A couple of recent cases related to the implementation of the Clean Air Act (CAA) in Indian Country have raised policy concerns about the risks tribes might take in choosing to develop their own CAA programs. Although neither of the cases is completely resolved (EPA is appealing to the full DC Circuit Court for reconsideration of its Oklahoma decision and EPA has stayed its decision related to disputed areas of the Wind River reservation), it might be worth the effort to consider some of the underlying issues and their implications for tribal policy.

**Oklahoma**

In July, 2011, EPA promulgated its rules on the “Review of New Sources and Modifications in Indian Country” (76 Fed. Reg. 38748). These rules were intended to fill a regulatory gap in Indian Country “by establishing a preconstruction permitting program for new or modified minor sources, minor modifications at major sources, and new major sources or major modifications in nonattainment areas.” Prior to this rule, there had been no Federal mechanism (i.e., Federal Implementation Plan [FIP]) to regulate these sources in Indian Country in the absence of a Tribal Implementation Plan.

The state of Oklahoma challenged EPA’s authority to impose the FIP in non-reservation areas of Indian Country, where neither the tribe nor the federal government had demonstrated jurisdiction. The state argued that its SIP applies to non-reservation areas of Indian Country because: (1) under the CAA, authority is binary, lying with either the state or the tribe; (2) authority over non-reservation Indian country must be demonstrated by the tribe; (3) EPA’s authority to impose a FIP extends only insofar as the tribe has demonstrated its authority;
and (4) neither EPA nor the tribe has demonstrated authority over non-reservation Indian Country. The Circuit Court of Appeals for the District of Columbia agreed with the state¹.

Subsequent to the DC Circuit Court’s ruling, EPA has appealed for a rehearing en banc² before the full court. EPA argues, in its brief for a rehearing, that the DC Circuit Court’s decision is contrary to case law in a number of instances. EPA asserts that “the Supreme Court has established controlling principles of federal Indian law that the presumptive dividing line between state authority on the one hand, and federal and tribal authority on the other hand, is Indian country as defined in 18 U.S.C. section 1151³, and that while Congress may provide for the application of state laws in Indian country, it must do so expressly” (USCA case#11-1307, Document #1484131, 03/17/2014, p. 11). The DC Circuit Court failed to apply this fundamental principle of federal Indian law. EPA went on to argue that, even if authority under the CAA is binary as between a state and a tribe, “the ultimate question is which sovereign has actual authority in a given area” (Ibid., p. 13). EPA requires both states and tribes to demonstrate their authority prior to approving a SIP or TIP. EPA states that, under the law, tribes have actual authority in Indian country even if they have had no reason to demonstrate it.

EPA’s appeal for a rehearing before the full DC Circuit Court was granted but the full Court sustained the original panel’s decision. EPA opted not to appeal the Circuit Court’s decision to the Supreme Court and is now considering how the Court’s ruling will impact EPA’s process for reviewing State Implementation Plans (SIPs) where Indian country may be involved.

**Wind River Reservation**

In December of 2008, the tribes of the Wind River Indian Reservation submitted an application to the U.S. EPA for treatment in a manner similar to states (TAS) under the Clean Air Act (CAA). The application was for administrative programs under the CAA and did not involve the tribes’ exercising any regulatory authority under the Act. Under the Tribal Authority Rule, the tribes were required to demonstrate their jurisdiction over areas where the programs would be applicable (i.e., within the exterior boundaries of the reservation and other non-reservation areas where they could demonstrate jurisdiction). The tribes’ jurisdictional assertions were opened to comment from neighboring jurisdictions to identify potential areas of dispute. The state of Wyoming, in its comments on the tribes’ application, asserted that the reservations exterior boundaries had been ‘diminished’ by the 1905 Act that opened the reservation to settlement by non-Indians.

After an exhaustive review of the administrative record of the tribes’ application (upward of 10,000 pages, including the Department of Interior Solicitor’s analysis of the 1905 Act’s impact on the tribal boundaries and the tribes’ response to the state’s comments), EPA issued its decision, approving the application, on December 6, 2013. It found in favor of the

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² En banc: By the full court of all of the appeals judges.
³ According to this definition, Indian country means [paraphrased]: (a) all land within the limits of any Indian reservation, (b) all dependent Indian communities within the borders of the U.S., and (c) all Indian allotments (For more, visit http://www.law.cornell.edu/uscode/text/18/1151)
tribes’ jurisdictional claims and approved the application for all areas within the exterior boundaries of the reservation, except for those areas affected by the 1953 Act, which the tribes had previously withdrawn. The decision was greeted with enthusiasm by the tribes but with some consternation by the state and some in the local non-Indian community. After a period of discussion between the state and EPA and the governing bodies of the tribes and EPA, on February 13, 2014, EPA stayed its decision with respect to those areas of the reservation under dispute. The next day, the state appealed EPA’s decision to the Tenth Circuit Court of Appeals.

In the five years that the tribes’ application was under review, hundreds of pages of legal analyses were drafted and much ink spilled over the impact of the 1905 Act on the reservation boundaries. During that time the tribes had a prominent seat at the table along with the state and local communities. EPA supported the tribes’ jurisdictional assertions in its decision but it is clear in the aftermath that the issues are far from being resolved. In addition to the Petition for Reconsideration that the state filed with the tenth Circuit, there is potential for other remedies (i.e., Congressional remedies to clarify the reservation boundaries) to address the ambiguities of the current situation. When Congress authorized the tribes to apply for authority to implement the Clean Air Act on reservation lands in 1990, it was not their intent that EPA would resolve these issues. EPA would make decisions based on its best understanding of tribal assertions with all interested parties at the table. In the final analysis, it is up to the Courts and Congress to weigh in on a definitive resolution. In this case, that resolution is still in the future but the tribes now have a strong record supporting their position.

**Lessons Learned**

In both of these cases, a critical factor missing in the management of both processes was an aggressive and consistent communication outreach to the affected communities to inform and educate all parties about the authority of tribes and the Federal government (in the absence of tribes) to regulate air pollution on Indian lands. Although it will never be possible to eliminate litigation in the area of environmental management, engaging the public in a conversation about the goals and priorities of specific tribal actions and the underlying values that they support could alleviate much of the fear and misunderstanding that often drives litigation.

Earlier this year, I had an opportunity to listen to a number of tribal representatives gathered at a national tribal forum discuss some of the background and implications for tribes of these two cases. One of the factors that dominated the discussion was the challenge of crafting and managing an effective communication strategy. The requirement to hold public hearings is an integral part of any regulatory process, but it’s often not enough to engage the public in a meaningful way. In fact, often attendance at these public hearings is disappointing and rarely is there discussion beyond the specifics of the action being proposed or finalized. A critical element raised by a number of tribal representatives participating in the discussion was the need for a broader and more comprehensive communication strategy not only for communities on the reservation but also for those communities adjacent to the reservation who might feel impacted by the tribe’s action. A communication strategy should be crafted for all actions, but especially for those that are likely to be controversial.
The rulemaking process is an extremely complex and resource intensive process involving many disciplines (policy, science, administration, law, etc.) and the need for communication is frequently overlooked or minimized. However, the development of a comprehensive communication strategy early in the rule development process can assist the tribe in identifying potentially controversial issues and help prepare the tribe for addressing the controversy. A communication strategy, however, is more than developing responses. In addition to identifying the potential issues and responses, it is important to identify political leaders and other influential members of the community (both on and off the reservation) to engage in the dialogue. It’s also important to identify venues where tribal leaders are likely to be able to meet a large number of community members (e.g., town/city council meetings, neighborhood gatherings, etc), in addition to scheduling and advertising the tribe’s own information sessions. The goal of these communication strategies should be to listen to the concerns, clarify any misunderstanding and correct any misinformation, and work toward a mutually satisfactory resolution. These efforts will pay off in the long run because they will open channels of communication beyond the reservation and build relationships that will serve the tribe in future actions it might wish to take.

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