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 Nos.	CIV-21-0719-F CIV-21-0805-F

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 56, Federal Defendants move for an order granting summary judgment in their favor on Plaintiffs' claims set forth in their Amended Complaints (*Oklahoma I* ECF No. 77 and *Oklahoma II* ECF No. 29) and on Federal Defendants' counterclaims set forth in their Answers to the Amended Complaints and Counterclaims (*Oklahoma I* ECF No. 80 and *Oklahoma II* ECF No. 30).[1]

Pursuant to the Scheduling Order, *Oklahoma I* ECF No. 89 ¶ 4(f), Federal Defendants have filed a single, combined memorandum in support of their cross-motion

[1] The Court has consolidated *Oklahoma I*, CIV-21-719-F, and *Oklahoma II*, CIV-21-805-F, for summary judgment briefing. *Oklahoma I* ECF No. 89 ¶ 1. The parties have further agreed that all claims, counterclaims, and defenses in both cases would be resolved through cross-motions for summary judgment. *Oklahoma I* ECF No. 88 ¶ 3.

for summary judgment and their response in opposition to Plaintiffs' motion for summary judgment. As set forth in that memorandum, which accompanies both filings, Federal Defendants are entitled to judgment as a matter of law on all claims and counterclaims.

DATE: July 28, 2022

Respectfully submitted,

LISA LYNNE RUSSELL
Deputy Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Div.

/s/ Arwyn Carroll
ARWYN CARROLL
Trial Attorney, Natural Resources Section
Massachusetts Bar No. 675926
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: 202-305-0465
Fax: 202-305-0506
arwyn.carroll@usdoj.gov

CLARE BORONOW
Senior Attorney, Natural Resources Section
Admitted to Maryland Bar
999 18th St.
South Terrace, Suite 370
Denver, CO 80202
Phone: 303-844-1362
Fax: 303-844-1350
clare.boronow@usdoj.gov

Counsel for Federal Defendants

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FEDERAL DEFENDANTS' COMBINED BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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AML	Abandoned Mine Land
ASAP	Automated System for Automated Payments
DACA	Deferred Action for Childhood Arrivals
IGRA	Indian Gaming Regulatory Act
OCC	Oklahoma Conservation Commission
OCCA	Oklahoma Court of Criminal Appeals
OCRA	Oklahoma Coal Reclamation Acts of 1978-79
ODM	Oklahoma Department of Mines
OSMRE	Office of Surface Mining Reclamation and Enforcement
OTC	Oklahoma Tax Commission
SMCRA	Surface Mining Control and Reclamation Act of 1977

INTRODUCTION

Oklahoma claims authority under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) to administer surface coal mining and Abandoned Mine Land (AML) reclamation on the Reservations of the Muscogee (Creek) Nation, the Cherokee Nation, and the Choctaw Nation of Oklahoma.[1] As this Court has already held after carefully reviewing SMCRA's text, Oklahoma is incorrect.

The Supreme Court and the Oklahoma Court of Criminal Appeals (OCCA) have held that Congress did not disestablish the Muscogee, Cherokee, or Choctaw Reservations, and that their boundaries remain intact. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *Hogner v. Oklahoma*, 500 P.3d 629, 635 (Okla. Crim. App. 2021) (Cherokee Nation); *Sizemore v. Oklahoma*, 485 P.3d 867, 870–71 (Okla. Crim. App. 2021) (Choctaw Nation of Oklahoma). All lands within the exterior boundaries of the Reservations thus constitute "Indian lands" as defined by SMCRA. In the absence of a Tribal program, SMCRA and its implementing regulations unambiguously vest the Office of Surface Mining Reclamation and Enforcement (OSMRE) with exclusive jurisdiction over surface coal mining and reclamation operations, and administration of an AML program,[2] on these lands. The

[1] Federal Defendants refer to all three reservations herein collectively as "the Reservations" and to the individual reservations as the "Muscogee Reservation," "Cherokee Reservation," and "Choctaw Reservation."

[2] Federal Defendants herein use the term "surface coal mining and AML reclamation" to encompass "surface coal mining and reclamation operations, and administration of an Abandoned Mine Land program." This shorthand is intended to encompass all surface coal mining and reclamation operations under Title V of SMCRA, as well as administration of

necessary consequence of *McGirt*, *Hogner*, and *Sizemore* is that Oklahoma lacks jurisdiction over surface coal mining and AML reclamation on lands within the exterior boundaries of the Reservations, and any attempt by Oklahoma to exercise such authority is preempted. Federal Defendants[3] are thus entitled to summary judgment on their counterclaims and on Oklahoma's claim seeking declaratory judgment.

Federal Defendants are also entitled to summary judgment on Oklahoma's claims asserted under the Administrative Procedure Act (APA) and SMCRA. Because SMCRA itself prohibits Oklahoma from exercising authority over surface coal mining and AML reclamation on Indian lands—and requires OSMRE to do so—OSMRE's actions were necessarily "in accordance with law" and therefore cannot be arbitrary and capricious. *Oklahoma v. Dep't of the Interior*, No. CIV-21-719, 2021 WL 6064000, at *9 (W.D. Okla. Dec. 22, 2021). In addition, the Court lacks jurisdiction to review Oklahoma's APA and SMCRA claims; and even if it had jurisdiction, Oklahoma has not demonstrated that OSMRE's actions were arbitrary or capricious or prejudicial to the State.

RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

The parties agree that these cases are appropriately resolved through summary judgment, *see* Joint Mot. for Briefing Schedule ¶ 3, ECF No. 88,[4] because the key issues

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an AML program under Title IV. Federal Defendants also use the term "State programs" in the plural to refer to both Oklahoma's Title V program and its Title IV program.

[3] Federal Defendants and Counterclaimant the United States are collectively referred to herein as "Federal Defendants."

[4] In light of the parties' agreement that *Oklahoma I*, CIV-21-0719-F, and *Oklahoma II,* CIV-21-0805-F, be consolidated for purposes of summary judgment briefing, *id.* ¶ 2, all ECF citations are to the docket in *Oklahoma I*, unless otherwise indicated.

turn on questions of law—namely, the impact of *McGirt*, *Hogner*, and *Sizemore* on SMCRA's assignment of authority to regulate surface coal mining and AML reclamation within the Reservations. Oklahoma's remaining claims are brought under the APA and must therefore be reviewed on the administrative record rather than a factual record developed during litigation. *N.M. Health Connections v. U. S. Dep't of Health & Hum. Servs.*, 946 F.3d 1138, 1161 (10th Cir. 2019). The LCvR 56.1(c) statement of material facts is thus not necessary for resolving summary judgment motions in these cases.

Nonetheless, Federal Defendants have responded to each of Oklahoma's statements of material fact by correspondingly numbered paragraph pursuant to LCvR56.1(c). Because the same set of facts supports Federal Defendants' cross-motion for summary judgment, Federal Defendants do not repeat the same factual statements in a separate section but instead include additional material facts in their numbered responses. Furthermore, at the outset, Federal Defendants note that numerous statements included in Oklahoma's Statement of Material Facts contain statements of law. These recitations of law do not constitute "facts" for summary judgment purposes.

1. Admitted.

2. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit that SMCRA created an AML program under Title IV and a regulatory program under Title V. The goals and operation of these programs are best described in SMCRA, Federal regulations, and case law, which speak for themselves.

3. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit this statement to the extent that AML programs are funded by grants consistent with SMCRA and applicable financial assistance statutes and regulations.

4. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit this statement to the extent that SMCRA authorizes OSMRE to provide grants to states to develop, administer, and enforce State programs, and to Tribes to develop, administer, and enforce Tribal programs.

5. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit that one of the purposes of SMCRA is contained in 30 U.S.C. § 1202(a) and that Congress provided a mechanism for states to obtain primary regulatory responsibility under Title V, and to receive funding to conduct AML reclamation under Title IV, on non-Federal, non-Indian lands within their borders.

6. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit that SMCRA is a cooperative federalism statute that allows states to obtain primary responsibility (*i.e.*, "primacy") for the regulation and administration of surface coal mining and AML reclamation operations on non-Federal, non-Indian lands within their borders. In 2006, Congress amended SMCRA to also allow Indian tribes to obtain primacy over Indian lands within the jurisdiction of the Tribe.

30 U.S.C. § 1300(j)(1). Federal Defendants deny Plaintiffs' characterization of OSMRE's oversight and backup enforcement authority of State and Tribal programs. OSMRE's responsibilities and authorities are best described by SMCRA, Federal regulations, and case law, which speak for themselves.

7. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit the first sentence. Those same standards would also apply to any Tribe seeking primacy. Federal Defendants deny the second sentence: SMCRA provides that the Secretary, not OSMRE, must approve or disapprove a proposed State or Tribal program. 30 U.S.C. § 1253.

8. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA and *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), which speak for themselves. Nonetheless, Federal Defendants admit that a state with approved State programs has authority over surface coal mining and AML reclamation operations on non-Federal, non-Indian lands within its borders. Specifically, the *Bragg* court more fully explained SMCRA's program of cooperative federalism as "expressly provid[ing]" for exclusive "State regulation of surface coal mining within [a State's] borders *or* federal regulation, but not both." *Bragg*, 248 F.3d at 289.

9. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit this statement. Furthermore, a "Federal program" promulgated

under 30 U.S.C. § 1254 is geographically limited to "lands within a State" and therefore excludes Indian lands, *id.* § 1291(6), (11).

10. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize SMCRA, which speaks for itself. Nonetheless, Federal Defendants admit this statement, but aver that OSMRE has not approved or disapproved Oklahoma's State programs, or promulgated a Federal program in Oklahoma, as a result of *McGirt*, *Hogner*, or *Sizemore*.

11. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize OSMRE's regulations, which speak for themselves. Nonetheless, Federal Defendants admit this statement only as to Title V. With regard to AML programs, Title IV of SMCRA requires Secretarial approval of a State or Tribal AML reclamation plan. Amendments to that reclamation plan must follow the procedures of 30 C.F.R. § 884.15. Furthermore, OSMRE has not amended Oklahoma's State programs as a result of *McGirt*, *Hogner*, or *Sizemore*.

12. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize Title V of SMCRA and OSMRE's Title V regulations, which speak for themselves. Nonetheless, Federal Defendants admit this statement. Furthermore, SMCRA's provisions for approving, disapproving, or amending a State program under Title V are immaterial to this action because such a program is only approved to regulate surface coal mining and reclamation on non-Federal, non-Indian lands. *See, e.g.*, 30 U.S.C. § 1291(11), (25). State AML reclamation programs work similarly. *See, e.g.*, 30 U.S.C. § 1235(d); 30 C.F.R. part 884.

13. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize OSMRE's Title V regulations, which speak for themselves. Nonetheless, Federal Defendants admit this statement. However, 30 C.F.R. § 732.17 is immaterial to this action because a State program is only approved for regulation of surface coal mining and reclamation on non-Federal, non-Indian lands.

14. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize OSMRE's Title V regulations, which speak for themselves. Nonetheless, Federal Defendants admit this statement. However, the Part 733 regulations are immaterial to this action because a State program is only approved for regulation of surface coal mining and reclamation on non-Federal, non-Indian lands.

15. Federal Defendants admit that OSMRE approved Oklahoma's most recent Title V program on April 2, 1982, after public comment and hearing. Oklahoma's Title V program was first conditionally approved in January 1981, 46 Fed. Reg. 4,902 (Jan. 19, 1981), but the Oklahoma Legislature rescinded the State's coal mining regulations on February 12, 1981, 47 Fed. Reg. 14,152 (Apr. 2, 1982). Oklahoma's Title V program was finally approved after multiple public comment periods and public hearings. *Id.*

16. Federal Defendants admit the facts in the first sentence. Federal Defendants dispute that the statements in the second sentence constitute statements of fact; instead, they characterize OSMRE's regulations, which speak for themselves. Nonetheless, Federal Defendants admit that ODM's oversight under its Title V program extends only to permitting and inspection activities within the scope of its approved State program and the cooperative agreement, which never included permitting and inspection activities on Indian

lands and provides for additional OSMRE involvement in the permitting, inspection, and oversight of Federal lands. *See* 30 C.F.R. § 936.30.

17. Federal Defendants admit that the Secretary approved Oklahoma's Title IV program on January 21, 1982; that OCC is responsible for implementing that program; and that SMCRA provides for all Federal funding for that implementation.

18. Federal Defendants admit that the Supreme Court issued its decision in *McGirt v. Oklahoma* on July 9, 2020. Federal Defendants dispute that the remaining statements in this paragraph constitute statements of fact; instead, they characterize *McGirt*, which speaks for itself. Nonetheless, Federal Defendants aver that the Court held that the Muscogee Reservation was never disestablished by Congress and, thus, constitutes "Indian country" under 18 U.S.C. § 1151(a). *McGirt*, 140 S. Ct. at 2459, 2468, 2482.

19. Federal Defendants dispute that the statements in this paragraph constitute statements of fact; instead, they characterize *McGirt*, which speaks for itself. Nonetheless, Federal Defendants admit that the Court said that "[t]he only question before [it]," *in that case*, "concern[ed] the statutory definition of 'Indian country' as it applies in federal criminal law under the MCA[.]" *McGirt*, 140 S. Ct. at 2480. Federal Defendants deny, however, that the Court's holding has no application outside of federal criminal law. The Court specifically noted that its holding that Congress never disestablished the Muscogee Reservation could be relevant to other "civil statutes or regulations" since "many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country." *Id.* Underscoring this, the Court concluded that the perceived implications of its ruling were "not a license . . . to disregard the law." *Id.* at 2481.

20. Federal Defendants admit that several lawsuits related to or stemming from *McGirt* have been filed but none of the cited cases or issues involves SMCRA. Furthermore, some of the cases cited by Oklahoma have been dismissed without any decision on the merits of the applicability of *McGirt*. *See Canaan Res. X v. Calyx Energy III, LLC*, No. CO-119245 (Okla. Jan. 26, 2022), ECF No. 33 (appeal voluntarily dismissed before a merits decision); *Oneta Power, LLC v. Hodges*, No. CJ-2020-193 (Okla. Dist. Ct. filed Aug. 21, 2020) (Plaintiff voluntarily dismissed claim alleging that *McGirt* deprived a county assessor of jurisdiction to assess ad valorem taxes within the Muscogee Reservation). *See* Notice of Partial Dismissal of Action (June 2, 2022). With respect to claimed tax exemptions, the Report of Potential Impact of *McGirt v. Oklahoma* cited by the State notes that the Oklahoma Tax Commission (OTC) already lacked jurisdiction to levy certain taxes on tribal members within Indian country before *McGirt*; the *McGirt* decision merely "change[d] the geographical area in which the OTC" believed that it had "jurisdiction to levy and enforce the State's taxes." Report at 1. The Report further concedes that "[a]lthough *McGirt* arose from a criminal proceeding, the implications of the decision extend to many other areas of Oklahoma law[.]" Report at 2.

21. Federal Defendants admit that the OCCA issued its decision in *Hogner* on March 11, 2021. Federal Defendants dispute that the remaining statements in this paragraph constitute statements of fact; instead, they characterize *Hogner*, which speaks for itself. Nonetheless, Federal Defendants aver that the OCCA affirmed that the Cherokee Reservation had never been disestablished and deny that this holding was "for purposes of

criminal jurisdiction only." Only a single judge expressed that view in a concurring opinion. *See Hogner*, 500 P.3d at 637 (Rowland, J., concurring in result).

22. Federal Defendants admit that the OCCA issued its decision in *Sizemore* on April 1, 2021. Federal Defendants dispute that the remaining statements in this paragraph constitute statements of fact; instead, they characterize *Sizemore*, which speaks for itself. Nonetheless, Federal Defendants aver that the OCCA affirmed that the Choctaw Reservation had never been disestablished and constitutes "Indian country," and deny that this holding is limited to only federal criminal law.

23. Admitted.

24. Federal Defendants admit that the April 2 Letters provided that ODM and OCC should maintain their routine activities for approximately 30 days to allow for the transition of administration from Oklahoma to OSMRE. However, the letters specified that ODM and OCC should avoid taking "any action with irreversible or irreparable adverse consequences for OSMRE's abilities to administer SMCRA within the boundaries of the Muscogee (Creek) Nation Reservation, which [for ODM would include] approving permitting actions or releasing bonds . . . ." OSMRE0639, OSMRE0642.[5] All other allegations or inferences contained in this statement are denied.

25. Admitted.

26. Denied. The April 2 Letters clearly stated that OSMRE had jurisdiction within the Muscogee Reservation but recognized the need for an "orderly transition of

[5] References to "OSMRE####" refer to the Bates-stamped Administrative Record.

responsibilities, records, documents, and data" from Oklahoma to OSMRE. OSMRE0638–42. However, Oklahoma's Attorney General specifically instructed ODM and OCC not to comply with OSMRE's instructions for transition. OSMRE0809–10. When it became clear that that neither ODM nor OCC would comply with OSMRE's transition requests, OSMRE was forced to continue to administer SMCRA within the borders of the Muscogee Reservation without ODM's or OCC's requested records, documents, and data. *See* Supp. Maki Decl. ¶¶ 3–9 (OSMRE exercising jurisdiction), ¶¶ 10–16 (difficulty obtaining records), ECF No. 71-1.

27. Federal Defendants admit that OSMRE published a *Federal Register* notice on May 18, 2021, to inform the public of the effect of *McGirt* on SMCRA jurisdiction within the borders of the Muscogee Reservation. Federal Defendants dispute that the remaining statements in this paragraph constitute statements of fact; instead, they characterize the notice, which speaks for itself.

28. Admitted.

29. Federal Defendants admit that the June 17 Letters provided that ODM and OCC should maintain their routine activities for approximately 30 days to allow for the transition of administration from Oklahoma to OSMRE. However, the letters specified that ODM and OCC should avoid taking "any action with irreversible or irreparable adverse consequences for OSMRE's abilities to administer SMCRA within the exterior boundaries of the Cherokee Nation and the Choctaw Nation Reservations, which [for ODM would include] approving permitting actions or releasing bonds . . . ." OSMRE0750, 755.

30. Federal Defendants incorporate by reference their response to Paragraph 29.

31. Denied. The 30-day transition period in the June 17 Letters was intended to facilitate the transition of the administration of surface coal mining and AML reclamation from Oklahoma to OSMRE. OSMRE0750, OSMRE0755. However, Oklahoma's Attorney General specifically instructed ODM and OCC not to comply with OSMRE's instructions. OSMRE0809–10. When it became clear that that neither ODM nor OCC would comply with OSMRE's transition requests, OSMRE was forced to continue to administer SMCRA within the borders of the Cherokee and Choctaw Reservations without ODM's or OCC's requested records, documents, and data. *See* Supp. Maki Decl. ¶¶ 3–9 (OSMRE exercising jurisdiction), ¶¶ 10–16 (difficulty obtaining records).

32. Federal Defendants admit that OSMRE published a *Federal Register* notice on October 19, 2021, to inform the public of the effect of *Hogner* and *Sizemore* on SMCRA jurisdiction within the borders of the Cherokee and Choctaw Reservations. Federal Defendants dispute that the remaining statements in this paragraph constitute statements of fact; instead, they characterize the notice, which speaks for itself.

33. Federal Defendants deny the characterization of OSMRE's treatment of Oklahoma's grants as "denials." OSMRE has not disapproved or denied any grant application from ODM. Fritsch Decl. ¶¶ 18–30, ECF No. 34-8; Second Fritsch Decl. ¶¶ 3–4. At the time the complaints were filed, OSMRE had disapproved, but not denied, OCC's FY 2021 grant and FY 2020 amendment applications. Fritsch Decl. ¶¶ 42–52; Second Fritsch Decl. ¶¶ 10–12. After ODM and OCC submitted grant amendments, OSMRE reviewed and approved both ODM's and OCC's amended grants for the full amounts requested on July 15, 2022. Second Fritsch Decl. ¶¶ 5–9, 13–17.

34. Denied. In accordance with its August 25, 2021 letter, OSMRE suspended ODM's grant funds in the United States Treasury Automated System for Automated Payments (ASAP) due to ODM's failure to provide required grant documentation. Fritsch Decl. ¶¶ 54–56; OSMRE0792–94 (August 25 Letters).

35. Federal Defendants deny any allegations that OSMRE's actions were unlawful. Federal Defendants admit that Oklahoma terminated some number of employees who operated Oklahoma's Title V program; closed its Tulsa Field Office; is no longer conducting inspections, taking enforcement actions, or issuing notices of violation; is no longer accepting or processing applications for permit revisions or bond reductions, release, or forfeiture; and indicated on its website that all inquiries related to coal mining in Oklahoma should be directed to OSMRE.

36. Federal Defendants admit the second sentence but deny the first sentence. OCC recently informed OSMRE that it intends to proceed with work on at least two AML reclamation sites on Indian lands without OSMRE's authorization. Third Maki Decl. ¶¶ 6–8 and Exhibit A. OCC also indicated that it plans to seek reimbursement for these projects through SMCRA if it prevails in this litigation. *Id.*

37. Federal Defendants deny the first sentence to the extent it suggests that OSMRE does not have authority under SMCRA within the Reservations, that OSMRE is not yet fulfilling its SMCRA obligations on these lands, or that OSMRE's authority was contingent on ODM and OCC initiating a transfer. OSMRE became the SMCRA authority within the Reservations by operation of law when the Reservations were recognized as not having been disestablished and only sought to facilitate an orderly transfer of information

to assist with the transition of implementation responsibilities. OSMRE is currently acting as the sole SMCRA regulatory and AML authority on Indian lands in Oklahoma. Maki Decl. ¶¶ 7–33, ECF No. 34-4; Supp. Maki Decl. ¶¶ 5–9; Third Maki Decl. ¶¶ 3, 5. For example, OSMRE is conducting regular inspections on all inspectable units on the three Reservations; issuing enforcement actions for any violations of SMCRA it becomes aware of; processing applications for new Indian lands permits; requesting and processing ordered revisions on existing permits; responding to citizen complaints; processing bond release applications and applications for termination of SMCRA jurisdiction; responding to AML emergencies; and hiring additional staff. Third Maki Decl. ¶¶ 3, 5. Under the terms of the parties' stipulation, OSMRE is working to "negotiate in good faith to develop and implement a protocol pursuant to which ODM will assign to OSMRE all performance bonds . . . for operations located within" the Reservations and for ODM to transfer to OSMRE "all performance bonds forfeited . . . for operations located" within the Reservations. Stipulation ¶¶ 5–6, ECF No. 86. Federal Defendants admit that ODM has requested a written proposal but aver that its General Counsel has rebuffed OSMRE's efforts to schedule a telephone call to discuss this process. Third Maki Decl. ¶ 4. The U.S. Department of the Interior is preparing a transfer proposal. *Id.* Federal Defendants admit that OSMRE has received some records, copies of records, documentation, data, and other information from ODM and OCC.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(a). "[T]his standard mirrors the standard for a directed verdict under [Rule] 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). With respect to claims brought under the APA, "a district court acts as an appellate court" such that it "employs summary judgment to decide, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *N.M. Health Connections*, 946 F.3d at 1161 (quotations and citations omitted).

ARGUMENT

Federal Defendants are entitled to declaratory judgment on their counterclaims that only OSMRE, and not Oklahoma, may exercise authority over surface coal mining and AML reclamation within the Reservations (Count One) and that SMCRA preempts Oklahoma's application of its State programs or other laws governing surface coal mining and AML reclamation on lands within the Reservations (Count Two). For the same reasons, Federal Defendants are entitled to summary judgment on Oklahoma's claims seeking declaratory judgment (Count One) and a determination that OSMRE's actions were "contrary to law" or "arbitrary and capricious" under the APA and SMCRA (Counts Two through Six).

I. OSMRE has exclusive SMCRA jurisdiction within the Reservations

Oklahoma no longer seriously contests the plain language of SMCRA. In the absence of a Tribal program, SMCRA is clear that only OSMRE—and not Oklahoma—may exercise jurisdiction on Indian lands and therefore within the Reservations. For the

same reason, SMCRA preempts Oklahoma's application of its State programs or any other state law regarding surface coal mining and AML reclamation to lands within the Reservations, and Oklahoma lacks any form of concurrent jurisdiction within the Reservations. Rather than engage with the statute, Oklahoma invokes "fundamental principles of equity" derived from inapposite decisions over possessory Indian land claims. But equity follows the law and cannot defeat Congress's clear intent to preclude state authority on Indian lands.

A. SMCRA's plain language gives OSMRE exclusive jurisdiction within the Reservations

As the Court has already recognized, SMCRA expressly grants authority to OSMRE over surface coal mining and AML reclamation on Indian lands in the absence of a Tribal program and precludes state authority over those same activities on those same lands. *Oklahoma*, 2021 WL 6064000, at *3–5. And as Oklahoma no longer seriously disputes, the Reservations constitute Indian lands under SMCRA. *Id.* at *5–6.

1. SMCRA—and Oklahoma's state laws and regulations—preclude Oklahoma from exercising authority over surface coal mining and AML reclamation on "Indian lands"

As the Court has already recognized, SMCRA "plainly precludes a state from administering either a Title IV reclamation program or a Title V regulatory program on Indian land." *Oklahoma*, 2021 WL 6064000, at *3. It does so by establishing three separate regimes, depending on the status of the land—that is, on Indian lands, Federal lands, or lands within a state. 30 U.S.C. §§ 1300, 1253, 1273, 1291; *see also Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 271 & n.6 (1981). Although a state may

assume primacy by establishing a "State program," *see* 30 U.S.C. §§ 1235, 1242, 1291(21) (Title IV), 1253 (Title V), such a program may only apply to "lands within [the] State." *Id.* § 1291(25). "Lands within [the] State," in turn, expressly exclude Federal lands and Indian lands. *Id.* § 1291(11); *see also Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 315–16 (3d Cir. 2002) (States may assume jurisdiction "on non-Federal and non-Indian lands within the particular state."). SMCRA, therefore, explicitly denies states authority to exercise jurisdiction over surface coal mining and AML reclamation on Indian lands. *New Mexico ex rel. Energy & Min. Dep't v. U.S. Dep't of the Interior*, 820 F.2d 441, 445 (D.C. Cir. 1987) (Title V); *Montana v. Clark*, 749 F.2d 740, 747–48 (D.C. Cir. 1984) (Title IV).

In contrast, the statute expressly grants such authority to OSMRE. Absent an approved Tribal program SMCRA grants to the Secretary of the Interior[6] the authority to administer Title V on Indian lands, 30 U.S.C. § 1300(j), including the authority to "incorporate the requirements of" SMCRA "in all existing and new leases issued for coal on Indian lands," *id.* § 1300(c)-(d); "include and enforce" any additional terms and conditions "as may be requested by the Indian tribe," *id.* § 1300(e); and approve any change to the terms and conditions of a coal lease on Indian lands, *id.* § 1300(f) ; *see also In re Surface Mining Regul. Litig.*, 627 F.2d 1346, 1365 (D.C. Cir. 1980) (recognizing the Secretary's Title V enforcement authority on Indian lands). OSMRE's regulations confirm this understanding, stating explicitly that OSMRE shall "be the regulatory authority on Indian lands[.]" 30 C.F.R. § 750.6(a)(1). Likewise, SMCRA gives the Secretary the ability

[6] The Secretary acts through OSMRE in exercising her responsibilities under SMCRA relevant to this action. 30 U.S.C. § 1211(a), (c).

to expend funds for the purpose of achieving the goals of Title IV on Indian lands where an "Indian tribe does not have an approved abandoned mine reclamation program." 30 U.S.C. § 1232(g)(3)(C). That same provision clarifies that states do not receive reclamation funds from fees "collected with respect to Indian lands." *Id.* § 1232(g)(1)(A). Consistent with SMCRA and OSMRE's regulations, Oklahoma's State programs do not extend to Indian lands by their own terms.[7]

2. The Reservations are "Indian lands" under SMCRA

Oklahoma no longer seriously disputes that the Reservations constitute "Indian lands" under SMCRA. In *McGirt*, the Supreme Court held that Congress had never disestablished the Muscogee Reservation. 140 S. Ct. at 2459–60, 2463–74. Soon afterwards, the OCCA applied *McGirt*'s reasoning to the Cherokee and Choctaw Reservations and held that they, too, were never disestablished.[8] *Hogner*, 500 P.3d at 635

[7] Oklahoma defines its "State program" as a program "to regulate surface coal mining and reclamation operations on non-Indian and non-Federal lands," Okla. Admin. Code § 460:20-3-5, and expressly limits the applicability of its program to non-Indian lands, *id.* §§ 460:20-3-6, 20-11-1, 20-15-3. OSMRE confirmed the same in its approval of Oklahoma's Title V program, explicitly limiting that approval only to "non-Indian and non-Federal lands within Oklahoma . . . ." 47 Fed. Reg. 14,152, 14,153 (Apr. 2, 1982), and in approving amendments to Oklahoma's Title IV program, 70 Fed. Reg. 16,941, 16,944 (Apr. 4, 2005) (the program "does not provide for reclamation and restoration of land and water resources adversely affected by past coal mining on Indian lands.").

[8] The Supreme Court recently reaffirmed this holding of *McGirt* and subsequent OCCA cases in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491–92 (2022) ("In *McGirt*, the Court held that Congress had never properly disestablished the Creek Nation's reservation in eastern Oklahoma. As a result, the Court concluded that the Creek Reservation remained 'Indian country.' . . . In light of *McGirt* and the follow-on cases, the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country."). In *Castro-Huerta*, the Court held that Oklahoma has concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country, reasoning that neither the General Crimes

(Cherokee Nation); *Sizemore*, 485 P.3d at 871 (Choctaw Nation of Oklahoma). SMCRA defines "Indian lands" as "all lands . . . within the exterior boundaries of any Federal Indian reservation . . . ." 30 U.S.C. § 1291(9). As this Court has already explained, because the Reservations remain intact, the lands within them are necessarily Indian lands for purposes of SMCRA. *See Oklahoma*, 2021 WL 6064000, at *5. Therefore, because none of these Tribes currently has a Tribal program, OSMRE has exclusive jurisdiction over surface coal mining and AML reclamation on lands within the exterior boundaries of the Reservations.

B. SMCRA preempts Oklahoma's exercise of jurisdiction within the Reservations

Federal Defendants are entitled to summary judgment on their second claim because SMCRA preempts Oklahoma's application of its State programs or other state laws regarding surface coal mining to lands within the Reservations. The doctrine of preemption derives from the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It thus "invalidates state laws that 'interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution.'" *United States v. City & Cnty. of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996) (quoting *Wis. Pub. Intervenor v. Mortier*,

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Act, 18 U.S.C. § 1152, nor Public Law 280, 18 U.S.C. § 1162 and 25 U.S.C. § 1321, "preempts preexisting or otherwise lawfully assumed state authority to prosecute crimes committed by non-Indians against Indians in Indian country." 142 S. Ct. at 2494. Even if *Castro-Huerta* applied to these civil cases, it confirms OSMRE's exclusive jurisdiction because the plain terms of SMCRA *do* "plainly preclude[ ] a state from administering either a Title IV reclamation program or a Title V regulatory program on Indian land," as this Court previously recognized. *Oklahoma*, 2021 WL 6064000, at *3.

501 U.S. 597, 604 (1991)). A state law may be preempted on its face or as applied to a specific circumstance. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (preemption "inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written").

The Tenth Circuit does not "invoke any presumption against preemption," but instead focuses "on the plain language of the [statute] 'which necessarily contains the best evidence of Congress' preemptive intent.'" *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1023–24 (10th Cir. 2022) (citation omitted)). "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Whether or not the statute contains expressly preemptive language, preemptive intent may be "inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Id.* at 76–77. In determining whether a federal statute preempts state law, "the purpose of Congress is the ultimate touchstone[.]" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted).

1. SMCRA expressly preempts Oklahoma's exercise of authority over surface coal mining and AML reclamation within the Reservations

SMCRA's plain language, structure, and framework evince Congress's clear intent to preempt state authority over surface coal mining and AML reclamation outside of State programs approved by the Secretary of the Interior. To start, § 1255(a) states that SMCRA expressly "supersede[s]" state laws and regulations that are "inconsistent with" its terms. 30 U.S.C. § 1255(a). This language clearly indicates Congress' intent to preempt

inconsistent state regulation, and the constraints it imposes are reflected in Oklahoma's State programs, which expressly exclude application to Indian lands. *See supra* Part I.A.1.

Even apart from § 1255, Congress designed SMCRA as a "comprehensive statute that regulates *all* surface coal mining operations" in the United States. *United States v. Navajo Nation*, 556 U.S. 287, 300 (2009) (emphasis added). It "establishes a program of cooperative federalism that allows the States . . . to enact and administer their own regulatory programs" within the limits of the statute. *Hodel*, 452 U.S. at 289. Its complexity and its establishment of separate regulatory and AML reclamation schemes for different types of lands and jurisdictional circumstances reflect Congress's deliberate intent to carefully apportion regulatory authority. Outside of SMCRA's explicit allowances for state and tribal regulation via programs approved by the Secretary, surface coal mining and AML reclamation is an "otherwise pre-empted field." *Printz v. United States*, 521 U.S. 898, 926 (1997) (citing *Hodel*, 452 U.S. at 288).

Most important to this action, SMCRA expressly excludes Indian lands from state jurisdiction and reserves such jurisdiction to OSMRE or tribes with approved programs. *See supra* Part I.A.1. The statute is explicit that a state cannot exercise authority over surface coal mining and AML reclamation within its borders absent an approved "State program." 30 U.S.C. §§ 1235(b) and (d), 1242(a) , 1291(21) (Title IV); *id.* § 1253(a) (Title V). Because a "State program" may only apply to "lands within such State," 30 U.S.C. § 1291(25), which explicitly excludes Indian lands, *id.* §§ 1291(11), 1235(b), (k) , SMCRA expressly prohibits state jurisdiction within Indian lands. *Oklahoma*, 2021 WL 6064000, at *3–4; *see also New Mexico*, 820 F.2d at 445; *Montana*, 749 F.2d at 747–

48. The application of Oklahoma's State programs or other laws and regulations to surface coal mining and AML reclamation within the Reservations therefore exceeds the authority granted by Congress to states and is preempted. *See Printz*, 521 U.S. at 926.

2. Conflict preemption also precludes Oklahoma's exercise of authority over surface coal mining and AML reclamation within the Reservations

Oklahoma's application of its State programs or other state laws or regulations to the Reservations is also preempted because it directly conflicts with SMCRA. Conflict preemption occurs when "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" or when "compliance with both federal and state regulations is a physical impossibility." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citation omitted). Both types apply here.

First, SMCRA limits state authority over surface coal mining and AML reclamation to approved State programs, which exclude Indian lands. It requires OSMRE to ensure that surface coal mining operations on Indian lands comply with federal standards and regulations. *See* 30 U.S.C. § 1300(c)–(d). And it affords tribes an opportunity to regulate surface coal mining and conduct AML reclamation within their reservations through an approved Tribal program. *See* 30 U.S.C. §§ 1235(k), 1300(j. State authority over surface coal mining and AML reclamation on Indian lands therefore would stand as an obstacle to the execution of the purpose of the statute by introducing an additional regulator that Congress plainly intended to preclude. *See Bragg*, 248 F.3d at 289.

The Supreme Court has found state regulation preempted in circumstances similar to this one. For example, like SMCRA, the Occupational Safety and Health Act (OSHA)

permits states to "assume responsibility for development and enforcement" of certain standards via a federally approved program. 29 U.S.C. § 667(b). Based on OSHA's structure, the Supreme Court held that the statute preempts state regulation outside of an approved program—regardless of whether the state regulation directly conflicts with federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98–99, 103–04 (1992). Similarly, the Supreme Court relied on the "all-encompassing program of water pollution regulation" in the Clean Water Act to conclude that the Act preempts state laws imposing different standards. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (citation omitted). There, as here, "[i]t would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate" state law and regulation that has "the potential to undermine this regulatory structure." *Id.*

The second form of conflict preemption occurs when compliance with both federal and state regulations is a "physical impossibility," such as when each would dictate a mutually incompatible result. *See Brewer v. Zawrotny*, 978 F.2d 1204, 1206–07 (10th Cir. 1992) (state law preempted where it would result in life insurance paid to a different beneficiary than dictated by federal law). That is the case here. For example, if Oklahoma continued to apply its program to Indian lands, an operator would need to acquire two permits under two different regulatory regimes, each with a bond—one payable to OSMRE and one to the State for the same operation. *See* 30 C.F.R. §§ 750.6(a)(6), 750.17, 800.16(b); Travers Decl. ¶¶ 4–5, ECF No. 71-4. And if OSMRE issued a notice of violation to an operator and ODM purported to issue a notice for the same violation under state law, a single penalty would not satisfy both. Appeals of such citations would go to different

tribunals—the Department of the Interior's Office of Hearings and Appeals and Oklahoma's hearing authority—which could lead to inconsistent judgments.

Finally, it is irrelevant that Oklahoma's laws and regulations, which by their terms do not apply to Indian lands, may purport to share the same objectives as SMCRA. "[I]t is not enough to say that the ultimate goal of both federal and state law" is the same. *Int'l Paper*, 479 U.S. at 494. "A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id*. In SMCRA, Congress has established a complex program for the regulation of surface coal mining and AML reclamation nationwide that balances the interests of operators, landowners, the public, states, and tribes. Oklahoma's unlawful exercise of authority over surface coal mining and AML reclamation on Indian lands "upset[s] the balance of public and private interests so carefully addressed by the Act," and prevents OSMRE from fulfilling its statutory duties under SMCRA. *Id.* SMCRA thus preempts any application of Oklahoma's State programs or other state laws or regulations regarding surface coal mining and AML reclamation within the Reservations.

3. Oklahoma may not exercise concurrent jurisdiction

Because SMCRA fully preempts the exercise of authority over surface coal mining and AML reclamation by states within Indian lands, Oklahoma may not exercise concurrent jurisdiction. Neither of Oklahoma's arguments to the contrary alter that result.

First, Oklahoma argues that SMCRA "merely creates minimum standards on Indian lands that Oklahoma's state laws and regulations satisfy," such that it should be allowed to enforce those laws and regulations within the Reservations. Pls.' Mot. for Summ. J. & Br.

in Supp. 26-27, ("State's Brief") at 26–27, ECF No. 97. But SMCRA explicitly *excludes* "Indian lands" from Oklahoma's jurisdiction. Oklahoma's State programs—and therefore its state laws governing surface coal mining and AML reclamation—cannot apply to Indian lands as a matter of law and therefore cannot be enforced on Indian lands *at all*, let alone concurrently with a Federal or Tribal program. *See Bragg*, 248 F.3d at 293 (SMCRA "does not provide for *shared* regulation of coal mining"); *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 318 (same).

The specific provisions of SMCRA cited by Oklahoma reinforce this conclusion. State's Brief at 26–27. As discussed *supra* Part 1.B.1, § 1255(a) demonstrates that Congress intended for SMCRA to preempt any "State law or regulation" that is "inconsistent" with its terms.[9] The same is true for § 1254(g), which likewise demonstrates Congress's intent to preempt state laws and regulations that "interfere with the achievement of" SMCRA's "purposes and . . . requirements."[10] 30 U.S.C. § 1254(g). Because SMCRA vests authority over surface coal mining and AML reclamation on Indian lands in OSMRE alone (absent a Tribal program), Oklahoma's application of its State programs or any other

[9] To the extent that Oklahoma argues that it may enforce state laws or regulations related to surface coal mining or reclamation activities separate from its State programs within the Reservations, it has not identified nor argued any such law or regulation in its complaints or opening brief. Moreover, as discussed above, SMCRA preempts state authority over surface coal mining and AML reclamation outside of a State program, which cannot apply to Indian lands, and § 1255 explicitly supersedes *any* "state law or regulation" inconsistent with SMCRA, regardless of whether that law is part of a State program.

[10] As discussed *infra* Part II.B.1.b, § 1254(g) comes into play only when a Federal program is promulgated for a state, which has not happened here. Still, § 1254(g) supports Congress's preemptive intent.

state law or regulation regarding surface coal mining or AML reclamation to Indian lands is "inconsistent with" SMCRA and "interferes with" the achievement of SMCRA's goals.

Second, Oklahoma argues that SMCRA's legislative history supports concurrent jurisdiction. State's Brief at 27–28. But the legislative history is irrelevant where, as here, the plain language of the statute itself evinces Congress's intent to preempt state regulation of surface coal mining and AML reclamation. *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Even were it relevant, the legislative history overwhelmingly indicates that Congress intended the Secretary, not states, to regulate surface coal mining and AML reclamation on Indian lands until or unless Tribal programs were established. *See, e.g.,* H.R. Rep. No. 95-218 at 133–34 (1977) (requiring "the Secretary" to "enforce" and "incorporate" SMCRA's provisions and standards on Indian lands); S. Rep. No. 95-128 at 99 (1977) ("'Land within any State' is so defined and used throughout the Act so as to insure that the States, through their State programs, will not assert any additional authority over . . . Indian lands").[11] Courts have consistently divined from this history and the plain text of the statute Congress's intent that the Secretary, and not the states, exercise authority

[11] Oklahoma suggests that Congress struck a provision that would have directed the Secretary to regulate surface coal mining on Indian lands. State's Brief at 27. In fact, as Oklahoma's cited source explains, while Congress initially considered a variety of approaches to regulation on Indian lands, including purely federal regulation, it ultimately decided that it needed more information and directed the Secretary of the Interior to "study the question of the regulation of surface mining on Indian lands." S. Rep. No. 93-402, at 74 (1973); 30 U.S.C. § 1300(a). In the interim, however, Congress "expect[ed] the *Secretary of the Interior* to protect the surface values of all Indian lands from the potential ravages of surface mining through his authority to approve all mineral leases and permits." S. Rep. No. 93-402, at 74 (emphasis added).

over surface coal mining and AML reclamation on Indian lands absent a Tribal program. *See In re Surface Min. Regul. Litig.*, 627 F.2d at 1364–65; *Montana*, 749 F.2d at 749.

C. Equitable principles cannot overcome SMCRA's plain statutory language

Faced with Congress's clear intent to preclude state authority over surface coal mining and AML reclamation on Indian lands, Oklahoma tries to find a loophole by invoking "fundamental principles of equity." But in *McGirt*, the Supreme Court expressly rejected Oklahoma's "unspoken message" that the Court "should be taken by the 'practical advantages' of ignoring the written law." 140 S. Ct. at 2474. Oklahoma's similar equitable arguments here must be rejected for the same reason.

1. *Sherrill* and its progeny do not authorize granting relief directly contrary to a Federal statute

As this Court has already recognized, equitable principles cannot defeat a federal statute. *Oklahoma*, 2021 WL 6064000, at *6. Because SMCRA mandates that only OSMRE may exercise authority over surface coal mining and AML reclamation on Indian lands (absent a Tribal program) and expressly precludes a state from so doing, the Court's inquiry is at an end—Oklahoma's appeal to equity cannot succeed in the face of contrary Congressional instruction. *See, e.g., Ute Indian Tribe of Uintah v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016) ("[I]t is not for [courts] to override Congress's commands on the basis of claims of equity from either side." (citation omitted)); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 900–01 (10th Cir. 2017) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." (quoting *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327–28 (2015))).

Rather than engage with this "foundational principle," *Safe Streets*, 859 F.3d at 901, Oklahoma tries to analogize these cases to *City of Sherrill v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), and two Second Circuit cases that applied it—*Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), and *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010)—on the basis that those cases also involved a federal statute. This analysis suffers numerous flaws.

In *Sherrill*, *Cayuga*, and *Oneida*, Tribes argued that they were dispossessed of their lands in the late 1700s and early 1800s in violation of the Nonintercourse Act, a federal statute that barred the sale of Tribal land without the federal government's consent. To remedy these past wrongs, the Tribes sought to revive their sovereignty over reacquired lands (*Sherrill*) and to take possession of lands that had long since passed into private ownership or recover money damages based on that right of possession (*Oneida* and *Cayuga*). The courts held that these "possessory land claims" were barred by equitable defenses, including laches, because they were "inherently disruptive" in seeking "to overturn years of settled land ownership." *Oneida*, 617 F.3d at 126.

There are a number of important differences between these cases and *Sherrill*, *Cayuga*, and *Oneida*. Most notably, the United States was not a party to *Sherrill,* and Oklahoma seeks to apply equitable principles in a manner that is different in kind from *Sherrill, Cayuga,* and *Oneida*—to alter the express mandate of Congress over an area in which it has clear authority. The relief that Oklahoma seeks—state authority over surface coal mining and AML reclamation on Indian lands—is expressly prohibited by SMCRA (as well as Oklahoma's own state laws and regulations). The courts in *Sherrill*, *Cayuga*,

and *Oneida* reached the question of whether equitable defenses barred the relief requested by the Tribes because no statute or regulation, including the Nonintercourse Act, otherwise resolved the issue. In contrast, here Congress has spoken and "courts may not invoke equity to craft a remedy inconsistent with the law."[12] *Sanders v. Mountain Am. Fed. Credit Union,* 689 F.3d 1138, 1144 (10th Cir. 2012); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation'" and cannot choose not to enforce a federal statute. (citation omitted)).

Oklahoma tries to avoid this result by suggesting that *McGirt* left open the possibility that equitable doctrines would "protect those who have reasonably labored under a mistaken understanding of the law." 140 S. Ct. at 2481. But as this Court has already recognized, *McGirt* "squarely rejected any notion that reliance interests could undermine the enforcement a federal statute," even when the result may be disruptive. *Oklahoma*, 2021 WL 6064000, at *6; *see also McGirt*, 140 S. Ct. at 2481 ("dire warnings" of "drastic" consequences are "not a license for us to disregard the law"). The Second Circuit—the same court that decided *Oneida* and *Cayuga*—reached this same conclusion in *Cayuga v. Tanner* where it refused to "read extratextual limitations" into the Indian

[12] Although no statute directly addressed the availability of the remedy sought by the Tribe in *Sherrill*, the Supreme Court noted that Congress had provided a mechanism for the acquisition of land in trust and described that mechanism as the "proper avenue for [the tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Sherrill*, 544 U.S. at 221. Likewise, here the proper mechanism for resolving authority over surface mining and AML reclamation on Indian lands is SMCRA, which represents Congress's decision as to how best to balance "the complex interjurisdictional concerns" involved in surface coal mining and AML reclamation. *Id.* at 220.

Gaming Regulatory Act (IGRA). 6 F.4th 361, 379 (2d Cir. 2021) . While Oklahoma tries to distinguish *Tanner* as a case about an "antecedent question," State's Brief at 22, the court in *Tanner* reached the question of relief—and held that because IGRA preempted local gaming regulation on Indian lands and the parcel at issue constituted Indian lands, no other relief was available, including on the basis of equities. *See* 6 F.4th at 379.

2. Equitable considerations do not provide a basis for Oklahoma to exercise SMCRA jurisdiction within the Reservations

The Court need not—indeed, should not—look beyond the plain language of SMCRA to reject Oklahoma's equitable arguments. But even if the Court considers those arguments, *Sherrill*, *Cayuga*, and *Oneida* do not provide a basis for applying equitable defenses like laches against the United States in these cases, and, even if they did, the tests proposed by *Cayuga* and *Oneida* weigh against such defenses applying here.

a) *Sherrill*, *Cayuga*, and *Oneida* do not provide a basis for applying equitable defenses against the United States

Oklahoma relies on *Cayuga* to contend that equitable defenses[13] should apply against the United States in these cases.[14] *See* State's Brief at 19–21. But even the *Cayuga* court "recogniz[ed] that the United States has traditionally not been subject to the defense of laches" and therefore limited its holding to the case at hand and did "not purport to set

[13] Although *Cayuga* analyzed equitable defenses under the umbrella of "laches," the Second Circuit clarified in *Oneida* that "*Cayuga* applied not a traditional laches defense, but rather distinct, albeit related, equitable considerations that it drew from *Sherrill*." 617 F.3d at 128. Like the Second Circuit and Oklahoma, Federal Defendants use the terms "laches" and "equitable defenses" interchangeably in this brief.

[14] The Supreme Court in *Sherrill* applied laches to the Oneida Indian Nation, not to the United States, which was not a party to that case.

forth broad guidelines for when the doctrine might apply." 413 F.3d at 278–79. Those limitations are appropriate as *Cayuga*'s laches analysis is at best nontraditional, *see Oneida*, 617 F.3d at 128, and is derived from a Seventh Circuit case which expressly refrained from determining when laches might apply against the federal government, *Cayuga*, 413 F.3d at 278–79; *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 672–73 (7th Cir. 1995) (the court "need not pursue the question of the existence and scope of a defense of laches in government suits to resolve this case").

Rather than rely on out-of-circuit case law, a better starting point is the Tenth Circuit, which has consistently held that "as to its governmental function, the doctrine of laches does not apply to the United States nor to its officers or agencies." *Thompson v. United States*, 312 F.2d 516, 519 (10th Cir. 1962); *see also Ute Indian Tribe*, 835 F.3d at 1263 ("[L]aches is a line of defense that usually may not be asserted against the United States."). Courts within this Circuit have been wary of recognizing new exceptions to this general rule, particularly based on extensions of *Cayuga*. *See, e.g.*, *United States ex rel Baker v. Cmty. Health Sys., Inc*., No. CIV 05-279 WJ/WDS, 2011 WL 13115254, at *8 (D.N.M. Dec. 7, 2011) (refusing to apply laches to United States based on *Cayuga* in False Claims Act case). Reliance on such equitable considerations is particularly "disfavored" in litigation involving federal environmental statutes "because of the interests of the public in environmental quality" and concern that "[a] less grudging application of the doctrine might defeat Congress's environmental policy." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1092 (10th Cir. 2014). Applying laches here would defeat Congress'

environmental policy in SMCRA to vest authority over surface coal mining and AML reclamation on Indian lands exclusively in OSMRE (absent a Tribal program).

But even if the Court accepts Oklahoma's invitation to deviate from Tenth Circuit precedent, the Second Circuit's laches factors in *Cayuga* do not justify applying laches to the United States here. Most importantly, even if the finding in *Cayuga* were accurate and the Tribe's rights at issue there were "private rights," the rights at issue here cannot be classified as private. Here, the United States is acting on its own behalf to vindicate OSMRE's authority to further the public interest by preventing "adverse effects of surface coal mining operations" on Indian lands. 30 U.S.C. § 1202(a); *see also id.* § 1202(m) (It is a purpose of SMCRA to "wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations."). And even *Cayuga* is clear that its application of laches against the United States in that case "does not disturb" prior Second Circuit cases holding that laches is not available against the government when it seeks to enforce a public right or protect the public interest. *Cayuga*, 413 F.3d at 279 n.8; *see also United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("[T]he United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.").

Oklahoma relies on an out of context quotation to contend that the United States is seeking to "vindicate the purported interest of the Tribes." State's Brief at 21. But as Federal Defendants explained in the brief cited by Oklahoma, their interest in these cases is "defending [*OSMRE's*] exercise of jurisdiction under SMCRA." ECF No. 44 at 6. That interest happens to be "coextensive" with the Tribes' interest in ensuring the continued

recognition of their Reservations in light of *McGirt*, as OSMRE's jurisdiction under SMCRA turns on that same recognition of the Reservations. *Id.* at 6–8. As numerous courts have held, laches does not apply when the United States is vindicating its own interests and those of the public, even if those align with the Tribes'. *See, e.g.*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV13883JGB(SPX), 2016 WL 2621301, at *4 (C.D. Cal. Feb. 23, 2016) ("When the United States acts as trustee for an Indian tribe, it is acting in its sovereign capacity to enforce a public right or public interests, and as such, delay-based offenses do not apply to it"); *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at *23 (E.D. Mich. Oct. 22, 2008) (same). Here, the matter is even more clear-cut than in those cases. In seeking to vindicate OSMRE's own authority under SMCRA, the United States is not acting in its capacity as a trustee for any tribe but rather in its own interest and the interest of the public in ensuring compliance with federal law and proper reclamation of surface coal mining sites pursuant to Congress' direction.

Second, this is not a case of laches, let alone "egregious" laches under the *Cayuga* factors. Laches applies when a party unreasonably delays in asserting a claim even after the party knew or should have known of the claim. *Biodiversity Conservation All.*, 762 F.3d at 1091. Here, OSMRE approved of Oklahoma's exercise of SMCRA authority for the past 40 years based on the broad understanding that Congress had disestablished the Reservations. Until *McGirt*, OSMRE—like Oklahoma—did not question the status of the Reservations. But after *McGirt*, *Hogner*, and *Sizemore*, OSMRE acted swiftly to determine the effect of the decisions on SMCRA authority within the Reservations and begin

transitioning the administration of SMCRA on Indian lands to OSMRE. *See, e.g.*, OSMRE0638–42 (April 2, 2021 Letters); OSMRE0748–65 (June 17, 2021 Letters); OSMRE0792–94 (August 25, 2021 Letters). The Court should decline Oklahoma's invitation to rewrite a clear statutory mandate by fashioning a new exception to the general rule that laches does not apply against the United States.

b) The *Cayuga* and *Oneida* tests weigh against relying on equitable factors to allow Oklahoma to exercise authority

Even if the Court were willing to deviate from Congress' clear intent in SMCRA and from the rule that equitable defenses do not apply against the United States, application of Oklahoma's proposed test, *see* State's Brief at 24 (citing *Oneida*, 617 F.3d at 127), would not displace OSMRE as the exclusive SMCRA authority within the Reservations.

First, the "length of time at issue" weighs against application of equitable defenses here. The Supreme Court issued its decision in *McGirt* on July 9, 2020 and the OCCA issued its decisions in *Hogner* and *Sizemore* on March 11, 2021 and April 1, 2021. OSMRE notified Oklahoma of its SMCRA jurisdiction and the necessary transfer of operations within the Muscogee Reservation on April 2, 2021 and within the Cherokee and Choctaw Reservations on June 17, 2021, and published corresponding public notice in the *Federal Register* on May 18, 2021 and October 19, 2021. OSMRE0638, 641, 699, 757, 760, 813.

Second, OSMRE's exercise of SMCRA authority within the Reservations does not present the sort of disruption alleged in *Sherrill*, *Cayuga*, and *Oneida*. As a primacy state, Oklahoma exercises federally delegated authority under federal oversight. *See Bragg*, 248 F.3d at 294 ("States ultimately remain subject to SMCRA" even after achieving primacy).

Transitioning that authority to OSMRE does not involve reversing several hundred years of regulatory authority by local governments, *see Sherrill*, 544 U.S. at 220, or the potential for the ejectment of tens of thousands of private land owners, *Cayuga*, 413 F.3d at 275, or over 200 years of past rental damages, *Oneida*, 617 F.3d at 126. The transition here is neither exceedingly difficult nor impracticable, as demonstrated by the fact that SMCRA authority transferred to OSMRE by operation of law and OSMRE is acting as the regulatory and AML reclamation authority within the Reservations. *See* Third Maki Decl. ¶¶ 3–5; Pritchard Decl., ECF No. 97-1 (ODM closed its Tulsa Field Office); Toole Decl., ECF No. 97-2 (OCC directs AML emergencies to OSMRE).

Third, and similarly, OSMRE's exercise of jurisdiction does not upset the justifiable expectations of individuals and entities, let alone those "far removed" from surface coal mining. All surface coal mining within Oklahoma for the past 40 years has occurred within the regulatory framework of SMCRA. Mine operators and other interested parties have been on notice for those past 40 years that Oklahoma regulates within the bounds of SMCRA, subject to OSMRE's oversight, and that OSMRE can take over SMCRA regulation in certain circumstances.[15] *See, e.g.*, 30 U.S.C. §§ 1235(d) (Title IV) and 1254(a)-(b) (Title V). The mere shifting of the administration of SMCRA from Oklahoma under OSMRE's oversight to OSMRE alone is not equivalent to the "upset[ting of] years

[15] Indeed, OSMRE implemented a Federal program in Oklahoma between 1984 and 1987. *See* 49 Fed. Reg. 14,674 (Apr. 12, 1984).

of settled land ownership" that the Second Circuit found compelling in *Cayuga* and *Oneida*.[16] 413 F.3d at 275; 617 F.3d at 127.

Finally, Oklahoma accuses OSMRE of frustrating the public's justifiable expectations by delaying "taking up the SMCRA programs." State's Brief at 25. But Oklahoma fails to acknowledge its own role in that delay—including by directing state agencies not to comply with OSMRE's transition-related requests, such as the sharing of information and records. *See* OSMRE0686, 799–800. It was not until Federal Defendants filed their own preliminary injunction motion, spurring the parties to reach an agreement on various transition-related issues in February 2022, *see* ECF No. 86, that Oklahoma truly engaged in the transition process that the agency had initially requested beginning in April 2021. *See* OSMRE0639, 642.

II. Federal Defendants are entitled to summary judgment on Oklahoma's remaining claims

The remainder of Oklahoma's claims challenge OSMRE's compliance with SMCRA's procedural requirements and the APA. Federal Defendants are entitled to summary judgment on those claims foremost because OSMRE's assertion of jurisdiction within the Reservations was mandated by SMCRA's plain language once the Supreme Court and OCCA recognized the continuing existence of the Reservations. As a result,

[16] Oklahoma also calls upon the "justifiable expectations of millions of Oklahomans." State's Brief at 25. But to the extent millions of Oklahomans have expectations about surface coal mining within the State, those expectations are that such mining and AML reclamation will be conducted pursuant to SMCRA in order to protect public health and the environment. They do not have a justifiable expectation that the State, rather than OSMRE, will administer the statute.

OSMRE's actions were not arbitrary or capricious and Oklahoma has demonstrated no prejudice from those actions, rendering any potential error harmless. The Court need not reach those merits, however, because it lacks jurisdiction to hear Oklahoma's APA and SMCRA claims.

A. The law mandates OSMRE's assertion of SMCRA jurisdiction

OSMRE's assertion of SMCRA jurisdiction within the Reservations is not only "in accordance with law" under 5 U.S.C. § 706(2)(A)—it is *mandated* by the law. As this Court has already recognized, Oklahoma may not exercise SMCRA authority within the Reservations. *Oklahoma*, 2021 WL 6064000, at *3–5. In the absence of a Tribal program, only OSMRE may do so. *Supra* Part I.A. Accordingly, OSMRE's exercise of SMCRA jurisdiction within the Reservations complies with the governing law—SMCRA, its regulations, *McGirt*, *Hogner*, and *Sizemore*.

For the same reason, OSMRE's actions "cannot be described as arbitrary and capricious given that SMCRA does not permit Oklahoma to administer a state program on Indian land." *Oklahoma*, 2021 WL 6064000, at *9. Oklahoma provides no convincing argument as to how an agency action can be "arbitrary and capricious" when the law requires the agency to take that very action—and when it has explained as much. OSMRE's actions thus do not violate the APA.

Finally, also for this reason, any alleged APA violation is at best harmless because Oklahoma has demonstrated no prejudice and the Court could not provide the relief that Oklahoma ultimately seeks—application of its State programs or any other state laws or regulations governing surface coal mining and AML reclamation to the Reservations. *See*

Shinseki v. Sanders, 556 U.S. 396, 409 (2009) (party seeking to set aside an agency action "carries the burden of showing that prejudice resulted'"); *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.,* 684 F.3d 1002, 1008 (10th Cir. 2012) (APA violation "does not require reversal unless a plaintiff demonstrates prejudice resulting from the error"); 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). No amount of administrative procedure or additional explanation of OSMRE's reasoning could allow Oklahoma to exercise SMCRA jurisdiction within the Reservations. For these reasons alone, Federal Defendants are entitled to summary judgment on Oklahoma's second through fifth claims.[17]

B. The Court lacks jurisdiction to hear Oklahoma's APA claims

Even if the Court were inclined to investigate Oklahoma's APA claims further, it could not because it lacks jurisdiction under SMCRA's judicial review provision to hear them. The APA provides for judicial review of challenges to "agency actions," as the APA defines them. 5 U.S.C. § 706(2). SMCRA's judicial review provision then sets a court's jurisdiction to hear such a challenge based on the type of agency action at issue. 30 U.S.C. § 1276(a). Even if the Court considers OSMRE's assertion of SMCRA jurisdiction within the Reservations an "agency action" under the APA, the Court lacks jurisdiction under § 1276(a) to review the only type of action it reasonably constitutes—that is, "any other action constituting rulemaking."

[17] Oklahoma also alleges violations of its "rights to fundamental fairness and due process" (Count 6), but does not separately argue that vague claim and so waives it. Even if not waived, Federal Defendants are entitled to summary judgment on the claim for the reasons set forth in this section.

1. SMCRA deprives the Court of jurisdiction

An State program under SMCRA comprises state laws and regulations governing surface coal mining regulation and AML reclamation on lands within a state, as SMCRA defines them. *See* 30 U.S.C. §§ 1253, 1291(11), (21), (25). Once it has an approved State program, a state must then "implement, administer, enforce and maintain" that program "in accordance with" SMCRA, OSMRE regulations, and "the provisions of the approved State program." 30 C.F.R. § 733.11 (Title V), § 884.16 (Title IV).

OSMRE has not disapproved or amended the laws or regulations making up Oklahoma's State programs themselves, which have always excluded "Indian lands," or implemented a Federal program in Oklahoma. As a result, none of the processes Oklahoma invokes apply to this circumstance. OSMRE has only informed Oklahoma that it may not *administer*, *implement*, or *enforce* its preexisting and unaltered State programs within the Reservations, which are Indian lands. So even if OSMRE's actions constituted "agency action" under the APA, they fall within the category of "[a]ny other action constituting rulemaking" and SMCRA vests exclusive jurisdiction for such claims in courts other than that of this District. 30 U.S.C. § 1276(a)(1).

a) OSMRE did not disapprove or amend Oklahoma's State programs

At the preliminary injunction stage, the Court concluded that "OSMRE's decision functions as a disapproval of Oklahoma's State program" because all surface coal mining operations and AML reclamation sites previously within Oklahoma's jurisdiction now fall within the Reservations. *Oklahoma*, 2021 WL 6064000, at *7 n.5. In doing so, however,

the Court did not consider the plain language of SMCRA and OSMRE's regulations, under which a "disapproval" of a State program is a response to a state's application to either begin or amend a State program, and an "amendment" is an action that approves an alteration of a state's laws or regulations. Neither of those actions has occurred here.

Section 1253 of SMCRA sets forth the requirements and process for approval of a Title V State program. Under that process, a state wishing to assume jurisdiction for regulating surface coal mining and reclamation operations within the state must submit for approval a State program with certain elements. 30 U.S.C. § 1253(a). After evaluating the program, the Secretary must "approve or disapprove" it, "in whole or in part," and provide reasons for any disapproval. *Id.* § 1253(b), (c). If disapproved in whole or part, the state may "resubmit a revised State program or portion thereof," and the Secretary is again required to "approve or disapprove the resubmitted State program or portion thereof" within a set timeframe.[18] *Id.* § 1253(c) . OSMRE has promulgated regulations adding further procedures and criteria for approval or disapproval of a proposed State Title V program. *See* 30 C.F.R. §§ 732.10–732.16.

OSMRE has also established regulations for amending a State Title V program. *See* 30 C.F.R. § 732.17. Under those regulations, it is the state's obligation to "promptly notify the Director" of OSMRE "of any significant events or proposed changes" to the approved State program. *Id.* § 732.17(b). Even if OSMRE's Director independently "determines that

[18] SMCRA includes similar requirements for approval of a State AML program under Title IV, which requires the existence of a Title V program and deems a Tribe with eligible lands "a 'State'" for Title IV purposes. 30 U.S.C. § 1235. *See also* 30 C.F.R. § 884.14 (process for approving or disapproving a State reclamation plan).

a State program amendment is required," the state must still submit a proposed amendment, *id.* § 732.17(f), which the Director approves or disapproves after following the requisite procedures, *id.* § 732.17(h). The Director is obligated to apply specific criteria when approving or disapproving a State program or amendment, *id*. §§ 732.17(h)(10), 732.15, and must disapprove an amendment within a given timeframe, *id.* § 732.17(h)(7)–(8).[19]

As these statutory and regulatory provisions make clear, "disapproval" in the SMCRA context means *denying* an *application* for either a new program or an amendment to an existing program and affording the state an opportunity to remedy any defects therein. Here, there was no application from Oklahoma—whether to institute a program or to amend it—for OSMRE to approve or disapprove. And no amendment or new application was necessary because Oklahoma's approved State programs—that is, its laws and regulations—already excluded "Indian lands," precluding Oklahoma's application of those laws and regulations to lands within the Reservations *See supra* Part 1.A. The Court's prior conclusion that OSMRE "disapproved" the State programs as a practical matter is thus inconsistent with SMCRA and the regulatory language. For the same reason, the Fourth Circuit's conclusion in *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006), that OSMRE must follow the same process for amending a State program as for initially approving it, and on which Oklahoma relies, *see* State's Brief at 41–42, is inapposite.

[19] A similar process exists for amending a State AML program under Title IV. 30 C.F.R. § 884.15.

b) OSMRE did not substitute a Federal program for Oklahoma's State programs

OSMRE also has not promulgated a "Federal program" in place of Oklahoma's State programs, and so was not obligated to follow the processes of 30 U.S.C. § 1254(a) or 30 C.F.R. § 733.13, as Oklahoma suggests, *see* State's Brief at 31–32, 39–40. Those procedures apply when a state is not effectively administering an already-approved Title V State program. 30 C.F.R. § 733.13(b). OSMRE has invoked those procedures in the past, and once implemented a Federal program in Oklahoma upon finding that ODM had failed to conduct necessary enforcement measures. *See* 49 Fed. Reg. at 14,674. Like a "State program," however, a "Federal program" that may be implemented in its place is statutorily limited to "lands within [a] State"—which exclude the Reservations. *See* 30 U.S.C. § 1291(6), (11). Therefore, OSMRE could not have, and did not, establish a "Federal program" applicable to the Reservations in place of Oklahoma's Title V State program.

Rather, as a practical matter and as the "regulatory authority on Indian lands" in the absence of a Tribal Title V program, 30 C.F.R. § 750.6, OSMRE is applying the existing "Federal program for Indian lands" to the Reservations, *id.* § 750.1; *see also* 30 U.S.C. § 1300(c)-(e); Yellowman Decl. ¶¶ 4–8, ECF No. 34-7. Despite its linguistic similarity to a "Federal program" under 30 U.S.C. § 1254, the "Federal program for Indian lands" is delineated by the 30 C.F.R. part 750 regulations and explicitly defined as "the regulation of surface coal mining and reclamation operations on Indian lands[.]" 30 C.F.R. § 750.1. OSMRE has likewise exercised its authority to operate a Federal reclamation program on Indian lands. 30 U.S.C. § 1232(g)(3)(C); *see also* 30 C.F.R. § 886.27 (procedure for

"Indian lands not subject to an approved Tribal reclamation program"). Because OSMRE has not implemented a Federal program as defined by 30 U.S.C. § 1291(6) in place of Oklahoma's State programs—which it has not altered in any way—OSMRE need not have followed the procedures for doing so found in 30 U.S.C. §§ 1235(d) and 1254(a) or 30 C.F.R. §§ 733.13 and 884.16.

c) The Court lacks jurisdiction to review any other alleged rulemaking

Neither SMCRA nor its regulations contain a procedure for what OSMRE must do when the status of the lands in question changes from "land within a State" to "Indian lands" following a high court decision. Because none of the existing regulations or procedures fit the facts, and because the shift in jurisdiction occurred as a matter of law, after deliberation, OSMRE notified Oklahoma that, in light of *McGirt*, *Hogner*, and *Sizemore*, Oklahoma's approved State programs could not be applied to the Reservations.

Oklahoma argues that this constituted a rulemaking under the APA, and thus that OSMRE should have—but did not—comply with the APA's informal rulemaking procedures, if nothing else.[20] *See* State's Brief at 40–43. But the Court lacks jurisdiction to review such claims for two reasons.

First, any action "constituting rulemaking" by OSMRE other than an approval or disapproval of a State program or the preparation or promulgation of a Federal program

[20] Oklahoma does not argue that OSMRE's actions constitute any other form of agency action under the APA. Such an argument is, accordingly, waived. *See Coleman v. Indep. Sch. Dist. No. 1-41 of Oklahoma Cnty.*, No. CIV-20-901-R, 2022 WL 289173, at *2 (W.D. Okla. Jan. 31, 2022).

may be heard "*only* by the United States District Court for the District in which the surface coal mining operation is located." 30 U.S.C. § 1276(a)(1) (emphasis added). This provision "sets subject matter jurisdiction" because it is "directive, not permissive[.]" *Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1550 (D.C. Cir. 1992). Here, Oklahoma has not disputed that all applicable surface coal mining operations within the Reservations are located outside of the Western District. *See* Maki Decl. ¶¶ 5–6 & Ex. A, ECF No. 34-4 Because, as explained *supra* Part II.B.1, OSMRE did not disapprove Oklahoma's State programs or promulgate Federal programs here, this Court lacks subject-matter jurisdiction to review claims challenging OSMRE's actions. *See Oklahoma*, 2021 WL 6064000, at *8 n.7.

Second, even if not jurisdictionally barred by the venue provision in 30 U.S.C. § 1276(a)(1), Oklahoma's claim challenging OSMRE's exercise of SMCRA authority within the Muscogee Reservation is untimely. SMCRA's jurisdictional provisions impose a 60-day statute of limitations period for "[a] petition for review of any action subject to judicial review under" that section. 30 U.S.C. § 1276(a)(1). That "sixty-day limitation period is jurisdictional." *Coal Corp. Operating Co. of Am. v. Hodel*, 876 F.2d 860, 861 (10th Cir. 1989). As the Court previously concluded, Oklahoma filed its action challenging OSMRE's April 2 Letters on July 16, 2021, more than 60 days after those letters issued. *Oklahoma*, 2021 WL 6064000, at *7–8.

Oklahoma attempts to overcome this difficulty by focusing on publication in the *Federal Register*. But the Court has already properly rejected Oklahoma's arguments that the *Federal Register* notices, rather than the letters, constituted the "agency action"

challenged here, because the letters "memorialize OSMRE's final decision and affect Oklahoma's rights and obligations . . . ." *Id.* Subsequent publication of OSMRE's conclusions in the *Federal Register* does not constitute "agency action" within the meaning of the APA where, as here, it does not reflect any decision by the agency, and merely informed the public of the information already communicated to Oklahoma.[21] *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974). Furthermore, because OSMRE did not disapprove, withdraw, or substitute Oklahoma's State programs, neither Federal regulations nor *Kempthorne* required publication in the *Federal Register*, as Oklahoma argues, *see* State's Brief at 30. Oklahoma's claims challenging OSMRE's assertion of its jurisdiction within the Muscogee Reservation under SMCRA's procedural requirements and the APA are untimely.[22]

2. OSMRE's challenged actions were not "agency actions" reviewable under the APA

This analysis assumes, of course, that OSMRE's assertion of SMCRA jurisdiction within the Reservations constitutes a reviewable "agency action" under the APA to begin with. Although the Court disagreed at the preliminary injunction stage, Federal Defendants maintain that it was not an agency action because OSMRE lacked discretion to reach any

[21] Oklahoma also contends that the April 2 Letters were not "final" because the 30-day transition period that OSMRE set through those letters was not met. As Oklahoma is well aware, it was not met because *Oklahoma* did not comply with it and, instead, fought transition every step of the way. *See* Fed. Defs.' Prelim. Inj. Mot. at 17–23, ECF No. 71 (establishing Oklahoma's lack of compliance with 30-day transition periods).

[22] Oklahoma did file its second action within 60 days of the June 17 Letters, but the first jurisdictional issue discussed above still precludes review of those claims.

other conclusion. It was the Supreme Court and OCCA that rendered the decisions that made OSMRE the authority within the Reservations by operation of SMCRA's plain language. *See Senior Executives Ass'n v. United States*, No. 8:12-CV-02297-AW, 2013 WL 1316333, at *17 (D. Md. Mar. 27, 2013); *Blakely v. United States*, 276 F.3d 853, 870 (6th Cir. 2002).

Accepting this argument would not mean that "all agency actions, whether discretionary or nondiscretionary, would be insulated from judicial review." *Oklahoma*, 2021 WL 6064000, at *8 n.6. The "committed to agency discretion" exemption in § 701(a)(2) is read "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019) (citation omitted). In the vast majority of circumstances, an agency's action is discretionary within the confines of the relevant law and thus reviewable. *See, e.g., City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 916–18 (10th Cir. 2004); *Payton v. U.S. Dep't of Agric.*, 337 F.3d 1163, 1168 (10th Cir. 2003). These cases are different from *Sac & Fox Nation of Missouri v. Norton*, which the Court cited because, there, no party disputed that an "agency action" had occurred. 240 F.3d 1250, 1261–62 (10th Cir. 2001). And whether an agency action is exempt from review because it is committed to agency discretion by law is secondary to the antecedent question of whether a case challenges "agency action."

C. Federal Defendants are entitled to summary judgment on the merits of Oklahoma's APA claims

Finally, even assuming that OSMRE's challenged actions constitute "agency actions" under the APA and that the Court has jurisdiction to review them, Federal Defendants remain entitled to summary judgement. As explained above, Federal Defendants' actions were required by—and thus in accordance with—the law. 5 U.S.C. § 706(2)(A). Oklahoma has not demonstrated that those actions were arbitrary or capricious or taken without observation of required procedures. *Id.* § 706(2)(A), (D).

1. OSMRE's assertion of SMCRA jurisdiction was not "without observance of procedure required by law"

Oklahoma argues that OSMRE was required to abide by certain procedures for "evaluating, amending, disapproving, or otherwise changing a State program." State's Brief at 31–32. But as explained *supra* Part II.B.1, OSMRE's exercise of SMCRA jurisdiction within the Reservations did not amend, disapprove, or otherwise change Oklahoma's State programs and did not promulgate a Federal program in its place. Neither SMCRA nor its regulations lays out a procedure governing this situation.

Nor was OSMRE required to engage in a notice and comment process in advance of alerting Oklahoma to the change in SMCRA jurisdiction. Nondiscretionary agency actions are not subject to the APA's notice-and-comment rulemaking requirements because, where an agency has no discretion, "providing notice and an opportunity for comment . . . would have served no purpose." *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011). Because the change in SMCRA jurisdiction occurred by operation of law, a notice and comment process would have been futile and agencies are not required "to do

a futile thing."[23] *Id.*; *see also Hispanic Info. & Telecomms. Network, Inc. v. FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (no additional procedures required where they would be "pointless formality in which the result was preordained").

2. OSMRE's actions were not arbitrary or capricious

Even assuming that OSMRE's *legally required* actions could be subject to arbitrary and capricious review, Oklahoma has not overcome the "presumption of validity [that] attaches to the agency action" nor carried its burden of demonstrating they were arbitrary or capricious. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014) (noting that this standard of review is "'very deferential' to the agency's determination"). Neither of Oklahoma's arguments on this front merit relief.

a) OSMRE provided a reasoned explanation

OSMRE explained its exercise of jurisdiction within the Reservations and "articulated a rational connection between the facts found and the choice made." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). Specifically, in its April 2 Letters, OSMRE explained the Supreme Court's recognition of the Muscogee Reservation in *McGirt*; that SMCRA "designates OSMRE as the regulatory authority over surface coal mining and reclamation operations on Indian lands where a tribe has not

[23] Moreover, OSMRE's actions are at best an interpretive rule and not subject to notice and comment for that additional reason. *See* 5 U.S.C. § 553(b)(3)(A). An interpretative rule "clarif[ies] a statutory or regulatory term, remind[s] parties of existing statutory or regulatory duties, or 'merely track[s]' preexisting requirements and explain something the statute or regulation already required." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236–37 (D.C. Cir. 1992)). Here, OSMRE did no more than clarify the operation of SMCRA in light of *McGirt*, *Hogner*, and *Sizemore*.

obtained primacy"; and that the reservation satisfied the statutory definition of "Indian lands." OSMRE0638–39; OSMRE0641–42. OSMRE then informed Oklahoma that Oklahoma "may no longer administer a SMCRA regulatory program" on those lands on that basis, and that OSMRE was the SMCRA authority within the Muscogee Reservation as a result. OSMRE0638–39; OSMRE0641–42. OSMRE reiterated these explanations with respect to the Cherokee and Choctaw Reservations in its June 17 Letters, after the OCCA recognized that they had not been disestablished. OSMRE0749–50; OSMRE0754–55. Though Oklahoma challenges these explanations on three bases, none supports setting aside the agency's legally required actions.

First, Oklahoma argues OSMRE should have addressed *Sherill* and the equitable considerations raised in that case. State's Brief at 33–34. But as explained *supra* Part I.C., *Sherrill* and its progeny are inapposite. Equitable considerations cannot overcome SMCRA's mandate.

Second, Oklahoma argues OSMRE failed to "address contrary evidence before the agency," invoking Oklahoma's April 16, 2021 letter raising several legal arguments in response to the agency's April 2 Letters. State's Brief at 34–35 (citing AR0660–62). OSMRE could not have considered the April 16 letter in its April 2 Letters, which the Court has correctly concluded were "final" with respect to Oklahoma's claims relating to the Muscogee Reservation. And OSMRE did consider the April 16 letter in advance of its June 17 Letters regarding the Cherokee and Choctaw Reservations. *See* OSMRE0707–10 (June 2 response to April 16 letter). But even putting the timing issues aside, Oklahoma has identified no "evidence" in this letter for the agency to consider. Evidence constitutes facts

or data. *See Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). Oklahoma's letter contains legal arguments that cannot alter the outcome in light of SMCRA's plain language.[24] Oklahoma has offered no authority for the proposition that an agency is obligated to respond to incorrect legal arguments before rendering a decision fully in line with binding statutory language.[25] *See Nat'l Elec. Mfgs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 515 (4th Cir. 2011) (The APA requires agencies to "provid[e] reasons for its actions sufficient to permit assessment by a reviewing court," but "this responsibility does not oblige the agency to provide exhaustive, contemporaneous legal arguments to preemptively defend its action").

Third, Oklahoma contends that OSMRE "failed to consider . . . the many serious practical implications" of Oklahoma's lack of SMCRA authority within the Reservations. State's Brief at 36. But the purpose of requiring an agency to consider the "important aspect[s] of the problem" is to ensure that the agency engaged in reasoned decisionmaking. *Ass'n of Priv. Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012)

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[24] Contrary to Oklahoma's argument, State's Brief at 35, Federal Defendants do deny that OSMRE was required to address the April 16 letter and have previously argued as much. Fed. Defs.' Prelim. Inj. Opp. at 29 & n.12, ECF No. 34.

[25] None of the cases that Oklahoma cites, *see* State's Brief at 34–35, supports this proposition; to the contrary, all address an agency's failure to consider *evidence* before it. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. 29, 51–53 (1983) (agency's finding contradicted "[t]he empirical evidence on the record"); *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 193–94 (D.C. Cir. 2010) (agency never considered "evidence showing the historical and cultural significance" of lands to Tribe); *Morall v. Drug Enf't Admin.*, 412 F.3d 165, 178 (D.C. Cir. 2005) (agency failed to consider witness's testimony before determining that witness was a "willful liar"); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 554, 558 (D.C. Cir. 1988) (agency ignored submitted data).

(quoting *State Farm*, 463 U.S. at 43). Here, OSMRE made the only decision permitted by SMCRA: that Oklahoma may not exercise SMCRA jurisdiction within the Reservations. Because OSMRE could make no alternative decision, it had no duty to consider the practical implications that Oklahoma raises.

b) OSMRE was not required to consider reliance interests

Oklahoma then invokes *Department of Homeland Security (DHS) v. Regents of the University of California*, 140 S. Ct. 1891 (2020), to argue that OSMRE's actions were arbitrary and capricious because the agency did not address Oklahoma's reliance interests. State's Brief at 36–40. But that decision is inapposite. There, DHS created a program for conferring affirmative immigration relief—the Deferred Action for Childhood Arrivals (DACA) program—under which the agency deferred removal of individuals brought into the United States as children. *See* 140 S. Ct. at 1901–02. Following a change in presidential administration, the Attorney General determined that the program was unlawful under the Immigration and Naturalization Act, and DHS concluded that the program should be terminated. *Id*. at 1903. The Supreme Court held that DHS was bound by the Attorney General's determination but retained discretion on how to wind down the program—including whether to continue forbearance from removal even while removing benefits eligibility. The Court therefore concluded that DHS had the discretion to consider the reliance interests of individuals subject to DACA and was arbitrary and capricious in failing to provide that consideration. *Id*. at 1912–15.

These cases are distinguishable on multiple points. First and foremost, the Supreme Court's decision in *McGirt*—and the OCCA's decisions in *Hogner* and *Sizemore*—

determined that the Reservations had not been disestablished. Their recognized existence rendered OSMRE, not Oklahoma, the SMCRA authority by operation of law. Unlike in *DHS* where the agency retained the authority to defer removal even if it had no authority over benefits eligibility and had "considerable flexibility" to wind down already-authorized benefits, 140 S. Ct. at 1911–12, 1914, OSMRE retained no discretion to allow Oklahoma to operate State programs on Indian lands. No reliance interest could alter that.

In any event, Oklahoma has not identified any "serious reliance interests" comparable to those in *DHS*—that is, the interests of individuals in not being deported and in receiving benefits such as permission to work and attend school. The "reliance interests" it invokes are—in essence—the reliance of mine operators, contractors, conservation districts, and the public on SMCRA regulation. *See* State's Brief at 37–38. Any such interests relied on regulation of surface coal mining and AML reclamation under SMCRA in order to protect public health and the environment—not a specific entity's exercise of jurisdiction—especially when Oklahoma's SMCRA programs were required to follow the same minimum standards and regulations that OSMRE must apply. Moreover, neither the State nor ODM or OCC employees could reasonably have relied on Oklahoma continuing to exercise SMCRA jurisdiction within Indian lands when Oklahoma's own program excludes application to those lands. And in its April 2 and June 17 Letters, OSMRE allowed for a short period of transition to effect a smooth transfer of operations.

Finally, Oklahoma's invocation of SMCRA's savings clause, 30 U.S.C. § 1255, and its provisions governing SMCRA programs within Indian lands, 30 U.S.C. § 1300, State's Brief at 39, do not alter this result because, as explained *supra* Part I.B, SMCRA expressly

preempts the exercise of State authority within Indian lands and neither of those provisions authorizes Oklahoma to apply its SMCRA programs to Indian lands—or OSMRE to authorize such application. And Oklahoma's appeal to § 1254(g) and the context where OSMRE substitutes a Federal Program for a State program, State's Brief at 39–40, is equally inapposite where both programs are statutorily defined to exclude application to Indian lands. *Supra* Part II.B.1.b.

D. Federal Defendants are entitled to summary judgment on Oklahoma's grant-related claims

Finally, Federal Defendants are entitled to summary judgment on Oklahoma's claims challenging OSMRE's grant-related actions (Count 3). First, the actions challenged through Oklahoma's third claim were not "final" agency actions because OSMRE had not yet issued a final decision on Oklahoma's grant requests at the time the complaints were filed. *See Rattlesnake Coal. v. U.S. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007) (no final agency action before agency "completes its review of the grant application and decides to disburse the appropriated funds"); *see also* Fritsch Decl. ¶¶ 16–17, 40–41, 53; Fed. Defs.' Prelim. Inj. Opp. at 11–13 (describing status of grant requests). Rather, OSMRE informed Oklahoma that the State would need to submit amended applications accounting for the change of jurisdiction within the Reservations before OSMRE could render a final decision. OSMRE0792–93, OSMRE0794–95; *see also* Fritsch Decl. ¶¶ 25–30, 48–56; Second Fritsch Decl. ¶¶ 4–8, 13–18. Oklahoma finally submitted those amended applications on June 21, 2022 (OCC) and June 27, 2022 (ODM), and OSMRE approved them on July 15, 2022, granting OCC's full request for $1,445,988.55 and ODM's full

request for $297,432.18. Second Fritsch Decl. ¶¶ 8–9, 16–18. This continuing process emphasizes the lack of finality at the time Oklahoma filed its complaints.

Even putting this lack of finality aside, the adverse grant decisions Oklahoma anticipates are not reviewable. Federal law mandates that OSMRE disapprove Oklahoma's applications for funding for activities on Indian lands because those lands are not included in Oklahoma's approved State programs. *See, e.g.*, 31 U.S.C. § 1301(a) (prohibiting use of appropriations for purposes other than those for which they were appropriated); 30 C.F.R. § 735.14(b) (allowing states to use grant money to cover the cost of a "State regulatory program," which does not include Indian lands); *id.* § 886.12(a) (requiring AML grant funding to be used to "carry out the specific reclamation and other activities authorized in SMCRA"). As OSMRE has no discretion to provide additional funding for activities on Indian lands, its grant-related actions are not reviewable under the APA.

Finally, even if reviewable, as the Court has already concluded, these decisions were not arbitrary or capricious under the APA because "it is not arbitrary and capricious to refuse to fund an unauthorized program" and that rationale was apparent from OSMRE's communications, including the June 2 letter to ODM. *Oklahoma*, 2021 WL 6064000, at *9. Oklahoma has not—and cannot—overcome the simple fact that SMCRA deprives it of jurisdiction within the Reservations, and so OSMRE's funding decisions are neither arbitrary nor capricious.

CONCLUSION

There remains no question on the key issue here: SMCRA's plain language mandates that, in the absence of a Tribal program, only OSMRE has authority over surface

coal mining and AML reclamation within the Reservations. On that basis alone, the Court should grant summary judgment to Federal Defendants on all claims in these actions. But even if the Court concludes that Oklahoma presents a valid APA claim and requires some additional administrative process, the outcome of that process is foreordained by SMCRA's plain language.

DATE: July 28, 2022

Respectfully submitted,

LISA LYNNE RUSSELL
Deputy Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Div.

/s/ Arwyn Carroll
ARWYN CARROLL
Trial Attorney, Natural Resources Section
Massachusetts Bar No. 675926
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: 202-305-0465
Fax: 202-305-0506
arwyn.carroll@usdoj.gov

CLARE BORONOW
Senior Attorney, Natural Resources Section
Admitted to Maryland Bar
999 18th St.
South Terrace, Suite 370
Denver, CO 80202
Phone: 303-844-1362
Fax: 303-844-1350
clare.boronow@usdoj.gov

Counsel for Federal Defendants