



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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Sent via email to jfredericks@ndnlaw.com

Re: Follow Up on December 20, 2018 Consultation

Dear John,

Thank you for meeting with EPA Region 8 on December 20, 2018 to consult on a variety of matters concerning your client, the MHA Nation. During the meeting, EPA Regional Administrator Douglas Benevento asked me to follow up with you about EPA's positions on legal issues concerning underground injection control (UIC) permit applications that have been submitted to EPA to operate disposal wells for oil and gas waste on the Fort Berthold Indian Reservation (FBIR). This letter summarizes EPA's positions on those legal issues. If you would like to discuss EPA's positions further, please contact me, and we can arrange time to do so.

Over the course of the last year, we have communicated on several occasions about whether EPA can consider the MHA Nation's Resolution No. 11-75-VJB when conditioning, approving, or denying UIC permit applications pursuant to the Safe Drinking Water Act. EPA understands that as a matter of tribal law, Resolution No. 11-75-VJB prohibits the underground injection of wastes from oil and gas development on the FBIR, without first obtaining tribal approval. Recently, on September 1, 2018, EPA met with you and your clients in Bismarck to consult on a number of matters, including permit applications for underground injection of oil and gas wastes on the FBIR. During that meeting, EPA explained that the Safe Drinking Water Act and its regulations govern EPA's decisions on UIC permit applications, and that based upon multiple decisions from EPA's Environmental Appeals Board (EAB), EPA lacks authority under the Act and its regulations to condition or deny UIC permit applications based upon the tribal resolution.

During that consultation, EPA invited the MHA Nation's views about whether other legal authorities might affect the operation of the Safe Drinking Water Act and its regulations, and thus might allow EPA to consider Resolution No. 11-75-VJB in its decisions on the permit applications. In response, you and your clients raised the Indian Reorganization Act, the federal trust responsibility to federally recognized Indian tribes, the "mild and equitable regulation" language under the 1825 Trade and Intercourse Treaties, and the 1851 Fort Laramie Treaty. We also discussed how principles of cooperative federalism might bear upon the operation of the Safe Drinking Water Act and its regulations. As a result, EPA undertook additional legal analysis, and carefully considered your views.

During our consultation on December 20, 2018, EPA communicated to you and your clients that EPA's legal positions have not changed as a result of our additional analysis. In brief, none of the legal authorities that you raised altered EPA's legal position that the Safe Drinking Water Act and its regulations do not authorize EPA to deny or condition UIC permit applications based on Resolution No. 11-75-VJB. Generally, it appears that you cited the legal authorities listed above for the proposition that they recognize the Tribes' sovereign authority. Please note that EPA's position does not dispute the Tribes' assertion of sovereign authority. Rather, it recognizes that EPA's authority under the Safe Drinking Water Act and its regulations is limited, and the legal authorities that you cited do not provide EPA any additional authority to consider Resolution No. 11-75-VJB in EPA's UIC permitting decisions. Principles of cooperative federalism do not provide EPA any additional authority, either.

Below I have provided a short summary of EPA's legal positions. This summary is not exhaustive, but provides a brief overview that I hope you will find helpful in understanding EPA's positions. As mentioned above, if you would like to discuss this matter further, we can arrange time to do so.

Safe Drinking Water Act

The Safe Drinking Water Act and its implementing regulations establish the only criteria under which EPA may condition, approve or deny permit applications for the underground injection of waste. Multiple decisions from EPA's EAB have determined that EPA cannot rely on any other factors when approving or denying permits. For example, the EAB has ruled that the issue of whether a permit applicant has complied with state and local laws may not be considered in EPA's Safe Drinking Water Act permitting decisions, because that issue is outside the scope of EPA's authority under the Act. *In re Envotech, L.P.*, 6 E.A.D. 260, 274-276 (EAB 1996). Similarly, EPA may not deny UIC permit applications for underground injection of oil and gas wastes on the FBIR based on tribal law, and specifically upon Resolution No. 11-75-VJB.

For your reference, below I have listed links to a number of relevant EAB decisions (note that these are the same links that ORC attorney Lucita Chin previously sent to you).

In re Envotech, L.P., 6 E.A.D. 260 (EAB 1996).

In re Beckman Production Services, 5 E.A.D. 10 (EAB 1994).

In re Terra Energy LTD., 4 E.A.D. 159 (EAB 1992).

In re Environmental Disposal Systems, INC., 12 E.A.D. 254 (EAB 2005).

Order Denying Review, *In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB 2007).

Indian Reorganization Act

Under the Indian Reorganization Act, Indian tribes can adopt a constitution and bylaws that become effective after approval by the Secretary of the Interior. 25 U.S.C. § 5123(a). EPA understands that the MHA Nation accepted the Indian Reorganization Act in 1934, and that the Secretary of the Interior approved the MHA Nation's Constitution in 1936. Pursuant to the authority in Article VI, Section 5 of the MHA Constitution, the MHA Nation adopted Resolution No. 11-75-VJB. However, EPA has not identified any legal authority that would indicate that a federal agency is bound by tribal resolutions adopted pursuant to a tribal constitution that has been approved by the Secretary of the Interior. On the contrary, we identified a case indicating that federal agencies are not bound by such tribal resolutions. In *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett*, 708 F.2d 326, 332 (8th Cir. 1983), the 8th Circuit ruled that the Department of Interior could not be bound, without Congressional consent, by a

tribal ordinance adopted pursuant to a tribal constitution that the Secretary of the Interior previously approved.

Federal Trust Responsibility to Federally Recognized Indian Tribes

Federal agencies can be subject to general or specific tribal trust responsibilities. Specific trust responsibilities derive from statutes, and we have not identified any statute that would impose on EPA a specific trust responsibility in this matter. Absent a specific trust responsibility, EPA is subject to the general trust responsibility. The general trust responsibility allows federal agencies such as EPA to consider a tribe's interests when exercising discretion. However, as described above, EAB decisions have determined that EPA lack authority to consider factors not listed in the Safe Drinking Water Act and its implementing regulations when deciding whether to condition, approve or deny a permit application. Therefore, EPA lacks discretion to consider Resolution No. 11-75-VJB.

1825 Trade and Intercourse Treaties

The 1825 Trade and Intercourse Treaties include language concerning the "mild and equitable regulation" of the Tribes. EPA's research found that the 1825 treaties concerned ending hostilities between Indians and United States citizens, and ensuring that the Tribes only traded with United States citizens. To guarantee that the Tribes would "be accommodated with such articles of merchandize, [etc.] as their necess[ities] may demand" despite only trading with United States citizens, Article 5 in the treaties states that "the United States agree to admit and license traders to hold intercourse with said tribe, under mild and equitable regulations...." EPA's position is that we cannot rely on that treaty language to condition or disapprove permit applications for underground injection of oil and gas wastes on the FBIR because that treaty language appears to have been meant to promote free trade with the United States, and does not appear to address environmental issues. *Cf. United States v. Arm*, 2013 U.S. Dist. LEXIS 63800, *4 (D. Mont. May 3, 2013) (refusing to interpret similar "mild and equitable regulations" language in a different treaty beyond the scope of free trade to allow hunting of MBTA-protected species) *rev'd on other grounds*, 788 F.3d 1065 (9th Cir. 2015).

1851 Treaty of Fort Laramie

Like the 1825 Trade and Intercourse Treaties, the 1851 Treaty of Fort Laramie does not appear to deal with environmental issues related to UIC permitting. Instead, the "purposes of the 1851 treaty were to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians. *Mont. v. United States*, 450 U.S. 544, 557-558 (1981). EPA's position is that we cannot rely on the language in the 1851 Treaty of Fort Laramie to condition or disapprove permit applications for underground injection of oil and gas wastes on the FBIR, as that language does not appear to address environmental issues. *Cf. Arm*, 2013 U.S. Dist. LEXIS 63800, *4 (refusing to interpret the 1851 Treaty of Fort Laramie to allow hunting of MBTA-protected species) *rev'd on other grounds*, 788 F.3d 1065 (9th Cir. 2015).

Principles of Cooperative Federalism

EPA is committed to following the principles of cooperative federalism. While our research did not identify any legal authority that would authorize EPA to condition or disapprove permit applications for underground injection of oil and gas wastes on the FBIR due to cooperative federalism, EPA notes that

the Safe Drinking Water Act UIC program is designed to encourage cooperative environmental regulation with tribal governments, in that EPA can approve tribes to undertake primary enforcement responsibility for the federal Underground Injection Control program in their jurisdictions. 40 C.F.R. § 145.1(h), .52.

Conclusion

EPA appreciates the time you have taken to discuss the legal issues described above, and if you would like to continue those discussions, EPA would welcome that opportunity. To arrange further discussion, please contact me at 303.312.6854 or at logan.paul@epa.gov.

Sincerely,



Paul Logan
Deputy Regional Counsel, EPA Region 8

cc: Douglas H. Benevento, Regional Administrator
Lucita Chin, EPA Region 8 Office of Regional Counsel