

D.C. Circuit Court Vacates Indian Country New Source Review Rule for Non-Reservation Indian Country

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On January 17, 2014, the D.C. Circuit Court vacated EPA's Indian Country New Source Review Rule ("Indian Country NSR")¹ as applied to non-reservation lands. In *Oklahoma Department of Environmental Quality v. EPA*² ("*Oklahoma v. EPA*"), a unanimous court found that EPA overstepped statutory limitations by applying a Federal Implementation Plan ("FIP") governing air permitting to lands outside of formal reservation boundaries without demonstrating that a tribe has jurisdiction over such lands.

EPA issued the Indian Country NSR in 2011, which gave EPA air permitting authority for all new sources in Indian country unless a tribe had obtained such permitting authority for itself. The State of Oklahoma sued EPA, claiming that the Indian Country NSR displaced a state's permitting authority on Indian lands outside of reservation boundaries. The Clean Air Act ("CAA") gives each state "the primary responsibility for assuring air quality within the entire geographic area comprising such State."³ The CAA also allows Indian tribes to be treated as states for purposes of managing air pollution in Indian country.⁴ EPA is authorized to regulate air pollution in a tribe's stead when a tribe has not qualified to do so.⁵ Tribes are authorized to regulate air quality in "Indian country," and EPA uses the same definition for Indian country as the federal criminal code, which is essentially: (1) lands within reservation boundaries; (2) dependent Indian communities; and (3) Indian allotments.⁶

Oklahoma v. EPA provides clarity as to the regulatory authority for sources operating on lands outside a reservation that may be interpreted as Indian country but where no formal jurisdictional determination has been made. As the Court explained, "[a] state . . . has regulatory jurisdiction within its geographic boundaries except where a tribe has a reservation or has demonstrated its jurisdiction."⁷ Unless a tribe or EPA demonstrates tribal jurisdiction over non reservation Indian country, "the State retains jurisdiction over non-reservation Indian country and its implementation plan is effective therein."⁸ The Court reiterated its holding from *Michigan v. EPA*⁹ that jurisdiction under the CAA lies either with a state or a tribe, and EPA has no inherent authority to regulate lands for which tribal jurisdiction has not been established.¹⁰ Additionally, the Court clarified that until a jurisdictional determination is made, non-reservation Indian country is subject to regulation by the state and not EPA. Tribes are not required to

demonstrate jurisdiction over lands within their own reservation boundaries.

The Court also dismissed EPA's assertion in the Indian Country NSR that "states generally lack the authority to regulate air quality in Indian country" as "plainly erroneous."¹¹ While this case does not define how EPA or a tribe must demonstrate jurisdiction, it essentially shifts the burden of proof to Indian tribes and EPA to demonstrate jurisdiction over lands outside of reservation boundaries, which are otherwise regulated by the state.¹²

For sources operating in Indian country where no jurisdictional demonstration has been made, the ruling in *Oklahoma v. EPA* means such sources should obtain New Source Review from a state permitting authority rather than EPA.

For questions regarding this issue, please contact Marie Bradshaw Durrant.

¹EPA, Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748 (July 1, 2011) (codified at 40 C.F.R. pts. 49 and 51).

²*Oklahoma Department of Environmental Quality v. EPA*, Case No. 11-1307 (D.C. Cir. Jan. 17, 2014).

³42 U.S.C. § 7407(a).

⁴*Id.* § 7601(d)(1)(A).

⁵*Id.* § 7601(d)(4).

⁶See 18 U.S.C. § 1151(a)-(c).

⁷*Id.* at *16.

⁸*Id.*

⁹*Michigan v. EPA*, 268 F.3d 1075, 1083-84 (D.C. Cir. 2001).

¹⁰*Oklahoma v. EPA*, at *15.

¹¹*Id.* at *18.

¹²*Id.* at *19.

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