consideration. If the income tax exemption is available only with respect to tribal members who live and work within the reservations of their own tribes, it will likely be available to fewer individuals than if the exemption also applied where, for example, a member of the Muscogee (Creek) Nation lived and worked within another reservation.

However, a subsequent case, *Washington v. Confederated Tribes of Colville Indian Reservation*,²³¹ which dealt with taxes on cigarettes rather than income taxes, made a clear distinction between member and nonmember Indians:

Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington’s power to impose its taxes on Indians not members of the Tribe. Similarly, the mere fact that nonmembers resident on the reservation come within the definition of “Indian” for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Although there were arguably tax-avoidance considerations involving the cigarette taxes in *Colville* that were not present with respect to the income tax in *McClanahan*, there is certainly a strong argument that *Colville* would support limiting the state income tax exemption to income earned within a tribe’s “Indian country” by a member of that tribe who also resides within that same Indian country.

228. *Chickasaw Nation*, 515 U.S. at 458.

229. *McClanahan*, 411 U.S. at 165.

230. Scott A. Taylor, *The Unending Onslaught On Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 957 (2008) (footnotes omitted).

231. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

In other words, the exemption would likely be available, for example, only to Muscogee (Creek) members to the extent they reside in and earn income from sources within the reservation of the Muscogee (Creek) Nation. The exemption would not be available, for example, to an enrolled Cherokee Nation citizen who resides in or earns income from sources within the Muscogee (Creek) reservation.

This narrower view is the one taken by the Oklahoma Administrative Code, which provides that the State income tax exemption only applies where the individual tribal member lives and works within the “Indian country” under the jurisdiction of the individual’s own tribe.²³² Since there is likely a significant number of members of the Five Tribes who live or work in a reservation of another tribe, this limitation would obviously reduce the impact on State income taxes of the express and implied reaffirmation that the reservations of the Five Tribes still exist.

A subsequent post-*Montana* case, *Oklahoma Tax Comm’n v. Sac and Fox Nation*,²³³ seems to anticipate post-*McGirt* consequences for the exemption from State income taxes for tribal members living on the reservations of the Five Tribes. It involved an Oklahoma tribe which brought an action to enjoin the State from collecting income taxes from tribal members. The Court couched the issue in this fashion: “In this case, we consider whether the State of Oklahoma may impose income taxes . . . on the members of the Sac and Fox Nation.”²³⁴

It cited *McClanahan* as holding that “a State could not subject a tribal member living on the reservation, and whose income derived from reservation sources to a state income tax absent express authorization from Congress.”²³⁵ The State argued that *McClanahan* was inapplicable because its analysis “applied only to tribes on established reservations” and that the Sac and Fox Reservation had been “disestablished” by an 1891 treaty.²³⁶ The United States Supreme Court concluded, however, that the State tax exemption was available as long as the tribal members both lived and worked within “Indian country,” which included for this purpose “formal and informal reservations, dependent Indian communities, and allotments, whether restricted or held in trust by the United States.”²³⁷ The case was remanded for a determination of whether the relevant tribal members who earned income from the tribe lived in “Indian country” as thus defined.²³⁸

McGirt addressed the existence of reservations, not tax exemptions. However, to the extent a member of a particular tribe resides and earns income within a reservation that is reaffirmed on the basis of *McGirt*, it would seem that both *McClanahan* and *Oklahoma v. Sac and Fox Nation* would support an exemption from State income taxes. If a tribal citizen/member lives or works in an area outside the formal reservation, the availability of the exemption may depend on whether the areas fall within “Indian country” as it has been more broadly defined.

On the other hand, for the nonmembers living and working within a reservation and

232. OKLA. ADMIN. CODE § 710:50-15-2(b).

233. *Oklahoma v. Sac & Fox Nation*, 508 U.S. 114 (1993).

234. *Id.* at 116.

235. *Id.* at 120.

236. *Id.* at 121.

237. *Id.* at 123.

238. *Sac & Fox Nation*, 508 U.S. at 126.

for tribal citizens who work or reside within a reservation of another Tribe, the exemption is probably not available. The U.S. Supreme Court, in *Oklahoma Tax Comm'n v. Chickasaw Nation*,²³⁹ held that a state may tax the incomes of all residents of the State who do not reside within “Indian country” even if they are tribal members whose income is from employment by their Tribe. This is based on “a well-established principle of interstate and international taxation—namely, that a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.”²⁴⁰

The Court in effect held that the state had territorial jurisdiction to tax those of its residents, including tribal members, who were not also residents of those areas of Oklahoma that were considered within tribal jurisdiction. Thus, to the extent *McGirt* may dramatically increase the recognized size of what would be considered “Indian country,” there are potentially tens or even hundreds of thousands of tribal members who previously were not considered to live within Indian country for this purpose but who now clearly would.

Oklahoma tribes should be confident in their power as sovereigns to impose income taxes on their enrolled citizens/members who reside and work within their reaffirmed reservations, and based on the caselaw and the Oklahoma Administrative Code, this power is probably exclusive as against the power of the state to tax the same income. To the extent that a tribe is treated as a state for this purpose, it should also be able to tax the income of nonresident tribal citizens/members who work on the reservation, and of resident enrolled members who work outside the reservation, but the state is likely to have concurrent jurisdiction to tax under these circumstances.

D. Sales Taxes—Overview

The post-*McGirt* OTC Report concluded that the primary fiscal impact on the state from the reaffirmation of one or more reservations would be the reduction in collections of income taxes and sales and use taxes.²⁴¹ As to collections of sales and use taxes with respect to the Muscogee (Creek) Nation Reservation, which was specifically reaffirmed by the decision, the report noted that

McGirt expands the area in which businesses and tribes may make tax-exempt sales to Creek Nation tribal members. Tribal and non-tribal businesses operating in the Creek Nation’s Indian country are not required to collect taxes on sales to Creek Nation tribal members. Although businesses *are* required to collect and remit the appropriate sales taxes from non-tribal members, there remains an issue with enforcement against tribal businesses that may successfully claim sovereign immunity.²⁴²

The OTC Report went on to estimate the per-year reduction in sales and use taxes with respect to the Creek Nation at \$38.1 million, with a total yearly reduction of \$132.2 million if all five reservations are reaffirmed on the basis of *McGirt*.²⁴³

Oklahoma obviously anticipates a significant impact on state sales tax revenues if

239. *Chickasaw Nation*, 515 U.S. 450.

240. *Id.* at 462–63 (emphasis in original).

241. OKLAHOMA TAX COMM’N, *supra* note 21, at 2.

242. *Id.*

243. *Id.*

the reservations of all Five Tribes are reaffirmed. Below, this article details the caselaw basis for these anticipated reductions. A broader focus of this article continues to be on any expansion of tribal taxing powers within newly reaffirmed reservations and on the extent to which any expanded tribal taxing powers will be exclusive as against state and local taxing authorities. As a policy matter and as a practical matter, a tribe is more likely to utilize any expanded taxing power only where that will not result in a duplication of tribal and state and local taxes.

E. Tribal Sales Taxes

The United States Supreme Court, in *Mescalero Apache Tribe v. Jones*,²⁴⁴ held that what was in effect a nondiscriminatory sales tax could be validly imposed by a state on sales by a tribe with respect to a business operated by the tribe outside the reservation.²⁴⁵ Thus, even if a tribe also had the power to tax some or all of those sales, its powers would only be concurrent with that of state and local taxing authorities. As to reservation sales, the Court, in *Washington v. Confederated Tribes of Colville Indian Reservation*,²⁴⁶ upheld a tribal tax imposed with respect to sales on trust lands of cigarettes to nonmembers.²⁴⁷ Although the court variously described the territory over which the tribe would have such taxing jurisdiction as “trust lands,” “reservation lands in which the tribes have a significant interest,” “reservation,” this was a pre-*Montana/Atkinson* decision, and the *Montana* rules would presumably now apply to limit the power of the tribes to tax sales to nonmembers as to areas of the reservation not held in trust for the tribes.²⁴⁸

F. Application of State Sales Taxes on Sales within the Reservation

In *Oklahoma Tax Comm’n v. Chickasaw Nation*,²⁴⁹ the United States Supreme Court held invalid a state tax on motor fuels sold by a tribe at its retail stores on trust lands where the incidence of the tax fell on the tribe or its members.²⁵⁰ However, the Court’s broad language indicates the exemption from the tax would extend beyond sales on trust lands. “If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside *Indian country*, the tax cannot be enforced absent clear congressional authorization.”²⁵¹

The only express definition of “Indian country” provided by the Court was by reference to 18 U.S.C. § 1151 as including “formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.”²⁵²

The OTC Report concedes that “[t]ribal and non-tribal businesses operating in the

244. *Mescalero*, 411 U.S. 145.

245. *Id.*

246. *Colville*, 447 U.S. 134.

247. *Id.* at 152–53.

248. *See supra* Section III.

249. *Chickasaw Nation*, 515 U.S. 450.

250. *Id.* at 453.

251. *Id.* at 459 (italics added).

252. *Id.* at 453 n.2.

Creek Nation's Indian country are not required to collect taxes on sales to Creek Nation tribal members."²⁵³ The report also acknowledges that the same result would apply to sales to members within the other four reservations of the Five Tribes if those are reaffirmed on the basis of *McGirt*.²⁵⁴

While holding that a tribal tax on cigarette sales to both members and nonmembers on tribal trust lands was valid, the Supreme Court also upheld state sales taxes with respect to the sales to the nonmembers, and upheld detailed record-keeping requirements imposed by the state in order to distinguish exempt sales to tribal members from nonexempt sales to nonmembers.²⁵⁵ However, the state's remedies against the tribe for failing to assist in collecting the taxes on nonmembers may be limited somewhat by the doctrine of sovereign immunity.²⁵⁶

Thus, the expansion of recognized tribal jurisdiction as the result of the reaffirmation based on *McGirt* of the reservations of any of the Five Tribes likely significantly expands the areas in which sales to a Tribe's members would be exempt from state sales taxes. To the extent such sales are exempt from state sales taxes, they should generally also be exempt from local sales taxes for the same reasons. The expansion of this exemption would also mean that the tribes would have an opportunity to increase revenues by imposing nonduplicative tribal taxes on those same sales.

G. Taxes with Respect to Real Property

The Supreme Court, in *Cass Cty. Minnesota v. Leech Lake Band of Chippewa Indians*,²⁵⁷ indicated that although

State and local governments may not tax Indian reservation land "absent cession of jurisdiction or other federal statutes permitting it . . .,"²⁵⁸ when Congress makes reservation lands freely alienable, it is "unmistakably clear" that Congress intends that land to be taxable by state and local governments, unless a contrary intent is "clearly manifested."²⁵⁹

On this basis, the Court concluded that lands reacquired in unrestricted fee by the tribe within its reservation were subject to state and local ad valorem taxes. Thus, the susceptibility of lands to state and local ad valorem taxes seems to be based on its alienability rather than whether it is located inside or outside of a reservation, meaning that the inclusion of lands within a reservation reaffirmed on the basis of *McGirt* should not change its ad valorem tax status. Further, special federal legislation applying to the Five Tribes made it clear that once restrictions are removed from fee lands within the Five Tribes domain, the land became taxable by the counties within Oklahoma.²⁶⁰

In 1908, Congress expressly provided Oklahoma new authority to impose ad

253. OKLAHOMA TAX COMM'N, *supra* note 21, at 2.

254. *Id.*

255. *Colville*, 447 U.S. at 160.

256. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991).

257. *Cass Cty. Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

258. *Id.* at 110.

259. *Id.* at 103.

260. *See* Act of August 4, 1947, 61 Stat. 731; Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137.

valorem taxes on real property owned in fee by tribal citizens.²⁶¹ The 1908 Act was the first major post-allotment federal legislation to remove restraints on alienation within the Five Tribes, thereby opening the door to ad valorem taxation of real property. The 1908 Act removed restrictions on alienation on lands owned by tribal citizens who were non-Indians and Indians citizens of less than one-half Indian blood.

“All lands, including homesteads, of said allottees . . . enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions.”²⁶²

In 1947, Congress passed the Stigler Act, removing all restrictions upon all lands in Oklahoma belonging to citizens of the Five Tribes upon death.²⁶³ The 1947 Act also limited the size of tax exempt lands to 160 acres and imposed tax exempt filing requirements on Indian property owners. Other than ad valorem taxes on real property, Congress has never authorized Oklahoma to impose any other types of taxes on Indian tribes or individual tribal citizens.

The OTC Report “does not anticipate an impact on collection of ad valorem taxes as a result of *McGirt*.”²⁶⁴ The report indicates that by reason of a provision in the Oklahoma Constitution the state ad valorem tax laws do not apply to lands owned by Indian tribes, lands held in trust by the United States, or restricted fee lands unless opened up for ad valorem taxation by Congress.²⁶⁵

However, the Supreme Court has made a distinction between state and local ad valorem taxes on unrestricted fee lands owned within its reservation by a tribe or its members, which will apparently be valid barring some sort of Congressional prohibition, and other types of tax with respect to those lands. In *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*,²⁶⁶ the Court noted that “[i]ability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment.”²⁶⁷

The ad valorem tax, in other words, is in effect a taxation on the ownership of the real property. This type of tax differs from transactional taxes with respect to real property that are related to transfers of such property. The Court held valid an ad valorem tax on real property owned in fee by the tribe or its members within the reservation on the basis that Congress had authorized “taxation of . . . land” but held invalid a state excise tax to the extent it imposed a tax on the sale by a tribe or its members of land located on the reservation, a transactional tax, because Congress had only authorized the “taxation of . . . land,” not “taxation with respect to land,” or “taxation of transactions involving land”²⁶⁸ Although finding that Congress’ intention to permit state and local “taxation of land” owned in fee by the tribe or its members was sufficiently clear, there was not a sufficiently clear intention to authorize such taxes on transactions by the tribe or its members “with respect to” land. “When we are faced with these two possible constructions, our choice

261. Act of May 27, 1908, ch. 199, 35 Stat. 312.

262. *Id.* § 1, 35 Stat. 312.

263. Act of August 4, 1947, ch. 458, 61 Stat. 731.

264. OKLAHOMA TAX COMM’N, *supra* note 21, at 12.

265. *Id.* at 12–13; OKLA. CONST. art. I, § 3.

266. *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

267. *Id.* at 266.

268. *Id.* at 269.

between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."²⁶⁹

Although the excise tax involved in the case was not an income tax on the profits from the sale of the land, it would seem that such profits would fall under the general exemption from state and local income taxes on income derived from sources within a reservation by tribal members who reside on the reservation.²⁷⁰ Oklahoma generally requires that profits on the sale of land be included in the computation of "Oklahoma Taxable Income" that is subject to the state income tax, but allows a deduction for "net capital gains" on the sale of real property that was held by the seller for at least five years before the sale.²⁷¹ However, all "income" received by a tribal member is exempt from the state income tax if the "member is living within 'Indian Country' under the jurisdiction of the tribe to which the member belongs; and, the income is earned from sources within 'Indian Country' under the jurisdiction of the tribe to which the member belongs . . ."²⁷²

This should generally exempt from the Oklahoma income tax the profit on the sale of real property located within a reservation, which would be included in that tribe's "Indian country,"²⁷³ if the seller is a member of the tribe who lives on that reservation. The inclusion of millions of additional acres that could potentially be included within the reservations of the Five Tribes if all Five Tribes' reservations are reaffirmed on the basis of *McGirt* would constitute a very substantial expansion of the geographical areas in which such exempt sales can potentially occur.

H. Taxes with Respect to Personal Property—Motor Vehicle Excise Taxes and Registration Fees

As the OTC Report highlights,²⁷⁴ Oklahoma imposes a vehicle registration fee "at the time of initial registration by the owner and annually thereafter,"²⁷⁵ and an additional excise tax on certain transfers of vehicles registered in Oklahoma.²⁷⁶ Although there is no express statutory exemption from these taxes for tribal citizens, the Supreme Court in *Oklahoma Tax Comm'n v. Sac & Fox Nation*,²⁷⁷ held that they could not be validly imposed on tribal citizens/members residing in their tribe's "Indian Country," including both formal and informal reservations, at least where the tax was not tailored "to the amount of actual off-[Indian country] use . . ."²⁷⁸

On the basis of this case, the OTC Report concludes that the state cannot require tribal members residing within their reservations to register their vehicles with the state or

269. *Id.* (internal citations omitted).

270. OKLAHOMA TAX COMM'N, *supra* note 21, at 11.

271. OKLA. ADMIN. CODE § 710:50-15-48(b)(1).

272. *Id.* § 710:50-15-2(b)(1).

273. "Indian country" includes both "formal and informal" reservations. *Id.* § 710:50-15-2(a)(1). For federal purposes, "Indian country" is criminal law jurisdiction marker pursuant to 18. U.S.C. § 1151(a)–(c).

274. OKLAHOMA TAX COMM'N, *supra* note 21, at 11.

275. OKLA. STAT. tit. 47, § 1132(A).

276. OKLA. STAT. tit. 68, § 2103(A)(1).

277. *Sac & Fox Nation*, 508 U.S. 114.

278. *Id.* at 127–28 (brackets in original).

to pay the state registration and excise taxes with respect to those vehicles.²⁷⁹ The report goes on to point out, however, that the state has vehicle registration and license tag compacts with the Chickasaw, Choctaw, and Cherokee Nations providing for the registration of some members' vehicles with the State and for some apportionment of the resulting revenues between the Tribes and the State.²⁸⁰

Thus, the reaffirmation of all Five Tribes' reservations would mean that each tribe's reservation would now include a much larger geographical area and resident tribal citizen population within that tribe's "Indian country." Absent compacts, those tribal citizen/members should be exempt from state vehicle registration and transfer fees, at least as they are currently structured. This should also mean a much larger area in which a tribe would have the exclusive right, as against the State, to impose similar fees.

I. Other Taxes with Respect to Personal Property

The OTC Report does not specifically address ad valorem personal property taxes except to the extent they may include the registration fees imposed on vehicles, and which are discussed immediately above. However, the Oklahoma ad valorem tax by its terms applies to "[a]ll property in this state, whether real or personal, except that specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax"²⁸¹

Personal property for this purpose is broadly defined,²⁸² although most Oklahoma residents are probably most impacted by personal property taxes primarily with respect to personal property, such as vehicles, which are required to be registered, and a variety of fees related to registration-required properties are statutorily stipulated to be in lieu of personal property taxes.²⁸³

As indicated above, the Supreme court in *Oklahoma Tax Comm'n v. Sac & Fox Nation*,²⁸⁴ held that vehicle registration fees and vehicle ownership transfer fees could not be validly imposed on tribal members residing in their Tribe's "Indian Country."²⁸⁵ The Court, in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*,²⁸⁶ had held that property taxes on personal property, primarily vehicles, owned by tribal members on a reservation could not be validly imposed by the state without congressional consent.²⁸⁷

Thus, state personal property ad valorem taxes seem generally invalid, absent congressional consent in some fashion, to the extent a state may seek to impose such taxes on the personal property, whether vehicles or other types of personal property, of a tribal member who resides on that member's reservation. To the extent any reservation reaffirmed by *McGirt* expands the recognized area of tribal territorial jurisdiction, it would

279. OKLAHOMA TAX COMM'N, *supra* note 21, at 11.

280. *Id.* at n.1.

281. OKLA. STAT. tit 68, § 2804.

282. *Id.* § 2807.

283. *See id.* § 2805.

284. *Sac & Fox Nation*, 508 U.S. 114.

285. *Id.* at 127–28.

286. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

287. *Id.* at 475, 480–81.

also expand the area within which tribal citizens could own personal property that would generally be free of state ad valorem taxes.

VII. SUMMARY OF TAX POLICY ISSUES POTENTIALLY ARISING FROM *McGIRT*

McGirt was celebrated by the Muscogee (Creek) Nation and within the Indian law community as the most important Indian law decision of the century. However, if the consequences of that case are limited to its most direct holding, that the Muscogee (Creek) Nation reservation remains intact and therefore Oklahoma lacks criminal jurisdiction over crimes involving Indians, this would seem to be a less significant victory than it could be.

Although the reaffirmation of any reservation on the basis of *McGirt* will also generally result in increased federal and tribal criminal jurisdiction over certain crimes occurring within any such reaffirmed reservation, the direct impact of an expanded criminal jurisdiction will extend to a relatively small portion of the included tribal population.

As a consequence, it is arguable that the potential increase in *civil* regulatory and adjudicatory jurisdiction throughout any reaffirmed reservation would offer *more* potential for tribes to recoup important attributes of sovereignty over those areas that could impact all of its resident citizenry.

The power to tax is one of the most significant attributes of sovereignty, and both the exercise and the choice not to exercise that tribal tax power may have significant economic, social, and political consequences. The reaffirmation of a reservation based on *McGirt* may present a tribe with the opportunity to significantly expand its tax revenue base, with potentially much greater positive consequences for tribes and their citizens than the expansion of criminal jurisdiction.

Hundreds of thousands or even millions of nonmember residents may eventually be included within reaffirmed reservations post-*McGirt*. However, most nonmembers will generally continue to be subject to the same federal, state, and local taxes as before *McGirt*, except to the extent that the state and local governments may feel it necessary to increase taxes on nonmembers to compensate for any reductions in tax collections from tribal members. It is also unlikely that these nonmembers will be subject to new tribal taxes because of the difficulty in satisfying the *Montana* exceptions. Since *McGirt* did not address these exceptions, or tax issues generally, it is probably too speculative at this point to conclude that *McGirt* signals the possibility that these exceptions may in the future be interpreted more favorably from a tribal perspective.

On the other hand, tribes on reaffirmed reservations post-*McGirt* will undoubtedly have some increased powers to tax their citizens/members, and some of these powers will be exclusive as against state and local taxing authorities.

From the Five Tribes' standpoint, whether any new tribal taxing powers will be exclusive to the tribe or concurrent with those of state and local governments may be crucial since, as a matter of tax policy, a Tribe may be reluctant to impose new tribal taxes that will duplicate continuing State or local taxes.

However, to the extent a tribe can now impose new taxes within its reaffirmed reservation that may be effectively offset by required reductions in state and local taxes, there may be a strong incentive to do so. New tribal tax revenues could support expanded

and improved tribal services for tribal citizens and could be a substantial step in diversifying a tribe's economy and direct revenue base. Moreover, such activity would be consistent with other efforts by tribes to preserve and expand their tribal identities as sovereign powers.

Although state and federal taxes may be impacted in a number of specific ways by the reaffirmation of reservations post-*McGirt*, the most significant immediate impact anticipated by the OTC Report will likely be on state and local income and sales taxes. Tribal citizens/members who reside on their own reservations are generally exempt from state and local income taxes with respect to income they earn from sources within those reservations. Moreover, sales to tribal citizens/members within their reservations are generally exempt from state and local sales taxes.

The OTC Report estimates that if the reservations of all Five Tribes are reaffirmed as a result of *McGirt*, tribal citizens/members could be newly exempted from as much as \$72.7 million per year in State income taxes and as much as \$132.2 million per year in sales and use taxes.²⁸⁸ That would generally leave the Five Tribes, if all five reservations are reaffirmed, with exclusive authority to impose sales taxes on sales to tribal members within their reaffirmed reservations, and income taxes on their tribal members who live in and receive income from within those same reservations.

As a starting point for any post-*McGirt* taxing strategy by the tribes, it should be recognized that many tribal citizens who may now qualify for exemptions from state income taxes or sales taxes may continue to pay those taxes simply because they are unaware of the exemptions, at least unless there is an aggressive education campaign by the tribes. Moreover, early anecdotal indications are that the Oklahoma Tax Commission will be reluctant to recognize expanded exemptions from state income taxes as a result of *McGirt*, and many tribal members, faced with resistance from the state taxing authority, may be unable or unwilling to pursue expanded exemptions through the required administrative and judicial proceedings. If it becomes clear that the State will not recognize state income tax exemptions that should be available when a reservation is reaffirmed, it may be necessary for the Tribes themselves to bring actions to enjoin the State from improperly taxing what should be exempt income earned by their members.²⁸⁹

Probably the worst result for the tribes would be that their citizens/members continue to pay taxes they should no longer be obligated to pay, with no part of these tax revenues directly benefitting the tribes. Most tribal citizens will be looking to their tribes for guidance and the opportunity for tribal leadership is significant, both in terms of educating tribal citizenry and crafting solutions that work for the tribes.

If the tribes were to decide to take advantage of these new revenue possibilities, internal tribal political considerations would probably suggest that this would best be

288. OKLAHOMA TAX COMM'N, *supra* note 21, at 2.

289. Tribes have been successful in bringing similar claims in federal district courts to enjoin state taxes, including the state of Oklahoma's prior attempts to collect improper taxes from tribes and/or tribal citizens. *See, e.g.,* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (cigarette taxes); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993) (income taxes and motor vehicle excise taxes and registration fee). Actions brought in federal court by Indian tribes to enjoin state taxes are not barred by 28 U.S.C. § 1341. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

accomplished early, by an early substitution of tribal taxes to replace any state and local taxes that will be removed as a result of the reaffirmed reservations post-*McGirt*. In other words, the continuation of current tax burdens, but with revenues now allocated to the tribes, will likely be more palatable to tribal members than a current reduction in state and local taxes followed at some indefinite point in the future by tribal taxes that would then be seen as imposing new tax burdens.

However, some or all of the Five Tribes may be reluctant or unable to take on the administrative burdens associated with imposing these taxes, and may also fear that the imposition of new tribal taxes that are seen as at the expense of state and local tax revenues will result in aggressive push back from those state and local tax authorities. Both of these concerns can potentially be mitigated by intergovernmental compacts.

Section V. of the OTC Report addresses mitigation strategies from the state's standpoint, and one of those is that "the State could enter one or more compacts with the tribes for collection and apportionment of various tax types" and points out that "[h]istorically, the State and the tribes have engaged in compacts for cigarette and tobacco taxes, motor fuel taxes, and license tags."²⁹⁰ Such compacts might lessen the administrative burdens on the tribes with respect to collection and enforcement of tribal taxes and provide an incentive to the State and local governments (assuming the latter are made parties to the compacts) to recognize rather than dispute expanded tribal taxing powers.

New compacts between the tribes and the state could allow the state to continue to enforce and collect sales and income taxes as before *McGirt*, with a remittance of the taxes collected from otherwise exempt tribal citizens to the tribes at a compacted rate that would compensate the state for shouldering the significant administrative burdens of collections and enforcements.

Tribal citizens would generally see no differences in the way the taxes are administered before and after *McGirt*, state and local authorities would not suffer a complete loss of the revenues from these taxes, while the Tribes could receive new tax revenue streams that could be put to use by the Tribes, such as in fostering economic development throughout their reservations.

However, imposing new tribal taxes to replace state and local taxes that can no longer be imposed is only one policy approach the tribes may consider. To the extent that exemptions from state and local taxes may now be available to tribal members living within their own newly reaffirmed reservations, these exemptions may serve as powerful lures to tribal citizens not currently residing, working, or doing business in their reservations. Economic development within the reservations could be spurred by the return of nonresident tribal members attracted by the more favorable tax environment for members residing and working or doing business in their reservations.²⁹¹ Tribes would be making the same decisions to impose or not impose income taxes as several states have

290. OKLAHOMA TAX COMM'N, *supra* note 21, at 20.

291. *But see* EagleWoman & Wastewin, *supra* note 110, at 13–16 (noting that state and local authorities have increasingly opposed any tax policy that would create a favorable tax environment for tribal and tribal member businesses relative to those of nonmembers, and that these authorities promote a "level playing field" argument that might require extending state and local concurrent taxing jurisdiction to overlap tribal taxing jurisdiction).

done as part of their overall economic development strategies.

Economic development within reaffirmed reservations, particularly development that benefits tribal citizens, will likely be an overriding goal of the Five Tribes. It may be wise to tout their reservations as particularly well-suited to serve as laboratories for the development of strategies to help revitalize rural economies. Most of the areas of the reservations are rural or contain only relatively small cities and towns, and have generally suffered from the same economic maladies that have afflicted much of rural and small-town America. In fact, tribal governments and business entities, as critical economic drivers for small towns, have been well-documented, even prior to *McGirt*.

Partnerships involving the tribes and state, local, and federal authorities could experiment with economic development strategies for rural reservation economies and help develop blueprints for rural development that could be exported to other areas of the country. Taxing policy could be a part of these efforts, and tribal advocacy for new federal and state tax legislation that would provide additional tax incentives to support economic revitalization on the reservations could be an important next step.

McGirt will likely have significant implications for the tribes, particularly as to tribal criminal jurisdiction. However, it is doubtful that expanded criminal jurisdiction holds the promise of greater potential benefit to tribes and their members than the exercise of civil, including taxing, jurisdiction. On the other hand, these potential benefits will likely be realized only with a considered strategy that recognizes risks but also appreciates the potential gains from a more proactive assertion of tribal sovereignty over reaffirmed reservations.²⁹²

292. *See id.* at 17–22 (arguing for economic development consistent with a “tribalist economic theory,” one that would integrate “both the contemporary revenue generating activities of Tribal Nations through economic development and the values traditional to tribal peoples of generosity, service, stewardship, conservationism, humility, connectedness, and responsibility.”).
