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The Wind River Reservation Treatment-as-State Controversy: How Confusion Undermines Opportunities for Cooperative Governance

By Bart J. Freedman, Alanna E. Peterson, and Marie E. Quasius

Under certain statutes, tribes can exercise civil jurisdiction over non-Indians. For instance, the Comprehensive Environmental Response, Compensation, and Liability Act allows tribes to pursue claims for natural resource damages, and the Clean Air Act ("CAA") and the Clean Water Act ("CWA") allow the Environmental Protection Agency ("EPA") to delegate regulatory authority to tribes, including permitting.

On December 6, 2013, the EPA approved the Northern Arapaho and Eastern Shoshone tribes' ("Tribes") application for treatment-as-state ("TAS") status under section 301(d) of the CAA, with respect to the Wind River Reservation.[1] The CAA authorizes the EPA to grant Indian tribes the same delegated regulatory authority as states under the CAA within reservation boundaries, irrespective of land ownership.[2]

The EPA's approval of TAS status for the Wind River reservation has generated significant controversy. Although the EPA's decision otherwise has no effect on civil or criminal jurisdiction, the State of Wyoming and other public and private entities have appealed the EPA's decision to the Tenth Circuit and raised an issue of first impression as to whether the EPA has authority to determine a reservation's boundaries for the purposes of the CAA. Depending on the outcome, this case could result in a departure from established principles governing the delegation of regulatory authority to tribes and should be of particular interest to entities operating on or near Indian reservations.

The Tribes' TAS Application

The Tribes live on the Wind River Reservation, which is located within the boundaries of Fremont County and Hot Springs County in west-central Wyoming. The reservation is approximately 2.2 million acres, of which 1.8 million acres is owned by the Tribes or their members. Only 10 percent of reservation lands are owned by non-Indians. Of the 10 percent owned by non-Indians, the federal government holds 25 percent in surface fee with minerals held in trust for the Tribes. There is significant oil, gas, and mining development within the exterior boundaries of the reservation and to the east and southeast of the reservation.

The State and Tribes agree that the exterior boundary of the Wind River Reservation encompasses the lands reserved under the 1868 Treaty of Fort Bridger,[3] less the area removed under the Lander[4] and Thermopolis Purchase[5] Acts plus those lands acquired by

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[1] *See* 78 Fed. Reg. 76829 (Dec. 19, 2013).
[2] 42 U.S.C. § 7601(d)(2)(B).
[3] 15 Stat. 673 (1868).
[4] 17 Stat. 214 (1872).
[5] 30 Stat. 93 (1897).

statute in Hot Springs County, Wyoming in 1940.[6] The parties dispute, however, whether the Act of March 3, 1905, 33 Stat. 1016 (1905) ("1905 Act") diminished the reservation or simply opened the land to settlement. The 1905 Act transferred certain areas of the reservation to the federal government to hold in trust for the tribes in order to facilitate non-Indian settlement of the area, including oil, gas, and mineral development.[7] The disputed area covers approximately a million acres of the southwestern portion of the reservation and includes Riverton, the largest city in Fremont County, which is composed almost entirely of non-members.

The Tribes applied for TAS status for the limited purposes of obtaining grant funding and the opportunity to comment on permit actions relating to air quality, participating in air quality commissions, and developing risk management plans. The Tribes did not request, and the EPA did not delegate, authority to implement any other CAA programs.[8]

In considering the Tribes' application, the CAA and implementing regulations require the EPA to determine the exterior boundaries of the reservation. During the public comment process, the state of Wyoming, elected officials, public entities, citizens of the state of Wyoming, and the city of Riverton all objected to tribal jurisdiction over what they viewed as non-reservation lands. To resolve this uncertainty, the Department of the Interior examined the treaties and the facts and concluded that the 1905 Act did not diminish the reservation.

On December 6, 2013, the EPA approved the Tribes' application to administer certain non-regulatory provisions of the CAA within the reservation boundaries, regardless of ownership. After considerable local conflict, both the State of Wyoming and the Tribes requested that the EPA stay its decision. On February 13, 2014, the EPA agreed to temporarily stay the effect of its CAA TAS determination while the State of Wyoming appealed its determination in the Tenth Circuit.[9]

The Tenth Circuit requires parties to undergo mediation before submitting briefs and scheduling oral argument. Mediation has not been scheduled and, due to the flexibility of the mediation requirements, there is no timeline for the court's decision.

The Existing Balance of Federal, State, and Tribal Jurisdiction in Indian Country

Tribal environmental authority in Indian country stems from both the tribes' inherent sovereign power to govern their people and territories[10] and from Congress's broad power to delegate authority to the tribes.[11] Tribes have full civil jurisdiction over their members with respect to their conduct within Indian country and may also exercise jurisdiction over

[6] 54 Stat. 642 (1940).

[7] Cong. Rec. H1945 (Feb. 6, 1905).

[8] EPA, *Approval of Application Submitted by the Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment in a Similar Manner as a State for Purposes of the Clean Air Act*, at *1 (December 6, 2013).

[9] EPA, *Letter from EPA Regional Administrator Shaun McGrath to the State of Wyoming, Eastern Shoshone Tribe, and Northern Arapaho Tribe Regarding the Stay of the Wind River Tribes TAS Decision* (Feb. 13, 2014) (refusing to "agree[] with or adopt[] the State's legal or factual arguments concerning the effect of the 1905 Act on the Wind River Indian Reservation boundaries or the potential effects of the EPA's TAS approval decision.").

[10] *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (recognizing tribes' right to self-government).

[11] *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (holding that a grant of regulatory authority is strengthened where the entity receiving that authority "possess[ed] independent authority over the subject matter.").

non-members who are engaged in conduct on reservation lands that involves the tribe or its members.[12]

Questions of tribal jurisdiction over non-members are complicated by the checkerboard land ownership patterns on many reservations. Indian country, as defined by federal law, includes reservations, dependent Indian communities, and allotments.[13] Indian country includes land owned by non-Indians within reservations and rights-of-way running through the reservation.[14]

Tribes presumptively lack jurisdiction over the activities of non-members on fee land within reservations except (1) where a non-member's conduct "threaten[s] the political integrity, economic security, or health or welfare of the tribe"; and (2) where a non-member enters into a consensual agreement with tribes or tribal members.[15] Tribes generally rely on the "health and welfare" exception to assert jurisdiction over non-members within the environmental sphere.[16]

States have limited, if any, jurisdiction over tribes and Indians within Indian country unless Congress authorizes a state to exercise jurisdiction. Absent express congressional action, states have no authority over tribes' land or resources.[17] In addition, states' authority is restricted even over some tribal member activities occurring outside the reservation.[18] Public Law 280 authorizes some states to assert criminal and civil jurisdiction in Indian country with tribal consent, but it does not extend to civil regulatory authority.[19] Thus, if a tribe chooses not to apply for regulatory authority, the EPA will administer the CAA in Indian country.

Criminal jurisdiction is governed by entirely different rules—practically speaking, changes to civil regulatory jurisdiction do not affect the scope of a tribe's criminal jurisdiction. Tribes often negotiate issues with local and state agencies regarding jurisdiction and the coordinated implementation of state, local, and tribal laws.

TA Status to Implement Environmental Regulations

Federal environmental laws allow tribes to assume the same types of delegated regulatory authority as states if they meet certain statutory criteria that are largely identical under each statute.[20] An Indian tribe must demonstrate that it (1) is federally recognized; (2) has a

[12] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

[13] 18 USC § 1151. Although this definition is contained in the criminal code, it applies in the civil context as well. *California v. Cabazon Band of Missouri Indians*, 480 U.S. 202, 207 n.5 (1987).

[14] 18 U.S.C. § 1151(a).

[15] *Montana v. United States*, 450 U.S. 544, 565 (1981). The second *Montana* exception does not apply here.

[16] *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 430-31 (1989) (recognizing that "in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest [in the use of fee land within the reservation because of] . . . the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe.").

[17] *Worcester*, 31 U.S. at 561.

[18] *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999) (state can only regulate a tribes' pre-statehood right to hunt, fish, and gather outside of reservation as necessary for conservation).

[19] *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976) ("[I]f Congress in enacting Pub. L. 280 had intended to confer upon the state general civil regulatory powers . . . over reservation Indians, it would have expressly said so.").

[20] *Compare* 42 U.S.C. § 7601(d)(2) (CAA) *with* 33 USC § 1377(e) (CWA) *and* 42 USC § 300j-11(b)(1) (Safe Drinking Water Act).

governing body that exercises substantial government power; and (3) is reasonably capable of carrying out the functions it seeks to administer. [21]

Each TAS provision defines the territorial reach of tribal authority differently. Under the CAA, tribes can apply to exercise regulatory authority "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[22] The EPA's view—as validated by the D.C. Circuit—is that the CAA expressly delegates federal authority to tribes to regulate air quality within the exterior boundaries of reservations, regardless of whether the tribes own the land.[23] This is a broad delegation—the CWA, in contrast, requires tribes to demonstrate inherent authority over non-Indian land within reservation boundaries.[24]

As was necessary for the Wind River reservation, the EPA consults with the Department of the Interior and Department of Justice to resolve any uncertainty or contention regarding a tribes' jurisdictional reach. Where the burden of conflict outweighs the benefits of TAS status, EPA has in the past limited the scope of the tribe's TAS jurisdiction to uncontested areas or, in other cases, tribes have elected to forego TAS status altogether. Although entities regularly challenge jurisdictional determinations for purposes of implementing the CAA, no entities have previously challenged the EPA's authority to make that determination or suggested that the EPA's determination could affect the allocation of civil and criminal jurisdiction more generally.

Tribes can obtain TAS status for virtually all purposes of the CAA,[25] including the ability to petition the EPA to intervene in upwind permit proceedings,[26] but must apply for authority to implement each CAA program separately. Thus, authority to receive information and comment on air permit applications does not automatically extend to other CAA programs (e.g., air permitting programs). Forty-seven tribes have obtained TAS status for CAA programs, some of which have submitted subsequent TAS applications to expand their CAA authority.

Possible Implications for Non-Members and the State of Wyoming

Although the Tribes did not apply for CAA permitting authority, the EPA's jurisdictional determination does control whether the state or federal government will issue air permits in the disputed area. Currently, the State of Wyoming issues air permits for oil, gas, and mining facilities in the disputed area. If the disputed area is within Indian Country, the EPA will administer any provisions of the CAA that the Tribes do not have the authority to administer, including air permitting.

This is particularly relevant because the Tribes' TAS status allows them to receive notice of and provide comments on air permits issued to the nearby oil and gas and mining developments and petition EPA to intervene in upwind permit proceedings. EPA cannot necessarily ignore the Tribes—when considering an air permit application, the EPA must

[21] 42 U.S.C. § 7601(d)(2).

[22] *Id.*

[23] *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1287-92 (D.C. Cir. 2000) (upholding the EPA's interpretation of the jurisdictional reach of the CAA TAS provision).

[24] *Montana v. EPA*, 137 F.3d 1135, 1140-41 (9th Cir. 1998) (upholding the EPA's interpretation of the jurisdictional reach of the CWA TAS provision).

[25] See 40 CFR § 49.3. The limited exceptions include criminal enforcement provisions and some submission deadlines. 40 CFR § 49.4.

[26] *See* 42 U.S.C. § 7426(b)-(c) (2000).

consider the Tribes' recommendations when making permitting decisions and provide a reasoned response if it chooses not to incorporate the Tribes' recommendations.

Tribal jurisdiction is one of the major issues regarding the TAS provisions and has caused a considerable amount of controversy in this case. Based on existing principles of federal Indian law, it is highly unlikely that the EPA's decision will affect the State's or Tribes' civil and criminal jurisdiction. Indeed, the only issues raised on appeal are whether the 1905 Act diminished the reservation and whether the EPA has authority to make that determination.

Although the EPA's decision has no legal effect on civil or criminal jurisdiction, what the law requires is altogether different from what parties are able to negotiate. In Michigan, the Saginaw Chippewa tribe used an Indian Child Welfare Act ("ICWA") decision as a springboard to negotiate with the city of Mt. Pleasant regarding diverse civil and criminal jurisdictional issues relating to taxation, licensing, and health inspection. Under ICWA, an Indian nation has exclusive jurisdiction when the Indian child in the child custody proceeding resides or is domiciled within the reservation. ICWA relies on the same definition of "Indian country," including the term "reservation," as the CAA and CWA.27 The Saginaw Chippewa tribe and the State disagreed over the exterior boundaries of the Isabella Reservation. The tribe sought a declaratory judgment in federal court that all lands within the boundaries of the Isabella Reservation were "Indian country" under federal law.28 The court never resolved the dispute because the parties reached a favorable settlement agreement that resolved other longstanding jurisdictional disputes between the Saginaw Chippewa tribe and the State.29

Conclusion

Because tribes can choose the scope of regulatory authority they wish to assume, entities operating within Indian Country may be regulated by the tribes for some purposes and the EPA for others. In addition, states may have a heightened stake in the outcome if tribes seek regulatory authority over Indian Country. Widespread misunderstanding of federal Indian law further complicates the implementation of this regulatory scheme. This confusion may complicate air permitting in and around Indian Country, so the resolution of this case should be of particular interest to entities seeking air permits to operate on or near Indian reservations.

Authors:

Bart Freedman
bart.freedman@klgates.com
+1.206.370.7655

Alanna Peterson
alanna.peterson@klgates.com
+1.206.370.8028

Marie Quasius
marie.quasius@klgates.com
+1.206.370.8195

[27] *See* 25 U.S.C. § 1903(10) (incorporating 18 U.S.C. § 1151 by reference).
[28] *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296-BC (E.D. Mich. 2011).
[29] *Id*.

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