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

STATE OF OKLAHOMA, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Case No. CIV-21-0719-F

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Oklahoma contends that a description of the term "Federal Indian reservation" found in the non-binding "Frequently Asked Questions" section of a Bureau of Indian Affairs (BIA) website somehow limits the meaning of that same term in the Surface Mining Control and Reclamation Act of 1977 (SMCRA), even though the BIA does not administer SMCRA. Oklahoma is wrong. Even if the FAQ section of BIA's website describes a "Federal Indian reservation" as limited to trust lands—which is not clear on its face—this argument fails at the outset because it contradicts the plain text of 30 U.S.C. § 1291(9), where Congress expressly provided that a Federal Indian reservation includes non-trust lands for purposes of SMCRA. If that were not enough, Oklahoma's argument also contradicts *McGirt* and ignores the most basic principles of statutory interpretation and administrative law. This Court should reject Oklahoma's new argument for all of these reasons.

I. A "Federal Indian reservation" under SMCRA unambiguously includes all lands within its exterior boundaries, including non-trust lands

Where the "statute's text is unambiguous, then its plain meaning controls, and [the Court's] inquiry ends." *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."). A statute's plain meaning "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Here, SMCRA defines "Indian lands" in full as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9). The plain language of this provision alone demonstrates that the term "Federal Indian reservation" is not ambiguous and that a "Federal Indian reservation" under SMCRA necessarily includes all lands within a reservation's exterior boundaries, including fee-patented lands not held in trust.

To start, the provision defines as Indian lands "*all* lands . . . within the exterior boundaries of any Federal Indian reservation," and affords no exception based on the status of lands within those geographic boundaries. *Id.* (emphasis added). The only textual addition to this clear definition reinforces this conclusion. It specifically includes such lands "*notwithstanding the issuance of any patent*, and including rights-of-way . . . ." *Id.* (emphasis added). The Major Crimes Act's definition of "Indian country" includes the same language. *See* 18 U.S.C. § 1151(a) ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation") (emphasis added). As the Court in *McGirt* explained, that clause acknowledges the federal allotment policy in the late 19th and early 20th Centuries whereby "Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members." *McGirt*, 140 S. Ct. at 2463 (citation omitted). Under that policy, many tribe members received a trust or restricted fee patent to

their individual parcels located within the reserved lands, which transferred legal title to the parcels. *Id.* at 2463–64. When the trust period expired or the restrictions were removed, the land became freely alienable and many tribe members subsequently transferred their lands to non-Indians. *Id.* The inclusion of the "notwithstanding" clause in SMCRA, then, as in the Major Crimes Act, "expressly contemplates private land ownership within reservation boundaries," including parcels that have "passed hands to non-Indians." *Id*. at 2464; *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357–58 (1962) ("notwithstanding the issuance of any patent" in § 1151(a) means that patented lands should not be excluded from an Indian reservation).

In focusing on the definition of "Federal Indian reservation," Oklahoma also ignores the second half of SMCRA's definition of Indian lands, which includes as "'Indian lands' . . . *all lands including mineral interests held in trust for or supervised by an Indian tribe*." 30 U.S.C. § 1291(9) (emphasis added). This language demonstrates that Congress contemplated inclusion of trust lands as "Indian lands" *separately* from lands within a reservation; that is, "Indian lands" includes lands within a reservation, *and* it also includes lands held in trust, whether or not they are within a reservation. This structure recognizes that, in some states, trust allotments exist outside of a reservation. *Cf. United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (trespass and ejectment action involving trust allotment outside of a reservation in New Mexico). If a Federal Indian reservation under SMCRA comprised *only* lands held in trust, as Oklahoma posits, Congress would not have needed the first half of the definition. Thus, Oklahoma's importation of the BIA website's description renders the first half of the definition superfluous in contravention of yet

another fundamental principle of statutory interpretation that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. U.S.*, 556 U.S. 303, 314 (2004).

In sum, the plain language of § 1291(9) forecloses Oklahoma's argument that a "Federal Indian reservation" includes only trust lands. That should end the inquiry.

II. Oklahoma's arguments otherwise are unavailing

Because "Federal Indian reservation" in SMCRA unambiguously includes lands within a reservation regardless of whether they are held in trust, the Court need not further consider Oklahoma's arguments. However, even if it does, the BIA's website description of Federal Indian reservation is not relevant to the interpretation of a statute administered by OSMRE and, in any event, does not support Oklahoma's position.

First, Oklahoma's argument runs afoul of basic principles of administrative law. Deference is ordinarily afforded "to an agency's interpretation of an ambiguous statute that it implements." *Newton v. F.A.A.*, 457 F.3d 1133, 1136 (10th Cir. 2006). OSMRE—not the BIA—implements SMCRA and promulgates regulations under it. *See* 30 U.S.C. § 1211(c)(1)–(2). The BIA acknowledges as much. 25 C.F.R. § 225.5 (BIA regulation stating: "OSMRE is the regulatory authority for surface coal mining and reclamation operations on Indian lands pursuant to [SMCRA]. The relevant regulations for surface mining and reclamation operations are found in 30 CFR part 750 and 25 CFR part 216."). OSMRE, in its own regulations, has not limited "Federal Indian reservation" to trust lands. *See* 30 C.F.R. § 700.5 (defining Indian lands identically to the statute).

In line with those regulations, OSMRE has consistently operated its Federal program for Indian lands on *all* lands within the exterior boundaries of a Federal Indian reservation—not just on trust lands. *See* 72 Fed. Reg. 20,672 (2007) ("The regulatory definition is identical to the definition of Indian lands in SMCRA at 30 U.S.C. 1291(9). Under that definition, we have asserted regulatory jurisdiction over all lands located within the boundaries of Federal Indian reservations, and certain lands outside reservation boundaries where the surface or mineral estate is held in trust for or supervised by an Indian tribe."). For example, OSMRE operates a Federal Indian lands program for lands within the boundaries of the entire reservation of the Crow Tribe of Montana. *See id.*; *see also* Yellowman Decl. ¶¶ 3–4, ECF No. 34-7. But only approximately 17% of lands in the Crow Reservation are held in trust for the tribe while another 28% is held in fee by non-Indians. *See Mescalero Apache Tribe v. New Mexico*, 677 F.2d 55, 57 n.1 (10th Cir. 1982). Oklahoma asks this Court to adopt its interpretation of a website of an agency that does not administer SMCRA—and which does not purport to interpret "Indian lands" in SMCRA—rather than defer to the interpretation and longstanding practice of the agency tasked by Congress with administering the statute. Such a request is contrary to fundamental principles of administrative law.

Second, as even Oklahoma admits, this website description lacks the force of law. *See* Pls.' Supp. Brief in Support of Mot. for Prelim. Inj. at 4, ECF No. 70 ("Pls.' Supp. Brief"). Most of the cases Oklahoma cites in support of considering of government websites, as even Oklahoma concedes, concern whether government websites are

admissible under the Rules of Evidence.[1] This obviously has nothing to do with the question here—whether a FAQ entry on the website of an agency that does not implement SMCRA can override the plain language of SMCRA itself. And although Oklahoma cites *Ellenberg v. New Mexico Military Institute*, 572 F.3d 815 (10th Cir. 2009), for the proposition that the "Department of Education's website" was "agency authority," Pls.' Supp. Brief at 5, *Ellenberg* in fact undermines Oklahoma's argument. In that case, the Tenth Circuit Court of Appeals relied on an *agency's regulations* to determine the applicability of the Americans with Disabilities Act (ADA). The court concluded the regulatory definition of a "qualified handicapped person" rendered the plaintiff ineligible for relief under the statute. *Ellenberg*, 572 F.3d at 820. Although the plaintiff pointed to several "federal and state agency publications," including an FAQ section on the U.S. Department of Education website, to support her interpretation of the ADA, the court rejected these sources, concluding they could not "impose an interpretation of [the statute] at odds with its implementing regulation[s]. . . ." *Id.* at 822–23. The same analysis applies here: OSMRE's regulations and longstanding practice trump a definition on a BIA website.

Third, Oklahoma's argument runs directly contrary to the Supreme Court's holding in *McGirt* itself. The Supreme Court expressly "rejected the notion that fee title is somehow inherently incompatible with [the] reservation status" of the Muscogee (Creek) Nation's

[1] For example, in *Gerritsen v. Warner*, 112 F. Supp. 3d 1011 (C.D. Cal. 2015), the court refused to take judicial notice of information on third party websites but did take notice of a government website under Fed. R. Evid. 201. The court in *United States v. Iverson*, 818 F.3d 1015, 1021 (10th Cir. 2016), considered whether a website fell within the public records exception to the rule against hearsay. These cases are entirely irrelevant to the issue here.

reservation. *McGirt*, 140 S. Ct. at 2475–76. As the State has already indicated that it is "not ask[ing] this Court to question *McGirt's* holding," and the Court has held that the issues in this case "do not require [it] to make a reservation status determination," there is no room for further debate—*McGirt* has settled this issue. *See* Order denying Mot. of the Muscogee (Creek) Nation for Limited Intervention at 6–7, ECF No 61; State's Response in Opp. to Mot. to Intervene on a Limited Basis at 3, ECF No. 45.

Finally, although the Court need not engage the BIA website's text given its irrelevance to this case, the website's definition itself does not clearly limit a "Federal Indian reservation" to trust lands as Oklahoma suggests. The first paragraph describes a "[F]ederal Indian reservation" as "an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, *and* where the federal government holds title to the land in trust on behalf of the tribe." *See* ECF No. 70-1 at 2–3 (emphasis added). While Oklahoma interprets that "and" to connect two mandatory requirements, it is more reasonably read as disjunctive, to describe a second, separate set of lands that *also* constitute a reservation. This is common in the English language[2] and makes the most sense in light of remainder of the FAQ entry. That is, the second paragraph identifies the Navajo Reservation as the largest "[F]ederal Indian Reservation" in the United States, even though

[2] For example, when Article III, Section 2, of the Constitution extends the judicial power "to all Cases, in Law and Equity," it does not mean that a case must be both legal and equitable—it means either legal *or* equitable.

the Navajo Reservation contains both trust and non-Indian fee lands. *See Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

Moreover, were the "and" in the FAQ entry conjunctive as Oklahoma reads it, it would be legally and factually incorrect: not only do most reservations today include a mix of trust and fee lands as a result of the prior federal allotment policy, but many reservations—such as those of the Five Tribes, including the Muscogee (Creek) Nation—were set aside from the start in fee subject to federal restrictions on alienation (sometimes termed "restricted fee"). *See McGirt*, 140 S. Ct. at 2475–76. And such restricted fee is functionally equivalent to trust land. *See United States v. Bowling*, 256 U.S. 484, 487 (1921).

III. The BIA website does not support Oklahoma's APA claims or reliance arguments

Oklahoma contends that, at the very least, OSMRE was obligated to consider the BIA's website before exercising SMCRA jurisdiction within the Muscogee Nation's reservation because the FAQ entry "raise[d] at least an important question about the meaning of 'Indian lands' under SMCRA . . . ." Pls.' Supp. Brief at 6–7. But as explained above, to the extent that Oklahoma interprets that website to define "Federal Indian reservation" as including only trust lands, it is inconsistent with *McGirt* and § 1291(9), as well as with the law more generally. Consideration of Oklahoma's interpretation of the BIA website would be improper when the plain language of SMCRA precludes that interpretation.

Nor does the BIA's website implicate reliance interests, as Oklahoma contends. *See* Pls.' Supp. Brief at 7. First and foremost, the equitable considerations Oklahoma invokes do not apply where the statute is unambiguous. *See* Defs.' Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. at 24–27, ECF No. 34. Moreover, Oklahoma has identified no evidence of anyone's reliance on the BIA's FAQ entry in the SMCRA context; its appeal to reliance in other contexts, Pls' Supp. Brief at 5–6, is irrelevant. Even Oklahoma does not contend that *it* relied on its interpretation of the BIA's website—which it raised for the first time at the hearing on its motion—in any way. And such reliance would not be at all reasonable, in any event, because—as explained above—the BIA website definition does not even appear to limit a "Federal Indian reservation" to trust lands, as Oklahoma suggests. In contrast, the public, operators, tribes, and States have consistently relied on OSMRE's longstanding practice of operating its SMCRA programs on all lands within a Federal Indian reservation, including both trust and fee lands.

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In short, and to answer the question the Court posed at the December 2, 2021 hearing: The description of "Federal Indian reservation" on the BIA's website has no bearing whatsoever on the meaning of that term within the definition of "Indian lands" under SMCRA. The Court should therefore reject Oklahoma's belated attempt to manufacture a controversy out of its interpretation of language on the website of another agency.

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Respectfully submitted,

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