

# EPA's Clean Air Act Approval for Wind River Reservation Tribes Changes Reservation Boundaries and Strips Wyoming of Environmental Permitting Jurisdiction

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On December 6, 2013, EPA approved the application of the Eastern Shoshone and Northern Arapaho Tribes ("Tribes") of the Wind River Indian Reservation for treatment in the same manner as a state ("TAS") under the Clean Air Act ("CAA"), effective immediately. 78 Fed. Reg. 76829 (Dec. 19, 2013). As part of the TAS determination, EPA also provided an interpretation of the Wind River Reservation boundaries that contradicts a recent Wyoming Supreme Court determination of the Reservation boundaries and other federal judicial decisions, and is in direct conflict with the State of Wyoming's ("State") understanding of its jurisdiction. This jurisdictional determination will have far-reaching effects on all State-issued environmental permits in the area, which now must be reissued by EPA, and may impact the State's jurisdiction over taxation and both criminal and civil matters. The TAS determination is subject to judicial review in the U.S. Court of Appeals for the Tenth Circuit, with a filing deadline of February 18, 2014.

The State is vigorously disputing EPA's interpretation, declaring that it will challenge the boundary determination and seeking support from industry and other affected parties. The Governor has instructed state agencies to continue with "business as usual." According to Governor Matt Mead, "This decision goes against 100 years of history, involving over a million acres of land. It is not a decision that should come from a regulatory agency."

EPA has made clear to the State that all EPA-administered regulatory programs will be affected by the boundary determination. EPA asserts that all State-issued environmental permits in the newly determined boundary area were not validly issued. This includes not only air-emissions permits but other permitted environmental activities such as water discharge and underground injection and storage, which now must be re-permitted through EPA. However, Governor Mead has directed all state agencies to maintain the status quo for law enforcement, regulatory agencies,

government services, property ownership, and water rights.

EPA's jurisdictional determination found that lands ceded by the tribe through a 1904 treaty, ratified in a 1905 Act of Congress ("1905 Act"), which include more than one million acres of land and the city of Riverton, are still part of the reservation and thus "Indian country" as defined in CAA regulations. A finding that an area is "Indian country" means emission sources on those lands are subject to tribal jurisdiction under the CAA; if the tribe does not have delegated permitting authority, EPA is the permitting agency. EPA declined to make a jurisdictional determination for neighboring lands subject to a 1953 treaty at the request of the Tribes but left open the option of a future jurisdictional determination at the Tribes' request.

Because the Tribes themselves did not gain CAA-implementation or permitting authority from the TAS determination, sources in the expanded Indian country area are subject to EPA air permitting and enforcement authority. As compared to State permitting, EPA permitting may introduce:

- higher fines for violations;
- automatic stays of permits during protests;
- longer permitting-completion times.

For more information on this issue, contact Marie Bradshaw Durrant, Pat Day, or Maryt Fredrickson.

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