

The Midnight Rider Rides Again: Tenth Circuit Clarifies Environmental Permitting Authority in Oklahoma

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On October 16, 2026, a divided panel of the U.S. Court of Appeals for the Tenth Circuit denied the Pawnee Nation's petition challenging the U.S. Environmental Protection Agency's ("EPA") approval of Oklahoma's request to administer 26 federally approved environmental programs in specified areas of Indian Country. In *Pawnee Nation of Oklahoma v. Zeldin*, No. 25-9548 (10th Cir. Oct. 16, 2026), the court held that the so-called "Midnight Rider" remains in effect, requires EPA to approve a qualifying request, and that EPA lacks authority to condition Oklahoma's approval on additional tribal-engagement requirements. The decision reduces uncertainty for regulated entities in Oklahoma, particularly within the reservation boundaries recognized after *McGirt v. Oklahoma*, 591 U.S. 894 (2020). It does not, however, eliminate the need for a project-specific analysis of the applicable program, regulated activity, land status, and respective state, federal, and tribal authorities.

The Midnight Rider: What It Does and Why It Matters

Section 10211 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144, 1937 (2005), became known as the "Midnight Rider" because Congress added it late in the legislative process and without substantive discussion. The Tenth Circuit described the provision as having been added "last minute and without discussion."

Section 10211(a) provides that when EPA has approved Oklahoma to administer an environmental program outside Indian Country, EPA must, at the State's request, approve the State to administer the same program in Indian Country without any further demonstration of authority. Section 10211(b) separately restricts EPA's ability to treat an Oklahoma tribe as a state unless the tribe satisfies the applicable statutory requirements and enters into a qualifying cooperative agreement with the Oklahoma agency holding the federally approved program authority.

The term "Indian Country" carries particular jurisdictional significance. As defined by federal law, it includes lands within the boundaries of an Indian reservation, regardless of ownership; dependent Indian communities; and Indian allotments for which Indian title has not been extinguished. 18 U.S. C § 1151. Thus, "Indian Country" is a jurisdictional classification rather than simply a description of land owned by a tribe or tribal member.

The "Midnight Rider" provision went unused until the Supreme Court held in 2020 in *McGirt v. Oklahoma,* that Congress never disestablished the Muscogee (Creek) Reservation. Oklahoma then invoked § 10211(a), and EPA approved Oklahoma's request in October 2020. EPA subsequently reconsidered that decision while leaving Oklahoma's approved authority in place. In January 2025, after more than three years of reconsideration and engagement with tribal nations, EPA replaced the

2020 decision with a new approval containing a tribal-engagement condition. EPA removed that condition in May 2025 after concluding that § 10211(a) did not authorize it. The Pawnee Nation then petitioned for judicial review.

The Tenth Circuit's Decision

The majority rejected the Pawnee Nation's challenge on three principal grounds.

- The court held that § 10211(a) remains in effect because it contains no sunset clause and did not expire when SAFETEA-LU's funding authorizations lapsed in 2009.
- The court held that the statute's directive is mandatory. Once the statutory criteria are satisfied, EPA must approve Oklahoma's request and may not add conditions that Congress did not include.
- EPA need not reevaluate previously approved programs and could rely on its existing determinations that Oklahoma's programs satisfy applicable federal requirements.

Judge Frederico dissented from the majority's treatment of EPA's authority to impose the tribal engagement condition. The dissent concluded that the statute did not clearly foreclose such a condition and criticized the majority for finding a displacement of tribal regulatory interests without a clearer statement from Congress.

Implications for Permitting and Regulatory Oversight

The decision confirms the statutory basis for Oklahoma's administration of at least 26 EPA-approved programs in Indian Country areas covered by Oklahoma's request and EPA's approval. Those programs arise under six federal statutes: the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Safe Drinking Water Act, Federal Insecticide, Fungicide, and Rodenticide Act; and Toxic Substances Control Act. Depending on the program, implementation may rest with the Oklahoma Department of Environmental Quality, the Oklahoma Corporation Commission, the Oklahoma Department of Agriculture, Food and Forestry, or another authorized state agency.

The decision does not give Oklahoma exclusive environmental authority throughout Indian Country, displace inherent tribal sovereignty, or resolve every jurisdictional question. EPA's approval excludes specified tribal trust lands, qualifying Indian allotments, and certain tribally owned fee lands, so reservation boundaries alone do not determine the regulator. Oklahoma's authority extends only to the programs and areas covered by Oklahoma's request and EPA's approval, and the approval itself contains program-specific limitations. For example, EPA's January 2025 decision expressly excluded all classes of wells from Oklahoma's approved Underground Injection Control program in Osage County.

EPA also retains applicable oversight and enforcement authority of approved state program. The court explained that oversight can include program reviews, review of particular regulatory actions such as draft permits, and consideration of compliance and enforcement matters.

Tribal nations likewise retain authority arising from their own laws and sovereign status, subject to governing federal statutes and principles of federal Indian law. Where Congress has authorized it, a tribe may seek treatment in a manner similar to a state and administer an EPA-approved program, although § 10211(b) imposes additional cooperative agreement requirement on tribes in Oklahoma. The Pawnee Nation, for example, previously received treatment-as-a-state authority for certain Clean Water Act functions on tribal trust lands.

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The reach of any independent tribal requirement, particularly as applied to nonmember or activities on non-Indian fee lan, remains a fact-, statute-, and land-status-specific question. For oil and gas operations, the regulator also depends on the activity. The Oklahoma Department of Environmental Quality and the Oklahoma Corporation Commission administer different programs, while EPA retains authority where no approved state program applies.

Practical Considerations

Operators, developers, and lenders should assess jurisdiction early for projects within or near recognized reservation boundaries.

That assessment should identify:

- The property's land status.
- The applicable environmental program and regulated activity.
- The responsible state, federal, and tribal authorities.
- Any independent tribal, federal, consultation, notice, or participating requirements.

The decision does not itself require changes to existing permits, but jurisdiction should be confirmed before new authorizations, expansions, or undertaking expansions or significant modifications. Early, respectful engagement with potentially affected tribes may still be prudent even when not required as a condition of Oklahoma's program approval, both to identify applicable tribal requirements and to reduce development risk.

Pawnee Nation provides meaningful regulatory clarity by confirming Oklahoma's authority to administer federally approved programs in areas covered by EPA's approval, some of which are located within Indian Country. It is not, however, a one-regulator rule. Effective permitting and project development still require a program-by-program and parcel-by-parcel assessment of land status, sovereign authority, and the respective roles of state, federal, and tribal regulators.

For assistance with regulatory compliance, permitting, enforcement, and related matters, please contact any member of the Environmental and Natural Resources Team.



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