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A MIXED OCTOBER FOR TRIBES LOOKING TO BE VIEWED AS A STATE FOR ENVIRONMENTAL REGULATORY PURPOSES

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October 2020 was a mercurial month for tribes hoping to control environmental regulations on tribal lands. Early in the month, a SCOTUS ruling designated a large portion of Oklahoma as being part of Indian Country, a decision which paradoxically resulted in the U.S. Environmental Protection Agency ("EPA") granting the state full control over the lands' environmental regulation. Later in the month, a regional office of the EPA granted treatment as a state ("TAS") control to a coalition of area tribes seeking authority under the Clean Water Act. TAS status allows tribes to develop their own standards for water and air quality on tribal lands, and the authority to determine how to handle other issues pertaining to environmental justice. Many federal environmental laws authorize the EPA to treat federally recognized Indian tribes as a state for the purposes of environmental regulation, the administration of certain functions, and for grant funding. However, in order to be treated as a state officially, tribes must apply for the status and receive approval from the EPA. The difference in these decisions reflects a divide between EPA policy at the federal and regional level, as well as a further politicization of environmental regulatory concerns.

Stitt versus McGirt v. Oklahoma

In early October, EPA granted Oklahoma Governor Kevin Stitt's request to keep the regulatory control of tribal lands in the power of the state. This decision includes to lands that are inside of reservations. Stitt's request was made in July, in response to the SCOTUS ruling (591 U. S. McGirt v. Oklahoma (2020)) ("McGirt") that determined large parts of the Creek reservation in Eastern Oklahoma had not been formally disbanded, and therefore state courts have no jurisdiction over the lands. Under McGirt, a large portion of the Eastern part of Oklahoma is viewed as being part of the Muscogee Nation Indian Reservation.

EPA Administrator Andrew Wheeler responded to Stitt's request in an October 1, 2020 letter, granting the state of Oklahoma to regulate environmental activities on tribal lands. The request was made using expanded gubernatorial powers granted in 2005. The law, which was added as a rider to the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, allows states to apply for environmental regulatory control over lands deemed to be part of Indian Country. It was authored by Oklahoma Republican Senator, Jim Inhofe.

Wheeler's letter cites McGirt, claiming that Governor Stitt's goal is to regulate tribal lands as allowed under the 2005 law, and therefore include these new lands that are determined to be part of Indian Country. The letter allows regulatory control over most of Oklahoma to remain in the state's hands and preserve the status quo. The Creek Nation responded with disappointment to the EPA decision, and said the EPA approval process was meant to forestall any response from the tribes and rob them of the ability to respond to Stitt's request. Several tribes signaled their intentions to fight these decisions, and suggested that the McGirt decision will result in a back and forth between state and tribal powers and jurisdictions over regulatory control. Any unequal treatment of hazardous waste and other environmental justices issues are likely to be met with litigation from several, if not all, of the affected tribes.

Wheeler's use of McGirt as a justification for preemptively blocking tribal regulatory control is ironic, since the ruling expands the amount of land ultimately thought to be part of Indian Country. McGirt illustrates the degree to which events have occurred on tribal lands without the consent of tribes. If lands being designated as part of Indian Country are determined, via the 2005 rider, to be out of tribal regulatory control, the appellation of "part of Indian Country" starts to lose meaning. The consent of tribes to use and regulate lands as they see fit would seem to go along with the official designation of the lands as being part of Indian Country. Proponents of the EPA's decision have argued that the main reason for maintaining state control over the lands is to avoid any confusion over regulatory authority in Eastern Oklahoma, rather than what is in keeping with the designation of tribal authority under the ruling.

Regional EPA Grants Tribe TAS Requests

The Pacific Southwest Regional office of the U.S. Environmental Protection Agency ("EPA") announced on October 22, 2020 week it approved applications made by a coalition of area tribes to develop their own water quality standards for tribal lands. The requests to be treated as a state ("TAS") under the federal Clean Water Act ("CWA") were submitted as a group including the Cabazon Band of Mission Indians, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, the Karuk Tribe, the Quartz Valley Indian Reservation, the San Carlos Apache Tribe, and the Yerington Paiute Tribe. In the same press release, the EPA also announced approval of an application made by the Navajo Nation for expanded authority under the Clean Air Act ("CAA") to issue permits for stationary sources of air pollution.

There are 24 tribes to whom the Pacific Southwest Region of the EPA have granted water quality standards authority. This standards authority grants the tribes authority to develop quality standards for the water within their reservations and is similar to the process used by states under Sections 303 and 401 of the Clean Water Act. The tribes must develop standards, then submit to the EPA for approval, and then the tribes will be able to administer surface water quality standards that build upon successful environmental programs.

John Busterund, the Pacific Southwest Regional Administrator of the EPA, stated the decision allows the tribes to "continue to safeguard the health and heritage of their tribal communities and natural resources." The decision also promotes tribal self-government because it gives the tribes the power to develop EPA-approved water quality standards and issue water quality certifications to protect their waters in the same way that states do.

The TAS approval for air permitting expands the Navajo Nation's authority so that it can permit sources of air pollution in the area formerly known as Bennet Freeze. In 2004, the Navajo Nation was the first tribe to receive this kind of authority and it now has 13 active permits throughout the reservation.

The contrast between these two determinations hints at an agency divide on tribal land determination. Though TAS status is TAS status, whether granted by a regional office administrator or the EPA Administrator himself, it seems significant that the TAS status in the Pacific Southwest was not announced by Andrew Wheeler. In any event, tribal lands are likely to be the subject of litigation in coming years, regardless of who is running the EPA.