



McGirt and PFAS Update

2022 Regulatory Newsreel Environmental Federation of Oklahoma

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McGirt Update

I. McGirt Recap

A. McGirt's predecessor – Murphy (deadlocked 4-4)

- Justice Breyer's comment during Murphy hearing

B. Supreme Court held that McGirt matter should have proceeded in federal court pursuant to the Major Crimes Act (5-4 decision)

- Held that the Creek “reservation” was never disestablished
- Expansive application to five tribes – Creek, Cherokee, Choctaw, Seminole and Chickasaw
- Chief Justice Roberts' dissent



McGirt Update

II. Status of Law After McGirt

A. In re the Income Tax Protest of Alicia Stroble (April 12, 2022)

- To qualify for Exempt Tribal Income:
 1. An enrolled member of a tribe
 2. Income earned from sources within “Indian Country” under the jurisdiction of member’s tribe
 3. Live in “Indian Country” under the jurisdiction of member’s tribe



McGirt Update

II. Status of Law After McGirt (Cont.)

A. In re the Income Tax Protest of Alicia Stroble (April 12, 2022) (cont.)

- ALJ for the Oklahoma Tax Commission held Protestant's income earned from the Muscogee (Creek) Nation were Exempt Tribal Income because after *McGirt*, Protestant resided in Indian Country



McGirt Update

II. Status of Law After McGirt (Cont.)

B. State of Oklahoma v. Victor Manuel Castro-Huerta

- Facts

1. Defendant is a non-Indian. Abused five-year-old stepdaughter who was Indian
2. Charged and convicted in state court and sentenced to 35 years imprisonment



McGirt Update

II. Status of Law After McGirt (Cont.)

B. State of Oklahoma v. Victor Manuel Castro-Huerta (Cont.)

- On Appeal, the Oklahoma Court of Criminal Appeals expanded McGirt saying the federal government has exclusive (not concurrent) jurisdiction over a crime committed by a non-Indian against an Indian.
- Questions presented to the Supreme Court:
 1. Whether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian Country
 2. Whether McGirt should be overruled



McGirt Update

II. Status of Law After McGirt (Cont.)

B. State of Oklahoma v. Victor Manuel Castro-Huerta (Cont.)

- Oral argument before U.S. Supreme Court on April 27, 2022
- Two main issues the justices focused on
 1. Legal implications of recognizing state concurrent jurisdiction
 2. Immediate, practical repercussions of McGirt decision



McGirt Update

II. Status of Law After McGirt (Cont.)

- C. The Supreme Court decision could be released as early as this morning at 9 CST.
- D. Practical Implications of McGirt and its Progeny



PFAS Update

I. What are Per- and Polyfluoroalkyl substances (“PFAS”)?

- Class of synthetic compounds developed in the 1930s at 3M and Dupont, and used in countless industrial and consumer applications
- After WWII, Dupont commercialized perfluorooctanoic acid (PFOA) into the product the company branded “Teflon”
- 3M commercialized its own PFAS chemical perfluorooctane sulfonate (PFOS), which they commercialized and branded “Scotchguard”



PFAS Update

II. Prior Regulatory Efforts

- May 2016 EPA issues a health advisory (PFOA and PFAS) drinking water level of **70 parts per trillion (“ppt”)**. The health advisory level is not a regulation.
- February 2019, EPA Action Plan “describes the EPA’s approach to identifying and understanding PFAS, approached to addressing current PFAS contamination, including:
 - i. Evaluate need for maximum contaminant level (MCL) for perfluorooctanoic acid (PFOA) and pefluorooctane sulfonate (PFOS);
 - ii. Beginning necessary steps to propose designating PFOA and PFOS as “hazardous substances” through one of the available federal statutory mechanisms, e.g., CERCLA, RCRA, TSCA, CWA and CAA



PFAS Update

III. Current Regulatory Status

- EPA
 - PFAS is a priority for Administrator Michael Regan
 - Three Clean Water actions announced in April 2022
 - ❖ Clean Water Act aquatic life criteria for PFA
 - ❖ EPA issued a memo to use its Clean Water Act permitting authorities to reduce discharges of PFAS at the source and to obtain more comprehensive monitoring information on potential sources of PFAS
 - ❖ Published a new draft method to measure for Adsorbable Organic Fluorine in water samples



PFAS Update

IV. What are States Doing?

- Many states have begun the process of regulating PFAS in drinking water and have adopted enforceable standards or Maximum Contaminant Levels (MCLs) for PFAS in their state.
 - i. While Oklahoma is not one of those states, recently, during the current 2021 legislative session, proposed SB 6722, to establish the “Oklahoma PFAS Waste Act”
 1. Defining PFAS and PFAS Waste
 2. Exemptions for consumer and industrial products that incidentally contain PFAS and that are routinely discarded through municipal waste streams
 3. Oklahoma Dept. of Environmental Quality agency to adopt rules and regulate the receipt, storage, treatment and disposal of PFAS Waste
 4. Storage, treatment and disposal will be protective of human health and the environment
 5. Generator of PFAS waste is responsible for safe and proper disposal of the waste
 6. No quantified limits



PFAS Update

V. June 21, 2022 EPA Health Advisory

- Concentrations of chemicals in Drinking Water at or below which adverse health effects are not anticipated to occur, are:

PFOA	0.004 ppt (4 parts per quadrillion)
PFOS	0.02 ppt
GenX	10 ppt
PFBS	2000 ppt

- This Health Advisory supersedes the 2016 advisory for PFOA & PFOS
- Implications of the new Health Advisory



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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Donald K. Shandy, or another licensed attorney.
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