State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Office of the Governor
PUBLIC LANDS POLICY COORDINATING OFFICE

KATHLEEN CLARKE
Director

October 6, 2015

Submitted via electronic mail: ow-docket@epa.gov

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: **Revised Interpretation of Clean Water Act Tribal Provision**
Site Security
Docket ID No. EPA-HQ-OW-2014-0461

Dear Administrator McCarthy,

The State of Utah comments on EPA's Notice of Proposed Interpretive Rule, 80 Fed. Reg. 47,430 (August 7, 2015), as follows:

EPA's Notice of Proposed Interpretive Rule, 80 Fed. Reg. 47,430 (August 7, 2015) (the "Notice"), fails to provide a reasoned basis for EPA to depart from its long-standing, well-reasoned interpretation that Clean Water Act ("CWA") Section 518 is not an express Congressional delegation but rather only authorizes treatment of Indian Tribes as States over activities that are shown, on a Tribe-by-Tribe basis, to be within the scope of Tribal authority in light of relevant principles of federal Indian law. EPA should therefore withdraw its proposed interpretive rule.

When it issued the existing interpretation of Section 518 in 1991, EPA declared that "**pending further judicial or Congressional guidance** on the extent to which Section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe by Tribe basis." 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991)(emphasis added). In the intervening 24 years, the interpretation of CWA Section 518 has not been squarely presented to or decided by any court. Moreover, Congress has taken no action whatsoever to amend Section 518 or to expound upon that section's meaning. There has thus been no change in circumstances that would justify a complete reversal of EPA's interpretation of Section 518.

EPA principally relies upon dicta from the three judicial decisions to justify EPA's Notice of Proposed Interpretive Rule, 80 Fed. Reg. 47,430 (August 7, 2015). These

decisions provide no basis for EPA's proposed dramatic about face in its interpretation of Section 518. First, EPA relies on Justice White's citation to Section 518 in his minority opinion in Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 428 (1989). This dicta does not support the proposed rule because (as EPA properly recognized in 1991 when it adopted its present interpretation of Section 518) "Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in Brendale." 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991). The EPA still acknowledges this to be true. See 80 Fed. Reg. at 47,433 ("Justice White's opinion was not a majority opinion of the Supreme Court (the other five justices did not opine on the issue) and ... the interpretation of CWA Section 518 was not actually before the Court in Brendale.")

Second, the dicta in the nearly 20 year old decision in Montana v. EPA, 941 F. Supp. 945 (D. Mont. 1996), provides no basis for EPA to change its longstanding interpretation of Section 518. In that case, the State of Montana, a county and certain municipalities filed an action for declaratory and injunctive relief against EPA and the Confederated Salish and Kootenai Tribes (the "Confederated Tribes") asserting that EPA's approval of the Confederated Tribes' treatment as a state application was based upon an "erroneous application of legal principles relating to the [Confederated] Tribes' inherent regulatory authority." 941 F. Supp. at 947. None of the parties to that litigation raised the question whether Section 518 provided an express delegation to Tribes. Nonetheless, the district court, noting (but not analyzing) the "ambiguous" legislative history, observed that the statutory language seemed to indicate that Congress wanted to make an express delegation. As EPA itself acknowledges, "[b]ecause EPA premised its approval of the TAS application at issue upon a showing of inherent tribal authority, it was unnecessary for the district court to reach the delegation issue as part of its holding." 80 Fed. Reg. at 47,434. Moreover, unlike the district court in Montana, EPA in its 1991 rulemaking analyzed the relevant legislative history. EPA correctly concluded that "if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers it probably would have done so through statutory language and discussed the change in the committee reports." 56 Fed. Reg. at 64,880 (emphasis added). EPA then appropriately determined that "it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. . . ." Id.

Third, the D.C. Circuit's 15 year old decision in Arizona Public Service v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), concerning the Clean Air Act's ("CAA") treatment as a state section, provides no support for EPA's current proposal to effect a complete reversal of its interpretation of CWA Section 518. Contrary to EPA's assertion, the D.C. Circuit in Arizona did not "observe favorably" the district court's statements concerning section 518 in Montana v. EPA. The Arizona court simply recited that "[o]ne federal court has observed, in dicta," that the statutory language of Section 518 seemed to indicate Congress intended to delegate authority to tribes. 211 F.3d at 1292. More significantly, the Arizona court underscored that the CAA and CWA are two entirely different statutes with different legislative histories. In fact, the Arizona court specifically pointed out that the "situation [in

that case] is quite different from what EPA found with respect to the Clean Water Act." Id. at 1291. While the court noted that the treatment as a state provisions in the CAA and the CWA are "somewhat similar," the court declared that the two provisions are "far from identical." Id. at 1292. More importantly, the court found that the "legislative history underlying the Clean Air Act is not 'ambiguous and inconclusive,' as was found to be the case with respect to the Clean Water Act." Id. at 1292.

Supreme Court decisions since Brendale make clear that EPA's proposed interpretive rule is not well founded. In the preamble to its 1991 rule, EPA declared that "[i]n evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in Montana [v. United States, 450 U.S. 544 (1981)] and Brendale." 56 Fed. Reg. at 64,878. Since then, the Supreme Court has repeatedly reinforced Montana's main rule that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997); Nevada v. Hicks, 533 U.S. 353, 358-59 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008). In Plains Commerce Bank, the Supreme Court declared the common foundation in all these cases is that "[e]fforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'" 554 U.S. at 330 (quoting Atkinson Trading Co., 532 U.S. at 659). The EPA's proposed interpretive rule, which could automatically subject non-Indian lands within a reservation to tribal jurisdiction, runs directly counter to the repeated pronouncements of the Supreme Court.

EPA's administrative experience with CWA "treatment as a state" applications also does not support the dramatic turnabout EPA is proposing. As EPA concedes, the agency's desire to remove what it now considers administrative burdens, "does not . . . provide a legal rationale to alter EPA's interpretation of section 518." 80 Fed. Reg. at 47,436. For approvals under Safe Drinking Water and most CWA programs, EPA will not authorize a State to operate a program without determining that the State has adequate legal authority to carry out the required program actions. Tribes should be held to the same standard and EPA has acknowledged as much. 54 Fed. Fed.39,098, 39,101 (Sept. 22, 1989) ("[j]ust as when EPA considers a State application under other CWA programs," EPA should not delegate "program responsibility to a Tribe unless the Tribe were to adequately show that it possesses the requisite authority."); 59 Fed. Reg. 13,820, 13,822 (March 23, 1994) ("the requirement to prove adequate legal authority "applies also to a tribe seeking program approval and ensures that a close analysis of the legal basis of a tribe's jurisdiction will occur before program authorization.")

In 1991, EPA properly rejected the suggestion "that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters" and that it adopt a "rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence." See 56 Fed. Reg. at 64,877-88. Instead, EPA correctly determined that the decision "[w]hether a tribe

has jurisdiction over nonmembers will be determined case-by-case based on factual findings." 56 Fed. Reg. at 64,878. In the intervening 24 years, Congress has not amended or expounded upon Section 518. The Supreme Court, though, has repeatedly reinforced Montana's main rule that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. There is thus no new guidance and no changed circumstances which would justify EPA's proposal to now reverse course and treat Section 518 as an express delegation of authority over nonmember activities within reservation boundaries. EPA's proposed interpretive rule should be withdrawn.

Utah's concern about an interpretation of CWA Section 518 that could allow tribal jurisdiction over state and private lands beyond the Tribe's inherent authority is illustrated by the extreme results that such an interpretation could create with respect to the historic Uncompahgre reservation in eastern Utah. In short, the historic Uncompahgre reservation[1] of nearly 2 million acres contains almost no tribal lands outside the separate Hill Creek extension[2] (see attached map), has few if any tribal residents, has little hydrologic connection to areas inhabited by Indians (since streams in the area drain downstream of areas of Indian inhabitation), yet contains hundreds of thousands of acres of private and state trust lands. Under multiple U.S. Supreme Court decisions, tribal regulation of these state and private lands would be 'presumptively invalid.'" Plains Commerce Bank, 554 U.S. at 330 (quoting Atkinson Trading Co., 532 U.S. at 659). The EPA's proposed interpretive rule concerning CWA Section 518 would stand the Supreme Court's decisions on inherent tribal sovereignty on their head, and potentially divest the State of Utah of jurisdiction over multiple Clean Water Act programs affecting state and private lands in large areas with little or no tribal nexus.

[1] The Uncompahgre Reservation was created by Executive Order in 1882 to house a Ute tribal band being relocated from Colorado in accordance with the Act of June 15, 1880, ch. 223, §1, 21 Stat. 199, 200. After a minimal number of allotments were made to individual Indians, the remaining lands were restored to public entry by the Act of June 7, 1897, ch. 3, 30 Stat. 62. In *Ute Indian Tribe v. State of Utah*, 773 F. 2d. 1087 (10th Cir. 1985), the U.S. Court of Appeals for the 10th Circuit held that, in the absence of explicit congressional intent to the contrary, the 1897 Act did not disestablish the Uncompahgre reservation, and that the reservation retained reservation status for jurisdictional purposes. 773 F. 3d at 1096-8. However, the 10th Circuit's majority opinion made it clear that Congress did not intend that the Uncompahgre band hold title to the land, other than individual allotments. Id. As the Court described it: "The end result was a reservation where the Indians held title to their allotted parcels, and the remainder of the land was opened to the public." Id. Once re-opened to the public, much of the land base of the Uncompahgre reservation was patented into fee or state ownership, with only a few tribal allotments remaining; Indian ownership is proportionately minimal.

[2] The Hill Creek extension was separately created by Congress inside the area of the historic Uncompahgre in 1948. Act of March 11, 1948, ch. 108, 62 Stat. 72. The reservation created by the 1948 Act is almost exclusively in tribal trust ownership, and the State of Utah's concerns expressed herein generally do not extend to the Hill Creek extension.

For the reasons set forth above, the proposed interpretive rule concerning CWA Section 518, as published at 80 Fed. Reg. 47,430 (August 7, 2015), should be withdrawn in its entirety, and EPA's longstanding 1991 interpretation maintained in effect. Please contact me if you have any questions.

Sincerely,

Kathleen Clarke
Director

Attachment – Map of Reservation Boundaries and Land Ownership – NE Utah

Historic Uintah Valley & Uncompahgre Reservation Boundaries