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

STATE OF OKLAHOMA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Civil Action Nos: CIV-21-719-F
CIV-21-805-F

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This is a case about federal overreach. The federal government wrongly seeks to expand the effect of *McGirt* and put Oklahoma in an increasingly "disadvantaged position as compared to the other forty-nine states." Order, ECF No. 75 at 1.[1] In their brief, Defendants continue to claim that *McGirt* effectively "mandated" their effort here to oust Plaintiffs from *any* regulation of surface mining or reclamation in certain parts of Oklahoma. Fed. Defs.' Cross-Mot. For Summ. J. & Br. in Supp. at 36, ("Gov't Br."), ECF No. 102. But as Plaintiffs explained, this argument fails to take proper account of equitable principles acknowledged in *McGirt* itself. It also fails to heed the Supreme Court's more recent decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), which made clear that despite *McGirt*, Oklahoma can and does retain powers "over all of its territory, including Indian country," *id*. at 2493, and will sometimes share jurisdiction with the federal government.

Underlying this overreach is Defendants' candid and repeated argument that a change in regulatory authority from the State to the federal government is, in their view, essentially "no big deal." Defendants brush aside "[t]he mere shifting of the administration of SMCRA [Surface Mining Control and Reclamation Act] from Oklahoma under OSMRE's [Office of Surface Mining Reclamation and Enforcement] oversight to OSMRE

[1] The parties agreed to consolidate *Oklahoma v. U.S. Department of the Interior*, No. Civ-21-719-F ("*Oklahoma I*") and *Oklahoma v. U.S. Department of the Interior*, No. Civ-21-0805-F ("*Oklahoma II*") for purposes of summary judgment briefing. *See Oklahoma I*, ECF No. 89; *Oklahoma II*, ECF No. 34. Unless otherwise indicated, "ECF No." refers to the docket in *Oklahoma I*.

alone." Gov't Br. at 35. And they openly challenge this Court's acknowledgment of the "'justifiable expectations of millions of Oklahomans,'" *id*. at 36 n.16, arguing that no Oklahoman should have any interest in whether the State or federal government regulates something so mundane as surface mining and reclamation.

These arguments make no sense. As a threshold matter, they are at odds with the federal government's own position in this case, which is that Congress deemed federal jurisdiction materially different from State jurisdiction. Even more inescapable is the fact that this country was born from an effort to balance and harness the differences between State and federal regulation. Since the Founding, the distinction between State and federal authority has been paramount: As the Supreme Court has stressed, "In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). And that distinction is heightened—not lessened—in SMCRA, which specifically envisions that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to [SMCRA] *should rest with the States*." 30 U.S.C. § 1201(f) (emphasis added).

There are two components to Defendants' overreach, and both are incorrect. First, the federal government claims that *McGirt* prohibits Oklahoma from operating its approved State programs under SMCRA on the lands in question. Even accepting the federal government's reading of the statute, however, fundamental principles of equity preclude Defendants' attempt to revoke Oklahoma's long-operating State SMCRA programs on the lands in question.

Second, Defendants assert even more broadly that after *McGirt*, they now have "exclusive jurisdiction" over surface coal mining and reclamation in the lands in question—and conversely, that Oklahoma lacks any authority to enforce even state laws and regulations that are *outside* the State SMCRA programs. Gov't Br. at 16–19. But the federal government vastly overstates the impact of *McGirt*, as it did this last Term before the Supreme Court in similarly claiming that it now has "exclusive jurisdiction" in parts of Oklahoma when it comes to criminal law. Br. for the United States as Amicus Curiae Supporting Resp't, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429), 2022 WL 1048910, at **8–19 (Apr. 4, 2022) ("U.S. Amicus Br."). As the Supreme Court reaffirmed in June in the *Castro-Huerta* decision, even after *McGirt*, Oklahoma "has jurisdiction over all of its territory, including Indian country," unless and until "federal law . . . preempt[s] that state jurisdiction." *Castro-Huerta*, 142 S. Ct. at 2493. And just as in *Castro-Huerta*, the preemption analysis reveals that far from granting the federal government exclusive jurisdiction, federal law in fact contemplates some concurrent jurisdiction by Oklahoma and the federal government.

What is more, the federal government has displaced Oklahoma's authority without engaging in procedures required by SMCRA and the Administrative Procedure Act ("APA") and without adequately explaining its decision or properly taking reliance interests into account. Once again, the federal government turns to the argument that its actions were mandated by law. But that is not correct. And even if it were, that does not excuse the government from all the requirements of reasoned decisionmaking.

This Court should grant summary judgment to Plaintiffs on all counts in their complaints and on both of the federal government's counterclaims.

ARGUMENT

I. Plaintiffs are entitled to summary judgment on Count One of their complaints and on both of Defendants' counterclaims.

For two independent and alternative reasons, Plaintiffs are entitled to summary judgment on Count One in their complaints—specifically, a declaration that Oklahoma has jurisdiction to regulate surface coal mining and reclamation operations on lands within the historic lands of the Muscogee (Creek) Nation, Cherokee Nation, and Choctaw Nation. First, fundamental principles of equity permit Oklahoma to continue operating its State SMCRA programs with federal funds. Second, even if Oklahoma cannot continue a SMCRA State program, SMCRA expressly permits Oklahoma to enforce, with State funds, State laws and regulations *outside* its State SMCRA programs, so long as those laws and regulations are more stringent than the federal standards in SMCRA. Under either scenario, SMCRA leaves Oklahoma with at least some jurisdiction to regulate on the lands in question, and therefore the requested declaration should issue. ECF No. 1 ¶ 64.

The same two reasons similarly entitle Plaintiffs to summary judgment on both of Defendants' counterclaims. Defendants seek declaratory judgment that: (1) "only OSMRE, and not Oklahoma, may exercise authority over surface coal mining and AML reclamation within the Reservations (Count One)"; and (2) "SMCRA preempts Oklahoma's application of its State programs or other laws governing surface coal mining and AML [abandoned mine land] reclamation on lands within the Reservations (Count Two)." Gov't Br. at 15.

Both seek to establish the federal government's *exclusive* authority on these lands. But if Plaintiffs are correct, for one reason or the other, that the State retains at least some surface mining and reclamation authority on the lands in question, then both should plainly be refused.

A. Fundamental principles of equity permit Oklahoma to continue operating its State SMCRA programs.

As Plaintiffs have explained, the same fundamental principles of equity recognized and applied by the Supreme Court in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill*"), preclude OSMRE's attempt to revoke Oklahoma's long-operating State SMCRA programs on the lands in question. Pls' Mot. for Sum. J. & Br. in Supp. at 15–26, ("Pls.' Br."), ECF No. 97. Defendants argue that *Sherrill* does not apply here because "equitable principles cannot defeat a federal statute." Gov't Br. at 27. They also contend that one of the doctrines on which *Sherrill* relies—laches—is generally not applicable against the federal government. *Id*. at 30–34. Neither argument is a correct reading of precedent.

1. *Sherrill*'s equitable principles apply even where there is a federal statute at issue.

At least three cases—including *Sherrill* itself—applied equitable principles to bar relief for alleged violations of a federal statute. Pls' Br. at 19 (discussing *Sherrill*, *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 617 F.3d 114 (2d Cir. 2010) ("*Oneida*"), and *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ("*Cayuga*")). Defendants contend that these cases are inapposite because the relief sought here "is expressly prohibited by SMCRA." Gov't Br. at 28. In those cases by contrast, "no statute

or regulation, including the Nonintercourse Act, otherwise resolved the issue." *Id.* at 28–29. Both of Defendants' contentions are incorrect.

To begin with, the relief granted to the State or local government in each of these cases *was* contrary to the Nonintercourse Act. The Nonintercourse Act, which has been amended several times, not only prohibited the sale of tribal land without the consent of the United States government but *rendered such sales invalid*. The 1793 version that was at issue in *Sherrill*, *Cayuga*, and *Oneida* provided in relevant part:

> [N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, *shall be of any validity in law or equity*, unless the same be made by a treaty or convention entered into pursuant to the constitution.

Act of Mar. 1, 1793, ch. XIX, § 8, 1 Stat. 329, 330 (1793) (emphasis added). In all three cases, it was argued that the State or local government was taxing or possessed tribal land sold in violation of the Nonintercourse Act. And in all three cases, the courts nevertheless sided with the State and local governments on equitable grounds, allowing the land sales to stand even though they were invalid by federal statute.

Specifically, in *Sherrill*, the Oneidas relied on the Nonintercourse Act in suing for declaratory and injunctive relief recognizing their present and future sovereign immunity from local taxation on properties that had been subject for generations to such taxation. 544 U.S. at 214. They "alleged that the cession of 100,000 acres to New York State in 1795 . . . violated the Nonintercourse Act and thus did not terminate [their] right to possession under the applicable federal treaties and statutes." *Id.* at 208. The Supreme Court

nevertheless allowed the taxation to continue on equitable grounds, expressly disregarding the "validity *vel non* of the [original] sales to the State." *Id.* at 214.

Similarly, in *Oneida*, the United States and the tribe brought claims alleging that New York's purchase of certain land was invalid under the Nonintercourse Act. 617 F.3d at 119. As the Second Circuit explained, "it is clear that any [nonpossessory] claim in the complaint is based entirely on the Nonintercourse Act" and that such claim is "grounded only in the allegation that the original land transactions violated the Nonintercourse Act." *Id*. at 133. The court further explained that "the Nonintercourse Act claim here necessarily requires a conclusion that title did *not* pass validly in the challenged land transactions, because the claim's premise is that the transactions violated the Nonintercourse Act." *Id*. at 137. Yet, the Second Circuit concluded that "the Nonintercourse Act claim[] is subject to equitable defenses," *id*. at 138, and sided with the State on those grounds, *id.* at 140.

And likewise, in *Cayuga*, the tribe sought "to enforce a 'federal common law' right of action for violation of their possessory property rights, as well as . . . to vindicate their rights under the Nonintercourse Act." *Id*. at 276. The district court agreed, finding that the "treaties between the Cayuga Nation and the State of New York in 1795 and 1807 were not properly ratified by the federal government and were thus invalid under the Nonintercourse Act." 413 F.3d at 268. The Second Circuit did not touch this finding of invalidity under the federal statute, but nevertheless found that equitable principles required siding with the State and maintaining the status quo. *Id*. at 279–80.

Defendants are also wrong that Congress has somehow spoken more clearly in SMCRA than in the Nonintercourse Act. Gov't Br. at 29 n.12. Defendants point to a

discussion in *Sherrill* that recognized Congress had passed, *separate* from the Nonintercourse Act, a law addressing specifically the procedure for how tribes "regain sovereign control over territory." 544 U.S. at 220–21. And it was that separate procedure, rather than the Nonintercourse Act, that "provide[d] the proper avenue for . . . reestablish[ing] sovereign authority." *Id.* at 221. Defendants argue that, unlike the Nonintercourse Act, SMCRA includes within it the "proper mechanism" for resolving the jurisdictional question at issue here. Gov't Br. at 29 n.12. Not so.

There is nothing in SMCRA that makes it materially more specific than the Nonintercourse Act. Indeed, Defendants themselves admit elsewhere in their brief that SMCRA *does not* speak specifically to the unique jurisdictional issue presented in this case about newly designated Indian lands within a State: "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." *Id.* at 43. Thus, the most Defendants can say is that Oklahoma is exercising authority in violation of a federal statute, but that is no different from what was claimed about the State and local governments in *Sherrill*, *Oneida*, and *Cayuga*, and then nevertheless rejected by the courts on equitable grounds.

Defendants next fall back to the argument that *McGirt* itself rejected application of *Sherrill* to the vindication of a federal statute. *Id.* at 29 (noting *McGirt*'s rejection of "dire warnings" of "drastic" consequences). But that argument misreads *McGirt*. The part of *McGirt* that rejected "dire warnings" spoke just to the Supreme Court's resolution of the specific statutory question before it: the interpretation of the Major Crimes Act. *McGirt v.*

Oklahoma, 140 S. Ct. 2452, 2480–81 (2020). The Court was refusing only to allow that particular task to be "inflected based on the costs of enforcing [the statute] today." *Id.* at 2481. It did not in that part of the opinion discuss equitable doctrines at all, much less hold that they could never be applied to federal statutes or in future cases. To the contrary, the Court immediately went on to explain that it was not "disregard[ing] the dissent's concern for reliance interests," but rather that it simply viewed the "concern [a]s misplaced" and one that instead could be addressed through equitable doctrines in "later proceedings.'" *Id.* (citation omitted). The Court thus did the *opposite* of rejecting the application of equitable principles in a case like this; it expressly reserved that question now squarely at issue.

Finally, Defendants wildly misconstrue *Cayuga Nation v. Tanner*, 6 F.4th 361 (2d Cir. 2021). Defendants suggest that the court there refused to apply *Sherrill* to forestall the enforcement of a federal statute on Indian lands. Gov't Br. at 29–30. That is incorrect. As Plaintiffs have explained, *Tanner* rejected the application of *Sherrill* with respect to the antecedent question of whether the Cayuga Reservation was a "'de facto *former* reservation[].'" Pls.' Br. at 22 (quoting *Tanner*, 6 F.4th at 379). Because Congress possesses the "singular power to disestablish a reservation," the court refused to apply *Sherrill* to determining the existence or not of a reservation. *Tanner*, 6 F.4th at 379 (holding that *Sherrill* cannot be interpreted "to have effectively disestablished the Cayuga Reservation"). That is a fundamentally different question from the one here—where the existence of the reservations is not in dispute in this limited context. The subsequent question here—not reached or discussed in *Tanner*—is whether *Sherrill*'s equitable

principles can apply to the enforcement of a federal statute on those lands. For all the reasons already discussed, they plainly can.

2. *Sherrill*'s equitable principles apply against the federal government.

Defendants' next contention is that *Sherrill*'s equitable principles can never apply against the federal government. But as even Defendants must admit, the Second Circuit squarely rejected that argument in *Cayuga*. There, the court held that equitable defenses may apply against the United States in the Indian law context in three situations: (1) "'the most egregious instances of laches'"; (2) where "'there is no statute of limitations'"; and (3) where "'the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights'" rather than "'to enforce sovereign rights.'" Pls.' Br. at 18–24 (quoting *Cayuga*, 413 F.3d at 279).

Defendants suggest that Tenth Circuit precedent warrants rejecting *Cayuga*'s reasoning. Gov't Br. at 31. But the Tenth Circuit has not decided this question. Most of the Tenth Circuit cases cited by Defendants involve the traditional doctrine of laches. In contrast, as Defendants concede, "'*Cayuga* applied not a traditional laches defense, but rather distinct, albeit related, equitable considerations that it drew from *Sherrill*.'" Gov't Br. at 30 n.13 (quoting *Oneida*, 617 F.3d at 128). And as the *Cayuga* court explained, that distinction makes all the difference. *Sherrill* "substantially altered the legal landscape in th[e] area" of Indian law, and thus "the federal law of laches can apply against the United States" in these circumstances. *Cayuga*, 413 F.3d at 279. The lone Tenth Circuit case cited by Defendants that addressed *Sherrill* did not disagree. While it noted that "'laches is a line

of defense that *usually* may not be asserted against the United States," Gov't Br. at 31 (emphasis added) (quoting *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016)), it did not rule out that the defense might apply in the right circumstances.

Recognizing that Tenth Circuit precedent does not ultimately control, Defendants retreat to arguing that the *Cayuga* factors do not, in any event, support applying *Sherill*'s equitable principles against the federal government here. They challenge only two of the three *Cayuga* principles. Defendants contend that: (1) they are "seek[ing] to enforce a public right or protect the public interest"; and (2) this is not a case of egregious laches. *Id*. at 32–33. They are wrong on both accounts.

First, Defendants claim that OSMRE is acting "to further the public interest by preventing 'adverse effects of surface coal mining operations' on Indian lands." *Id*. at 32 (quoting 30 U.S.C. § 1202(a)). But beyond that bald assertion, Defendants have not identified a single adverse effect of surface coal mining operations anywhere in Oklahoma that the State has failed or is failing to prevent. Quite the opposite. Defendants concede there is no suggestion that Oklahoma "is not effectively administering" any part of the State SMCRA programs. *Id*. at 42.

The fact is that this case is very similar to *Cayuga*. There, the court found the federal government was not "'enforc[ing] a public right'" or "protecti[ng] . . . the public interest," but rather "vindicat[ing] the interest of the Tribe, with whom it has a trust relationship." 413 F.3d at 279 & n.8. So, too, here.

The government quarrels that it "is not acting in its capacity as a trustee for any tribe but rather in its own interest." Gov't Br. at 33. But that misses the point. The question is

not whether the government is standing in the shoes of the tribes, but whether it is actually—to borrow its own words—"seek[ing] to enforce a public right or protect the public interest" on anyone's behalf. *Id*. at 32. Even the cases cited in Defendants' brief make that clear, asking whether the United States is "acting in its sovereign capacity *to enforce a public right or public interests*." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883 JGB (SPx), 2016 WL 2621301, at *4 (C.D. Cal. Feb. 23, 2016) (emphasis added). And as explained above, it is not. While the government claims to be "further[ing] the public interest by preventing 'adverse effects of surface coal mining operations' on Indian lands," Gov't Br. at 32, it admits that it has not found Oklahoma's programs insufficiently protective of the environment, *id.* at 42. As one OSMRE official candidly explained, "the need for OSMRE to take over these duties was not because of something Oklahoma did but because of the *McGirt* decision." Decl. of Joseph Maki ¶ 10, ECF No. 34-4.

Second, Defendants are also wrong that this is not an "egregious" case of laches as understood by *Sherrill* and *Cayuga*. Defendants premise their argument on the notion that laches apply only "when a party unreasonably delays in asserting a claim *even after the party knew or should have known of the claim*." Gov't Br. at 33 (emphasis added). And they argue that they did not have a "claim" here until *McGirt* changed the status of the lands in question. But that is not how *Sherill* measured delay.

Like the *McGirt* decision in this case, there was a 1985 court decision that arguably changed the law and first put the tribes in *Sherrill* on notice that they might have a claim for return of their lands. The *Sherrill* Court did not, however, measure the delay from that

then-20-year-old decision. Instead, the Supreme Court looked at the "two centuries" during which New York and its county and municipal units had governed the lands at issue. 544 U.S. at 216. In short, the Court looked at the entire history and behavior of the relevant parties since the original transfer of the land, irrespective of whether it was known then to be invalid or not. The Court explained that "[t]he acquiescence doctrine does not depend on the original validity of the boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary line." *Id*. at 218.

Following *Sherrill*, the Second Circuit has taken the same approach to assessing the egregiousness of delay. In *Cayuga*, the court found that "a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined." 413 F.3d at 279. And in *Oneida*, the court recognized that "a tremendous expanse of time separates the events forming the predicate of the ejectment and trespass-based claims and their eventual assertion." 617 F.3d at 126. There was no discussion in either case of when the tribes or the United States "knew or should have known" that they had a legally viable claim for the possible return of sovereignty over the land at issue. Gov't Br. at 33.

Measuring properly the "observance of" State jurisdiction here, *Sherrill*, 544 U.S. at 218, this is plainly an "egregious" case. OSMRE not only acquiesced in, but affirmatively approved of, Oklahoma's exercise of SMCRA regulatory authority for the past forty years—virtually the entire existence of SMCRA itself. Defendants do not dispute, because they cannot, that the federal government approved twenty-eight amendments to the State SMCRA programs over that time. Gov't Br. at 7.

In any event, *McGirt* makes clear that it was not changing the law, but rather revealing an "unappreciated" truth. 140 S. Ct. at 2481. So even if timeliness is measured from when Defendants "should have known," which it is not, they are wrong in contending that the clock began with *McGirt*. According to the majority in *McGirt*, the laws have long been crystal clear—the result in *McGirt* was only a matter of finally "taking them at their word." *Id.*

3. Equitable principles preclude OSMRE's attempt to revoke Oklahoma's State SMCRA programs.

The only remaining question is whether the *Sherrill* equitable principles—applied to a federal statute asserted by the United States, as they may be—preclude the federal government's effort here to oust the State's jurisdiction. As Oklahoma showed, they do. Pls.' Br. at 24–26 (discussing "(1) the length of time between the injustice and the present; (2) the disruptiveness of the claims; and (3) 'the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiff's injury'") (quoting *Oneida*, 617 F.3d at 127).

First, for the same reasons discussed above that make this an "egregious" case of laches, the "length of time at issue" weighs in favor of the equitable principles here. Oklahoma has regulated surface coal mining and reclamation within its borders since statehood in 1907, and it has done so continuously under SMCRA with the federal government's approval since 1981. Pls.' Br. at 25. Defendants once again argue that they acted promptly after the Supreme Court's decision in *McGirt* and the Oklahoma Court of Criminal Appeals' decisions in *Hogner* and *Sizemore*. Gov't Br. at 34. But as explained

above, *Sherrill*, *Cayuga*, and *Oneida* did not focus on the amount of time since the tribes or the United States knew of a violation of law, but rather how long expectations had been settled in favor of State control. *See supra* pp. 12–13.

Second and third, the federal government's actions here both are disruptive and have upset justifiable expectations. As this Court observed, OSMRE's decision upsets "the justifiable expectations of millions of Oklahomans, expectations which go back over a hundred years and are rooted in the very existence of Oklahoma as a state." ECF No. 75 at 12. Defendants counter that interested parties have always been on notice that OSMRE could take over SMCRA regulation and that the "[t]he mere shifting of the administration of SMCRA from Oklahoma under OSMRE's oversight to OSMRE alone" is hardly notable. Gov't Br. at 35. Defendants also dismissively contend that Oklahomans "do not have a justifiable expectation that the State, rather than OSMRE, will administer the statute." *Id.* at 36 n.16. These arguments do not withstand scrutiny.

To begin with, Defendants' contentions are squarely at odds with SMCRA. The entire cooperative federalism regime in SMCRA (and other statutes) is premised on the notion that state-based regulation is qualitatively different (and at least sometimes superior to) federal regulation. Indeed, as Plaintiffs have pointed out before and Defendants do not deny, Congress expressly found in SMRCA that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to [SMCRA] *should rest with the States*." 30 U.S.C. § 1201(f) (emphasis added). This is no meaningless formality. The Supreme Court has long recognized that this regime allows States to "enact and administer their own regulatory

programs, *structured to meet their own particular needs*." *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 289 (1981) (emphasis added). That is because "state agencies may have comparative advantages in the form of superior knowledge of local situations and ability to resolve factual controversies rapidly." Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 660 (1985); *see also* Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 729 (2003) (noting that the "cooperative federalism approach . . . sets forth a basic federal framework while allowing states to experiment within certain contours").

What is more, the notion that federal and state regulation are essentially interchangeable would surprise the Founders and raise serious constitutional concerns. In our system of dual sovereignty, the States are not merely "instruments of federal governance." *Printz v. United States*, 521 U.S. 898, 919 (1997). Even within a cooperative federalism regime, "a State's government will represent and remain accountable to its own citizens." *Id.* at 920. Federal oversight of state regulation is not expected to be the same thing as direct federal control. Nor may it be; the Constitution does not permit such "commandeering of state governments." *Id.* at 925.

It is thus well-settled that a deprivation of State sovereignty is unquestionably harmful. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (explaining that a State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"); *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001) (finding irreparable harm to the State where federal agency action "places its sovereign interests and public

policies at stake"); *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 17 (D.D.C. 2014) (loss of State sovereignty is "irreparable harm").

In all events, mine operators and other interested parties in Oklahoma had a justifiable expectation that OSMRE would not take over the State SMCRA programs except under those conditions Congress provided in SMCRA—among them, promulgation of a Federal program when a State is not effectively administering its program, 30 U.S.C. § 1254(a); 30 C.F.R. § 733.13. But, again, OSMRE has conceded that Oklahoma has not failed in administering its State SMCRA programs. *See supra* p. 11. And it has made clear that it "has not promulgated a 'Federal program' in place of Oklahoma's State programs." Gov't Br. at 42.

B. Even if Oklahoma cannot continue its State SMCRA programs, it is still permitted under SMCRA to enforce surface mining and reclamation laws outside those programs.

Even if principles of equity do not save Oklahoma's State SMCRA programs, SMCRA itself expressly preserves other State surface mining and reclamation authority on the lands in question. Defendants disagree, claiming "exclusive jurisdiction" and contending 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." *Id*. at 1, 15 (emphasis added). But it is clear from even a cursory review of the statute that Defendants are wrong. SMCRA distinguishes between the operation of State programs and the operation of other state laws and regulations, and it only preempts those other State laws and regulations that are less protective than SMCRA. Otherwise, the

State retains concurrent jurisdiction over the lands in question—a practice the Supreme Court generally and recently reaffirmed in *Castro-Huerta*.

1. Oklahoma retains authority over all lands within its borders, including Indian lands, unless preempted by federal law.

Slightly less than two months ago, the Supreme Court made clear in *Castro-Huerta*, that despite *McGirt*, Oklahoma can and does retain powers "over all of its territory, including Indian country," unless preempted by federal law. The United States had argued that ordinary preemption analysis did not apply to Indian lands at all. U.S. Amicus Br., 2022 WL 1048910, at *7, 30. Rather, the federal government argued that it had exclusive jurisdiction in the wake of *McGirt*, "absent a more specific statutory provision conferring jurisdiction on a State." *Id.* at *7–8. The Supreme Court rejected this argument as entirely backwards.

The Court explained that "[s]ince the latter half of the 1800s, [it] has consistently and explicitly held that Indian reservations are 'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'" *Castro-Huerta*, 142 S. Ct. at 2493 (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)). The Court identified no fewer than five cases from 1859 to 2001 that followed this "overarching jurisdictional principle." *Id*. at 2494. And it expressly refuted the dissent's contrary contention that Indian lands are "inherently separate from States," *id.* at 2503, emphasizing specifically that Oklahoma's Enabling Act, ch. 3335, 34 Stat. 267 (1906), made "Indian country . . . part of the territory of Oklahoma." *Castro-Huerta*, 142 S. Ct. at 2503. States—including Oklahoma—"do not need a permission slip from Congress to exercise their

sovereign authority" on Indian lands. *Id.* Rather, "the Constitution allows [it]." *Id.* at 2493. The "default" is that States have jurisdiction "unless that jurisdiction is *preempted*." *Id.* at 2503.[2]

The Court in *Castro-Huerta* went on to find that federal law did not preempt State jurisdiction over crimes committed by non-Indians against Indians in Indian country. The Court considered both "ordinary principles of federal preemption" and whether "the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Id.* at 2494. And it found preemption on neither ground, concluding therefore that Oklahoma and the federal government have "concurrent jurisdiction" in that area of law over the lands in question. *Id.* at 2495.

Here, Defendants invoke only ordinary principles of preemption. Gov't Br. at 20. They contend that SMCRA "expressly preempts" all Oklahoma laws regarding surface coal mining and AML reclamation on the same lands. *Id.* at 20–22. And they argue that any exercise of state jurisdiction "directly conflicts" with SMCRA. *Id.* at 22–24. Both arguments are wrong.

2. SMCRA does not expressly *preempt* all State laws and regulations but rather expressly *preserves* State authority.

The text of SMCRA could not more clearly preserve the exercise of some State authority outside a State SMCRA program. SMCRA provides that "[n]o State law or

[2] To the extent the federal government attempts to cabin this conclusion in *Castro-Huerta* to criminal jurisdiction, *see* Gov't Br. at 18-19 n.8, that is demonstrably incorrect. The Court held broadly that "the Constitution allows a State to exercise jurisdiction in Indian country" unless preempted by federal law. *Castro-Huerta*, 142 S. Ct. at 2493; *see also id.* (referencing both "civil and criminal" law).

regulation . . . shall be superseded by [SMCRA] or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of [SMCRA]." 30 U.S.C. § 1255(a). The very next subsection elaborates that "[a]ny provision of any State law or regulation . . . which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of [SMCRA] or any regulation issued pursuant thereto *shall not be construed to be inconsistent* with [SMCRA]." *Id.* § 1255(b) (emphasis added). In short, SMCRA sets a federal floor above which States may still regulate; it does not entirely oust State authority, as Defendants claim.

This should be the end of the analysis, as many other similarly worded provisions have been repeatedly and consistently understood by courts to preserve State authority. For example, Section 116 of the Clean Air Act ("CAA") provides:

> [N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416. Courts have uniformly read this provision as "clearly indicat[ing] that Congress did not wish to abolish state control." *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342–43 (6th Cir. 1989). "[T]he CAA is designed to provide a floor upon which state law can build, not a ceiling to stunt complementary state-law actions." *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor*

Energy (U.S.A.) Inc., 25 F.4th 1238, 1263 (10th Cir. 2022) (citing 42 U.S.C. § 7416); *see also Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 783 (9th Cir. 2005) ("California is allowed to implement air quality standards that are more stringent than federal requirements, *see* 42 U.S.C. § 7416."); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1055 (D.C. Cir. 2001) ("CAA § 116 . . . allows a state to impose a local air quality standard more stringent than the corresponding [national ambient air quality standards]").

The same is true of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). The CWA provides that a State "may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation." 33 U.S.C. § 1370. The Supreme Court has explained that this provision "specifically allows source States to impose stricter standards." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987). RCRA provides that "[n]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations." 42 U.S.C. § 6929. This provision, the Tenth Circuit has explained, merely "establishe[s] the federal requirements as the floor for regulatory controls." *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs of Cty. of Rogers*, 27 F.3d 1499, 1506 n.6 (10th Cir. 1994).

So, too, with respect to the Real Estate Settlement Procedures Act ("RESPA"). That statute provides:

> This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to [real estate] settlement practices, except to the extent that

> those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency.

12 U.S.C. § 2616. It then explains that the Consumer Financial Protection Bureau "may not determine that any State law is inconsistent . . . if the Bureau determines that such law gives greater protection to the consumer." *Id.* The Ninth Circuit has held that this "plain language . . . explicitly disproves the . . . argument that Congress intended that RESPA 'occupy the field' when it comes to the mortgage creditor's obligations to provide reports to debtors to the exclusion of other law, state, or federal" because "RESPA requires . . . that where state law provides greater consumer protection to debtors regarding mortgages on their principal residence, state law prevails." *In re Monroy*, 650 F.3d 1300, 1301 (9th Cir. 2011) (citing 12 U.S.C. § 2616).

To reach the opposite conclusion, Defendants offer several unpersuasive and atextual arguments.

First, Defendants simply ignore the statute's definition of "inconsistent." They repeatedly and talismanically invoke Congress's intent "for SMCRA to preempt any 'State law or regulation' that is 'inconsistent' with its terms." Gov't Br. at 25; *see also id.* at 20–21 ("This language clearly indicates Congress's intent to preempt inconsistent state regulation. . . ."). But they never once—in fifty-five pages—discuss or even acknowledge that the statute goes on immediately (in 30 U.S.C. § 1255(b)) to expressly preserve as *not* inconsistent an entire body of State law.

Second, Defendants conflate a State's SMCRA program, or its implementation of SMCRA, with other State laws and regulations concerning surface mining and reclamation.

Defendants argue again and again that "SMCRA expressly excludes Indian lands from state jurisdiction and reserves such jurisdiction to OSMRE or tribes with approved programs." Gov't Br. at 21; *see also id.* at 17, 25. But the only authorities it cites for that proposition relate to *State SMCRA programs* and the administration of *SMCRA*. *See* 30 U.S.C. § 1235 ("State reclamation program"); *id.* § 1242 (State authority "pursuant to an approved State program"); *id.* § 1291(21) (defining "reclamation plan" to refer to a plan submitted "under a State program or Federal program"); *id.* § 1291(25) (defining "State program"); *id.* § 1253 (relating to "State programs"). In short, when Defendants assert that "the statute expressly grants such authority to OSMRE," Gov't Br. at 7, they have purported to show only that States cannot administer *SMCRA* on Indian lands. *See, e.g.*, 30 C.F.R. § 750.6(a)(1) (making OSMRE "the regulatory authority on Indian lands" for administering *federal* law).

Indeed, Defendants at one point lay bare their attempted sleight-of-hand. They argue that "Oklahoma's State programs—*and therefore its state laws governing surface coal mining and AML reclamation*—cannot apply to Indian lands." Gov't Br. at 25 (emphasis added). This statement plainly equates Oklahoma's "State programs" with any and all "state laws governing surface coal mining and AML reclamation."

But that is not what SMCRA says. The statute clearly distinguishes between the operation of "State programs" governed by 30 U.S.C. §§ 1235, 1242, 1253, and 1291, and other State laws and regulations. By their own terms, the preemption and savings clauses in 30 U.S.C. § 1255 speak only to the latter. Thus, while SMCRA may well preclude operation of a "State program" on Indian lands, 30 U.S.C. §§ 1291(11), (25), 1235(b), (k),

it does not do so with *other* State laws and regulations that provide more stringent environmental and land use controls than SMCRA.[3]

Third, Defendants assert, without citation to any statutory provision, that "Congress designed SMCRA as a 'comprehensive statute that regulates all surface coal mining operations' in the United States." Gov't Br. at 21 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 300 (2009)). But as the Supreme Court just reiterated in *Castro-Huerta*, express preemption cannot be based on this sort of appeal to what "Congress *implicitly intended*." 142 S. Ct. at 2496. "[T]he text of a law controls over purported legislative intentions unmoored from any statutory text." *Id.* And here, the text of 30 U.S.C. § 1255 is clear.

Defendants reach, Gov't Br. at 21, for *Hodel*. But that case supports Plaintiffs. The Supreme Court there was discussing the constitutionality of SMCRA and the State's ability to create and administer a State SMCRA program. *See Hodel*, 452 U.S. at 289 (discussing SMCRA's "program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs"). It did not cite, discuss, or in any way purport to address the meaning of 30

[3] The standard for, and scope of, preemption is arguably different where the federal government has promulgated a Federal SMCRA program—something Defendants concede has *not* happened here. The statute provides that "[w]henever a Federal program is promulgated for a State . . . any statutes or regulations of such State . . . shall, insofar as they interfere with the achievement of the purposes and the requirements of this chapter and the Federal program, be preempted and superseded by the Federal program." 30 U.S.C. § 1254(g). The precise contours of this partial preemption need not be decided here, of course, where there is no Federal program. But whatever this provision means, it also does not preempt *all* state laws or grant the federal government *exclusive* jurisdiction.

U.S.C. § 1255 or that provision's preservation of certain *other* state laws and regulations. To the extent the case addressed preemption at all, it made clear that SMCRA only "establishes mandatory minimum federal standards." *Id.* Put simply, *Hodel* was focused on State programs, not preemption of other State laws and regulations, and in any event, supports Plaintiffs' argument that SMCRA establishes only *minimum* federal standards.

Defendants' reliance on *Printz* is even further misplaced. Gov't Br. at 21. Discussing *Hodel*, the Supreme Court there explained that SMCRA "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz*, 521 U.S. at 926. That statement is fully consistent with Plaintiffs' reading of 30 U.S.C. § 1255—State laws and regulations are preempted only insofar as they fall below federal standards.

Finally, Defendants turn to legislative history. Gov't Br. at 26. But as Defendants admit, legislative history is irrelevant where the text is clear. *See Castro-Huerta*, 142 S. Ct. at 2496 ("Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto)."). And it is clear here. In any event, Defendants' legislative history (like nearly all of their other arguments) relates only to State SMCRA programs and the administration of SMCRA. It does not speak to 30 U.S.C. § 1255 and SMCRA's treatment of *other* State laws and regulations.

3. Conflict preemption does not oust all other State laws and regulations regarding surface coal mining and reclamation.

Defendants' conflict preemption argument suffers from many of the same flaws as their express preemption argument, as well as some others. Defendants rely on two

different types of conflict preemption: (1) so-called "obstacle" preemption, which occurs when a "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"; and (2) impossibility preemption, which occurs when "'compliance with both federal and state regulations is a physical impossibility.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citations omitted). Neither is persuasive.

As to "obstacle" preemption, Defendants' argument once again conflates State SMCRA programs with *other* State laws relating to surface mining and regulation. Defendants' argument is premised on the notion that "SMCRA limits state authority over surface coal mining and AML reclamation *to approved State programs*." Gov't Br. at 22 (emphasis added). But as already shown above, that is simply incorrect. The statute plainly distinguishes between "State programs," *see, e.g.*, 30 U.S.C. § 1253, and other "State laws," 30 U.S.C. § 1255.

This fatal flaw is further illustrated in Defendants' reliance, Gov't Br. at 23, on *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992). The statute at issue there provided that "a State 'shall' submit a plan if it wishes to 'assume responsibility' for 'development and enforcement . . . of occupational safety or health standards relating to any occupational safety and health issue with respect to which a Federal standard has been promulgated.'" 505 U.S. at 99. The Court explained that "[t]he unavoidable implication of this provision is that a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval." *Id.* But the statute there did not

contain a savings clause, as here, that specifically addresses and preserves certain other State laws and regulations outside the State program or plan.

The other case on which Defendants rely—*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)—is also unavailing. Defendants correctly note that the Supreme Court, in that case, found *some* State law preempted by the CWA under an obstacle preemption analysis. But in a later part of the opinion that Defendants ignore, the Court noted that a "saving[s] clause specifically preserves other state actions." *Id.* at 497. And as discussed above, *see supra* p. 21, that savings clause is strikingly similar to the one here, in that it "allows States . . . to impose higher standards" within their borders than the federal government. *Id.*

As to impossibility preemption, Defendants come nowhere close to meeting that "demanding" standard. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). Defendants merely hypothesize that concurrent jurisdiction—possibly requiring two permits under two different regulatory regimes, each with a bond payable to separate entities—would be problematic. Gov't Br. at 23. That speculation hardly demonstrates an "inevitable collision" between state and federal law. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). And it certainly does not do so in the wake of *Castro-Huerta*, in which the Supreme Court did not hesitate to conclude that Oklahoma and the federal government could exercise concurrent jurisdiction over these very same lands in the area of criminal law, where life and liberty are almost always at stake.

Defendants' baseless speculation only further highlights, in fact, the federal government's refusal to take seriously the language in 30 U.S.C. § 1255. As Plaintiffs have

noted time and again, the provision preserves only those State laws and regulations that are more protective of environmental quality than SMCRA. It is difficult to imagine how any such State laws would make it impossible for a regulated entity also to comply with federal law. By meeting a stricter standard under State law, the regulated entity would necessarily also be complying with the lower federal standard.

4. The requested relief does not require Plaintiffs to identify any particular other State laws or regulations regarding surface mining and reclamation.

Defendants' ultimate fallback is its observation, in a footnote, that Plaintiffs have not identified any State laws and regulations outside the State SMCRA programs that they seek to enforce. Gov't Br. at 25 n.9. But there is a reason Defendants relegate that point to a footnote: It is irrelevant to the declaratory relief requested by both Plaintiffs *and* Defendants.

On one hand, Plaintiffs seek in Count One a declaration that SMCRA leaves Oklahoma with at least some jurisdiction to regulate on the lands in question. Whether that declaration is correct or not, as a matter of law, does not depend on whether the State currently has in effect any particular laws that would be preserved by the savings clause. On the other hand, Defendants seek two declarations proclaiming the federal government the exclusive authority on the lands in question. The correctness of those sweeping declarations likewise does not depend on whether Plaintiffs have identified any particular laws that are not preempted. If anything, it is Defendants' burden to show the preemption of *any* State laws and regulations regarding surface mining and reclamation—real or hypothetical—on the lands in question.

What is more, whether Oklahoma has *any* remaining real or hypothetical authority on the lands in question to enforce State laws, using State funds, is critical to Plaintiffs' other claims. As discussed below, if Oklahoma has any remaining authority on the lands at issue, Defendants' actions here plainly violate both SMCRA and the APA. Among other things, Defendants' explanation of the basis for its actions would be incomplete at best, and it would plainly have failed to fully account for the State's reliance interests.

In any event, one example of a State law or regulation outside the State SMCRA programs that is not preempted is the Oklahoma Conservation Commission's ("OCC") authority over abandoned mine reclamation under Okla. Stat. Ann. tit. 27A, § 1-3-101. Indeed, OCC is currently undertaking purely State-funded efforts on the lands at issue pursuant to this authority. Exhibit 1.

II. Plaintiffs are entitled to summary judgment on their remaining claims (Counts 2 through 6).

As Plaintiffs have argued, OSMRE's actions violate the APA for three reasons: (1) they are not in accordance with law; (2) they are arbitrary and capricious because OSMRE failed to reasonably explain them and ignored reliance interests; and (3) they were not promulgated in compliance with the APA's required rulemaking procedures. Pls.' Br. at 31–44. Defendants' responses are unavailing.

A. OSMRE's decisions are not in accordance with law.

First, as Plaintiffs have explained, *id*. at 31, OSMRE erroneously interpreted *McGirt* to "necessarily foreclose" Oklahoma's SMCRA authority. 86 Fed. Reg. 26,941 (May 18,

2021), ("Notice of Decision"), AR 0699.[4] Among other errors, OSMRE did not even acknowledge *Sherrill*. Defendants respond that the "assertion of SMCRA jurisdiction" was "mandated by the law," and that "*Sherrill* and its progeny are inapposite." Gov't Br. at 37, 49. That is incorrect for the reasons previously explained. *See supra* Part I.

But it also misses an important point. Even accepting Defendants' own explanation of the law, what OSMRE still did incorrectly is assert in the Notice of Decisions that *McGirt*, standing alone, conclusively resolved Oklahoma's SMCRA authority. As Defendants' own brief shows, *McGirt* itself does not "foreclose[]" anything. AR 0699; AR 0810. *McGirt* certainly says nothing about the correct interpretation of SMCRA, and it expressly acknowledged that legal doctrines including laches might apply in future cases "to protect those who have reasonably labored under a mistaken understanding of the law." 140 S. Ct. at 2481. Rather, Defendants' (ultimately erroneous) conclusion about Oklahoma's SMCRA authority follows from an analysis of *McGirt*, numerous provisions in SMCRA, and multiple cases addressing *Sherrill* and other equitable principles. That is what Defendants say now, and yet that is not what OSMRE said in its decision. OSMRE simply asserted with no justification that *McGirt* "necessarily" required its action. AR 0699, AR 0810. That was a plainly erroneous statement about *McGirt* and, therefore, not in accordance with law.

Second, OSMRE failed to engage in any of the processes Congress and the agency itself established for evaluating, amending, disapproving or otherwise changing a State

[4] "AR" refers to OSMRE's Certified Index to the Administrative Record.

SMCRA program, all of which require notice and comment, and in certain circumstances, public hearings. *See* 30 U.S.C. § 1254(c); 30 C.F.R. §§ 732.17(h), 733.13(d). Defendants argue that OSMRE was not required to do so because it did not promulgate a "Federal program" for Oklahoma. Gov't Br. at 42–43. But Plaintiffs do not dispute that OSMRE did not promulgate a "Federal program." Plaintiffs' point is that OSMRE took action that effectively disapproved Oklahoma's State SMCRA programs.

As this Court concluded, "OSMRE's decision functions as a disapproval of Oklahoma's state program." ECF No. 75 at 15 n.5. Defendants counter that the disapproval of a State program can only occur where OSMRE "den[ies] an application for either a new program or an amendment to an existing program." Gov't Br. at 41 (emphases omitted). But as this Court further explained, "[w]hile it may be true that OSMRE has not formally disapproved Oklahoma's entire state program, the practical effect of OSMRE's decision has been to do just that, because all of the surface mining previously regulated by Oklahoma under SMCRA now takes place on Indian land." ECF No. 75 at 15 n.5. Oklahoma's State SMCRA programs have ended at the insistence of the federal government; indeed, the government sought a preliminary injunction to bring the programs to an end.[5] That is a disapproval of the programs in any ordinary sense of the term.

[5] As this Court knows, the preliminary injunction motion was resolved by a joint stipulation. Defendants suggest that the Oklahoma Department of Mines ("ODM") has been uncooperative in working with OSMRE to develop a protocol for the transfer of performance bonds as required by the stipulation as its General Counsel rejected efforts to schedule a telephone call. But that is not true. OSMRE made one attempt to schedule a phone call. Third Decl. of Joseph Maki ¶ 4, ECF No. 102-2. ODM's General Counsel expressed that he would prefer to proceed through written proposals, and OSMRE agreed to work on a proposal.

Once again, Defendants are missing the point—which is that OSMRE engaged in an *unlawful* and *procedurally improper* disapproval. Defendants argue that there was no amendment or disapproval because "there was no application from Oklahoma . . . for OSMRE to approve or disapprove." Gov't Br. at 41. But that is precisely the complaint. OSMRE determined that there was a problem with allowing Plaintiffs to continue to administer Oklahoma's State SMCRA programs. It then *failed* to follow the steps that require, among other things, soliciting an application from the State for OSMRE's review, 30 C.F.R. § 732.17(f)(1), or initiating a conference with the State, 30 C.F.R. § 733.13(c). In short, Defendants' argument that the procedures were not followed is Plaintiffs' point exactly.

Finally, to the extent OSMRE's decisions sought to oust the State entirely from regulating surface mining and reclamation on the lands in question—as Defendants now argue in defending those decisions—that is also not in accordance with law. As explained earlier, Defendants are incorrect that the federal government has exclusive jurisdiction on the lands at issue and that Oklahoma "lacks any form of concurrent jurisdiction." Gov't Br. at 16. That sweeping claim cannot be reconciled with the plain language of 30 U.S.C. § 1255.

B. OSMRE's decisions are arbitrary and capricious.

In addition to being contrary to law, OSMRE's actions were arbitrary and capricious. Pls.' Br. at 32–40. The agency was required to "make plain its course of inquiry, its analysis and its reasoning." *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). And it was required to consider reliance interests. OSMRE did neither here.

1. OSMRE failed to supply a reasoned explanation for its decision.

As Plaintiffs have explained, OSMRE's written explanations were woefully deficient. Pls.' Br. at 33–36. The agency did not even acknowledge—much less discuss—the relevance of *Sherrill*, the Supreme Court's express recognition in *McGirt* that laches might apply in future cases "to protect those who have reasonably labored under a mistaken understanding of the law," *McGirt*, 140 S. Ct. at 2481, or the effect of SMCRA's savings clause on its effort to stop all State regulation. Nor did OSMRE devote a single word to the serious practical implications of its actions.

Regarding the failure to address the practical implications, Defendants' response is to again insist that its actions were mandated by law. Gov't Br. at 51 ("Because OSMRE could make no alternative decision, it had no duty to consider the practical implications that Oklahoma raises."); *see also id*. at 37 (arguing that agency action cannot be arbitrary and capricious "when the law requires the agency to take that very action"). And again, Defendants are wrong. They had choices—choices that might have mitigated the practical consequences. For example, had OSMRE considered that SMCRA preempts only those State laws and regulations that are less protective than SMCRA, it might have decided that Oklahoma could continue to enforce, with State funds, certain State laws. And that might have lessened some of the impacts of its actions.

Even if OSMRE's actions were mandated by law, however, Defendants do not cite a single case that excuses them from even acknowledging real-world impacts. Instead, the Supreme Court has made clear that if an agency believes practical consequences to be

legally irrelevant, it must at least explain why. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("*DHS*").

As to the various legal considerations, Defendants' response is that OSMRE was not "obligated to respond to incorrect legal arguments." Gov't Br. at 50. That is simply incorrect, and Defendants tellingly do not cite to a single authority for that proposition either. If OSMRE believed the arguments were legally incorrect, it was required to explain as much. Agencies must respond to "significant" comments "which, if true, raise points relevant to the agency's decision a*nd which, if adopted, would require a change in an agency's proposed rule*." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (emphasis added). In responding to such comments, the agency "must disclose in detail the thinking that has animated the form of a proposed rule." *Id.* at 35.

That is the alpha and omega of reasoned decisionmaking. An agency is not permitted to ignore legal questions, no matter how obvious it believes they are, if they might affect the agency's path. At a minimum, doing so would deprive the courts of anything to review. That is why mere "'conclusory statements' . . . 'cannot substitute for the reasoned explanation.'" *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304-05 (D.C. Cir. 2009); *see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an 'agency's statement must be one of reasoning.'"). Nor may an agency "complete[ly] fail[] to explain its [legal reasoning]," *CSI Aviation Servs., Inc. v. U.S. Dept. of Transp.*, 637 F.3d 408, 416 (D.C. Cir. 2011), or merely assert that "[t]he case law supports" its action, *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 182–83 (D.D.C. 2008) (finding statement insufficient because it did not explain

"which cases it relied upon or how it derived support . . . from those cases"); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) ("When an agency merely parrots the language of a statute without providing an account of how it reached its results, it has not adequately explained the basis for its decision.").

Finally, whatever might be said about the May 18 and October 19 Notices, Defendants offer no defense whatsoever for the total lack of any explanation in the Grant Funding Denials.

2. OSMRE did not consider important reliance interests.

There is no dispute that OSMRE failed to consider any reliance interests. Instead, Defendants respond that OSMRE was not required to do so because its decision was mandated by law and, furthermore, it had no discretion to defer that mandatory transfer of authority. For all the reasons already explained, the transfer of authority was not mandated by law.

But even if it were, Defendants' argument that it had no discretion to defer the transfer of authority is belied by its own actions. OSMRE waited almost a year after *McGirt* before sending its April 2021 letter to Plaintiffs, AR 0638–40,—all the while permitting Oklahoma to continue administering its State SMCRA programs. And even then, OSMRE allowed for a 30-day transition period. So despite Defendants' "'convenient litigating position,'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), it is clear from the record that OSMRE thought it had "flexibility in carrying out its responsibility," *DHS*, 140 S. Ct. at 1914. Accordingly, it was required—just as the agency was in *DHS*—

to consider reliance interests and whether the provided transition period could adequately address those interests.

Moreover, as Plaintiffs have explained, SMCRA's savings clause created ample flexibility for discussion between Oklahoma and OSMRE about other transition measures to mitigate reliance interests. Pls.' Br. at 39–40. Defendants' only response to this point is to rehash its denials that the savings clause preserves any State authority in Indian lands. Gov't Br. at 52–53. But as already discussed, the text of the clause is clear.

Defendants pivot next to denying, in any event, that there are any serious reliance interests at all. *Id*. at 52. Their main argument here is also a repeat of a point made earlier: that there is no justifiable reliance on State regulation as opposed to federal regulation. As explained above, this argument is specious. *See supra* pp. 15–17. Both SMCRA and the country more broadly are premised on the notion that state-based regulation is meaningfully different from federal regulation. And to the extent that the federal government is claiming OSMRE oversight of State regulation is indistinguishable from direct federal control, that would raise serious constitutional concerns about the "commandeering of state governments." *Printz*, 521 U.S. at 925. The fact of the matter is, as this Court correctly observed, OSMRE's decisions upset "the justifiable expectations of millions of Oklahomans, expectations which go back over a hundred years and are rooted in the very existence of Oklahoma as a [sovereign] state." ECF No. 75 at 12.

C. OSMRE also failed to comply with the APA's rulemaking procedures.

In addition to compliance with SMCRA procedures and regulations, *see supra* pp. 30–32, OSMRE was required to comply with the APA's rulemaking procedures. Pls.' Br.

at 40–43. Defendants counter that OSMRE was not required to do so because, as they have repeatedly argued, they believe OSMRE's actions were non-discretionary. Yet again, for the reasons explained above, that is incorrect. *See supra* Part I. And for those same reasons, Defendants' reliance on *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1 (D.C. Cir. 2011), is misplaced. In that case, EPA was not required to provide notice and comment on "'conditions in a [state's] CWA 401 certification'" because the agency lacked "'the ability to amend or reject'" such conditions. *Lake Carriers' Ass'n.*, 652 F.3d at 10 (citing *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107, 110–11 (2d Cir. 1997) (explaining that the statute's "language is unequivocal" that the federal agency cannot amend or reject State conditions)). That is not the case here.

What is more, Defendants do not dispute that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). And Defendants concede, as they must, that OSMRE's prior approval of Oklahoma's State SMCRA program was done through APA rulemaking. Gov't Br. at 7–8; *see also* 47 Fed. Reg. 14,152 (Apr. 2, 1982); 30 C.F.R. § 936.20. So for this independent reason, as well, OSMRE was required to do the same to repeal that program.

Defendants respond essentially by denying that they repealed Oklahoma's State SMCRA programs. They contend that OSMRE's decisions are equivalent to an interpretive rule that merely clarified a statutory or regulatory term or explained something already required in the law. Gov't Br. at 48 n.23 (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014)). But as discussed above, and as this Court has already recognized,

OSMRE's decisions did far more than that. "OSMRE's decision functions as a disapproval of Oklahoma's state program." ECF No. 75 at 15 n.5; *see also supra* pp. 31–32. OSMRE's actions thus fit the definition of a "legislative rule" because they "supplement[ed] a statute, adopt[ed] a new position inconsistent with existing regulations, or otherwise effect[ed] a substantive change in existing law or policy." *Mendoza*, 754 F.3d at 1021. And legislative rules may only be implemented and repealed by notice-and-comment rulemaking.[6]

D. OSMRE's APA violations are not harmless error.

Defendants assert that "any alleged APA violation is at best harmless." Gov't Br. at 37. They contend that "[n]o amount of administrative procedure or additional explanation of OSMRE's reasoning could allow Oklahoma to exercise SMCRA jurisdiction within the Reservations," *id.* at 38, and the outcome of any additional process is thus "foreordained," *id.* at 55.

As suggested above, there are numerous ways in which additional procedure or explanation might have a different result. For example, if this Court were to agree with Plaintiffs about the savings clause, OSMRE would have to consider different arrangements with the State and how and whether concurrent jurisdiction might best work. At the very minimum, OSMRE would have to consider different transition plans and whether the State is entitled to more federal funding for the transition than it has been permitted. And if this Court were to agree with Plaintiffs that *Sherrill* at least applies in this circumstance (even

[6] As Plaintiffs argued in their opening brief, OSMRE's failure to follow notice-and-comment rulemaking also entitles Plaintiffs to summary judgment on their fundamental fairness claim (Count 6). *See* Pls.' Br. at 43 n.7. Contrary to Defendants' assertion, Gov't Br. at 38 n.17, Plaintiffs have not waived that claim.

if leaving open the question whether *Sherrill* controls the outcome), OSMRE would have to thoroughly and seriously consider whether and how the *Sherrill* factors play out. And lastly, even if OSMRE were merely required to provide for a notice-and-comment process, it would have to accept and consider a much wider array of views, including those of the entities OSMRE seeks to regulate, as well as those of every-day Oklahomans living with the fall-out from *McGirt*.

E. This Court has jurisdiction over Plaintiffs' APA and SMCRA claims.

Finally, Defendants claim that this Court lacks jurisdiction over Plaintiffs' APA and SMCRA claims. They are wrong.

1. Plaintiffs' claims are timely and in the proper venue.

Plaintiffs' APA and SMCRA claims are timely and in the proper venue because OSMRE's action disapproved Oklahoma's program, as explained above and as this Court has already concluded. ECF No. 75 at 15 n.5. Under 30 U.S.C. § 1276(a)(1), actions challenging the disapproval of a State program must be filed in the U.S. District Court for the District which includes the capital of the State whose program is at issue, and be filed "within sixty days from the date of such action." The venue is plainly correct, and so is the timing because both suits were filed within 60 days of the relevant Federal Register notice. As Plaintiffs explained, Pls.' Br. at 30, the Federal Register notice is the correct trigger date because approvals and disapprovals of State programs are only complete upon OSMRE's publication of the decision in the Federal Register.

Defendants raise several objections, all of which stem from their view that these suits do not involve disapprovals of State SMCRA programs but rather "other"

rulemakings. First, they argue that both suits are in the wrong venue because under 30 U.S.C. § 1276(a)(1), only actions challenging approvals or disapprovals may be filed in this District. Gov't Br. at 43–44. Actions challenging "other" rulemakings must be filed in the U.S. District Court for the District in which the surface coal mining operation is located. Second, Defendants argue that the Federal Register notice is not the proper trigger date because, again, these suits do not concern approvals or disapprovals of State SMCRA programs. *Id*. at 44–45. If correct, this would make *Oklahoma I* untimely but not *Oklahoma II*.

Defendants are wrong for several reasons. For starters, these suits *do* involve disapprovals of State SMCRA programs, for the reasons already discussed at length above. *See supra* pp. 31–32. That undermines both of Defendants' objections, since they do not contest either that this is the right venue for a disapproval suit or that disapprovals become final only upon publication in the Federal Register. So if this Court continues to agree that OSMRE's actions constitute disapprovals, there is neither a venue nor timeliness problem—for either case—under Defendants' own reasoning.

But that is not the only problem with Defendants' argument. The other is that if OSMRE's actions are *not* disapprovals, then they are *not* rulemakings at all. Defendants insist that the actions would be some "other" rulemaking, but they offer no basis for that assertion. Rather, the actions would simply constitute agency adjudications, consistent with Defendants' own (erroneous) contention that Federal Register publication is not needed. *Cf.* Pls.' Br. at 30 (noting that rulemakings must be published in the Federal Register). And as adjudications, OSMRE's actions would be properly brought under the APA in this

District, *see* 28 U.S.C. § 1391(e) (where plaintiff resides), well within the APA's six-year statute of limitations, *see* 28 U.S.C. § 2401(a).[7]

In all events, Defendants do not contest that if final, the Grant Funding Denials were timely challenged in the proper venue under the APA.

2. OSMRE's actions are final agency actions reviewable under the APA.

As Plaintiffs argued, and this Court agreed, there can be no serious dispute that all of the challenged actions are final agency action. Pls.' Br. at 43–44; ECF No. 75 at 16. Nevertheless, Defendants double-down on this argument, too, contending that OSMRE's revocation of Oklahoma's State SMCRA programs were "non-discretionary" and therefore unreviewable. Gov't Br. at 45–46. They are wrong. This Court rightly found the argument would lead to "absurd results." ECF No. 75 at 16 n.6.

Even assuming that OSMRE's decisions were "non-discretionary," which they are not for all the reasons already discussed, nothing in the APA supports Defendants' novel argument. The "'strong presumption that Congress intends judicial review of administrative action' . . . 'is overcome [in the APA] only in two narrow circumstances,'" *ASSE Int'l, Inc. v. Kerry,* 803 F.3d 1059, 1068 (9th Cir. 2015) (internal citation omitted)—

[7] Defendants are wrong in asserting that Plaintiffs have not argued that OSMRE's actions constitute any other form of agency action under the APA. Gov't Br. at 43 n.20. Plaintiffs argued in the alternative that if this Court find OSMRE's actions not to be rulemakings, those actions could be challenged under the APA. Pls.' Br. at 31. That alternative argument followed directly from Plaintiffs' pleadings in the alternative that OSMRE's actions were adjudications. *E.g.*, ECF No. 1 ¶¶ 76–79, 102, 104.

when Congress expressly bars judicial review, *see* 5 U.S.C. § 701(a)(1), and when "agency action is committed to agency discretion by law," *id.* § 701(a)(2).

Nor do either of Defendants' cases come close to supporting their newfound exception to judicial review. In *Blakely v. United States*, 276 F.3d 853 (6th Cir. 2002), the plaintiffs sought to use the APA to overturn a consent judgment in a civil forfeiture. 276 F.3d at 860. The Court rejected this effort, explaining that because the "civil forfeiture . . . was achieved by a consent judgment in [a] judicial proceeding[] [,] the civil forfeiture did not involve agency action." *Id*. at 870. Here, OSMRE did not issue the Notice of Decision and Grant Funding Denials as part of a civil judicial proceeding.

The other case—*Senior Executives Ass'n v. United States*, No. 8:12-cv-02297-AW, 2013 WL 1316333 (D. Md. Mar. 27, 2013)—is dubious case law at best. It is an unpublished out-of-circuit district court decision, and its reasoning is deeply flawed. The plaintiffs there challenged the Stop Trading on Congressional Knowledge Act of 2012 ("STOCK Act"), which prescribed the public disclosure of certain financial information of congressional members and employees. *Id*. at *1. The plaintiffs argued that the government's planned publication of their financial information, required by the STOCK Act, contravened the APA. *Id*. at *16. The district court held that the publication "is a nondiscretionary, ministerial act involving no decision making that the Government must execute in accordance with express statutory mandate." *Id*. at *17. The court observed that the APA could compel an agency to take this type of ministerial action. *Id*. It then leaped to the conclusion that, "[q]uite plausibly, the corollary of the rule that an agency's failure

to carry out nondiscretionary, ministerial statutory duties supports APA review is that its success in carrying out such duties fails to support APA review." *Id*.

But the "plausibl[e]" "corollary" on which *Senior Executives* relied simply does not follow and is unsupported by any case law. That an agency can only be compelled to take nondiscretionary, ministerial duties does not logically suggest that a court cannot, or should not, review an agency's claim that it was mandated by statute to take a certain action. Indeed, the plain text of the APA indicates otherwise—that courts can and should review such action to determine whether the agency's reading of the statute as mandatory is, in fact, correct. *See* 5 U.S.C. § 706(2)(A) (permitting review to determine whether agency action is "in accordance with law").

In any event, *Senior Executives* at most supports the notion that ministerial duties may be unreviewable. And whatever else OSMRE's decisions might be, they were not ministerial—something that "does not require any significant judgment, statutory interpretation, or policy-making decisions." *Hedgepath v. Pelphrey*, 520 F. App'x 385, 389 (6th Cir. 2013) (internal quotation marks and citation omitted) (emphasis added). In contrast, the Notices of Decision reflect statutory interpretation and analysis that took the agency nearly a year to complete, *compare McGirt*, 140 S. Ct. at 2452 (decided July 9, 2020), *with* Notice of Decision (issued May 18, 2021), AR 0699, and that this Court is fully capable of reviewing. In fact, when OCC asked OSMRE a question about the potential impact of *McGirt* for AML reclamation, OSMRE responded that it was "an excellent question," with "a lot of complexities involved," and responded five months later with no conclusions. Suppl. Decl. of Robert Toole ¶ 3, Ex. A; ¶ 4, Ex. B, ECF No. 42-2.

Separately, Defendants argue that the Grant Funding Denials 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." Gov't Br. at 53. But these claims are belied by Defendants' own declarations. Those declarations make clear that OSMRE considers itself "legally prevented" from disbursing funds to Plaintiffs for any activities that occurred after the Grant Funding Denials. Decl. of Paul Fritsch ¶¶ 28, 47, ECF No. 34-8; Second Decl. of Paul Fritsch ¶ 3, ECF No. 120-1. For example, ODM's Grant Funding Denial was issued on June 29, 2021. AR 0764. Defendants' declarations state that OSMRE is "legally prevented from approving" any grants "for costs related to ODM's unauthorized administration and enforcement on Indian lands since June 30, 2021"—the day after the relevant Grant Funding Denial. ECF No. 34-8 ¶ 28; *see also* ECF. No. 120-1 ¶ 3. Similarly, the declarations state that OSMRE is "legally prevented from disbursing *any* additional AML grants to OCC." ECF No. 34-8 ¶ 47 (emphasis added); *see also* ECF. No. 120-1 ¶ 3. Indeed, in Defendants' brief, they admit that "Federal law mandates that OSMRE disapprove Oklahoma's applications for funding activities on Indian lands." Gov't Br. at 54. While Defendants continue to insist that there is still no finality to the funding question, it is quite clear that the agency's mind has long been and remains made up.

CONCLUSION

This Court should grant summary judgment to Plaintiffs on all claims and counterclaims and correspondingly deny summary judgment to Defendants.

Dated August 26, 2022

Respectfully submitted,

s/ Elbert Lin

Bryan Cleveland
Deputy Solicitor General
Jennifer Lewis
Assistant Attorney General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
bryan.cleveland@oag.ok.gov

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

Matthew Z. Leopold (*Pro Hac Vice*)
Erica N. Peterson (*Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
Phone: (202) 955-1500
mleopold@HuntonAK.com
epeterson@HuntonAK.com

Counsel for Plaintiffs

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

Trevor S. Pemberton
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

Phone: (405) 521-2058
Trevor.pemberton@gov.ok.gov

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