IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA STATE OF, et al.,

Plaintiffs,

vs. Case No. CIV-21-719-F

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

DECEMBER 2, 2021

1:30 P.M.

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Tracy Thompson, RDR, CRR
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5505

APPEARANCES:

FOR THE PLAINTIFFS:

Mr. Ryan T. Leonard
Edinger Leonard & Blakely, PLLC
6301 N. Western Ave.
Suite 250
Oklahoma City, OK 73118

Mr. Elbert Lin
Hunton Andrews Kurth, LLP-Richmond
951 E. Byrd St.
Riverfront Plaza
East Tower
Richmond, VA 23219

Ms. Melissa A. Romanzo
Hunton & Williams, LLP
101 S. Tryon St.
Suite 3500
Charlotte, NC 28280

Mr. Mithun S. Mansinghani
Attorney General's Office-NE
21 Street-OKC
313 N.E. 21st St.
Oklahoma City, OK 73105

FOR GOVERNOR KEVIN STITT:

Mr. Trevor S. Pemberton
Office of Governor J. Kevin Stitt
2300 N. Lincoln
Oklahoma City, OK 73105

FOR THE DEFENDANTS:

Ms. Arwyn Carroll
U.S. Dept. of Justice - DC
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611

(PROCEEDINGS HAD ON DECEMBER 2, 2021.)

THE COURT: We're here in Civil 21-719, State of Oklahoma and others vs. the U.S. Department of the Interior and others, for a motion hearing, specifically focusing on the plaintiffs' motion for a preliminary injunction, filed on August the 23rd of this year.

Counsel will please give your appearances.

MR. LEONARD: Ryan Leonard for the plaintiffs, Your Honor.

MR. PEMBERTON: Trevor Pemberton on behalf of the Governor.

MR. LIN: Elbert Lin on behalf of plaintiffs.

MS. ROMANZO: Elizabeth Romanzo on behalf of the plaintiffs.

MR. MANSINGHANI: Mithun Mansinghani for the plaintiffs and also behind the bar is the Attorney General.

THE COURT: Very well.

MS. CARROLL: Good afternoon, Your Honor, Arwyn Carroll for the federal defendants. And with me at counsel table I have Conor Cleary, Emily Morris and John Austin from the Department of the Interior Solicitor's Office.

THE COURT: Okay. Thank you.

As everybody has a right to expect, I have reviewed the motion, the response and the reply. It will come as no surprise that I've also got a dog-eared copy of the McGirt

decision here that I've looked at a time or two. And I've also, obviously, reviewed other relevant materials. Although I will say this, I judge from the briefing and the quality of the briefing -- and let me emphasize quality briefing on both sides -- that I'm not going to sit here and claim that with the hours I have devoted to the matter that I am yet ready to go toe-to-toe with either side in terms of your preparation and your mastery of the issues. The briefing that I've got before me tells me that. I've got a lot of quality briefing before me. And that's helpful. And I expect likely we'll have equally quality presentations today.

My intent is to hear from counsel for the plaintiffs in support of the motion. It will come as no surprise to you that I'm certainly going to have some questions as we go. I hope I have come up with some hard questions for both sides. We'll see. There's space in this case, if you will, for some hard questions for both sides.

If anybody came here this afternoon thinking that you would hear a ruling from the bench, you are going to be disappointed. This is a matter involving some urgency, really from the perspectives of both sides, and both sides need to have whatever degree of certainty I can lend to the situation. So I do plan to rule without delay and certainly without avoidable delay. But the complexity of the matter, at least legally and perhaps to some degree factually, although perhaps

not factually, the complexity of the matter is such that I am really loath to rule from the bench.

As Mr. Mansinghani knows, I've ruled from the bench a few times lately. And I have done so in some situations where I felt, all things considered, it was appropriate to do so, but I'm really not in a position to rule today.

With that understanding and, again, I will repeat, because of the urgency of the matter, with the understanding that both sides do deserve to get to some degree of certainty as soon as reasonably possible, I will be making a written ruling as soon as reasonably possible.

With that, I'll hear from the plaintiffs in support of the motion.

MR. LEONARD: Thank you, Your Honor.

THE COURT: And let me -- trust me, I'm not going to just chop up your presentation with all kinds of inconvenient interruptions, but there's one or two things I need to get out of the back of my mind lest they distract me.

First of all, what is the status of the -- as we speak, of the various petitions in the Supreme Court asking that court to revisit McGirt?

MR. LEONARD: Your Honor, there are approximately 45 petitions for cert that have been filed that are currently pending before the U.S. Supreme Court. They are in various stages of briefing. In what the State would consider the

principal case, the Castro-Huerta case, the State's reply is due on December 8th, and we anticipate a decision on cert likely in mid to late January.

THE COURT: Okay. Well, I do appreciate that. Obviously, this is not a matter in which I feel that I can wait to see whether they grant cert, let alone what they do after they grant cert. And that, obviously, is a highly speculative proposition in any event. It's a, if you will, a distraction that I wanted to get out of the back of my mind so that we can tend to business here, so Mr. Leonard, you may proceed.

MR. LEONARD: Thank you, Your Honor. It's an honor to be in your court today. So the State is going to have two counsel, with the Court's indulgence, present the argument today. My co-counsel Elbert Lin, who is here behind me, he will address the arguments related to the State's program under the Surface Mining Control and Reclamation Act, otherwise known as SMCRA, as well as the federal defendants' violations of the Administrative Procedures Act. I will address arguments related to the McGirt decision and why we believe McGirt does not serve to strip the State of jurisdiction over mines in eastern Oklahoma over the Creek lands in question.

Your Honor, as this Court alluded to in an earlier ruling, there can be no doubt that the McGirt decision upended the common understanding of the State of Oklahoma held by the State, the tribes, and millions of Oklahomans over multiple

generations for more than a century. I do think providing a brief background of several issues raised in McGirt is important and relevant to the issues before the Court today, including the future scope of McGirt.

In McGirt, the majority reached its decision notwithstanding the fact that when Oklahoma became a state, the Enabling Act, passed by Congress and signed into law by President Theodore Roosevelt in 1907, welcomed Oklahoma into the union "on equal footing with the original states."

The majority in McGirt reached its decision notwithstanding the fact that since statehood at least 21 federal statutes have been enacted into law, passed by Congress, signed by the president, that specifically contained the phrase "former Indian reservations in Oklahoma." And the Court reached its decision notwithstanding the fact, as Chief Justice Roberts observed, the five tribes repeatedly and emphatically agreed for more than a century that no reservations exist in Oklahoma, including as recently of 2016 when the governor of the Chickasaw Nation, a man who I have the utmost respect for, testified before Congress as he had on other occasions that "There are no reservations in Oklahoma."

THE COURT: Have you ever known a federal district judge to overrule the U.S. Supreme Court?

MR. LEONARD: We're not asking that, Your Honor.

THE COURT: Well, okay. But to clear the air, I

think the McGirt decision is a disaster for the State of Oklahoma, but there are other serious issues afoot, as you know. And that brings me to a question.

In the final paragraph of the McGirt decision, Justice Gorsuch wrote for the Court that "Congress has never withdrawn the promised reservation." That's at page 2482. In this case, the State's briefs, which are clearly within the category of well-written briefs, consistently refers to the geographic area in question in this case as "the historic lands of the Muscogee Creek Nation." And that incantation is repeated numerous times in the State's briefs. It reads as if there's a horrible word you're trying to avoid, namely, "reservation."

Does the State dispute, Mr. Leonard, that the Supreme Court squarely held that the Creek reservation, as established by the 1832 and 1833 treaties, exists as a federally-recognized Indian reservation to this day? Does the State dispute that?

MR. LEONARD: Your Honor, the State does not dispute that McGirt is the law of the land. The State does not dispute that the Supreme Court recognized the Muscogee Creek Nation reservation for the very limited purpose of federal major crimes. So we do not dispute that the reservation exists here today for purposes of the federal Major Crimes Act, which is exactly what the Supreme Court said.

THE COURT: And there's one part of that that I'll take a little bit of issue with, and I want you to set me

straight. Near the beginning of Justice Gorsuch's opinion, he did, as you have said in your briefs and here, have said that "We are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law." And those are probably the five most consequential words in that opinion from the State's perspective.

And then in -- with no insult intended to Justice Gorsuch -- over on page 2480, there's kind of what I would, again, no insult, it's kind of a weasely paragraph, where he talks about finally the State worries that our decision will have significant consequences for civil and regulatory law. And then the opinion just kind of proceeds to straddle the fence a little bit, well, it might be this or it might be that. And there may be various reliance interests that can come into play and so forth. All of that said, I see -- on one hand, there's the disclaimer where he wrote at the beginning of the opinion "for purposes of federal criminal law," but I see a rather clear cleavage between that limiting language and, if you will, the holding elsewhere in the opinion, that the reservation still exists.

Now you say that that holding and that result are linked and that I should accordingly limit my reading of McGirt to purposes of federal criminal law, but obviously it's no news to you that your one albatross around your neck is the fact that the definition of Indian Country in the Major Crimes Act is

replicated elsewhere, almost verbatim, in Section 1291, in terms of a definition of Indian lands. How do you avoid a decision based on the holding that the reservation still exists to this day, as I believe you have acknowledged now? How do you avoid that holding seeping its way into the statutory subject matter of this case, based only on Justice Gorsuch's opening comment, but here we're talking about federal criminal law? I'm not sure that that disclaimer gets you as far as you need to go, but this is your chance to help me on that.

MR. LEONARD: Your Honor, I understand the points the Court is raising. I think it's important to understand what McGirt is and what it isn't, including what the issues were that were before the Supreme Court in McGirt. Before the Supreme Court in McGirt, the State took the position, which was consistent with the position of the State, Congress, tribal leaders, non-tribal leaders alike, for over a century that the reservations had been disestablished. McGirt was a disestablishment case, there was no alternative argument raised before the Supreme Court, the City of Sherrill case, which is, we believe, is explicitly on point as an alternative argument. Our view is, Judge --

THE COURT: The gist of the alternative argument being what?

MR. LEONARD: Being exactly what Justice Gorsuch said in the majority opinion in McGirt, we are asking this Court to

follow the majority opinion in McGirt. And that is, A, it's limited to major crimes, but, B, the majority opinion, Justice Gorsuch explicitly said, in response to the concerns of the dissent, because the concerns of the dissent -- you read the dissent, and it looks like the sky is falling. And, indeed, that is the very concern of the State as we appear here in court today. But Justice Gorsuch himself basically said in effect the concerns of the dissent are misplaced because there are equitable doctrines available to the State on a case-by-case basis. He identified those other legal doctrines to include procedural bars, res judicata, laches, statutes of repose. The Court need look no further than the City of Sherrill case, which is a 2005 U.S. Supreme Court decision, eight-to-one decision, written by Justice Ruth Bader Ginsburg, in which the court allowed the State of New York to continue to exercise its sovereignty and jurisdiction over Indian Country lands. In the City of Sherrill case, the lands involved the Oneida Indian Reservation.

THE COURT: In that case were the plaintiffs running flat up against federal statutory law?

MR. LEONARD: In the Sherrill case -- the Sherrill case involved taxation, but the Sherrill case was broadly written and recognized not only laches, acquiescence and possibility, but other federal equity doctrines in the concept of Indian law. And here, Your Honor, the law we're running up

against, obviously, as the federal defendants are arguing, is, well, we've got a federal statute here, we're tied to the federal statute. But what the federal defendants are ignoring is that particularly in instances involving Indian law, the U.S. government is subject to a defense of laches. In the Cayuga Nation v. Pataki case, the court, the Second Circuit, identified three factors, and I'm getting to them, three factors where the United States is subject to a laches defense. This was also an Indian law case, and it also involved a federal statute, the federal Nonintercourse Act. The Second Circuit in the Cayuga Nation v. Pataki case says the U.S. is subject to laches in three instances. One, when it's an egregious case; two, when the statute of limitations doesn't apply; and, three, when the U.S. is intervening to vindicate the interests of an Indian nation. The State doesn't have to meet all three of those instances, only one. And so you look at those factors and apply them to what we're looking at here.

One, is this an egregious case? The federal defendants are seeking to dislodge the State of its jurisdiction over mines in the Creek lands, but we know there are other cases pending. In effect, the State is going to lose its jurisdiction over mining in all of eastern Oklahoma. And as the Court is well aware, this is not the only challenge in the civil space.

THE COURT: I'm going to ask you to slow down just a

bit, please.

MR. LEONARD: Sorry, Judge.

This is not the only challenge that we have in the civil space. Obviously, these issues aren't before this Court today, but the State currently has 5,000 tax protests and exemption applications pending before the Oklahoma Tax Commission filed by Native Americans saying they don't owe income taxes in Oklahoma because they live in the eastern part of the state. We've got regulatory challenges, we have the Environmental Protection Agency, who several weeks ago sent notice to the State that, well, now in eastern Oklahoma we're going to require tribal consent to spend the State's superfund dollars. So these civil challenges are everywhere, Judge.

And what makes this case subject to the City of Sherrill and the application of the equitable doctrines is the exception identified in the Cayuga Nation case v. Pataki, which says the U.S. government is subject to laches, because here it's an egregious case, the statute of limitations does not apply, and the federal government is plainly not intervening to protect a sovereign right. This SMCRA statute, which my co-counsel will get into the particulars about, the SMCRA statute is the perfect example of cooperative federalism at work, this is the federal government delegating to the states the right to exercise jurisdiction over mining. This is not a federal sovereign right, the federal government has given that to the

states, and they've given it to Oklahoma for almost 50 years. So there's no sovereign right just by virtue of it being a federal statute, that does not -- it does not flow that that automatically is a sovereign right, so --

THE COURT: Well, let's focus for a minute on one part of the defendants' comeback on the, if you will, the equitable arguments. On page 25 of the defendants' response brief there is a passage -- and I'm going to leave out citations and quotations and just read the words -- the defendants refer to an equally foundational principle applies more directly: courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. It is a longstanding maxim that equity follows the law. Because an Article III court sitting in equity remains bound to a federal statute's text, the Court cannot ignore SMCRA's jurisdictional mandate regardless of any equitable and practical concerns asserted by the State.

And as if that were not enough, over on the next page the defendants cite another Supreme Court case to the effect that a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation and cannot choose not to enforce a federal statute.

And so, again, that proposition could make a difference in this case because -- and we can come back to this if need be -- it may well be that the State is running headlong into some

clear statutory language defining what the federal agency is empowered to do with respect to mining or reclamation activities and clear statutory language defining Indian lands for purposes of the Surface Mining Act. So if I conclude that the statutory language is unambiguous, how do you avoid the effect of the passages that I just read?

MR. LEONARD: Your Honor, the passages that you read, one was from the Sanders case, which involved a truth-in-lending case; the Safe Streets case, cited by the federal defendants, as a recreational marijuana case out of Colorado; and the last case, the Oakland Cannabis Buyers Co-op, is also a marijuana case. Your Honor, none of those cases involve Indian law. Indian law is its own animal, my words. Oklahoma has always been unique, Congress has treated Oklahoma as unique, I spent four years in the 90s working as a young staff person, worked on these issue. Oklahoma was always treated differently than other states. So in the instance of Indian law, the Second Circuit, applying Seventh Circuit authority, has made it clear that the United States is subject to a laches defense, and that's how we believe this Court gets around the language that you just cited.

When it comes to Indian law, the United States cannot sit back on its hands for 50 years. The United States is charged with knowing the law. The McGirt decision didn't create new law, you read Justice Gorsuch's opinion, he says, well, this

has been the law and everybody has been doing it wrong for over a century, but it's always been the law. The federal government, since 1977, when SMCRA became law, has been charged with knowing that the Creek Nation Reservation existed, whether it be for the purpose of federal major crimes or otherwise. And so they're charged with that. They've waited 50 years and now they're coming in because of the McGirt decision in which the court said two things, A, limited only to the federal major crimes and, B, no reason to have concern about an unwarranted expansion, those concerns are "misplaced." That is Justice Gorsuch's own words. The concerns are misplaced, because the State has these obvious equitable defenses that are embodied in the City of Sherrill case.

THE COURT: And he also said, in effect, they might or might not work, and if they don't work, that's tough. He basically said that.

MR. LEONARD: I'm more of an optimist, Judge. At least, that's how I read it. I read the majority decision to say that, you know, that these are going -- if this is not a limited decision, we're going to consider this case by case. And this is one of those cases, obviously, Your Honor.

THE COURT: Okay. While we're on the subject of statutory language, as we're all well aware, going to Section 1291, specifically subdivision 9, really parroting the Major Crimes Act, subdivision 9 of Section 1291 says: "Indian lands"

means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation. And then it goes on with some more elaboration.

Does the State dispute that the land involved in this case does qualify as Indian land under SMCRA?

MR. LEONARD: Your Honor, the State does not concede that the lands in question qualify as Indian lands. And this is part of the argument I prepared, but it is not in the briefing and the reason it's not in the briefing is because this is the early stage of the case, but looking at 30 U.S.C. Section 1291 subparagraph 9, the definition of Indian lands says that the lands, as the Court said, is within the boundaries of any federal Indian reservation. "Federal Indian reservation" is not a defined term in the statute. Since the filing of this case and since the filing of the briefs, the State has done a little bit of research, this is not before the Court today, this is not essential to the relief we're seeking today, but if you -- because it's not a defined land, we thought, well, what does the U.S. Department of the Interior think "federal Indian reservation" means? So if the Court were to go to the website of the U.S. Department of the Interior, if the Court would allow me, I'd like to share what the Department of the Interior thinks the "federal Indian reservation" means.

THE COURT: Well, I'll hear you. I'm going to ask you to read slowly if you're going to read, it's always

tempting to read fast. I'm going to ask you to read slowly. I'm going to hear you and, obviously, if this is a new argument, there are some limitations on how far we can go with that today, but with that understanding, I'll hear you.

MR. LEONARD: And I'll read slow, Judge.

So this is not an argument that's in the briefs. We are not advancing this argument today, but in direct response to your question, do we concede these are Indian lands, here is why we do not.

The Department of the Interior, on their own website, says a federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States executive order or federal statute or administrative action as permanent tribal homelands. And where the federal government holds title to the land in trust, the land in trust on behalf of the tribe.

So according to the Department of the Interior's own definition of "federal Indian reservation," the land in question has to be held by the federal government in trust on behalf of the tribe. And, Your Honor, the problem we have with respect to the Creek lands in question here is that according to the Muscogee Creek Nation's website, the Creek Nation Reservation consists of 7,000 square miles, which equates to roughly four and a half million acres. Of those four and a half million acres, as of October 2019, 8,148 acres are held in

trust. That is less than 1/100 of 1 percent of the Creek Nation Reservation recognized in McGirt is held in trust. So, that fact, those are the facts as we understand them, that does not jive with the Department of the Interior's own definition that's on their website under frequently asked questions of what they consider a federal Indian reservation to be. So, Your Honor, that is why we do not concede that point.

THE COURT: You may continue.

MR. LEONARD: And, Your Honor, the reason -- I was not trying to deliver a broadside to Justice Gorsuch's majority opinion, but I do think, as we think about what McGirt looks like moving forward, assuming McGirt remains the law of the land and consistent with Justice Gorsuch's statement in the majority opinion, this is going to be a case-by-case analysis. I do think some of these background facts, the common understanding that everybody had for over a century, the Enabling Act, the understanding of Congress, which, though I may believe it to be unambiguous, others did not, obviously. But I don't think that those issues are completely irrelevant to this Court's consideration. So we're not trying to question the decision, but I think, as we think about what McGirt looks like moving forward, those are relevant issues, we believe, Your Honor.

Along the same lines, if I could just briefly share what's going on with respect to McGirt as the Court considers this

specific case involving mines in eastern Oklahoma. And as the Attorney General, who is here today, is well aware, there can be no dispute that since July 2020, McGirt has substantially and negatively impacted law enforcement and public safety in eastern Oklahoma. The challenges created when a State loses jurisdiction overnight of all crimes involving Native American defendants and victims in 43 percent of its territory that is home to 1.9 million Oklahomans, there's no dispute that those challenges are both immense and, in many cases, tragic.

What is before this Court today is the fundamental issue of whether McGirt will be confined to the federal major crimes, that's how we read the decision, or whether the decision will be expanded and new and unprecedented ways.

As I said, the majority dismissed the fears of McGirt seeping into the civil realm as misplaced due to the availability of the equitable defenses recognized in McGirt itself, the City of Sherrill, and the City of Sherrill's progeny. The federal defendants -- and this is an important point -- themselves recognized and acquiesced in McGirt being limited to federal criminal jurisdiction only for almost a year after the McGirt decision came down. It even approved a full year of funding in December 2020. Almost six months after the McGirt decision came down, in December of 2020, the federal defendants approved an entire year of funding under SMCRA for the State. It had six months to think about it.

THE COURT: Wasn't it late 2020 that it landed in the lap of the Solicitor in the Department of the Interior? Oklahoma wrote a letter, the Solicitor said I'll get to it when I get to it and then the Solicitor finally got to it?

MR. LEONARD: My understanding is -- and we have the Solicitor here.

THE COURT: No, no, I'm talking about the --

MR. LEONARD: Wrong Solicitor.

THE COURT: Wrong Solicitor.

MR. LEONARD: My understanding, Your Honor, is that the State received notice in the spring of 2020. I don't specifically know whenever the U.S. Solicitor received --

THE COURT: You mean the spring of 2021.

MR. LEONARD: The spring of 2021. That's when the State received notice that, no, we're going to broaden the reading of McGirt, and we're going to take away the State's funding under SMCRA.

THE COURT: You may continue.

MR. LEONARD: Your Honor, the federal defendants, through their actions, seek not only the strip the State of its regulatory jurisdictions over mines in much of eastern Oklahoma, but the State believes their actions represent a much more serious threat, the kind of which no state in this union has ever been subjected to by any act of Congress or court since the founding of the republic. The actions of the federal

defendants, if carried to their logical conclusion, represent a threat aimed at the very sovereignty, the very soul of Oklahoma, as our state has existed for over a century. A state that four million Oklahomans, tribal and non-tribal, now call home.

If successful here, the efforts to expand McGirt will be energized and widespread. There are some who have already provisionally proclaimed the State of Sequoyah, a concept that was firmly rejected by President Roosevelt and Congress in 1907 when Oklahoma became a state. Mining regulation is under assault here, but broader challenges in the civil arena are building steam. I mentioned the tax protests, sales and property tax challenges have been filed, I mentioned the EPA's effort to seek to require the State to obtain tribal consent before spending our superfund dollars, an effort the State has resisted. All of these efforts, and they will grow, have two things in common: One, they seek to broaden a narrow opinion on its face into something that it is not; and, two, they turn a blind eye to the binding U.S. Supreme Court precedent in City of Sherrill and in McGirt. The McGirt majority pointed exactly to the equitable defenses available to the State here, which the federal defendants are subject to, based upon the Cayuga Nation case and other -- and the subsequent Oneida, a Second Circuit case.

Your Honor, as a -- personally, as I think about this, I

come from a family of lawyers. And as a young law student, I had a family member tell me, he says, when in doubt about the law, always go with what makes sense. The law almost always makes sense is what I was told. And in my legal career, that has held true.

Here, the State believes with respect to McGirt, there are at least two paths forward, each of which are the law and each of which make abundant sense and that is, as I've said, Your Honor, the Supreme Court's decision in McGirt, by its very words, the Supreme Court went out of its way to limit the scope of McGirt only to the federal major crimes, the question before it, and, secondly, the City of Sherrill, equitable defenses. And if the Court -- I'm sure the Court has read that case. Reading that case, it sounds a whole lot like what we are facing here in Oklahoma.

Your Honor, with respect to the State's --

THE COURT: Well, in the City of Sherrill case or in the Sherrill case, I think -- and I don't know what -- I certainly don't want to speak for the defendants, but that involved issues as to the status of land that had been privately owned for -- almost for eons, privately owned in non-Indian hands for a very long time and, in this case, the land we're talking about has definitively been found to be an Indian reservation. So there's, if you will, that antecedent element of uncertainty that was present -- that the Court

wanted to avoid and in which the Court found decisive in Sherrill seems to me, perhaps, not to be present to the same degree here, because now we have a definitive holding by the Supreme Court that what -- in your briefs you talk about the lands within the boundaries of the historic Creek Nation is in fact an Indian reservation that was not disestablished.

So I'm not sure that you get as much mileage out of Sherrill as you might be suggesting because of the historical facts that were before the Court in Sherrill, those northeastern tribes, a lot of non-federally-recognized northeastern tribes, over a couple of decades, came up with a lot of arguments that we really own this land that had been in non-Indian hands for not just a hundred years, but hundreds of years. And that troubles me just a bit in terms of, with a wave of the hand, picking up equitable defenses based on Sherrill. Where here, we've got a definitive holding that this land is a reservation and has been for over a hundred years.

Can you help me on that?

MR. LEONARD: Your Honor, the land in Sherrill was the same -- it was also recognized as Indian Country under 18 U.S.C. 1151. I read the facts of Sherrill to be analogous in Sherrill. In the late 1700s, the tribe started selling its land, the tribal members started moving away, it's an oft-repeated story, it's not a pleasant story, in many instances it's a tragic story but has happened all over the

eastern seaboard, the tribal members moved west, but everybody in Sherrill recognized that the Oneida Indian Reservation was never actually disestablished, that was never in question. The Second Circuit held that the land in Sherrill was within the Oneida Indian Reservation. Everybody may have forgotten about it, but it was never disestablished, so that was not in dispute. In McGirt, the question was, were Oklahoma's reservations disestablished or were they not? But in Sherrill, everybody recognized that the reservations were not disestablished. So, you know, fast forward 200 years, which is only -- you know, in Oklahoma we've been a state for 114 years or maybe 115 years now, so 100 years, 200 years, at some point. You know, it's all about the same. Fast forward to the late 1990s, the tribe comes back in, buys land within the City of Sherrill, everybody knows this is within an Indian reservation. So in McGirt, McGirt may have recognized the reservations, but in Sherrill they were already recognized; everybody knew it was an Indian reservation. The Second Circuit said this is 18 U.S.C. 1151 Indian Country land. Tribe buys the land, very predictably tells the City of Sherrill and the State of New York you can't tax us, Indian-owned land within a Native American reservation that's not been disestablished, everybody agrees. In an eight-to-one decision, even though this is Indian land, the same land -- so to answer the Court's question -- it's the same land in Sherrill as what we're

dealing with in eastern Oklahoma here. 18 U.S.C. 1151 Indian Country Justice Ginsburg eight-to-one decision, I would argue you read the facts of Sherrill, that makes what we're dealing with look like child's play. I mean, in Sherrill, it was a few parcels of land being taken off the tax rolls. Here, we're a modern-day state in this union who stands to lose much of its sovereignty over half of our territory. It makes no sense, Your Honor, but it's not -- that does not have to be the result. And, in fact, McGirt says that's not going to be the result, those concerns are misplaced.

So the facts in Sherrill are exactly analogous to our facts here, Indian Country land in Sherrill, Indian Country land in eastern Oklahoma, equitable defenses apply, United States is subject to laches, Your Honor, that's the path forward as far as the State is concerned.

THE COURT: While you're paused, let me ask you another question on a little bit different subject.

Obviously, this case was filed several months ago. The State's opening brief was -- and motion and opening brief was filed before the end of August, and there are some affidavits, obviously, and supplemental affidavits, that go to, among other things, who is, in fact, regulating surface mining in Oklahoma at this time. And the facts may have evolved a bit, but let me ask you this: In the State's supporting affidavits, summarizing, the State tells me that it has funded the

regulatory program through 2021 by way of a loan from another State agency, while the federal agency claims that it has already made site inspections of the area. Confining ourselves, now, to just the Creek reservation, the Muscogee Creek reservation, who is actually doing the regulating and inspecting and responding with respect to surface mines in that geographic area? Has that, by way of facts on the ground, has that now passed to the federal agency or does the State -- is the State still active?

MR. LEONARD: Your Honor, the State remains active. I'll let my co-counsel, Mr. Lin, address some more of the specifics. And hopefully I don't have a misunderstanding of this. My understanding is the State continues to regulate mines. To this day, the State has advanced a loan to the departments to continue that effort through the end of this month. There were certain notices that had to be given to the employees in mid-November, but sitting here today, the State continues to exercise its jurisdiction and that has not been disturbed.

THE COURT: I'm talking about the physical activity, if you will, of inspecting, citing violations. If Mr. Lin is prepared to address that, then I'll wait until he's at the lectern.

MR. LEONARD: Your Honor, my co-counsel, they can add some additional detail, but my understanding is the State is

continuing to exercise that function.

THE COURT: Very well. I'll inquire of Mr. Lin on that.

MR. LEONARD: Your Honor, I've addressed the -- the Court obviously has the Sherrill decision at its disposal, I would just identify three Sherrill factors that the Court raised. One was -- and these are factors that would be considered in applying these equitable defense. One is the length of time that has elapsed, in Sherrill it was 200 years, in Oklahoma it was 114 years. Teddy Roosevelt was president, this is four years after Orville Wright, about the time of the Model T, that was a long time ago, and the State has exercised its jurisdiction for over a century to regulate mines, and under SMCRA, since 1977, so it's been a long time.

The disruptive nature of the claim. Your Honor, I can't imagine what would be more disruptive than the federal government coming in and supplanting the jurisdiction of the State over a large portion of its territory. This case involves the Creek Nation, but we know that there are other pending cases with similar facts, so the State is looking at losing potentially jurisdiction over much of its territory as it relates to mines and where do we draw the line? The majority in Sherrill said concerns are misplaced, equitable defenses available. Where do we draw the line, Judge? I mean, the Sherrill decision says we're not going to have any

unconscionable results.

Your Honor, taking the State's jurisdiction away over the mining program, a program that Congress made the explicit decision to give to the states. As I said, this is cooperative federalism in action, this isn't a federal interest, this isn't a sovereign right. The federal government gave up that right to the states, and we've been doing it very well for 50 years, almost, so disruptive nature of the claim, we meet second Sherrill element as well.

And then, lastly, the third Sherrill element is the degree that the justifiable expectations are disrupted. Your Honor, as I think about this, I mean, justifiable expectations, getting back to the point I raised earlier, some of the issues before the Court, I think the expectations of the State and the tribes and Congress and everybody for more than a century was that the State of Oklahoma, when it entered the union in 1907, it entered the union on equal footing with their sister states and it's the State's sovereignty to exercise, it's not the federal government's sovereignty to exercise, it's not the tribe's sovereignty to exercise.

My grandfather spent 95 years -- he was born 11 months before statehood in Oklahoma territory -- much of that time as a lawyer, practicing law in the panhandle during the dirt storm years. He thought we lived in a state. Everybody since statehood has thought we've lived in a state, the tribes

included, including as recently as five years ago. So what are those justifiable expectations? I think people in eastern Oklahoma and in western Oklahoma, for that matter, they had a right to expect that they had -- they lived under the sovereignty and certainty that state jurisdiction allows. That's exactly what the federal government is trying to take away through their actions.

So, Judge, we think the facts of Sherrill are spot on. We think the decision is narrow, limited only to the federal major crimes, but if the Court says, well, yeah, but look at this, this is a reservation, so how do you narrow it? The authorities are replete that every tribe is different, every treaty is different. The McGirt decision only pertained to the Creek Nation territory. The majority opinion in McGirt only said this is -- they went out of their way to say this is limited to the federal major crimes. They didn't say that they're going to take away much of the sovereignty of our state, so we think Sherrill is spot on. And if the Court were to say, well, we just can't interpret this decision narrowly, we believe it should be, but if the Court says it can't, well, then Sherrill, in our view, is the answer for Oklahoma moving forward, whether it's on mining, taxation, regulation. The Supreme Court has made it clear that the states aren't going to lose their jurisdiction in situations like this, where it's unconscionable that the State would.

Your Honor, that concludes my presentation.

THE COURT: Very well. I'll hear from Mr. Lin.

Welcome, Mr. Lin. My first question will be no surprise since I approached this with Mr. Leonard.

Basically, who is minding the store, as we speak?

MR. LIN: The short answer is the State is still attempting to do so. So we have funded both agencies that we're talking about, OCC and ODM, with State funds. Some employees have been offered early retirement packages that they wouldn't otherwise have been offered, and they have accepted and left, but the programs are still active. There have been some -- there's some overlap as the federal government has attempted to assert their jurisdiction. For example, they have limited our access to an electronic database that allows us to make changes to permits and things of that sort, so there are things that we just can't do, but we are attempting to continue to regulate with State funds in that space.

THE COURT: Well, are there any, for instance, any bond releases that are in process now that the State is executing?

MR. LIN: I don't think there's anything that's happened in the past few months. There is the one that -- the one permit that was discussed in the declarations that's in the reclamation process, but none of those bonds have been released in the time that this motion has been pending.

THE COURT: Has the federal agency told the State that it may not purport to release bonds?

MR. LIN: I think the letters that they sent to us can be fairly read that way. They say do not do things like release the bonds. And, Your Honor, if I may, I'll get back to the bond issue when we talk about irreparable harm, because the government's main focus on the question of irreparable harm is that they're concerned we're going to release these bonds. Not simply release them, but release them in a situation that would result in environmental harm. And there's, of course, not a single piece of evidence in the record that the State has ever irresponsibly released a bond under the SMCRA program in the 40 years that we've been doing this.

THE COURT: One more question before I allow you to get to what you intended to stay.

MR. LIN: Of course.

THE COURT: On page 11 of the State's opening brief, the State asserts that the federal agency has instructed the Oklahoma Department of Mines to continue with inspections and enforcement. Has the federal agency formally retracted that request?

MR. LIN: As I understand their position, they instructed us in these letters, which are Exhibits 1 and 2 to the complaint, to continue to do those kinds of things, inspections and administrative things, but not undertake

actions like releasing bonds.

Their position, I believe, is that that transition period has ended and that they are now undertaking the inspections but, again, we continue to try to perform as many functions as the State is able to perform.

THE COURT: Very well. And if the defendants wish to suggest otherwise, I will certainly welcome any representations on that score. Obviously, by stipulation we're not here for an evidentiary hearing, so we can't get too far down that road if there's any inconsistency in factual representations. But, nevertheless, I would be curious as to what the defendants have to say.

So with that, Mr. Lin, you can tell me what you planned to tell me.

MR. LIN: Thank you, Your Honor. I do have one other preliminary point. You had asked my colleague, Mr. Leonard, about the communication between the State and the Solicitor's office and when that started. In the supplemental declarations, Exhibit 2, which is the supplemental declaration of Robert Toole, he does attach his e-mail correspondence with Alfred Clayborne, who was with the federal government, that communication started in July of 2020. So the State reached out to the department and said, hey, McGirt has come down, do you guys have a view on how that affects the mining programs? And so they were on notice at that point. We asked them the

question, and they did not take any step to try to take that away from us until we received, first, the letters on April 2nd, and then, of course, the federal register notice on May 18th, the following spring.

But as Mr. Leonard said, my focus is going to be the merits of our APA and SMCRA arguments. And so even if you are not persuaded by Mr. Leonard's points on McGirt and Sherrill, we believe these are further independent flaws with the government's actions here on which we are likely to succeed. And then, Your Honor, at the very end, I will cover the remaining PI factors, irreparable harm, balance of harms and public interest.

So I would like to start with SMCRA. And I think it's important to clarify the scope of what the government is arguing here. They are not simply contending that if the Creek lands constitute Indian lands under SMCRA that the State has no power to implement SMCRA. They are going further than that. They are saying that the State has no power whatsoever, that we are entirely preempted from regulating mining or reclamation in these areas. And that's clear from their brief, page 18, where they say that SMCRA unambiguously assigns the Secretary exclusive authority to regulate surface mining coal operations and to conduct AML reclamation on those lands. That's not limited to the implementation of SMCRA. And furthermore, Your Honor, as you know, they've filed counterclaims in this case.

And their second counterclaim is seeking an order preliminarily and permanently enjoining us from regulating in whole or in part surface coal mining and reclamation operations such as by running the State's SMCRA program, but that's not the only thing that they're trying to preempt. They want to preempt all state laws that regulate surface mining. And here is the problem with that, that's not what SMCRA says. SMCRA does not categorically bar states from enforcing even their own state laws concurrently or over the top of the federal government on Indian lands.

And I think there are three provisions that I would draw your attention to. The first is 30 U.S.C. 1255, SMCRA has a robust savings clause, which the government doesn't even acknowledge in their brief, that allows states to continue to regulate if its laws are as strict or stricter than federal law. 30 U.S.C. 1255.

And it actually says the Secretary shall set forth any state law or regulation which is construed to be inconsistent with this chapter in the sense that it is less strict than federal standards.

The second provision I think that's important here, is 30 U.S.C. 1300. And that's the provision that speaks directly to the regulation of surface mining on Indian lands. Nothing in that provision, Your Honor, if you read the text of it, either bars states from regulating independently on Indian lands or

grants the federal government exclusive authority to do so. It simply says, and this is a quote, "All surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by" and then there's a list of sections in the U.S. Code "and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands." It gives the Secretary the power and responsibility to incorporate those standards into leases, but it does not give the Secretary either exc- -- any authority, much less exclusive authority, to enforce surface coal mine regulations and laws on Indian lands.

And then the third provision is 30 U.S.C. 1254(g). Now, that's an analogous context where the federal government disapproves an existing state program on state land, but here is why I bring it up: So in the analogous context, if we had a state program that's just running on undisputed state land, not Indian land, and the federal government says you're doing a bad job, we're going to take that power away and come in with a federal program, that provision, 30 U.S.C. 1254(g), does provide that the federal government can selectively preempt state laws, but it specifically puts a burden on them and says that state laws can then be preempted only insofar as they -- and this is a quote, "interfere with the achievement of the purposes and the requirements of this chapter and the federal program." And then it goes on to say, "The Secretary shall set

forth any state law or regulation which is preempted and superseded in this way." And the federal government has done nothing close to that here. They've simply come in with a sweeping decree that the State cannot continue to regulate in this space.

Now the government points to a regulation, Your Honor -- actually two -- 30 C.F.R. 750.6 and 30 C.F.R. 701.4(h). Neither of those gives the Secretary exclusive preemptive authority to get rid of any state laws as applied to Indian lands. And so I think that fundamentally is the problem with their SMCRA argument.

Our other alternative argument that I'd like to address before turning to the other PI factor is the APA arguments, which I think the government's briefing is particularly weak.

As you know, the APA provides for review of final agency action and requires agencies to engage in reasoned decision making. Even if nothing else, we believe that the decisions here, so even if you don't buy any of our other arguments, we think the OSMRE's decision making here fails the APA's requirements for reasoned decision making.

Now there are two questions here that I think needs to be answered that are raised in the briefing. The first is are these decisions reviewable at all under the APA? And the second is, if so, did the government violate the APA?

So as to the first, the government takes what we think is

a very novel position, and that is that an agency decision that is mandated by law is simply immune from judicial review.

Your Honor, there is --

THE COURT: Who was the Maryland judge in that Maryland case? Do you remember?

MR. LIN: I don't know the name, I'm sorry.

THE COURT: I hope it wasn't my good friend Dick Bennett.

MR. LIN: I hope for my sake it was not.

THE COURT: Okay.

MR. LIN: But, Your Honor, there is clearly no such exception. There are a legion of Supreme Court cases, most recently DHS v. Regents, the Weyerhaeuser case from a couple years ago, the Tenth Circuit as well has said there are only two exceptions to judicial review under the APA. First, where a statute bars judicial review, and, second, where agency action is committed entirely to agency discretion, which is, of course, the opposite of what the government is contending here. And indeed, the DHS case that I just mentioned here, Your Honor, you may know, remember it, that was the deferred action for childhood arrivals case, where the government changed their position on that deferred action for deferred deportation. And they said, our position is compelled by law. And the United States Supreme Court gave that close APA review.

And of course, Your Honor, as you've acknowledged, for its

part the government musters just that one case, an eight-year-old, unpublished, out of circuit district court decision that self-consciously recognized it was going out on a limb. It did not cite a single precedent in support of the position that it set forth.

So I think these decisions are clearly reviewable, which leaves the question whether they violated the APA. And I believe they did for two reasons. The first is that the government did not acknowledge or address reliance interests, and Mr. Leonard covered many of the important reliance interests for the State. There are others that we've talked about, including the contractors who have contracted with the State's mining program. The Supreme Court in DHS v. Regents says when you change positions, government, you must acknowledge reliance interests. The government claims that it's excused from doing so because it was only following the statute. But, again, Your Honor, I think that DHS v. Regents' case is right on point. The Court there said -- the agency there said we are compelled by law to do this, and Chief Justice Roberts said that's not enough, you still need to consider reliance interests. And, in fact, the Chief explained one of the reasons why you need to consider reliance interests is because if there's any room for transitionary measures, those are the kinds of things that reasoned decision making requires you to consider. And, as we know, Your Honor, the

government here has conceded that a transition period was relevant, it was permissible, they gave us one, at least a month, and then they sat on this decision for a year after McGirt before taking any action. So there is room for considering reliance interests, and that's why they need to talk about it. They need to think about these things, they need to have a conversation with the State about what makes sense, what is the best way to go forward. And they didn't do that.

And then the second, Your Honor, is that the government did not respond to any of the arguments made by former Attorney General Hunter until after it had made its decision. And importantly, they don't dispute that they should have responded to those arguments. Instead, they say in a footnote of their brief that they responded in a letter that they sent on June 2nd. But, of course, June 2nd is after they had made their decision. There's some dispute about whether the decision was made on May 18th or April 2nd. It doesn't matter, June 2nd is after both of those. And the Supreme Court has said, again, DHS v. Regents, it is a foundational principle of administrative law that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action and not post-hoc reasoning that is offered by the agency."

THE COURT: Let me divert you to one question and

then I'll let you get back to your intended presentation.

One thing that nags at me, and this is not to suggest what the outcome is on any of these APA issues, I've carefully read the briefs and actually done some independent research, so I really don't have -- have not reached a conclusion on any of the APA issues, but one thing that nags at me is this: Even if you're right, do those APA issues do anything other than kick the can down the road, in the sense of -- I'm not sure that the State's complaint and briefs present anything that would not ultimately be curable in some way by going back to square one and doing it right, if they've done it wrong.

Can you help me on that?

MR. LIN: Of course. Two answers to that, Your Honor. The first is, I think it might make the difference, if you agree with us on how we read SMCRA, which is that, even if we cannot implement a SMCRA program, we still have the power to continue to enforce concurrently or over the top of the federal government in that space, and making them go back to the drawing board and engage in this decision-making process in a meaningful way is going to require them to come to the table with us and figure out how do we actually regulate in the space in a way that's consistent with SMCRA. So that's Answer Number 1.

Answer Number 2 -- so actually three answers, I'm sorry, Your Honor. Answer Number 2 is we think Sherrill is applicable

here. We think reliance interests are important and we think it applies, and we think that that's part of the reason for having a reasoned decision-making process, which is that you take input from the interested parties and you consider whether that equitable defense really applies here, and then we can review that, as the Court, based on the record and all of the interested parties having submitted their decisions -- I'm sorry, their interests.

And then the third answer, Your Honor, is, as you know, there are whole case reporters full of books -- full of cases where agency decision making is sent back, even if the judge suspects that it may not ultimately make a difference, because the rule of law is important, that's why these rules are here. And an agency has to follow the procedures that are in place because we don't know what they might uncover if they were actually to go through the process as required. So, Your Honor, that covers the merits arguments.

As to the remaining issues, irreparable harm, balance of harms and public interest. I think they are easily met on the record here, and I think the best way, at least that I would propose to think about it is this: The question before the Court is whether to issue an injunction to maintain the status quo, so that if the State is right, the State is ultimately right, this program doesn't go through two, possibly more than two, unnecessary transitions. We're sort of seeing that

already, gets transitioned over to the federal government, and if it turns out we're right, it's going to get transitioned back to the State. And then on the flip side, if the government is right, it will just have to wait a little while longer to get its hands on the mining regulation in this state, and we know it's already waited a year since the McGirt decision. What is another three to six months or however long it will take this Court to rule on summary judgment after granting a preliminary injunction motion?

And so I think if you take that as the overarching framework for understanding what we're asking for, then the question is, in addition to that, what are the harms on either side? I think the State will clearly be harmed if the status quo is changed. We will be stopped from enforcing State law, and that is a paradigmatic irreparable harm that courts have recognized over and over again, enjoining a state -- stopping a state from enforcing its own sovereign laws is an irreparable harm. But then there are others. As I mentioned, we've already lost some experienced employees who we may not be able to get back. They move on. They do other things with their lives, and they have dozens of years of experience, and we can't put that Humpty Dumpty back together again once they've left. And, of course, we will incur expenses, we already are, that we cannot recover.

Now, the government says if we ultimately prevail, we can

submit a request for more grant funding, sounds like maybe back -- to backfill what we paid. But in the same breath they say that they retain discretion over what to award, so there's no guarantee that they're actually going to pay us back for the period in which we've been incurring our own expenses.

And then, the other hand, I don't think the federal government has shown that there will be any harm in maintaining the status quo. As I've already mentioned, they sat on this issue for a year, and then they lean primarily on this idea, Your Honor, that we talked about right at the outset, that we might release bonds -- and not just release them, that's not their objection -- it's that we might release them and leave the -- in a situation where the area is environmentally unsafe, and that the government will then have to incur their own costs to reclaim the area in a way that is environmentally safe. There is not a shred of evidence in the record that Oklahoma has ever, ever done that, that the federal government has ever objected to any bond release because it has left the area in an environmentally unsafe or unsound way. So it's pure speculation, which, again, is hornbook law, does not constitute irreparable harm.

And, then, as for the money that they might lose, they've said that if we provide -- continue to provide funding during the preliminary injunction period that they're going to have to go and get that money back. They haven't asked for the money

back for the year since July of 2020. They've argued that McGirt is self-executing here, and that they're mandated to take over the program, so why is another three months any more harmful than the last year or for that matter the last 40 years that the State has been regulating in the space, they haven't asked for that money back either.

And then I do need to mention very briefly the question of bond, because I know the Tenth Circuit says the district court must consider the question of bond. But what the Tenth Circuit has also said is that a bond is not necessary where there is no real concern about loss, and for the reasons I've mentioned, I don't think there is a real valid basis for the only argument the government makes is that they're concerned we might release $7 million in bonds, and that they'll have to incur that expense to reclaim it in an environmentally safe way and, again, there's not a shred of evidence that that is something that the State has done or will do.

THE COURT: Thank you, Mr. Lin.

MR. LIN: Thank you, Your Honor.

THE COURT: We've been going a little over an hour, and I think perhaps before I hear from the defendants we should take a break. So let's be guided by the clock on the wall and plan on resuming at five minutes till three. Court will be in recess.

(RECESS HAD.)

THE COURT: Welcome again. We're continuing in Civil 21-719, State of Oklahoma and others vs. U.S. Department of the Interior and others.

Before we get to the defendants' presentation, let me direct one additional question to plaintiffs' counsel. I suspect this would be Mr. Lin, but could be Mr. Lin or Mr. Leonard, one or the other. There was some reference made to concurrent state and federal jurisdiction, which is kind of a, if you will, a bit of a curiosity to me, specifically in terms of how concurrent state and federal jurisdiction would work in practice, especially in light of the fact that the State program has been historically, as I understand it, primarily federally funded. I don't hear the federal agency stepping up to suggest that they would fund the State's piece of the action, if you will, if there were concurrent state and federal jurisdiction. So how would that work in practice?

MR. LIN: A couple of answers, Your Honor. So I think it's difficult to know how it would work in practice, but so the first answer is, not just in theory, in practice that happens all the time. The Clean Air Act, for example, has a similar savings provision, and there are State laws that overlay federal laws, so long as they're stricter than the federal standards that's apply. So there are ways in which concurrent jurisdiction can exist where the State comes in and says, look, for our purposes, for our state, there are things

that we want to be done that are stricter than what the federal government would do. States like California, for example, often do that for environmental regulation. Exactly how that would work here is yet to be determined. And it's not something that we sat down and tried to parse through. We may not be able to continue to do all of the things that we're doing now, but the point is simply that -- the fundamental premise of the government's argument is, we have no authority at all to do anything, and I think that is what is wrong with their decision, and that is a basis for finding a likelihood of success on the merits.

THE COURT: Thank you.

I'll hear from the defendants.

MS. CARROLL: Thank you, Your Honor. And good afternoon. My name is Arwyn Carroll. I'm counsel for federal defendants in this matter.

Your Honor has heard a lot this morning about reliance interests and disruptive consequences, and we don't -- we don't -- "dispute" is the right word, but McGirt has clearly had consequences on the state of Oklahoma and the area within it. But what McGirt clearly did, as Your Honor pointed out, is it acknowledged that the Muscogee Nations Reservation was established by treaty, it held that Congress never disestablished that reservation. That holding renders the lands within the reservation Indian lands under SMCRA's clear

definition in Section 1291. Like Indian Country under the Major Crimes Act, "Indian lands" is a defined term, it has a meaning, as all lands within the exterior boundaries of any federal Indian reservation.

SMCRA, Your Honor, is a -- it's a comprehensive federal program. As Congress acknowledged in Section 1202, it is designed to cover -- to govern all surface coal mining within the United States, surface coal mining regulation. Oklahoma derives its authority to regulate surface coal mining from its approved program, a program approved under SMCRA.

What Oklahoma is asking the Court to do now is allow it not to regulate outside of SMCRA or to apply its separate regulations or laws to surface coal mining, but to apply it --

THE COURT: I'm going to ask you to slow down just a bit, please.

MS. CARROLL: I'm sorry, Your Honor. -- to apply its approved Title V program to lands that are clearly exempted from the program, both under SMCRA itself, under federal regulations, under the program, the terms of Oklahoma's law and -- and under the terms of Oklahoma's law.

Your Honor had mentioned that you had dug deep into the briefs. I'm happy to go through the structure of SMCRA and why it precludes state regulation and requires OSM to engage in state regulation, but I don't want to spend time we don't need to spend on that.

THE COURT: That's not necessary.

MS. CARROLL: Thank you, Your Honor.

THE COURT: Let me touch on a couple of issues that this probably is not in the sequence that you intended to address them, but it's helpful to get these things out of the front of my mind so that I can concentrate better on what you do have to say.

On this question of who regulates what -- well, actually, let me back up and ask another question. And let's go to western Oklahoma, non-Indian land. I don't even know if there is any surface mining taking place in western Oklahoma, but regardless of where in the state it might be, is Oklahoma continuing to operate any part of the federally approved state program on non-Indian land?

MS. CARROLL: Your Honor, two answers to that -- or two points to that question. First, I don't believe there is any surface coal mining in -- within the western district. But if there were, if there were, then, yes, Oklahoma would still have authority under SMCRA to regulate under its title -- approved Title V program and conduct reclamation under its approved Title IV program.

THE COURT: So, as far as you're aware, under the cooperative program, Oklahoma is, from the -- at least from the perspective of the federal defendants, entirely out of business because it's all encompassed by Indian land.

MS. CARROLL: That appears to be the situation on the ground, yes, Your Honor.

THE COURT: Okay.

MS. CARROLL: But Oklahoma's program remains in effect and hasn't been disapproved or altered from a legal perspective.

THE COURT: Yeah, that's a -- yeah, that's another issue, that's a pretty technical point, maybe too technical, but nevertheless, you may proceed.

MS. CARROLL: Thank you, Your Honor. So I won't dig into the structure of the statute, then, because Your Honor is clearly involved -- has engaged with it, but I do want to point out, first, that it would be unprecedented for Oklahoma to have authority or to exercise any authority within statutorily defined Indian lands within the boundaries of the reservation. No state -- and even states with approved programs, no state regulates within the boundaries of a federal Indian reservation under SMCRA.

OSM, instead operates a federal program for Indian lands, which it promulgated in the 1980s, following SMCRA's passage, and on reservations in states with state programs, which is what it would do here. It would be -- it would, actually -- and is doing. Your Honor asked about the -- what's going on on the ground. OSM, as of September, is conducting inspections, it is issuing notices, it is, in effect, is implementing its

federal program for Indian lands. And so to the extent that the State is purporting to continue to regulate, it's OSM's position that they're doing so without authority. And OSM is not only fully prepared to but has stepped in to do so.

And then, you know, Oklahoma has raised the idea that there is -- let me take a step back there. Oklahoma has raised the idea that, you know, McGirt -- that OSM needed to have considered its reliance interests or the interests under the City of Sherrill and equitable interests in light of the City of Sherrill before exercising its jurisdiction. But, Your Honor, so as our, I think, our briefs make clear, it's our position that once the McGirt decision issued, recognizing the historic lands of the Muscogee Nation as a reservation, SMCRA's definition applied as a matter of law. There's nothing really for OSM to consider with respect to reliance issues such as in the City of Sherrill because there is no -- no reliance on a federal -- a state program implemented under this federal comprehensive statute. Oklahoma has its state program, it could continue to operate it, should there be other operations, coal mining operations.

THE COURT: Forgive the interruption, but the State advances some reliance arguments, such as that it has been or will be forced to terminate contracts with contractors and conservation districts, it apparently has terminated employment of some employees. But let's just stay with what the State

says in its brief, that it's forced to terminate contracts with contractors and conservation districts, it is unable to respond to emergencies, it is unable to act on bond releases. Do the defendants take issue with any of those contentions as to forms of reliance?

MS. CARROLL: As to forms of reliance, Your Honor, they don't seem to be reliance, to me, so much as the harms argument. It seems like the reliance question here is -- they're relying on the existence of the State program.

THE COURT: Well, you got a point, there are some elements of both, but the contracts have been entered into in reliance on the statutory regime and the way it has worked for a long time. And the State has relied on the statutory regime for its ability to respond to emergencies and so forth. But I take it, whether we look at it in terms of reliance or harms, the three points that I've specifically touched on, the defendants don't take issue with as a factual matter; is that correct?

MS. CARROLL: As a factual matter, Your Honor, I guess I'm not clear on what the question is.

THE COURT: Well, the State has said, in its brief, opening brief, page 20, that it has been forced to terminate contracts with contractors and conservation districts, that it is unable to respond to emergencies and unable to act on bond releases. Factually, do you take issue with any of that?

MS. CARROLL: We don't dispute them as facts, Your Honor.

THE COURT: Okay. Now, going back to what might more classically be determined to be reliance issues, because I think you correctly point out that perhaps the things I refer to would more readily fall under the heading of harms, but going back to what we might more classically look at as reliance issues under the APA arm of this case, what would have been wrong with a notice -- with issuing a notice and an opportunity for comment, so that if the State had anything to talk about under Sherrill or otherwise, that could have been submitted and considered, then you would have a -- certainly a much more bulletproof record. What would have been wrong with that?

MS. CARROLL: I think, Your Honor, that what it comes down to is that even though that would have given the State an opportunity to speak and OSM to hear more about their reliance interests, as we've argued in our brief, the reliance interests, as a matter of law, can't impact OSM's decision. OSM is bound by the text of SMCRA and by the decision in McGirt recognizing the reservation. Sherrill, for example, doesn't apply in this case, where -- it focuses on land claims, which, you know, in which the United States appeared as, you know, in a trustee-ship sort of extent, not on programs under a federal statutory regime, focused on equitable claims, not federal

statutory claims.

THE COURT: Now, one of the Second Circuit cases, I can't remember which one it was, involved federal statutory law, did it not?

MS. CARROLL: Your Honor, it -- it may have involved federal statutory law but not a preemptive regime the way that SMCRA does. And to the extent that it allowed a defense of laches against the federal government in that case, I believe that's the Cayuga Nation case, the Second Circuit case. It acknowledged that laches only applies against the U.S. when it's -- at least in that case -- when it was a plaintiff intervenor asserting an equitable claim, that's not the case here. And the factors that it set out -- or not the case here where the U.S. isn't attempting to assert a private right.

THE COURT: Okay. Now, you've mentioned that notice and comment would have been futile because of the holding in McGirt and the unequivocal statutory language, that brings me to another point and, again, forgive the interruption.

But what I get out of your briefs -- or your brief, is an argument that because the relevant statutory language is mandatory and unequivocal, the agency decision is unreviewable, aside from any issue as to whether there should have been notice and comment, simply that because the relevant statutory language is mandatory and unequivocal the agency decision is unreviewable.

So my question is this: Is an agency decision reviewable under the APA if the agency erroneously concludes that the relevant statutory language is mandatory and unequivocal?

MS. CARROLL: Your Honor, I think I would take a step back there and say what we're arguing is that this isn't an agency action or an agency decision -- that Oklahoma isn't challenging a decision by the agency.

THE COURT: There's a notice of decision that Oklahoma has a problem with.

MS. CARROLL: It's a federal register notice, yes, Your Honor. A notice explaining that SMCRA required OSM to exert -- exercise jurisdiction within Indian lands, but what they're really challenging here is -- I mean, the decision that was -- is not a decision by OSM to take action, it was -- it was the change of jurisdiction that operated by -- that happened as an operation of law.

THE COURT: Okay. Well, back to my question. Is an agency decision reviewable under the APA if the agency erroneously concludes that the relevant statutory language is mandatory and unequivocal?

MS. CARROLL: I would believe it would be reviewable, Your Honor, if it was an agency action, yes.

THE COURT: Okay. Now, on that same -- in that same general area, I also note the State's argument that the defendants in this case are, as a practical matter, asserting

that if an agency decision is discretionary it's not reviewable, and if it's not discretionary it's also not reviewable, as these defendants have clearly argued. Is there a category of nondiscretionary decisions involving the application of statutory language that is reviewable?

CARROLL: Your Honor, again, caveating that we don't believe this is an agency action to begin with, there are as we -- I mean, the cases that we've cited in our brief with respect to that -- that issue do suggest that there is -- there are occasions when an agency simply has no discretion and, as a result, isn't taking an agency action. And that's what we're arguing there.

THE COURT: Well, that's not my question. It's really a fair reading or at least fair inferences from some of our briefs that, first of all, as a matter of statutory law under the APA, if a matter is committed to agency discretion then it's not reviewable. Are we together on that?

MS. CARROLL: That's correct, Your Honor.

THE COURT: But you're saying this is not discretionary ergo, it's not reviewable. Okay. Is there any such thing as a middle ground or an intermediate category of decisions that is reviewable? That's the best of all possible worlds for a federal bureaucrat is to say, it's discretionary and not reviewable, and it's not discretionary and not reviewable. That's just an absolute catch-22. This is your

chance to help me on that.

MS. CARROLL: I follow your question now, Your Honor. Agency actions are presumed to be reviewable, that's basic APA law. But, again, our argument isn't that -- and this isn't, I think, probably going to satisfy you, but our argument is that this isn't an agency action. What Oklahoma is ultimately challenging here is, you know, it's -- take a step back. This didn't require interpretation by the agency. The agency didn't have to interpret the language of SMCRA or apply the language of SMCRA to the McGirt decision. It didn't need to make any decision about whether it has jurisdiction or not because that jurisdiction transferred as a matter of law. And when it comes to how it was, you know, began to implement its jurisdiction, it had some discretion there, and it has worked -- tried to work with Oklahoma for a time to make that happen cooperatively. That didn't ultimately work out. But coming back to your question, Your Honor, to be sure, agency decisions -- agency actions are presumably reviewable on that basis.

THE COURT: But if it's -- but your contention is if it's discretionary it's not reviewable, and if it's nondiscretionary it's not reviewable; is that right?

MS. CARROLL: My contention is that it's not an agency action at all because it was mandated by law.

THE COURT: Your briefs pretty much say what I just said.

MS. CARROLL: Then that is our position, Your Honor.

THE COURT: Very well.

MS. CARROLL: So drawing back briefly to the reliances and equitable interests question. Actually, no, I think I --

The plaintiffs have suggested that -- that OSM doesn't dispute that the factors in Sherrill -- that are satisfied here, we do, just to be clear. We dispute that it's been -- we dispute that Oklahoma has been regulating surface coal mining under SMCRA for 140 years, they haven't. They've been regulating under SMCRA for about 40 years and doing so under the authority of SMCRA, not under its own --

THE COURT: Yeah, well, I think the point was, whether it was stated exactly this way or not I don't know, but Oklahoma has been regulating, surface mining for quite a while before 1977.

MS. CARROLL: To be sure, Your Honor. But their authority to do so, once -- once the comprehensive federal regime came into play, it preempts any other regulation in that field. And Oklahoma hasn't even -- hasn't pointed to any other law, any other state law, that they want to use to regulate surface coal mining other than their SMCRA program. So there's no reliance interest in enforcing a federally-approved program, under federal law, that allows for equitable considerations.

MS. CARROLL: I guess, coming back to the APA

question, Your Honor. Even if this is -- even if you decide this is an agency action that is reviewable and subject to your review, it's not arbitrary and capricious. The agency did take into account the relevant considerations here which are largely the Supreme Court's decision in McGirt recognizing the reservation and the plain language of SMCRA that delineates authority based on geographic location. The agency -- the decision is not in excess of statutory authority because SMCRA very clearly, on its face, gives OSM authority and requires OSM to regulate when there is no tribal program within Indian lands and precludes the State from regulating within Indian lands.

At most, Your Honor, there may have been some procedure that could be done. And -- but that doesn't mean that an injunction is warranted, because the outcome is fairly clearly dictated by the statute -- the language of the statute and the fact that the -- the reliance and equitable interests just simply don't come into play under a federal statutory regime like this.

So even if you were to find it's an agency action and reviewable, that's the outcome here. It's just that -- delays by a couple of months what is inevitable and already incurring on the ground. Oklahoma mentioned, you know, they talked about how long OSM took to come to this decision or that's how they've characterized it, but as you know fully well, McGirt threw a lot of -- a curveball at a lot of people, and OSM took

its time, made sure that it was correct under the law and then made sure that it, you know, reached out to Oklahoma through its letters and tried to allow Oklahoma to continue its routine inspections and routine activities that wouldn't have any significant, you know, impact on the program or any nonreversible impact on the program for a period of time to allow for clear transition to preserve the environment, to help operators not have a sudden shift. OSM tried to do that for a period of time, but it didn't -- ultimately, we're here today, which shows that that didn't work.

OSM also, with respect to the timing there, when -- Oklahoma has mentioned that OSM continued to provide grant funds for a period of time after McGirt issued, which it did, that's true, and the facts are not disputed there. But that was during a time when only McGirt had issued. If you look at the Exhibit A to Joe Maki's declaration, it shows where surface coal mining and reclamation activities operations occur within the various recognized reservations. A small percentage of them only seven out of 50 occur within the Muscogee Nations Reservation. So at the time, Oklahoma not only still had and still continues to have an intact Title V regulatory program, intact Title IV reclamation program, but through, you know, I guess until Hogner issued in March of 2021, of this year, and then Sizemore a year -- a month later or so, or a few weeks later, there was still plenty for Oklahoma to do, to have

authority over, but once those three reservations have been recognized, they constitute Indian lands under SMCRA and now there's no -- there -- OSM can't provide funding without conceding jurisdiction that Oklahoma simply doesn't have.

It would be -- to do so would be to afford -- to provide funds for purposes that Congress hasn't appropriated them for, and OSM simply can't do that.

Further, with respect to the APA, Your Honor, if -- you know, if you were to find this was an action and it was some kind of a rulemaking, then the Court lacks jurisdiction to hear this challenge. Section 1276(a) affords the Court in the district where the capital is located, jurisdiction to review approvals or disapprovals or amendments of the State program. But this action didn't require any -- it wasn't an approval. It doesn't require an amendment, and it didn't require a disapproval, because the State program has always, since the very beginning, excluded Indian lands. It's geographic by definition, not by the specific areas. So since it's always excluded Indian lands, this isn't an alteration to the State program. It's also not a promulgation of a federal program because that is also statutorily defined in Section 1291 as exclu- -- but when OSM institutes a federal program in place of a state program, it -- that federal program is limited to the lands within a state which also excludes state -- which also includes federal and Indian lands.

So what the program that OSM is instituting here is not a federal program under Title V, Section 1254, but rather the federal program for Indian lands, which it promulgated by -- through notice and comment rulemaking back in the 1980s and which it uses to regulate surface coal mining within the lands of several other reservations in the United States.

There will also be a statute of limitations problem, because the notice -- plaintiffs focus here on the notice of the federal -- for the Federal Register notice and when that issued, but to the extent that Your Honor concludes that this was an action or decision by the agency, the letters issued on April 2nd to Oklahoma -- to ODM and to OCC contain the full explanation of OSM's decision-making process. And so that would be the agency action at issue here, the Federal Register notice, would just be the full notice to everybody else.

Finally, Your Honor, with respect to -- do you have any further questions on the merits before I turn to --

THE COURT: Not at this point. You may continue.

MS. CARROLL: Thank you, Your Honor.

With respect to irreparable harms, Oklahoma, to the extent that they are economic harms, if Your Honor were to conclude -- and I honestly don't see how you can -- but if you were to conclude that SMCRA does not -- or that the decision in McGirt rendered the Muscogee Nations Reservation Indian lands under SMCRA, Oklahoma can seek the grant funds. They exist. They

haven't been given to anybody else. They haven't been removed, they're sitting in an account waiting for, you know, for a final conclusion. So Oklahoma can obtain the money.

And we recognize that Oklahoma has had to take some staff reduction actions in the meantime, but that's, again, the unfortunately inevitable result of the plain language of SMCRA, and so it doesn't merit an injunction, a preliminary injunction, here.

And then there's not a sovereignty -- there's not a harm to Oklahoma sovereignty here. The State has made a lot of -- has discussed often its -- today its sovereignty interests, but, again, though Oklahoma spent -- you know, may have regulated in this area prior to the passage of SMCRA, SMCRA preempts the field of surface coal mining regulation within the United States. It is designed to be comprehensive, it states as much in its text. It has been considered as such by every court that has considered that issue. And it can't -- so there's no -- there is no entitlement to continue regulating under SMCRA the same way that a police power being abrogated might have a sovereign implication, because right now it's solely within an approved statutory program under SMCRA.

THE COURT: You've made reference to some money that's being held in an account. Roughly how much is that?

MS. CARROLL: I don't have the number right in front of me, Your Honor, but it would be the money that was allocated

to Oklahoma for its federal grants under Title V and Title IV prior to the termination.

THE COURT: Is that in the hundreds of thousands or millions or tens of millions?

MS. CARROLL: I believe with respect to OCC it's in the one to two million, perhaps two million range. For ODM, I don't know off the top of my head, Your Honor.

THE COURT: Very well. I'm not asking you to guess.

MS. CARROLL: I can find out if that's important.

But, yeah, so it's, you know, plaintiffs submitted a declaration suggesting that the account had somehow been closed or deleted, but that's not the case. It's simply being -- a hold has been placed that doesn't allow Oklahoma to access the money because they don't have jurisdiction within these lands.

Finally, just a few straight points, Your Honor. Oklahoma mentioned a definition on the -- they said the Department of the Interior website, it talks about what a federally recognized Indian -- or a federal Indian tribe might be, that's from the Bureau of Indian Affairs website and does not speak to what the definition is under SMCRA. It's, in any event, language on a website. What -- plaintiffs didn't raise this argument in their papers, but language on a website doesn't supersede federal statutory language.

And Oklahoma has also mentioned there were some -- actually, no, I think we've covered that.

That's my presentation, Your Honor. It is our position that even were you to find that there were some kind of process that needs to occur before OSM can step in -- OSM has been regulating on the ground since September, any further requirement of process would be simply that, some additional process, but it can't change the statutory requirements.

THE COURT: Well, on that score, it's just possible that the defendants in this case have a more serious problem procedurally than they do with the combined effect of SMCRA and the McGirt decision. And that raises the possibility that this matter goes in the direction of the can just getting kicked down the road, which, in the nature of things, I don't like. But it is possible that the defendants have a more serious problem procedurally than substantively, again, with respect to the combined effect of the statute and the Supreme Court's decision.

So let's talk just a minute about the possibility that relief may be granted on the basis of procedural issues. I'm going to go back and take a hard look at the notice and comment issue, for instance. You've said that the State ought to be required to put up, what, an $8 million bond?

MS. CARROLL: Yes, Your Honor.

THE COURT: The state of Oklahoma is running a bigger surplus than the federal government. Why should a state of the union have to put up an $8 million bond?

MS. CARROLL: Your Honor, as long as Oklahoma is purporting to exercise its Title V program within Indian lands, it can -- it can still and has been purporting to release bonds required of --

THE COURT: I'm talking about an injunction bond.

MS. CARROLL: Yes, Your Honor. And I'm going to try to explain the basis for that.

THE COURT: Okay.

MS. CARROLL: So they're required to -- operators are required to put up bonds to ensure that they can reclaim the land to the extent that SMCRA and state law requires. Oklahoma has been -- has been releasing bonds, those reclamation bonds, on at least a couple of occasions since this lawsuit was filed. Release -- a final release of a reclamation bond prevents -- basically removes SMCRA jurisdiction over the operator.

THE COURT: About 40 years ago, I represented a rich doctor who thought he could save some taxes by getting into a surface mining deal, and the happiest day of his life was the day I got him off that bond.

MS. CARROLL: Yes, Your Honor. So what our concern here is -- and it's the subject, to an extent, of our counterclaims, and as we signaled in our counterclaims, we may file our own preliminary injunction motion, is that Oklahoma continues to purport to be able to release those bonds and has forfeited one of the bonds despite over 20,000 gallons of acid

mine discharge seeping into the environment and continuing to do so. So OSM, you know, you can speak to the relative -- you know, relative funding of the OSM and the federal government, but OSM can only use money that has been appropriated by Congress for the purposes that it has been appropriated for.

THE COURT: That's understood. But let's say that I just can't get past the procedural issues, so let's say that I do grant some interim relief, and then if it turns out that I erroneously did that with the consequence that the defendants are entitled to some form of recourse, why couldn't you just come right back into a federal court under 28 U.S.C. 1331 and sue the state of Oklahoma and require them to pay up or, for that matter, file a motion to that effect in this case?

MS. CARROLL: Because the money doesn't necessarily go to Oklahoma when the bonds are released, Your Honor. It's a -- as you've clearly had experience with, it's a bond, and it -- once it's been released --

THE COURT: Well, but whatever the root origin may be of the State's acts that are detrimental to the feds, why can't the feds just sue the State? Either sue the State or file a motion in this case to reduce that to judgment?

MS. CARROLL: Because there would -- I mean, this would be the subject of our own motion, Your Honor, but there would be a harm to OSM's ability, for example, to get operators to do the reclamation and -- during the period while the bond,

you know, after the bond has been released. There are other environmental harms that could occur if the bond is released and it hasn't yet been reclaimed to the environmentally required standard and so on. And so that's why we're asking for the bond.

THE COURT: Thank you. I want to address one thing with -- I have one inquiry of Mr. Leonard before we recess. And that is this: I take it that the State considers this matter that you brought up that's not in the briefs of the definition of a federal Indian reservation as being potentially, at least ultimately, if not at this stage, potentially dispositive. Am I right about that?

MR. LEONARD: Your Honor, so Section 1291 subsection 9 requires, in order for these lands to be Indian lands, under SMCRA --

THE COURT: I'm not asking you to argue the point; I'm asking you to answer my question.

Does the State consider that issue to be potentially dispositive?

MR. LEONARD: It would be, Your Honor.

THE COURT: I'm going to get some supplemental briefs on that. On the face of it, I can't help but think "don't believe everything you see on the Internet." On the other hand, if there's some meat here, then I want to know about it. I don't want to just bypass a potentially dispositive issue

because it arose later than it should have.

So how much time would you need to file a supplemental brief, let's call it not longer than ten pages of actual argument, on this issue of the definition of a federal Indian reservation? How long would you need? Surely not more than ten days.

MR. LEONARD: Your Honor, today is Thursday. If we could have until Monday or Tuesday, we could get it on file.

THE COURT: Well, I'm going to give you a week to file a supplemental brief on the issue of the definition of federal Indian reservation that you have raised. I'm going to give the defendants another week to file a response to that supplemental brief, confined strictly to that issue of whether the definition of federal Indian reservation, as you have referred to it here, and as you will undoubtedly be referring to it in your supplemental brief, is relevant to this case. And if it's relevant, then, what its impact is in this case.

MR. LEONARD: Yes, Your Honor.

THE COURT: And, Counsel, I certainly commend you on your arguments here today. They have helped me to work my way through it. I wouldn't want anybody to do any reading of the tea leaves. This is a complex matter, and it would be foolish to try to read anything into my questions or comments one way or the other. And I've already cleared the air with one comment on the McGirt decision, as such, but that's really

irrelevant to where this matter goes on the merits. And I want everyone to clearly understand that. It really is irrelevant to where this matter goes on the merits. If McGirt is going to be reviewed and revisited, it's going to have to be by the Supreme Court or by Congress. And certainly not by this Court.

So that does conclude the arguments on the motion this afternoon. I will look forward to getting the supplemental briefs. And I'll be addressing the matter just as soon as I possibly can.

Court will be in recess.

(COURT ADJOURNED.)

CERTIFICATE OF OFFICIAL REPORTER

I, Tracy Thompson, Federal Official Realtime Court Reporter in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 6th day of December 2021.

/S/ Tracy Thompson

Tracy Thompson, RDR, CRR
Federal Official Court Reporter