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Yazzie v. EPA

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Yazzie v. EPA, 851 F.3d 960 (9th Cir. 2017)

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In *Yazzie v. EPA*, the Ninth Circuit deferred to the EPA's discretion in its adoption of a federal implementation plan under the Clean Air Act for a coal-fired power plant on the Navajo Nation Reservation that reduced power generation at the plant, imposed a cap on total emissions of nitrogen oxides, and required that the plant cease coal-fired power generation by end of 2044.

I. INTRODUCTION

In *Yazzie v. EPA*, tribal conservation organizations and non-profit environmental organizations challenged the United States Environmental Protection Agency's ("EPA") source-specific Federal Implementation Plan ("FIP") under the Clean Air Act ("CAA") for a coal-fired power plant on the Navajo Nation Reservation in Arizona.[1]

The Ninth Circuit held that the federal government's partial ownership of the Navajo Generating Station ("Station") "did not eliminate any deference to the EPA's interpretation of the CAA and its implementing regulations."[2] The court stated that the EPA had reasonably concluded that because the Navajo Nation had not submitted a Tribal Implementation Plan ("TIP"), the Tribal Authority Rule ("TAR") applied, giving the EPA authority to implement a FIP at the Station.[3] Moreover, the court held that the EPA correctly interpreted the TAR and the CAA's Regional Haze Regulation to conclude that emission reductions did not apply to FIPs for regional haze that are enacted in place of TIPs. The court further stated that it was reasonable for the EPA to give an emission credit to the Station when evaluating if the BART alternative resulted in greater emission reductions, and therefore it deferred to the EPA in its determination that the FIP alternative for nitrous oxide emissions was a "better than BART" alternative.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Requirements and History of the CAA

Under the CAA, each state submits a State Implementation Plan ("SIP") to the EPA that sets forth emission limits to improve air visibility under the Regional Haze Regulations.[5] If a SIP is rejected or the State does not submit one, the EPA must create a FIP to fill in any resulting regulatory

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1 Yazzie v. EPA, 851 F.3d 960, 964 (9th Cir. 2017).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*

gaps.[6] A SIP must identify the "best available retrofit technology" ("BART") to reduce emissions from major emission sources.[7] A State can bypass a BART by enacting a "'better than BART'" alternative.[8] Under the "better than BART" alternative for Regional Haze Regulations, a SIP requires that the necessary emissions reductions "take place during the first long-term strategy for regional haze" and "in no event later than five years."[9] However, it is disputed whether this deadline applies to a FIP enacted in place of a TIP under the TAR, rather than a SIP.[10] For tribes, the EPA issued a special TAR which allows tribes to develop their own TIP similar to a SIP.[11] However, Tribes are not required to adopt a TIP, so a TAR authorizes the EPA to enact a FIP to fill in gaps to meet emission goals under the Regional Haze Regulations.[12]

Amendments to the CAA in 1990 expanded its focus to include the visibility impairment caused by air pollutant emissions from "numerous sources located over a wide geographic area," known as regional haze.[13] To reach the goal of achieving natural visibility by 2064, the CAA requests that each State submit a SIP to the EPA setting forth "emission limits and other measures necessary to make reasonable progress toward the national visibility goal."[14] SIPs must identify the BART to reduce admissions, and any source subject to the BART must install and operate the technology "as expeditiously as practicable" and within five years after approval of a SIP or FIP.[15] To circumvent the BART with a "better than BART" alternative, the State's SIP must have all the necessary emission reductions taking place within the "first long-term strategy" of the plan[16] and show the alternative will achieve "greater reasonable progress" than would have resulted from the BART."[17] There are three different methods to show that an alternative will result in "greater reasonable progress":(1) "[i]f the distribution of emissions is not substantially different than under BART, and the alternative measure results in greater emission reductions"; (2) "if the distribution of emissions is significantly different," "dispersion modeling" must be conducted, "which focuses on visibility rather than emissions"; or (3) "otherwise based on the clear weight of the evidence."[18]

The TAR arose from the CAA Amendments that authorized the EPA to "treat Indian Tribes as States if certain conditions were met, and

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6 *Id.*
7 *Id.*
8 *Id.* (quoting Arizona ex. rel. Darwin v. EPA, 815 F.3d 519, 526 (9th Cir. 2016)).
9 *Id*. at 969 (quoting 40 C.F.R. § 51.308(e)(2)(iii)).
10 *Id*.
11 *Id*.
12 *Id.*
13 *Id*. at 966.
14 *Id.*
15 *Id*.
16 *Id.*
17 *Id*. at 972.
18 *Id*. at 972.

to issue regulations outlining when that treatment should occur."[19] The TAR treats eligible tribes "in the same manner as States with respect to all provisions" of the implementation of regulations under the CAA "except for mandatory plan submittal deadlines."[20] Since Tribes are not required to adopt TIPs, the EPA must implement "without unreasonable delay" provisions to protect air quality in the absence of tribal provisions.[21] However, the TAR exempts tribes from certain CAA requirements such as specific visibility deadlines and allows the EPA more time to implement a FIP for a tribe than a State because States are farther along in the development, planning, and implementation of air quality expertise.[22]

B. The Navajo Nation Station's FIP

The Station is the "largest coal-fired plant in the western United States."[23] Its emission of nitrogen oxide ("NOx") affects the visibility at major national parks and wilderness areas including the Grand Canyon.[24] The Station also powers a major water distribution system for Arizona and is a significant employer and revenue generator for the Navajo Nation.[25] Four utilities and the Department of Interior (through the U.S. Bureau of Reclamation) co-own the Station under a lease from the Navajo Nation.[26] The Navajo Nation is barred from controlling or regulating the operation of the Station under the lease.[27] Under the proposed amended lease, the Station would operate as is until 2044, after which the Navajo Nation could continue its operation of the Station, but would have to do so as a "new source" that generates electricity without coal.[28]

The Navajo Nation did not issue a TIP for the Station, so the EPA issued a proposed FIP that offered both a BART determination and BART alternative.[29] The BART determination would reduce NOx emissions by almost 80% within 5 years of the final FIP.[30] The BART alternative extended the deadline for NOx emission reductions to 2023 and gave an "emission credit" for the Stations previous installation of low NOx technology.[31]

After a supplemental proposal, the final rule imposed a lifetime cap on NOx emissions (ending in 2044), reduced power generation, finalized a longer deadline of emission reductions, and issued an emission

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19 *Id*. at 966.
20 *Id*.
21 *Id*.
22 *Id*. at 967.
23 *Id*. at 965.
24 *Id*.
25 *Id*.
26 *Id*.
27 *Id*.
28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*.

credit.[32] The EPA concluded that the plan qualified as a "better than BART" alternative.[33] In addition, the EPA stated that a "more flexible, extended compliance schedule was warranted due to (1) the Station's unusual and significant challenges; and (2) the EPA's discretion under the TAR."[34]

III. ANALYSIS

The Ninth Circuit reviewed the challenge to the EPA under the Administrative Procedures Act ("APA"), which states that final agency action shall be upheld unless it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[35] This is a "highly deferential" standard, with deference to an agency's interpretation of an administrative statute governed by two questions – "steps" – laid out in *Chevron, U.S.A. Inc., v. NRDC.*[36] The first step under *Chevron* looks at whether Congress "addressed the precise question at issue."[37] If Congress was unambiguous in its intent on the issue, then the court must give effect to Congress's express intent.[38] If the statute is "silent or ambiguous with respect to the specific issue," the court must look at "whether the agency's answer is based on a permissible construction of the statute."[39] Additionally, "an agency's interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation."[40]

The court made its decision based on several factors including the statutory BART deadlines required by the CAA, the eligibility of tribes to be treated as States, the substantive and procedural deadlines of tribes under the CAA, and if the FIP was a "better than BART alternative."

A. BART deadlines required by the CAA

The Petitioners, Vincent Yazzie, and several tribal conservation and non-profit environmental organizations, contended the EPA failed to comply with the CAA statutory deadline that a BART must be implemented within five years of "the promulgation of a FIP."[41] However, the court found that the CAA's five-year deadline did not apply because the FIP proposed a "better than BART" alternative, and the deadline only applies to BART.[42]

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[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*. at 968.

[36] *Id*. (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)).

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] *Id*. (quoting Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L.Ed. 2d 79 (1997)).

[41] *Id*.

[42] *Id*.

B. Eligibility of Tribes to be treated as States

Petitioners also argued that because the Navajo Nation had contracted its power to regulate the Station to the State, it was not "eligible" for treatment as a State under TAR.[43] However, the court held that the CAA "mentions nothing about a tribe's eligibility" and applies "so long as a tribe does not submit an approved TIP".[44] The court indicated that the CAA authorizes the EPA to treat tribes as States if they meet certain requirements,[45] which includes a reasonable expectation that tribes are "capable, in the judgement of [the EPA], of carrying out the functions to be exercised in a manner consistent with the terms and purposes" of all applicable regulations.[46] Additionally, the court highlighted that if the EPA determines that treating tribes the same as States is "inappropriate or administratively infeasible" the EPA may provide other means by which it "will directly administer such provisions so as to achieve the appropriate purpose."[47] This, the court found, the EPA did through the TAR provision, which provides that the EPA shall provide Federal implementation plans that "are necessary or appropriate to protect air quality . . . if a tribe does not submit a tribal implementation plan . . . or does not receive EPA approval . . . ."[48] Further, the court found that under an additional provision of the CAA the EPA is authorized "to adopt a FIP when a tribe is not treated as a State."[49] Therefore, the court held that the EPA had correctly applied the TAR because the Navajo Nation had not submitted a TIP, and the EPA had authority to implement a FIP for NOx emissions at the Station.[50]

C. Application of CAA Substantive or Procedural deadlines to Tribes

The Petitioners argued that the EPA's interpretation of the language and purpose of the CAA is incorrect and any flexibility under the TAR only applies to procedural or submission deadlines, not substantive or compliance deadlines.[51] The EPA contended that the Navajo Nation Station was not subject to this deadline because it only applies when a *State* adopts a BART alternative,[52] and under the TAR, tribes are exempt from "[s]pecific visibility implementation plan submittal deadlines" under the CAA.[53] Moreover, the EPA argues that the TAR entitles it to establish

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43 *Id*. at 970.
44 *Id*.
45 *Id*.
46 *Id*.
47 *Id*. (quoting 42 U.S.C. § 7601(d)(4)).
48 *Id*. (quoting 40 C.F.R. § 49.11(a)).
49 *Id*. (quoting 42 U.S.C. § 7601(d)(4)).
50 *Id*.
51 *Id*. at 971 (referencing 40 C.F.R. § 49.4(e); 70 Fed. Reg. at 39,158).
52 *Id*.
53 *Id*. (quoting 40 C.F.R. § 49.4(e)).

different deadlines for the FIP and the deadline here is "explicitly tied to the period of the first long-term strategy" which States had to submit by 2007, but tribes were not subject to.[54]

The court looked to the Tenth Circuit decision in *Arizona Public Service Co. v. United States EPA* which held that "TAR only excused tribes from meeting procedural requirements" and that "[n]othing in the TAR requires the FIP to comply with the regional haze deadlines applicable to a SIP."[55] Further, the court stated that it could not say that the EPA's interpretation of its own regulation was erroneous or inconsistent.[56] The court held that "the EPA reasonably interpreted the TAR . . . and the Regional Haze Regulations . . . to conclude that the emission reductions deadline . . . does not apply to FIPs for regional haze that are promulgated in place of TIPs."[57]

D. The EPA FIP Alternative is "Better than BART"

The Petitioners next contended that the EPA failed to show "by the clear weight of evidence" that the alternative achieved greater progress than BART.[58] Of the three different methods to show a "better than BART" alternative the EPA relied on the first method – that the "distribution of emissions" was not substantially different than BART and the alternative resulted in "greater emission reductions."[59]

The court found that the "clear weight of the evidence" standard only applied to the third method, and the EPA chose the first method.[60] The court reasoned that there are "three *separate* methods" to establish that an alternative is "better than Bart" and that the State can either use the two quantitative measures in the first method *or* the qualitative method in the third.[61] The first method does not incorporate the "clear weight of evidence" standard, and thus the court found that the EPA was only required to show "distribution of emissions" was "not substantially different" and the alternative would result in "greater emission reductions."[62] Similarly, the court noted that the EPA did not have to conduct visibility modeling required under the second method.[63]

The Petitioners stated that the EPA did not meet the first prong of the method because "distribution of emissions" should include both

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54 *Id*. at 970.

55 *Id*. at 971 (referencing Ariz. Pub. Serv. Co. v. United States EPA, 562 F.3d 1116 (10th Cir. 2009)).

56 *Id*. at 970 (quoting Auer v. Robbins, 519 U.S. 452 at 461 (U.S. Feb. 19, 1997)).

57 *Id*. at 972.

58 *Id.*

59 *Id*.

60 *Id*. at 972.

61 *Id*. (citing *WildEarth Guardians v. EPA*, 770 F.3d 919, 934 (10th Cir. 2014).

62 *Id*.

63 *Id*.

geographic and temporal distribution.[64] The court indicated that the plain language of the regulation under the first method does not indicate whether the "distribution of emissions" is geographic (i.e., locations/sources of the emissions), temporal (i.e., the timing of the emissions) or both.[65] However, the EPA has consistently interpreted "distribution of emissions" to refer only to the geographic distribution of emissions.[66] Thus, the EPA concluded that the distribution of emissions between BART and the FIP's BART alternative was not substantially different because geographic distribution of emissions is similar as they both apply to the same source – the Station."[67] Additionally, the EPA noted this interpretation was reasonable as where there is only one source being regulated – as is case here – if emissions are reduced, visibility is improved.[68] The court held that the BART alternative regulatory deadline does not apply to an FIP enacted under the TAR as the key inquiry is whether the EPA is required to consider timing in evaluating the "distribution of emissions" prong.[69] Further, the court stated that it "must defer to the EPA's interpretation."[70]

The Petitioners additionally argued that the FIP's BART alternative did not meet the second prong of the first method because it did not result in "greater emission reductions".[71] The BART alternative incorporated an emission credit for the Station's voluntary instillation of NOx reducing technology.[72] "Absent this credit the BART alternative would not achieve greater NOx reductions than BART."[73] Therefore, the question was if it was reasonable for the EPA to give the Station an emission credit when evaluating if the BART alternative resulted in greater emission reductions.[74] The Petitioners argued that the incorporation of the credit into the alternative calculation was inconsistent with the EPA's prior statement on the BART and therefore was unreasonable.[75] They further argued that the EPA was inconsistent in factoring the emission credit in computing the emission reductions under BART.[76] However, the EPA did not consider the credit in the BART determination, but only for evaluating alternatives to BART.[77] Therefore, the EPA's incorporation of the credit was not inconsistent with its prior statement.[78] Moreover, the TAR gave the EPA discretion to allow a credit

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64 *Id*.
65 *Id*. at 973.
66 *Id*. (citing § 51.308(e)(3)).
67 *Id*.
68 *Id*.
69 *Id*.
70 *Id*.
71 *Id*. at 974.
72 *Id*.
73 *Id*.
74 *Id*. at 974.
75 *Id*.
76 *Id*.
77 *Id*.
78 *Id*.

for the BART alternative.[79] The Court held that the TAR grants the EPA wide latitude to determine what plan provisions are necessary to protect air quality for a source on tribal lands when there is no TIP.[80] Therefore, it was reasonable for the EPA to give the Station an emission credit when evaluating if the BART alternative resulted in greater emission reductions and it deferred to the EPA's reasonable determination that the FIP alternative was "better than BART."[81]

IV. CONCLUSION

The outcome of *Yazzie v. United States EPA* affirms the Ninth Circuit's decision to give an entity more flexibility in complying with regulations if those decisions are entitled to the implementing Agency's deference. The court held that the EPA did not abuse its discretion when it adopted a FIP under the Clean Air Act for a coal-fired power plant on the Navajo Nation Reservation that reduced power generation at the plant, imposed cap on total emissions of nitrogen oxides, and required that the plant cease conventional coal-fired power generation by end of 2044. Additionally, the court took into account the Station's voluntary compliance technology, the tribe's interests in the Station, and that the Station would cease to use coal at all in the future as factors in deciding the discretion allowed by the EPA. The Ninth Circuit denied the petitions stating that "In light of the discretion that the EPA enjoys, we cannot conclude that, under these unique circumstance, the EPA acted arbitrarily and capriciously.[82]

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79 *Id*.
80 *Id*.
81 *Id*.
82 *Id*. at 975.