D.C. Circuit Affirms EPA's Clean Air Act Treatment As States Rule

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On May 5, 2000, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in Arizona Public Service Company v. Environmental Protection Agency, et al., ____ F.3d ____, 2000 WL 493047 (D.C. Cir. 2000), affirming the EPA's 1998 rule implementing the federal Clean Air Act's "treatment as states" provision. See Indian Tribes: Air Quality Planning & Management, 63 Fed. Reg. 7,254 (1998) (the "Tribal Authority Rule" or the "TAR"). The TAR governs the procedures Indian tribes must follow to apply for and obtain "treatment as a state" status, which then permits EPA to delegate Clean Air Act program authority to that tribe. The TAR also identifies those provisions of the Clean Air Act that EPA has determined are not "appropriate" to be delegated to (or imposed upon) Tribes.

I. The Petitioners' Arguments.

Arizona Public Service Company, the State of Michigan, and other industry petitioners (collectively the "Petitioners") had challenged the Tribal Authority Rule on several grounds. First, the Petitioners argued that the 1990 Amendments to the Clean Air Act did not expressly delegate to Native American Tribes authority to regulate air quality on all land within reservations, including fee lands held by private landowners who are not tribal members. Second, the Petitioners challenged EPA's construction of the term "reservation" to include lands outside reservation boundaries including trust lands and "dependent Indian communities." Third, the Petitioners challenged the Tribal Authority Rule's provision which provided that only "appropriate governmental entities" could comment on tribal applications for program delegation, excluding comments from the general public. Fourth, Petitioners challenged the TAR arguing the EPA improperly held that the 1990 Amendments to the Clean Air Act abrogated preexisting contracts under which tribes agreed not to regulate certain privately held land. Finally, the Petitioners argued that EPA improperly interpreted the 1990 Amendments to the Clean Air Act as exempting Native American tribes from certain of the Act's judicial review requirements.

II. The Court's Opinion.

A. The TAR Expressly Delegates Regulatory Authority Over Fee Lands Within Reservation Boundaries.

Writing for the Court, Chief Judge Edwards rejected the Petitioners' first claim finding that the 1990 Amendments did expressly delegate to tribes authority to regulate air quality on fee lands located within the exterior boundaries of a reservation.

Section 7601(d), in pertinent part, authorizes EPA to treat otherwise eligible tribes as states if "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. §7601(d)(2)(B). The statute's clear distinction between areas "within the exterior boundaries of the

reservation" and "other areas within the tribe's jurisdiction" carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction. Thus, EPA correctly interpreted §7601(d) to express Congressional intent to grant tribal jurisdiction over non-member owned fee land within a reservation without the need to determine, on a case-specific basis, whether a tribe possesses "inherent sovereign power" under [Montana v. United States, 450 U.S. 544 (1981)].

Judge Edwards further noted that the legislative history of the 1990 Amendments supports EPA's interpretation that Congress expressly delegated authority over all lands within reservation boundaries, including non-Indian owned fee lands. According to Judge Edwards, "as originally introduced, 42 U.S.C. §7601(d) differed in significant respect from the final adopted version. The original §7601(d)(2)(B) provided that treatment of tribes as states was authorized if 'the functions to be exercised by the Indian tribe are within the area of the tribal government's jurisdiction.' . . . The statute as finally enacted, however, treats tribes and states as equivalent if the tribe is to exercise functions 'within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction.'" Judge Edwards found that Congress' move "from authorizing tribal regulation over the areas 'within the tribal government's jurisdiction' (an admittedly general category) to a bifurcated classification of all areas within 'the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction'" strongly suggests that Congress viewed all areas within the exterior boundaries of the reservation to be within the area of the tribal government's jurisdiction.

Judge Ginsberg dissented from this portion of the Court's opinion, concluding that §7601(d)(2)(B) "is not an express delegation of authority for Indian tribes to regulate the conduct of non-members on fee lands within the boundaries of a reservation." Judge Ginsberg rejected the majority's argument that "Congress expressly delegated authority over all lands within a reservation by linking 'within the exterior boundaries of the reservation' disjunctively to 'other areas within the tribe's jurisdiction.'" Judge Ginsberg explained that "when one reads the relevant sentence as a whole - rather than focusing solely upon the last phrase - one sees that, rather than expressing a delegation of authority over fee lands and rights-of-way within a reservation, the sentence by its terms merely lays down a precondition to the Administrator's treating a tribe as a state. Even more certainly, there is no way to read the phrase deemed crucial by the Court ('within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction') as an express delegation of authority." Judge Ginsberg also relies on the legislative history of the 1990 Amendments to argue that there is no express delegation of authority.

Finding an express Congressional delegation in §301(d) is made even more difficult, as the Petitioners contend, by the Congress' having deleted a literal delegation to tribes that was included in the corresponding section of the bills by which the 1990 Amendments were first introduced in the House and the Senate: "The Administrator . . . may delegate [to] tribes primary responsibility for insuring air quality and enforcement of air pollution control." . . .

The 1990 Amendments as finally enacted into law do not contain this literal delegation provision. The court is of course correct that the Congress need not use the word "delegate" in order to effect an express delegation . . .. That the Congress "specifically rejected language favorable to [EPA's] position," . . ., however, is further

evidence that the legislature did not mean to enact a delegation of authority. Indeed, to believe that the Congress meant §301(d)(2)(B) to serve as a delegation, after it had included the "notwithstanding" proviso in the narrower §110(o) and removed from §301(d) a provision that expressly provided a delegation to the tribes, would require one to believe the Congress was more interested in testing our interpretive acumen than in clearly expressing its will on the important issue of tribal authority over non-members.

B. "Reservation" Includes Trust Lands.

The full Court upheld EPA's interpretation of the term "reservation." The Petitioners had argued that EPA's interpretation contravenes the Clean Air Act's plain language and renders 25 U.S.C. §467 (which governs the process for designating lands as part of a reservation) superfluous by ignoring the distinction between "trust lands" and "reservations."

The Court began its analysis by noting that the Clean Air Act does not define the term "reservation." Accordingly, the Court noted that it must "look to the term's ordinary and natural meaning, and the context in which the term is used. . . . And we must remain cognizant of the rule that court's construe federal statutes literally to benefit Native American nations." The Court then noted that the dictionary definition of "reservation" is a "tract of public land set aside for a particular purpose (as schools, forests, or the use of Indians)." The Court found that definition "surely encompasses both trust lands and formally designated reservations." In light of "ample precedent treating trust land as reservation land in other contexts, and the cannon of statutory interpretation calling for statutes to be interpreted favorably towards Native American nations" the Court ruled that it could not "condemn as unreasonable EPA's interpretation of 'reservations' to include pueblos and tribal trust land."

C. Tribes May Impose Tribal Implementation Plans and Redesignate Lands Outside Reservation Boundaries for PSD Purposes.

Next, the Court considered the challenge to the areas over which tribes may exercise jurisdiction to propose tribal implementation plans and redesignations. Under the Clean Air Act, Indian tribes are authorized to redesignate "lands within the exterior boundaries of reservations of federally recognized Indian tribes." 42 U.S.C. §7474(c). Tribes also may submit tribal implementation plans "applicable to all areas . . . located within the exterior boundaries of the reservation, not withstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. §7410(o). In the tribal authority rule, EPA interpreted those two provisions to authorize tribal redesignation and implementation of tribal implementation plans not just within the limits of reservations but also within allotted lands and "dependent Indian communities." The Petitioners argued that both §7474(c) and §7410(o) were geographic limitations on the powers of tribes to redesignate areas and issue tribal implementation plans. The Court, however, rejected both arguments. With respect to §7474(c), the Court concluded that that section simply establishes "the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in non-reservation areas." With respect to §7410(o), the Court reasoned that "§7410(o) cross-references §7601(d), which allows for tribes to exercise jurisdiction over reservation areas or 'other areas within the tribe's jurisdiction.' . . . Most importantly, §7410(o)

provides that TIPs apply to all areas within the borders of a reservation once the plan 'becomes effective in accordance with the regulations promulgated under §7601(d) of this Title.' Therefore, it is permissible for EPA to give §7410(o) the reading it proffers: a reinforcement of tribes' jurisdiction to implement TIPs in reservation land."

D. Other Issues Held to be Moot or Not Ripe for Adjudication.

With respect to the Petitioners' challenges concerning the right of the public to comment on tribal applications, the abrogation of existing agreements by tribes not to regulate certain lands, and the exemptions of tribes from judicial review requirements, the D.C. Circuit found that those issues were either moot or not ripe for adjudication. On the issue of public comment, the Court noted that EPA has issued a clarification that the agency will accept comments directly from all commentors on the determination of a tribe's eligibility to be treated as a state. See Indian Tribes: Air Quality Planning & Management, 65 Fed. Reg. 1,322, 1,323 (2000). With respect to the other two issues, the Court concluded that EPA has made no judgment on either the scope and effect of specific agreements or specific proposals concerning alternatives for judicial review and that those issues therefore were not ripe for adjudication.